DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Lawrence A. Jacobs

Group General Counsel of News Corporation

THE SPEAKERS

Lawrence A. Jacobs
Senior Executive Vice President & Group General Counsel, News Corporation

Yosef Riemer
Partner, Kirkland & Ellis, LLP

Jonathan Zavin
Partner, Loeb & Loeb, LLP

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TO THE READER:

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments and of his company's leadership as a corporate citizen, we are honoring Lawrence A. Jacobs, Group General Counsel of News Corporation. His address will focus on innovative Internet issues. The panelists' additional topics include online sharing sites; protecting content from manipulation in the digital age; intellectual property, antitrust and the consumer; and Directors & Officers liability under new SEC enforcement policies.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator

Lawrence A. Jacobs

Senior Executive Vice President & Group General Counsel, News Corporation

News Corporation

Lon Jacobs is Senior Executive Vice President and Group General Counsel of News Corporation, one of the world's largest media companies. Mr. Jacobs is also a member of the Office of the Chairman of News Corporation and General Counsel of Fox Entertainment Group, which is wholly owned by News Corporation.

Mr. Jacobs previously held the position of Executive Vice President and Deputy General Counsel of News Corporation. He joined News Corporation in 1996 as Senior Vice President and Deputy General Counsel.

Mr. Jacobs began his career at Squadron, Ellenoff, Plesent & Sheinfeld (merged with Hogan and Hartson in 2002), where he was a partner from 1991 until 1996.

Mr. Jacobs serves on the Board of Directors of NDS Group, plc. and Aristotle International, Inc.

Mr. Jacobs serves on the board of the Jewish Community Relations Council and YAI National Institute for People with Disabilities.

He is a graduate of Temple University *summa cum laude* and the Brooklyn Law School *cum laude*, where he was also a member of *Law Review*.

Mr. Jacobs lives in Manhattan with his wife and two daughters.

JACK FRIEDMAN: Welcome. I'm Jack Friedman, Chairman of the Directors Roundtable. We are a civic group whose mission is to organize the finest programming on a national and global basis for Boards of Directors and their advisors, including General Counsel.

Having a General Counsel receive this global honor is a wonderful opportunity to get to know the individual and his company.

The format this morning will be simple. The Distinguished Speakers will make opening remarks which will be followed by a roundtable discussion. The transcript will be made available to 150,000 leaders nationally and globally. The honor truly has a broad significance.

I'd like to begin the program by inviting Lawrence "Lon" Jacobs, our distinguished Guest of Honor, to make his opening remarks.

Lon has a distinguished career in both the corporate legal world and in the law firm area, and is active in a number of charitable activities.

LAWRENCE A. JACOBS: Thank you, Jack. I want to thank all the panelists for joining me here today, and all of you. I was going to thank my coworkers by name, but I got such a turnout that I just want to thank you all for actually doing all the work at News Corp. so I can do more important things, like give speeches to the Directors Roundtable!

Before I begin, I would like to point out that contrary to popular belief, News Corp. actually owns other businesses in addition to Fox News. We also own Dow Jones and *The Wall Street Journal*, the National Geographic Channel, the *Times of London*, the Australian MySpace, and of course all the other Fox-branded businesses, including 20th Century Fox Film and Fox Broadcasting Company.

So, as you might imagine, most of the legal focus at media companies today relates to the changing and expanding digital landscape. Dealing with what we at News Corp. now call the "all-media market" is becoming ever more challenging. It requires constant diligence and innovation

across a broad spectrum of issues. Protecting the content we create is more important than ever. We are focused on changing attitudes, so that online piracy is viewed by the public at large as stealing – the same as going into a store and shoplifting a DVD. We are focused on supporting legislation and law enforcement efforts, both here and abroad, that recognize the value of copyrighted works. We are bringing the efforts of marketplace changes to the attention of regulators, legislators and courts, both in the U.S. and abroad, and we are focused on exploiting new technologies and creating new business models that make sense in this new media market.

Just keeping up with the newest media words and phrases has become a challenge! Phrases like "TV everywhere and anywhere," "buy once, play anywhere," "freemium content," "digital journalism," "citizen journalism," "journalistic ecosystem," "trademark keyword advertising," and my current favorite, "cyclical vs. secular." Of course, let's not forget all the new principles, such as "UGC principles," "online safety principles," and the latest entry, "online behavioral advertising principles." Sorry – we shouldn't call it "behavioral advertising" anymore; from now on, please use the phrase, "affinity advertising through interest-matching technology."

The fact is, the media market has changed more in the past five years than in the 50 years before it. We're discovering new ways to connect with consumers, and coming to terms with the fact that the old mainstream mass media culture is only a part of the much larger landscape.

Far from killing the content business, innovations in digital technology are helping to transform it in revolutionary ways. There are already a number of new business models and new technologies that are showing real promise. Hulu has exceeded all of our expectations. Authentication looks like the right approach to implementing the notion of "TV anywhere and everywhere" without destroying the existing and very profitable cable model.

3D television is coming to the U.K. next year, and the newest 3D technology for theatrical films is truly extraordinary. James Cameron's revolutionary new movie, *Avatar*, comes out this December, and you can buy your tickets now, if you'd like!

However, with the advent of all that, this media market brings with it a big set of challenges for content companies. The good news is that a number of constituencies are beginning to recognize those challenges. House Speaker Nancy Pelosi called for Congress to look into ways to help the newspaper business. The shadow government in the U.K. is focusing on ways to expand and revitalize local media, and the FTC is about to hold two days of workshops in December titled "From Town Criers to Bloggers – How Will Journalism Survive in the Internet Age?"

And the courts, for the most part, have taken our side. Although we lost the copyright infringement case against Cablevision regarding what they call their "headend DVR," this was just the first skirmish in what promises to be a long and complicated war. When I say "we" regarding these lawsuits, I'm referring to the content industry as a whole.

We have successfully enjoined RealNetworks from selling their RealDVD software that would have permitted their customers to copy DVDs to their PCs without our permission, and we continue to see support from courts internationally in our efforts to shut down pirate sites like PirateBay. We even won the WTO suit against China, although it still remains to be seen whether that ruling will have any impact on the behavior of the Chinese government.

In addition, cooperation between content companies and content distributors continues to move forward. UGC principles – "UCG" stands for "user-generated content" – have already been agreed to and adopted in this country, and both here and abroad, progress is being made towards cooperation with ISPs in our ongoing efforts to block unauthorized P2P downloading and streaming of copyrighted materials.

The approach that is gaining real traction is called "graduated response," whereby users who illegally download content are first warned, then tutored, and eventually deprived of their Internet connection.

For those of you who may be concerned that this approach raises net neutrality or privacy issues, graduated response has zero impact on either of these issues. Also, keep in mind that 80% of all bandwidth is used for P2P file-sharing, the overwhelming majority of which is used for illegal downloading, distributing viruses, and even worse, child pornography. In the U.S., there are ongoing discussions between content companies and ISPs on how to best implement a graduated response regime. In France, a graduated response law has already been enacted, and just recently, the U.K. government issued a paper called "Digital Britain," which contemplates a graduated response requirement for all ISPs in that country. To my shock – and I'm not kidding – even BSkyB now promotes a graduated response regime that includes termination of Internet access for repeat offenders.

Now, things are not all sunshine and light in this area. There is an ongoing debate in Europe as to whether Internet access constitutes a fundamental right, such that suspension of Internet access would be impermissible. Despite this progress we're making in a number of areas, we still have a long way to go.

Clearly, the content business that is most challenged in the all-media marketplace is the newspaper business. As I touched on earlier, a great deal of discussion is taking place in Washington on how to save the newspaper industry, but it remains to be seen whether any legislative or regulatory action will actually be taken. News Corp. occupies an unusual position with respect to newspapers in this country, because we only own the two newspapers – *The Wall Street Journal*, which already successfully charges for its content online and continues to see an increase in subscribers, and the *New York Post*, which has frankly never made money and is likely to continue to lose money, at least in the near future.

So, let me start with the antitrust laws. Is there anyone left who seriously considers newspapers to be a separate market, completely distinct from television, cable and Internet? Yet, the antitrust authorities refuse to acknowledge even this much, saying simply that the current regime is sufficient to take into account changing circumstances in the marketplace, and that these issues will be addressed on a case-by-case basis. As most of you know, News Corp. has announced that it intends to start charging for its newspaper content online. This is much more important to us in the U.K. and Australia, but we would also like to see this happen in the U.S.

But the current antitrust laws make it difficult for us even to talk with our competitors to see if we can come up with an approach that works for the industry online, and keeps the newspapers competitive with each other and in the marketplace.

As you know, we don't have the alternative of bringing the antitrust authorities into the process

early in order to safely discuss different approaches and, as you might imagine, it is very difficult to come up with a business model through a series of one-on-one negotiations rather than through group negotiations. The fact that we don't have a clear signal from Washington, let alone the state AGs, as to whether an online bundled package of content from different owners would be viewed favorably, creates a significant chilling effect on the process.

A related issue is the restriction on cross-ownership of newspapers and broadcast stations, which was anachronistic and unsupportable when it was enacted 45 years ago, but which is strongly supported by many in Congress. We expect the courts to make the right decision if and when this issue is eventually decided by them, but again, the cost, time and uncertainty created by this continuing prohibition imposes an unnecessary burden on an already challenged industry.

On a related issue, the federal courts recently vacated the FCC's cable ownership cap, calling this rule arbitrary and capricious. Apparently, the FCC, under Kevin Martin, was not aware of the competition being provided by satellite TV companies and the phone companies.

In addition to cross-ownership restrictions, there also remains the FCC rule with respect to duopolies and other restrictions that limit ownership of local TV stations. Local TV stations are also suffering through the Great Recession,

and it still remains to be seen how much of the local advertising downturn is cyclical and how much is secular. But again, there remain anachronistic rules that prevent stations in both large and small markets from combining with each other in order to manage costs and continue to provide a robust and cost-effective local news offering, both on and offline.

Now we have a new chairman at the FCC, Julius Janikowski, and so far, he's very impressive. But how ownership and other restrictions on broadcasters are treated under him still remains to be seen. We hope he recognizes that it's time to eliminate rules that were adopted for a radically different marketplace, and that he resists calls for new regulation that will burden the already-struggling industry.

Another problem confronted by the newspaper industry is the misappropriation of its content by online aggregators. Some consider this to be a copyright issue with significant fair use implications, but we look at this as more of an issue of free riding – other companies making money through the unauthorized use of the product of our hard work, whether it be small news aggregators like *The Huffington Post*, or the 800-pound gorilla, Google.

