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TABLE OF CONTENTS

ARTICLES

Against the Dilution of a Child's Voice in Court	<i>Melissa L. Breger</i>	175
Trips Article 31bis and H1N1 Swine Flu: Any Emergency or Urgency Exception to Patent Protection?.....	<i>Dawn Dziuba</i>	195
A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts	<i>Simona Grossi</i>	213

NOTES

Conveyancing at a Crossroads: The Transition to E-Conveyancing Applications in the U.S. and Abroad	<i>Michael E. Doversberger</i>	281
Oh La, La! How Will the Polarized Decisions of the United States and France Regarding the Responsibility for Policing Trademarks on Online Auction Sites Be Synthesized?	<i>Olivia M. Fleming</i>	313
Leveling the Trade Playing Field: The Ailing U.S. Manufacturing Sector and the Need For Trade Parity	<i>Zachary T. Lee</i>	355
Food-Borne Illnesses Strike U.S. Food Supply: A Discussion of Inadequate Safety Procedures and Regulations in the U.S. and Abroad	<i>Elizabeth A. Trachtman</i>	385

AGAINST THE DILUTION OF A CHILD'S VOICE IN COURT¹

Melissa L. Breger

Children's voices have been diluted in the court system, as the dominant paradigm in children's legal theory has too often overlooked the voices of our youth. The dilution of children's voices in the courtroom is not only disempowering and disenfranchising to children, but is also misguided. In the United States, there is no uniform standard for the role of the child's attorney. Instead there are multiple models of lawyering for children throughout the states.

This Article first examines the currently existing American child attorney paradigms through the lens of international norms and the written ideals of the CRC treaty, arguing that without the child's right to be heard codified into American law, the United States is not consonant with the United Nations Convention on the Rights of the Child (the "CRC"), Article 12. The Article then examines the laws of New York State as an additional backdrop and also to propose forward-thinking and child rights-oriented statutes.

Ultimately, this article emphasizes the fundamental importance and essence of listening to our children's true voices in the courtroom. Until children can be fully heard, their voices remain absent, or at best diluted, from the very legal system intended to help them.

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I. INTRODUCTION

As justice for children has progressively become a pivotal issue to international scholars, as well as to scholars across the United States, symposia and literature analyzing children's rights provide a wonderfully rich forum for law students, professors, and policy makers to exchange views about the rights of our most vulnerable citizens.² Although there are myriad topics to address in the arena of children's law, the distillation at the core about a child's right to be heard is particularly timely and pertinent. The issue has been debated throughout entire journals, comprehensive books, and countless law review articles. Yet, still there has not been uniformity in United States' laws about the role of the attorney for the child, despite a growing consensus among legal academics and child advocacy experts.

The issue of hearing a child's voice is embodied in Article 12 of the United Nations Convention on the Rights of the Child (hereinafter "CRC"), which will be outlined below. The United States should draw from this aspirational CRC language in creating uniform standard roles and responsibilities for its children's attorneys. Many states have already done so, and I proffer New York State - with its more developed new laws - as one paradigm to explore further.

Ultimately, my basic premise is that the United States should have a uniform child-centered legal advocacy paradigm through which the child's views are voiced to the trier of fact as clearly as is possible. When an attorney substitutes his or her own judgment on behalf of a child, that attorney creates a barrier to the child's true voice. This is tantamount to a "dilution of the child's voice" by the time the finder of fact hears it, and it is this concept of dilution that I am utilizing throughout this Article. Admittedly, a child talking directly to a judge might be the truest way of having that child's voice being heard by the finder of fact. This type of direct contact, however, between child and judge is rare, time-consuming and fraught with many complicated ethical issues beyond the scope of this paper.³

2. One such symposium occurred at Albany Law School, examining United States laws through the lens of the CRC. In February 2009, Professor Maria Grahn-Farley convened a class of twelve students in her *International Child Rights* class, along with top statewide leaders, judges, scholars and practitioners. Professor Grahn-Farley invited me to write a brief essay critiquing New York laws in the context of the CRC, and that then became the genesis of this more expanded Article. Two of the most prominent and comprehensive children's law conferences in legal academia include UNLV CONFERENCE ON REPRESENTING CHILDREN IN FAMILIES CHILDREN'S ADVOCACY AND JUSTICE TEN YEARS AFTER FORDHAM (2006) and FORDHAM CONFERENCE ON ETHICAL ISSUES IN THE LEGAL REPRESENTATION OF CHILDREN (1995).

3. As examples of the complicated issues inherent in direct judge-child contact, many jurisdictions are decreasing their use of *in camera* proceedings as it becomes clearer that children are indeed parties, and this would be an *ex parte* communication. Then, of course, there are also due process issues for the parents if the finder of fact is speaking directly to the child. *See, e.g.*, In the Matter of H.R.C. (In re Compton), 2009 Mich App LEXIS 2558 (Mich.

The next best alternative is to have an attorney who serves as a mouthpiece for the child and expresses a child's voice directly to the finder of fact. There is inevitably some dilution in that voice as well, as the tone, inflection, exact wording, and emotion may often be lost in translation. Yet, if an attorney adds a gloss or interpretation to the child's wishes, or worse yet, ignores the child's preferences entirely, that child's voice has been diluted at best, and possibly extinguished, in the proceedings. Even if one is not persuaded that this dilution is entirely disempowering to a child, particularly one who is most likely undergoing trauma, it is important to think about the effect on the operation of law. The finder of fact now makes a decision without hearing all positions clearly and fully articulated.

Hence, this Article makes the claim that American states should reflect upon the broad aspirational goals of Article 12 of the CRC, borrow the CRC and/or New York language as a model for formulation of uniform child-centered rules about the role of the attorney for the child, and also be cognizant of child-oriented goals in practice as well.

II. OVERVIEW: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The CRC is arguably the most widely and swiftly ratified United Nations human rights treaty existing.⁴ Its history dates back to 1924, when the League of Nations adopted a Declaration on the Rights of the Child.⁵ A broadened version of the Declaration was adopted by the United Nations in 1979. Then, over the course of a decade, summits were held internationally to fine-tune the wording of the treaty, which was thereby unanimously adopted in 1989 by the United Nations General Assembly.

To date, almost two hundred countries have signed the CRC, and all but two of those countries have ratified the treaty.⁶ Notably, the United States and Somalia are the only two countries that have not ratified the CRC.⁷

When a country signs, but does not ratify a treaty – as in the case of the

Ct. App. 2009); Judith Cashmore & Patrick Parkinson, *What Responsibility Do Courts Have To Hear Children Voices?* 15 INT'L J. OF CHILD. RTS 11-13 (2007) (addressing the issue in New Zealand and Australia). Furthermore, presumably the attorney for the child has an established relationship with the child already and should be trained in representing and interviewing traumatized children. We cannot likewise expect all judges to have relationships or bonds with all of their child litigants, nor be trained in social science literature as to the appropriate lines of questioning for traumatized children.

4. Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess. 61st plen. mtg., Annex, U.N. Doc. A/44/25 (1989); Maria Grahn-Farley, *International Child Rights at Home and Abroad: A Symposium on the UN Convention on the Rights of the Child: I. Foreword: Crossing Borders*, 30 CAP. U. L. REV. 657 (2002); CHILDREN'S VOICES: RESEARCH, POLICY & PRACTICE 12 (Anne B. Smith et al. eds, Pearson Education New Zealand 2000) [*hereinafter* "Smith, Taylor & Gollop"].

5. See *Geneva Declaration on the Rights of the Child*, League of Nations Doc. (1924), available at <http://www.un-documents.net/gdrc1924.htm>. (last visited November 11, 2010).

6. Smith, Taylor & Gollop, *supra* note 4, at 12.

7. *Id.*

United States with respect to the CRC – arguably that country is still bound not to contravene the treaty's object or purposes.⁸ Thus, to some extent the CRC retains force and legitimacy even in the United States. Some American state courts and scholars have noted that particular provisions of the CRC may eventually have the force of customary international law.⁹

As a whole, the CRC conveys humanitarian, economic, social, cultural, political and legal rights to the individual child, thereby allowing children's rights to parallel those of adults.¹⁰ As Professor Grahn-Farley notes:

The CRC is a unique human rights treaty, not only in its universality, but also in its paradigmatic shift from looking at the child as a passive object based on her needs to looking at the child as an active subject and bearer of her own rights¹¹

8. The issue of whether a non-ratified treaty has force in a particular country is obviously a more complicated issue, which is outside the scope of this paper. I simplify the issue in keeping with the goal of this paper, which looks at the CRC for its inspirational model language and international consensus. For a more in-depth look at the issue of ratification of treaties, see, e.g., Andrew D. Finkelman, *The Post-Ratification Consensus Agreements Of The Parties To The Montreal Protocol: Law or Politics? An Analysis of Natural Resources Defense Council v. EPA*, 93 IOWA L. REV. 665, 725 (“They constrain the parties in a manner equivalent to the effect of an international agreement that the parties have signed but not ratified. In such a case, while not yet bound to perform those obligations, the parties “should [make] no efforts that would defeat the object and purpose” of the recommendations.”) (citing Article 18 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 336, and also citing Christopher C. Joyner, stating “governments . . . remain obliged in spirit, if not in law, not to defeat the object and purpose of the measure, Christopher C. Joyner, *The Legal Status and Effect of Antarctic Recommended Measures*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed., 2003)). See also *Graham v Florida*, 130 S. Ct. 2011 (2010) (Justice Kennedy dissenting) (“While international law is not decisive, it is illuminating.”).

9. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002). Some scholars have argued that the CRC will soon be customary international law given its widespread consensus, See e.g., Gary B. Melton, *Children, Family, and the Courts of the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2039-40 (1993). Professor Jean Koh Peters and her Yale Law students have compiled a comprehensive outline of all U.S. published opinions, which either view the CRC as customary international law, or cite to the CRC. Jean Koh Peters, *How Children are Heard in Child Protective Proceedings in the United States and the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2006). Similarly, Professor Bernadine Dohrn outlines cases where the European Court of Human Rights and the Inter-American Court of Human Rights have incorporated and drawn upon the CRC in legal decision-making. Bernadine Dohrn, *Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 NEV. L.J. 749 (2006).

10. See, e.g., Maria Grahn-Farley, *International Child Rights at Home and Abroad: A Symposium on the UN Convention on the Rights of the Child: Foreword: Crossing Borders*, 30 CAP. U.L. REV. 657, 659-661 (2002); Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention On The Rights Of The Child And Its Consistency With United States Law*, 5 GEO. J. ON FIGHTING POVERTY 185 (1998).

11. Grahn-Farley, *supra* note 10, at 659.

The CRC contains fifty-four “Articles” or sections.¹² The section of particular focus here is Article 12 of the CRC, which says in relevant part: “States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”¹³ Article 12, subsection 2, further states: “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”¹⁴ Thus, the CRC values the voicing of a child’s opinion or view in proceedings pertaining to the child.

Specifically, as Professor Grahn-Farley notes:

Article 12 establishes a general right of the child to participate and be heard in situations concerning the child. Article 12 is the article in the CRC that has most influenced the field of child rights to change the focus from looking at the child as an object of needs to a subject and bearer of her own rights To be able to develop as a human being, the child has to be heard and her opinions have to be respected¹⁵

Keeping in mind any law’s practical frailties and realities, ratifying the CRC is not necessarily consonant with implementing the CRC in practice. For example, many of the ratifying countries to the CRC have grappled with the issue of whether their own laws are indeed in line with the CRC both in policy and practice.¹⁶ Child’s rights scholar Professor Jean Koh Peters contends that while many countries who have ratified the CRC do not in fact comply fully

12. These 54 Articles “cover Provision Rights (to have access to rights such as health care and education), Protection Rights (not to be discriminated against, nor abused), and Participation Rights (civil and political rights).” Smith, Taylor & Gollop, *supra* note 4, at Introduction.

13. United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, 44th Sess. 49th plen. mtg., Annex, U.N. Doc. A/44/736 (1989); 28 I.L.M. 1448 (1989).

14. *Id.*

15. Maria Grahn-Farley, *International Child Rights at Home and Abroad: A Symposium on the UN Convention on the Rights of the Child: I. Foreword: Crossing Borders*, 30 CAP. U.L. REV. 657, 659-661 (2002).

16. See., e.g., Pauline Tapp & Mark Henaghan, *Conceptions Of Childhood And Children’s Voices- The Implications Of Article 12 Of The UN CRC*, in Smith, Taylor & Gollop, *supra* note 4, at 91-109 (noting, that at times, court practices seem slated against children’s voices in New Zealand); Anne B. Smith & Nicola J. Taylor, *The Sociocultural Context of Childhood: Balancing Dependency & Agency*, in Smith, Taylor & Gollop, *supra* note 4, at 1-17 (criticizing the practices of their courts in ultimately often deferring to the adults for direction in England and Australia); Edmund D. Christo, *The Implementation of the United Nations Convention on the Rights of the Child in Trinidad and Tobago* (July 17, 2008) (finding Trinidad and Tobago making progress toward implementing CRC into actual practice).

with the CRC, many states in the United States actually do comply with the CRC.¹⁷ She bases this assertion upon a comprehensive study of 250 jurisdictions worldwide, which surveyed all United States jurisdictions and all signatories to the CRC.¹⁸

This Article addresses primarily the written and aspirational ideals of the CRC and its wide international agreement; it does not assert any argument about international compliance with the CRC. Specifically, the Article looks at current United States laws through the lens of the CRC, utilizing the CRC as “a living document to provide the framework for the development of policy and practice.”¹⁹

If children’s voices are to be expressed to finders of fact based merely upon a policy, but are not expressed in reality inside the courtroom, children as a class are silenced nonetheless.²⁰ This holds true in our United States courts as well; often there are child rights statutes on the book, but such rights are not actualized in practice.²¹ This Article will thus additionally examine the newest laws of the State of New York through this lens to demonstrate a state that is currently trying to close the gap between theory and practice.

III. THE UNITED STATES DEBATE ON THE ROLE OF ATTORNEY FOR CHILD: VIEWING NEW YORK AS A WORKING MODEL

Certainly, the United States has grappled for some time with the complicated issue of children’s voices in legal proceedings. Indeed, the debate surrounding the precise role of an attorney for a child has been ongoing for decades. The issue has been written about, argued about, convened about, and analyzed extensively – yet there is still not a uniform and unanimous role nationwide.

The issue of the proper role of the child’s attorney is especially salient

17. Jean Koh Peters, *How Children are Heard in Child Protective Proceedings in the United States and the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2006). As one example, the United States grants lawyers for children in all juvenile delinquency proceedings. Furthermore, in many American states, children are appointed counsel in other types of proceedings.

18. Peters, *supra* note 17.

19. Smith, Taylor & Gollop, *supra* note 4.

20. Naomi Cahn, *Special Issue on Legal Representation of Children: Responses to the Conference: Representing Children and International Norms*, 6 NEV. L.J. 1232, 1235 (2006) (citing Jean Koh Peters, *How Children are Heard in Child Protective Proceedings in the United States and the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2006)).

21. As is noted in the First Star report with regard to United States child advocacy laws, there is not always a straight correlation between a state’s law and enforcement of the law. “Our assumption is that good law is the cornerstone of any state’s commitment to the rights of its children.” FIRST STAR, A CHILD’S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN, 19 (2nd ed. 2009), available at http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf [hereinafter FIRST STAR (2nd ed.)].

and critical in child welfare proceedings. In such proceedings, the majority of states require an attorney for the child, yet there is variance in whether that attorney plays more of an investigative role instead of an advocacy role. Child permanency or child welfare proceedings are those in which the court determines the future of a parent-child relationship and whether a termination of parental rights is necessary. These child welfare proceedings, as an umbrella category, also encompass proceedings that determine whether a parent or caretaker has committed child abuse or neglect. Different states utilize different terminology (e.g., child protective proceedings, child dependency proceedings, shelter hearings, child welfare hearings, child abuse and neglect proceedings). Fundamentally though, these proceedings are among the most critical, the most sensitive, and perhaps the most traumatic for children. It is during these proceedings that lawyers and judges determine whether a parent or caretaker has abused or neglected a child, and whether or not that parent or guardian may maintain the child in the home temporarily, and ultimately, permanently.

Much of the scholarly literature – including this Article – focuses exclusively upon the role of the attorney in child welfare proceedings as a whole, because there is little variance in the idea that an attorney must advocate for the voice of a child in juvenile delinquency or status offense proceedings. Another substantial body of literature addresses the role of the child's attorney in custody, visitation, and matrimonial proceedings.²² While there is tremendous overlap between private custody proceedings and child protective proceedings, the distinctions are significant. Child protective proceedings involve the government intervening in a family's life, as opposed to a private dispute amongst various caretakers. A child involved in the quagmire of governmental proceedings is already likely feeling fairly powerless and traumatized if removed from home involuntarily, thus making it even more essential to give the child a voice in court.²³ And child protective proceedings correlate primarily with families who are impoverished or otherwise disenfranchised in American society, as discussed *infra*. Therefore, issues of power imbalance and caste systems are ever-present in such proceedings in our Family Courts in the United States.

22. See generally Martin Guggenheim, *The AAMSL's Revised Standards for Representing Children in Custody and Visitation Proceedings*, 22 J. AM. ACAD. MATRIM. LAW. 251 (2009); Linda Elrod, *Client-Directed Lawyers for Children: It is the 'Right' Thing to Do*, 27 PACE L. REV. 869 (2007); Randy Frances Kandel, *Just Ask the Kid!: Towards a Rule of Children's Choice in Custody Determinations*, 49 MIAMI L. REV. 299 (1994); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (Spring 2002).

23. See, e.g., Anne B. Smith et al, *Children In Foster And Kinship Care*, in Smith, Gollop & Taylor *supra* note 4, at 73 & 88.; Katherine Hunt Federle, *The Ethics Of Empowerment: Rethinking The Role Of Lawyers In Interviewing And Counseling The Child Client*, 64 FORDHAM L. REV. 1655 (1996).

A. *Outlining the Various Child Attorney Paradigms in the United States*

Despite the reams of paper written on the topic, the debate concerning the role of the child's attorney perseveres. Prominent national organizations have grappled with and put forth their own model rules for attorneys for children.²⁴ These model rules have been analyzed and dissected –necessarily for such a complicated decision -- yet still, no national consensus exists in the United States of America.

The three most prominent models in the United States describing the role of the child's attorney in child welfare proceedings are: (1) the true advocacy/counsel role, also known as the “expressed interests/wishes” model; (2) a “best interests” or guardian ad litem (“GAL”) role;²⁵ and (3) a hybrid role melding of the two.²⁶ The hybrid model should be distinguished from some state laws, which permit two separate advocates for an individual child: one attorney and one lay advocate.

While the CRC does not explicitly posit a particular paradigm for the attorney for the child, I argue that it is most aligned with a true advocacy approach, which is addressed *infra*. To provide a context, I will briefly mention the principles of the dominant paradigm - the best interests model - as well as the hybrid model which attempts to meld the two constructs.

In a best interests model or GAL model, the predominant model in the United States, the child's attorney is to determine and convey to the court what is in the “best interests” of that particular child in that particular proceeding.²⁷

24. E.g., The National Association of Counsel for Children (NACC) and the American Bar Association (ABA). The newly revised version of the ABA Proposed Model Act on the Representation of Children has language consistent with the concepts in this paper, including that once a child is capable of forming an opinion to his or her attorney, that attorney should adopt a more traditional lawyer-client relationship.

25. Technically, in some eyes, best interests lawyers and guardian ad litem lawyers are two different models –a best interests lawyer having to be an attorney, a GAL may or may not be an attorney. Yet, I am conflating the two for purposes of this Article because, like many, I see them as one and the same – a representative or lawyer who is determining “best interests” instead of conveying the voice of the child. See Jane Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioner on Uniform State Laws Recommendation on Child Representation*, 6 NEV. L. J. 1385, 1389 (2006). Additionally, some scholars have outlined up to six models, but I am grouping them into three for purposes of this Article.

26. For critique of the hybrid model, note: “But the mere expression of a child's wishes, by a lawyer who immediately turns around and undermines the child's stated position by arguing for, or presenting evidence supporting, the opposite result, hardly provides the child with a meaningful voice.” Gary Solomon, *Giving Children a Meaningful Voice: The Role of the Child's Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings*, available at <http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf> (referencing Merrill Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, 10/6/92 N.Y.L.J., 1) (“How can an attorney seriously state one position based on the child's wishes and then, without further ado, take a different and conflicting position based on his perception of the child's best interests?”).

27. For a history of the guardian ad litem role and the mandates of the Child Abuse Prevention and Treatment (CAPTA) and several later modifications to it, see Child Welfare

Yet, there is no requirement that such a lawyer listens to or even determines what that child wants. Hence, many critics would say in effect that this attorney is serving the court – or the state - more than serving his or her client, the child.²⁸

In a hybrid model, the attorney for the child is often named the lawyer-guardian ad litem, thus melding the two main paradigms into one role. As one example, the Michigan statute offers guidance about the role of the attorney in the following language: “The child’s wishes are *relevant* to the lawyer-guardian ad litem’s determination of the child’s best interests, and the lawyer-guardian ad litem shall weigh the child’s wishes according to the child’s competence and maturity.”²⁹ The hybrid attorney can often be faced with the untenable position of having to argue for a position directly inapposite to what the child client has expressed.

The best interests and hybrid models have been criticized for allowing attorneys too broad, and often unbridled, discretion in determining what is in a particular child’s “best interests.”³⁰ Some scholars have asked why the best interests of the child paradigm is dominant, asking such poignant questions such as: “(1) Are adults concerned that recognizing children’s voices will erode adult power or the very institution of family? and (2) [Is it] that Family Court is involved in ‘childwork’ - children are the objects of concern, the

Information Gateway, *About CAPTA: A Legislative History*, <http://www.childwelfare.gov/pubs/factsheets/about.cfm> (last visited November 11, 2010). Additionally, a detailed and thorough review of the history of CAPTA and its change to other funding schemes, see LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, pt. XI (A) (2009). As Professor Sarah Ramsey explains the origins of the guardian ad litem: “A major impetus for the states adopting legislation that provided for counsel for children was the 1974 Child Abuse Prevention and Treatment Act. The Act made a state’s receipt of federal funds for programs under the Act contingent on the state’s fulfilling certain conditions, including a requirement that the state shall: ‘Provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings. It is not clear from this requirement what role the child’s representative is to play and the legislative history of the Act does not indicate what kind of representation was desired. Neither the Act nor the Department of Health and Human Services regulations require that the guardian ad litem be a lawyer.’” Sarah H. Ramsey, *Representation Of The Child In Protection Proceedings: The Determination Of Decision-Making Capacity*, 17 FAM. L.Q. 287, 289 (1983).

28. Certainly, the issue is much more complicated and nuanced than how it is stated, but the inherent paternalism is one of the chief complaints of the best interests model. See, e.g., Martin Guggenheim, *A Law Guardian by Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 809, 827-28 (2007); Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006); Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 CAP. U. L. REV. 411, 442 (2008).

29. MICH. COMP. LAWS § 712A.17d (1)(i) (1939) (emphasis added).

30. See, e.g., GARY SOLOMON, JUVENILE RIGHTS PRACTICE TRAINING MANUAL: VOL. 1 REPRESENTING CHILDREN IN CHILD WELFARE PROCEEDINGS, PART TWO: ROLE OF CHILDREN’S ATTORNEY (The Legal Aid Society 2009); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. OF PUB. INT. L. 106 (Spring 2002) (addressing issue in custody cases).

subjects of legal applications . . . ”³¹

Critics of the models also address the potential for race and class discrimination and inherent power imbalance. As Professor Randi Mandelbaum notes, while highlighting the data that the lawyers and judges in Family Court are most often of a different race, class and culture of the litigants:³²

The inevitable result is that many lawyers are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own. Not only is there a significant chance that these decisions and ensuing positions may be against the best interests of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative, but it also leads to a system where the position taken by a child’s attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child.³³

Issues of race, ethnicity, and class in the child protective system cannot be overlooked when the city of Chicago, for example, has more than 95% of the children in foster care classified as African-American and New York City’s statistics are similarly racially and economically imbalanced.³⁴ In Central Harlem, in 1998, one out of 10 children were placed in foster care, yet fewer than 200 children total from the wealthier Upper East Side of Manhattan total were in foster care.³⁵ Certainly, any race and class differences amongst the

31. Pauline Tapp & Mark Henaghan, *Conceptions Of Childhood And Children’s Voices-The Implications Of Article 12 Of The UN CRC*, in Smith, Taylor & Gollop, *supra* note 4, at 91-109.

32. See, e.g., Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. at 36 (2000); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997); Melissa L. Breger, *Making Waves Or Keeping The Calm: Analyzing The Institutional Culture Of Family Courts Through The Lens Of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55 (2010).

33. *Giving the Children a Meaningful Voice: The Role of the Child’s Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings*, available at <http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf> (citing Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1 at 36 (2000)).

34. MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS?* 205 (Harvard Univ. Press 2005).

35. *Id.* (citing DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (Basic Civitas Books 2002); Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race: Association of*

children represented and the attorneys themselves – as well as any age and education distinctions— may not play a role at all in any approach involving the legal representation of children. Yet, if a lawyer is conveying the express wishes of a child instead of substituting the attorney's own judgment, there is much less of a chance that any variance in values enters the equation.

States that are closest to being consonant with CRC can become even more aligned with its Article 12 by adopting a true advocacy approach in child representation to ensure every child's voice is heard. This Article will utilize the recently enacted guidelines and laws of New York State as a case study to demonstrate the comparison between laws, and to highlight a state that is truly moving forward in the arena of child rights-oriented, child-centered statutes.

B. Hearing the Child's Voice in the Direct Advocacy Paradigm: New York as an Example

New York State has predominantly leaned toward a true or direct advocacy approach, and its statutes advise that counsel for the child "express [the child's] wishes" in, *inter alia*, termination of parental rights and child protective proceedings.³⁶ A direct or true advocacy approach is one in which the lawyer's role is seen as being the child's mouthpiece and voice in the courtroom. In other words, the child's lawyer is committed to articulating and achieving the client's interests. In the direct advocacy model, children's attorneys strive to treat their child clients no differently than if they were representing an adult client, whenever possible.

Specifically, the pertinent New York statute, the Family Court Act ("F.C.A."), states:

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of [attorneys for children] for minors who often require the assistance of counsel to help protect their interests and to

the Bar of the City of New York, 6 N.Y. CITY L. REV. 61 (2003). Sarah H. Ramsey, *Representation Of The Child In Protection Proceedings: The Determination Of Decision-Making Capacity*, 17 FAM. L.Q. 287, 295-297 (1983); see also U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT (1997): REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM 4-5 (1999).

36. N.Y. FAM. CT. ACT § 241 (McKinney 1988). See also Jane Spinak, *When Did Lawyers For Children Stop Reading Goldstein, Freud and Solnit? Lessons From the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L.Q. 393, 394.

help them express their wishes to the court.³⁷

New York's system of direct advocacy child representation earned the state an overall grade of "A" in a recent comprehensive national report.³⁸ This report was revamped and updated in 2009 by First Star, a non-partisan group which evaluated each state on a series of five factors. These factors are: (1) whether counsel is provided to children in child welfare proceedings; (2) the duration of the child's attorney representation; (3) whether the attorney advocates for the express wishes of the child in a client-directed manner; (4) what education and training is required for child attorneys and whether it is multi-disciplinary; and (5) to what extent children have actual rights derived from their status as parties. The report gives "extra credit" if the state law has addressed caseload standards. Each state is then given a grade from 1-100 points with each of the five factors worth 20 points. In 2009, New York, as an example, ranked the third highest state out of the entire nation, receiving a score of 98, an "A" grade.³⁹

1. Highlighting Gaps within New York's Direct Advocacy Model

Yet, even though New York earned a stellar grade in both of the First Star reports, the role of the child advocate in New York needs to be even more precisely defined. A number of recent mandates have aided in this task.⁴⁰ Most notably, in November 2007, former Chief Judge Judith S. Kaye issued Section 7.2 of the Rules of the Chief Judge,⁴¹ when she sought to clarify the role of the attorney for the child in New York. Specifically, the new Rules in relevant part, state:

37. N.Y. FAM. CT. ACT § 241 (McKinney 1988).

38. FIRST STAR, A CHILD'S RIGHT TO COUNSEL: FIRST STAR'S NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN (1st ed. 2007), available at <http://www.firststar.org/LinkClick.aspx?fileticket=Zh0LWwpfvRA%3d&tabid=74> (last visited on Nov. 11, 2010) [hereinafter FIRST STAR (1st ed.)]. The 2nd edition from 2009 rates two states with an A+, Massachusetts and Connecticut. New York still earned a grade of A in the 2nd edition and was ranked 3rd in the nation out of all states. FIRST STAR (2nd ed.), *supra* note 20.

39. FIRST STAR (2nd ed.), *supra* note 20. This amounted to 20 points in each category except for the category providing for children to be present at their own proceedings. In 2007, New York received a score of 94, also an "A" grade. *Id.*

40. For example, the New York State Bar Association Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings were issued in June 2008; the New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings were issued in June 2007; the Administrative Board of the Courts of New York issued a policy statement, entitled "Summary of Responsibilities of the Attorney for the Child," in October 2007; and the Legal Aid Society, Juvenile Right Practice re-issued its practice manual policy to clarify roles in 2008.

41. N.Y. CT. RULES § 7.2 (2007); 22 N.Y.C.R.R. 7.2.

[T]he attorney for the child must zealously advocate the child's position. (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances. (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests. (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.⁴²

Section 7.2 of the Rules of the Chief Judge of New York also changed the title of the child advocate from "Law Guardian" to "Attorney for the Child" to ensure that the title more accurately reflected the lawyer's role as a true advocate for the child. On April 14, 2010, former New York Governor David Paterson indeed signed this change of name into law, thereby reforming

42. This language is not entirely new or entirely controversy-free, (*cf.* Martin Guggenheim's analysis of similar language), yet it still represents a positive step toward validating child's voices being heard by a court. It is also important to keep in mind New York State Rules of Professional Conduct states:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

Additionally, Rule 1.14(b) states that:

"[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

N.Y. RULE OF PROF'L CONDUCT R. 1.14, available at <http://www.nysba.org/Content/ContentFolders30/CommitteeonStandardsofAttorneyConduct2/Rule1.14.pdf> (last visited Nov. 11, 2010).

multiple statutes.⁴³

A change in nomenclature may seem an odd way to reform a law. Yet, the term “law guardian” is reminiscent of “guardian ad litem” and served to perplex lawyers and judges.⁴⁴ As mentioned above, in many jurisdictions the guardian ad litem is often not an attorney and serves more of an investigative and reporting arm of the court. Thus, the word “guardian” in the title for the attorney for the child needed to be eliminated to better clarify the role and duties of the attorney.⁴⁵

Just as when countries which have ratified the CRC do not always reflect the CRC goals in practice, even when a particular state has a codification of the role of attorney for the child, there can be variance in practice by region within that state because of the multitudinous factors involved. Illustratively, despite a direct advocacy paradigm in New York State, upstate rural regions and urban regions often differ from suburban downstate and New York City regions.

There are a number of hypotheses as to why this variance occurs.⁴⁶ Some would posit that the inconsistency in practice has been the result of the amorphous term “law guardians” as discussed above. While this vagueness is most likely a legitimate factor, so are factors such as the level of training, the types of practices, accountability to an institutional provider, and the disparate cultures of Family Courts regionally. All of these factors may help to explain why attorneys for children statewide and nationwide may interpret their roles differently.⁴⁷

One prominent example of an agency singularly focused upon the true advocacy/ expressed interests paradigm is the The Legal Aid Society, Juvenile Rights Practice (“JRP”) of New York City.⁴⁸ JRP is the largest and one of the most respected institutional provider of legal services for children nationwide. JRP provides a system of accountability, rigorous training, and tremendous

43. Bill A7805B/S.5461-B, amending S1101 of CPLR, SS503 & 508 of the Executive Law; SS35 & 35-a of the Judiciary Law; the Family Court Act, generally; SS2306 & 2782 of Public Health law; and SS358-a, 372, 383-c, 384, 384-a, 384-b, 409-e, 409-f & 422 of the Social Services Law (substituting the term “attorney” or “counsel” for “law guardian.”), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07805&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited Nov. 11, 2010).

44. SOLOMON & SOPHER, JUVENILE RIGHTS PRACTICE TRAINING MANUAL 5 (The Legal Aid Society 2009); Andrew Schepard, *The Law Guardian: the Need For Statutory Clarification*, N.Y.L.J., Sept 14, 2000, at 3.

45. According to the recently signed bill’s summary, it “relates to the representation of children; replaces the term ‘law guardian’ with the term ‘attorney for the child’ to more accurately reflect the attorney’s role.” Bill A7805B/S.5461-B, available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07805&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited Nov. 11, 2010).

46. This is an area worthy of further review and research, but outside the scope of this particular Article.

47. See Melissa L. Breger *Making Waves Or Keeping The Calm: Analyzing The Institutional Culture Of Family Courts Through The Lens Of Social Psychology Groupthink Theory*. 34 LAW & PSYCHOL. REV. 55 (2010).

48. Formerly Juvenile Rights Division (“JRD”).

legal and research support. JRP also maintains a staff of paralegals, social workers and investigators as part of the team. As part of the intensive training that is mandatory for new attorneys, JRP instills in each new lawyer the ethos that the child's voice and child's wishes are the governing force behind legal representation. In 2008, JRP revamped its manual to include a thirty-six page document based solely upon the issue of child representation, which further clarifies its positions and grapples with some of the tough issues in maintaining a true advocacy approach.

2. Grappling with Thorny Issues Arising in Direct Advocacy Paradigms

One valid issue in children's rights law generating much discussion is how to represent a non-verbal child. Non-verbal children would be children truly not capable of clearly expressing their wishes due to age or disability, and thus their "voices" cannot be heard or conveyed to the court. Leading family law scholar and Professor Martin Guggenheim even argues that it is somewhat of a farce to have lawyers for non-verbal children, as representing such a child may encourage a lawyer to substitute his own judgment and views for that of the child's.⁴⁹ Guggenheim asserts that perhaps non-verbal children are better with no attorney at all, or even a non-lawyer best interests advocate.

Across the nation to date, lawyers are appointed to children in child welfare proceedings, even if those children are non-verbal. Too often, in the case of young children, however, attorneys decide not to visit their child clients at all because they reason that the child cannot communicate. In such a case, where the attorney is not even meeting his or her client, Professor Guggenheim's position is validated.

For those who do not see the need to meet with a young child client, one must consider that there are other options and duties when an attorney for the child is appointed. As one example, JRP instructs its attorneys to study the child to assess the child's physical well-being, to examine the child's living conditions and interactions with caretakers, and to speak to collateral sources. This snapshot of the child offers a richer and more nuanced context to an attorney's legal representation, thus preventing an attorney from resorting to assumptions and choosing not to visit with a non-vocal child client simply because of the child's inability to communicate.

Similarly, scholars have argued that there are "children [who] may be too

49. See, e.g., Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996). Prof. Guggenheim states, with regards to representing very young children, "Peter Margulies, for example, wisely recommends that lawyers representing impaired elderly clients make decisions on behalf of the client by taking into account the client's lifetime commitments, where they can be determined, and the objective fairness of the various alternative decisions. It is not possible to do the same thing on behalf of clients who have no lifetime experience and have not formed, no less revealed, their values to anyone." *Id.*

young to participate formally, but their age should not necessarily prohibit communication with them since 'listening to' and observing young children is possible."⁵⁰ The very young child is still entitled to a voice, and as Professor Jean Koh Peters notes, the CRC does not require that a child be mature or of a certain age. For example, even a three-year-old can assert her view that she wants to go home to her mother, and such a view should be conveyed to the court, regardless of whether it is indeed honored by the ultimate fact-finder.⁵¹ Even in Judge Kaye's mandate, attorneys must express the very young child's wishes, if the child wants the attorney to do so.⁵²

Koh Peters posits that when attorneys are the vehicle for conveying a child's voice in the courtroom, those attorneys should limit themselves to representing the child's "legal interests" even when representing non-verbal children.⁵³ To represent a child's legal interests is to examine the "child in her context" and investigate her unique family and personal environment, yet ultimately only proffer to the court a position which the legal proceeding has the authority to address. Specifically, a lawyer for children needs to remain cognizant and alert to the inclination to substitute personal judgment by considering questions, such as: (1) "If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?" and (2) "Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?"⁵⁴ Similarly, other scholars and practitioners advocate for lawyers to spend significant time meeting with the child client in order to ascertain her unique perspective. Engaging in this process may reconcile several models of lawyering for children.⁵⁵

50. Anne B. Smith & Nicola J. Taylor, *The Sociocultural Context of Childhood: Balancing Dependency & Agency*, in Smith, Taylor & Gollop, *supra* note 4, at 14 (citing Pugh and Selleck, *Listening to and Communicating with Young Children in the Voice of the Child: A Handbook for Professionals* 120-136 (Falmer Press, London 1996) ("Also, participation by children helps them to accept the decision made about them." *Id.*).

51. Jean Koh Peters, *Special Issue on Legal Representation of Children: Article: How Children are Heard in Child Protective Proceedings in the United States and the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2006).

52. In fact, Rule 7.2 is silent on the age issues. N.Y.CT.RULES, § 7.2 (2007); N.Y. COMP. CODES R. & REGS. TITLE 22, § 1200.14. Many argue that seven be the bright line because children as young as seven can be charged with juvenile delinquency. JRP (and the new standards of the New York State Bar Association) propose following the wishes of children as young as seven for several developmental reasons, and also because seven-year-old children in many states can actually be charged with juvenile delinquency. For another perspective, see Professor Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV.L.J. 1240 (2006) (arguing for a bright-line distinct role).

53. Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1507, 1511 (1996).

54. *Id.*

55. See, e.g., ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES* (Family Law, American Bar Association 1993).

As a concrete example of this process, the lawyer for the child is not expected to follow blindly any statement asserted by a child, but rather to delve into the nuances of what the child is saying to help the child determine her true wishes.⁵⁶ Critics of a true advocacy model talk about how children are often coached, or worse yet, alienated against one parent. The lawyer needs to counsel the child as she would any other client. If a child were to say "I want to live with my parents" – this could be absolutely the truth at face value, but it could also be said through layers of complexity: "I don't want to live in foster care" or "My parents promised me I wouldn't have to go to school, if I told you that" or "I feel guilty speaking against my parents." These are valid explanations on their own, but the attorney for the child would best inquire further about why a child is making a particular request to ascertain her true voice. Then, as in Judge Kaye's mandate, the attorney can counsel the child as to her options -- careful to keep in mind the power imbalance between attorney and client, adult and child. In the final analysis, the attorney should express the child's whole voice to the court, as the attorney would do for any other client within the context of a lawyer's role and professional responsibilities.

Critics of a true advocacy approach additionally argue that children often vocalize positions, which then place them in harm's way. Yet, these critics need to be mindful that checks and balances already exist in our child welfare system.⁵⁷ In other words, the attorney for the child in a court proceeding is just one voice of many in a child welfare proceeding and is not necessarily the determinative voice. The Family Court Judge will hear from the agency and caseworker and the parents' attorneys. Perhaps the judge will also hear from a mental health professional, educational professional, and/or CASA volunteer. After hearing the voices of all attorneys, advocates, and litigants, the Court ultimately makes the final determination upon assessing all voices.⁵⁸

A child has a right to be heard in the proceeding just as any other litigant, particularly because it is the child's life which is arguably impacted the most by any resultant decision in the proceeding. And if we listen to children on this very issue, many children would choose not to have a lawyer at all rather than have one who does not express their true voices.⁵⁹

56. The NACC rules state: "Client directed representation does not include 'robotic allegiance' to each directive of the client." NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, REVISED VERSION OF ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES B-4 (1999).

57. FIRST STAR (1st ed.), *supra* note 37 ("Client-directed representation empowers the court to make the most prudent and wise decision as to the best interests of the child").

58. See e.g., Robert E. Shepherd, Jr. & Sharon S. England, *I Know the Child Is My Client, But Who Am I?*, 64 *FORDHAM L. REV.* 1917 (1996). Rarely are juries utilized in such proceedings nationwide. For an analysis of the use of juries in child protective proceedings, see Melissa L. Breger, *Introducing the Construct of the Jury Into Family Violence Proceedings and Family Court Jurisprudence*, 13 *MICH. J. GENDER & L.* 1 (2006).

59. We should not underestimate the effect of having a voice through an attorney can have on a child, in terms of that child's sense of empowerment but also in terms of adhering to and permanency of orders. See *infra* note 62 and accompanying text. As Professor Guggenheim

Thus, if an attorney for the child substitutes his or her own judgment or opinion, that attorney imposes a barrier between the court and the child's voice and creates even more dilution to the child's true voice. This is disempowering to children who are already disenfranchised and silenced for various reasons, such as class, race, age, and status in society.

C. Recognizing A Child's Voice As A Meaningful Component Of Legal Decision-Making

Children's voices have been stifled, diluted or ignored in the court system, and this is partly due to the dominant paradigm in children's legal theory focusing upon "best interests," while often overlooking the voices of our youth. The dilution of children's voices in the courtroom is not only disempowering and disenfranchising to youth, but is also misguided.

The complexity and nuance of the concept of a child's voice in the courtroom, particularly as it relates to children's rights and justice, is beautifully articulated by leading critical child-centered theorist, Professor Annette Appell: "Children's voices should inform and guide justice, but its variety, softness and youth easily confound that goal. Children are extraordinarily diverse and each child inhabits multiple roles . . ." ⁶⁰ In representing children, Appell goes on to urge that:

[F]inding and respecting a child's voice means doing our best as adults and professionals to mute our voices. That means doing our best not to project our class, race, gender and professional orientation or values onto our clients and their dilemmas . . . We must have faith in their wisdom and their identity as far away from our own wisdom and identity as our

states: "[C]hildren have contacted me periodically complaining about their law guardian. Their complaints are strikingly similar. They all told me that they wanted a lawyer who would fight for them...if they could not have a lawyer who could seek what they want, they would much prefer not having a lawyer at all...the core meaning of a lawyer in American culture is dramatically at odds with the role and purpose of a law guardian." Martin Guggenheim, *A Law Guardian by Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 805-806; *see also* Theresa Hughes, *A Paradigm Of Youth Client Satisfaction: Heightening Professional Responsibility For Children's Advocates*, 40 COLUM. J.L. & SOC. PROBS. 551 (2007); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663 (Summer 2006); Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163 (2008); Miriam Aroni Krinsky and Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L. J. 1302 (2006); *cf.* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

60. Annette R. Appell, *Special Issue on Legal Representation of Children: Article: Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 713 (2006).

clients may be.⁶¹

In a true advocacy paradigm, a lawyer's role is certainly not to merely parrot the child's voice in the courtroom and end there. As in any other client-directed advocacy paradigm, a lawyer is also a counselor and adviser of the panoply of options to a client.

As is the case in many Family Court cases, procedural justice is critical to all litigants;⁶² the fairness of the processes themselves often weigh more importantly than the result in determining a litigant's sense of justice. In this regard children should be allowed to voice their opinions about matters which involve their own lives.⁶³ Children need to be meaningfully engaged in the legal processes themselves, not just the outcomes or enforcement.⁶⁴

61. *Id.* at 715.

62. *See, e.g.* Melissa L. Breger, Gina M. Calabrese, and Theresa A. Hughes, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries and Judges*, 44 S.C.L. REV. 303 (2004); Melissa L. Breger, *Introducing the Construct of the Jury Into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 2 (2006). *See also*, Miriam Aroni Krinsky and Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings* 6 NEV. L. J. 1302 (2006).

63. *See, e.g.*, Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561 (2005) ("Even when the hearing outcome is negative, people treated fairly, in good faith, and with respect, experience greater satisfaction with the result and are more likely to comply with the decision rendered by the court...they may even feel they have voluntarily chosen the course that is handed down by the judge. These feelings of 'voluntariness' rather than coercion tend to produce greater compliance with the results of the hearing. In observing how George was often treated by his caregivers and the many decision-makers who exercised dominion and control over his life both before and after our Clinic was appointed as his attorney ad litem, our students noted how excluding him from the process, without first giving him opportunity to heard, denied him both voice and validation."); Anne B. Smith & Nicola J. Taylor, *The Sociocultural Context of Childhood: Balancing Dependency & Agency*, in Smith, Taylor & Gollop, *supra* note 4, at 13 (citing P. F. Tapp, *Use of the United Nations Convention on the Rights of the Child in the Family Court*, in PROCEEDINGS OF THE FAMILY LAW CONFERENCE 235-264 (Family Law Section of the New Zealand Law Society 1998)).

64. While outside the scope of this particular Article, I would argue that children's law is lagging and is an outlier to the progressive developments in other areas of law, such as mental disability and elder law, which are trending toward pure advocacy even when clients have limited capacity. I thank my Albany Law School colleagues, particularly Professors Evelyn Tenenbaum, Nancy Maurer and Tim Lytton, for raising these issues when I presented this paper at an Albany Law School Faculty Workshop. Specifically, there are similar issues representing the elderly and that NY's Section 81 Mental Hygiene Law "functional competence" laws have reconciled some of these issues, as well as parallels in the areas of disability rights and clients with "diminished capacity. *See also* Martha Minow, *Children's Rights: Where We've Been, And Where We're Going*, 68 TEMP. L. REV. 1573, 1579 (1995) (even those in comatose states arguably have self-determination rights).

