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everal years ago, Gary Raskin, as chair of the Los Angeles Lawyer Editorial Board, used this column to express his views on the ways in which many lawyers go astray with the written word. It is indeed ironic that lawyers, who are trained to use language to communicate precisely and effectively, so often run afoul of the basics of English grammar. So, with a hat tip to Gary, your current chair will now jump into the fray with an airing of a select few of his own linguistic pet peeves.

**Verbal contracts.** The word “verbal” derives from the Latin for “word.” “Verbal” is an adjective that means “of or having to do with words.” It does not mean “oral,” except to the extent an oral utterance contains words. A “verbal contract” can therefore describe either a written contract or an oral contract, as long as words (Latin, *verba*) were used. I once defended a client at deposition who knew the meaning. He was asked, “Was it a written contract or a verbal contract?” He responded by saying “a written contract is a verbal contract.” Fortunately for my client relationship, I knew the meaning of “verbal” as well—unlike opposing counsel.

Everyone must do their part to protect the environment. Throughout my career I have been astonished at the number of legal documents that cross my desk containing pronouns that do not agree with their antecedents. If you would not say, “Everyone are happy today,” then you should know not to say, “Everyone is happy to see their team win.” Yet the problem is common, even among those with professional speechwriters and editors. One president’s state of the union address contained this sentence: “If anyone tells you that America’s best days are behind her, then they’re looking the wrong way.” Many writers will say that the grammatically correct result is either awkward (i.e., using “he or she” or “his or her”) or sexist (i.e., using just “he” or “his”), and I don’t disagree. The best solution is to write one’s way around the problem instead of butchering the language—for example, by replacing “anyone” with “people” in the state of the union excerpt.

**“Its,” “it’s,” and (heaven forfend) “it’s.”** The rule that governs proper use of the three letters “i,” “t,” and “s,” when they are combined to create a word or a contraction, is exceedingly simple. Here it is: If you want to say “it is” or “it has,” then write “it’s.” For all other uses, write “its.” For legal writing, the rule can be made even easier: always write “its” (without the apostrophe), since the contraction “it’s” will usually be considered too colloquial.

**Lie, lay.** This is a hard one for many people. They will often say or write “he was laying down for a nap,” using the transitive verb “lay” in place of the correct, intransitive verb “lie.” The verb “lay,” being transitive, must have an object; for example, the row of bricks in “lay a row of bricks” or the foundation in “lay a foundation before moving to introduce the evidence.” “Lie,” being intransitive, stands alone and does not take an object. A complicating factor is that the past tense of the irregular verb “lie” just happens to be “lay.” Thus, while there is a temptation to decree that one should never say “lay down” when speaking of someone reclining, it remains correct to say, “She lay down for a nap yesterday.”

Why should lawyers be concerned about grammar? One reason is that the decision makers in a lawyer’s professional life—including judges and clients—may not put up with substandard usage of English by counsel. With that, I hope you enjoy this issue of the (grammatically impeccable) Los Angeles Lawyer magazine.

Paul S. Marks is the chair of the Editorial Board of Los Angeles Lawyer magazine and a partner with Neufeld Marks, a boutique law firm located in Little Tokyo. He serves as a commissioner on the California Commission on Access to Justice.
Protecting a Client’s Government Benefits after a Settlement

AN AWARD OR SETTLEMENT can adversely affect eligibility of disabled and low-income clients for needs-based government assistance programs, many of which consider a person’s financial need when determining eligibility. Programs such as Supplemental Security Income, for example, have income and asset limits. For other benefits—such as Medicaid (known as Medi-Cal in California) and In-Home Support Services—a person’s income will affect eligibility, but whether assets will be considered depends on the specific program. The Affordable Care Act expanded Medi-Cal to include many who were previously excluded and ended the asset test for others. However, certain Medi-Cal programs, such as the Aged and Disabled Program, continue to have asset limits. For many individuals and families, these programs provide valuable support and should be considered when structuring an award or settlement.

To advise a client, it is necessary to understand the difference between income and assets. In general, money is considered income in the month that it is received. At the beginning of the next month, any money left over is considered an asset. Not every program has an asset limit, so a lump sum payment may only cause a brief disruption in an individual’s participation in a needs-based program rather than terminating it indefinitely.

Once it is clear how the monetary award will affect a client’s eligibility for government programs, there are several possible ways to manage these awards. For small awards or settlements, the simplest option may be a spend-down. Clients may simply spend down their resources to below the limit of the affected program. Clients who opt to spend down the money must use it for goods and services or to repay debts. Giving money away for less than fair market value may result in a penalty that could cause the client to become ineligible for benefits. There are some transfers that do not trigger the penalty, such as the transfer of certain assets to a disabled child. The client should keep receipts to prove that the transfers were valid.

In many cases, however, the award or settlement may be so significant that a spend-down is impractical or imprudent. In these instances, a special needs trust—also known as a supplemental trust—can be created. The Omnibus Budget Reconciliation Act of 19931 authorizes these trusts to hold assets belonging to the recipient of needs-based government benefits. The assets and income of a special needs trust are not counted toward the resource and income limit for the purpose of determining eligibility. A wide variety of disbursements from the special needs trust can be made for the benefit of the beneficiary for medical and other purposes, although monies should never be given directly to the beneficiary, and the beneficiary cannot serve as the trustee of his or her own special needs trust.

If the recipient of the settlement or award is concerned about preserving her or his benefits, a first-party special needs trust is available. These trusts are funded with assets belonging to the settlor. The trust is funded with assets belonging to the settlor, not the beneficiary. The settlor cannot be the disabled beneficiary. Third-party special needs trusts are established by a third party—usually a parent or grandparent—for a disabled beneficiary. The trust is funded with assets belonging to the parent or grandparent, and then the beneficiary’s assets are added to it.

POOLED SPECIAL NEEDS TRUSTS

Pooled special needs trusts are established and managed by a nonprofit association. The funds of all beneficiaries are pooled together to provide better returns and discounts. No court action is required; a competent beneficiary can execute a joinder to join the existing pooled special needs trust. The beneficiary receives statements for his or her individual account within the pooled special needs trust.

Practitioners should also be aware of the other type of special needs trusts known as third-party special needs trusts. These are created by a third party—usually a parent or grandparent—for a disabled beneficiary. The trust is funded with assets belonging to the settlor, not the beneficiary. The settlor cannot be the disabled beneficiary. Third-party special needs trusts do not require court supervision and do not require that the state’s Medicaid agency be repaid for its expenditures at the time of the beneficiary’s death or termination of the trust.

Understanding how an award or settlement may affect a client’s needs-based government assistance can help attorneys to better advise their clients about managing these resources.

The assets and income of a special needs trust are not counted toward the resource and income limit.

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1 42 U.S.C. §1396p(d).
2 Prob. Code §§2320 et seq.
3 Prob. Code §§1060 et seq., 2620 et seq.
Civil Penalties for Misclassification of Independent Contractors

SINCE 2013, CALIFORNIA LABOR CODE Section 226.8 has exposed employers to stiff penalties for willfully misclassifying employees as independent contractors. While misclassification is likely to receive heightened IRS scrutiny, the enhanced penalties in civil actions may also attract the interest of lawyers who bring representative actions. Accordingly, companies that have independent contractors should carefully assess whether to reclassify independent contractors as employees.

The California Supreme Court long ago adopted a multifactor test for determining whether an individual served as an independent contractor or employee.1 The court has discussed the tests contained in the Restatement Second of Agency and the Fair Labor Standards Act, and the court has indicated that the factors include: 1) the alleged employee's opportunity for profit or loss depending on his managerial skills, 2) the alleged employee's investment in equipment or materials required for his or her tasks, or his or her employment of helpers, 3) whether the service rendered requires special skill, 4) the degree of permanence of the working relationship, 5) whether the service rendered is an integral part of the alleged employer's business, and 6) the extent to which the employer has the right to control the manner and means of the result desired.2

California law presumes that someone providing services to a business acts as an employee of that business.3 But many companies incorrectly believe that by having an individual sign an independent contractor agreement they can avoid employee status. The label of an agreement, however, does not determine independent contractor or employment status.4 Instead, the degree of control the company exercises over the work details is the critical factor in deciding employee versus independent contractor status.5

Recognizing a pervasive problem of businesses’ intentionally misclassifying employees as independent contractors to the workers’ financial detriment, the legislature enacted Section 226.8. For employers who engage in a pattern or practice of misclassifying employees as independent contractors, the civil penalty ranges from not less than $10,000 to not more than $25,000 for each violation, in addition to any other penalties or fines permitted by law. Because the Labor Code provision does not expressly provide for a private right of action, a prospective plaintiff must exhaust administrative remedies by filing a certified letter with the Labor and Workforce Development Agency under the Private Attorney General Act (PAGA).6 As the statute contemplates penalties for a pattern or practice of violations, the misclassification of employees as independent contractors may well give rise to representative actions under PAGA, which in large companies may involve dozens if not hundreds of people. Companies now face not only thousands of dollars in penalties for multiple misclassifications but also reasonable attorneys’ fees incurred by plaintiff’s counsel under PAGA.

Whether a particular person is determined to be an employee or independent contractor is a fact-intensive inquiry. However, the court of appeal recently confirmed in Bain v. Tax Reducers, Inc., that a true independent contractor needs to set his or her own schedule and act with considerable independence.7 In that case, the plaintiff, an accountant, had no clients of his own with the company in which he worked. The plaintiff’s duties included preparing tax returns, bookkeeping services for clients, computer tax returns, and filing. He filled out time sheets but never invoiced the defendant company. The court applied the presumption of employment and found it important that the company: 1) controlled the individual’s schedule by requiring him to attend staff meetings, 2) required the individual to record his hours on the same time sheets as other employees, 3) required the individual to perform the same administrative duties as other employees, 4) decided which projects the individual worked on and which hours he worked, and 5) had his work audited by its night auditor before it went out.8 Accordingly, the court of appeal affirmed the superior court’s determination that Bain was an employee, not an independent contractor.

The court of appeal also provided some guidelines as practical tips for companies to follow. In deciding employment status, the court of appeal noted that the company provided supplies and equipment. The court of appeal also observed that Bain did not have any outside clients for whom he performed services, and he provided all his services to the company. In addition, Bain did not market or advertise his services, never used his own employees or subcontractors, and had no other business. Further, the company reimbursed him for his expenses and never required him to invoice the company for his services.9

This all goes to show that “the label placed by the parties on the relationship is not dispositive and subterfuge will not be countenanced.”10 Nor does the issuing of a 1099 and not withholding taxes matter. As the court of appeal held, “such conduct is a consequence of their agreement to treat Bain as an independent contractor. 

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tor and not the means of proving independent contractor status.11

This is not to say that an independent contractor relationship cannot exist under the proper circumstances. A prior court of appeal case, Mission Insurance Company v. Workers' Compensation Appeals Board, found that an individual who contracted with a security alarm firm's Orange County accounts was an independent contractor rather than an employee and annulled a writ petition with a contrary finding of the Workers' Compensation Appeals Board.12 There, the subcontract between the principal and the individual's business entity provided that the entity was an independent contractor, had the sole right to hire and fire its employees and directed and supervised those employees.13 The individual's tax returns stated he was self-employed, did not work specific hours, and he used his own vehicle and paid his own expenses. On the other hand, he attended lectures and classes at the company and wore a company shirt with a company insignia.14

The individual's eligibility for worker's compensation benefits turned on whether he was an employee or an independent contractor. The court held: “We believe that in reality only one reasonable inference can be drawn from the evidence in the case at bench, and that therefore [the individual] was an independent contractor at the time he was injured as a matter of law.”15 The court went on to hold:

Board's enumeration of these facts in connection with its conclusion that Morse [the company] had the right to exercise control suggests that the Board may have had a mistaken concept of the type of control that has significance in a situation such as this. It concluded that Morse had the power to affect the applicant's conduct. Of course it did. But the fact that Morse prescribed standards of performance and that the applicant on occasion attended classes concerning proper methods of installation and service was not evidence that Morse controlled the matter in which the desired result was to be achieved.16

In rejecting the contention that the written agreement was “a subterfuge by Morse to avoid the employer/employee relationship,” the court enumerated several factors, including the establishment of work quality standards that “constitutes evidence that the applicant was an independent contractor.”17 The court added that the agreement “expressly stating that the relationship created is that of independent contractor should not be lightly disregarded when both parties have performed under the contract…”18

Another court of appeal decision, Millsap v. Federal Express Corporation, concluded that an individual who delivered packages for a company acted as an independent contractor as a matter of law.19 There, during one such delivery, the individual struck an automobile. The court ruled, as a matter of law, that the company was not liable for negligence because at the time of the accident the individual was acting as an independent contractor. According to the court of appeal, the company lacked sufficient control to convert the relationship into that of an employer and employee: “Even one who is interested primarily in the result to be accomplished by certain work is ordinarily allowed to retain some interest in the manner in which the work is done.”20 The court observed that the individual understood he was an independent contractor. He used his own car, purchased his own gas, made repairs, and had his own liability insurance. He received no standard employee benefits, with no taxes withheld from his paycheck. That he was provided with instructions and manuals made no substantive difference to the court.21

Even so, given California's statutory presumption of employment, companies must not make the decision to characterize an individual as an independent contractor lightly. While having a written independent contractor agreement is a start, many other factors must be considered to increase the likelihood a person is deemed an independent contractor. For example, the company should not pay an individual personally. Instead, the company should insist on paying a corporation properly formed and registered with the California secretary of state. Forming such a business costs very little and the potential independent contractor can do it online in a matter of minutes. Such a structure militates against the argument that the individual truly acts as an employee and not an independent contractor.