Now, there is precedent for the newspaper companies to require permission for others to make use of the product of their hard work, including the concept of hot news, but again, the uncertainty of the law creates a significant chilling effect and imposes an expensive and time-consuming burden on the newspaper industry.

Now, as if that wasn't enough for the newspaper industry, privacy issues are now threatening the one area in online advertising that is showing real promise for companies striving to monetize their own online content, and that, of course, is affinity advertising through interest-matching technology. As I mentioned earlier, the industry, at the FTC's urging, has produced a set of principles intended to allow for a robust ad market online, while protecting users' privacy and giving them the opportunity to opt out. Unfortunately, it is still not clear that Congress will be satisfied with this approach.

Equally troubling are attempts by state legislators to regulate online data collection and use in the name of privacy. For example, a new law that was recently enacted in Maine prohibits the collection of any personal information from minors for marketing purposes without verifiable parent consent. This statute is, in all likelihood, unconstitutional, and Maine's AG and federal judge have already indicated as much, but again, the mere threat of such laws requires vigilance in all 50 states, as well as time and money, just to maintain the status quo.

In the U.K., the challenges for newspapers are even more profound, because in addition to all of the hurdles that exist here, they have to contend with the BBC. Last year, the BBC spent £140 million on its free website. All U.K. newspapers combined spent less than £100 million. I won't go into detail here, but if you would like to know more about our attitude toward the BBC, you should watch or read James Murdoch's recent speech at the MacTaggert lecture in Edinburgh. You can get either version online; and, of course, it's free!

The main point of James' speech is that the BBC should focus on what it does well and what the private industry does not provide, rather than trying to be all things to all people and attempting to crowd out the private industry, especially in areas where the private industry can do a good job, such as the provision of robust local media service that combines audio, video and print content.

Now, newspapers are not the only content business that is threatened by the use of content without compensation. As I just mentioned, local TV stations are struggling through the significant drop-off in local advertising, and online video presents a potential threat to all television content, even with the implementation of authentication measures.

I'm getting a little ahead of myself and the industry here, but I believe that it won't be long before almost all creators of professional copyrighted content begin to charge for all of their content online, whether it is through charging the ISPs or the end users. Even YouTube is now looking at ways to charge for content online.

The movie industry is also under attack, and not just from illegal DVD copies and illegal online downloads. The most recent example of the continuing threat to the movie industry comes from Redbox, a company that places vending machines in front of stores and offers DVD rentals for a dollar a night. As you might imagine, it's a lot less likely that a person will buy a DVD if the same DVD can be rented for a buck. The reason we can't stop Redbox from instituting this business model is the "first sale doctrine," which was codified by the Copyright Act of 1976. This doctrine permits the buyer of a DVD to do anything that person wants with the DVD, including renting, selling or giving it away. However, in almost every other country where we have significant business, rental of our products cannot be done without our permission. To make matters worse, Redbox is now suing us, as well as several other studios, because we refuse to sell them our DVDs through our wholesale network.

I'm not suggesting that we need to change the first sale doctrine; we just cannot be forced to sell our product at the discounted rate to distributors who are undermining our business interests. Keep in mind that we could solve this problem simply by flipping our windows – that is, make the movie available at first only through rental, and then later make it available for purchase. However, that is not our preferred solution.

Let me bring this back to the advice given a few months ago by my friend, Mike Fricklas, the general counsel at Viacom. He and I agree on most current legal issues relating to content protection, and I agree with most of what Mike said a few months back, including his advice to the audience on how to deal with the new media landscape. The one place where we do differ, however, is on how to deal with the people who vehemently disagree with us, especially online news aggregators and the vocal members of the copyleft movement.

We at News Corp. have tried to engage these people in civilized and thoughtful discussions, but there is no given then. News aggregators and bloggers have no use for the businesses that actually create the content, and that they base their business models on. We at News Corp. believe that there is a place for all of us. Citizen journalism is highly valued by us, and bloggers and aggregators can provide valuable alternative voices. But without the professionals, without the infrastructure that permits good investigative journalism, detailed research and editorial judgment, what are we left with?

Unfortunately, the professional journalists are valued not at all by the other side of this issue. We are not simply going to turn the other cheek anymore, because, as a content company, we exist to connect the world of ideas in entertainment to masses of people. It's that simple. At News Corp., we think we do it better than anyone else! So we will continue to seize new opportunities, tackle obstacles that stand in our way, and keep the consumer at the center of everything we do.

Now, before I turn this back to Jack to continue the discussion, I would like to present you all with a challenge, the purpose of which is to make it possible for even the least informed among us to follow this conversation. Here's the challenge: Try to participate in the conversation without using any acronyms. I have tried it in the past, although obviously not as part of this speech, and I think you will see that it is virtually impossible!

Thank you.

> "Protecting the content we create is more important than ever. We are focused on changing attitudes, so that online piracy is viewed by the public at large as stealing – the same as going into a store and shoplifting a DVD."
> – *Lawrence A. Jacobs*

JACK FRIEDMAN: Before I introduce our second speaker, I want to ask Lon a question or two. You had mentioned the European discussion of fundamental rights in this area. I think it's unusual from an American point of view, so can you tell us a little bit more about this discussion?

LAWRENCE A. JACOBS: Well, in some ways, it's very similar to the discussion here, but I think where the basic, beginning point is, is that they are much more focused on fundamental rights than we are in the U.S., and so they view the right to privacy, for example, as a fundamental right. Here in the U.S., you have to look through the Constitution to come up with a right to privacy. So it's across the boards in Europe; they are much more focused on fundamental human rights, and it could broaden as far as to the right to access to the Internet.

JACK FRIEDMAN: And if you have that fundamental right, what does that mean in practice? Does it mean that anybody can do anything and you can't shut them off?

LAWRENCE A. JACOBS: You can't shut them off, but you can bring an action against them; you can sue them for damages; they could be fined by the government. But you could not cut off their Internet access, no.

JACK FRIEDMAN: I'd like to save this issue for the panel discussion later. It's an interesting idea because of the basic technology making it almost free to reach approximately seven billion people. Thank you very much. Our next speaker is Darin Snyder of O'Melveny & Myers.

DARIN SNYDER: Thanks, Jack. First, I want to thank Lon and his colleagues at News Corp. for the opportunity to work with them on a regular basis. It is really an honor and a pleasure to work with such outstanding professionals, people who are really dedicated to the highest practice of law from inside a company. It really is an honor, Lon. Thank you very much to all of you.

What I would like to talk about very briefly is looking forward, and since I have something like seven minutes, *very* briefly introduce some of the topics that I see as addressing intellectual property protection in the future, as the Internet continues to develop.

The Internet has, in many respects, been like a wine. It took several years for its real promise to start to show. In the mid-1990s, when the Internet was introduced to consumers, the idea was that you would be able to deliver any content to anybody, anywhere in the world. That largely was not true, because the last mile had not yet reached most consumers. Also, broadband really didn't exist, and so the bandwidth constrained what could be distributed. Now we've gotten to a point, though, where that largely is possible, at least in the United States. You can deliver almost any content to anyone, anywhere. That gives rise to many of the issues that Lon described.

The other aspect of it that is important to remember, and Jack mentioned this in the context of Europe, is that the general notion is something that public policy has very strongly favored. It wants to promote that kind of access, the ability, at least at the technological level, of delivering any content anywhere, to anyone, at any time.

Now, that's a great idea unless you happen to own the content! And if you do own the content and a company, like News Corp. – they're involved in doing that – it raises a host of very interesting and problematic issues for the future.

Because time is very limited, what I want to try to do is give you a little taste of some of the issues that I see as particularly important.

The first is international reconciliation of laws. Lon talked about some of the different initiatives and talked optimistically about how those initiatives suggest that we're making progress on these issues. But the initiatives were different in every country.

Let me take one example of the kinds of problems this creates. Nobody would contest that trademark protection is important, at least not anybody who owns a valuable trademark. But in the context of eBay, using it just as an example, here you have a company that's doing all it can within the context of its business model to protect against the sale of counterfeit goods, and it received wildly different results from the courts in which these problems are addressed. So even though it's been successful in the United States, it has not been successful in Germany; it has largely been unsuccessful in France; and it has been successful in Belgium.

So even though it is a single business model, protecting a single type of IP, addressing a single problem, you get wildly different results around the world.

I could probably spend all day taking bets on what this map shows! This is actually a map that identifies those countries that are members of the World Intellectual Property Organization (WIPO) Treaty. The gray, and you'll notice it covers a significant part of the world, they are not members. The light green are those countries that are technically members but where enforcement is questionable. That includes, you might notice, China, where there's a billion and a half potential consumers, and the government, although having signed the treaty, has been the subject of legal action and has not taken the kind of enforcement actions that are necessary to really protect content.

WIPO is just one example of the many treaties that are protecting intellectual property. If we're going to fulfill the promise of the Internet, at some point we are going to have to reconcile all that, because digital content knows no borders at all.

The second issue I want to give you a taste of is the scope of intellectual property protection, particularly in the context of business method patents. After the *State Street Bank* decision, there was a proliferation of patents trying to protect the ability to control certain technologies over business methods. Not mechanical devices; not methods using machines; but business methods. This chart shows you the growth of business method applications since 1998, when there were approximately 1,000 applications. In 2008, there were over 13,000 such applications. This is only for what is called "Section 705" applications, and that section particularly deals with the Internet, eCommerce, and data processing.

And why is that important? It's important because if you were involved in content distribution, the people who have applied for these patents are claiming that they have some proprietary right to prevent you from using certain business methods, certain approaches to distributing that technology. If you violate their patent, they then sue you, either to stop you or to collect money from you.

The Supreme Court now has what's called the *In Re Bilski* decision in front of it. It granted cert. on June 1st. There is now a huge number of briefs, including amicus briefs, to address the issue of what kind of scope is going to be afforded business method patents. There is a lot of anticipation that the Supreme Court is going to change the machine or transformation test announced by the Federal Circuit, and it is going to have a huge impact on the viability of the patents represented by these applications and people's ability to do business in the online world.

The third issue I want to give you a taste of: developing vertically integrated delivery vehicles. Now that we have a world in which the pipes are so broad that they are almost uncontrollable, you can deliver almost anything to anyone, anywhere. There is a proliferation, and I predict a further proliferation, of effort to try to protect the way that it is delivered by controlling the thing in consumers' hands.