IV. CONCLUSION: SYNTHESIS OF UNITED NATIONS AND UNITED STATES LAWS

The widespread ratification of the CRC represents an international consensus view that children should have a voice in their own proceedings.⁶⁵ This Article is not specifically positing that the United States ratify the CRC treaty – although ratification would certainly be a positive movement—but rather that the United States uniformly embrace the aspirational goals of the CRC Article 12 and the international norm. Focusing more closely upon the jurisdictions within the United States, this Article offers the laws of the State of New York as one positive example. New York is close to meeting the CRC mandate that children have “the right to express [their] views freely.” All states, including New York, need to ensure that the legislative ideals are implemented statewide in a consistent and mandatory fashion so that children’s voices are as unfiltered as possible.

By contrasting laws in the United States to the ideal language of the CRC, I hope to highlight the fundamental importance and essence of listening to our children’s voices in the courtroom, as leading scholars have been urging for decades.

We should strive to enact a uniform standard nationwide. Specifically, other states in the United States should follow New York State’s lead in developing a true advocacy approach to hear children’s express wishes and voices in the courtrooms with all their depth and complexity. Only then can the United States as a country accurately align itself with the international consensus embodied in Article 12 of the United Nations Convention on the Rights of the Child and be truly compatible with the child’s right to be heard. Children’s voices must be heard, and every client, even a young child, deserves nothing less. Until children can be fully heard in court, their voices remain absent, or at best diluted, from the processes of the very legal system intended to help them.

65. See, generally Anne B. Smith & Nicola J. Taylor, *The Sociocultural Context of Childhood: Balancing Dependency & Agency* in Smith, Taylor & Gollop, *supra* note 4, at 13.

TRIPS ARTICLE 31BIS AND H1N1 SWINE FLU: ANY EMERGENCY OR URGENCY EXCEPTION TO PATENT PROTECTION?

Dawn Dziuba

SUMMARY

This Article examines the application of the emergency exception to patent protection as embodied in TRIPS Article 31, along with the recent Article 31bis amendment. This Article also explores economic and policy concerns surrounding the application of the emergency exception using HIV/AIDS and bird flu as examples. Finally, this Article examines the potential application of the emergency exemption in the case of the swine flu/H1N1 virus.

I. BACKGROUND OF TRIPS AND OF THE ARTICLE 31BIS AMENDMENT

This section discusses the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) Article 31, along with the World Trade Organization (“WTO”) decision that led up to the amendment 31bis. The WTO is an international organization that deals with rules of commerce and trade between nations.¹ The WTO administers the TRIPS agreement, which regulates intellectual property rights among its members.² This Agreement is important because the interpretation of relevant law governing patents may impact the manufacture, distribution and spread of medication in times of crisis. This section focuses on the section of TRIPS that would apply in times of national emergency.

A. ARTICLE 31

Article 31(b) provides an exception to the general prohibition against the use of patentable subject matter without authorization of the rights holder. This “other use” exception applies only in certain circumstances.³ Specifically,

1. See World Trade Organization homepage, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 22, 2010).

2. See Agreement on Trade Related Aspects of Intellectual Property Rights, available at <http://www.worldtradelaw.net/uragreements/tripsagreement.pdf> (last visited Dec. 22, 2010).

3. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 31(b),

Article 31(b) provides that:

[S]uch use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly⁴

Thus, the “other use” exception can only be applied in circumstances of “national emergency or “extreme emergency.” The language of TRIPS is ambiguous in that it does not provide a definition of “national emergency” or “extreme urgency”⁵ and gives no other guidance for what circumstances would qualify as such. But this language was intentionally left vague, and has produced substantial discussion regarding the scope of these terms.⁶ It is arguable whether these terms include HIV or AIDS, the bird flu, chronic conditions, or others medical scenarios.

Even after the Doha Declaration,⁷ scholars are undecided as to whether the TRIPS ambiguities have been resolved.⁸ Specifically, the argument is that the Declaration fell short of defining the language with any certainty and granted power to individual WTO members to define for themselves what constitutes a national emergency.⁹ According to Jennifer Bjornberg:

Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Agreement].

4. *Id.* (emphasis added).

5. *Id.*

6. Angela G. Thornton-Millard, *Intellectual Property Rights and the AIDS Epidemic in Sub-Saharan Africa*, 11 *TRANSNAT'L L. & CONTEMP. PROBS.* 517, 532 (2001).

7. The Doha Declaration provides for circumstances where governments may issue compulsory licenses on otherwise patented medications when deemed necessary to protect the public health. See <http://www.worldtradelaw.net/doha/tripshealth.pdf> (last visited Dec. 22, 2010).

8. Jennifer Bjornberg, *Brazil's Recent Threat on Abbott's Patent: Resolution or Retaliation?*, 27 *Nw. J. INT'L L. & BUS.* 199, 214 (2006).

9. *Id.*

It is not clear, for example, that the WTO requires that Brazil be steeped in disease before declaring the compulsory licensing a necessity. The licensing of a medication against the will of the patent holder may be a necessary means of averting such disaster. It is unclear, however, how well an argument such as this would hold without some clear declaration from the WTO. As the Doha Declaration shows, the WTO has been hesitant to provide a concrete definition of “national emergency” on which an outcome could be easily predicted.¹⁰

However, the lack of a definition may be necessary to give individual nation states the ability to respond rapidly to conditions that constitute a “national emergency” or “extreme urgency” relative to the circumstances that formulate the “norm” for that particular country.

B. WAIVER

In the event of national emergency or a circumstance of extreme urgency, Article 31(b) waives the need to obtain authorization from the right holder of a patented product to use that product.¹¹ The waiver concept is important because it means that patent rights will go unprotected if such conditions exist. In the case of a national emergency or circumstances of extreme urgency, companies may not be required to negotiate for use prior to the grant of a compulsory license.

C. DOMESTIC USE REQUIREMENT, WTO DECISIONS, AND THE AMENDMENT

Section (f) of Article 31 imposes a domestic use requirement on any country that invokes the compulsory use exception. It reads: “[A]ny such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use”¹² Professor George Tsai suggests that this means the compulsory use of the patented product has to be “predominantly for the supply of the domestic market of the Member authorizing such use”¹³ He argues that the “domestic use” requirement creates a barrier for poor and less developed countries, and the “barrier comes from the fact that these nations simply do not have, and often are not capable of obtaining, the technological means to engineer and produce generic drugs.”¹⁴ Tsai lists the obstacles to local production as “a lack of skilled labor, a weak financial sector, the

10. *Id.* at 218 (emphasis added).

11. *See* TRIPS Agreement, *supra* note 3, art. 31(b).

12. *Id.* at 31(f).

13. *See* George Tsai, *Canada's Access to Medicines Regime: Lessons for Compulsory Licensing Schemes Under the WTO Doha Declaration*, 49 VA. J. INT'L L. 1063, 1072 (2009).

14. *Id.*

diminished flow of foreign investment, the questionable quality of product, the lack of an efficient system for storing and transporting drugs, and the lack of an enforceable regime of drug legislation.”¹⁵

As a result of these challenges, the WTO modified Article 31(f)'s domestic use requirement and recognized that “exceptional circumstances exist justifying waivers” of the domestic use requirement for pharmaceutical products.¹⁶ On December 6, 2005, the WTO council set forth the considerations underlying its decision.¹⁷ In particular, the Council noted the need “to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPS Agreement”¹⁸ The Council placed particular consideration on “the importance of a rapid response to those needs”¹⁹ After the WTO's decision, the TRIPS council permanently amended “the TRIPS agreement to incorporate the system of compulsory licensing proposed” in the August 30, 2003 decision.²⁰ These decisions reflected the need to implement paragraph 6 of the Doha Declaration, which states, “[W]e recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.”²¹

The decision to approve the amendment to the TRIPS agreement containing Article 31bis was made on December 6, 2005.²² Members of the council were initially given until December 1, 2007 to ratify the amendment, but this deadline has been extended until December 31, 2011.²³

D. ARTICLE 31BIS

Article 31bis provides an exception to certain requirements under Article

15. *Id.* at 1073.

16. *See* TRIPS Agreement, *supra* note 3, art. 31(b).

17. *See* Decision by General Council for TRIPS, Amendment of the TRIPS Agreement, WT/L/641 (Dec. 6, 2005), available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm (last visited Dec 22, 2010) [hereinafter Amendment].

18. *Id.*

19. *Id.*

20. *See* Tsai, *supra* note 13, at 1073.

21. *Id.*

22. *See* Press Release, World Trade Organization, Members OK Amendment to make Health Flexibility Permanent WTO Doc. PRESS/426 (Dec. 6, 2005), available at http://www.wto.org/english/news_e/pres05_e/pr426_e.htm.

23. World Trade Organization, Members Accepting Amendments of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last visited Apr. 27, 2010). Countries that have accepted the amendment include: the United States, Switzerland, El Salvador, Korea, Norway, India, Philippines, Israel, Japan, Australia, Singapore, Hong Kong, China, European Communities, Mauritius, Egypt, Mexico, Jordan, Brazil, Morocco, Albania, Macau, China, Canada, Columbia, Zambia, Nicaragua, Pakistan, and the Former Yugoslav Republic of Macedonia. *Id.*

31(f) with respect to the grant of a compulsory license, along with the exportation of a pharmaceutical product to an eligible importing member.

Article 31(f) provides “any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use[.]”²⁴ The first paragraph of Article 31bis creates an exception to this requirement, and the second paragraph of Article 31bis sets forth the details of the exception as follows:

1. The obligations of an exporting Member under Article 31(f) shall not apply with respect to the grant by it of a compulsory [license] to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s) in accordance with the terms set out in paragraph 2 of the Annex to this Agreement.

2. Where a compulsory [license] is granted by an exporting Member under the system set out in this Article and the Annex to this Agreement, adequate remuneration pursuant to Article 31(h) shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory [license] is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall not apply in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.²⁵

II. INTERPRETING AND APPLYING TRIPS

A. INTENTION OF DRAFTERS

Scholars differ over the intention and purpose of the TRIPs agreement. For example, Professor Aditi Diya Nag writes, “TRIPS attempts to achieve a fair balance between protection of IP rights and social and economic welfare. Therefore, the national emergency exception is not a mere loophole, but an opportunity for the right holder to act with concern for his global surroundings.”²⁶ According to George Tsai, although the language of the TRIPS agreement “is undoubtedly open ended, the humanitarian motivation of

24. See TRIPS Agreement, *supra* note 3, art. 31(b).

25. See Amendment, *supra* note 17.

26. See Aditi Diya Nag, *The Bird Flu and the Invoking of TRIPS Article 31 “National Emergency” Exception*, 34 SYRACUSE J. INT’L L. & COM. 689, 712-13 (2007).

the drafters is clear: the benefits from technological innovation cannot accrue only to the makers of that technology, and consequently, the agreement must protect both manufacturer rights and user rights in a manner conducive to social welfare."²⁷

However, Professor Robert Shapiro has pointed out that "TRIPS was drafted after extensive lobbying by international pharmaceutical manufacturers and reflects many values [favorable] to large multi-national corporations."²⁸ Shapiro further describes the ying and yang embodied in the TRIPS agreement:

TRIPS is based on a private property model that exhibits two rationales in tension with each other. The first rationale focuses on the property owner, as it is an individual's prerogative to do with one's property as one pleases. The underlying rationale of property rights is that property holders should have the freedom to engage in maximally free contracts. In addition, property rights ensure a return on investment. This approach provides an incentive to produce property and as a result, inventors will continue to produce. Thus, there is very little room for government interference.

The second rationale examines the public policy perspective in which property rights can be legitimately encumbered with public regulation to strike a balance between the interests of producers and consumers of intellectual property rights. The public policy alternative is embedded in the provision of TRIPS. There is much discretion afforded in the exceptions that TRIPS allows; for example, it is unclear whether a country must declare a national health emergency to invoke compulsory licensing.²⁹

The debate over the different underlying intentions is important in the interpretation of TRIPS provisions, particularly when key terms are left undefined. As discussed, the lack of clearly defined terms gives wide latitude, and arguably, autonomy, to individual countries determining whether Article 31 applies to them.

B. EMERGENCY USE EXCEPTION QUESTIONS

The emergency use exception might have a negative impact on incentives

27. See Tsai, *supra* note 13, at 1071.

28. See Robert Shapiro, *Patent Infringement During a Time of National Emergency: Are Canadian, American and Mexican Governments Permitted to do so Under Their Domestic Law, NAFTA and TRIPS; If so at what Cost?*, 18 WINDSOR REV. LEGAL & SOC. ISSUES 37, 50 (2004).

29. *Id.* at 50-51.

for patent development and creation. For example, the public health exception “may ultimately serve as a chilling disincentive for research and development of new drugs in the developed countries, which in the long term has the potential of indiscriminately disadvantaging all the peoples of the world.”³⁰ Professor Nag argues that, “[T]here is often a misconception that protection under TRIPS is a burden on the developing world and hence undesirable, if not unfair.” He then points out that “The contrary can often be true.”³¹

However, there are reasons why developing countries would find TRIPS desirable for the public health interest. Nadine Farid writes:

Combating public health crises is a critical component of improving a state’s stability and enabling its growth. These characteristics will better permit a state to operate a functional intellectual property system that properly rewards incentives and allows for legitimate trade, as mandated and structured by TRIPS. Obtaining access to patented pharmaceuticals is necessary to effectively combat public health crises. In turn, managing public health crises with the use of patented pharmaceuticals will only be possible if those pharmaceuticals are made affordable. Thus, in order for TRIPS to be implemented effectively and its goals achieved, there must be a system in place by which developing countries can access affordable pharmaceuticals and stem the public health issues that impede economic development.³²

Similarly, Arnaldo Locavo argues that just like their responses to threats of terrorism, “Governments will act to respond to actual and potential national emergencies even to the point of ignoring the much valued rights of intellectual property holders.”³³ This is consistent with Shapiro’s perspective that “A nation’s survival should trump intellectual property rights . . . [and that t]he international community should come to the aid of developing nations who are struggling with an epidemic in an effort to help supply those citizens with the required drugs.”³⁴

In contrast, Noah Lars, professor of law at University of Florida, cautions against the negative effect of compulsory licenses:

Imagine that the government prohibited drug manufacturers

30. See Arnaldo Lacayo, *Seeking a Balance: International Pharmaceutical Patent Protection, Public Health Crises, and the Emerging Threat of Bio-terrorism*, 33 U. MIAMI INTER-AM. L. REV. 295, 297 (2002).

31. See Nag, *supra* note 26, at 696.

32. See Nadine Farid, *Reconsidering the TRIPS-Based Non-Violation Complaint 2* (2009) (unpublished article, on file with author), available at <http://works.bepress.com/nadinefarid/3/>.

33. See Lacayo, *supra* note 30, at 318.

34. Shapiro, *supra* note 28, at 57.

from generating any profit on sales of vaccines and other critical pharmaceuticals, allowing them to recoup only their expenses for raw materials and counting on their corporate public-spiritedness to continue supplying the market. Although members of the pharmaceutical industry participate in a variety of charitable activities, altruism alone will not maintain product lines that generate little or no profit.³⁵

Thus, the tension between public health and the rights of patent holders affects the discussion of the national emergency exception to TRIPS protection. The case examples below further illustrate this point.

III. CASE EXAMPLES

This section explores the cases of HIV/AIDS and bird flu in relation to the emergency exception of TRIPS.

A. HIV/AIDS

1. SCOPE OF THE EPIDEMIC

Johanna Kiehl has argued that Article 31(b)'s waiver provision could be interpreted in a manner as to not encompass a public health emergency like the HIV/AIDS epidemic.³⁶ In her 2002 analysis, Kiehl projected that the number of HIV infections in Asia and the Pacific region could exceed those in Africa by 2010.³⁷ In comparison, the Joint United Nations Program on HIV/AIDS reported that in 2006 there were an estimated 700,000 people living with HIV in China³⁸ while there were 5.5 million people living with HIV in South Africa.³⁹

Additionally, HIV/AIDs can have economic consequences. According to

35. Lars Noah, *Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs*, 54 S.C. L. REV. 741, 753 (2003).

36. See Johanna Kiehl, *TRIPS Article 31(B) and the HIV/AIDS Epidemic*, 10 J. INTELL. PROP. L. 143, 144 (2002).

37. *Id.*

38. Joint United Nations Programme on HIV/AIDS [UNAIDS] & World Health Organization [WHO], *Asia: AIDS Epidemic Update Regional Summary*, UNAIDS/08.09E/JC1527E (Mar. 2008), available at http://data.unaids.org/pub/Report/2008/jc1527_epibriefs_asia_en.pdf.

39. Joint United Nations Programme on HIV/AIDS [UNAIDS] & World Health Organization [WHO], *Sub-Saharan Africa: AIDS Epidemic Update Regional Summary*, UNAIDS/08.08E/JC1526E (Mar. 2008), available at http://data.unaids.org/pub/Report/2008/JC1526_epibriefs_subsaharanafrika_en.pdf. See generally Joint United Nations Programme on HIV/AIDS [UNAIDS], *2007 AIDS Epidemic Update*, <http://www.unaids.org/en/KnowledgeCentre/HIVData/EpiUpdate/EpiUpdArchive/2007/default.asp>.

Keihl, “AIDS-related costs to African firms may include absenteeism, productivity declines, health and insurance payments, and recruitment and training.”⁴⁰ Shapiro argues that “The reason for the large gap between those infected and those being treated is due to the high cost of drugs.”⁴¹ Companies are concerned that they might not be able to capture value on research and development costs if their exclusive ownership is threatened.⁴² The “cocktails of drugs” usually given to HIV patients can run thousands of dollars.⁴³ In her assessment, Keihl also looked at the potential for political instability as a consequence of the conditions created by the AIDS epidemic.⁴⁴

2. APPLICATION OF ARTICLE 31 TO HIV/AIDS

According to Keihl, the potential of an unfavorable ruling by the WTO is a factor in deciding whether to bring a compulsory licensing action.⁴⁵ Keihl argues that “[e]ven if a WTO panel believes [that] a human right to health exists and should be considered in the balance, many people believe strong intellectual property protection accomplishes public health objectives.”⁴⁶

When interpreting TRIPS, especially the application/construction of Article 31(b), countries have a questionable amount of room to balance intellectual property protection with other potential policy objectives.⁴⁷ In analyzing the application, Keihl writes:

According to the plain terms of Article 8.1, public health measures adopted by Members must be “consistent with the provisions of this Agreement” (such as TRIPS Article 27.1 . . .) and “necessary” to protect public health. A panel will find that TRIPS Article 31(b) public health emergency legislation is not consistent with TRIPS Article 27.1, that it is not “necessary” under Article 8.1, and that when the other terms of Article 31 are applied in the HIV/AIDS context, it upsets the basic balance of the Agreement.⁴⁸

Keihl points out that a challenge might be a discrimination problem under Article 27.1, and she questions whether the scope of the legislation is limited to certain pharmaceuticals.⁴⁹ This could depend on the legal scope of the

40. Keihl, *supra* note 36, at 145.

41. Shapiro, *supra* note 28, at 56.

42. See Keihl, *supra* note 36, at 170.

43. Shapiro, *supra* note 28, at 56.

44. See Keihl, *supra* note 36, at 146.

45. *Id.* at 154.

46. *Id.* at 159.

47. *Id.* at 163.

48. *Id.* at 165.

49. *Id.* at 166.

legislation that attempts to utilize the exception.⁵⁰

B. BIRD FLU POTENTIAL

Some scholars argue that the bird flu crisis could trigger the emergency exception to Article 31 and 31bis, and they discuss the potential application of Article 31bis in situations of national emergency or extreme urgency.⁵¹ The bird flu crisis case is particularly relevant because of its similarity to the swine flu crisis.⁵²

Bird flu (a.k.a. avian influenza H5N1 flu virus) is typically transmitted amongst wild birds, but the virus can also be transmitted from birds to humans.⁵³ According to the Centers for Disease Control and Prevention (CDC), more than a dozen countries have reported approximately 400 cases of human infection with highly pathogenic avian influenza A (H5N1) viruses globally.⁵⁴ However, the CDC reports that any human-to-human transmission of H5N1 bird flu "has been limited, inefficient and unsustainable."⁵⁵

Roche Laboratories, Inc., the manufacturer of the bird flu vaccine Tamiflu,⁵⁶ came under international pressure and ended up donating three million doses of the vaccine to the World Health Organization (WHO) free of charge.⁵⁷ However, some countries, like India, have questioned whether this supply would be adequate to meet worldwide needs.⁵⁸ The Indian government encouraged one of its domestic pharmaceutical companies, Cipla, to manufacture a generic version of the Tamiflu vaccine.⁵⁹ Cipla anticipated that it could manufacture the generic version of the vaccine at a much lower price

50. See Kiehl, *supra* note 36, at 166.

51. See Nag, *supra* note 26, at 691.

52. There are some important similarities and differences between the swine flu and the bird flu. The signs and symptoms of the swine flu are somewhat similar to the bird flu and seasonal flu strains; however, swine flu is more likely to result in death of humans infected with the virus. The similarities between the swine flu virus and the avian flu virus occur because of how the swine flu virus developed from mutations of previous viruses including strains of human influenza, avian flu, and pig flu. See University of Maryland (2009, April 30). Swine Flu Outbreak Illuminated By Avian Flu Research, <http://www.sciencedaily.com/releases/2009/04/090429132238.htm> (last visited Dec. 29, 2010).

53. See Center for Disease Control and Prevention, Key Facts About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus, <http://www.cdc.gov/flu/avian/gen-info/facts.htm> (last visited Mar. 28, 2010) [hereinafter Key Facts].

54. See Center for Disease Control and Prevention, Avian Influenza A Virus Infections of Humans (2008), <http://www.cdc.gov/flu/avian/gen-info/avian-flu-humans.htm> (last visited Mar. 28, 2010).

55. See Key Facts, *supra* note 53.

56. See Jean-François Tremblay, *Roche may Grant Tamiflu Licenses: Cipla Intends Mass Production of Antiviral to Supply India and Other Countries*, 83 CHEMICAL & ENGINEERING NEWS 43, at 17 (2005), available at <http://pubs.acs.org/cen/news/83/i43/8343notw8.html>.

57. See Nag, *supra* note 26, at 699.

58. *Id.*

59. See Tremblay, *supra* note 56.

than what Roche was selling Tamiflu for at retail.⁶⁰ Additionally, Cipla wanted to sell its generic product at a much cheaper price than Roche's Tamiflu, particularly in countries that did not recognize Roche's patent on the brand product.⁶¹ In a likely attempt to maintain control over the market, Roche was later accused of licensing additional doses of the vaccine to a small group of manufacturers, the entire list of which is kept a secret.⁶²

However, Cipla's manufacture of a generic Tamiflu can be justified through the use of the Article 31bis's national emergency exception if the bird flu was considered a matter of national emergency or extreme urgency.⁶³ As discussed, the bird flu did not reach the point of being transmitted from human-to-human and was not classified as a full pandemic. Cost of the treatment itself may not "have a place in the legal consideration of arguing for patent rights violations."⁶⁴ However, the expectations and standards set by the international community are influential. Nag also addresses criticisms that compulsory licensing harms the patent holder:

Compulsory licenses . . . are not a weapon against a patent holder (such as Roche) just because it refused to grant a voluntary patent license to a third party (Cipla). This would in fact destroy the quintessential nature of the patent – the patent holder's right to say no to forced sharing. The international community recognizes, however, that TRIPS gives countries a process by which to address their concerns and disputes, especially in cases of extreme circumstances or urgency, where it can be argued that certain other considerations (of greater public well-being) would prevail over those of patent protection.⁶⁵

C. ANTHRAX & BIOTERRORIST THREATS

An Anthrax threat is a useful case scenario in which to analyze Article 31's effect on combating bioterrorism. In 2001, several prominent U.S. citizens were sent a form of anthrax (*Bacillus anthracis*) through the mail.⁶⁶ Bayer makes Ciproflaxin (also known generically as Cipro), which can treat the inhalation anthrax.⁶⁷ Allegedly, the U.S. government initially bought enough Cipro to treat important government officials, but not enough for the mass U.S.

60. *Id.*

61. *Id.*

62. *See* Nag, *supra* note 26, at 699.

63. *Id.* at 703.

64. *Id.* at 704.

65. *Id.* at 706.

66. *See* Shapiro, *supra* note 28, at 39.

67. *Id.*

populace.⁶⁸ Bayer initially saw this as an opportunity to make a profit by getting companies to agree not to manufacture the drug and allowing the lack of competition to drive up the price of Cipro.⁶⁹ Shapiro estimates that if these manufacturers could have sold a generic version, the cost of Cipro would have been cut in half.⁷⁰ The possibility of patent infringement became an issue as the U.S. government contemplated infringing Bayer's patent. Ultimately, the U.S. government was able to negotiate with Bayer to purchase Cipro at a reduced cost in order to moot the potential infringement.⁷¹

IV. SWINE FLU?

A. HYPOTHETICAL: SWINE FLU CRISIS

Imagine the following scenario. The outbreak of the swine flu suddenly skyrockets and researchers and experts are unable to determine why. Amidst the confusion, company XYZ stumbles upon a vaccine that may fight off the virus. Does this scenario trigger the exception of Article 31 and 31bis? It is important to remember that Article 31 is a defense to patent infringement. Simply put, the question is whether the prerequisite conditions exist for the exception's application.

B. SCOPE OF PANDEMIC

Although TRIPS Article 31 could potentially apply to the swine flu crisis, it is unclear whether such a crisis would satisfy the extreme urgency or national emergency requirements. However, comparing the disease's scope and magnitude to the previously discussed HIV/AIDS, bird flu, and Anthrax examples gives some indication as to Article 31's application to swine flu.

In March 2009, swine flu was detected among humans for the first time.⁷² In human infections, swine flu typically takes the form of a respiratory infection.⁷³ This infection exploits the immune system and leads to possibility of secondary infections, major organ dysfunction, and even death.⁷⁴

However, even with the severity of these symptoms, it is unclear whether swine flu could qualify as a pandemic. The World Health Organization's (WHO) definition of pandemic contains three elements: (1) "a new influenza virus subtype emerges;" (2) "it infects humans, causing serious illness;" and (3)

68. *Id.*

69. *Id.* at 40.

70. *Id.*

71. *Id.* at 41.

72. *Swine Flu: FAQ*, CBC News, July 21, 2009, <http://www.cbc.ca/health/story/2009/04/24/f-swineflu-faq.html> [hereinafter *Swine Flu: FAQ*].

73. *Id.*

74. *Id.*

“it spreads easily and sustainably among humans.”⁷⁵ Using these elements, the WHO classified swine flu, or the H1N1 influenza, as a pandemic, which was the first time that WHO has issued a global flu “epidemic” in more than forty years.⁷⁶ The last pandemic was the Hong Kong flu which killed more than one million people in 1968.⁷⁷

This classification places swine flu at Level 6, the WHO’s highest alert level, and means that the H1N1 swine flu virus can spread from person to person in a sustained manner of transmission in two or more regions on the globe.⁷⁸ CBC News reported that, “The pandemic declaration sends a signal to governments to spend more on containing the virus and to drugmakers to speed up the development of a swine flu vaccine. However, it does not mean the virus is causing more severe illnesses or deaths.”⁷⁹

Initial estimates may have been too conservative. One such estimate indicated that as of June 2009 there had been more than 27,737 cases of swine flu, including 141 deaths.⁸⁰ However, as of July 31, 2009, the WHO had documented an estimated 162,000 cases of the swine flu throughout the world, including more than 1,154 deaths.⁸¹ Additionally, it has become clear that generally younger, otherwise healthy people are more susceptible to the swine flu virus.⁸²

Difficulties in estimating exact numbers stem from the fact that instances of the swine flu may be underreported. Specifically, not everyone who is infected seeks medical attention and those that do may not even be tested for the swine flu.⁸³ In 2009, the Centers for Disease Control and Prevention (CDC) acknowledged that it may be impossible to verify the exact numbers of H1N1 swine flu cases.⁸⁴ As of November 12, 2009, the CDC estimated that:

[B]etween 43 million and 89 million cases of 2009 H1N1 occurred between April 2009 and April 10, 2010. The mid-level in this range is about 61 million people infected with

75. See Nag, *supra* note 26, at 698.

76. See *WHO Declares Swine Flu Pandemic, no Change in Canada’s Approach*, CBC NEWS, June 11, 2009, <http://www.cbc.ca/world/story/2009/06/11/swine-flu-virus-who-pandemic.html>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Swine Flu Cases Climb Among U.S. Soldiers in Iraq*, ASSOCIATED PRESS, Aug. 12, 2009, available at http://www.msnbc.msn.com/id/32386260/ns/health-cold_and_flu/ns/health-swine_flu/.

82. *Tracking Swine Flu may Become Easier*, CBC NEWS, July 31, 2009, <http://www.cbc.ca/health/story/2009/07/31/swine-flu-who.html>.

83. Centers for Disease Control and Prevention, *CDC Estimates of 2009 H1N1 Influenza Cases, Hospitalizations and Deaths in the United States, April 2009 – March 13, 2010*, http://www.cdc.gov/h1n1flu/estimates_2009_h1n1.htm (last visited Dec. 22, 2010).

84. *Id.*

2009 H1N1. CDC estimates that between about 195,000 and 403,000 H1N1-related hospitalizations occurred between April 2009 and April 10, 2010. The mid-level in this range is about 274,000 2009 H1N1-related hospitalizations. CDC estimates that there were between about 8,870 and 18,300 2009 H1N1-related deaths that occurred between April 2009 and April 10, 2010. The mid-level in this range is about 12,470 2009 H1N1-related deaths.⁸⁵

It is clear that swine flu can have a significant economic impact. In April and May of 2009, many major airlines waived fees or refunded tickets for passengers who had initially been destined for Mexico.⁸⁶ Additionally, some hotels reported taking extra precautions in the disinfection and cleaning of rooms, while others allowed cancellations altogether.⁸⁷ Furthermore, costs associated with purchasing pandemic-related insurance policies have a direct effect on other areas of the economy.⁸⁸

Swine flu's impact on the function of local businesses can also have a direct impact on the economy. For example, businesses could experience losses if forced to close or if the access to the physical location of the business is limited.⁸⁹ Several employment law newsletters across the states have addressed the concern about how businesses can protect employees from swine flu while simultaneously maintaining normal operating levels and limiting detriments to productivity.⁹⁰ Further, swine producers reported that they suffered financial losses due to misconceptions about how the swine flu disease is spread.⁹¹

C. TREATMENT AND LIMITATIONS

Several possible vaccines for H1N1 swine flu are going through the testing and development process, including two prescription anti-viral drugs, oseltamivir (Tamiflu) and zanamivir (Relenza).⁹² However, these drugs have limited application, and they can only be used to treat relatively severe cases.⁹³

85. *Id.* See generally *id.* for a discussion on influenza-associated hospitalizations collected through the CDC.

86. Deirdre Van Dyk, *Has Swine Flu Infected Your Travel Plans?*, TIME, May 4, 2009, <http://www.time.com/time/travel/article/0,31542,1895467,00.html>.

87. *Id.*

88. *Id.*

89. See generally James Davis, Richard Lewis & Noel Paul, *The Limits of Insurance Coverage to Compensate Victims of a Swine Flu Pandemic*, LexisNexis Communities 2009 Emerging Issues 3572 (Apr. 30, 2009).

90. *Id.*

91. Brian Brus, *Pigs Getting Bum Rap due to Name of Flu Virus Strain*, THE J. REC. (May 4, 2009), available at <http://journalrecord.com/2009/05/04/pigs-getting-bum-rap-due-to-name-of-virus/>.

92. See *Swine Flu: FAQ*, *supra* note 72.

93. *Id.*

The question of who would receive any vaccines available for the swine flu virus is complicated. In the United States, the Advisory Committee on Immunization Practices, a body that counsels the federal government on vaccine matters, recommends that 160 million people in so-called “high risk” groups should be vaccinated as a preventive measure.⁹⁴ High risks groups include people who come into contact with young infants, health care and emergency medical service workers, pregnant women, youth under age twenty-four, and those age twenty-four through sixty-five with specific underlying medical conditions.⁹⁵

In addition to these priorities, distribution of available vaccines would be limited by special considerations. For example, some researchers have advised pregnant women not to be vaccinated because of concerns of thimerosal, a preservative in the vaccine that contains mercury, a substance with links to autism.⁹⁶ Additionally, with respect to the antiviral drugs Tamiflu and Relenza, manufactured by Roche Holdings AG and GlaxoSmithKline PLC, the British Medical Journal reported that researchers have advised that children under twelve should not take these drugs because the drugs may do them more harm than good.⁹⁷ Finally, there is a narrower list for receiving the vaccine should supplies be tight, which could be narrowed down to around 60 million people.⁹⁸

D. IMPLICATIONS

As discussed previously, the WHO has declared swine flu to be a pandemic. The WHO’s position strongly supports an argument for invoking the national emergency exception. The impact of swine flu has exceeded that of the bird flu or avian influenza. The fact that swine flu can be readily and reliably transmitted from human to human increases the sense of urgency for some type of measure to become available. It is clear that this is an “extreme urgency.”

Because there are also limitations on the availability of a swine flu vaccination, limited supply and a potentially high demand may mean that there is an increased likelihood that the Article 31 exemption could be invoked by a country extreme urgency or national emergency. For example, U.S. President Barack Obama declared that the 2009 H1N1 swine flu was a national emergency on October 24, 2009.⁹⁹ Because the members of the WTO are

94. *Id.*

95. Betsy McKay, *Pregnant Women, Kids to get Vaccine First*, WALL ST. J. (July 30, 2009), at A3, available at <http://online.wsj.com/article/SB124887563173290207.html>.

96. *Id.*

97. *Flu Drug use Discouraged*, WALL ST. J. (Aug. 10, 2009), available at <http://online.wsj.com/article/SB10001424052970203612504574342680430728144.html>.

98. See McKay, *supra* note 95.

99. Sharona Hoffman, *Measure for Measure: The Government’s Response to H1N1 and Remaining Liability Issues*, 2009 Emerging Issues 4567 (Nov. 13, 2009), available at <http://law.lexisnexis.com/webcenters/lexisone/Emerging-Issues-Analysis/Sharona-Hoffman-on->

permitted latitude to evaluate whether their country is in a state of “national emergency,” President Obama’s declaration of the 2009 H1N1 virus as a national emergency could support a manufacturer’s argument for exercising an exception to Article 31 of the TRIPS agreement. President Obama’s declaration could be important evidence if litigation results over the issue of a patent and whether the prerequisite conditions for national emergency exception existed. Further, if the exception is exercised, there is still a question of how the provision that allows production predominantly for the supply of the domestic market will be applied.

V. SPECIAL CONCERNS

This section addresses special concerns regarding interpretation and application of the national emergency exception.

A. TIME

Under the TRIPS agreement, patents are provided protection for twenty years.¹⁰⁰ According to Kiehl, “The idea behind compulsory licenses is that they offer some protection against abuses of power”¹⁰¹ The time limitation on Article 31(c) as to when the circumstances of urgency or national emergency no longer exist and are unlikely to occur is also questionable.¹⁰² This limitation is of an uncertain length because it is unclear what will satisfy Article 31’s language: “if and when the circumstances which led to it cease to exist and are unlikely to recur.”¹⁰³ Although this provision may be one attempted method of protecting against abuse of the TRIPS agreement, it is still susceptible to an overly broad interpretation.¹⁰⁴

Thus, if Article 31 were invoked because of the severity of the swine flu for the production of one of the vaccinations mentioned previously, it is still unclear how long this compulsory license would extend or what would have to happen for there to be an adequate cessation of the conditions of the pandemic that invoked the exception. How long would the emergency exception to TRIPS be valid if there is uncertainty in the prospect of the severity of the pandemic? The United States could argue, at a minimum, that as long as President Obama considers the 2009 H1N1 swine flu to be a national emergency, this exception will persist.

Measure-for-Measure-The-Governments-Response-to-H1N1-and-Remaining-Liability-Issues.

100. See TRIPS Agreement, *supra* note 3, art. 33.

101. See Kiehl, *supra* note 36, at 162.

102. *Id.*

103. See TRIPS Agreement, *supra* note 3, art. 31(g).

104. See, e.g., Patrick Marc, *Compulsory Licensing and the South African Medicine Act of 1997: Violation or Compliance of the Trade Related Aspects of Intellectual Property Rights Agreement?*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 109, 116 (2001).

B. POSSIBLE LOOPHOLE

Another concern is that the national emergency clause is a “loophole” that could “be used against pharmaceutical companies in a time of disease or global despair.” For example, according to Nag:

In a time when a possibly pandemic disease affects the world . . . it is no surprise that the possibility of using a loophole in the agreement is very tempting. Nevertheless, if TRIPS were revised by adding more precise definitions of what constitutes a “national [emergency] or extreme urgency,” then it would intensify the enforcement powers of the agreement by closing up such loopholes.¹⁰⁵

The case examples discussed above reveal that the lack of precise definitions within Article 31 presents significant challenges. An unanswered question is whether chronic conditions should potentially be considered for the national emergency exception.¹⁰⁶ It would be useful to have further clarification regarding the extent of the conditions and effects of the underlying basis for the exception so that we could better discern just what types of situations will invoke this exception.

C. MONEY

If a compulsory license were granted, further complications would exist concerning what compensation should be given for any such license. Article 31bis attempts to address this, but the language in paragraphs one and two, which addresses importing and exporting countries, is cumbersome. A standard compensation was proposed in a bill, but Congress never passed it. In the Public Health Emergency Medicines Act, “[T]he 9 factors to use in determining what reasonable compensation is for a patent infringement under the Public Health Emergency Medicines Act include:

- (1) evidence of the risks and costs associated with the invention claimed in the patent and the commercial

105. See Nag, *supra* note 26, at 712.

106. Some situations that meet the criteria for the national emergency exception may waver in the severity of the emergency, thus raising the question of whether a chronic condition meets the national emergency exception. For example, an influenza virus may reach the state of pandemic, then subside to non-pandemic state, but then re-emerge at a later date at an increasing rate of infection. This may be the case with the swine flu, as some physicians in the United Kingdom became concerned about a swine flu resurgence because of deaths from the H1N1 flu in December 2010. See Bosely, Sarah (Health Editor, “Flu Surge Alarms Doctors as Virus Hits Children,” <http://www.guardian.co.uk/society/2010/dec/23/flu-surge-doctors-virus-children> (last visited Dec 27, 2010).

development of products that use the invention; (2) evidence of the efficacy and innovative nature and importance to the public health of the invention or products using the invention; (3) the degree to which the invention benefited from publicly funded research; (4) the need for adequate incentives for the creation and commercialization of new inventions; (5) the interests of the public as patients and payers for health care services; (6) the public health benefits of expanded access to the invention; (7) the benefits of making the invention available to working families and retired persons; (8) the need to correct anti-competitive practices; or (9) other public interest considerations.¹⁰⁷

Likely, this bill never received congressional approval because the bill heavily favors social interests at the expense of intellectual property rights. However, the bill is useful in enumerating specific factors to be considered in determining compensation, especially those factors that are consistent with goals of the TRIPS Agreement. For example, factors (1) and (4) of the proposed Public Health Emergency Medicines Act recognize the importance of maintaining strong incentives for the development of intellectual property rights. Factor (9) is very general, and the "other public interest considerations" language leaves countries room for social welfare considerations. These considerations include, among other things, governmental interest in public health and safety and the cost of disseminating access on a broad scale.

CONCLUSION

A strong case could be made that the swine flu would fall under the Article 31 emergency exemption, especially given that it reached pandemic status, its potential of human-to-human transmission, and the scope of the condition. However, as we have seen, there is still ambiguity regarding just how the emergency exemption to Article 31 would be applied, how long it would continue, and how compensation would be decided. The swine flu has moved through a post-pandemic state, but may resurge with a second wind of outbreaks, yielding the potential for increased infections from its initial pandemic numbers -- this possibility makes addressing the questions raised by Article 31 ever more urgent.¹⁰⁸ The resurgence of swine flu could cause an increased demand on the medications affected by the national emergency exception.¹⁰⁹

107. See Shapiro, *supra* note 28, at 60 n.102.

108. See Kelland, Kate, "Flu Kills 27 in Britain," Reuters, December 26, 2010, available at <http://www.reuters.com/article/idUKTRE6BM2UI20101224?type=companyNews>.

109. See Campbell, Denis, "Doctors Warn of Flu Crisis," The Guardian, December 17, 2010, available at <http://www.guardian.co.uk/society/2010/dec/17/doctors-warn-flu-crisis>.

A COMPARATIVE ANALYSIS BETWEEN ITALIAN CIVIL PROCEEDINGS AND AMERICAN CIVIL PROCEEDINGS BEFORE FEDERAL COURTS

Simona Grossi¹

I. INTRODUCTION

Comparative analysis of civil proceedings requires an in-depth study of the structure and most distinguishing elements of each country involved. It has the goal of identifying the rationales and features that make each country unique.

It is commonly misconceived that common law systems rely solely on the authority of precedent and civil law systems rely only on the authority of statutes and codes.² This article demonstrates that the Italian and the U.S. legal systems are not purely inquisitorial nor purely adversarial, but that they share similarities and can learn from each other.³

In the adversarial system in the United States, the judge plays a relatively passive role in the proceeding. Facts and evidence are gathered by the parties and finally judged by a jury, a body of ordinary citizens instructed as to the applicable law by the judge, who will eventually render a judgment on the basis of the jury's decision - the *verdict*.

In the United States, not all cases are tried through a jury trial. Some cases are decided by judges without a jury, either because the case is in an area where there is no right to a jury trial, or because the parties have waived their right to a jury trial. In such cases, the judge's role is still much more passive than it would be under the inquisitorial system. Some common law countries other than the United States have gone much further in eliminating jury trials in civil cases.

On the contrary, in inquisitorial systems like the Italian one, the judge plays a more active role in the proceeding. The jurist instructs the parties on how to proceed, grants or denies their requests for time limits and admission of evidence, and eventually decides upon facts and evidence, without any jury.

However, the Italian and the U.S. civil proceedings share many more

1. Simona Grossi is an Associate Professor of Law at Loyola Law School L.A. Special thanks for this article goes to Professor Patrick Hanlon for his dedication, assistance, help, great insight, and advice on this work. Additional thanks goes to Professor David Oppenheimer, my professor of Civil Procedure at Boalt Hall. This article constitutes the introduction to the Commentary to the Italian Code of Civil Procedure, Oxford University Press, February 2010.

2. See CHARLES F. ABERNATHY, *LAW IN THE UNITED STATES, THE MIXED SYSTEM OF CODE-BASED AND COMMON LAW IN THE UNITED STATES* 3 (2006).

3. The present analysis shows how the Italian legal system is not purely *inquisitorial* and the U.S. legal system is not purely *adversarial*.

commonalities than one could expect. This may be because the U.S. legal system is not purely adversarial and the Italian legal system is not purely inquisitorial. There are many similar, if not identical, mechanisms and techniques for identifying the relevant facts and evidence and applying the substantive law to facts.

Some mechanisms are more efficient than others, but the many similarities between the two systems suggest that a hybrid model could be proposed for adoption.⁴ The presence or absence of a jury and the differences in discovery procedures are not incongruous enough to preclude adoption of common procedural rules and models.⁵

1.1 A brief description of the adversarial and inquisitorial systems

As a general rule, the adversarial system of common law countries is lawyer-centered. Lawyers are the protagonists of lawsuits; by their continuous confrontation and “fight,” lawsuits get resolved. In theory, the judge plays a passive role by enforcing procedural rules (including rules of evidence) and leaving the initiative to investigate and present the case to the parties through their lawyers.⁶

In other words:

Civil litigation in the United States is presented and defended primarily by advocates for the parties, with the judge serving in a relatively passive role. Theoretically, the parties bear the entire responsibility for presenting the law and the facts; the judge is obliged merely to affirm or reject the parties' contentions. For this reason the American system is called the adversary system. Most other modern legal systems employ what is usually called the inquisitorial system, meaning only that the initiative rests with the judge for developing the facts of a case and the governing legal principles.⁷

4. For further consideration of the possibility of adopting a unique set of rules of civil procedure, see G. C. Hazard, Jr. et al., Joint American Law Institute/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, Int'l Inst. for the Unification of Private Law, Study LXXVI - Doc. 12 (Feb. 2004).

5. In this respect, see also Rolf Stürmer, Transnational Rules of Civil Procedure Feasibility Study, Int'l Inst. for the Unification of Private Law, Study LXXVI - Doc. 1, at 10 (Feb. 1999).

6. In the U.S. system, in jury trials, the role played by the Italian judge is split between the judge and the jury. The jury, of course, plays an even more passive role than the judge. Even in cases where the U.S. judge acts as a finder of fact, and where it would be theoretically possible for him to play a role similar to that of an Italian judge, the U.S. judge continues to adopt an essentially reactive role, leaving the initiative to the parties' lawyers.

