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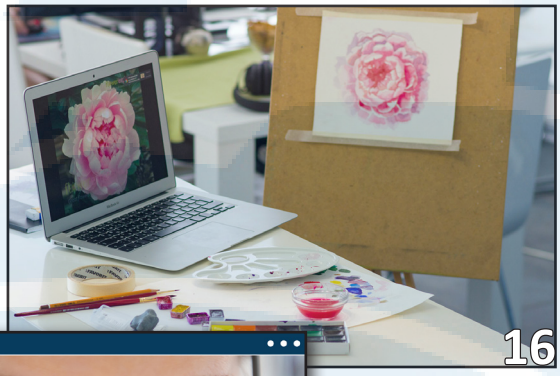

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Remote mediation has presented an opportunity to rethink the mediation process. Participating in a remote mediation requires advance planning about the many technical aspects of using videoconferencing platforms as well as the substance of the mediation. This article explores ways the mediator and counsel can take advantage of one of the hidden benefits of remote mediation: an opportunity to renew their focus on planning, which can lead to true customization of each mediation experience.

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Understanding how mediators gather relevant information just by looking at people's facial expressions and reactions can help you become a more effective advocate and participant in virtual mediations. This article explores the role of body language in virtual or remote mediations, where mediators see participants in a box and on a screen as opposed to in a chair and in person.

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16 • Computers as the Canvas: Digital Art, Intellectual Property Rights, and the Law

It is an exciting time for digital art! Computer-generated content creators are receiving new recognition and respect for their works, and in the age of COVID-19, even physical visual art is being digitized. Digital art has its own copyright concerns as well as specialized concerns over attribution and unauthorized transfers. This article will consider some of those concerns, whether the art was originally created electronically or a physical work was reproduced using a computer.

18 • H-1B Visas: New Procedures and Policies

Two interim final rules were recently promulgated: one by the U.S. Department of Labor and one by the U.S. Department of Homeland Security. These two interim final rules make it more difficult for skilled foreigners to work in the United States by creating additional legal obstacles to obtaining an H-1B visa. On 2 November 2020, U.S. Citizenship and Immigration Services published a proposed rule that seeks to replace the current H-1B lottery selection process with a new wage-based selection process that would prioritize the selection of H-1B registrations for employers who pay the highest wages. This article discusses the impact of these new current and proposed rules on the H-1B process, as well as the status of their pending litigation.

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Message From the Chair

Year of the Pandemic

In H. G. Wells' famous book *The War of the Worlds*, written in 1898 and made into movies in 1953 and 2005, aliens invade Earth and mankind's greatest weapons and technology are utterly useless in stopping their onslaught. Mankind is decimated and doomed. It is only when the aliens are infected with Earth's tiniest inhabitants, germs and viruses, that the aliens become sick and die. The aliens are defeated and Earth is saved, but not because of mankind's technology or advances but because of nature itself.

ROBERT J. BECERRA

Now, as of the writing of this message, nature, through the COVID-19 pandemic, is newly raging, with cases and hospitalizations skyrocketing worldwide despite medical science. Notwithstanding those efforts, the pandemic wreaks havoc on our plans, gatherings, travel, businesses, and the world's economy. Unprecedented government fiscal stimulus has been used to keep us all moving forward. The pandemic was the leading issue in the 2020 presidential election. Masks, social distancing, and in many places shutdowns are happening around the world, yet the virus rages on. *Virus*, interestingly enough, comes from the Latin word meaning "slimy liquid" or "poison." Quite apt. Salvation is seen through the prospect of new vaccines being distributed as I write this message. Time will tell how long it will be until a vaccine finally defeats the "slimy liquid."

Yet the ILS marches on. Last November the section had a successful leadership retreat and executive council meeting at the Hyatt Regency Coconut Point Resort in Bonita Springs, Florida, which featured hybrid attendance with both live and virtual sessions. We also revived ILS Talks, our 15-minute speaking opportunities for members. In December, the section held an outdoor holiday party at THēsis Hotel in Coral Gables that was well attended, with masks, and lifted our holiday spirits.

Despite our best efforts and planning, the ILS board made the decision to cancel the iLaw2021 conference, originally scheduled for late February, due to issues with obtaining sponsors and speakers, the likelihood of very low live attendance coupled with the high cost of the conference, and lastly, The Florida Bar itself strongly recommending against any kind of live programming during the scheduled time frame. Rather than delay the conference a couple of months, when the pandemic will still be with us with a probability of having to reschedule once again, we reluctantly cancelled this year's iLaw in favor of holding iLaw 2022 next February. Despite this disappointing development, the section is continuing to provide content to our members through our Lunch and Learn program featuring prominent international practitioners, webinars on various topics, and promotion of our International Law Deskbook, a leading international law reference work, ideally suited for the international law certification exam review.

Our Richard De Witt Memorial Vis Pre-Moot Competition will be held virtually on 27 February 2021, and the all-virtual format has encouraged foreign law schools, even from China, to participate, when otherwise the cost of travel and accommodations would be prohibitive. Please continue to get involved in our more than twenty committees and the great work they do to put on our programming. Contact me and I will get you connected with a committee that will both interest you and motivate you to bigger and better things.

As we move forward in 2021, the section will endeavor to have live programming consistent with COVID-19 precautions when possible and perceived safe by

Message From the Chair, continued

attendees. We will rise to the challenges confronting us and move forward, adapting and pivoting where necessary. As with the aliens in H. G. Wells' book, the virus has thrown us all for a loop. But unlike those aliens, we are of the same Earth and nature that created COVID-19, and we will survive and thrive. As of this writing, The Florida Bar is still planning to host a live annual convention in Orlando in June. If we get to June and the Bar believes it is safe enough to conduct a live convention, we will know we are more than halfway home.

Enjoy this issue of the *ILQ*, put together by our great co-editors-in-chief, Laura Reich and Ana Barton, special features editor Jeff Hagen, and world roundup and section scene editor Neha S. Dagley. It is a publication I am proud of as chair of this section, and one all of you can take pride in as well. Stay tuned for notices in our weekly Gazette when publication opportunities in the *ILQ* arise. We want to hear from you and learn from your contributions.

With best regards,

Robert J. Becerra
Chair, International Law Section of The Florida Bar
Board Certified in International Law
Becerra Law PA

From the Editors . . .

ANA M. BARTON

LAURA M. REICH

Dear ILS members and friends, 2020 is finally in the rear-view mirror and 2021 stretches in front of us. Most of the conversations among friends, family, and co-workers these days seem to revolve around how soon things will "get back to normal"—when people expect to receive the COVID-19 vaccine, return to their offices, go on vacation, etc. Unlike last year, these conversations now seem tinged with hope that the worst of the pandemic is behind us.

Yet, it seems clear that the legal profession has learned many things during the pandemic that will result in a *new normal* rather than simply a return to the old ways of doing things. We have learned that depositions, motion calendars, evidentiary hearings, and even trials can be held remotely. We have learned that with competent neutrals in place, mediations and arbitrations can also be conducted via Zoom. We have learned how to work from home even with the distractions of children, pets, televisions, and undone chores. And we have learned that on any video call, at least one person will be on mute.

Perhaps we can sum up what we have learned from 2020 by saying we have all learned to live and work digitally. Thus, this edition of the *ILQ*—Focus on Digital Law—is particularly timely. Digital law addresses how individuals and groups interact with each other using technology. As lawyers and international law practitioners, we are still learning best practices for relating to each other over computers and webcams. Digital law also addresses the legal decisions and ethics that govern digital environments. People find all sorts of trouble on the Internet, engaging in (or falling victim to) hacking or phishing, catching or spreading viruses, illegally downloading entertainment, and generally not being good digital citizens.

In this edition of the *ILQ*, we hope to address many of these issues. First, we turn to the issue of remote mediation, which had long been discounted as a "bad idea" by lawyers, clients, and mediators alike. Now, however, many practitioners are realizing it can be an effective and efficient way to mediate a case. In his article "Remote Mediation: An Opportunity for Customization," Howard A. Herman suggests that remote mediation is an opportunity to rethink and improve the mediation process, if the participants are willing to plan ahead. David S. Ross then explains in "From Eye-Rolls to Grimaces: Understanding Body Language in Virtual Mediations" how mediators (as well as counsel and party representatives) can interpret the signals sent by other participants to be more effective in virtual mediations. The editors of the *ILQ* want to thank these experienced JAMS mediators for contributing to this edition on digital law, and we also thank Sherman Humphrey, JAMS global practice manager, for making the introduction.

Next, Enrico Schaefer explains "Why Are Airbnb Hosts Litigating a Class Action Against Airbnb?" This fascinating case, which arises out of how Airbnb hosts were treated in the early days of the pandemic, blends old-fashioned contract law with the cutting edge of the sharing economy and its heavy reliance on technology. Then, Laura Reich and Clarissa Rodriguez explore the landscape of digital art and its protections in "Computers as the Canvas: Digital Art, Intellectual Property Rights, and the Law."

Finally, Larry S. Rifkin offers thoughts on new interim final rules, promulgated during the pandemic, and their effects in "H-1B Visas: New Procedures and Policies." This timely article discusses the impact of these new current and proposed rules on the H-1B process, as well as the status of related pending litigation.

As always, we are also pleased to offer the reader our two recurring columns: "Best Practices," which in this edition addresses digital marketing, written by Neha S. Dagley and Josh Rosner; and "Quick Take," which addresses digital service taxes, written by Jeffrey S. Hagen.

We hope you will enjoy these articles and that they will help guide you as we all learn to practice law digitally.

Yours,

Laura M. Reich
Ana M. Barton
Co-Editors-in-Chief

QUICK TAKE

Digital Service Taxes—Breakthrough or Breaking Point?

By Jeffrey S. Hagen, Miami

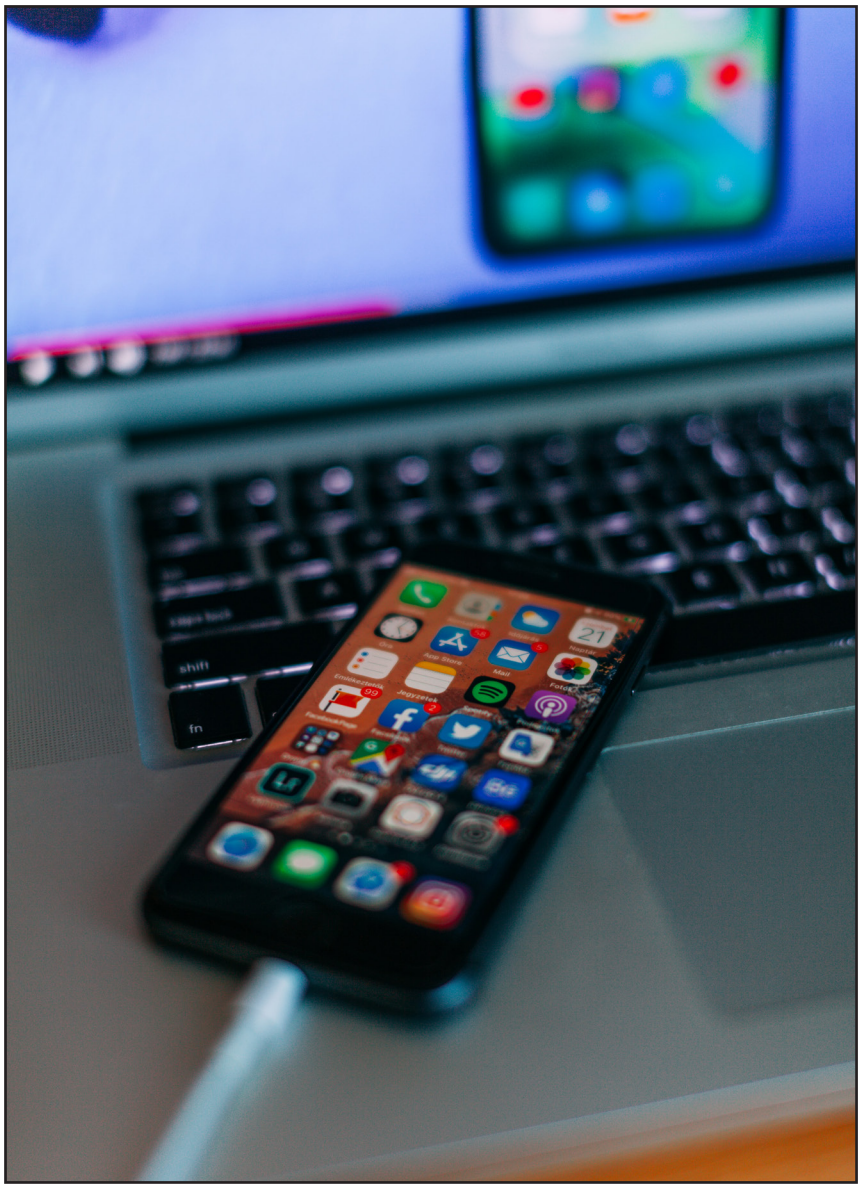
Arthur Miller said "[a]n era can be considered over when its basic illusions have been exhausted." This concept may now be applicable to one of the foundational legal principles in the taxation of international business transactions: that a company must have a permanent establishment (PE) in a particular jurisdiction to be subject to taxation there. Many countries have proposed, and some have implemented, an easing of this requirement, replacing the necessity of a PE with the presence of a nexus between a country and a company's activities. Nexus, these countries claim, can be physical *or* digital. Other jurisdictions have posited that the operation of a digital platform creates a virtual physical presence. In what the U.S. government deems an effort to divert wholly U.S.-taxable profits away from U.S. tech companies, there is now a focused international attempt to upend the traditional system of international taxation and to adopt a new system based on an end user's consumption. There is significant coordination to enact globally uniform Digital Service Taxes (DSTs) as soon as this year.

Proponents of this new model of taxation argue that implementing DSTs will help transition international tax principles to the modern era. Amazon, Facebook, Google, and other modern multinational companies earn billions of dollars of advertising revenue annually from ads targeted to non-U.S. users without even one employee or office in these countries (therefore, no PE), leaving little taxable profit in the countries where most of their products are consumed. Small businesses in all jurisdictions have been stymied by the swift rise of big tech, a phenomenon that has been fast-tracked by the pandemic. DSTs offer foreign governments a therapeutic in the form of financial opportunity, paving the way for the recovery of a portion of their would-be taxable share of their residents' consumption. After all, a guiding principle of the Organization for Economic Cooperation and Development (OECD) has been to tax "where value is created" using "significant economic presence."[1] Throughout 2020, the OECD attempted to achieve global agreement on digital taxation, an ambitious goal it calls *Pillar One*.

Understandably, the United States has been halfhearted in OECD negotiations, which under the Trump administration came to an impasse.[2] (A query remains as to whether a Biden administration's assumedly more globalized approach will yield a different result.) The U.S. position regarding DSTs has been that there is nothing to gain by agreeing to a global digital taxation framework—most of the world's largest search engines, online marketplaces, and social media platforms are owned and operated exclusively by U.S. companies. In fact, many EU countries may have designed their proposed DST framework to specifically target U.S. companies by setting minimum revenue thresholds that only U.S. companies meet.[3] For example, some legal analysts believe the U.K. framework of applying a DST when a "company passes the U.K. threshold of 500 million pounds in global revenue and 25 million pounds in U.K. revenue" is arbitrary and therefore discriminatory.[4] Companies would need to take on additional costs to apply DSTs as well, as requirements to identify the locations of users and ad recipients could be significant.

