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**MEDIA MOGULS RISKING IT ALL: CONTRACT CLAUSES
IN THE ENTERTAINMENT BUSINESS IN THE AGE OF
#MeToo**

RICK G. MORRIS*

ABSTRACT

This article explores the ability of entertainment companies to respond to the salacious misconduct or bad behavior of their talent and leaders through the perspectives of corporate ownership, impacted employees, business partners, and the victims of the misconduct. The article examines the history of social trouble in the media caused at both the individual and corporate level, and how such social trouble can lead to irreparable reputational and financial damage. This article proposes that entertainment companies should consistently implement and apply morals clauses in talent and leadership contracts as a solution to this post-Weinstein problem. While morals clauses can be wielded as a sword against risky talent, this article identifies three challenges that morals clauses face including pushback from unions, negotiations to soften morals clauses, and the prior status quo that permitted free speech and industry practices to rationalize and ignore misconduct. Finally, this article will urge entertainment companies to be proactive in protecting their reputation, their employees, and their very

* Rick G. Morris, M.B.A., DePaul University, J.D., University of Kansas, LL.M., New York University; Associate Dean and Associate Professor, Northwestern University School of Communication. I would like to thank Professors James Webster and Rives Collins, as well as Jan Feldman, Executive Director of the Lawyers for the Creative Arts, for reading early drafts and providing helpful comments. I would also like to thank my graduate class in entertainment law for their insightful questions which led me to believe that an article from this perspective was needed. Finally, I would like to thank my life partner and intellectual partner, Madison, for her support and comments.

existence amidst the backdrop of the #MeToo movement and recent developments in litigation by employing a modern morals clause in future contracts.

INTRODUCTION

The news media reports that your media company's namesake CEO has been involved in salacious behavior for the last twenty years. The reports are numerous and damning. Multiple women come forth reporting sexual harassment. What do you do?¹

Or, a news headline announces that the lead star of your company's most popular sitcom has been accused of sexual misconduct. The alleged misconduct is so offensive that it could be fatal to the success of the company. Your executives decide to terminate your company's relationship with that star. However, the star is under contract for additional seasons. What can be done?²

Or, your partner, television host, and well-known chef is accused of assault. You own several restaurants with this partner, and his prestige as head chef is crucial to the value of the brand. What happens next?³

If these scenarios seem familiar, it is because they were ripped from recent headlines. Companies inherit great risk when their leaders engage in behavioral misconduct. Especially in media companies, when transgressions are made, they are very often high-profile, reported in the news, and subject to public criticism via the Tweet and re-Tweet of social media and entertainment companies⁴ have become intertwined with our

¹ Schuyler Moore, *Morality Clauses in Hollywood: What You Need to Know*, FORBES (Mar. 12, 2018), <https://www.forbes.com/sites/schuylermoore/2018/03/12/morality-clauses-in-hollywood/#57019b6e49a5>.

² See discussion *infra* pp. 13–17. See Rosanne Barr and the actions that led her to leave the sitcom *Roseanne*, *infra* pp. 14–15.

³ See Julia Moskin, *Mario Batali Exits His Restaurants*, N.Y. TIMES (Mar. 6, 2019), <http://www.nytimes.com/2019/03/06/dining/mario-batali-bastianich-restaurants.html> (“A year after reports that the celebrity chef sexually assaulted and harassed women, the Bastianich family and Mr. Batali's other partners have bought out his stake and regrouped.”).

⁴ For the purpose of this article, media companies include not only the traditional networks such as ABC, CBC, NBC, PBS, Fox, and

everyday lives. Communication is their business, and we engage in communication every day. The reputation of the company, its leadership, and its clientele is often crucial to its success as a business and influences whether people engage with their product. When leaders of these companies engage in misconduct such as sexual harassment or assault, their actions jeopardize the company's reputation, and subsequently, the success and perhaps even viability of that company.⁵ While other industries may have addressed questions of leadership misconduct less ostensibly, the media industry stands in a glaring spotlight shines on how poorly it has handled errant leadership. This article examines the history of those issues created by leadership misconduct, identifies the current and real remaining problems facing the media industry, and proposes change in the form and a plenary use of modernized

CW, but also all cable networks, all streaming companies such as YouTube, Hulu, Netflix, HBOGo, all social media such as Facebook, Twitter, Instagram, and all affiliates of those main companies like their news divisions and entertainment distribution collectives. It would also include any alternative distribution platforms.

⁵ See, e.g., *The New York Times Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, N.Y. TIMES, <https://www.nytimes.com/editorial-standards/ethical-journalism.html#> (last visited Nov. 18, 2019) (This handbook, developed by the staff of the New York Times, sets forth ethical and behavioral standards of conduct for news and editorial departments); ASSOCIATED PRESS, ASSOCIATED PRESS STATEMENT OF NEWS VALUES AND PRINCIPLES (2017), <https://www.ap.org/about/news-values-and-principles/downloads/ap-news-values-and-principles.pdf>; WALT DISNEY COMPANY, CORPORATE SOCIAL RESPONSIBILITY UPDATE (2018), <https://www.thewaltdisneycompany.com/wp-content/uploads/2019/03/2018-CSR-Report.pdf>; CBS CORPORATION, 2016 BUSINESS CONDUCT STATEMENT (2016), <https://www.cbscorporation.com/wp-content/uploads/2018/03/CBS-2016-BCS.pdf>.

morals clauses⁶ to help mitigate the effects of misconduct in the era of #MeToo, Time's Up, and common sense.⁷

I. HOW COMPANIES ARE MADE VULNERABLE BY THE BEHAVIORAL MISCONDUCT OF THEIR OWN

Companies need to protect themselves, especially media and entertainment companies. Whether they are part of a mega corporation like a news division or an entertainment brand,

⁶ The term “morals clause” or “morality clause” originated in approximately 1921. *See, e.g., Morality Clause For Films; Universal Will Cancel Engagements of Actors Who Forfeit Respect*, N.Y. TIMES, <https://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.html?pageNumber=8> (last visited Nov. 18, 2019). While perhaps appropriate at the time in 1921, this author takes issue with continued use of the term “morals clause.” A morals clause functions as a “for cause” clause in a contract in the entertainment industry. The term morals clause is too broad in that “immoral” activity is not necessarily something that a person would be fired for, even if it could be determined what is “immoral.” And yet the term is also simultaneously too narrow because a company might want to terminate employment for non-morality issues like mere disagreeable speech. Because of this obsolescence-by-age, this author suggests the term “behavioral clause” as a more accurate and descriptive term. However, the scholarship and practice still refers to this type of clause as a “morals clause;” so for accurate representation congruent with the historical context and academic and case indexing, this author will continue to refer to this type of clause as a morals clause often throughout this article. *See infra* pp. 30–33.

⁷ For past scholarship on the state of morals clauses, *see generally* Caroline Epstein, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. OF INTELL. PROP. AND ENT. L. 72 (2015); David E. Fink & Sarah E. Diamond, *Morality Clauses in the Age of #MeToo and Time's Up*, 34 COMM. LAW. 4 (2019); Caysee Kamenetsky, *The Need for Strict Morality Clauses in Endorsement Contracts*, 7 PACE INTELL. PROP., SPORTS & ENT. L. FORUM 289 (2017); Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal, and Practical Guide*, 29 COLUM. J.L. & ARTS 235 (2005); Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares about Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. OF SPORTS AND ENT. L. 347 (2009); Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3 (2017).

company where a portion of their goodwill and intellectual property determines their company's total market value,⁸ or whether they own a local operation like a theatre, symphony, or opera company; a company's reputation can be everything. It can directly affect both the value of individual products like a show, a series, or a movie, to even the value of the entire company.⁹

⁸ For example, the market value of Disney as of the close of markets on May 21, 2019 was \$241 billion. *See Walt Disney Market Cap*, YAHOO (Sept. 19, 2019), https://ycharts.com/companies/DIS/market_cap. Disney owns a full range of communication entities like ABC Television, ABC News, ESPN, the Disney Channel plus A&E and many other cable networks, movie studios, theme parks, and numerous websites. A problem at any one of their owned entities could cause the value of their company to tumble. This is only to use Disney as one example among many and all; this is the case for any publicly-traded media company. And they must all protect their reputation. *See* Mark Fritz, *Disney's Wild World of Lawyers: The Scippiest Place on Earth?*, L.A. TIMES (Nov. 3, 1996), <https://www.latimes.com/archives/la-xpm-1996-11-03-mn-60757-story.html>; *see also* Jay Michaelson, *Mickey Takes Deadmau5 to Court*, DAILY BEAST (Sept. 3, 2014), <https://www.thedailybeast.com/mickey-mouse-takes-deadmau5-to-court>. Disney highly values its reputation and publishes so on its website. *See, e.g., Disney is No. 1 on Forbes' World's Best Regarded Companies List*, WALT DISNEY COMPANY (Sept. 12, 2018), <https://www.thewaltdisneycompany.com/disney-is-no-1-on-forbes-worlds-best-regarded-companies-list/>. Similarly, the owners of the Barney trademark are also protective. *See* Brooke A. Masters, *Protecting the Barney's Image from Bogus Beasts*, WASH. POST (Mar. 25, 1998), <https://www.washingtonpost.com/archive/local/1998/03/25/protecting-barneys-image-from-bogus-beasts/1e1c5a94-acd7-4de6-ac9b-5f85b50bcd8e/>. Similarly, when media companies' reputation starts taking a beating, as Facebook is learning. *See* Don Reisinger, *Tesla and Facebook Corporate Reputation Rankings Plummet*, FORTUNE (Mar. 6, 2019), <https://fortune.com/2019/03/06/tesla-facebook-reputation/>; *see also* Evan Osnos, *How Much Trust Can Facebook Afford to Lose?*, NEW YORKER (Dec. 19, 2018), <https://www.newyorker.com/news/daily-comment/how-much-trust-can-facebook-afford-to-lose>.

⁹ This includes protection of reputation of all types. In 1989, Disney even sued the Academy of Motion Picture Arts and Sciences (the people who award the Oscars), contending that a musical number that included Snow White was "unflattering." Bruce V. Bigelow, *Disney Sues Over Snow White Portrayal*, ASSOCIATED PRESS (Mar. 31, 1989), <https://www.apnews.com/bad7541b13ce3cac192194760359909b>.

This is especially true for publicly-traded companies and particularly fragile companies.¹⁰ A publicly-traded company has SEC oversight and is prone to shareholder lawsuits.¹¹ A shareholder can sue over practically any perceived breach of duty by management or the board of directors. What happens when a stock falls by a huge percentage within the same timeframe of breaking of news involving the misconduct of an employee or manager? Or what happens when a media mogul commits some egregious act while on the job? Shareholders are likely to sue. Why? To protect their investment from the company's tarnished reputation.

A “media mogul,” for the purpose of this discussion, means a person in a significant leadership position in an entertainment company. When a media mogul commits a significant breach of behavior, it may *all* be on the line – and that *all* can include up to the *entire value and existence* of the company itself. Behavioral misconduct may cost damages of many millions; it may cost enduring reputational damage; it may cost collateral damage to partner companies in many millions; it may cost collateral damage to innocent individuals part of the same or related production team that may no longer profit from being on that production. The damage can extend up and down the line of production various ways, even causing intellectual property that should have decades of value and *in which many companies and people have invested in* good faith, instantly worthless. The damage can be so extensive that there is no reliable way to estimate it. Once upon a time, the aggrieved party would sue and either a settlement or a judgment would bring the aggrieved some money and the case would be closed¹² Now, the number of aggrieved parties coming forward is increasing, and the variety of

¹⁰ For possibly “fragile” companies, *see, e.g., infra* note 103 and accompanying text (theatre closed down six days after a story published that contained bad publicity about one of its leaders).

¹¹ *See* Joe Flint, *Suit Accuses Current, Former CBS Executives of Insider Trading*, WALL ST. J. (Feb. 12, 2019), <https://www.wsj.com/articles/suit-accuses-current-former-cbs-executives-of-insider-trading-11550016859>.

¹² *See* Christina Pazzapese & Collen Walsh, *The Women's Revolt: Why Now, and Where To*, HARV. GAZETTE (Dec. 21, 2017), <https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/>.

remedies sought are multiplying, as are the dangers to the companies.¹³

Individuals succumb to bad behavior, even those that live in the limelight. Not always, but perhaps it is even more expected now than ever. Or, perhaps, individual misconduct was simply more tolerated than it is now.¹⁴ But today is a new day and those aggrieved have found their voice.¹⁵ Media companies are especially at-a high profile and high risk area – the media is happy to report on each other for competitive edge. For example, when the Harvey Weinstein story became public, it first appeared in the *New York Times*, circulation 540,000 weekday copies in 2017¹⁶

¹³ See, e.g., Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary/>.