In addition, the payment structure should not look like a biweekly or monthly salary provided to an employee. For example, many purported independent contractor arrangements provide for payments to the decimal point on a monthly basis, which plainly smacks of employment status. Therefore, arrangements such as payment of $8,333.33 on a monthly basis, which amounts to $100,000 per year, should not occur. This type of arrangement looks like an employee's salary, not compensation for an independent contractor's task-based services. Rather, the payment structure should contemplate specific projects, and compensation ideally should vary between the projects performed.

Another important aspect of a true independent contractor relationship involves the independent contractor agreement. It should expressly provide that the individual can set up his or her own schedule and provide services for other businesses. In this regard, many purported independent contractor agreements state the company requires the individual to devote at least 40 hours a week and full-time service to the operation of its business. This runs completely contrary to independent contractor status and instead looks and smells like employment status. The true independent contractor must have the discretion to set his or her own schedule so long as the project gets completed.

Surely, under the most recent decision of the California court of appeal, it becomes even harder for a company to justify classifying an employee as an independent contractor. This, coupled with Labor Code Section 226.8, requires companies to make tough decisions. Many companies that have long characterized individuals as independent contractors now have to determine if changing their status from independent contractor to employee will make the company liable. In other words, companies now wonder whether it may be best to maintain the status quo and hope that no one finds out, instead of changing independent contractors to employees with the prospect of scrutiny showing misclassification.

This raises the same question as when lawyers look beyond the wording of written job descriptions and examine the actual daily job duties of employees to find that many employees characterized as exempt should instead enjoy nonexempt status with the benefit of receiving overtime wages. With the advent of Labor Code Section 226.8, and recent trends in the law, companies should cut their losses and reclassify most purported independent contractors as employees. This recharacterization will certainly avoid penalties for willful misclassification of employees as independent contractors. In addition, doing so will cure any violations otherwise actionable under PAGA. This can prevent plaintiff's lawyers from bringing a civil suit for penalties and recovering attorney's fees.

Employees, by contrast, should seize on the new Labor Code provision. To begin, any plaintiff lawyer who has a potential client characterized as an independent contractor should probe whether factors mitigating toward employment exists. If indicia of employment exist, counsel should investigate whether other similar individuals may also fit the criteria for a representative action. Certainly, not all potential clients wish to become involved in a representative action, as it may lengthen the process and reduce their ultimate personal settlement. On the other hand, bringing such a representative action creates significant leverage against (and a potential nightmare for) a business trying to defend its characterization of individuals as independent contractors.

Until there is reported case law concerning Section 226.8, it is difficult to assess how courts will treat representative actions under
PAGA for willful misclassifications of employees as independent contractors. However, given the developing case law and the statute itself, such lawsuits appear lucrative for employees and plaintiff’s lawyers. The statute in Labor Code Section 226.8(i)(4) simply defines “willful” as “avoiding employee status by voluntarily and knowingly misclassifying that individual as an independent contractor.” This does not seem a difficult standard to prove for an individual misclassified as an independent contractor.

For that reason, companies should develop a checklist of necessary features of the actual relationship before categorizing an individual as an independent contractor. This checklist should include, at the bare minimum, the following:

- The individual should have his or her own business registered with the secretary of state.
- The company should pay the independent contractor’s business, not the individual directly.
- The company should set up payment schedules per project, not by a fixed sum per month, as the latter arrangement looks like an employee’s salary.
- The company must allow the independent contractor to set his or her own schedule, so long as the individual completes the required project in a timely fashion.
- The independent contractor should not receive any type of benefits employees receive, including health benefits, paid vacation, paid sick leave and overtime—many purported independent contractor agreements actually include such benefits.
- The independent contractor should pay through the corporation for materials and supplies.
- The independent contractor’s business should carry liability insurance and pay for it.
- The company and the independent contractor should have to give notice before terminating the independent contractor relationship.22

Putting these items in a well-drafted independent contractor agreement will provide significant protection to companies wishing to utilize the services of independent contractors. Additionally, companies must ensure that the features set forth in the independent contractor agreement actually occur, as the label of the agreement has no bearing on independent contractor versus employment status.

The enactment of Labor Code Section 226.8 provides a wake-up call for companies using people designated as independent contractors. While California law has long existed on the subject, the new penalties and exposure to representative actions under PAGA have plainly raised the stakes. Although companies can never be assured of avoiding lawsuits, counsel will have to more carefully consider whether the checklist described above has been implemented.

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2 Borello, 48 Cal. 3d at 355.
4 Borello, 48 Cal. 3d at 358.
5 Id. at 350.
6 LAB. CODE §§2698 et seq.
8 Id. at 139.
9 Id.
10 Borello, 48 Cal. 3d at 349.
11 Bain, 219 Cal. App. 4th at 140.
13 Id. at 214-15.
14 Id. at 216-17.
15 Id. at 219.
16 Id. at 221 (emphasis in original).
17 Id. at 223-24.
18 Id. at 226.
20 Id. at 432.
21 Id.
22 Tieberg v. Unemployment Ins. Appeals Bd., 2 Cal. 3d 943, 949 (1970) (“Strong evidence in support of an employment relationship is the right to discharge at will, without cause.”).
practice tips

The Special Notice Provisions Applicable to Probate Proceedings

PROBATE CODE SECTION 1001 states that the rules that govern civil actions apply to probate proceedings, except to the extent that the probate code provides applicable rules. Practitioners should be aware that this is a big exception. Numerous statutes cover probate procedure in general, and other rules are specifically tailored to decedent’s estates, trust proceedings, conservatorships, and guardianships.1

The administration of a decedent’s estate begins with the filing of a petition for either appointment of a personal representative or the probate of a decedent’s will, or both,2 with the petitioner required to publish and serve notice of the hearing.3 Publication must begin at least 15 days prior to the hearing, with a minimum of three publications and at least five days separating the first publication from the last (not counting the publication dates).4

Service of the notice of hearing must be made at least 15 days before the hearing on each heir of the decedent “known to or reasonably ascertainable by the petitioner,”5 and every devisee, executor, and alternate executor named in any will being offered for probate.6 It is the prerogative of every devisee, executor, and alternate executor to withdraw as attorney of record for a personal representative,26 and the personal representative shall give notice to the known or reasonably ascertainable creditors of the decedent.7

It is critical that notice of administration of a decedent’s estate be provided to known creditors and to specified public entities.8 Additional notice is to be given to the recognized diplomatic or consular officer of the appropriate foreign country of any citizen of a foreign country who dies intestate or with a will that does not name an executor, or if it appears that property will pass to a citizen of a foreign country.9

It is critical that notice of administration of a decedent’s estate be provided to known creditors and to specified public entities.10 Typically, notice is given after letters are issued,11 which starts the clock on the four-month creditor’s claim period.12 It is not enough to just publish the required notice of the hearing on the petition for probate;13 rather, the personal representative shall give notice to the known or reasonably ascertainable creditors of the decedent.14 A creditor is known if the personal representative is aware that the creditor has demanded payment from the decedent or the estate.15 For many years, only notice to known creditors was required; however, the U.S. Supreme Court has now decided that the due process clause of the Fourteenth Amendment requires notice to reasonably ascertainable creditors.16

As for public entities,17 three agencies have specific notice requirements. The Department of Health Care Services must be served notice if the personal representative knows or has reason to believe that the decedent received MediCal benefits or was the surviving spouse of a person who received MediCal.18 Also, if the personal representative or estate attorney knows or has reason to believe that an heir is “confined in a prison….or…any county or city jail, road camp, industrial farm, or other local correctional facility,” the California Victim Compensation and Government Claims Board must be notified.19

Finally, notice must be provided to the Franchise Tax Board.20 Once a probate is underway, more specifically, “[a]t any time after the issuance of letters,” any interested person21 may file a request for special notice.22 The person requesting notice may request notice of any or all of the following matters: petitions, inventories and appraisals, objections to appraisals, accounts, and status reports.23

After a request for special notice has been made, the person filing the petition is required to give written notice of the filing, together with a copy of the petition and the time and place set for the hearing, by mail to the person named in the request.24 Regarding inventories or other papers that do not require a hearing, notice of the filing and a copy of the paper filed must be served within 15 days of the filing.25

Sureties who post bond for a personal representative have their own special notice provision. A person who files any of the following types of petitions must serve the surety with a notice of hearing: 1) a petition to surcharge, 2) an objection to an account, 3) a petition to suspend or remove a personal representative, and 4) a motion to withdraw as attorney of record for a personal representative.26

Generally, notices of petitions filed subsequent to the petition for probate must be mailed at least 15 days in advance of the hearing to the personal representative, to all persons who requested special notice, and to others as specified by statute,27 with a number of other code sections specifying additional persons to receive such subsequent notices. For example, when the personal representative petitions the court to settle an account, notice must be mailed at least 15 days prior to the hearing to anyone requesting special notice, to each known heir and devisee whose interest in the estate would be affected by the account, to the attorney general if any portion of the estate is to escheat to the state and its interest would be affected by the account, and if the estate is insolvent, to each creditor who has filed a claim that is allowed or approved but is unpaid in whole or in part.28

Dealing with property of a decedent’s estate is another fertile ground for required notices. Real property may be sold only after publication of notice of the sale has been completed,29 although publication can be dispensed with if the property’s value does not exceed...
notice. And notice to the attorney general is court in its discretion determined is entitled to executor, and any other person whom the notice, be given. If a person otherwise entitled to notice, including a longer period of notification, it may require that further or additional notice giving notice are inadequate in a particular situation, it may require that further or additional notice, including a longer period of notice, be given.35 If a person otherwise entitled to notice cannot be located after a diligent search, the court may prescribe the manner of giving notice to that person or may dispense with notice to that person.36

A personal representative who is granted powers under the Independent Administration of Estates Act may proceed to sell property by giving a notice of proposed action to each person requiring notice at least 15 days in advance of the proposed action.38

If a hearing is continued or postponed, no additional notice is required, unless otherwise ordered by the court.39 Notice can be waived, but the waiver must be in writing and filed with the court. The waiver can be executed by a guardian ad litem, guardian, conservator, trustee, or other fiduciary.40

Stringent service of notice is required for petitions to prorate estate tax liability or to prorate generation-skipping transfer taxes.42 Under both these provisions, service must be made at least 30 days ahead of the hearing in accordance with the rules that govern service of summons.