It is not difficult to imagine why EU countries have strived to implement DSTs. France, for example, was forecast to bring in an extra 400 million euro via digital taxes in 2020 alone.[5] France was the first country to

unilaterally impose a DST in July 2019 (3% of revenue earned from the digital activities of French users). The United States responded with tariffs on French goods like cheese, wine, and handbags, leading to an agreement to postpone the brewing trade war to allow OECD discussions to transpire in 2020 first.[6] Austria, Hungary, India, Turkey, and several other countries that have already implemented a unilateral DST have stated that their domestic policies will be repealed if international agreement is reached. This may be wishful thinking, as most non-U.S. jurisdictions want a DST imposed but cannot agree on the details like percentage, thresholds, and method of collection. U.S. cooperation, even under a Biden administration, is far from certain.



Until there is more clarity, international tax compliance in 2021 is likely to be a considerable challenge for large tech companies. It will be particularly intriguing to observe if the United States responds in kind to unilaterally imposed DSTs with the imposition of tariffs on the exports of other countries, or if the United States will finally make a real appearance at the DST bargaining table. As the brick-and-mortar world of international business transactions recedes, a new regime is arriving, with global economic implications unknown.

Jeffrey S. Hagen *is an associate with Harper Meyer LLP, located in Miami. He serves as chair of the Tax Committee of The Florida Bar International Law Section, as well as* International Law Quarterly's *special features editor. If you have questions relating to digital service taxes or other 2021 international tax issues, please reach out to Mr. Hagen at jhagen@harpermeyer.com or 305-577-3443.*

Endnotes

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Remote Mediation: An Opportunity for Customization

By Howard A. Herman, San Francisco

We all fall into routines. In the past, busy lawyers and mediators have been reluctant to engage in too much pre-mediation session process, assuming instead that most mediations will proceed in a predictable fashion. Administrative staff, or perhaps junior lawyers, get the matter on calendar and perform the advance work. Briefing schedules are set, with briefs seldom exchanged, and perhaps there might be brief pre-session calls between counsel and the mediator after completion of the briefing before the day of the session.

Remote mediation has presented an opportunity to rethink the mediation process and brings a welcome change to typical daily patterns. Technology has opened the door to allow us to truly customize each mediation. Participating in a remote mediation requires advance planning about many technical aspects. Some of these include:

- Which videoconferencing platform will be used
- Whether all participants will appear via video, or some will appear in person or by phone
- Processes and procedures to maintain security and provide privacy
- Use of video tools: screen sharing, breakout rooms, and chat functions
- How to document the agreement: via DocuSign or another tool
- General ground rules; e.g., length of sessions, breaks
- The mediator and counsel can have a conversation about these things and the substance of the mediation as well. As every dispute has its own unique dynamics, even if the legal issues are routine, an initial, joint conference with the mediator and lead counsel can address such issues as:

  - Pre-session discovery/information exchange
  - Determining the most useful participants
  - The nature of the briefing; i.e., whether the briefing should be exchanged or provided only to the mediator confidentially or a mix of both
  - Whether a joint session makes sense either at the outset, or perhaps will be needed at a later point during the mediation
  - Whether the entire mediation should occur on a single day or in a series of shorter sessions

In addition, remote mediation presents opportunities related to several of the above substantive points. For example, deciding who will participate looks a bit different with remote mediation. For corporate parties,

Remote Mediation, continued

higher-level decision makers may have greater availability if travel is not necessary. For individual litigants, more thought might be given to the inclusion of people who ordinarily might not participate but who might contribute productively to the negotiation process (e.g., family members or other support persons). And the targeted use of joint sessions—either at the outset of a mediation or at other points—may prove to be less uncomfortable on video than when actually sitting in the same room.

After the briefing, but before the session, relatively short videoconferences have become common to ensure the technology works for all of the participants. Expanding the length of these meetings, perhaps to one hour per side, has many advantages. The mediator can essentially have a brief first caucus to do the following:

- Establish trust and a connection between the mediator and the clients
- Begin to understand the perspectives of each participant
- Process initial reactions to matters revealed by any information exchange and in response to the briefing
- Revisit the organization of the mediation session, further customizing the process to the needs of case

For example, in a recent mediation of a single-plaintiff, failure-to-accommodate disability case, during the initial call with counsel both sides thought it was best to defer any joint meeting until late in the mediation process (if at all). During the pre-session videoconferences, it became clear to me that each side had things that needed to be said directly to the other side before productive negotiations could occur. Therefore, counsel and I designed a targeted joint opening session to accomplish this while avoiding the adversarial "opening statements" that had driven the original decision to work mainly in caucus.

When the pandemic made remote mediation the only choice, many were wary. So much of mediation practice is about connection, and in-person interactions are still ideal for that purpose. But a hidden benefit of this disruption has been a renewed focus on planning, which can lead to true customization of each mediation experience. Let's hope that this customization will remain even after we're able to return to mediating in person.

Howard A. Herman *has worked as a mediator and as a developer of ADR programs since 1985. He has mediated several thousand disputes covering a wide range of case types. He specializes in matters involving high emotion and complex power dynamics. Mr. Herman's clients extol his intelligence, fairness, integrity, patience, and sensitivity. They characterize him as thoughtful, imaginative, earnest, and relentless in his pursuit of practical solutions. Mr. Herman is a process expert who takes pride in customizing his approach to each case in response to the needs of the participants. Mr. Herman can be reached at hherman@jamsadr.com.*

From Eye-Rolls to Grimaces: Understanding Body Language in Virtual Mediations

By David S. Ross, New York

This article explores the role of body language in virtual or remote mediations, where mediators see participants in a box and on a screen as opposed to in a chair and in person.

Understanding how mediators gather relevant information just by looking at people's facial expressions and reactions can help you become a more effective advocate and participant in virtual mediations. Below, I explain why it is crucial to be aware of your own body language, enabling you to make smart decisions that can boost your credibility, likability, and persuasiveness with the mediator, as well as your clients, colleagues, and adversaries.[1]

Since JAMS began using virtual platforms exclusively in mid-March, the neutrals I call the "Master Mediators" (*i.e.*, six extraordinary and effective full-time JAMS mediators)[2] have settled hundreds of legal disputes. Importantly, they have mediated an extremely broad range of legal disputes, from personal injury to sexual harassment to complex commercial matters. So, my findings and prescriptive thoughts relate to virtually any type of mediation.

Previously, the Master Mediators have weighed in on mediating using virtual platforms.[3] While they expressed a unanimous preference for in-person mediations, they all recognized that, increasingly and by continued necessity, virtual mediation offers an unexpectedly effective alternative with upsides, including no travel time or related costs. They agree that virtual mediations are becoming easier and more natural.

Interestingly, two Master Mediators said that virtual mediations can often be more enjoyable and more efficient than in-person mediations. Participants appearing from home feel more relaxed and, consequently, may be more transparent about what they really need to settle.

In sum, based on the collective view of the six Master Mediators—as well interviews with lawyers who have mediated virtually and my own experience conducting virtual mediations—virtual mediation works and is here to stay.

With this in mind, I asked the following question particular to remote processes: Is "upper-body language" harder to read in virtual mediations? The Master Mediators reached a virtually unanimous decision: no.

From Eye-Rolls to Grimaces, continued

Why Body Language Matters

As Charles Craver, a leading expert on the role of body language in negotiation, writes in *Effective Legal Negotiation and Settlement*: "Nonverbal communication . . . constitutes a majority of the communication conveyed in a negotiation."

To be blunt, body language matters.

And it really matters to the Master Mediators as they try to assess the credibility of plaintiffs and defendants who, if the dispute doesn't settle, will likely be witnesses in an adjudicative proceeding. Effective mediators also assess the truthfulness and credibility of negotiators. For example, when a negotiator stakes out an extreme position or declares a bottom line, the mediator must determine in real time if the person really means it. And body language can help.

The Master Mediators also read body language to understand people's feelings, such as anger or disappointment, in order to acknowledge those feelings and build rapport. Feelings play a role in every mediation, whether the dispute involves allegations of sexual harassment, former partners working through a partnership dissolution, or a straight commercial dispute where people simply feel cheated or wronged.

Good mediators show clients they are listening closely, with curiosity and compassion.

Master Mediators Pay Close Attention to the Whole Person

While a few Master Mediators said that inconsistent statements and oral evasiveness matter more to them when assessing truthfulness and credibility, they all agreed that reading a person's body language can help a lot.

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Why Are Airbnb Hosts Litigating a Class Action Against Airbnb?

By Enrico Schaefer, Traverse City, Michigan

In October 2020, Traverse Legal PLC and the Gibbs Law Firm filed a class action against Airbnb alleging breach of the Terms of Service (TOS) and a breach of fiduciary duty. The dispute arose out of COVID-19 refunds that Airbnb promised to guests, forced on hosts, and ultimately converted into travel credits. Hundreds of Airbnb hosts from around the world have been filing arbitration claims against Airbnb since April 2020 for these same issues. Airbnb's attorneys in arbitration essentially argue that the TOS allow Airbnb to do whatever it wants, whenever it wants, for whatever reason it wants, and that it doesn't have to tell hosts or guests why it makes its decisions.

In December 2020, Airbnb had an Initial Public Offering (IPO) that, by any measure, was incredibly successful but, more importantly, sets the tone for the many sharing economy companies that are also going public, or will in the coming years. No doubt, these platforms are big and powerful. But will the people and companies doing the sharing have a seat at the table?

Will the people doing the work have any rights against the platforms that connect the sharers with the people seeking services? In this article, I lay out some of the Airbnb cases' issues and ask these questions: Just because a sharing software platform has excellent SEO and scale, should it be allowed to avoid what would otherwise be obvious contract obligations in any other context? Should sharing economy platforms be allowed

to draft escape clauses in their TOS that can be used to defend any claim of a breach? I argue that sharing platforms such as Airbnb that take the long view will realize the sharers are the key to long-term success. They will attract and keep the best hosts because they are willing to be transparent and accountable to certain minimum obligations. Sharing platform companies have always competed on what they pay their service providers.

But service providers need things more important than money. They need predictability and transparency. The sharing platforms that lean into these obligations will win in the end. I also argue that right now, Airbnb's "give with the right hand, take away with the left" strategy is going to be a losing strategy in the end.

The Players: Airbnb, Inc.,[1] Airbnb Payments, Inc.,[2] and Airbnb Payments UK Ltd. (collectively Airbnb), operating through Airbnb.com, is a software platform acting as a directory of short-term rental listings posted by its users (aka hosts). Listings added to the directory by hosts are organized by location and are shown to travelers looking for alternatives to hotels and resorts. Travelers can use the Airbnb search feature of the website to locate and book short-term rentals (STRs) with hosts. Travelers locate properties primarily through a search feature filtered by the host's cancellation policy, the traveler's selected destination, travel dates, the star rating of the host, and potential "Super Host" classification of the host.

Airbnb hosts have filed class action litigation against Airbnb, Inc.,[3] and Airbnb Payments, Inc., in California seeking monetary damages and injunctive relief. The following articles summarize these actions:

- Airbnb subject of class action lawsuit from Michigan firm[4]
- Airbnb Accused in Lawsuit of Ripping Off Hosts and Guests With COVID Refund Policy[5]

How does Airbnb work?

STR hosts who choose Airbnb make a substantial investment in the platform, building a body of reviews, building 5-star reviews, and developing their reputation, SEO, and status with the Airbnb listing algorithm. Airbnb hosts rely on their ability to control their rental terms within the Airbnb platform to build their STR business. The opportunity cost of moving to another platform is tremendous. Many STR hosts rely on predictable and stable cash flow in order to make mortgage payments, pay cleaning staff, pay support staff, and generate profits.

STR hosts on the Airbnb platform take all the financial risk, purchase properties or offer their own homes or rooms for rent, take out mortgages, do the cleaning and maintenance or hire cleaning and maintenance crews, engage in property management, and work hard for 5-star customer reviews from their guests. STR platforms, including Airbnb, allow the STR host and their guests to enter into short-term rental agreements, enforceable under contract law, set the rental terms and house policies, and control their cancellation policy to create predictable cash flow.

All STR platforms, including Airbnb, require everyone to agree the STR platform is not a party to the rental agreement, avoiding liability and local regulations.

Use of the Airbnb Listing Directory and Booking Platform

Use of Airbnb.com allows users to see all listing information and associated web pages under a browser wrap arrangement with the terms of service and privacy policies linked in the footer. Hosts who want to add a listing and travelers who want to reserve a listing are provided a click wrap agreement, together with other information, and are advised they are agreeing to the terms and privacy policies only through the use of hyperlinks, as these policies are not stored on the registration page. Registered users are not provided a scroll wrap, which would require a user to review the terms as part of actual registration, and no emailing of terms to users occurs as a result of registration. As Airbnb is the drafter of all of its terms and policies, Airbnb is responsible to ensure these terms and policies

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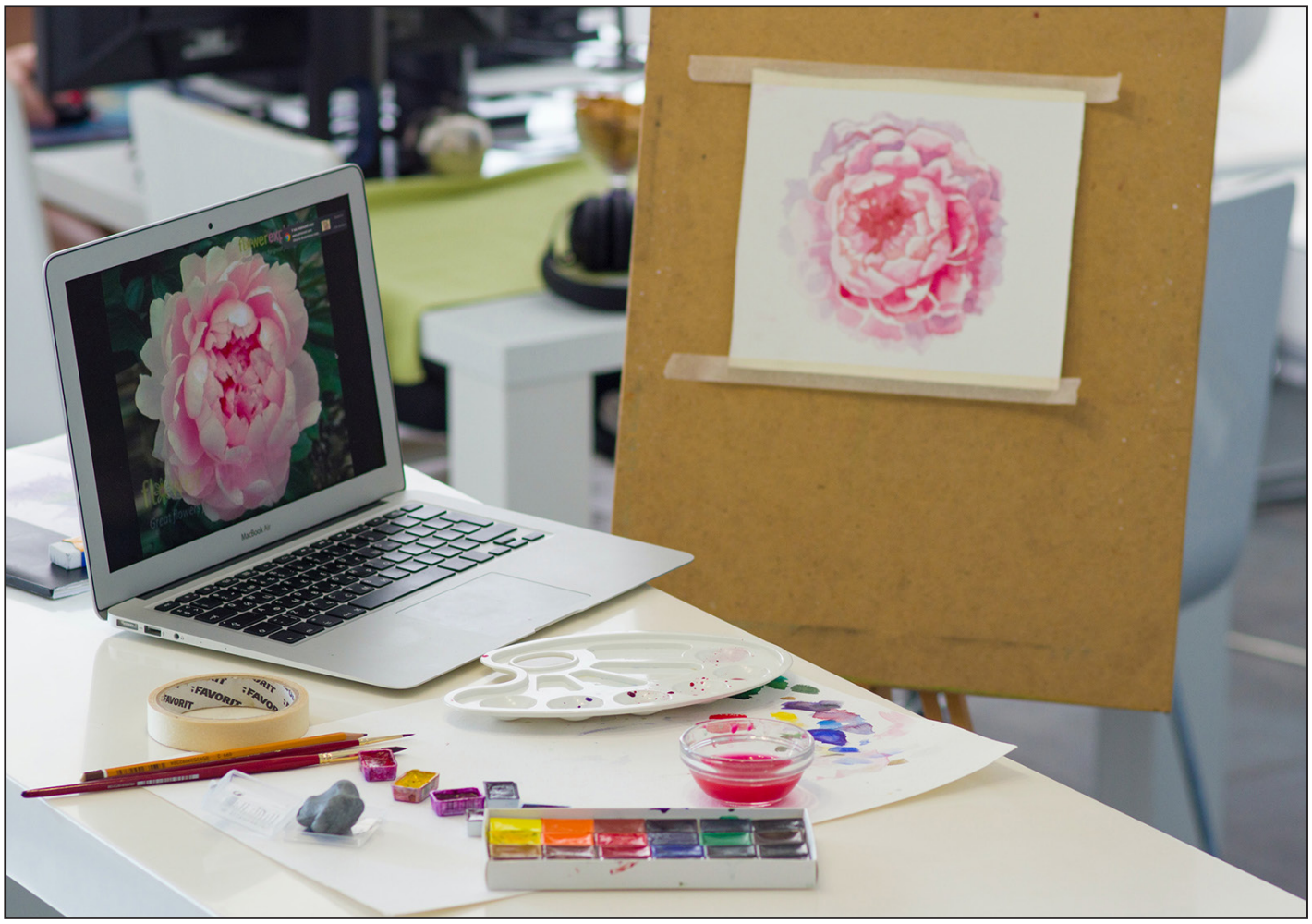
Computers as the Canvas: Digital Art, Intellectual Property Rights, and the Law

By Laura M. Reich and Clarissa A. Rodriguez, North Miami

For as long as there has been art, there has also been a hierarchy among the various forms and genres of art. The famous prehistoric cave paintings in Lascaux, France, are widely accepted to have been important in ancient people's spiritual rituals and therefore sacred.[1] The French Royal Academy of Art, founded in 1648, established a hierarchy of genre and subject matter of art, where painting was prioritized over sculpture and certain subjects were considered more noble than others: history and portraiture, then genre paintings depicting scenes of everyday life, and finally landscapes and still life painting.[2] More recently, in his February 2006 TED Talk on the importance of creativity in education, the late Sir Ken Robinson argued that every education system on earth has a hierarchy within the arts where art and music are given a higher status than drama and dance.[3]

In all this hierarchy, where does digital and computer-generated art fall? When the computer is the canvas for depictions of history or portraiture, should we value it like fine art produced with paint on canvas? When a company like Pixar produces a computer-animated movie like the recently released *Soul*—of which there are currently murmurs about a Best Picture nomination—do



we value it like art, or drama, or neither? And how do we protect art in digital form, whether it was created in digital form or converted to digital form? This article will attempt to tackle these questions.