¹⁴ See, e.g., Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> (“The mogul used money from his brother and elaborate legal agreements to hide allegations of predation for decades.”). One person allegedly molested by Harvey Weinstein criticizes the system that protected Weinstein and let him continue in his ways. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; see also Marlow Stern, *'Untouchable' Exposes How the Media Protected Harvey Weinstein for Decades*, DAILY BEAST (Jan. 26, 2019), <https://www.thedailybeast.com/untouchable-explores-how-the-media-protected-harvey-weinstein-for-decades>. See also JODI KANTOR & MEGAN TWOHEY, *SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT* (2019).

¹⁵ The “MeToo” movement was founded in 2006 by Tarana Burke as a way to help women who survived sexual violence. The phrase was made popular and went viral in 2017 when actress Alyssa Milano suggested the use on Twitter in the wake of the Harvey Weinstein scandal. See Aisha Harris, *She Founded MeToo. Now She Wants to Move Past the Trauma.*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html>; see also Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE (May 29, 2019), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html>.

¹⁶ See Amy Watson, *Average paid and verified weekday circulation* of the New York Times from 2000 to 2018 (in 1,000 copies)*,

and 89 million online hits per month,¹⁷ and in the *New Yorker* with a print/digital circulation in 2017 of 1.1 million and 15.6 million unique hits on its website.¹⁸ Once the story breaks, many other news outlets pick it up and “report on the reports.” In addition to the mass media, individuals can broadcast their own station via social media. For example, Ronan Farrow, the journalist who broke the Weinstein story in the *New Yorker*, has a Twitter account of 878,000 followers.¹⁹ In the past, news could be stopped; today it travels fast and far.

Post-2017 and the Harvey Weinstein scandal, support for victims of sexual harassment has dramatically increased, so companies should expect more lawsuits if such allegations continue to be made against them.²⁰ These lawsuits will take new forms. In the case of Les Moonves, *infra* at 25–27, we see that the victims attempted to take up lawsuits against the board of directors for negligent retention and even securities fraud.²¹ What was once

STATISTA, <https://www.statista.com/statistics/273503/average-paid-weekly-circulation-of-the-new-york-times/> (last visited Nov. 18, 2019).

¹⁷ See Ross Benes, *How the New York Times Gets People To Spend 5 Minutes Per Visit On Its Site*, DIGIDAY (Dec. 21, 2017), <https://digiday.com/media/new-york-times-gets-people-spend-5-minutes-per-visit-site/>.

¹⁸ See Lucia Moses, *How The New Yorker is Capitalizing on Its Trump Bump*, DIGIDAY (Mar. 10, 2017), <https://digiday.com/media/new-yorker-enjoying-trump-bump/>.

¹⁹ See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, THE NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>; see also Ronan Farrow (@RonanFarrow), TWITTER, https://twitter.com/RonanFarrow?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Nov. 18, 2019).

²⁰ Gene Maddaus, *Paz de la Huerta Adds Bob Iger and Michael Eisner to Weinstein Lawsuit*, VARIETY (Aug. 27, 2019), <https://variety.com/2019/biz/news/paz-de-la-huerta-eisner-iger-weinstein-lawsuit-1203316154/>; Dominic Patten, *Disney To “Vigorously” Fight New \$60M Harvey Weinstein Assault Suit From Paz De La Huerta*, DEADLINE (Aug. 27, 2019), <https://deadline.com/2019/08/paz-de-la-huerta-sues-disney-harvey-weinstein-rape-claim-miramax-1202705695/>.

²¹ For securities fraud, see generally Karen Bitar & Sarah Fedner, *Recent Developments in Securities Litigation: The “Event Driven” #MeToo Lawsuit*, JD SUPRA (June 12, 2019), <https://www.jdsupra.com/legalnews/recent-developments-in-securities->

a personnel matter has now become a public matter and the risks have multiplied ranging from financial to reputational damage.

The speed with which a company acts can minimize its damage, and particularly, its reputational damage. Under the doctrine of *respondeat superior*, a company may be held liable for its employee's conduct. If the board of directors has knowledge that one of its own has engaged in behavioral malfeasance, it needs to take swift and certain action.²² The faster a company disassociates from a CEO or executive in social trouble, the more likely it is to stop any harassment, contain the damage, to keep it from spreading, and to protect its reputation.²³

A company failing to quickly address behavioral misconduct from within risks prolonging damage to its reputation and to possible victims. A rapid response can, thus, decrease damage. Engaging in proactive measures, such as the inclusion of morality clauses into media business contracts, may mitigate those damages from the onset.

II. THE HISTORY OF SOCIAL TROUBLE IN THE MEDIA

An executive gets into what this article calls "social trouble" as a broad categorization, by engaging in conduct including sexual harassment, improper supervision, use of language so deficient for the board of directors to remove them, or any other display of "moral turpitude." In this case it does not need to rise to a criminal level, it only needs to be significantly damaging to the reputation of the company.

60318/; Eriq Gardner, *CBS Hit With Shareholder Suit Over Leslie Moonves Sexual Harassment Allegations*, HOLLYWOOD REP. (Aug 27, 2018), <https://www.hollywoodreporter.com/thr-esq/cbs-hit-shareholder-suit-les-moonves-sexual-harassment-allegations-1137677>

("The complaint alleges the company should have disclosed that enforcement of its own harassment policies was inadequate.").

²² See generally *Vicarious Liability/Respondeat Superior*, JUSTIA, <https://www.justia.com/injury/negligence-theory/vicarious-liability-respondeat-superior/> (last visited Nov. 18, 2019). Although assuming the CEO, once "caught" would not cause any more problems, it is always possible and then the board might also face claims of Negligent Retention. So far those claims have not been successful, but at some point they might.

²³ See discussion *infra* pp. 25–26.

The behavior leading to social trouble can include anything from improper language²⁴ to other bad behavior including, direct sexual harassment,²⁵ violating insider trading rules,²⁶ inappropriately smoking a banned substance when you are a federal contractor, or violating SEC rules.²⁷ The list is extensive and this article will only discuss examples.

With this bad behavior comes damage to reputation, either to the product's reputation or to the company. Damage to reputation in a non-media company might be manageable. However, in a media company the scrutiny is magnified. The media company often has an audience very willing to pounce, criticize, and publicize missteps. Further, in the era of self-media like Twitter, Facebook, and Instagram, potentially devastating news travels fast around the world. Is reputational damage something that will pass or is it something that should concern the attention of the board of directors? Bad behavior that threatens the company to the extent that the leadership person needs to be removed from their position is something that will rise to the highest levels of the company. The tools provided by a good "morals" or "behavioral clause" include rapid damage control to reputation, the ability to quickly sever the relationship with the bad actor, and the potential ability to limit liability. The arguments herein do not portend to judge, but rather are borne of many years of front-line human resources legal experience. When something goes wrong, what tools are needed? Some might wonder if these same principals might be extensible to other industries. Why of course many industries may consider such strategic tools, but the focus here is on the special attributes and needs of the entertainment industry.

²⁴ The "improper language" can have its own range of bad behavior from potentially anti-Semitic language to other offensive and racist language.

²⁵ See *infra* pp. 20–22 (discussing alleged activity in the Harvey Weinstein case); *infra* pp. 25–27 (the Les Moonves case); *infra* pp. 27–28 (the case of Kevin Tsujihara).

²⁶ See *infra* note 74 and accompanying text.

²⁷ See *infra* note 83 and accompanying text.

A. MEDIA: OFTEN BIG BUSINESS GROWN THROUGH INNOVATION

For as big and powerful as “the media” might be, it has a remarkable history that has small business and start-up stories time and time again. Not only is the popular media of today fairly young, most beginning in the 1900s through the early 2000s, but it seems to have had some larger-than-life owners or leadership.

Movie studios, for example, are relatively new to the scene: Universal Studios was founded in 1912,²⁸ Paramount was founded in 1912,²⁹ Warner Brothers was founded 1923, Walt Disney studios was founded 1923,³⁰ and Sony Pictures (Columbia) was founded 1924.³¹ Similar to the technology companies and founders with which we are familiar, like Apple to Steve Jobs and Steve Wozniak,³² and Microsoft to Bill Gates,³³ these media had figures that were key to their success.

Television networks also have a recent history. Of the current full-time television networks, American Broadcasting Company (ABC) was founded in its modern form in 1953,³⁴ CBS television was founded in 1941,³⁵ the National Broadcasting

²⁸ *Our History*, NBCUNIVERSAL, <http://www.nbcuniversal.com/our-history> (last visited Nov. 18, 2019).

²⁹ *The Paramount Story*, PARAMOUNT STUDIOS, <http://www.paramountstudios.com/phone/paramount-history.html> (last visited Nov. 18, 2019).

³⁰ *Disney History*, D23, <https://d23.com/disney-history/> (last visited Nov. 18, 2019).

³¹ *Sony Pictures History*, SONY PICTURES MUSEUM, <http://www.sonypicturesmuseum.com/studio/history/sony-pictures> (last visited Nov. 18, 2019).

³² Angeliqe Richardson & Ellen Terrell, *Apple Computer, Inc.*, LIBRARY OF CONG. BUS. REFERENCE SERVS. <https://www.loc.gov/rr/business/businesshistory/April/apple.html> (last updated Aug. 12, 2015).

³³ *This Day in History | 1975 April 04 Microsoft founded*, HISTORY.COM (Oct. 9, 2015), <https://www.history.com/this-day-in-history/microsoft-founded>.

³⁴ CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: THE HISTORY OF AMERICAN BROADCASTING* 288 (3d ed. 2002).

³⁵ GARY R. EDGERTON, *THE COLUMBIA HISTORY OF AMERICAN TELEVISION*, 66–67 (2007).

Company's television network (NBC) was founded in 1939,³⁶ and Fox was founded in 1986.³⁷ They have all had towering figures that made them what they are today. ABC had Leonard Goldenson,³⁸ CBS had William S. Paley and Frank Stanton,³⁹ NBC had David Sarnoff, Bob Wright, and Brandon Tartikoff,⁴⁰ and Fox had Rupert Murdoch.⁴¹

Other media includes Pixar, founded by Steve Jobs and former Lucasfilm employees (think *Toy Story* and *The Incredibles*),⁴² Cable News Network (CNN) founded in 1980 by Ted Turner,⁴³ and Facebook, which was founded in 2004 by Mark Zuckerberg, and others.⁴⁴

All of these companies have two things in common; the companies themselves are relatively young in their development, and they are each led by iconic individuals. They are young by necessity, whether film, television, radio, internet, streaming, or any permutation or combination; successful media depends on innovation and the invention and development of technology, so most media is relatively "new" because media, itself, is constantly innovating. Most importantly here, however, is the uniqueness of the leadership. Sometimes, individual leaders are close to indispensable to the company. Much of the media known today was founded in the rental spaces, garages, and dormitories of these individuals. This is the life story of modern media. While none of

³⁶ *Our History*, NBCUNIVERSAL, <http://www.nbcuniversal.com/our-history> (last visited Nov. 18, 2019) ("David Sarnoff launches regular TV service from the 1939 World's Fair in Flushing, Queens").

³⁷ Sterling & Kitross, *supra* note 34, at 289.

³⁸ Felicity Barringer, *Leonard Goldenson, Force Behind ABC, Is Dead at 94*, N.Y. TIMES (Dec. 28, 1999), <https://www.nytimes.com/1999/12/28/business/leonard-goldenson-force-behind-abc-is-dead-at-94.html>.

³⁹ Sterling & Kitross, *supra* note 34, at 283–84.

⁴⁰ Lee Hall, *Always cutting edge: From David Sarnoff to Bob Wright, how NBC grew to become a giant*, BROADCASTING + CABLE (Mar. 10, 2002), <https://www.broadcastingcable.com/news/always-cutting-edge-91622>.

⁴¹ Sterling & Kitross, *supra* note 34, at 508.

⁴² *Our Story*, PIXAR, <https://www.pixar.com/our-story-1> (last visited Nov. 18, 2019).

⁴³ Rachel Doecker, *CNN Launched 6/1/1980*, LIBRARY OF CONG. BUS. REFERENCE SERVS. <https://www.loc.gov/r/b/business/businesshistory/June/cnn.html> (last updated Mar. 3, 2016).

⁴⁴ Jose Antonio Vargas, *The Face of Facebook*, NEW YORKER (Sept. 13, 2019), <https://www.newyorker.com/magazine/2010/09/20/the-face-of-facebook>.

the above referenced leaders are subjects of the stories in this article, we will see that when the leadership of media companies run into moral or social trouble in the media industry, it can impact many lives at many levels.

Moral or social trouble often manifests as a conduct breach. Conduct breaches can affect single projects, a series of projects, or entire companies. The outcomes vary, the amount at-risk varies, the preventative measures vary, and industry practices vary. Therefore, the following sections split up the types of scenarios into those posing risk to a single-project or series-of-projects and those posing risk to the company as a whole.