You've got a couple of good examples with the Kindle – I've got one in my bag, lovely device – and the iPod, where both of those can now control delivery. Even though they cannot control the center of the stream, they have vertical integration because they control the front end. The storage of the media, either in Amazon's case, or iTunes for Apple; they also control the device that's in the consumers' hands. So even though they can no longer control the middle, the way you used to be able to with broadcast technologies or newspaper or satellite technologies, they now control the device. This gives rise to a whole new set of intellectual property issues, because those devices, no matter what the decision on business methods, are going to have proprietary technologies that can be controlled.

Finally, the development of proprietary content selection vehicles. Now, this is – I'm not allowed to use "behavioral advertising"– so it's "affinity advertising using interest-matching technologies."

LAWRENCE A. JACOBS: Good!

DARIN SNYDER: The formula – that little unassuming formula up there, which is about 250 years old and was developed by Reverend

Bayes, is actually the underlying algorithm for all of this affinity-matching through interest-matching technology.

It's enormously powerful and it allows you to predict what somebody's going to do, even though there's no association between two variables. So, it might be easy to figure out that someday I'll be in the market for tires, because I bought a car. That's simple. It's much harder to figure out that someday I might be in the market for low-fat milk because I just bought a car. But using this formula, and the much more sophisticated aspects of it, they can do exactly those kinds of things, which is why Safeway started tracking your purchases by giving you discounts, and why we've got a number of other companies that are doing exactly that same thing, most notably Netflix, which says, "We can predict what kind of movies you are likely to enjoy based on what you've done and based on what a number of other people are doing." They are enormously successful at that, and it gives them an advantage over others who are just renting movies without those kinds of recommendations.

The problem, as Lon intimated, is that this kind of content aggregation, or content selection, also including the area of advertising, has attracted a huge amount of Congressional attention and lawmaking attention in principally two areas. The first of those is collecting the content, and what rights do people have in either knowing or opting out of that content collection. The second is protecting that information once they have it. What kind of efforts do you have to take to protect that personally identifiable information; what do you have to do if, for some reason, there is a leak.

The FTC has announced that it is enormously interested in this issue, and it's going to have a series of roundtables beginning this December, and all people who are interested in this topic should participate and provide comment.

There are also at least four different Congressional bills that are addressing one or other of the two issues I mentioned – either the collection or the protection of the information. So there will likely be some federal legislative response in addition to the number of state initiatives that Lon mentioned.

Finally, this is an area that is addressed by a number of public interest groups, and they are very powerful, and they've gotten very organized. Their interests, ostensibly in the context of privacy and trying to protect privacy, are not always the same as those who are developing protections around content and the ability to deliver that content in a meaningful, business-oriented way.

So, that's my tasting menu for today. I hope, if nothing else, I've whetted your appetite!

JACK FRIEDMAN: Thank you.

I am struck by the enormous content and variety of comments that the first two speakers have made! Lon, I can see an agenda for the next five or ten years because of the things you went through.

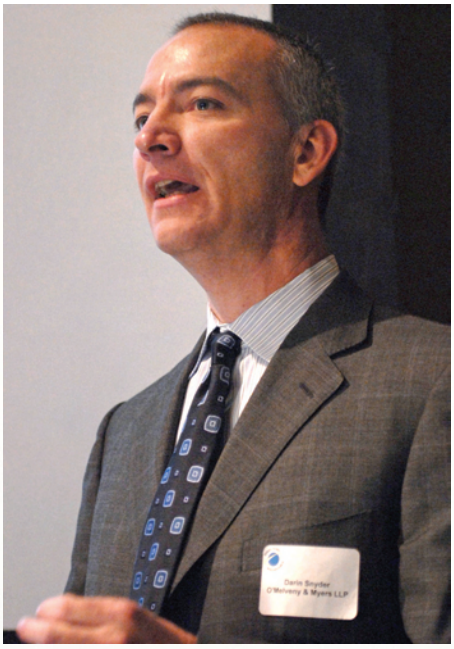
I'd like to introduce our next speaker, Jonathan Zavin of Loeb & Loeb.

JONATHAN ZAVIN: Thank you, Jack. Thank you for inviting me, Lon. Thank you, Jack, for having me on the panel.

I'm going to talk about a very specific problem, and an issue that I foresee as a future problem, which is the digital manipulation of content.

Up until the last few years, it's been assumed that a content company, when they create content, controls the right to make derivative works of that content. To put it simply, if Fox makes a movie, that no one can take that movie and put a different ending on it; that is one of the fundamental rights of a content owner. I believe that that right is now actually in issue, and it's been put in issue by, of all people, the Register of Copyrights. The context that this arises in is a case called *Huntsman v. Soderbergh*.

A number of years ago, a number of companies sprang up, mostly in Utah and Colorado, that decided that the motion pictures that the studios made were nice, but they would be even better if certain scenes or dialogue – those



containing what they believed was excessive or inappropriate sex, profanity or violence – were deleted. They proceeded to do this and they did it in two ways: The first method was the old-fashioned way – they simply edited a copy of the film, taking out what they considered to be excessive sex, violence and profanity, and made and distributed DVDs of the edited film. The second method was a new technology which was introduced by a company called ClearPlay; ClearPlay created software that allowed the user to buy an authorized DVD of a motion picture, put it in their computer, download ClearPlay software, which had a "mask" tailored for that specific motion picture, and play the DVD on their computer with the aid of the "mask." What the viewer would see when they played the authorized DVD through the mask was the motion picture with certain scenes and dialogue skipped or muted. The preparation of the mask, or the editing, was done by ClearPlay, although in later ClearPlay models the viewer did have certain options. ClearPlay, in effect, created a different version of the film, there was no physical alteration of the authorized DVD.

The seven major motion picture studios ended up in litigation, in federal court in Colorado, against all of the companies providing unauthorized edited copies or versions of the studios films. The studios' claims against ClearPlay was that it created unauthorized derivative works of

the studios' films, and this was copyright infringement. This lawsuit became a highly charged political issue. Congress intervened and held hearings as to whether the ClearPlay technology should be permitted. The issue got caught up in the election cycle of 2004 and it became a family values issue as to whether it was a good thing to delete sex, violence and profanity from motion pictures.

Jack Valenti testified for the motion picture companies as to why this should not be permitted. Despite Valenti's testimony, the Family Movie Act was passed in 2005, legalizing the specific ClearPlay technology.

Marybeth Peters, the Register of Copyrights, was also asked to testify at these hearings. What concerns me is not the specific legislation that was passed, which was fairly limited in scope, but rather the possible long-term effects of Marybeth Peters' testimony. In that Congressional hearing, Ms. Peters testified that it was the view of the Copyright Office that for a derivative work to be infringing, there had to be a fixation of the derivative work. In other words, as long as there was no fixed copy of the new work created (and no public performance of the new work), the work could not be infringing. What this allows, through the use of digital technology, is the possibility of the unauthorized, but legal, creation of different versions of digital content owned by others, so long as, in effect, no permanent copy is created.

At the time of the passage of the Family Movie Act, everyone in Congress was very solicitous of family values and, in effect said why shouldn't parents be allowed to get these masks and create new copies without this sex, violence and profanity? The problem this raises is that much more extensive, and possibly less benign uses can be made of what has now become a huge potential loophole in the Copyright Act.

For example, under this requirement that a derivative work must be "fixed" to be infringing, someone might well attempt to take Fox's *Star Wars*, and turn it into a pornographic movie. All they would have to do is take an authorized *Star Wars* DVD, create a "mask" or program which combines the film with other images from different content – drawn from the Internet perhaps, and digitally combine them on the user's screen. There would be no fixed copy created, although the same unauthorized performance would be seen every time the software was used. Clearly, this would be new content, and what one would certainly have thought was an illegal unauthorized derivative work.

While someone might use this technique to make pornography, they could also attempt to make other motion pictures using this technology, and using Fox content. Further, while this case arose in the motion picture context, this type of digital manipulation could equally easily be used for any digital content. Newspaper articles or books could also be digitally manipulated as long as there was no "fixation" of the new work.

This is an example of "hard" cases making perhaps bad law. My personal view is that Marybeth Peters was wrong as to whether the Copyright Act requires fixation for a derivative work to be infringing. I believe that what happened in this instance is that the politics skewed the result. I believe that Ms. Peters was against the passage of the Family Movie Act – she testified that in her view it should not be passed – and in an effort to convince Congress not to pass the new legislation, she argued that it was unnecessary because it was unnecessary, i.e., ClearPlay's activity was not illegal under existing law. I think she was wrong as to existing law (or at least as to its intent), but that testimony by the Copyright Office is in the record, and in the not too distant future, other people may realize that this type of digital manipulation is possible.

JACK FRIEDMAN: Could I ask you, is there a clear definition of "fixation," or does it have a variety of possible meanings?

JONATHAN ZAVIN: "Fixation" means fixed in permanent form. The Ninth Circuit, in a case prior to Ms. Peter's testimony (which she did *not* mention in her testimony), actually said that there is no fixation requirement in the Copyright Act for infringing derivative works. However, what the Ninth Circuit said, and I'm hard put to understand the distinction, was that while there is no fixation requirement, the Copyright Act does require that the infringing work be embedded in concrete form. If anyone here can tell me the difference between "fixation" and "embedded in concrete form," I would appreciate it.

But yes, "fixation" means "fixed in some permanent way."

JACK FRIEDMAN: What you're saying is that the squiggles on a DVD which bring us movies are fixation.

JONATHAN ZAVIN: Yes. Just in the same way the grooves in a record would be fixation. Because the work can be reproduced over and over again from that record or DVD. A classic example of non-fixation is someone who writes a poem in the sand on a beach. That's always been given as the classic example of non-fixation: the waves are going to wipe it out at any moment. However, in the digital age, it seems that fixation can occur in nanoseconds, and the content owners have argued, for example, in the recent *Cablevision* case, that fixation that lasts as little as 1.4 seconds is sufficient to constitute copying and fixation. The Second Circuit didn't agree.

JACK FRIEDMAN: Let me thank you very much. Our next speaker is Yosef Riemer of Kirkland & Ellis.

YOSEF RIEMER: Thank you. I join the other speakers in congratulating not just Lon, but all the in-house lawyers at News. It's been my great privilege to represent News and work with them in a number of significant matters over the years.

Before I begin my remarks, I did want to say one thing about the last presentation. As someone who has represented News, I did find myself thinking as I listened to that presentation that while this is not my area of expertise, I have to presume that it does not represent the views of News Corp. that anyone has the right to make a pornographic version of *Star Wars*!