7. Geoffrey C. Hazard, Jr. & Michele Taruffo, AMERICAN CIVIL PROCEDURE: AN

The Federal Rules of Civil Procedure and their changing interpretation by case law, as well as the Italian rules of civil procedure and jurisprudence, make it clear that judges have strong powers in both proceedings.⁸ In both cases, lawyers have the power to shape claims, defenses, and evidence to submit to the judge or jury who will eventually evaluate them. Therefore, neither of them can be considered truly adversarial or truly inquisitorial.

Particularly in the American legal process, judges are taking a more active role and discretionary approach to pretrial case management.⁹ On some occasions, United States federal judges may have more discretion than Italian judges because their powers are not regulated. For example, in settlement conferences, the “informal” case management tool, a trial judge has “a level of control and a degree of discretion that strain the boundaries” of the traditional role because the customary litigant input or legal criteria are missing.¹⁰

1.2 Efficiency and fairness as terms of the comparative analysis

Efficiency and fairness are terms used by the present comparative analysis to evaluate the main legal devices adopted by the two legal systems and to identify the best solution which each of them may have adopted. It is therefore necessary to illustrate the concepts and ideas behind the words “efficiency” and “fairness.”

Any expert or practitioner studying a civil procedure rule or mechanism would question whether it is efficient and fair. In other words, the practitioner would ask to what degree the rule was overly time and cost consuming, and whether it is fair considering the position and interests of all the parties in the proceeding.

A proceeding can last for years and is often expensive both for the parties and the state. Therefore, the rules governing the proceeding should frame mechanisms which are the least time and cost consuming. A lengthy and expensive device will not be efficient.

Efficiency is a term that is not difficult to define. Everybody has an idea of what is efficient and what is not. Usually, all the parties in a proceeding, even when they have opposing interests, would likely come to the same conclusion as to what is efficient.

This article adopts the meaning of efficiency as a device that, all else being equal, is the least time and cost consuming. This definition measures efficiency in terms of costs and time; similar procedural devices are judged on the time and costs required to achieve the same result. The less

INTRODUCTION 86 (1993).

8. On the powers of Italian judges, see CRISANTO MANDRIOLI, *DIRITTO PROCESSUALE CIVILE* 68, Torino, 2007.

9. Johathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 90-91 (2003).

10. *Id.* at 30.

expensive and time consuming they are, the more “efficient” they are considered. The necessity to frame fast and cheap civil procedure devices, however, should not lead a legislature to frame civil procedure rules which prevent reasonable, well grounded, and “fair” solutions.

Compared to the concept of “efficiency,” the concept of “fairness” is much more complicated and what is fair is often debatable. Usually, scholars and practitioners have been more concerned about efficiency than fairness. However, while efficiency is undoubtedly an important concern, fairness is paramount not only of litigants, but also of society and for the acceptance of the rule of law.¹¹ Some have defined “fairness” as meaning “having one’s ‘day in court,’ if desired,” and “having rewards and penalties based on actual damages.”¹² Whichever definition may be correct, the concept of “fairness” immediately evokes the concept of “due process,” as the U.S. Supreme Court has often stated.¹³

There may be different views as to what the due process rule means and what its scope and limits are. The United States and Italy have adopted different provisions concerning “due process” and “fairness.” Therefore, it is not possible to adopt “due process” as a term of comparison in the present analysis. Rather, a common nucleus of shared values might be identified and adopted as the definition of “fairness” in order to state whether a specific rule, requirement, mechanism, or proceeding is “fair.”

The Fifth Amendment of the U.S. Constitution provides, “No person shall . . . be deprived of life, liberty, or property, without due process of law.” Clause one of the Fourteenth Amendment of the U.S. Constitution provides, “No State shall . . . deprive any person of life, liberty, or property without due process of law.”¹⁴ These provisions and the required elements of due process have been construed as those that “minimize substantively unfair or mistaken deprivations of property” by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.¹⁵ The core of this requirement is notice and a hearing before an impartial tribunal. The concept of due process has been developed through the idea of “fundamental fairness,” which has been illustrated by case law.¹⁶

11. Robert M. Howard, et. al., *Pre-Trial Bargaining and Litigation: The Search for Fairness and Efficiency*, 34 *LAW & SOC'Y REV.* 431 (2000). See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (noting that, regardless of the outcome, if litigants perceive the process as fair, then there is general acceptance of the outcome, and hence compliance with the law).

12. See Howard, *supra* note 11, at 433.

13. See, e.g., *Schall v. Martin*, 467 U.S. 253, 268 (1984); *S.D. v. Neville*, 459 U.S. 553, 556 (1983). See also Howard, *supra* note 11, at 432.

14. The difference between the Fifth and the Fourteenth Amendment is that the Fifth Amendment applies to the Federal Government only, while the Fourteenth Amendment applies to the states.

15. See *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

16. *Republic of Aus. v. Altmann*, 541 U.S. 677, 717 (2004). See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007).

Unlike the United States version of due process, which is defined in very general terms, the Italian legal system does not contain any guidelines as to its scope and limits which continue to be set by judges. The due process rule under Article 111 of the Italian Constitution defines due process by listing some rights and guarantees which are considered fundamental elements of due process. However, the list of rights and guarantees under Article 111 of the Italian Constitution is not exhaustive,¹⁷ and Italian judges have helped in expanding and better clarifying the list under Article 111.¹⁸

Article 111 makes it clear that confrontation and parties' rights to defense (the parties' rights to present their case, objections, and answers) are considered essential elements of "fair play," and are essential elements of due process. A reasonable duration of the proceeding is also considered an element of due process. The duration of the proceeding should not be considered in the abstract but with respect to the specific circumstances of the case to ensure that the proceeding be fast, but not superficial.¹⁹

Pursuant to the sixth paragraph of Article 111, all judicial decisions shall state the rationale for the decision in order to make judges accountable to the public. The rationale for the judgment is considered fundamental for the party intending to challenge the judgment because it gives that party an actual opportunity to identify the weak points of the judgment. The judgments, however, should not contain any possible dissenting opinion.

Considering the foregoing and relevant case law construing the due process provisions in both legal systems, it is possible to identify commonalities among the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 111 of the Italian Constitution in that each serve notions of fairness. Specifically, both legal systems consider the following elements to be part of the concept of fairness: (1) fair notice and fair warning; (2) a hearing before an impartial judge; (3) rationality of the proceeding and of the measures adopted; and (4) fair play.

"Efficiency" (in terms of time and cost) and fairness are interrelated concepts. For instance, a high cost proceeding may be unfair if it forces the

17. For a more comprehensive description of due process rule under art. 111 of the ITALIAN COST., see Alessandro Andronio, COMMENTARIO ALLA COSTITUZIONE 2099 (R. Bifulco et al. eds., Torino 2006).

18. Art.111 of the ITALIAN COST., in the relevant part dealing with civil proceedings, provides that "(1) Justice must be administered by fair trials defined by law. (2) Trials are based on equal confrontation of the parties before an independent and impartial judge. The law has to define reasonable time limits for the proceedings. . . . 6) Reasons must be stated for all judicial decisions." (in Italian, it reads "(1) La giurisdizione si attua mediante il giusto processo regolato dalla legge. (2) Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata...(6) Tutti i provvedimenti giurisdizionali devono essere motivate . . .").

19. In any event, the way the provision is written, and the use of the adjective "reasonable" does not make the provision a valid instrument to combat the excessive duration of proceeding in Italy.

parties to spend more resources than necessary. The present study treats the two concepts of efficiency and fairness separately and identifies when the one occurs a consequence of the other. For example, unfairness may be a consequence of inefficiency, and vice versa.

II. GENERAL OVERVIEW OF THE ITALIAN PROCEEDING²⁰

2.1 *The courts and selection and appointment of judges*

Federal courts analogous to United States federal courts do not exist in Italy. Instead, there are various *tribunali*²¹ which are located in various districts, and various *corti d'appello*²² located in the different Italian provinces. There is only one court of last resort for the territory, *Corte di Cassazione*,²³ which is located in Rome.

Courts are divided according to their specialties; there are civil courts, criminal courts and administrative courts. There is one *Corte Costituzionale*,²⁴ whose task is to ensure that any law provision complies with the Constitution and is construed accordingly. If a party believes that an existent and applicable law breaches any provision of the Constitution, it can file a motion before *Corte Costituzionale* through the judge of the pending proceeding where the issue has been raised. The party asks whether a conflict exists between the applicable law and the Constitution and, if so, requests repeal of the inconsistent law.

Whether specific litigation should be commenced before a specific court (e.g. civil court) is an issue of jurisdiction that can be solved by applying the relevant law provisions. On the contrary, identifying the proper court within a specific jurisdiction is a question of "venue" ("*competenza*"), which can be decided on the basis of the applicable law provisions concerning venue.²⁵ The judges of first instance courts are appointed by public examination for which a law degree ("*laurea*") is required.

20. See also *infra* App. A.

21. Tribunale (Trib.) is the court of first instance in Italy. Giudice di Pace (Justice of the Peace) is the first instance judge with jurisdiction over claims not exceeding EUR 2,500.

22. Corte d'Appello (Corte app.) is the appellate court in Italy, which can review the judgments rendered by the court of first instance (Tribunale).

23. Corte di Cassazione (Cass.) does not review the facts, but only the law, that is, the application of the applicable law provisions to facts, as accomplished by the lower courts. Cass. has no discretion on whether to hear a case. Once the motion for review (*ricorso in Cassazione*) has been filed and it complies with the applicable law provision., Cass. will hear and decide the case See ICCP art. 360.

24. Pursuant to art. 134 of the ITALIAN COST., Corte Cost. decides (i) disputes concerning the constitutionality of laws and acts with the force of law adopted by state or regions; (ii) conflicts on the allocation of powers between branches of government within the state, between the state and the regions, and between regions; and (iii) accusations raised against the president in accordance with the constitution. *Id.*

25. Art. 7 C.P.C.

After earning a law degree from a university, applicants can take the exam to become judges.²⁶ Those who become judges usually have not practiced as lawyers and do not consider themselves lawyers. They usually have little, if any, experience lawyering and managing cases and they must learn how to deal with them. However, most of the time, even after many years of experience as judges, they will still be missing this important piece of experience which could lead them to adopt a more practical and efficient approach to cases.

The judges are autonomously represented by the Consiglio Superiore della Magistratura (“CSM”). This body is chaired by the President of the Republic. Its membership consists of the President and the Public Prosecutor of *Corte di Cassazione* and university law professors and attorneys at law with fifteen years of experience.²⁷

The judiciary is, therefore, an independent body. Judges are mainly chosen by merit through public exams. They have a law degree and are specifically trained to do their job. And unlike the appointment process in the United States, the Italian executive branch does not take part in the process of selecting judges.

2.2 Personal and subject-matter jurisdiction and venue: detailed provisions with no ambiguity as to their scope

In domestic litigation, there are no particular problems in identifying the personal and subject-matter jurisdiction of courts since the relevant provisions of the Italian Code of Civil Procedure (“ICCP”) set the jurisdictional criteria with great specificity. On the contrary, in transnational litigation, Italian International Private Law no. 218/1995 applies. Its provisions on jurisdiction may sometimes be ambiguous and raise issues of interpretation. Once jurisdiction over a case has been established, the ICCP sets the conditions to identify the proper venue of litigation. These provisions are very detailed.

2.3 Main structure of the civil proceeding

The Italian civil proceeding is either directed by a judge or a panel of judges.²⁸ Parties may exchange pleadings and eventually discuss their case

26. However, they usually prepare for taking that exam by attending special schools and courses, and this could take a substantial amount of time (two years or more).

27. Two-thirds of CSM’s members are elected by various ordinary judges, and one-third are elected by the Joint Sitting of the Senate and the House of Representatives of the Parliament. In addition, CSM may appoint as judges of Cass. distinguished university law professors and attorneys at law with fifteen years of experience who are registered in the special register of attorneys admitted to represent and defend clients before Cass. *See Cost. Art. 104 (Italy)*.

28. In the few cases under Art. 50 *bis* ICCP, or where the judgment is challenged before

before the judge, who will finally decide the facts alleged and the evidence gathered by the parties under his supervision. The proceeding is not divided into a pretrial and trial phase, but facts and evidence are presented and admitted into the record from the beginning of the proceeding until specific time limits set by the applicable ICCP provisions expire. Once the relevant time limits expire, the party may not introduce new facts and evidence unless specific extenuating circumstances occur justifying the admission of such new facts or evidence.²⁹

The whole proceeding takes place before the judge. The proceeding is commenced when the plaintiff serves the complaint upon the defendant. The defendant should file the answer within in a specific time limit before the first hearing if the party intends to raise specific objections to the complaint. Otherwise, those objections are considered waived.³⁰ There is no specific and mandatory layout for the complaint, the answer, or the following pleadings. But Article 163 of the ICCP does require that the complaint contain certain elements, the lack of which renders the complaint null.

Article 167 of the ICCP does not require a specific layout for the answer. However, the defendant should respond to the plaintiff's pleading and raise all necessary objections. The answer should be filed within twenty days before the first hearing. Otherwise, the relevant objections that should be raised by this time limit will be considered waived by the defendant.

Law suits are easily filed because the threshold requirements needed to commence a lawsuit are easily met. Every pleading that meets the basic requirements under Article 163 of the ICCP and is not barred by one of the main objections (e.g. expiration of the relevant statute of limitation, lack of jurisdiction, etc.) may proceed toward a final judgment.³¹ But the complaint and the answer are not brief documents. They contain the facts, evidence, and legal theory the party intends to apply in the case, which may amount to a significant amount of information.

The legislature encourages lawyers to draft the first pleadings with as much detail as possible. The complaint is required to contain more information than a mere "notice" of the pleading to the other party and must include evidence. However, it is the general practice, where possible with

Corte app. or *Cass.*; Corte Cost. as well is made by a panel of judges.

29. The general principle is set by Art.184 *bis* of the ICCP, according to which "[t]he party showing that he suffered a waiver for reasons non attributable to him, may request the investigating judge to put him back within the applicable time-limits. The judge decides pursuant to article 294, second and third paragraphs." See SIMONA GROSSI & CHRISTINA PAGNI, COMMENTARY TO THE ITALIAN CODE OF CIVIL PROCEDURE (2010).

30. The objections which should be raised before the first hearing are similar to the United States' *affirmative defenses* under FED. R. CIV. P. 8(c), but they are not listed in any specific provision of the C.P.C. The time limit for filing a response that contains affirmative defenses is twenty days before the first hearing. See also art. 166-168 *bis* C.P.C.

31. However, the complaint should contain the elements listed under art. 163 C.P.C. otherwise it will be null. Art. 164 C.P.C.

applicable time limits and waivers, to avoid disclosing too much information to the opposing party until the very end of the case.

Article 24 of the Italian Constitution acknowledges everyone's right to bring cases before courts of law in order to protect their rights under civil or administrative law. In order to bring or defend against a suit, a party should act in good faith which means its claim or defense should be supported by legal grounds. Where, as determined by a judge, a groundless pleading or groundless answer is filed with gross negligence or malice, the defendant or the plaintiff may request the judge to condemn the opposing party to pay damages for serious liability ("*responsabilità aggravata*") pursuant to Article 96 of the ICCP.³² This sanction, however, is very rarely applied because it puts upon the party requesting its application a heavy burden of proof to show that the opposing party acted with gross negligence or malice when it filed the pleading or the answer.

The current workload for Italian courts is very heavy. The Italian justice system is experiencing a crisis of lengthy litigation. The system is hardly satisfying the requirements of due process under Article 111 of the Italian Constitution regarding "reasonable duration," which threatens the goals of efficiency and fairness.

Once the parties have exchanged the complaint and the answer, they appear before the judge. The judge asks them preliminary information about the case and then grants them time limits to file additional pleadings. They may specify the content of the respective claims and defenses and eventually request that the judge admit evidence. The pleadings are exchanged within the time limits under Article 183, sixth paragraph, nos. 1, 2 and 3 of the ICCP. There is no right to amend a complaint once this time-limit expires.

Once the evidentiary pleadings and the corresponding rebuttals have been filed by the parties, the judge, by order, decides what evidence to admit. The evidence which the judge may decide to admit should be admissible and relevant. In other words, it should meet the requirements for admission set by the ICCP and should help in proving or disproving the facts of the case.

Once the judge decides that the evidence offered by the parties is admissible and relevant, the judge schedules a hearing for evidence admission (e.g., for witnesses' examinations, inspections, etc.). There may be more than one hearing for evidence admission, depending on the type and amount of evidence to admit.

32. Similarly, in the United States, there is the substantive tort of "abuse of process," which someone commits when he files a frivolous lawsuit against someone else in order to achieve a collateral advantage of some kind. Furthermore, under FED. R. CIV. P. 11 lawyers can be sanctioned for frivolous claims. As under art. 96 C.P.C., it is difficult to show that something is frivolous, especially because notice pleading allows, to a certain extent, for filling in factual gaps in discovery.

Soon after the end of the evidentiary phase, the judge declares the evidentiary phase closed and schedules a hearing where the parties present their conclusions and final arguments. These cannot be different from those already filed,³³ but are simply more specific, as they may have been slightly amended during the proceeding. This hearing also gives them a time limit for filing final pleadings and final pleadings in rebuttal. The judge will render his decision within the following thirty days.³⁴ The judgment rendered by a first instance judge may be appealed³⁵ before *Corte d'Appello* which will review the entire decision making process of the first instance judge. Issues of fact, as well as issues of law, may be reviewed by *Corte d'Appello*. This is a *de novo* review, and the whole first instance proceeding is reviewed. However, *Corte d'Appello* cannot address new issues of fact or law which were not previously submitted to the first instance judge. However, in very specific cases where it was impossible to previously file those issues of facts or law, depending on circumstances beyond the party's control, an exception may be granted. These circumstances rarely occur. As a general rule, and except under equally rare circumstances, third parties³⁶ who did not take part in the first instance proceeding are not allowed to file motions for intervention in the appeal proceeding.

Finally, the judgment rendered by the *Corte d'Appello* may be reviewed³⁷ by the *Corte di Cassazione* only on the basis of the specific grounds under Article 360 of the ICCP. These deal only with issues of law. The *Corte di Cassazione* is in fact considered the "judge of the laws," and

33. However, parties may renounce some of their original claims and defenses. See GROSSI & PAGNI, *supra* note 29.

34. In cases which should be decided by a panel of judges, the panel will render the judgment within the following sixty days. However, either the thirty day time limit or the sixty day time limit is not final, and the judge(s) may render judgment long after the expiration of those time-limits. *Id.*

35. The losing party may appeal from the judgment rendered by the first instance judge by filing the appeal (complaint) within one year and forty-six days. See Art. 327 C.P.C. This runs from the publication of the judgment (long time limit for appealing) or by thirty days running from the time of the service of the judgment by the winning party (short time-limit for appealing). If the winning party serves the judgment upon the losing party, this latter party will have only thirty days from the date of the service to appeal; on the contrary, if the winning party does not serve the judgment on the losing party, this latter will have the regular, long, one year and forty-six day term to appeal. The decision as to whether the short or long time-limit to appeal should be triggered eventually rests upon the winning party. *Id.*

36. Art. 344 of the C.P.C. uses the term "third party" to refer to someone who did not take part in the first instance proceeding, that is, a non-party in the first instance proceeding which, only under exceptional circumstances, is allowed to appeal the first instance judgment. *Id.*

37. The losing party may challenge a judgment rendered by the *Corte app.* before the *Corte di Cassazione* (Cass.) by one year and forty-six days. See art. 327 C.P.C. This runs from the publication of the judgment rendered by *Corte app.* (long time-limit for challenging), or by sixty days running from the service of the judgment by the winning party (short time-limit for challenging). See *supra* text accompanying note 35.

not the judge of the facts of the case; the facts are considered established once the *Corte d'Appello* has double checked the assessment made by the first instance court.

The *Corte di Cassazione* has no discretion in deciding whether or not to hear a case submitted to it for review to the extent that the motion for review (*ricorso in Cassazione*) meets the formal requirements set by the ICCP.³⁸ The *Corte di Cassazione* could just deny the motion for review³⁹ if, after reviewing the pleadings and the documentation on file, it believes that the motion is groundless.

2.4 *Pro-se litigants*

A private person cannot file *pro se* complaints before a justice of the peace (except in very rare cases where the amount of the claim does not exceed EUR 516) because only counsel has the knowledge and expertise to apply the relevant legal provisions in the view of Italian law. Also, the parties cannot maintain proceeding without the assistance and guidance of trained counsel because this is seen as prejudicial to the party and inefficient.

Considering that Article 24 of the Italian Constitution acknowledges the right of every individual to act and defend himself in a proceeding and that the state undertakes to protect this right, the State grants free counsel to whomever cannot afford to hire their own attorney to file a suit or defend himself in a proceeding. However, free counseling may result in sub-par representation since lawyers who provide free counseling services are paid very poorly by the state. Unfortunately, many good lawyers are not willing to offer free counseling. And there is no provision in the ethical code encouraging them to provide such service.

2.5 *No jury*

There is no jury in civil proceedings. The decision is rendered only by the judge who is typically presiding over the proceeding alone. But on some occasions, the proceeding is decided by a panel of judges.⁴⁰

2.6 *The law of evidence*

Since there is no jury and the decisions on evidence are made by the

38. In particular and mainly: (i) the judgment appealed should be one which Cass. may review; (ii) the motion for review should be based on one or more grounds under art. 360 C.P.C.; (iii) the power of attorney should meet the requirements set by C.P.C.

39. Motion for review of the judgment is not similar to the *writ of certiorari*, because review by the Cass. is not discretionary. See GROSSI & PAGNI, *supra* note 29.

40. Corte app. and Cass. decides by panel of judges. A case is decided by a panel of judges also if it falls within the scope of art. 50 *bis* C.P.C. *Id.*

judge, the law of evidence is not designed to take into account any danger of improperly influencing a inexperienced fact-finder. Therefore, there is no prohibition against the use of character evidence, no hearsay rule, and no general provision describing the concept of "relevancy" of evidence.

The concept of "relevant" evidence essentially excludes anything that does not prove the essential elements of claim or defense of the case. For example, in a civil proceeding concerning a car accident, the fact that the defendant received a fine for speeding in the past would not be relevant. Similarly, the fact that the defendant received a letter from his employer complaining that he was recently driving negligently would not be relevant. It could not directly prove that the defendant caused the accident at issue.

The rules governing evidence do not give much weight to circumstantial evidence and inferences. They place much more emphasis on direct evidence. Inferential reasoning is allowed, but has limits. As in the example above, the judge would not be allowed to infer from defendant's previous speeding fines that the defendant caused the accident on that specific occasion. The burden of proof is upon the plaintiff to prove that (i) there was an accident; (ii) that he suffered damages as a consequence of that accident; and that (iii) the defendant caused the accident either willfully or negligently.

The necessity to fill any gaps and have enough evidence to build a reasonable story of the accident (what happened, why it happened, how it happened, etc.) would never provide justification for the judge to draw inferences as above described. The judge would find for the defendant only if the plaintiff is not able to prove each element of his claim.

The judge will not grant the plaintiff's claim if the proponent could only claim that it is "more likely than not" that each element of the plaintiff's claim exists. Rather, the proponent must provide "strong evidence" (a substantially higher standard than the "more probable than not" standard).⁴¹ The plaintiff must prove that the accident was caused by the defendant's negligent conduct and that the plaintiff suffered damages in a specific amount as a result.

Pursuant to Article 116 of the ICCP, the judge evaluates the evidence, except conclusive evidence (i.e., the evidence which binds the judge to a specific evaluation) and outcome (e.g. admission, oath)).⁴² In particular, the judge is free to decide which exhibits and which witness statements to consider and, in general, which evidence on file is more suitable to support the decision. All of these decisions

41. For instance, identity could not be proven through an application of the "modus operandi" theory. *Id.*

42. Where conclusive evidence like admissions or oaths is offered by one party, the judge cannot decide whether to believe it or not. The judgment on the probative value of such evidence has already been made by the legislator. If relevant in the case, this evidence should be admitted and be considered by the judge in rendering the judgment. *Id.*

are within the judge's discretion. The judge is free to exercise this discretion provided that he gives reasons for his decisions in the judgment.

There are various types of evidence that parties may offer for the record. The judge rules on these offerings and admits items he or she considers admissible and relevant.⁴³ This analysis will merely consider lay and expert testimony and exhibits, which are the most common types of evidence in a civil proceeding.

2.6.1 *Lay testimony and expert testimony*

The rules governing witness testimony are set forth in Article 244 in the ICCP. Additional provisions concerning testimony are set forth in Article 2721 of the Italian Civil Code ("ICC"). Article 246 ICCP provides that the witness should not have any personal interest in the case where he testifies. There is no express requirement as to the personal, first-hand knowledge of the matters upon which the witness will testify; this is an implied requirement that will be checked by the judge when interviewing the witness. "Having an interest in the case" means that the witness could himself commence the same action in which he will testify, file an intervention in that action, or call a third party to join to that action.⁴⁴

If a witness with a personal interest in the case testified in the same case, his testimony would be null. However, a party's objection is required to exclude the testimony as the court cannot raise the issue *sua sponte*. Counsel is not allowed to directly examine and cross-examine witnesses; only the judge can do that. The parties can, however, submit questions to the judge which they would like him to ask the witnesses. Such questions should be framed separately and specifically and indicate the persons who should be examined and the facts upon which they should testify.

Therefore, a request to the judge to examine the witnesses "on all the circumstances indicated in the complaint" would be improper because it is not divided into separate queries concerning the single facts and circumstances upon which the witness should testify. The requirement for specific queries to pose to the witness is intended to allow the judge to check the admissibility and relevance of the single questions and to allow the opposing party to object as to the relevance and admissibility of each question. Each question answered by the witness will constitute evidence, which will be admitted only if it complies with the applicable rules of evidence on relevance and admissibility. The judge will have to decide whether or not to allow (and ask) such questions to the witness on the basis of those rules.

The credibility of a witness is not a condition for the admissibility of

43. See *supra* para. 2.3.

44. See Cass., no. 6894/2005.

the testimony, and the judge does not have the power to exclude testimony because he believes the testimony is unreliable. This is a legislative requirement.⁴⁵ Provided that a witness has no personal interest in the case, he should be presumed credible and his testimony should be admitted. Once admitted, it will then be up to the judge to disregard this testimony if it is found unreliable when rendering the judgment. Testimony is rendered under oath and the opposing party can challenge it through additional evidence and, eventually, through a charge of false testimony which could result in the judge's referral to the Public Prosecutor for due inquiries.

The testimony should concern facts and not opinions. However, the witness may testify about his ideas and opinions on how the fact occurred when these ideas and opinions are strictly linked to the witness's perception and knowledge of the event.⁴⁶ The experts are qualified witnesses who render opinions on specific issues concerning their specific field of expertise. Each party can offer the report of an expert into evidence to support his claim or defense without prior authorization by the judge. The report is admitted into evidence once it is filed.⁴⁷

The judge is also entitled to, and frequently does, appoint his own expert any time he needs the assistance of a qualified expert to solve technical issues. The costs of using an expert are charged to the party requesting the expert or equally to both parties if the judge requested the expert. In this event, the parties are able to appoint their own experts to review and comment upon the work of the judge's expert. The experts – either the judge's or the parties' – will not need to show that they are qualified to offer their testimony as experts in the field in which they claim to be experts. Their expertise is presumed. However, the parties retain the power to challenge this presumption. This process is used to prevent the judge from taking the challenged expert's opinion into account.

Generally, a judge's expert will be appointed to help the judge in evaluating evidence already collected where specific expertise is required.⁴⁸ However, under special circumstances where technical expertise is the only possible means to collect evidence, it will be used to this end as well. In any event, the party with the burden of proof will not be able to shift this

45. As a general rule, as far as the witness has no personal interest in the case and his testimony is relevant, the testimony is admitted. It will be then up to the judge to disregard that testimony if he believes that is not reliable or it is contradictory. However, the judge cannot decide not to examine witnesses because he believes, *a priori*, that their testimony will not be reliable.

46. *See* Cass., 5/2001.

47. The expert's report is basically treated as an exhibit that is admitted once it is filed. In other words, the judge should not make any specific evaluation in order to admit it into evidence, but could decide not to consider it if it is not relevant. *See infra* para. 2.6.2.

48. The appointment of a technical expert falls within the discretionary power of the judge, but when the judge appoints his own technical expert, the parties are entitled to appoint their own experts to work together with the judge's expert and ensure that the parties' rights are not violated.

burden to the judge's expert. Technical expertise is not evidence by itself, but merely a "means of collecting evidence" and is primarily a tool in the hands of the judge and the parties to help them evaluate evidence already collected in the proceeding.

2.6.2 Exhibits

Exhibits are moved into evidence by their filing with the court without any prior evaluation by the judge as to their admissibility or relevance in the case. Once admitted, the judge decides whether to take them into account when deciding the case. The party filing an exhibit is not required to "lay the foundation" for its admission, or specifically "identify" it by providing information about the document, or show that it is authentic. Similarly, there is no "best evidence" rule and generally copies and duplicates are admitted instead of originals even when the content of the exhibit must be proven.

However, parties may object to the authenticity of exhibits, claiming that they could have been tampered with. The opposing party could object by claiming that the document is false. For instance, the defendant could object to a letter filed by the plaintiff, who claimed that it was written by the defendant, by counterclaiming that it was not actually written and signed by the defendant. The defendant could then either file a forgery claim⁴⁹ within the proceeding, or file an autonomous claim in a separate proceeding. The decision to challenge an exhibit's authenticity is, therefore, left to the parties. However, absent any such challenge, the exhibit is admitted as if there was a stipulation by the parties. Exhibits are usually considered more reliable than witness testimony, which could present memory, perception, narration, or sincerity problems.

2.6.3 Burden of proof

As a general rule, Article 2697 ICC provides that, "Whomever wants to claim the existence of a right in a proceeding, should prove the factual grounds of it. Whomever objects as to the existence of the claimed right, should prove the factual grounds of the objection." However, the burden of proof may be upon the plaintiff or upon the defendant, depending on the specific claim or defense. Italian law does not have a graduated set of burdens to apply in civil proceedings.

49. Here, the forgery claim – filed within the proceeding where the forged document has been exhibited or in a separate proceeding, an action for forgery ("querela di falso") – is a civil claim or civil proceeding, where only the probative value of the document is considered: if the document is forged, it is not "authentic" and should be disregarded as not relevant and inadmissible evidence. Forgery, however, may be also the object of a criminal proceeding, where the conduct of the person committing forgery will be judged.

2.7 Facts and evidence gathering: no discovery but an evidentiary phase in a single judge-directed proceeding

Facts and evidence may be presented from the very first pleadings: the complaint, and the answer. Although ideally the parties present all facts and offer evidence by the complaint or by the answer in order to frame the "theme" of the case as soon as possible,⁵⁰ they are not obligated to do so. Rather, the parties may describe the facts of the case by (and not later than) the pleadings under Article 183, sixth paragraph, no. 1 of the ICCP.⁵¹ They may also offer evidence by (and not later than) the pleadings under Article 183, sixth paragraph, no. 2 of the ICCP.⁵²

Outside of admitting exhibits, the parties must request that evidence be admitted.⁵³ The offers of evidence are made in writing (in the relevant pleadings), and parties can object to them for two reasons: inadmissibility and irrelevance.⁵⁴ There is no discovery, and the fact-finding and offer and collection of evidence phase starts from the very beginning of the proceeding and lasts until the filing of the pleadings pursuant to Article 183, sixth paragraph, no. 3. The Italian proceeding is not designed to be an "ongoing" process where complaints and answers may be amended through the conclusion of the proceeding in light of the evidence offered and admitted during the evidentiary phase. It is not a flexible tool in the hands of the parties primarily intended to satisfy their interests.

There are specific deadlines and many formalities⁵⁵ that should be met

50. The rules governing the content of the complaint (*see* art. 163 C.P.C.) and of the answer (*see* art. 167 C.P.C.) encourage them to do so. *See* GROSSI & PAGNI, *supra* note 29.

51. This is the first pleading exchanged by the parties soon after the first hearing and after the filing of the complaint and answer. By this pleading, parties should specify the content of their respective claims and defenses and, therefore, the facts constituting the grounds of same claims and defenses.

52. Specifically, art. 183 describes the content of the pleadings which the parties may exchange after the complaint and the answer. By these pleadings, the party may amend their claims and defenses (by the time limit set forth in art. 183, sixth para., no.1), offer evidence to support their claims or defenses (by the time limit set forth in art. 183, sixth paragraph no. 2), and offer rebuttal evidence (by the time-limit set forth in article 183, sixth para. no. 3). As a general rule, and unless exceptional circumstances occur, these time limits are final and cannot be extended by the judge. Evidence in rebuttal, however, may be offered in the following brief, pursuant to art. 183, sixth para. no. 3 C.P.C. *See* GROSSI & PAGNI, *supra* note 29.

53. *See supra* para. 2.6.2.

54. As an example, a testimony rendered from a person who has a personal interest in the case, would be "inadmissible." A testimony which does not prove or disprove a "material" fact in the case would be irrelevant. Similarly, a testimony offered to prove the content of a contract, which should have been proved in writing, is inadmissible; if evidence of the contract is not useful to prove or disprove a material fact in the case, then it is not relevant. Therefore, the party could object that this testimony is not relevant and should not be admitted. *See supra* para. 2.6.

55. The rules on service of process and power of attorney offer good examples of such formalities.

for the proceeding to move forward. The claims and defenses cannot be amended after the specific time limits set forth in Article 183 of the ICCP in which time limits expire before the evidentiary phase (where evidence, other than exhibits, is offered and admitted) is even commenced. Therefore, a judgment rendered at the end of such proceeding could lack “rationality.” It could not be logically based on the full record as it developed throughout the whole proceeding on the basis of a logical reasoning,⁵⁶ thus, it is unfair.

Soon after, the filing of the pleadings under Article 183 of the ICCP hearings for the admission of evidence is scheduled. During those hearings, the judge hears testimony or admits evidence requests that he previously granted by order. The evidentiary hearings are devoted to the admission of evidence and discussions of the issue of admissibility or relevancy of that evidence. There can be more than one evidentiary hearing if the admission of evidence cannot be completed in one hearing.⁵⁷

The judge is always present during the proceeding and directs and supervises the parties and the whole development of the proceeding. The judge has proven to be very important for counsel, who otherwise might have problems in managing the proceeding and decide by themselves, on the basis of the provisions of the ICCP, which facts and evidence should support their respective claims and defenses.⁵⁸

2.8 *No settlement within the proceeding*

Settlement is generally considered an efficient tool in the hands of the parties in order to prevent or solve litigation once a suit has been brought.

56. For instance, where the evidence offered during the evidentiary phase made it proper to file new claims, that was not possible to file – unless in the extreme and exceptional circumstances under art. 184 *bis* C.P.C. – since the time limits to file and amend claims and defenses would have already expired, under art. 183, sixth para. no. 3.

57. For instance, it may be that many witnesses should be examined and cross-examined and that the examinations cannot be completed in one day. In this event, the judge will schedule another hearing, and maybe other hearings, as many as necessary to complete the admission of evidence (for example, the examination of witnesses). *See* GROSSI & PAGNI, *supra* note 29.

58. This has also been demonstrated by the discipline of the proceeding for company law matters, set forth in *Legisl. Ital. Decree no. 5/2003*. That proceeding is divided into two parts: the first part, where parties exchange pleadings without the judge’s intervention; and the second part, where the parties appear before the judge to discuss the case. The provisions governing the phase taking place in the absence of the judge are complex, and sometime counsel are not able to correctly construe them. In these events, they request the judge’s intervention to overcome the impasse and tell them how to proceed. However, such difficulties might be due to the ambiguity in the provisions themselves, which call for a judge’s clarifications. *Id.*

Whatever the answer be, the phase of the proceeding accomplished in the judge’s absence – in the proceeding specifically dealing with company law issues – did not have much success in Italy, and the company law proceeding discipline is going to be repealed by the new reform of the C.P.C.

Settlement procedures are viewed favorably by the judiciary because settlements reduce the judge's caseload. Despite this general understanding and various attempts by the Italian legislature to introduce settlement procedures in civil actions, settlement procedure still remains a "dead" instrument that is rarely used by the parties.

Article 185 of the ICCP provides a provision that allows the parties to petition the judge to settle the dispute in an "ordinary"⁵⁹ civil proceeding anytime after the commencement of the action. However, cases are very rarely settled once they go to court, since parties are almost never willing to do so, especially at the beginning of the litigation when, according to the provision set forth in Article 185 ICCP, settlement should happen. This may be due to the lack of a "culture of settlement." The parties to an Italian action are generally not "educated" on the advantages of settling the case, and they prefer to go to court to take their chance on winning there.⁶⁰

Both the lack of a settlement culture and the lack of any real duty of the judge to try to settle the case between the parties,⁶¹ at the beginning or throughout the proceedings, make the Italian proceedings inefficient. Litigating a case where there is no real need to do so generates high costs, which could be easily avoided through settlement. Not only could the case be settled entirely, but there could also be undisputed issues that could easily be disposed of through settlement.

In addition to the lack of a culture of settlement, this general refusal to try to settle civil litigation may also be because at the beginning of a proceeding and until its end, once the evidentiary phase is closed, each party does not know which evidence the opposing party is going to use to support its claims or defenses. In the Italian proceeding, in fact, there is no

59. "Ordinary proceedings" means proceedings which are not governed by special rules, such as precautionary measures proceedings, labor proceedings, company law proceedings, etc.

60. Mediation is not yet a popular ADR tool in Italy. While there are examples of mandatory mediation in the Italian legal system (e.g. in family law, in labor issues and in disputes concerning specific corporations' subject matters) and of private mediation - held by the ADR Center in Rome and by the Milan Chamber of Arbitration - the tool is not used as a real dispute resolution tool. The number of cases held by private mediation providers is low and mandatory mediation is entered just as a necessary step to access the ordinary justice in court.

61. Before the reform of civil proceedings accomplished by Law no. 80/2005, art.183 C.P.C. provided that, at the first hearing the judge should interview the parties as to the facts of the case and, where possible, try to reconcile them. In other words, differently from what is now provided by art.185, C.P.C., it was not up to the parties to request the judge to try to settle the dispute, but the judge had a duty to do so where the litigation was such that settlement could be attempted. Despite the former provision of art. 183 C.P.C., judges very rarely tried to settle the dispute between the parties appearing before him, considering that the parties had no intention whatsoever to try to settle the dispute just at the beginning of the proceeding. Consequently, and in view of the general practice, the provision for judges' settlement attempt at the beginning of the proceeding was eliminated. See GROSSI & PAGNI, *supra* note 29.

discovery. Therefore, the information which a party decides to “disclose” is only that information that it deems useful to support its own position.⁶² Once cases reach the point of litigation, they very rarely settle during the proceeding, and they end by a judgment, usually after two or three years in the first instance, three or four years at the appellate level, or after additional three years at *Corte di Cassazione*’s level.⁶³

2.9 Judgments

At the end of the proceeding, judgment is rendered within thirty days following the filing of the final pleadings in rebuttal in cases of litigation pending before a single judge. Judgment is rendered within sixty days following the filing of the final pleadings in rebuttal when the case is decided by a panel of judges. This, however, is not a final time limit for the judge who usually issues the judgment much later.

The text of the judgment is mainly divided into three parts: the facts, the applicable law, and the holding. The text of the judgment does not contain any dissenting opinion. Judgments rendered by lower courts and those rendered by the superior courts are not binding. But they usually influence the decisions.⁶⁴ This does not mean that precedent is binding upon courts, but that precedent can and usually does influence future decisions by judges, irrespective of the hierarchy among them, if the judgment is well reasoned and well-grounded and contains a good interpretation and application of the law.⁶⁵

Typically, a judge does not grant relief which was not specifically petitioned for by the parties. This is because there has to be a strict correspondence between what relief has been demanded by the parties and what relief is finally granted by the judge.⁶⁶ This, on some occasion, might

62. It is in fact true that in Italy parties are encouraged to set their claims and defenses at the very beginning of the proceeding, in their complaint and answer. However, this is rarely done, because parties prefer to wait until the very end of the proceeding to show their complete “theme.” This, in the absence of discovery, truly affects the possibility of a settlement during the proceeding. *Id.*

63. The median time for disposition in federal courts is not that different – approximately two years. Ordinary cases in federal courts would never go to the Supreme Court.

64. The Trib. or the Corte app.’s decision might also influence the Cass.’s judgments, since hierarchy among courts does not prevent such influence.

65. The same thing is true in the United States, at least to a large degree. For instance, while a district court in New York is bound by the decision of the U.S. Court of Appeals for the Second Circuit, it is free to, and often does, look at opinions of other courts, at any level of the hierarchy, for precedents, whose opinions are influential if well-reasoned; however, they are not binding. See GROSSI & PAGNI, *supra* note 29.

66. Art. 112 C.P.C. provides that “Il giudice deve pronunciare su tutta la domanda e non oltre i limiti di essa; e non puo’ pronunciare d’ufficio su eccezioni, che possono essere proposte soltanto dalle parti.” (The judge shall state over the whole claim and within its limits; he shall not state sua sponte over objections which may be raised only by the parties).

appear very formal and could run contrary to the whole development of the proceeding, It can also result in an outcome that is irrational, illogical, and unfair.

2.10 Appeal

Judgments can be appealed before the *Corte d'Appello* after showing grounds for appeal. Usually the grounds for appeal concern the interpretation of the law, the granting or denial of evidence, and the interpretation of facts. The complaint on appeal does not comply with a specific layout but it should indicate and specify the grounds upon which the appeal is sought.

Similarly, no specific layout is required for the motion for review (*ricorso in Cassazione*) before *Corte di Cassazione*. However, the grounds upon which a judgment issued by *Corte d'Appello* is challenged before *Corte di Cassazione* should be specifically indicated and specifically complied with those listed under Article 360 ICCP. The list of grounds for appeal before *Corte di Cassazione* set forth in Article 360 ICCP is exhaustive, and the grounds merely concern errors of law, and not errors of fact. *Corte di Cassazione* will review the appellate court's judgment as to the application of the law to fact. No further review of the facts of the case will be accomplished, and no new claims or evidence will be considered.

III. GENERAL OVERVIEW OF THE U.S. PROCEEDING BEFORE U.S. FEDERAL COURTS⁶⁷

The U.S. court system consists of fifty state court systems plus a similar system for the District of Columbia and a separate system of federal courts. The federal courts and most state court systems are organized into trial courts (the U.S. district courts in the federal system), intermediate appellate courts, and a Supreme Court. As explained below,⁶⁸ federal courts have limited jurisdiction; they may only hear cases raising a federal question or cases based on diversity of citizenship where a substantial sum is at stake.

State courts, in contrast, can hear practically any sort of case, including most cases involving federal claims. With respect to state law, the individual state supreme courts have the final authority. As to federal issues (including constitutional ones), state courts are subject to the oversight of the United States Supreme Court.

The diversity of U.S. court systems poses a problem for a

Id.

67. For a general overview, see Geoffrey C. Hazard, Jr. and Michele Taruffo, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION (1997). See also John B. Oakley, Vikram D. Amar, CIVIL PROCEDURE, IN INTERNATIONAL ENCYCLOPAEDIA OF LAWS, VOL. 5 (2001); Jack H. Friedenthal, Et. Al., CIVIL PROCEDURE (4th ed., 2005). See also *infra* App. A.

68. See *infra* para. 3.2.

comparative analysis. Dealing fully with the variations among the various state courts and between them and the federal courts would unduly expand the length of this Article. At the same time, most judicial systems in the United States are variations of a central theme. Procedurally, for the last seventy years that theme has been played by out in the federal courts. For that reason, this Article will treat the federal courts as typical of the various U.S. court systems. Although it will take note of major variations to the extent they appear important to the overall analysis.

3.1 The appointment of judges

Justices of the Supreme Court, the circuit courts of appeals, and the district courts are appointed by the President of the United States with the advice and consent of the Senate. These are life appointments and can only be removed through impeachment by the Congress for “high crimes and misdemeanors.” There is no statutory qualification for judicial appointment to the Supreme Court or the lower federal courts. The process of appointment of a federal judge starts from a judicial vacancy. A vacancy occurs when a judge dies, resigns, is impeached by Congress, or where a new position is created by Congress.

Congress is involved throughout the process of appointment of federal judges,⁶⁹ including both in the selection of candidates and confirmation of nominations. Congress's influence in the selection of potential candidates lies in its capacity to make recommendations.

As a general rule, in the United States judges do not specialize in specific subject matters. American judges are lawyers who have been appointed to the bench. They still think of themselves as lawyers, and they often go back to being lawyers after they resign from the bench. In the United States, lawyers and judges are divisions of a single legal profession and are separated from each other only by a permeable membrane. It is quite natural for judges selected this way to play the relatively passive role that judges play in the U.S. system.

Similarly, United States judges do not have a career ladder that they can climb based on their skill at resolving cases. At best, working one's way up means getting appointed to an appellate court. Such appointments are not the result of meritocratic advancement from the lower court bench. Many appellate judges were never district court judges. The absence of a definite career ladder and responsibility for the job one does at an entry level court supports the U.S. model of a passive judge managing a civil

69. Specifically, the Senate is involved while the House of Representatives has no formal role in appointment of judges. On the other hand, senators have a very important role, not only collectively, but as to judges in their states, individually as well. This is especially the case when the senator is of the same political party as the president.

litigation process largely driven by the lawyers.⁷⁰

3.2 Personal and subject matter jurisdiction and venue of litigation

When filing a complaint before a court, the plaintiff should check that the court has jurisdiction, specifically, subject matter jurisdiction and venue⁷¹ over that particular dispute brought before it. Furthermore, the court should have personal jurisdiction. That is, the court should have power to enter a judgment which would be binding on the defendants involved. Usually, state or federal constitutional provisions or statutes determine whether specific courts have subject matter jurisdiction over certain categories of controversies.