Is Digital Art Really "Art"?

Before diving too deeply into the law surrounding digital and computer-generated art, we should define what is included in those fields. In general, digital art is artwork, performances, or practices that use digital technology as part of the creative or presentation process.[4] Unfortunately, as with many cutting-edge media, the definition and what is included in that definition are often changing. For purposes of this article, digital art includes graphic design, Internet art, partially or fully computer-generated performances, virtual reality, software art, digital installations, and digital writing.

There is a misconception that such digital art is not "real art," and certainly not "fine art." After all, some say that "real art" requires an artist who has mastered an art form—pencils or brushes, color and shadow, stone or marble—and not just someone who has purchased a tablet and some software. That is just cheating, they say; anyone with money can do that! And visual art forms only really *exist* if they are physical—digital art is simply lines of code in a computer somewhere, easily transferable and infinitely reproducible.

First, this perspective arrogantly clings to the old hierarchies of art and subsequently devalues the skill of the graphic or digital artist. While a computer and digital software are powerful tools for artists, they do not make art "easy" any more than a calculator makes tax accounting easy. Lawyers have access to tools like Westlaw Edge and Lexis Advanced, but those tools do not make practicing international law easy. In short, digital art is not easy because no form of art is easy. Any child can draw, but that does not mean they are Michelangelo or DaVinci. The same is true with computer-generated art. Philosophically, it is the creativity of the artist and his or her ideas that create art rather than the tools with which the artist brings that art to life.

More practically, however, should digital art be considered in the same manner as traditional art, or merely as a form of intellectual property? We suspect most people are comfortable with the idea that computer programs and the code they are based on can be protected as intellectual property. But while there clearly are intellectual property protections for works of art, there are other protections for art that are less tangible and harder to quantify, such as free speech, First Amendment protections, and certain moral rights that connect a creator to his or her creation. By recognizing computer-generated and digital art as an art form, we extend these protections. Go watch Pixar's *Wall-E* or the aforementioned *Soul*, Disney's *Frozen* or *Zootopia*, or Netflix's *The Little Prince* and then try to argue that computer-generated art is not beautiful or does not have something important to say.

Still, digital art has unique problems. It is easily reproduced and hard to value. Moreover, digital content creators themselves may view their work differently. Often, they are not trying to scrupulously protect their creations; rather they *want* to share it. And they often subscribe to the belief that copy control is impossible. One digital content creator, who put a copyright "all rights reserved" notice on his website, joked that the notice was really only there "out of habit" and explained, "I always kind of feel it means nothing because if someone's going to take it, they can take in the same way that I will."[5] So, whether it was created digitally or converted to digital form, what protections are available for computer-generated art?

Considerations for Protecting Digitally Produced Art

From the advent of digital environments (such as computers, computer-generated imagery (CGI) in movies and television, and the Internet), a key question has been whether it is possible to protect the economic rights under copyright law, for example to copy and distribute, on the Internet.[6] As one scholar explained, after interviewing digital artists in the UK and Ireland,

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H-1B Visas: New Procedures and Policies

By Larry S. Rifkin, Miami

The H-1B nonimmigrant classification, one of the principal temporary work visas for foreign nationals with a U.S. bachelor's degree or higher or foreign equivalent, is a vehicle through which U.S. employers may hire foreign workers on a temporary basis. In furtherance of President Trump's Executive Order 13788, *Buy American and Hire American*, 82 Fed. Reg. 18,837 (Apr. 18, 2017), two interim final rules were recently promulgated: one by the U.S. Department of Labor (DOL) and one by the U.S. Department of Homeland Security (DHS). These two interim final rules, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (DOL Rule) and *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (Oct. 8, 2020) (DHS Rule), make it more difficult for skilled foreigners to work in the United States by creating additional legal obstacles. DOL and DHS both cited to the negative economic consequences of the COVID-19 pandemic on the U.S. economy as justification to invoke the Administrative Procedure Act's (APA) good cause exception and issue the rules without the normal thirty-day notice and comment period. DOL also invoked the good cause exception to dispense with the APA's normal thirty-day waiting period, and the DOL Rule went into effect immediately. On 2 November 2020, U.S. Citizenship and Immigration Services (USCIS) published a proposed rule that seeks to replace the current H-1B lottery selection process with a new wage-based selection process that would prioritize the selection of H-1B registrations for employers who pay the highest wages.[1] This article will discuss the impact of these new current and proposed rules on the H-1B process, as well as the status of their pending litigation.

Overview of H-1B Process Prior to 8 October 2020

The H-1B is a temporary (nonimmigrant) visa category that allows employers to petition for noncitizens who will work in the United States in a specialty occupation; or perform services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project; or work as a fashion model of distinguished merit and ability.[2] For H-1B purposes, a specialty occupation is defined as "an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor . . ., and which requires the attainment of a

bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."[3]

Furthermore, in order for a position to qualify as a specialty occupation, one of the following four criteria must be met:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations, or in the alternative, an employer must show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is typically associated with the attainment of a baccalaureate or higher degree.[4]

The regulatory definition of specialty occupation has remained largely unchanged since 1991.[5]

As part of the H-1B application process, the employer must first attest, on a Labor Condition Application (LCA) filed with the Department of Labor,[6] that the employer will pay the H-1B worker a wage that is no less than the wage paid to similarly qualified workers or if greater, the prevailing wage for the position in the geographic area in which the H-1B worker will be working.[7] The secretary of Labor must then certify the LCA filed by the foreign worker's prospective U.S. employer before the prospective employer may file a petition with USCIS on behalf of the foreign worker for H-1B, H-1B1, or E-3 nonimmigrant classification.[8] In the absence of a collective bargaining agreement or an independent survey, the DOL's National Prevailing Wage Center (NPWC) will derive the prevailing wage from the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey,[9] which provides "at least 4 levels of wages commensurate with experience, education, and the level of supervision."[10] Since 2004, the four wage levels have been set as follows: Level I (entry) – 17th percentile; Level II (qualified) – 34th percentile; Level III (experienced) – 50th percentile; and Level IV (fully competent) – 67th percentile.[11] Once an employer receives a certified LCA, the employer must file the Petition for Nonimmigrant Worker, Form I-129, with USCIS seeking classification of the foreign national as an H-1B worker.

President Trump's Executive Order

On 18 April 2017, President Donald Trump issued Executive Order 13788, titled "*Buy American and Hire American.*"[12] Executive Order 13788 was published in the Federal Register (FR) on 21 April 2017.[13] The purpose of the "Buy American and Hire American" Executive Order was to "create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws."[14] More specifically, Section (5)(b) of the Order reads:

> In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.[15]

On the date he signed the Order, President Trump told supporters that H-1B visas "should include only the most skilled and highest-paid applicants and should never, ever be used to replace American workers."[16] He also stated that the Order was a means to end the "theft of American prosperity" caused by the H-1B program, which he believed had been brought on by low-wage immigrant labor.[17]

In directing DHS and DOL to devise policies to limit the issuance of H-1B visas to only the most skilled or highest paid petition beneficiaries, the Trump administration restricted an avenue of legal immigration into the United States. Major tech companies, universities, and hospitals contend that the H-1B program allows them to fill highly specialized jobs for which there are sometimes few qualified Americans.[18] According to USCIS data,

"Microsoft, Amazon, Google, Apple, Intel, Oracle and Facebook were heavy users of H-1B visas."

New Department of Labor Rule

The DOL Interim Final Rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, took immediate effect on 8 October 2020 and was promulgated because DOL "determined that the way it currently regulates the wages of certain immigrant and nonimmigrant workers in the H-1B, H-1B1, E-3, and PERM programs is inconsistent with the text of the [Immigration and Nationality Act (INA)]."[19] DOL further stated that "the existing prevailing wage rates used by the Department in these foreign labor programs are causing adverse effects on the wages and job opportunities of U.S. workers, and are therefore at odds with the purpose of the INA's labor safeguards."[20] As a result, DOL's Rule adjusts the four wage levels in order to "reduce the dangers posed by the existing levels to U.S. workers' wages and job opportunities, and thereby advance a primary purpose of the statute."[21] According to DOL, the new wage adjustments "are meant to guard against both wage suppression and the replacement of U.S. workers by lower-cost foreign labor."[22]

The new Rule's wage adjustments are as follows: The Level I wage was increased from the 17th percentile to the 45th percentile; Level II was adjusted from the 34th percentile to the 62nd percentile; Level III was adjusted from the 50th percentile to the 78th percentile; and Level IV was adjusted from the 67th percentile to the 95th percentile.[23] According to the American Action Forum, the practical application of the DOL Rule was an increase in wages for entry-level workers that ranged from 58% to 150% of the current wage.[24] According to their research, a software developer's weekly entry-level salary of US$769 under the prior system increased to US$1,923 under the DOL Rule, reflecting a 150% increase.[25] Similarly, for the most common occupations, employers would have to raise Level II wages from 31% to 47% under the new rule.[26] According to the American Action Forum's research, the "new rule is likely to harm U.S. businesses—particularly startups and nonprofits—and hinder the economic recovery."[27]

On 5 November 2020, the National Foundation for American Policy (NFAP) submitted a comment in response to the DOL Rule, stating that, according to their research, the "new DOL wage system requires employers to pay exactly $100 an hour, or $208,000 a year, for over 18,000 combinations of occupations and geographic labor markets, regardless of skill level and position because DOL cannot provide prevailing wage data for the occupations under the new system."[28] On 9 November 2020, the U.S. Small Business Administration issued a statement regarding the DOL Rule: "Advocacy is concerned this interim final rule, which will cost employers over $198 billion over a 10-year period, according to DOL's analysis, will have a disproportionate impact on small businesses. . . . Small businesses across the country are already struggling to survive and many are facing record business closures due to COVID-19 related economic difficulties."[29] Despite the criticism, DOL's Interim Final Rule went into effect on 8 October 2020 without the required notice and comment period.

New Department of Homeland Security Rule

DHS's new Rule, *Strengthening the H-1B Nonimmigrant Visa Classification Program*, amending certain DHS regulations governing the H-1B nonimmigrant visa program, was also promulgated on 8 October 2020, with an effective date of 7 December 2020. In its new Rule, DHS states:

> The primary purpose of these changes is to better ensure that each H-1B nonimmigrant worker (H-1B worker) will be working for a qualified employer in a job that meets the statutory definition of a "specialty occupation." These changes are urgently necessary to strengthen the integrity of the H-1B program during the economic crisis caused by the COVID-19 public health emergency to more effectively ensure that the employment of H-1B workers will not have an adverse impact on the wages and working conditions of similarly employed U.S. workers.[30]

The first thing the Rule does is amend the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(ii)

to clarify that there must be a direct relationship between the required degree field(s) and the duties of the position.[31] If a bachelor's degree in any or various different fields is sufficient to qualify for the position, the position is not considered a specialty occupation.[32] Similarly, if attainment of a general degree, such as a Master of Business Administration, without further specialization, is sufficient to qualify for the position, then the proffered position is also not a specialty occupation.[33] In order to establish a direct relationship, the petitioner needs to provide information regarding the course(s) of study associated with the required degree, or its equivalent, and the duties of the proffered position, and demonstrate the connection between the course of study and the duties and responsibilities of the position.[34] If the employer accepts several types of degrees for the same position, the H-1B petitioner will need to establish how each field of study is directly related to the duties and responsibilities of the position.[35]

Furthermore, previous DHS regulations stated that the position must "normally" require a bachelor's degree to qualify as a specialty occupation, or such a requirement must be "common to the industry," or "usually associated" with the position.[36] The new Rule eliminates the terms normally, common, and usually from the regulatory criteria, meaning "that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is always the requirement for the occupation as a whole, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position."[37]

Current Status of the DOL and DHS Rules

As previously stated, both the DOL and DHS Rules were promulgated without first publishing proposed rules in the Federal Register. The APA permits agencies to bypass the notice and comment period, but only in limited cases where the agency has "good cause" to find that the notice and comment process would be "impracticable, unnecessary, or contrary to public interest."[38] The APA's requirement of notice and comment is "designed to assure due deliberation of agency regulations" and "foster the fairness and deliberation of a pronouncement of such force."[39] On 19 October 2020, the U.S. Chamber of Commerce filed a lawsuit in federal court to set aside the two interim final rules promulgated by DOL and DHS, alleging that there was no good cause to excuse the APA's notice requirement in either instance.[40]

On 1 December 2020, the U.S. District Court for the Northern District of California set aside the DOL and DHS Rules and held that neither DOL nor DHS had a justification to rush the publication and implementation of these regulations without following the required notice and comment periods.[41] Finding there was no rational relationship between the unemployment caused by the COVID-19 pandemic and the employment of H-1B workers, the court found that DHS did not demonstrate a "dire emergency" to justify bypassing the APA's required notice and comment period.[42] Similarly, the court struck down DOL's immediate implementation of the new prevailing wages calculations, based on DOL's violation of the notice and comment requirement.