1. “*KEY PLAYER SYNDROME*”

Suppose the damage is caused by a single star on a single show. If that show is a one-time type of show, for example, an awards show and the proposed host has done something bad, perhaps the problem can be solved by merely changing hosts? If the show is a weekly show, perhaps eliminating a character and going on with the rest of the show might be an option. The highest profile of that problem was with Charlie Sheen on the show *Two-and-a-Half-Men*. He was the star of the show and the show was built around him, but it was owned, written, and produced by Chuck Lorre (and others) so ultimately the answer was merely to kill off the lead character.⁴⁵

The “key player syndrome” can extend to particularly valuable behind-the-camera or off-screen players. For example, Director James Gunn was fired from directing *Guardians of the Galaxy 3* by Disney for social media messages that he posted many years before. This jeopardized not only the production of the movie, but the jobs of the many people expected to work on the movie as well.⁴⁶ Disney manifested the key player syndrome

⁴⁵ See Kimberly Nordyke, *How Charlie Sheen’s Character Dies on ‘Two and a Half Men’*, HOLLYWOOD REP. (Sept. 19, 2011), <https://www.hollywoodreporter.com/news/how-charlie-sheens-character-dies-237384>.

⁴⁶ Mr. Gunn’s previous two *Guardians of the Galaxy* movies had grossed \$863 million and \$773 million. See Mike Fleming Jr., *James Gunn Fired From ‘Guardians Of The Galaxy’ Franchise Over Offensive Tweets*, DEADLINE (July 20, 2018), <https://deadline.com/2018/07/james-gunn-fired-guardians-of-the-galaxy-disney-offensive-tweets->

when Disney “rehired” Mr. Gunn to direct the movie some time later, after an apology by Mr. Gunn and after about a year had passed.⁴⁷

The problem becomes more complicated when the person in social trouble also owns all or part of the company’s property, as in the case of Rosanne Barr, in which case she also created her own character. Ms. Barr co-owned a portion of the company when she tweeted an allegedly racist tweet.⁴⁸ Ms. Barr did try to apologize for the Tweet.⁴⁹ At the time of the incident, the show, *Roseanne*, was the highest rated ABC television show in years, had brought in an estimated \$45 million in revenue, and was estimated to bring in \$60 million the next year.⁵⁰

Disney, which had been a leader in combating racial stereotypes, owns ABC, and Bob Iger, president of Disney, said there was “no place for that type of bigotry.”⁵¹ ABC Television quickly canceled Barr’s show.⁵² After the show was canceled, Barr sent out a Tweet apologizing to the “hundreds of people” who lost their jobs on her show.⁵³ In addition to losing her show, she was also terminated by ICM Partners, her talent agency.⁵⁴ After the show was canceled, all appeared to be lost for the remaining cast and crew; they had all been affected by the actions of a single person, the star of the show, and a co-owner of the property. Fortunately, in this case, the collateral damage did not last long. Within days The Carsey-Werner Company, the producing

1202430392/. Mr. Gunn claimed that the tweets were meant as sarcastic humor. *Id.*

⁴⁷ Julia Alexander, *Disney Rehires James Gunn for Guardians of the Galaxy 3 After Firing Him Over Old Tweets*, THE VERGE (Mar. 15, 2019), <https://www.theverge.com/2019/3/15/18267551/james-gunn-direct-guardians-of-the-galaxy-3-disney-marvel>.

⁴⁸ John Koblin, *After Racist Tweet, Rosanne Barr’s Show is Canceled by ABC*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html>.

⁴⁹ Desiree Murphy & Jennifer Drysdale, *Roseanne Barr Fallout: A Complete Guide to How Her Racist Tweet Led to the Cancellation and ‘The Connors’*, ET ONLINE (Oct. 16, 2018), <https://www.etonline.com/roseanne-barr-fallout-a-complete-guide-to-how-her-racist-tweet-led-to-cancellation-and-the-connors>.

⁵⁰ Koblin, *supra* note 48.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Murphy & Drysdale, *supra* note 49.

⁵⁴ *Id.*

company, put together a new package, got Barr to agree to a settlement to leave the production,⁵⁵ and sold a spinoff titled “*The Connors*” to ABC restoring the rest of the cast’s jobs. When ABC brought back *The Connors*, Barr was not to have any financial stake in the show and no creative control.⁵⁶

The *New York Times* reports that cancelling a show is highly unusual, as networks normally rework the show without the offending character, as in *Two and a Half Men*, *House of Cards*, and *Transparent*.⁵⁷ However, the fact that the show was cancelled in less than 12 hours suggests that “the intensity and immediacy of the social media age [has] turned corporate crisis management into an exercise where minutes, and sometimes seconds, count.”⁵⁸

In the first episode of the new show, *The Connors*, Barr’s character was killed off via an opioid overdose.⁵⁹ In the end, similarly, the solution was the removal of a character; however, much contractual negotiation needed to occur before the show could continue.⁶⁰ *The Connors* fared well enough as a replacement show that it was renewed for a second season by ABC.⁶¹

The case of Louis C.K. and his movie, *I Love You, Daddy*, demonstrates the damage key player syndrome can do at the cinematic level when an individual’s misconduct causes the cancellation of a movie release. A television show might cost three to four million dollars for an hour-long episode, and sometimes up to seven million dollars an episode, and even more in special

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Koblin, *supra* note 48.

⁵⁸ Michael M. Grynbaum, *Disney Made Quick Work of ‘Roseanne.’ It’s Not Always So Easy.*, N.Y. TIMES (May 30, 2018), <https://www.nytimes.com/2018/05/30/business/media/disney-roseanne-response.html>.

⁵⁹ Murphy & Drysdale, *supra* note 49.

⁶⁰ *Id.*

⁶¹ Alex Welch, “*The Connors*” Renewed for a Second Season by ABC, ZAP2IT (Mar. 22, 2019), <https://tvbythenumbers.zap2it.com/more-tv-news/the-conners-renewed-for-second-season-by-abc/>.

The ratings were well behind the ratings of the former “*Rosanne*” show, but it was the highest rated freshman comedy, meaning its renewal was highly likely. *Id.*

cases.⁶² A single-camera half-hour show might cost \$1.5 million to three million an episode. A season's order that is between a dozen and two dozen shows, the lost revenue, lost jobs and expenditures add up quickly, not to mention the lost opportunity costs and the lost future royalty streams. Similarly, in the film industry a budget for a single movie can exceed \$20 million and can often rise to the level of \$100 million to \$200 million per movie or even more.⁶³ Further, there is often a completion bond on a movie, so there could be a contractual hit to an insurance company, assuming no escape clause for these types of actions.⁶⁴

In the case of Louis C.K., his movie, *I Love You, Daddy*, was completed but its release suddenly canceled after the *New York Times* reported on accusations made by five women who claimed to experience unwelcomed sexual behavior by him.⁶⁵ The release of his movie was canceled the same day the *New York Times* published its story, and the production crew, having followed the film to completion, never received the full benefit of their work.⁶⁶ FX also announced that they were ending their association with Louis C.K.⁶⁷ Louis C.K.'s management company subsequently dropped him as a client and HBO dropped him from

⁶² Maureen Ryan & Cynthia Littleton, *TV Series Budgets Hit the Breaking Point as Costs Skyrocket in Peak TV Era*, VARIETY (Sept. 26, 2017), <https://variety.com/2017/tv/news/tv-series-budgets-costs-rising-peak-tv-1202570158/>.

⁶³ The website "The Numbers: Where Data and the Movie Business Meet," lists more than 400 movies that have had a budget of \$100 million or more. THE NUMBERS, <https://www.the-numbers.com/movie/budgets/all/401> (last visited Nov. 18, 2019).

⁶⁴ Susan Antilla, *Entire Industries Being Blacklisted By Insurers Over #MeToo Liability*, THE INTERCEPT (Feb. 2, 2019), <https://theintercept.com/2019/02/02/workplace-harassment-insurance-metoo/> (seven of thirty-two insurers polled by the publisher of the *Betterley Report* have blacklisted companies in the entertainment industry for employment practices liability insurance).

⁶⁵ Yohana Desta, *Louis C.K. Accused of Sexual Misconduct by Five Women*, VANITY FAIR (Nov. 9, 2017); Melena Ryzik, Cara Buckley, & Jodi Kantor, *Louis C.K. is Accused By 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html>.

⁶⁶ Ryan Reed, *Louis C.K.: 'I Love You, Daddy' Canceled, FX Ends Partnership*, ROLLING STONE (Nov. 10, 2017), <https://www.rollingstone.com/movies/movie-news/louis-c-k-i-love-you-daddy-canceled-fx-ends-partnership-124646/>.

⁶⁷ *Id.*

a comedy benefit.⁶⁸ The IMDB page for the movie lists a cast and crew of more than one hundred individuals who worked on the movie.⁶⁹

Over one hundred people worked on the movie; some of them for years. The movie's cancellation caused them to lose any invested interest in that production including the economic value of any back end payments,⁷⁰ the very valuable intangibles from credit for working on the movie,⁷¹ awards they might have won for their performances or their technical work,⁷² and numerous other benefits from being associated with a movie. The value of the work itself in entertainment cannot be underestimated: "[s]creen credit is probably the single most important factor for artists in the entertainment business. This factor determines who is 'hot' and who is not; it is the basis for determining whether artists are offered subsequent assignments and their increase in compensation for those assignments."⁷³

⁶⁸ *Id.*

⁶⁹ *I Love You, Daddy (2017) Full Cast & Crew*, IMDB, https://www.imdb.com/title/tt7264080/fullcredits?ref_=tt_cl_sm#cast (last visited Nov. 18, 2019).

⁷⁰ See, e.g., Dave McNary, *Hit Microbudget Pics Offer Healthy Backend for Name Actors*, VARIETY (Apr. 11, 2013), <https://variety.com/2013/film/news/hit-microbudget-pics-offer-healthy-backend-for-name-actors-1200349263/>.

⁷¹ Robert Davenport, *Screen Credit in the Entertainment Industry*, 10 LOY. L.A. ENT. L. REV. 129, 129 (1990).

⁷² For a movie, the most obvious award is the Oscar given out by the Academy of Motion Picture Arts and Sciences. However, there are numerous other awards including the Screen Actors Guild Awards, Black Critic's Circle Award, Gay and Lesbian Entertainment Critics Association Awards, the regional awards like the Chicago Film Critics Award, and there are the awards in the individual crafts like costuming, editing, writing. There are also film festival awards such as Sundance, Cannes, the Chicago International Film Festival, the Toronto International Film Festival, the Venice Film Festival, and many, many others. If a movie is not released due to the malfesance of a leader, each person who worked on that movie will not benefit from whatever acclaim the movie would have earned from respected film organizations.

⁷³ Davenport, *supra* note 71, at 129.

2. CONDUCT RESULTING IN CORPORATE FATALITY

Risk to a single project or series of projects from a lone actor can be contained, insulated, and sometimes even redeemed. However, the stakes rise when entire companies become at risk. When the CEO or another executive officer engage in or are alleged to have engaged in behavioral misconduct, it can threaten many projects, many thousands of jobs, millions of dollars of work, and create third party liabilities and unexpected calls on resources. The devastation can be extensive, unexpected, and swift. The relevant managers need to be ready to act swiftly and to have tools available that can save the company.

An eponymous CEO, Martha Stewart, is just one example of how the lone conduct of a company's chief officer can bring on such corporate-wide devastation. Martha Stewart Living Omnimedia was a media company built on Ms. Stewart's personal brand. It had television shows as well as physical goods and brands of housewares and garden ware. Ms. Stewart's name is part of what gave those products value and it was her name that helped to sell the goods. However, the SEC alleged that she committed insider trading⁷⁴ and took her to trial where she was convicted⁷⁵ and sent to jail. As part of her subsequent civil settlement with the SEC, she had to pay \$195,000 in fines and fees, and she could not serve as a director or CEO of a publicly-traded company for five years.⁷⁶ Even more devastating was the impact her conviction had on the image of the Martha Stewart brand, which deteriorated as a result. In an attempt to salvage the company, the board of directors enlisted a third-party – the government – to mitigate the damaging outcome.⁷⁷ The settlement precluded Ms. Stewart from contributing to the board in certain ways including being CEO.

⁷⁴ Press Release, Sec. Exch. Comm'n., SEC Charges Martha Stewart, Broker Peter Bacanovic with Illegal Insider Trading (June 4, 2003), <https://www.sec.gov/news/press/2003-69.htm>.

⁷⁵ Leslie Eaton, *The Martha Stewart Verdict: The Overview; Stewart Found Guilty of Lying in Sale of Stock*, N.Y. TIMES (Mar. 6, 2004), <https://www.nytimes.com/2004/03/06/business/martha-stewart-verdict-overview-stewart-found-guilty-lying-sale-stock.html>.

⁷⁶ Landon Thomas, *Martha Stewart Settles Civil Insider-Trading Case*, N.Y. TIMES (Aug. 7, 2006), <https://www.nytimes.com/2006/08/07/business/07cnd-martha.html>.