The federal court system derives from two main documents: Article III of the United States Constitution, and the Judiciary Act of 1789. Article III, Section 1, of the Constitution provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 of Article III defines the permissible scope of federal judicial power, listing the areas in which federal subject matter jurisdiction may be asserted. Congress has no power to extend the subject-matter jurisdiction beyond the limits set forth by Article III of the Constitution, and if it does so the grant is unconstitutional.⁷²

On the other hand, the 1789 Judiciary Act establishes the doctrine that the actual scope of the jurisdiction of the federal courts at any given time is governed by the relevant jurisdictional statutes passed by Congress, even if the outer limits of permissible federal judicial power are set forth by the Constitution.

Subject matter jurisdiction of the federal courts is limited by both the Constitution and by statutes. Plaintiffs must show subject matter jurisdiction at the outset of the case. Subject matter jurisdiction cannot be conferred upon the federal courts by agreement of the parties. Absence of subject matter jurisdiction cannot be waived by the parties. Federal courts have subject matter jurisdiction (i) where the plaintiffs' claim is based on federal law or (ii) in diversity cases, that is, where a case is brought by a citizen of a state against a citizen of another and the amount in controversy

70. However, as political as the selection of federal judges may seem, it is not nearly as political as the process for selecting state judges. In many states, judges are elected, and in many others they are appointed for a limited term initially and then required to run for election within a certain period of time. Few if any state courts grant life tenure to judges. Among other things, this method of selection means that state judges are even less likely to think of themselves as a separate professional cadre and are in even more close affinity to practicing lawyers.

71. Rules concerning venue allocate cases among the same type of courts having jurisdiction over a case, within a given judicial system. See 28 U.S.C. § 1391.

72. *Hodgson v. Bowerbank*, 9 U.S. 303, 304 (1809).

is at least \$75,000.⁷³ In those cases, by and large, federal courts' jurisdiction is concurrent with state courts' jurisdiction. However, there are some cases where federal courts have exclusive jurisdiction, as in bankruptcy proceedings.

3.3 Main structure of the civil proceeding

Mainly, the procedure before trial courts can be divided into two phases: (i) a pre-trial phase, which takes place between the parties with minor involvement by the judge; and (ii) a trial phase, which takes place in court before the judge and a jury, where the right to jury trial is provided and a jury is timely demanded. This Article considers mainly jury trials. While jury trials are the majority, a very sizable minority of cases are tried before a judge. It makes sense to focus primarily on the jury trial because the rules are determined primarily by the jury trial paradigm.

The proceeding commences by filing a complaint before the appropriate court. Following the filing of the complaint, which must be served upon the defendant(s). Upon receiving the complaint, the defendant(s) must file its answer to the complaint, and then the parties exchange their pleadings provided by Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 7.

The parties may exchange a limited number of pleadings: a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a cross-claim, a third-party complaint, an answer to a third-party complaint, and if the court orders one - a reply to an answer.

Once the parties exchange their pleadings, they go through the discovery process. They exchange information concerning evidence they have or want to obtain from the opposing parties, within the limits of applicable law provisions. After the discovery phase concludes, the parties go to trial. At trial, before the judge and a selected jury, they offer their evidence (including witnesses), present their claims and defenses, and present final arguments. Once the trial is concluded and the jury is properly instructed, the jury renders a verdict and a final judgment is issued by the judge on that verdict.

There are three points at which litigants can try to resolve the case through motions to avoid the necessity of a trial. First, the defendant can move to dismiss the complaint on the basis of one of the defenses listed in Fed. R. Civ. P. 12(b). These defenses include absence of subject matter jurisdiction, absence of personal jurisdiction, or failure to state a claim on which relief can be granted. A motion to dismiss under Fed. R. Civ. P.

73. Besides these two major instances of federal courts' subject-matter jurisdiction, federal courts have jurisdiction in suits where the United States is a party, in admiralty and maritime cases, in actions between two or more states, and in a few other situations.

12(b)⁷⁴ must be made before the defendant answers. Second, at any time after the pleadings are closed, any party can move for judgment on the pleadings. Such a motion would assert that a state of facts shown on the face of the pleadings, including defensive pleadings, entitles one party or the other to judgment, and development of other facts is unnecessary. For example, the plaintiff's complaint might show that the claim is barred by the statute of limitations, or the defendant's answer might contain sufficient admissions to show that the plaintiff is entitled to judgment.

Third, any party may move for summary judgment under Fed. R. Civ. P. 56. A summary judgment motion is different from a motion for judgment on the pleadings in that it may be based on information outside the pleadings, uncovered in discovery or some other way. The moving party will be entitled to summary judgment if he shows that there is no "genuine issue of material fact" and that he is entitled to judgment as a matter of law. Technically motions for summary judgment may be made at any time after twenty days from the date of filing the complaint. In practice judges usually refuse to grant summary judgment until the opposing party has had ample opportunity to develop his case through discovery. Summary judgment may be granted on some issues or claims and not others. So, summary judgment motions are often used immediately prior to trial to simplify the issues to be tried.⁷⁵

A uniform system of pleading for all suits in federal courts was established with the promulgation of the Federal Rules of Civil Procedure in 1938, which also introduced a new simplified approach to pleadings in federal courts. Pleadings merely had to give "fair notice" (the so called "notice pleading" system), an approach considerably simpler than the fact pleading approach then provided in state courts. In the "notice pleading" system, in order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) (a motion to dismiss the case for failure to state a claim upon which a relief can be granted),⁷⁶ the pleading only needs to contain a short and plain statement of the claim showing that the pleader is entitled to relief.⁷⁷ It is not necessary to plead the operative facts in detail.

Recently, however, the U.S. Supreme Court increased the burden on plaintiffs in *Twombly v. Bell Atlantic*.⁷⁸ The Court in *Twombly* held that under the notice pleading standard, the complaint should be not only *cognizable*⁷⁹ but also *plausible*,⁸⁰ meaning that the pleading should contain

74. See *infra* para. 3.7.2.1.

75. Pretrial dispositive motions are discussed in more detail below. See *infra* para. 3.7.2.

76. See *infra* para. 3.7.2.1.

77. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

78. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

79. This was stated in *Conley v. Gibson*, 355 U.S. 41 (1957), where the Court also said that a claim should not be dismissed unless the plaintiff cannot prove any set of facts under which relief can be granted. *Id.*

enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the claim. Once pleadings have been exchanged, parties go through discovery – when they exchange information and evidence – and pretrial conferences.

Under Fed. R. Civ. P. 16 (a), courts have general authority to schedule pretrial conferences that often, lead to the adoption of orders for the management of discovery and other matters and preparation for trial.⁸¹ After pretrial conferences, if the parties have not settled the dispute, a jury is selected through the *voir dire* process,⁸² and the trial starts before the jury and the judge. During the trial, evidence gathered during discovery will be offered to the jury under the judge's supervision. At the end of the trial, the jury reaches a verdict upon which the judge will render a judgment.

3.4 *Pro se litigants*

No one is required to hire a lawyer. Parties may nearly always represent themselves in court. But it is rare for litigants to represent themselves in ordinary civil litigation. As a practical matter, they would hardly be able to manage the complexity of a case in federal court. This broad permission for pro se litigation may be due to the lack of any right to free counseling and legal aid, which would eventually deprive the party of the right to defense and access to justice had the party no right to litigate pro se.

However, this system could be highly unfair in terms of a lack of “fair play.” By acting as a plaintiff or by defending himself in court and not knowing the rules and case law construing the same, the pro se litigant will not have equal opportunity to file pleadings, respond to opposing counsel's arguments, offer evidence, etc. Thus, his access to justice will be

80. After *Dioguardi*, Twombly reformed the notice pleading system. See Kevin M. Clermont, *Litigation Realities Redux* (Cornell Legal Studies, Research Paper No. 08-006, 2008), available at <http://ssrn.com/abstract=1112274> (observing that “This move represents the Court's first unmistakable step backward from the modern conception of notice pleading”).

81. FED. R. CIV. P. 16(b) is a *required* conference. It happens near the beginning of the case and results in a scheduling order governing the time for joining any further parties, amending pleadings, filing motions, and completing discovery. In complicated cases, the scheduling order can be much more detailed even than this. The schedule may only be modified for good cause.

FED. R. CIV. P. 16(d) also requires a final pretrial conference, where the judge and parties formulate a plan for the trial, including admission of evidence. After the final pretrial conference, the judge will enter a final pretrial order, which can only be amended to prevent “manifest injustice.” Therefore, there are at least two pretrial conferences in any case, however simple, that is, the FED. R. CIV. P. 16(b) scheduling conference and the FED. R. CIV. P. 16(d) final pretrial conference. In more complicated cases there will be a number of other pretrial conferences that are designed to monitor the progress of the case and make midcourse corrections. Each of these gives rise to a pretrial order that modifies the previous pretrial orders governing the course of the case. *Id.* For further information, see also *infra* para. 3.7.

82. See *infra* para. 3.5.

substantially impaired. Forms of legal aid should be provided and are highly encouraged.

3.5 Jury⁸³

According to the Seventh Amendment of the U.S. Constitution, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." A similar guarantee can be found nearly in every state constitution.⁸⁴

The right to jury trial, as it existed at common law in 1791, when the Seventh Amendment was ratified by the original states – is not created, but "preserved" by the Amendment in "suits at common law."⁸⁵ Historically, a right to jury trials did not exist in suits that sought only equitable relief, such as an injunction or specific performance. After the Seventh Amendment, therefore, cases at law continued to carry the right to trial by jury in federal courts, while suits in equity continued to be decided by judges, the distinction being based primarily on the nature of the relief sought. Therefore, by designating the right to relief sought, the plaintiff is able to control his right to a jury trial. However, such distinction is not so simple and the U.S. Supreme Court has tried to clarify this issue through a series of decisions, the most important of which are *Beacon Theater Inc. v. Westover*,⁸⁶ *Dairy Queen Inc. v. Wood*,⁸⁷ and *Ross v. Bernhard*.⁸⁸ In *Beacon Theater*, the Court held that when a remedy at law is available, a constitutional right to a jury trial exists regardless of whether historically the action would have been tried in equity. In *Dairy Queen*, the Court further specified that only the most imperative circumstances may lead to an exclusion of the right to a jury trial.

Finally, further defining the conditions for the existence of the right to a jury trial, the Court stated, "As our cases indicate, the legal nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."⁸⁹ Courts which have adopted

83. See FRIEDENTHAL *supra* note 67, at 488.

84. However, Colorado, Louisiana and Wyoming have no constitutional guarantee to jury trial in civil cases. See FRIEDENTHAL *supra* note 67, at 507.

85. However, even if the right to jury trial is "preserved" by the VII Amendment to the U.S. Constitution and only upon the most compelling circumstances can "the right to a jury trial of legal issues be lost through prior determination of equitable claims," the litigants may waive such right if they do not make a timely demand for a jury trial. See FED. R. CIV. P. 38.

86. 359 U.S. 500, 510-11 (1959).

87. 369 U.S. 469, 82 (1962).

88. 396 U.S. 531 (1970).

89. *Id.* at 538. The court's reference to pre-merger custom" means the custom that existed before the "merger" of law and equity (formerly, two separate systems with separate

the *Ross* test have, nevertheless, generally refused to apply the third complexity criterion.⁹⁰

The jury is a fundamental institution in the American proceeding and in *Beacon Theatres, Inc. v. Westover*⁹¹ and its progeny, the U.S. Supreme Court stated that trial by jury is “the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”⁹²

Not only is the jury a constitutional actor in the American legal process, the jury also tremendously shapes and influences that process and the law governing the same. The jury has three tasks to accomplish: (1) determining the facts; (2) “evaluating the facts in terms of the legal consequences as formulated by the trial judge in the jury instructions”; and (3) deciding in the form of a verdict.⁹³ However, the jury is not composed of legal professionals, and they usually do not know anything about the law governing the case prior to their selection to the jury; therefore, they are instructed as to the applicable law by the judge.

Pursuant to Fed. R. Civ. P. 48, in civil litigation the jury should be composed of at least six members and the verdict should be unanimous, unless otherwise stipulated by the parties.

Parties have an opportunity to shape the jury by challenging jurors. Each party has an unlimited number of challenges “for cause.” They may challenge a potential juror who does not have the statutory qualifications, may be biased, or has a relationship with one of the parties or counsel. Furthermore, each party may challenge three potential jurors for any reason or no reason through the “peremptory challenges.”⁹⁴ Parties will use these challenges to avoid jurors who they believe are likely to be hostile, but for whom there is an insufficient basis for a challenge for cause. Parties determine whether a juror is subject to challenge for cause (or ought to be challenged preemptorily) through “voir dire,” a procedure used to gather information about prospective jurors. Sometimes the lawyers for the parties question jurors, and sometimes the judge questions them with substantial

rules) in 1938. *Id.*

90. See FRIEDENTHAL, *supra* note 67, at 533.

91. 359 U.S. at 500.

92. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

93. See FRIEDENTHAL, *supra* note 67, at 512.

94. FED. R. CIV. P. 47(b) requires the court to allow the number of peremptory challenges provided by statute, 28 U.S.C § 1870. The statute provides: “In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.” All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.”

input from the lawyers.⁹⁵ *Voir dire* provides the parties with the information they need in order to persuade the jury. It also provides the factual basis for arguments to the judge that particular jurors should be disqualified for cause.

The idea that the parties actively participate in the process of selecting their jury seems strange when compared to Italian judges, who develop a reputation for impartiality through training in a kind of administrative bureaucracy. Here, "impartiality" of the finder of facts comes from a sort of "scrubbing" by the parties. This process of selecting the trier of facts is consistent with the adversarial nature of the American proceeding: if one side is better at jury selection than the other, it will gain an advantage. The judge does not play an important role in selecting the jury. He may ask the questions that disqualify people who are clearly not qualified for some reason. However, the real jury shaping is done by the parties, and not by the judge. The purpose of the parties' participation is not to check the powers of the judge but to affirmatively influence the composition of the jury.

Once the jury has been impaneled, it hears evidence which is presented by counsel under the judge's supervision. Pursuant to the relevant federal rules of evidence, the judge supervises the process of evidence selection and allows the relevant and admissible evidence to get in and be taken into account by the jury, while precluding the introduction of irrelevant and inadmissible evidence. The jury then has to judge the evidence offered at trial in light of the instruction which will be provided to it by the judge either during (in case of limiting instruction)⁹⁶ or after trial and either before or after the parties' closing arguments.⁹⁷

Once all the evidence is presented to the jury, the jury makes its decision by a general or special verdict or by a verdict that is a mixture of the general and special verdict. By the general verdict, the jury simply indicates which party wins the case, without giving further explanation for such decision. In contrast, when adopting the special verdict, the jury responds to a list of factual issues with reference to which the court will ask the jury to make findings. In this case, the judge then applies the substantive law to these findings and enters the appropriate judgment.

95. Some courts also use questionnaires to explore jurors' attitudes on certain subjects in greater detail than can be done on oral examination.

96. When the judge deems that an offered item of evidence is admissible for a specific use, but would be inadmissible for another use, he will instruct the jury consistently, warning it that it will be able to consider that item only for the instructed permissible use.

97. Parties ordinarily submit requests for jury instructions under FED. R. CIV. P. 51(a)(1). This is done either at the close of the evidence or at an earlier point ordered by the court (in which case the parties may have the opportunity to supplement their requests). The court must inform the parties of its proposed instructions, give them an opportunity to object, and rule on the objection. See FED. R. CIV. P. 51(b)(1)-(2). It is in the debate over jury instructions that the parties set forth their views of the law and the judge makes rulings that may be the basis for an appeal.

The judges make the decision as to which form of verdict the jury should use.⁹⁸ They usually prefer general verdict forms because framing the issues to submit to the jury may be difficult and time consuming, especially in complex cases.⁹⁹ Special verdicts may be considered an intrusion in the jury's domain and an abuse of control over the jury.

General verdicts may lead to problems because they make it impossible to see whether the jury made its decision after careful consideration of the judge's instructions or whether the decision was based on emotion and bias.¹⁰⁰ At best, the special verdict form would allow a more precise check against a jury totally misunderstanding the case. If the jury rendered a special verdict, the lawyer could look at inconsistent answers in order to create a basis for an appeal, or more likely, a new trial. Still, the underlying reasoning adopted by the jury would not be disclosed to the parties, who then will have no way to check whether that reasoning was "right" or "wrong." The litigants rarely know what actually happened, and no one provides an account for the real basis of the decision, if there is one.

Here, the system seems unfair because it runs contrary to most of the fairness criteria of rationality, predictability, and fair play. It runs against rationality because the judgment thus rendered is not "clearly" based on the records and reached after logical reasoning that can be shared by reasonable people. The reasoning followed by the jury is not shown to anybody and remains in the jury's "black box." It runs against predictability in that the decision rendered on the basis of the verdict cannot be reviewed under the reasoning criteria and schemes, which were adopted by the jury. A system where the grounds for review on appeal are more clear and depend less on discretion and on factors which are not "disclosed" to the parties would be more fair and desirable.

Practical reasons have been offered to keep the jury's reasoning "not public." First, it would be impracticable to have six or twelve jurors to agree on the same reasoning to support their verdict. Second, jurors are lay people who are not used to writing reasoning that supports findings of fact; this would require a level of technicality that they do not possess. Finally, a secretary to the jury would probably be necessary to this end, and such an addition is impractical.

In any event, the jury decision making process is a matter of ideology: the jury represents the democratic community in applying community standards to the matter at hand, regardless of what the law may be. In short, the strong version of jury ideology is a negation of the rule of law. The

98. *Broad. Satellite Int'l, Inc. v. Nat'l Digital TV Ctr., Inc.*, 323 F.3d 339 (5th Cir. 2003); *Davis v. Ford Motor Co.*, 128 F.3d 631 (8th Cir. 1997).

99. FRIEDENTHAL, *supra* note 67, at 571.

100. *See Skidmore v. Baltimore & O. R.*, 167 F.2d 54 (2d Cir. 1948), *cert. denied*, 335 U.S. 816.

system will not go there, but it stops quite far from subjecting jury decisions to a rational restraint. The main tool the system uses is the power of the judge to order a new trial,¹⁰¹ which does not substitute for the jury's decision but instead obtains the decision of a new jury.

However, many cases are tried to a judge. These are not the paradigm, but they are the majority.¹⁰² It is not clear whether judges decide cases differently from juries, but the form is certainly different and more transparent. The judge has to make findings of fact and conclusions of law, will have a very thoughtful opinion, and will be subject (so far as findings of fact are concerned) to appellate review in a way that the jury is not. Judge-made decisions are subject to the "clearly erroneous" standard.¹⁰³ Specifically, the appellate court will affirm the judgment, unless the finding of fact is clearly erroneous, but that is a lot different from passion or prejudice. There is an element of reasoned decision-making in this kind of case that is missing from jury trials. Trials to the judge also have a big effect on the rules of evidence, since judges resolve any doubts by letting evidence in and then taking its worth into account. Trials to the judge in Italy and in the United States look more similar and seem more "fair" in this respect.

On the contrary, when reviewing jury fact finding, the standard is more strict.¹⁰⁴ To find error at all, the appellate court has to conclude that the trial court's decision was not merely wrong, but something close to an unreasonable decision.¹⁰⁵ In other words, the appellate court should see whether there is evidence in the record on which a reasonable jury could find the required facts to support either the general or special verdict. Only in this event will the appellate court not reverse the prior decision.¹⁰⁶

This makes it very hard to "review" a jury verdict. Perhaps the only case in which the assessment of facts contained in the jury verdict could be truly reviewed is through a motion for a new trial under Fed. R. Civ. P.

101. See *infra*.

102. As explained above, trials to a judge happen either because there is no right to a jury trial or because parties waive it.

103. See FRIEDENTHAL, *supra* note 67, at 640. In recognition of the trial judge's special expertise, the clearly-erroneous standard is said to preclude the appellate court from re-determining the weight or credibility of the evidence. *Inwood Labs, Inc. v. Ives Labs, Inc.* 456 U.S. 844 (1982). It also precludes the appellate court from independently assessing the inferences drawn from the facts by the trial judge. *U.S. v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950).

104. "The issue often arises on appeal after the trial judge has denied a motion for new trial on the ground that the evidence was sufficient to support the verdict." See FRIEDENTHAL, *supra* note 67, at 639.

105. See ALLEN, ET AL., EVIDENCE: TEXT, PROBLEMS AND CASES 106 (4th ed. Aspen, 2006).

106. If this would come up in connection with a decision concerning a motion for a new trial, then the question would be whether the verdict was against the "great weight of the evidence".

59.¹⁰⁷ In jury trials, through the motion for new trial, which must be made by ten days after the entry of the judgment, the movant may request the trial court to order a new trial if the verdict is excessive, inadequate, or against the clear weight of the evidence. Specifically, the trial court will grant a motion for new trial for excessive verdict when it determines that the amount of the verdict is so unreasonable that it shocks the conscience.¹⁰⁸ This is clearly a high threshold that must be met for the trial court to order a new trial. The amount object of the trial must be so unreasonable as to shock the conscience.

The court will grant a motion for new trial when verdict is against the weight of the evidence so that a new trial is necessary to prevent a miscarriage of justice. The evidence may be such that reasonable people could find as the jury did, but the verdict still may be manifestly against the weight of the evidence.¹⁰⁹ The trial judge may weigh the evidence and grant a new trial under these circumstances.¹¹⁰ Here, the threshold is high, requiring a strong conflict between the evidence and the verdict itself so that the order for new trial is necessary to avoid a miscarriage of justice.

Here, the question is whether an excessive verdict not so unreasonable as “to shock the conscience” or a verdict in conflict (even if the conflict is not that strong) with the weight of the evidence offered at trial, but not resulting in a “miscarriage of justice” still able to affect the parties’ rights could lead the trial court to grant a new trial. The trial court will likely not grant a new trial because of the great deference to the jury, a fundamental institution in the American proceeding.

Whether the circumstances justify the granting of a new trial is a decision left to the sound discretion of the trial judge.¹¹¹ Such discretion is so broad that one court has described it as “virtually unassailable on appeal.”¹¹² Usually, judges do not like to grant motions for a new trial because new trials are expensive and time consuming. Consequently, the jury’s findings of fact hardly get reviewed through motions for a new trial and hardly get reviewed at the appellate level where the “abuse of discretion” standard applies. Notwithstanding these factors, the jury is indeed a fundamental institution of the American legal process and tremendously affects the process and the law provisions regulating it, especially the laws of evidence.

3.6 *Laws of evidence*

As observed:

107. *See also infra* para. 3.9.

108. *See generally* *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996).

109. *Bevevino v. Saydjari*, 574 F.2d 676 (2d Cir.1978).

110. *See* FRIEDENTHAL, *supra* note 67, at 594.

111. *See generally* *Gasperini*, 518 U.S. at 415.

112. *See* *Children’s Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 867 (8th Cir. 2004).

A more theoretical difference between the American conception of evidence and that in the civil law system stems from the fact that the civil law system regards the judge as an expert in evaluating evidence, while the American system regards the judge as substituting for a lay jury in evaluating evidence. The intellectual tradition of civil law scholarship treats the task of factual analysis as involving a technical rigor no less exacting than legal analysis. The method of legal training in the civil law centers on deductive analysis, which is assumed to be equally applicable to legal reasoning and to factual analysis. In contrast, the American system rests on the premise that assessment of evidence involves no special expertise. By definition, in a jury case the evidence is assessed by minds untrained in law; it would be a contradiction to say that legal training is required to analyze the facts when jurors do so without any such training. Moreover, judges in the American system have no special judicial training before appointment to the bench, nor are they systematically trained within the court system or promoted on the basis of experience. When it comes to factual determination, therefore, the judge in the American system is regarded as having no special insight.¹¹³

This clearly identifies the main differences between the two systems in terms of evidence and helps to understand the American law of evidence and the rules and exceptions that are discussed below.

Considering that in the American legal process the jury is the fact-finder that should determine the facts on the basis of the evidence offered, it is easy to understand how the rules of evidence are shaped in light of the presence of the jury in most American civil proceedings.¹¹⁴ While in the pre-trial discovery the parties disclose and exchange evidence and information, evidence will be considered by the jury and the judge only if it is offered at trial and admitted into evidence. This requires the evidence to be relevant and admissible.

Besides the Federal Rules of Civil Procedure, a separate set of rules, the Federal Rules of Evidence ("Fed. R. Evid." or "FRE") governs evidence admissibility and relevance. There is a general presumption under Fed. R. Evid. 401 that relevant evidence is admissible unless there is a good reason under the rules not to admit it. The American concept of relevance in Fed. R. Evid. 401 seems much broader than the Italian concept of relevance. It

113. See HAZARD, JR. & TARUFFO, *supra* note 7, at 81-82.

114. See also Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999).

allows much more circumstantial evidence as relevant evidence, which in the Italian system would be neither relevant nor admissible.

The Fed. R. Evid. are designed to limit the amount of information available to jury members about the case to only those pieces of evidence that are admitted to the court. This is different from Italian civil proceeding and has a dramatic effect. In Italy, there is no equivalent performance. The judge proceeds through the facts in a highly analytic way, takes evidence more or less as he finds it, gives it the credence it deserves, and then decides the case and records pursuant to his "cautious evaluation."¹¹⁵ Pursuant to FRE 401, in order to be relevant unless where differently provided, evidence should have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is offered to prove a fact of consequence (materiality). A proposition of fact is of consequence in a legal dispute, if it matters to the legal resolution of that dispute. That is, evidence is admissible if it can be connected through a reasonable, logical, and non-speculative inferential reasoning to one of the essential legal elements of the substantive law governing the case.

In general, the policy behind the Fed R. Evid. is to admit "all evidence which is logically probative"¹¹⁶ within the limits set forth by the Fed R. Evid.; it is considered fair to require litigants to be able to address and explain or contradict all the evidence jurors will consider.

Consistently with this general view, Fed. R. Evid. 402 provides, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

However, even if all admissible evidence is relevant in the United States, not all relevant evidence is admissible. Fed. R. Evid. 403 sets forth a balance test which the judge uses to decide whether to exclude evidence which, although relevant, is highly prejudicial and therefore, not admissible. Specifically, FRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The dangers to which the admission of the item of evidence may lead are those spelled out by Fed. R. Evid. 403. The Advisory Committee Note to Fed. R. Evid. 403 clarifies, "Unfair prejudice within its context means undue tendency to suggest decision on an improper

115. C.P.C. art. 116 provides "Il giudice deve valutare le prove secondo il suo prudente apprezzamento" ("The judge shall judge the evidence pursuant to his cautious evaluation").

116. James Bradley Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898).

basis, commonly, though not necessarily, an emotional one.”

Thus, the Fed. R. Evid. recognize that the jury’s decision might be influenced by improper elements, such as bias or prejudice. Therefore, Fed. R. Evid. 403 is necessary to keep evidence away from the jury that has a tendency to suggest decision on an improper basis. According to the Advisory Committee, “In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.” In this respect, under Fed. R. Evid. 105, when evidence is admitted that it is admissible as to one party or for one purpose, but not admissible as to another party or for another purpose, the court, upon request, should restrict the evidence to its proper scope and instruct the jury accordingly.

Fed. R. Evid. 403 also calls for exclusion of relevant evidence on efficiency grounds. Where admission of the evidence would lead to undue delay, jury confusion, or unnecessarily cumulative evidence, it is inefficient. This gives the judge the authority to check the inclination of some lawyers to offer everything, even where it may lead to prolonging the trial and confusing the jury.

Similarly, evidence admissible under Fed. R. Evid. 403 may be inadmissible under a different provision of the Fed. R. Evid. or other law provisions. A detailed set of rules within the Fed R. Evid. determines when evidence should be excluded. The rationale behind most of these “exclusionary” rules is to allow the jury’s decision making process to properly function and to protect the parties from the risk of an unfair condemnation or conviction; in a few occasions, the Fed. R. Evid. pursue a broader public policy.¹¹⁷

An important and distinguishing exclusionary rule intended to protect the parties from improper inferences which the jury might draw against them is the character evidence rule under Fed. R. Evid. 404, which bans the admission of character evidence to show action in conformity with that character. This rule is clearly aimed at the jury, which would easily draw the wrong inference from the offered evidence of past conduct. However, there are exceptions to such prohibition.¹¹⁸

Fed. R. Evid. 404(b) sets a critical exception to the general prohibition under Fed. R. Evid. 404, providing that evidence of past specific facts is admissible for purposes other than proving character. For example, it is admissible to prove motive, identity, plan, lack of accident, or mistake, etc. Under this rule, and under the *modus operandi* theory, evidence of past specific acts could be admitted to prove identity as an essential element of a criminal or civil case when identity is disputed. Specifically, if the past acts share unique characteristics with the litigated event, the jury is allowed to

117. Like the Fed. R. Evid. concerning sex offenses or child molestation cases, see generally FED. R. EVID. 412.

118. See FED. R. EVID. 404(a)(1)(2)(3).

consider it to prove identity, provided that the proponent of the evidence will introduce evidence sufficient to support a finding that the party did commit the act under the circumstances which make the past act relevant for non-character use.

This rule, and especially this doctrine, seems to run contrary to the general prohibition of character evidence under Fed. R. Evid. 404. However, it is still consistent with the broad concept of relevancy under Fed. R. Evid. 401, which would allow circumstantial character evidence to be admitted, provided that a judge determined under Fed. R. Evid. 403 that the dangers of unfair prejudice do not substantially outweigh the evidence's probative value. But this rule may lead to unfair situations. If evidence of a parties' past bad acts are admitted to show the identity of the alleged perpetrator in the current proceedings, the fact finder may improperly use that evidence and decide against the party because of past actions, rather than the actions that actually led to the litigation at hand.

Character evidence is excluded for three reasons. First, it often has low probative value. Second, if it is disputed, there is a risk of digressing into a mini-trial on character and diverting the fact finder's attention from the main issue in the case. And third, it may be unfairly prejudicial, particularly if it pertains to the character of a party to the lawsuit.

Other exclusionary rules apply the same rationale behind the character evidence exclusionary rule, which is to avoid improperly influencing the jury. External policies are those under Fed. R. Evid. 407,¹¹⁹ 408,¹²⁰ 409,¹²¹ and 411.¹²²

3.6.1 *Lay testimony and expert testimony*

Parties to litigation may be witnesses in their own case, and experts are considered witnesses. Therefore, any report or testimony rendered by them is treated as evidence.

A witness must have first hand knowledge of the matter on which he will testify, pursuant to Fed. R. Evid. 602. If there is doubt as to whether the witness has first-hand knowledge, the proponent of the evidence must

119. FED. R. EVID. 407 states that evidence of subsequent remedial measures is not admissible to prove negligence, fault and defect, but it is admissible for other purposes, such as proving ownership, control, feasibility of precautionary measures and for impeachment. See *infra* para. 3.6.1.1.

120. Evidence of compromise and offer to compromise is not admissible essentially to prove liability; but it is admissible for other purposes such as proving a witness's prejudice or bias. FED. R. EVID. 408.

121. Evidence of payment of medical and similar expenses is not admissible to prove liability for the litigated injury. FED. R. EVID. 409.

122. Evidence that a person was or was not insured against liability is not admissible to prove that the insured acted negligently or otherwise wrongfully, but it is admissible for other purposes such as proving agency, ownership, control or bias or prejudice of a witness. FED. R. EVID. 411.

present "evidence sufficient to support a finding" that he does. This is a relatively low standard of proof, requiring only evidence on the basis of which a jury could reasonably find that it is more probable than not that the witness had personal knowledge. If this modest level of proof is provided, it falls to the jury to decide whether the witness has the knowledge he claims to have and whether his testimony is credible.

The witnesses are interviewed directly by the counsel and the judge.¹²³ Similar to what happens under the Italian rules of evidence, a lay witness, or non-expert witness, cannot render opinions during his testimony unless his opinions are rationally based on his perception and they are helpful to understanding his testimony or are helpful in the determination of a fact in issue. They cannot be based on scientific, technical, or other specialized knowledge.¹²⁴

On the contrary, experts testify in the form of an opinion if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.¹²⁵ By giving opinions and drawing inferences, the witness would do the job of the jury. The expert may not only testify in the form of opinion, but he may also give a dissertation or exposition of scientific data or other principles relevant to the case, leaving the trier of fact to draw the due inferences and apply them to the facts.

Lay witnesses and experts offer different types of testimonies, and in *State v. Brown*¹²⁶ the court held that the distinction between lay and expert witnesses is that lay testimony "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma.¹²⁷

An expert witness must qualify as such in order to give expert testimony. Thus, the proponent of expert testimony should present evidence of the expert's curriculum, publications, and experience in the specific field of interest. In addition, the proponent must show that the expert's opinion would be helpful to the jury under Fed. R. Evid. 702. Fed. R. Evid. 702 incorporates the principles of *Daubert v. Merrell Dow Pharmaceuticals*,

123. The judge can ask questions to witness, but this is rarely done. Juries cannot ask questions, although there is a growing trend in some jurisdictions toward allowing jurors to propose questions to the judge, who may in his discretion put them to the witness.

124. See FED. R. EVID. 701.

125. See FED. R. EVID. 702.

126. 836 S.W.2d 530, 549 (1992).

127. See also FED. R. EVID. 702 advisory committee's notes.

*Inc*¹²⁸ and the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*.¹²⁹ In *Daubert*,¹³⁰ the Court stated that trial judges are “gatekeepers” in that they have to exclude unreliable expert testimony,¹³¹ and in *Kumho*, the Court stated that this gatekeeper function should apply to all expert testimony, not just testimony based on science.¹³² Consistently with *Kumho*, Fed. R. Evid. 702 provides that all types of expert testimony present questions of admissibility for the trial court, which the court should decide pursuant to Fed. R. Evid. 104(a).¹³³ Therefore, the proponent of the expert testimony should meet the burden of establishing that the pertinent admissibility requirements are met by the preponderance of the evidence. In other words, he should demonstrate to the judge that it is more probable than not that the assessments of his expert are reliable.¹³⁴ In *Daubert*, the court set forth a non-exclusive checklist of facts to be applied by trial courts in assessing the reliability of scientific expert testimony.¹³⁵

Judges have the power under Fed. R. Evid. 706 to appoint their own

128. 509 U.S. 579 (1993).

129. 526 U.S. 138 (1999). See also FED. R. EVID. 703 advisory committee’s note.

130. The Court held “We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes” *Daubert*, 509 U.S. at 597.

131. The Supreme Court held that “The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.* at 580.

132. The Court held “The *Daubert* “gatekeeping” obligation applies not only to “scientific” testimony, but to all expert testimony. Rule 702 does not distinguish between “scientific” knowledge and “technical” or “other specialized” knowledge, but makes clear that any such knowledge might become the subject of expert testimony.” *Kumho Tire*, 526 U.S. at 138.

133. FED. R. EVID. 104(a) provides that “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provision of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges”.

134. But the proponent is not required to prove that the assessments of his expert are correct. See *In re Paoli R.R. Yard PCB*, 35 F.3d 717, 744, (3d Cir. 1994).

135. These factors are: (i) whether the expert’s technique or theory can be or has been tested, that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusive approach that cannot reasonably be assessed for reliability; (ii) whether the technique or theory has been subject to peer review and publication; (iii) the known or potential rate of error of the technique or theory when applied; (iv) the existence and maintenance of standards and controls; and (v) whether the technique or theory has been generally accepted in the scientific community. These factors are neither exclusive nor dispositive, and other cases have acknowledged that they cannot apply to every type of expert testimony and that, sometime, other factors may apply. To the contrary, they stand as a guide-reference to trial courts, to solve questions of admissibility of the proffered expert-testimony and confirm that such admission is not an automatic process. *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).

experts, but they rarely do so. They and the jury rely on the testimony of the parties' experts and on their confrontation to decide which solution offered is the best one. This seems to be more efficient than having an expert appointed by the judge and is ultimately consistent with the adversarial nature of the American proceeding. However, the parties' experts have reasons to present the case in the way most favorable to their client. Therefore, an expert appointed by the judge to check the analysis and method used by the parties' expert would be advisable because it would favor the adoption of a rational decision consistent with the facts and the evidence offered by the parties. This would still be consistent with the adversarial nature of the American civil proceeding but would avoid any errors that could derive therefrom.

3.6.1.1 Impeachment

The strength and accuracy of any witness testimony depends on the capacity to observe events, to remember them, and to relate them accurately and honestly. This is particularly important especially if you consider that the jury will especially rely on witnesses and their "story" to decide which party should win. To make sure that the witness testifies accurately and honestly, Fed. R. Evid. 602 requires that the witness has first-hand knowledge of the matter on which he testifies. Fed. R. Evid. 603 requires the witness to affirm that he will testify truthfully and to take the oath to that purpose. However, the witness might lie or simply not remember exactly the events on which he testifies. In this case, his testimony should be shown to the jury as unreliable testimony that the jury could disregard. A witness could be impeached through cross examination or through extrinsic evidence, (evidence other than that developed through direct or cross-examination).

Under Fed. R. Evid. 404(a)(3), evidence of a person's character or a trait of character is admissible. A witness's character is significant for truthfulness to infer action in conformity with that character on a particular occasion and to infer whether the witness is lying or telling the truth on the witness stand. To this purpose, Fed. R. Evid. 404(a)(3) refers to Fed. R. Evid. 607, 608, and 609, allowing impeachment through character testimony.

Even absent any specific evidence that the witness is actually lying on the stand, evidence of the witness's character for untruthfulness, or evidence that the witness lied in the past, could be used to discredit his testimony under the "preponderance of the evidence" standard as well as through inferences which could be inaccurate. Thus, there could be a risk of inefficiency and unfairness.¹³⁶

Fed. R. Evid. 609(2) provides that evidence of a prior conviction of a

136. See FED R. EVID. 609(2).

crimen falsi, (a crime of dishonesty) could be admitted to prove that the witness who committed the crime in the past has a propensity to lie and should not be believed. The judge would allow such extrinsic evidence if the dangers of unfair prejudice under Fed. R. Evid. 403 do not substantially outweigh the probative value of this evidence. Assuming the defendant was sued for fraud in a civil case and that the plaintiff would like to prove that the defendant was convicted of fraud nine years ago, he could very well do that under Fed. R. Evid. 609 provided that the dangers of unfair prejudice do not substantially outweigh the probative value of this evidence.¹³⁷

Should evidence of a prior conviction be admitted, it would be highly prejudicial to the defendant because it is very likely that the jury could improperly use this evidence to draw improper inferences about the propensities and identities of the adverse party. A limiting instruction under Fed. R. Evid. 105, is possible to help remedy this problem, but it might not adequately protect the defendant from this risk. If this occurred, the solution would be inefficient and unfair.

The prior conviction impeachment device may have derived from common law. As it was noted, "At common law a person's conviction of treason, any felony, or misdemeanor involving dishonesty (*crimen falsi*), or the obstruction of justice, rendered the convicted person altogether incompetent as a witness." These sorts of crimes that would disqualify someone as a witness at trial were labeled "infamous" crimes. By statutes and common law, the disqualification for conviction of infamous crimes has been universally abrogated. Now, prior convictions for crime are merely grounds for impeaching credibility."¹³⁸

3.6.1.2 Hearsay

Under the U.S. law of evidence, hearsay is inadmissible under Fed. R. Evid. 802. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The statement may be oral or written, and it may also be non-verbal assertive conduct that the "declarant" intends to use as a substitute for words.¹³⁹

There are at least two policies furthered by this rule. One is the desire and ability for cross examination and the other is the ability of the fact finder to observe the behavior of the witness while he is testifying. The U.S. system prefers to have live testimony to cross examine under oath. The absent "declarant" cannot be cross-examined, and the jury has little basis

137. It should be noted that the crime had to have been committed within ten years of the testimony. Also, the probative value of such evidence depends on how probative the prior conviction is of the truthfulness of the witness at the time of the witness's testimony.

138. JOHN W. STRONG ET. AL., MCCORMICK ON EVIDENCE, § 42 (5th ed. 1999).

139. Non-assertive conduct, that is, conduct held by the declarant without any intention to assert a belief, or use it as a substitute for words, are non hearsay. See FED. R. EVID. 801.

for assessing his credibility. Live testimony also gives the fact finder a chance to judge the credibility of the witness by observing behavior and conduct while testifying. Moreover, the rules also discourage second hand testimony under the assumption that it is not as reliable.

The exceptions to the hearsay rule can be divided into two groups. One set of exceptions applies if the declarant is not available to testify.¹⁴⁰ If the declarant is unavailable, previous statements under oath may be admitted if the party against whom they are offered had an opportunity and motive to develop the declarant's testimony by direct, cross-examination, or redirect examination.¹⁴¹ The rules reflect a judgment that, while it would be better to call the declarant to the witness stand when possible, the out-of-court statement at issue has enough indication of reliability to justify admitting it.

The second set of exceptions applies whether the declarant is available or not. These include present sense impressions (i.e., statements reflecting the sense impressions of the declarant while the defendant was perceiving an event or condition),¹⁴² excited utterances (statements made under stress, caused by a startling event),¹⁴³ records of regularly conducted activities like public records,¹⁴⁴ statements in very old documents,¹⁴⁵ and many other things.¹⁴⁶ In each case, there is some reason to believe in the reliability of the relevant out-of-court assertion. There is no special reason to put the declarant on the stand to testify. Finally, there exists a residual category that allows courts to admit hearsay statements where there are guarantees of trustworthiness comparable to those observed in the rules.¹⁴⁷

The problem with the structure of the hearsay rule is that it contains too many exemptions and exceptions. The intrinsic risk is that some out-of-court statement, relevant for the purpose of the matter asserted, could not come in under any exceptions to the hearsay rule simply because a specific exception has not been exactly drafted for that purpose. Fed. R. Evid. 807 addresses this problem. It allows the trial judge to admit hearsay evidence, provided that the proponent shows: (i) guarantees of trustworthiness equivalent as those under Fed. R. Evid. 803 and 804 exist; (ii) the evidence proves a material fact more than any other item of evidence which the proponent could procure through reasonable efforts; and (iii) the interest of the justice will be furthered by the admission of the evidence. The rule also includes procedural safeguards to give the opposing party fair notice that a party intends to invoke the rule, including the name and address of the

140. They are the exceptions. *See* FED. R. EVID. 804.

141. FED. R. EVID. 804.

142. *See id.* at 803(1).

143. *See id.* at 803(2).

144. *See id.* at 803(8).

145. *See id.* at 803(16).

146. *See id.* at 801(d), listing the "exemptions" to the hearsay rule; *Id.* at 803; *Id.* at 805.

147. FED. R. EVID. 807.

declarant. Although the exception is residual and is used rarely by courts and litigants to admit evidence excluded under the hearsay exception, it does avoid injustice in situations that fall outside any of the listed hearsay exceptions.

In any event, not all the exceptions to the hearsay rule comply with the rationale of the rule. The rationale is to make sure that out-of-court statements relevant for the truth of the matter asserted are excluded because of the dangers of unreliability. These dangers relate to all four testimonial qualities: sincerity, narration, perception, and memory. A statement which is not reliable for one of these qualities, and which was made out-of-court, not under oath, and where the witness is not available and cannot be cross-examined at trial, should not be admitted.

However, Fed. R. Evid. 803(2) presents some problems in this respect. The rule provides that “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is admissible. The rationale is that the stress steals the capacity to fabricate. Therefore, the statement is more likely to be sincere. It is true that the statement was made under stress. Thus, if not a sincerity danger, there could be a perception and accuracy danger. The out-of-court statement could come in, and it would be treated as if it was given under oath, at trial, even if there will be a high risk of misperception due to the stress.¹⁴⁸

3.6.2 Exhibits

The other type of evidence most commonly used are exhibits, which are real and demonstrative evidence like written documents, audio, video and photographic recordings, and electronic and digital data compilations. The requirement for exhibits is set forth by Fed. R. Evid. 901, which provides:

- (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (1) Testimony of witness with knowledge. Testimony that the matter is what it is claimed to be. (2) Non-expert

148. In Italy, where there is no hearsay rule, such statement will not be admitted into evidence because it would be not relevant (an Italian judge would think that it does not prove any element of the claim or defense through a logical, reasonable and not speculative reasoning). See GROSSI & PAGNI, *supra* note 29.

opinion on handwritings. Non-expert opinion as to genuineness of handwriting, based upon familiarity not acquired for purposes of litigation..." the non-exhaustive list of examples of authentication or identification continues.¹⁴⁹

Fed. R. Evid. 901 contains under (a), the basic foundation and the evidentiary standard that the proponent of an exhibit must satisfy to have it admitted into evidence; and under (b), illustrations of the kinds of foundations through which the proponent could meet the requirement under Fed. R. Evid. 901 (a), by evidence sufficient to support a finding, which is evidence upon which the judge thinks a jury could reasonably find a fact to be more likely true than not.