Lon made the comment that protecting content is more important than ever. He is absolutely right. The speakers so far have focused on protecting intellectual property aspects of content. But there is another aspect of protecting content that is important here and that is the extent to which content owners can control the manner in which their content is distributed – how their products and services get to customers. That has been the focus of a great deal of antitrust litigation and since antitrust is one of the areas in which I frequently practice, both in terms of handling litigation and counseling clients, I thought I would focus on trends in antitrust law.

Before I talk about some of the development in that area of law, however, it seems appropriate in light of other references today for me to touch briefly on the Redbox litigation which is one example of a case in which a plaintiff is asserting a right to challenge a content provider's chosen distribution policies under the antitrust laws. I represent 20th Century Fox in that case. I will obviously limit my comments to matters that are in the public domain rather than getting into anything privileged or the like.

Here is the background on the Redbox litigation. For those of you who don't know the company, Redbox places kiosks in supermarkets, gas stations and other locations. The kiosks offer a limited selection of DVDs for rent, currently for a dollar a night. Redbox has contracts with some studios such as Disney and Paramount, to buy those studios' titles as they are released.

Redbox and 20th Century Fox had extensive negotiations, but ultimately they were unable to come to an agreement on a price at which 20th Century Fox would supply Redbox with Fox DVDs as they were released. Fox could have told Redbox that Fox and its distributors would no longer supply Redbox with any Fox DVDs. Instead, Fox announced a new distribution policy, under which Fox and its distributors would supply kiosk operators with Fox DVDs starting thirty days after new DVDs are released. Redbox then sued 20th Century Fox claiming that Fox had violated the antitrust laws by not agreeing to rent new DVDs in that initial thirty-day period. In addition to suing Fox, Redbox has also brought antitrust suits against Universal and Warner Bros. We recently filed two motions on behalf of Fox: a motion to dismiss Redbox's suit and a motion to transfer venue.

When Lon spoke about the Redbox case in his remarks, he mentioned that under the laws in many other countries, Fox has the right to say to any business that buys its DVDs, "You cannot rent our products without Fox's permission." Fox has never claimed in the U.S. that Redbox needs its permission to rent a Fox DVD. The issue in the case is not whether Fox can stop Redbox from renting a DVD, but whether Fox can somehow be forced to sell DVDs to Redbox on the day Redbox wants to buy those DVDs and to make those sales at the price Redbox was demanding. Redbox admits in its complaint that there were negotiations between Fox and Redbox and that ultimately, the parties were unable to come to an agreement on a price at which Redbox could have gotten Fox DVDs immediately upon release.

Let me take a step back from the case and speak more generally about antitrust. It has now become well settled in a host of decisions that antitrust should focus on protecting competition, not competitors. In other words, business disputes do not rise to the level of being antitrust claims where what is being asserted is an alleged harm to a particular retail chain or a particular business as opposed to competition itself.

While this is well settled now, it would not have been when I started my legal career (which sometimes feels as if it was the seventeenth century), but there has been a remarkable amount of change in antitrust. I well understand Lon's frustration with particular enforcement decisions concerning the ability of newspaper publishers to even discuss the kind of content arrangements that Lon mentioned. But to the extent antitrust disputes do get to litigation, there has really been a sea change in the rigor and economic sophistication with which antitrust claims are analyzed. Let me briefly touch on what I think may be the most dramatic way of illustrating that change.

In 1978, Robert Bork wrote a seminal work, called *The Antitrust Paradox*, in which he was very critical of decisions of the Warren Court and the early Burger Court – decisions which held up as a value, as a goal of the antitrust laws, the protection of small business. Some of you may remember Judge Bork, who served on the D.C. Circuit and was nominated, but not confirmed, as a Supreme Court Justice. Long before those things, Bork wrote this book in which he criticized antitrust decisions of the 1960s and 1970s on a number of grounds. One of his contentions was that courts would be left without real analytical tools – without grounding in economics – if they continued

deciding cases on whether a particular result served small business.

In 1993, fifteen years after publication of *The Antitrust Paradox*, a new edition of the book was published and Judge Bork wrote a new introduction and a new conclusion. What Judge Bork wrote in 1993 (and I am paraphrasing, not quoting) was very different: he said there has been a sea change in antitrust with courts being much more careful and a trend toward courts grounding antitrust decisions in economic analysis.

The point Bork made in that conclusion in his 1993 edition was absolutely right. In fact, if you look at the handout we prepared, you'll see what Judge Bork said in 1993 about this change has not only continued, but accelerated, in the time since 1993. Let me just use the U.S. Supreme Court as an example, in two regards. First, the number of antitrust cases the Supreme Court has been willing to take has been increasing: it took fewer than one antitrust case a term from 1991 to 2003, but eleven in the last six terms. (This has occurred during a period in which the total number of cases in which the Supreme Court has granted *certiorari* is down.) Second, almost every time the Supreme Court has taken an antitrust case, it has decided the case in a way which required or heightened the need for rigorous economic analysis.

These recent Supreme Court cases, taken together, impose sharp limits on what a plaintiff can assert and must prove to win an antitrust claim. There is more information about these cases in the handouts, but let me briefly discuss some examples. One of the most significant is *Bell Atlantic against Twombly*, a case that I think people are going to be hearing about over and over again – not just in antitrust, but in other areas, because it heightens the standard a plaintiff must meet to even plead an antitrust case. Under the old standard, courts asked for *any* set of facts that could be imagined that would entitle the plaintiff to relief. Under the new standard, it's not "where does the imagination take us;" rather the question is whether there is something that seems credible, that seems *plausible* – that's really the key word – *plausible* suggesting that these allegations would entitle somebody to relief.

> "... I believe that it won't be long before almost all creators of professional copyrighted content begin to charge for all of their content online, whether it is through charging the ISPs or the end users."
> – *Lawrence A. Jacobs*

There are a number of other recent antitrust cases we talk about in the handout that are also quite significant. In two of the recent cases, the Supreme Court overruled longstanding precedent. In 2007, in *Leegin v. PSKS*, the Supreme Court reversed a 96-year-old decision and held that it no longer considered resale price maintenance to be *per se* illegal. In 2006, in *Texaco v. Dahger*, the Court overruled an earlier decision so that it would no longer be *per se* illegal for two companies in a joint venture to sell separately branded products at the same price.

Many of these cases impose tougher burdens on antitrust plaintiffs. In *Illinois Tool Works v. Independent Ink*, the Court held that market power would not be presumed in tying cases just because the defendant had a patent. Rather the plaintiff would have to prove that the defendant actually had market power. In *Volvo Trucks v. Reeder-Simco* GMC, the Supreme Court said actual competition had to be shown and could not just be inferred in Robinson-Patman cases. The Supreme Court has also tightened the requirements for pleading predatory pricing and price-squeezing theories in recent decisions.

Taken together, these cases heighten the requirements for bringing and maintaining various kinds of antitrust cases. Many of them do so in the context of motions to dismiss. That is particularly important because if baseless antitrust claims survive a motion to dismiss, the discovery involved can impose enormous costs on the defendants.

Let me note one more thing about these cases. What is even more striking than the results of these cases is the lack of controversy they have generated. For example, in the last four years, the Supreme Court has decided eight antitrust cases. Four of the eight were decided unanimously. A fifth was decided on a 7-1 vote and the sixth and seventh on votes of 7-2. Only one of the eight was decided by a 5-4 vote. There is a broad consensus on antitrust. That consensus is extremely helpful in giving firms in numerous industries greater ability to control their content in the sense of being able to make fundamental decisions about how they reach the consumers who use or buy their products and services.

JACK FRIEDMAN: I'd like to introduce our final speaker, Clifford Thau of Vinson & Elkins. I've asked him to move beyond the IP area, to speak about issues from a corporate and securities point of view.

CLIFFORD THAU: Thank you to the Directors Roundtable for having me. It's a pleasure to be on the panel with you and my distinguished co-panelists.

Those of you who are familiar with the show *Sesame Street* know there's a segment, "Which of these is not like the others?" I'm the part that's not like the others! I'm not talking about IP. I'm not talking about content. I'm not going to be using a single acronym today. I'm just going to talk about what's been going on at a new, reinvigorated SEC.

In the wake of the Madoff scandal and the financial meltdown, there have been a lot of accusations, allegations of wrongdoing in the financial markets, as we all know. We have a new head of the SEC, Mary Schapiro, and she has appointed, and the Senate has confirmed, Rob Khuzami, who is a former prosecutor, to be head of the Division of Enforcement of the SEC. Rob Khuzami's not only a distinguished prosecutor; he's also former general counsel of litigation at Deutsche Bank. In turn, Rob Khuzami has appointed as his deputy

another former prosecutor, and the head of the New York office of the SEC, George Canellos, who is also a former prosecutor.

In years gone by, the SEC has frequently promoted from within, and the fact that there are going to be former prosecutors in each of these senior positions is indicative of potentially a different feel and a more aggressive tone at the SEC. In fact, Rob Khuzami has analogized the role of the Division of Enforcement as the "cop on the beat," and again, indicative of a more aggressive sense at the SEC.

Numbers don't tell the whole story, but the SEC is very proud of the fact that there have been more investigations brought this year than last, more formal investigations, more emergency temporary restraining orders. You see, percentage-wise – and again, numbers don't tell the whole story – but there's certainly an effort to bring more cases at the SEC.

One initiative of the new group running the SEC, or running the Division of Enforcement, is the creation of specialized units. You see the five specialized units on the slide. During our breakfast today, before we joined you, Lon was mentioning that an important issue at News Corp. and many other international corporations is the Foreign Corrupt Practices Act. In the past, that statute and the enforcement of it, has been more the purview of the Department of Justice which, as you know, has criminal jurisdiction; the SEC does not. Here, the SEC has said they are going to be more interested in the enforcement of the Foreign Corrupt Practices Act, bringing investigations to that area, and again, lower standard of proof required in an SEC action than a criminal action. I'll talk about that in a second, in the *Bank of America* case. Resolution of investigations by the SEC end in consent decrees where a party neither admits nor denies the allegations. Look for more activities by the SEC in this area, the Foreign Corrupt Practices Act, as well as the other areas contained on the slide.

Again, indicative of a more aggressive tone, the SEC has indicated a great reluctance going forward to enter into tolling agreements – which, as you know, are a means of postponing or potentially postponing actions, not to be bound by the statute of limitations. The reluctance or the limitation on tolling agreements is an indication that the SEC plans on moving quicker and not letting its cases languish.