Several of the Los Angeles Superior Court local rules impose additional notice requirements. For example, a notice of hearing for a petition to determine title to real or personal property must contain “[a] description of the subject property sufficient to provide adequate notice to any party who might be interested in the property.” Another common situation involves petitions for special letters of administration, which the court has no power to grant without notice to the surviving spouse, domestic partner, the person nominated as executor, and any other person whom the court in its discretion determines is entitled to notice.44 And notice to the attorney general is required in connection with a petition to determine heirs if there is a possibility of escheat.45

Trust Proceedings
Unlike the administration of a decedent’s estate, there is no one place to start a trust proceeding, although a petition asking the court to rule on one of the many facets of the internal proceedings of a trust is often employed.46 As a general rule, the requirements for notice involving trust proceedings are governed by the same overall provisions that govern decedent’s estates, “[e]xcept as otherwise provided.”47

The most significant exception to this omnibus cross-reference can be found in Probate Code Section 17203, which requires 30 days’ notice of any proceeding under Probate Code Section 17200. Notice must be served on 1) all trustees, 2) all beneficiaries of the trust, 3) the attorney general (if a charitable trust is involved), and 4) any other person whose interest in the estate would be affected by the petition.48 It is important to note that the Probate Code expressly prohibits the court from shortening the 30-day notice period for persons included in this last catch-all category.49

The notice requirements are expanded when a person otherwise entitled to notice deceases. If no personal representative has been appointed for such person and such person’s interest in the trust has not passed to his or her heirs or beneficiaries under Division 8 of the Probate Code (disposition of estates without administration), notice must also be given to each of the deceased person’s heirs and devisees, as well as all persons named as executors in the deceased person’s will and to each person serving as guardian or conservator of the deceased person.50

Certain persons can request special notice of proceedings, even if they would not otherwise be entitled to notice. Thus, a beneficiary may request “special notice of the filing of petitions...relating to any or all of the purposes described in Section 17200...”51

If the matter concerns a trustee’s compensation, a creditor of the trust (or a creditor of the settlor), or any other person having legal or equitable interest in the property, notice must be given to each known creditor and to any persons described in Code of Civil Procedure Sections 413.10 et seq., which govern service of summons.52

The additional statutorily required recipients of this notice are 1) all trustees of the trust and of any other trusts to which an allocation of liability may be approved by the court, 2) all beneficiaries whose interests would be affected, 3) any personal representative of the deceased settlor’s estate, and 4) the attorney general, if the petition relates to a charitable trust.53

It should be noted that nothing prevents petitioners in trust proceedings from providing more notice than required.54

Guardianships and Conservatorships
A guardianship or conservatorship proceeding begins with the filing of a petition,55 with the default notice period set at 15 days.56 Probate Code Section 1460 also sets forth a default list of recipients for guardianship and conservatorship notices regarding petitions, reports, and accounts, including 1) the guardian or conservator, 2) the ward or conservatee 3) a spouse or domestic partner, 4) anyone who has requested special notice, 5) for any hearing on a petition to terminate a guardianship, to accept the resignation of, or to remove the guardian, the persons described in Probate Code Section 1510(c), and 6) for any hearing on a petition to terminate a conservatorship, to accept the resignation of, or to remove the conservator, the persons described in Probate Code Section 1821(b).57

The court retains the power to permit deviations from this list for good cause.58

If either the court or the petitioner knows or has reason to know that the proposed conservatee or ward “may be an Indian child,” then a lengthy list of additional notice requirements comes into play.59 Conversely, no notice is required to be given to a child under 12 years of age if notice was properly given to a parent, guardian, or other person having legal custody of the minor, with whom the minor resides or if the petition is brought by a parent, guardian, or other person having legal custody of the minor, with whom the minor resides.60

Several other notice provisions are also common to both guardianships and conser-
vatorships. For example, if the proposed ward or conservatee has developmental disabilities and other conditions are satisfied, the petitioner is required to serve a notice of the hearing on the director of the regional center for the developmentally disabled at least 30 days before the day of the hearing on a petition for appointment.67

If the guardianship or conservatorship estate consists or will consist wholly or in part of money received from the Veterans Administration, revenue or profit from that money, or from property acquired wholly or in part from that money, or property acquired wholly or in part with that money or from that property, notice of the time and place of hearing on a petition, report, or account, and a notice of the filing of an inventory must be mailed to the Director of Social Services.84

Additional provisions govern each type of proceeding. For guardianships, in addition to the persons listed in the statutes covering both guardianships and conservatorships, notice of the hearing on the initial petition for guardianship must also be given to 1) any person having legal custody of the proposed ward, or serving as guardian of the estate of the proposed ward,69 2) the parents of the proposed ward,70 3) the relatives named in the petition,71 4) the person having the care of the proposed ward, or serving as guardian of the estate of the proposed ward,76 and 7) the petitioner is required to serve a notice of the hearing on the initial petition for guardianship must also be given to 1) any person having legal custody of the proposed ward, or serving as guardian of the estate of the proposed ward,69 2) the parents of the proposed ward,70 3) the relatives named in the petition,71 4) the person having the care of the proposed ward, or serving as guardian of the estate of the proposed ward,76 and 7) the person having legal custody of the proposed ward,72 5) if required by either Probate Code Section 146173 or Section 1542,74 the Director of State Hospitals, the Director of Developmental Services, or the Director of Social Services,75 6) the parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency,76 and 7) the parents of a proposed ward who has been judicially declared free from their custody and control.77 On the other hand, the court may order that notice need not be given to any person who “cannot with reasonable diligence be given the notice” or if “the giving of the notice would be contrary to the interest of justice.”78

Another notice requirement is imposed with regard to a petition for guardianship of the person: “In each case involving a petition for guardianship of the person, the petitioner shall mail a notice of the hearing...to the local agency designated by the board of supervisors to investigate guardianships for the court.”79

There are also notice provisions specific to conservatorship proceedings. For example, a citation80 must be served on the proposed conservatee.91 Furthermore, notice of the hearing on a petition for appointment of a conservator must be given to the conservatee’s relatives within the second degree.82 In addition, if required by Probate Code Section 1461,83 notice shall be given to the Director of State Hospitals, the Director of Developmental Services, or the Director of Social Services.84 Third, if the “petitioner and the proposed conservator have no prior relationship with the proposed conservatee and are not nominated by a family member, friend, or other person with a relationship to the proposed conservatee, notice shall be mailed to the public guardian of the county in which the petition is filed.”85

In Los Angeles County, conservators must provide copies of all inventories, appraisals, and accountings to the Court Investigator.86 The requirement to provide the Court Investigator with copies also applies to accountings when “a conservatee is a beneficiary of a trust subject to the court’s continuing jurisdiction or supervision.”87

If a guardian or conservator intends to sell property, they must follow the procedures that govern personal representatives of a decedent’s estate.88 However, unlike personal representatives of a decedent’s estate, neither guardians nor conservators can be granted the power to act under the Independent Administration of Estates Act.89

The Probate Code also imposes ongoing notification duties upon guardians and conservators. For example, no later than 90 days after being appointed (“or within any further time as the court...may allow”), the guardian or conservator must file an inventory and appraisal.90 This document, which must include a notice of how to file an objection, must be served on 1) the conservatee and the attorneys of record for the ward or conservatee, 2) the conservatee’s spouse or registered domestic partner, and 3) the conservatee’s relatives in the first degree, and, if there are no such relatives, to the next closest relative, unless the court determines that the mailing will result in harm to the conservatee.91

A copy of the inventory and appraisal must also be mailed to the director of the appropriate department at the director's office in Sacramento if the ward or conservatee is or has been during the guardianship or conservatorship a patient in a state hospital under the jurisdiction of the Department of State Hospitals or the Department of Developmental Services.92 Similar notice requirements apply with regard to accounts filed by guardians and conservators.93

Once letters of guardianship or conservatorship have been issued, a request for special notice can be filed by 1) the ward, if over 14 years of age, 2) the conservatee, 3) the spouse of the ward or the spouse or domestic partner of the conservatee, 4) any relative or creditor of the ward or conservatee, or 5) “any other interested person.”94

In Los Angeles County, two local rules impose additional requirements when a conservator resigns and when a conservatee dies. Regarding the former, the final account of a resigning conservator will not be approved unless the successor conservator was served with a notice of hearing and copy of the proposed final account and/or petition for its approval.95 As to the latter, a notice of hearing and a copy of the petition for settlement of a final account must be given to the personal representative, “if any, of the deceased conservatee, and if none, to all known heirs at law, devisees, and other successors-in-interest.”96

Despite the cross-reference to the general rules that govern civil actions, probate practice is fraught with special notice provisions that must be identified and followed. A single misstep can result in having a hearing continued in order to provide adequate notice, or worse, having a judgment voided.

1 See, e.g., CODE CIV. PROC. §1005 (governing the giving of notice as to numerous motions and the timing and required method of service for oppositions and replies, this general rule all but disappears due to the many specific notice provisions in the Probate Code).

2 See CODE §800(a).

3 See, e.g., CODE §§8003(b), 8120. Use of the Notice of Petition to Administer Estate (Judicial Council Form DE-121) is sufficient for this purpose but is not required. CAL. R. CT. 7.54.

4 See CODE §8112(a).

5 See CODE §8110(a).

6 See CODE §8110(b). However, parties filing any petition need not give notice to themselves or to anyone joining in the petition. PROB. CODE §1201. This true-saving statute applies as well to trust proceedings, guardianships and conservatorships.

7 See, e.g., CODE §8111. The exception applies if the to-be-created trust “has a designated trustee resident in this state” unless there is no “identified distributee.”Id. In any event, the Attorney General is entitled to a copy of the will. GOV’T CODE §12591.

8 See CODE §8113.

9 See CODE §8112.

10 See CODE §8111. “As it relates to a personal representative, ‘[Letters] means letters testamentary, letters of administration, letters of administration with the will annexed, or letters of special administration.” PROB. CODE §522(a).

11 Under Probate Code §8400(a), a “person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters.”

12 See CODE §9100(a)(1).

13 See CODE §§8003(b), 8120, 9050(b); Cr. R. 7.54.

14 See CODE §9050(a). Notice must be given using the Notice of Administration to Creditors (Judicial Council Form DE-157). CAL. R. CT. 7.101(a).

15 See CODE §9050(a).


17 See GOV’T CODE §811.2.

18 See CODE §§9202(a), 9202(b).

19 See CODE §9202(c).

20 The United States is an interested person “where compensation, pension, insurance, or other allowance is made or awarded by a department or bureau of the United States government to a decedent’s estate...” PROB. CODE §7280.

21 Specifically, “any person interested in the estate, whether as devisee, heir, creditor, beneficiary under a
trust, or as otherwise interested, may...file...a written request for special notice." PROB. CODE §1250(a). The Request for Special Notice (Judicial Council Form DE-154) is designated as mandatory.

23 PROB. CODE §1250(c).

24 PROB. CODE §1252(a). Use of the Notice of Hearing—Decedent’s Estate or Trust (Judicial Council Form DE-120) is mandatory.

25 PROB. CODE §1252(b).

26 PROB. CODE §1213(a). This provision also applies to guardianships and conservatorships.

27 PROB. CODE §1220.

28 PROB. CODE §11000.

29 PROB. CODE §10300. The rules governing publication are set forth in Government Code §6063a (“Publication of notice pursuant to this section shall be for at least 10 days. Three publications in a newspaper published once a week or oftener, with at least five days intervening between the first and last publication dates not counting such publication dates, are sufficient. The period of notice commences upon the first day of publication and terminates either at the end of the day of the third publication or at the end of the tenth day, including therein the first day, whichever period is longer.”).

30 PROB. CODE §10301.

31 PROB. CODE §10303. However, court confirmation of the sale is still required. PROB. CODE §10308.

32 PROB. CODE §10302(a)

33 PROB. CODE §1203(a).

34 PROB. CODE §1203(b).

35 PROB. CODE §1202.

36 CAL. R. CT. 7.52(c).

37 PROB. CODE §§10400 et seq.

38 PROB. CODE §10586.

39 PROB. CODE §1205.

40 PROB. CODE §1204.

41 PROB. CODE §20122(b).

42 PROB. CODE §20222.

43 L.A. SUP. CT. LOCAL R. 4.37(b)(1). “For such property, “the notice must state the street address or, if none, a description of the property’s location.” In addition, the notice of hearing must contain “[a] statement advising any person interested in the property that he or she may file an answer to the petition.” L.A. SUP. CT. LOCAL R. 4.37(b)(2).

44 L.A. SUP. CT. LOCAL R. 4.50.

45 L.A. SUP. CT. LOCAL R. 4.60.

46 PROB. CODE §17200.

47 PROB. CODE §17100.

48 PROB. CODE §§17203(a)(1)-(3), 17203(b).

49 Id.

50 PROB. CODE §17203(c).

51 PROB. CODE §1204(a).

52 PROB. CODE §1204(b)(3).

53 PROB. CODE §17204(b)(1). A verified statement of the person’s interest must accompany the request.

54 PROB. CODE §17204(b)(2). The petition also requires a verified statement of the creditor’s interest and may be made by an ex parte application.

55 PROB. CODE §19020(a).

56 See PROB. CODE §§8121(a), 19040(a).

57 PROB. CODE §19050. “[A] trustee has knowledge of a creditor of the deceased settlor if the trustee is aware that the creditor has demanded payment from the deceased settlor or the trust estate.” Id.

58 PROB. CODE §19023.

59 PROB. CODE §19024.

60 PROB. CODE §17105.

61 See PROB. CODE §1510.


63 Prob. Code §1460(b).

64 Prob. Code §1460(c).

65 PROB. CODE §1460.2(a). Under Probate Code §1460.2(b), the list includes the minor’s parent or legal guardian, Indian custodian, if any, the Indian
child’s tribe, the tribal chairperson, and, to the extent required by federal law, the Secretary of the Interior’s designated agent, the Sacramento Area Director, Bureau of Indian Affairs.