The judge should make a rough estimate of underlying probabilities, which is the same kind of estimation and thought process he makes when estimating probative value under Fed. R. Evid. 403. The judge should not decide whether the exhibit is authentic, which is the task of the jury, but simply that the proponent of the exhibit has offered evidence sufficient to support a finding that the exhibit is what the proponent claims it to be. The judge should not submit to the jury an exhibit which the jury could not reasonably believe to be authentic; but it will ultimately rest upon the jury to decide whether the exhibit is authentic. However, once an item of evidence has been authenticated, it could still be excluded pursuant to Fed. R. Evid. 403.

By stating that "the requirement of authentication of identification [is] a condition precedent to admissibility," Fed. R. Evid. 901 makes authentication and identification an aspect of relevancy. As noted by the Advisory Committee Note to Fed. R. Evid. 901, the requirement of showing authenticity or identity falls into the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Fed. R. Evid. 104 (b).¹⁵⁰ The common law approach to authentication of documents has been criticized as an "attitude of agnosticism, which departs sharply from men's customs in ordinary affairs" and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face."¹⁵¹ According to the Advisory Committee, today there are means – such as requests to admit and pretrial conference – that eliminate much of the need for authentication or identification. Therefore,

149. FED. R. EVID. 901.

150. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. FED. R. EVID. 104(b).

151. See also Charles T. McCormick, *CASES AND MATERIALS ON EVIDENCE* 388 (West Pub. Co. 3rd ed. 1956).

the rules for authentication and identification seem inefficient by requiring long, complex, and expensive procedures that could be avoided. The Advisory Committee Note to Fed. R. Evid. 901 says that “the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and case of genuine controversy will still occur.” However, Fed. R. Evid. 901 does seem suited to addressing the “unforeseen circumstances” to which the Advisory Committee refers because it spends a lot of effort addressing the wrong problems.

3.6.2.1 *The Best Evidence Rule*

Additional foundation to prove content is required when a writing, recording, or photograph is offered. The original will likely be more trustworthy than a copy. Therefore, the best evidence rule under Fed. R. Evid. 1002 requires that the original of the writing, recording, or photograph be produced instead of a copy of the same, unless the absence of the original is explained or justified or the exceptions set forth by the Fed. R. Evid. or Act of Congress apply.

3.6.3 *Burden of Proof*

In the ordinary civil case, the plaintiff’s burden is to prove its case by a preponderance of the evidence.¹⁵² The Supreme Court held that the preponderance of the evidence standard is satisfied when it is more likely than not that the preliminary fact is true, and that “the preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded the consideration.”¹⁵³

Therefore, if at the end of trial, the jury believes that the evidence offered does not show that the plaintiff’s position is not more likely correct than not, the plaintiff loses. This probabilistic thinking¹⁵⁴ is at odds with the way in which the Italian rules of evidence are framed and would be regarded as giving rise to greater risk of error and, therefore, lack of accuracy in the decision-making process.¹⁵⁵

152. The defendant must also prove each affirmative defense by the preponderance of the evidence. *Id.*

153. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

154. “In the US [sic] view, it is candid, rational, and desirable to recognize that the truth and hence fact-finding is a matter of probability, and that the system should seek to optimize its probabilistic standards of proof.” Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proofs*, 50 AM. J. COMP. L. 252 (2002); see also Richard Friedman, *Anchor and Flotsam: Is Evidence Law ‘Adrift’?*, 107 YALE L. J. 1921, 1946 (1998) (reviewing MIRIJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (1997)).

155. See also *infra* para. 4.

It is difficult to analyze, in a comparative perspective, the American and the Italian standard of proof. This comparative analysis is made even more complex by the cultural differences and different approach to the law of evidence adopted by the two systems.¹⁵⁶

3.7 Pretrial process

Pretrial process in the United States has several objectives. First, discovery is intended to give each party equal and full access to relevant evidence. While discovery often is easily manageable, in many large cases it can be extraordinarily expensive and time-consuming. Second, efforts are made throughout the pretrial process, especially as a trial date approaches, to simplify the issues and “package” the case for a convenient trial. Third, as shown *infra* in 3.8, the pre-trial process encourages settlement. Finally, in order to govern all of these objectives, the federal courts use a series of pretrial conferences under Fed. R. Civ. P. 16. After an initial “scheduling” conference the judge will produce a pretrial order setting a schedule for discovery, motions, and other matters. These orders may be modified for cause at subsequent conferences. As trial approaches, the court is required to hold a final pre-trial conference that will plan for the trial. The order resulting from this conference will govern the progress of the trial and will be modified only to prevent manifest injustice. Rule 16 thus provides the framework for judges to manage the pretrial process and avoid unnecessary expense or delay.

3.7.1 Discovery

Discovery has been defined as the constitutional foundation of American civil litigation,¹⁵⁷ and it serves three main purposes. First, it helps preserve relevant information that might not be available at trial. Second, it helps identify the issues truly disputed between the parties. Finally, it helps the parties to obtain information that will lead to admissible evidence on disputed issues, thus limiting surprises at trial.

Within discovery, parties have the right to obtain information and documents as long as they fall within the broad scope of discovery under Fed. R. Civ. P. 26(b).¹⁵⁸ There is some preliminary information the parties

156. See *infra* para.3.6.

157. Geoffrey C. Hazard, Jr., *From whom no Secrets are kept*, 76 TEX. L. REV. 1665, 1694 (1998).

158. FED. R. CIV. P. 26(b) provides that “Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

have to provide to each other under the Federal Rules of Civil Procedure without awaiting a discovery request from the opposing party.¹⁵⁹ Besides this basic and mandatory information, Fed. R. Civ. P. 26(a)(2) requires identification of any experts who will testify and provision of a written report signed by each expert.¹⁶⁰

In addition, other information and documents must be provided upon request.¹⁶¹ The parties have broad access to each other's basic information, claims, and defenses before appearing in front of the judge, so that they can eventually settle a dispute before trial. The result of settlement is an enormous saving of judicial resources and costs for the parties. The settlement game is in the hands of the parties, but they must play within the strict limits imposed by the rules and by the judge.

There is an invasion of the privacy of the individual litigants and their litigation strategies which cannot be completely shielded by the work-product rule.¹⁶² This could enhance fairness, especially in terms of "fair play," intended as equal opportunity to file pleadings, respond to pleadings, and offer evidence.

The provisions of detailed rules concerning discovery, as well as sanctions for parties who fail to observe them, ensures effective and efficient discovery, which eventually increases the possibilities that the parties will settle the case rather than proceed to trial.

Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable or at least twenty-one days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).¹⁶³ In

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." *Id.*

159. See FED. R. CIV. P. 26(a)(1)(A). This information includes the contact details of each individual likely to have discoverable information, a copy of all documents and tangible things that the disclosing party possesses that may be used to support its claims or defenses (except for impeachment), a computation of each category of damages claimed by the disclosing party and a copy of documents on which such calculations are based, and any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. *Id.*

160. See FED. R. CIV. P. 26(a)(2).

161. See FED. R. CIV. P. 26(d)(1), according to which a party may not seek discovery from any source before parties have conferred, as required by FED. R. CIV. P. 26(f).

162. The work-product rule is governed by FED. R. CIV. P. 26(b)(3), according to which, ordinarily, "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Equal access to the facts is assured by the discovery system. See FRIEDENTHAL, *supra* note 67, at 629. However, discovery may lead to reveal strategy when evidence is necessary to show the existence or inexistence of an element of a claim, which existence is disputed and might eventually influence the bargaining powers of the parties, and such evidence should be disclosed, upon request by a litigant. *Id.*

163. See FED. R. CIV. P. 26(f).

addition to these conferences between the parties, the court may order the attorneys and any unrepresented parties to appear before it for one or more pretrial conferences pursuant to Fed. R. Civ. P. 16, in order to expedite the disposition of the action, establish early and continuing control so that the case will not be protracted because of lack of management, discourage wasteful pretrial activities, improve the quality of the trial through more thorough preparation, and facilitate settlement.¹⁶⁴ Various methods of discovery devices are available to parties such as oral depositions,¹⁶⁵ interrogatories,¹⁶⁶ the right to compel an opponent to produce documents and other tangible things for inspection and copying under Fed. R. Civ. P. 34,¹⁶⁷ the right to physical or mental examination under Fed. R. Civ. P. 35,¹⁶⁸ and admissions under Fed. R. Civ. P. 36.¹⁶⁹

164. See FED. R. CIV. P. 16(a).

165. Oral depositions allow a party to question any person (the deponent), whether a party to the litigation or not, under oath. FED. R. CIV. P. 30(a)(1). The parties designate as officer, the reporter, who records the questions, the answers, and any objections made by the parties or by the witness. *Id.* at 30(b)(5). An attorney schedules a deposition by serving a notice on the opposing attorney; under FED. R. CIV. P. 30(b)(6) an attorney may also notice the deposition of a corporation or association, requiring the latter to produce the person or persons having knowledge of the subject matter upon which the deposition should be taken.

166. See FED. R. CIV. P. 33. By interrogatory, one party sends to another a series of questions to be answered under oath within a specific time; the exchange of questions and answers is accomplished by mail; no court's order is required, and no officer needs to be appointed. If a question is thought to be improper, the responding party may respond so, and avoid answering. Then the proponent may seek a court's order compelling an answer. But, before doing so, the proponent should try to confer with the opposing party and solve the issue. The responding party has a duty to respond to interrogatories not only on the basis of her own knowledge, but also by using the knowledge of other persons, including her lawyers, employees, and other agents, that reasonably can be obtained through investigation.

167. FED. R. EVID. 34 also allows the party entry to land or property in the possession or control of the opponent in order to inspect, measure, survey, photograph, test or sample the property, or to observe an operation taking place on the property; it also allows access to electronically stored information including data, photographs, and sound recordings. A party that intends to inspect documents and things or to enter property must first confer with the other party in accordance with FED. R. CIV. P. 26(d)(1) and (f). Following this conference, a party simply serves a notice on the opponent stating what it wants to see, and when, where, and how the party would like to see it. A request must describe the items to be discovered with "reasonable particularity". The opposing party has at least 30 days to respond to the request. Particularly, the party that receives a request serves a written response on the requesting party, as well as any other parties to the lawsuit, within the time specified by the FED. R. CIV. P. 34. The response states the responding party's objections, if any, but, absent any objections, the responding party must produce the documents as requested or admit counsel to its premises for the scheduled inspection. The procedure under FED. R. CIV. P. 34 is used also to obtain electronically stored information. Interestingly, although FED. R. CIV. P. 34 is limited to parties, amendments to FED. R. CIV. P. 45 provides identical procedure to obtain material from non-parties, by serving a *subpoena* on the non-party.

168. Physical or mental examination under FED. R. CIV. P. 35 is used only if the person's physical or mental condition is in controversy, and the movant shows "good cause" to compel the examination.

169. Admissions under FED. R. CIV. P. 36 are written requests served by a party upon another, to admit the truth of certain matters of fact or of the application of law to fact, or the

There is a presumption that the responding party must bear the expense of complying with discovery requests, but Fed. R. Civ. P. 26(c) gives the district court discretion to grant orders protecting a party from undue burden or expense in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery (protective orders).¹⁷⁰ The court has much discretion in granting protective orders, which could be considered as a reasonable response of the system to the relative broad scope of discovery. Specifically, in *Seattle Times Co. v. Rhinehart*,¹⁷¹ the Supreme Court held that "liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."¹⁷² Because pretrial discovery permits liberal discovery under Fed. R. Civ. P. 26(b)(1), it was necessary for the trial court to have the authority to issue protective orders conferred by Fed. R. Civ. P. 26(c). Nevertheless, pretrial discovery has a significant potential for abuse through depositions and protective orders, and therefore the decision to grant protective orders because of this suspected abuse is to be made by a managerial judge. Managerial judges were created by through the evolution of the system to better meet the needs of the parties.

The creation of managerial judges shows the system is flexible and capable of meeting the needs of the parties, and demonstrates that procedural devices themselves become adaptable to the changing needs of the system - thus eventually reducing the costs (instead of creating a new mechanism the system adapts to the available mechanisms). Flexibility ultimately enhances efficiency.

3.7.2 Shaping cases for trial: dispositive motions and final pretrial conference

The primary tools that judges have for shaping cases for trial (or avoiding the necessity of trials) are rulings on dispositive motions. Motions under Rule 12 are generally made early in an effort to forestall discovery and obtain an early dismissal of some or all of the case. On the other hand, motions for summary judgment under Fed. R. Civ. P. 56 typically are made after discovery and are often designed to simplify the issues for trial as much as possible in order to achieve a disposition of the case without a trial.

3.7.2.1 Motion to dismiss under Fed. R. Civ. P. 12(b)(6) or for judgment on the pleadings under Fed. R. Civ. P. 12(c)

Fed. R. Civ. P. 12(b) provides:

genuineness of a document or other evidence that may be used at trial. Similarly to admissions ("confessioni" in the Italian legal system), admissions under FED. R. CIV. P. 36 are conclusive evidence, unless withdrawn, and cannot be contradicted at trial.

170. See FED. R. CIV. P. 34.

171. 467 U.S. 20, (1984).

172. *Id.*

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.¹⁷³

In other words, a party may request the court to dismiss a complaint for the grounds under Fed. R. Civ. P. 12(b) and, if granted, such motion bars the action to move forward. Pursuant to Fed. R. Civ. P. 12(h)(2), the motion under Fed. R. Civ. P. 12(b)(6), or the motion to dismiss for failure to join a person required by Rule 19(b), or to state a legal defense to a claim, may be raised in any pleading allowed or ordered under Rule 7(a) by a motion under Rule 12(c) or (c) at trial.¹⁷⁴ While a motion to dismiss for lack of subject-matter jurisdiction may be raised at any time during the proceeding, the lack of personal jurisdiction, improper venue, insufficient process, or insufficient service of process should be raised in a pre-answer motion or else they will be considered as waived.

The different types of motions to dismiss a complaint found under Fed. R. Civ. P. 12 (b) represents the various procedural tools available to prevent a proceeding from moving forward where it should not due to incurable irregularities in the complaint. A particularly interesting motion is the motion to dismiss for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6).

By filing this motion, the movant requests the judge to dismiss the case because either the plaintiff failed to adequately plead its claim, or because no relief exists at law which could be granted. Therefore, no evidence could be offered to support the complaint as it is framed and a trial would be a "waste" of judicial resources that would inevitably lead to a judgment denying the claim.

Once a motion under Fed. R. Civ. P. 12(b)(6) is filed, in consistency with the idea to favor access to justice instead of formality, the court would most likely allow the plaintiff the possibility to amend the complaint, unless

173. FED. R. CIV. P. 12(b).

174. FED. R. CIV. P. 12(h)(2).

such possibility could not cure the defects in the complaint itself because no remedy exists at law which the plaintiff could demand.

Another tool which expedites litigation and avoids waste of time and judicial resources is judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), which provides, "After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings."¹⁷⁵

Under Fed. R. Civ. P. 12 (c), a moving party might request the court to rule on the case based on the pleadings, without the need to commence a discovery phase and to go to trial if no material facts remain at issue and the parties' dispute can be solved on both the pleadings and those facts of which the court can take judicial notice. This device under Fed. R. Civ. P. 12(c) has not been frequently used, and it has been frequently displaced by the pre-answers Fed. R. Civ. P. 12(b) motions or by the post-answer motions for summary judgment under Fed. R. Civ. P. 56. However, Fed. R. Civ. P. 12(c) motion could be used to press Fed. R. Civ. P. 12(b) defenses to the pleading's procedural defects or to seek a substantive disposition of the case on the basis of its underlying merits.¹⁷⁶

The court accepts all well-pleaded material allegations of the nonmoving party as true and views all facts and inferences in the light most favorable to the pleader. The court will grant a Fed. R. Civ. P. 12(c) motion on the pleading if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law.¹⁷⁷ On the contrary, if a disputed material fact exists, the court must deny the Fed. R. Civ. P.12(c) motion, and judgment on the pleadings will be granted only where it appears beyond doubt that the plaintiff will be unable to prove any facts to support the alleged claims for relief. To this respect, the pleader's choice of theory will not be dispositive because the court would be free to inquire whether relief for the pleader is possible under any set of facts that might be established consistent with the allegation.¹⁷⁸

The decision to grant a Fed. R. Civ. P. 12(c) motion is usually a "final order" and may be immediately appealed, while a decision denying such a motion is generally considered "interlocutory" and cannot be immediately appealed before a final disposition on the merits.¹⁷⁹

3.7.2.2 *Summary judgment motion under Fed. R. Civ. P. 56*

Another tool to reduce wasting judicial resources, costs, and time is the motion for summary judgment, which the court can grant under Fed. R. Civ. P. 56(c) "if the pleadings, the discovery and disclosure materials on

175. FED. R. CIV. P. 12(c).

176. *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993).

177. *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214 (3rd Cir. 2005).

178. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

179. *Paskavan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233 (6th Cir. 1991).

file, and any affidavits show that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law." The motion is different from a Fed. R. Civ. P. 12(c) motion because it allows a party to pierce the allegations of the pleadings and requires the opposing party to set forth specific facts showing that there is a genuine issue for trial. Typically, the moving party will support its motion with materials provided in discovery and affidavits, and the opposing party will file counter-affidavits and refer to documents and other evidence from discovery to show that there is a genuine issue of material fact.

A party is entitled to summary judgment if he shows that there is no genuine issue of material fact on a specific, dispositive issue. Thus, for example, if facts as to which there is no genuine dispute show that the plaintiff's claim is barred by the statute of limitations and the defendant is entitled to judgment as a matter of law, it does not matter that there may be genuine dispute about many other facts in the case. Those disputes concern facts that are not material to the dispositive issue.

Summary judgment does not have to dispose of the entire case, and parties frequently move for partial summary judgment. Summary judgment may, for example, resolve liability but not damages. It may also resolve certain issues (such as fraud) without resolving others (such as breach of contract).

Under Fed. R. Civ. P. 56(d), when summary judgment does not dispose of the entire case, the court should, if practicable, ascertain what facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court would then enter an order specifying the facts as to which no real controversy exists, and those facts would not need to be established at trial.

In ruling on a motion for summary judgment, the court will not weigh the evidence or findings of fact, but it will merely assess whether a genuine issue exists as to any material fact. If the court determines that a genuine issue of material fact exists, the motion for summary judgment will be denied. In performing that assessment, the judge will accept the evidence of the nonmoving party as true and will resolve all doubts and draw all reasonable inference in favor of the non-moving party.

The court cannot grant summary judgment motions when there is a genuine issue of material fact which needs to be tried, or where the moving party is not entitled to a judgment on an issue as a matter of law. The court has more discretion in denying motions for summary judgment. It may conclude that a fuller factual development is necessary or that some other reason exists that makes it wiser to go to trial. Since denial of summary judgment is not a final order, the district judge's discretion in denying a motion for summary judgment is usually not subject to effective appellate review.

Summary judgment represents one of the most important methods of pretrial disposition in the U.S. federal courts, which, according to some, has

contributed to the decline of trials to a shift from trial-centered to motion-centered adjudications and, eventually, to a decline in the Seventh Amendment Right to trial by jury.¹⁸⁰ This argument should not be supported, considering the true nature of the summary judgment motion, which is that of requesting the judgment “as a matter of law” and, therefore, not to judge evidence in place of the jury.

3.7.2.3 Case Management

Traditionally, judges played a relatively minor role in pretrial proceedings. The process of discovery and motions would be under the control of the parties, and a judge would merely resolve disputes that the parties could not resolve for themselves. Fed. R. Civ. P. 16, however, reflects a much more active philosophy of case management. It involves the judge in scheduling practically at the outset of the case, provides a vehicle for constant monitoring of the progress of the case, and allows for the simplification of issues prior to trial. More generally, judicial involvement allows for trial planning that makes the trial more efficient and more understandable to the jury.

The increased managerial role of federal judges has engendered some resistance. Professor Judith Resnik, for example, has viewed the growth of managerial judges, prompted by “changed initiated by judges themselves in response to work load pressures”¹⁸¹ with some alarm. According to Prof. Resnik, such changes and the increased managerial role of trial judges is dangerous because these changes are made “privately, informally, off the record, and beyond the reach of appellate review.”¹⁸² Moreover, federal rule-makers fail to articulate the rules by which judicial management should work.¹⁸³

3.8 Settlement encouraged

Most cases are settled or dismissed soon after discovery, before trial. This means that, during the pretrial phase and through the discovery process, counsel manage to better understand their respective positions and are ready to settle without going through a long and expensive judicial process. The overall structure seems highly efficient in terms of savings of public (judicial) and private (parties) resources.

This result is undoubtedly affected by the pre-trial devices conceived by the Federal Rules of Civil Procedure and by the Federal Rules of

180. See, e.g., Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886363.

181. Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 391 (2003).

182. *Id.* at 426.

183. *Id.* at 439.

Evidence. An essential purpose of party conferences under Fed. R. Civ. P. 16 is to encourage settlement. Thus, Fed. R. Civ. P. 16 specifically authorizes the judge to address "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." The rule also allows the judge to require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute. Finally, under certain circumstances, a judge can require the parties to participate in good faith in alternative dispute resolution procedures.

Generally, participants in the U.S. judicial system, especially judges and lawyers, highly value settlement. The same is probably true of sophisticated litigants, though it might not be true for individual litigants in some situations. The large-scale use of settlement allows parties to manage the risks of adverse outcomes and to avoid the cost of trials. It also saves public resources that otherwise would be devoted to conducting a trial.

However, settlement is not universally admired. Professor Owen Fiss, for instance, states:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.¹⁸⁴

However, federal procedure in theory and operation strongly promotes settlements. Some critics, while accepting the legitimacy of settlement, believe that judges have too much power to force parties to settle when the parties themselves would prefer to litigate. Professor Molot warns that judicial "efforts to influence outcomes in settlement conferences" can "represent a wild card beyond the control of the litigants or the law."¹⁸⁵ There is a danger that in the pursuit of efficiency judges may effectively deprive the parties of their right to defense and improperly limit their access to justice.

184. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

185. Molot, *supra* note 9, at 84.

3.9 *Judgments*

The court will normally issue a judgment on a verdict shortly after trial pursuant to Fed. R. Civ. P. 58. In most cases, this may be done by the clerk of the court without the intervention of the judge. The losing party can challenge the verdict in two ways: by renewing a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), or by filing a motion for a new trial under Fed. R. Civ. P. 59. We will briefly analyze both of these options before taking note of what, to Italian observers, is an oddity of U.S. practice: the court's freedom to conform the judgment to the evidence under Fed. R. Civ. P. 54.

3.9.1 *Judgment as a matter of law under Fed. R. Civ. P. 50*

A motion for judgment as a matter of law must be made after the jury has heard the evidence on an issue, but before the case has been submitted to the jury. A party that fails to make a motion for judgment as a matter of law before the case goes to the jury waives the right to make the motion after the verdict is rendered. Under Fed. R. Civ. P. 50(a), if the judge finds that a reasonable jury would not have sufficient evidentiary basis to find for the party opposing the motion on a fact, the judge may resolve the issue against that party and then enter judgment on any claim or defense that requires a favorable finding on that issue.¹⁸⁶ If the judge grants a Fed. R. Civ. P. 50 motion, he effectively takes the case away from the jury, potentially intruding into the jury's domain. Accordingly, such motions are granted only cautiously. In this respect, courts have held that before ruling on a motion for judgment as a matter of law the trial court must advise opposing parties of the deficiencies in their proof and give them the opportunity to present additional evidence on the dispositive facts.¹⁸⁷

There has been a tendency towards more judicial control and more intrusion into the jury's domain, which is confirmed by the adoption of the "substantial evidence" test by judges. Under this test, the court grants the motion unless there is sufficient or substantial evidence suggesting that the jury might decide for the non-movant.¹⁸⁸ Here, the court exercises discretion in deciding whether or not to take a case away from the jury. However, the "substantial evidence" standard the movant should meet is high, and the motion will likely be granted only in particular circumstances where it is clear that the evidence in the record does not properly support a particular verdict so that a judgment as a matter of law is more appropriate.

If the court does not grant the motion for judgment as a matter of law during trial, the motion may be renewed under Fed. R. Civ. P. 50(b) after

186. See FED. R. CIV. P. 50(b).

187. See *Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996).

188. See *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333 (1933).

judgment on the verdict is entered. If the court is convinced that the motion has merit, it may either order judgment as a matter of law for the moving party or order a new trial.

3.9.2 *Motion for a new trial under Fed. R. Civ. P. 59*

The court can grant a motion for new trial under Fed. R. Civ. P. 59 when the verdict is against the weight of the evidence or is either excessive or inadequate, where probative evidence is newly discovered, or where conduct by the court, counsel, or the jury improperly influenced the deliberative process.¹⁸⁹

3.9.3 *Judgment under Fed. R. Civ. P. 54(c)*

As a separate issue for purposes of the present analysis, Fed. R. Civ. P. 54(c) presents features which are worthy to analyze. Fed. R. Civ. P. 54(c) provides, "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

As a general rule, the district court generally grants the relief sought to which the party is entitled, even if such relief was not requested in the pleadings, which serve as mere "guides."

The lawsuit is, in fact, measured by what is pleaded and proven, not merely by what is demanded.¹⁹⁰ In other words, it is the court's duty to grant all appropriate relief.¹⁹¹ However, in case of default judgments, where the defendant fails to file its appearance, the court may not award relief beyond that sought in the complaint because the non-appearing defendant might be relying on the claims contained in the original complaint. Therefore, Fed. R. Civ. P. 54(c) states that a default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.

This rule, therefore, gives some power to the court to shape and award the relief sought by the parties. However, a party will not be able to recover on issues not presented or litigated before the jury, nor may the party recover relief that was lost due to failures in pleadings or in proof.¹⁹²

189. *See supra* para. 3.5.

190. *Minyard Enters. v. Southeastern Chem. & Solvent*, 184 F.3d 373 (4th Cir. 1999); *Baker v. John Morrell*, 266 F.Supp.2d 909, 929 (N.D. Iowa 2003).

191. *See Felce v. Fiedler*, 974 F.2d 1484, 1501 (7th Cir. 1992) (holding that the court must grant whatever relief is appropriate, and the provision under FED. R. CIV. P. 54(c) must be construed liberally).

192. *See Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1080 (7th Cir. 1998) (finding that trial courts may not award relief upon theory which was not properly raised at trial).

Furthermore, the court will not force the parties to accept an award or a remedy which none of them desires.

Fed. R. Civ. P. 54(c) allows some flexibility to courts in ruling upon cases.¹⁹³ This flexibility favors fairness instead of formality by providing courts with power (and discretion) in the interpretation of claims, defenses, and evidence. In fact, the formal repetition of claims in a specific format will not be required if the pleadings and evidence offered by the parties make the theory advanced by the parties and the relief sought by the parties clear.

Therefore, where the parties were wrong as to the legal remedy sought, the court could still award a different remedy as far as it deems it appropriate. The prayer for the relief sought in the complaint, that is, the demand for the relief to which the pleader believes to be entitled, is not considered part of the substantive claim. Thus, the selection of an improper form of relief will not subject the complaint to dismissal for failure to state a claim or cause, provided that the substantive allegations show that some other form of relief would be appropriate.¹⁹⁴ This provision clearly favors access to justice and flexibility instead of formality, thus ultimately favoring efficiency.

3.10 Appeal

As a general rule, in order to appeal a judgment before a court of appeals, the judgment must be final. That is, the judgment must end the litigation on the merits and leaves nothing for the court to do but execute the judgment.¹⁹⁵ The judge may issue an interlocutory order that finally decides an issue before him or an order deciding the case on the merits. The interlocutory order is not subject to immediate appeal, but it may be reviewed only after the case is decided by a final decision on the merits.

There are several exceptions to the final judgment rule. First, the collateral order doctrine, established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*,¹⁹⁶ provides that if the object of the order is collateral to the rights underlying the action and is too important to be denied review, than the order is immediately appealable. The purpose of the final-judgment rule will not be frustrated by allowing such an appeal. For this rule to apply, the court should find that there could be no effective review of the order after a final judgment is entered.

193. Consistent with the idea of "flexibility" and efficiency, is the mechanism of amendment and that of the "relation back" theory under FED. R. CIV. P. 15, which allow courts to grant leave to amend and relation back (an amendment to a pleading relates back to the time of the original pleading). This is consistent with the idea of the American proceeding as an on-going process, where substance often prevails over formality.

194. WRIGHT, MILLER & KANE, CIVIL PROCEDURE § 1255 (3rd edition).

195. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

196. 337 U.S. 541 (1949).

Second, an order should be immediately appealable where immediate harm might occur to the appellant if review is postponed.¹⁹⁷

Third, various statutes provide for immediate appeals of non-final orders. For example, orders granting, continuing, modifying, or dissolving injunctions, or refusing to do so.¹⁹⁸ In addition to orders involving the appointment or winding up of receiverships,¹⁹⁹ and orders in admiralty cases that determine the rights and liabilities of the parties,²⁰⁰ are all immediately appealable.

Fourth, Section 1292(b) of Title 28 of the United States Code provides for an appeal where the district judge certifies that its order involves a controlling question of law on which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court of Appeals may exercise discretionary jurisdiction over such cases.

Fifth, sometimes an order will finally resolve the case against one defendant without resolving the case against all defendants. Under Fed. R. Civ. P. 54(b), the district court may enter a judgment on such a claim if it “expressly determines that there is no just reason for delay.” As is true of appeals under section 1292(b), however, the Court of Appeals has discretion over whether to accept the lower court’s judgment in such cases.²⁰¹

The last exception to the final judgment general rule involves applications to the appellate court for writs of mandamus or prohibition to reverse some intermediate trial-court rulings that exceed the discretion of the district court. Courts are extremely reluctant to grant these extraordinary writs, which are available only where the district court has violated a non-discretionary duty. Moreover, the possibility that an appeal might be sought under Section 1292(b) suggests that certification should be sought under that statute before resorting to mandamus.²⁰²

The scope of the appellate review is limited to certain matters. Most importantly, the courts of appeals cannot receive new evidence concerning the facts. Instead, those courts can merely address legal arguments regarding the law applicable to the facts. The Court of Appeals owes different levels of deference to the district court, depending upon the particular issue. The appellate court will review the trial court’s rulings of law *de novo* – that is, without any deference at all. Similarly, appellate courts will review the district court’s grant of summary judgment motions

197. FRIEDENTHAL, *supra* note 67, at 629.

198. 28 U.S.C.A. § 1292(a)(1) (2009).

199. *Id.* § 1292(a)(2).

200. *Id.* § 1292(a)(3).

201. FRIEDENTHAL, *supra* note 67, at 623. See also *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270 (2d Cir. 1968).

202. FRIEDENTHAL, *supra* note 67, at 635. See *In re El Paso Elec.*, 77 F.3d 793 (5th Cir. 1996).

de novo, since the appellate court is as well situated as the district court to assess whether there are genuine issues of material fact for trial.

Courts of Appeals apply an abuse of discretion standard to the various decisions a district court must make on a discretionary basis. This would include, for example, decisions to include or exclude expert testimony under Fed. R. Evid. 702. The Court of Appeals will give greater deference to a district court's findings of fact where there is no jury trial below. Those findings of fact will be upheld unless the court of appeals thinks they are "clearly erroneous."

The maximum degree of deference is given to findings of fact by a jury, which will not be disturbed unless the Court of Appeals concludes that no rational jury could decide the case as that jury did. This standard is stricter than the standard applied by district courts in ruling on motions for a new trial.²⁰³

3.10.1 Appellate review of evidence

The appellate review of evidence is governed by Fed. R. Evid. 103, an important instantiation of the adversary system of trial. Fed. R. Evid. 103 provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground was not apparent from the context; or (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.²⁰⁴

This means, in order to be reviewable by the Court of Appeals, the error must be harmful. For an error to be harmful it must affect the substantial rights of the parties, and the nature of the error must have been called to the attention of the judge so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures.

Fed. R. Evid. 103 is perfectly consistent with the provisions under Fed. R. Civ. P. 61:

Unless justice requires otherwise, no error in admitting or

203. For more details concerning the nature and scope of review, see FRIEDENTHAL, *supra* note 67, at 636.

204. FED. R. EVID. 103.

excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial right.²⁰⁵

A “harmless error” is one that does not affect the parties’ substantial rights or does not defeat justice. In construing this requirement, it has been held that the harmless error inquiry examines whether the trial error “affected the outcome of a case to the substantial disadvantage of the losing party.”²⁰⁶ The court will consider the centrality of the evidence and the prejudicial effect of the inclusion or exclusion of the evidence.²⁰⁷ The error will be considered harmless only if the court states “with fair assurance” that the judgment was not substantially affected by the wrongfully admitted or excluded evidence.²⁰⁸ Generally, a court will not consider an error harmless when it is left with a grave doubt as to whether the error had a substantial influence in the ultimate verdict.²⁰⁹ In making this evaluation, the court considers the entire record and applies the harmless standard on a case-by-case basis.²¹⁰

This approach to review seems to be efficient because it avoids the use of judicial resources where the error made in reaching the decision to challenge was not a harmful one. However, the line between what is a “substantial influence” and a mere influence, and a “substantial disadvantage” to the losing party and a mere disadvantage to that party might lead to results unfair to that party. The losing party could probably be refused the right to appeal because it does not seem that the error he would challenge substantially affected the trial court’s decision.

IV. CONCLUSIONS: MAIN DIFFERENCES AND SIMILARITIES, FURTHER ANALYSIS

Considering the foregoing and in addition to the points which have already been raised and analyzed through this work and the separate brief analysis of the Italian civil proceeding and the U.S. civil proceeding (before federal courts), many efficiency and fairness issues come to consideration for further in-depth analysis.

205. FED. R. CIV. P. 61.

206. *United States v. O'Keefe*, 169 F.3d 281, 287 (5th Cir. 1999).

207. *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997).

208. *Tesser v. Board of Educ.*, 370 F.3d 314, 319-20 (2d Cir. 2004).

209. *General Motors v. New A.C. Chevrolet*, 263 F.3d 296, 329 (3d Cir. 2001); *Nieves-Villanueva*, 133 F.3d at 102; *Krulewitch v. United States*, 336 U.S. 440, 444-45(1949).

210. *Nieves-Villanueva*, 133 F.3d at 102.

4.1 General considerations

When comparing the Italian civil proceeding versus American civil proceeding, one notable difference is the duration of the two proceedings and, specifically, the duration of the American “trial,” as compared to the duration of the Italian proceedings once the pleadings under Italian article 183 ICCP have been exchanged.

Italian civil proceedings can be inefficient in terms of the time it takes to litigate each case. While even the most complex United States trials could be resolved in terms of weeks or months, the Italian proceedings before first instance courts can last up to three years because the hearings required to resolve the lawsuit are scheduled so far apart. But inefficient delays are not the only problems caused by trial proceedings spread out over years.

The proceeding can also might be less fair to the parties because the delays in the litigation will cause the judge to be less familiar with the case than he otherwise would have been. In addition, extended time between hearings and litigation dragged out over several years can create gaps in evidence and explanations provided by counsel. And it is unlikely the judge’s notes will be sufficient to overcome these gaps because the minutes of an Italian hearing are not transcribed verbatim, like they are in the United States. Thus, it is highly possible that the notes taken by the judge are incorrectly recorded and contain defects.²¹¹

The Italian proceeding is also unfair in terms of predictability, because the time-lags among hearings could increase uncertainty as to the final outcome and will likely benefit one party to the damage of the other.

Some commentators might say that the delays in the proceeding are due to the lack of judges and personnel, while others believe that by increasing the number of judges and personnel to deal with cases, there would simply be more cases filed and the delays in the proceedings would be the same.²¹²

The specialized nature of the Italian courts should favor efficiency more than the United States federal courts do. Specialized judges handle

211. The minutes of the hearing in Italy are not a verbatim transcript (in contrast to U.S. procedure). Thus, like all summaries, it could contain defects.

212. “[A]ny reduction in delay increases the incentive to litigate and reduces the parties’ incentives to settle, with the consequent increase in litigation offsetting the reduction in delay. Therefore, most attempts at reform, such as adding judges, will only increase the number of dispositions, rather than decreasing the time to disposition. Adding judges to the system to reduce congestion is similar to expanding the lanes of a freeway, an improvement that would draw traffic off the side streets and from public transportation. More cases might flow into the system, and the lesser burden of litigating might reduce the subsequent incentives to settle, so the increased number of judges would be able to adjudicate basically the same percentage of cases filed in the same time frame.” Clermont, *supra* note 80, at 22.

criminal or civil cases (as well as administrative cases) and among each category (civil, criminal and administrative) there are further specializations²¹³ as to the types of proceedings usually dealt with by each department within each court. Therefore, the designated judge usually possesses the expertise to handle the proceeding pending before him more expeditiously and with less risk for an erroneous decision. However, specialization by itself is not enough to cope with the inefficiency of the Italian proceeding due to delays in the proceeding itself.

4.2 *The pre-trial phase*

To reduce delays and improve fairness and efficiency, the Italian proceeding should be envisioned to start and finish in a short time frame. This would be possible only if the parties would exchange pleadings and set evidence requests before appearing before the judge. While the American proceeding is divided into two phases – a pre-trial and a trial phase, with only one phase fully developed before a judge and a jury – the Italian proceeding starts and ends before a judge, without a jury.

The full involvement of the Italian judge from the beginning of the proceeding may be inefficient because at this very preliminary stage, unless there is some defect in the complaint or answer that needs to be cured, or a particular procedural issue which calls for immediate attention and decision by the judge, there is no need for a judge's involvement and supervision.

In this respect, the ICCP provisions dealing with a labor proceeding can offer a model which should be considered for general application to an ordinary proceeding. In the labor proceeding, governed by article 409, there must be (i) a mandatory settlement attempt at the very beginning of the proceeding; (ii) claims and defenses made in the first pleadings (complaint and answer) which should indicate the evidence the parties intends to admit; (iii) one or two hearings devoted to the admission of evidence and to the discussion of the case; and (iv) a reading of the holding judgment to the parties at the end of the proceeding soon after the end of the discussion.²¹⁴ This type of proceeding is much more efficient and fair than an ordinary civil proceeding. Unfortunately, the legislator has not yet managed to develop such a proposal for all proceedings.

In 2003, in an unsuccessful attempt to satisfy the need for a more

213. In addition to the main divisions between criminal and civil courts, there are additional divisions of tasks and competences within the same courts. For instance, within each Trib., there will be a judge dealing with company law proceedings, a judge dealing with labor law proceedings, a judge dealing with family law issues, etc. See GROSSI & PAGNI, *supra* note 29.

214. This is subject to the power of the judge to later file a full copy of the judgment, including the grounds supporting the holding. A "holding" judgment is just the decision of the case, basically, who wins and who loses, without any explanation for that. The grounds of the decision will be published later, together with the full text of the decision. *Id.*

efficient, and especially faster, proceeding, Legislative Decree no. 5/2003 (“D.Lgs. 5/2003”) dealing with company law proceedings was passed.²¹⁵ Pursuant to D.Lgs. 5/2003, a proceeding is divided into two parts: one without the presence of the judge and the other before the judge. In the first part, the parties exchange pleadings (without involving the judge), and only when the claims, defenses, and evidence are finally set do the parties schedule a hearing before the judge. The judge will then admit evidence and decide the case after a hearing or two unless there is a substantial amount of evidence that would require more evidentiary hearings to consider.²¹⁶ But a proceeding that would start without a judge may not be feasible. And this is one of the reasons why D. Lgs. 5/2003 has not been successful and was repealed by a recent reform of the ICCP.²¹⁷

On the other hand, the American model, with its pre-trial discovery and pre-trial conferences before the judge, could not be used in Italy either because there is no discovery or managerial conferences before a judge prior to the start of the proceeding. And where the United States’ model won’t work either, perhaps the best model for Italy to consider is the above-mentioned labor proceeding model. The labor proceeding procedure under article 185 ICCP could be amended to provide that the judge, after the pleadings have been exchanged, should try to settle the dispute if on the face of the dispute it appears it is a case that can be settled.

Forcing early settlement negotiations is advantageous for parties because at the very least, it forces them to acknowledge the strengths of the parties relative positions. This realization alone is often enough to incite settlements that save time and costs. These settlement agreements could then be treated as a real judgment for enforcement purposes.

Even if the American and Italian proceedings seem very different on their face, at least as far as the structure is concerned (setting aside the problem of time) they function more or less in the same way. For example, (i) there is a phase devoted to defining the issues of law and of fact (which could be discovery and pre-trial conferences, for the American proceedings, and exchange of pleadings under article 183 ICCP for the Italian proceedings); (ii) a phase devoted to the admission of evidence; (iii) a phase devoted to final arguments; and (iv) the rendering of the judgment. The major difference, however, seems to be rooted in the law of evidence, and more specifically, the rule of relevance through which decisions about whether to admit evidence are made by inferential reasoning.

The mechanism of introducing evidence in the two proceedings is sometimes different because of the presence or absence of a jury. The introduction of evidence in United States’ trials follows the story telling method. Counsel presents to the jury a reliable story and provides them with

215. See GROSSI & PAGNI, *supra* note 29.

216. *Id.*

217. *Id.*

as much information as possible to put them in a position to make the right decision. The story telling model requires a lot of circumstantial evidence to tell a complete story to the jury. And in order to provide that story to the jury, Unites States allows any evidence into the proceedings that is conceivably relevant.

This practice of admitting any relevant evidence into trial has brought the United States close to adopting "probability" as a standard for admitting evidence instead of "certainty." And "probability" as a standard creates an inferential chain of reasoning approach which might lead to incorrect results.²¹⁸ Furthermore, such a broad concept of admitting evidence means that additional rules²¹⁹ describing what evidence might be relevant, but cannot be admitted into evidence for fear of prejudicing one of the parties²²⁰ or public policy, must also be added.²²¹ And it has also been argued that limiting instructions do not always help in making the jury properly consider the evidence offered.²²²

As an example of how inferential evidence can lead to incorrect results, one could consider the hearsay rule and the exception of non-assertive conduct, which does not constitute inadmissible hearsay. Non-assertive conduct is conduct that the actor held without the intention to communicate his belief by that conduct. Therefore, it is more likely that, by not intending to communicate his belief, the declarant was sincere in his statement. However, it is also likely that the non-assertive conduct had a meaning different from that inferred by the jury. One might then wonder whether the probable absence of just the hearsay danger of sincerity is sufficient justification for removing nonassertive conduct from the definition of hearsay altogether and admit it at trial as admissible and relevant evidence.

Usually, when evidence is admitted that would normally be excluded under the rule of hearsay, it is because of the need to tell a complete story to the jury or because the evidence could not be obtained otherwise without a hefty burden. However, the "necessity to tell a story" cannot always justify exceptions. Sometimes the exceptions contradict the rationale behind the general rule, as in the case of the assertive conduct exception to the hearsay

218. See *supra* para. 3.6 for a discussion on character evidence, impeachment evidence and hearsay.

219. The existence of such a broad provision on relevance makes provisions like Fed. R. Evid. 404, 407, 408,409, 411 and 807 necessary. The procedures under Fed. R. Evid. 404, 407, 408, 409, 411 and 803, providing for the exclusion of evidence, which may be prejudicial to the defendant or contrary to public policy furthered by the same rules, may take substantial time for completion because they make the use of inferential procedures. Such procedures, besides being time consuming, bring the risk of making incorrect inferences, thus eventually reaching incorrect results.

220. See *supra* para. 3.6.1.2 for a discussion on FED. R. EVID. 807.

221. See *supra* paragraph 3.6.

222. See also Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation does not help*, 19 L. & BEHAV. 407 (1995).

rule. It is not easy to distinguish assertive conduct from nonassertive conduct. There is no scientific test to identify it, and therefore, there is room for error. It is the judge who must make this decision under Fed. R. Evid. 104(a) and he might be wrong. And, even if judges were to be right most of the time, considerable time and effort is still spent arguing and deciding preliminary questions of facts and foundational requirements under the Federal Rules of Evidence. But wasted time and effort arguing preliminary questions of fact is not the only inefficient result of admitting all relevant evidence.

Discovery, as a specific device of the American proceeding, can be a tool to achieve "fairness", but it can be sometime very expensive and time-consuming, considering the broad scope of discovery under Fed. R. Civ. P. 26(b)(1). The category "any non-privileged matter that is relevant to any party's claim or defense" may include evidence which, in the end, is not really relevant to the requesting party's claims or defenses.²²³ This is because the party requesting the information may not know exactly what it is seeking. It may take time to analyze all the available evidence and find the evidence supporting the party's claims or defense. Once requested, the party obtaining the information will have to review it to eventually decide whether or not the evidence supports its case, and this demand and review process might be very expensive and time-consuming. Though this process can certainly time-consuming, it is fair because its intent is to further fair play and rationality in the decision-making process.

Discovery might be the only device in the hands of the parties to collect all the evidence they need in order to support their position at trial; however, it may be an expensive and time-consuming process. Further, because of discovery, the trial may be decided by how much the party is willing to spend. A party might be willing to spend more money to obtain the information which he needs to support his position at trial and, therefore increase his chances to win a case, but the party also runs the risk of losing at trial because his position is not sufficiently substantiated. The result is different in an Italian proceeding.