⁷⁷ Eaton, *supra* note 75.

Fortunately, Martha Stewart Living Omnimedia recovered as a company and continues to operate.

In comparison, one may remember the 2010 media atrocity of the appearance of Tony Hayward, the CEO of British Petroleum (“BP”) and how his remarks about the Deepwater Horizon oil platform explosion got him fired.⁷⁸ Hayward himself had replaced a prior disgraced CEO and promised to focus on safety.⁷⁹ Unfortunately, the Deepwater Horizon tragedy he presided over killed several workers and dumped millions of gallons of oil into the Gulf of Mexico. The impact of his remarks was so severe that it caused the BP stock to plummet, which ultimately initiated his removal as CEO.⁸⁰ In another corporate case, Elon Musk, CEO of Tesla and SpaceX, was caught smoking what appeared to be marijuana on a video podcast.⁸¹ In combination with the fallout he received from publishing a Tweet that implied he was close to sealing a business deal, an act that potentially violates SEC rules, he was almost removed from his position as CEO as well.⁸² Despite being an iconic founder of several well-respected companies, his personal misconduct could have proved to be corporately fatal.⁸³

⁷⁸ Bryan Walsh, *Oil Spill: Goodbye, Mr. Hayward*, TIME (July 25, 2010), <http://science.time.com/2010/07/25/oil-spill-goodbye-mr-hayward/>.

⁷⁹ *Id.*

⁸⁰ James Quinn & Rowena Mason, *BP Oil Spill: Billions Wiped Off Value BP as Share Price Plummets*, THE TELEGRAPH (June 10, 2010), <https://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7816623/BP-oil-spill-Billions-wiped-off-value-BP-as-share-price-plummets.html>.

⁸¹ Eric Lutz, *Reefer Madness: Elon Musk’s Viral Blunt-Smoking Photo Comes Back to Haunt Him*, VANITY FAIR (Mar. 8, 2019), <https://www.vanityfair.com/news/2019/03/reefer-madness-elon-musks-viral-blunt-smoking-photo-comes-back-to-haunt-him> (marijuana is legal in California, but not for people with government security clearances).

⁸² Benjamin Bain & Gregory Mott, *Can Elon Musk Tweet That? The SEC Is Digging In*, BLOOMBERG (Aug. 7, 2018), <https://www.bloomberg.com/news/articles/2018-08-07/can-elon-musk-tweet-that-the-sec-may-have-an-opinion-quicktake>.

⁸³ Alan Ohnsman, *Elon Musk’s Tesla Tweet Puts CEO Role at Risk Again*, FORBES (Feb. 25, 2019), <https://www.forbes.com/sites/alanohnsman/2019/02/25/elon-musks-tesla-tweet-puts-ceo-role-at-risk-again/#5d66e4576cdb>.

BP was fortunate in the corporate world; it still exists and has generally recovered. Martha Stewart Living Omnimedia was also fortunate with its outcome in the media industry. However, if we move further into the media world, we can find an even more serious example of a CEO's behavior taking an entire company down. The executive's actions risked all of the capital invested in the company, all of the current projects, and all of the money loaned to the company, and eventually involved money pledged by the company's insurers.⁸⁴ If not for a last-minute "white knight" buyer, numerous third parties would have been collateral damage to his alleged sexual proclivities.

The most visible current example is Harvey Weinstein, the former head of the Weinstein Company. In October of 2017, the *New York Times* ran a story on how Mr. Weinstein, the head of the Weinstein Company, had been paying off sexual harassment accusers for decades.⁸⁵ The employees of the Weinstein Company had contracts saying they would not criticize its leaders and the women accepting payouts agreed to confidentiality clauses.⁸⁶ Many of his employees knew of the alleged inappropriate conduct and some of the board members were concerned.⁸⁷ The allegations went back decades involving both actresses and employees. The board of the Weinstein Company acted quickly, firing co-founder Weinstein from his own company a few days later, on October 8th.⁸⁸ Part of the board resigned in protest of Mr. Weinstein's actions while the remaining board members, including his brother, hung on to the company without him.⁸⁹

⁸⁴ Brooks Barnes & Jan Ransom, *Harvey Weinstein Is Said to Reach \$44 Million Deal to Settle Lawsuits*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/harvey-weinstein-settlement.html> ("Insurance policies would cover the \$44 million if the current agreement is finalized.").

⁸⁵ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html>.

⁸⁹ *Id.*

The Weinstein Company, one of Hollywood's most successful independent producers, went into a death spiral. The company was eventually sold in a bankruptcy auction to the single bidder, Lantern Entertainment, who bought the assets for \$310 million.⁹⁰ That was 40% less than was being offered for the company a few months before and a fraction of what it was allegedly worth before the sexual misconduct allegations.⁹¹ A year before the scandal broke, Mr. Weinstein claimed the company was worth \$700 to \$800 million.⁹² Although \$310 million is substantial, Mr. Weinstein and his brother would not receive anything as a result of the sale, the proceeds, instead, going toward paying off lawyers, creditors and others including the alleged victims.⁹³ He lost his company and his company's fortune within a year. Virtually all of The Weinstein Company's employees lost their jobs.⁹⁴

In addition to losing his company and his fortune, Mr. Weinstein lost family, friends, and honors. His wife, Georgina Chapman, began divorce proceedings.⁹⁵ His friendship with the Clintons and the Obamas deteriorated.⁹⁶ The British Academy of

⁹⁰ Chris Isidore, *Remains of the Weinstein Company Sold – to the Only Real Bidder*, CNN BUS. (May 2, 2018), <https://money.cnn.com/2018/05/02/media/weinstein-company-bidder/index.html>. Another report has the final closing price at \$289 million. The deal was an asset-only deal for 270 films and other properties. See Dawn C. Chmielewski, *Lantern Entertainment Closes \$289 Million Acquisition of the Weinstein Co.'s Assets*, DEADLINE (July 16, 2018), <https://deadline.com/2018/07/lantern-entertainment-closes-289-million-acquisition-weinstein-co-s-assets-1202427141/>.

⁹¹ Chmielewski, *supra* note 90.

⁹² *Id.*

⁹³ Yohana Desta, *After Months-Long Death Rattles, the Weinstein Company Is Officially Kaput*, VANITY FAIR (July 16, 2018), <https://www.vanityfair.com/hollywood/2018/07/the-weinstein-company-lantern-entertainment>.

⁹⁴ *Id.*

⁹⁵ Weinstein and his wife were married in 2007 and have two children. See Pat Saperstein, *Harvey Weinstein's Wife Georgina Chapman Divorcing Him*, VARIETY (Oct. 10, 2017), <https://variety.com/2017/film/news/harvey-weinstein-wife-georgina-chapman-divorcing-divorce-1202586378/>.

⁹⁶ Jon Blistein, *Hillary Clinton, Obamas Rebuke Harvey Weinstein After Assault Allegations*, ROLLING STONE (Oct. 11, 2017),

Film and Television Arts (“BAFTA”) suspended his membership for “behavior completely unacceptable and incompatible with BAFTA’s values.”⁹⁷ He resigned from the Director’s Guild of America (“DGA”),⁹⁸ France revoked his Legion of Honor award,⁹⁹ and Harvard took away his DuBois Medal.¹⁰⁰ All of these incidents were reported within the first couple of months after the *New York Times* article! Weinstein tried to submit the claims for his defense into insurance companies who argued they were not required to cover him for intentional acts.

Enough cannot be said about the Weinstein case. It generated national news coverage, is influential in the current practices and attitudes towards #MeToo, and it resulted in the complete demise of Mr. Weinstein’s company. What happened to Mr. Weinstein is not only reserved for nationally renowned film producers, however. On the far smaller scale of a local theater, the damage can be equally complete.¹⁰¹ The news magazine *The Chicago Reader*, a long-standing, weekly publication known for running in-depth stories of Chicago interest, ran a feature about alleged physical abuse in a local storefront theater known as the *Profile Theatre*. The artistic director pushed back and said that he

<https://www.rollingstone.com/movies/movie-news/hillary-clinton-obamas-rebuke-harvey-weinstein-after-assault-allegations-118236/>.

⁹⁷ Seth Kelley, *BAFTA Suspends Harvey Weinstein*, VARIETY (Oct. 11, 2017), <https://variety.com/2017/film/news/harvey-weinstein-bafta-1202586879/>.

⁹⁸ David Robb, *Facing DGA Expulsion, Harvey Weinstein Resigns His Membership*, DEADLINE (Nov. 27, 2017), <https://deadline.com/2017/11/harvey-weinstein-booted-from-the-directors-guild-dga-1202215223/>.

⁹⁹ Harry Cockburn & Harriet Agerholm, *Macron ‘to Revoke Harvey Weinstein’s Legion of Honour Award’*, INDEPENDENT (Oct. 15, 2017), <https://www.independent.co.uk/arts-entertainment/films/news/emmanuel-macron-revoke-harvey-weinstein-legion-of-honour-award-france-a8002176.html>.

¹⁰⁰ Graham W. Bishai & Leah S. Yared, *Harvard to Rescind Harvey Weinstein’s Du Bois Medal*, HARV. CRIMSON (Oct. 19, 2017), <https://www.thecrimson.com/article/2017/10/19/weinstein-dubois-medal-rescinded/>.

¹⁰¹ Aimee Levitt & Christopher Piatt, *At Profiles Theatre the Drama – and Abuse – is Real*, CHICAGO READER (June 8, 2016), <https://www.chicagoreader.com/chicago/profiles-theatre-theater-abuse-investigation/Content?oid=22415861> (“For more than 20 years, actors and crew members stayed silent about mistreatment they suffered at the acclaimed storefront theater.”).

believed in the codes of conduct and that no abuse had happened.¹⁰² However, six days after the Chicago Reader article was published, the theater, which had been in business for decades, closed its doors forever.¹⁰³ The theatre, despite its longevity and artistic acclaim, had suffered a “death penalty” of its own.

a) *Collateral Damage Caused by Corporate Moral Death*

Corporate fatality does not always strike so immediately. Some damage may show up years later. For example, Bill Cosby was listed as a creator of *The Cosby Show*, and his production company Bill Cosby Enterprises produced the show along with Carsey-Werner Enterprises. The show aired from 1984 to 1992 and won numerous awards.¹⁰⁴ *The Cosby Show* has had enduring residual value airing in re-runs continuously after the end of its network run. Mr. Cosby, however, was arrested many years later in December 2015¹⁰⁵ for a sexual assault that occurred in 2004, and was convicted and sentenced to three to ten years in prison.¹⁰⁶ The show was pulled from TV Land¹⁰⁷ and BET after the

¹⁰² Jake Malooley, ‘*Unfortunately, I am the villain*’: Profiles Theatre Artistic Director Darrell W. Cox Responds to Reader Abuse Investigation, CHICAGO READER (June 10, 2016), <https://www.chicagoreader.com/Bleader/archives/2016/06/10/unfortunately-i-am-the-villain-profiles-theatre-artistic-director-darrell-w-cox-responds-to-reader-abuse-investigation>.

¹⁰³ American Theatre Editors, *Chicago’s Profiles Theatre Closes in Wake of Abuse allegations*, AM. THEATRE (June 15, 2016), <https://www.americantheatre.org/2016/06/15/chicagos-profiles-theatre-closes/>.

¹⁰⁴ Marcia Johnson, *The Cosby Show (1983-1992)*, BLACKPAST (Apr. 19, 2011), <https://www.blackpast.org/african-american-history/cosby-show-1984-1992/>.

¹⁰⁵ Eric Levenson & Aaron Cooper, *Bill Cosby sentenced to 3 to 10 years in prison for sexual assault*, CNN (Sept. 28, 2018), <https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html>.

¹⁰⁶ *Id.*

¹⁰⁷ Cynthia Littleton & Ted Johnson, *Bill Cosby Scandal Boils Over in New Media Climate*, VARIETY (Nov. 25, 2014), <https://variety.com/2014/biz/news/bill-cosby-sexual-assault-allegations-public-opinion-1201364071/>.

allegations,¹⁰⁸ Thus destroying the residual value of the television program for the foreseeable future.

The collateral damage from Mr. Cosby's conviction was immense. It damaged a major production company, perhaps caused one of the stars on his show to work at Trader Joe's grocery store, and, according to one opinion, created hardship for African American women actors from the show. When the show went into syndication, the life a show has in re-runs after it has shown on the broadcast network, it sold for an unprecedented \$4 million an episode.¹⁰⁹ The reruns across two decades generated over \$1.5 billion in revenue.¹¹⁰ Once a show is cancelled from rerun networks, the syndication dollars end.¹¹¹ When the show was cancelled, revenue ended not only for Mr. Cosby, but also for Carsey-Werner Television, one of the companies that invested heavily in him.¹¹² Carsey-Werner also, coincidentally, produced the *Roseanne* show, which likewise was canceled for a misconduct by its name star.¹¹³

One former *Cosby Show* actor, Geoffrey Owens, took a job at Trader Joe's partially due to the loss of residuals from the

¹⁰⁸ Whitney Friedlander, *Bounce TV Pulls 'Cosby' reruns, BET's Centric Yanks 'The Cosby Show'*, VARIETY (July 7, 2015), <https://variety.com/2015/tv/news/cosby-reruns-bounce-tv-1201535254/>.