On 3 December 2020, a New Jersey federal judge also froze enforcement of the DOL Rule, finding that a legal challenge from a group of technology consulting firms was likely to succeed.[43] As a result of these two decisions, on 3 December 2020, the Office of Foreign Labor Certification (OFLC) announced that as of 15 December 2020, NPWC will resume processing all pending and new Form ETA-9141's for use in filing Labor Condition applications and PERM applications, and will use the Occupational Employment Statistics (OES) survey data that was in effect on 7 October 2020 for prevailing wage determinations where the OES survey data is the prevailing wage source.[44] Furthermore, any employer wishing to obtain review of a prevailing wage determination issued using the 8 October 2020 - 30 June 2021 wage source year data that was implemented under the Interim Final Rule was permitted to make a

timely request for review to the NPWC director on or before 4 January 2021.[45] As of the writing of this article, the DOL Rule and the DHS Rule have both been set aside by federal courts, and the adjudication of H-1B visa applications reverts to the standards and wage levels set prior to 8 October 2020.

Changes to H-1B Lottery Selection Process

Congress set the current annual cap for the H-1B visa category at 65,000, with an additional 20,000 for H-1B applicants with advanced degrees (U.S. master's degree or higher).[46] From the 65,000 visas, 6,800 visas are set aside each fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. For at least the last decade, USCIS has received more H-1B petitions than the annual H-1B numerical allocation in those respective years.[47] In prior years, USCIS used a computer-generated random selection process (lottery) to select enough H-1B petitions to meet the congressionally mandated regular cap.[48]

On 2 November 2020, the Department of Homeland Security published a proposed rule in the Federal Register for comment: *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*.[49] Under the proposed rule, the current H-1B lottery selection system would be eliminated. When initial H-1B visa applications subject to the annual 85,000 maximum exceeded that cap, visas would be awarded first to applicants in the highest of four wage categories, then to those in the third level, and down to the lowest level until all were issued.[50] This is a drastic change that would adversely affect several classes of applicants, including international students who are recent graduates applying for H-1B visas. In these cases, it is highly unlikely that employers would offer Level III and Level IV wages (the highest possible) to recent graduates who have little if any professional experience in their specialized field.

The proposed rule's comment period ended on 2 December 2020, and practitioners are awaiting the Final Rule; however, there has been some question as to the legality of the proposed rule. The Immigration and Nationality Act specifically states that "Aliens . . . shall be issued visas . . . in the order in which petitions are filed for such visas or status."[51] There is no provision in the statute for selecting visas based on salary, and legal challenges may arise with regard to DHS's authority to amend the current H-1B selection process.

Conclusion

In its waning days, the Trump administration attempted to make radical changes to the H-1B program, narrowing the definition of specialty occupation, making astronomical

increases to prevailing wages, thereby locking out students and IT professionals from possibly qualifying for H-1B visas, and proposing for the selection of H-1B applications to be based on proffered salary, instead of the current lottery system. As of the writing of this article, the DOL and DHS Rules have been set aside by federal district judge rulings. The legal landscape on these issues is constantly changing, and practitioners need to be aware of the latest developments. Despite these restrictive approaches, with increased awareness of current policies, persistence, and the proper legal strategies, the H-1B visa is a valid option for practitioners and their clients.

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Endnotes

1 *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 85 Fed. Reg. 69,236 (Nov. 2, 2020).

2 8 C.F.R. § 214.2(h)(4)(iii)(A).

3 8 C.F.R. § 214.2(h)(4)(ii).

4 8 C.F.R. § 214.2(h)(4)(iii)(A).

5 *See e.g. InspectionXpert Corp. v. Cuccinelli*, 19-cv-65, 2020 WL 1062821, at *24 & n. 21 (N.D.N.C. Mar. 5, 2020).

6 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

7 20 C.F.R. § 655.731(a).

8 8 U.S.C. § 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1); 8 C.F.R. § 214.2(h)(2)(i)(E).

9 *Id.* at (a)(2)(A).

10 8 U.S.C. § 1182(p)(4).

11 DOL Rule, 85 Fed. Reg. at 63,875.

12 https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/

13 82 FR 18837.

14 https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first

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16 Glenn Thrush, et al., "Trump Signs Order That Could Lead to Curbs on Foreign Workers." *New York Times*, 18 Apr. 2017, available at https://www.nytimes.com/2017/04/18/us/politics/executive-order-hire-buy-american-h1b-visa-trump.html

17 *Id.*

18 http://www.sify.com/finance/intense-scrutiny-of-h-1b-visa-applications-making-it-more-difficult-for-skilled-foreigners-to-work-in-us-news-economy-rjuleEagbbjaf.html

19 *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* at pages 75-76.

24 https://www.americanactionforum.org/research/assessing-the-department-of-labors-rule-raising-wage-requirements-for-h-1b-workers/ (3 Nov. 2020).

25 *Id.*

26 *Id.*

27 *Id.*

28 https://nfap.com/wp-content/uploads/2020/11/National-Foundation-for-American-Policy-Comment-Letter-DOL-Wage-Rule.November-5-2020.pdf

29 https://advocacy.sba.gov/2020/11/10/advocacy-submits-comment-letter-to-recommend-that-dol-delay-implementation-of-ifr-increasing-wages-for-h-1b-visas/

30 *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (8 Oct. 2020).

31 *Id.* at 63,924.

32 *Id.* at 63,925.

33 *Id.*

34 *Id.*

35 *Id.*

36 8 C.F.R. § 214.2(h)(4)(iii)(A).

37 85 Fed. Reg. 63,926.

38 5 U.S.C. § 553(b)(3)(B).

39 *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

40 *Chamber of Commerce of the United States of America,* et al., v. *US Department of Homeland Security, et al.* (Case No. 4:20-cv-7331-JSW) (Dec. 1, 2020).

41 *Id.*

42 *Id.*

43 *ITServe Alliance, Inc., et al.*, v. Scalia, et al. (Case No. 3:20-cv-14604) (Dec. 3, 2020).

44 https://www.dol.gov/agencies/eta/foreign-labor

45 *Id.*

46 https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2021-cap-season

47 *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 85 Fed. Reg. 69,236, 69,237 (Nov. 2, 2020).

48 https://www.uscis.gov/news/alerts/uscis-completes-the-h-1b-cap-random-selection-process-for-fy-2020-and-reaches-the-advanced-degree

49 *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 85 Fed. Reg. 69,236.

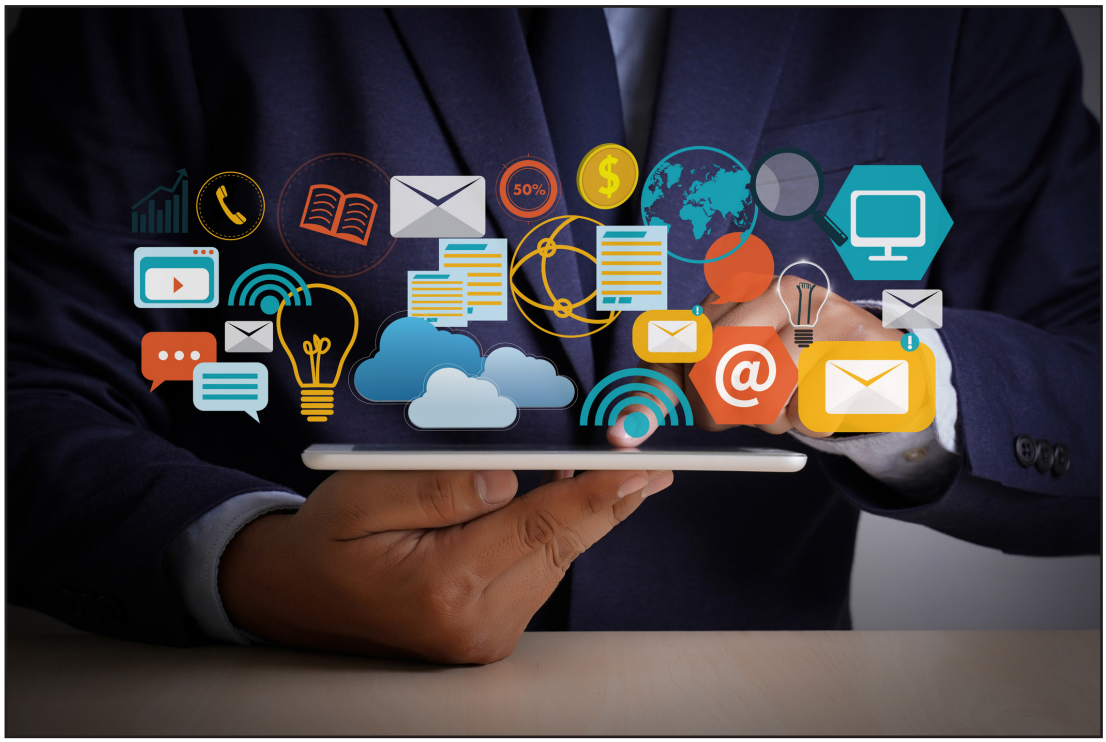
50 Id. at 69,241.

51 INA § 214(g)(3).

BEST PRACTICES

Expand Your Network and Brand With Digital Marketing

By Neha S. Dagley and Josh Rosner, Miami



The pandemic has impacted nearly every industry throughout the globe. The legal industry is no exception. Digital marketing has become more crucial than ever amid the COVID-19 pandemic. The digital marketing space certainly seems crowded at times, but with the right personal touch, creativity, and innovation, it can help expand your network and brand. Here are some tips on what you can do to improve your digital marketing during (and after) the pandemic.

1. **Think about improving your social media game.** Start creating or optimizing your LinkedIn, Instagram, Facebook, Twitter, and even your very own TikTok. The goal is to introduce your brand to the world and increase your digital footprint. With this in mind, always remember that content, content, and more content is the key to success in driving traffic to your brand. When posting content, remember to like, comment, and share your colleagues, connections, followers, or interest posts so your content can circulate throughout social media. If you are struggling to allocate time to create content, try to consistently memorialize your thoughts and accomplishments so you never have to start from scratch. If you are looking for consistency, consider using one of the many apps on the market that help with content planning and timing of social media posts.

2. **When figuring out what kind of content to explore, think about creating videos to attract a new audience.** Experiment with new ideas out of your comfort zone, like social media stories or live videos. We are living in a digital age where visuals are more important than ever. While thinking about what content you want to produce, try to be consistent with your brand, and engage with your audience. Another way to utilize videos is to go live, and you can do that by using platforms like Facebook, Instagram, or YouTube.

3. **Virtual networking is the new normal for business development to create new relationships, partnerships, and collaboration.** The pandemic has caused a shift from shaking hands in person to

Best Practices, continued

pressing a button to go on a live Zoom call. To get your name out virtually, think about attending a local bar association networking event and meeting new people. Invite a person you meet to a virtual one-on-one meeting or telephone call and learn everything you can about him or her. Regardless of how you meet someone nowadays, the most critical aspect is to follow up—a timeless concept we often forget when we get busy with the practice of law.

4. **If you love to write, think about starting a blog.** Companies that blog produce an average of 67% more leads monthly than companies that don't (DemandMetric.com). When blogging, think about what your purpose is when writing articles. You want to provide relevant content that will appeal to your target audience. When deciding what content you want to put forward, research other lawyers or law firms currently blogging. Once you have written your article, think about how you can immediately promote it on your website and social media.

5. **If you love to listen to a podcast, consider starting one.** Creating a podcast is a good medium for people who have a story to tell because audio is an intimate, relatable way to share information. Listeners feel connected to the podcasts they listen to and to the people on them. Podcasting is another form of producing content. Nearly 70 million Americans listen to podcasts every month, and according to the podcast platform anchor.fm, that number is going up. When you have a podcast, you can use it as an innovative approach for reaching a new audience and creating new business development opportunities. This strategy will enable you to develop new content through storytelling.

6. **Create and engage with your contact list.** To be successful with business development, organize and keep track of your contacts. Learn about different email marketing platforms that can send out email blasts periodically, like MailChimp or Constant Contact. These emails can be segmented for holidays, announcements, newsletters, offers, webinars, or events.

The pandemic has made us rethink not only the way we practice law but also the business of law. This is as good a time as any to create or rethink your digital presence. Create your digital marketing plan now and become consistent with it. Laying the foundation now (if you haven't already) will allow you to build upon it long after the pandemic is behind us.

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The Hyatt Regency Coconut Point Resort and Spa, host hotel for the retreat

ILS Chair Bob Becerra welcomes members and guests to the ILS Retreat.

Relaxing around a fire pit—a retreat favorite

Sandy Quinter follows the sign to the Friday Evening Reception.

ILS Retreat *continued*

Saturday Morning Executive Committee Meeting

Bob Becerra conducts the ILS Executive Committee Meeting for in-person participants as well as for those joining the meeting via a Zoom webinar.

Laura Reich sports one of the ILS masks provided to retreat participants to ensure a safe in-person meeting.

Richard Montes de Oca reviews the meeting materials.

Socially distanced tables ...

Angie Froelich, Bob Becerra, and Rafael Ribeiro

Diana Fischer and Jim Meyer

Adrian Nuñez and Sherman Humphrey

Peter Quinter, Sherman Humphrey, Bob Becerra, and Rafael Ribeiro

ILS Retreat *continued*

Saturday Morning Committee Meeting

ILS committees meet in blended sessions with some members meeting in person while others join via videoconferencing.

ILS Retreat *continued*

Kids at Play

The ILS Retreat is a great time for members' families to enjoy kid-friendly fun.

Saturday Evening Dinner

Adrian Nuñez, Yamilet Toro, Bob Becerra, Christiana Carroll-Becerra, and Jim Meyer