Another initiative is encouraging whistleblowers. Those of you familiar with the Sarbanes-Oxley Act know that there are certain requirements for public corporations in connection with having hotlines, but what Khuzami and others at the SEC have said is they feel it's very, very important to encourage people to come forward and outline potential violations of the law.

This is an interesting one, because again, those of you who followed the *Madoff* case in the press know that there were a lot of tips, and people did come forward and try to tell the SEC about what they believed to be issues or concerns in connection with the Madoff investment scheme. But the SEC is inundated, I think the number is in excess of 100,000 tips per year, and there's a recognition that they have to do a better job of sorting out and paying proper attention to the more serious of the tips that they receive, and they've started an Office of Market Intelligence to better sift through and identify the more serious of the tips that they receive.

One more – I can't say it's an initiative, but I guess a renewed vigor in a particular area – is that the Commission is going to be absolutely looking to not only identify wrongdoing by corporate entities, but to seek to look very, very carefully at the individuals who make the decisions at those corporations, and seek sanctions against those individuals where appropriate.

To paraphrase Rob Khuzami, the focus of any penalty policy should be assurance that malefactors (I don't think I've seen that word since Franklin Roosevelt) get appropriately severe sanctions to sufficiently deter them and others from engaging in similar misconduct in the future.

It's not just the entity; it's the individuals who make the decisions that the SEC is going to be looking at. I'm not saying that's a new policy,

because you see, certainly back in 2006, the SEC said the same, but I think you could accept, in the *Bank of America* case which I'm going to talk about in just a moment, the SEC's going to be looking very seriously at individual conduct.

I'm just going to jump ahead. In the *Countrywide* case, as many of you know, the SEC has brought a case against the former CEO of Countrywide, Angelo Mozilo. The SEC has also finished its investigation of Hank Greenberg, resulting in a $15 million fine.

I want to talk about one recent case which I find interesting. It's called *Nature's Sunshine*. In this case, the SEC brought an action under the Foreign Corrupt Practices Act, and brought a case against senior management at Nature's Sunshine. This is a theory of liability not frequently used by the SEC. They brought what's called a "books and records violation" against management under the Foreign Corrupt Practices Act, for failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions were properly accounted for.

A new use of the theory against senior management for responsibility for keeping accurate books and records, and you can see the fine is not substantial relative to some of the others, but still, a new and aggressive theory by the SEC.

I just want to talk for a moment about *Bank of America*, which all of you have read about in the paper. It's an interesting case, because, as I've been talking about SEC emphasis on looking at individual conduct, not just firm conduct, in *this* case, the SEC brought an action just against the bank; no individuals. Among other things in that case, as has been widely reported, that bothered Judge Rakoff.

Now, some people who are not familiar with this area of practice asked, "Why is it that a federal District Judge is involved here at all?" It's a settlement reached between the SEC and a bank; or a firm, or individual. What role does the court have here? Because the SEC settles its cases with a consent judgment, and therefore invokes the injunctive power in the settlement – in other words, a party agrees not to violate the laws going forward – the injunction power derives or it's enforced by the court; a federal judge has to approve a settlement between the SEC and a private party. It's not uncommon for a federal judge to look at a settlement between the SEC and a party and not delve into the terms of the settlement. This is different here, obviously very different. Judge Rakoff was very troubled by the settlement for a variety of reasons. Having said that, it's probably not unfair to say that other judges might have taken a less scrupulous attention to the terms.

In any event, as we know from litigation, you get a judge and the judge makes the decision.

The slide here talks about, what Judge Rakoff explains why it is that he must make a determination to the fairness, reasonableness and adequacy of the settlement before him.

The Judge asked the question which many of us who are involved in settling cases asked. If the bank is innocent of lying to its shareholders, why is it prepared to pay $33 million to its shareholders as a penalty for lying to them? Leaving aside that issue, is it appropriate for shareholders to pay for a settlement in a case where allegedly the shareholders have been lied to? It's an interesting question that some of us grapple with in resolving cases. That is, when you're paying money, what does the outside world believe? What do you think, or what does a person reading the

newspaper think, when the company pays a large sum of money in settlement?

In any event, Judge Rakoff, as is now well-known, said, "I'm not approving this settlement. I'm troubled by it. I'm troubled by the amount at issue," again, charged language. "The proposed consent agreement of this case suggested a rather cynical relationship between the parties. The SEC gets to claim that it's exposing wrongdoing on the part of Bank of America in a high-profile merger. The bank's management gets to claim they have been coerced into an owner's settlement by overzealous regulators. All this is done at the expense not only of the shareholders, but also of the truth."

So the truth wins out here, which is comforting. What's interesting here is, I've talked about how I believe the SEC has looked to individual conduct in its investigations. Here is an instance where the SEC did *not* go after the individuals, and the Judge was certainly closely questioning the SEC's decision-making in this case.

Just as a postscript, Judge Rakoff ordered the parties to be ready for trial, I believe, in February of next year, and some people have asked, "Why no appeal?" Under federal practice, there is generally no appeal until the case is concluded.

So, again: important case, active SEC, and I think we'll be reading and hearing about a lot of high-profile cases brought by the SEC going forward.

Thank you very much.

JACK FRIEDMAN: We're going to have a discussion among the Panelists and our Guest of Honor, and then we'll be opening it to the audience.

First of all, I'd like to begin by asking Lon questions.

Could you give us a sense of your responsibilities in your Legal Department as well as its size and other details?

LAWRENCE A. JACOBS: Sure. Globally, there are over 200 lawyers in this corporation. At the Corporate Department here in New York, there are a dozen of us. I think just about all of them are here today. We cover everything from the corporate work to the litigation to the IP issues, compliance issues. We try to get involved in all of the important matters relating to the company, whether it's here in New York, in L.A., or internationally.

JACK FRIEDMAN: What are some of the governmental agencies, legislatures, and so forth that News Corp. is involved with, here or abroad?

LAWRENCE A. JACOBS: Well, at the top of the list would be the FCC, because of our broadcast licenses. Because of our broadcast licenses, any transaction we do, they'll get involved in the antitrust issues. But a close second would be the DOJ and the FTC, because there's an antitrust issue in virtually every transaction we're involved in.

JACK FRIEDMAN: Foreign governments, some of the large countries, like England or whatever, have their parallel agencies.

LAWRENCE A. JACOBS: You have the parallels in country by country, but you also have to deal with the EU, which tends to scrutinize these issues even more than the U.S. regulators.

JACK FRIEDMAN: I will now ask what is often the single most interesting question for many people in the audience: What is your approach to working with outside law firms?

LAWRENCE A. JACOBS: The answer is that we are looking for lawyers who not only have the technical expertise, but have real world judgment, who, when they handle a litigation, don't look at it as an opportunity to take every deposition and turn over every stone; people who have a good sense of the value of a dollar. Really, we're looking for strategic thinkers more than anything else. It also helps if they are decent people, like these fellows on the panel!

JACK FRIEDMAN: What is the way in which you and the members of the Legal Department work with the business side of your company, including the Board?

LAWRENCE A. JACOBS: Well, they're our clients. So the same way that the Legal Department has their client, our client is the CEO of the division that's doing the transaction or handling the litigation. We look at them the same way any other lawyer is going to look at a client.

JACK FRIEDMAN: Do you sit in on Board meetings?

LAWRENCE A. JACOBS: Yes, sir.

JACK FRIEDMAN: We had an event a number of years ago. I won't mention the huge company that is a competitor of yours. The in-house counsel who was in charge of approving all the websites, all the copyrights, et cetera told the story that they worked very hard not to have the reputation in the company of merely being obstacles to doing business, the idea that lawyers are just there to say, "No, no, no," and make it difficult. They really were dedicated to the success of and facilitating the smooth flow of the company's business by reviewing promptly and giving specific guidance.

He said the problem they have, even with that good spirit, was that commonly they'll have some business person come in and say, "We've announced to the trade that we're opening up a new website to do business, and everybody's going to be coming on. I was told that I have to come to the Legal Department to get approval." He would say to him, "We're very glad to help. We'll review it as quickly as we can. When has this website been announced it will be available for business?" He said, literally – this is not a joke – he said, "In an hour."

> "We at News Corp. believe that there is a place for all of us. Citizen journalism is highly valued by us, and bloggers and aggregators can provide valuable alternative voices. But without the professionals, without the infrastructure that permits good investigative journalism, detailed research and editorial judgment, what are we left with?"
> – *Lawrence A. Jacobs*

Is that a general problem that business people think of lawyers as the last step of approval, and you've got to get them to realize that it takes time to make the proper judgments?

LAWRENCE A. JACOBS: We struggle with that a little bit, but I think we're doing a pretty good job of convincing the various divisions that we're a resource, and we're not there to hinder, and that we will keep them out of trouble. So it's becoming less and less of a problem because the people I work with have developed real relationships and are viewed not as another layer of bureaucracy to get through, but people who have real abilities to make sure that they can launch the website they want to launch – for example – but not get in trouble for doing it.

JACK FRIEDMAN: I'd like to start the panel discussion with a question which cuts across several of your areas. It has to do with litigation.

It's commonly said that in areas like patents and copyrights, juries really don't understand these things very well. They just don't understand what's behind them.

If it does go to litigation, is everything litigated in front of a jury? Is that the common thing?

YOSEF RIEMER: Well, many cases are *not* litigated before juries. Let me give you two examples. First, the most important business cases in the country are often litigated in the Delaware Chancery Court, which is truly a remarkable court in terms of the high caliber of the judges who serve and have served on that bench. There are no jurors in Chancery Court. That changes things and not just at trial. For example, I had a case in that court in 2001 against a plaintiff's lawyer from Texas who had never litigated there before. The plaintiff's lawyer was trying to avoid summary judgment and argued a narrow point he thought was in dispute. The Chancery Court judge said something along the lines of, "There may be a factual issue here, but it's very difficult for me to imagine how a finder of fact would ever find what you are asserting." The Texas lawyer responded by saying he looked forward to putting the evidence on and that he was confident of convincing the trier of fact. After about three rounds of this, the Vice Chancellor said, "I'm not sure your local counsel explained everything to you. When I say I don't think you can convince a finder of fact, I mean *me*." As you can imagine, the fact that the judge hearing an argument will be the finder of fact at trial can have a very salutary effect on a case.

Second, more and more cases are now tried in arbitration. Typically this happens because there are contractual or other arrangements requiring that disputes be arbitrated.

I personally have probably tried about two dozen non-jury cases to decision, whether in arbitration, in Delaware Chancery Court or in other forums where you end up with a bench

trial for one reason or another. So many cases are jury trials, but many others are not.