¹⁰⁹ Dana Feldman, *Cosby on Trial: How Sexual Assault Allegations Have Cost Him A Fortune*, FORBES (June 8, 2017), <https://www.forbes.com/sites/danafeldman/2017/06/08/a-look-into-how-the-criminal-case-against-bill-cosby-is-costing-him-a-fortune/#45b9bf5141ad>.

¹¹⁰ *Id.*

¹¹¹ *See id.* Forbes also notes that Mr. Cosby suffered other personal income loss including the loss of his comedy tour, the loss of media streaming revenue, and the loss of new projects that he was working on. *Id.*

¹¹² Roger Friedman, *Second Stunning Blow for Producer of "Rosanne" and "Cosby" as Syndication Revenue Vanishes*, SHOWBIZ 411 (May 29, 2018), <https://www.showbiz411.com/2018/05/29/second-stunning-blow-for-producer-of-roseanne-and-cosby-as-syndication-revenue-vanishes>.

¹¹³ *Id.*; see also Daniel Holloway, *'Roseanne' Episodes Pulled From Hulu, Viacom Cable Channels*, VARIETY (May 29, 2018), <https://variety.com/2018/tv/uncategorized/roseanne-episodes-viacom-cable-channels-1202824599/>.

Cosby Show.¹¹⁴ One commentator noted that most of the shows actors who left without their residual checks after the show's cancellations were African-American women, the majority gender on set.¹¹⁵ Residuals are calculated on a sliding scale from the original fee. After the thirteenth time a show airs, a leading actor gets five percent of the original fee for each episode that airs in perpetuity.¹¹⁶ An estimated seven hundred plus people have been involved in productions starring Mr. Cosby and earn \$20 million dollars per year of residuals.¹¹⁷ This does not include the loss of revenue from the top-line sales or the companies involved in distribution.

This issue can affect the highest levels of companies. Recently, the CBS Board removed Leslie Moonves for inappropriate activities that took place over many years. Once they came to light, the Board acted swiftly and separation from CBS was quickly completed. A story written by Ronan Farrow broke in *The New Yorker* on July 27, 2018.¹¹⁸ The story said that Mr. Moonves had been one of the most powerful media executives in America and had a knack for picking projects, so much so that the previous year he had earned \$70 million.¹¹⁹ Furthermore, he had become a prominent voice in the #MeToo movement and helped found the Commission on Eliminating Sexual Harassment

¹¹⁴ Itay Hod, *Geoffrey Owens Says Lost 'Cosby Show' Residuals a Factor in His Trader Joe's Job*, THE WRAP (Sept. 6, 2018), <http://www.thewrap.com/geoffrey-owens-says-lost-cosby-show-residuals-factor-trader-joes-job-exclusive/>.

¹¹⁵ Ariana Romero, *When Networks Pull The Cosby Show, Its Women Stars Who Pay For Bill Cosby's Transgressions*, REFINERY29 (Apr. 27, 2018), <https://www.refinery29.com/en-us/2018/04/197615/cosby-show-pulled-keshia-knight-pulliam-tempestt-bleedsoe> (stars such as Keshia Knight Pulliam, Lisa Bonet, and Phylicia Rashad are some of the people affected).

¹¹⁶ Dom Serafini, *The Cost of Falling Stars: The Bill Cosby Residuals Story*, VIDEOAGE (Jan. 4, 2016), <https://www.videoageinternational.net/2016/01/04/watercooler/the-cost-of-falling-stars-the-bill-cosby-residuals-story/>.

¹¹⁷ *Id.*

¹¹⁸ Ronan Farrow, *Les Moonves And CBS Face Allegations Of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct>.

¹¹⁹ *Id.*

and Advancing Equality in the Workplace, which was chaired by Anita Hill.¹²⁰ Mr. Moonves had also promulgated a “Zero Tolerance” policy at CBS in an email sent to all employees the year before.¹²¹ In the reporting for the article, Ronan said that six women who had professional dealings with Mr. Moonves between the 1980’s and the late 2000’s had been sexually harassed by Mr. Moonves.¹²² The article alleged that CBS had been covering up similar misconduct for many years.¹²³

On August 2nd, 2018, CNN reported that the CBS Board had hired two law firms to conduct a full investigation of the allegations against CEO Moonves and “cultural issues at all levels of CBS.”¹²⁴ By September 9th, 2018, Mr. Moonves stepped down as CEO effective immediately. The reporting surrounding the resignation attributed it to the sexual misconduct allegations and also noted that the “shakeup may position CBS for a sale,” and that “the company is also facing some continued reputational risk.”¹²⁵ CBS began damage control immediately; they made donations to organizations that supported the #MeToo movement and other groups fighting for workplace equality for women.¹²⁶ Mr. Moonves denied many of the allegations, some happening before he came to CBS.¹²⁷

¹²⁰ *Id.*

¹²¹ Dawn C. Chmielewski, *Leslie Moonves Promoted CBS’ “Zero Tolerance Policy” Towards Harassment*, DEADLINE (July 30, 2018), <https://deadline.com/2018/07/cbs-leslie-moonves-email-zero-tolerance-policy-towards-harassment-1202436794/> (the email was sent March 9, 2017 and said that “the company is committed to providing every employee with a professional work environment that’s free of discrimination and harassment. . . .”).

¹²² Farrow, *supra* note 118.

¹²³ *Id.* (“The company is shielding lots of bad behavior.”).

¹²⁴ Brian Stelter, *CBS board hires two law firms as fallout over harassment allegations grows*, CNN BUS. (Aug. 2, 2018), <https://money.cnn.com/2018/08/02/media/cbs-board-harassment-allegations/index.html>.

¹²⁵ Brian Stelter, *Les Moonves is out at CBS after harassment allegations, corporate battle*, CNN BUS. (Sept. 9, 2018), <https://money.cnn.com/2018/09/09/media/les-moonves-cbs/index.html>.

¹²⁶ *Id.*

¹²⁷ Phil McCausland & Alex Johnson, *Les Moonves leaves CBS, denies new report of sexual misconduct*, NBC NEWS (Sept. 9, 2018), <https://www.nbcnews.com/news/us-news/six-more-women-accuse-cbs-ceo-leslie-moonves-sexual-misconduct-n907926>.

CBS survived the trauma of the high-profile loss of Mr. Moonves. In the aftermath CBS created the job of “Chief People Officer.”¹²⁸ And when it came time to pay Mr. Moonves his \$120 million in severance, the Board refused on the grounds that he was fired for cause.¹²⁹ Mr. Moonves also survived the separation from CBS. In fact, he recently opened his own media company in Hollywood and CBS is paying the rent for his space.¹³⁰

At another mega-media company, the chairman of Warner Brothers, Kevin Tsujihara, stepped down in March of 2019 because of sexual misconduct allegations.¹³¹ The announcement of his resignation came more than a week after Warner Media said it was investigating claims that Tsujihara promised acting roles to a young actress in exchange for sexual favors.¹³² The information became public on March 6th in an article in the Hollywood Reporter.¹³³ The resignation happened mere days later on March 18th. The board acted swiftly. In his announcement, the CEO of the parent corporation, WarnerMedia,

¹²⁸ Joe Pompeo, “*He’s Not Acting as If He’s a Temp*”: *Despite the Moonves Baggage, CBS Insiders See a Strong Case for Joe Ianniello as C.E.O.*, VANITY FAIR (Oct. 22, 2018), <https://www.vanityfair.com/news/2018/10/despite-moonves-cbs-insiders-see-a-strong-case-for-joe-ianiello-as-ceo>.

¹²⁹ Joy Press, *Les Moonves will not get \$120 Million severance from CBS, board says*, VANITY FAIR (Dec. 18, 2018), <https://www.vanityfair.com/hollywood/2018/12/les-moonves-will-not-receive-120-million-dollar-severance-from-cbs?verso=true>.

¹³⁰ David Gelles, Rachel Abrams & Edmund Lee, *Les Moonves, Fired by CBS, Sets Up Shop in Hollywood*, N.Y. TIMES (Feb 8, 2019), <https://www.nytimes.com/2019/02/08/business/media/les-moonves-moonrise.html> (his new company is called “Moon Rise Unlimited”).

¹³¹ Jade Scipioni, *Warner Bros. chairman and CEO Kevin Tsujihara to step down amid sexual misconduct allegations*, FOX BUS. (Mar. 18, 2019), <https://www.foxbusiness.com/features/warner-bros-chairman-and-ceo-kevin-tsujihara-to-step-down-amid-sexual-misconduct-allegations>.

¹³² *Id.*

¹³³ Tatiana Siegel & Kim Masters, “*I Need to Be Careful*”: *Texts Reveal Warner Bros. CEO Promoted Actress Amid Apparent Sexual Relationship*, HOLLYWOOD REP. (Mar. 6, 2019), <https://www.hollywoodreporter.com/features/i-need-be-careful-texts-reveal-warner-bros-ceo-promoted-actress-apparent-sexual-relationship-1192660>.

acknowledged the reach such behavior could have – including on partners and other divisions:

It is in the best interest of WarnerMedia, Warner Bros., our employees and our partners for Kevin to step down as Chairman and CEO of Warner Bros. Kevin has contributed greatly to the studio's success over the past 25 years and for that we thank him. Kevin acknowledges that his mistakes are inconsistent with the company's leadership expectations and could impact the Company's ability to execute going forward.¹³⁴

A few months later Warner Bros. named Ann Sarnoff as the first woman to run the studio.¹³⁵

These scandals reach all corners of entertainment, including the upright halls of opera. Conductor James Levine was at the Metropolitan Opera in New York for forty years before allegations of sexual misconduct began. Levine was fired after “credible evidence” was found that he had engaged in “sexually abusive or harassing conduct with seven people” over a twenty-five year period.¹³⁶ Mr. Levine sued the Met three days later for breach of contract and defamation.¹³⁷ The Met then filed a countersuit for \$5.86 million for “what it called a breach of loyalty.”¹³⁸ The Met said that it “has and will continue to incur significant reputational and economic harm as a result of the

¹³⁴ Cynthia Littleton, *Kevin Tsujihara Out as Warner Bros. Chief Amid Sexual Impropriety Scandal*, VARIETY (Mar. 18, 2019), <https://variety.com/2019/biz/news/kevin-tsujihara-warner-bros-sexual-impropriety-1203165653/> (quoting WarnerMedia CEO John Stankey).

¹³⁵ Brian Stelter, *Ann Sarnoff named chair and CEO of Warner Bros. She is the first woman to run the studio*, CNN BUS. (June 24, 2019), <https://www.cnn.com/2019/06/24/media/ann-sarnoff-warner-bros/index.html>.

¹³⁶ Associated Press, *Metropolitan Opera says it has evidence conductor James Levine abused or harassed 7 people*, USA TODAY (May 19, 2018), <https://www.usatoday.com/story/life/people/2018/05/18/metropolitan-opera-says-james-levine-abused-harassed-7-people/625573002/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

publicity associated with Levine's misconduct."¹³⁹ The Met has been in difficult financial condition and its bond rating was recently lowered.¹⁴⁰ Eventually, in August 2019, the suit settled.¹⁴¹ Continuing the trend that no media or art form, including opera, is immune from such claims, the famous opera star, Plácido Domingo, has also received accusations of sexual harassment from a number of women and not only did he lose individual engagements, but he also lost his job at the Los Angeles Opera.¹⁴²

In the wake of #MeToo, the number of fired or resigned media leaders for reasons of alleged sexual misconduct has increased exponentially. In another famous example, Roger Ailes, the former CEO of Fox Television, had numerous women accuse him of sexual assault and harassment. Shortly after, he stopped working for Fox.¹⁴³ Similarly, Matt Lauer's departure from NBC also happened suddenly. NBC received notice on Monday night and Lauer was fired by Wednesday morning when a notice was

¹³⁹ Michael Cooper, *Met Opera Accuses James Levine of Decades of Sexual Misconduct*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/arts/music/james-levine-metropolitan-opera.html>.

¹⁴⁰ *Id.*

¹⁴¹ Michael Cooper, *James Levine and Met Opera Settle Suit Over Sexual Misconduct Firing*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/arts/music/james-levine-metropolitan-opera.html>.

