Transatlantic Law Journal

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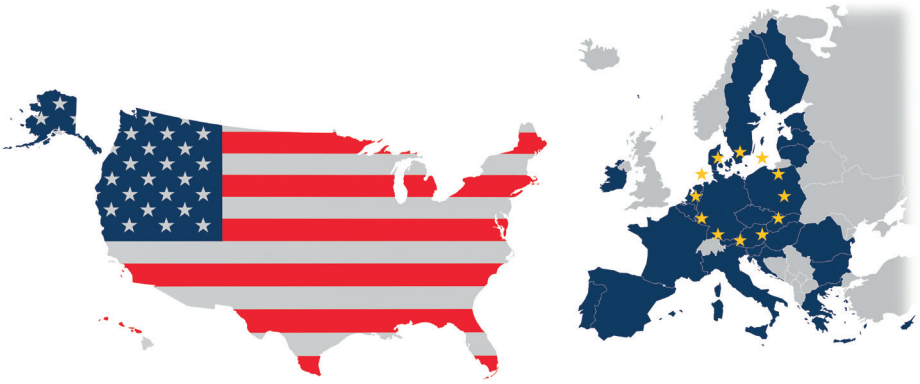

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In cooperation with DAJV
Deutsch-Amerikanische
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Unique guide to
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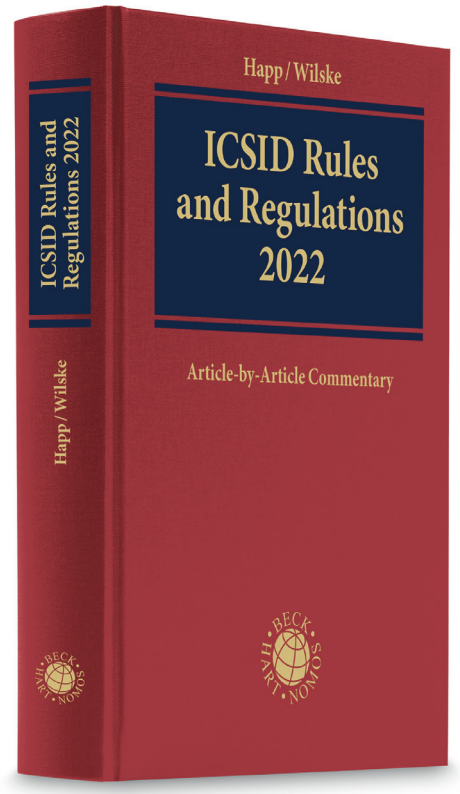

Happ/Wilske
ICSID Rules and Regulations 2022
Article-by-Article Commentary

2022
892 pages. Hardcover
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The 2022 ICSID Rules and Regulations

amendments mark the fourth amendment of the International Centre for Settlement of Investment Disputes' Rules and Regulations since 1968. They may be seen as the most extensive revision of them to date, especially since the significance of ICSID arbitration has been growing, as evidenced by the continuously increasing number of ICSID cases registered over the years.

The main objectives of the revision was to modernise, simplify and streamline the legal framework of ICSID proceedings. ICSID and its Member States achieved this by filling existing gaps, codifying international standards and practices, and by addressing specific ISDS concerns. A team of renowned practitioners and rising stars in the field of International Arbitration have analysed these updated frameworks – i.e., the ICSID Arbitration Rules, the Conciliation Rules, the Institution Rules as well as the Administrative and Financial Regulations – provision by provision to offer practical and theoretical guidance for experienced lawyers, as well as beginners in the field alike.

The Commentary also provides detailed background information on the amendment procedure of each provision and gives insight into whether, and if so, which, existing case law remains relevant to the application of the new Rules and Regulations. The Commentary is rounded off with reflections on various aspects of ICSID arbitration.

The editors and authors

Richard **Happ** and Stephan **Wilske,** the editors, are practicing lawyers and experts in ICSID arbitration.

The authors are practicing lawyers and academics with deep practical expertise in ICSID arbitration: Alexander **Bedrosyan,** Saadia **Bhatty,** Jeremy **Bloomenthal,** Karl-Heinz **Böckstiegel,** Bianca **Böhme,** James **Boykin,** Marc **Bungenberg,** Björn P. **Ebert,** Susan **Franck,** Amy **Frey,** Lindsay **Gastrell,** Ankita **Godbole,** Anne-Karin **Grill,** Richard **Happ,** Eva **Kalnina,** Swee Yen **Koh,** Barton **Legum,** Silvia **Marchili,** Lars **Markert,** Tatiana **Minaeva,** Enrique **Molina,** William W. **Park,** Tim **Rauschning,** Noah **Rubins,** Monique **Sasson,** Georg **Scherpf,** Sungjean **Seo,** Hi-Taek **Shin,** Lukas **Schultze-Moderow,** Laurence **Shore,** Cedric **Soule,** Nandakumar **Srivatsa,** Anna **Stier,** Anastasiya **Ugale,** Baiju **Vasani,** Stephan **Wilske,** Sebastian **Wuschka** and Alvin **Yeo.**

The editors were assisted by Ralf **Lewandowski** and Mathilde **Raynal.**

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Deutsch-Amerikanische Juristen-Vereinigung e.V.

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Editor in Chief:
Dr. Stephan Wilske (Responsible according to German press law), Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte, Steuerberater, Lautenschlagerstr. 21, 70173 Stuttgart
email: editors@tlj.law

Contact person for the publisher:
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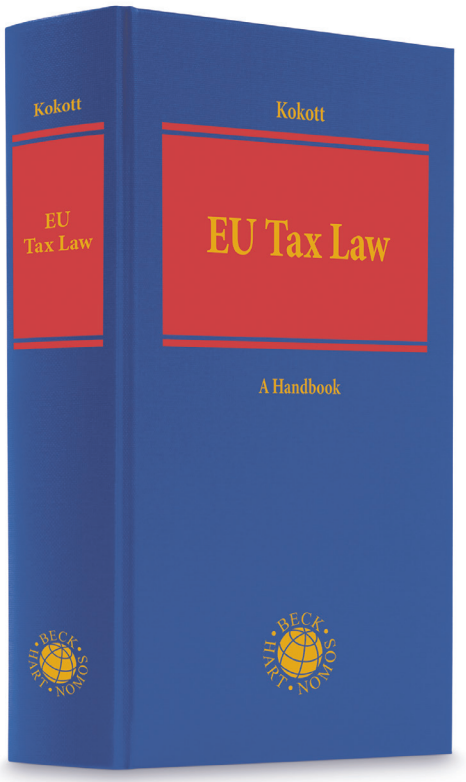

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The advantages at a glance

- comprehensive and systematic analysis of the vast body of ECJ case law
- focus the various EU tax law problems, including VAT
- includes the wider context of constitutional and international law

The author

Prof. Dr. **Juliane Kokott** LL.M. (Am. Univ.), S.J.D. (Harv.), holds the position of Advocate General at the Court of Justice of the European Union. Before joining the Court of Justice, she was professor of public (international) law at the universities of Augsburg, Heidelberg, Düsseldorf and St. Gallen and visiting professor at Berkeley Law. Since 2018, she co-chairs the ILA Study Group on International Tax Law.

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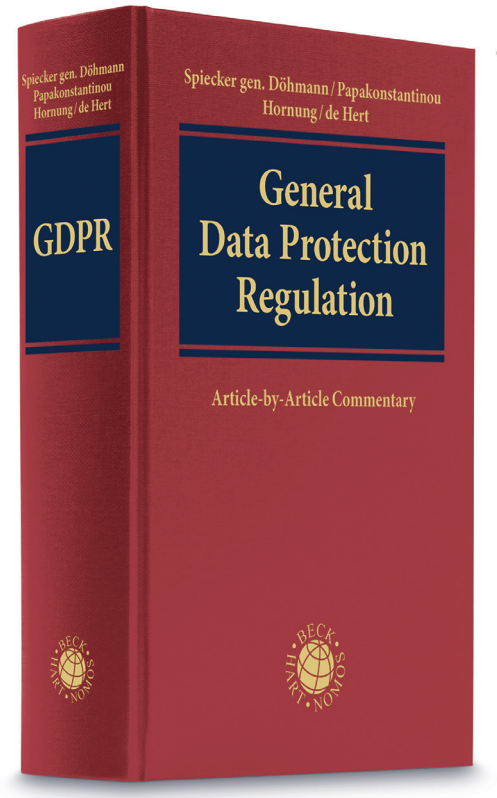

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Editorial

The TLJ – A Bridge over (at Times) Troubled Waters

Stephan Wilske
(Co-Chief Editor)

James H. Boykin
(Co-Chief Editor)

The farewell issue of the predecessor of the TLJ, namely the ZDAR, reminded its readers in 2018 of a speech of then Senator Barack Obama in Berlin on 24 July 2008.[1] The presidential candidate of those days was emphasizing that despite all challenges and controversies, neither America nor Europe should turn inward and that "[n]*ow is the time to build new bridges across the globe as strong as the one that bound us across the Atlantic*".[2]

And of course, there were challenges and controversies even during the tenure of the 44th U.S. President, who had been in power for less than eight months when he was awarded the Nobel Peace Prize for 2009. Allegations of U.S. spying and surveillance programs in Europe (even including high-ranking German politicians) caused some damage to transatlantic trust. Even in times of the

1 Obama's Speech in Berlin, The New York Times (24 July 2008), https://www.nytimes.com/2008/07/24/us/politics/24text-obama.html.

2 Obama's Speech in Berlin, The New York Times (24 July 2008), https://www.nytimes.com/2008/07/24/us/politics/24text-obama.html.

so-called historic turning point[3] – or *Zeitenwende*[4] – different geopolitical perceptions are often hardly covered up.

The EU managed to survive the populist wave by turning to its historical crisis-response strategy: Muddling through.[5] There is obviously concern in Europe that the U. S. may remain a widely divided country.[6]

With respect to climate change, European countries welcome the U. S. commitment to energy transition. However, they fear the U. S. Inflation Reduction Act (IRA) with its USD 369 billion of subsidies for electric vehicles and other clean technologies[7] which could put companies based in Europe at a disadvantage. In response, the European Commission presented its Green Deal Industrial Plan. Do we face increased competition to create manufacturing hubs for clean tech products with increased levels of state aid and all the accompanying issues?

Food issues are always sensitive in Europe as they deeply touch traditional culture and beliefs. Thus, we may expect many discussions when it comes to artificial meat or in vitro or lab-grown meat – probably an emerging industry.[8] In June 2023, two U. S. companies received final U. S. Department of Agriculture approval to sell lab-grown meat, paving the way for the nation's first-ever sales of the product. With these approvals, the United States will become the second country after Singapore to allow the sale of so-called cultivated meat, which is derived from a sample of livestock cells that are fed and grown in steel vats.[9] Again, Europe falls behind in what might be a future market and, as a consequence, European companies that want to invest in this business are starting to build up their production facilities in North America.[10]

Needless to mention that the global dominance of social media platforms by U. S. companies is a permanent issue of concern for European countries and societies. And the question whether and how to regulate artificial intelligence might be the next challenge.[11] Did we mention already the questions how to deal with hate speech (without crossing the line to censorship)? And deep-fakes and other issues of technical manipulation are obvious other challenges, in particular in times of political elections.[12]

Despite all these and other challenges, relations between Germany and the U. S. remain strong and continue to strengthen, in commerce, politics, and international cooperation.[13] Now that the global pandemic is (hopefully) past, transatlantic activity and cooperation is increasing. For instance, the German newspaper *Handelsblatt* reported in its issue of 27 April 2023 that while the U. S. company Carrier Global had acquired the crown jewels part of the landmark German company Viessmann, namely its climate division, for a purchase price of about USD 12 billion,[14] Robert Bosch GmbH

3 See *Norman Thatcher Scharpf*, The Transatlantic Partnership – United for Present and Future Challenges, TLJ Vol.1 No. 1 (2023), at p. 9.

4 The *Zeitenwende* speech was an address delivered to the Bundestag by Olaf Scholz, the Chancellor of Germany, on 27 February 2022, https:\\en.wikipedia.org/wiki/Zeitenwende_Speech. The Chancellor's speech was a reaction to the Russian invasion of Ukraine of 24 February 2022.

5 *The Editors*, As Challenges Mount, Can Europe Correct Its Course?, World Politics Review (22 May 2023), https:\\www.worldpoliticsreview.com/post-brexit-europe-populism-politics-eu-us-relations\.

6 One Nation, Too Divided?, KelloggInsight (6 September 2022), https://insight.kellogg.northwestern.edu/article/political-sectarianism-one-nation-too-divided. But see also *John Geer and Mary Catherine Sullivan*, How Politically Divided Is the U. S.? It's Complicated but Quantifiable, The Washington Post (7 June 2022), https:\\www.washingtonpost.com/politics/2022/06/07/public-opinion-polarization-partisan-republicans-democrats.

7 See *Inflation Reduction Act Guidebook*, https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/; see also *Summary: The Inflation Reduction Act of 2022*, https://www.democrats.senate.gov.

8 *Sghaier Chriki/Jean-François Hocquette*, The Myth of Cultured Meat: A Review, Frontiers (7 February 2020), https://www.frontiersin.org/articles/10.3389/fnut.2020.00007/full.

9 *Leah Douglas*, 'A new era': US regulator allows first sales of lab-grown meat, Reuters (21 June 2023), https://www.reuters.com/business/retail-consumer/upside-foods-good-meat-receive-final-usda-approval-sell-cultivated-meat-2023-06-21/.

10 *Katrin Terpitz*, "Meilenstein: USA erteilen Zulassung für Fleisch aus Zellkulturen" [*USA approves lab-grown meat*], Handelsblatt 22 June 2023, https://www.handelsblatt.com/technik/forschung-innovation/ernaehrung-meilenstein-usa-erteilen-zulassung-fuer-fleisch-aus-zellkulturen/29220512.html.

11 See Last Words by Dr. Strangelaw, TLJ Vol.1 No. 1 (2023), at p. 47; see also *Victor Li*, What Could AI Regulations in the US Look Like? (14 June 2023), https://www.abajournal.com/legalrebels/article/rebels-podcast-episode-089.

12 *Isha Marathe*, Turbocharged by Election Season, Deepfakes May Soon Face Legal Reckonings, ALM LAW.COM (27 June 2023), https://www.law.com/2023/06/27/turbocharged-by-election-season-deepfakes-may-soon-face-legal-reckonings.

13 In 2019, bilateral trade in goods and services between the U. S. and Germany totaled nearly USD 260 billion, with U. S. exports of USD 96.7 billion and imports of USD 162.9 billion. See, U. S. Relations With Germany, U. S. Dept. of State (21 June 2021), https://www.state.gov/u-s-relations-with-germany/.

14 *Catiana Krapp/Anja Müller/Julian Olk*, "Es hätte noch attraktivere Angebote gegeben" [*There were even more attractive offers*], Handelsblatt (27 April 2023), p. 24.

had acquired at around the same time a chip production facility of the California company TSI Semiconductor for about USD 1.5 billion.[15] Obviously, transatlantic economic cooperation, alliances and reciprocal investment are evidence that the transatlantic partnership has deep roots built on shared values (and not only on parallel economic interests), which can withstand present and future challenges.

The TLJ's intention and vision is to accompany transatlantic legal practice and relevant developments, to try to explain these where possible and – slightly pretentious – provide guidance where appropriate.

As lawyers we should always be aware that – as recently highlighted by an op-ed in the New York Times – if one had to advise people on how to really understand the United States, it might be better to suggest watching all forty-four seasons of "Survivor" instead of reading the Declaration of Independence because some pieces of culture – deliberately or not – are so revealing of a country's essence that they can provide more insight than foundational texts.[16]

In spite of an appreciation for such curiosities, this editorial will not discuss to what extent wisdom from Bob Dylan has shaped decisions of the California appellate courts, or when and why U. S. Supreme Court Chief Justice Roberts invokes Jimi Hendrix at Woodstock.[17] However, we will keep in mind the influence of culture on legal developments, in particular in the vivid transatlantic context. We will also not shy away from giving voices from other parts of this globe a platform to share their experience. And when "*it gets dark, too dark for us to see*",[18] we offer the column of Dr. Strangelaw to provide us with intellectual shelter or, at least, a chance to create awareness for a seemingly awkward legal position.

The mission of the TLJ is to explore (sometimes strange) new legal developments on both sides of the Atlantic, to seek out new developments and new achievements, and to boldly go where no one has gone before. We invite our readers to follow us on this mission, to become involved and to participate in shaping legal relationships on both sides of the Atlantic.

Thus, in the spirit of a contemplative song from the British-American supergroup from the 1980 s, the Traveling Wilburys' "*End of the Line*", we invite our readers to "*lend a hand*" while we're "*doin' the best we can*".[19]

*Stephan Wilske and James H. Boykin, Stuttgart and Washington, D. C.**

15 *M. Buchenau/F. Holtermann/J. Hofer*, "Bosch investiert Rekordsumme" [*Bosch is investing record amounts*], Handelsblatt (27 April 2023), p. 22.

16 *Lydia Polgreen*, Opinion Today: "Survivor" and other Cultural Works that Define America, The New York Times (20 June 2023), https://www.nytimes.com/interactive/2023/06/20/opinion/nyt-columnists-culture.html.

17 But see *Stephan Wilske*, This is the End … oder: Into the Great Wide Open? Unterschiedliche Inspirationen der Rechtsauslegung auf beiden Seiten des Atlantiks, Zeitschrift für Deutsches und Amerikanisches Recht (ZDAR), July 2018, 87.

18 See Bob Dylan's classic song "*Knocking on Heaven's Door*", written for the soundtrack of the 1973 film "*Pat Garrett and Billy the Kid*" and released as a single two months after the film's premiere.

19 "*End of the Line*" is a song by the British-American supergroup The Traveling Wilburys. It was their final track on their debut album *Traveling Wilburys Vol. 1*, released in October 1988. The song was written by Bob Dylan, George Harrison, Jeff Lynne, Roy Orbison and Tom Petty. It was used over the end credits of the final episode of the British sitcom "*One Foot in the Grave*" and the American comedy "*Parks and Recreation*". Most recently, the song was used in the trailer for the 2023 Tom Hanks movie, "*A Man Called Otto*".

* Dr. Stephan Wilske, FCIArb is a Partner in the dispute resolution department of Gleiss Lutz, Stuttgart, Germany, and heads the firm's International Arbitration Focus Group. He is admitted to the bars of Germany, New York and the U.S. Supreme Court, and lecturer at the Universities of Jena and Heidelberg. James H. Boykin is Chair of Hughes Hubbard's International Arbitration practice group in the Washington, D.C. office of Hughes Hubbard & Reed. His practice focuses on international arbitration and includes state-to-state and investor-state arbitration as well as commercial disputes.

Welcome Words

Foreword

Seventy-five years ago, the groundwork of the German constitutional order, which over the decades has provided the citizens of our country a secure foundation for the pursuit of happiness, was laid at the Constitutional Convention at Herrenchiemsee. The convention had its genesis in the appeal by the Western Allies for a constitutional assembly that was formally conveyed to the Minister-Presidents of the West German *Länder* on 1 July 1948. This day is widely regarded as the Federal Republic of Germany's "hour of birth". From that point onward, the fate of our country has been inextricably linked to that of the former Western Allies – particularly the United States of America.

Today, we find ourselves faced with crises and challenges of a global scale. The urgent need to adapt our way of life to the exigencies of climate protection and the economic transformation that entails, not to mention geopolitical shock waves such as Russia's unlawful war of aggression against Ukraine, make it all the more important for the forces of freedom and democracy to come together. Against this backdrop, it is becoming clear that a further deepening of the already close transatlantic ties of friendship between the United States of America and Germany will be needed in the decades to come.

The resulting interconnectedness of our lives will give rise to a number of novel legal issues that may run the gamut from overarching questions of constitutional significance to the minutiae of commercial law, the answers to which will be of great interest to legal scholars and practitioners alike. The *Transatlantic Law Journal* aims to provide a platform for the analysis and discussion of these issues and thus offer judges and attorneys, public administrators and legal departments and also legal scholars and law students, on both sides of the Atlantic, a valuable tool for finding solutions to such conflicts. In this spirit, the founding of this journal carries with it the not so modest hope that it will make a small contribution to transatlantic legal relations and thereby indirectly help to facilitate the resolution of global challenges. May this be accomplished in a framework of peace, freedom, democracy and the rule of law.

*By Stephan Harbarth, Karlsruhe**

* Prof. Dr. Stephan Harbarth, LL.M. (Yale) is President of the German Constitutional Court (*Bundesverfassungsgericht*).

Why a TLJ?

With this first issue of the *Transatlantic Law Journal* (TLJ), the German-American Lawyers' Association (*Deutsch-Amerikanische Juristen-Vereinigung* – DAJV) once again has its own legal journal. In doing so, we are continuing a tradition of more than forty years, but at the same time breaking new ground.[1]

On 1 September, 1975, the first issue of the then DAJV-Newsletter was published. The newsletter quickly developed into a legal journal. From 1986 onwards, this also became clear in the layout, and from 2014 onwards in the new designation as *Zeitschrift für deutsches und amerikanisches Recht* (*Journal of German and American Law*). Regrettably, it was not possible to continue the journal beyond 2015 in the familiar form. In 2018, a farewell issue was published.[2] Since 2020, the DAJV has published the *Transatlantic Legal Blog*. That online offering will continue apace and will now

1 See *Reimer von Borries/Sebastian Mock*, 40 Jahre DAJV im Spiegel der Vereinspublikation, Zeitschrift für Deutsches und Amerikanisches Recht (ZDAR), July 2018, 3-4.

2 See *Sebastian Mock/Stephan Wilske*, ZDAR Abschiedsausgabe/The Farewell Issue, Zeitschrift für Deutsches und Amerikanisches Recht (ZDAR), July 2018, 2.

be complemented by the publication in print of the *Transatlantic Law Journal*. The TLJ goes beyond earlier projects in terms of concept and objectives:

- An excellent German-American editorial team, coordinated by Stephan Wilske and James H. Boykin, is responsible for the content of the TLJ.
- An editorial board of renowned personalities, who are particularly committed to German-American exchange, provides advice.
- The publishing house C. H. Beck is a committed strategic partner who contributes its experience and know-how.
- The journal targets a readership that extends beyond Germany and is therefore published almost exclusively in English.
- The project is based on the resurgence in awareness of the importance of transatlantic legal relations particularly in light of recent geopolitical events.

The DAJV has a statutory mandate to promote German-American legal exchange, and this journal is an important part of discharging that mandate. At the same time, however, the issues at stake are not limited to German-American relations. Rather, they implicate more broadly the legal relations between Europe and North America at a time when those regions' shared commitment to democracy and the rule of law seems at times to be increasingly under threat. It is for this reason that the DAJV has elected with this publication to address a broader audience beyond its membership with the hope of capturing that audience's interest and attention to its work. And, last but not least, personally and on behalf of the DAJV, I would like to express my utmost gratitude to each and every one of those who contribute to this project: the editorial team, the editorial board and the publisher!

*By Thomas Pfeiffer, Heidelberg**

* Prof. Dr. Dr. h. c. Thomas Pfeiffer is President of the DAJV and Director of the Institute for Comparative Law, Conflict of Laws and International Business Law of the Heidelberg University.

A Warm Welcome to the TLJ

Few would quarrel with the proposition that countless aspects of modern life take place against a global backdrop, rather than one that is merely regional, national, or local. Everything from the details of private life – the food we eat, the sources of the energy we consume, our methods of communicating with one another, where and how we are educated, critical matters of public health, the protection of personal privacy – to the regulatory scaffolding that structures our societies, and finally to broad questions of peace and security, has a transnational, and often an international, dimension. In light of that modern reality, nothing could be more essential than an effective mechanism through which scholars, public officials, and practicing lawyers can wrestle with these issues and benefit from one another's experiences. The *Transatlantic Law Journal* has been created for just that purpose – and not a moment too soon.

Although it is easy to point to differences in our legal systems – the United States largely follows the Anglo-American common-law model, while continental Europe adheres to the civil law system (whether based in Roman law, the Napoleonic Code, or other variations) – those differences relate more to the details about the way in which we all attempt to follow and to advance the Rule of Law, than they do to the underlying philosophy we all share. In that sense, the differences might seem to be unimportant. But our problems are the same: they stem from the same sources, and they impose similar burdens on our societies. Working in isolation, each country and region has tackled them as well as it could.

But there is a great opportunity in these different approaches, and it is one that the TLJ will enable us to exploit. In its pages, we will learn about the approaches different legal systems have taken, how well they have worked, and what types of rules or institutions are beneficial. The exchange of experience will enrich everyone. And this exchange will not be limited to the articles alone. We can look forward to collaborations, co-authorships, symposia inspired by issues of TLJ, and the creation of long-term friendships, all of which will advance the goals of the *Journal* in an even more durable way.

I anticipate eagerly the scholarly output that this new journal will facilitate, and I give my most sincere congratulations and thanks to the many people whose efforts have brought it this far.

*By Diane P. Wood, Chicago**

* Diane P. Wood is a Circuit Judge on the United States Court of Appeals for the Seventh Circuit. She also serves as a Senior Lecturer in Law at the University of Chicago Law School, and as the Director of the American Law Institute.

Welcome Note

Sometimes when something brand new appears, we say to ourselves, "how is it that no one came up with this before"? Such is the case with the *Transatlantic Law Journal* (TLJ). We simply never knew what we were missing. But in fact the case for a scholarly journal closely examining the multitude of ways in which transatlantic relations, legal or otherwise, are conducted is a compelling one. The TLJ is destined to cast a brilliant spotlight on one of the most important and fast-changing arenas in the contemporary world. Its advent is to be warmly welcomed.

*By George A. Bermann, New York**

* George Bermann is the Walter Gellhorn Professor of Law and Monnet Professor in European Union Law, as well as the director of the Center for International Commercial & Investment Arbitration at Columbia Law School.

First Issue of the Transatlantic Law Journal

Dear readers, colleagues, and fellow enthusiasts of the law,

It is truly an honor to have been asked to author this welcome message for the inaugural issue of the *Transatlantic Law Journal*.

The launch of this journal marks a significant milestone. It is the start of a new platform, where legal minds from different nations and cultures can share their expertise, viewpoints, and research findings – enriching our understanding of a constantly evolving legal landscape.

As Chair and Managing Partner of Gibson Dunn, I have witnessed firsthand that working together across oceans, practices, and perspectives leads to extraordinary results that no one person could achieve alone. Our teams bring the best talent from around the firm – leveraging our experience globally to facilitate cross-border transactions, resolve disputes, and provide insights on current and anticipated regulatory frameworks. And by working collectively, we are able to accomplish great things for our clients.

That same type of teamwork among thought leaders is exactly what this journal seeks to foster.

We can all benefit from the knowledge of our colleagues – whether they are next door or a continent away – as we navigate the complexities of emerging technologies and changing political and economic climates around the world. By nurturing cross-cultural competence and dialogue, we can build bridges, foster greater understanding, and work together to reach new heights.

The *Transatlantic Law Journal* will play an important role in this endeavor. I hope it will inspire innovative solutions and spark important discussions.

I extend my heartfelt congratulations to the publishers, editors, contributors, and supporters of this journal as we celebrate its inaugural edition. And I look forward to all that is still to come.

*By Barbara L. Becker, New York**

* Barbara L. Becker is Chair and Managing Partner at Gibson, Dunn and Crutcher LLP, New York.

Alumni Associations in the U. S. – Revisited

In the Farewell Issue of ZDAR in July 2018,[1] I gave a brief outline in German on alumni associations in the U. S. The new *Transatlantic Law Journal* has prompted me to take up the topic again, now in the English language.

In my contribution to the Farewell Issue on "Alumni Associations in the USA", I tried to describe the importance of alumni associations for law schools in the U. S., and how this concept transferred across the Atlantic Ocean to us. I then also mentioned alumni associations of law firms, as well as the Harvard Law School Association of Germany, an association I have been a member of for years and of which I was president for a long time. I followed the outbreak of the pandemic in 2020 with concern. That even raised questions as to how to develop business and practice international business law in the midst of a global pandemic. I wrote an editorial on this topic titled "International Business Law and Business Development in Times of Pandemic" in IWRZ.[2] Looking back, the pandemic lasted much longer than we initially thought. As we are all painfully aware, it had a significant impact on almost everything in our daily lives, especially concerning international business transactions and the associated travel, which I also wrote about in detail in an editorial in the IWRZ 2022 titled "International Business Law and Business Development in Times of Pandemic – Revisited".[3] I would urge readers to read these two editorials. The reason as to why I refer to these editorials is that, as it now turns out, many of the alumni associations of American law schools have returned to hosting in-person conferences or are planning to do so again. In my opinion, it is of utmost importance to actively participate in alumni associations and to attend meetings in person. There is no substitute to gathering in person if you wish to meet and exchange ideas with lawyers from different fields, different countries, and different generations. Video conference technology allowed us to maintain contact during the height of the pandemic, but experience has shown that it is an "Ersatz" (in the English sense of the word, *i. e.* an inferior substitute) for assembling and exchanging ideas in person.

At this point, I would like to call on all German lawyers, as well as of course Americans and third-country nationals who are members of alumni associations, to take up the thread again and participate in such in-person events. If there are no American law school alumni associations in Germany, as is the case with many, then the DAJV (German-American Lawyers' Association) will take on the role of a "surrogate" for alumni associations. I hereby repeat my appeal to the readers of the *Transatlantic Law Journal* to make the effort to personally attend the meetings of the DAJV, whether you are in Germany or in the U. S., in order to establish and/or strengthen existing personal relationships that can only truly be developed when meeting face-to-face.

Thus, please take advantage of the opportunities offered by the alumni associations, the DAJV, as well as the *Transatlantic Law Journal*. Let me personally say that I have been active in transatlantic business for more than 40 years, and I think it is essential that we maintain and intensify the dialogue especially among lawyers.

I mention in this context also the important role of the AmCham Germany (American Chamber of Commerce in Germany), which now already exists for exactly 120 years, and of which I am the Regional Chapter Chair for Baden-Wuerttemberg. You may find a short Welcome Note of the AmCham in this inaugural issue.

The times we live in are difficult. We must navigate in a multipolar world, and there are serious challenges also for the transatlantic community ahead. That is why it is important to keep in mind

1 *Gerhard Wegen*, Zu Alumni Associations in den USA, Zeitschrift für Deutsches und Amerikanisches Recht (ZDAR), July 2018, 83 *et seq*.
2 *Gerhard Wegen*, Internationales Wirtschaftsrecht und Business Development in Pandemie-Zeiten, Zeitschrift für Internationales Wirtschaftsrecht (IWRZ), Vol. 5 2020, 193.
3 *Gerhard Wegen*, Internationales Wirtschaftsrecht und Business Development in Pandemie-Zeiten – Revisited, Zeitschrift für Internationales Wirtschaftsrecht (IWRZ), Vol. 4 2022, 145.

alumni associations, or as previously explained, the DAJV too, which can offer such suitable platforms to (re-)connect with colleagues, therefore, please participate.

I wish the *Transatlantic Law Journal*, its editorial board, and its editors great success.

*By Gerhard Wegen, Stuttgart**

* Prof. Dr. Gerhard Wegen, LL.M. (Harvard), Attorney-at-Law (New York); admitted to practice in Germany and New York, as well as several federal courts up to the U.S. Supreme Court; Of Counsel at Gleiss Lutz in the Stuttgart office.

Welcome Note

As Chairpersons of the Corporate and Business Law Committee of the American Chamber of Commerce in Germany,

we feel honored and pleased to contribute a welcome note to this first issue of the *Transatlantic Law Journal*.

Today, the need for a platform facilitating exchange between academics and legal practitioners focusing on legal topics relevant for transatlantic relations is undeniable. We are living in a world that is marked by global economic disruptions and geopolitical challenges. The dynamic between the global political blocks increases the importance of transatlantic collaboration as a decisive factor for global order and stability. While economic dependencies on certain global players are revisited in the processes of "decoupling" and "de-risking", the ties between Europe and the U.S. are close and reliable. To foster this cooperation, an alignment on central legal concepts and procedures is necessary. Therefore, it is positive that the *Transatlantic Law Journal* is not only focusing on business topics, but also will cover the whole range of Public and Constitutional Law.