68 Prob. Code §1461.5(a)-(b).
70 Prob. Code §1511(b)(3).
71 Prob. Code §1511(c)(2). Pursuant to Probate Code §1510(c)(3), the petition for guardianship must list all known relatives of the proposed ward within the second degree—that is, parents and children (who are related in the first degree), and grandparents, aunts, uncles and siblings (who are related in the second degree).
72 Prob. Code §1511(c)(3).
73 Probate Code §1461 requires notice of hearing for certain petitions, accounts or reports, if the ward is or has been during the guardianship a patient in, or on leave from, a state hospital under the jurisdiction of the State Department of State Hospitals or the State Department of Developmental Services.
74 If the proposed guardian is not a relative of the ward (Prob. Code §1540), Probate Code §1542 requires that notice be given to the state Director of Social Services and to the local agency designated by the Board of Supervisors to investigate guardianships for the court.
75 Prob. Code §1511(d).
76 Prob. Code §1511(e)(1).
77 Prob. Code §1511(e)(2).
78 Prob. Code §1511(g).
80 Prob. Code §1823(a).
81 Prob. Code §1824. Service must be made either by personal service or by means of a Notice and Acknowledgment of Receipt.
82 Prob. Code §1822(b)(2). Pursuant to Probate Code §1821(b), the petition for conservatorship must list all known relatives of the proposed conservatee within the second degree. In addition to the relatives noted above (see note 71, supra), this would include grandchildren. If the proposed conservatee has no spouse and no relatives within the second degree exist or can be found, then notice must be sent to the following relatives: 1) the spouse or domestic partner of a predeceased parent of the proposed conservatee, 2) the children of a predeceased spouse or domestic partner of the proposed conservatee, 3) the natural and adoptive children of the proposed conservator’s aunts and uncles, and 4) the proposed conservatee’s nieces and nephews (natural or adoptive).
83 Prob. Code §1461.
84 Prob. Code §1822(c).
87 Id.
88 See Prob. Code §§2543(b), 10300-10301, 10302(a), 10303, 10308.
89 See Prob. Code §§2543(b), 10386.
90 Prob. Code §2610(a).
91 Id.
92 Prob. Code §2611. Although the term “director” is not defined in the section, Probate Code §1461(a) defines director (but curiously, only for purposes of §1461) as “the Director of State Hospitals when the state hospital...is under the jurisdiction of the State Department of State Hospitals” and as “the Director of Developmental Services when the state hospital...is under the jurisdiction of the State Department of Developmental Services.”
94 Prob. Code §2700(a).
95 L.A. Sup. Ct. Local R. 4.91(b).
PRIOR TO 2001 IN CALIFORNIA, film and television producers did not have to worry much about docudramas based on real-life celebrities or other public figures because these works were protected against right of publicity claims under California law and shielded by the First Amendment. Since then, however, significant California cases have raised new issues in this conflict that now make the right of publicity concerning docudramas much more complex and indefinite. One key issue is whether courts should treat docudramas differently from other types of expressive works that they have addressed and accord them additional protection. The arguments on both sides of this issue can be predicted by examining the nature of the above change in the law and the cases that have applied it.

In 1979, Guglielmi v. Spelling-Goldberg Productions gave more weight to the public’s interest in free expression and popular culture communicated in motion picture and television productions than to a celebrity’s economic rights in his or her name, likeness, and persona. The nephew of the late silent film star Rudolph Valentino, who controlled the rights to his uncle’s name, likeness, and personality, sued a production company that had produced a television motion picture titled Legend of Valentino: A Romantic Fiction. Although the story was fictionalized, the film’s central character was based on Valentino. Valentino’s name was used in the title, and his name, likeness, and persona were used in the advertising of the film. Guglielmi claimed that these uses violated his common law right of publicity. The trial court ruled against Guglielmi. Because Guglielmi was decided in 1979 when California only recognized a right of publicity for living persons under Civil Code Section 3344, the California Supreme Court affirmed the judgment.

Chief Justice Rose Bird wrote a lengthy concurring opinion that became the more significant precedent of the case in which she affirmed that publicity rights should survive...
III Productions, Inc. v.

The transformative test, a new test borrowed from copyright cases, was developed for expres-
sive works to determine “whether the celebrity
likeliness is one of the ‘raw materials’ from
which an original work is synthesized, or
whether the depiction or imitation of the
celebrity is the very sum and substance of the
work in question…in other words, whether
a product containing a celebrity’s likeness is
so transformed that it has become primarily
the defendant’s own expression rather than
the celebrity’s likeness.”12 The court added
that a factor in close cases is whether the
marketability and economic value of the chal-
lenged work derives primarily from the fame
of the celebrity depicted.13 Applying this
test to Saderup’s skilled but conventional and
imitative drawings of the Three Stooges, the
court held that Saderup’s art was not suffi-
ciently transformative to outweigh Comedy
III’s right of publicity and affirmed the judg-
ment against Saderup.14

The transformative test was thereafter
applied by California courts in four succes-
sive key cases to other types of expressive
works: one in respect to comic books15 and
three in respect to video games.16 Unlike the
lawsuit in Comedy III, these actions were
brought by celebrities who were very much
alive.

**Transformative Test Cases**

**In Winter v. DC Comics,**17 famed albino
musicians Johnny and Edgar Winter sued
DC Comics over its portrayal in a popular
comic miniseries of the villainous fictional
characters Johnny and Edgar Autumn, the
half-worm, half-human offspring of a super-
natural worm creature. The Autumn’s had
long white hair and albino features like the
Winters, and Johnny Autumn was shown
wearing a tall black top hat like the kind
often worn by Johnny Winter. But the Au-
tumn brothers were not blues musicians.
They were evil subhuman creatures who en-
gaged in murder, violence, and bestiality.
Understandably outraged, the Winter broth-
ers sued for, among other claims, the viola-
tion of their statutory rights of publicity
under Civil Code Section 3344.18 The trial
court ruled in favor of DC Comics and the
court of appeal affirmed on all causes of
action except the claim under Civil Code
Section 3344 concluding that triable issues of
fact existed as to whether the comic books
were transformative.19

On petition for review, the California
Supreme Court applied the transformative
test to the comic book characters and easily
reached a result opposite from Comedy III.20
The court held that, unlike Saderup, DC
Comics had not created conventional imita-
tive likenesses of the Winters. Rather, it had
greatly transformed them into fanciful, imag-
innative half-human creatures that were man-
ifestly no longer (nor represented as) Johnny
and Edgar Winter, and, because of this trans-
formation and the fact that the characters at
issue were only one element of a larger story
about another character, the value of the
comics did not derive primarily from the
fame of the Winter Brothers.21 Therefore,
the court reversed the judgment of the court
of appeal on the right of publicity claim.22

In Kirby v. Sega of America, Inc., singer
and dancer Kerin Kirby, who had performed
under the name Lady Kier with the band
Deee-Lite in the early 1990s, sued Sega of
America over its use of a computer-generated
character named Ulala in its video game
Space Channel 5.23 Ulala was a thin female
reporter in the twenty-fifth century who wore
pigtails, an orange top featuring the number
5, orange gloves and boots, a blue ray-gun
holster, headset, and backpack. The game
was set in outer space, where Ulala had been
sent to investigate an invasion of earth by
dancing aliens who shot earthlings with ray
guns that caused the humans to dance uncon-
trollably. The goal of players was to make
Ulala match the dance moves of other char-
acters. In these sequences, Ulala typically
danced in short quick movements.

Kirby claimed that Ulala was based on the
public persona she had developed of a “funky
diva-like artistic character.” In her perfor-
manences and videos, Kirby employed a variety
of different looks and styles, usually with a
1960s retro feel, which included form-fitting
unitards and a page-boy haircut, but some-
times bare-midriff tops, cheerleader skirts,
pigtails, space or other helmets, and a blue
backpack. As part of her act, Kirby also danc-
ed in a flowing fashion. Furthermore, in three
of her recorded songs, Kirby introduced her-
self with the words “ooh la la.” Kirby conceded
that her persona comprised several looks and
was versatile. Nonetheless, she claimed that
Sega misappropriated her likeness and per-
sona for Ulala and introduced evidence that a
firm retained by the defendant had approached
her to ask if she wanted to license music videos
and songs to promote the game. She had
refused. The trial court ruled in favor of Sega
on First Amendment grounds.24

The court of appeal acknowledged that
video games are “expressive works entitled to
as much First Amendment protection as the
most profound literature.”25 The court then
applied the transformative test to Ulala. The
court found that, despite possibly intentional
minor similarities to Kirby, Ulala’s likeness
and persona were different in a number of sig-
nificant details.26 As in Winter, the court
considered not only the character’s features
but also the imaginary world that the character inhabited. Consequently, following Winter, the court concluded that Ulala was sufficiently transformative of Kirby's likeness and persona to constitute a new independent expressive work and affirmed the trial court's judgment.32

The expressive works at issue in Winter and Kirby are, however, distinguishable from docudramas. Both cases involved characters who, although based on real celebrities, had been transformed through the artists' creativity into highly fanciful beings that were not meant to imitate or represent their original subjects. In contrast, not only do the characters in docudramas represent their subjects, but the artistic merit of the actors' performances as such characters is often based on how closely the actors mirror their subjects (think, for example, of Julianne Moore's uncanny Emmy-winning portrayal of Sarah Palin in HBO's Game Change or Al Pacino's Emmy-nominated replication of Phil Spector in HBO's Phil Spector). Much more applicable to docudramas are No Doubt v. Activision Publishing, Inc. and In re NCAA Student-Athlete Name & Likeness Licensing Litigation, two recent right of publicity cases involving video game avatars that represent real persons.

In No Doubt, video game company Activision entered into a licensing agreement with the members of the famous band to use avatars based on the band members in its game Band Hero. The license agreement authorized the company to use the names and likenesses of band members provided that the avatars, computer-generated images of the band members, could only be shown performing up to three songs approved by the band and only using the voices of the band members. Moreover, only the approved likenesses of the band members could be used. Pursuant to this license, the members of No Doubt posed for a full-day session of motion capture photography so that their avatars could be as realistic as possible. The results were avatars that closely matched the appearance of the band members.

However, No Doubt soon discovered that Activision had exceeded the scope of its license. The avatars in the game could be manipulated by players to perform songs that were not approved and not even written by the band. In addition, the band members' voices could be altered so that Gwen Stefani sang in a male voice and the male members of the band sang in female voices. Band members could also be made to perform solo or with other groups. No Doubt filed suit against Activision, claiming that these unauthorized uses violated the band's statutory and common law rights of publicity. The superior court denied Activision's special motion to strike the complaint under Section 425.16 (Anti-SLAPP motion) of the Code of Civil Procedure.33 On appeal, Activision argued that its uses of the band members' likenesses were transformative because the avatars were used in a variety of imaginative venues and settings, including outer space, and because they could be manipulated to perform songs that the band never would have performed in real life—sometimes with other people and in other voices. The court of appeal firmly rejected these arguments, holding that the avatars of the band members were not transformative because, unlike the fanciful characters in Winter and Kirby, they were “at all times immutable images of the real celebrity musicians.” The court focused on the activities of the avatars and noted that, regardless of settings, the avatars were at all times shown performing rock songs, the same activity in which the band engaged in real life that had given it celebrity. The court concluded that neither the player's ability to place the avatars in fanciful contexts, or with other people, nor the ability to manipulate the avatars in the ways alleged made the avatars transformative when the avatars remained literal recreations of their subjects engaged in their subjects' professional activities. Consequently, the court affirmed the superior court's judgment.36

Practically the identical issue came before the Ninth Circuit Court of Appeal in In re NCAA, the most recent right of publicity decision under California law regarding celebrity likenesses in expressive works. Like No Doubt, In re NCAA involved a video game, NCAA Football, made by Electronic Arts, which used highly realistic avatars based on real athletes. The avatars played college football in the same positions and on the same teams as the real athletes they were based upon. However, the game also allowed players to alter certain physical characteristics of the avatars, such as athletic ability and physique (although the avatar still remained the avatar of the particular athlete), and to control other factors in the setting and context of the game including weather, crowd noise, and mascots.