¹⁴² Michael Cooper, *Plácido Domingo Leaves Los Angeles Opera Amid Sex Harrasment Inquiry*, N.Y. TIMES (Oct 2, 2019), <https://www.nytimes.com/2019/10/02/arts/music/placido-domingo-la-opera-sexual-harassment.html>; Storm Gifford, *Number of women who claim opera star Plácido Domingo sexually harassed them rises to 20*, N.Y. DAILY NEWS (Sept. 5, 2019), <https://www.nydailynews.com/news/national/ny-11-more-women-claim-domingo-harassed-them-20190905-d4u6ebqtlzf7fl3cs7fx3imbiu-story.html>.

¹⁴³ Anita Balakrishnan & Michelle Castillo, *Roger Ailes resigns as CEO of Fox News*, CNBC (July 21, 2016), <https://www.cnbc.com/2016/07/21/fox-news-confirms-that-roger-ailes-is-leaving-company.html>; Lloyd Grove, *Megyn Kelly: 'Roger Ailes Tried to Grab Me Three Times. I Had to Shove Him Off Me'*, DAILY BEAST (Nov. 29, 2017), <https://www.thedailybeast.com/megyn-kelly-roger-ailes-tried-to-grab-me-three-times-i-had-to-shove-him-off-me>; Sarah Ellison, *Inside The Final Days Of Roger Ailes' Reign At Fox News*, VANITY FAIR (Sept. 22, 2016), <https://www.vanityfair.com/news/2016/09/roger-ailes-fox-news-final-days>.

read on-air as the Today Show started.¹⁴⁴ After the Weinstein story was published in 2017, Kevin Spacey, the Oscar, Tony, and Emmy winning performer who brought fame to the streaming service of Netflix through his show *House of Cards*, was accused of sexually assaulting an underage actor years before in 1986.¹⁴⁵ He was subsequently accused by several more men of sexual assault.¹⁴⁶ Mr. Spacey then faced a civil lawsuit by an accuser that was eventually withdrawn, and a related Massachusetts criminal case where prosecutors later dismissed all charges due to unavailable witnesses.¹⁴⁷

III. MORALS CLAUSES AS A SWORD AGAINST MEDIA MOGUL MISCONDUCT AND BEYOND

CEOs, other executives, talent, directors, and other key employees are likely to be operating under the terms of a contract. Under the general canons of contract construction, when interpreting a contract, one usually looks only within the four corners of the contract.¹⁴⁸ However, the interpretation of certain terms may not always be clear. Under standard employment contracts, the “for cause” terms by which an employee may be fired, disciplined, or removed from their current position can be vague. The court reporters are full of those disputes. If firing: for cause” is difficult by itself, what about firing for something even more vague, like firing a person for what they say or do in their off time? In a media company, the reputation factor, the value of the public good will, can be much higher than in other companies

¹⁴⁴ USA Today Editors, *Read the NBC News memo on firing Matt Lauer over ‘inappropriate sexual behavior’*, USA TODAY (Nov. 30, 2017, 8:19 AM), <https://www.usatoday.com/story/life/entertainthis/2017/11/29/nbcs-statement-firing-matt-lauer-over-inappropriate-sexual-behavior-complaint/904395001/>.

¹⁴⁵ Chris Francescani, *The rise and fall of Kevin Spacey: A timeline of Sexual Assault Allegations*, ABC NEWS (June 3, 2019), <https://abcnews.go.com/US/rise-fall-kevin-spacey-timeline-sexual-assault-allegations/story?id=63420983>.

¹⁴⁶ *Id.*

¹⁴⁷ Laura Bradley, *Kevin Spacey’s Criminal Case Has Been Dismissed*, VANITY FAIR (July 17, 2019), <https://www.vanityfair.com/hollywood/2019/07/kevin-spacey-criminal-case-dismissed>.

¹⁴⁸ See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 209-215 (AM. LAW INST. 1979) (Integrated Agreements and Parol Evidence; the contents of the four corners of a contract controls absent a special circumstance).

and the likelihood of exposure is certainly high. An employee, absent a specific contractual agreement, might have significant statutory or common law protections available depending on their jurisdiction. So, what is a board to do?

Companies have long had “key person” insurance to protect them against the unexpected or untimely loss of the talents of people in key management roles. In the case of individual misconduct that impairs a company’s reputation, what is a company to do? Key person insurance usually covers only death or disability. However, companies should consider expanding this key person insurance to cover key talent that descends into social trouble.

The entertainment industry has long employed morals clauses. Again, a morals clause is a provision in the employment contract that enables an employer to terminate any contract “if the talent engages in conduct that results in adverse publicity or notoriety or risks bringing the talent into public disrepute, contempt, scandal or ridicule.”¹⁴⁹ Morals clauses first arose in entertainment in 1921 when Roscoe “Fatty” Arbuckle was arrested for rape and murder.¹⁵⁰ Although he was eventually acquitted,¹⁵¹ the reputational harm had taken its toll. Afterwards, several entertainment companies, led by Universal Studios, began to include morals clauses in their contracts to protect themselves from similar harm.¹⁵²

Post-Weinstein and post-Spacey, large film studios, like Fox and Paramount, are moving to reinstate morals clauses in contracts once again.¹⁵³ Small scale film distributors are also

¹⁴⁹ Tatiana Siegel, *#MeToo Hits Movie Deals: Studios Race to Add ‘Morality Clauses’ to Contracts*, HOLLYWOOD REP. (Feb. 7, 2018), <https://www.hollywoodreporter.com/news/metoo-hits-movie-deals-studios-race-add-morality-clauses-contracts-1082563>.

¹⁵⁰ Caroline Epstein, *Morals Clauses: Past, Present, and Future*, 5 N.Y.U. INTELL. PROP. & ENT. LAW 72, 76 (2015).

¹⁵¹ Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN (Nov. 8, 2011), <https://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/>.

¹⁵² See *Morality Clause for Films*, *supra* note 6, at 8 (“Actors and actresses employed by the Universal Film Company hereafter will be bound by a ‘morality clause’ in their contracts, permitting the company to discontinue their salaries if they forfeit the respect of the public.”).

¹⁵³ See Siegel, *supra* note 149.

beginning to add morals clauses to protect themselves from liability arising from talent touched by sexual harassment scandals.¹⁵⁴ Even downstream ancillary partners including cable channels are requiring morals clauses.¹⁵⁵ Those ancillaries, frequently distributors, can suffer similar damage if a movie, a television show, or a brand becomes suddenly unmarketable due to someone's misconduct. The broad range of behavior encompassed by morals clauses begs the question as to which misconduct exactly is actionable. For example, a morals clause could limit such behavior to criminal activity. It could read: "If the employee is charged with a crime, whether felony or misdemeanor, the board of directors may take disciplinary action that may include immediate termination, suspension of duties and/or pay, or other penalties deemed appropriate by the board."¹⁵⁶

However, this language may not cover the full range of behavior a media company sensitive to reputational harm may desire. A broader morals clause might look like this:

If at any time while Artist is rendering or obligated to render on-camera services for the program hereunder, Artist is involved in any situation or occurrence which subjects Artist to public scandal, disrepute, widespread contempt, public ridicule, [*or which is widely deemed by members of the general public, to embarrass, offend, insult or denigrate individuals or groups,*] or that will tend to shock, insult or offend the community or public morals or decency or prejudice the Producer in general, then Producer shall have the right, in its sole discretion, to take any action it deems appropriate, including but not limited to terminating the production of the program.¹⁵⁷

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Epstein, *supra* note 150. See also Nader v. ABC Television Inc., 330 F. Supp. 2d 345, 347 (S.D.N.Y. 2004) (where the Nader was fired after his second criminal arrest).

¹⁵⁷ Bob Tarantino, *Keep your pants on - the morals clause in performer contracts*, LEXOLOGY (Jan. 18, 2012), <https://www.lexology.com/library/detail.aspx?g=7b61d1e8-8dcb-4d37-b1b3-f8a9af8bb8e8>.

A morals clause is not designed to *rectify* the behavior of misbehaving talent. It is very difficult to regulate individual behavior anyway. Rather, morals clauses empower companies to protect themselves from the damaging effects of talent engaging in undesirable behavior.

Effective morals clauses provide companies the option to quickly sever its relationship with talent in order to protect its reputation and limit its potential liability. A typical “for cause” clause does not cut it in the entertainment industry. Due to movements like #MeToo, public pressure to oust individuals for any allegation of sexual misconduct supports the comeback of morals clauses.

However, media companies face several challenges in reinstating these broad morals clauses including (A) direct pushback from unions against moral clauses; (B) negotiations held by the talent’s counsel to soften the clause; and (C) a prior status quo of permitting, or ignoring, certain free speech that is now considered harassment.

A. PUSHBACK FROM UNIONS AGAINST MORALS CLAUSES

While morals clauses are routine for actors and on-air journalists, other showbusiness disciplines avoid or even forbid them. Directors and Writers’ unions in particular do not favor morals clauses.¹⁵⁸ Some of the most powerful people in media are the directors and the writers because they control the content of production. Yet *every* major movie studio, most minor studios, all major television networks, many local television stations, etc. are signatories to the union agreements with the major directors’ union, the Directors Guild of America (“DGA”). But what does the DGA have to say about morals clauses? DGA Contract language provides that: “Employer agrees that it shall not include or enforce any so-called ‘Morals Clause,’ as the term is commonly understood in the motion picture and television industries, in any contract of employment or deal memo for the services of an Employee.”¹⁵⁹

¹⁵⁸ See, e.g., *Basic Agreement Article 17-123*, DIRECTORS GUILD OF AMERICA 277 (2017), <https://www.dga.org/-/media/447D60B880324B1D99217478D9E8FF1E.pdf>; see also *Article 54 - Prohibition of So-Called “Morals Clause”*, WRITERS GUILD OF AMERICA 309 (2017), <https://www.wga.org/uploadedfiles/contracts/mba17.pdf>.

¹⁵⁹ DIRECTORS GUILD OF AMERICA, *supra* note 158.

Another powerful media union, both to Hollywood movies and to television, is the Writers Guild of America (“WGA”). Most of the major and accomplished writers end up being a member of the Writers’ Guild and similar to the DGA, all major studios, all networks, etc. are signatories to agreements with the WGA. So, what does the WGA say about morals clauses? WGA Contract language provides that: “Subject to any contractual obligations to the contrary which may exist on March 1, 1981, Company agrees that it will not include the so-called ‘morals clause’ in any writer’s employment agreement covered by this Basic Agreement.”¹⁶⁰

The Screen Actors Guild (“SAG-AFTRA”) is different. It has no formal prohibition against a morals clause, but it appears as if it might be considering morals clauses as unnecessary for its members:

We are also hearing reports as well of more widespread use of increasingly onerous morality clauses, and that is obviously a significant concern for us. While we do not have contract language directly prohibiting these clauses, we will be taking a close look at this issue to ensure that the union is taking all appropriate measures to protect our members.¹⁶¹

Even though SAG-AFTRA may not favor morals clauses for its members, it has taken other steps to regulate potential misconduct. For example, in an attempt to eliminate the “casting couch,” SAG-AFTRA prohibits business meetings in private homes and hotel rooms. It has also devised new reporting procedures.¹⁶²

¹⁶⁰ WRITERS GUILD OF AMERICA, *supra* note 158.

¹⁶¹ Natalie Robehmed, *The Morality Clause: How #MeToo Is Changing Hollywood Dealmaking*, FORBES (Mar. 29, 2018), <https://www.forbes.com/sites/natalierobehmed/2018/03/29/the-morality-clause-how-metoo-is-changing-hollywood-dealmaking/#353e501f3e4d>. SAG is also moving to counter harassment and discrimination through its new policy. *See, e.g.*, Letter from Gabrielle Carteris, President, SAG-AFTRA and David White, Nat’l. Exec. Dir., SAG-AFTRA, to Member, https://www.sagaftra.org/files/call_to_action_final.pdf.

¹⁶² Gabrielle Carteris, *SAG-AFTRA President: Have the Weinstein Revelations Really Changed Anything?* (Guest Column), HOLLYWOOD REP. (Oct. 4, 2018), <https://www.hollywoodreporter.com/>

Printed press authors have an opinion too. Morals clauses are becoming more prevalent in author contracts.¹⁶³ The Authors Guild opposes morals clauses.¹⁶⁴ They are concerned that the morals clauses are too broad and allow a publisher to terminate “based on individual accusations or the vague notion of ‘public condemnation’ – which can occur all too easily in these days of viral social media.”¹⁶⁵ They are concerned with the “ambiguity and subjectivity” of the clauses.¹⁶⁶ If sexual harassment allegations are determined to be unfounded, for example, but media employers of the accused have already severed ties, the accused’s career may be ruined anyway. By taking action too quickly, a company’s decision to enforce a morals clause may harm both the actor involved and the company itself. It works both ways. The company’s reputation, brand, and livelihood may suffer deeply for ostracizing innocent talent. The board’s decision to enforce morals clauses, thus, demands care.