Beyond those genuine political aspects, many very practical and tangible topics in our day-to-day lives as lawyers and decision-makers in globally active firms deserve and require a joint effort by the legal communities on both sides of the Atlantic. Bankers are confronted with a fragmented regulatory landscape and diverging standards in accounting and regulation as well as complex "equivalence decisions" between jurisdictions. Lawyers not only must deal with different legal systems, but increasingly must take global risks into account and offer reasonable legal solutions to mitigate those risks. Beyond all of this, new segments of law will emerge, that will require common standards or at least common mechanisms for alignment and interpolation. In this context, the complex challenges of pursuing global de-carbonization is a noteworthy example. Globally active companies are confronted with different sustainability standards and taxonomies as well as diverging and potentially conflicting incentives, such as the differences between the "EU Green Deal" and the "U.S. Inflation Reduction Act". The digital transformation and the use of Artificial Intelligence offer further aspects which require alignment and consent between the transatlantic partners and their respective legal communities.

The *Transatlantic Law Journal* fulfils all prerequisites to succeed in reaching its mission statement of being an academic journal to foster transatlantic cooperation. The list of contributors is impressive and includes reputable and high-ranking representatives from the most relevant legal professions. We are very confident that with those starting conditions, the TLJ will be able to reach and achieve both of its aims: high academic standards and practical relevance.

*By Denise Bauer-Weiler and Robert Weber, Frankfurt**

* Dr. Denise Bauer-Weiler and Dr. Robert Weber are Co-Chairs of the Corporate and Business Law Committee of the American Chamber of Commerce in Germany e.V.

Articles

By Norman Thatcher Scharpf, Frankfurt am Main*

The Transatlantic Partnership – United for Present and Future Challenges

We stand at a critically important juncture in history. Over the past year, as the world united to confront ongoing threats to democracy and human rights, we saw clearly the strength and solidarity of the transatlantic relationship and its vital importance – not just as a source of present-day jobs and prosperity, but also as a lever to advance economic and strategic priorities and to make our nations, and the entire world, more secure for the future.

As Consul General of the largest U. S. diplomatic post in Europe, with more than 1,000 employees from thirty-nine different U. S. government agencies and sub-agencies, I see and feel the importance of our transatlantic relationship every day. Every day, I witness the cultural, business, and familial ties that bind our two societies together. Those ties are rooted in our shared values, which form the foundation of the transatlantic partnership that has maintained our rules-based international order for more than seventy years.

All too recently, some have taken the U. S.-German, and more broadly, the U. S.-European, relationship for granted. Today, we see clearly what we can – what we must – achieve together.

More than one year ago, when Putin launched Russia's brutal full-scale invasion of Ukraine, he was sure Russia's capture of Kyiv would only take a matter of days. But the United States and Germany joined to help the brave and determined people of Ukraine prove Putin wrong. In response to Russia's full-scale invasion, Chancellor Scholz invoked a historic turning point – a *Zeitenwende* – that has reframed Germany's role with respect to providing for transatlantic, and global, security.

Putin was sure he could exploit Russia's network of natural gas pipelines – such as "Nordstream 2" – to coerce Europe to look the other way as he conducted his war to wipe independent Ukraine off the map. But Germany stepped up and proved Putin wrong by turning down thermostats, developing new sources of energy, and reducing its dependence on Russian energy sources.

Putin misjudged everything – from our solidarity in standing strong against his illegal invasion of a sovereign European state, to the willingness of community, civil society, and business leaders in our countries to take a stand for democracy and the principles of sovereignty and territorial integrity that undergird international security over short-term interest and profits.

What we have experienced over the past year exemplifies the power of what can be achieved when democratic allies, despite our individuality and uniqueness, freely choose to unite in response to the world's most pressing global problems. Today, we are more united and resolute than ever, and the strength of U. S.-German partnership is the source of my optimism for the years ahead.

Our transatlantic solidarity is central to three of the most consequential areas in which our transatlantic partnership delivered in 2022, and which remain critical in our joint course of action in the coming months:

First, our solidarity in delivering ongoing support to Ukraine;

Second, in increasing awareness of the systemic challenges posed by the People's Republic of China (PRC) to our transatlantic and international security;

And third, in utilizing our strong economic ties to develop shared approaches to great global challenges.

We have come together to provide military, economic, and humanitarian support to Ukraine. Our collective support – whether in the form of tanks, critically needed ammunition, or shelter provided to refugees fleeing Russia's barbaric atrocities – is enabling Ukraine's courageous fighters to retake more of Ukraine's territory and defend their independence and their democracy. When we help independent, democratic Ukraine defend itself, we are also defending global peace and advancing the cause of freedom.

As Germany cut its dependence on Russian gas over the past year in response to Russia's full-scale invasion, German industry and society proved more adaptable than Putin expected. Germany weathered the crisis and became more resilient. The mild winter helped, but so too did prudent policy decisions with rapid implementation. The people of Germany played an essential role in that – making their own sacrifices, housing refugees, and adapting German businesses to better support Ukraine. We have helped support states like Germany as they shift away from Russian energy through joint initiatives like the U. S.-EU Task Force on Energy Security.

As President Biden clearly states, we will be with Ukraine for as long as it takes. Our support for Ukraine's self-defense is fundamentally about the ability of Ukraine's citizens to freely determine their country's future. Ukraine is defending that, right now, through success on the battlefield, with the support of the G7 and other countries. We are helping to repair, replace, and defend Ukraine's energy infrastructure, including by providing Ukraine with advanced air defense through precision systems like the Patriot missile battery.

* Norman Thatcher Scharpf is Consul General at the U. S. Consulate General in Frankfurt am Main. This article is based on a speech that Consul General Scharpf gave at the German-American Lawyers' Association (DAJV) Transatlantic Legal Conference in Frankfurt am Main on 17 March 2023.

And we will continue to help Ukraine succeed on the battlefield to put President Zelenskyy in the strongest possible position, when and should Ukraine choose to enter negotiations.

The second area of increasing transatlantic unity is around our joint recognition of the challenge posed by the PRC to the rules-based international order. For more than seventy years, the commitment to upholding the UN Charter has undergirded security, and unprecedented prosperity – not just for the United States, the countries of Europe, and other democracies, but, more broadly, for hundreds of millions of people lifted out of poverty in Africa and Asia.

The PRC is the only country with both the intention to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it. This is the same order that helped lift hundreds of millions of Chinese citizens out of extreme poverty over the past four decades. The PRC's repressive and undemocratic actions at home, and increasingly abroad, threaten the security upon which we all rely, unless democratic allies and partners throughout the globe stand together.

The United States is committed to continuing to manage the relationship with the PRC responsibly. We will continue to pursue cooperation with the PRC on issues that serve the common good of our people and the good of people around the world, such as climate change and biodiversity. We will engage constructively with the PRC wherever we can, always in line with our principles, because working together to solve great challenges is what the world expects from great powers, and because it is directly in our interest.

But we and our Allies and partners also must defend our interests and meet the challenge posed by the PRC. How? By each of our countries investing more in the foundations of our strengths at home, cooperating with our trusted partners to reinforce democracy, human rights, and a level economic playing field, supported by the rule of law. This is the only way to ensure growth and security, both at home and abroad. As the PRC continues to export its authoritarian practices around the world and target individuals through its global campaign of transnational repression, we must work together with our Allies and partners to stand up for democratic values and human rights.

Through continued, honest engagement, the United States and Europe are working together – not to decouple from our economic relationships with the PRC, but to diversify and de-risk in those relationships. We are expanding trade and investment opportunities among reliable partners, creating better job opportunities throughout the world, and developing a more robust defense of human rights.

One key source of our strength is an extensive trade relationship rooted in free-market principles and the rule of law. Germany is one of the United States' most significant economic partners – and our biggest in Europe. Germany is the second-largest source of foreign direct investment into the United States, and the United States is the largest foreign direct investor in Germany. Looking more broadly, the United States and the EU together account for about 25 % of global trade, and we combine to produce almost 50 % of the world's GDP.

We will over time have our differences, such as over terms of trade, across certain categories of goods and services, and even over more complicated issues like data transfers. But rules-based economies can rely on shared history and values to work through even the most intractable issues. One way that we have been addressing complicated issues is through the U. S.-EU Trade and Technology Council (TTC). The TTC is the essential platform for advancing transatlantic cooperation and synchronizing democratic approaches to trade, technology, and security. As a forum for shaping the rules, norms, and standards on trade and technology, the TTC plays a critical role in our shared prosperity and in the global economy.

Together, we are countering non-market policies and practices that undermine our businesses and workers in the global trading system. Through the TTC, we have launched a pilot exchange to simplify transatlantic trade for exports, and re-exports, of dual-use items and sensitive technologies, while ensuring appropriate protection against misuse. We also launched a new Transatlantic Initiative on Sustainable Trade to identify actions in key areas of trade and environmental sustainability that support our shared goals of a green and sustainable future and to increase transatlantic trade and investment.

In December, the TTC previewed a roadmap for developing and implementing trustworthy artificial intelligence, a rapidly evolving sector that demands an equally evolved set of policies. Looking forward, the TTC is developing tools for further cooperation on new and emerging technologies.

The U. S. and EU have also deepened cooperation through the TTC to address the misuse of technology to target human rights defenders (HRDs). In December, we released a joint statement on protecting HRDs online, and we are developing public guidance in 2023 on how companies can effectively collaborate and coordinate with civil society and HRD protection providers to identify, address, mitigate, prevent, and enable access to remedy for digital attacks targeting HRDs.

These are just a few areas that exemplify the ongoing work we are undertaking to strengthen the foundation of our transatlantic ties and to face challenges pragmatically, head on, and to turn them into opportunities.

That has also been our approach to the third key area of our partnership: collaborating to solve the greatest global challenges. From addressing climate change, to improving public health, to expanding inclusive economic growth, both the United States and Germany have joined broad-based coalitions dedicated to delivering solutions. By working with each other, we can pool our creativity and innovation to solve problems together.

The value of this collaboration was illustrated recently by Germany's success in constructing a new liquefied natural gas terminal in record time. The first direct shipment of liquefied natural gas from the United States arrived at the Uniper terminal in Wilhelmshaven on 3 January 2023.

On both sides of the Atlantic, we are making bold investments in clean energy, to build industries of the future, including investments in battery and green hydrogen technologies.

In the United States, the bipartisan Infrastructure Law, the CHIPS Act, and the Inflation Reduction Act (IRA) provide

the legal foundation for unprecedented investments in infrastructure and a green economy.

It is in our mutual interest that both the United States and Europe have a strong, clean-energy industrial base and meet the clean-energy needs of the future. President Joe Biden and European Commission President Ursula von der Leyen concurred that the principles of accelerating the global clean-energy economy, and building resilient, secure, and diversified clean-energy supply chains, are at the heart of the IRA. That is why the United States and the European Commission continue to coordinate our respective incentive programs so that they are mutually reinforcing.

We are committed to building a stronger transatlantic partnership around: energy security; climate ambition; and resilient, reliable supply chains. This partnership undoubtedly will succeed because of the power of our people, and our businesses, to innovate and to adapt, and because of the rules-based system that the legal community helps to protect. These strengths are the core of our dynamic, democratic societies. These strengths build a foundation of trust for the transatlantic countries to continue to work together and to turn global challenges into constructive opportunities. When we stand united in the face of crises, we focus our hearts and our minds on solving the problem at hand.

As Russia continues waging an unprovoked and unconscionable war against its democratic neighbor, and as the PRC seeks to rewrite the rules of the international order, it will be up to all of us to continue working creatively together. It is up to us to demonstrate that by collaborating with the broadest possible set of partners, democracies deliver for their citizens. It is up to all of us to deliver with, and for, our people, and in the process, for others around the globe.

As we look back at the enormous challenges and hardships since 2022, we can declare that we have worked together; and that by working together, we have delivered – for our countries and for our citizens. And it is precisely this creative unity – above all else – that makes me optimistic for the future. I look forward to continuing this cooperation to face the challenges of tomorrow. ■

By Allison Torline and Stephan Hudetz, Frankfurt am Main*

The New, Friendlier Space Race

– An Overview of Transatlantic Competition/Cooperation and Applicable Legal Regimes –

Thinking about the space race today, perhaps your first thought goes to a man's famous "one small step" and the heated competition between the United States and Soviet Union during the 1960s. However, a renewed interest in outer space has been developing, especially in the United States and Europe. The U. S. has been leading this growth, having reached a "fever pitch" in 2021. In that year, the global space market grew to approximately USD 469 billion.[1] Whereas U. S. investment in the space industry decreased in 2022,[2] European investment grew by roughly 23 % to 1.1 billion EUR, with the biggest markets in the United Kingdom, France, and Germany.[3] This rapid growth over the past ten years has largely been driven by an increase of private actors as well as public-private partnerships, particularly in the satellite industry. It is projected that the space economy could grow to USD 1 trillion by 2030,[4] leading the authors to conclude that the world is engaged in a new (albeit friendlier) space race.

With this article, we take a closer look at the space industry to find out whether the U. S. and Europe are competitors or co-explorers in the new space race. We then examine the current legal regimes in place to support the space economy and how legal regulations need to be updated to keep up with today's modern space industry.

I. Comparing the U. S. and European Space Markets

1. The U. S. Space Market

The U. S. government has been a major contributor to space-related ventures, with the National Aeronautics and Space Administration (NASA) at the forefront of space exploration.[5] NASA is currently pursuing a variety of initiatives in space exploration but the current focus is on the Artemis Program.[6] This program *inter alia* aims to establish a sustainable human presence on the Moon by the end of the decade.[7] Under the Artemis Program's umbrella, NASA has established partnerships with several private companies, including Elon Musk's SpaceX.[8] For example, NASA is part-

* Allison Torline is Counsel at Busse Disputes, an arbitration and litigation boutique located in Frankfurt am Main, Germany. She is admitted to the New York bar and obtained her J. D. from The George Washington University Law School. Stephan Hudetz is a Research Assistant at Busse Disputes. He is a German qualified lawyer who graduated from the University of Tübingen and obtained an LL.M from Stellenbosch University.

1 The New Space Era: Expansion of the Space Economy, Bank of America Institute (27 January 2023), https://business.bofa.com/content/dam/flagship/bank-of-america-institute/transformation/expansion-of-the-space-economy-january-2023.pdf.

2 *Akash Sriram/Tanya Jain*, US space industry funding drops 53 % in Q1, hitting 8-year-low-report, Reuters (20 April 2023), https://www.reuters.com/lifestyle/science/us-space-industry-funding-drops-53-q1-hitting-8-year-low-report-2023-04-20/.

3 Space Venture Europe 2022: Investment in the European and Global Space Sector, European Space Policy Institute (10 May 2023), https://www.espi.or.at/reports/space-venture-europe-2022/.

4 A giant leap for the space industry, McKinsey & Company (19 January 2023), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/chart-of-the-day/a-giant-leap-for-the-space-industry.

5 See NASA's internet representation, NASA (last accessed: 23 June 2023), https://www.nasa.gov/about/index.html.

6 *Adam Mann/Ailsa Harvey*, NASA's Artemis program: Everything you need to know, Space.com (12 December 2022), https://www.space.com/artemis-program.html.

7 See "*cmwarner" (username)*, Lunar Living: NASA's Artemis Base Camp Concept, NASA Blogs (28 October 2020), https://blogs.nasa.gov/artemis/2020/10/28/lunar-living-nasas-artemis-base-camp-concept/.

8 *Mann/Harvey*, NASA's Artemis program: Everything you need to know, Space.com (12 December 2022), https://www.space.com/artemis-program.html.

nering with the latter concerning the Commercial Crew Program which pursues the goal of safe, reliable, and cost-effective transportation of humans to and from the International Space Station.[9]

2. The European Space Market

Europe has also been investing in space-related ventures, with the European Space Agency (ESA) being the main agency responsible for space exploration and research in Europe.[10] The ESA is an intergovernmental organization that is independent from the European Union.[11] According to research carried out by the European Commission in 2017, the European space economy employs over 231,000 professionals and its value was estimated at around 53–62 billion EUR.[12] There are several ongoing space-related initiatives in Europe, including Galileo, which is a global navigation satellite system intended to become Europe's alternative to the U.S. Global Positioning System (GPS).[13] Another example is Copernicus – a joint program by the ESA and the European Union to observe Earth.[14] Like NASA, the ESA has also increasingly established partnerships with private companies. For example, the ESA has concluded a partnership with Airbus and Thales Alenia Space Italy to develop technologies and spacecraft for space exploration.[15]

3. Competition and Cooperation

The above demonstrates that, to some extent, the U.S. and European space industries have been competing against each other. However, they also frequently collaborate to further develop space exploration. For example, in 2020, NASA and the ESA signed an agreement to collaborate on the Artemis Program. As part of this agreement, the ESA will provide key components for the Lunar Gateway, a space station that will orbit the moon and serve as a staging point for lunar missions.[16]

II. Overview of the current legal regime and the need for change

The increase in global space activities, especially the increase in commercial space ventures by private actors, highlights the importance of having a robust legal system. The existing international framework for space law mainly consists of five international treaties. The first was the Outer Space Treaty of 1967, which provides the basic framework on international space law and *inter alia* governs the responsibility of states for space activities conducted by governmental or non-governmental entities.[17] This treaty has been signed by the United States and most European countries.[18] The Outer Space Treaty is supplemented by other treaties such as the Rescue Agreement of 1968,[19] the Liability Convention of 1972,[20] the Registration Convention of 1975[21] and the Moon Agreement of 1979.[22] In addition to these treaties, a plethora of national laws exist which regulate individual countries' domestic frameworks for space-related activities.[23]

1. United States

The United States is party to all of the above-mentioned treaties with the exception of the Moon Agreement. In addition, the United States regulates space operations through a number of national agencies and laws.[24] With the Commercial Space Launch Act of 1984, for instance, the U.S. recognized the private sector's potential to provide commercial launch vehicles, orbital satellites, and operate private launch sites and services. This law sets out the framework for the regulation and licensing of all U.S. commercial space launches and spacecraft.[25] There are a variety of permits and licenses that a commercial space operator must obtain before commencing space-related activities. For example, a company is required to obtain a license demonstrating that the operation meets certain orbital debris-mitigation standards.[26]

9 *Danielle Sempsrott*, Commercial Crew Program Overview, NASA (11 August 2022), https://www.nasa.gov/content/commercial-crew-program-overview.

10 See ESA's internet representation, ESA (last accessed: 23 June 2023), https://www.esa.int/.

11 *Joanne Wheeler*, The Space Law Review: Europe, The Law Reviews (5 January 2023), https://thelawreviews.co.uk/title/the-space-law-review/europe.

12 EU space policy, European Council (6 December 2022), https://www.consilium.europa.eu/en/policies/eu-space-programme/.

13 *Joanne Wheeler*, The Space Law Review: Europe, The Law Reviews (5 January 2023), https://thelawreviews.co.uk/title/the-space-law-review/europe.

14 See Copernicus, ESA (last accessed: 23 June 2023), https://www.esa.int/Space_in_Member_States/Germany/Copernicus#.ZF5YwE8ytcA.link.

15 See ESA's published information on EDRS, a public-private partnership between ESA and Airbus: Partnership, ESA (last accessed: 23 June 2023), https://www.esa.int/Applications/Telecommunications_Integrated_Applications/EDRS/Partnership#:~:text=EDRS%20is%20a%20public%E2%80%93private,to%20ESA%20and%20customers%20worldwide; ESA Φ-lab at ESRIN and Thales Alenia Space to work jointly on Earth observation innovation, ESA (30 November 2022), https://philab.esa.int/esa-%CF%86-lab-at-esrin-and-thales-alenia-space-to-work-jointly-on-earth-observationinnovation/.

16 NASA, European Space Agency Formalize Artemis Gateway Partnership, NASA Press Release (27 October 2020), https://www.nasa.gov/press-release/nasa-european-space-agency-formalize-artemis-gateway-partnership.

17 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies [hereinafter: "Outer Space Treaty"], United Nations, 27. January 1967, A/RES/21/2222, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html; as regards the regulation of the responsibility of states for national space activities, see Art. VI of the Outer Space Treaty.

18 See Status of the Outer Space Treaty, United Nations Office for Disarmament Affairs (last accessed: 23 June 2023), https://treaties.unoda.org/t/outer_space.

19 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, United Nations, 16 December 1967, A/RES/22/2345, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introrescueagreement.html.

20 Convention on International Liability for Damage Caused by Space Objects, United Nations, 29 November 1971, A/RES/26/2777, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html.

21 Convention on Registration of Objects Launched into Outer Space, United Nations, 12 November 1974, A/RES/29/3235, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introregistration-convention.html.

22 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, United Nations, 5 December 1979, A/RES/34/68, available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html.

23 The United Nations provide an overview on national space laws: U.N. Committee on the Peaceful Uses of Outer Space, *Schematic Overview of National Regulatory Frameworks for Space Activities*, U.N. Doc. A/AC.105/C.2/2023/CRP.28 (20 March 2023), available at: https://www.unoosa.org/res/oosadoc/data/documents/2023/aac_105c_22023crp/aac_105c_22023crp_28_0_html/AC105_-C2_2023_CRP28E.pdf.

24 *Dara A. Panahy*, The Space Law Review: USA, The Law Reviews (5 January 2023), https://thelawreviews.co.uk/title/the-space-law-review/usa.

25 See U.S. Commercial Space Launch Act, codified at 51 U.S.C. § 50901, available at: https://www.congress.gov/bill/98th-congress/house-bill/3942.

26 Space Innovation; Mitigation of Orbital Debris in the New Space Age Second Report and Order, IB Docket Nos. 22-271 and 18-313, Federal Communications Commission (FCC), 8 September 2022, FCC-CIRC2209-01, available at: https://docs.fcc.gov/public/attachments/DOC-387024A1.pdf

Since commercial space activities have rapidly evolved and additional stakeholders have entered the field, it is important for the United States to develop its space regulations even further.[27] Realizing this, the U. S. launched the Artemis Accords in 2020,[28] a non-binding agreement designed to establish a set of principles to guide civil space exploration. Such principles include *inter alia* the use of space for peaceful purposes, transparency, emergency assistance, registration of space objects, the utilization of space resources, the mitigation of orbital debris, and the safe disposal of spacecraft.[29] In addition, the agreement is intended to help realize the goals of the Artemis Program.[30] Some commentators have criticized the agreement as "*too US-centric*",[31] although this has not stopped states from signing on. As of May 2023, the Artemis Accords had been signed by 25 states, including several European countries.[32]

2. Europe

Most European countries have signed the above-mentioned international treaties. In contrast to the U. S., space law within Europe is fragmented since a multitude of European countries have their own domestic legislations.[33] Only a few regulations have been made at a European level. In particular, the European space policy is shaped by the ESA and the European Union. Both coordinate financial and intellectual resources of European countries to undertake space-related endeavors.[34] Commercial space activities are mainly affected by the ESA's procurement framework, which *inter alia* consists of the ESA's procurement regulations[35] and a set of general clauses and conditions for ESA contracts.[36]

Perhaps as an indication of interest in more centralization, the European Union adopted a new regulation on 28 April 2021, establishing the European Union Space Programme for the years 2021 to 2027 and the European Union Agency for the Space Programme (EUSPA).[37] This regulation brings together existing EU programs, such as Copernicus and Galileo, under one umbrella.[38] Currently, the European Union is working on developing a system for space traffic management to address the threat posed by an increasing number of space objects to Europe's assets in space.[39] Like the U. S., however, Europe needs to continue to pursue appropriate regulations for today's modern space economy.

3. Laws and Regulations to Come

As mentioned above, the U. S. and Europe are both interested in developing additional laws to govern space-related activities. Areas of particular interest include (i) property rights concerning resources obtained from celestial bodies; (ii) liability in case of spacecraft and satellite collisions; and (iii) responsibility for the cleanup of debris and other "space waste". Another area of interest concerns the resolution of space-related disputes, especially those involving states and state-owned entities.[40] To be effective, these issues will need to be dealt with at an international level, which includes the U. S., Europe, and as many other states as possible.

III. Conclusion

The space race between the United States and Europe is in full swing. Fortunately, this space race differs from its 1960 s counterpart. These players are not facing each other in hostility. Rather, they are involved in a competition that offers enough room for occasional (perhaps even frequent) cooperation. Another distinction is that the private sector is actively involved in this new, friendlier space race. Working independently and with governments, private companies are significantly contributing to the accelerated growth of the space industry. This brave new world of space investment calls for an increased need for legal certainty. More laws and regulations – especially regarding commercial space operations – are needed to keep up with this changing environment. ■

27 *Dara A. Panahy*, The Space Law Review: USA, The Law Reviews (5 January 2023), https://thelawreviews.co.uk/title/the-space-law-review/usa; See also President's Memorandum of December 9, 2020 on National Space Policy, Federal Register 85 FR 81755 (16 December 2020), https://www.federalregister.gov/documents/2020/12/16/2020-27892/the-national-space-policy.

28 The Artemis Accords, NASA (last accessed: 23 June 2023), https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf.

29 Artemis Accords, U. S. Department of State (last accessed: 23 June 2023), https://www.state.gov/artemis-accords/.

30 International Partners Advance Cooperation with First Signings of Artemis Accords, NASA (13 October 2020), https://www.nasa.gov/press-release/nasa-international-partners-advance-cooperation-with-first-signings-of-artemis-accords.

31 *Matthew Gross*, The Artemis Accords: International Cooperation in the Era of Space Exploration, Harvard International Review (23 January 2023), https://hir.harvard.edu/the-artemis-accords/.

32 Artemis Accords, U. S. Department of State (last accessed: 23 June 2023), https://www.state.gov/artemis-accords/.

33 National Space Legislations, ESA (last accessed: 23 June 2023), https://www.esa.int/About_Us/ECSL_-_European_Centre_for_Space_Law/National_Space_Legislations.

34 *Joanne Wheeler*, The Space Law Review: Europe, The Law Reviews (5 January 2023), https://thelawreviews.co.uk/title/the-space-law-review/europe.

35 ESA Procurement Regulations and related Implementing Instructions (10 July 2019), ESA/REG/001, rev. 05, available at: https://download.esa.int/docs/LEX-L/Contracts/ESA-REG-001_rev5_EN.pdf.

36 General Clauses and Conditions for ESA Contracts, ESA (5 July 2019), ESA/REG/002, rev. 3, available at: https://esamultimedia.esa.int/docs/LEX-L/Contracts/ESA-REG-002_rev3_EN.pdf.

37 Regulation (EU) 2021/696 of the European Parliament and of the Council of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme and repealing Regulations (EU) No. 912/2010, (EU) No. 1285/2013 and (EU) No. 377/2014 and Decision No. 541/2014/EU (12 May 2021), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.170.01.0069.01.ENG.

38 EU Space Policy, European Council (6 December 2022), https://www.consilium.europa.eu/en/policies/eu-space-programme/.

39 An EU Approach for Space Traffic Management, European Commission (last accessed: 23 June 2023), https://defence-industry-space.ec.europa.eu/eu-space-policy/eu-space-programme/eu-approach-space-traffic-management_en.

40 See *Allison Torline*, Looking Back While Looking Up: A Review of Space Arbitration Topics, Kluwer Arbitration Blog (22 February 2023), https://arbitrationblog.kluwerarbitration.com/2023/02/22/looking-back-while-looking-up-a-review-of-space-arbitration-topics/.

By Jonathon K. Hance and L. Andrew Taggart, Houston*

Andy Warhol May Be a Copyright Infringer

According to the U.S. Supreme Court, Andy Warhol's "Orange Prince" illustration is not a "fair use" of Lynn Goldsmith's photograph.[1] Goldsmith's case against the Andy Warhol Foundation for copyright infringement will continue forward.

I. Factual Background and Procedural History

The controversy centers on a 1981 photograph that Goldsmith's agency licensed to *Vanity Fair* magazine in 1984 for a "*one time*" use as an "*artist reference*" to illustrate a story about Prince.[2] *Vanity Fair* commissioned Andy Warhol to create an illustration based on Goldsmith's photograph, which was published by the magazine alongside its article entitled "Purple Fame" about the "*sexual style of the new celebrity and his music*."[3] Goldsmith received a USD 400 fee.[4]

But Warhol did not make just a single illustration; he also created thirteen additional silkscreen prints (including Orange Prince) and two pencil drawings based on Goldsmith's photograph.[5] Apparently, however, Goldsmith did not know about Warhol's "Prince Series" until 2016 when a copy of Orange Prince landed on the front cover of *Condé Nast* – "*again, for the purpose of illustrating a magazine story about Prince*."[6] This time, the Andy Warhol Foundation for the Visual Arts, Inc. (AWF) granted the magazine rights to use Orange Prince in exchange for USD 10,000. However, Goldsmith received nothing.

On seeing her photograph in the magazine, Goldsmith alerted AWF that Orange Prince infringed her copyright over her photograph of Prince.[7] AWF disagreed, and a lawsuit ensued.[8] At its core, the lawsuit concerns whether Warhol's use of Goldsmith's photograph constitutes "fair use" or copyright infringement.

The fair use doctrine under United States copyright law "*permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster*."[9] To determine whether a particular use of a copyrighted work is "fair," judges generally consider four factors, the first of which (at issue here) concerns the degree to which the use is "transformative."[10] Prior to the Supreme Court's ruling in this case, the test for "transformative" use was "*whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character*."[11] Applying that standard, a New York district court judge ruled in 2019 that Warhol's series was fair use of Goldsmith's photograph because Warhol had transformed Goldsmith's image of Prince from "*a vulnerable human being*" into an "*iconic, larger-than-life figure*."[12]

The intermediate appellate court rejected the district judge's consideration of the intent and meaning behind the work and found that the Prince Series was not a "transformative" fair use of the copyrighted photograph because it

* Jonathon K. Hance (Partner, Bracewell LLP) is both a litigator and an intellectual property lawyer who enjoys identifying, monetizing, and enforcing intellectual property rights, protecting brands, and resolving disputes. He is a musician (violist), a computer programmer, and art fan. L. Andrew (Drew) Taggart (Partner, Bracewell LLP) is a commercial litigator with experience resolving intellectual property, construction, oil and gas, real estate, and environmental disputes.

1 See *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).
2 *Andy Warhol Foundation*, 143 S. Ct. at 1266.
3 *Andy Warhol Foundation*, 143 S. Ct. at 1266.
4 *Andy Warhol Foundation*, 143 S. Ct. at 1267.
5 *Andy Warhol Foundation*, 143 S. Ct. at 1267-68 (internal citations omitted).
6 *Andy Warhol Foundation*, 143 S. Ct. at 1266.
7 *Andy Warhol Foundation*, 143 S. Ct. at 1271.
8 *Andy Warhol Foundation*, 143 S. Ct. at 1271 (summarizing that "*AWF … sued Goldsmith … for a declaratory judgment of noninfringement or, in the alternative, fair use*" and that "*Goldsmith counterclaimed for infringement*.")
9 *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal citations omitted).
10 *Andy Warhol Foundation*, 143 S. Ct. at 1274. More fully stated, the first factor is "*the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes*." 17 U.S.C. § 107(1). According to the Supreme Court, "[t]*his factor considers the reasons for, and nature of, the copier's use of an original work*," and "[t]*he 'central' question it asks is 'whether the new work merely supersedes the objects of the original creation supplanting the original, or instead adds something new, with a further purpose or different character.'*" *Andy Warhol Foundation*, 143 S. Ct. at 1274 (internal citations omitted) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). Because "[a] *use that has a further purpose or different character is said to be 'transformative,'*" the first factor is referred to in shorthand as the "transformative use" factor. *Andy Warhol Foundation*, 143 S. Ct. at 1275.
11 *Cariou v. Prince*, 714 F.3 d 694, 706 (2 d Cir. 2013).
12 See *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3 d 312, 316, 326 (S. D. N. Y. 2019).

retained the "*essential elements*" of the Goldsmith photograph without "*significantly adding to or altering*" those elements.[13]

II. The Reasoning of the U. S. Supreme Court

Now, in an opinion that has attracted much attention in both artistic and legal circles, a 7-2 majority of the Supreme Court[14] held that Orange Prince is not transformative, but for new reasons.[15] Like the intermediate court, the Supreme Court also does not think that Warhol's work was transformative in the artistic sense: "*Orange Prince crops, flattens, traces, and colors the photo but otherwise does not alter it*."[16] But its opinion does not hang on that observation, and perhaps for good reason. It is no secret that Warhol used outside sources as more than just inspiration for his art. His career was dedicated in large part to "Pop" art – which he described as something that "*comes from the outside*," or, in other words, relies on outside sources.[17] As one art historian puts it, "[t]*he copy that exceeds the original was a central component of Warhol's sensibility. He repeated and remade found photographs into vibrant paintings and prints that were themselves repeated with varying degrees of visual difference*."[18] As a result, "*Warhol neither rips off nor transcends his sources. He retains them as flickering, repeatable afterimages while dramatically changing their pictorial appearance and effect*."[19] But all that is of no consequence.