Sandy and Peter Quinter, Frederic Rocafort, and Diana Fischer

Bob Becerra

Sunday Morning Breakfast

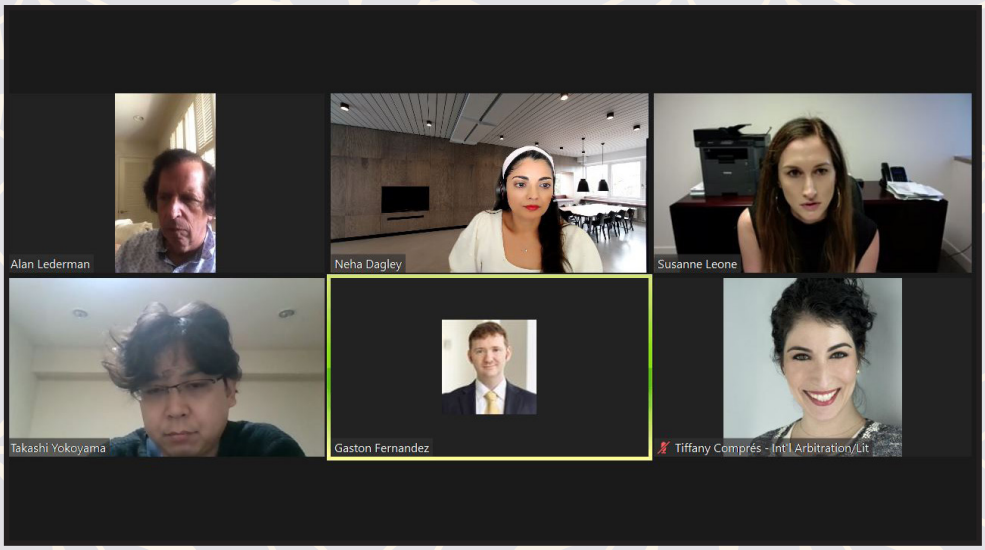
Peter Quinter and Laura Reich

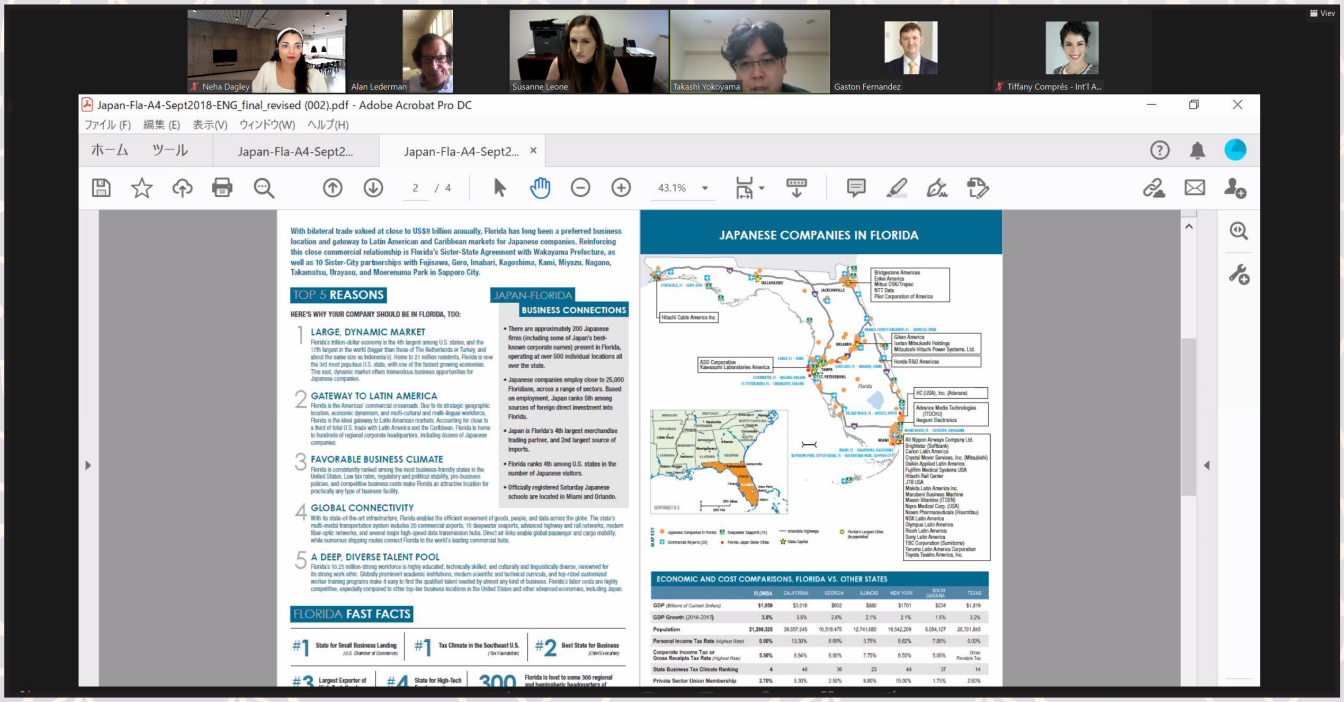
Laura Reich enjoys breakfast with her family.

ILS Asia Committee

30 October 2020
via Zoom

On 30 October 2020, the Asia Committee held a virtual meeting. The India and China subcommittee chairs, Neha S. Dagley and Gaston Fernandez, reported their respective plans for the upcoming year.





Takashi Yokoyama gave a presentation regarding the development of a viable relationship between the Japanese business community and the Florida legal community.

ILS Holiday Party

16 December 2020
THēsis Hotel • Coral Gables

'Tis the Season! The Florida Bar International Law Section gathered on 16 December 2020 for its annual Holiday Party. The reception was held outside at the THēsis Hotel in Coral Gables, Florida. Masks and social distancing were required. The ILS Executive Board looks forward to celebrating with you all in 2021 and beyond!

Grant Smith and Bob Becerra

Davide Macelloni and Bob Becerra

Yes, we wore masks, but a great time was had by all!

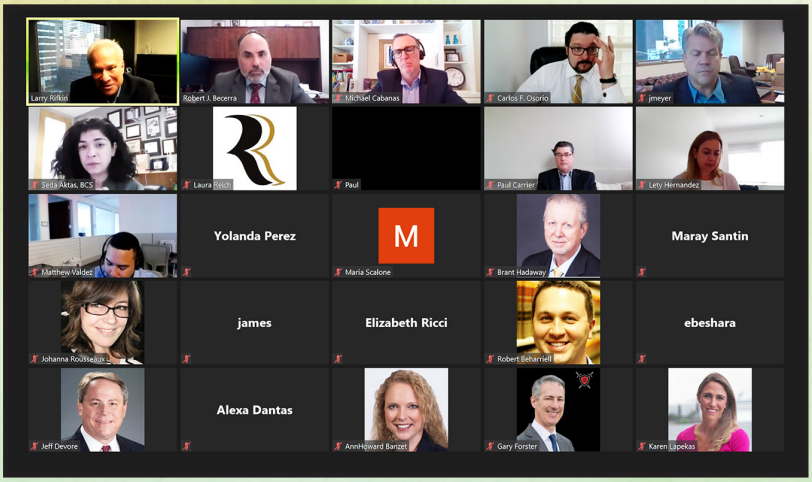
Carolina Obarrio, Bob Becerra, Ed Vidal with his wife, Jeff Hagen, Sherman Humphrey, William Diab, Grant Smith, and Omar Ibrahim

Gary Davidson, Laurence Gore, Vanessa Brizo, Daniel Milan, and Elaine Claimiris

ILS Lunch and Learn

13 January 2021

The International Law Section hosted its January Lunch and Learn via Zoom. ILS Chair Bob Becerra moderated the event, which featured a presentation by Larry S. Rifkin of Rifkin & Fox-Isicoff PA in Miami. Rifkin is chair of The Florida Bar Liaison Committee to the Department of Homeland Security (U.S. Citizenship and Immigration Services), Department of Labor, and Department of State. He is a past chair of the ILS and continues to serve on the section's Executive Council.



Participants enjoy the presentation by Larry Rifkin.

Larry Rifkin

Bob Becerra

Jim Meyer

Michael Cabanas

WORLD ROUNDUP

ASIA/JAPAN

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JIDRC-Tokyo opening ceremony and Japan Arbitration Day held in October.

On 12 October 2020, the Ministry of Justice with the Japan Federation of Bar Associations, the Japan Association of Arbitrators (JAA), and the Japan International Dispute Resolution Centre (JIDRC) hosted the opening ceremony for its new hearing facility in Tokyo (JIDRC-Tokyo). JIDRC-Tokyo commenced operation in March 2020 following the establishment of the Japan International Dispute Resolution Centre in Osaka (JIDRC-Osaka) in May 2018. This commemoration was combined with JAA's annual Japan Arbitration Day that promotes international arbitration. With widescreen projectors and audio technology, JIDRC-Tokyo is equipped with two modern conference rooms and six breakout rooms for hearings in international arbitration and mediation. Due to the ongoing COVID-19 pandemic, JIDRC has also implemented virtual hearing protocols with major videoconference platforms, including simultaneous transcription and interpretation services. As the first hearing facility in Japan, the JIDRC confidently offers counsel and parties a premier dispute settlement instrument in cross-border litigation.

Japan and the UK sign Comprehensive Economic Partnership Agreement.

On 23 October 2020, Japan and the United Kingdom (UK) signed the Japan-UK Comprehensive Economic Partnership Agreement (CEPA) in Tokyo, which is one of the UK's first free trade agreements since the former European Union (EU) agreement. The CEPA is expected to be a milestone for the UK's possible participation in the Comprehensive and Progressive Trans-Pacific Partnership with Japan and other signatories. It also entails the removal and replacement of references to the EU, with amendments related to the applicable territories, from the Japan-EU Economic Partnership Agreement signed in 2018. In addition, it addresses the following items:

- Establishment of the application process for a financial service license with transparent measures that enable an applicant to be reviewed in a "reasonable period of time"
- Digital and data provisions that enable cross-border data flows, prohibit data localization, and adopt and maintain a regulatory framework for the protection of privacy information
- Cooperative agreements on audiovisual services that the EU has historically refrained from in trade policy discussions on this area
- No investor-state dispute settlement provisions; however, it contains a review clause by the Multilateral Investment Court system, which may initiate a review procedure to scrutinize the present provisions of CEPA
- Modern intellectual property provisions, such as additional duration for the protection of industrial designs, technological protection measures, registration and renewal processes for trademarks, and multiple design applications

Fifteen Pacific rim countries sign Regional Comprehensive Economic Partnership.

On 15 November 2020, after eight years of negotiations, the Regional Comprehensive Economic Partnership (RCEP) was signed by fifteen countries in the Pacific rim region: Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, New Zealand, the Philippines, Republic of Korea, Singapore, Thailand, and Vietnam. The RCEP signatories account for about 30% of the global GDP and 30% of the world population. The RCEP is expected to facilitate the expansion of regional trade and investment and to promote global economic development. The RCEP contains these key aspects:

- Modern coverages of the existing ASEAN Plus One FTAs in relation to recent trade reality changes, such as electronic commerce, small and medium enterprises, regional value chain, and complex market competition
- Comprehensive chapters encompassing: (1) trade in goods, including customs procedures, sanitary and phytosanitary measures, standards, technical regulations and conformity assessment measures, and trade remedies; and (2) trade in services, including financial, telecommunication, professional services, and temporary movement of natural persons
- Mutual beneficial treatments that may have vast

economic impacts on diverse levels of businesses in developing countries, in particular with respect to those countries that have adopted flexible measures and special implementations tailored for Cambodia, Lao PDR, Myanmar, and Vietnam

Takashi Yokoyama *is a Japanese attorney admitted in New York. He was previously engaged in corporate and litigation practice for over nine years in the legal departments of Sojitz Corporation and other corporations in Tokyo. During and after his JD and LLM programs at the University of Miami School of Law, he also worked for the Energy Charter Secretariat in Brussels and WilmerHale's International Arbitration Group in London.*

INDIA

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Supreme Court of India stays US$562.5 million ICC arbitral award against Indian state-owned satellite company Antrix that was confirmed by a U.S. district court.

A US$562.5 million ICC arbitral award was confirmed by the United States District Court for the Western District of Washington in *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, 2020 WL 6286813, at *1 (W.D. Wash. Oct. 27, 2020). The judgment included US$562.5 million representing the full amount of the award, and also included US$672,791,593.75 for pre- and post-award simple interest from 14 September 2015 (the date of the award) at US$331,787.64 per day.

The underlying dispute arose from a 2005 agreement between Antrix and Devas. Antrix agreed to "build, launch, and operate two satellites and to make available 70 MHz of S-band spectrum" to Devas (the Agreement). Devas is a corporation formed under the laws of the Republic of India, and Antrix is a corporation wholly owned by the Government of India (the commercial arm of the Indian Space Research Organisation). In 2011, Antrix repudiated the agreement, and Devas commenced arbitration proceedings. In September 2015, an ICC arbitral tribunal in New Delhi ordered Antrix to pay US$562.5 million to Devas for wrongful termination of the Agreement (the Award).

In its attempts to oppose enforcement of the Award, Antrix pursued various legal arguments and avenues for several years resisting confirmation of the Award. But on 27 October 2020, a U.S. district court in Washington State ruled in favor of Devas, rejecting Antrix's argument that the Award was not made by arbitrators appointed in accordance with the Agreement. The court found that Antrix's repeated refusal to appoint an arbitrator operated as a forfeiture of its right to do so and that the ICC properly made the appointment under its rules and under the Agreement itself, which expressly incorporated the ICC rules. An interesting aspect of the case involved Antrix's public policy argument. Antrix cited to a policy of "respect for the sovereignty of other nations and respect for foreign arbitral awards." Although the court recognized that actions against foreign states in U.S. courts raise sensitive issues concerning foreign relations, the public policy argument was rejected for several reasons, including the federal policy in favor of arbitration and the lack of any issues raised relating to India's sovereign rights.

On 4 November 2020, the Supreme Court of India stayed execution of the Award, stating, "[w]e consider it highly iniquitous to permit the party to execute an award without the objections under section 34 of the [Arbitration and Conciliation] Act to the Award itself being heard." The court held that the Award shall be held in abeyance until the Delhi High Court decides the application for stay in the Application under Section 34.

Vodafone prevails in arbitration commenced under India-Netherlands Bilateral Investment Treaty.

On 25 September 2020, the Permanent Court of Arbitration at The Hague ruled against India and in favor of Vodafone in a dispute commenced under the India-Netherlands Bilateral Investment Treaty (BIT). The arbitration was commenced in 2012 and was based on Article 4.1 of the India-Netherlands BIT, which provides, "[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." The claim was premised on withholding tax legislation passed by India that gave the government certain retrospective rights.

The history of the dispute relates to Vodafone International Holdings BV's (a Dutch company) 2007 purchase of shares in a Cayman company. The Indian authorities sought to tax this event on grounds that the underlying asset was situated in India, even though this was an offshore transaction between two nonresident companies. At issue was a capital gains tax of approximately US$2.2 billion assessed against Vodafone's Netherlands holding company. When Vodafone challenged the tax assessment, it lost in the Bombay High Court but ultimately prevailed in the Supreme Court of India (*Vodafone International Holdings BV v. Union of India & Anr* (*Civil Appeal No.733 OF 2012 (arising out of S.L.P. (C) No. 26529 of 2010)*). The Supreme Court of

India declared that Vodafone was not liable to be taxed in India. According to Justice Radhakrishnan, the Indian tax authorities' demand of "nearly Rs.12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks authority of law."

Vodafone's victory did not last long. Shortly after the ruling, the finance minister of India introduced the Finance Bill (2012), which contained retrospective amendments favorable to the government's position. The amendments were passed permitting the Indian tax authorities to renew their demand on Vodafone. Vodafone thereafter commenced the 2012 arbitration proceedings against the government contesting the tax liability arising out of the retrospective amendments. The Indian government's conduct in passing the retrospective amendments has received global criticism from press and investors, particularly where the Supreme Court of India's decision should have brought finality to the dispute.

Neha S. Dagley *is an attorney with the law firm of Rivero Mestre LLP in Miami, Florida. For the last fifteen years, she has represented foreign and domestic clients across multiple industries and national boundaries in commercial litigation and arbitration matters. A native of Mumbai, Neha is fluent in Hindi and Gujarati. She is the cofounder and president of the Australia United States Lawyers Alliance, Inc. (AUSLA), and currently serves as chair of the India Subcommittee of The Florida Bar's International Law Section Asia Committee.*

LATIN AMERICA

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Brazil and the United States sign bilateral protocol for transparency.

On 19 October 2020, Brazil and the United States signed a new protocol on trade rules and transparency, which updated the Agreement on Trade and Economic Cooperation (ATEC) that was signed on 19 March 2011. The new protocol aims to enhance bilateral economic partnership; facilitate trade, investment, and good regulatory practices; and promote anticorruption measures.

Brazil and the United States have a strong economic relationship. According to the Office of the United States Trade Representative,[1] in 2019, U.S. goods and services trade with Brazil totaled an estimated US$105.1 billion. Exports were US$67.4 billion; imports were US$37.6 billion. The U.S. goods and services trade surplus with Brazil was US$29.8 billion in 2019. Brazil is currently the fourteenth largest goods trading North American partner, with US$73.7 billion in total (two-way) goods traded during 2019.

On anticorruption, the new protocol recognizes the need to build integrity within both the public and private sectors. It also recognizes the importance of regional and multilateral initiatives to prevent and combat bribery and corruption in matters affecting international trade and investment involving both countries.

In addition, the new protocol affirms obligations that Brazil and the United States have under multilateral anticorruption instruments to which they are parties, such as the United Nations and the Organization for Economic Cooperation and Development conventions.