Plaintiff Samuel Keller had been the starting quarterback at Arizona State and Nebraska. Although Keller had not licensed his likeness, the avatar representing him had the same height, weight, skin tone, hair color, hair style, home state, facial features, school year, and other traits as Keller and was obviously
intended to replicate him.\textsuperscript{38} Indeed, players of the game could upload rosters of names from third parties so that the players’ names (including Keller’s) appeared on their jerseys. Keller objected to this unauthorized use of his likeness, and he and eight other athletes sued Electronic Arts for violations of their common law and statutory rights of publicity under Civil Code Section 3344.\textsuperscript{39} As Activision had in \textit{No Doubt}, Electronic Arts moved to strike the complaint under California’s anti-SLAPP statute.\textsuperscript{40} Under this statute, a defendant cannot strike the complaint if the plaintiff establishes a probability that the plaintiff will prevail on his claim even if the defendant’s activity is in furtherance of the right to free speech under the United States Constitution or the California Constitution. The district court denied Electronic Arts’ motion.\textsuperscript{41}

On appeal, the Ninth Circuit had to decide whether it was probable that the plaintiffs would prevail in the litigation. The court examined whether the defendant’s use of Keller’s likeness was transformative under the above cases.\textsuperscript{42} As in \textit{No Doubt}, Electronic Arts argued that its avatar of Keller was transformative because the contexts and settings for the avatar could be creatively altered in several ways and that, unlike the avatars in \textit{No Doubt}, the physical characteristics of the avatar of Keller could be substantially altered by the player.\textsuperscript{43} The court rejected both these arguments.\textsuperscript{44} First, the court relied on \textit{No Doubt} in holding that the ability to place an avatar in different contexts or settings did not transform the avatar itself when the avatar was depicted as the subject doing the activity for which the subject is known.\textsuperscript{45} Second, and perhaps more controversially, the court held that the player’s ability to alter the physical characteristics of the avatar did not make the use transformative.\textsuperscript{46} The court interpreted \textit{No Doubt} as holding that the key question was whether the artists had transformed the avatar into a fanciful creative character or entirely new character, not whether the player could manipulate the avatar.\textsuperscript{47} Since the avatar of Keller remained, despite alterations, the college quarterback Keller playing his actual game of college football, the avatar was not transformative.\textsuperscript{48}

In addition to the transformative defense, however, Electronic Arts also raised a separate defense that would be significant in a docudrama case. Electronic Arts argued that the material in \textit{NCAA Football} constituted both a “public affairs” account under Civil Code Section 3344(d) and an account of “public interest” under common law and that therefore Keller’s consent to the use of his likeness was not required.\textsuperscript{49} After reviewing the few California cases on this issue,\textsuperscript{50} the court rejected this defense. The court held that \textit{NCAA Football} was a game and not a publication or report of factual data as required under those cases.\textsuperscript{51} In addition, the court distinguished the case from \textit{Dora v. Frontline Video, Inc.}, which held that a documentary presenting factual information about surfing that contained videotape and an interview of surfer Miki Dora was a public affairs account. The court also distinguished other cases that involved publications of factual data.\textsuperscript{52} The court then held that it was likely the plaintiffs would prevail in the litigation and affirmed the trial court’s judgment.\textsuperscript{53}

The danger the holding in \textit{In re NCAA} poses to the motion picture and television industries was emphasized by Judge Sidney Thomas in his strong dissent:
The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.\textsuperscript{54}

The question now facing Hollywood is how should a California court apply the above precedents when faced with a claim that a docudrama has violated a subject’s right of publicity. This question will be tricky for defendant producers.

\textbf{Applicability to Docudrmas}

The producers’ first argument will likely be that docudramas and video games, while both expressive works, should be treated differently by the courts because docudramas are more transformative types of art. The makers of video games of the kind in \textit{No Doubt} and \textit{In re NCAA} create computer-generated images meant to be identical to their subjects. In \textit{No Doubt}, Activision used actual photographs of the band members to create their matching avatars. Such avatars are not artistic interpretations or transformations of their subjects. They replicate their subjects. In contrast, the character in a docudrama can never be identical to the subject because the character is a different person—an actor performing a role. The actor transforms the subject, with help from the writer and director, by interpreting and acting out the subject’s gestures, speech, emotions, and movements. Furthermore, as these works almost always contain fictional or dramatized scenes, the actor may be shown behaving in certain ways that are unlike the real subject.

The subject’s counterargument will likely be that these transformative elements still do not meet the threshold set by \textit{No Doubt} and \textit{In re NCAA}. Under those cases, the subject must be transformed into a fanciful creature or entirely new character, neither of which happens in a docudrama. The subject remains the subject performing, for the most part, those activities that made his life story significant. Indeed, it is usually the subject’s well-known life story that makes the film valuable. Although Judge Bybee in \textit{In re NCAA} rejects the dissenting argument and indicates that courts can distinguish cases where a video game company has emphasized reproducing reality from cases involving other kinds of expressive works, he offers no support for this position.\textsuperscript{55} If courts strictly follow \textit{No Doubt} and \textit{In re NCAA}, they should find that docudramas are not transformative.

Producers’ second and stronger argument will likely be that a docudrama is a matter of public interest and an account of public affairs under Civil Code Section 3344(d). A docudrama is different from a video game in this respect. A video game is an interactive game; a docudrama tells a story about a public figure. Producers will cite cases where this defense has been applied to bar claims by real persons who appeared in documentaries, a more analogous form.\textsuperscript{56} Indeed, the Ninth Circuit has just ruled, relying partly on \textit{Dora}, that a television documentary about the history of a notorious white supremacist gang qualified as a public affairs account under Civil Code Section 3344(d).\textsuperscript{57} The line between documentaries and docudramas is arguably thin when they are viewed as matters of public interest. The fact that docudramas also have entertaining elements should not in itself disqualify them from being accounts of public affairs as noted in \textit{Dora}.\textsuperscript{58}

However, the subject will likely argue that docudramas, unlike documentaries, are not primarily publications of factual data. Rather, they are primarily dramatic works. They routinely dramatize and exaggerate the truth. In almost all cases, they add fictional elements such as made-up scenes and invented or composite characters. Their goal is to entertain, not inform. This position seems supported by the fact that Civil Code Section 3344.1 (applicable to deceased celebrities) contains the same public affairs exclusion\textsuperscript{59} as Civil Code Section 3344 (applicable to living persons) but also, unlike Section 3344, contains the additional express exclusion for audiovisual works and television programs that are fictional or nonfictional entertainment, treating public affairs and entertainment as separate categories.\textsuperscript{60}

Because there are strong arguments for and against the above issues, producers have ample reason to be nervous. Motion picture and television production companies have made and will make docudramas where the consent of the subject or other real-life character has not been obtained; for example, when the person depicted is a criminal or another public figure who will be portrayed...
negatively. It is now very possible that such a person will bring a claim against a production company for the violation of his right of publicity, seek injunctive relief and damages, and prevail. In fact, such a claim has already been made in New York: convicted murderer Chris Porco sued Lifetime Entertainment, which was seeking to air its television docudrama *Romeo Killer: The Chris Porco Story*, for a violation of his right of publicity under New York law.61 A New York state judge granted a temporary restraining order blocking the broadcast, but the appellate division of the New York Supreme Court vacated the order temporarily pending the determination of Lifetime’s appeal of that order.62

Lawyers for producers and networks can spend many hours trying to classify their production as transformative or an account of public affairs, but the outcome will be very uncertain. A simpler and more definitive solution is required. The best solution is legislative, not judicial. Studios and networks should use their significant clout to persuade the legislature to amend Civil Code Section 3344 to add the same additional exclusions for film and television productions as are provided in Civil Code Section 3344.1(a)(2). It seems likely that there will be loud objection to this from the Screen Actors Guild and other groups that seek to protect celebrity rights, but such an amendment would be constitutional because it would only further the cause of creative expression under the First Amendment. It would clarify the right of publicity for the courts and eliminate expensive and risky litigation. Although it would narrow the rights of celebrities, they would still be protected against the use of their names and likenesses in connection with commercial products and services, arguably the main purpose of right of publicity laws. Until such an amendment is passed, however, producers will have to think long and hard before giving true life stories the green light.

3 Id. at 861.
4 Id. at 872.
5 Civ. Code §990(n)(1).
8 Id. at 394.
9 Id. at 396.
10 Id. at 397.
11 Id. at 404.
12 Id. at 406.
13 Id. at 407.
14 Id. at 410.
17 Winter, 30 Cal. 4th 881.
18 Id. at 886.
19 Id. at 887.
20 Id. at 890.
21 Id. at 892.
23 Id. at 53.
24 Id. at 58.
25 Id. at 59.
26 Id. at 61.
29 No Doubt, 192 Cal. App. 4th at 1023.
30 Id. at 1025.
31 Id. at 1034.
32 Id. at 1033.
33 Id. at 1034.
34 Id. at 1040.
36 Id. at 7-8.
37 Id. at 8.
39 In re NCAA, No. 10-15387, at 8.
40 Id. at 11-16.
41 Id. at 17.
42 Id. at 16-18.
43 Id. at 16.
44 Id. at 18.
45 Id.
46 Id. at 31.
47 Id. at 28.
50 Id. at 31.
51 Id. at 31.
52 Id. at 43 (Thomas, J., dissenting).
53 Id. at 21 n.5.
56 Dora, 15 Cal. App. 4th at 543.
“APPROPRIATION ART” is art that incorporates images or objects that already exist. Throughout the twentieth century, artists have appropriated existing images to create new art and as a method of social criticism. By the middle of the twentieth century, it had become commonplace for artists to incorporate images from popular culture and prior art into new artistic works. The idea behind certain contemporary appropriation art is to challenge the idea that all art must be created entirely by the artist and to shift the focus of artistic creation from the craftsmanship of the artist toward the artist’s ability to juxtapose disparate elements in a way that creates new meaning.

As the number of artists engaging in appropriation art has increased, so too have the number of lawsuits claiming infringement of the original works appropriated. Central to these cases is one of the thorniest issues in intellectual property: whether the appropriation artist is entitled to a fair use defense. Although the Copyright Act sets forth four nonexclusive factors to consider in this determination, numerous courts and commentators have noted that determining fair use is an “open-ended and context-sensitive inquiry.”

This issue came to a head in Cariou v. Prince, which the Second Circuit took nearly a year to decide. The case presented complicated legal issues and a fascinating set of facts, pitting a professional but largely unknown photographer, Patrick Cariou, against Richard Prince, one of the contemporary art world’s most celebrated stars. Cariou sued Prince and the Gagosian Gallery for infringement arising from Prince’s undisputed use of Cariou’s photographs of Rastafarians in Prince’s series titled Canal Zone. In the end, the fair use analysis of the lower court and the Second Circuit centered primarily on one factor: whether Prince’s works were transformative as a matter of law.

Earlier Cases

Prior to Cariou, courts within the Second and Ninth Circuits considered whether appropriation art qualified as fair use. In Rogers v. Koons, photographer Art Rogers sued artist Jeff Koons after Koons allegedly took a photograph taken by Rogers of a man and his wife holding puppies that Koons had found in a gift shop, tore off the copyright symbol, and instructed the image to be turned into a

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by Sarah L. Cronin and Joshua M. Keesan
THE SECOND CIRCUIT rejected the district court’s determination that Prince’s art pieces could only qualify for a fair use defense if they “comment on, relate to the historical context of, or critically refer back to the original works.” In the Second Circuit’s view, whether a work is transformative does not depend on whether it “comments” on the original work but rather whether it has altered the original work with “new expression, meaning or message.”

If the photographs commented on the doll, it did so only in its threshold determination of parody, not as a requirement for the use to be transformative.18 In yet another case, the Ninth Circuit held that the defendant’s use of video clips in a biography of Elvis Presley was transformative when “the clips play only for a few seconds after creating a collage painting consisting of fragmented images of four pairs of women’s legs dangling over images of desserts and set against the background of Niagara Falls.11 One of the pairs of legs came from an advertisement in Allure magazine.12 Koons made several changes to the photograph before incorporating it into his collaged work, including cropping, inverting, and modifying the image in ways the court found to be significant.13 Koons articulated that his objective in using the photo was to comment “on the social and aesthetic consequences of mass media,” thus using it “in the creation of new information, new aesthetics, new insights and understandings.”14 Characterizing Koons’s use of the image as satire, the court found that the use was transformative because Koons had a “sharply distinct objective” in using the photograph than the plaintiff had in creating it.15

Another instance of appropriation art giving rise to a lawsuit is Mattel Inc. v. Walking Mountain Productions. Photographer Thomas Forsythe was sued by Mattel after he developed a series of photographs depicting Mattel’s Barbie doll in various sexualized positions juxtaposed with vintage kitchen appliances.16 The Ninth Circuit held that the series of photographs was a transformative fair use because it could reasonably be perceived as a parody of Barbie.17 Although the court did discuss whether the photographs commented on the original works, it could reasonably be perceived as a parody because the claimed object of the parodic was not the photograph of the puppies itself but rather society at large.10

Over a decade later, however, Koons escaped liability when he was sued in Blanch v. Koons after creating a collage painting consisting of fragmented images of four pairs of women’s legs dangling over images of desserts and set against the background of Niagara Falls. Koons made several changes to the photograph before incorporating it into his collaged work, including cropping, inverting, and modifying the image in ways the court found to be significant. Koons articulated that his objective in using the photo was to comment “on the social and aesthetic consequences of mass media,” thus using it “in the creation of new information, new aesthetics, new insights and understandings.” Characterizing Koons’s use of the image as satire, the court found that the use was transformative because Koons had a “sharply distinct objective” in using the photograph than the plaintiff had in creating it.