Writing for the majority of the Supreme Court, Justice Sotomayor focused on the commercial use of Orange Prince to determine whether it was transformative of Goldsmith's photograph. The question is not whether the works themselves are artistically different but whether the uses of the works are different. Here, the majority concluded that "[b]*oth are portraits of Prince used in magazines to illustrate stories about Prince*"[20] and that "[j]*ust as Goldsmith licensed her photograph to Vanity Fair for $400, AWF licensed Orange Prince to Condé Nast for $10,000*."[21] As the Court further explains:

> [t]*aken together, these two elements – that Goldsmith's photograph and AWF's 2016 licensing of Orange Prince share substantially the same purpose, and that AWF's use of Goldsmith's photo was of a commercial nature – counsel against fair use, absent some other justification for copying. That is, although a use's transformativeness may outweigh its commercial character, here, both elements point in the same direction.*[22]

More simply put – because AWF and Goldsmith both licensed their respective works to magazines (albeit under different license terms and for different purposes), Warhol's Orange Prince was not transformative.[23]

The majority, however, glosses over the distinction between Goldsmith's license of the photograph to *Vanity Fair* for use as an "artist reference" (not publication of the photograph itself in the magazine) and AWF's license of Orange Prince for publication of the work itself in *Condé Nast*. In the strictest sense (and certainly from the perspective of a licensing professional), the commercial uses of the works were different. Though both licenses ultimately resulted in an illustration of Prince appearing in a magazine, *Vanity Fair* did not publish Goldsmith's photograph. Instead, it hired Warhol to create an illustration from her photograph based on the license granted by Goldsmith to the magazine. In spite of this, the majority over-simplifies: "*Both Goldsmith and AWF sold images of Prince (AWF's copying Goldsmith's) to magazines to illustrate stories about the celebrity, which is the typical use made of Goldsmith's photographs*."[24]

More oddly, while the majority counsels that "[a] *court should not attempt to evaluate the artistic significance of a particular work*",[25] its opinion does exactly that. In distinguishing Warhol's illustrations of Campbell's soup cans from Orange Prince, the majority writes that "*the Soup Cans series uses Campbell's copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup*" and that Warhol's series "*conjures up the original work to shed light on the work itself, not just the subject of the work*."[26] But could the same not be said for the Prince Series? Could Orange Prince be a commentary on the consumerism of pop artists that sheds light on the commoditization of Prince in celebrity culture?

Justice Elena Kagan, writing for the dissent, thinks so. But according to her, the majority "*disregard*[s] *Warhol's creative contributions because he licensed his work*."[27] In this regard, she wrote:

> *The majority's commercialism-trumps-creativity analysis has only one way out. If Warhol had used Goldsmith's photo to comment on or critique Goldsmith's photo, he might have availed himself of that factor's benefit …. But because he instead commented on society – the dehumanizing culture of celebrity – he is (go figure) out of luck.*[28]

13 *Andy Warhol Foundation*, 992 F.3 d at 115. The Second Circuit further explained that whether a work is transformative "*cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic – or for that matter, a judge – draws from the work*." *Andy Warhol Foundation*, 992 F.3 d at 113-14. Rather, a secondary work's transformative purpose and character must, at a bare minimum, "*comprise something more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizable deriving from, and retaining the essential elements of, its source material.*" *Andy Warhol Foundation*, 992 F.3 d at 114.

14 Justice Sotomayor wrote for the majority, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett, and Jackson. Justice Gorsuch filed a concurring opinion in which Justice Jackson joined. Justice Kagan dissented, joined by Chief Justice Roberts.

15 *Andy Warhol Foundation*, 143 S. Ct. at 1287 ("*Because this Court agrees with the Court of Appeals that the first factor likewise favors her, the judgment of the Court of Appeals is Affirmed.*")

16 *Andy Warhol Foundation*, 143 S. Ct. at 1270.

17 *Richard Meyer*, The Supreme Court Is Wrong About Andy Warhol, The New York Times (5 June 2023), https://www.nytimes.com/2023/06/05/opinion/supreme-court-andy-warhol.html; Regarding the case at hand, Dr. Meyer submitted an amicus brief to the Supreme Court.

18 *Meyer*, The Supreme Court Is Wrong About Andy Warhol, The New York Times (5 June 2023), https://www.nytimes.com/2023/06/05/opinion/supreme-court-andy-warhol.html.

19 *Meyer*, The Supreme Court Is Wrong About Andy Warhol, The New York Times (5 June 2023), https://www.nytimes.com/2023/06/05/opinion/supreme-court-andy-warhol.html.

20 *Andy Warhol Foundation*, 143 S. Ct. at 1278.

21 *Andy Warhol Foundation*, 143 S. Ct. at 1279.

22 *Andy Warhol Foundation*, 143 S. Ct. at 1279.

23 *Andy Warhol Foundation*, 143 S. Ct. at 1278.

24 *Andy Warhol Foundation*, 143 S. Ct. at 1281 n.15.

25 *Andy Warhol Foundation*, 143 S. Ct. at 1283. The majority doubles down on this point. "*A court need not, indeed should not, assess the relative worth of two works to decide a claim of fair use. Otherwise, 'some works of genius would be sure to miss appreciation,' and '[a]t the other end, copyright would be denied to [works] which appealed to a public less educated than the judge.'*" *Andy Warhol Foundation*, 143 S. Ct. at 1284 n.19 (quoting *Bleistein v. Donaldson Lithographic Co.*, 188 U. S. 239, 251-52 (1903)).

26 *Andy Warhol Foundation*, 143 S. Ct. at 1281 (internal citations omitted).

27 *Andy Warhol Foundation*, 143 S. Ct. at 1302 (Kagan, J. dissenting).

28 *Andy Warhol Foundation*, 143 S. Ct. at 1301-02 (Kagan, J. dissenting) (emphasis in original).

The "*newness*"[29] of Warhol's works is also of little value to the majority. Justice Kagan calls Warhol "*the avatar of transformative copying*" – an apt moniker.[30] His illustrations of soup cans, soap-pad boxes, Chairman Mao, Liz Taylor, Marilyn Monroe, and Prince all stem from photographs of those subjects. Warhol altered (dare we say, "transformed") these images using a laborious and complicated silk-screening process that Warhol perfected to create these works that appear in every major art-history textbook.[31] And according to experts in this case, the differences between Goldsmith's photograph and Orange Prince (as summarized by Justice Kagan) are stark:

> *The two works are "materially distinct" in "their composition, presentation, color palette, and media" – i.e., in pretty much all their aesthetic traits. And with the change in form came an undisputed change in meaning. Goldsmith's focus – seen in what one expert called the "corporeality and luminosity" of her depiction – was on Prince's "unique human identity." Warhol's focus was more nearly the opposite. His subject was "not the private person but the public image." The artist's "flattened, cropped, exotically colored, and unnatural depiction of Prince's disembodied head" sought to "communicate a message about the impact of celebrity" in contemporary life. On Warhol's canvas, Prince emerged as "spectral, dark, [and] uncanny" – less a real person than a "mask-like simulacrum." He was reframed as a "larger than life" "icon or totem." Yet he was also reduced: He became the product of a "publicity machine" that "packages and disseminates commoditized images." He manifested, in short, the dehumanizing culture of celebrity in America. The message could not have been more different.*[32]

But none of that really matters. According to the majority, "[b]*oth are portraits of Prince used in magazines to illustrate stories about Prince*" – and that's what counts.[33] Artists hence beware – it's not how hard you work but how your estate chooses to use your work long after your death that really matters.

In reaching its decision, the majority balances the original copyright holder's exclusive right to create derivative works (*i.e.*, "*recast, transformed, or adapted works*") with the fair-use doctrine, which "*permits courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster.*"[34] To preserve a copyright owner's right to create derivative works, "*the degree of transformation required to make 'transformative'* [and thus fair] *use of an original must go beyond that required to qualify as a derivative.*"[35] Accordingly, "[a] *use that shares the purpose of a copyrighted work … is more likely to provide the public with a substantial* [infringing] *substitute for matter protected by the copyright owner's interests in the original work or derivatives of it, which undermines the goal of copyright.*"[36] In other words, art that supersedes other art in substance **and purpose of use** is not "transformative" fair use.

It is well-settled that U.S. copyright law requires this balancing act to promote creativity. And both the majority and dissent appear to agree that fostering creativity is of utmost importance. However, they disagree on how to achieve that goal and whether Warhol's Orange Prince supersedes (that is, infringingly replaces) Goldsmith's photo. To answer this question, the majority focused on the similar commercial nature of both Goldsmith's photo and Warhol's illustration, while the dissent aims at the artistic differences between the works themselves, writing that the works "*could not have been more different*":

> *All I can say is that it's a good thing the majority isn't in the magazine business….* [An editor] *would be drawn aesthetically to one* [work]*, or instead to the other. You would want to convey the message of one, or instead of the other. The point here is not that one is better and the other worse. The point is that they are fundamentally different. You would see them not as substitutes, but as divergent ways to (in the majority's mantra) illustrate a magazine about Prince with a portrait of Prince. Or else you (like the majority) would not have much of a future in magazine publishing.*[37]

The dissent further argues that "*new creations come from building on – and, in the process, transforming – those coming before*"[38] and that the majority's decision limiting the transformative fair use exception "*stymies and suppresses that process, in art and every other kind of creative endeavor*":

> *The decision enhances a copyright holder's power to inhibit artistic development, by enabling her to block even the use of a work to fashion something quite different. Or viewed the other way round, the decision impedes non-copyright holders' artistic pursuits, by preventing them from making even the most novel uses of existing materials. On either account, the public loses: The decision operates to constrain creative expression.*[39]

But to the majority, the dissent "*ignores the value of original works*" and the many other "*escape valves*" that provide space for the enterprising artist.[40] That is, the dissent is tilting at windmills.[41] The system will not fall apart, artists will not stop creating, and "[i]*f the last century of American*

29 See, *e.g.*, *Andy Warhol Foundation*, 143 S.Ct. at 1295 (Kagan, J. dissenting) (observing that "*Warhol cropped the photo, so that Prince's head fills the whole frame*", "*converted the cropped photo into a higher-contrast image, incorporated into a silkscreen*", and then "*traced, painted, and inked*" the illustration to create a new work that "*exaggerated the darkest details of Prince's head*", "*presenting him in a more face-forward way*").

30 *Andy Warhol Foundation*, 143 S.Ct. at 1293 (Kagan, J. dissenting).

31 See, *e.g.*, *Andy Warhol Foundation*, 143 S.Ct. at 1296 (describing Warhol's process of creating the prints as "*laborious and painstaking*").

32 *Andy Warhol Foundation*, 143 S.Ct. at 1293 (internal citations omitted).

33 *Andy Warhol Foundation*, 143 S.Ct. at 1278.

34 *Stewart*, 495 U.S. at 236.

35 *Andy Warhol Foundation*, 143 S.Ct. at 1275.

36 *Andy Warhol Foundation*, 143 S.Ct. at 1276 (internal citations omitted).

37 *Andy Warhol Foundation*, 143 S.Ct. at 1297 (internal citations omitted).

38 In support of the proposition that "[n]*othing comes from nothing*," Justice Kagan observes that "*Shakespeare borrowed over and over and over*" quotes Robert Louis Stevenson's admission that Treasure Island borrowed from Daniel Defoe, Edgar Allen Poe, and Washington Irving, Mozart and Beethoven borrowed the three-section sonata form from Haydn, Stravinsky stole from Schoenberg. *Andy Warhol Foundation*, 143 S.Ct. at 1307-08 (Kagan, J. dissenting).

39 *Andy Warhol Foundation*, 143 S.Ct. at 1305 (Kagan, J. dissenting). The dissent concludes: The majority opinion "*will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.*" *Andy Warhol Foundation*, 143 S.Ct. at 1312.

40 *Andy Warhol Foundation*, 143 S.Ct. at 1286-87 (noting other "escape valves" such as "*the idea-expression distinction; the general rule that facts may not receive protection; the requirement of originality; the legal standard for actionable copying;* [and] *the limited duration of copyright*").

41 Surely, this author's work is sufficiently transformative of *Cervantes*'s Don Quixote – both in terms of artistic merit and use – such that use of this phrase is considered "fair." And, in any event, other "escape valves" also apply.

art, literature, music, and film is any indication, the existing copyright law, of which today's opinion is a continuation, is a powerful engine of creativity."[42]

In any event, the majority's commercialism test, as difficult as it may be to apply in practice, is now the law of the land. To determine whether a work is transformative as opposed to an infringing derivative work (absent another viable "escape valve"), creators must question – potentially decades in advance – whether a new work will share substantially the same commercial purpose as the original work.

Rather than prognosticate, artists could obtain a license to create derivative works from the prior-rights-holder. Easy, right? The majority thinks so: "*It will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work*."[43] But this maxim holds true only if license fees are economically viable. While it is true that license fees could be "*incentives for artists to create original works in the first place*",[44] if license fees are cost-prohibitive, artists may make the decision to do something different, which could have the effect of minimizing the prevalence of new works that comment on or draw from prior works.

The question then becomes, how will content creators price licenses for derivative works? At the time prior to the creation of a derivative work, the value of that derivative work is difficult, perhaps impossible, to quantify (particularly if the subsequent creator is an unknown artist). In such instances, fees could be quite low. The license fee Goldsmith (an unknown compared to Warhol) charged to *Vanity Fair* was low: USD 400.[45] Adjusted for inflation, that's USD 1,167.90 in today's dollars. To some artists expecting to monetize a work, that fee could be a small token to pay for the assurance of broad commercialization rights. But for others, even this price point will be too high.

III. Possible Consequences

The majority is probably right; its decision will not "snuff out the lights of Western civilization, returning us to the Dark Ages of a world without Titian, Shakespeare, or Richard Rogers."[46] But it could drive art underground (at least initially), and it will increase litigation as copyright holders seek to collect license fees (or copyright infringement judgments) against artists who once probably assumed their works to be artistically transformative and immune from suit. Tellingly, this decision – that purports to have narrowly addressed a single Warhol work in the shadow of a small-time photographer who earned USD 400 for her work – has attracted significant press.

News outlets, legal reporters, and pop culture publications have all widely covered the story.[47] The reviews have been mixed. Perhaps unsurprisingly, original rights owners often plagued by unlicensed derivative works have hailed the decision as a long-awaited change to copyright law. For example, *Rolling Stone* magazine quoted Mitch Glazier, CEO of Recording Industry Association of America, as stating: "*we applaud the Supreme Court's considered and thoughtful decision that claims of 'transformative use' cannot undermine the basic rights given to all creators under the Copyright Act.* […] *Lower courts have misconstrued fair use for too long and we are grateful the Supreme Court has reaffirmed the core purposes of copyright*."[48] Other practitioners, particularly in legal circles, have opined that the opinion is "*quite narrow*" and "*does not seem to signal a radical shift in prior fair use analyses of … more characteristically 'non-commercial' uses*."[49]

To describe the *Warhol* decision as "quite narrow," however, belies the eighty-seven, impassioned pages written by the Supreme Court. The opinion is anything but inconsequential. ■

42 *Andy Warhol Foundation*, 143 S. Ct. at 1287.
43 *Andy Warhol Foundation*, 143 S. Ct. at 1286.
44 *Andy Warhol Foundation*, 143 S. Ct. at 1286.
45 *Andy Warhol Foundation*, 143 S. Ct. at 1266.
46 *Andy Warhol Foundation*, 143 S. Ct. at 1286.
47 See, *e. g.*, *Ethan Millman*, Music Groups Call Supreme Court Ruling in Warhol Case a 'Massive Victory' for the Business, Rolling Stone (18 May 2023), https://www.rollingstone.com/culture/culture-news/supreme-court-warhol-prince-ruling-music-copyright-1234737740/; *Hannah Albarazi*, Kagan Rips Sotomayor's 'I Could Paint That' Warhol Opinion, Law360.com (18 May 2023), https://www.law360.com/articles/1679296/kagan-rips-sotomayor-s-i-could-paint-that-warhol-opinion; *Jess Bravin*, Supreme Court Rules Andy Warhol's Image of Prince Breaches Copyright Laws, The Wall Street Journal (18 May 2023), https://www.wsj.com/articles/supreme-court-rules-andy-warhols-image-of-prince-breaches-copyright-laws-e6c35d52.
48 See *Millman*, Music Groups Call Supreme Court Ruling in Warhol Case a 'Massive Victory' for the Business, Rolling Stone (18 May 2023).
49 See *Albarazi*, Kagan Rips Sotomayor's 'I Could Paint That' Warhol Opinion, Law360.com (18 May 2023).

By Catherine Holland and Matthias Sonntag*

Trademark Parodies – a Transatlantic Comparison in Light of the U. S. Supreme Court's *Bad Spaniels* Decision No. 22-148 of 8 June 2023

I. Something to Chew on – The U. S. Trademark Parody Dispute

In the words of the U. S. Supreme Court: "*This case is about dog toys and whiskey, two items seldom appearing in the same sentence*."[1] Jack Daniel's Property Inc. owns trademark registrations for the distinctive shape of the whiskey maker's iconic square Jack Daniel's bottle (which launched in 1895) as well as for several of the words and graphics on its label, including the brand name "Jack Daniel's". In contrast, VIP Products is a dog toy company marketing a line of chewable rubber toys under the umbrella term "Silly Squeakers." The toys in the line are designed to parody popular

* Catherine Holland (Partner, Knobbe Martens) is experienced in all aspects of domestic (U. S.) and international trademark, unfair competition and copyright matters. Her practice includes domestic and foreign trademark selection and searches, trademark procurement and prosecution, *inter partes* proceedings before the Trademark Trial and Appeal Board (TTAB), intellectual property audits, intellectual property licensing, franchising, domain name disputes, counterfeit goods and customs, copyrights, entertainment law, rights of publicity, and trademark and copyright enforcement and litigation. Matthias Sonntag (Partner, Gleiss Lutz) is an intellectual property lawyer advising and representing in disputes involving all kinds of IP, in particular patents, trademarks, design rights, copyright and know-how protection as well as unfair competition matters. In addition Matthias advises on licensing issues and on the transfer of technology.
1 *Jack Daniel's Properties, Inc. v. VIP Products, LLC*, No. 22-148, slip op. at 1 (U. S. Supreme Court 8 June 2023).

beverage brands, *e. g.* Smella Arpaw (*cf.* Stella Artois) or Doggie Walker (*cf.* Johnnie Walker). In 2014, VIP added a squeaky, chewable dog toy called "Bad Spaniels" designed to look like a bottle of Jack Daniel's whiskey. The picture below shows the original Jack Daniel's bottle and the Bad Spaniels dog toy:

VIP proceeded to pile on a poop-themed twist to other aspects of the Jack Daniel's bottle. VIP replaced the brand "Jack Daniel's" with the words "Bad Spaniels". The words "Old No. 7 Brand Tennessee Sour Mash Whiskey" on the whiskey bottle were replaced with the words "The Old No. 2 On Your Tennessee Carpet". The alcohol notice on the whiskey bottle "40 % ALC. BY VOL. (80 PROOF)" was changed to "43 % POO BY VOL." and "100 % SMELLY" on the dog toy.

The whiskey maker, who had employed a decades-long marketing strategy to achieve its highly recognizable brand, did not appreciate the joke. Indeed, it had a bone to pick. Jack Daniels sent a letter demanding that VIP stop using its trademarks. When VIP did not stop, Jack Daniels sued them for trademark infringement and trademark dilution. VIP responded by arguing that the dog toy was a parody product intended to amuse the public, which neither infringed nor diluted Jack Daniel's trademarks. VIP argued that its use of Jack Daniel's marks in this way was protected speech under the "*Rogers* test,"[2] and that its product was a parody which made it a fair use exception to trademark infringement.

The *Rogers* test was developed by the Second Circuit to evaluate First Amendment interests in the trademark context. While the *Rogers* test was originally applied to the use of a trademark in the title of an "artistic work" which had an "expressive element", federal courts have adopted the test to address uses of trademarks *in* artistic works such as books, movies, or images. In the present case, VIP argued that it was appropriate to use the *Rogers* test to evaluate VIP's right to use the Jack Daniels' trademarks and trade dress in its parodic commercial product, the dog toy.

As in many interesting trademark disputes, the reviewing courts did not agree with the courts below. The district court (first instance trial level) decided in favor of Jack Daniel's. It held that consumers were likely to be confused about the source of the Bad Spaniels toy, and that the toy's negative associations with dog excrement (*e. g.*, "The Old No. 2") would harm Jack Daniel's reputation.

On appeal, the Court of Appeals for the Ninth Circuit went the other direction. It found that VIP's use of the whiskey maker's trademarks was intended to convey a humorous message, and that i) this use was protected speech under the First Amendment pursuant to the *Rogers* test, and ii) this use was a parody, which shielded it from a claim of trademark dilution.

As the final arbiter of the dispute, the U. S. Supreme Court in an unanimous opinion written by Justice Elena Kagan reversed the Ninth Circuit, and decided in favor of Jack Daniel's. In doing so, it made two key statements about the application of the *Rogers*-defense and the fair use defense in trademark infringement claims.

The U. S. Supreme Court held that the *Rogers* test does not apply if the allegedly infringing material is used as an indication of origin by the alleged infringer. Even if VIP's use of the Bad Spaniels mark conveys a humorous message, the Court stated it is not automatically entitled to *Rogers'* protection. The Court stressed that special First Amendment protection is **not** appropriate when the accused infringer has used a trademark to designate the source of its *own* goods. It stated that the *Rogers* defense was never meant to allow the parodic use of trademarks, if such use would confuse customers about the origin of the product. In that situation, the trademark provisions of the Lanham Act are the appropriate statutory scheme for deciding disputes.

With respect to the fair use defense, the U. S. Supreme Court held that however wide the scope of the "noncommercial use" exclusion, it cannot include every parody or humorous commentary. The Court noted that the plain language of the Lanham Act states that a fair use exclusion does not apply when the use is "*as a designation of source for the person's own goods or services.*"[3] In other words, no matter how funny the parody is, if it is used as a trademark by the defendant, it is not a fair use under the Lanham Act.

In summary, the Supreme Court made it clear that the *Rogers* "artistic expression" defense and the fair use parody defense, are not available to defendants who are using allegedly infringing material as a trademark to identify their own goods or services.

II. The Impact on Trademark Parody in the U. S. – There have been Many Bones to Pick

The Supreme Court decision provides a framework for analyzing trademark parody cases, which should result in greater consistency in the decisions of lower courts. They have often struggled when interpreting the interplay between the trademark provisions of the Lanham Act and other concepts such as free speech and parody.

Surprisingly, there are other meaty trademark parody cases involving dog toys and accessories. In 2007, the Fourth Circuit found that there was no likelihood of confusion in a dispute between Louis Vuitton and a dog toy company named Haute Diggity Dog.[4] Haute Diggity Dog wanted to

2 *Rogers v. Grimaldi*, 875 F.2 d 994 (2nd Cir. 1989).
3 *Jack Daniel's Properties, Inc. v. VIP Products, LLC*, No. 22-148, slip op. at 19 (U. S. Supreme Court 8 June 2023) (quoting 15 U. S. C. § 1125(c)(3)(A)).
4 *Louis Vuitton Malletier S. A. v. Haute Diggity Dog, LLC*, 507 F.3 d 252 (4th Cir. 2007).

enable dogs to make a fashion statement and produced chew toys inspired by designer brand purses. The chew toy at issue in this case was the CHEWY VUITON bag below:

Since Louis Vuitton also manufactured dog accessories at the time, it sued Haute Diggity Dog for trademark infringement, copyright infringement and trademark dilution. After the district court found that these products did not create a likelihood of confusion, Louis Vuitton appealed to the Fourth Circuit, which assessed whether these dog toys were a successful parody. The court wrote that the fact that the chew toys are chewed by a dog while genuine Louis Vuitton bags should not be chewed by a dog made it funny. The court determined that the effective parody in the form of a dog chew toy, coupled with Louis Vuitton's fame and marketing position, actually diminished the likelihood of confusion, and concluded that there was no likelihood of confusion.

In another case, the Southern District of New York found that there was a likelihood of confusion between accessories and pet products. In that 2002 case, the defendant Nature Labs sold a line of pet perfumes whose names parodied high-end human perfume brands.[5] One of these dog perfumes was named "Timmy Holedigger" shown below:

Unsurprisingly, the luxury brand Tommy Hilfiger sued. The defendant requested application of the *Rogers* test; however, the court declined to do so. The court stated that *Rogers* comes into play when a lawsuit involves only non-trademark uses of a mark, i. e., a mark that is not used to identify source. The expressive content – including parody – that might be inherent in a particular trademark does not change the fact that the traditional likelihood of confusion analysis must be applied when determining trademark infringement.

The *Jack Daniel's* Supreme Court has now confirmed that no one can escape the Lanham Act likelihood of confusion analysis by attempting to apply the *Rogers* test to a mark that is used to indicate source. However, the Court emphasized that a humorous message may be a factor when determining if consumers are confused about the product's origin. This is because "*consumers are not so likely to think that the maker of a mocked product is itself doing the mocking.*"[6] In other words, if the defendant using a parodic trademark can demonstrate that consumers would not believe the original trademark owner would make such a statement about its own products, the defendant may be able to prove that there is no likelihood of confusion.

The *Rogers* test is still applicable for marks that are used to express creative ideas or to provide commentary, so long as they do not also indicate the source of product. This means that creators can continue to use marks in this fashion.

It is important to note, however, that three justices issued a concurring opinion casting doubt on the legal underpinnings and validity of the *Rogers* test. We can expect to see this issue litigated in the future.

III. The German View – Poodles, Cows and Condoms

While a *Rogers* defense does not exist in German law, German courts would probably reach a conclusion similar to the one reached by the U. S. Supreme Court in the *Jack Daniel's* case by applying different laws. The German Trade Mark Act, in contrast to the Copyright Act (§ 51a *Urheberrechtsgesetz*, UrhG), does not feature a statutory provisions on the use of trademarks for parodic or humorous purposes, however, the case law of the Federal Court of Justice ("FCJ") provides guidance.

In the fairly recent decision "*Springender Pudel*" ("Jumping Poodle"),[7] the court considered the trademark below:

For obvious reasons, PUMA did not like this trademark, and applied for its cancellation on the basis of the well-known word/device mark inserted below:

The FCJ concluded that the contested trademark registration was to be cancelled since the owner of the well-known ear-

5 *Tommy Hilfiger Licensing, Inc. v. Nature Labs*, LLC, 221 F. Supp. 2 d 410 (S. D. N. Y. 2002).
6 *Jack Daniel's Properties, Inc. v. VIP Products, LLC*, No. 22-148, slip op. at 10 (U. S. Supreme Court 8 June 2023).
7 Bundesgerichtshof (BGH) [Federal Court of Justice] 2 April 2015 – I ZR 59/13, BGHZ 205, 22 (Ger.).

lier trademark did not have to tolerate that a mark infringing its trademark rights was registered for identical or similar goods, even if the mark was a parody of a well-known mark. It came to this conclusion even though it found that the "Jumping Poodle" mark humorously alluded to the well-known PUMA trademark and qualified as a trademark parody, which is protected by the constitutional right of freedom of art. The scope of protection of the freedom of art also includes depictions in which the artist takes up other people's brands or products in a humorous and satirical manner. The FCJ also found that there was no likelihood of confusion between the conflicting marks, but that there were sufficient similarities so that the relevant public would associate the contested sign with the well-known PUMA trademark. In the end, however, the FCJ held that the plaintiff's trademark rights, which were protected by the constitutional property guarantee (Article 14 of the German Basic Law (Constitution)), took precedence over the protection of artistic freedom.

In contrast, in the 2005 *Milka* case, the FCJ decided that the constitutional right of freedom of art prevailed over the interests of the trademark owner.[8] Unlike the PUMA case, the registration of the mark was not in dispute, but only its use in text designed to look like a postcard.

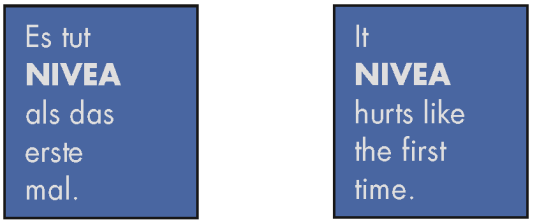
The color of the postcard and the name "Milka" are well-known registered trademarks of Kraft Foods. The FCJ held that the relevant public would associate the color of the postcard and the name "Milka" with the owner of the registered trademarks and therefore would assume that they were used as trademarks, *i.e.* an indication of origin. While balancing the conflicting constitutional rights (freedom of art on the one hand and guarantee of property on the other hand), the FCJ concluded that the constitutional right of freedom of art prevailed over the guarantee of property (the trademark rights) because the design of the postcard in question did not disparage the registered trademarks, and the defendant did not appear to be distributing the postcard purely for commercial gain. Instead, the well-known trademarks were used in the presentation of a product in a witty and humorous way (here: reproduction on a postcard).

In another pair of cases, the so-called "*MARS / NIVEA-constellation*", the FCJ grappled with the issue of trademark disparagement. In those cases, the FCJ found trademark infringement when a foreign trademark was affixed to novelty gag gifts that might create the impression they were sponsored by the trademark owner as an unusual advertising campaign.

The first case[9] concerned the famous trademark "MARS." The 

chocolate bar had been promoted under the well-known advertising slogan "*MARS macht mobil – bei Arbeit, Sport und Spiel!*" ("*MARS makes you mobile for work, sports and play*"). This slogan was also registered as a trademark. A company in the business of selling novelty gag gifts began marketing individually packaged condoms in a matchbook-style folding box. On the cover of the "matchbook" was the image of a MARS chocolate bar with the original "Mars" lettering. Below the image of the chocolate bar were the words "*macht mobil*" ("*makes you mobile*"). Upon opening the "matchbook" the text continued "*bei Sex-Sport und Spiel*" ("*for sex-sports and games*"), thus completing the allusion to Mars' advertising slogan.

In a second case,[10] another novelty gift company was also using a famous trademark in connection with condoms. In that case, the condoms were individually packaged in transparent sleeves. On each sleeve was a sticker that resembled the well-known Nivea cream can with white text in the Nivea font appearing on a blue background:



In both cases, the FJC found that such use qualified as an unfair exploitation of the reputation of the famous trademark. It found that the advertising value of the famous trademark could be damaged because the public could believe that such a novelty article was an inappropriate advertisement by the actual trademark owner. The use of the trademark in a word play with an obscene meaning was not covered by the constitutional right of freedom of art.

In general, the FCJ is amenable to finding that a trademark parody does not qualify as trademark infringement, so long as the contested usage comments on the content of the earlier (well-known) trademark, but does not tarnish the image of the well-known trademark, or simply exploit the popularity of the trademark for commercial gain.

IV. Conclusion – Trademark Parody has a Place in our Dog-Eat-Dog World

The American and German courts appear to reach a similar result when considering the property rights of trademark owners versus the rights of others to engage in free speech and artistic expression. In general, individuals may refer to the trademarks of others in parodies or other comedic or social commentary, so long as they do not do so for commercial gain, do not use the trademarks to refer to their own goods and services, do not tarnish the reputation of the trademark owner, and do not confuse the public into believing the use was somehow approved or sponsored by the trademark owner. The courts recognize that we humans enjoy a good laugh from time to time, and that we should occasionally be allowed to evoke well-known brands to poke fun at the dog-eat-dog world in which we live. ■

8 Bundesgerichtshof (BGH) [Federal Court of Justice] 3 February 2005 – I ZR 159/02, Neue Juristische Wochenschrift (NJW) 2005, 2856.
9 Bundesgerichtshof (BGH) [Federal Court of Justice] 10 February 1994 – I ZR 79/92, BGHZ 125, 91 (Ger.).
10 Bundesgerichtshof (BGH) [Federal Court of Justice] 10 October 1994 – I ZR 130/92, NJW 1995, 871 (Ger.).

By Dr. Daniel Felz, Atlanta*

Privacy Litigation Takes Flight in the U. S.: Will Telephone and Videotape Privacy Statutes Make Websites Riskier in the U. S. than the EU?