Having said that, I have to respond to the view you asked about – that jurors really don't understand things very well. With all respect to anyone who has that view, I have always thought that any litigator who says that is just confessing to bad lawyering. The challenge for any lawyer going before a jury is to explain things in a way that enables people who are not specialists to understand. Yes, trials go on day after day, and people don't pay attention at the same level to every fact. As lead counsel in a case before a jury, however, your job is to find organizing principles in your opening statement, use them in your direct and cross-examinations, and then tie those themes together in your closing. Mock jury research can be very helpful in seeing what people best relate to and understand.

Even very complicated cases can be explained to juries, and I wouldn't be afraid of that. You just have to do the right preparation.

CLIFFORD THAU: If you think about what it is, what we do as lawyers – and the panel here are all litigators – the skill we bring is we're never going to know the particular area as well as the client – the patent at issue, or the financial situation – but we try to learn it for the purpose of the case. But the skill that we bring is the ability to take, as Yosef said, complicated concepts and make them understandable. I find, I don't do as much jury work, but in terms of presenting cases to a judge, very frequently the judge doesn't have the area of expertise, either. The skill that we bring is taking complicated materials, accounting materials, financial transactions, whatever it may be, and making it understandable to a lay judge or a jury. That's the skill of the advocate, and that's why, hopefully, if we're good at what we do, we can make complicated information understandable.

JONATHAN ZAVIN: In my view, in the copyright area, there are fewer and fewer jury trials. Judges have become much more amenable to granting summary judgment. I think this is true generally in the federal courts. I saw a statistic recently that the number of jury trials in the federal courts has decreased by somewhere between a third and a half in the last ten years. Judges will also recite that if there's any disputed issue of fact, that it must go to a jury, and then particularly in copyright cases, they'll frequently find that there is no genuine issue of disputed fact.

I also don't think companies need be as scared of juries as they sometimes appear to be. My experience is that juries generally can sort out even a fairly complex issue, and they're not as anti-company as people think. I think the best examples of that recently, much to the shock of some defense lawyers, are the peer-to-peer cases brought by the music industry against individuals. Two of these cases finally went to juries, one in Minnesota and one in Massachusetts. In both cases, the defense lawyers viewed these cases as ones in which the juries would be sympathetic to the defendants. The plaintiffs were huge music companies against poor individual defendants, the mother of young children in one case, a student in another. I suspect that in both cases defense counsel thought that no jury was going to find in favor of these large companies, or at least not award substantial damages against the individual defendants However, in both cases, the juries not only found in favor of the companies; they brought in staggeringly large verdicts against the individuals; for many, many hundreds of thousands of dollars.

JACK FRIEDMAN: How was that read by the Bar? I mean, apart from the fact that it says that juries are more open-minded to hearing both sides of the case. But was there something deeper going on such as juries not liking people getting information for free that they should be paying for?

JONATHAN ZAVIN: I think that the content companies should take some comfort from these cases. In these cases you took normal jurors, who are presumably unfamiliar with intellectual property protection, and given enough time, it was possible to explain to them why stealing or pirating content was both unlawful and bad. My firm has handled the peer-to-peer cases for the major motion picture studios. What we've found is that judges, when educated, almost invariably understand this. None of the motion picture cases have yet gone to a jury; but what the record company cases show is that people are educatable in this area, which is somewhat comforting.

DARIN SNYDER: If I could add just a couple of points? One is that there is no requirement that these cases go to a jury. It's a right, but both sides can agree not to. If a case does go to a jury, it means that one side or the other actually *wants* the jury, and there must be some rationale for that. Often, it's because there is an understanding, whether or not it's backed up

by the evidence, that jurors can award very big amounts in damages. There is some evidence that indicates that's not necessarily true, that judges give just as large awards as juries, but there is that belief; particularly in some jurisdictions known for trying certain types of IP cases – like the Eastern District of Texas, where we have some eye-popping awards recently, in the hundreds of millions of dollars. That attracts the plaintiffs' bar like really nothing else.

The second point is that even though these cases are technologically very complex, that doesn't mean that they're easier for judges than they are for jurors. Our judges are not picked because they have technological savvy. I was talking to the Chief Judge of the Northern District of California recently, who was lamenting that he had to make a decision in a case involving a biotechnology, and each side had a Nobel prizewinner! So he said, "I'm in the position of telling one of these Nobel prizewinners that he was either wrong or lying!" He didn't really relish that. He found that job no easier as a judge who'd been practicing for some decades than a jury would.

The third point – and this is really echoing one that's already been made – is that the trial is an issue of strategy and tactics, and you deal with the forum that you're working in. Whether it's a jury – or to a certain extent, a judge – it's really a morality play. You're not trying to teach people to practice a technology, no matter how simple or how technological; you're trying to help your client solve a difficult business problem that's gotten to litigation. That means adjusting your strategy and tactics to whatever the forum is, and if it means convincing a judge, you may do it one way; if it means convincing a jury, it may be another way. But you're ultimately trying to convince them that you're right, and that's not unique to technologically complex issues any more than it is antitrust cases or contract cases or securities cases.

JACK FRIEDMAN: There's a famous case involving the late Professor Louis Loss from Harvard Law School, author of the great securities treatise, and Judge Friendly, of greatest stature as a federal judge. Loss was appearing as a witness, and Friendly said, "I'm really puzzled

because the position you're taking as a witness is directly opposite to the position you take in your treatise." Loss actually said, "Your Honor, I think more clearly when I'm being paid." So, that gets back to the Nobel laureate issue.

Several of the examples that have come up have been between companies, whether it is the content company feeling they're being ripped off by another company, or something else. You mentioned a case where there is a company against an individual, and it has to do again with the content that has been created. I was wondering what type of issues are there with others in the creation of content with the talent, with the unions, etc.

LAWRENCE A. JACOBS: Well, that's right, and most of the lawyers who work for News Corporation are working with the creation of the content, working on the agreements between the talent and the company, or between the producers and the directors. That's where most of the legal work takes place.

JACK FRIEDMAN: Someone who's very active in the contract area said that contracts in Hollywood are *never* disputed in court. *Never*. I said, "How often are they disputed?" and he said, "Well, I don't remember who it last was – Olivia de Havilland. Somebody from the 1940s – people just don't want to go to court over these contracts if they have a dispute." There's a whole group of people who represent talent who make sure that the movie is filmed without a finalized contract. That is their policy. Somebody actually said, "I never let my client do his work with a finalized contract." They just keep sending it back and forth. It drives New Yorkers crazy to hear what goes on in Hollywood.

LAWRENCE A. JACOBS: I think that used to be more true years ago than it is now. When we acquired 20th Century Fox Film, the lawyers were stunned that literally, no contract was ever signed. You're absolutely right. But that has really changed over the years.

JACK FRIEDMAN: And how far back is that?

LAWRENCE A. JACOBS: That's going back to the mid-'80s. But no, contracts get signed now, and they get litigated and rights to movies get litigated. *Watchmen* was a movie that Fox had rights to; it was litigated very recently.

JACK FRIEDMAN: We have at least one person here from Silicon Valley, and the others, I'm sure, work with Silicon Valley people. There is ongoing development of new technology, whether it's the Internet or iPods, Kindle, or Blu-ray, and it's week by week. What is the impact of the speed of change and where your clients think the technology is going?

DARIN SNYDER: That's a really broad and important question, Jack. I think that if there's any lesson to be learned, it's that the pace of technological change has increased very rapidly. There have been more changes in the last five years than there were in the previous 50 and there's really no indication that it is going to slow down.

The legal apparatus, though, is no better than it was 50 or even 100 years ago. As a result, we're constantly playing catchup; we're constantly creating regulatory or statutory or sometimes judicial Band-Aids to deal with immediate problems, and not really crafting long-term viable solutions. So we've got a situation with the Internet where distribution of content radically changed. You have other types of technological devices, like the movement from analog recording to digital recording that allows the creation of perfect copies. Previously you could at least count on, in part, the degradation in quality of copies to be an inhibition on distribution of content. So, the real issue is that we are increasingly less able to have a legal regime that is keeping up with the changes in technology. We're playing catchup; we're getting further and further behind, and we have to occasionally pause and figure out what makes sense on a broader basis to deal with these issues, including on a global scale, because, as I pointed out, you no longer can look at geographic limitations as real controls.

JACK FRIEDMAN: I'd like to open up the conversation to the audience. If you'd like to ask a question or make a comment, we would be very pleased to have you join in.

AUDIENCE MEMBER: Netflix makes its inventory available to people and Redbox makes its inventory available. What is the difference between the two approaches? Is it basically just the timing in which their inventory is made available to their customers, or is there some other fundamental difference between them?

YOSEF RIEMER: I can't speak for all the studios, but from what has been in the press, Netflix has agreements with individual studios on the terms on which different titles are available at different points in time.

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>
> *– Lawrence A. Jacobs*

Over time, I would presume that individual studios enter into various kinds of agreements with various firms offering their content for rent. What people negotiate can change over time. For example, it is not unusual now for studios to sign revenue sharing agreements on DVD rentals. Revenue sharing agreements were not common during much of the heyday of VHS rentals.

As I mentioned, Redbox *does* have agreements with, I believe, three of the major studios, who have agreed to sell their titles to Redbox immediately upon release of those titles. Redbox and Fox were unable to come to agreement on economic terms for such a contract. This morning I saw something show up on my daily Google alert, in which a Redbox official was quoted as saying that Redbox is constantly negotiating with the studios.

JACK FRIEDMAN: Wasn't it 20 years ago when the *Sony* case determined whether the individual consumer had rights? What is the situation now, in terms of the rights of people to get things for free? I know music downloading is very famous recently. Please review, if you would, the *Sony* holding, so that people are reminded.

JONATHAN ZAVIN: The *Sony Betamax* decision, for these purposes, was a limited holding that simply said that the producer of a device which could be used for substantial non-infringing purposes was not contributorily liable for the infringing use of that device, and that it was fair use for a consumer to time-shift television content by recording on a VHS device for later viewing. The Supreme Court, recently in the *Grokster* case, revisited some of these issues, and while certainly not overruling the *Sony Betamax* decision, said that if somebody "induces" infringement through use of a device or method they can be contributorily liable for the infringements which occur.

JACK FRIEDMAN: Can everybody just download everything and pass it around to their Facebook page or whatever the media is? My niece is in her teens, and I asked her if you get classes on how to do these things, and she started laughing. She said, "No, of course not. Anything you want now, you just go to some other kid and they explain it."