In the Italian proceeding, where there is no discovery period, no such possibility exists and, therefore, the party has no choice but to accept the risk of commencing a suit and eventually losing it because he was not able to offer sufficient evidence showing that his claim was well grounded. Winning or losing a case is always a matter of evidence. The perfect legal theory about the existence of a right is useless if the claim is not supported by sufficient evidence showing the existence of the plaintiff's right.

By providing discovery, the American system appears to be more "fair" than the Italian system because it eventually leaves to the party the decision as to whether the party should bear the costs of the discovery and

223. See FED. R. CIV. P. 26(b)(1).

go to trial, or whether to settle the case before instead.

Parties to a litigation should be able to decide whether or not to go through a discovery process and to bear the costs of having access to the information which they need to eventually win the case. If such possibility does not exist, then the parties have fewer chances to adequately present their case, which is unfair.

A right to discovery increases the fairness of the proceeding and, eventually, its efficiency because there are more chances that, throughout the suit, the plaintiff will get what he wants. Dispositive motions, such as motion to dismiss under Fed. R. Civ. P. 12(b)(6), motions for judgment on the pleadings under Fed. R. Civ. P. 12(c), and motions for summary judgment under Fed. R. Civ. P. 56, highly increase the efficiency of proceedings and favor the saving of judicial resources.

Similarly in the Italian proceeding, the parties have the option to request the judge to immediately decide the case without starting the evidentiary phase, where the pleadings, on their face, show that there is no "triable issue," that is, either no relief at law exists that the plaintiff could claim or whether no evidence has been offered by the parties to support their claims or defense. Article 187 ICCP provides, "When the investigating judge considers the case ready to be decided on the merits without the need to acquire further evidence, the judge refers the parties to the panel of judges." And the judge could decide that the case is ready to be decided at the first hearing, once the complaint and the answer only would have been exchanged.²²⁴ However, Italian judges are usually reluctant to grant such a request and prefer to go through the whole proceeding before making any decision as to whether the case should be dismissed for reasons analogous to the one supporting a motion under Fed. R. Civ. P. 12(b)(6) or under Fed. R. Civ. P. 56. Perhaps, by providing a specific motion like Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 56, the instrument under article 187 ICCP would be more effective. In other words, article 187 of the ICCP could be framed as a motion under Fed. R. Civ. P. 12(b)(6), or even as a motion under Fed. R. Civ. P. 56, the filing of which compels the judge to decide on the immediate dismissal of the case, and the judge's decision could be subject to review on appeal. Article 186 *quinquies* could be added to the previous provisions to expressly provide for a motion for immediate decision of the case because the pleadings and the evidence offered show that there is "no genuine issue as to any material fact" which deserves further consideration and, therefore, the claim should be dismissed.

4.3 Trial

One of the most efficient features of the United States jury trial is that the hearings are scheduled close in time to each other and a final decision is

224. See Corte app, sez. 25.Oct. 20.05, n. 1004, Guir. It. 2005, II, 2.

reached as soon as possible. This is certainly attributable to the presence of the jury.²²⁵ When a jury is convened to decide a case, these steps are necessary in order to save the jury's time and allow them to make a decision immediately after the evidence has been offered to them at trial.²²⁶

At trial, after the judge has deemed the evidence admissible, the parties offer the evidence to the jury. The main evidence is witness statements or exhibits that, absent any stipulations by the parties, are offered into evidence through witness testimony who will have to lay the foundation for their admission. The story telling approach adhered to by United States courts again provides the rationale behind this. Telling a jury a story through the help of witnesses helps them better understand the story itself and remember the documents which were offered to them as part of that story. The story is made by many circumstantial elements and inferences, so "a story" is needed to link, through inferential reasoning, the available evidence to the facts of consequence in the case.

Anyone can be a witness in a case as long as he has first-hand knowledge of the matter he testifies about, pursuant to Fed. R. Evid. 602. The plaintiff or the defendant may be witnesses in their own case and it is left to the jury to decide whether or not their testimony is reliable. This is different from the way testimony is treated in the Italian legal system, in which a party to an action cannot be witness in his own case. However, Italian judges can examine the parties to get information about the case (*interrogatorio libero*) and the parties' statements will be considered as circumstantial evidence, but they are not "technically" evidence.²²⁷

Therefore, there is no actual difference between the two systems as to the testimony provided by the parties to the litigation, except for the procedure to admit such evidence. Once the party answers the formal interrogatory, his answers will be treated as admissions and it will be eventually up to the opposing party to decide whether to claim that those answers are false so that the party should be charged with the crime of perjury. However, there might be differences in terms of fairness.

In the Italian civil proceeding, the party cannot spontaneously render any testimony. The only possible way to render testimony is to answer to the requests for clarifications made by the judge (*interrogatorio libero*) at the beginning of the proceeding. It is then left to the opposing party to decide whether or not to request an *interrogatorio formale*, provided that the necessary requirements are satisfied. However, *interrogatorio formale* is not similar to the spontaneous testimony rendered by the parties in the

225. Judges do care about the jury's time, and about the risk that, by "dissolving" it through time, as in the Italian proceeding, the jury might get confused, both dangers which are considered under FED. R. EVID. 403 balancing test. See GROSSI & PAGNI, *supra* note 29.

226. Hearings in bench trials can be scheduled with long intervals in between.

227. This situation is different from the situation where the witness is subject to formal interview ("*interrogatorio formale*"), because in this case, the party's answers to questions will be treated as "admission" ("*confessione*").

American proceeding.²²⁸

There is a presumption for bias in the Italian legal proceeding that prevents the admission of the parties' testimony. This may seem unfair because the party might want to offer his testimony, and it is also inefficient because by excluding the possibility to consider the party's own testimony as evidence, fundamental information and evidence will probably be left out of the proceeding. This would offer fewer chances to correctly decide the case and more chances to get at an unreasonable and unfair decision.

4.4 Courts and decisions

In the United States there are two basic levels of proceedings, and the United States Supreme Court may grant Certiorari by its own discretion.²²⁹ In Italy, *Corte di Cassazione* does not have similar discretion, and once the procedural requirements to bring a case before it are met, *Corte di Cassazione* hears the case and decides whether or not to grant review and later remand a case to the lower court. This may be a more fair model than the United States legal proceeding, but in terms of efficiency, a second review might not always be necessary.

Considering that *Corte d'Appello* has the power to do a review *de novo* of the entire case, as to both the facts and the law of the case as if it was brought to the first instance court, there should be no need to challenge the judgment of *Corte d'Appello* before a superior court, unless there is truly a complex legal issue which may need further review. Not all cases, though, present extremely complex legal issues and many cases go to *Corte di Cassazione* for review without any serious need for a further review from the "judge of the laws."

As is the case with the U.S. Supreme Court, it should be left to the discretion of *Corte di Cassazione* to decide whether or not to review judgments issued by *Corte d'Appello*. This would preserve extraordinary resources. Finally, counsel would be encouraged to do a better job on the appellate phase, knowing that there could be no further possibility of appeal. Also, non-meritorious claims and defense would be reduced.

It would also be fairer to include the dissenting opinion in the Italian judgments issued by the panel of judges. This, in fact, would render each judge accountable for their decisions and push them to pay more attention. Furthermore, it would help the losing party to identify the reasons which would further an appeal and to see whether its defense in the prior proceeding matched the theory advanced by the dissenting judge to

228. As already said, the party's answers to "interrogatorio formale" will be treated as admissions.

229. There are not really three levels of proceedings in the American federal system because the U.S. Supreme Court has discretion as to whether it would grant *certiorari* and review the judgment issued by an appellate court. See GROSSI & PAGNI, *supra* note 29.

eventually consider the chances of a successful appeal.

It is true that more judicial resources would be used in writing a single judgment, but perhaps better judgments would be written and would thus discourage the losing party from appealing the judgment. Furthermore, the parties might eventually settle the controversy if they knew that the position taken by the majority might eventually be reviewed by the appellate court, if the minority's position would be followed at that stage.

Pursuant to article 112 of the ICCP, the Italian judge may not grant to the parties a relief different from the one sought since there has to be a strict correspondence between what has been demanded by the parties and what is finally granted by the judge. Therefore, an Italian judge could not grant a remedy different from the one which the parties expressly requested in their pleadings and confirmed in their conclusions and final pleadings.²³⁰ The provision of article 112 of the ICCP seems to be more predictable than the one under Fed. R. Civ. P. 54(c) in that it puts the parties on "notice" of what to expect, thus allowing them to properly defend against the possibility of the court granting the specific remedy sought.

Moreover, the mechanism under article 112 of the ICCP seems to be more efficient, because it tends to define more precisely the scope of the litigation, to the final benefit of the parties who will focus their efforts on specific facts, evidence, and legal theories. And the courts will be not required to put any effort in identifying the remedy sought.

In American law, remedy is not considered a substantive part of the claim. Therefore, Fed. R. Civ. P. 54 (c) gives too much power to the judges, and reduces the fairness of the proceeding because the opposing party is not on notice of what to expect. On the other hand, by being so flexible, Fed. R. Civ. P. 56 is efficient and fair to the party who could suffer damages if it had no right to get a relief somehow different from the one which was expressly claimed.

230. Claims and objections which were not repeated in the conclusions would be considered as waived, unless the judge believes that the party's conduct strongly indicates its intention to keep those claims or objections. *Id.*

CONVEYANCING AT A CROSSROADS:

THE TRANSITION TO E-CONVEYANCING APPLICATIONS IN THE U.S. AND ABROAD

Michael E. Doversberger*

INTRODUCTION

A real property interest is arguably the most sacred form of ownership, and is “the largest and most important transaction in most people’s lives”¹ A home or business is not only of personal importance for many but also the most significant financial asset they possess. Society, therefore, has an interest in ensuring that conveyances of real property are undertaken in a controlled and predictable manner. However, in an increasingly digital world focused on speed and efficiency, the paper-centric U.S. real estate conveyance process has become archaic. This has resulted in an uncomfortable position for parties to real estate transactions, as the transition to new electronic processes is sometimes viewed as undermining the reliability of the past. Despite the significance attached to a real estate transaction, the pending digital conversion cannot be ignored. How society reacts to these changes will determine the ease with which the transition to e-conveyances occurs.

Part One will begin with a brief discussion that highlights the international support of e-conveyance applications and the general embrace of “secure, paperless, electronic, end to end, pre-sale to post-completion conveyancing.”² This section will specifically address conveyancing applications in Canada, Scotland, Ireland, Denmark, and Australia. Part Two will then provide a detailed analysis of the comprehensive English e-conveyance system, including how it operates, the problems associated with it, the legal implications of the system, and where England stands today in implementing e-conveyance applications. Part Three will address U.S. barriers to e-conveyance applications, the enactment of enabling laws, and how the digital age and new technology are working against these barriers. This section will also discuss some of the key issues and concerns U.S.

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1. Sam Stonefield, *Symposium: Choosing the Digital Future: The Use and Recording of Electronic Real Estate Instruments*, 24 W. NEW ENG. L. REV. 205, 220 (2002).

2. The eConveyancing Task Force of the Law Soc’y of Ir., *eConveyancing: Back to Basic Principles*, PROP. VALUER 26, 26 (Aug. 2008), available at http://www.magico.ie/files/admin/uploads/W153_Field_2_33070.pdf.

jurisdictions face in their inevitable transition to increased e-conveyance applications.

Perhaps the most important objective of this Note is not to highlight the inefficiencies of the current U.S. land conveyance system or the benefits of e-conveyancing applications, but rather to emphasize that the switch to increased e-conveyancing is inevitable. To these ends, Part Four of this Note will provide an overview of how the digital age has already impacted practitioners in the United States, and will recommend steps to prepare for the increasing legal and technological impact e-conveyancing will have. Only by embracing the pending transition can the benefits of e-conveyancing applications be fully realized.

PART ONE: A GLOBAL TRANSITION TO INCREASED E-CONVEYANCING APPLICATIONS

Numerous changes in both technology and culture are forcing the real estate conveyance process to change. Greater interconnectivity brought by advances in technology and the internet, for instance, has rendered the paper-centric models of conveyancing outdated.³ Dictated by societal preferences and demand, technology is reshaping international conveyance processes.⁴ As John A. Gose states:

The real estate conveyancing world has experienced more changes during the past 15 years than in the prior 300 years. After 450-plus years, the real estate conveyancing world is going through a major change brought on by a new electronic world—a world that could not be imagined by the creators of the parchment, paper world.⁵

Ontario, Canada

Ontario, Canada has responded to this transformation by developing an electronic conveyancing system. Ontario's electronic system began in the 1980s when the Ontario Ministry of Consumer and Business Services started working with Teranet, a private company based in Toronto, on the development of an e-registration system.⁶ As stated on the Teranet website:

The task involved updating a complex 200-year-old paper-based system and creating a database containing records for

3. JOHN SPRANKLING ET AL., *GLOBAL ISSUES IN PROPERTY LAW* 116 (2006).

4. *See generally id.*

5. John A. Gose, *Real Estate Conveyances from Livery of Seisin to Electronic Transfer: Real Estate Transactions Enter the Digital/Electronic World*, 33 REAL EST. ISSUES, No. 2, 59, 64 n.2 (2008), available at http://www.cre.org/publications/33_2.pdf.

6. *Id.*

more than five million parcels of land. Teranet not only operates the system on behalf of the Ontario government but also enables remote electronic access via streamlined and secure operations, primarily for lawyers, conveyancers and financial institutions. The need to physically visit local Land Registry Offices has been eliminated in many cases.⁷

Lawyers and other accredited agents of a party are able to submit electronic documents through the system. These documents are then regarded as official records.⁸ Other electronic “applications include transaction-based e-commerce operations, enterprise systems management, risk management solutions, records conversion, imaging, land registration, parcel mapping and data mining.”⁹ Teranet also offers a closure service whereby an agent has control over funds and instructs the service to execute and forward payments to an appropriate party.¹⁰

Generally, innovative legislation has prevented major setbacks and allowed for continued progress, including legislation that provides that “electronic documents that create, transfer or otherwise dispose of an estate or interest in land are not required to be in writing or to be signed.”¹¹ By August 2005, approximately five million electronic transactions had been completed on the system.¹²

British Columbia, Canada

In British Columbia, OneMove Technologies, Inc. (“OneMove”) offers a similar system.¹³ OneMove utilizes “one web-based platform that serves all those involved in a real estate transaction, [as opposed to Teranet’s] separate platform for each professional.”¹⁴ This approach has greatly reduced the time it takes to purchase a home in British Columbia.¹⁵ Instead of physically traveling to the land registry office, “all you have to do ‘is push submit’ and the title is transferred, the money is released from trust and the deal is done”¹⁶ OneMove’s convenience has made it a

7. Teranet Inc., Fast Facts, <http://www.teranet.ca/corporate/history.html> (last visited Apr. 26, 2010) [hereinafter Teranet Fast Facts].

8. PAUL BUTT, *ELECTRONIC CONVEYANCING: A PRACTICAL GUIDE* 1 (2006).

9. Teranet Fast Facts, *supra* note 7.

10. Teranet Inc., Solutions for the Legal Profession, <http://teranet.ca/services/legal.html> (last visited Apr. 26, 2010) [hereinafter Teranet Solutions].

11. BUTT, *supra* note 8, at 2.

12. *Id.*

13. Eric Shackleton, *Software Tames Tangle of Paperwork*, THE GLOBE AND MAIL (Toronto), July 11, 2008, available at <http://www.theglobeandmail.com/real-estate/article49142.ece>.

14. *Id.*

15. *Id.*

16. *Id.*

popular tool for conveyancers. With only 300 transactions per month six years ago, OneMove currently facilitates 6,000 transactions per month.¹⁷ Possibly because of OneMove's success, Teranet appears to be moving towards greater interconnectivity among its users.¹⁸ Although both OneMove and Teranet have reduced the time and effort needed for a real estate transaction, it is unclear how much money has been saved.¹⁹

Scotland

Scotland's Automated Registration of Title to Land ("ARTL") project²⁰ was also developed in response to societal preferences in favor of electronic commerce.²¹ ARTL will allow e-registration²² and will be available on the internet.²³ Using ARTL, an authorized conveyancer is able to register deeds electronically by answering a series of online questions,²⁴ and owners will be able to pay some taxes online.²⁵

Potential benefits of ARTL include decreased costs for paper and postage, less bureaucracy and more control for users, reduced risk associated with delayed registration, and potentially discounted registration fees.²⁶ Paper documents will initially still be acceptable, as there are security concerns with the new system.²⁷ Certification processes, accreditation requirements for direct e-registration users, and an auditing system may help mitigate these concerns.²⁸

By 2001, forty-one solicitor firms and numerous lenders were participating in an ARTL pilot program.²⁹ The participants gave generally positive feedback.³⁰ In part because pilot participants were initially required to use both the standard paper process and ARTL's electronic process, the number of participants was rather low.³¹ Nonetheless, the incentive to

17. *Id.*

18. *Id.*

19. *Id.*

20. Registers of Scotland, History of ARTL, <http://www.ros.gov.uk/artl/history.html> (last visited Apr. 26, 2010) [hereinafter History of ARTL].

21. See generally Alistair Rennie et al., *The Age of e-Conveyancing?*, J. ONLINE, June 1, 2001, available at <http://www.journalonline.co.uk/Magazine/46-6/1000947.aspx>.

22. History of ARTL, *supra* note 20.

23. Registers of Scotland, What is ARTL?, http://www.ros.gov.uk/artl/what_is_artl.html (last visited Apr. 26, 2010).

24. Rennie et al., *supra* note 21.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See generally *id.* (for the proposition that the "electronic registration is merely an experimental replication of the paper-based registration" and that more participation is required to fully test the system).

submit feedback and shape the development of ARTL helped make the pilot program a success.³² Legislative support was also crucial.³³ The legislature responded to ARTL positively and modified the law regarding the validity of digital deeds.³⁴

By the end of 2008, ARTL was transitioning from design to a live application.³⁵ In fact, “[t]he first full live transfer of a property title . . . successfully took place . . . [using ARTL on] Thursday 17th April 2008, marking a key milestone for the ARTL project.”³⁶ The success of ARTL seems to be Scotland’s first major step towards comprehensive e-conveyancing.³⁷

Ireland

Like Scotland, Ireland plans to increase the availability of e-conveyance applications. The Law Society of Ireland has expressed concern that the “current [conveyance] process is not adapted to deal with modern society.”³⁸ Specifically, paper-based conveyancing cannot handle the increased volume, diversity, and modern expectations for speed and transparency.³⁹ Further, Irish conveyancing “is hampered by a complex, cumbersome legislative framework and thus inherent delay.”⁴⁰

The Law Society of Ireland suggested that simply making the paper-based system digital was not enough and that the entire process needs to be re-engineered to fit with the electronic environment.⁴¹ Ultimately, “[u]nder e-conveyancing, the Law Society believes the total transaction time for the conveyance of a family home from initial viewing of the property to completion, registration of ownership and discharge of the prior mortgage could be five working days.”⁴²

Denmark

Also overburdened by paper documents, Denmark’s conveyancing process requires numerous hardcopies for “purchase agreements, loan

32. *Id.*

33. *Id.*

34. History of ARTL, *supra* note 20.

35. Law Society of Scotland, ARTL-Automated Registration of Title to Land, http://www.lawscot.org.uk/Members_Information/convey_essens/artl (last visited Apr. 26, 2010).

36. *Id.*

37. Rennie et al., *supra* note 21.

38. Law Soc’y of Ir., *supra* note 2, at 26.

39. *Id.*

40. *Id.*

41. *Id.* at 26, 29.

42. *Conveyance Overhaul Proposed to Speed Up Property Deals*, IRISH EXAMINER, July 23, 2008, available at <http://archives.tcm.ie/irishexaminer/2008/07/23/story68023.asp>.

documents, insurance papers and deeds of conveyance⁴³ Denmark anticipates that e-conveyancing applications will replace its paper system and increase overall speed and flexibility.⁴⁴ To these ends, Denmark seeks a “more efficient conveyancing system in which the legal scrutiny will extensively be performed automatically and mechanically.”⁴⁵ The ultimate goal is to have mouse clicks replace paper pushing.⁴⁶

The Danish Bankers Association and the Danish Mortgage Banks have been instrumental in preparing a common infrastructure for the system.⁴⁷ The Danish Court Administration is also moving forward and developing e-conveyancing processes.⁴⁸ The Bankers Association and Mortgage Banks are working closely with the court’s information technologies providers to ensure a seamless transition.⁴⁹

Eventually, Denmark hopes to create a common arena for conveyancing professionals, including various agents, lawyers, and insurance companies.⁵⁰ Communication between interested parties is crucial for the e-conveyance system to maximize its potential.⁵¹ In order to foster communication and reduce information gathering costs, conveyancing professionals can access documents online,⁵² instead of coordinating and communicating information with all interested parties over the phone or by post.⁵³ Even the Danish loan process will be streamlined with e-conveyancing applications capable of removing old loans and creating new ones.⁵⁴ Denmark expects its system to make the conveyancing process easier for all involved, as well as promote Denmark as a global leader in applying technology to real estate transactions.⁵⁵

Australia

Likewise, the Commonwealth of Australia has responded to excessive amounts of paper documents and the underutilization of new technologies⁵⁶ by planning to implement an extensive form of e-conveyancing. As one

43. DANISH BANKERS ASS’N, SUMMARY OF ANNUAL REPORT 2006 8 (2006).

44. *Id.* at 9.

45. *Id.* at 11.

46. *Id.* at 8.

47. *Id.* at 6.

48. *Id.* at 8.

49. *Id.* at 10.

50. *Id.* at 8.

51. *See generally id.*

52. *See generally id.* at 9.

53. *See generally id.*

54. *Id.* at 9-10.

55. *Id.* at 6.

56. *See generally* Angus Kidman, *The End of the Paper Trail*, LAW. WKLY., Sept. 15, 2006, available at <http://www.legalconsult.com.au/News/Technology/The-end-of-the-paper-trail.html>.

Australian legal publication noted:

Just a glance at the number of ‘stakeholders’ involved in the national e-conveyancing project gives a sense of its scale and complexity. The list runs to not only lawyers’ representatives, state government land registries and banks, but a range of service providers that assist law firms and the state to deal with the huge number of transactions involved.⁵⁷

However, the Australian system has been slowed by internal disputes. The National Electronic Conveyancing System (“NECS”) was a cooperative arrangement between industries and state governments for a national e-conveyance system by 2010.⁵⁸ Despite the NECS, some states are not willing to adapt their individual systems to the NECS criteria.⁵⁹ Initially, the State of Victoria’s e-conveyance pilot (a system which eventually would make cross-border real estate transactions easier) was to serve as a model for other states.⁶⁰ However, Victoria, has declined to share any of its conveyancing software with other Australian states unless they agree to certain conditions.⁶¹ Specifically, Victoria and the State of Queensland prefer “a state-centric approach with each jurisdiction using similar software but without the nationwide interoperability.”⁶² In any event, “[t]he fate of the \$44 million e-conveyancing project is uncertain since the major banks pulled out . . . [based, in part, on] frustration over Victoria’s flagging commitment to NECS.”⁶³ Although debate rages over what form of e-conveyancing is best in Australia, global demand for e-conveyance applications cannot be denied.

PART TWO: COMPREHENSIVE E-CONVEYANCING IN ENGLAND

A. *Historical Overview*

Compared with other nations, England’s e-conveyance system is fairly comprehensive. To best understand the system’s development, it is crucial to keep in mind the historical underpinnings of the English land

57. Shaun Drummond, *Legal Constraints Slow e-Conveyance Victoria*, LAW. WKLY., Sept. 15, 2006, LEXIS, News Library, LWYRWK File.

58. Kidman, *supra* note 56.

59. Drummond, *supra* note 57.

60. Kidman, *supra* note 56.

61. Karen Deame, *Rebellion Frustrates e-Conveyance*, THE AUSTL., Oct. 30, 2007, available at <http://www.theaustralian.com.au/australian-it/rebellion-frustrates-e-conveyance/story-e6frgamo-1111114752889>.

62. *Id.*

63. *Id.*

transfer system, which ultimately is the system that gave rise to U.S. land conveyance processes.⁶⁴ Under the English feudal system, real property transfers were performed in a ceremony called the "livery of seisin," which was essentially a transfer of interest by possession.⁶⁵ The transferee's possession of the property notified any third party of the real estate transaction⁶⁶ and established a legally recognizable claim to the land.

As English society developed, a system of notice by possession was no longer adequate and a new method of conveyancing was needed.⁶⁷ England responded through its Statute of Uses, which allowed for the use of deeds.⁶⁸ Subsequently, the Statute of Enrolments was added to mandate that sales of freehold estates must be put in writing.⁶⁹ Additionally, the Statute of Enrolments required the payment of a tax and was arguably the first statutory recording law.⁷⁰ The Statute of Wills, permitting a testator to devise real property in a will,⁷¹ and the Statute of Frauds, requiring that "all transfers of interests in real property be in writing and signed 'by the party to be charged,'"⁷² also facilitated the development of a formal conveyancing system.

Although English laws required conveyances to be written, they did not require use of a single, original document.⁷³ As stated by authors David E. Ewan, John A. Richards, and Margo H.K. Tank:

Indeed, real property conveyances often used indenture (the practice of writing two or more copies of the document on a single large sheet of parchment, which was then cut apart with a jagged or wavy line—the indenture—into two parts) to document the transaction. This created more than one original document. . . . In other words, there may be many original deeds. Originality was not important because there was a talismanic effect of having one original document; instead, originality was important only insofar as it allowed one to be confident of the accuracy of the information displayed in the medium.⁷⁴

As a result, a written agreement was utilized simply as the best way to

64. David E. Ewan et al., *It's the Message, Not the Medium!*, 60 BUS. LAW 1487, 1499 (2005).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1499-1500.

70. *Id.* at 1500.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

guarantee trustworthiness given the technological constraints on early conveyancers.⁷⁵ The laws developed as a response to concerns over accuracy and were not based “on the form in which it is presented.”⁷⁶ This conception supports the application of modern technology to the conveyancing process.

B. Modern Inefficiencies and the Transition to E-Conveyancing

The traditional English conveyance system harbors many of the same inefficiencies as the prevailing U.S. conveyance system. Not only does the English process rely heavily on paper documents and standard mail, but purchasers and sellers of real property also suffer from common transaction anxieties. One such anxiety is the registration gap: the “inevitable hiatus between the completion of the transaction in the solicitors’ office and the actual registration of that transaction”⁷⁷ This apprehension is compounded because of the multiple parties that are often involved in a real estate transfer and the numerous ways a transaction can fail.⁷⁸ The length of time to complete a transaction, the general absence of transparency, and the potential for “poor conveyancing standards” are also problematic.⁷⁹ With the advent of new technology, the English Land Registry, a government agency in charge of recording property dealings,⁸⁰ decided to overhaul the existing system.

As a result, the Land Registry decided upon a comprehensive system of electronic conveyancing as the best solution. According to some, e-conveyancing has the potential to “radically reshape the process of land conveyancing, not only to work better but to work in a way which can be handled”⁸¹ The system aims to correct many problems that plague the English system such as the length of time from an offer’s acceptance to completion, a lack of transparency and uncertainty, and general risks and anxieties faced by those involved in a transaction.⁸²

The proposed e-conveyancing applications, however, would require a

75. *Id.*

76. *Id.* at 1501.

77. BUTT, *supra* note 8, at 8.

78. P.V. RAJASEKHAR, INT’L CONF. ON ENHANCING LAND REGISTRATION & CADASTRE FOR ECON. GROWTH INDIA, E-CONVEYANCING: CHALLENGES AND AMBITIONS 14 (2006), available at http://www.fig.net/commission7/india_2006/papers/ts03_02_rajasekhar.pdf.

79. TED BEARDSALL, FIG INT’L SEMINAR, E-CONVEYANCING A CHALLENGE AND A PRIZE 5 (2004), available at http://www.fig.net/commission7/innsbruck_2004/papers/beardsall.pdf.

80. Land Registry, About the Land Registry, http://www.landreg.gov.uk/about_us/ (last visited Apr. 26, 2010).

81. RAJASEKHAR, *supra* note 78, at 2.

82. LAND REGISTRY, E-CONVEYANCING, THE STRATEGY FOR THE IMPLEMENTATION OF E-CONVEYANCING IN ENGLAND AND WALES 10 (Oct. 12, 2005), available at http://www.landreg.gov.uk/assets/library/documents/e-conveyancing_strategy_v3.0.doc [hereinafter STRATEGY FOR THE IMPLEMENTATION].

substantial investment of time and capital. The Land Registry's e-conveyance system has been in development for over a decade.⁸³ The system focuses on "listening to potential users and meeting their needs, learning the lessons available from previous projects, and addressing the fears and concerns raised."⁸⁴ Unfortunately, cost estimates were unclear from the beginning due to uncertainties.⁸⁵ Some costs were definite, such as IBM's winning contract bid to oversee development and to design the information technologies system, which was estimated to cost £21 million over five years.⁸⁶ But it was clear that hidden costs were going to be significant. Further, when implementing the system, "it is not prudent to switch from a tried and tested system of conveyancing unless it can be demonstrated that any proposed system will reduce or banish many, if not all, of the negative aspects of the current system."⁸⁷

Despite these uncertainties, the e-conveyance project continued. Shifting from a concept to a functioning model, however, required significant effort. "[F]or most jurisdictions the laws relating to property transfer are extremely complicated, and so it is not a simple matter to convert paper-based systems built up over several centuries to straightforward electronic processes."⁸⁸ Feedback, proposals, suggestions, and questions were sent to and from concerned parties,⁸⁹ and slowly, England's model of comprehensive e-conveyancing, set out in detail below, began to emerge.

C. *Laying the Legal Foundation*

Of course, without the support of Parliament, the legal foundations needed for the Land Registry's e-conveyancing applications would have been impossible. In 1998, the Law Commission and Land Registry published a report titled "Land Registration for the Twenty First Century," setting out preliminary proposals.⁹⁰ The Land Registration Act 2002 "came into force on 13 October 2003, [and] contain[ed] legislative provisions to enable the implementation of e-conveyancing in the form envisaged."⁹¹

83. Ian Grant, *Land Registry e-Conveyancing System to Include PKI*, COMPUTERWEEKLY.COM, Jan. 17, 2008, <http://www.computerweekly.com/Articles/2008/01/17/228972/land-registry-e-conveyancing-system-to-include-pki.htm>.

84. LAND REGISTRY, *E-CONVEYANCING: A LAND REGISTRY CONSULTATION REPORT 17* (2003), available at <http://www1.landregistry.gov.uk/assets/library/documents/eccir.pdf> [hereinafter CONSULTATION REPORT].

85. BUTT, *supra* note 8, at 5.

86. *IBM Bags £21m E-Conveyancing Deal*, GHOSTDIGEST, July 14, 2005, http://www.ghostdigest.co.za/code/A_723.html.

87. RAJASEKHAR, *supra* note 78, at 14.

88. *Id.* at 6.

89. *Id.* at 3-4.

90. STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 8.

91. *Id.*

This was “an attempt to reshape conveyancing to ensure its compatibility with the commercial world of the twenty-first century.”⁹² By 2003, and after the passage of supportive legislation aimed at “dematerialisation,”⁹³ a plan for the “implantation of e-conveyancing was approved.”⁹⁴

D. Components and Operation of E-Conveyancing

With legal backing, the Land Registry’s proposed e-conveyance applications incorporate numerous components that collectively constitute the system.⁹⁵ One component is the central service, which links conveyance participants and helps coordinate contracting and registration.⁹⁶ Another is a method of electronic funds transfer (“EFT”), which is connected to the central service.⁹⁷ The EFT service “will enable the whole nexus of payments associated with a property transaction to be agreed in advance and then settled electronically and with immediate effect at the time when all the funding is confirmed as being available and the transaction is completed.”⁹⁸ Finally, there is a channel access service, which will allow users to access both the central service and the EFT.⁹⁹ The actual interface, however, may be customized by individual users.¹⁰⁰

User access to the full array of e-conveyance applications may be limited, with “[t]he highest level of access . . . given to conveyancing professionals so that they can produce documents and carry out online all the transactions necessary for a valid conveyance of land or property.”¹⁰¹ As stated by authors Robert Abbey and Mark Richards:

The relationship with the [land] registry will be contractual, under a ‘network access agreement[,]’ and the registry will be obliged to contract with any solicitor or licensed conveyancer who meets specified criteria.¹⁰²

The criteria for use will be based on feedback from an extensive

92. Barbara Bogusz, *Bringing Land Registration into the Twenty-First Century – The Land Registration Act 2002*, 65 MOD. L. REV. 556, 557 n.4 (2002).

93. Beardsall, *supra* note 79, at 3.

94. BUTT, *supra* note 8, at 4.

95. *Id.* at 8.

96. *Id.*

97. *Id.*

98. STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 17-18.

99. BUTT, *supra* note 8, at 4.

100. *Id.*

101. The Introduction of E-Conveyancing, DIY Conveyance (UK), <http://www.diyconveyance.co.uk/introduction-econveyancing.html> (last visited Apr. 26, 2010).

102. ROBERT ABBEY & MARK RICHARDS, A PRACTICAL APPROACH TO CONVEYANCING 53 (9th ed. 2007).

consultation project.¹⁰³ One objective of the access agreements might be to raise overall conveyancing standards, and conveyancers who consistently delay the process might lose their right to use the system.¹⁰⁴ In one consultation study, which focused largely on interested conveyancers and stakeholders, “[n]early 83% of respondents stated that they would be interested in offering e-conveyancing services.”¹⁰⁵

At certain transactional stages, such as when a client authorizes the conveyancer to act or when the conveyancer is investigating title, searching local records, or seeking mortgage offers, a progress report must be sent to a “chain manager.”¹⁰⁶ Chain managers “provide information on the progress of all transactions in a chain and . . . facilitate [the] simultaneous exchange of contracts and completion of all transactions in a chain.”¹⁰⁷ This enables the chain manager or conveyancers to spot potential delays in the process.¹⁰⁸ Importantly, “the information that a practitioner will be required to supply will relate to progress only and not to personal or financial information.”¹⁰⁹ Therefore, “it will be necessary to confirm whether or not a purchaser has received an acceptable mortgage offer where a mortgage is needed, but there will be no need to disclose the contents of that offer.”¹¹⁰

A chain matrix “will . . . allow buyers, sellers, their legal representatives, estate agents and lenders to view the progress of every transaction . . .” in a property chain,¹¹¹ and is expected to “highlight where a bottleneck exists” by notifying those responsible.¹¹² The hope is that “[a]nyone who has had their life expectancy shortened by the peculiar torture of the English system of property conveyancing will cheer . . . [because there will be] no more heartbreaking calls announcing that the biggest financial transaction in your life has just been wrecked . . .”¹¹³ The

103. *Id.*

104. *Id.*

105. CONSULTATION REPORT, *supra* note 84, at 17.

106. BUTT, *supra* note 8, at 11.

107. Land Registry, *Doesn't the Idea of a Chain Management Matrix Take Away Control Over Exchange and Completion from the Practitioner?*, <http://landregistry.org.uk/kb/Default.asp?ToDo=view&questId=120&catId=27> (last visited Apr. 26, 2010).

108. *See generally* Interview by April Stroud with Mr. Sahib Sehrawat, Chief Land Registrar, <http://www.palgrave.com/law/stroud2e/resources/transcripts/sahib.html> (last visited Apr. 26, 2010) (for the proposition that “a chain manager will be appointed to monitor the chain”).

109. Land Registry, *The Proposed System of Chain Management Appears to Require Practitioners to Provide Information to the Central System that Clients May Instruct Them not to Divulge. Will this Create a Conflict of Interests for Practitioners?*, <http://www.landreg.gov.uk/kb/default.asp?ToDo=view&questId=128&catId=27> (last visited Apr. 26, 2010).

110. *Id.*

111. The Free Library, *E-Conveyancing*, <http://www.thefreelibrary.com/E-conveyancing-a0189505541> (last visited Apr. 26, 2010).

112. *See id.*

113. Michael Cross, *Technology: Inside IT: Has Land Registry Bitten Off More than it*

Land Registry contends that pinpointing those responsible for delays in the conveyancing process “gives them the impetus to get things moving again for fear of damage to their reputations.”¹¹⁴ It is hoped that a chain matrix “will facilitate a simpler, more co-ordinated exchange of contracts and completion.”¹¹⁵ Thus, a buyer theoretically will not be left in the position where he has contracted to buy a new home, but then his current home sale fails, leaving him financially distressed.¹¹⁶ Therefore, “[f]or buyers and sellers, this should mean better information, greater certainty and less stress.”¹¹⁷

Reaction to the chain matrix idea has been mixed. Although “[t]wo-thirds of respondents [to a consultation study] supported the overall concept of a chain matrix, with almost a third giving a strong endorsement[,] . . . 20% of respondents did not support the concept.”¹¹⁸ As discussed in more detail below, the chain matrix prototypes, in practice, faced significant, if not prohibitive, hardships.

Under the proposed system, a buyer and seller would electronically communicate, as well as send or receive any documents, like a contract draft.¹¹⁹ The conveyancer will still “have to study these documents and make any further enquiries or negotiate any amendments to the draft contract in exactly the same circumstances as now.” The hope is that under e-conveyancing, any amendments will be incorporated and approved electronically, without involving traditional post.¹²⁰ Similarly, mortgage preparations will also be conducted online.¹²¹

In addition to having a chain manager facilitate the transaction, the Land Registry will also have a greater role in the pre-contract stage of the transaction. For instance, when “the seller’s conveyancer uses the E-Conveyancing service to transmit the draft contract from his case management system to the buyer’s conveyancer, automatic validation checks would compare contract data with Land Registry data and electronic messages would indicate any discrepancies.”¹²² Theoretically, this check will be beneficial in spotting problems; however, its effectiveness has not been proven in practice. There is concern that the validation checks will improperly find errors when the contract is fine, resulting in unneeded

Can Chew Entering the Matrix, GUARDIAN, Apr. 12, 2007, Technology Guardian section, at 6, available at <http://www.guardian.co.uk/technology/2007/apr/12/comment.egovernment> [hereinafter *Bitten Off*].

114. *Getting Ready to Go Digital*, FIN. TIMES ADVISER, Nov. 1, 2007, 2007 WLNR 21968346, available at <http://www.ftadviser.com/FinancialAdviser/Archive/Supplements/article/20071101/dd9a95ec-ea4b-11dc-abcd-0015171400aa/Getting-ready-to-go-digital.jsp>.

115. STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 16 (emphasis removed).

116. BUTT, *supra* note 8, at 14.

117. STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 16.

118. CONSULTATION REPORT, *supra* note 84, at 163.

119. BUTT, *supra* note 8, at 12.

120. *Id.* at 13.

121. ABBEY & RICHARDS, *supra* note 102, at 52.

122. STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 18 (emphasis removed).

delays.¹²³ A similar concern is that the checks will give the conveyancer a false sense of assurance that the contract is sound when, in fact, the automatic checks simply missed an error.¹²⁴

At the point when both parties agree to the contract, it would need to be signed electronically and then exchanged electronically.¹²⁵ For this reason, a secure and reliable method of electronic signatures cannot be overlooked. As previously discussed, a deed historically had to “be signed, witnessed and delivered . . .” and “an electronic contract or transfer could not comply with these requirements.”¹²⁶ However, the Electronic Communications Act 2000 now supports “the use of electronic communications”¹²⁷ and allows documents to be validly signed with electronic signatures.¹²⁸

In addition to legislative support, the high financial stakes involved in a real property transfer require exceptional reliability and security with regard to electronic contracting. To these ends, “[e]lectronic signatures are the key to the process. These are not fancy graphics or jokes at the end of e-mails, but the use of mathematically complex encryption keys to guarantee the authenticity of a document.”¹²⁹ With each electronic document, there is a digital signature file that is transferred with it that “verifies that the document was signed by a particular person, and the content of the document hasn’t been changed in anyway, not even a single character, since it was signed.”¹³⁰ Utilizing such technologies, the expectation is that both the general public and conveyancers will be able to use the system without concern of fraud.

Moreover, a “pre-completion search at the Land Registry will not be required as there will no longer be a registration gap to worry about . . .” thereby reducing the possibility of priority disputes involving a subsequent purchaser.¹³¹ This simultaneous registration mitigates problems caused by third-parties who claim an interest in a recently purchased or sold property.¹³² However, there is some initial concern over duplicate paper and electronic lodgments, or of multiple paper and electronic mortgages, which may result in complicated priority disputes.¹³³ If the system operates as

123. BUTT, *supra* note 8, at 13.

124. *Id.*

125. RAJASEKHAR, *supra* note 78, at 5.

126. BUTT, *supra* note 8, at 17-18.

127. Office of Public Sector Information, Electronic Communications Act 2000, http://www.opsi.gov.uk/acts/acts2000/ukpga_20000007_en_1 (last visited Apr. 26, 2010).

128. BUTT, *supra* note 8, at 17.

129. Emma Slessenger et al., *Apologies for Any e-Conveyance*, PROP. WK., June 6, 2001, available at <http://www.propertyweek.com/story.asp?storyCode=3007849>.

130. BUTT, *supra* note 8, at 18.

131. *Id.* at 16.

132. Bogusz, *supra* note 92, at 558, 564.

133. LAND REGISTRY, REPORT ON RESPONSES TO E-CONVEYANCING SECONDARY LEGISLATION PART TWO 37, available at <http://www1.landregistry.gov.uk/assets/library/>

expected, mortgage names will be changed automatically at the completion of a transaction, increasing the convenience to the parties.¹³⁴ Many practitioners support the idea of increased standardization in the mortgage process.¹³⁵

Crucial to the full benefit of an electronic system is a method of EFT.¹³⁶ As author Paul Butt has explained:

All the parties to a chain will pay all necessary funds required to complete the transaction . . . as well as the purchase price - into the Agent Bank prior to the day fixed for completion. . . . The Agent Bank will then be able to confirm that all monies necessary to complete all transactions in the chain are in its hands. Assuming this to be the case, at the time fixed for completion, the Central Service will instruct the Agent Bank to make all the necessary payments.¹³⁷

Although the EFT provides convenience, such as reducing anxiety about whether financing will arrive,¹³⁸ there is concern that having finances available prior to the transaction will result in lost interest payments, which could be substantial.¹³⁹ Nonetheless, per the consultation report, “[a]bout 60% of respondents agreed that an EFT system could reduce costs and improve accuracy.”¹⁴⁰

E. E-Conveyancing Today

Currently, the Land Registry has passed the point of proposal and is now actively implementing its e-conveyance applications. The system is being introduced on an incremental basis in order to be more manageable to users.¹⁴¹ A variety of e-services already exist, including Information Services and Network Services.¹⁴² Information Services include Land Charge searches, and Network Services relate to the creation and lodgement of documents.¹⁴³ Users can apply for adverse possession notifications,

documents/secondary_legislation.pdf (last visited Apr. 26, 2010) [hereinafter REPORT ON RESPONSES].

134. BUTT, *supra* note 8, at 17.

135. REPORT ON RESPONSES, *supra* note 133, at 13.

136. See STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 17.

137. BUTT, *supra* note 8, at 21-22.

138. *Id.*

139. *Id.*

140. CONSULTATION REPORT, *supra* note 84, at 16.

141. BUTT, *supra* note 8, at 23.

142. Land Registry, Current E-Services, <http://www1.landregistry.gov.uk/e-conveyancing/currservice/> (last visited Apr. 26, 2010).

143. *Id.*

upgrade title, and utilize other online services.¹⁴⁴ A validation system for electronic signatures is also scheduled to be implemented.¹⁴⁵ The validation system was developed, in part, by government defense research agencies, and also with input from lawyers, mortgage professionals, and other governmental organizations.¹⁴⁶

In September of 2005, "Easy Convey Ltd. . . . a leading developer of electronic conveyancing products and services . . . announced that one of its clients . . . filed the UK's first online Stamp Duty Land Tax return."¹⁴⁷ The process was openly supported by its user, who stated the paperless e-conveyance application greatly reduced the time and effort involved in the process.¹⁴⁸ By 2006, the National Land Information Service had performed over seven million searches for electronic information.¹⁴⁹

Even some of the true innovations of e-conveyancing, like the chain matrix, have been prototyped. The chain matrix pilot took place in three separate cities between autumn of 2006 and spring of 2007, and the Land Registry planned to apply user feedback and adapt the matrix accordingly.¹⁵⁰ Having a sufficient number of chain participants was a key element in the proper measurement of the chain matrix's utility.¹⁵¹ The expectation was that "[a]round 900 potential users [would] have access to the prototype, with numbers expected to rise during the trial period."¹⁵² Potential users included "solicitors and estate agents who, along with support staff, completed their Chain Matrix training . . . as [the] Land Registry's team of instructors went on the road visiting the three trial areas of Portsmouth, Fareham and Bristol."¹⁵³

The prototype launched on March 29, 2007,¹⁵⁴ and the English law firm Coffin Mew LLP was the first to enter a chain during the Land Registry's testing.¹⁵⁵ Speaking for the firm, Conveyance Manager John Blake stated that the firm was "delighted to be the first to use the Land Registry's new Chain Matrix."¹⁵⁶ "The intention is to test the system, which

144. BUTT, *supra* note 8, at 25-26.

145. Grant, *supra* note 83.

146. *Id.*

147. Press Release, Easy Convey Ltd., e-Conveyancing Now a Reality as Easy Convey Client Files First Online Stamp Duty Land Tax Return 1 (Sept. 6, 2005), <http://www.easyconvey.com/PR/060905SDLTPR.pdf>.