The new protocol also establishes that both countries shall encourage enterprises to adopt or maintain sufficient internal accounting controls, compliance programs, or monitoring bodies, independent of management, to assist in preventing and detecting bribery and corruption.

On trade facilitation, the new protocol sets forth rules on advance rulings, single window, and penalties. Moreover, it establishes standards of conduct and determines that each country shall adopt or maintain measures to deter its customs officials from engaging in any action that would result in, or that reasonably creates the appearance of, use of their public service position for private gain, including any monetary benefit.

Brazilian Central Bank and National Monetary Council announce Brazilian Regulatory Sandbox.

Moving forward with efforts to develop the sector of fintech in Brazil, on 26 October 2020, the Brazilian Central Bank (Bacen) and the National Monetary Council (CMN) announced the implementation of the Regulatory Sandbox.

The Regulatory Sandbox envisions providing specific regulations to develop new business models, to increase competition for financial services providers, and to promote innovation.

It will be performed through periodic regulatory cycles provided by Bacen, up to one year, which may be extended once for the same time period. During the cycles, entities will be subject to different regulatory requirements and may receive personalized guidance from regulatory agents on how to interpret and apply the applicable regulation. In that regard, Bacen will monitor

the implementation and results of the projects in order to assess the risks associated with new products and services.

As part of this initiative, in November 2020, Bacen launched PIX, an Open Banking initiative, which allows for instant banking transactions.

Mexico proposes labor and tax reforms.

On 11 November 2020, Mexico introduced a bill to amend labor and tax laws, such as the Federal Labor Law, Income Tax Law, Value-Added Tax, and Federal Tax Code, to prohibit outsourcing to prevent violations of labor rights and tax fraud. If approved, the bill would largely eliminate the use of service companies in the country.

In Mexico, since 30 November 2012, outsourcing has been incorporated in the legal framework by the Federal Labor Law; however, according to the explanatory notes, the law was not enough to prevent improper practices related to outsourcing. This regime has been used by many companies to harm labor rights and to reduce their obligations, and is also being used to pay fewer taxes.

According to the bill, only specialized work that is not part of the company's business purpose or its economic activity is allowed to be subcontracted, and only after being approved by the Labor and Social Welfare Secretariat (*Secretaría del Trabajo y Previsión Social*). In addition, some other requirements must be fulfilled, such as the signing of an agreement that sets forth the scope of services and the number of employees.

The bill was sent to legislative commissions of the Chamber of Deputies and was expected to be voted on by the end of 2020.

Cintia D. Rosa *focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked at the Brazilian Federal Police. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in compliance from the GV São Paulo Law School.*

Paula E. Pagani *focuses her practice on compliance and data privacy matters. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in white-collar and data privacy from the GV São Paulo Law School.*

Endnote

1 Office of the United States Trade Representative. (19 October 2020). United States and Brazil Update Agreement on Trade and Economic Cooperation with New Protocol on Trade Rules and Transparency. Washington, D.C., USA. Retrieved from https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules

MIDDLE EAST

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Kingdom of Bahrain sets up special office to tackle financial crimes and money laundering.

Less than two months after jailing three Future Bank officials and imposing a total of US$47 million in fines for trying to launder Iranian bank funds through the Bahraini banking system, Bahrain has now set up a prosecution office solely to tackle financial crimes and money laundering. The newly created Financial Crimes and Money Laundering Prosecution Office will be responsible for, among other things, investigating money laundering, bribery, embezzlement, and the misappropriation of funds.

The United Arab Emirates sanctions 200-plus law firms for anti-money laundering failures.

In October 2020, the UAE initiated a crackdown on the roles law firms play in countering money laundering and terrorist financing. The government found more than 200 law firms noncompliant with established procedures to combat money laundering. As a result, the ministry suspended the licenses of these law firms for one month and took legal action against noncompliant lawyers. In addition, lawyers and law firms that did not quickly rectify their procedures to combat money laundering were heavily fined.

Another U.S. court rejects enforcement of arbitral award against Saudi Aramco.

Last December, I reported on an arbitration out of Egypt where three arbitrators were sentenced to jail for their roles in a sham arbitration. Specifically, in 2015, three arbitrators in the Cairo-based International Arbitration Centre (IAC) issued a US$18 billion award against Chevron and Saudi oil company Aramco. The award granted damages to thirty-nine Saudi and Egyptian nationals who claimed they were entitled to compensation because they were heirs to a 1933 land concession granted by their ancestors to the oil companies' predecessor that ended in 1993, but the land was not returned. Despite the Egyptian court finding the arbitration was a sham and sentencing the arbitrators, the petitioners moved to enforce the award in the United States. Following the lead of two other U.S. federal courts that rejected enforcement of the award, a court in the United States District Court for the Southern District of Texas also refused to enforce the award. The court's decision can be found at *Al-Qarqani*

v. Arab Am. Oil Co., No. 4:18-CV-01807 (S.D. Tex. Nov. 12, 2020).

***Omar K. Ibrahem** is a practicing attorney in Miami, Florida. He can be reached at omar@okilaw.com.*

NORTH AMERICA

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U.S. Supreme Court considers holocaust survivors' claims in *Republic of Hungary v. Simon* and *Federal Republic of Germany v. Philipp*.

The U.S. Supreme Court heard arguments in early December 2020 on whether American courts have a place in cases considering whether Hungary and Germany must pay for property stolen from Jews before and during World War II. In *Republic of Hungary v. Simon*, No. 18-1447, fourteen Holocaust survivors brought claims for property stolen by the Hungarian state-owned railway, which transported hundreds of thousands of Jews to Nazi death camps during the war. In *Federal Republic of Germany v. Philipp*, No. 19-351, the families of Jewish art dealers seek the recovery of the Guelph Treasure, a collection of medieval religious art, which the Jewish art dealers were forced to sell in Nazi Germany for well below its value. Although both Hungary and Germany argued to the U.S. Court of Appeals for the District of Columbia Circuit that plaintiffs lacked standing in U.S. court, the court ruled that the cases could proceed.

At issue is the Foreign Sovereign Immunities Act of 1976 (FISA), which generally bars suits in U.S. courts against foreign nations, with some exceptions including for the expropriation of property. Counsel for Hungary and Germany argued that claims, such as the ones at issue, should first be brought in the courts of the nation where the alleged expropriation occurred. The plaintiffs, as well as many amicus curiae, argued that such legal actions in Hungary and Germany have proved futile, citing one particularly egregious example where a 92-year-old plaintiff's suit was dismissed for lack of evidence beyond her own sworn testimony and who was then ordered to pay the government's legal fees.

Although the U.S. government lawyers offered little argument in the Hungarian case, government lawyers in the German case argued that FISA's expropriation of property exception applied only to the taking of a foreign national's property, and they warned the justices that opening the door to these types of suits in U.S. court could result in foreign countries hearing cases for acts in violation of the law of nations by the United States in its history.

FBI warns China targeting Chinese residents living on U.S. soil.

The FBI issued warnings to state and local law enforcement agencies to avoid voluntary or inadvertent cooperation with a Chinese government program attempting to coerce Chinese citizens legally resident in the United States to return to China to face charges. China's campaign—called Fox Hunt—to compel those it suspects of financial crimes or corruption to return to China, often by means of kidnapping, blackmail, or threats, often involves seeking the aid of local law enforcement. Many targeted in the investigation have claimed that Beijing is also using Fox Hunt to improperly detain political dissidents.

In late 2020, the U.S. Justice Department charged eight people as acting as agents for the Chinese government in connection with their surveillance of U.S. residents. In one case, a U.S. resident was given the choice of returning to China or committing suicide; in another, the wife and family of a U.S. resident were threatened unless the U.S. resident returned to China. Notably, the United States does not have an extradition treaty with China. The FBI has offered its assistance to those who believe they are being improperly targeted by the Fox Hunt investigation.

International lawyers' group accuses Mexican tax enforcement scheme of violating international law.

The London-based International Bar Association (IBA) has expressed concerns over Mexico's recent attempts to discourage taxpayers from hiring lawyers and threatening both taxpayers and lawyers with criminal sanctions for failing to resolve tax disputes. In a letter addressed to Mexican Finance Minister Arturo Herrera, IBA Legal Practice Division Vice President Peter Bartlett accused President Andres Manuel López Obrador's government of "openly threatening the Rule of Law." Mexican taxpayers are allegedly being warned not to consult with tax lawyers in disputes over potential tax liability and are threatened with criminal charges if they fail to settle with the government.

Mexican President López Obrador has pledged to improve Mexican tax revenue as Mexico has the lowest collection of taxes as a percent of GDP among the countries in the Organization for Economic Co-operation and Development. The low collection rate is due to

factors as wide ranging as a large workforce paid informally in cash and the corruption of tax officials. As COVID-19 has stressed the country financially, Mexico intends to make up some of the shortfall through aggressive tax collection.

Cuba to unify currency and eliminate the Cuban convertible peso (CUC)

Since 1994, foreigners and tourists in Cuba have had access to the Cuban convertible peso, or CUC, which was pegged to the U.S. dollar. Local Cubans, however, used only the much weaker Cuban peso. Cuba announced that it will end its dual currency system and have a single unified currency trading at twenty-four Cuban pesos per U.S. dollar, starting in January 2021. While currency unification will likely benefit the Cuban economy, it will also likely hurt those Cubans who were able to trade in CUCs. The Cuban economy took a significant hit due to COVID-19 and the resulting drop in tourist trade. The unified currency is part of an ongoing government program to improve the health of the Cuban economy, including modifying prices and salaries throughout the country.

Laura M. Reich *and* ***Clarissa A. Rodriguez*** *are the founding shareholders of Reich Rodriguez PA. The firm specializes in commercial litigation, international arbitration, and alternative dispute resolution. Reich Rodriguez's practice areas include art law disputes with an emphasis in recovery and restitution of stolen and looted art, with a focus on European art and art of the Americas.*

WESTERN EUROPE

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EU removes Cayman Islands and Oman from offshore blacklist.

The EU list of non-cooperative jurisdictions for tax purposes (the EU blacklist) is an international tax governance tool used by the EU to tackle tax fraud, tax evasion, and money laundering. EU countries agreed to utilize this list when considering certain administrative and legislative measures. The first EU blacklist was adopted on 5 December 2017 and has been updated multiple times since. On 6 October 2020, the Economic and Financial Affairs Council of the EU adopted a revised EU blacklist and added two new jurisdictions to the list, namely, Anguilla and Barbados. It removed the Cayman Islands and Oman because of their implementation commitments. For instance, according to the report by the Code of Conduct Group, the Cayman Islands improved its framework on Collective Investment Funds. Pursuant to this latest revision, the EU blacklist is now composed of the following twelve jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, U.S. Virgin Islands, and Vanuatu.

H&M fined €35 million over data breach.

On 1 October 2020, H&M was fined €35 million for illegal employee surveillance in Nuremberg, Germany. This was the second highest fine imposed on a single company since the EU's General Data Protection Regulation (GDPR) laws became enforceable in 2018.

The investigation concluded that H&M recorded details about its employees in Nuremburg, Germany, including extensive private information, such as records on vacations, medical conditions, family issues, and religious beliefs. Some of the information was recorded by managers who overheard workplace conversations. The notes were highly detailed and updated on a regular basis by the supervisors. Due to a configuration error in October 2019, the illegal data collection became public when it was accessible companywide for several hours.

H&M acknowledged responsibility and has taken significant steps to comply with data protection laws. H&M also apologized to its employees and paid them considerable compensation. Furthermore, H&M implemented a comprehensive action plan and improved its IT system, appointed a data protection coordinator, and provided data privacy training to its leadership and staff.

Susanne Leone *is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.*

From Eye-Rolls to Grimaces, from page 13

And they did not pretend to know how they read body language so effectively, with one Master Mediator exclaiming, "I can't articulate how I do it. I just can!"

Their extraordinary skills are likely not innate, but developed through years of mediation experience. Intriguingly, several Master Mediators speculated that they honed their people-reading skills as children when they navigated complicated family dynamics, such as an overbearing or controlling parent.

Your Face Is Your Canvas—Paint It Wisely

The Master Mediators agreed that while seeing a person's entire body and observing gestures and body positions often reveal useful information about feelings or state of mind, seeing a person's face matters most. And when only a few faces are on the screen, mediators can see expressions and micro-expressions more easily and more accurately than they can in person because everything is magnified.

As one Master Mediator put it, "Eyes and mouths are most important. I see emotions on their faces, even when they try to disguise or hide them." Another bluntly asserted, "I get as many clues from the neck up as from the whole body."

One Master Mediator told the story of an inexperienced lawyer who rolled her eyes and grimaced whenever she heard something she disagreed with or did not believe, perhaps lulled into complacency given the relative informality of a virtual mediation compared to court. So, the Master Mediator took her aside to explain that eye-rolls show contempt and can alienate the person who is speaking, often making that person less likely to want to share information or collaborate. The young lawyer promptly stopped the eye-rolling.

Effective negotiators and advocates control what they say and how they act, balancing being firm and being likable. Despite experiencing strong negative feelings, they maintain their composure and calmly listen while they control natural urges to interrupt, challenge assertions, or launch personal attacks.

If you want an adversary to listen to your point of view, it is best to lead by example by listening to his or her point of view. The same advice applies to how to interact with the mediator, with whom you want to build a positive, trusting, and collaborative working relationship.

***David S. Ross, Esq.**, has been a mediator with JAMS for nearly 30 years. He specializes in complex employment and commercial disputes and has resolved thousands of two-party and multi-party cases, including many class actions. Mr. Ross regularly handles high-profile cases involving celebrities, politicians, and CEOs of global corporations. Mr. Ross can be reached at dross@jamsadr.com.*

Endnotes

1 For a look at how I conduct research and present my findings, see "Zeroing In on Zoom: What Good Mediators *Really* Think About It," available at https://www.jamsadr.com/blog/2020/mind-of-the-master-mediator

2 The Master Mediators featured David Geronemus, Dina Jansenson, Shelley Olsen, Carol Wittenberg, Peter Woodin, and Michael Young.

3 *See* note 1.

Class Action Against Airbnb, from page 15

are clearly written so they can be easily understood, are prominently displayed, and are consistent with their marketing language.

Airbnb.com operates on some simple principles, many of which are fundamental to this dispute and included in its Terms of Service.

- Airbnb requires hosts and travelers to both acknowledge and agree that it is just an online marketplace where travelers can find hosts, and to hold the host payouts to confirm the reservation is as listed. (TOS; Section 1.1)
- Airbnb requires hosts and travelers to both acknowledge and agree that Airbnb is not a party to the rental agreement between hosts and their guests, and is not responsible for anything related to the reservations made by travelers using the platform. (TOS; Section 1.2)
- Airbnb requires hosts and travelers to both agree that Airbnb does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any listings or host services and thus has no involvement in hosting or managing properties. (TOS; Section 1.2)
- When a traveler makes a reservation with a host, Airbnb, through a wholly owned subsidiary, collects the rental payment and holds the host payout in escrow to either apply the cancellation policy agreed to by the guests and controlled by the hosts or disburse to the host on occupancy. (TOS; Section 1.2)
- Airbnb requires hosts and travelers to both acknowledge and agree that the rental agreement is exclusively between hosts and their guests, under the terms selected and controlled by hosts, including the cancellation policy selected by hosts and the house rules posted with their listing. (TOS; Section 1.2)
- Airbnb reserves the right to change the terms between Airbnb and its members (hosts and travelers), but only after giving its members thirty days' notice by email and only applying those new provisions moving forward after the expiration of thirty days. (TOS; Section 3)
- Airbnb is simply a software platform and allows the parties (hosts and guests) the freedom to contract and enter into a short-term rental agreement on terms controlled by the host. (TOS; Sections 16 and 6.1)

The very first paragraph of both the Terms of Use and Payment Terms policies, in the most prominent location in the Terms of Use and Payment Terms, is Airbnb's stated and repeated preference for Consumer Arbitration with AAA for all disputes by all members and the class action waiver by all members. In order to enforce these types of severe limitations on user rights and remedies and to require arbitration in an adhesion contract, Airbnb must provide a clear, fair, and efficient alternative to other available dispute resolution forums.