JONATHAN ZAVIN: Obviously, at least the content holder's view, is they cannot. The "copyleft" would say "yes." I don't think anyone on this panel would agree. Certainly I'm sure Lon wouldn't agree. The studios, as I said, have brought hundreds and hundreds of cases against people who have "shared" copyrighted motion pictures on peer-to-peer systems. The record companies have brought thousands of cases. It is clearly the position of the content holders that one cannot simply download anything available on the Internet.

DARIN SNYDER: I think one of the disconnects, or one of the issues underlying the question, is having to distinguish between some of the parties that are involved. You have to distinguish between the consumer, the person who is trying to receive the copy, from the distributor or the person who's facilitating the copy or creating the technology that allows the copy.

JACK FRIEDMAN: There are two groups. One is the commercial one who's distributing it for profit, like Netflix or Redbox, versus the amateur teenager who just passes it around.

DARIN SNYDER: Legally, no; legally, there isn't a difference.

JACK FRIEDMAN: No difference?

DARIN SNYDER: There is no difference if you were committing copyright infringement, if you receive an unauthorized copy or if you make an unauthorized copy, outside of certain exceptions such as the fair use doctrine. The issue that we've been talking about for many of these cases relates to the commercial interests that facilitate those copies, such as Napster or Grokster, the originators of the RealDVD software; and those cases typically turn on the extent of the control that they either have over the copy of the content or that their software allows for the copying of the content.

So, RealDVD was shut down. An injunction was obtained against their software, because the court found that it really didn't have a substantial non-infringing use. Its real purpose, and really its only purpose, was the illegal copying of copyrighted material. A recent decision out of the Second Circuit here, in a similar context, addressed a similar issue in the context of Internet radio. Because they weren't personalizing the content enough, even though they were distributing it and were making copies, it was not specialized enough, they didn't have enough control by the consumer, to be subject to different royalty rules for copying, other than those that apply generally to radio stations, where there are compulsory royalty systems set up so that you don't have to get permission every time you're going to make a copy.

So when you're dealing with consumers, it's a much more black and white issue. You cannot make unauthorized copies. It's illegal. It's "don't do it." The cases are pretty consistent. The statute isn't at all ambiguous, even though some public interest groups would like to make you think so. As one student said to me one time, "Yeah, but free music is so cool." So are free Mercedes! But the car dealer takes a dim view of that!

But when you're talking about the vehicle, the distribution vehicle, whether it's the software or the online provider, then the issue becomes more complicated, and it really comes down to an issue of control.

LAWRENCE A. JACOBS: For us, we think that they're both pretty much black and white. The way we look at it when it comes to someone profiting on our content, it's as simple as we don't want anyone profiting off our hard work without compensation. It's as simple as that. We would like the regulations and the laws and the statutes to reflect that notion, that you can't repurpose our content and sell it without compensating us.

AUDIENCE MEMBER: Don't some creators who want to distribute content do it for free?

LAWRENCE A. JACOBS: You make a good point. There are a lot of content creators who are still trying – the question had to do with the fact that there are content creators who are still making the content available for free, and the ability to use that content and redistribute it. That's their choice. All we're saying is that if you choose not to provide it for free, you should have the right to block that. But yes, there are a lot of content providers who are still holding out hope that advertising support is sufficient to come up with a viable business model.

AUDIENCE MEMBER: Can you distinguish between different users?

LAWRENCE A. JACOBS: I think that you can start to draw a distinction. There are a lot of people who would shoehorn everything they do into a fair use argument, so that when you're taking, when you go to the standard failures arguments, we believe in that as much as anyone. But at some point, it becomes pretty clear that if you're an aggregator, what you are doing is you are creating a new commercial venture based on providing nothing new. You're just taking the content of other people who have worked hard and spent a lot of money to create that content. So that if you have – to us, it's a very clear differentiation between sports clips that you'll see on the evening news versus a Web site that exists solely to take other people's content and aggregate it, as a commercial venture, so that they put advertising around it and they make money off of our content.

JACK FRIEDMAN: The earlier question that was just answered was, "Given the variety of content, which can be anything from movies to sports to all kinds of different things, is it really the policy that *everything* should be charged for, from the standpoint of the content owner?"

I'd like to turn to one thing that was one of your entities that was discussed in passing.

A number of years ago here, we organized – and I did feel very privileged to have been the moderator – but I wrote a letter to Mr. Seltzburger and Peter Conn, and Seltzburger at the time said Peter Conn asked *The Wall Street Journal* if they would have an extremely senior person from each publication do a program here at the Club on the challenges, and even the dangers,

of being a journalist. It was in honor of Daniel Pearl. So that was a number of years ago and we've had a very nice relationship with *The Wall Street Journal*. We always make ourselves available and so forth.

But I think it might be interesting, since it is arguably the first or second most famous newspaper in the world, to talk a bit about what type of issues come up with a newspaper like that, whether people are mad at you or you're trying to find new ways of getting income, or what is business speech, but what are just some things?

LAWRENCE A. JACOBS: A broader question, you're just asking how it's doing and how people are viewing *The Wall Street Journal* now that they're under Dow Jones.

JACK FRIEDMAN: Or, from your standpoint.

LAWRENCE A. JACOBS: Which is very positive, by the way!

JACK FRIEDMAN: I'm just saying, you're the general counsel of the corporation, and you're not day-to-day on every division, but it's fascinating with the epic world newspaper to talk a little bit about the type of issues that come up, either in the business or the legal side.

LAWRENCE A. JACOBS: Well, let me start off by saying that News Corp. tends to be not very centralized, and most of the legal issues would be handled by Mark Jackson, who's the general counsel of Dow Jones, who happens to be here today.

But I think that Mark would tell you that he spends a lot of time dealing with – it comes back to the notion that the laws are different from country to country, and so there are a lot of issues that Mark needs to deal with where you would think that reporting a factual story, you are completely protected. Well, that's true in this country. But if you say something that's even remotely negative about the leader in Singapore, you run a risk that your journalists are going to end up in jail and that you're going to be prohibited from publishing in that

country. I think that we spend a lot of time focusing on those sorts of issues, because it's such an international newspaper, and I think that's probably the major concern, is protecting the journalists around the world.

JACK FRIEDMAN: The issue of free speech must be something that you stand up for when it becomes critical.

LAWRENCE A. JACOBS: Well, we're also dealing with – in terms of free speech, one of the bigger issues we're dealing with now is the notion of what constitutes indecency – whether a fleeting expletive should be considered indecent. That went up to the Supreme Court recently and is now back down at the lower court for a review of the Constitutional issues, and in all likelihood, it will be back up at the Supreme Court before too long.

JACK FRIEDMAN: By the way, what is indecent? A couple of years ago I saw the play, *Avenue Q*, which is the play with puppets that got all kinds of recognition. There was a family sitting next to me with a twelve-year-old girl. At intermission, I turned to her and to her mother, "Is it disturbing, the words that they're using?" Both the mother and the twelve-year-old girl started laughing. The girl said, "When I watch T.V., a sitcom or something, they use twice as many bad words!" Maybe each generation gets acclimated to a whole different vocabulary. You're trying to protect kids, which is appropriate, but the kids can be so far ahead of where the parents think they are. Or they hear things from their friends. Nice kids who are from nice families get exposed to so much of the world – it's just unbelievable.

LAWRENCE A. JACOBS: But we're also trying to give parents the tools to make the decision themselves. So you can edit out content that's coming into the house as a parent. So we leave it up to the parents to act like parents.

AUDIENCE MEMBER: Is very much being done about pirating?

LAWRENCE A. JACOBS: Well, there is a lot that's being done. It doesn't get a lot of press, but we have a number of different approaches to law enforcement, where we are trying to shut down the pirate sites, where we are trying to go after the worst infringers. Frankly, I think we could do a better job of publicizing what it is we do and why we do it, and I think we need to do a better job of convincing people, in addition to the judges and the juries, that this downloading is, in fact, theft. But no, there is a lot going on there that just doesn't get a lot of publicity.

JACK FRIEDMAN: I'd like to conclude this program with a couple of questions directed toward Lon.

Even though you work 150 hours a week, or certainly something around that, during the five minutes a month that you have free, what are some of the interests that you pursue on your own time?

LAWRENCE A. JACOBS: I spend a lot of time working with the special needs community. I'm Chairman of the Board of an organization called The Cook Center for Learning and Development, which has its own freestanding high school for special-needs kids. It also has a lower school. They do a lot of work with kids in pre-K programs, including Head Start. That takes up a fair amount of my free time.

JACK FRIEDMAN: Is it funded publicly or through private donations, or some combination?

LAWRENCE A. JACOBS: It's both, and it's a good question, because one of the things

that makes Cook unique is that it is completely needs-blind, and so any student that would benefit from being a Cook kid is accepted. Then we look at the financial ability of the parents to pay. If they cannot pay, in essence Cook fronts the money for them and then seeks reimbursement from the Department of Education based on the theory that there is no appropriate placement in a public school. So it gets harder and harder to get that money from the Department of Education. It's not so much in proving the point that these kids don't have an appropriate placement in a public school; it's just that the process, which used to take nine months, now takes two years, and it's only getting longer. Frankly, it's because the city has a budgetary crisis and they're looking to save money however they can, and one way to save the money is to withhold this reimbursement for as long as they can.

JACK FRIEDMAN: I understand also that you are a Civil War and Abraham Lincoln buff, so I'm curious how you developed that interest.

LAWRENCE A. JACOBS: This is the 200th anniversary of Lincoln's birth this year, and so it's a big year and I just joined the New York Historical Society as a treat to myself. I don't remember how I got interested. I think it was because the heroes you learn about in elementary school were people like Abraham Lincoln.

JACK FRIEDMAN: I don't know how they weigh different countries like China which can have different heroes than America, but still people worldwide know great people in different countries. There was a global poll taken on who in history do you admire the most. If my memory is correct, #1 or close to #1 in the whole world was Abraham Lincoln. He stands for compassion and reconciliation.

LAWRENCE A. JACOBS: He also stood first and foremost for the dignity of all humanity.

JACK FRIEDMAN: We thank Lon who has made his time and wisdom available. We feel honored, even more than our honoring him with this global recognition. I also want to thank the various panelists for sharing their expertise and audience, because ultimately it's the audience that is the focus of the Directors Roundtable.

Yosef J. Riemer

Litigation Partner,
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KIRKLAND & ELLIS LLP

Yosef J. Riemer is a litigation partner at Kirkland & Ellis LLP, where his practice spans a wide range of litigation and arbitration matters, including breach of contract cases; antitrust matters; litigation over M&A and corporate control matters; securities, fraud and class action litigation; trade secret cases; RICO actions; and contested restructuring matters.