148. *Id.* at 2.

149. BUTT, *supra* note 8, at 26.

150. *Id.* at 28.

151. *Id.* at 29.

152. Land Registry, Chain Matrix, <http://www1.landregistry.gov.uk/ar07/services/chainmatrix> (last visited Apr. 26, 2009).

153. *Id.*

154. *Id.*

155. Coffin Mew LLP, Chain Matrix First for Coffin Mew LLP, <http://www.coffinmew.co.uk/currenttopics/archive/ct%20chain%20matrix.htm> (last visited Apr. 26, 2010).

156. *Id.*

will eventually incorporate an Electronic Funds Transfer system . . . [and] replace the existing slow and cumbersome system used at present to transfer money on the day of completion.”¹⁵⁷ The prototype was to be evaluated both at the midway and ending point of the testing.¹⁵⁸ A voluntary trial of the complete e-conveyance system, minus the EFT service, was then scheduled for October 2007, the housing market’s slowest period.¹⁵⁹

Unfortunately, the chain matrix and subsequent pilots were unsuccessful. Much of its failure was because the chain matrix pilot “attracted less than half the participants originally hoped for.”¹⁶⁰ As a result, the chain matrix development and use of the EFT service has been indefinitely postponed.¹⁶¹ Michael Cross stated that:

One reason for failure was apathy from the people expected to use it. Conveyancers were reluctant to try it out, partly because their own case management systems did not plug in The trial also found no evidence that people would pay to use the service, undermining the business case. Privacy may also have been a worry: ‘Many citizens were either not aware or not convinced of the benefits of Chain Matrix and many prevented their conveyancer from entering their transactions onto Chain Matrix,’ the [Land Registry] evaluation says. In the event, only 200 out of 1,467 clients who signed up to view the matrix did so. While the technology worked well, with the system available 99.5% of the time, the pilot covered only 229 chains instead of the 500 hoped for. A knock-on casualty of the postponement was the procurement of an [EFT] service to pass money from buyers to sellers as the e-conveyancing system transferred title to the property. Although solicitors had raised concerns about the system’s security, the Land Registry denied that this was a reason for cancellation. The registry hopes to revive the matrix concept in some form [and believes the market wants increased sale transparency].¹⁶²

157. *Id.*

158. Land Registry, *supra* note 152.

159. BUTT, *supra* note 8, at 31; *see also* Land Registry, Electronic Conveyancing Pilot Launches in October 2007, http://www.landreg.gov.uk/about_us/pressoffice/notices/default.asp?article_id=8426 (last visited Apr. 26, 2010).

160. Michael Cross, Technology: Web Plan for Property Sales After Lack of Interest in Pilot, THE GUARDIAN (U.K.), Apr. 10, 2008, Technology Guardian section, at 3, *available at* <http://www.guardian.co.uk/technology/2008/apr/10/property>.

161. *Id.*

162. *Id.*

One additional reason for failure was the pilot's non-compulsory status.¹⁶³

Following the failure, the complete e-conveyancing trial was put on hold.¹⁶⁴ The Land Registry opted instead to focus on e-discharges, e-charges and e-transfers in line with its e-registration services, which "will be the Land Registry's priorities in its e-conveyancing programme in 2008 and 2009."¹⁶⁵ The Land Registry also seeks to consolidate its services¹⁶⁶ and continue to evaluate and comment on its consultations.¹⁶⁷ Although the lack of support has delayed some of England's key e-conveyance applications, the transition nonetheless continues.

F. Barriers to Implementation

There are concerns over England's e-conveyance applications beyond the lack of support for the pilots. One anxiety is that the process is proceeding too slowly. As noted by Cross, caution itself can be risky, and "like medieval cathedral builders, the people running the programme will be long gone by the time it is complete [which will decrease continuity and accountability]."¹⁶⁸ Another concern is that the e-conveyancing system's relatively low political profile may cause a degree of change that will result in public outcry and criticism when the system is fully implemented.¹⁶⁹ After all, "the introduction of e-conveyancing will be a huge change for everyone involved in the homebuying process which makes it even more important that its introduction is managed in controlled steps and in accordance with a clear timetable."¹⁷⁰

Furthermore, the computer system that runs the system is a cause for hesitation. Although computers are able to operate airplanes, trains, and missile systems,¹⁷¹ the fear with e-conveyancing is that an initial failure might result in the entire program being deemed too risky and result in further delay.¹⁷² Adding to this concern is that the system relies on connecting to an integrated network, which involves not just the Land Registry's system but also the internet service providers for the conveyancers who are accessing it.¹⁷³ In fact, "[a]ll communication between

163. Minutes from City of London Law Society, Land Law Committee Meeting 2 (Mar. 26, 2008), <http://www.citysolicitors.org.uk/FileServer.aspx?oID=389&iID=0>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Bitten Off*, *supra* note 113, at 6.

169. *Id.*

170. *Getting Ready to Go Digital*, *supra* note 114.

171. BUTT, *supra* note 8, at 40.

172. *Id.* at 41.

173. *Id.*; see generally LAND REGISTRY, E-CONVEYANCING: REALISING THE VISION, ITEM A: PLANNING BOOK 1, WHERE ARE YOU STARTING FROM? (2005), available at

practitioners, lenders, Land Registry and other organisations involved in the conveyancing process will be capable of being electronic, as will all exchanges of formal documentation.”¹⁷⁴ Moreover, “there are problems of risk . . . allocation.”¹⁷⁵ Thus, “increasing the speed of conveyancing has to be balanced by the need for reliability.”¹⁷⁶ As Cross states:

The registry’s core function, to provide a definitive proof of title, is by definition a monopoly, based on absolute trust. Becoming a middleman in every single property transaction is another function entirely, and one that may not fit as easily with monopoly status. The system itself, handling transactions worth £1m every minute, will have to be bulletproof.¹⁷⁷

Any mishaps with the conveyancing system could cast doubt on the entire system and also disrupt the UK economy.¹⁷⁸ Moreover, “[a]n electronic system might be more vulnerable for hackers and electronic fraud or disruption . . . [and the] use of technology . . . may encourage the development of new methods for defrauding individuals.”¹⁷⁹

The Land Registry hopes to combat these fears with advanced security technology, increased dependence on private systems instead of the internet, use of network access agreements,¹⁸⁰ and audit trailing software. Additionally, every six months, the Land Registry will commission an independent firm to test the system security.¹⁸¹ If a system weakness is discovered, it will be corrected and then retested.¹⁸²

Nonetheless, concerns over any resulting liability due to fraud remain.¹⁸³ As stated in a Land Registry consultation study:

[One] respondent did not see why solicitors (and their insurers), if they were forced to use electronic signatures, should be expected to bear the liability for any fraudulent

http://www1.landregistry.gov.uk/assets/rft_downloads/workshop1/planningbk1_final.pdf [hereinafter PLANNING BOOK].

174. STRATEGY FOR THE IMPLEMENTATION, *supra* note 82, at 17 (emphasis removed).

175. Raymond Perry, *E-conveyancing: Promise and Reality*, INTERNET NEWSLETTER FOR LAWYERS, Sept./Oct 2003, <http://www.venables.co.uk/n0309econveyancing.htm>.

176. *Electronic Conveyancing Is Just a Click Away*, KALTONS TECH. SOLIC., <http://web.archive.org/web/20060926215041/www.kaltons.co.uk/articles/240.cfm> (last visited Apr. 26, 2010).

177. *Bitten Off*, *supra* note 113, at 6.

178. *Id.*

179. Haim Sandberg, Real Estate E-Conveyancing: Vision and Risks 6 (C. of Mgmt. Sch. of Law, Isr., Working Paper), available at <https://lawlib.wlu.edu/works/516-1.pdf> (last visited Apr. 26, 2010).

180. BUTT, *supra* note 8, at 46.

181. REPORT ON RESPONSES, *supra* note 133, at 25.

182. *Id.*

183. See Interview by April Stroud, *supra* note 108.

clients who manage to beat the system. Indeed, the Law Society agreed that when a solicitor's PC has been unknowingly hacked to perpetrate fraud it is essential that it should be very clear that the burden of proof should be on the Land Registry to show that there was carelessness or fraud on the part of the conveyancer. Conveyancers were, of course, willing to be responsible for security within their own offices to prevent signature theft and for adherence to whatever protocols are laid down for the use of an electronic conveyancing system.¹⁸⁴

In response, the Land Registry has proposed an indemnity fund to compensate parties who suffer a loss in certain situations.¹⁸⁵ However, this does not mean that the Land Registry will not require a negligent solicitor to compensate the fund for any payments made.¹⁸⁶ The effect is that "[t]he future will clearly require conveyancing practitioners to be experts in 'software updates and virus warnings' as well as in the law and practice of conveyancing."¹⁸⁷

Despite the general public's familiarity with using electronic personal identification numbers with debit or credit cards, a form of a digital signature, much skepticism remains regarding other forms of digital signatures.¹⁸⁸ In fact, "48% of respondents expressed concern over the use of an e-signature."¹⁸⁹ As the Land Registry points out, however, the current system is far from being free of abuse, and e-conveyancing may actually reduce the risks.¹⁹⁰ With increased use of electronic documents, forgery will be more easily detected, resulting in a forged document's invalidation.¹⁹¹ Further, "the password and other security measures that will be needed for [an electronic signature means forgery] is not likely to happen without the knowledge of [an authorized user]"¹⁹² In any event, the use of electronic signatures and e-conveyancing applications as a whole must find an appropriate balance between usability and security.¹⁹³

Another concern is that some users disfavor the additional transparency that the chain matrix might create.¹⁹⁴ After all, some parties

184. CONSULTATION REPORT, *supra* note 84, at 147.

185. BUTT, *supra* note 8, at 46.

186. ABBEY & RICHARDS, *supra* note 102, at 54.

187. *Id.*

188. BUTT, *supra* note 8, at 47.

189. CONSULTATION REPORT, *supra* note 84, at 18.

190. BUTT, *supra* note 8, at 46.

191. REPORT ON RESPONSES, *supra* note 133, at 26.

192. *Id.*

193. RAJASEKHAR, *supra* note 78, at 7.

194. *See* The Free Library, *supra* note 111.

may prefer that the transaction is delayed.¹⁹⁵ Similarly, there is concern about “contract races.” Essentially, if there are multiple buyers or sellers pursuing the same property, they will be able to monitor their rival’s progress in the conveyance.¹⁹⁶ The problem with contract races may be mitigated to some extent by solicitor disclosure requirements.¹⁹⁷ Thus, and even though the chain matrix will result in transparency, “whether . . . it will also improve conveyancing standards . . . is difficult to say.”¹⁹⁸

Critics have also questioned whether electronic conveyancing will be more efficient than the traditional system. Although the current paper-based system is cumbersome, “many of the delays we experience will not be eradicated by the application of advanced technology. Sellers and buyers all have their own agendas and a standardised procedure cannot even hope to accommodate each individual’s whim.”¹⁹⁹ After all, contracts will still need drafting, and indemnity insurance policies will still need to be negotiated.²⁰⁰ Some of the largest delays in a conveyance, such as obtaining a mortgage, will not be reduced.²⁰¹ Similarly, though electronic documentation seeks to remove paper, initial uncertainties about the system will likely result in conveyancers printing paper copies to keep a record for themselves, in part because of liability fears.²⁰² Moreover, a transaction “is always only as fast as the slowest party.”²⁰³

There is also a concern that, while England’s e-conveyancing model might work as planned for residential or small business transactions, it could fail when faced with complex commercial dealings. After all, “electronic systems are notoriously bad at handling anything out of the ordinary. The great majority of conveyancing transactions are more or less standard; but occasionally there will be complex property transfers, particularly in the commercial sector, where contracts can easily run to 100 pages.”²⁰⁴ It therefore seems that sales “characterised by uniformity of process and fees charged on a per unit basis . . . [are] the basis of the Land

195. *Id.*

196. BUTT, *supra* note 8, at 61-62.

197. See generally Chain Matrix, Conveyancer’s Deskaid, http://www.cofrestrfatir.gov.uk/assets/library/documents/cm_conveyancerguide.pdf (last visited Mar. 6, 2010); see also E-Conveyancing-Solicitors.co.uk, Jargon Buster, <http://www.e-conveyancing-solicitors.net/alljargons.php#ContractRace> (last visited Apr. 26, 2010).

198. Cripps Harries Hall LLP, *E-Conveyancing-Hit or Miss?*, http://www.crippslaw.com/index.php?option=com_content&view=article&id=386:e-conveyancing-hit-or-miss&catid=149:conveyancing-publications-archive&Itemid=477 (last visited Apr. 26, 2010).

199. *Id.*

200. BUTT, *supra* note 8, at 50.

201. *Id.* at 52.

202. *Id.* at 58.

203. The Free Library, *supra* note 111.

204. *E-Conveyancing the Next Generation*, CAIN ASSOCIATES, http://www.cain-associates.co.uk/news_story.php?id=44&a=a (last visited Apr. 26, 2010).

Registry e-conveyancing model,” and more complex deals are perhaps outside its scope.²⁰⁵ Although e-conveyancing applications face many challenges,²⁰⁶ the potential benefits of applying new conveyance methods to an outdated and unfit process cannot be ignored.

PART THREE: U.S. E-CONVEYANCING APPLICATIONS

A. Overview & Barriers

Although “the current US system of transferring interests in real property is rooted in the English feudal system . . . ,”²⁰⁷ significant (if not prohibitive) barriers exist to comprehensive domestic e-conveyance applications. Some of these complications include the lack of a national land market in the United States,²⁰⁸ the jurisdictional nature of U.S. conveyances, and the government’s role in the process.

U.S. land records are often locally controlled and maintained, and property and contract laws are state dependent.²⁰⁹ Further, because of unique common law interpretations, “[t]hrough one might see certain similarities in state interpretations, the law of conveyancing remains particularly state-dependent.”²¹⁰ This acts as a barrier to comprehensive, uniform e-conveyance applications. After all, a comprehensive e-conveyance system would have difficulty gaining support if it simply discarded decades of state common law which was tailored to the specific preferences of individual states.²¹¹

Intrastate diversity also acts against a comprehensive e-conveyance system because, in addition to the fifty states, there are 320 unique recording jurisdictions.²¹² Further, Federal and Native American laws must also be considered.²¹³ In the United States, “diversity is the word” when it comes to real estate transactions.²¹⁴ Designing comprehensive e-conveyance applications that account for these many variables would require tremendous flexibility, and perhaps undermine efficiency. This is unlike the United Kingdom where “the lack of state-based complications there simplifies the prospect of introducing a national system”²¹⁵

Similarly, a lack of standardized land description and mapping

205. Carolyn Owen, *Is e-Conveyancing Coming Home?*, 152 NEW L.J. 1900 (2002).

206. ABBEY & RICHARDS, *supra* note 102, at 54.

207. Ewan et al., *supra* note 64, at 1499.

208. SPRANKLING ET AL., *supra* note 3, at 116.

209. *Id.*; see also Gose, *supra* note 5, at 60 n.2.

210. Gose, *supra* note 5, at 60 n.2.

211. *Id.*

212. *Id.* at 62 n.2.

213. *Id.* at 60 n.2.

214. *Id.*

215. Kidman, *supra* note 56.

techniques presents another barrier to a uniform, comprehensive U.S. conveyance system (e.g., “we still use metes and bounds descriptions”).²¹⁶ Further, the conveyance and sale process is still paper centric and may require physical signatures and transportation of paper documents, and most sale listings are local in scope.²¹⁷ Professional reluctance to change, discussed in detail below, is yet another significant impediment to implementation.

B. Impact of Technology

Despite these diverse and powerful barriers, recent technology has resulted in changes that seem to favor the development of increasingly standardized e-conveyancing applications. The availability of new forms of transportation and online real estate websites allowing access to property listings, for instance, have contributed to an increase in the purchase of out-of-state vacation homes.²¹⁸ This, in turn, undermines the jurisdictional nature of the current U.S. system.

Further, private online websites like “Zillow.com,” launched in February 2006,²¹⁹ have reshaped information gathering techniques. This is significant because it represents a national electronic real estate resource that “attempts to consolidate all residential real estate information and is designed to be used by all members of the industry [such as brokers and appraisers], including the consumer.”²²⁰

Zillow lists home sale prices, provides comparable home sales data, incorporates satellite imagery, estimates monthly payments, provides relevant school districts based on the home location, lists the number of days the home has been listed on Zillow.com, provides property taxes from prior years, the date and price of the last home sale, and contact information.²²¹ In addition, Zillow has mortgage information, an “advice” link, and local information tabs to learn about the surrounding area.²²² Another service provided by Zillow is its property value “Zestimates,” which are “estimates of the market value of the residence.”²²³ Although the reliability of the Zestimates has been heavily criticized,²²⁴ the popularity of these features evidence general U.S. support of electronic real estate applications. In fact, Zillow.com receives approximately four million

216. SPRANKLING ET AL., *supra* note 3, at 116.

217. *Id.* at 116.

218. *Id.*

219. Gose, *supra* note 5, at 61.

220. *Id.*

221. Zillow.com, <http://www.zillow.com> (last visited Apr. 26, 2010).

222. *Id.*

223. Gose, *supra* note 5, at 62.

224. *See id.*

visitors every month.²²⁵ Even though the U.S. has numerous barriers, “[t]he electronic tide simply cannot be held back.”²²⁶

C. Legal Support

Legislation has been enacted that is both in support of electronic commerce and essential for increased e-conveyance processes. The Electronic Signature in Global and National Commerce Act, for instance, was adopted on June 30, 2000.²²⁷ This Act addresses the problem of state diversity and “transforms the traditional State Contract Law requiring ‘written’ signatures binding parties to certain contracts, to a new federal [electronic signature] mandate.”²²⁸

The Electronic Signatures Act (“ESA”) was seemingly long overdue, as there was already a strong international movement towards similar legislation. The United Nations Commission on International Trade Law adopted the Model Law on Electronic Commerce in 1996, and in the same year the American Bar Association-Digital Signature Guidelines were drafted.²²⁹ Germany passed the Digital Signature law in 1997, Singapore adopted the Electronic Transactions Act in 1998, and the Directive of the European Parliament and of the Council on a Community Framework for electronic signatures was adopted in 1999, among other directives.²³⁰ Finally, “[u]nder the Electronic Signature Act, the USA joins the rest of the world in moving contract creation, modification and storage into a non-paper environment.”²³¹ Similarly, changes to the Federal Rules of Civil Procedure and Federal Rule of Evidence also support a paperless, electronic world.²³²

In addition to the ESA, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) proposed the Uniform Electronic Transactions Act (“UETA”).²³³ UETA, in part, lays the foundation for electronic property recording.²³⁴ Under UETA, a scanned document is the legal equivalent of a paper document, electronic records have the legal effect of paper records, and scanned documents may satisfy originality requirements.²³⁵ At the start of 2008, “forty-six states, the District of Columbia and the U.S. Virgin Islands had enacted UETA. Only Georgia,

225. *Id.* at 61.

226. *Id.* at 62.

227. Martha A. Broderick et al., *Electronic Signatures: They're Legal, Now What?*, 11 INTERNET RES. 423, 423 (2001).

228. *Id.*

229. *Id.* at 424-25.

230. *Id.* at 425.

231. *Id.* at 423.

232. See Ewan et al., *supra* note 64, at 1495.

233. Gose, *supra* note 5, at 63.

234. *Id.*

235. See Ewan et al., *supra* note 64, at 1490.

Illinois, New York, and Washington had not, but these states did have laws recognizing electronic signatures.”²³⁶

Further, the majority of U.S. states now provide open and easily accessible public records.²³⁷ In the state of Washington, for instance, electronic availability of public records, such as sale prices, is required by statute.²³⁸ However, in a minority of states, access to public records is limited based on privacy concerns.²³⁹ Even these limits to otherwise available information have been met with criticism. Specifically, the lack of transparency has been said to decrease consumer awareness of the value of property and therefore result in “tax inequities, tax revenue leakage and administrative inefficiencies.”²⁴⁰ In any event, the trend towards more electronic real estate applications is clear.

D. Gaining Momentum

Despite a large percentage of U.S. national recording still being paper-based, “electronic recording is gaining momentum because it is more accurate, reduces costs, and dramatically reduces turnaround on time-sensitive transactions.”²⁴¹ Given these benefits and the digital age at hand, the question for most U.S. recorders is not if e-recording will occur, but when.²⁴² In fact, approximately sixty-five counties have already commenced e-recording.²⁴³

In addition to the increased use of e-recording applications, states are also moving toward expanded e-conveyance systems. In November of 2006, Pennsylvania conducted its first fully electronic real estate transaction, which was one of the first in the nation.²⁴⁴ As stated in a local newspaper:

[T]oday's buyer and sellers needed to sign their names only once. They used an electronic pen and signature pad similar to what's used at a supermarket checkout, after reviewing documents on a laptop computer. The transaction, conducted by HomeSale Settlement Services . . . [and] was notarized electronically, the first use of an e-notary in the state. Documents were encrypted -- meaning they were

236. Gose, *supra* note 5, at 63.

237. *Id.* at 60.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 64.

242. *See id.*

243. Ewan et al., *supra* note 64, at 1498.

244. Tim Mekeel, *Home Sales: Forget the Paper*, LANCASTER NEW ERA (Pa.), Nov. 13, 2006, at A1, available at 2006 WLNR 19776240.

given a kind of coding that hides the content from all but authorized users, to keep them secure -- then transmitted to the courthouse. At the courthouse, the documents were authenticated by an employee, then electronically stamped and recorded in a matter of minutes. Next the recorded documents were transmitted back to the settlement table, where they were copied onto compact discs and memory sticks -- information-storage devices about the size of a thumb -- that were given to the buyer and sellers. . . . The Pennsylvania Department of State, the National Notary Association and the Lancaster County Office of recorder of Deeds, all of which support the e-notary technology, had officials on hand.²⁴⁵

Although this transaction involved no mortgage and was simply a cash deal,²⁴⁶ it still remains a significant step in the evolution of conveyancing in the United States.

Also evidenced in the Pennsylvania transaction was the support of certain interested stakeholders, such as HomeSale Settlement, which is the nation's tenth largest title agency and handles over five thousand transactions per year.²⁴⁷ HomeSale supports the efforts in Pennsylvania and elsewhere to switch to e-conveyancing because it reduces the time period for documents to be delivered to the Recorder of Deeds.²⁴⁸ This, in turn, reduces HomeSale's exposure time for which they may be liable and reduces the risks associated with their business.²⁴⁹ The significance of such user support cannot be understated. As the failed English chain matrix prototype demonstrated, without general user and practitioner support, the inevitable transition to greater e-conveyance applications will be delayed and sporadic.

Other U.S. organizations have also shown a willingness to be "early movers" when it comes to electronic systems.²⁵⁰ Specifically, with regard to electronic signatures, some of these organizations include DLJdirect, "which uses digital certificates to verify customer identities," IBM Global Financing, "which is using technology by eOriginal to facilitate Web-based commercial lease transactions," Salt Lake City, Utah courts, "which have accepted digitally signed documents since March 2000 through a system from iLumin Inc.," and the Securities and Exchange Commission, "which is using PureEdge software to accept 10K and other regulatory filings via the

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. Broderick et al., *supra* note 227, at 423-34.

web.”²⁵¹ These entities likely recognize the benefits of early familiarity with new technologies, as well as the general market perception of expertise that comes with utilizing the newest tools.

Although e-signatures are not the common practice among conveyances, “the next wave of technological reliability and confidence in electronic data . . . will see a leap toward the promised ‘paperless society’ as e-signatures and e-records usurp the role of ink and paper.”²⁵² Even though it is unclear precisely what form e-conveyancing applications will take in the United States, or whether England’s system will act as its ultimate model (adapted accordingly), there can be no doubt that the use of electronic conveyancing applications will increase.

PART FOUR: READY OR NOT

A. Embrace the Transition

Practitioners should carefully monitor the progression towards increased U.S. e-conveyance applications in order to properly advise clients and to best prepare for the changes that lie ahead. After all, changes in technology can greatly influence both substantive law, such as the passing of the ESA and the adoption of UETA, as well as the daily work of impacted stakeholders. As noted in the Financial Adviser, “It will be interesting to see how e-conveyancing develops in the future. If embraced by the industry and implemented in the right way, it has the potential to revolutionise the home-buying process.”²⁵³

As discussed in Part Three, user acceptance is as important as scope and design are to the success of U.S. e-conveyance applications. For instance, the Land Registry’s evaluation report of why its chain matrix, and arguably EFT service prototypes failed, specifically mentioned a reluctance of conveyancers, including attorneys, to use the prototype.²⁵⁴ At one point, the disdain in England for the use of new technologies became so severe that its application resulted in large numbers of retirement among English real estate lawyers.²⁵⁵ To reject U.S. e-conveyancing applications without due consideration fails to recognize changing client preferences and may result in a disservice. As author Neil Kinsella poignantly stated:

A salutary’ example of a failure to face up to seismic change is the music industry, which is finally moving on from the traditional format of signing artists, making

251. *Id.*

252. Stephen Murphy & John Trott, *The E-Sign Act and the Paperless Society*, 66 J. PROP. MGMT. 4, 6 (2001), available at 2001 WLNR 12210220.

253. *Getting Ready to Go Digital*, *supra* note 114.

254. Cross, *supra* note 160, at 3.

255. See BUTT, *supra* note 8, at 32.

records and selling them. Instead the industry is now looking to give music away for free, but with advertising built in to replace the lost revenue. . . . If the sexy, youth-orientated music industry was slow to react, how then will the stereotypical fuddy-duddies of the legal profession fare—much less their regulators?²⁵⁶

It is important to note that the value of services is not diminished by these changes. Even in England's comprehensive e-conveyance system, for instance, attorneys "still play a big part in the process making sure that everything is up to legal standards and that the parties involved get a fair and legal treatment as stipulated in the contracts that were mutually agreed upon."²⁵⁷

Further, technology that has been embraced by the legal profession has improved legal services, and e-conveyance applications have the potential to do the same. The use of digital scanning, digital document storage, and remote access are just a few examples.²⁵⁸ Technological developments have also produced new sources of client communications, such as email and videoconferencing, which allow firms to reduce travel costs and save time.²⁵⁹ Similarly, professionals can now access their computers from home via the firm's network, utilize advanced phone capabilities (for instance, having a client dial the office phone which is then automatically routed to an attorney's cell phone), conduct online research through services such as LexisNexis and Westlaw, and even blog or podcast to clients.²⁶⁰ By utilizing these new technologies, practitioners regularly work with local counsel and members of the legal community in different states or cities as needed.²⁶¹ This is especially true for national law firms, where legal professionals of one office have little physical contact with some of their most relied upon co-workers.²⁶²

B. Realize the Benefits

As conveyancing transitions to the digital age, firms that successfully implement change are more apt to thrive. After all, "[i]t is not the strongest

256. Neil Kinsella, *Traditional Law Firms Need to Embrace Technology to Survive*, LAWYER, Feb. 11, 2008, at 6, available at <http://www.thelawyer.com/traditional-law-firms-need-to-embrace-technology-to-survive/131153.article>.

257. Hunter Blyth, *E-Conveyancing*, Dec. 27, 2007, <http://www.artipot.com/articles/82555/e-conveyancing.htm>.

258. George N. Saliba, *Technology and Law Firms: Is Your Attorney Up to Speed?*, N.J. BUS., Jan. 2008, at 2.

259. *Id.*

260. *Id.*

261. Joe Kashi, *Building a Virtual Law Firm Changes and Opportunities*, LAW PRAC. TODAY, Jan. 2004, <http://www.abanet.org/lpm/lpt/articles/ft01042.html>.

262. *Id.*

of the species that survive, nor the most intelligent, but the one most responsive to change.”²⁶³ As the Canadian Teranet Inc. advertises: “No solution should be static; it should evolve, expand and develop as you do. That’s why we continue to set the standard for e-services by anticipating and promptly implementing change.”²⁶⁴ As electronic transactions increase,²⁶⁵ there are ways to ensure a smooth transition.

Ideally, jurisdictions that offer U.S. e-conveyance applications will take an incremental approach.²⁶⁶ This will permit users to try each step as it becomes available so that they may benefit from staggered implementation. As stated by English author Paul Butt, impacted stakeholders “need to take advantage of this and make use of each new procedure, each step forward, as soon as it is available. Otherwise, [if] . . . e-conveyancing does become compulsory, it will all be new to us.”²⁶⁷ In the age of e-conveyancing, only the practitioners that invest the effort to master the electronic services will prosper.²⁶⁸ To these ends, procedures will need to be put in place to proactively mitigate potential hurdles, such as a technological glitch on the day of a closing.²⁶⁹

The Land Registry’s “Planning Book 1” is a good reference for identifying a firm’s current working environment.²⁷⁰ The planning book identifies five levels towards e-enablement for England’s comprehensive e-conveyance system.²⁷¹ Level one, and unlikely an issue for many, is the use of unlinked computers.²⁷² For individual practitioners, level two may be more burdensome.²⁷³ Specifically, level two requires an active network linking a firm’s computers to one another,²⁷⁴ and is more troublesome where there are “different machines of different ages running different operating systems”²⁷⁵ Level three requires a firm’s business structure

263. Martindale-Hubbell, *Managing Change in a Law Firm*, <http://www.martindale-hubbell.ca/managing-change-law-firm> (last visited Apr. 26, 2010) [hereinafter *Managing Change*].

264. Teranet Solutions, *supra* note 10.

265. Blyth, *supra* note 257.

266. See generally *E-Conveyancing the Next Generation*, *supra* note 204 (for the proposition that “the apparently glacial progress of the [English] e-conveyancing programme is undoubtedly the best way to approach the issue”).

267. See BUTT, *supra* note 8, at 36.

268. Press Release, Easy Convey Ltd., *New Version of Easy Convey’s e-Conveyancing Software Set to Tempt Legal Experts into the Electronic Age 1* (Dec. 6, 2005) (On file with Easy Convey Ltd.), available at <http://www.easyconvey.com/PR/061205CASAversion5.pdf>.

269. BUTT, *supra* note 8, at 37.

270. PLANNING BOOK, *supra* note 173.

271. *Id.*

272. See *id.*

273. See BUTT, *supra* note 8, at 34.

274. PLANNING BOOK, *supra* note 173.

275. LAND REGISTRY, *LANDNET, E-CONVEYANCING: A GUIDE TO PREPARATION 3*, available at http://www.landreg.gov.uk/assets/library/documents/landnet14_insert.pdf (last visited Mar. 6, 2010) [hereinafter *A GUIDE TO PREPARATION*].

to be revamped to take advantage of the network.²⁷⁶ Finally, level four, the baseline for the English e-conveyance system, requires connecting a firm's internal network to an outside network.²⁷⁷ The highest level of e-enablement as defined by the Land Registry is level five, which involves redesigning a firm to reflect its numerous networks.²⁷⁸ A survey of English practitioners found that 80% had achieved level four or higher.²⁷⁹ Analyzing feedback from practitioners helps assess whether e-conveyancing applications are being introduced at the right pace,²⁸⁰ and provides a helpful benchmark for users and administrators.

Users of e-conveyance applications will also need to have some way to ensure the reliable performance of their internal systems, and be able to maintain a network and to amend electronic documents.²⁸¹ Outside technical consultants, who may respond within twenty-four hours, might not be fast enough to prevent the failure of a pending transaction.²⁸² To the extent practical, U.S. jurisdictions that allow for e-conveyancing should attempt to emulate the Land Registry's efforts of offering extensive online training modules to mitigate last minute crises.²⁸³ Even after the implementation of e-conveyancing applications, continued training is crucial. Internal auditing procedures²⁸⁴ and a system to archive a mixed collection of paper and electronic documents²⁸⁵ will also be needed.

Internal support is also necessary for the successful use of e-conveyance applications, including explaining to staff the what, the how, and the why for e-conveyancing.²⁸⁶ After all, "[o]nly by establishing a valid and meaningful motif for change, will genuine appetite for change be achieved and your audience engaged."²⁸⁷ In a typical law firm, the adaptation to a new technology "is 5 percent about the software and 95 percent about personnel."²⁸⁸ It is also important to emphasize how e-conveyancing will alter their daily work, including its impact on billable time.²⁸⁹ After all:

276. PLANNING BOOK, *supra* note 173.

277. *Id.*

278. *Id.*

279. A GUIDE TO PREPARATION, *supra* note 275, at 2.

280. *Id.*

281. See PLANNING BOOK, *supra* note 173.

282. BUTT, *supra* note 8, at 34.

283. PLANNING BOOK, *supra* note 173; see also generally Land Registry, Education & Training, http://www1.landregistry.gov.uk/education_and_training/ (last visited Mar. 6, 2010).

284. PLANNING BOOK, *supra* note 173.

285. *Id.*

286. Managing Change, *supra* note 263.

287. *Id.*

288. David Gialanella, *New Tech, Old Problem*, A.B.A. J., Aug. 2008, at 35, available at http://www.abajournal.com/magazine/article/new_tech_old_problem.

289. See Managing Change, *supra* note 263.

[L]aw firm changes have been identified as a potential cause of crisis for attorneys. Attorneys can be argumentative and skeptical, and are too busy to change for the sake of change. Converting them to your cause and winning them over is half the battle. The other half requires a good deal of common sense and a bit of hard yakka.²⁹⁰

The embrace of U.S. e-conveyance applications will go a long way towards their successful implementation, and the problems that plague many of the Land Registry's prototypes can be proactively mitigated. Only by embracing the pending transition can the efficiencies of e-conveyancing be more quickly realized.

CONCLUSION

The most sacred form of ownership is undergoing unprecedented changes during the digital age transition. Similar to nations throughout the world, new technology and electronic preferences in the United States, as well as new legislation, will inevitably result in increased use of e-conveyance applications. Whether or not the applications will take the uniform and comprehensive form of the English system, or be jurisdictionally dependent, e-conveyancing capabilities will develop as an alternative to the slower, less efficient, paper-centric undertaking of today.

Individual law firms and real estate practitioners should prepare for e-conveyance applications, as it will directly affect their practice. Proactively investing and training for these applications will ease the transition and reassure clients of transactional reliability. Truly, "law firms are finally at a point where their investments in technology are making a difference across the board to productivity, client service, and profitability."²⁹¹

In the end, however, "[t]his transition from paper to electronic documents will occur for the same reasons that papyrus rolls replaced clay tablets several thousand years ago: as familiarity and acceptance builds and the technology improves, the advantages of the newly available medium will far outweigh the costs and disadvantages."²⁹² With increased globalization and interconnectivity, the limits of e-conveyancing are uncertain. Although the last few decades have spawned unprecedented advances in e-conveyancing applications, perhaps the next systemic shift may be a move from local or national uses to standardized global

290. *Id.*

291. BARBARA DUNN & DOUGLAS ZUCKER, ISSUES & TRENDS IN LAW FIRM MANAGEMENT, TECHNOLOGY, AND WORKPLACE 4 (2005), available at www.hildebrandt.com/PublicDocs/Doc_ID_2285_5312005955562.pdf.

292. Stonefield, *supra* note 1, at 204.

applications.²⁹³ With the fast pace of technological development, this next step may not be that distant and is just another incentive to become familiar with e-conveyance applications as they become available. After all, e-conveyancing is here to stay.

293. SPRANKLING ET AL., *supra* note 3, at 114.

OH LA, LA! HOW WILL THE POLARIZED DECISIONS OF THE UNITED STATES AND FRANCE REGARDING THE RESPONSIBILITY FOR POLICING TRADEMARKS ON ONLINE AUCTION SITES BE SYNTHESIZED?

Olivia M. Fleming*

INTRODUCTION

Luxurious goods are status symbols. People see a woman with a GUCCI® handbag or a man wearing a ROLEX® watch and immediately recognize that these are expensive, lavish items. Clothing, accessories, cars, electronic devices, restaurant choices, and jewelry are all material goods or services that can symbolize wealth.¹ For many, it is important to be seen possessing these luxurious items.² This is why online auction websites offering imitations of luxurious goods are enticing; why pay full price when you can get a visual status symbol for less? Unfortunately, many consumers are being duped into purchasing goods that are not “genuine.” It is an unpleasant surprise to receive a fake ROLEX® watch in the mail, especially one looking nothing like a real ROLEX® watch. The world has taken notice of the sale of counterfeit luxury goods on online auction sites, and the sale of these counterfeit products has outraged the brand owners of the genuine luxury products.³

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1. See, e.g., Dana Thomas, *Excerpt: 'Deluxe: How Luxury Lost its Luster'*, NPR (Aug. 20, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=14185246>. “The ‘Luxury Goods Industry’ as it is known today is a \$157 billion business that produces and sells clothes, leather goods, shoes, silks scarves and neckties, watches, jewelry, perfume and cosmetics that convey status and a pampered life—a luxurious life.” *Id.* “Thirty-five major brands control [sixty] percent of the business, and dozens of smaller companies account for the rest. The top six brands—Louis Vuitton, Gucci, Prada, Giorgio Armani, Hermès, Chanel—have revenues in excess of \$1 billion.” *Id.*

2. See, e.g., International Trademark Association, *Anti-Counterfeiting*, http://www.inta.org/index.php?option=com_content&task=view&id=134&Itemid=142&getcontent=3 (last visited Feb. 26, 2010) (“The high levels of trademark counterfeiting in particular reflect consumers’ increased desire for brand name products, the ability of counterfeiters to adapt to trends in the public appetite and the enormous profits that can be made from the sale of counterfeit goods.”) [hereinafter INTA].

3. See Molly Buck Richard, *Tougher Policing Requirements on Trademark Holders*, TEX.

Commercial counterfeiting is the practice of placing a fake trademark on a product, often of lesser quality, in order to make the product outwardly indistinguishable from the genuine product and intentionally deceive consumers as to its source.⁴ eBay®, Inc. (“eBay”), one of the world’s largest online auctioneers, has been hit with several lawsuits claiming that its online auction website should be responsible for policing these counterfeit goods and trademarks. The charge has been that eBay should police the use of trademarks of genuine luxury goods manufactured to assure that goods sold on its auction website are not counterfeit.⁵ Two recent decisions, one from the United States, *Tiffany Inc. v. eBay, Inc.*⁶ (“Tiffany”), and one from France, *Louis Vuitton Malletier v. eBay, Inc.*⁷ (“Louis Vuitton”), show a difference of international opinion as to whether online auctioneer eBay should police trademarks. France wants eBay to take preventative measures on its auction website to stop the sale of counterfeit French goods,⁸ while the United States believes it is the trademark owner’s job to police their own brands to stop potential online counterfeiters.⁹ These two decisions have left the United States, France, and other countries scratching their heads about how to handle counterfeit goods on online auction sites such as eBay.

Based on these recent decisions, online auction sites find themselves free of liability in one forum, but liable in another. United States’ trademark laws do not force online auction internet sites to actively search for trademark infringement.¹⁰ The trademark owner bears the principal responsibility to police and protect its brand from infringers or those producing counterfeit goods. In France, eBay was found liable for selling counterfeit French goods on eBay’s French auction website and was ordered by the French court to pay sixty-one million of dollars in damages.¹¹

LAWYER (Oct. 13, 2008), *available at* <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202425182603> (“No longer confined to street corners in large cities, the market for luxury knock-offs has moved on to the Internet, where it is easy for counterfeiters to sell goods online and evade prosecution.”).

4. MATTHEW BENDER, TRADEMARK AND UNFAIR COMPETITION DESKBOOK, 2-5 GILSON ON TRADEMARKS § 5.19 (2)(2008) [hereinafter 2-5 GILSON ON TRADEMARKS (MB)].

5. *See Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008); *SA Louis Vuitton Malletier v. eBay, Inc.*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), *available at* <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf> [hereinafter *Louis Vuitton*].

6. *See Tiffany Inc.*, 576 F. Supp. 2d at 518.

7. *See generally, Louis Vuitton*, RG 2006077799, *available at* <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

8. For another French decision involving protection of trademarked goods *see Societe Hermes International v. SA eBay France and eBay International AG*, Tribunal de Grande Instance [T.G.I.] [Ordinary court of original jurisdiction], Troyes, June 4, 2008, Case No. 06/02604, Slip Op. (Fr.).

9. *See Tiffany Inc.*, 576 F. Supp. 2d at 518 (finding trademark right holders bear the principal responsibility to police their trademarks).

10. *Id.*

11. *See Doreen Carvajal, eBay’s Fake Louis Vuitton to Cost it \$61M*, N.Y. TIMES (July 1,

One possible problem that could result from these divergent opinions is an international polarization of trademark law. Some countries could begin to follow France's lead, forcing internet auction sites to police trademarks,¹² while other nations impose this duty on trademark owners.¹³ France and the United States are not the only two countries to have divergent opinions on policing online auction sites. Both Belgium and Germany have come to opposite conclusions as well, with Belgium ruling similarly to the United States and Germany ruling similarly to France. In Belgium, L'Oreal brought a case against eBay "accusing the company of not doing enough to prevent the sale of counterfeit goods posted on its auction and sale sites."¹⁴ The Belgian commercial court ruled that the world's largest online auctioneer did not have 'a general monitoring obligation' of what is offered on its site.¹⁵ In contrast, Germany's highest court ruled that the German branch of eBay had to attempt to prevent the sale of fake Rolex watches on its auction website.¹⁶ The German court also told eBay that it "is obliged to take all reasonable and technically possible steps to ensure that fake Rolex watches are not put on auction on its site."¹⁷ Therefore, the dilemma of who should police online auction sites is not only a problem in the United States and France, but a problem affecting other countries as well. This Note will focus only on the United States and France, but will keep in mind these other decisions.

With the United States ruling for eBay and France ruling for the trademark owner, this could be the beginning of the end for a fair and open online marketplace, as auction sites struggle to follow multiple international laws to avoid being sued. The French judgment also affects free-trade on the internet, leaving open the possibility for France to begin censoring (blocking) online auction sites for fear that French citizens will buy counterfeit French goods.¹⁸ Unless the United States and France can harmonize their competing

2008), available at http://www.huffingtonpost.com/2008/07/01/eBays-fake-louis-vuitton_n_110134.html.

12. See *infra* notes 16-17.

13. See *infra* notes 14-15.

14. Agence France-Presse, *eBay Claims Court Victory over L'Oreal in Fake Goods Case*, PHIL. DAILY INQUIRER (Aug. 13, 2008), available at <http://newsinfo.inquirer.net/breakingnews/infotech/view/20080813-154328/eBay-claims-court-victory-over-L'Oreal-in-fake-goods-case>. See also Valerie Walsh Johnson & Laura P. Merritt, *Tiffany v. eBay: A Case of Genuine Disparity in International Court Rulings on Counterfeit Products*, LANDSLIDE, Nov./Dec. 2008 (discussing the Belgium decision and how eBay was not generally responsible for monitoring all listings and holding eBay to the standards of a normally cautious and diligent e-commerce participant).

15. Johnson & Merritt, *supra* note 14.

16. Independent Online, *Ebay[sic] Told to Block Fake Rolex Sales*, Apr. 19, 2007, http://www.ioltechnology.co.za/article_page.php?iArticleId=3790048.

17. *Id.*

18. Though France has not begun blocking online auction sites like eBay, it has begun to censor certain websites. One could make the argument that France could do the same to websites that carry counterfeit goods. See, e.g., European Digital Rights, *France Obtained ISP Support in Blocking Illegal Sites*, June 18, 2008, <http://www.edri.org/edriagram/number6.12/isp-france-block-sites> (French Interior Minister Michel Alliot-Marie announced the French state

auction website trademark decisions, online censorship could occur and citizens in a number of countries might find themselves blocked from online auction sites like eBay, Amazon, and Yahoo.

These decisions also affect other online auction sites that sell goods accessible around the world. Trademark owners, seeing the success of Louis Vuitton, might begin suing in European countries shown to be favorable to national trademark owners. This raises the issue of how much vetting, if any, online auction sites must do to stop counterfeit goods from being sold. Based on these polarized decisions, how will the United States and France harmonize their online auction site policies regarding trademarks to combat counterfeiting and protect consumers and trademark owners alike?

Counterfeiting is a global problem that can not be easily dismissed. Counterfeiting prevents the trademark owner's ability to guarantee quality products to its customers and hampers a consumer's ability to associate goods and services with their source.¹⁹ There is no denying that the internet provides a way to fuel counterfeiters' illegal practices by making any type of good readily available at the click of a button. The United States' failure to require eBay and other online auctioneers to ensure the authenticity of the goods sold exacerbates an already immense global problem. Though the Louis Vuitton decision was perhaps too nationalistic and harsh, the French were correct in determining that online auction sites must exert more control over the goods being sold. Online auction sites are in the best position to install measures to help combat the sale of counterfeit goods. This discussion does not condone restricting free trade, but it does encourage online auction sites such as eBay to take a few extra steps to reduce the number of counterfeit goods sold on its auction site. Though online auction sites have responsibility, trademark owners should not shift the blame solely or even principally onto these websites. Just as trademark owners spend time and money building their brand, they should also be willing to spend the money it takes to police their trademarks and protect consumers. No solution is complete, but more could be done to protect consumers in the battle against the sale of counterfeit goods.