Companies routinely offer website and app functionalities like chat tools or videos to users, as well as use analytics tools to evaluate that the website is working correctly. These technologies have operated without material risk in the U. S. for years. Now, however, U. S. plaintiffs are leveraging privacy statutes from the telephone, telegraph, and video-cassette eras to challenge these technologies as unlawful – and going against the grain of U. S. privacy legislation in doing so. Companies are at risk of multi-million dollar class-action lawsuits for offering routine technologies like chat tools or videos.

This article provides an overview of this new wave of privacy litigation. It first summarizes the background to these new lawsuits. It then provides an overview of each type of emerging litigation: wiretapping litigation and Video Privacy Protection Act litigation.

I. Background to the new litigation

The U. S. has recently seen a rapid increase in the number of privacy statutes. This began with California's Consumer Privacy Act of 2018,[1] since which eight more states have enacted general privacy statutes.[2] Unlike in Europe, these privacy statutes do not require affirmative, "opt in"-style consent for cookies, pixels, and similar common website tracking technologies. Instead – via rules on the "sale" of data and the "sharing" of data for targeted advertising – U. S. privacy laws generally require companies to provide notice and an "opt-out" option with which consumers can "turn off" some (but not all) website trackers.

A new wave of lawsuits is developing independently from these privacy statutes and moving in the opposite direction. These lawsuits argue that much older laws passed to regulate telephones and video cassette tapes now apply to website technologies, and render them unlawful. An initial wave of litigation uses so-called "wiretapping" statutes – passed in the 1960 s to protect telephone calls and telegraphs – to challenge the use of website chat functionalities and session-replay technologies. A second wave of litigation uses the Video Privacy Protection Act – passed in the 1980 s to protect information about the video cassettes people had rented – to challenge video content embedded on sites.

The key to these cases is they take the form of large-scale class actions, each claiming so-called "statutory damages" of several thousand dollars per plaintiff. This enables these lawsuits to quickly demand millions (or at times billions) in damages for practices that have been relatively routine on websites and apps, and which are arguably compliant with U. S. privacy laws.

II. "Wiretapping" Litigation

Wiretapping generally refers to the practice of surreptitiously intercepting others' confidential communications. The very name "wiretapping" shows the historical nature of the term: telephone and telegraph communications were traditionally transmitted by "wires", and one way to secretly intercept communications was to literally "tap" into these telecommunications wires.

Wiretapping statutes made this and similar practices illegal. The Federal Wiretap Act – passed in 1968 – makes wiretapping a crime and permits lawsuits to be brought when it occurs, as do similar wiretapping statutes in all 50 U. S. states.[3] Broadly speaking, unlawful wiretapping consists of "intercepting" or "eavesdropping on" the "content" of confidential communications without the consent of all required parties.[4]

U. S. plaintiffs are now alleging that common website technologies result in "wiretapping." Wiretapping statutes are favored by plaintiffs because they contain so-called "statutory damages" clauses. If wiretapping found to have occurred, a penalty of between USD 1,000 to 50,000 (depending on the statute) can be automatically assessed – without the plaintiff needing to show any actual harm.[5] The U. S. class-action regime permits these claims to be brought "at scale". A single case may seek to represent all persons who visited a site over years-long periods, and to claim thousands in statutory damages on behalf of each person.

This article briefly sketches two of the main types of wiretapping cases: (1) chat tool cases, and (2) session replay cases. It then outlines open issues and potential defenses.

* Daniel J. Felz, Dr. iur. (Universität Mainz), J. D. (University of Georgia), B. A. (University of Georgia) is admitted to the bars of Georgia, New York, and Texas. He is a partner at Alston & Bird in Atlanta, Georgia, in their Privacy, Cyber and Data Group.

1 *See* California Consumer Privacy Act, Cal. Civ. Code § 1798.100 *et seq.*

2 *See* Colorado Privacy Act, Colo. Stat. § 6-1-1301; Connecticut Data Privacy Act, Conn. Public Act. 22-15 (10 May 2022); Iowa Data Privacy Law, Iowa Senate File 262 (28 March 2023); Indiana Consumer Data Protection Act, Ind. Senate Bill 5 (1 May 2023); Montana Consumer Data Privacy Act, Mont. Senate Bill 384 (19 May 2023); Tennessee Information Protect Act, Tenn. House Bill No. 1181 (11 May 2023); Utah Consumer Privacy Act, Utah Code § 13-2-1 *et seq.*; Virginia Consumer Data Protection Act, Va. Code § 59.1-571. As of the publication of this article, the Texas legislature passed the Texas Data Privacy & Security Act (Tex. House Bill No. 4, passed by legislature 18 June 2023) and the Oregon legislature passed the Oregon Consumer Privacy Act (Or. Senate Bill 619, passed by legislature 25 June 2023); unless the governors of these states veto these bills, they will become law and make Texas and Oregon the tenth and eleventh U. S. states to pass general privacy statutes.

3 *See* Federal Wiretap Act of 1968, as amended, 18 U. S. C. § 2510-2522.

4 *See, e. g.*, California's Invasion of Privacy Act, which is codified at Cal. Penal Code § 631(a): "*Any person who … willfully and without the consent of all parties to the communication … reads or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire … is punishable by a fine not exceeding two thousand five hundred dollars …*"

5 As an example, the Federal Wiretap Act permits statutory damages of up to USD 10,000 per claim (*see* 18 U. S. C. § 2520(c)(2)), while California's Invasion of Privacy Act permits statutory damages of up to USD 5,000 per violation (*see* Cal. Penal Code § 637.2(a)).

1. Wiretapping Claims on the Basis of Chat Tools

Many websites offer "chat" functionalities that enable users to engage in typed chats with the website operator. These may be "live chat" features through which the user chats with human operators, or "chatbots" through which users chat with AI-powered applications. In either case, companies that offer chat functionalities on their websites typically do not build these tools themselves; instead, they license chat functionalities from third-party vendors.

This results in "wiretapping", according to numerous lawsuits filed in the U. S. The general theory of these cases is as follows: When users access a website, they intend to communicate with the company operating the site. But this company has integrated a chat tool created by a third party. The chat tool provider "intercepts" and "records" chats in real time and – as a third party – thus "wiretaps" the chats between the users and the site.

2. Wiretapping Claims on the Basis of Session Replay

Session replay is an analytics technology that can be integrated into websites. As its name suggests, it enables users' sessions on websites to be captured and – if needed – "replayed". By capturing user interactions with websites at regular intervals, session replay technologies reconstruct what a user did while using a website. Data such as mouse clicks, keyboard strokes, scrolling, zooming, cursor movements, or similar data may be captured, although as a rule, session replay tools have settings to avoid collecting personal information that users enter. Companies often use session replay to improve the website experience, e. g. by identifying parts of websites that are causing confusion to users, or by reconstructing what happened when a specific user claims to have had an issue.

Like with chat tools, session replay technology is typically provided by a third party vendor. Thus, here again, U. S. plaintiffs claim that – by making users' sessions accessible to third-party vendors – websites that use session replay enable these vendors to "wiretap" users' sessions.

3. Results of Wiretapping Suits

While "wiretapping" concepts may seem an odd fit for websites, these suits have found some initial success in some U. S. courts. Although no wiretapping case has yet made it to the advanced stages of U. S. litigation – *i. e.*, summary judgment or jury trial – courts of California, Florida, and Pennsylvania have permitted wiretapping suits to proceed past motions to dismiss. This makes such lawsuits significantly more costly to defend, which in turn has encouraged plaintiffs to pursue more wiretapping claims. Wiretapping suits have been brought against companies in practically all major industries, such as healthcare, financial services, automotive, retail, media, and many others.

Indeed, plaintiffs' firms are gaining expertise in these types of suits. The same plaintiffs' firms often file the similar wiretapping lawsuits against multiple companies. These firms may work with common plaintiffs who act as "testers" by visiting company websites that may use chat tools or session replay technologies. If – for example – a tester finds a chat tool, she may "have a conversation" with it, then later purport to learn that a third-party vendor recorded the conversation, and decide to bring a lawsuit in response.

Typically, wiretapping lawsuits are brought as putative class actions, in which the plaintiffs' lawyers seek to represent all persons who visited the company's website during, e. g., the past year. Thanks to the statutory damages often available under wiretapping statutes, these cases often start by seeking several thousand dollars in damages per potential class member, resulting in aggregate million-dollar demands.

4. Open Questions in Wiretapping Litigation

Applying older wiretapping laws to newer technologies raises a number of questions. Given the early stage of this litigation, many of these questions are still being worked out by U. S. courts – with some courts taking markedly different positions on key issues than others. This can provide companies that face a wiretapping lawsuit with strategies for potential defenses.

a) Consent

Wiretapping does not occur if all parties to the communication consent to having others "listen in" to their communication.[6] Consent can thus provide a complete defense to wiretapping claims. In the cases to date, it has become clear that so-called "clickwrap" consent – *i. e.*, consent obtained via an affirmative "click" – is sufficient to defend against wiretapping lawsuits. This would mean that websites that take a more European approach, by forcing users to interact with detailed cookie pop-ups prior to using the site, may be able to claim they have obtained "consent" to let website vendors "wiretap" all activities on a website.

However, this type of approach is not common in the U. S. – and more importantly it is not otherwise required by U. S. privacy laws. Many major brands do not require consumers to "click" their consent to cookies and trackers in order to use their sites; indeed. Instead, companies often provide a prominent banner that informs users about the use of cookies, and permits users to opt-out of cookies at any time. This sets up arguments that users – having received notice that cookies and trackers are in use – have given companies *implied* consent under the wiretapping statutes. However, implied-consent arguments involve factual claims that may not be decided early in U. S. litigation. Instead, courts may permit wiretapping claims to move past the motion to dismiss, and elect to resolve implied-consent arguments during or after discovery. Thus, while the "typical" U. S. approach of notice-banner-and-opt-out may ultimately win the day, it may require significant litigation to reach a decision.

b) Can a website "wiretap" its own communications?

Vendors that provide chat tools and session replay technology are not classic "wiretappers" in a key way – they are not interlopers secretly "eavesdropping" on others' conversations. They have instead been hired by the website operator subject to enforceable contract terms. Can a website wiretap its own communications by hiring a vendor to assist with website operations? U. S. courts have taken markedly different approaches to this question. Some courts have suggested that, by law, websites are not "wiretapping" when they invite their own vendors to assist with tracking website activity – instead, the vendor functions as an "extension" of

6 As an example, California's Invasion of Privacy Act defines wiretapping as "*willfully and without the consent of all parties to the communication, read[ing] … or [] learn[ing] the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable.*" (Cal. Penal Code § 631).

the website operator.[7] However, other courts have suggested the opposite, particularly if vendors may use data collected from a website for their own purposes.[8] Some plaintiffs attempt to avoid this issue by alleging that the website is not engaged in wiretapping itself, but rather is "aiding and abetting" wiretapping by a session replay vendor.[9]For this question, a number of factors tend to play a role, such as who the intended recipient of a website communication is (the website itself versus a third-party vendor), and the contractual terms in place with the vendor – and whether these permit the vendor to use data for its own business purposes. This question can thus offer possibilities for defending a suit, although it may vary strongly from case to case.

c) What are the "contents" of communications?

Wiretapping statutes typically prohibit third parties from intercepting the "content" of communications.[10] In the case of chat tools, the argument is that the vendor sees the "content" of communications in the form of the actual chats between consumers and the website. For session replay, however, it is far less clear whether the "content" of any communication is involved. These tools often simply capture website activity – mouse clicks, site navigation, and other interactions – and are often designed to redact or avoid capturing "contents" like emails, web forms, and the like. Indeed, the federal courts in Florida held that session replay generally does not capture the "contents of communications", and dismissed a large number of session-replay lawsuits.[11] However, courts in California and Pennsylvania remain open to the argument that session replay captures "contents" of communications, requiring a more strategic defense in those states.

d) Arbitration

Websites often maintain terms of use that contain arbitration clauses and class action waivers. Site visitors who create accounts, order products, join loyalty programs, sign up for newsletters, or take other actions while on the site are often asked to accept the terms of use – including their arbitration clause. If the plaintiff(s) in a wiretapping case have created an account in the course of their usage, this often sets up companies to ask courts to dismiss the suit and compel arbitration. Of course, arbitration may not by itself remove the threat of large-scale proceedings; some plaintiffs' firms may continue to pursue so-called "mass arbitrations". However, the prospect of arbitration may help level the playing field when discussing potential cases with plaintiffs' counsel.

III. Video Privacy Protection Act lawsuits

The Video Privacy Protection Act (VPPA)[12]was passed in 1988 in response to a political scandal. Robert Bork was a judge nominated by then-President Reagan to serve on the Supreme Court. During confirmation hearings, a Washington newspaper obtained Bork's video rental history from a local video store – and published it. Congress quickly passed the VPPA to make the disclosure of video rental histories illegal.

Accordingly, the VPPA applies to "video tape service providers", and prohibits them from disclosing "personally identifiable information" about consumers that "*identifies [the consumer] as having requested or obtained specific video materials or services*".[13] The VPPA permits up to USD 2,500 in statutory damages per violation. Originally, the VPPA was intended to apply to video and DVD rental stores such as Blockbuster Video – classic "*Videotheken*" in German terms. As streaming became popular, the VPPA was read to include video services like Netflix that can collect information about video watching history. In 2012, the VPPA was amended to permit video tape service provider to share video rental or watching history by obtaining prior specific, express consent from the consumer.

1. The New Wave of VPPA Litigation

Recently, plaintiffs have started targeting VPPA suits towards a broad range of companies whose websites happen to include videos. The novel theory of these suits is as follows: by placing video content available to the public, the company operating the site becomes a "video tape service providers" under the VPPA. These suits then look at the specific pages on which companies have posted videos, and identify whether these contain commonly-used tracking technologies, such as the Meta pixel or Google Analytics. Since these technologies often share browsing events with these third parties indicating that consumers visited a page containing video content, these suits allege that companies are "disclosing" information about consumers "having requested or obtained specific video materials".

As of June 2023, over 300 companies have been sued under the VPPA as part of the new wave of VPPA litigation. Most of these companies are not in the video or entertainment industries, and include automotive, retail, consumer goods, financial services, traditional media, healthcare, and many other types of "non-video" companies.

In other words, at present, simply posting video content on a website that also uses tracking technologies creates the risk of a VPPA lawsuit. Like the wiretapping litigation discussed above, VPPA suits are typically filed as putative class actions, with the plaintiffs' lawyers seeking to obtain the USD 2,500 in damages available under VPPA on behalf of all persons who visited the site.

The theory behind VPPA suits is certainly novel, and to date, no VPPA lawsuit has proceeded to an advanced stage of litigation. Still, several VPPA suits have recently survived motions to dismiss in U. S. courts. This has permitted them

7 *See, e. g., Byars v. Hot Topic, Inc.*, 2023 U. S. Dist. LEXIS 24985, *23-26, 2023 WL 2026994 (C. D. Cal. Feb. 24, 2023) (citing *Warden v. Kahn*, 99 Cal. App. 3 d 805, 811 (1979) (stating that California's wiretapping statute "*has been held to apply only to eavesdropping by a third party and not recording by a participant to a conversation*")).

8 In re *Facebook, Inc. Internet Tracking Litig.*, 956 F.3 d 589, 599 (9th Cir. 2020); *see also Graham v. Noom, Inc.* No. 20-CV-08183-LB, 2021 WL 1312771 at 2 (N. D. Cal., Apr. 8, 2021).

9 California Penal Code § 631(a) at times serves as the basis for "*aiding and abetting*" claims, due to its language encompassing any person "*who aids, agrees with employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the facts or things mentioned above in this section.*" (*see e. g., Saleh v. Nike, Inc.*, 533 F. Supp. 823, 832-33 (N. D. Cal. 2021)).

10 *See, e. g.*, California's Invasion of Privacy Act, which defines wiretapping as "*read[ing], or attempt[ing] to read, or to learn the contents or meaning of any message, report, or communication.*" (Cal. Penal Code § 631).

11 *See, e. g., Goldstein v. Costco Wholesale Corp.*, 559 F. Supp. 3 d 1318 (S. D. Fl. 2021) (holding "*the mere tracking of Plaintiff's movements on Defendant's website*" did not violate FSCA because it was analogous to activities captured by a security camera at a physical store); *Jacome v. Spirit Airlines*, No. 2021-000947-CA-012021, 2021 Fla. Cir. LEXIS 1435, *12 (Fla. 11th Cir. Ct. June 17, 2021) (also holding that "*mouse clicks and movements, keystrokes, search terms, information inputted by Plaintiff, and pages and content viewed by Plaintiff*" did not constitute "contents" of communication).

12 The VPPA is codified at 18 U. S. C. § 2710.

13 18 U. S. C. § 2710(a)(3), (b)(1).

to proceed to class-certification and discovery, encouraging further VPPA suits to be filed.

2. Open Questions in VPPA Litigation

Like with wiretapping claims, applying video-tape legislation to modern website technologies raises a number of issues. These questions are still being worked out by U. S. courts, with some courts taking different positions on key issues than other courts. This can provide potential defenses for companies that face a VPPA suit. Key issues include:

a) Who is a "video tape service provider"?

Perhaps the most obvious question is whether any company that happens to post a video on its website should be considered a "video tape service provider" under VPPA. At present, U. S. courts have issued only limited rulings on this question, holding that companies that fairly fall into the "media" category (the Boston Globe)[14] and companies that create videos through branded partnerships to drive website traffic (WebMD)[15]are "video tape service providers". Many of the other companies currently facing VPPA suits are not media companies; they do not rent, sell, or distribute videos; and videos may simply be incidental to normal marketing and promotions. Recent motions to dismiss brought in VPPA cases have argued that such companies are not "video tape service providers" under VPPA.[16] However, VPPA cases have settled before such motions to dismiss were decided. This issue thus remains open, while potentially offering possibilities for defense.

b) What kind of "subscription" is necessary to trigger VPPA liability?

VPPA only applies to the personal information of "consumers", defined as a "renter, purchaser, or subscriber" of video-related goods or services.[17]When consumers purchase a subscription with a streaming service, the case is clear as to why they would be a "consumer" under VPPA. But in many recent VPPA suits, plaintiffs have claimed to be VPPA "consumers" on the far more attenuated basis that they visited a website, signed up to receive the email newsletter, and in doing so "subscribed" to a service from the site – and thus should also be considered a "subscriber" for any videos that happen to be on the same site. Some U. S. courts have rejected this argument, but others have not. At least one court has held that subscription to "something" (even a newsletter) is enough to trigger VPPA liability. Thus, this issue broadly remains open, but depending on where claims are brought may offer defenses.

c) Do website tags share "personally identifiable information"?

Website tags typically do not share "identifiable" information like names, email addresses, or similar. Instead, they share pseudonymized identifiers such as cookie IDs, along with device information such as IP addresses, URLs visited, and – potentially – information about what videos were viewed. Some courts have held that these types of "anonymized serial numbers" are not personally identifiable information because they require "*pieces of information collected elsewhere by […] third parties*" to be linked to a consumer.[18] But, more recent cases have suggested that a serialized ID like a cookie ID is personally identifiable information under VPPA, since the cookie provider may be able to identify the user behind such an identifier.[19]

d) Can websites obtain VPPA-required consent?

Much like in wiretapping litigation, consent can provide a complete defense to VPPA claims. However, under VPPA, consent has a number of requirements that can be technically complex to implement: (a) it must be "*informed*" and "*written*"; (b) it must be obtained "*in a form distinct and separate*" from other consents or terms that may affect "*other legal or financial obligations of the consumer*"; (c) it must be obtained "*at the time*" a website seeks to share consumers' information; and (d) the website must provide an option "*for the consumer to withdraw [consent] on a case-by-case basis or to withdraw from ongoing disclosures*" of personal information.[20] Perhaps due to these technical complexities, some websites have elected to simply remove tags from certain video-containing webpages instead of attempting to build consent VPPA-compliant interfaces.[21]

IV. Conclusion

U. S. privacy litigation is testing the old adage that new wine cannot be put into old wineskins. Privacy statutes designed for non-digital eras are currently powering waves of litigation against newer website technology. Although companies have defenses when faced with wiretapping or VPPA claims, defense must be approached strategically. Also, now would be a good time for companies to comprehensively review the technologies integrated into their websites and apps to proactively set themselves up to defend what can be multi-million dollar class actions.

In all, although the EU has likely used more ink in developing and deploying rules for cookies and similar website tags, the higher risk of litigation may currently reside in the U. S. Litigation is widespread and affects even companies that are fully compliant with U. S. privacy statutes. Companies are well-advised to review their website practices in the help of their litigation counsel to prepare. ■

14 *Ambrose v. Boston Globe Media Partners, LLC*, No. 1:22-cv-10195-RGS (D. Mass. Sept. 19, 2022).
15 *Lebakken v. WebMD, LLC*, Case No. 1:22-cv-644-TWT (N. D. Ga. Nov. 4, 2022).
16 *See, e. g.*, *Carroll v. La-Z Boy Inc.*, Case No. 4:22-cv-08961 (N. D. Cal. Mar. 13, 2023) (Dkt. 30).
17 18 USC § 2710(a)(1).
18 *Robinson v. Disney Online*, 152 F. Supp. 3 d 176, 179 (S. D. N. Y. 2015).
19 *Stark v. Patreon, Inc.*, __F. Supp. 3 d __, 2022 WL 7652166, at *7-*8 (N. D. Cal. Oct. 13, 2022).
20 27 U. S. C. § 2710(b)(2)(B).
21 In a recent proposed settlement, the Boston Globe offered to "suspend operation" of social media pixels on "*any pages on its website that both include video content and have a URL that substantially identifies the video content viewed*" (*Ambrose v. Boston Globe Media Partners, LLC*, No. 1:22-cv-10195 (D. Mass. May 19, 2023) (Dkt. 48)).

By Blerina Jasari, Washington, D. C.*

Fraud against the U. S. Government

– A Discussion on the False Claims Act –

The Federal False Claims Act (FCA)[1] – also referred to as the "Lincoln Law" because it was enacted during the U. S. Civil War to deter suppliers of goods from defrauding the Union Army – is the U. S. Government's primary weapon for combatting fraud against it. Used as a criminal statute as well as a civil enforcement tool, the FCA provides an avenue to recover money improperly paid on fraudulent claims submitted to the United States. On the one hand, it allows the government to recover payment and penalties from individuals and businesses that "*knowingly*" submit false claims to the U. S. On the other hand, it also allows private citizens or "whistleblowers" who are original sources of facts that give rise to the government's claim to sue persons or entities that are defrauding the government and recover damages and penalties on the government's behalf. In cases where suit is brought by a private citizen, the private citizen receives 30 % or more of any ultimate recovery, depending on whether the government has intervened in the action or not.[2]

I. Liability Under the False Claims Act

The FCA establishes liability against any individual or entity that knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval by the government.[3] The FCA also creates liability for any entity or individual that knowingly makes or uses, or causes to be made or used, a false record or statement in connection with a claim.[4] Companies and individuals also can be liable for conspiring to violate the FCA, and conspiracy claims are analyzed under traditional civil conspiracy precedent.[5] A "*claim*" is any request or demand for money that may be made directly or through an intermediary, such as a vendor. There are three separate and distinct ways to establish requisite knowledge under the FCA. A person violates the FCA when they (1) have actual knowledge, (2) act with deliberate ignorance of the truth, or (3) act in reckless disregard of the truth. The U. S. Supreme Court recently held that subjective knowledge is relevant under all three prongs.[6] It reasoned that the FCA's scienter element, interpreted in light of the common law fraud, refers to a defendant's "*knowledge and subjective beliefs*." This means that it is not sufficient that the petitioners allege that the respondent's interpretation was wrong, and it should have known that; to prevail in an FCA case, petitioners must present evidence showing that the respondent actually knew or believed that its claims were not accurate, or at a minimum was aware of a substantial and unjustifiable risk that its claims were not accurate. The U. S. Supreme Court further clarified that the focus is on what a respondent thought when submitting a claim – not what it may have thought after submitting it.

II. False Claims Act Activity in Current Practice

1. Financial Incentives to Pursue Claims

The financial incentives for private citizens to pursue claims under the FCA prompts hundreds of lawsuits each year, particularly in the healthcare and life sciences industries. In 2022 alone, the U. S. Department of Justice (DOJ) recovered USD 2.2 billion in FCA cases.[7] Over USD 1.7 billion of the amounts recovered related to matters that involved the health-care industry, including drug and medical device manufacturers, durable medical equipment, home health and managed care providers, hospitals, pharmacies, hospice organizations, and physicians.[8]

2. False Claims Act Activity and Private Equity Firms

Of particular note is that once a private citizen files a claim, also known as a *qui tam* suit, the DOJ is required to investigate the allegations.[9] Being in DOJ's crosshairs can be costly and time-consuming and can carry great reputational risks to companies and investors associated with a claim. For example, in the case of *U. S. ex rel. Martino-Fleming v. South Bay Medical Health Centers, et al.*, in October 2021, the DOJ reached a settlement with a private equity firm that is the largest FCA settlement to date. In that case, the firm paid nearly USD 20 million to settle claims under the FCA related to the company's illegal conduct, which predated the firm's investment in the company. In the U. S. District Court for the District of Massachusetts' decision on summary judgment motions, the court found that there was evidence that the firm "*rejected recommendations*" to bring the company into compliance. The court held that this amounted to "*knowing ratification*" of a pre-acquisition "*policy*" of submitting false claims.[10]

In another case, in *U. S. ex rel. Johnson, et al. v. Therakos, Inc., et al.*, the DOJ announced an FCA settlement with a private equity firm and immunotherapy company, Therakos, Inc., in the amount of USD 11.5 million.[11] The DOJ alleged that between 2006 and 2015, Therakos engaged in off-label marketing to promote its cancer treatment for use in pedia-

* Blerina Jasari, Diplom-Juristin (Ruhr University Bochum), LL. M. (Université de Cergy-Pontoise), LL. M. (Temple University Beasley School of Law), is admitted to the bars of New York and the District of Columbia. She is a partner of Boyle & Jasari LLP, where she specializes in white-collar criminal defense, international criminal law, and international arbitration and FINRA arbitration.

1 31 U. S. C. §§ 3729, *et seq*.
2 31 U. S. C. § 3730.
3 31 U. S. C. § 3729 (a)(1)(A).
4 31 U. S. C. § 3729 (a)(1)(B).
5 See *U. S. ex rel. Westmoreland v. Amgen, Inc.*, 738 F. Supp. 2 d 267, 280 (D. Mass. 2010).
6 *U. S. ex rel. Schutte v. SuperValu Inc., et al.*, No. 21-1326 (1 June 2023), available at: https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf.
7 False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022, Dept. of Justice Press Release (7 February 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.
8 False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022, Dept. of Justice Press Release (7 February 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.
9 31 U. S. C. § 3730.
10 *Martino-Fleming*, Civ. Action No. 15-13065 (D. Mass. 19 May 2021).
11 Former Owners of Therakos, Inc. Pay $11.5 Million to Resolve False Claims Act Allegations of Promotion of Drug-Device System for Unapproved Uses to Pediatric Patients, Dept. of Justice Press Release (19 November 2020), https://www.justice.gov/usao-edpa/pr/former-owners-therakos-inc-pay-115-million-resolve-false-claims-act-allegations.

tric patients. Therakos was a Johnson & Johnson subsidiary from 2006 to 2012, at which point it was acquired by a private equity firm. There were no allegations as to the private equity firm's involvement in the alleged conduct. The complaint, however, alleged that the improper off-label promotion continued after the private equity firm acquired Therakos, and that the firm hired a former Therakos employee as the company's new CEO. Similarly, in *U. S. ex rel. Mandalapu, et al. v. Alliance Family of Companies LLC, et al.*, the DOJ announced a USD 15.3 million settlement with Alliance Family of Companies LLC, a national ambulatory EEG testing company, and a private equity firm that had invested in Alliance in 2017, for submitting false claims to federal healthcare programs.[12] The private equity firms in these cases sued the founders of Alliance for fraud during the diligence process, claiming that they actively misled investors about the alleged schemes.

3. False Claims Act Activity in all Industries

As stated above, the majority of FCA activity involves the healthcare and life sciences industries. However, the FCA is implicated any time a person or entity receives federal funds or property and files a false claim. Examples of non-healthcare related FCA settlements include mortgage and banking fraud, defense and other government contractor fraud, evasion of customs duties, or bid-rigging and kickbacks. In *U. S. v. Ameri-Source International Inc., et al.*, for example, the DOJ collected over USD 3 million from three companies accused of evading customs duties on imports of aluminum extrusions from China by misrepresenting the country of origin of the imported products.[13] In another example, a New York-based environmental remediation firm paid nearly USD 3 million to resolve an FCA suit alleging that it accepted kickbacks and rigged bids, and passed inflated charges on to the U. S. Environmental Protection Agency in connection with work performed at a federal Superfund site.[14]

4. DOJ Investigations

In many cases brought by whistleblowers, companies who become the target of a DOJ investigation may not even know that they are the subject of an investigation. Whistleblower claims are filed under seal and remain under seal until the DOJ decides to partially lift the seal, engages in settlement discussions with the defendants, or makes an intervention decision and unseals the complaint and portions of the court docket. Other ways a company may become aware of an action are: receipt of a so-called Civil Investigative Demand from the DOJ; a "contact letter" from the DOJ; an inadvertent disclosure by the whistleblower or other persons who are familiar with the complaint; or suspicious agency activity, including heightened audits, regulatory inquiries, and/or investigative contacts with employees or contractors. This process can take months or even years and damages may be increasing each day without the companies' and its investors' knowledge. The whistleblower could still be an employee at the company and the company may continue to engage in wrongdoing thereby creating new damning facts that may be used against it and its investors.

III. Conclusion

The cases cited above illustrate that private equity firms within the United States and abroad are at an increased risk of scrutiny by the DOJ if they fail to exercise their due diligence in vetting the companies in which they invest. Training in compliance and FCA risk are a must, and firms should be particularly cautious when dealing with companies in high-risk areas, such as the healthcare and life science markets. Pre-acquisition diligence and post-acquisition compliance programs are key to navigating such sensitive sectors and experienced counsel should be retained if faced with an FCA investigation. ■

12 EEG Testing and Private Investment Companies Pay $15.3 Million to Resolve Kickback and False Billing Allegations, Dept. of Justice Press Release (21 July 2021), https://www.justice.gov/opa/pr/eeg-testing-and-private-investment-companies-pay-153-million-resolve-kickback-and-false.

13 Four Pennsylvania-Based Companies and Two Individuals Agree to Pay $3 Million to Settle False Claims Act Suit Alleging Evaded Customs Duties, Dept. of Justice Press Release (22 February 2016), https://www.justice.gov/opa/pr/four-pennsylvania-based-companies-and-two-individuals-agree-pay-3-million-settle-false-claims.

14 Sevenson Environmental Services Inc. Agrees to Pay $2.72 Million to Settle Claims of Alleged Bid-Rigging and Kickbacks, Dept. of Justice Press Release (17 November 2014), https://www.justice.gov/opa/pr/sevenson-environmental-services-inc-agrees-pay-272-million-settle-no-vedeeplclaims-alleged-bid-rigging.

By Dennis E. Boyle, Washington D. C.*

Understanding the Role of Counsel in an Internal Investigation

– Who Protects the Individuals? –

Most of the published literature concerning internal investigations focuses upon the role of counsel conducting an internal investigation (investigating counsel), with only scant attention paid to the rights of corporate officers, directors, and senior officials who will be interviewed during the course of the investigation, even then, the focus is on how *Upjohn* warnings[1] should be given. Although investigating counsel may call themselves "white-collar attorneys" or say that they "represent the corporation", the reality is that these outside attorneys are functionally the same as prosecutors. They will at some time share their "work product" with the Department of Justice (DOJ), often with disastrous consequences for people who cooperated with the investigation.

Individuals interviewed by investigating counsel may not understand that these attorneys frequently have an agenda, which usually involves minimizing responsibility for corpo-

* Dennis E. Boyle (J. D. University of Baltimore), (B. A. Elizabethtown College), is a founding partner of Boyle & Jasari where he specializes in white-collar criminal defense. He is admitted to the bars of several U. S. states (New York, District of Columbia, Pennsylvania, Maryland, and Alaska).

1 See *Upjohn Co. v. United States*, 449 U. S. 383 (1981).

rate misconduct and shifting responsibility away from the corporation. Unfortunately, while this is happening, the targeted individual(s) often believe they are assisting the company and do not understand the jeopardy they face. If the topic of defense counsel comes up, investigating counsel will almost always recommend defense counsel with whom investigating counsel has a relationship and indicate that the company will pay for legal counsel, implying that only payment for the recommended counsel is available.