Notably, union members are not immune to the allegations of misconduct either. While they seek to support their members in the face of false or frivolous allegations, they are also sometimes called upon to defend guilty members. And if the allegation is sexual harassment of some sort? The union may end up in the unenviable position of representing both the accuser who is a union member, and the accused who is also a union member. This difficult position is being acted out in the ballet world.¹⁶⁷ The conundrum of unions and morals clauses is problematic – as long as the union’s role is clear, to represent its members against

news/sag-aftra-president-have-weinstein-revelations-changed-anything-guest-column-1149279.

¹⁶³ Judith Shulevitz, *Opinion: Must Writers Be Moral? Their Contracts May Require It*, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/opinion/sunday/metoo-new-yorker-conde-nast.html>.

¹⁶⁴ *Why We Oppose Morals Clauses in Book Contracts*, AUTHORS GUILD (Jan. 24, 2019), <https://www.authorsguild.org/industry-advocacy/why-we-oppose-morals-clauses-in-book-contracts/>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Michael Cooper, *Caught in the Middle of #MeToo: Unions That Represent Accusers and Accused*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/arts/metoo-unions-ballet-ramasar.html>. Unions usually consider that they have a “duty to protect members whose contractual rights may have been violated.” *Id.*

charges at almost all cost, unions could carry out their advocacy roles fairly easily with only occasional conflicts. However, in a #MeToo world, one never knows with whom the bad behavior will originate.

The theatre community in Chicago is concerned about sexual harassment in live theatre and they are on the cutting edge of addressing the issue. Some have formed an advocacy group, created a website to inform on the issues, and now have promulgated a policy. The *Not In Our House* Project #NotInOurHouse¹⁶⁸ “was born of artists and administrators at all levels of our community working together toward a cultural paradigm shift away from turning a blind eye to sexual harassment, discrimination, violence, intimidation and bullying in our theatres and towards mentoring, prevention, and accountability.”¹⁶⁹

The organization has promulgated extensive standards that are intended to be used as a model for the industry.¹⁷⁰ Those standards, similar to the SAG statement, help and assist in protecting members and working actors. However, they do not address the question of how to fire misbehaving leadership. Only the employer can take that action and the contract clauses discussed in this article are a tool that helps the employers act quickly, if needed.

One difficulty, perhaps even a danger of morals clauses, is that they can be used as a double-edged sword. The enforcement of a morals clause is inherently a judgment call. While morals clauses can protect a company from people who are behaving like sexual predators and permit the termination of CEOs with bad behavior, there are several other concerns about the lines surrounding a termination for cause based on behavior. For example, morals clauses have been used to terminate Hollywood writers who refused to testify before the House Un-American Activities Committee in the 1950’s.¹⁷¹ There is also significant

¹⁶⁸ *Chicago Theatre Standards Pilot Project*, #NOTINOURHOUSE, <https://www.notinourhouse.org/chicago-theatre-standards-pilot-project/> (last visited Nov. 18, 2019).

¹⁶⁹ *Id.*

¹⁷⁰ *Download the Standards*, #NOTINOURHOUSE, <https://www.notinourhouse.org/download-the-standards/> (last visited Nov. 18, 2019).

¹⁷¹ *See, e.g.*, *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847–48 (9th Cir. 1954). Lardner was discharged from his employment four days after being cited for Contempt of Congress for

concern that morals clauses may not serve LGBTQ interests. *The Advocate* notes that Hollywood Studios used morality clauses as “a weapon against queer performers.”¹⁷² Tracy Gilchrist notes that much “fuzziness” surrounds what is called “moral turpitude.”¹⁷³ Careers can be in danger for differing viewpoints and life differences, and this is yet to be sorted out.

Other market forces are likely to push back against moral clauses. Counsel serving executives on boards of large media companies, for example, will do their best to limit the “for cause” contract clause to one that is as narrow as possible in favor of their client. For executives, simply not having a morals clause is the most ideal. One alternative to not having one at all could be to negotiate a narrow definition of “cause” for termination.¹⁷⁴ A morals clause, however, is, by its nature, a broad clause with much discretion vested in the employer. Counsel for executives or even client talent might negotiate a tighter standard for dismissal so as to prevent spurious and capricious termination.¹⁷⁵

Furthermore, no current standard exists that direct the interpretation of morals clauses. This allows boards of

refusing to answer the question whether he was a member of the Communist Party. *Id.*

¹⁷² Stuart N. Brotman, *Convicting Celebrities: How the Morals Clause Continues to Shape American Culture*, HARV. J. SPORTS & ENT. L. BLOG (Feb. 26, 2019), <https://harvardjse.com/2019/02/convicting-celebrities-how-the-morals-clause-continues-to-shape-american-culture/> (arguing that there may now be an “implied” morals clause); Tracy Gilchrist, *Sexual Abusers Spur Return of “Morality Clauses” That Could Be Bad for LGBT Actors*, THE ADVOCATE (Feb. 8, 2018), <https://www.advocate.com/arts-entertainment/2018/2/08/sexual-abusers-spur-return-morality-clauses-could-be-bad-lgbt-actors>.

¹⁷³ Gilchrist, *supra* note 172.

¹⁷⁴ Mark J. Oberti, *5 things all execs should have in employment contracts*, BUS. JOURNALS (Jan. 25, 2013), <https://www.bizjournals.com/bizjournals/how-to/human-resources/2013/01/5-things-all-execs-should-have-in.html>.

¹⁷⁵ See Eriq Gardner, *Charlie Sheen’s Contract: Was There Actually a Morals Clause? (Analysis)*, HOLLYWOOD REP. (Mar. 8, 2011), <https://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309>; see also *Harvey Weinstein Contract With TWC Allowed For Sexual Harassment*, TMZ (Oct. 12, 2017), <https://www.tz.com/2017/10/12/weinstein-contract-the-weinstein-company-sexual-harassment-firing-illegal/>.

entertainment companies to react willy-nilly to allegations of misconduct, which may vary from year-to-year and change over time. The fact that there is no “rubric for assessing to what extent morality clauses are enforceable, fairly imposed, and lawfully interpreted” is, of course, a concern of those who are subject to the clauses.¹⁷⁶ And the potential unfairness is a good reason that counsel for executives and clientele will do their best to limit the morals clause as much as possible and to draw as narrow of a definition of the conduct that constitutes a breach of contract as possible.

B. NEGOTIATIONS TO SOFTEN THE MORALS CLAUSE

Entertainment is a cult of personalities. Relationships often depend on who you know and the individuals with which you will work. Even more invidious in the industry is that who you can bring to the table and who you can convince to work on a project determines your power. Your next success is often based upon your past successes. So, in some ways, it is an industry uniquely set up for #MeToo problems. If the question was about, for example, the CEO of a utility company, or a large real estate company, or a large manufacturer, there are probably a dozen or several dozen qualified CEOs around the country who could step in to replace one errant CEO who has committed a breach. BP, a company in the energy industry, for example, did not have much of a problem replacing their CEO after egregious conduct.¹⁷⁷ In fact, many companies have installed “succession planning” in case something happens to their CEO.¹⁷⁸ But entertainment is different. Often people at the top are considered a “genius.” Blair Tindal, author of *Mozart in the Jungle: Sex, Drugs, and Classical*

¹⁷⁶ Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 9 (2017).

¹⁷⁷ Christina Burack, *Musicians assume harassment is ‘just part of life’*, DEUTSCHE WELLE (Dec. 23, 2017), <https://www.dw.com/en/musicians-assume-harassment-is-just-part-of-life/a-41913820>.

¹⁷⁸ John Welsh, *7 Steps To Successful Succession Planning*, FORBES (Jan. 14, 2019), <https://www.forbes.com/sites/johnwelsheurope/2019/01/14/7-steps-to-successful-succession-planning/#2b4867d945fb>. The usual “succession planning” is in case of an accident or in case of death or incapacity, or for a natural and expected occurrence such as a planned retirement. But succession planning can also prepare a company for other sudden replacement such as a publicity crisis. *Id.*

Music, says “sexual harassment is widespread in the industry” and the conductor is often seen as “above moral wrong.”¹⁷⁹

However, top management of the media industry often share the attributes of the stars. The actors may, in fact, be easier to replace than the CEOs. Furthermore, in many cases, management and CEOs may have significant ownership stakes, and therefore a large block of shareholder votes. Charlie Sheen did not have a standard morals clause in his contract.¹⁸⁰ Harvey Weinstein did not have a morals clause in his contract.¹⁸¹ They negotiated it down.

Further, in addition to corporate ownership interests, the person may also be a key owner of the intellectual property of the company.¹⁸² Rosanne Barr was a key co-owner of the intellectual property of her show.¹⁸³ Michael Jackson owned extensive

¹⁷⁹ Burack, *supra* note 177.

¹⁸⁰ Charlie Sheen’s clause was very limited. It was for “a felony offense involving moral turpitude under federal, state, or local laws, or is indicted or convicted of any such offense” Gardner, *supra* note 175. Such a clause, requiring legal action such as an indictment or conviction is very restrictive to the employer. *Charlie Sheen -- Morality Not My Problem*, TMZ, (Feb. 14, 2011), <https://www.tMZ.com/2011/02/14/charlie-sheen-two-and-half-man-morals-clause-morality-drugs-cocaine-prostitutes/> (“Charlie Sheen cannot be fired from Two and a Half Men for doing drugs, hiring hookers, or any of his other antics...because he doesn’t have a ‘morals clause’ in his contract, TMZ has learned.”).

¹⁸¹ TMZ, *supra* note 180. (“TMZ is privy to Weinstein’s 2015 employment contract, which says if he gets sued for sexual harassment or any other ‘misconduct’ that results in a settlement or judgment against TWC, all Weinstein has to do is pay what the company’s out, along with a fine, and he’s in the clear.”); *see also* Richard Morgan, *Harvey Weinstein’s Contract Gave Him Outs for Harassment Claims*, N.Y. POST (June 6, 2018), <https://nypost.com/2018/06/06/harvey-weinsteins-contract-gave-him-outs-for-harassment-claims/>.

¹⁸² Jem Aswad, *Michael Jackson’s Estate and Sony/ATV Extend Mijac Administration Agreement*, VARIETY (July 21, 2017), <https://variety.com/2017/music/news/michael-jackson-estate-and-sonyatv-extend-mijac-administration-agreement-1202502241/>. Michael Jackson owned not only his own copyrights, but also the Beatle’s music library and others; his catalog was “one of the most significant and valuable in music.” *Id.*

¹⁸³ Nellie Andreeva, *‘Roseanne’ Followup Without Roseanne Barr Inches Forward, Hurdles Remain*, DEADLINE (June 1, 2018),

intellectual property rights in his company's products, as did many of the people who were founding artists.

Therefore, in a CEO contract, there may also be a need for a provision for the intellectual property rights to be held in trust for the benefit of the company. This provision is likely to create some resistance at contract negotiation time.

Even old allegations might be enough to cause a company to want to end a relationship. In the case of the deal between Amazon and Woody Allen, the allegations were 25 years old and allegedly involved accusations surrounding his daughter, Dylan Farrow; he has denied the allegations and the State did not charge Allen with any crime.¹⁸⁴ Amazon spent \$70 million to end Woody Allen's contract with Amazon Productions.

The Amazon deal, reached in August 2017, was to finance and distribute at least four films, including "*A Rainy Day in New York*," which was complete.¹⁸⁵ Amazon said the deal had become impracticable because of "supervening events, including renewed allegations against Mr. Allen, his own controversial comments, and the increasing refusal of top talent to work with or be associated with him in any way, all of which have frustrated the purpose of the agreement."¹⁸⁶ Another report said that an Amazon lawyer, Attorney Robert Klieger, told U.S. District Judge Denise Cote that the company protected itself after Allen made "public comments that at a minimum were insensitive to the #MeToo movement."¹⁸⁷

<https://deadline.com/2018/06/roseanne-followup-spinoff-without-roseanne-abc-darlene-pitch-meet-ing-problems-1202402239/>. While the producing company Carsey-Werner owned the show, Roseanne was a co-creator and co-owner. *Id.*

¹⁸⁴ Sopan Deb, *Woody Allen Sues Amazon Over Canceled \$68 Million Deal*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/movies/woody-allen-amazon-lawsuit.html>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Larry Neumeister, *Amazon: Woody Allen's #MeToo comments wrecked movie deal*, ASSOCIATED PRESS (Apr. 12, 2019), <https://www.apnews.com/59a6dfc685d140e3a7c71a371d419cc6>.

C. BREAKING DOWN THE PRIOR STATUS QUO WHERE MEDIA SPEECH AND MEDIA PRACTICES RATIONALIZED MISCONDUCT

While some contenders of morals clauses may argue that their actions are protected by the First Amendment, they are wrong. The First Amendment protects infringement of speech by government, but it does not protect speech between private parties. It is generally permissible for employers to fire an employee for offensive speech.¹⁸⁸ Although this may not have been the trend of the past, it appears to be the trend of the future.