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1. The first factor of a fair use analysis is whether and to what extent the challenged use is transformative.
   True.
   False.

2. The second factor is the economic value of the copyrighted work.
   True.
   False.

3. In *Cariou v. Prince*, the Second Circuit ruled that the third factor—the amount and substantiality of the portion used in relation to the original work as a whole—weighed in Prince’s favor.
   True.
   False.

4. In *Cariou*, the court noted that the more transformative the use, the less significant the fourth factor is.
   True.
   False.

5. There are six statutory fair use factors for courts to consider.
   True.
   False.

6. The title of the Richard Prince series at issue in *Cariou* is:
   A. Jamaica.
   B. Canal Zone.
   C. No Rasta.
   D. None of the above.

7. Prince was the sole defendant in *Cariou*.
   True.
   False.

8. Prince testified at his deposition that his work was not intended to communicate a message.
   True.
   False.

9. The district court held in *Cariou* that transformative fair use requires the secondary use to comment on the original work.
   True.
   False.

10. The Second Circuit held that 25 of Prince’s artworks in the series constituted fair use.
    True.
    False.

11. The Second Circuit remanded the case as to 10 of the artworks at issue.
    True.
    False.

12. Cariou has made more than $1 million from sales of his works at issue in the case.
    True.
    False.

13. Cariou characterized the Second Circuit’s approach to fair use as “I know it when I see it.”
    True.
    False.

14. Prince petitioned to have certain aspects of the Second Circuit’s opinion reheard en banc.
    True.
    False.

15. Scholars have observed little or no correlation between judicial findings of transformativeness and fair use.
    True.
    False.

16. In *Seltzer v. Green Day, Inc.*, the Ninth Circuit held that the band Green Day’s use of the plaintiff’s illustration was entitled to a fair use defense.
    True.
    False.

17. In *Rogers v. Koons*, the court concluded that artist Jeff Koons’s work was a parody.
    True.
    False.

18. The photograph at issue in *Blanch v. Koons* first appeared in which magazine?
   A. Cosmopolitan.
   B. Vogue.
   C. Vanity Fair.
   D. Allure.

19. In *Mattel v. Walking Mountain Productions*, the Ninth Circuit held that a series of photographs of Mattel’s famous Barbie doll was not transformative fair use because they could not reasonably be perceived as a parody.
    True.
    False.

20. The photograph at issue in *Morris v. Guetta* was of which musician?
    A. Sid Vicious.
    B. Johnny Rotten.
    C. Iggy Pop.
    D. Joey Ramone.

21. Cariou did not make any sales of his works at issue in the case.
    True.
    False.

22. Prince’s use of Cariou’s works was not transformative.
    True.
    False.

23. There is no correlation between judicial findings of transformativeness and fair use.
    True.
    False.

24. Scholars have observed little or no correlation between judicial findings of transformativeness and fair use.
    True.
    False.

25. The Second Circuit held that a series of photographs of Mattel’s famous Barbie doll was not transformative fair use because they could not reasonably be perceived as a parody.
    True.
    False.
Notably, Prince’s deposition disclosed the possibility that the paintings qualified as commentary on Cariou’s art. Prince testified that he did not “really have a message” in his work, nor did he have a particular interest in the original meaning of the photographs he uses. As a result, the district court ordered Prince’s works to be turned over and impounded, destroyed, or otherwise disposed. Prince immediately appealed. 

In his appeal to the Second Circuit, Prince specifically took issue with the aspect of the district court’s ruling imposing a requirement that a work must comment on the original in order to be deemed “transformative.” Disagreeing with the trial court’s emphasis on Prince’s deposition testimony, Prince argued that his reluctance to articulate a specific artistic intent “is consonant with the core post-modern belief that an artist’s intent is irrelevant because an artwork’s meaning is manifold, malleable, and does not have one single meaning in the eye of the viewer.”

**The Second Circuit Rules**

Nearly a year after hearing oral argument on the case, the Second Circuit issued its opinion reversing the district court in part. In a 2-1 decision, the Second Circuit rejected the district court’s determination that Prince’s art pieces could only qualify for a fair use defense if they “comment on, relate to the historical context of, or critically refer back to the original works.” In the Second Circuit’s view, whether a work is transformative does not depend on whether it “comments” on the original work but rather whether it has altered the original work with “new expression, meaning or message.” With this in mind, the Second Circuit pronounced itself “convinced” of the transformativeness of 25 of the works. In its view, these 25 works featured an “entirely different aesthetic than Cariou’s photographs,” and as such, were “fundamentally different and new.”

Unlike the district court, the Second Circuit was unmoved by Prince’s deposition testimony that he was not “trying to create anything with a new meaning or a new message” and that he didn’t have any interest in Cariou’s original intent. The court held that the transformativeness analysis turns on how the works “may reasonably be perceived,” rather than on an artist’s subjective views of his or her work and its meaning.

The court quickly dispensed with the other fair use factors. As for the first factor, the purpose and character of the use, the court acknowledged that Prince’s works are commercial but expressly stated that this factor was relatively insignificant given its ruling regarding the works’ transformativeness. Similarly, the court also diminished the import of the second factor, the nature of the copyrighted work, under which published, expressive, creative works merit greater fair use protection than unpublished, factual works. Although Cariou’s work was creative and published, the court noted that this factor is of limited usefulness when transformativeness is established. The court held that the third factor, the amount and substantiality of the portion used in relation to Cariou’s works as a whole, should be interpreted in conjunction with transformativeness. Specifically, the court concluded that in 25 pieces, Prince used key portions of Cariou’s photographs but did so in the service of transforming those portions “into something new and different.” That factor also weighed in Prince’s favor. With respect to the fourth factor, the effect of Prince’s use upon the potential market for Cariou’s photographs, the court similarly noted that the more transformative the use, the less significant this factor.

Moreover, the court noted the markedly different markets for the two artists’ works. Although Cariou has earned just $8,000 in royalties from the photographs at issue and has only sold four prints from the book, the court noted that Prince’s Canal Zone series was unveiled at a celebrity-studded affair hosted by the Gagosian Gallery and that Prince’s works from the series have sold for over $10 million. Accordingly, the court concluded that this factor weighed in Prince’s favor as well. The Second Circuit’s analysis of each of the Copyright Act’s four fair use factors appears to have been guided directly by its conclusion that 25 of the works were transformative. Transformativeness was indisputably the central focus of the analysis and was critical to the court’s ultimate determination of fair use.

In dissent, J. Clifford Wallace, a senior circuit judge of the U.S. Court of Appeal for the Ninth Circuit sitting by designation, agreed with the majority that the district court improperly held that only works that “commented” on the original works were entitled to the fair use defense. Judge Wallace strained from his colleagues, however, in arguing that the Second Circuit should have remanded the case to the district court (and potentially, to a jury) to apply the correct legal standard to the facts. Furthermore, Judge Wallace noted that although Prince’s testimony need not be deemed dispositive of the fair use issue, it could be at least considered relevant to the transformativeness analysis. Acknowledging his own lack of expertise with art, Judge Wallace was puzzled by the majority’s conclusion that 25 of the works were fair use while five were not. In his view, the district court should have been called upon to apply the analysis to the entire series. If after remand the correct legal standard were applied, additional facts or testimony could have become relevant that might have further affected the analysis and results.

**Other Recent Cases**

Although the Second Circuit’s decision in Cariou may be widely discussed, a survey of other notable recent cases reveals that the Second Circuit’s approach, in which transformativeness was seemingly elevated above all other factors in the fair use analysis, is typical.

Over the past few years, scholars have observed a “high correlation between judicial findings of transformativeness and fair use.” In a 2011 empirical analysis updating prior, similar studies, for example, Professor Neil Netanel analyzed decisions during 2006-2010 and found that the correlation was striking. In 20 out of the 22 opinions he analyzed, courts found that the defendant’s use was transformative further determined that the defendant had engaged in fair use. In all but three of the cases Netanel analyzed in which the court found that the use was not transformative, the court likewise found no fair use.

A review of opinions in 2013 produces an even more striking result. In all 15 cases (including Cariou) decided in 2013, if the court found the work transformative it likewise found fair use, and if it found the use was not transformative it found that fair use had not been established as a matter of law.

For example, in Seltzer v. Green Day, Inc., the Ninth Circuit affirmed the district court’s grant of summary judgment in favor of the band Green Day for the band’s unauthorized use of the plaintiff’s illustration of a man’s screaming face in a video projected behind the band during a concert tour. In determining that the use was transformative, the Ninth Circuit explained that the illustration was used merely as “raw material” for the creation of a new work that featured the illustration as “not simply a quotation or republication.” Although the band had used the plaintiff’s entire work, the court concluded that the other three fair use factors weighed in Green Day’s favor. Accordingly, summary judgment was proper.

On the other hand, in Morris v. Guetta, another “appropriation art” case involving Thierry Guetta (also known as Mr. Brainwash), photographer Dennis Morris alleged that Guetta infringed Morris’s copyright in a photograph of the Sex Pistols bass player Sid Vicious by incorporating the photograph into artworks. Both parties filed motions for summary judgment—Guetta on his fair use defense, and Morris on his copyright claim—and the district court denied Guetta’s motion and granted Morris’s. Analyzing the trans-
formativeness of the works, the court noted that Guetta’s works showed Sid Vicious making the same facial expression he was making in Morris’ photograph, and although the works added certain new elements, “the overall effect of each is not transformative; [Guetta’s] works remain at their core pictures of Sid Vicious.”64 As a result, the court held that the works were not sufficiently transformative. After addressing the other three factors, the court concluded that Guetta could not establish a fair use defense.65 In short, Cariou epitomizes a trend in recent case law elevating transformativeness as the most determinative factor in the fair use analysis.

The Five Remaining Paintings

On June 10, 2013, the Second Circuit denied Cariou’s petition to have the case reheard by the panel, or in the alternative, for a rehearing en banc.66 Cariou filed a petition for writ of certiorari to the U.S. Supreme Court.67 He argued in his petition that the Court should immediately review the case, because the “I know it when I see it” approach to fair use is untenable and “[d]etermining whether a secondary use is transformative based solely upon judicial ‘observation’ rather than upon the testimony of the secondary user, is necessarily subjective and unworkable.”68 The Court denied the petition.69

Cariou was left to fight Prince in the district court over the remaining five paintings. Cariou filed a memorandum of law applying the Second Circuit’s test for fair use to the remaining five paintings, arguing that Prince’s use of his photos was not transformative.70 Prince recently filed a memorandum of law in opposition, arguing that summary judgment with respect to the remaining five paintings should not be granted, because a reasonable jury could find that the remaining paintings did make fair use of Cariou’s photographs.71 In support of his opposition, Prince has submitted two expert declarations that opine on the “artistic and creative purpose” of the remaining paintings and how that purpose contrasts with Cariou’s book Yes Rasta.72

Whatever the final result of Cariou and Prince’s dispute, one thing is clear. For now, the most important inquiry in assessing a potential fair use defense is to analyze whether or not the allegedly infringing work is transformative as a matter of law. If not, a fair use defense will likely fail. But reaching a determination of transformativeness remains easier said than done, with courts taking a variety of approaches. Although the Supreme Court has declined the opportunity to further delineate a cogent legal test for determining transformativeness, appropriation art that undeniably adds something new to an under-lying work will likely be protected under existing copyright law.