The fact that outside counsel is recommending defense counsel to someone who is a target of an internal investigation is the same as a prosecutor in a criminal case recommending a defense attorney to a suspect. This should be a clear conflict of interest since the attorney conducting the internal investigation is not likely to recommend someone who would question the investigating attorney's methodology or conclusions.[2]

I. The role of attorneys conducting internal investigations

Prior to the passage of the Sarbanes-Oxley Act of 2002,[3] corporate criminal defense counsel in the United States functioned in pretty much the same manner as any other criminal defense counsel. However, a series of corporate scandals in the late 1990 s and early 2000 s involving companies like Enron, Tyco International, Adelphia, Peregrine Systems, and WorldCom, just to name of few, cost investors billions of dollars, mainly through creative accounting techniques that hid debt and/or inflated profits.

As these corporate scandals cascaded one after another, Congress felt compelled to act, and in so doing, altered the traditional role of the defense attorney, at least for corporations. It began with creating a requirement that all publicly traded companies establish an Audit Committee independent from the corporation's officers or its board of directors.[4] It was and remains the duty of the Audit Committee to conduct independent audits, or investigations, to ensure compliance with federal laws.[5] The Audit Committee, in turn, was empowered to hire outside counsel to conduct "independent investigations" into alleged wrongdoing by the corporation.[6]

In so doing, Congress changed the role of white-collar defense lawyers in the United States forever. Rather than being advocates for their clients, as the Rules of Professional Conduct seemed to require, they became primarily investigators, essentially performing the tasks previously performed by the Securities and Exchange Commission (SEC) and DOJ. Whenever misconduct was discovered within the corporation, the white-collar investigating attorneys would recommend creating or enhancing the compliance program, self-reporting the violation to the SEC or DOJ, and then would work towards negotiating a Deferred Prosecution Agreement (DPA) or a Non-Prosecution Agreement (NPA).[7] American corporations and international corporations that fall within the criminal jurisdiction of the United States (which, practically speaking, is all of them) would only rarely contemplate mounting a defense in a criminal trial.

It was not always this way. In the 1990 s, white-collar defense counsel defended corporations in the same way other defense counsel defended individuals. For example, in the 1990 s Royal Caribbean Cruise Lines was charged with violating a variety of environmental criminal statutes.[8] The company retained several defense attorneys, including two former heads of the Environmental Law Section at the DOJ, two other former assistant U. S. attorneys as well as a former Attorney General for its defense.[9] Rather than negotiating a DPA or an NPA, these defense counsel proceeded to trial, where Royal Caribbean was ultimately convicted in 1998 and 1999.

The actual defense of a corporation at trial is a relic of the past. The shifting role of defense counsel has now placed the internal investigation at the center of the white-collar criminal defense counsel's job, and, over the years, the DOJ has made itself the master of the internal investigation. Although supposedly conducted under the guise of the attorney-client privilege, in reality, successive Deputies Attorney General have published successive memoranda and made speeches detailing what the DOJ expects in return for (unenforceable) promises of leniency.[10]

Corporate white-collar defense counsel now investigates (hence the title "investigating counsel"), negotiates agreements, recommends changes to compliance programs, and then moves on to the next internal investigation.

II. The role of the defense attorney representing an individual in an internal investigation

The role of the attorney defending an individual has not changed, however. Ordinarily, individuals are not entitled to NPAs; however, the now infamous Jeffrey Epstein was able to enter into a NPA with the DOJ.[11] Thus, unless an individual happens to be named Jeffery Epstein and the charges involve the sexual abuse of children, DPAs and NPAs are not going to be available, and the case is going to be resolved either by a guilty plea or a trial. The white-collar criminal defense attorney's role in representing the individual will be to investigate in order to understand the events leading to the accusation or charges, and to zealously advocate for the client. The attorney is not a neutral investigator collecting facts, and only rarely would a white-collar criminal defense attorney encourage an individual to self-report his or her violations.

2 See Model Rules of Professional Conduct, American Bar Association (last accessed: 26 June 2023), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/; Rule 4.1 ("*a lawyer shall not knowingly…make a false statement of material fact or law to a third person*") and Rule 4.4 ("*a lawyer shall not use …methods of obtaining evidence that violate the legal rights of such a person*").
3 P. Law 107–204 (2002).
4 P. Law 107–301 (2002).
5 P. Law 107–301 (2002).
6 15 U. S. C. § 78j–1(m)(3)(B)(5)).
7 Justice Manual, Title 9-28.000, U. S. Dept. of Justice (last accessed: 5 June 2023), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
8 *U. S. v. Royal Caribbean Cruises*, Ltd., Dept. of Justice, Environmental and Natural Resources Division (last updated: 6 May 2015), https://www.justice.gov/enrd/us-v-royal-caribbean-cruises-ltd.
9 See *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2 d 1358 (S. D. Fla. 1998).
10 See, *e. g.*, Memorandum by Deputy Attorney General Monaco, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, Dept. of Justice, Office of the Deputy Attorney General (15 September 2022), https://www.justice.gov/opa/speech/file/1535301/download.
11 *Doe v. United States of America*, No. 9:2008cv80736, Document 361-62 (Non-Prosecution Agreement with J. Epstein) (S. D. Fla. 2019), available at: https://www.documentcloud.org/documents/6184602-Jeffrey-Epstein-non-prosecution-agreement.

Unlike individuals, corporations do not suffer the ignominy of criminal charges. Corporations cannot go to prison or easily have their reputations destroyed. Exxon-Mobil, for example, might be considered a "career criminal" if it were an individual.[12] As a corporation, it simply pays fines – intended to not destroy the company – and continues with its operations.[13] For most people subject to a federal criminal investigation or indictment, their goals are first to avoid charges or conviction if possible, and to minimize the consequences of a conviction if that is not possible. They generally have very little interest in the well-being of their employer who, in most cases, eventually fires them anyhow.

The counsel for the individual will conduct an investigation, but the purpose of that investigation is to find evidence useful to the person under investigation. It differs substantially from the government investigation, or the "internal investigation" undertaken by corporate counsel. Counsel for the individual is focused upon finding and securing exculpatory evidence or other evidence favorable to his or her client.

It will frequently be in the client's interest to approach the government independently, rather than cooperate with an internal investigation. Early cooperation with the government may mitigate or eliminate the possibility of criminal exposure. It is also better for the client to communicate with the FBI or federal prosecutors without their witness statements being filtered through investigating counsel working for the corporation. In some cases, the client may even qualify as a "whistleblower" receiving the protections offered by that status.[14]

From the very beginning of the white-collar criminal defense counsel's involvement, the attorney's goal will be to defend the client, including the preparation of a trial defense. This involves an individualized strategy that varies greatly from case to case, but the strategy will frequently conflict with the goals of investigating counsel for the corporation. Most federal crimes involve a specific intent. For example, in a Foreign Corrupt Practices Act case, a defendant must act "corruptly", meaning that he or she must seek to influence or persuade a foreign official to "*act or fail to act contrary to his or her established duty*".[15] Even if the defendant was involved in providing something of value to a foreign official that would not violate the law if there was no corrupt intent.

In pursuing a defense strategy designed to protect the individual, the concerns of investigating counsel or the corporation are irrelevant to the white-collar defense counsel. Defense counsel's only loyalty is to the individual.

III. The natural conflict between the investigating counsel/corporation and the white-collar defense counsel/individual in an internal investigation

There is an inherent conflict of interest under Model Rule of Professional Conduct 1.7 that prevents corporate investigating counsel from representing corporate executives, officers, and directors while at the same time representing the corporation, and few investigating counsel would risk violating this rule. However, the client who does not understand the subtleties of the Rule is likely to be confused about the role of investigating counsel. This confusion tends to be handled in one of two ways. First, investigating counsel likely relies upon *Upjohn* warnings to insulate themselves from allegations of confusion. Second, investigating counsel will refer the individual to counsel of the corporation's own choosing. The Model Rules of Professional Conduct to address this situation are Rules 4.1 and 4.3.

Let's begin by examining *Upjohn* and the circumstance giving rise to the Supreme Court's requirement that a warning must be given. Although *Upjohn* warnings are frequently referred to as "corporate *Miranda* warnings", they are but they are not. *Upjohn* dealt with the attorney-client privilege and held that a corporation could assert the privilege with respect to interviews of corporate employees during an investigation. It did not establish any "warning" to be given to an interviewee.[16]

As a practical matter, *Upjohn* does not require that anyone be informed that anything that person says can be used against him or her. There is no requirement to inform the individual of a right to counsel. There is certainly no requirement to inform the individual that they do not have to speak with the investigating counsel or that they can terminate the interview at any time. To the contrary, the individual may be told that his or her employment will be terminated if they do not cooperate. This advice is inconsistent with a voluntary statement.

When an individual enters into communication with investigating counsel, investigating counsel assumes an obligation under Model Rule 4.1 to be truthful in communications with him or her. The comment to the Rule states that "[m]*isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.*" Often, and particularly when acting on orders from superiors or when superiors have knowledge of their actions, corporate officers, directors, and executives will believe that their interests and those of the corporation are aligned. *Upjohn* does not require this ambiguity to be resolved, but Rule 4.1 does. By allowing ambiguity to exist as to the role of investigating counsel, investigating counsel violates this rule.

Rule 4.3 concerning a lawyer's duty when dealing with unrepresented parties is also relevant. It states:

> *"When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."*

Ethical and moral considerations should require then that all people being interviewed by investigating counsel be in-

12 *Philip Mattera*, Exxon Mobil: Corporate Rap Sheet, Corporate Research Project (21 June 2021), https://www.corp-research.org/exxon-mobil.

13 *Philip Mattera*, Exxon Mobil: Corporate Rap Sheet, Corporate Research Project (21 June 2021), https://www.corp-research.org/exxon-mobil.

14 Both the DOJ and the SEC operate whistleblower protection programs. For an explanation of whistleblower awards from 2022, see False Claims Act Settlements and Judgements Exceed $2 Billion in Fiscal Year 2022, Press Release by Dept. of Justice, Office of Public Affairs (7 February 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.

15 15 U.S. C. § 78dd–1 (Prohibited Foreign Trade Practices by Issuers).

16 *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981).

formed of the true role of investigating counsel and that everyone be informed of their right to counsel **before** deciding to proceed with an interview. Sadly, this rarely happens. Even when referrals are made, they are usually made to attorneys who are not going to disrupt the investigative practice.[17]

IV. Conclusion – the need for an independent counsel for the person being interviewed

Many corporate investigating counsel move from the DOJ to large law firms seeking the more lucrative remuneration offered in private practice; however, they often bring with them the pro-government mind-set from their time at the DOJ. When placed in the corporate investigative counsel role, they continue on their quest to ferret out "bad guys" using techniques they learned from federal investigators who are even allowed to lie to potential suspects.[18] If *Miranda* warnings are mere speed bumps on the road to a confession, *Upjohn* warnings are a mere ripple in the pavement; they do not dispel confusion over the role of counsel in an internal investigation.

Only truly independent counsel can protect an individual in a corporate investigation. Corporate officers, directors, and executives frequently owe the corporations they work for a fiduciary duty, or at least a duty of loyalty. There should be reciprocity in the relationship. Individuals in internal investigations undertaken on behalf of a corporation should be encouraged to retain independent counsel at the corporation's expense, but they should have their own counsel whether the corporation pays for it or not. ■

17 *Heather M. Field*, Complicity by Referral, The Georgetown Journal of Legal Ethics, Vol. 31:77 (2018), 79, available at: https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2019/01/GT-GJLE180003.pdf.

18 See *Frazier v. Cupp*, 394 U.S. 731 (1969).

By Christopher C. King, Zürich*

Complex Contracts in the Era of Chat GPT and Other Generative AI – A German – American View

I. Introduction

The transition from the German language ZDAR to the English-language TLJ is a good opportunity to review the advance of the English language, and the choice of law question in complex contracts such as M&A and lending over the past decades, as well as the path forward.

II. Discussion

1. English Language Contracts before Generative AI

As General Counsel of a European multinational company for the past twenty-six years, I have tried where possible to make transactions on the European Continent work in German, Dutch, French or any other language I understood other than English. English-language contracts were far longer, the meaning of many English legal terms was ambiguous,[1] irrelevant[2] or did not closely correspond to the Continental terms, requiring extra definition. Also, the advantage of a legal system well suited to many purposes was thrown away in favor of detailed provisions on a large variety of normally non-contentious matters and a private liability system. For example, German law implemented the EC Unfair Contracts Directive[3] in § 307 BGB[4] to apply to standard terms in commercial contracts.[5] By invalidating unfair clauses in business contracts that are not specifically negotiated by the parties, the application of § 307 BGB tends to discourage unfair provisions, for example technical defaults in committed loan agreements that would otherwise frustrate the purpose of the commitment from the borrowers point of view. Where all parties see the "trick", avoiding the clauses being proposed and rejected at minimum increases process efficiency. Although in practice, nearly all defaults called by banks are payment or financial covenant defaults, the U.S.-style English language version contains a myriad of provisions that can result in technical defaults and can be a trap to borrowers. In 2011,[6] I attributed the increased use of such contracts to principal-agent conflicts by external advisers and by adverse selection driven to the information asymmetry between such lawyers and their clients. This problem is well known in microeconomics with the clearest case being the doctor-patient relationship. A patient with broken finger who gets a diagnosis using the Latin term for "broken finger" is more likely to respect that doctor's diag-

* Of Counsel at Kellerhals Carrard. Dr. iur. (University of Hamburg), J.D. (UCLA), Solicitor of the Supreme Court of England and Wales, Attorney-at-Law (New York & California), Rechtsanwalt (Berlin), Europäischer Rechtsanwalt (Bern), Certified Financial Modeler (German Institute for Corporate Finance, Frankfurt am Main), Certified Global Negotiator (ES-HSG) (St. Gallen).

1 This is not only to mirror Continental terms with very precise meanings such as "*unverzüglich*", "*Anwartschaft*", or "*fonds de commerce*", but also due to the inherent ambiguity of many English legal terms. For example, the English word "law" could have different meanings, depending on context: "*Recht*" (the body of all sources of law in a legal system), a statute, or the body of law which in England before the formation of the United States was administered by courts appointed by the King and not by the Church of England. Also, the meaning of legal terms is not uniform among English-speaking countries. For example, the English term "moot" has the opposite meaning in English and American legal English.

2 That is for example the case for provisions in integration clauses which only have an effect on admissibility of evidence under highly technical rules of evidence such as the parole evidence rule or doctrines relating to form requirements ("seisin"), for which there are no Continental equivalents. Since they relate to legal doctrines that do not exist in Continental Europe, the clauses are at best irrelevant, when the contract is subject to the law of a civil law jurisdiction.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contracts Directive), European Council (5 April 1993), L 95/29, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013.

4 *Bürgerliches Gesetzbuch* [Engl.: German Civil Code].

5 Germany is not the only country that did this. France also implemented this directive to apply in some circumstances to commercial contracts. See *Christian Klein*, Die Vertragsrechtsreform in Frankreich, Recht der Internationalen Wirtschaft (RIW), Issue 6 2016, 328.

6 *Christopher King*, Das Agentenproblem der Anwälte in der Verhandlung komplexer Verträge, Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarktrecht sowie Umstrukturierungen (GesKR), Issue 2 2011, 129.

nosis and pay a high fee compared to a doctor who says, "you have a broken finger", which the patient already knows.[7]

2. Market Failure and Prisoner's Dilemma in Contract Design

In some cases, there is even a prisoner's dilemma in the documentation. Although both parties would profit from an efficient process and short documentation, in complex contracts such as M&A, lending or project contracts, each party would lose if only the provisions protecting it were simplified. For example, for the seller, the limitations on remedies in M&A, and for an investment grade borrower, materiality provisions, caps, baskets, "Mulligan" clauses, "snooze, you lose" clauses and the like. Not only is a lot of time lost in exchanging lengthy "pro-seller" and "pro-buyer" clauses (or pro-lender and pro-borrower), but from the U. S. perspective, trickiness can pay off, at least in the short term. A lending partner at one of the largest U. S.-based international law firms bragged to his bank client (and me) that every bilateral loan document that he drafted was in default the first day it was signed. Although this was probably an exaggeration, the results of such tricky drafting could be disappointing for borrowers: commitment fees paid to the banks are thrown away, since the bank never really makes a commitment. There are risks of cross-defaults to other loans and bonds. The borrower's financial statements showing the loans as long-term financing are probably inaccurate. Both the risk of arbitrary results and increased transactions costs have led some commentators to conclude that the invalidity of such standard clauses in commercial contracts is efficient, which is the better view.[8] Note that the long-term interests of even the party applying the unfair clause may be different from the short-term interests pursued by its lawyers. If customers become aware that a particular bank is calling in committed loans early under the guise of tricky technical defaults, that loan product may become unattractive to the bank and difficult to sell.

3. Past Technological Advances and their Effect on Contract Design

Query what role technology has played in complex contracts up to 2011? In my view, a negative role for the parties involved. The technical advances allowed for longer documents and allowed lawyers to tack on clauses from the last transaction, resulting in an explosion in the length of complex contracts. The number of hours spent drafting a bond or a loan agreement greatly increased between 1980 and 2011, due to inefficiency driven by technology and an increase in the use of the English language, thereby overcompensating the efficiency from word processing as opposed to typewriters and carbon paper. The efficiency of word processing was outweighed by its misuse.

Since 2011, AI based translation from services such as Google, Deepl, Reverso, etc., which in the beginning were very poor, improved greatly. In theory, this should permit more work in local languages, since the argument that documents had to be in English as the *lingua franca* had largely fallen away. The opposite was observed, and the trend to use more English remained unbroken. This points to other considerations, in particular principal-agent conflicts, being a bigger driver rather than information asymmetry (home preference) or the efficiency accompanying the use of a *lingua franca*.

4. Changes expected from Generative A.I.

Query whether recent AI advances, particularly Chat GPT, could be different and either change or accentuate the trend to English language drafting.

Anyone who has used the most recent for-pay version of Chat GPT has likely been impressed by the quality, leading to a combination of euphoria and uncertainty as to where generative AI will go.[9] Of course, the document generated by Chat GPT does not distinguish between, *e. g.*, "*Treu und Glauben*" in §§ 157, 242 BGB and the minimal duty of "good faith" in U. S. law under *Laidlaw v. Organ*.[10] Readers will still read the translation through their own cultural lens for this and many other matters. Without a course on comparative law, this is inherent in any translation or any draft using legal transplants. For many purposes, Chat GPT translations are completely adequate. The legal press has made a big point about some mistaken citations, but query why they are applying such a high standard? What percentage of case citations in briefs written by "real" lawyers contain mistakes? Probably 99 %. Those mistakes are not newsworthy, but just part of the normal procedure.

The intriguing side of Chat GPT (and other generative AI programs) for complex contracting is not, however, its excellent translation. It is in preparing a draft contract from a term sheet or heads of terms or in researching legal questions. Chat GPT is based on a heuristic learning model and should improve with each contract it drafts and with each question it answers.

Some observers foresee Chat GPT and similar AI tools, for example Luminance for due diligence, radically changing the costs and procedure for documenting complex business transactions.[11] What does this mean for German-American complex contracts? Will the technology go beyond word processing, and will we even see AI tools utilized for tasks such as e-discovery, which worked perfectly, but did not reduce litigation costs, since the volume of documents increased greatly?

7 This could explain why drafters continue to use Latin phrases in English language contracts despite nearly every handbook and article on contract drafting advocating "plain English". See, *e.g.*, *Kenneth Adams*, A Manual of Style for Contract Drafting (5th ed. 2023). An example of such a Latin clause in the interpretation section of an English language complex contract would be misapplying the doctrine of *expressio unius, exclusio alterius*.

8 *Friedrich Graf von Westphalen*, Von den Vorzügen des deutschen Rechts gegenüber anglo-amerikanischen Vertragsmustern, Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss), Vol. 102 2003, 53-74.

9 *Rolf Schwartmann*, Regeln für Textroboter – ChatGPT auf dem Prüfstand, Recht der Datenverarbeitung (RDV), 2023, 106. See also *Richard Bachgrund*, Das Pro und Contra für Chatbots in Rechtspraxis und Rechtsdogmatik, Computer und Recht (CR), 2023, 132 (134-135).

10 *Laidlaw v. Organ*, 15 U. S. 178 (1817): A buyer of tobacco learned that a peace treaty signed with England had eliminated a blockade and permitted tobacco exports. This was expected to greatly increase the value of tobacco. In this seminal case, the U. S. Supreme Court found no duty of disclosure by the buyer to the seller. U. S. law has numerous exceptions to this general rule, the most famous of which is Rule 10b-5 under the Securities Exchange Act of 1934, which with respect to dealings in investment securities contains in clause b a prohibition "*to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading*." Another important exception is for merchants (not other sellers) who have enhanced duties, *i. e.* to observe reasonable commercial standards of fair dealing in the trade under U. C. C. § 2-103(b).

11 *E.g.*, *Monique Noack*, Welche Zukunft Haben HR und Rechtsberatung?, Arbeit und Arbeitsrecht (AuA), Issue 4 2023, 36-39. But see *Bachgrund*, CR 2023, 132-140.

III. Conclusion

Although my crystal ball is cloudy, let me take an educated guess as to how AI tools might play out in the German-America context.

As every drug dealer and U. S. corporate lawyer knows, the best business model is one that creates its own demand. This is also true for AI solutions. As long as AI cannot completely replace the lawyers (and for some simple questions it certainly can), the best business strategy both for the lawyers and for AI platforms will be to continue the upward spiral of complexity that has prevailed for the last forty years.

By continuing to draft tricky and complex documents, the AI tools will be necessary to embark upon the "Easter egg hunt" to find the unfair provisions and the lawyers will be necessary to resolve those. Lawyers can explain the back and forth by claiming that they are "transaction engineers" as they do now, *i. e.* the drafting is gauged to bring out real business issues[12] and of course also to win zero-sum issues for the client (in microeconomic terms, "rent-seeking"). Rent-seeking can make sense for some parties, even though it is a negative sum game for both combined. Each lawyer using AI will hold out that they are zealously representing their clients and not (just) churning fees with tricky drafting.

The reason this should be possible in most cases irrespective of advances in AI is the nature of the complex contracts themselves. A business which is the subject of an M&A agreement (merger agreement, share purchase agreement, etc.) or a committed loan agreement is fractal in nature.[13] You can look at the business at any level of magnification and see the same factors, just different details. Investors or lenders can look at the external accounts (and perhaps the company forecast and business plan) and see certain details on the performance of the business. Behind those accounts are internal accounts and ledgers. Behind each of the line items on the ledgers are not just supporting papers but a whole story. Customer number 500 ordered more of product 123 in the last month. So did customer 600. What does that mean? A secular trend? Safety stocks ahead of an expected price increase? If the latter, then shouldn't the forecast assume a price increase for product 123? A forecast of how much? How would that change demand? What information is there on customers 500 and 600's alternatives? It goes on and on. With more information, warranties and schedules can be more detailed, and efficiency gains from AI can be erased by more granular documentation.

This would mean more English language and more U. S. law-based documentation.

The beauty of this approach for the software companies and lawyers is that if one lawyer uses AI to draft a tricky contract or schedule, the other party is also forced to use AI to check the same contract without missing anything. Accordingly, the AI creates or augments its own demand. Finally, AI tools create more leverage within a law firm and allow partners to benefit from economies of scale resulting from IT investment made in the AI tools. This fuels another microeconomic anomaly, the "Hollywood" effect,[14] which draws more lawyers into the profession as some young people choose a career as a lawyer based on numbers like the average partner income of over USD 7 million at the most profitable U. S. law firms[15] (and not the fate of 80-90 % of associates who do not make equity partner).

Die-hard Chicago School economists will say more detailed AI-generated contracts are more efficient, since maybe such processes will uncover a zone of possible agreement where otherwise none was discovered and thereby better price assets. First, this approach ignores transaction costs. Second, while it sometimes happens that a company is put on the market but then taken off the market because the price is slightly under the sellers' reserve price, this is not often observed. Due to transaction costs, management time, disruption of the target company, and possibly hindering a future sale if a sale is aborted and a process is restarted too soon, sellers try not to put targets on the market if they think the achievable purchase price is close to their reserve price. Accordingly, there is normally a wide zone of possible agreement, so that such differences just shift transaction gains from buyer and seller to the advisers (and to some extent between buyer and seller).

It is possible that transaction costs may be slightly tempered by the heuristic nature of technology. Rather than knowledge being internalized within the big law firms, it will be internalized within the big AI firms, which – as far as the legal profession goes – might share the same with a wider group of lawyers and at least slightly democratize some practices that are currently oligopolistic. Maybe it is not a coincidence that in the AmLaw partner income survey cited above, the AmLaw 100 partner income was down on average 3.7 % in 2022, while the second 100 firms' income were slightly up. This could be good news for German firms that are not integrated into American or international law firms as it could allow them to compete on a more level playing field. More democracy in firm structure not only can reduce the transaction costs to clients but also benefit a larger group in the legal professions outside the biggest international firms. ■

12 *Werthmann* in DiMatteo/Janssen/Ortolani/de Elizalde/Cannarsa/Durovic The Cambridge Handbook of Lawyering in the Digital Age (2021), Ch. 4.

13 For other examples of such systems, including clouds and coastlines, see *Benoit Mandelbrot*, The Fractal Geometry of Nature (1983).

14 The Hollywood effect is well documented. It explains the paradox of how professions or activities with a very few high-earning people at the top result in below-average earnings of the whole class. The Hollywood effect is also the principal reason why gambling is restricted or prohibited in most countries; *Thomas Miles/Steven Levitt/Andrew M. Rosenfield*, Is Texas Hold' Em a Game of Chance? A Legal and Economic Analysis, Georgetown Law Journal, Vol. 101 (2013), 581 (583). Countervailing tendencies in Generation Z have been observed, such that some of the members of this generation might be less susceptible to this effect. However, this topic goes far beyond the scope of this article.

15 See *ALM Staff*, The 2023 AM Law 100: Ranked by Profits Per Equity Partner, The American Lawyer (18 April 2023), https://www.law.com/americanlawyer/2023/04/18/the-2023-am-law-100-ranked-by-profits-per-equity-partner/.

Case Law

This very first *Cases and Case Notes* section has a focus on the rulings made by the U. S. Supreme Court in the 2022/2023 term. As usual, several landmark decisions were issued only days before the Court's recess, which normally begins on 1st July and lasts until the first Monday of October.

We start with the long-awaited *Andy Warhol* decision which is of significant interest to artists, artconnoisseurs, and copyright holders and users alike since it deals with the copyright "fair use" doctrine. The ruling was 7-2, with Justice Elena Kagan penning a stinging dissent (joined by Chief Justice John Roberts). She wrote that the opinion will "stifle creativity of every sort" and would leave the Supreme Court's prior precedent in "shambles".

In *Gonzales, et al v. Google LLC*, the Court had to decide whether Google's video platform "YouTube", was partially responsible for ISIS recruiting and, therefore liable for the death of a U. S. student killed by the terrorist group ISIS in the November 2015 Paris attacks. However, the Court rather avoids the crucial questions by exercising a kind of judicial restraint. In the related case, *Twitter v. Taamneh* the Court expresses more assertive views, as it considered the nexus between the design and operation of a social platform and terrorist attacks as too remote. However, social platform operators should heed the concurring opinion of Justice Jackson and her remark "*that today's decisions are narrow in important respects.*"[1]

The two *Students for Fair Admissions* decisions caused a media frenzy, as it ended affirmative action in the U. S. for both private and public universities. The decisions will likely fundamentally reshape college admissions for the future unless educational institutions find other ways and means. It seems that legal academia is disappointed but undeterred.[2]

Decisions that are of importance for society's self-image and that affect a more conservative or more liberal worldview in the U. S. sense were the subject of the *Groff* decision with the question of whether an evangelical Christian must also work on Sunday and the *303 Creative LLC* decision on the always heatedly debated issue of same-sex marriage.

Interestingly, despite the 6-3 conservative majority in the Supreme Court, with three justices appointed by the 45th U. S. President, a clear partisan divide is not consistently evident. For this issue, this section has gotten quite U. S.-heavy. This is not solely by choice, but rather because of the aforementioned end-of-term decisions of the U. S. Supreme Court. This section is meant to provide an overview of the most important cases from both the U. S. and Europe to establish a profound overview of transatlantic legal developments.

1 *Andy Warhol Foundation for the Visual Arts, Inc., Petitioner v. Lynn Goldsmith et al.:* Andy Warhol's Foundation Infringed Photographer's Copyright

17 U. S. C. § 107

U. S. Supreme Court, Opinion, (On Writ of Certiorari to the United States Court of Appeals for The Second Circuit), May 18, 2023, [Docket No. 21-869], 598 U. S. ___ (2023)[1]

Syllabus: In 2016, petitioner Andy Warhol Foundation for the Visual Arts, Inc. (AWF) licensed to Condé Nast for $10,000 an image of "Orange Prince" – an orange silkscreen portrait of the musician Prince created by pop artist Andy Warhol – to appear on the cover of a magazine commemorating Prince. Orange Prince is one of 16 works now known as the Prince Series that Warhol derived from a copyrighted photograph taken in 1981 by respondent Lynn Goldsmith, a professional photographer. Goldsmith had been commissioned by Newsweek in 1981 to photograph a then "up and coming" musician named Prince Rogers Nelson, after which Newsweek published one of Goldsmith's photos along with an article about Prince. Years later, Goldsmith granted a limited license to Vanity Fair for use of one of her Prince photos as an "artist reference for an illustration." The terms of the license included that the use would be for "one time" only. Vanity Fair hired Warhol to create the illustration, and Warhol used Goldsmith's photo to create a purple silkscreen portrait of Prince, which appeared with an article about Prince in Vanity Fair's November 1984 issue. The magazine credited Goldsmith for the "source photograph" and paid her $400. After Prince died in 2016, Vanity Fair's parent company (Condé Nast) asked AWF about reusing the 1984 Vanity Fair image for a special edition magazine that would commemorate Prince. When Condé Nast learned about the other Prince Series images, it opted instead to purchase a license from AWF to publish Orange Prince. Goldsmith did not know about the Prince Series until 2016, when she saw Orange Prince on the cover of Condé Nast's magazine. Goldsmith notified AWF of her belief that it had infringed her copyright. AWF then sued Goldsmith for a declaratory judgment of noninfringement or, in the alternative, fair use. Goldsmith counterclaimed for infringement. The District Court considered the four fair use factors in 17 U. S. C. § 107 and granted AWF summary judgment on its defense of fair use. The Court of Appeals reversed, finding that all four fair use factors favored Goldsmith. In this Court, the sole question presented is whether the first fair use factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," § 107(1), weighs in favor of AWF's recent commercial licensing to Condé Nast.

Held: The "purpose and character" of AWF's use of Goldsmith's photograph in commercially licensing Orange Prince to Condé Nast does not favor AWF's fair use defense to copyright infringement. […]

Editors' Note: For a discussion of the U. S. Supreme Court's opinion, see the article by Jonathon K. Hance and L. Andrew Taggart in this issue. However that need not be the last word. If you have a viewpoint or insight to share, the TLJ invites you to submit your own article discussing this opinion. How does the opinion affect your area of practice? ■

1 *Twitter, Inc. v. Taamneh*, 598 U. S. ___ (2023), Justice Jackson concurring; available at: https://www.supremecourt.gov/opinions/22pdf/21-1496_d18f.pdf.

2 *Christine Chamosky*, "Schools Still Have Ample Power": Legal Academia Disappointed – But Undeterred – by SCOTUS Affirmative Action Ruling, Law.com (29 June 2023), https://www.law.com/radar/card/schools-still-have-ample-power-legal-academia-disappointed%E2%80%94but-undeterred%E2%80%94by-scotus-affirmative-action-ruling-292-157186/.

1 *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, No. 21-869, 143 S. Ct. 1258, 598 U. S. ____ (2023), *aff'g*, 11 F. 4th 26 (2d Cir. 2021).