Media, however, is special in this case too. Media is a holder, protector, and exercisor of the First Amendment. Media companies may be segregated organizations doing only one function, as CNN was in its beginning in 1980. More often, however, media is a conglomeration, such as Time Warner, which now owns CNN, Warner Brothers Studio, and HBO, the home of Game of Thrones and many other programs that stretch the First Amendment and program content in one way or another. The media, including Facebook, Twitter, Instagram, and all other modes of disseminating news and views, are protected in the U.S. by the First Amendment and, in the case of internet providers, sometimes other laws such as the Telecommunications Act of 1996.¹⁸⁹ The media are also protective of their rights to artistic expression and their ability to tell stories. Some of these stories will have tales of sex and relationships.¹⁹⁰

¹⁸⁸ Debra C. Weiss, *Does Roseanne Barr have a valid legal claim for cancellation of her show?*, A.B.A. J. (May 31, 2018), http://www.abajournal.com/news/article/roseanne_legal_claim_cancellation_show.

¹⁸⁹ Telecommunications Act of 1996, P. L. 104-104, 110 S. 56 (1996).

¹⁹⁰ One of Harvey Weinstein's early successes was distributing the movie *sex, lies, and videotape* which was groundbreaking in its discussion of marital infidelity. Sean Axmaker, *How Steven Soderbergh's 'sex, lies, and videotape' Still Influences Sundance After 25 Years*, INDIEWIRE (Jan. 15, 2014), <https://www.indiewire.com/2014/01/how-steven-soderberghs-sex-lies-and-videotape-still-influences-sundance-after-25-years-31300/>. Louis C.K.'s movie *I Love You Daddy* was rumored in the press to be perhaps inspired by Woody Allen's life. Tatiana Siegel, *Louis C.K. Opens Up About His Controversial New Film, Woody Allen Influences*, HOLLYWOOD REP. (Sept. 10, 2017),

The job of the leadership in the media is often to take chances on content, whether it is the topics covered by its news division, or whether there should be a same-sex kiss on prime-time television, to whether nudity is appropriate on a show, to questioning why network television cannot show more nudity,¹⁹¹ to being the arbitrators of how much violence is on television,¹⁹² and whether violence is shown on streaming services such as YouTube¹⁹³ and Facebook.¹⁹⁴

There is no excuse for bad behavior in real life, but in their business world, the executives are deciding on the lines of social behavior every day. In many cases, it is a good decision to have the morals discussion and to move the country forward, but in some cases, one wonders if the lines have become blurred for the individual lives. In any case, the media is an industry that vigorously defends its right to make these decisions. Therefore, there is a need for a clear and enforceable contractual provision *ab initio*. Once the leader becomes “too valuable” or once the pernicious behavior becomes public, it is just #TooLate.

D. COMPARE ENTERTAINMENT WITH SPORTS

The sports industry deserves at least a brief mention because not only have they generally found a way to embrace morals clauses, but they also have league-based contractual

<https://www.hollywoodreporter.com/news/louis-ck-opens-up-his-controversial-film-i-love-you-daddy-tiff-2017-1037371>.

¹⁹¹ Bob Wright, president of NBC, wrote a memo in 2001 wanting to be able to compete with HBO in its violence, language and nudity. See Neal Gabler, *Cable vs. broadcast: TV's different mindsets*, L.A. TIMES (Apr. 4, 2010), <https://www.latimes.com/archives/la-xpm-2010-apr-04-la-ca-cable-cosmology4-2010apr04-story.html>.

¹⁹² *Id.* These questions are not immaterial, they can advance social discussions. For example, showing certain violence can dramatize police brutality or violence against transgender people. So moving the boundaries are an important part of the media executive's business.

¹⁹³ Amy X. Wang, *Youtube Removes 30 Music Videos for 'Gestures of Violence'*, ROLLING STONE (May 29, 2018), <https://www.rollingstone.com/music/music-news/youtube-removes-30-music-videos-for-gestures-of-violence-621/>.

¹⁹⁴ Sherisse Pham, *How Facebook decides what violent and explicit content is allowed*, CNN BUS. (May 22, 2017), <https://money.cnn.com/2017/05/22/technology/facebook-leaked-documents-sex-violence-nudity/index.html>.

methods of bringing errant executives back into line. In their examination of morals clauses, Taylor, et al. notes that the major leagues of Football,¹⁹⁵ Baseball,¹⁹⁶ and Hockey,¹⁹⁷ all have a form of a morals clause for their players that require sportsmanship-like conduct and general good conduct both on and off the field. Those contracts are signed by the players unions, contain good behavior language, and are quite contrary to the explicit desires of many of the entertainment union contracts that we have examined.¹⁹⁸ In this way, the sports industry is very different than the entertainment industry. Athletes are likely to have a “morals clause” not only in their primary jobs as sports figures, but also in their outside “endorsement lives” where an athlete might be working for a beverage company or a sportswear company.¹⁹⁹

The sports industry and the entertainment industry have the same problems in leadership ranks. For example, Robert Kraft is the owner of the New England Patriots football team. What happens if a CEO commits a morals violation?²⁰⁰ Kraft was arrested and charged with soliciting prostitution at a day spa involved with human trafficking. This is a current case and has not yet gone to trial, but what remedies are available to those individuals and institutions associated with Kraft? The interesting thing about sports is that “organized sports,” has a labyrinth of contracts that creates special relationships. Contained within these layers of contracts are exactly the types of remedies that do not exist in the entertainment industries. For example, the organization’s constitutions, bylaws, or rules often permit some sort of sanctions.

¹⁹⁵ Porcher L. Taylor III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse Morals Clause: The Unique Way to Save Talent’s Reputation and Money in A New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT L.J. 65, 78 (2010).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *See supra* note 158.

¹⁹⁹ Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L., 1, 7–8 (2005).

²⁰⁰ A.J. Perez, *Patriots owner Robert Kraft pleads not guilty to charges of soliciting prostitution*, USA TODAY (Feb. 28, 2019), <https://www.usatoday.com/story/sports/nfl/patriots/2019/02/28/robert-kraft-patriots-owner-pleads-not-guilty-solicitation-prostitution-charges/3016697002/>.

In football, the Commissioner of the NFL, Roger Goodell, has the authority to punish owners for “conduct detrimental to the welfare of the League or professional football.”²⁰¹ This gives the leagues extra-judicial power to reign in an errant participant, often mitigating bad publicity. The *New York Times* reported that Jerry Richardson, former owner of the Carolina Panthers, “was fined \$2.75 million after an investigation confirmed claims that for years he sexually harassed employees.”²⁰²

Another possible punishment in the sporting world is to rescind stadium naming rights. In the case of Richardson, the stadium is currently named after his company, Gillette. Changing the name of a stadium is one way to distance a sports team from offending bad behavior. There is a petition to end the naming rights for The Patriots’ stadium in response to Richardson’s criminal charges.²⁰³ The fact that the sports industry has institutionalized procedures for dealing with bad behavior should be a clear signal to the entertainment industry.

E. REVERSE MORALS CLAUSES – RECIPROCAL PROTECTION?

The use of so-called “reverse morals” clauses is a recent development that this article cannot fail to mention because it strengthens the argument for morals clauses and because it identifies the need for reputational protection.²⁰⁴ A reverse-morals clause is “a reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from the negative, unethical immoral, and/or criminal behavior of the endorsee-company or purchaser of talent’s endorsement.”²⁰⁵ Thus, in scenarios where the *client* desires to terminate its employment with a company because of its association to

²⁰¹ Ken Belson, *What Will the N.F.L. Do About Robert Kraft This Time?*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/sports/nfl-robert-kraft.html>.

²⁰² *Id.*

²⁰³ Alex Betschen, *Gillette Stadium No More? How an Online Petition Could Change Naming Rights Agreements*, UB L. SPORTS & ENT. F. (Mar. 13, 2019), <https://ublawsportsforum.com/2019/03/13/gillette-stadium-no-more-how-an-online-petition-could-change-naming-rights-agreements/>.

²⁰⁴ See *The Reverse Morals Clause*, *supra* note 195, at 79.

²⁰⁵ *Id.* at 66–67.

reputational harm, reverse morals clauses empower these clients to do so.

Such a clause “gives talent the reciprocal right to terminate an endorsement contract based on negative conduct.”²⁰⁶ When extended to ordinary entertainment management contracts, it could give the leadership a method of enacting a golden parachute to exit a company under fire, perhaps when the company is most in need of good management talent. The mere fact that talent would like their own “escape clause” in the form of a reverse morals clause is the *sine qua non* indication of the bilateral and material importance of such contract clauses.

As mentioned, one method of mitigating bad actions or scandals of various sorts in sports is to remove names from public view, and so it also works in the case of reverse morals clauses. This is most often done with stadiums. What happens if the stadium is named for a company that falls into disrepute? For example, “Enron Field” was renamed after the team determined that continuing to play in Enron Field after the scandal and corporate failure did not suit their public image²⁰⁷ In the case of Enron Field, after the company fell into disrepute, it had to sell the naming rights back to the Houston Astros at a greatly reduced price, and the Astros quickly re-sold the naming rights to Minute Maid.²⁰⁸ Stadiums need to be renamed due to scandal or bankruptcy with some frequency.²⁰⁹

²⁰⁶ *Id.* at 67.

²⁰⁷ Enron paid \$100 million to buy the naming rights to Enron Field for 30 years. They had to sell it back to the Houston Astros two years later for just \$2.1 million. See Gus Lubin & Simone Foxman, *The Enron Field Curse: Why You Should Avoid Companies That Put Their Name On A Stadium*, BUS. INSIDER (Jan. 18, 2012), <https://www.businessinsider.com/the-enron-field-curse-why-you-should-steer-clear-of-companies-that-put-their-name-on-stadium-2012-1>.

²⁰⁸ ESPN Baseball, *Name that park: For Astros, it's Minute Maid*, ESPN (June 5, 2002), <http://www.espn.com/mlb/news/2002/0605/1391013.html>.

²⁰⁹ Morgan Watkins, *U of L is pulling Papa John's off Cardinal Stadium after N-word scandal*, LOUISVILLE COURIER J. (July 13, 2018), <https://www.courier-journal.com/story/sports/college/louisville/2018/07/13/papa-johns-n-word-scandal-u-l-address-cardinal-stadium/783009002/>; see also Paul Toscano, *The Stadium Curse: Naming Deals Gone Bust*, CNBC (Mar. 17, 2010), <https://www.cnbc.com/2010/01/20/The-Stadium-Curse:-Naming-Deals-Gone-Bust.html>.

CONCLUSION

With the pervasiveness and invasiveness of current media, the damage that is done to individuals, and the ability to prove the actuality of the misconduct, almost no discipline or person will be able to avoid a “morals clause” or “behavior clause” any longer. It may not be called a “morals clause” but the contents will be similar from industry to industry and the effect will be the same – there will need to be a fairly broad agreement that the employment contract can be terminated under terms of bad behavior or reputational damage, as defined in the clause and as might be limited by the bona-fides of negotiation. The perplexing paradox is that media has been both a leader in effectuating morals clauses, being first to actively consider and to name the problem, while simultaneously resisting their comeback. And while their purpose might now be even more essential, perhaps it is time to rename the “morals clause,” to something more reflective of the time. One would like to respect that “morals” are not at the center of the problem, but rather a behavior, harassment, sometimes pernicious speech, and other activities.

Despite the conceptual and even active resistance that exists to this day, inappropriate speech and conduct will continue. It is to the benefit of the entertainment industry to embrace the concept of a morals clause to defend itself from future allegations. Does there need to be protections and due process? No doubt. Fairness must be prioritized for everyone. However, show business is just too valuable and complex to let the collateral damage ripple through the jobs of innocent people who had nothing to do with the misconduct of others. At times, media companies will need to end relationships based on actions of their stars or management. And there is nothing wrong with that.

In a country where employment-at-will is synonymous with fire-at-will, why are morals clauses important? Because contracts are essential for the talent and the leadership of companies. While the leadership is required to show up and use their best efforts to manage the company, the company’s obligations are also spelled out, and one of those obligations is the terms for termination. The nature of employment contracts is that they modify the general condition of employment-at-will that governs the employment relationship. Will termination only be for cause? If so, what constitutes cause? If it can be for bad behavior, and what exactly is bad behavior? Is it only being convicted of a crime? Or is it more? What is the balance in this very specific

industry steeped in practices, relationships, and specialized power and ownership structures? The clause will determine, and over time the practice and the interpretation will help establish the practice.

It is important to have a set of rules in place for those who might eventually break the rules, and who are important enough to be able to cause significant damage as they do so. It will put rein in the damage resulting from those who disregard the rules whether purposely or accidentally.

There is a substantial risk to media companies due to the misconduct of their management. The risks can range from a tarnished reputation to the death of a company itself. It is too late to think about a morals clause once the problem has appeared. It needs to be a standing practice and it needs to be in every relevant contract. Without morals clauses, the entertainment industry risks the very thing that makes it profitable: its reputation.