Among the clients he has represented in his 23 years at Kirkland & Ellis are News Corp., Honeywell International Inc., NRG Energy, Inc., The Blackstone Group, Bain Capital, DHL, Agfa Corp., Dow Chemical Co., Schering-Plough Corp., Bristol-Myers Squibb Co., Casio USA, and Apax Partners LLP. He recently acted as litigation counsel for NRG Energy, Inc. in a series of cases litigated as part of NRG's successful defense of a hostile take-over attempt by Exelon Corp. (which Exelon abandoned when Exelon's nominees to NRG's Board of Directors were defeated). He is currently handling a number of diverse matters including a high-profile antitrust case filed by Redbox Automated Retail, LLC in which he is representing 20th Century Fox Home Entertainment over Redbox's effort to compel 20th Century Fox to sell newly released Fox DVDs to Redbox for Redbox's use in kiosks offering discount DVD rentals. Mr. Riemer has consistently achieved favorable results, whether in the many cases he has been able to win on pretrial motions or in the more than two dozen cases he has tried in federal and state courts and before arbitrators.

Prior to joining Kirkland, Mr. Riemer clerked for Judge Spottswood W. Robinson (who was then the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit) and Judge Oliver Gasch (of the U.S. District Court for the District of Columbia). He graduated from Brandeis University in 1978 and George Washington University Law School in 1984 (where he was first in his law school class). He practiced for eight years in Kirkland's Washington, D.C. office before relocating his practice to its New York office in 1994.

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Darin Snyder

Partner,
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O'MELVENY & MYERS LLP

Darin Snyder is a partner in O'Melveny's San Francisco Office and Chair of the Intellectual Property and Technology Practice within the Litigation Department. Darin has extensive experience in major civil and criminal litigation matters involving intellectual property and technology-intensive business sectors. The trial victory for client **NDS Group**, in which he served as lead counsel, was named by the *Daily Journal* as one of the top 10 defense verdicts of 2008. Darin has been recognized repeatedly by Law & Politics Media Inc. as a Northern California "Super Lawyer." *The Legal 500* has repeatedly recognized Darin, in particular, for his excellence in trade secret litigation, quoting clients who call him "'[o]ne of the West Coast's biggest names in the area.'"

Illustrative Professional Experience

Representative Patent Litigation

- Consults with several companies on a confidential basis regarding patent infringement, licensing, and strategic counseling issues.

Representative Trade Secret and other Technology Litigation

- Represents companies in several confidential civil and criminal investigations involving the alleged theft of trade secrets.
- Represents **News Corp. subsidiaries NDS Group plc and NDS Americas** in defending against claims by EchoStar Satellite Corp. for alleged copyright infringement, violation of the Digital Millennium Copyright Act (DMCA), and related claims. The under-`lying technology involves the software and hardware used to create "smartcards" that decrypt subscription digital television broadcasts. The action was tried to a jury in the Central District of California over a period of five weeks. Although plaintiffs sought nearly $2 billion in damages, the jury awarded only $45.69 in actual damages and only $1,000.00 in statutory damages. The *Daily Journal* selected the matter as one of the top 10 defense verdicts of the year. Also represented NDS in a similar action brought by Spanish satellite cable provider Sogecable. Previously represented these clients in similar litigation in the Northern District of California brought by Canal+ and related companies and in a related criminal investigation conducted by the U.S. Attorney's office. The civil action was dismissed pursuant to a very favorable settlement for his clients, and the U.S. Attorney's office ultimately declined to file charges.

O'Melveny & Meyers LLP

O'Melveny helps build and connect global communities of law and business. Our public service and pro bono contributions strengthen the communities we serve. Because community building is a mutual effort, we receive as much as we give. We learn from clients and industries that entrust us with their futures. We are reminded, often by those who most need our help, that the law respects and empowers all.

Our clients come from many industries and nations. Their diversity spurs our own diversity and reach. Since establishing our Tokyo office more than two decades ago, O'Melveny's Asia practice has grown into a market leader among international law firms, with nearly 130 legal professionals in Tokyo, Shanghai, Beijing, Hong Kong, and Singapore. In Europe, we have offices in the key economic and political centers of London and Brussels.

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In 2010, we will continue to enhance O'Melveny's internal resources that help our clients succeed in the global marketplace: sophisticated legal technology, greater lawyer diversity, and ambitious professional development. We are optimistic about the future – for our clients, our communities, and our world.

Clifford Thau
Partner, Vinson & Elkins, LLP

Cliff's main area of practice is commercial litigation with an emphasis on lawsuits involving the federal securities laws, including representation of issuers, underwriters, officers and directors, and accounting firms in securities laws class actions; securities and private equity firms and senior management in federal and state regulatory proceedings; and Audit Committees in internal investigations and SEC investigations into allegations of accounting irregularities. Cliff also represents media and real estate entities and corporations in commercial litigation and accounting firms in malpractice actions, bankruptcy court proceedings, and SEC investigations.

Cliff is the Managing Partner of the New York office and the Securities Litigation Practice Leader.

- *Chambers USA: America's Leading Lawyers for Business* in securities litigation, 2009
- *The Best Lawyers in America* in commercial litigation, 2005 – 2010
- "New York Super Lawyer," *New York Super Lawyers*, 2009

Cliff was named a top lawyer in securities litigation by *Chambers USA: America's Leading Lawyers for Business*, 2009, where he was recognized by his clients for his "thorough analysis and excellent strategic thinking."

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For almost a century, Vinson & Elkins lawyers have provided innovative business solutions for clients whose needs are as diverse as the entities they represent. In today's challenging environment of global markets, volatile economies and complex human and environmental issues, our time-tested role as trusted advisor has become even more critical. The depth and breadth of our lawyers' experience, combined with the responsiveness and efficiencies of the firm's global reach, enables Vinson & Elkins to serve clients from start-up, to the negotiating table and boardroom, before legislative and regulatory bodies, in the courtroom, and beyond.

Vinson & Elkins LLP began in Houston, Texas, as a two-man partnership in 1917, when James A. Elkins and William A. Vinson joined professional forces with a studied eye to the future. Both men were ambitious to establish a law firm that would endure, and offer other lawyers the opportunity to prosper and achieve their goals. Vinson recalled the founding partners' fateful decision to merge in this way: "We chatted awhile, and a sudden thought struck me: 'Here is your man!'" Vinson asked, "How would you like to come to Houston?" Elkins replied: "That is the ambition of my life, make me a proposition." The proposition was a partnership, and Elkins' response was unhesitating: "I accept." Thus, Vinson & Elkins was born.

In those days, the oil boom was already transforming Texas and the world, and Houston was home to much of the energy industry's activity. V&E "cut its teeth" on oil and gas matters, and today remains one of the world's leading energy law firms, with offices in Abu Dhabi, Austin, Dallas, Houston, New York, Washington, Beijing, Dubai, Hong Kong, London, Moscow, Shanghai and Tokyo.

Influenced by the strong personalities of its founding partners, V&E's early hallmarks were stability, adaptability and a congenial informality among its lawyers. Those traits are still in evidence today, even as Vinson & Elkins has grown into a worldwide operation with over 700 lawyers in 13 offices across the globe.

Jonathan Zavin

Partner, Loeb & Loeb LLP

Jonathan Zavin is a commercial litigator and intellectual property attorney with extensive experience in intellectual property matters, and has litigated scores of copyright and trademark cases. He has also advised major film studios, producers, recording companies and publishing companies on transactions in the entertainment and new media industries.

Mr. Zavin's commercial litigation background has been in areas as diverse as securities litigation (including Rule 10b-5 and RICO claims), litigation arising from the purchase and sale of large companies, employment discrimination litigation, FTC hearings involving the antitrust implications of an acquisition, commercial breach of contract actions and construction disputes.

At the request of the United States government, Mr. Zavin has traveled to Estonia, Latvia, Lithuania, Colombia, Kazakhstan, Greece and South Africa to meet with various government ministries and industry groups regarding the protection of intellectual property rights.

Mr. Zavin has lectured extensively on the subject of copyright law before law and industry organizations, including the Copyright Society of the U.S.A. and the American Bar Association. He is the author of articles addressing intellectual property issues. Mr. Zavin is on the Editorial Board of the Loeb & Loeb IP/Entertainment Case Law Weekly Update for Motion Picture Studios and Television Networks.

Distinctions:

- Named in *The Legal 500 U.S.* in Intellectual Property: Copyright, published by Legalease Limited and John Pritchard (2007 and 2008 editions)
- Named "Top Lawyer" in *The Hollywood Reporter, ESQ.*'s "Power Lawyers Top 100" list (2007-2008)
- Named in "*Chambers USA*, America's Leading Lawyers for Business," in Media & Entertainment: Copyright & Contract Disputes, (2007-2009 editions)
- Named "New York Super Lawyer" in Intellectual Property Litigation and General Litigation by *Law & Politics* (2006-2009)
- Named one of the "Leading Lawyers in America," *Lawdragon 3000 Leading Lawyers Guide* (2006)

Practice Areas:

- Business Litigation
- IP and Entertainment Litigation
- Intellectual Property

Loeb & Loeb LLP

Loeb & Loeb LLP is a national law firm with nearly 300 attorneys focusing on select core industries and practice areas, rather than endeavoring to be all things to all clients. The firm represents multi-national, *Fortune 100* companies in their mid-market transactions and litigation matters, and serves as primary outside counsel to a multitude of mid-market clients. The firm also represents clients ranging from high-tech start-ups to high net worth individuals and families. Loeb & Loeb has five offices, located in Los Angeles, New York, Chicago, Nashville and Washington, D.C., and has applied to open a representative office in Beijing to service a rapidly growing number of Asian clients.

The firm has an established history and nationally recognized reputation in the entertainment and media industry, and is highly regarded for its depth in financial services and real estate. Today, Loeb & Loeb, which has been recognized as a leading law firm in intellectual property, is broadening its industry focus to encompass technology, including pharmaceutical and biotech.

In response to client expectations, Loeb & Loeb has expanded over the years without sacrificing the ability to provide clients with direct access to the counselors who serve their legal needs. We pride ourselves on client matters being conducted and coordinated expertly, efficiently and expeditiously. Our culture is geared towards establishing and strengthening long-term client relationships and we put an emphasis on senior attorney involvement with all transactions or matters. Teams are kept to optimal size to provide the highest quality advice, efficiency, cost-effective and seamless services across practices and offices.