2 *Twitter, Inc. v. Taamneh, et al.:* ISIS Attack in France and the Responsibility of Social Media Platforms for Content by Terrorists

18 U. S. C. § 2333

U. S. Supreme Court, Slip Opinion, (On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit), May 18, 2023, [Docket No. 21-1496], 598 U. S. ___ (2023)[1]

Syllabus: In 2017, Abdulkadir Masharipov carried out a terrorist attack on the Reina nightclub in Istanbul, Turkey, on behalf of the Islamic State of Iraq and Syria (ISIS), a designated Foreign Terrorist Organization. Masharipov killed Nawras Alassaf and 38 others. Alassaf's family then brought this suit under 18 U. S. C. § 2333, an Antiterrorism Act (ATA) provision that permits U. S. nationals who have been "injured … by reason of an act of international terrorism" to file a civil suit for damages. Instead of suing ISIS directly under § 2333(a), the plaintiffs (respondents here) invoked § 2333(d)(2) to sue three of the largest social-media companies in the world – Facebook, Twitter (petitioner here), and Google (which owns YouTube) – for aiding and abetting ISIS. The parties today agree on the basic aspects of these platforms: Billions of people from around the world have signed up for them and upload massive amounts of content each day. Defendants profit from that content by placing advertisements on or near it and use "recommendation" algorithms that match content, advertisements, and users based on information about the use, advertisement, and content being viewed. As the parties represent things, the algorithms here match any content with any user who is more likely to view that content, and the platforms perform little to no front-end screening on any content before it is uploaded. Plaintiffs, however, allege that for several years the companies have knowingly allowed ISIS and its supporters to use their platforms and "recommendation" algorithms as tools for recruiting, fundraising, and spreading propaganda; plaintiffs further allege that these companies have, in the process, profited from the advertisements placed on ISIS' tweets, posts, and videos. The District Court dismissed the complaint for failure to state a claim, but the Ninth Circuit reversed.

Held: Plaintiffs' allegations that these social-media companies aided and abetted ISIS in its terrorist attack on the Reina nightclub fail to state a claim under 18 U. S. C. § 2333(d)(2). Pp. 6–31.

(a) In 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA) to impose secondary civil liability on anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." § 2333(d)(2). The question here is whether the conduct of the social-media company defendants gives rise to aiding-and-abetting liability for the Reina nightclub attack. Pp. 6–8.

(b) The text of JASTA begs two questions: What does it mean to "aid and abet"? And, what precisely must the defendant have "aided and abetted"? Pp. 8–21.

(1) Nothing in the statute defines any of the critical terms in the phrase "aids and abets, by knowingly providing substantial assistance." The term "aids and abets," however, is a familiar common-law term and thus presumably "brings the old soil" with it. *Sekhar* v. *United States*, 570 U. S. 729, 733. Congress also provided additional context in JASTA by pointing to *Halberstam* v. *Welch*, 705 F. 2 d 472, as "provid [ing] the proper legal framework" for "civil aiding and abetting and conspiracy liability." 130 Stat. 852. *Halberstam*'s legal framework, viewed in context of the common-law tradition from which it arose, confirms that "aids and abets" in § 2333(d)(2) refers to a conscious, voluntary, and culpable participation in another's wrongdoing. Pp. 9–17.

…

[Editors' Note: In subsections (i)-(iii) of this section, the Syllabus discusses the Halberstam opinion in which "the D.C. Circuit undertook an extensive survey of the common law with respect to aiding and abetting" and synthesized therefrom its "basic thrust" to apply to the very different facts of the instant case.]

(2) The parties then vigorously dispute what precisely a defendant must aid and abet under § 2333(d)(2). Plaintiffs assert that it is "the person," while defendants insist that it is the "act of international terrorism." That syntactic dispute makes little difference here, because aiding and abetting is inherently a rule of secondary liability for specific wrongful acts. In the tort context, liability is imposed only when someone commits (not merely agrees to commit) an actual tort. And in this case, the ATA limits that liability to injuries caused by an "act of international terrorism," § 2333(a). It thus is not enough for a defendant to have given substantial assistance to a transcendent enterprise. A defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong – here, an act of international terrorism. However, that does not require a strict nexus between the assistance and the wrongful act; defendants are liable for other torts that are the foreseeable risk of an intended tort, and an aider and abettor can assist someone without knowing all the details of his plan. Plus, in appropriate circumstances, a defendant's role in an illicit enterprise can be so systemic and intentional that the defendant aids and abets each act of the enterprise – as in *Halberstam* itself.

To summarize the requirements of § 2333(d)(2), the phrase "aids and abets, by knowingly providing substantial assistance" points to the elements and factors articulated by *Halberstam*. Those elements and factors should not be taken as inflexible codes but should be understood in light of the common law and applied as a framework designed to hold defendants liable when they consciously and culpably "participate[d] in" a tortious act in such a way as to help "make it succeed." *Nye* & *Nissen* v. *United States,* 336 U. S. 613, 619. Pp. 17–21.

(c) Plaintiffs have satisfied *Halberstam*'s first two elements by alleging both that ISIS committed a wrong and that defendants knew they were playing some sort of role in ISIS' enterprise. But plaintiffs' allegations do not show that defendants gave such knowing and substantial assistance to ISIS that they culpably participated in the Reina attack. Pp. 21–30.

(1) Plaintiffs allege that defendants aided and abetted ISIS in the following ways: First, they provided social-media platforms, which are generally available to the internet-using public; ISIS was able to upload content to those platforms and connect with third parties on them. Second, defendants' recommendation algorithms matched ISIS-related content to users most likely to be interested in that content. And, third, defendants knew that ISIS was upload-

1 *Twitter, Inc. v. Taamneh, et al.*, No. 21-1496, 598 U. S. ___ (18 May 2023), *rev'g*, 2 F. 4th 871 (9th Cir. 2021).

ing this content but took insufficient steps to ensure that its content was removed. Plaintiffs do not allege that ISIS or Masharipov used defendants' platforms to plan or coordinate the Reina attack. Nor do plaintiffs allege that defendants gave ISIS any special treatment or words of encouragement. Nor is there reason to think that defendants carefully screened any content before allowing users to upload it onto their platforms.

None of plaintiffs' allegations suggest that defendants culpably "associate[d themselves] with" the Reina attack, "participate[d] in it as something that [they] wishe[d] to bring about," or sought "by [their] action to make it succeed." *Nye & Nissen*, 336 U. S., at 619 (internal quotation marks omitted). Defendants' mere creation of their media platforms is no more culpable than the creation of email, cell phones, or the internet generally. And defendants' recommendation algorithms are merely part of the infrastructure through which all the content on their platforms is filtered. Moreover, the algorithms have been presented as agnostic as to the nature of the content. At bottom, the allegations here rest less on affirmative misconduct and more on passive nonfeasance. To impose aiding-and-abetting liability for passive nonfeasance, plaintiffs must make a strong showing of assistance and scienter. Plaintiffs fail to do so.

First, the relationship between defendants and the Reina attack is highly attenuated. Plaintiffs make no allegations that defendants' relationship with ISIS was significantly different from their arm's length, passive, and largely indifferent relationship with most users. And their relationship with the Reina attack is even further removed, given the lack of allegations connecting the Reina attack with ISIS' use of these platforms. Second, plaintiffs provide no reason to think that defendants were consciously trying to help or otherwise participate in the Reina attack, and they point to no actions that would normally support an aiding-and-abetting claim.

Plaintiffs' complaint rests heavily on defendants' failure to act; yet plaintiffs identify no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends. Even if such a duty existed in this case, it would not transform defendants' distant inaction into knowing and substantial assistance that could establish aiding and abetting the Reina attack. And the expansive scope of plaintiffs' claims would necessarily hold defendants liable as having aided and abetted each and every ISIS terrorist act committed anywhere in the world. The allegations plaintiffs make here are not the type of pervasive, systemic, and culpable assistance to a series of terrorist activities that could be described as aiding and abetting each terrorist act by ISIS.

In this case, the failure to allege that the platforms here do more than transmit information by billions of people – most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas – is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted ISIS' acts. A contrary conclusion would effectively hold any sort of communications provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That would run roughshod over the typical limits on tort liability and unmoor aiding and abetting from culpability. Pp. 21–27.

…

[Editors' Note: The Ninth Circuit "focused primarily on the value of defendants' platforms to ISIS, rather than whether defendants culpably associated themselves with ISIS' actions", the Syllabus recounts.]

(3) There is also one set of allegations specific to Google: that Google reviewed and approved ISIS videos on YouTube as part of a revenue-sharing system and thereby shared advertising revenue with ISIS. But the complaint here alleges nothing about the amount of money that Google supposedly shared with ISIS, the number of accounts approved for revenue sharing, or the content of the videos that were approved. Nor does it give any other reason to view Google's revenue sharing as substantial assistance. Without more, plaintiffs thus have not plausibly alleged that Google knowingly provided substantial assistance to the Reina attack, let alone (as their theory of liability would require) every single terrorist act committed by ISIS. Pp. 29– 30.

(d) The concepts of aiding and abetting and substantial assistance do not lend themselves to crisp, bright-line distinctions. Applying the guideposts provided by the common law and *Halberstam*, the nexus between defendants and the Reina attack is far removed. As alleged by plaintiffs, defendants designed virtual platforms and knowingly failed to do "enough" to remove ISIS-affiliated users and ISIS-related content from their platforms. Yet, plaintiffs have failed to allege that defendants intentionally provided any substantial aid to the Reina attack or otherwise consciously participated in it – much less that defendants so pervasively and systemically assisted ISIS as to render them liable for every ISIS attack. Plaintiffs accordingly have failed to state a claim under § 2333(d)(2). Pp. 30–31.

2 F. 4th 871, reversed.

Thomas, J., delivered the opinion for a unanimous Court. Jackson, J., filed a concurring opinion.

Editors' Note: *Twitter, Inc. v. Taamneh* was decided together with *Reynaldo Gonzales, et al. v. Google*. For a Case Note on the liability of social media giants and a comparison between U. S. and EU regulation efforts, please refer to p. 35. If you have a viewpoint or insight to share, the TLJ invites you to submit your own article discussing this opinion. ■

3 *Reynaldo Gonzalez, et al., Petitioners v. Google LLC*: ISIS Attack in France and the Responsibility of Social Media Platforms for Content by Terrorists

18 U. S. C. § 2333

U. S. Supreme Court, Slip Opinion, (On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit), May 18, 2023, [Docket No. 21-1333], 598 U. S. ___ (2023)[1]

Syllabus: PER CURIAM.

In 2015, ISIS terrorists unleashed a set of coordinated attacks across Paris, France, killing 130 victims, including Nohemi Gonzalez, a 23-year-old U. S. citizen.[2] Gonzalez's parents and brothers then sued Google, LLC, under 18 U. S. C. §§ 2333(a) and (d)(2), alleging that Google was both directly and secondarily liable for the terrorist attack

1 *Gonzalez, et al. v. Google LLC*, No. 21-1333, 143 S. Ct. 1191, 598 U. S. ___ (2023), *vacating and remanding*, 2 F. 4th 871 (9th Cir. 2021).

2 "ISIS" is shorthand for the Islamic State of Iraq and Syria. In some form or another, it has been designated a Foreign Terrorist Organization since 2004; ISIS has also been known as the Islamic State of Iraq and the Levant, al Qaeda in Iraq, and the al-Zarqawi Network.

that killed Gonzalez.[3] For their secondary-liability claims, plaintiffs alleged that Google aided and abetted and conspired with ISIS. All of their claims broadly center on the use of YouTube, which Google owns and operates, by ISIS and ISIS supporters.

The District Court dismissed plaintiffs' complaint for failure to state a claim, though it offered plaintiffs leave to amend their complaint. Instead, plaintiffs stood on their complaint and appealed, and the Ninth Circuit affirmed in a consolidated opinion that also addressed *Twitter, Inc. v. Taamneh*, ___ U. S. ___ (2023). 2 F. 4th 871 (2021). With respect to this case, the Ninth Circuit held that most of the plaintiffs' claims were barred by § 230 of the Communications Decency Act of 1996, 110 Stat. 137, 47 U. S. C. § 230(c)(1). The sole exceptions were plaintiffs' direct- and secondary-liability claims based on allegations that Google approved ISIS videos for advertisements and then shared proceeds with ISIS through YouTube's revenue-sharing system. The Ninth Circuit held that these potential claims were not barred by § 230, but that plaintiffs' allegations failed to state a viable claim in any event.

We granted certiorari to review the Ninth Circuit's application of § 230. *See* 598 U. S. ___ (2022). Plaintiffs did not seek review of the Ninth Circuit's holdings regarding their revenue-sharing claims. In light of those unchallenged holdings and our disposition of *Twitter*, on which we also granted certiorari and in which we today reverse the Ninth Circuit's judgment, it has become clear that plaintiffs' complaint – independent of § 230 – states little if any claim for relief. As plaintiffs concede, the allegations underlying their secondary-liability claims are materially identical to those at issue in *Twitter*. *See* Tr. of Oral Arg. 58. Since we hold that the complaint in that case fails to state a claim for aiding and abetting under § 2333(d)(2), it appears to follow that the complaint here likewise fails to state such a claim. And, in discussing plaintiffs' revenue-sharing claims, the Ninth Circuit held that plaintiffs plausibly alleged neither that "Google reached an agreement with ISIS," as required for conspiracy liability, nor that Google's acts were "intended to intimidate or coerce a civilian population, or to influence or affect a government," as required for a direct-liability claim under § 2333(a). 2 F. 4th, at 901, 907. Perhaps for that reason, at oral argument, plaintiffs only suggested that they should receive leave to amend their complaint if we were to reverse and remand in *Twitter*. Tr. of Oral Arg. 58, 163.

We need not resolve either the viability of plaintiffs' claims as a whole or whether plaintiffs should receive further leave to amend. Rather, we think it sufficient to acknowledge that much (if not all) of plaintiffs' complaint seems to fail under either our decision in *Twitter* or the Ninth Circuit's unchallenged holdings below. We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief. Instead, we vacate the judgment below and remand the case for the Ninth Circuit to consider plaintiffs' complaint in light of our decision in Twitter.

It is so ordered.

Case Note

Coming Soon: Social Media, Regulation – What's Going On? A Comparison between the U. S. and European Regulation of Social Media Platforms

§ 230 of the 1996 Communications Decency Act is the "safe harbor" for social-media platforms that strictly limits the civil liability of providers of an interactive computer service for injurious third-party content and empowers platforms to monitor their websites for harmful content without any obligation to remove any of the material.[4] The highly anticipated U. S. Supreme Court case *Gonzales v. Google LLC*, 598 U. S. ___ (2023) addressed the question whether § 230 also provides immunity for the social media platforms using algorithms for content recommendation.

The background of the case was the terrorist attacks in Paris in 2015, where 130 people died, including the young American citizen Nohemi Gonzales.[5] The Gonzales family sought legal remedies against Google LLC arguing that the YouTube algorithm based on the user's preferences recommended radicalization videos of ISIS and, therefore, the company is to be held liable under § 2333 of the Antiterrorism and Effective Death Penalty Act of 1996. On 18 May 2023, the Supreme Court remanded the case for the Ninth Circuit Court of Appeals to reconsider it in light of the U. S. Supreme Court holdings in *Twitter, Inc. v. Taamneh*.[6] That case was also decided by the Supreme Court on 18 May 2023 and explicitly dealt with the question whether social media platforms could be held liable under § 2333 of the Antiterrorism Act after an ISIS terrorism attack in Istanbul in 2017. In that case, the Court ruled unanimously that social media platforms do not "*aid and abet, by knowingly providing substantial assistance*" as § 2333(d)(2) of the Antiterrorism Act states[7] and therefore denied civil liability of social media platforms under this act.[8] The rulings in both cases were seen as "*a significant victory for big technology companies*".[9]

Since the court made no ruling in either case regarding the application of § 230, the hard-fought debate regarding the scope of social media platforms' liability for third-party content and the need for content moderation and review of § 230 remains unresolved.[10] The danger of the U. S. Supreme

3 Title 18 U. S. C. § 2333(a) provides: "*Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.*" Section 2333(d)(2) provides: "*In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S. C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.*"

4 *Michael D. Smith/Marshall van Alstyne*, It's Time to Update Section 230, Harvard Business Review (12 August 2021), https://www.hbr.org/2021/08/its-time-to-update-section-230.

5 *Patrick Garrity/Shanshan Dong/Gene Choo*, American Student Nohemi Gonzalez Identified as Victim in Paris Massacre, NBC News (14 November 2015), https://www.nbcnews.com/storyline/paris-terror-attacks/american-student-nohemi-gonzalez-idd-victim-paris-massacre-n463566.

6 *Gonzalez v. Google*, 598 U. S. ___ (2023); available at: https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf; *Twitter, Inc. v. Taamneh*, 598 U. S. ___ (2023); available at: https://www.supremecourt.gov/opinions/22pdf/21-1496_d18f.pdf.

7 *Gonzalez v. Google*, 598 U. S. ___ (2023), p. 29.

8 *Adam Liptak*, Supreme Court Won't Hold Tech Companies Liable for User Posts, The New York Times (18 May 2023), https://www.nytimes.com/2023/05/18/us/politics/supreme-court-google-twitter-230.html.

9 *Stefania Palmer/Richard Waters*, Supreme Court sides with tech giants over legal shield for content, Financial Times (18 May 2023), https://www.ft.com/content/46cfa976-d8a4-4514-8c79-f4003d3005df.

10 *Eric Goldman*, More Thoughts about the SCOTUS Twitter and Google Rulings, Technology & Marketing Law Blog (23 May 2023), https://blog.ericgoldman.org/archives/2023/05/more-thoughts-about-the-scotus-twitter-and-google-rulings.htm.

Court's deflating of the online community's expectations before the *Gonzales* and *Twitter* decisions is that Congress may feel invigorated in its attempt to curtail the privileges enjoyed by online platforms and press. Similar discussions have been ongoing within the European Union for several years. With the Digital Services Act,[11] the EU recently introduced a new regulatory framework for online platforms, which came into force on 16 November 2022 (but the majority of its provisions will only apply as of 17 February 2024). In the next issue, we will delve into the concepts of platform liability for third-party content in the U. S. and the EU under the new Digital Services Act.

*Hannah Bug, Berlin**

11 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), European Union, L 277/1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065.

* Dr. Hannah Bug, LL. M. (Edinburgh), Lic. en Droit (Paris), is admitted to the German bar. She is Counsel with Gleiss Lutz in Berlin.

4 *Groff v. DeJoy, Postmaster General:* Christian Man Can Take Sundays Off

42 U. S. C. § 2000 e; 29 CFR § 1605

U. S. Supreme Court, Slip Opinion, (In Writ of Certiorari to the United States Court of Appeals for the Third Circuit), June 29, 2023, [Docket No. 22-174], 600 U. S. ___ (2023)[1]

Syllabus: Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.

Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. § 2000 e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18 (quoting 432 U. S., at 84). The Third Circuit found the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th, at 175.

Held: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. Pp. 4–21.

(a) This case presents the Court's first opportunity in nearly 50 years to explain the contours of *Hardison*. The background of that decision helps to explain the Court's disposition of this case. Pp. 4–15.

Title VII of the Civil Rights Act of 1964 made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's … religion." § 2000 e–2(a)(1). As originally enacted, Title VII did not spell out what it meant by discrimination "because of … religion." Subsequent regulations issued by the EEOC obligated employers "to make reasonable accommodations to the religious needs of employees" whenever doing so would not create "undue hardship on the conduct of the employer's business." 29 CFR § 1605.1 (1968). In 1970, however, the Sixth Circuit held that Title VII did not require an employer "to accede to or accommodate" a Sabbath religious practice because to do so "would raise grave" Establishment Clause questions. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2 d 324, 334. This Court affirmed *Dewey* by an evenly divided vote. See 402 U. S. 689. Congress responded by amending Title VII in 1972 to track the EEOC's regulatory language and to clarify that employers must "reasonably accommodate. … an employee's or prospective employee's religious observance or practice" unless the employer is "unable" to do so "without undue hardship on the conduct of the employer's business." § 2000 e(j). Pp. 4–6.

Hardison concerned an employment dispute that arose prior to the 1972 amendments to Title VII. In 1967, Trans World Airlines hired Larry Hardison to work in a department that operated "24 hours per day, 365 days per year" and played an "essential role" for TWA by providing parts needed to repair and maintain aircraft. *Hardison*, 432 U. S., at 66. Hardison later underwent a religious conversion and be- gan missing work to observe the Sabbath. Initial conflicts with Hardison's work schedule were resolved, but conflicts resurfaced when he transferred to another position in which he lacked the seniority to avoid work during his Sabbath. Attempts at accommodation failed, and TWA discharged Hardison for insubordination.

Hardison sued TWA and his union, and the Eighth Circuit sided with Hardison. The Eighth Circuit found that reasonable accommodations were available to TWA, and rejected the defendants' Establishment Clause arguments. *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2 d 33, 42–44. This Court granted certiorari. TWA's petition for certiorari asked this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied by the Eighth Circuit, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement. At the time, some thought that the Court's now-abrogated decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 – which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional, *id.*, at 612–613 – posed a serious problem for the 1972 amendment of Title VII. Ultimately, however, constitutional concerns played no on-stage role in the Court's decision in *Hardison*. Instead, the Court's opinion stated that

1 *Groff v. DeJoy*, 600 U. S. ___ (2023), *cert. granted*, 143 S. Ct. 646 (2023), *vacating and remanding*, 35 F. 4th 162 (3rd Cir. 2022).

"the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." *Hardison*, 432 U. S., at 83, and n. 14. The Court held that Title VII imposed no such requirement. *Id*., at 83, and n. 14. This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id*., at 81. Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath.

The parties had not focused on determining when increased costs amount to "undue hardship" under Title VII separately from the seniority issue. But the Court's opinion in *Hardison* contained this oft quoted sentence: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Although many lower courts later viewed this line as the authoritative interpretation of the statutory term "undue hardship," the context renders that reading doubtful. In responding to Justice Marshall's dis- sent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id*., at 83, n. 14. Pp. 6– 12.

(3) Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard. To be sure, many courts have understood that the protection for religious adherents is greater than "more than … *de minimis*" might suggest when read in isolation. But diverse religious groups tell the Court that the "*de minimis*" standard has been used to deny even minor accommodations. The EEOC has also accepted *Hardison* as prescribing a "more than a *de minimis* cost" test, 29 CFR § 1605.2(e)(1), though it has tried to soften its impact, cautioning against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§ 1605.2(e)(1), (2). Yet some courts have rejected even the EEOC's gloss on "*de minimis*," rejecting accommodations the EEOC's guidelines consider to be ordinarily required. The Court agrees with the Solicitor General that *Hardison* does not compel courts to read the "more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost. Tr. of Oral Arg. 107. Pp. 12–15.

(b) The Court holds that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. The Court understands *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business. This fact specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech. Pp. 15–21.

To determine what an employer must prove to defend a denial of a religious accommodation under Title VII, the Court begins with Title VII's text. The statutory term, "hardship," refers to, at a minimum, "something hard to bear" and suggests something more severe than a mere burden. If Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Adding the modifier "undue" means that therequisite burden or adversity must rise to an "excessive" or "unjustifiable" level. Understood in this way, "undue hardship" means something very different from a burden that is merely more than *de minimis*, *i. e.*, "very small or trifling." The ordinary meaning of "undue hardship" thus points toward a standard closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U. S., at 83, n. 14. Further, the Court's reading of the statutory term comports with pre-1972 EEOC decisions, so nothing in that history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ___, ___. And no support exists in other factors discussed by the parties for reducing *Hardison* to its "more than a *de minimis* cost" line. Pp. 16–18.

The parties agree that the "*de minimis*" test is not right, but they differ in the alternative language they propose. The Court thinks it is enough to say that what an employer must show is that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U. S. at 83, n. 14. Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. Pp. 18.

The Court declines to adopt the elaborations of the applicable standard that the parties suggest, either to incorporate Americans with Disabilities Act case law or opine that the EEOC's construction of *Hardison* has been basically correct. A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision. But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification the Court adopts today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test. Pp. 18–19.

The Court also clarifies several recurring issues. First, as the parties agree, Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." § 2000 e(j). Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business. A court must analyze whether that further logical step is shown. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue." Bias or hostility to a religious practice or accommodation cannot supply a defense.

Second, Title VII requires that an employer "reasonably accommodate" an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. Faced with an accommodation request like Groff's, an employer must do more

than conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options would also be necessary. Pp. 19–20.

(c) Having clarified the Title VII undue-hardship standard, the Court leaves the context-specific application of that clarified standard in this case to the lower courts in the first instance. Pp. 21.

35 F. 4th 162, vacated and remanded.

Alito, J., delivered the opinion for a unanimous Court. Sotomayor, J., filed a concurring opinion, in which Jackson, J., joined.

Editors' Note: *Groff* is another landmark ruling by the U.S. Supreme Court this year. The U.S. Supreme Court used the case to clarify the degree to which the law requires an employer to accommodate an employee's religious needs. The plaintiff objected to working on Sundays. The Third Circuit found for the employer because making that accommodation (for example, finding others to cover the plaintiff's Sunday work assignments) posed more than a de minimis burden on his employer. The U.S. Supreme Court stressed how an "*undue hardship*", which an employer is not required to bear, is more than a de minimus burden. Rather, it means a "*substantial*" burden in the overall context of the employer's business. For a more detailed first assessment of the decision, we invite you to refer to the New York Times[2] and Law.com.[3] TLJ invites practitioners to submit articles discussing this opinion and what impact this employee-favorable ruling might have. ■

2 *Abbie VanSickle/Adam Liptak*, Supreme Court Sides With Postal Carrier Who Refused to Work on Sabbath, The New York Times (29 June 2023), https://www.nytimes.com/2023/06/29/us/politics/supreme-court-religion-sabbath-postal-worker.html.

3 *Lauren Anthony/Greg Archibald*, Scheduling Around the Sabbath: "Groff v. DeJoy" and Its Potential Impact on the Workplace, Law.com (12 May 2023), https://www.law.com/thelegalintelligencer/2023/05/12/scheduling-around-the-sabbath-groff-v-dejoy-and-its-potential-impact-on-the-workplace/.

5 *Timothy Moore, in his official capacity as speaker of the North Carolina House of Representatives, et al. v. Rebecca Harper*: "Independent State Legislator" Theory Is Rejected

Federal Constitution Art. I, § 4; 28 U.S.C. § 1257(a)

U.S. Supreme Court, Slip Opinion, (On Writ of Certiorari to the Supreme Court of North Carolina), June 27, 2023, [Docket No. 21-1271], 600 U.S. ___ (2023)[1]

Syllabus: The Elections Clause of the Federal Constitution requires "the Legislature" of each State to prescribe the rules governing federal elections. Art. I, § 4, cl. 1. This case concerns the claim that the Clause vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law. Following the2020 decennial census, North Carolina's General Assembly drafted a new federal congressional map, which several groups of plaintiffs challenged as an impermissible partisan gerrymander in violation of the North Carolina Constitution. The trial court found partisan gerrymandering claims non justiciable under the State Constitution, but the North Carolina Supreme Court reversed. *Harper* v. *Hall*, 380 N.C. 317, 868 S.E. 2 d 499 (*Harper I*). While acknowledging that partisan gerrymandering claims are outside the reach of federal courts, see *Rucho* v. *Common Cause*, 588 U.S. ___, ___, the State Supreme Court held that such questions were not beyond the reach of North Carolina courts. The court also rejected the argument that the Federal Elections Clause vests exclusive and independent authority in state legislatures to draw federal congressional maps. The court enjoined the use of the maps and remanded the case to the trial court for remedial proceedings. The legislative defendants then filed an emergency application in this Court, citing the Elections Clause and requesting a stay of the North Carolina Supreme Court's decision. This Court declined to issue a stay, but later granted certiorari.

After this Court granted certiorari, the North Carolina Supreme Court issued a decision addressing a remedial map adopted by the trial court. *Harper* v. *Hall,* 383 N.C. 89, 125, 881 S.E. 2 d 156, 181 (*Harper II*). The North Carolina Supreme Court then granted the legislative defendants' request to rehear that remedial decision in *Harper II*. The court ultimately withdrew the opinion in *Harper II* concerning the remedial maps and overruled *Harper I*, repudiating its holding that partisan gerrymandering claims are justiciable under the North Carolina Constitution. The court dismissed plaintiffs' claims but did not reinstate the 2021 congressional plans struck down in *Harper I* under the State Constitution. This Court has entertained two rounds of supplemental briefing on jurisdictional questions in light of the state court's rehearing proceedings.

Held:

1. This Court has jurisdiction to review the judgment of the North Carolina Supreme Court in *Harper I* that adjudicated the Federal Elections Clause issue. A corollary to this Court's jurisdiction over "Cases" and "Controversies" is that there must exist a dispute "at all stages of review, not merely at the time the complaint is filed." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 71 (internal quotation marks omitted). The North Carolina Supreme Court's decision to withdraw *Harper II* and overrule *Harper I* does not moot this case. Prior to the appeal and rehearing proceedings in *Harper II*, the court had already entered the judgment and issued the mandate in *Harper I*, and the legislative defendants acknowledged that they would remain bound by *Harper I*'s decision enjoining the use of the 2021 plans. When the North Carolina Supreme Court "overruled" *Harper I* as part of the rehearing proceedings, it repudiated *Harper I*'s conclusion that partisan gerrymandering claims are justiciable under the North Carolina Constitution. But the court did not purport to alter or amend the judgment in *Harper I* enjoining the use of the 2021 maps. Were this Court to reverse *Harper I*, the 2021 plans would again take effect. Because the legislative defendants' path to complete relief runs through this Court, the parties continue to have a "personal stake in the ultimate disposition of the lawsuit" sufficient to maintain this Court's jurisdiction. *Chafin* v. *Chafin*, 568 U.S. 165, 172 (internal quotation marks omitted).

This Court also has jurisdiction to review the judgment in *Harper I* under 28 U.S.C. § 1257(a), which provides that jurisdiction in this Court extends to "[f]inal judgments … rendered by the highest court of a State in which a decision could be had." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, identified categories of cases in which a decision of a State's highest court was considered a final judgment for § 1257(a) purposes despite the anticipation of additional lower court proceedings, including "cases … in which the

1 *Moore v. Harper*, 600 U.S. ____ (2023), *cert. granted*, 142 S.Ct. 2901 (2022), *aff'g sub nom.*, *Harper v. Hall*, 868 S.E. 2 d 499 (N.C. 2022).

federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.*, at 480. *Harper I* is such a case. Because subsequent proceedings have neither altered *Harper I*'s analysis of the federal issue nor negated the effect of the *Harper I* judgment striking down the 2021 plans, that issue both has survived and requires decision by this Court. Pp. 6–11.

2. The Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections.

Marbury v. *Madison,* 1 Cranch 137, famously proclaimed this Court's authority to invalidate laws that violate the Federal Constitution. But *Marbury* did not invent the concept of judicial review. State courts had already begun to impose restraints on state legislatures, even before the Constitutional Convention, and the practice continued to mature during the founding era. James Madison extolled judicial review as one of the key virtues of a constitutional system, and the concept of judicial review was so entrenched by the time the Court decided *Marbury* that Chief Justice Marshall referred to it as one of society's "fundamental principles." *Id.*, at 177.

The Elections Clause does not carve out an exception to that fundamental principle. When state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review. Pp. 11–26.

(a) In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, this Court examined the Elections Clause's application to a provision of the Ohio Constitution permitting the State's voters to reject, by popular vote, any law enacted by the State's General Assembly. This Court upheld the Ohio Supreme Court's determination that the Federal Elections Clause did not preclude subjecting legislative acts under the Clause to a popular referendum, rejecting the contention that "to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of Article I [the Elections Clause]." *Id.*, at 569. And in *Smiley* v. *Holm*, 285 U. S. 355, this Court considered the effect of a Governor's veto, pursuant to his authority under the State's Constitution, of a congressional redistricting plan. This Court held that the Governor's veto did not violate the Elections Clause, reasoning that a state legislature's "exercise of … authority" under the Elections Clause "must be in accordance with the method which the State has prescribed for legislative enactments." *Id.*, at 367. The Court highlighted that the Federal Constitution contained no "provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted." *Id.*, at 368.

This Court recently reinforced the teachings of *Hildebrant* and *Smiley* in *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, a case concerning the constitutionality of an Arizona ballot initiative to amend the State Constitution and to vest redistricting authority in an independent commission. Significantly for present purposes, the Court embraced the core principle espoused in *Hildebrant* and *Smiley*: Whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court dismissed the argument that the Elections Clause divests state constitutions of the power to enforce checks against the exercise of legislative power.

The basic principle of these cases – reflected in *Smiley*'s unanimous command that a state legislature may not "create congressional districts independently of" requirements imposed "by the state constitution with respect to the enactment of laws," 285 U. S., at 373 – commands continued respect. Pp. 15–18.