The rental contract between a host and a guest is made at the time the reservation is booked, when the guest clicks the Reserve button and makes payment to the "Airbnb Payments Entity," which acts as an escrow company holding the host payout until check-in by the guest. The rental contract between hosts and their guests include the payment terms, the listing details, the house rules, and the host cancellation and refund policy. After a traveler reserves the property, the Airbnb platform blocks the listing for the booked reservation dates, making it impossible for anyone else to rent the property during the reservation dates and making the property unavailable to any other potential renters. Booking a property is, among other things, a commitment by the traveler to pay and a commitment by the host to remove the listing's availability.

Airbnb acting through its wholly owned subsidiary Airbnb Payments agreed to make payouts to the host consistent with the host-mandated cancellation policy (TOS Section 9.2) and Airbnb's Guest Refund Policy.

Setting the Cancellation Policy

Hosts who list their properties on the Airbnb platform ultimately have several options in setting their cancellation policies, generally identified within the platform as flexible, moderate, strict, and super strict. The default cancellation policy set and heavily promoted and preferred by Airbnb is flexible, with free cancellation and a full refund up until 24 hours before check-in.

The Airbnb hosts' sign-up process not only encourages flexible cancellation policies, but automatically

Class Action Against Airbnb, continued

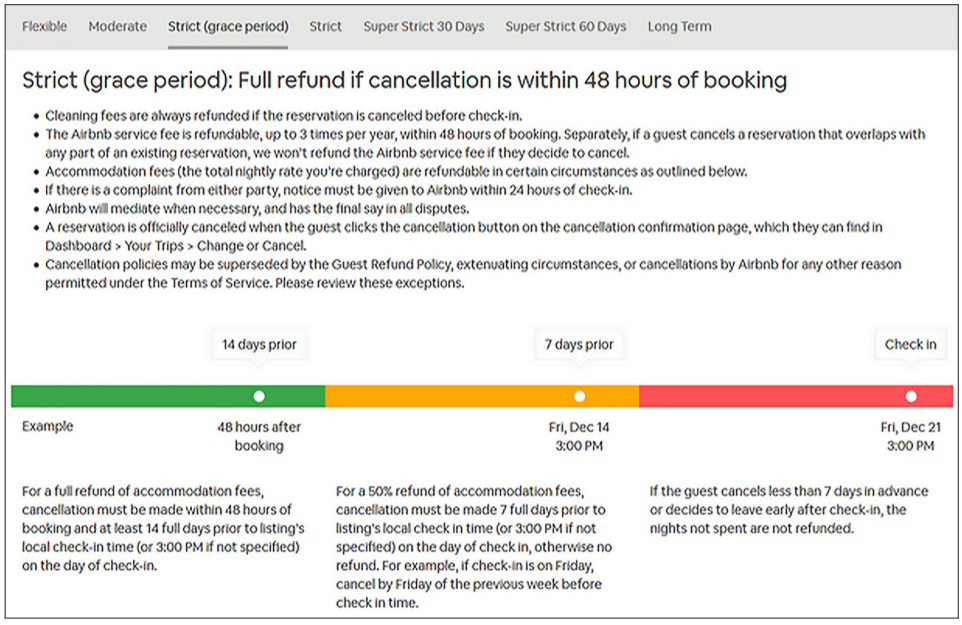
designates the initial cancellation policy as flexible. Regardless, Airbnb understands that many hosts need to either place the cancellation risk onto travelers or split the risk with travelers in order to ensure cash flow. Airbnb allows within its platform complete control over cancellation policy selection by hosts. Hosts must search within their set-up options to change the cancellation policy from flexible to some other option. Airbnb generally shows listings with flexible and moderate cancellation policies before listings with strict and super-strict cancellation policies and continually markets to hosts to change their cancellation policies to flexible. Hosts are told that stricter cancellation and refund policies will negatively impact their listings search results and are made to agree by clicking several checkboxes that they understand the negative consequences of using a stricter cancellation and refund policy. Regardless of Airbnb's preference for less restrictive cancellation policies, Airbnb provides choice and control to hosts in order to promote the use of their platform by hosts.

Because of the importance of cash flow, many hosts, including the claimant in the Airbnb class action, select a strict or super-strict cancellation policy. A depiction by Airbnb of the current strict cancellation and refund policy is shown below.

When a traveler is searching for properties, the traveler can filter out all properties with strict cancellation policies as a top line, top left filter item.

Travelers see the cancellation policy of hosts in several places before reserving the property, and even for strict cancellation policies are afforded a forty-eight-hour grace period to cancel a reservation for a full refund if they decide they are not comfortable with a cancellation policy or any other aspect of the listing or rental agreement.

Airbnb has an entire policy page devoted to refunds titled "Airbnb Guest Refund Policy." Guests are told they can only get refunds if there is a host-created "Travel Issue," which is defined as host cancellation, or a "listing's description or depiction of the accommodation is materially inaccurate" or when the house is uninhabitable because of, for instance, vermin or undisclosed pests. The Airbnb guest refund policy has mandated a detailed procedure for the guest and Airbnb to follow before a refund as a result of a host-created problem can be processed. Regardless, none of the Airbnb guest refund policies would support a refund in bookings at issue in this matter. The guests in this case agreed to the claimant's strict (or super-strict) cancellation policy.



Airbnb's Expected IPO

It is important to understand the context in which Airbnb has made and continues to make decisions, including:

- refund decisions;
- its cavalier attitude toward its obligations under the various terms and policies; and
- its shift toward using its escrow role to benefit itself using host payouts for its own business or converting those payouts into Airbnb revenue.

As the COVID-19 epidemic, soon to be pandemic, started sweeping through China, the Far East, and Europe, Airbnb was on the cusp of a highly publicized Initial Public Offering (IPO). It was expected the public offering would be made in May 2020. Airbnb's primary focus in the winter and early spring of 2020 was on increasing its IPO valuation.

In preparation for its IPO, Airbnb calculated the value of a traveler in comparison to the value of a host, concluding that travelers were far more valuable. Airbnb concluded that hosts would be incentivized to use the platform as long as Airbnb was able to attract an increasing number of travelers and remain the market leader against its hard-charging competition, namely booking.com and VRBO. Upon information and belief, Airbnb decision-making related to cancellations, security deposits, damage to properties caused by travelers, and other customer support issues began to skew heavily toward keeping travelers happy, irrespective of the Terms of Service and host cancellation policies.

Airbnb is divided into divisions, two of which are the traveler and host divisions. The traveler division received financial and other resources, had more power in decision making, and was provided preference over the host division as Airbnb approached its expected IPO. Airbnb, in the shadow of an IPO, seemed increasingly detached from its obligations to hosts or the fact that Airbnb's success was built on the backs of hosts.

The COVID-19 Pandemic

Airbnb was aware of COVID-19 well before most governments, including the United States, as a result of its global presence and specifically via extensive presence and listings in China, including Wuhan, China. Airbnb began making calculated decisions about how COVID-19 would impact its upcoming IPO, how to retain travelers, and how to maximize its value for a delayed IPO if necessary. Airbnb began making calculated decisions to gain for itself a competitive advantage over companies like booking.com and VRBO as a result of COVID-19's negative impact on all travel. Airbnb decided that it would delay its IPO and focus its efforts to ensure that travelers would return to Airbnb after the COVID-19 impact on travel started to soften.

Airbnb decided it would seek to reform the existing rental agreements between hosts and their guests by creating a new policy specific to COVID-19 to justify its decision to provide refunds to travelers and override the strict and super-strict cancellation policies of hosts. Airbnb's public relations team sought to divert over US$1 billion in payouts belonging to hosts for its own public relations benefit and goodwill valuation and to convert over US$500 million of host payouts into revenue for Airbnb through a bogus "travel credit" strategy (see Travel Credit Scam below). Airbnb further decided it would keep all Airbnb fees for cancelled reservations.

Airbnb created a new webpage indicating that the existing Extenuating Circumstances Policy (ECP) did not apply to COVID-19 refund claims, specifically noting "[The extenuating Circumstances Policy] does not address circumstances related to the coronavirus (COVID-19) pandemic." Instead, on or about 1 March 2020, Airbnb created and expressed its intention to apply a newly created COVID-19 policy. The Way Back Machine, an internet archive allowing users to see what websites looked like in the past, shows 110 captures and approximately 50 changes since 14 March 2020, none of which were changed pursuant to 30 days' email notice under Section 3 of the TOS. Airbnb's new COVID-19 ECP was sent to travelers with reservations, explaining that they could obtain a full refund if they cancelled before check-in, minus Airbnb's fees, all without question, vetting, documentation, or support as would have been required under its prior policies. The new COVID-19 ECP was put into effect without the required thirty-day email notice to hosts required to become effective under Airbnb's take it or leave it policies. The new COVID-19 ECP was applied retroactively to existing reservations against the express provisions of the Terms of Service, which provide in Section 3 that no changes can become effective until after the thirty-day email notice is sent to users.

Despite all parties, including and especially Airbnb,

Class Action Against Airbnb, continued

having agreed in the TOS that Airbnb was not involved in any way with listings, including hosting or managing properties, Airbnb sought to insert itself directly into the most important hosting and property management function; namely, customer service, refunds, and cancellations. Hosts almost immediately became irate for a variety of reasons, including:

- Hosts had not been provided any input or notice of Airbnb's unilateral decision to communicate directly with the hosts' guests encouraging and causing full refunds and, ultimately, bogus travel credits (see Travel Credit Scam below).
- Hosts were already working things out with guests, including in some instances offering partial refunds that travelers were not entitled to under the cancellation policy and their own travel credits for future travel.
- Many travelers had previously agreed with hosts to cancel right away so that the listing calendars would open so other travelers could book reservations, some of which were still occurring, including emergency workers, business travel, and local travel. Airbnb's communication to travelers encouraged them to wait until the last minute to cancel, blocking host calendars until just before the booking.
- Many locations had no travel issues or COVID-19 issues during the applicable time periods of the COVID-19 ECP.
- Many guests had already indicated they were cancelling because conferences had been cancelled or for other personal reasons, which could never be a valid reason for a refund under any Airbnb policy.
- Hosts in some cases had agreed to provide refunds to guests if the host was able to rebook. Airbnb interfered with those rental agreement modifications between hosts and guests.

Class Action Against Airbnb, continued

- Airbnb's new policy allowed, and thereby encouraged, travelers to wait before cancelling.
- Airbnb's new policy and its communications with travelers were generally hostile to hosts, undermined the hosts and their customer relationships, and adversely affected the hosts' reputations. Airbnb's customer support personnel pressured hosts to consent to refunds by telling guests things like "most hosts are offering refunds."
  - When in fact many hosts had flexible or moderate cancellation policies that provided for full refunds under their rental contracts, Airbnb forced refunds on hosts with strict cancellation policies, and Airbnb used other deceptive tactics to pressure hosts.
  - Airbnb failed to support (and undermined) hosts who had already told guests that the strict cancellation policy they had agreed to did not

provide a refund or who were already providing options to guests.

- Airbnb told guests they could get a full refund even after guests had agreed to abide by their cancellation policy.

- Airbnb's handling of the matter made it far less likely that travelers would book again with the host in the future.
- Airbnb's decision to interfere with the cancellation policy of hosts, many of whom had multiple properties, created unexpected cash flow issues and resulted in significant loss of revenue. Hosts had relied on their cancellation policies and general 50-50 split of the reservation fee with their guests in order to navigate issues created by COVID-19 and to endure the pandemic.
- Airbnb's unilateral actions made it difficult for hosts to pay the workers supporting their STR operations, including cleaning and maintenance crews, to pay mortgages, and to satisfy other obligations.
- Hosts are not offered any insurance options through the Airbnb platform for unexpected events. Travelers have the option to buy traveler insurance, including all-risk policies that would cover pandemics. Many hosts had fully advised their guests to purchase traveler insurance as part of the booking process.
- While COVID-19 was hard on everyone, there was nothing inherently unfair about splitting the pandemic risk 50-50 in most cases, as previously agreed by hosts and guests under a strict cancellation policy.
- While Airbnb was telling hosts that refunds were justified irrespective of their cancellation policies because no one could have foreseen the COVID-19 pandemic, Airbnb was telling travelers not to expect their more basic traveler insurance to provide coverage since pandemics were expected events.

The Fraudulent Change of the Word *Endemic* to *Epidemic* in the ECP

The ECP is contrary and/or inconsistent with the Guest Refund Policy, which only provides refunds if a host cancels or a house is substantially uninhabitable as compared to the listing details.

Prior to 1 March 2020 or so, Airbnb's ECP purported to allow a refund after review by a specialized team and after ensuring the traveler was "directly affected" in extremely limited circumstances, if the hosts or a guest suffered an *endemic* disease. This EPC provision was extremely limited in that a guest, or the guest's travelling party, could only make a request for refund if the endemic was not associated with an area; meaning the endemic could not be something that an area had experienced previously . . . "for example, malaria in Thailand or dengue fever in Hawaii [would not be an extenuating circumstance]." So, for instance, malaria as a localized disease would only be the subject of a possible refund if it took hold in another unexpected geographic area such as London, and did not become an epidemic or pandemic, but malaria would not be the cause of a possible refund in Thailand.

Neither epidemics nor pandemics were included by Airbnb or its attorneys in drafting the original ECP, which, assuming it is even valid, would have been the version in effect at the time of most of the subject reservations in this case.

An endemic is fundamentally different from an epidemic or a larger epidemic called a pandemic. An epidemic is actively spreading; new cases of the disease substantially exceed what is expected. More broadly, it's used to describe any problem that's out of control, such as "the opioid epidemic." An epidemic is often localized to a region, but the number of those infected in that region is significantly higher than normal. For example, when COVID-19 was limited to Wuhan, China, it was an epidemic. The geographic spread turned it into a pandemic. Endemics, on the other hand, are a constant presence in a specific location. Malaria is endemic to parts of Africa. Ice is endemic to Antarctica.[6] To summarize:

- An epidemic is a disease that affects a large number of people within a community, population, or region.
- A pandemic is an epidemic that's spread over multiple countries or continents.
- An endemic is something that belongs to a particular person or country.

Class Action Against Airbnb, continued

A lawyer drafting the adhesion TOS for Airbnb would never have included the word *endemic* without having decided to intentionally exclude *epidemics* and *pandemics*. Airbnb and its attorney specifically sought and decided to exclude pandemics from the ECP in effect at the time of the subject reservations. On or about 1 March 2020, Airbnb secretly and without the required thirty-day notice under Section 3 of the TOS changed the word *endemic* to *epidemic* in its ECP, and tried to hide that change from the world, including deleting the pre-13 March 2020 version of the ECP from its website, and scrubbing its website of all references to the word *endemic*.

Airbnb then misrepresented that its ECP had always included the word *epidemic* and allowed its lawyers to argue that Airbnb was merely clarifying the ECP policy.