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2 Ames, supra note 1, at 1477.
3 Id. at 1478.
4 Id. at 1479.
5 Cariou v. Prince, 714 F. 3d 694, 705 (2d Cir. 2013).
6 Id. at 694.
7 Id. at 698.
8 Rogers v. Koons, 960 F. 2d 301, 303 (2d Cir. 1992).
10 Koons, 960 F. 2d at 310. The court also found that Koons had used the “identical expression of the idea that Rogers created.” Id. at 308.
11 Blanch v. Koons, 467 F. 3d 244, 247-48 (2d Cir. 2006).
12 Id.
13 Id. at 248.
14 Id. at 253 (internal citations omitted).
15 Id. at 252-53.
16 Mattel Inc. v. Walking Mountain Prods., 353 F. 3d 792, 796, 806 (9th Cir. 2003).
17 Id. at 806.
18 Id. at 801-02.
19 Elvis Presley Enters., Inc. v. Passport Video, 349 F. 3d 622, 628 (9th Cir. 2003).
20 Id. at 629 (emphasis added).
21 Cariou v. Prince, 784 F. Supp. 2d 337, 344 (S.D.N.Y. 2011). Prince was able to sell his works for millions of dollars, but Cariou’s show based on the photographs in Morris’ photographs.71 In support of his opposition, Prince has submitted two expert declarations that opine on the “artistic and creative purpose” of the remaining paintings and how that purpose contrasts with Cariou’s book Yes Rasta.72

Whatever the final result of Cariou and Prince’s dispute, one thing is clear. For now, the most important inquiry in assessing a potential fair use defense is to analyze whether or not the allegedly infringing work is transformative as a matter of law. If not, a fair use defense will likely fail. But reaching a determination of transformativeness remains easier said than done, with courts taking a variety of approaches. Although the Supreme Court has declined the opportunity to further delineate a cogent legal test for determining transformativeness, appropriation art that undeniably adds something new to an under-lying work will likely be protected under existing copyright law.
IN THE UNITED STATES, Internet service providers (ISPs) are exempted from liability for material they host on behalf of third parties by the Digital Millennium Copyright Act (DMCA). Under European law, ISPs are exempted from the same liability by the Directive on electronic commerce (E-Commerce Directive). The legislation in both jurisdictions is similar, and case law in the United States and the European Union has led to convergence in some respects and divergence in others.

Under U.S. law, the DMCA provides for an exemption for ISPs from monetary damages and from injunctions for hosting material at the direction of a user on a system or network controlled or operated by or for the ISP. The exemption is subject to the ISP’s not having actual knowledge that the material is infringing and not being aware of facts or circumstances from which infringing activity is apparent or, upon obtaining actual knowledge or awareness, acting expeditiously to remove or disable access to the material. The exemption is also subject to the requirement that the ISP does not receive a financial benefit directly attributable to the infringing activity when the ISP has the right and ability to control that activity.

The law of the European Union provides for a hosting exemption under Article 14 of the E-Commerce Directive whereby an ISP’s providing a service of the storage of information provided by a recipient of a service is not liable for the information stored at the recipient’s request on condition that the ISP does not have actual knowledge of illegal activity or information. With regard to claims for damages, the ISP must not have been aware of facts or circumstances from which illegal activity or information is apparent or, upon obtaining such knowledge or awareness, must act expeditiously to remove or disable access to the information. Whereas the DMCA excludes from its exemptions ISPs that derive a financial benefit from, and have the right and ability to control, the activity, recital 42 of the E-Commerce Directive provides that the exemptions from liability for ISPs are limited to service providers whose conduct is merely technical, automatic, and passive, indicating a lack of knowledge or control of the data stored.

To summarize, the DMCA and the E-Commerce Directives both exempt from liability material hosted by an ISP if the ISP has neither actual nor constructive knowledge that the material is infringing or illegal. In addition, both limit the exemption to ISPs that, on obtaining knowledge, act expeditiously to remove the infringing or illegal material, and both impose a neutrality requirement for the exemption. However, the exemption under the DMCA is limited to material infringing copyright, while the E-Commerce Directive extends the

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exemption to illegal material generally, including
defamatory statements.

**Neutrality Requirement**

An ISP will be excluded from availng of the DMCA's hosting exemption if it receives a financial benefit directly attributable to the infringing activity and has the right and ability to control such activity. Both elements must be met to avail of the exemption.7

In considering what is a direct financial benefit in *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit, drawing on the common law standard for vicarious copyright infringement and the ruling in *Ellison v. Robertson*,8 ruled that the question is “whether the infringing activity constitutes a draw for subscribers, not just an added benefit.”9 The court also noted Congress's express statement that receiving a one-time setup fee and flat, periodic payments for services from a person engaging in infringing activity would not constitute receiving a “financial benefit directly attributable to the infringing activity.”10

The concept of “right and ability to control” has received extensive consideration from U.S. courts over the years. These courts have consistently ruled that the mere ability to remove or block access to materials posted on an ISP's site does not equate to a right and ability to control.11 In particular, they have held that a right to control is not established merely from such activities as generating e-mail responses when an item is listed and sold,12 advertising the platform,13 providing credit card processing,14 or implementing filtering software.15 In contrast, in *Perfect 10, Inc. v. Cybernet Ventures Inc.*, the Central District of California found a right and ability to control arose when the ISP prescreened sites, gave extensive advice regarding content, and prohibited the proliferation of identical sites.16

The high bar for establishing that an ISP has control over infringing activities under U.S. law is further explained in several recent cases involving copyright infringement on the Internet. In *Io Group v. Veoh Networks*, the Northern District of California distinguished Napster's liability under common law for copyright infringement in *AG&M Records, Inc. v. Napster, Inc.*,17 The court noted that the Napster system was set up solely for copyright infringement and its “control over its system was directly intertwined with its ability to control infringing activity,” whereas Veoh's ability to control its index did not equate to an ability to identify and terminate infringing videos.18

In *Viacom International, Inc. v. YouTube, Inc.*, the Second Circuit rejected the district court's conclusion that “until the ISP becomes aware of specific unauthorized material, it cannot exercise ‘power or authority’ over the specific infringing item...it does not have the kind of ability to control infringing activity the statute contemplates.”19 The Second Circuit noted the circumstances concerning the right and ability to control in *Perfect 10* and suggested that the right and ability could arise in a case of inducement of copyright infringement based on “purposeful, culpable expression and conduct.”20 The court held that, for an ISP to have the right and ability to control, it must exert “substantial influence on the activities of users.”21

Unlike the DMCA, the European E-Commerce Directive does not have an express prohibition on a financial benefit directly attributable to the infringing activity. But recital 42 of the directive has been interpreted to limit the exemptions to ISPs whose conduct is merely technical, automatic, and passive.22

A number of informative judgments of the Court of Justice of the European Union (CJEU) on this question arise from references for preliminary rulings from national courts of EU member states.23 In its judgments, the CJEU provides a preliminary ruling on the interpretation of EU law before returning a case to the national court of origin for final judgment. In the joined cases Google France, Google Inc. v. Louis Vuitton Malletier, Google France SARL v. Viaticum SA and Luteciel SARL, and Google France SARL v. CNRRH SARL, which concerned alleged trademark infringement through Google Adwords, the CJEU drew on recital 42 of the E-Commerce Directive and held that the hosting exemption is limited to neutral service providers—that is, providers whose conduct is “merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”24 The court held that the mere fact an ISP is subject to payment, that Google sets the payment terms, or that it provides general information to its clients cannot deprive Google of the exemptions in the E-Commerce Directive. The court also held that the concordance between the key word selected on Adwords and the search term is not sufficient to justify the view that Google has knowledge of, or control over, the data entered on its systems by advertisers in Adwords.25 However, the court noted that Google's role in drafting the commercial that accompanies the advertising link or in establishing or selecting key words is relevant in deciding whether Google is a neutral service provider.26 The CJEU sent the matter back to the French court of origin for this assessment.

The CJEU also heard a reference from the High Court of Justice of England and Wales in July 2011 in *L’Oreal SA and Others v. eBay International AG and Others*. The case concerned eBay's liability for the sale of counterfeit products on its Web site. Advocate General Niilo Jääskinen questioned whether neutrality is the correct test in relation to hosted data and expressed his surprise if intervention and guidance concerning the contents of listings would deprive eBay of the hosting exemption.27 Notwithstanding the Advocate General's reservations, the CJEU endorsed its previous ruling and held that an ISP that has not taken a neutral position in relation to postings cannot rely on the hosting exemption from liability.28 The court also held, however, that “the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service, and provides general information for customers cannot have the effect of denying the exemptions.”29 On the other hand, the court also held that when an ISP provides assistance by optimizing or promoting the presentation of offers for sale, it cannot be considered neutral and cannot rely on the hosting exemption.30

Comparison of the American interpretation of the “right and ability to control” and the European court's interpretation of a “lack of knowledge or control” yields similarities. The activities that the EU courts have ruled do not offend the EU requirement of neutrality would equally not affect an ISP's exemption under U.S. law. However, it is questionable whether activities that the CJEU suggested would imply that an ISP is no longer neutral—such as optimizing and promoting offers—would amount to the extensive content advice that gives an ISP the right and ability to control under U.S. law.31 In this respect it seems that U.S. law is more protective of ISPs than EU law.

**Actual Knowledge**

Under Section 512(c)(1)(A)(i) of the DMCA, the ISP's hosting exemption is subject to the condition that the ISP “does not have actual knowledge that the material or activity using the material on the system or network is infringing.” In *Corbis Corporation v. Amazon*, the Western District of Washington considered what would amount to actual knowledge of blatant, repeat infringements requiring an ISP to terminate a user to continue to avail of the exemption. The court held that such knowledge “requires, at a minimum, that a service provider who receives notice of a copyright violation be able to tell merely from looking at the user’s activities, statement, or conduct that copyright infringement is occurring” and provided examples from other cases, including 1) statements from a vendor that a product is bootlegged or pirated, 2) chat rooms hosted by the service provider in which users discuss how the service can be used to circumvent copyright laws, and 3) the offering of hundreds of audio files in a single day for peer-to-peer copying.32

In *UMG Recordings, Inc. v. Shelter Cap-
that an ISP ought to have known or had good reason to suspect illegal activity. Therefore, he opined, an ISP would not have actual knowledge of a user’s infringement of a trademark simply because another user has infringed the same trademark. Nor would an ISP have actual knowledge of a user’s infringing a trademark simply because the user has been found to infringe another trademark. However, when a user has been found to infringe a trademark, the Advocate General have known. In determining whether a service provider is aware of “facts or circumstances from which infringing activity is apparent,” the district court in Corbis held that “the question is not what a reasonable person would have deduced given all the circumstances...instead the question is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.”40 In that case, the court noted that the only evidence available—that the vendor

In Viacom International, the Southern District of New York ruled in 2010 that both actual and constructive knowledge must be of specific and identifiable infringements of particular individual items and not “mere knowledge of [the] prevalence of such activity in general.”34 This holding was affirmed on appeal, with the Second Circuit holding (and the Ninth Circuit recently agreeing35) that the difference between actual and constructive knowledge is not the difference between specific and generalized knowledge but instead between a subjective and an objective standard. Thus, an ISP has actual knowledge if it actually or “subjectively” knows of a specific infringement and has “red flag” or constructive knowledge if it is aware of facts that make the infringement “objectively” obvious to a reasonable person.36 The Second Circuit also held that the willful blindness doctrine from trademark law “may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.”37

On remand, the district court rejected Viacom’s attempt to argue that because of the sheer volume of material uploaded to YouTube, the burden was on YouTube to prove that it did not have actual knowledge of infringing clips. “[T]he burden of showing that YouTube knew or was aware of the specific infringements of the works in suit cannot be shifted to YouTube to disprove. Congress has determined that the burden of identifying what must be taken down is to be on the copyright owner...”38

Under Article 14(a) of the E-Commerce Directive the ISP’s hosting exemption from liability is subject to the condition that the ISP “does not have actual knowledge of illegal activity or information....” In the L’Oréal case against eBay, the Advocate General opined that actual knowledge consists of two aspects. First, the ISP must have actual knowledge and not a mere suspicion or assumption regarding the illegal activity or information. Second, the Advocate General held that the requirement of actual knowledge seems to exclude construed knowledge. It is not enough

would not exclude the ISP from having actual knowledge of the user’s repeat infringement of the same trademark. The Advocate General characterized this scenario as the same continuous infringement rather than two separate infringements.39

The Advocate General’s opinion is consistent with the views of the Second and Ninth Circuits that an ISP’s actual knowledge must be of a specific user who infringes a specific right. Actual knowledge cannot arise from an ISP’s knowledge that it is hosting material capable of protection nor from the prevalence of infringing activity in general.