(b) The precedents of this Court have long rejected the view that legislative action under the Elections Clause is purely federal in character, governed only by restraints found in the Federal Constitution. The argument to the contrary does not account for the Framers' understanding that when legislatures make laws, they are bound by the provisions of the very documents that give them life. Thus, when a state legislature carries out its federal constitutional power to prescribe rules regulating federal elections, it acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the state legislature's exercise of power.

This Court's decision in *McPherson* v. *Blacker*, 146 U. S. 1, in which the Court analyzed the Constitution's similarly worded Electors Clause, is inapposite. That decision did not address any conflict between state constitutional provisions and state legislatures. Nor does *Leser* v. *Garnett*, 258 U. S. 130, which involved a contested vote by a state legislature to ratify a federal constitutional amendment, help petitioners. That case concerned the power of state legislatures to ratify amendments to the Federal Constitution. But fashioning regulations governing federal elections "unquestionably calls for the exercise of lawmaking authority." *Arizona State Legislature*, 576 U. S., at 808, n. 17. And the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution. Pp. 18–22.

(c) Petitioners concede that at least some state constitutional provisions can restrain a state legislature's exercise of authority under the Elections Clause, but they read *Smiley* and *Hildebrant* to differentiate between procedural and substantive constraints. But neither case drew such a distinction, and petitioners do not in any event offer a defensible line between procedure and substance in this context. Pp.22–24.

(d) Historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. Two state constitutional provisions adopted shortly after the founding expressly constrained state legislative action under the Elections Clause. See Del. Const., Art. VIII, § 2 (1792); Md. Const., Art. XIV (1810). In addition, multiple state constitutions at the time of the founding regulated the "manner" of federal elections by requiring that "elections shall be by ballot." See, *e. g.*, Ga. Const., Art. IV, § 2. Moreover, the Articles of Confederation – from which the Framers borrowed – provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct." Art. V. Around the time the Articles were adopted, multiple States regulated the appointment of delegates, suggesting that the Framers did not understand that language to insulate state legislative action from state constitutional provisions. See, *e. g.*, Del. Const., Art. XI (1776). Pp. 24–26.

3. Although the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state

law, federal courts must not abandon their duty to exercise judicial review. This Court has an obligation to ensure that state court interpretations of state law do not evade federal law. For example, States "may not sidestep the Takings Clause by disavowing traditional property interests." *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 167. While the Court does not adopt a test by which state court interpretations of state law can be measured in cases implicating the Elections Clause, state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

The Court need not decide whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause, as petitioners did not meaningfully present the issue in this Court. Pp. 26–29.

380 N. C. 317, 868 S. E. 2 d 499, affirmed.

Roberts, C. J., delivered the opinion of the Court, in which Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson, JJ., joined. Kavanaugh, J., filed a concurring opinion. Thomas, J., filed a dissenting opinion in which Gorsuch, J., joined, and in which Alito, J., joined as to Part I.

Editors' Note: *Moore v. Harper* raises two fundamental democratic principles: (1) every vote counts and (2) checks and balances. Highlighting how democratic government ultimately rests in the hands of voters, the North Carolina's legislature intentionally redrew voting districts allegedly to favor one political party. Aggrieved citizens asked the state court to consider the lawfulness of the state legislature's action. The state legislature responded that its act of gerrymandering may not be challenged and is exempt from judicial review. In other words, the state legislature believed that it may act independently of either federal or its own laws. The U. S. Supreme Court disagreed, rejecting the "independent state legislature" theory.[2] Reaching all the way back to the country's "founding era" and the development of its core democratic tenets, the court affirmed the role of judicial review and the need to ensure that all state laws (including those that regulate elections) comply with both the federal and the state's own constitutions. The preceding note serves as a preliminary exploration and not a conclusive assessment. We encourage readers to refer to the New York Times for a first assessment.[3]
What do you think of *Moore v. Harper*? Submit your article for publication in the TLJ. ■

2 *Debra Cassens Weiss*, Supreme Court rejects 'independent state legislature' theory, rules state courts may review congressional maps, ABA Journal (27 June 2023), www.abajournal.com/web/article/supreme-court-rules-in-case-raising-independent-state-legislature-theory.
3 *Richard H. Pildes*, The Supreme Court Rejected a Dangerous Elections Theory. But It's Not All Good News, The New York Times (28 June 2023), https://www.nytimes.com/2023/06/28/opinion/supreme-court-independent-state-legislature-theory.html.

6 *303 Creative LLC, et al. v. Aubrey Elenis, et al.*: Web Designer Can Refuse Service to Same-Sex Couples

U. S. Supreme Court, Slip Opinion, (On Writ of Certiorari to the U. S. Court of Appeals for the Tenth Circuit), June 30, 2023, [Docket No. 21-476], 600 U. S. ___ (2023)[1]

Syllabus: Lorie Smith wants to expand her graphic design business, 303 Creative LLC, to include services for couples seeking wedding websites. But Ms. Smith worries that Colorado will use the Colorado Anti-Discrimination Act to compel her – in violation of the First Amendment – to create websites celebrating marriages she does not endorse. To clarify her rights, Ms. Smith filed a lawsuit seeking an injunction to prevent the State from forcing her to create websites celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman. CADA prohibits all "public accommodations" from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Colo. Rev. Stat. § 24–34–601(2)(a). The law defines "public accommodation" broadly to include almost every public-facing business in the State. § 24–34–601(1). Either state officials or private citizens may bring actions to enforce the law. §§ 24–34–306, 24–34– 602(1). And a variety of penalties can follow any violation. Before the district court, Ms. Smith and the State stipulated to a number of facts: Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender" and "will gladly create custom graphics and websites" for clients of any sexual orientation; she will not produce content that "contradicts biblical truth" regardless of who orders it; Ms. Smith's belief that marriage is a union between one man and one woman is a sincerely held conviction; Ms. Smith provides design services that are "expressive" and her "original, customized" creations "contribut[e] to the overall message" her business conveys "through the websites" it creates; the wedding websites she plans to create "will be expressive in nature," will be "customized and tailored" through close collaboration with individual couples, and will "express Ms. Smith's and 303 Creative's message celebrating and promoting" her view of marriage; viewers of Ms. Smith's websites "will know that the websites are her original artwork;" and "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services."

Ultimately, the district court held that Ms. Smith was not entitled to the injunction she sought, and the Tenth Circuit affirmed.

Held: The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. Pp. 6–26.

(a) The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." Boy Scouts of America v. Dale, 530 U. S. 640, 660–661 (internal quotation marks omitted). The freedom to speak is among our inalienable rights. The freedom of thought and speech is "indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U. S. 357, 375 (Brandeis, J., concurring). For these reasons, "[i]f there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U. S. 464, 476 (internal quotation marks omitted).

This Court has previously faced cases where governments have sought to test these foundational principles. In *Barnette*, the Court held that the State of West Virginia's efforts to compel school children to salute the Nation's flag and recite the Pledge of Allegiance "invad[ed] the sphere of intellect and spirit which it is the purpose of the First Amendment … to reserve from all official control." 319 U. S., at

1 *303 Creative, LLC v. Elenis*, 600 U. S. _____ (2023), *cert. granted in part*, 142 S. Ct. 1106 (2022), *rev'g*, 6 F.4th 1160 (10th Cir. 2021).

642. State authorities had "transcend[ed] constitutional limitations on their powers." 319 U. S., at 642. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, the Court held that Massachusetts's public accommodations statute could not be used to force veterans organizing a parade in Boston to include a group of gay, lesbian, and bisexual individuals because the parade was protected speech, and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." *Id.*, at 572–573. And in *Boy Scouts of America v. Dale*, when the Boy Scouts sought to exclude assistant scoutmaster James Dale from membership after learning he was gay, the Court held the Boy Scouts to be "an expressive association" entitled to First Amendment protection. 530 U. S., at 656. The Court found that forcing the Scouts to include Mr. Dale would undoubtedly "interfere with [its] choice not to propound a point of view contrary to its beliefs." *Id.*, at 654.

These cases illustrate that the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574, and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U. S. 443, 456. Generally, too, the government may not compel a person to speak its own preferred messages. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505. Pp. 6–9.

(b) Applying these principles to the parties' stipulated facts, the Court agrees with the Tenth Circuit that the wedding websites Ms. Smith seeks to create qualify as pure speech protected by the First Amendment under this Court's precedents. Ms. Smith's websites will express and communicate ideas – namely, those that "celebrate and promote the couple's wedding and unique love story" and those that "celebrat[e] and promot[e]" what Ms. Smith understands to be a marriage. Speech conveyed over the internet, like all other manner of speech, qualifies for the First Amendment's protections. And the Court agrees with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve her speech, a conclusion supported by the parties' stipulations, including that Ms. Smith intends to produce a final story for each couple using her own words and original artwork. While Ms. Smith's speech may combine with the couple's in a final product, an individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*, 515 U. S., at 569.

Ms. Smith seeks to engage in protected First Amendment speech; Colorado seeks to compel speech she does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to compel her to create custom websites celebrating other marriages she does not. 6 F. 4th 1160, 1178. Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 633, 642. Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting ideas about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith. 6 F. 4th, at 1178. But while the Tenth Circuit thought that Colorado could compel speech from Ms. Smith consistent with the Constitution, this Court's First Amendment precedents teach otherwise. In *Hurley*, *Dale*, and *Barnette*, the Court found that governments impermissibly compelled speech in violation of the First Amendment when they tried to force speakers to accept a message with which they disagreed. Here, Colorado seeks to put Ms. Smith to a similar choice. If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs,sanctions that may include compulsory participation in "remedial … training," filing periodic compliance reports, and paying monetary fines. That is an impermissible abridgement of the First Amendment's right to speak freely. *Hurley*, 515 U. S., at 574.

Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic – no matter the message – if the topic somehow implicates a customer's statutorily protected trait. 6 F. 4th, at 1199 (Tymkovich, C. J., dissenting). Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The Court's precedents recognize the First Amendment tolerates none of that. To be sure, public accommodations laws play a vital role in realizing the civil rights of all Americans, and governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts v. United States Jaycees*, 468 U. S. 609, 628. This Court has recognized that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250 (internal quotation marks omitted). Over time, governments in this country have expanded public accommodations laws in notable ways. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. *Dale*, 530 U. S., at 656–657. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings. See, *e.g.*, *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437. Importantly, States have also expanded their laws to prohibit more forms of discrimination. Today, for example, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. The Court has recognized this is "unexceptional." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ___, ___. States may "protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." *Ibid.* At the same time, this Court has also long recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. See, *e.g.*, *Hurley*, 515 U. S., at 571, 578; *Dale*, 530 U. S., at 659. As in those cases, when Colorado's publicaccommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const. Art. VI, § 2.

As the Tenth Circuit saw it, Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere." 6 F. 4th, at 1179–1180 (internal quotation marks

omitted). In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. The speaker in *Hurley* had an "enviable" outlet for speech, and the Boy Scouts in *Dale* offered an arguably unique experience, but in both cases this Court held that the State could not use its public accommodations statute to deny a speaker the right "to choose the content of his own message." *Hurley*, 515 U. S., at 573; see *Dale*, 530 U. S., at 650–656. A rule otherwise would conscript any unique voice to disseminate the government's preferred messages in violation of the First Amendment. Pp. 9–15.

(c) Colorado now seems to acknowledge that the First Amendment does prohibit it from coercing Ms. Smith to create websites expressing any message with which she disagrees. Alternatively, Colorado contends, Ms. Smith must simply provide the same commercial product to all, which she can do by repurposing websites celebrating marriages she does endorse for marriages she does not. Colorado's theory rests on a belief that this case does not implicate pure speech, but rather the sale of an ordinary commercial product, and that any burden on Ms. Smith's speech is purely "incidental." On the State's telling, then, speech more or less vanishes from the picture – and, with it, any need for First Amendment scrutiny. Colorado's alternative theory, however, does not sit easily with its stipulation that Ms. Smith does not seek to sell an ordinary commercial good but intends to create "customized and tailored" expressive speech for each couple "to celebrate and promote the couple's wedding and unique love story." Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond its reach.

The State stresses that Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But many of the world's great works of literature and art were created with an expectation of compensation. And speakers do not shed their First Amendment protections by employing the corporate form to disseminate their speech. Colorado urges the Court to look at the reason Ms. Smith refuses to offer the speech it seeks to compel, and it claims that the reason is that she objects to the "protected characteristics" of certain customers. But the parties' stipulations state, to the contrary, that Ms. Smith will gladly conduct business with those having protected characteristics so long as the custom graphics and websites she is asked to create do not violate her beliefs. Ms. Smith stresses that she does not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments.

The First Amendment's protections belong to all, not just to speakers whose motives the government finds worthy. In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But abiding the Constitution's commitment to the freedom of speech means all will encounter ideas that are "misguided, or even hurtful." *Hurley*, 515 U. S., at 574. Consistent with the First Amendment, the Nation's answer is tolerance, not coercion. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Colorado cannot deny that promise consistent with the First Amendment. Pp. 15–19, 24–25.

6 F. 4th 1160, reversed.

Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Alito, Kavanaugh, and Barrett, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Kagan and Jackson, JJ., joined.

Editors' Note: There are limits to free speech. However, *303 Creative, LLC*, emphasizes just how broad free speech protection is. The plaintiff wanted to expand her business to include wedding website designs, but she feared violating her state's public accommodation law if she declined to create content contrary to her views and religious beliefs (the primary one relevant to this dispute was same-sex marriage). She sued those responsible for enforcing that law for a clarification of her rights. Not at issue was the decision with whom to do business. The parties' stipulations narrowed the legal dispute down to a pure free-speech question about artistic expression. Viewed through that lens, the U. S. Supreme Court found that the state cannot use the statute to control the content of the plaintiff's expressive services.

How easy is it to draw a line between a businessperson selling a good or service and infusing that service with the businessperson's personal beliefs? Contribute to the discussion by submitting an article to the TLJ.

There is more to the story. Now, in the aftermath of the decision, reports have surfaced that the man who purportedly made the request to 303 Creative LLC that triggered the business-owner to ask about her legal right to refuse requests from same-sex-couples apparently never made the request in the first place.[2] The plaintiff identified the customer's full name, email address and phone number in the original complaint, but according to press reports, he only learned about the case when journalists contacted him after the decision's publication.[3] This is all the more surprising considering that this man apparently has been happily married – to a woman – for over 15 years. Maybe our columnist Dr. Strangelaw should take a closer look at this decision for the next issue. For now you may refer to the Associated Press[4] and Law.com[5] for a first assessment and further insights. ■

2 *Sam Levine*, Key document may be fake in LGBTQ+ rights case before US supreme court, The Guardian (29 June 2023), https://www.theguardian.com/law/2023/jun/29/supreme-court-lgbtq-document-vera-city-colorado.

3 *Jessica Gresko*, The Supreme Court rules for a designer who doesn't want to make wedding websites for gay couples, Associated Press (30 June 2023), https://apnews.com/article/supreme-court-gay-rights-website-designer-aa529361bc939c837ec2ece216b296d5.

4 *Jessica Gresko*, The Supreme Court rules for a designer who doesn't want to make wedding websites for gay couples, Associated Press (30 June 2023), https://apnews.com/article/supreme-court-gay-rights-website-designer-aa529361bc939c837ec2ece216b296d5.

5 *Angela D. Giampolo*, "303 Creative" Decision Will Have Far-Reaching Impact on LGBTQ Community, Law.com (06 January 2023), https://www.law.com/thelegalintelligencer/2023/01/06/303-creative-decision-will-have-far-reaching-impact-on-lgbtq-community/.

Book reviews

A Look at the Transatlantic Bookshelf

Dreaming the Arbitration Dream, Reflecting on Dispute Resolution and Changing Times, and Celebrating Art – And All This in Book Reviews

"Look at the transatlantic bookshelf," what is that supposed to be? You know the book reviews, the ones in which someone emphasizes on one or two pages why the reviewed book is good and why you absolutely have to buy it? Yes, exactly the book reviews, in which essentially only the table of contents is embellished with one or two words (does the author get something for it? – well at least the book itself). This is not only – to put it mildly – uninspiring, but also does not make you want to read the reviewed book at all costs. The transatlantic relationship, at least the transatlantic economic and legal life as experienced by the members and friends of the DAJV, is different. Therefore, the book reviews are also different – we take a look at the transatlantic bookshelf and present new, or sometimes older, but in any case books that make you want to deal with a topic or topic areas and that, if not a German-American link, at least (sometimes perhaps forcibly) allow a transatlantic link to be established. And whoever thinks that this is going to be a two man show is mistaken. Once a year we will let a star guest author look into her or his transatlantic bookshelf. We are sure that other bookshelves will also contain one or two treasures.

But now enough of the preface. What follows is the first look at the transatlantic bookshelf and we hope – oh, what are we writing? we know – that it will not be just another book review, but exactly what we want: in a light-hearted way make you want to read and incidentally also introduce a book or two.

First topic, and how could it be otherwise given our daily practice: international arbitration.

Have you ever thought about how to achieve the arbitration dream? Can it be achieved at all, and what is it actually? Someone who should know is *Professor Julian D. M. Lew KC* – it is not for nothing that the *liber amicorum* dedicated to him bears the title "Achieving the Arbitration Dream".[1] Julian Lew is certainly not only someone who has achieved the arbitration dream, but also lived it. The *liber amicorum* is dedicated to making this dream tangible and to illuminating aspects – more is probably not possible in view of the complexity of arbitration – that are part of this arbitration dream or that made the arbitration dream possible in the first place. *Julian Lew*, at any rate, pursued the dream of autonomous arbitration, as *Noah Rubins* points out in his contribution "Autonomous Arbitration: Were We Dreaming?" It seems that autonomous arbitration does not exist, and yet every success – big or small – begins with a dream. It is not only about the beginnings, but also about the future. Thus, *Mohamed S. Abdel Wahab* rightly raises the question of whether the AI Arbitrator could become reality, or will remain just a dream, fiction, or could it turn into a nightmare. We cannot now illuminate all aspects of the arbitration dream, even though the list of contributors reads like a "who's who" of international arbitration. Not only would we then fail to live up to our own dream of colorful book reviews (remember, we do not just want to embellish the table of contents with one or two words), we would certainly also do injustice to one or the other contributor. What makes the book so interesting is the sheer variety of contributors, personalities and characters, each emphasizing in their own way a part of the big picture, the arbitration dream. The question of whether Julian Lew's arbitration dream has become reality is, in any event, answered by his daughters *Lauren Levin* and *Ariella Lew* in their article "Prof Dr Julian Lew QC: The Dream Realised". In any event, some of the contributors set new limits on the minimum possible length of a contribution with, at times, the biographical note of the author(s) being longer than the contribution itself.

Irrespective of this, however, it should be clear that the arbitration dream as such is not over and that everyone can realize or at least dream their own arbitration dream. In any case, it is worthwhile to think about international arbitration. The ***liber amicorum* for George Bermann** provides an incentive to do so.[2] If one considers today's world with its trouble spots or climate change, there is so much that can and should be thought about. Conflict resolution, including international arbitration, is certainly one of them. Where does it come from, this compelling inclusion of international arbitration, this almost self-evident reference to international arbitration when it comes to international crises, conflicts or disputes? Is there not a bit of a pro-arbitration bias (who could blame us)? The "Reflections on International Arbitration" then also raise the question, "Why Pro-Arbitration" (*Robert H. Smit*) and also venture a look past the "Pro-Arbitration" (*El Jin Lee*). But these are only two thought exercises in the "Reflections on International Arbitration". International arbitration offers immense opportunity to get lost in thought, to reflect, to dream (Julian Lew comes to mind), and to emphasize the good (and the need for improvement). It is not surprising, then, that eighty-five chapters of "Reflections on International Arbitration" provide food for thought. Not only on the influence George Bermann had on international arbitration,[3] but also on current arbitration practice, comparative law, developments in the jurisprudence of national courts, the significance and scope of arbitration agreements, and finally investor-state dispute settlement. Once you start thinking and actually get to thinking, you eventually, but very definitely, end up at the last chapter, "Arbitration in a Changing World" (*Caline Mouawad*).

This leads us straight on. Nowhere else is arbitration changing as gradually and yet as rapidly as international investment arbitration. Since the *Achmea* decision of the ECJ at the latest, investor-state dispute settlement cannot be ignored when thinking about international arbitration (and that is a good thing, since investor-state dispute settlement is an important part of international arbitration and makes a valu-

1 *Stavros Brekoulakis/Romesh Weeremantry/Lilit Nagapetyan* (eds.), Achieving the Arbitration Dream, Liber Amicorum for Prof. Julian D. M. Lew KC (2023).

2 *Julie Bédard/Patrick W. Pearsall* (eds.), Reflections on International Arbitration: – Essays in Honor of Professor George Bermann (2022).

3 George Bermann has been, *e. g.*, Chief Reporter of the ALI Restatement of the U. S. Law of International Commercial and Investor-State Arbitration (2008-2020), Chair or President of many organizations dealing with comparative law, private international law and international arbitration, advisor to the Legal Service of the Commission of the European Union, co-editor in chief of the most respected international law reviews and author of amicus briefs in groundbreaking cases at the U. S. Supreme Court and elsewhere. We better not even start with his honorary degrees and awards and impressive list of publications.

able contribution to international conflict resolution). The partly negative stance, especially of the ECJ, is not only reflected in the decisions following the *Achmea* decision,[4] such as *Komstroy*[5] or *PL Holdings*.[6] No, it is already evident in the discussions on TTIP and CETA. Against this background, it is extremely welcomed that there is now an unexcited (and we mean that very positively) and academically outstanding **commentary on the investment law part of CETA**.[7] The commentary, edited by *Marc Bungenberg* and *August Reinisch*, includes contributions from numerous acknowledged experts as well as practitioners and academics to be considered leading experts in the future. The nearly 1,000-page work comprehensively covers the CETA provisions on investment protection, placing them in existing case law and vividly demonstrating why the CETA provisions are worded as they are and how they might play out in practice. In the words of the preface, "*CETA changes the paradigm regarding the scope of application, substantive standards as well as investor-state dispute settlement, as the different contributions to* [the] *commentary* […] *show*". Overall, very impressive work, welcomed if carried on. We look forward to the second edition, which will then hopefully be able to draw on numerous CETA cases (for the resolution of which the first edition of the commentary will certainly prove helpful).

The world is indeed at a turning point – at least according to *Matthias Herdegen* in his work "***Heile Welt in der Zeitenwende***",[8] which is not only aimed at jurists. And yes, indeed, every age, every world order, and even every conception of the world experiences a turning point at some point – no matter what kind. It may be that, given recent history, we were living in an "ideal world" (*heile Welt*), and yes, the Russian attack on Ukraine marks a turning point. Now it is up to us to understand this act, which is contrary to international law, not only as a turning point in defense and military policy. *Matthias Herdegen* skillfully elaborates the questions this turning point poses for us, be it questions of internal and external security or fundamental questions of society. It is a matter of tackling the problems that are now more pressing than ever (energy and supply security, climate and nature protection, respect for international law, a peaceful community of states geared to economic cooperation, and internal and external security) without calling into question our fundamental values (as enshrined in fundamental rights and as they shape our democratic order). In this respect, *Matthias Herdegen* then also encourages us to dare more politics ("*Mehr Politik wagen*").

Sometimes, however, it does not just have to be law and politics that moves the world. Since ancient times, music has played an almost elementary role in human interaction. It is precisely this realization that leads us, especially in times when there is talk of a turning point, to pause and also look at the history of music. And what could be better than the one and only **Rolling Stones**? In 2022, they **celebrated 60 years** – a band that has also (one may smile at this) shaped transatlantic fortunes. *Lesley-Ann Jones* does an excellent job of describing how five young Brits set out in the 1960s to play the music of Black America.[9] It does seem somewhat absurd how the once anti-establishment musicians became one of – if not the – most successful rock bands ever. One may consider whether this is also due to the fact that the British musicians are meanwhile complemented and supported by American musicians. Indeed, the rhythm section of the Stones is meanwhile American since bass guitarist Darryl Jones joined the band in 1993 after Bill Wyman retired and Steve Jordan became their drummer following Charlie Watts' death in 2021. Their studio album *Blue & Lonesome* released in December 2016, which features only blues covers of American blues musicians, is evidence of their roots in American blues.[10] Certainly, the Rolling Stones have contributed a lot to the transatlantic relationship – not only in terms of culture, but also in economic terms, … not to mention the contribution to law enforcement on both sides of the Atlantic.[11]

All kidding aside, the Rolling Stones have managed something that only a few succeed in doing: on the one hand, they have remained true to their roots, but on the other hand, they have moved with the times and evolved, thus remaining in the – not only musical – awareness. But it is not that they have made a complete U-turn; no, they have consciously adapted the course so that basic values are preserved, but at the same time created space for new things – and that closes the circle to *Matthias Herdegen's* turning point (*Zeitenwende*).

So blue skies on the musical horizon? We want to leave this question unanswered. Everyone can make up his or her own mind about the history of the Rolling Stones and the connection with the *Zeitenwende*. Let's turn indeed to the blue sky instead: **T. C. Boyle** – probably one of the most popular contemporaneous American authors in Germany – has published a new novel entitled **Blue Skies**.[12] When you start reading, you are directly involved in the world of thoughts of a woman who has just bought an unusual pet and thus not only gave in to an impulse, but in one way or another also fulfills herself a wish. One could think that the book keeps what the title promises: a shallow story of an ideal world – blue skies after all. But that would be a huge mistake. The allusion to Herdegen's *Zeitenwende* (who recognized it?) is no accident. In fact, Boyle also deals with a turning point, or rather a change, namely climate change. Ah, now we are on a topic we actually wanted to avoid. Well, never mind. Boyle's descriptions of an almost apocalyptic Florida, which puts an American family before an inner test, are written so colorfully and yet again soberly that one could go from laughing to crying. Boyle writes with straightforward language so approachable that the narrative and characters become human. One could see oneself in one or the other scene, but in any case one could imagine what is described. As Boyle said the other day at a reading in Stuttgart, "*My job as an artist is to perform, your job is the interpretation*." To stimulate one's own imagination and to give room for interpretation is something Boyle has definitely succeeded in doing with Blue Skies. What is clear though, even without interpretation, is that climate change is a topic that must be dealt with and addressed.

4 *Slovak Republic v. Achmea B.V.*, C-284/16, Judgement of the Court (Grand Chamber) of 6 March 2018.
5 *Republic of Moldova v. Komstroy LLC*, C-741/19, Judgement of the Court (Grand Chamber) of 2 September 2021.
6 *Republiken Poland v. P. L. Holdings S.à.r.l.*, C-109/20, Judgement of the Court (Grand Chamber) of 26 October 2021.
7 *Marc Bungenberg/August Reinisch* (eds.), CETA Investment Law, Article-by-Article Commentary (2022).
8 *Matthias Herdegen*, Heile Welt in der Zeitenwende (2023).
9 *Lesley-Ann Jones*, The Stone Age: Sixty Years of the Rolling Stones (2022), German translation by Conny Lösch.
10 See Paul McCartney's remark about the Rolling Stones in 2022: "*I'm not sure I should say it, but they're a blues cover band, that's sort of what the Stones are.*" *Mike Snider,* Paul McCartney disses The Rolling Stones, calling them 'a blues cover band' USA Today (last visited: 30 June 2023), https://eu.usatoday.com/story/entertainment/music/2021/10/13/paul-mccartney-says-rolling-stones-a-blues-cover-band/8439133002/.
11 See, however, *Jessica Pallington West*, What Would Keith Richards Do? Daily Affirmations from a Rock'n Roll Survivor (2009), at 109 ("*I've never had a problem with drugs, only with policemen*").
12 *T. C. Boyle*, Blue Skies (2023), German translation by *Dirk van Gunsteren*.

At the end of our look at the transatlantic bookshelf, we have to realize that every look into a bookshelf also holds surprises. What began with international arbitration and brought us via the great history of the world and politics to the history of music was, in any case, a lot of fun for us. We hope that we were able to make our "book review dream" come true a little bit and that you, dear reader, have become interested in picking up one or the other of these books yourself.

For the readers' convenience, this look at the transatlantic bookshelf featured:

- Stavros Brekoulakis, Romesh Weeremantry, and Lilit Nagapetyan (eds.), '*Achieving the Arbitration Dream, Liber Amicorum for Prof. Julian D. M. Lew KC*', Wolter Kluwer 2023;
- Julie Bédard and Patrick W. Pearsall (eds.), '*Reflections on International Arbitration, Essays in Honor of Professor George Bermann*', Juris 2022;
- Marc Bungenberg and August Reinisch (eds.), '*CETA Investment Law, Article-by-Article Commentary*', Beck Hart Nomos 2022;
- Matthias Herdegen, '*Heile Welt in der Zeitenwende*', C. H. Beck 2023;
- Lesley-Ann Jones, '*The Stone Age, Sixty Years of the Rolling Stones*', John Blake Publishing 2022 (German translation by Conny Lösch, '*The Stone Age: 60 Jahre The Rolling Stones/Die erste Biographie der größten Rockband aller Zeiten*' by Piper, 2022);
- T. C. Boyle, '*Blue Skies*', Bloomsbury 2023 (German translation by van Gunsteren was published by Carl Hanser Verlag, 2023).

Books Just Arrived

The following books have reached the editorial staff of the TLJ. We, of course, reserve the right to review these books in the next "Look at the Transatlantic Bookshelf":

- Stefan Kröll, Andrea K. Bjorklund, and Franco Ferrari (eds.), '*Cambridge Compendium of International Commercial and Investment Arbitration*', 3 volumes, CUP 2023;
- Henry Kissinger, '*Leadership: Six Studies in World Strategy*', Allen Lane 2022 (German translation by Dedekind, Dierlamm, and Dürr was published by C. Bertelsmann Verlag, 2022, under the title: Kissinger, '*Staatskunst: Sechs Lektionen für das 21. Jahrhundert*');
- Henry Kissinger, Eric Schmidt, and Daniel Huttenlocher, '*The Age of AI: And Our Human Future*', Hodder and Stoughton 2022.

If you would like us to include a particular book in the Transatlantic Bookshelf, or would like to submit a book review yourself, please write to us; the TLJ is also interested in book reviews from readers.

*Björn P. Ebert and Stephan Wilske, Stuttgart**

* Dr. Björn P. Ebert is an Associated Partner in the dispute resolution department of Gleiss Lutz, Stuttgart, Germany, and regularly acts as counsel in international arbitration and proceedings for the enforcement and setting aside of arbitral awards. Dr. Stephan Wilske, LL. M. (The University of Chicago) is a Partner in the dispute resolution department of Gleiss Lutz, Stuttgart, Germany, and heads the firm's International Arbitration Focus Group. He regularly acts as counsel and arbitrator in international arbitration.

In a Nutshell

This section looks ahead to identify pending court cases, recent legislative acts, proposed legislation, and regulatory measures that are relevant to transatlantic legal and commercial relations. The selection is necessarily arbitrary in light of busy legislators, other regulators and courts with heavy caseloads. Nevertheless, we hope that the one or the other piece of information might be of interest to the readers of the TLJ. Items flagged in this section may be the subject of more developed articles in future editions of TLJ.

What's Next on the Transatlantic Agenda?

I. From the Courts

The TLJ flags a case that the U. S. Supreme Court has accepted for review and is consistent with the First Amendment and intellectual property cases discussed in this issue. In *Vidal v. Elster*,[1] one of the questions the U. S. Supreme Court will decide is "[w]*hether the refusal to register a mark under Section 1052(c) violates the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure.*"[2]

II. Statutes (Enacted and Proposed)

1. U. S. INFORM Consumers Act Effective

Effective 27 June 2023 is the INFORM Consumers Act, which will bring greater transparency to online sales. It covers online marketplace platforms that bring buyers and sellers together. If the platform sells consumer products "*in the United States*", then the platform's provider must gather (and verify) certain information about its "*high-volume third party sellers*". For such a seller, this means disclosing its financial information (bank account and tax ID number) and contact information to the platform provider. The data's use will be limited to safeguard privacy and security, although the general purpose of the disclosure requirement is to deter crime, specifically, the sale of stolen goods. The greater transparency also might benefit buyers in a more practical sense. The buyer will know the seller's identity and have a direct means of communication. Moreover, a buyer will have a means to report suspicious conduct. Compliance is ensured by threat of fine against the platform provider.