The Travel Credit Scam

Airbnb makes money by charging a service fee—a percentage of the total—to both the people who rent out their space (hosts) and those who stay there (guests). By connecting travelers and hosts through its directory of listings, Airbnb makes billions of dollars per year from hosts offering short-term rentals on its platform.

After Airbnb made its unilateral decision to interfere with host refund policies and to ignore its own contract obligations, the following occurred:

- Airbnb went on a public relations tour taking credit for refunding guests, creating the impression that Airbnb had refunded travelers, when, in fact, the refunds were provided exclusively by host payouts converted by Airbnb;
- Airbnb essentially used over US$1 billion in host payouts to purchase US$1 billion dollars' worth of goodwill from travelers;
- In fact, Airbnb did not refund travelers but aggressively pushed "Airbnb travel credits" on travelers.[7] Airbnb used a variety of techniques to avoid refunds to travelers, including user messaging and flow that made it easy for guests to claim travel credits and difficult for guests to obtain refunds. Upon information and belief, many guests did not know they could obtain a refund, and believed their only option was an Airbnb travel credit good only for one year.
- According to Airbnb, over US$500,000 worth of travel credits were issued to travelers, many of whom never realized they could obtain a refund. Who would take a travel credit over a full refund?
- Airbnb knows that people receiving travel credits often don't use them, forfeiting the money. Upon information and belief, Airbnb used the travel credit scam for the specific purpose of converting host payouts—to which Airbnb could never have any claim—into Airbnb revenue.
- It is unclear whether the host payouts, now represented as Airbnb travel credits, have already been moved into Airbnb's general accounts in order to relieve its cash flow problems and to improve its IPO balance sheet.

Other Examples of ECP Abuse by Airbnb

Airbnb disregarded its own initial ECP, and its revised ECP, in refunding guests who were cancelling for reasons having nothing to do with personal health issues. For instance, Airbnb provided full refunds to travelers who cancelled before the new COVID ECP, whose travel dates were outside the dates set forth in the COVID ECP, and who admitted they were cancelling for reasons not covered by any version of the ECP. Even if the word pandemic had been included in the applicable ECP, Airbnb would not have been entitled to avoid its own contractual obligations and review process. Airbnb would not have been entitled to incite guests and encourage cancellations. Airbnb would not have been entitled to interfere with the efforts of hosts to manage their customer relationships. Under Airbnb's interpretation of the ECP, it does not have to provide any justification for ECP refunds, is not accountable to hosts to show it went through the required process, and does not need to show its own communications with the hosts' guests requesting a full refund.

As an escrow for host payouts, Airbnb has no right to unilaterally, in its sole discretion, for any reason, and without justification, interfere with a cancellation policy agreed to between hosts and their guests. The ECP is

a fraudulent scheme by which Airbnb and its escrow service take full control of payouts belonging to hosts and use host payouts for Airbnb's own purposes.

Airbnb's CEO Brian Chesky on or about 30 March 2020 in a YouTube video message to hosts told them that the "[ECP] cancellation update" and decision to refund travelers was "not a business decision." Discovery will reveal that the decision to refund travelers was, in fact, a business decision by Airbnb. Further, Airbnb's CEO Brian Chesky on or about 30 March 2020 in a YouTube video message to hosts told them that Airbnb had made mistakes and that the host's cancellation policies would be honored moving forward. This proved to be untrue. Airbnb continues, among other things, to offer refunds in violation of the cancellation policies of hosts, to change its policies without the required thirty-day email notice under Section 3, to force hosts to offer refunds, to provide misinformation to guests, to reform rental agreements, to convert host payouts into Airbnb travel credits, and to interfere with the relationship between hosts and guests.

By way of example only, Airbnb's new COVID-19 ECP version purports to require guests to attest—defined as sworn under oath—that they or someone in their party has COVID-19 before allowing a refund. Upon information and belief, Airbnb is not requiring sworn proof, or any substantial proof, of a COVID-19 diagnosis. In fact, guests in some instances needed only to click a link to receive an Airbnb travel credit or full refund without any review. Airbnb had obligations to review all refund requests under the TOS, and all versions of the ECP, but admits it did not do so, instead laying off hundreds or thousands of customer personnel and summarily allowing refunds to reduce its own overhead and expenses.

The COVID ECP has been modified numerous times since March 2020, with no contractually required thirty-day notice by email to hosts and ignoring the ECP that would have been in effect at the time the rental contract was entered into between the host and the guest. Even modified ECPs were not implemented as drafted by Airbnb. Airbnb's refusal to implement the rental agreement entered into at the time of the reservation is also demonstrated by its refusal to apply the cancellation policy in effect at the time the rental contract was entered into between the host and the guest. For instance, the strict cancellation policy was changed in or about December 2019 from fourteen days to seven days from check-in date. Even for cancellations having nothing to do with COVID, Airbnb provided a full refund to travelers cancelling between seven and fourteen days before check-in, when they should have received no refund at all.

Here Is What Airbnb Did Wrong

Airbnb violated its terms of services and policies when it unilaterally, without notice and without consent, incited and offered refunds to travelers in direct violation of the cancellation policy agreed to and contracted between host and traveler. Airbnb secretly changed its refund and cancellation policies and then wrongfully applied those policies retroactively to existing reservations and hosting contracts. Airbnb failed to provide notice of TOS changes as required under Section 3 and violated the TOS by then applying modified terms to existing reservations and guest/host rental agreements. Airbnb further sought to defraud hosts and travelers with a newly implemented exceptional circumstances policy and its applicability to COVID-19 cancellations in violation of host cancellation policies. Airbnb failed, under the TOS, to perform the required process for submitting and reviewing exceptional circumstances claims in order to protect its own interest, and against the interest of hosts. A key part of Airbnb's business model is to hide much of the information hosts would need to know if Airbnb breached its TOS, the extent of damages, and the rationale and support provided by guests for cancellations. By way of example only, Airbnb initially deleted reservation and payout information from host accounts, which would allow a host to view the payouts and other losses incurred.

Airbnb tortiously interfered with the relationships and existing rental agreements between hosts and travelers to which Airbnb is expressly not a party, as set forth in Section 1.2 of its TOS, causing damages to hosts and

benefitting Airbnb. Airbnb customer service personnel are providing guests misinformation about host cancellation policies, travelers' rights under long-standing reservation agreements, Airbnb's own application of policies, and other matters, causing confusion and interfering with host-guest relationships.

Airbnb acts as fiduciaries, trustees, and/or collection agents holding guest rental payments to ensure the host listing is as represented and available on the day and time indicated in the reservation. Airbnb affirmatively requires both the traveler and the host to agree that Airbnb is NOT a party to the rental agreement between the traveler and the host. Despite acting merely as trustee of rental payouts to hosts, Airbnb's attorneys and customer support, through the Extenuating Circumstances Policy (ECP) and Terms, nevertheless take the position that it can unilaterally decide whether to (a) pay hosts, (b) convert the host payout into Airbnb travel credits/revenue, or (c) fully refund guests despite the rental agreement, which indicated that guests would receive, for example with a strict cancellation policy, a 100% refund within forty-eight hours of making the reservation, forfeit 50% of their rental fee if cancelled seven days or earlier before their check-in date, or forfeit 100% of their rental payment if cancelled within seven days of the check-in date.

Airbnb misappropriated/converted reservation payouts belonging to hosts, and for which Airbnb was a trustee. By converting payouts into travel credits that might never be redeemed, Airbnb took control of payout funds belonging to hosts, which could never belong to Airbnb, but for Airbnb's benefit. Airbnb used host payouts to mitigate its own losses as a result of COVID-19, to attract additional investment, and to position itself for its IPO. Airbnb sought to retroactively make hosts the "insurer" of the pandemic in order to protect travel insurance companies, credit card companies, itself, and other third parties with whom Airbnb has its own relationships beneficial to Airbnb.

To summarize, Airbnb customer service personnel are providing guests misinformation about host cancellation policies, travelers' rights under long-standing reservation agreements, its own application of policies, and other matters. Airbnb is representing to travelers that their travel insurance may not apply to COVID-19 cancellations because the "COVID-19 pandemic is an 'expected event,'" yet is telling hosts that full refunds are appropriate despite the terms of service because COVID-19 was an unexpected event. Airbnb's website and marketing process, emails, and webpages are often inconsistent with Airbnb's TOS. This includes Airbnb's representations to hosts when they register to use the site that they control their cancellation policy and thus cash flow and risk, but then Airbnb purports in its adhesion browser wrap agreement to reserve the right to override the cancellation policy in its sole discretion for any reason.

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Endnotes

1 https://www.airbnb.com

2 https://www.airbnb.com/help/article/2909/payments-terms-of-service

3 https://www.traverselegal.com/class-action-airbnb/

4 https://shorttermrentalz.com/news/airbnb-class-lawsuit-michigan/

5 https://skift.com/2020/11/05/airbnb-accused-in-lawsuit-of-ripping-off-hosts-and-guests-with-covid-refund-policy/

6 https://intermountainhealthcare.org/blogs/topics/live-well/2020/04/whats-the-difference-between-a-pandemic-an-epidemic-endemic-and-an-outbreak/#:~:text=AN%20EPIDEMIC%20is%20a%20disease,a%20particular%20people%20or%20country.

7 https://www.traverselegal.com/airbnb-covid-travel-credit-process/

Computers as the Canvas, from page 17

the digital-art world is one where "artists challenge and resist [copyright] law's default positions and policy's dominant presumptions, artists are informed and influenced by multiple elements and contextual factors in their process of meaning-making and decision making about copyright, and, artists face moral dilemmas and are pulled in different directions with respect to their perspectives and decisions regarding copyright."[7]

So, how do creative practitioners involved in digital art generation relate to copyright law? And how can digital content creators support themselves if their art is endlessly copyable? It seems that digital content creators have found ways to monetize their work wherever it resides, without any need for copyright protection. Indeed, "sharing" is often part of the ethos of such artists, many of whom see free and widespread distribution of their work as raising their public profile and, accordingly, their value. Many digital artists support themselves through a "portfolio" sustenance model.[8] For example, many view their artistic and intellectual assets to be not merely the economic rights provided by copyright but also "other intangibles like their brand value and reputation as artists, the idea of the work itself, the audience's familiarity with the work and their authorship of the work, and other skills like teaching, speaking and performance."[9] For these reasons, while prevention of copying is less important in the digital realm, attribution (and the danger posed by *false* attribution) is more important.

The Visual Artists Rights Act of 1990 (VARA)[10] was the first federal copyright law to grant protection to the "moral" rights of artists, such as to insist upon proper attribution of the artwork. The concept of an artist's moral rights in his or her artwork comes from the European concept of "droit moral," which is the artist's right to create a work, display it however the artist chooses, and demand attribution. Such moral rights are different from the rights provided by copyright law, which creates a transferable economic interest in original works that may exist beyond the life of the creator.

Moral rights, however, are nontransferable and personal only to the creator of a work.[11]

The United States enacted VARA, which became effective in 1991, to protect some moral rights in visual art following the United States' acceptance of the Berne Convention for the Protection of Literary and Artistic Works. In the 1998 *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.* case, the Supreme Court stated that VARA was intended to protect the moral rights of artists and that VARA "is analogous to Article 6(b) of the Berne Convention for the Protection of Literary and Artistic Words, but its coverage is more limited."[12]

Unfortunately, however, VARA appears to exclude many digital works from the definition of *visual art*, excluding these works from rights of attribution and integrity. Under VARA, "[a] work of visual art does not include . . . any poster, map, globe, chart, technical drawing, diagram, model, applied art, *motion picture or other audiovisual work*, book, magazine, newspaper, periodical, *data base, electronic information service, electronic publication, or similar publication*" (emphasis added).[13] Accordingly, VARA "has been critiqued as providing too little protection to too few artists. In sum, VARA does too little, does it poorly, and does it for too few."[14] Expanding VARA—or moving beyond it to create a new statutory scheme—to cover electronic and digital works would provide digital artists with the rights of attribution they desire but lack. One suggestion would be to expand VARA's protection to all copyrighted works rather than just a subset of delineated works of visual art. Another option would be to expand the protections of the Copyright Act or the Lanham Act to give digital artists (along with others) a cause of action for plagiarism. As it currently stands, however, existing laws provide only minimal protection for digital artists seeking to insist upon their artistic moral rights, such as proper attribution of their work.

Considerations for Protecting Traditional Art Reproduced Digitally

Imagine you are attending the unveiling of a piece of public art in a neighborhood park in your hometown. Professional and amateur photographers swarm the event, taking pictures of the new art installation from every conceivable angle. Those photographs will later appear in print and on the Internet. They may even be turned into commercial products like images on T-shirts, calendars, and postcards. Digital artists may take photographs and later manipulate them in a computer to create something new. Are these photographs, their derivative uses, and any digital art later created from them entitled to protection? The answer varies based on the laws of the jurisdiction.[15]

In the United States, the public's right to capture, transmit, and manipulate images of public art is not always certain. While most of the European Union and, indeed, the United States recognize a right to "freedom of panorama"—including the right to take pictures of public art—the United States takes a narrow view of this right. This can pose a particular problem for digital artists when the Internet is used to transmit original or manipulated images, whether for commercial or noncommercial use. Indeed, what is legal and considered "fair use" in one jurisdiction may not be in another jurisdiction. Greater clarity would benefit artists and digital artists alike.

When the art is not "public," however, the rules are different. For example, what protections are available when a museum takes photos of its physical visual art and puts those images on the Internet, in effect creating digital art? Since COVID-19 shut the doors of museums and galleries around the world and cancelled most art fairs and other festivals where art is commonly sold, art has been increasingly displayed online.[16] Some galleries, art brokers, auction houses, and others wishing to sell art have dealt with copyright and other issues arising from displaying art online by creating digital "viewing rooms," which require the user to agree to certain terms and conditions before being allowed to view the art for sale. Others, perhaps due to cost or lack of technical savvy, merely post terms and conditions for viewing a public webpage somewhere on the host's website itself. In this way, they hope to turn misuse of the artwork into more

than just a copyright violation, but also into a breach of contract.

Online museums are getting even more creative, offering virtual reality, interactive exhibits, and audiovisual presentations and lectures about their art. Some have even created immersive online museums where visitors walk digital avatars through virtual museums. These virtual museums can even be rented out in the evenings for digital fundraisers, just like the physical museum spaces! But these museums must be aware of the possible intellectual property concerns in these activities. Initially, museums must make sure they have the clear right—from the artist or otherwise—to display the artwork electronically. Although the copyright principle of "fair use" may protect the museum's use of the artwork they physically display, ideally the museum should also have the contractual right to display the work online. Additionally, museums should have a clear employment or work-for-hire relationship with the photographer and the graphic designer who takes the high-resolution images of the physical art and who designs the virtual space in which the virtual art will be displayed. While large institutions may already be familiar with these and other copyright and intellectual property concerns about displaying their art online, smaller institutions will undoubtedly need guidance, and mistakes will be made along the way.[17] Museums should inform virtual visitors that the artwork displayed by the museum online is protected by copyright and potentially subject to other rights held by the artists—such as rights of attribution. Artists should also monitor any artwork displayed virtually to guard against improper "downstream" use of the images.

Conclusion

It is an exciting time for digital and computer-generated art. As this art achieves greater recognition and respect in the wider art world, the same problems that have plagued physical art will affect digital art. Accordingly, new and existing laws will need to be crafted and expanded to provide protections for digital art to accommodate its place in the ever-changing landscape of art.

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Endnotes

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