Constructive Knowledge

If an ISP does not have actual knowledge of an infringement, the question arises whether it can have constructive knowledge. Constructive knowledge is assessed by reference to what the ISP knew and what the ISP ought to have known. In determining whether a service provider is aware of “facts or circumstances from which infringing activity is apparent,” the district court in Corbis held that “the question is not what a reasonable person would have deduced given all the circumstances...instead the question is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.”40 In that case, the court noted that the only evidence available—that the vendor
In *Perfect 10* the Ninth Circuit rejected the argument that a Web site such as illegal.net amounts to a red flag. The name does not determine that the material on the site is actually illegal or stolen.\(^43\) The court held that in order for a Web site to qualify as a red flag, it needs to be apparent that the site instructed or enabled users to infringe another’s copyright. The court identified many reasons why a password hacking site may not be illegal.\(^44\)

Likewise, in *UMG Recordings*, the Central District of California held that knowledge that widespread infringement is taking place on a Web site is not a red flag that precludes application of Section 512(c).\(^45\) On appeal, the Ninth Circuit confirmed this ruling and rejected the theory of constructive knowledge arising from tagging music videos and purchasing search terms. In another case alleging red-flag knowledge, the Northern District of California rejected the argument that a red flag was shown from “the professionally created nature” of the submitted content or from the absence of required labeling.\(^46\) The court found persuasive the Ninth Circuit’s reasoning that even when material is described as illegal or stolen, the ISP should not have the burden of determining its legality.

Under EU law, the constructive knowledge requirement is similarly divided into a dual subjective-objective test, though the CJEU ruling suggests the threshold for constructive knowledge may not be as high in Europe. In the *L’Oréal* case against eBay, the CJEU noted that, in the case of facts or circumstances from which the illegal activity or information is apparent, it is sufficient for the ISP to have been aware of “facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b).”\(^47\) The knowledge elements of Article 14 “must be interpreted as covering every situation in which the provider concerned becomes aware, in one way or another, of such facts or circumstances.”\(^48\) The court gave practical examples of when the ISP will lose the exemption. For example, if an ISP discovers an illegal activity or illegal information as a result of its own investigation, or if an ISP is notified, it has constructive knowledge.

Notifications, however, could not automatically exclude the exemption. Notifications “may turn out to be insufficiently precise or inadequately substantiated.”\(^49\) The court held, however, that notifications remain a factor that national courts must take account of when determining whether an ISP was “aware of facts or circumstances on the basis of which [it] should have identified the illegality.”\(^50\)

The *L’Oréal* ruling on the threshold for proving constructive knowledge was reflected in decisions of the High Court of England and Wales, including *Davison v. Habeeb & Ors.*\(^51\) Interpreting the U.K. government’s regulations implementing the E-Commerce Directive\(^52\) and drawing on the CJEU’s observation in *L’Oréal* that insufficiently precise or inadequately substantiated notifications do not create constructive knowledge, the court decided that an ISP did not have actual or constructive knowledge of allegedly defamatory allegations when it was faced with conflicting claims between the claimant and the author of the allegations that the ISP was not in a position to adjudicate.\(^53\) It should be kept in mind, however, that a similar claim in the United States would not be considered under the DMCA but under the separate exemption regime of the Communications Decency Act.\(^54\)

The CJEU’s ruling seems to prescribe a less strict standard than that of the U.S. courts for an ISP to be held to have constructive knowledge, referring only to “facts and circumstances” rather than the U.S. courts’ search for “blatant factors.” The CJEU’s acknowledgment that the relevant facts and circumstances can arise from “every situation” in which the ISP becomes aware “in one way or
another” of those facts suggests a lower threshold for the ISP to be fixed with constructive knowledge. Nevertheless, the CJEU’s specification that the test for constructive knowledge is the objective “diligent economic operator” is consistent with the view of the Second and Ninth Circuits that red-flag knowledge must be assessed by reference to whether the infringement was objectively obvious to a reasonable person.

The law of the United States and the European Union on the exemption of ISPs from liability for hosting third-party material is based on similar legislative provisions, and the interpretations of those provisions made by U.S. and EU courts have maintained a largely similar approach. However, the EU courts appear to have a higher standard for an ISP to be considered neutral, and the standard for being held to have constructive knowledge appears to be less strict under EU law. Given the global nature of ISP operations, it is to be hoped that jurisdictions will maintain an awareness of one another’s laws and strive to maintain an equivalent exemption regime to the extent that cultural and legal differences permit.

3 17 U.S.C. §512(c).
8 Ellison v. Robertson, 357 F. 3d 1072 at 1078 (9th Cir. 2004).
9 Perfect 10, Inc. v. CCBill LLC, 488 F. 3d 1102, 1117 (9th Cir. 2007).
10 Id. at 1118.
13 Corbis Corp., 351 F. Supp 2d at 1110.
14 Hendrickson, 298 F. Supp. 2d at 918, quoted in Corbis Corp., 351 F. Supp. 2d at 1110.
21 Viacom Int’l, 676 F. 3d at 38.
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Google France, Google Inc. v. Louis Vuitton Malleter; Google France v. Viaticum SA and Luteciel SARL; Google France SARL v. CNRRH SARL and Others, Joined cases C-236/08—C-238/08, Judgment of the Court (Grand Chamber) of Mar. 23, 2010, ECR I-02417, ¶114 (2010).

Id. at ¶116, 117.

Id. at ¶118.

L’Oréal SA and Others v. eBay Int’l AG and Others, Case C-324/09, Judgment of the Court (Grand Chamber) of 12 July 2011, at ¶116 (2011).

Id. at ¶115.

Id. at ¶116.


UMG Recordings Inc. v. Shelter Capital Partners LLC., 718 F. 3d 1006, 1022 (9th Cir. 2013).

UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1109 (C.D. Cal. 1999); id. at 1023.


See UMG Recordings Inc., 718 F. 3d at 1023.

Viacom Int’l, 676 F. 3d at 31.

Id. at 35.


L’Oréal SA and Others v. eBay Int’l AG and Others, Case C-324/09, Op. of Jääskinen, A.G., at ¶167 (Dec. 9, 2010).

Corbis Corp. v. Amazon, 351 F. Supp 2d 1090, 1108 (W.D. Wash. 2004) (quoting 3 NIMMER ON COPYRIGHT §12B.04[A][1], 12B-49 (2002)).

Corbis Corp., 351 F. Supp 2d at 1109.


Perfect 10, Inc. v. CCBill LLC, 488 F. 3d 1102, 1114 (9th Cir. 2007).

Id.


L’Oréal SA and Others v. eBay Int’l AG and Others, Case C-324/09, Judgment of the Court (Grand Chamber) of 12 July 2011, at ¶120 (2011).

Id. at ¶121.

Id. at ¶122.

Id.

Davison v. Habeeb & Ors, No. HQ10D04366, EWHC 690 (QB) at ¶44 (Mar. 29, 2010).

L’Oréal SA and Others, Joined cases C-236/08—C-238/08, Judgment of the Court (Grand Chamber) of Mar. 23, 2010, ECR I-02417, ¶114 (2010).

Id. at ¶116, 117.

Id. at ¶118.

L’Oréal SA and Others v. eBay Int’l AG and Others, Case C-324/09, Op. of Jääskinen, A.G., at ¶146 (Dec. 9, 2010). The relevance of the neutrality requirement set out in recital 42 was also questioned in the High Court of England and Wales in Kaschke v. Gray & Anor, EWHC 690 (QB) at ¶44 (Mar. 29, 2010).

L’Oréal SA and Others, Case C-324/09, Judgment of the Court (Grand Chamber) of 12 July 2011, at ¶116 (2011).

Id. at ¶115.

Id. at ¶116.


UMG Recordings Inc. v. Shelter Capital Partners LLC., 718 F. 3d 1006, 1022 (9th Cir. 2013).

UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1109 (C.D. Cal. 1999); id. at 1023.


See UMG Recordings Inc., 718 F. 3d at 1023.

Viacom Int’l, 676 F. 3d at 31.

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Corbis Corp., 351 F. Supp 2d at 1109.


Perfect 10, Inc. v. CCBill LLC, 488 F. 3d 1102, 1114 (9th Cir. 2007).

Id.


L’Oréal SA and Others v. eBay Int’l AG and Others, Case C-324/09, Judgment of the Court (Grand Chamber) of 12 July 2011, at ¶120 (2011).

Id. at ¶121.

Id. at ¶122.

Id.

Davison v. Habeeb & Ors, No. HQ10D04366, EWHC 690 (QB) at ¶44 (Mar. 29, 2010).


The legal situation for ISPs in this situation may soon be clarified by the UK’s draft Defamation (Operators of Websites) Regulation 2013, available at http://www.legislation.gov.uk/uksi/2013/978011104620/pdfs /uksi_978011104620_en.pdf, which prescribes a notice and takedown procedure.

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ON TWO SATURDAYS—MARCH 8 AND 22—this course will be presented by Trial Advocacy and the Litigation Section and will offer an innovative and practical seven-step method for analyzing the admissibility of potential evidence. Participants receive a written summary of key rules of evidence, including key definitions and evidentiary presumptions, a user-friendly outline for raising and responding to hearsay objections, and a clear and concise summary of the complex rules regarding the admissibility of character evidence and evidence of specific instances of conduct. Written course materials will be distributed via e-mail prior to the first class. Please make sure we have your correct e-mail address at the time of registration. The program will take place at LACBA, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. Breakfast will be available at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 012203.

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Arguing for Restorative Justice as an Alternative to Mass Incarceration

IN THE UNITED STATES, the current incarceration rate is “markedly above the historical and comparative norm.” One scholar has argued that imprisonment has ceased to be about the “incarceration of individual offenders but rather the systematic imprisonment of whole groups of the population.”1 According to civil rights lawyer and professor Michelle Alexander, mass incarceration in the United States is “a stunningly comprehensive and well disguised system of racialized social controls similar to Jim Crow.”2 Alexander further claims that in 1982, when the administration of president Ronald Reagan initiated its war on drugs, national surveys showed that less than 2 percent of the American public viewed drugs as the most important issue facing the nation. Within a short time, however, the budgets of agencies responsible for drug treatment, prevention, and education were dramatically slashed while the budgets for FBI antidrug and federal law enforcement agencies soared. Although the causal connection between crime rates and imprisonment rates is still hotly debated, scholars worldwide have attributed the extraordinary increase in incarceration in the United States to three-strikes laws, habitual offender laws, and the war on drugs.3

Restorative Justice

Movements for restorative justice as a criminal justice reform measure have arisen in many countries in response to the harsh and impersonal type of retributive justice meted out against offenders in the name of the state. One famous example of restorative justice is the Truth and Reconciliation Commission (TRC) launched in 1995 by the South African government under Nelson Mandela. The commission sought to provide closure for perpetrators and victims of the apartheid era. The TRC was chosen to avoid the extremes of retribution and blanket amnesty. Restorative justice has been hailed as the model for countries that are ending internal war or ethnic conflict.

Through the TRC, perpetrators got a chance of being granted amnesty through public hearings while victims got a hearing on the abuses that they suffered. Victims could achieve closure and be eligible for reparations. This process is a departure from the traditional model of retributive justice, which has punishment as its central goal and in which the wronged party is the state. The retributive justice model requires little input from the victims and offers little consideration for the perpetrator. In contrast, restorative justice’s central concern is the restoration of community and the healing of breaches.

Juvenile Justice

In 2008, South Africa passed its Child Justice Act, which embraces restorative justice as the guiding value for its juvenile justice system. The act recognizes the concept of “ubuntu,” which emphasizes human interdependence and the connectedness of human relationships. New Zealand has also incorporated restorative justice processes into its presentencing conferencing in its district courts and made restorative justice the hub for its juvenile justice system.4

The central, practical concern of restorative justice is the healing of breaches, the restoration of broken relationships, and the redressing of imbalances between victim and perpetrator, who is given the opportunity to be reintegrated into the community.5 The promise of restorative justice is that it may offer a sophisticated model of transition from breach by the offender to his or her rehabilitation and restoration of the social order. In contrast, well-known formulations of retributive justice often ignore the social context in which crime arises and are miss-

A restorative justice model could ameliorate the harsh impact of our current penal system on youth.

1 DAVID GARLAND, ED., MASS IMPRISONMENT 1-2 (2001).
3 See, e.g., Nicola Lacey, American Imprisonment in Comparative Perspective, DAEDALUS 102, 107-8 (Summer 2010); Anthony Doob & Cheryl Webster, Countering Punitiveness: Understanding Stability in Canada’s Imprisonment Rate, 40 LAW & SOC’Y REV. 2, 354-8 (June 2006).
7 See Bruce Western & Becky Pettit, Incarceration & Social Inequality, 139 DAEDALUS 3, 8-9 (Summer 2010).

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