2. Digital Platform Commission Act Proposed

There are also potential new laws on the horizon. Pending before the U. S. Senate is the proposed Digital Platform Commission Act of 2023 (S. 1671). The International Asso-

1 *Katherine K. Vidal, Under Secretary of Commerce for Intellectual Property and Director, U. S. Patent and Trademark Office v. Elster*, 26 F. 4th 1328 (Fed. Cir.), *cert. granted*, No. 22-704 (U. S. 5 June 2023).

2 *Katherine K. Vidal, Under Secretary of Commerce for Intellectual Property and Director, U. S. Patent and Trademark Office v. Elster*, No. 22-704, Case Docket Sheet Summary of the Questions Presented.

ciation of Privacy Professionals reported that "*U.S. Sens. Michael Bennet, D-Colo., and Peter Welch, D-Vt., introduced the Digital Platform Commission Act. The proposed legislation would create a Federal Digital Platform Commission 'with the mandate, jurisdiction, and tools to develop and enforce rules for a sector that has gone virtually unregulated' – artificial intelligence and social media. 'We need an expert federal agency that can stand up for the American people and ensure AI tools and digital platforms operate in the public interest,'*" quoting Sen. Bennet.[3] On 18 May 2023, the Senate referred the bill to the Committee on Commerce, Science, and Transportation.

3. European Union to Introduce Regulation for A.I.

The European Union is on the verge of passing one of the world's first laws governing A.I. and dealing with the risks that stem from the application of A.I.[4] On 21 April 2021, the European Commission proposed a regulation of the European Parliament and the Council governing A.I. ("**AI Act**").[5] In June 2023, the European Parliament has approved its negotiating position on the proposed Act, which will have to be discussed with the Council to agree upon a final form. An agreement is supposed to be reached by the end of this year.[6] The reasons for the need to regulate A.I. systems are described as follows by the European Parliament: "*AI systems should be overseen by people, rather than by automation, to prevent harmful outcomes.*"[7] Specific objectives of the AI Act are to ensure that the A.I. systems on the European market are safe and respect existing laws, to ensure legal certainty to facilitate investment and innovation in A.I., to enhance governance and effective enforcement of existing laws applicable to A.I. systems, to facilitate the development of a single market for lawful, safe and trustworthy A.I. applications and to prevent market fragmentation.[8] Following these objectives, the AI Act sets different standards to A.I. systems depending on the risks which their application entails. Therefore, some A.I. systems are prohibited from the outset because their risk is unacceptable whereas other A.I. systems have to meet certain requirements depending on their risk level.

4. Germany to Introduce Commercial Courts with English

Germany is considering allowing English in court proceedings. Pending is a draft bill for an "*[a]ct to strengthen the Federal Republic of Germany as a judicial forum by introducing Commercial Courts and English as the court language in civil trials*".[9] The German Minister of Justice, Heiko Buschmann (FDP), introduced the bill with the aim to allow for swift final and binding decisions and to enable negotiations in English, thereby "*[competing] with renowned foreign commercial and arbitration courts*". The proposed bill would allow the federal states to install "*Commercial Chambers*" within their District Courts specialized to resolve disputes with an amount in dispute of 1 million EUR and up. Several interest groups have published their statements and opinions about the draft bill.

5. German Arbitration Law Reform Proposed

Germany is considering an update to its arbitration law. The modernization of the German Arbitration Law – last reformed in 1997 – is currently the subject of a White Paper.[10] The German Ministry of Justice aims to increase Germany's competitiveness as a venue for arbitration by identifying issues with the current arbitration law. The Ministry calls for the simplification of formal requirements and more transparency, as well as for a more international approach by allowing foreign parties to submit an arbitral award to be declared enforceable or set aside, as well as any documents from the arbitration proceedings to be in English.

III. Regulatory Matters

1. Potential Ban of Non-Compete Clauses in U.S. Employment Contracts

The U.S. Federal Trade Commission is considering whether to ban non-compete clauses in employment contracts. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3,482 (19 January 2023). At issue is whether an employer may prevent an employee from later working for (or starting his or her own) competing business. The proposed rule would bar an employer from requiring non-competition as a term of employment. The FTC is acting under its authority to prevent unfair methods of competition, which the FTC says this kind of limitation on an employee's future employment creates. This is worth monitoring because if adopted, the FTC's Non-Compete Clause Rule would have broad effect, barring it from both future and existing employment agreements. There also is the potential that non-compete clauses could be barred even if limited to a certain geographical area or timeframe.

2. "Made in USA" Means Just That

A proposed consent agreement between Cycra, Inc. and the U.S. Federal Trade Commission brings attention to what constitutes a truly American-made product in this era of globalization. As the FTC construes the definition for purposes of the consent agreement, the U.S. must be more than just the place of final assembly or processing. "[A]*ll significant processing that goes into the product*" must occur in the U.S., and "*all or virtually all*" of its "*ingredients or components*" must be "*made and sourced in the United*

3 US senators introduce Digital Platform Commission Act, IAPP (22 May 2023), https://iapp.org/news/a/u-s-sens-introduce-digital-platform-commission-act/. See also *U.S. Senator Michael Bennet*, Bennet, Welch Reintroduce Landmark Legislation to Establish Federal Commission to Oversee Digital Platforms (18 May 2023), https://www.bennet.senate.gov/public/index.cfm/2023/5/bennet-welch-reintroduce-landmark-legislation-to-establish-federal-commission-to-oversee-digital-platforms.

4 *Lisa O'Carroll*, EU moves closer to passing one of world's first laws governing AI, The Guardian (14 June 2023), https://www.theguardian.com/technology/2023/jun/14/eu-moves-closer-to-passing-one-of-worlds-first-laws-governing-ai; the European Parliament calls it the "*the world's first rules on AI*" once approved (EU AI Act: first regulation on artificial intelligence, European Parliament (last updated: 14 June 2023), https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804.).

5 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, European Commission, https://artificialintelligenceact.eu/the-act/.

6 EU AI Act: first regulation on artificial intelligence, European Parliament (last updated: 14 June 2023), https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804.

7 EU AI Act: first regulation on artificial intelligence, European Parliament (last updated: 14 June 2023), https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804.

8 EU AI Act, p. 3.

9 Referentenentwurf "Justizstandort-Stärkungsgesetz", Dept. of Justice of the Federal Republic of Germany (25 April 2023), https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Commercial_Courts.html (available in German only).

10 Modernisierung des deutschen Schiedsverfahrensrechts: Bundesjustizminister legt Vorschläge vor, Dept. of Justice of the Federal Republic of Germany (18 April 2023), https://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2023/0418_Modernisierung_Schiedsverfahrensrecht.html (available in German only).

States" as well. *See* Cycra, Inc.: Analysis of Proposed Consent Order to Aid Public Comment, 88 Fed. Reg. 24,617 (21 April 2023).

3. Air Travel

The U. S. Congress recently enacted the NOTAM Improvement Act of 2023. As explained at H. R. 346, "[t]*his act directs the Federal Aviation Administration (FAA) to establish the FAA Task Force on NOTAM (notice to air missions required by international or domestic law) Improvement and requires the FAA to implement a federal NOTAM system. A NOTAM is a notice containing information essential to personnel concerned with flight operations but not known far enough in advance to be publicized by other means. It states the abnormal status of a component of the National Airspace System.*"

4. The Green Transition: Europe Pushes Forward … Will America Follow?

The European Union is pushing forward with the "Green Transition" by introducing more sustainable finance regulation. On 13 June 2023, the European Commission published legislative proposals including an ESG Ratings Regulation and the EU Taxonomy Delegated Acts.[11] These bills join the numerous other European-wide attempts to ensure that environmental, sustainable, and governance ("ESG") issues are incorporated in areas where they were not previously seen such as the financial sector. This will likely also have an impact on U. S.-based and other international entities. This is because the proposals currently making their way through the European legislative process, such as the Corporate Sustainability Due Diligence Directive, include third country entities within their scope.[12] While different States in the U. S. have demonstrated some willingness to embark upon a similar path, there are also States fighting against the inclusion of ESG entirely.[13] It remains to be seen how the United States will approach the ESG question and whether it will be able to do so at the federal level. However, one thing is for sure: U. S. companies will not be able to avoid asking themselves how ESG changes in legislation will impact them.

We invite our readers to make us aware of legal developments, upcoming and pending cases, as well as regulatory measures on both sides of the Atlantic, which might be of significance to the transatlantic legal community.

11 Proposal for a Regulation of the European Parliament and Council on the transparency and integrity of Environmental, Social and Governance (ESG) rating activities 2023/0177(COD), available at: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2023/0177(COD)&l=en.

12 *See* Art. 2 no. 2 2022/0051 (COD).

13 *Shelly Hagan/ Nic Querolo*, Texas Anti-ESG Push is Coming for Insurers and Pensions in New Bills, Bloomberg (3 March 2023), https://www.bloomberg.com/news/articles/2023-03-03/texas-anti-esg-bill-targets-public-pensions-insurers#xj4y7vzkg.

Last Words by Dr. Strangelaw

Challenging the Artificial: About the Allegedly Intelligent and Horribly Negligent

This year, 2023, is the year of the Artificial Intelligence. There is no doubt about it. Rapid advancements in machine learning and deep neural learning networks have brought this new technology to the forefront of our collective consciousness. It has, without a doubt, the potential to revolutionize many aspects of our daily lives, from communication and entertainment, from business-solutions to spare-time activities.

Accordingly, almost everyone wants in on the technology, with new A. I. solutions published every day. Everyone, from part-time entrepreneurs to Fortune 500 companies, wants to capitalize on the possibilities that it offers. Even Henry Kissinger, who can look back on an impressive 100 years of life experience in what is probably the most turbulent century in modern history, and who wrote a book titled "The Age of A. I.: And Our Human Future",[1] called the new generation of AI an "intellectual revolution".[2]

> *"The early bird gets the worm, but the early worm … gets eaten."*
>
> *– Norman R. Augustine*

This quote perfectly summarizes the curious case of a New York attorney, who chose to use OpenAI's ChatGPT to perform legal research. In a client's case against Colombian airline "Avianca" for an injury incurred on a 2019 flight, the attorney cited at least four cases involving several aviation mishaps that he could not find through the usual methods used at his New York law firm. This, in hindsight, was because none of these cases actually existed.[3] Only after the opposing side pointed out to the court that they had considerable doubts about the authenticity of the citations, were the lawyer and his firm exposed. It turned out that the lazy lawyer never did any fact checking or research regarding the case law that the bot cheerily spouted out. The judge confronted the lawyer and his team with one legal case made up by the A. I. The bot initially presented it as a wrongful death case brought by a woman against an airline but later morphed the same case into a legal claim about a missed flight to New York, forcing the (now male) plaintiff to incur additional expenses.[4] "*Can we agree that's legal gibberish?*", he asked. Yes, your honor, we can.

To understand how a mishap of this scale that "reverberated throughout the entire legal profession"[5] can even happen in the first place, you have to understand how ChatGPT works. ChatGPT is a so-called "generative" A. I. and part of the LLM sort of algorithms. LLM in this context is not an

1 *Henry Kissinger/Eric Schmidt/Daniel Huttenlocher*, The Age of AI: And Our Human Future (2021).

2 *Henry Kissinger/Eric Schmidt/Daniel Huttenlocher*, ChatGPT Heralds an Intellectual Revolution, The Wall Street Journal (24 February 2023), https://www.henryakissinger.com/articles/chatgpt-heralds-an-intellectual-revolution/.

3 See *Mata v. Avianca, Inc.*, No. 1:2022cv01461, Doc. 54 (S. D. N. Y. 2023), available at: https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2022cv01461/575368/54/

4 *Larry Neumeister*, New York lawyers blame ChatGPT for tricking them into citing "bogus" legal research, NBC Connecticut (8 June 2023), https://www.nbcconnecticut.com/news/national-international/new-york-lawyers-blame-chatgpt-for-tricking-them-into-citing-bogus-legal-research/3046714/.

5 *Benjamin Weiser/Nate Schweber*, The ChatGPT Lawyer Explains Himself, The New York Times (8 June 2023), https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html.

abbreviation for a law degree, but stands for "Large Language Model".[6] The creator "feeds" the algorithm vast amounts of online and offline sources, that the program then analyzes and remembers. When you ask the A.I. a question or give it a "prompt", it will rummage through its enormous memory and – within seconds – find matching key words. From there it calculates which words are most likely to follow in a sentence. Of course, this explanation is simplified beyond fairness but at its core, that is how it works. By constantly enlarging the pool of sources, as well as implementing user feedback and fine-tuning its own machine-learning capabilities, the algorithm steadily increases its accuracy to guess the correct words. By now, it has gotten so good that it recently made headlines by passing the Uniform Bar Exam, beating the Student Average.[7] According to this, you would think that it should make for a formidable research assistant, but the case at hand tells a different story. A huge weakness of the way the A.I. works is that it has a tendency to "hallucinate". This is what happens when the algorithm misjudges the likelihood of the next words in the sentence and drifts off in a different (and often incorrect) direction.[8] While the chat-feature of ChatGPT allows the user to correct these hallucinations, the hallucinated "gibberish" first has to be identified as such. This is exactly what our negligent New York lawyer failed to do, as he tried to be an early bird but turned out to be an early worm, sticking his neck where it did not belong. His story serves as a cautionary tale for legal tech users worldwide and raises the question: "Does the use of A.I. have to be regulated?"

Curiously, the tone of A.I. leaders regarding regulation of their respective matter is completely contrary to the point of view of most in the tech-industry. Instead of stubbornly taking the "regulation slows down innovation" stance, as leaders in disruptive technologies or industries tend to do,[9] OpenAI's CEO Samuel Altman is practically begging lawmakers for A.I. regulation, citing fears of human extinction.[10] While this may sound drastic, the concept of an all-conquering A.I. that may pose an existential threat to humans is nothing new.[11] While a certain existential dread may be in order as well as a system of checks and balances to prevent future A.I. from turning from a benevolent assistant to a maleficent superintelligence in the spirit of Terminator's "Skynet", for now you may rest easy knowing that the current generation of A.I. cannot quite grasp the citation of U.S. case law.

This, however, does not mean that the current A.I. is completely harmless: Especially A.I. generated images can have a real world influence, with people unable to determine the difference between real photographs and artificially generated images. In the last few months A.I.-generated images went viral several times, once with a picture of Pope Francis dressed in a trendy white Balenciaga puffer coat,[12] another time with a picture of Donald Trump getting arrested,[13] and – less harmless and fun – with a fake photo of an explosion at the U.S. Pentagon, causing a brief dip in the stock market.[14] Especially the third example serves as a painful reminder that A.I. may not yet be dangerous by itself, but it can certainly be used as a powerful weapon to sow misinformation and spread fake news. Therefore, it serves as a valuable asset in the toolbox of bad actors looking to influence public opinion or meddle in democratic elections.[15] Recognizing this, the European Union proposed the EU AI Act,[16] assessing the different risk levels of different A.I. and regulating accordingly. While the EU charges forth, Washington chooses a more gentle approach – at least for now: While an "A.I. Risk Management Framework" exists, those pose more of a guideline than a regulation. In stark contrast to the proposed EU Act, the U.S. – for now – places their trust more or less in the voluntary compliance of the industry's leaders with their suggestions. For Reference: The EU lawmakers are willing to fine companies not in compliance of their proposed act with up to 6 % of their yearly revenue. Next to this, the GDPR fines look like a toothless tiger. While the EU A.I. Act has not yet been passed, with this in mind, it certainly provides for a development to be closely watched.

With that, Dr. Strangelaw rests his case, adding one final quote that is always to be kept in mind regarding future regulation:

"You can't legislate against stupidity"
– Jesse Ventura (The 38th Governor of Minnesota)

J.-C. S.

6 *José Neto*, ChatGPT and the Large Language Models (LLMs), Medium.com (21 March 2023), https://medium.com/chatgpt-learning/chatgpt-and-the-large-language-models-llms-c69bfdf48347.

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10 *Geoffrey Hinton/Bill Gates/Sam Altman et al. (Signatories)*, Statement on AI Risk: AI experts and public figures express their concern about AI risk, Center for AI Safety (last accessed: 27 June 2023), https://www.safe.ai/statement-on-ai-risk#signatories.

11 See *e.g.*, Elon Musk, who was an early investor in OpenAI: *Jack Smith IV*, Elon Musk Calls For Regulation of "Demonic" Artificial Intelligence, The New York Observer (27 October 2014), https://observer.com/2014/10/elon-musk-calls-for-regulation-of-demonic-artificial-intelligence/; *Dylan Love*, Warning: Just Reading About This Thought Experiment Could Ruin Your Life – What is Roko's Basilisc?, Business Insider (6 August 2014), https://www.businessinsider.com/what-is-rokos-basilisk-2014-8.

12 *Matt Novak*, That Viral Image Of Pope Francis Wearing A White Puffer Coat Is Totally Fake, Forbes (26 March 2023), https://www.forbes.com/sites/mattnovak/2023/03/26/that-viral-image-of-pope-francis-wearing-a-white-puffer-coat-is-totally-fake/?sh=484bfb1f1c6c.

13 *Kayleen Devlin/Joshua Cheetham*, Fake Trump arrest photos: How to spot an AI-generated image, BBC News (24 March 2023), https://www.bbc.com/news/world-us-canada-65069316.

14 *Donie O'Sullivan/Jon Passantino*, "Verified" Twitter accounts share fake image of "explosion" near Pentagon, causing confusion, CNN Business (23 May 2023), https://edition.cnn.com/2023/05/22/tech/twitter-fake-image-pentagon-explosion/index.html.

15 *E.g. Selcan Hacaoglu/Taylan Bilgic/Firat Kozok*, Kremlin Denies Meddling Ahead of Turkey's Knife-Edge Vote, Bloomberg (12 May 2023), https://www.bloomberg.com/news/articles/2023-05-11/turkish-opposition-leader-blames-russians-for-vote-meddling; *Isha Marathe*, Turbocharged by Election Season, Deepfakes May Soon Face Legal Reckonings, Law.com (27 June 2023), https://www.law.com/legaltechnews/2023/06/27/turbocharged-by-election-season-deepfakes-may-soon-face-legal-reckonings/.

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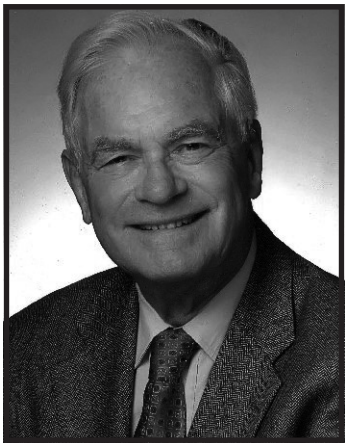
Obituary

Prof. Dr. Eric E. Bergsten, 1931–2023

The Vis Moot community is mourning the loss of its founder, former director and president, honorary president and valuable friend, Professor Dr. Eric E. Bergsten. Eric passed away on 1 July 2023 at the age of 91.

Eric has dedicated his career and life to promoting commercial law and arbitration with a vision of peaceful dispute resolution. By establishing the Vis Moot, Eric has helped to give students all over the world access to legal education and advocacy training. Eric thereby influenced, like few other people, the lives and careers of countless students, arbitration practitioners and scholars.



Born on 17 July 1931 in Evanston, Illinois, in the United States, he was the only child of a Swedish immigrant father and an American mother who had her family roots in Finland. Coming from a modest family, he learned from his parents the importance and the value of education that he pursued throughout his entire life.

After his studies at Northwestern University, Eric went to law school at the University of Michigan where he obtained his law degree (J. D.) in 1956. He served three years as a JAG officer (Judge Advocate General's Corps) in the Pentagon before he continued his studies in French law at the University of Chicago and in Aix-en-Provence. Eric's doctoral thesis was on the law of treaties in the French courts. Upon his return from France, Eric began teaching commercial law and international law at the University of Iowa, where he remained for thirteen years.

In 1975 Eric joined the staff of UNCITRAL in New York as a Senior Legal Officer, where he was primarily responsible for what became the UN Convention on Contracts for the International Sale of Goods, the CISG (1980). In 1979, the headquarter of UNCITRAL was transferred to Vienna, Austria, where Eric remained for the next twelve years until his retirement in 1991. The last six of those years Eric was the Secretary of UNCITRAL. After his retirement from UNCITRAL, Eric spent a year as visiting professor at Fordham University and then joined Pace University School of Law in 1992. At Pace Law School, where he stayed for seven years before returning to Vienna, Eric started what he described as *"the best part of his professional career"*. This is when the story of the Vis Moot began.

Together with the founder of the then newly established Institute of International Commercial Law at Pace University – Professor Al Kritzer, and the founding director of the Institute – Professor Willem C. Vis, Eric elaborated on the idea of the Vis Moot and developed the structure and format of the competition that has now been used for more than 30 years.

Of the three founders, it was Eric who was to actually go on and run the operations of the Vis Moot. Vienna was selected as the place to hold the Vis Moot. This was a natural choice for Eric, not only because UNCITRAL was located in Vienna where he had spent many years himself. More importantly, returning to Vienna also provided better opportunities to spend time with his Viennese wife Brigitta.

The first Moot in Vienna was held in 1993 with 11 teams. After the first Vis Moot ended, Eric happily said to his wife Brigitta "At least it was not a failure." Eric never pursued the idea of the Vis Moot as a vehicle of achieving personal success or recognition. He was simply inspired by the idea of gathering students from all over the world to promote legal education. He did not like the fact that the Moot was a competition, but recognised that a competition was needed to engage and encourage universities to send students and invest time and effort.

Eric was a visionary who was able to spread his enthusiasm about the Vis Moot and its ideals amongst everyone he met. The constant and organic growth of the Vis Moot therefore came as no surprise to many people. Eric easily connected with people and unified the arbitral institutions as supporters and sponsors of the Vis Moot. He succeeded in convincing numerous coaches and professors to support the Vis Moot as an important educational program, and gathered renowned arbitration practitioners and scholars to return every year to the oral hearings in Vienna.

Obituary

Each year more teams and arbitrators attended the Vis Moot. Eric deliberately decided not to limit team participation but rather adjusted the organization to accommodate the number of participants. Eric disliked the idea of excluding university teams from the Vis Moot. He instantly encouraged the idea of pre-moots and a sister moot now known as the Vis East. Eric allowed many others to benefit from his own achievements as long as the idea seemed helpful to students and was not created for the purpose of a commercial undertaking.

In the first 15 years of the Vis Moot, Eric did virtually everything himself; and consequently probably had less spare time after his retirement than during his active career at UNCITRAL!

Eric had the vision to establish a permanent Moot operation in Vienna, independent from him as a person. In 2007 the Vis Moot Association was founded as a non-profit organization under Austrian law as the legal entity that runs the Vis Moot.

Eric became the president of the Association and over time handed the operations over to three directors Patrizia Netal, Stefan Kröll and Christopher Kee. Facilitating a very smooth transition, Eric ensured his considerable knowledge about how the Moot should be run was always available to his successors.

It was only in 2022 that he resigned as president and became the Association's Honorary President.

With now 380 university teams from nearly 90 countries the Vis Moot has developed into something that is much more than a student competition. Everyone who has participated in the Moot knows what the Vis Moot spirit means. It was Eric who embodied and lived the Vis Moot Spirit through his own personality, vision and enthusiasm. He succeeded with his vision of not only promoting a more uniform approach of international commercial law but also to unite students and practitioners from all over the world. He helped to connect people; he enabled careers; and he created the opportunities for so many that would not have happened without the Moot. It is his inspirational contribution to the arbitration community that will live on in the memory of countless friends and colleagues.

Eric and Brigitta, a teacher, shared not only the love for education and knowledge but also for music and arts. He had three children and was a loving stepfather of Brigitta's two daughters, conveying his passion for education and arbitration. The Vis Moot also affected the lives of his family members in the most positive ways.

Rest in peace, Eric. We will deeply miss you.

Patrizia Netal, Prof. Dr. Christopher Kee and Prof. Dr. Stefan Kröll — Vienna, July 2023

DAJV News

DAJV Hosts New Journal

The transatlantic relationship is a place of strength, underpinned by the rule of law. Through it, peace and prosperity has been maintained, but as the world becomes an ever more complicated place, its importance only increases. There is no better, or exciting, time to contribute to the transatlantic relationship than now. At its forefront will be the *Transatlantic Law Journal* hosted by the DAJV. It is a new publication, but it will build on the tradition and benefit from the experience of its predecessor, the *Zeitschrift für Deutsches und Amerikanisches Recht* (ZDAR).

The *Transatlantic Law Journal* provides a forum at the highest level. Prominent members of the legal, business, and diplomatic communities are participating in it, reflecting the full spectrum of insights and experiences. However, the audience is not limited to top professionals and practitioners. The *Transatlantic Law Journal* will serve as a bridge to those new to the field as well as an educational resource for the general public. Importantly, it will be a medium of current and topical conversation.

More than just law! – What DAJV offers

Seeing an opportunity to expand horizons, twelve young German and one US-American lawyer founded the German-American Lawyers' Association (DAJV) in 1975. Since that day, the DAJV has promoted and cultivated interest in US and German law brought to us by the academic studies, professional activities and journeys of our numerous members.

The DAJV is a vibrant association of over 2,500 members from law, industry and society-at-large, who are offered

- Organization of and participation in different Groups
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- Seminars
- Regular meetings, e.g. the Annual Conference, Transatlantic Legal Conference (TLC) and Thanksgiving Dinner(s)
- A hugely successful Internship Service for students and trainee lawyers
- A Mentoring program for young lawyers
- The Student Division, and A division for Young Professionals

The Executive Committee of the DAJV is composed of the members of the central executive committee and regional director members that also represent the association in Germany and locations throughout the U.S.

Our office in Bonn-Bad Godesberg supports the Executive Committee in its work, still from the city in which the association was founded.

Upcoming Events

1. DAJV Annual Conference

DAJV's Annual Conference on German and American Law will take place on 29–30 September 2023, this year in Stuttgart. Further details will be available on the DAJV website shortly. For your planning convenience, DAJV has reserved exclusive room allotments at the Motel One Stuttgart-Mitte, Steigenberger Graf Zeppelin, and Le Méridien Stuttgart hotels.

For the booking information and further details, visit:
https://www.dajv.de/events/dajv-jahreskonferenz-2023/.

The DAJV is looking forward to welcoming you to Stuttgart!

2. DAJV LL.M. Day

Studying abroad is a unique and exciting time where you can develop your professional skills as well as gain valuable personal experience. By participating in a Master of Laws program in the United States, you will expand your knowledge of a fascinating country and its legal system.

Participate in DAJV's LL.M. Day on 6 November 2023 in Cologne. This is a great opportunity to learn about LL.M. programs in the U.S. and interact directly with representatives of excellent law schools.

Learn more at:
https://www.dajv.de/llmday2023/

3. More Events on the Horizon

Be sure to visit DAJV's website as additional events and holiday celebrations are added to this year's calendar.

And feel free to continue the discussion of the topics of this issue on the DAJV Transatlantic Legal Blog at www.dajv.de/blog/.

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The *Transatlantic Law Journal* (TLJ) is an open forum. Please share your ideas, proposals, insight and expertise, and contribute to the transatlantic exchange of ideas, knowledge, and dialog!

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The *Transatlantic Law Journal* will publish an issue every two months, for a total of six a year.

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Please email your proposed contribution to editors@tlj.com.

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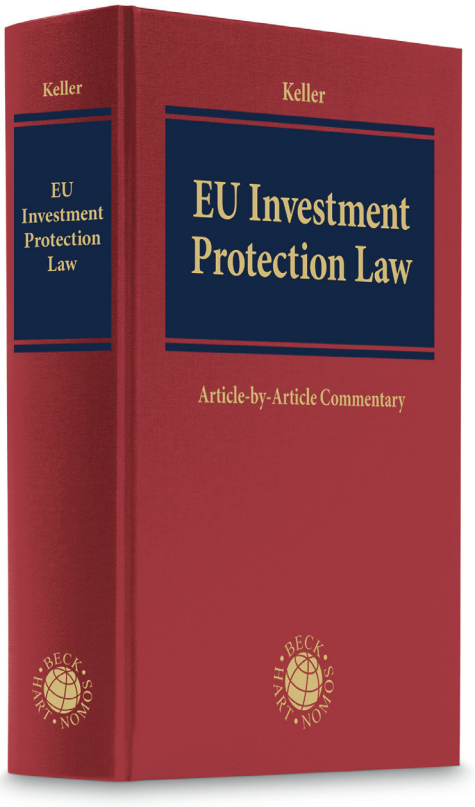

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With the provisional entry into force of the Comprehensive Economic and Trade Agreement (CETA), the free trade agreement between Canada, the European Union and its Member States, the legal framework for EU investment protection is in the spotlight as never before.

The EU itself is at the very forefront: as policymaker in its new role as guardian of EU investment protection since the Lisbon Treaty, as lead negotiator and party to CETA, the Vietnam and Singapore Free Trade Agreements and other emerging agreements with third countries, and since recently also as investment treaty case respondent. In CETA, the EU has sought to implement a number of policy goals, including a new tribunal mechanism for resolving investment disputes, more precision in the wording of legal standards of protection in order to achieve better consistency in decision-making, and the inclusion of requirements on conflicts of interest of arbitrators and transparency of proceedings.

This volume provides a comprehensive article-by-article commentary on this ground-breaking agreement, deconstructing the legal issues, and providing insights from a practitioner's perspective. With a broader legal framework also in place in the form of three EU Regulations which underpin the investment protection law framework, the work also provides comprehensive commentary on (i) Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, (ii) Regulation (EU) 1219/2012 establishing transitional arrangements for bilateral investment agreements between EU countries and non-EU countries and (iii) Regulation (EU) 2019/452 establishing a framework for screening of foreign direct investments into the European Union.

About the editor and authors

The editor **Moritz Keller** is a practising lawyer in the field of international arbitration and investment protection law and a partner at Clifford Chance. The contributors are prominent international arbitration specialists from Clifford Chance and rothorn legal: Johanneke Butijn, Martyna Darczuk, Ignacio Diaz de la Cruz, Monika Diehl, Maria Virginia Feliz Ball, Jason Fry, Simon Greenberg, Fernando Irurzun Montoro, Azal Khan, Karandeep Khanna, Caroline Kittelmann, Bartosz Krużewski, Pauline Lafleure, Sarah Lemoine, Steffen Lindemann, Juliette Luycks, Eva Matheij, Vinayak Panikkar, Adelina Prokop, Moritz Schmitt, Dimitri Slobodenjuk, Charlotte Smit, Elias Soria Iglesias, Thomas Voland, Alix de Zitter.

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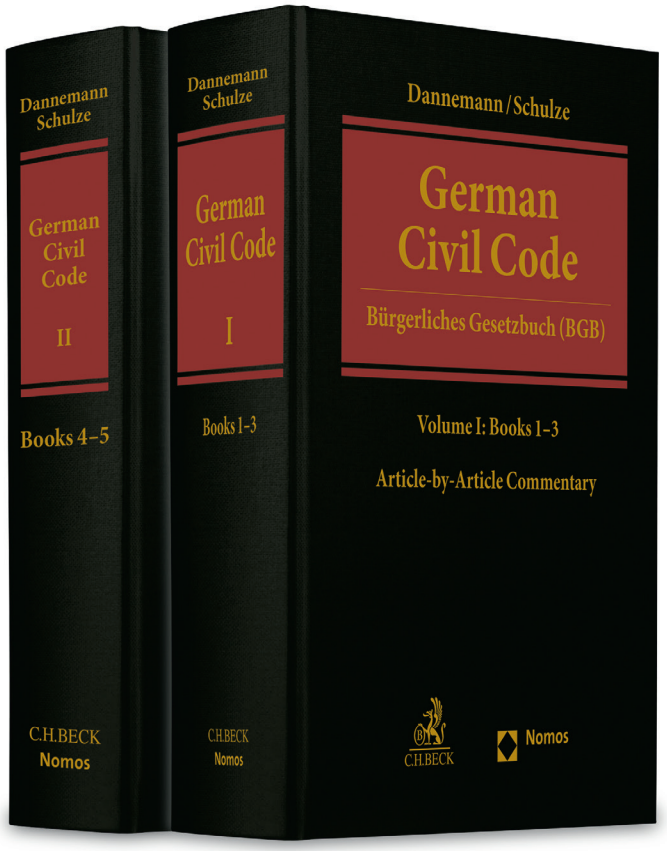

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About the Editors

This commentary is edited by Professor Dr Gerhard **Dannemann,** Humboldt University of Berlin, and Professor Dr Reiner **Schulze,** University of Münster. The contributors to the commentary are academics and practitioners in the field of civil and comparative law.