Part one of this Note discusses the background of counterfeiting's global impact, what constitutes a counterfeit good, and background information on eBay. Part two explores the United States' and France's trademark laws, the *Tiffany* and *Louis Vuitton* decisions, how each country came to their diverging legal conclusions on policing online auction site trademarks, and how the trademark laws of the United States and France compare and contrast. Finally, part three discusses possible solutions to the problem of these polarized decisions and what

came to an agreement with the French ISPs to block sites carrying content related to pedophilia, terrorism, and racial hatred content. She stated that "We can no longer tolerate the sexual exploitation of children in the form of cyber-pedophilia. We have come to an agreement: the access to child pornography sites will be blocked in France. Other democracies have done it. France could wait no longer."

19. 2-5 GILSON ON TRADEMARKS (MB), *supra* note 4, § 5.19 (1).

can be done to further protect consumers and trademark owners alike.

I. BACKGROUND INFORMATION ON ONLINE AUCTION SITES AND THE GLOBAL EFFECT OF COUNTERFEIT GOODS

It is essential to harmonize online auction trademark policies between countries because online auction sites impact the global economy in a major way.²⁰ Some of the top destinations for e-business and e-commerce trading are online auction sites.²¹ E-commerce trading and e-business make more than 250 online auction sites a hotbed for conducting Internet trading and business.²² The most well-established online auction sites are eBay, Yahoo, and Amazon.²³ “Online auction fraud [is] the Internet-related complaint most often lodged with state and federal officials.”²⁴ And because these companies sell the most goods, they are the most likely to be venues for internet based fraud and deceit.²⁵ The Consumer Reports National Research Center surveyed eBay buyers and almost half replied that they had encountered deceptions.²⁶

The traditional retail economy is falling behind e-commerce retail sales, which is growing at about six times the rate of retail sales in the United States.²⁷ Unfortunately, online sales of counterfeit goods are also growing at twice the rate of all online sales.²⁸ The problem has been growing so rapidly that at least one source projected that at the current rate “counterfeit goods will outstrip the

20. Though there are other online auction sites, this Note’s focus is eBay’s practices because its online auction site has had the most counterfeit litigation occurring across the world. *See infra* notes 125-65, 182-221 and accompanying text.

21. *See* Mohamed S. Wahab, E-Commerce and Internet Auction Fraud: The E-Bay [sic] Community Model, Computer Crime Research Center, Apr. 29, 2004, <http://www.crime-research.org/articles/Wahab1/>.

22. *Id.*

23. *Id.*

24. Marlene Naanes, *Consumer Reports: 1 in 4 New Yorkers Shopping Online Ripped off*, AM N.Y. (Oct. 1, 2008), available at <http://www.sun-sentinel.com/topic/am-scaml001,0,7437335.story?track=rss-topicgallery>.

25. *See* Nicola Cooke, *Online Auction Fraud on the Increase*, SUNDAY BUS. POST (Apr. 8, 2007), available at 2007 WLNR 7075863 (“Online auction room fraud is on the rise, with websites such as eBay and Amazon being targeted because of their large number of users.”). *See also* *Don’t Fall Prey*, THE STATESMAN (June 20, 2007), available at 2007 WLNR 11506962 (“An increase in online retail sales by [twenty-six] per cent and the record-breaking number of domain-name registrations of 64.5 million have been accompanied by horrific rise in Internet crimes with online fraud complaints nearly doubling in 2003-2004 (FBI) and affecting nearly 10 million people.”).

26. *Winning at eBay: How to Bid Smart & Play Safe*, Consumer Reports, http://www.consumerreports.org/cro/money/shopping/shopping-tips/ebay-8-07/overview/0708_ebay_ov_1.htm (last visited Mar. 6, 2010).

27. Travis Brown, *Protecting Brand Integrity Online: A New Approach, Manage Smarter* (Dec. 21, 2007), available at http://www.trainingmag.com/msg/content_display/marketing/e3i074b6c9d80a440503cdb4d6644646bb8.

28. *Id.*

sale of legitimate goods online in 2010 about three to one.”²⁹ Thus, it is important to learn how counterfeit goods enter consumers’ channels of trade and influence consumers’ purchasing.

A. *How Counterfeiting Permeates Channels of Trade*

Consumers may have heard about counterfeit goods, but many do not know what counterfeiting actually means. Counterfeiting is the “deliberate use of a false mark that is identical with or “substantially indistinguishable” from a registered mark.”³⁰ When a trademarked good is counterfeited,³¹ the person using the trademark is doing so without the authorization of the trademark owner. The inclusion of “substantially indistinguishable” in the counterfeit definition is of particular importance because it allows for lower quality goods to be liable for counterfeiting by removing the requirement that the goods be identical to the trademarked good.³² The reason the mark does not need to be identical is because that would require the quality of the goods to be the same for counterfeiting to have occurred. If this were the case, merchants with low quality products could get away with copying trademarked products because the lower quality good would be *distinguishable* from the high quality product.³³ For instance, “[W]here the genuine good is made out of metal and the cheaper copy is made out of plastic, . . . there can still be counterfeiting.”³⁴

In order to bring a counterfeiting claim in the United States under the United States Trademark (Lanham) Act of 1946 (“Lanham Act”), a trademark owner must be federally registered with the United States Patent and Trademark Office’s (“USPTO”) principal register.³⁵ Therefore, any manufacturer of a

29. *Id.*

30. International Trademark Association, Trade Associations, http://www.inta.org/index.php?option=com_content&task=view&id=606&Itemid=128&getcontent=1 (last visited Jan. 27, 2009) (“INTA was founded in 1878. It is a not-for-profit worldwide membership organization of trademark owners and advisors. INTA’s mission is to support and advance trademarks and related intellectual property”); See also 2-5 GILSON ON TRADEMARKS (MB), *supra* note 4, § 5.19 (2) (2008).

31. 2-5 GILSON ON TRADEMARKS (MB), *supra* note 4, § 5.19 (2)(a). “Only a limited number of marks are registered with the USPTO, so the United States trademark counterfeiting laws related are limited to a clearly defined set of genuine marks.” (Comment: this quote is not at 5.19 (3)(b)(iv), is it a quote in another part of this source or a paraphrase?) *Id.* § 5.19 (3)(b)(iv). See also Trafficking in Counterfeit Trademarks, Service Marks, and Certification Marks—18 U.S.C. § 2320, <http://www.usdoj.gov/criminal/cybercrime/ipmanual/03ipma.pdf> (last visited Apr. 26, 2010) (“Examples of well-known trademarks include Kodak®, Apple®, Microsoft®, Coca-Cola®, GE®, Life-Savers®, USA Today®, KLEENEX®”) [hereinafter Trafficking].

32. 2-5 GILSON ON TRADEMARKS (MB), *supra* note 4, at § 5.19 (3)(b)(ii).

33. *Id.*

34. *Id.* § 5.19(2)(a).

35. *Id.* § 5.19(2). “A mark is counterfeit if it is a spurious mark that is identical to or substantially indistinguishable from the plaintiff’s mark where the plaintiff’s mark was in use and registered on the USPTO’s principal register for use on the same goods to which the defendant applied the mark.” *Id.* at § 5.19 (3)(b).

good that copies a mark registered on the principal register of the USPTO can be liable for counterfeiting.³⁶

eBay's counterfeiting woes mostly arise from sellers claiming to be selling "genuine luxury products"; when in reality, the "genuine product" is a knockoff. There is no statutory meaning of knockoff, but it is usually defined as a cheap copy intended to remind a consumer of the original product, and therefore, in many cases, knockoffs are actually counterfeit goods.³⁷ Some knockoffs, however, are not counterfeit in the trademark sense, because they do not use a counterfeit name or label.³⁸ Conversely, it is still possible to be found liable for counterfeiting without identically copying the product.³⁹ By definition, an item that is counterfeit infringes on a company's trademark rights; however, it is still possible to be found liable for counterfeiting without identically copying the product.⁴⁰

In a typical counterfeiting case, unlike a trademark infringement case, the producer of the fake goods intends for the "trademark" to be nearly impossible to tell apart from the genuine article.⁴¹ When the "copy of the genuine mark is so close that an ordinary purchaser would not be able to tell the difference between fake and real, and all the other statutory criteria are met . . . a court should find that counterfeiting has taken place."⁴² Another difference between counterfeiting and infringement is that counterfeiting is limited to marks registered on the principal register of the USPTO, unlike infringement, which can be for any trademark, whether on the federal registry or merely protected by common law state rights.⁴³ Despite these differences, both counterfeiting and trademark infringement involve the likelihood that consumers will be confused about the source of the goods or service.⁴⁴ Additionally, both counterfeiters and infringers benefit from the goodwill built up by the trademark owner in his brand.⁴⁵

It is important to note that a mark can only be considered counterfeit if it is precisely related to the goods or services for which the genuine good is registered,⁴⁶ and "[i]t is not counterfeiting to use another's trademark on or in connection with a good that is only *related to* those for which the genuine mark is registered."⁴⁷ This means that if a counterfeiter used the TIFFANY® brand mark on cat food, as opposed to jewelry, that would not be considered

36. *Id.* at § 5.19(3)(b).

37. *Id.* at § 5.19(2)(b).

38. *Id.*

39. *Id.* at § 5.19 (3)(b)(iv). Counterfeiting is tied to trademark infringement, and "all counterfeits infringe, but not all infringements are counterfeit." *Id.* § 5.19 (2)(a).

40. *Id.* at § 5.19 (2)(a).

41. *Id.*

42. *Id.*

43. *Id.* See 15 U.S.C. § 1116(d)(1)(B)(i) (2008).

44. 2-5 GILSON ON TRADEMARKS (MB), *supra* note 4, at § 5.19 (2)(a).

45. *Id.*

46. *Id.*

47. *Id.*

counterfeit because cat food is not what Tiffany has registered on the principal registry, which is silver jewelry.

Luxury goods are particularly impacted by counterfeiting because counterfeiters unlawfully take advantage of the prestige of luxury brands, which harms those brands' tradition, identity and image.⁴⁸ Since a counterfeiter is not primarily concerned with avoiding infringement, rather just making a profit, it makes sense that counterfeiters copy a mark identically in order to fool the consumer.⁴⁹ The product is made to purposefully deceive the consumer as to the source of the product.⁵⁰ The trademark placed on the "fake" product is outwardly indistinguishable from the genuine article.⁵¹ This purposeful deceit is what makes counterfeiting a worldwide threat to consumers, companies, and the economy.

B. Why Counterfeiting is a Worldwide Threat

Why does counterfeiting matter? In order to understand why the French and United States decisions have a major impact on the economy, it is important to look at how the sale of counterfeit goods affects jobs, transactions, and consumers. Counterfeit fraud and deception are not merely online domestic issues. Worldwide, five to seven percent of the world's trade is in counterfeit goods, posing a threat to global health and safety.⁵² It has been estimated "that 750,000 American jobs have been lost due to overseas IP [intellectual property] infringement, and that \$200 billion in U.S. sales are lost each year."⁵³ This problem is exacerbated when goods are sold online because of difficulties in "policing," or checking, to ensure those goods being sold are legitimately from the company listed. Counterfeiting crosses country lines through the Internet, using sites such as eBay, making it an international problem. While Customs can normally stop fake goods from entering the country at ports, it is far more difficult to police counterfeit goods on a website and stop those goods from entering the country.⁵⁴

Additionally, there are serious health and safety risks associated with certain counterfeit products, such as electrical devices, pharmaceuticals,

48. LVMH, FAQ Brand Protection, http://www.lvmh.com/fonctionalite/pg_faq_lutte.asp (last visited Apr. 26, 2010).

49. 2-5 GILSON ON TRADEMARKS (MB), *supra* note 4, at § 5.19 (3)(b)(iv).

50. *Id.* at § 5.19 (2).

51. *Id.*

52. *Id.* § 5.19 (3)(b)(vi)(2008). See The International Anticounterfeiting Coalition, Get Real - The Truth About Counterfeiting, <http://www.iacc.org/counterfeiting/counterfeiting.php> (last visited Apr. 26, 2010).

53. Katherine L. Tabor, IP Litigation Summer 2008 Newsletter, MONDAQ (Oct. 8, 2008), available at 2008 WLNR 19297656. See also The International Anticounterfeiting Coalition, *supra* note 51.

54. See Trafficking, *supra* note 31 ("With a large number of victims across a potentially large geographic region—especially in the case of goods offered online—and small losses per victim, a large-scale counterfeiter can often evade civil sanctions.").

automobile parts, and airplane parts.⁵⁵ For example, the Federal Aviation Administration estimates that 520,000 airplane parts, or two percent of all parts installed in planes, are counterfeit.⁵⁶ The Motor Equipment Manufacturers Association noted safety violations from automotive parts that were counterfeit, which is dangerous to consumers driving those cars because the quality standards in counterfeits are lower.⁵⁷ Furthermore, counterfeiters do not pay taxes, child labor is often used in making counterfeit goods, and counterfeiting helps support illegal activity as profits from the sale of counterfeit goods are linked to organized crime and drug trafficking.⁵⁸ With no limit to what types of goods can be counterfeited, it is easy to see how an online trading and buying website opens itself up to a potential world of illegal activity.⁵⁹

A company's business and good name is threatened when it is being counterfeited or infringed.⁶⁰ When consumers decide what goods to purchase, they should be able to rely on trademarks and the quality those marks represent.⁶¹ Indeed, "In the case of luxury items, such as ROLEX® watches or GUCCI® leather goods, failure to take action against counterfeiters can erode the status-symbol allure of these goods."⁶² Technological innovations allow counterfeiters to make near-identical copies of products.⁶³ Additionally, because products are listed online on sites like eBay, it is hard to tell the counterfeit items apart from the genuine items because the consumer is looking at a picture of the good rather than the actual product.⁶⁴

A consumer who unknowingly purchases a counterfeit product, anticipating a bargain, is actually paying "an inflated price for an inferior product."⁶⁵ This threat is greatest with online auction sites because of the

55. Underwriters Laboratories, *The Impact of Product Counterfeiting*, <http://www.ul.com/global/eng/pages/offering/services/programs/anticounterfeitingoperations/counterfeiting/> (last visited Apr. 26, 2010).

56. The International Anticounterfeiting Coalition, *supra* note 52.

57. *Id.* See also 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:92.50 (4th ed. 2007) (quoting *U.S. v. 10,510 Packaged Computer Towers, More or Less*, 152 F. Supp. 2d 1189 (N.D. Cal. 2001)) ("Counterfeit certification marks falsely imply that the merchandise has been tested and approved for safety. American consumers rely on these representations.").

58. The International Anticounterfeiting Coalition, *supra* note 52.

59. See Joe Pinchot, *Buyer Snagged by Web Fraud; Paid Directly for Online Auction*, THE HERALD (Sept. 20, 2008), available at 2008 WLNR 17906938 ("Millions of people take part in Internet auctions every day, and most of the transactions take place as they should. However, online auction fraud is the No. 1 fraud committed over the Internet, according to the National Consumers League.").

60. Emily Favre, *Online Auction Houses: How Trademark Owners Protect Brand Integrity Against Counterfeiting*, 15 J.L. & POL'Y 165, 166 (2007).

61. Trafficking, *supra* note 31.

62. Mark Sommers, *Taking an Aggressive Stance Against Counterfeiters: An Overview of Trademark Counterfeiting Litigation Under the Lanham Act*, IP LITIGATOR (Sept./Oct. 1999), available at <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=d0fb159b-947e-427a-b03a-e6d60cf272f5>.

63. Favre, *supra* note 60, at 166.

64. See *id.*

65. Underwriters Laboratories, *supra* note 55.

volume and number of different goods being bought and sold on a daily basis. Buying a product online comes with an increased risk of anonymity.⁶⁶ For instance, because eBay chooses a seller profile that is nearly anonymous,⁶⁷ “intellectual property rights owners (and in particular, trademark owners) face daunting obstacles in first, uncovering the person responsible for selling counterfeit products and second, stopping their source.”⁶⁸ Since the seller is usually unknown, a product can only be confirmed as genuine by a consumer viewing a picture of it on his or her computer screen.

C. *The World's Largest Online Auction Website*

Ebay is at the heart of the debate over online auction site counterfeiting. eBay has described itself as “the world’s largest online marketplace - where practically anyone can sell practically anything at any time.”⁶⁹ eBay started in 1995 when Pierre Omidyar wrote a code for an auction website that he ran from his home computer.⁷⁰ The auction website went public in 1998.⁷¹ More than one hundred million people around the globe now use eBay’s online marketplace to either buy or sell goods.⁷² The users include individuals, small businesses, and enterprises that take advantage of the eBay business model and auction every type of good imaginable.⁷³

eBay portrays itself as “an open trading platform” in which the market is the barometer of the value of the items sold.⁷⁴ Its online marketplace structure enables trade on a local, national, and international basis,⁷⁵ and millions of items are traded each day on eBay’s online “platform.” This platform is a means for parties to arrange payment and delivery between each other so that no one at eBay ever physically possesses the goods that are offered for sale;

66. See Brown, *supra* note 27 (“In addition, the Internet is ideally suited to protecting the anonymity of the operator behind such trade. Web sites are easy to set up, easy to take down and scam operations are easy to relocate. Local police are no match for this.”).

67. See eBay, <https://scgi.ebay.com/ws/eBayISAPI.dll?RegisterEnterInfo> (last visited Apr. 26, 2010) (looking at eBay’s registration page, eBay does not require an average seller to list any sensitive information, such as a driver’s license number, a social security number, or any other information that is unique to an individual).

68. Actuate IP, eBay = Counterfeiter, According to French, <http://www.actuateip.com.au/wordpress/?p=11> (June 20, 2008, 12:01 EST).

69. eBay, <http://www.ebayinc.com/list/milestones> (last visited Apr. 26, 2010) [hereinafter Milestones].

70. *Id.*

71. *Id.*

72. Leah Macpherson, Sell your stuff on eBay, Microsoft Home Magazine, <http://www.microsoft.com/canada/home/life-and-style/articles/sell-your-stuff-on-ebay.aspx> (last visited Apr. 26, 2010) [hereinafter Sell Your Stuff].

73. See *id.*

74. Milestones, *supra* note 69.

75. eBay, New Study Reveals 724,000 Americans Rely on eBay Sales for Income, <http://investor.ebay.com/releasedetail.cfm?releaseid=170073> (last visited Apr. 26, 2010) [hereinafter About eBay].

eBay is merely a facilitator of the transaction.⁷⁶ Their business model has attracted the attention of individuals and business owners alike across the world, and eBay has a large hold on the domestic and international online marketplace.⁷⁷

eBay has approximately eighty-four million users in thirty-nine markets worldwide,⁷⁸ and this tremendous worldwide participation in eBay has changed the face of Internet commerce.⁷⁹ In 2007, the total value of items sold on eBay's trading platforms was nearly \$60 billion,⁸⁰ meaning that "eBay users worldwide trade more than \$1,900 worth of goods on the site every second."⁸¹ With this massive volume of trade also comes a high-risk of encountering counterfeiters. Counterfeiters create goods that look similar enough, if not identical, to original products in order to fool a consumer into purchasing the counterfeit "knock off" as an original. eBay is aware of the presence of counterfeiters on the auction website and offers the following tools, programs, and resources in order to keep consumers safe on their website: eBay Feedback, Buyer Protection, Spoof (Fraudulent) Web Site Protection, eBay Security Center, and Verified Rights Owner ("VeRO") Program.⁸²

The main program to protect consumers and companies from fraudulent activity is the VeRO Program, which addresses listings offering potentially infringing items posted on the eBay website.⁸³ VeRO is a notice and takedown system in which intellectual property owners can inform eBay of any listing that potentially infringes their rights, and then eBay can remove the listing.⁸⁴ eBay created this program "so that intellectual property owners [could] easily report listings that infringe their rights."⁸⁵ More than 14,000 rights owners participate

76. Anne Gilson LaLonde, *Tiffany Ultimately Responsible for Protecting Its Marks, So No Contributory Infringement by eBay for Sale of Counterfeit Goods*, Tiffany v. eBay, Inc., 2008 U.S. Dist. LEXIS 53359 (S.D.N.Y. 2008) (LexisNexis Expert Commentaries). See Tiffany Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 474 (S.D.N.Y. 2008), finding that:

While eBay is perhaps best known for auction-style listings, sellers can also choose to sell their goods through fixed price or 'Buy It Now' listings. Sellers are responsible for setting the parameters and conditions of the sale, including the minimum acceptable bid, the Buy It Now price (if applicable), and the duration of the listing. Sellers are also responsible for the content of the listings, including the titles and descriptions of the items.

77. Sell Your Stuff, *supra* note 72.

78. eBay, eBay Inc. Awarded the National Medal of Technology and Innovation for Advancing Global Entrepreneurship, <http://investor.ebay.com/releasedetail.cfm?releaseid=337160> (last visited Apr. 26, 2010).

79. *Id.*

80. *Id.*

81. *Id.*

82. About eBay, *supra* note 75.

83. Tiffany Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 478 (S.D.N.Y. 2008).

84. *Tiffany Inc.*, 576 F. Supp. 2d at 478.

85. eBay: How eBay Protects Intellectual Property (VeRO), <http://pages.ebay.com/help/tp/programs-vero-ov.html> (last visited Apr. 26, 2010) [hereinafter eBay VeRO].

in this program.⁸⁶

Despite these precautions, trademarks and goods are continually counterfeited and consumers are defrauded by purchasing items believed to be genuine. It might seem odd that a company as large as eBay would not have more effective tools in place to stop counterfeit trademarks and goods from entering channels of trade, but eBay isn't completely to blame because between constant technological innovations and a high volume of sales, counterfeiters can slip through the cracks regardless of the mechanisms in place designed to detect them.

According to United States law, trademark owners are in the best position to locate and identify counterfeits of their products because owners are far more knowledgeable about what is counterfeit than an online auction house.⁸⁷ Online auction sites house hundreds and thousands of items, and they are usually unaware of the differences that set a genuine article apart from a counterfeited one. However, the French do not agree, and now the trademark world has two polarized decisions that could change the way luxury companies litigate online auction counterfeits.

II. CURRENT UNITED STATES AND FRENCH TRADEMARK LAW

A. *The French Decision*

1. *An Explanation of French Trademark Law*

In France, a trademark is a sign capable of graphic representation that serves to distinguish the goods or services of a natural or legal person.⁸⁸ The rights to a mark are “acquired through registration and the use of the mark by another in any way on goods similar to those of the registration is an infringement.”⁸⁹ The pertinent trademark statute is law No 91-7 of January 4, 1991, effective December 28, 1991.⁹⁰

“[C]ommercial litigation between merchants [is] held before a Tribunal of

86. *Id.*

87. Favre, *supra* note 60, at 170.

88. 1 ALAIN MICHELET & ERIC LE BELLOUR, FRANCE § 58.4 - TRADEMARKS THROUGHOUT THE WORLD (Anne-Laure Covin et al. eds., 5th ed. 2008). See also JF Bretonnière and Cécile Cailac, How to Litigate Successfully in IP Matters Before the French Civil Courts, http://www.buildingipvalue.com/06EU/209_212.htm (last visited Apr. 26, 2010) (“Under French law, only the IP rights owner and/or the exclusive licensee may file an IP rights infringement action.”).

89. 7 MATTHEW BENDER, FRA-WORLD TRADEMARK LAW AND PRACTICE § 7.01 (2008).

90. INTA, APPENDIX D: National Approaches to Protection of “Well-Known” Marks France, Germany, Italy, Spain, http://www.inta.org/membersonly/downloads/ref_AppendixD.pdf (last visited Apr. 26, 2010) [hereinafter INTA National Approaches].

Commerce, a court specialized in commercial litigation.”⁹¹ This commercial litigation extends to trademark disputes and issues revolving around counterfeit goods. Since online counterfeiting crosses country lines, the French, in order to sue defendants that sell potentially counterfeit goods to French citizens, have liberal personal jurisdiction policies that allow them to sue in France and not in the country in which the alleged infringer is located.⁹²

In order to have jurisdiction over a defendant in France, the plaintiff must prove there is jurisdiction under Article 46 of the French Civil Procedure Code.⁹³ Article 46 states that the plaintiff has jurisdiction to sue in the place where the damaging fact occurred or where the damage was suffered.⁹⁴ In the case of websites, “the jurisprudence in Section 46 approves the criterion of accessibility of a foreign site to the French public to justify competence of French jurisdictions.”⁹⁵ However, a French trademark is infringed only if the website targets the French public.⁹⁶

French courts look to a number of factors to determine whether a website targets the French population. First, the court looks at the language used on the website.⁹⁷ For instance, the use of a foreign language would indicate whether that website owner intended to operate in France or not.⁹⁸ If the language were primarily English, the courts would probably find there to be no trademark infringement in France.⁹⁹ However, if a website were entirely in French, this could lead courts to believe a company was targeting the French people. Secondly, the court can look to the availability of products and whether the website is using the contested trademarks to offer products and/or services for sale within the French territory.¹⁰⁰ Therefore, if an online auction site is

91. Jonathon Wise Polier, *French-American Commercial Litigation: How to Avoid Being Forced to Litigate in France and How to Understand French Commercial Litigation Practices*, http://www.paris-law.com/articles/Fench_comercial_litigation-en.htm (last visited Apr. 26, 2010). See also Bretonnière & Cailac, *supra* note 88 (“Civil proceedings relating to trademarks are exclusively heard by a high court, as are any proceedings involving both a trademark matter and a related matter concerning copyright, industrial designs or unfair competition.”).

92. See generally *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 5 available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

93. *Id.*

94. *Christian Dior Couture, SA v. eBay, Inc. and eBay International AG*, Tribunal de Commerce de Paris, Première Chambre B [Paris Commercial Court], June 30, 2008, General Docket No. 2006077807 at 6 (Fr.) [hereinafter *Christian Dior*].

95. *Id.*

96. JF Bretonnière & Cécile Cailac, *Online Trademark Infringement: Key Issues Before the French Courts*, http://www.buildingipvalue.com/08_EMEA/127-130BakerMcKenzie.pdf (last visited Apr. 26, 2010).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* “The courts may use further criteria to determine whether trademark infringement has been committed in France, including: (1) the use of the contested trademark on a website registered under the domain ‘.fr’ (although in itself this is insufficient to find that infringement

accessible to the French public, despite originating in a foreign country, the availability to the French public might be sufficient to justify the courts to allow French jurisdiction.¹⁰¹

With regard to the specific jurisdiction the Cassation Court retained over eBay, the court found that French eBay is a holding company of the eBay group¹⁰² and was responsible for the operation of the French site, headquartered in California.¹⁰³ As such, the court held eBay liable for the actions of eBay International AG.¹⁰⁴ In its findings, the court noted there was an “absence of conventional provisions between France and the United States regarding conflicts of jurisdiction, [w]hereas the Cassation Court extends the internal jurisdiction rules to international order.”¹⁰⁵ Because the alleged damage occurred in France, it did not matter that eBay was headquartered in California or in another part of the world; it is where the damage occurred, and in this instance, that damage occurred in France.

“The general principles of liability under civil law are set by Articles 1382, 1383 and 1384 of the Civil Code.”¹⁰⁶ Article 1382 provides that one who causes damage to another is obliged to compensate for that damage.¹⁰⁷ Article 1383 provides that every person is liable for the damage he or she causes, “not only by his intentional act, but also by his negligent conduct or by his imprudence.”¹⁰⁸ Finally, Article 1384 provides that one is not only liable for damages created personally, but also for the acts of persons for whom he is responsible or by things in his custody.¹⁰⁹ The main thrust of these three Articles is that if someone causes damage to another, regardless of whether it was intentional or negligent, that person is responsible for those damages and must compensate the injured party.

Even though France has general civil liability, there is a code specifically

occurred in France); (2) the inclusion of prices in a particular national currency (eg, euros); and (3) the inclusion of a French address or telephone number for contacts or the option to order products in or from France. The French courts have applied these principles to various types of website.” *Id.*

101. SA Parfums Christian Dior, SA Kenzo Parfums, SA Parfums Givenchy, & The Guerlin SA Corporation v. eBay Inc. and eBay International AG, Tribunal de Commerce de Paris, Première Chambre B [Paris Commercial Court], June 30, 2008, General Docket No. 2006065217 at 7(Fr.) (“And yet, they note, the advertisements in dispute, as the documents added to the arguments show, appear on foreign eBay sites, are translated into French and the products offered for sale can be delivered to France.”).

102. Christian Dior, General Docket No. 2006077807 at 6 (There were five French decisions decided on the same day in the same court, so there are some facts that are interchangeable, including where eBay was considered located).

103. *Id.*

104. *Id.*

105. *Id.*

106. INTA National Approaches, *supra* note 89 (“Protection against unfair competition is provided by Articles 1382, 1383 and 1384 of the French Civil Code. French law does not provide specific protection against passing off.”).

107. *See id.* “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.” *Id.*

108. *Id.*

109. *Id.*

addressing intellectual property. France's Intellectual Property Code (Le Code de la Propriété Intellectuelle, or "CPI") is dedicated to trademarks and other distinctive signs.¹¹⁰ "While intellectual property rights are generally available in the CPI, text dealing specifically with trademark rights is found in Articles L.711-1 through L.716-16 and Articles R.712-1 through R.718-4."¹¹¹

"The French law specifically lists the acts that constitute trademark infringement" under CPI Article L.713-2 and 713-3.¹¹² Under CPI article L.713-2, "unauthorized reproduction, use, or affixing of a mark; and the use or reproduction of marks for goods or services identical to those designated in the registration"¹¹³ is considered trademark infringement. Additionally, under CPI Article L.713-3, the "reproduction, use, or affixing of a mark; or use of a reproduced mark for goods or services that are similar to those designated in the registration" and the "imitation of a mark and the use of an imitated mark for goods or services that are identical or similar to those designated in the registration"¹¹⁴ is prohibited. Thus, the reproduction, use, or affixing of a trademark, as well as the use of the reproduced trademark, is forbidden in the case of products or services identical to those described in the registration, except in the event of an authorization from the owner.¹¹⁵

Some of the world's most luxurious goods are produced in France, and thus trademarks are particularly well protected.¹¹⁶ The Cour de Cassation¹¹⁷ made specific reference that Moët Hennessy-Louis Vuitton ("LVMH") represents luxury goods and were registered French Trademarks.¹¹⁸ Indeed, Louis Vuitton and the LVMH brands¹¹⁹ are well-known trademarks, and it is understandable that French law would want to protect these marks, just as the

110. *Id.*

111. Terrance J. Keenan, *American and French Perspectives on Trademark Keying: The Courts Leave Businesses Searching for Answers*, 2 SHIDLER J. L. COM. & TECH. 14 (2005).

112. Internet Business Law Services, France Sanctions Online Sales of Counterfeited Goods, July 7, 2008, http://www.ibls.com/internet_law_news_portal_view.aspx?id=2091&s=latestnews.

113. *Id.*

114. *Id.*

115. *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 11 available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

116. French Law: The French Law Resource, http://www.frenchlaw.com/trade_marks.htm (last visited Apr. 26, 2010).

117. See Cour de Cassation, http://www.courdecassation.fr/about_the_court_9256.html (last visited June. 1, 2010) ("[t]he Court of Cassation is made up of chambers among which the appeals for consideration by the Court are distributed on the basis of varying criteria determined by the Bureau of the Court..").

118. *Louis Vuitton*, RG 2006077799 at 1, available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

"[Louis Vuitton Malletier] is the company which, within the luxury group LVMH, designs, manufactures and markets leather goods and ready-to-wear products worldwide under the Louis Vuitton trademark." *Id.*

119. See Internet Business Law Services, *supra* note 112.

United States offers greater protection to its famous trademarks.¹²⁰ Articles L.711-4, L.714-4, and L.713-5 of the CPI specifically mention well known trademarks.¹²¹ Article L.714-4(a) and (c) of the CPI establish the criteria for “well known marks,”¹²² providing that a well known mark is an “earlier mark that has been registered or that is well known within the meaning of Article 6 bis of the Paris Convention for the Protection of Industrial Property” or “a trade name or signboard known throughout the national territory, where there exists a risk of confusion in the public mind.”¹²³ The law clarifies that marks must be known by the public in general, not just those who buy the goods.¹²⁴ The LVMH brands are indeed known throughout France, and if a counterfeiter were passing off his product as one of LVMH’s, there would be consumer confusion as to the source or affiliation of that product.

Another CPI Article, L.713-5, is very pertinent to the *Louis Vuitton* case. Article L.713-5 provides that any person who uses a mark “enjoying repute for goods or services that are not similar to those designated in the registration shall be liable under civil law if such use is likely to cause a prejudice to the owner of the mark or if such use constitutes unjustified exploitation of the mark.”¹²⁵ Therefore, a person or company is liable if they use a mark without permission of the owner, or if they create a lesser-quality product that is not similar to the high-quality product and would cause prejudice to the trademark holder.

2. *Le Commercial Court de Paris: Louis Vuitton Malletier v. eBay, Inc.*

eBay was sued in French Civil Court, known as the Commercial Court of Paris, on December 4, 2006, by SA Louis Vuitton Malletier, which is one of LVMH’s luxury groups.¹²⁶ Louis Vuitton, under the LOUIS VUITTON® trademark, creates, manufactures, and sells leather and ready-to-wear products worldwide.¹²⁷ Louis Vuitton charged eBay with failing to ensure, as its duty, that eBay’s online auction site did not commit any illegal acts harmful to the Louis Vuitton name.¹²⁸ Louis Vuitton claimed that eBay willingly allowed “obviously illicit” illegal listings on all of its sites, encouraged infringement,

120. See 15 U.S.C. § 1125 (explaining how the United States protects famous trademarks).

121. INTA National Approaches, *supra* note 90.

122. Legifrance.gouv.fr, http://www.legifrance.gouv.fr/html/codes_traduits/cpiatext.htm#Chapter%20I%20Constituent%20Elements%20of%20Marks (last visited Apr. 26, 2010).

123. *Id.*

124. See also Internet Business Law Services, *supra* note 112 (“The Code expressly defines a ‘well known mark’ as ‘being known by a substantial proportion of the public and as immediately alluding the product/service to which it applies.’”) (internal quotations removed).

125. INTA National Approaches, *supra* note 90.

126. *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 1 available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

127. *Id.*

128. *Id.* at 2.

and cost LVMH approximately 20 million Euros.¹²⁹ eBay argued that it allowed these types of listings because the company was merely a simple website host that complied with its legal obligations as established by French Law.¹³⁰ Ultimately, eBay was unsuccessful in its defense and had to pay Louis Vuitton damages for indemnificatory royalties, brand image, and nonmaterial damage.¹³¹

According to Article 46 of the French Civil Procedure Code, jurisdiction was deemed proper because the presumed violation caused substantial prejudice to France, where Louis Vuitton is headquartered.¹³² Louis Vuitton claimed that eBay hosted obviously illegal advertising on all of its sites, which tended to favor trademark infringement and enormously damaged Louis Vuitton's brand and image.¹³³ The French court system has jurisdiction to repair any trademark infringement that occurred in France on an Internet site, as long as the site is accessible to the French public; this is the case with eBay's sites.¹³⁴ This ideology mirrors the European Community jurisprudence, which recognizes that the place where the damaging fact occurred indicates both the place where the damage occurred and the place of the event causing it.¹³⁵ Therefore, based on a sworn statement that the French public could access the eBay sites, and that Article 46 allows a party to use the jurisdiction of the place where the damaging fact occurred or the place where the damage has been suffered, jurisdiction was deemed proper in France.¹³⁶

Regarding the subject of the litigation, Louis Vuitton demonstrated to the Cassation Court that eBay "clearly" advertised the sale of products on the eBay website that described counterfeit products.¹³⁷ Beginning in 1999, Louis Vuitton sent eBay repetitive warnings that counterfeit goods were available on its website. However, Louis Vuitton claims eBay did not take any measures that would efficiently fight against counterfeiting.¹³⁸ Louis Vuitton gave eBay some anti-counterfeiting suggestions, such as requiring the sellers to guarantee products offered for sale are authentic, or permanently closing the account of any offender after the first violation of selling counterfeit products.¹³⁹ Additionally, Louis Vuitton said that eBay sometimes allowed questionable

129. *Id.*

130. *Id.* at 8, 10.

131. *Id.* at 2.

132. *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 5 available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 6-7.

137. *Id.* at 7.

138. *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 7 available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

139. *Id.*

advertising, and did not close accounts of recurrent offenders even though trademark owners reported a violation.¹⁴⁰ Turning a blind eye toward repeat offenders and showing a “lack of effort” to stop counterfeit activities helped convince the court that eBay “clearly” advertised the sale of counterfeit products.

eBay countered Louis Vuitton’s accusations by stating that their website is a site-hoster¹⁴¹ that does not participate in the sale of goods between parties; eBay is merely a simple storage provider that does not participate in the content of the listing or the contracts created between the seller and the buyer.¹⁴² However, eBay was cognizant of illegal activity. French eBay claims it immediately removed advertising that was obviously illegal when reported by third parties.¹⁴³ Additionally, eBay recognized that counterfeiting fraud existed and set up a system called VeRO, which is “a program helping protect intellectual property,” reimbursing the users who are the victims of counterfeiting up to the limit of 150 Euros.¹⁴⁴ Louis Vuitton chose to not join this program.¹⁴⁵ Since November of 2006, eBay has adopted many additional measures intended to fight counterfeiting while also maintaining “the freedom of expression” of its internet users.¹⁴⁶

Louis Vuitton also noted that because eBay was not limited to data storage, but also performed brokerage activity, which is its main activity, that this action prohibited eBay from invoking the regime of limited responsibility, reserved by the legislation for hosting services or simple technical service providers.¹⁴⁷ Despite eBay’s plea that it was a simple host provider, the court invoked its civil liability by proclaiming that eBay operated as a firm specializing in online brokerage services.¹⁴⁸ The court concluded eBay was a major participant in the sales on its sites and played a very active role in commercial campaigns meant to increase the number of transactions and

140. *Id.*

141. *Id.* For more detailed information on being a site-hoster in France, see *id.* at 10.

142. See also *Hermès International v. eBay France & eBay International AG*, Troyes Court of First Instance, Civil Chamber, June 4, 2008, RG No. 06/02604 at 6 (Fr.) (eBay claims it conducted an activity described as “brokerage of auctions conducted remotely through electronic means” in accordance with the terms of Section L. 321-3 of the Commercial Code.)

143. *Louis Vuitton*, RG 2006077799 at 2.

144. *Id.* at 10.

145. *Id.* at 8. See also *eBay VeRO*, *supra* note 84.

146. *Louis Vuitton*, RG 2006077799 at 8.

147. *Id.* at 7.

148. *Id.* at 10. The French court found it was obvious that eBay is a brokerage site and that the defending companies cannot benefit from the status of technical providers in the sense of Section 6 regarding trust in on-line trade, since they perform a commercial activity with the remuneration based on the sales of products on the auctions and, therefore, their activity is not limited to hosting of Internet sites, which would permit eBay to benefit from the provisions, applicable to hosting services only. *Id.* See also Philippe Boivin, *eBay Wins Some (in the US [sic]), Loses Some (in France)*, MCCARTHY TÉTRAULT (Aug. 8, 2008), available at http://www.mccarthy.ca/article_detail.aspx?id=4100.

commissions it collects.¹⁴⁹ The evidence and elements presented showed eBay was a high performance commercial brokerage service, and its hosting and brokerage services were indivisible.¹⁵⁰ Ultimately, the court determined that “even though eBay organizes the display of the listings, eBay is not an *editor of content* since the content of the listings is provided by the users.”¹⁵¹ At the same time, however, the court concluded that eBay was not just a simple host; it was also “an *editor of communication* services specializing in online brokerage [and,] [a]s such, eBay [did] not have an obligation to confirm that all goods sold through its services are genuine, but it [was] required to ensure that its website [would] not be used for illegal activities.”¹⁵²

Louis Vuitton’s mark was allegedly harmed from 2001 to 2006 by the prejudice caused to it by eBay’s illicit behavior.¹⁵³ Louis Vuitton brought forth evidence that the total commission eBay collected for the sale of their counterfeit products on its French eBay online auction site was 1.6 million Euros, and that ninety percent of products sold were counterfeit.¹⁵⁴ Because eBay collected remuneration for each sale of counterfeit products, the illicit use of Louis Vuitton’s rights harmed Louis Vuitton’s image and caused moral damage.¹⁵⁵ Contrary to Louis Vuitton’s claims, eBay indicated that there was no risk of confusion between authentic Vuitton products and counterfeit Vuitton products sold on the eBay sites.¹⁵⁶

Despite eBay’s pleas, the court stated that, on a very large scale, eBay favored and amplified commercialization of counterfeit products through the online auction sale of counterfeit products.¹⁵⁷ The court articulated that eBay had an obligation to make sure its website activity did not result in illegal acts that would cause damage to businesses.¹⁵⁸ Additionally, the court stressed eBay

149. *Louis Vuitton*, RG 2006077799 at 11. See also Lewis R. Clayton, ‘*Tiffany v. eBay*’, THE NAT’L L. J. (Aug. 11, 2008), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423571347> (“Sellers are responsible for the content of listings and the description of items; eBay does not inspect or take possession of goods. eBay charges an ‘insertion fee’ for each listing, and collects a ‘final value fee’ of 5.25% to 10% if an item is sold.”) (internal quotations removed).

150. *Louis Vuitton*, RG 2006077799 at 11. The French court declared that “eBay Inc. and eBay International AG are not merely hosters and may not, accordingly, benefit pursuant to their status as brokers from the provisions of Article 6.1.2 of the Act dated June 21, 2004 relating to confidence in the digital economy” *Id.* at 17.

151. Boivin, *supra* note 147.

152. *Id.*

153. *Louis Vuitton*, RG 2006077799 at 8.

154. *Id.*

155. *Id.* “[Louis Vuitton Malletier] also puts forward the existence of moral damage caused by the massive sale of infringing products on eBay’s sites, gradually affecting the considerable design and quality efforts which set off the products marketed by [Louis Vuitton Malletier].” *Id.* at 15.

156. *Id.* at 9.

157. *Id.* at 11.

158. *Id.* at 12. See also Boivin, *supra* note 148 (“[M]ere mentions in the eBay terms of use about illegal activities, which cannot be distinguished from the other terms of use . . . were not

did not fulfill its obligation to “verify that the sellers regularly performing numerous transactions on its sites are duly registered by various competent administrations, and, in France, with the Register of Businesses and Companies or the order of Trade, as well as social or other bodies.”¹⁵⁹

This lapse in obligation aggravated the court, and it believed that eBay exercised gross negligence by its repeated violations and failure to implement any efficient technical or human solutions to prevent sale of counterfeit products on its sites. On top of that, the court believed eBay was facilitating illegal trade for the “obvious purpose” of collecting earnings and commissions from the counterfeit transactions.¹⁶⁰ On the face of it, it appears that the French court weighed heavily against eBay on the fact that it collected commissions and profits from selling counterfeit goods.

The Court also said that eBay deliberately refused to create efficient and suitable means to fight against counterfeiting,¹⁶¹ such as obliging sellers to provide, upon request, a purchase bill or a certificate of authenticity of the products put on sale and found that to be an aggravating factor. Additionally, the court stated that eBay refused to permanently close the accounts of sellers found to be selling counterfeit merchandise after the first violation and to immediately withdraw illegal advertising reported by the LVMH company departments responsible for fighting against counterfeiting.¹⁶² Finally, the court commented that eBay should not be entitled to ask companies that are victims of counterfeiting on its sites to contribute financially to the fight against illegal activities committed on eBay.¹⁶³ The French court was appalled that eBay would require a third party company that had no control over its website to contribute financially.

The underlying reason for the decision on the merits was that Louis Vuitton had exceptional worldwide recognition after decades of hard work, placing it among the most prestigious brands in the world.¹⁶⁴ The French court found that “globalization of trade and appearance of new means of communication related to freedom of trade have favored commercialization of fraudulent products, including counterfeit products, which are a distortion of legal economy.”¹⁶⁵ The court recognized that Louis Vuitton was the victim of

sufficient . . . eBay should have emphasized . . . in sufficient clarity, that civil and penal consequences can be imposed on those who sell or buy counterfeits.”)

159. *Louis Vuitton*, RG 2006077799 at 12.

160. *Id.* at 10. The French court stated, “Whereas, the report of a renowned expert, Mr. Maurice Nussenbaum, which, however, was not prepared adversarially, was placed in evidence in order to enlighten the Court, whereas, at the outcome of his study, such expert found, on the basis of eBay’s own statistical data, that during the months of April to June 2006 149,739 advertisements including the Louis Vuitton trademark were broadcast on all of the eBay sites and gave rise to 96,581 actual sales; whereas, the average price of such sales was € 96.50” *Id.* at 13.

161. *Id.* at 12.

162. *Id.*

163. *Id.*

164. *Id.* at 9.

165. *Id.*

internet commercialization of continually increasing numbers of counterfeit products, and that the sale of these products was taking place on eBay.¹⁶⁶

This decision punished eBay for being an online auction site that could not exercise the type of proper care or control over its sellers that the French wanted, and, in the end, the nail in French eBay's coffin was that it collected commissions from the sale of counterfeit goods. This decision came down just weeks before the *Tiffany* decision, which came to a remarkably different conclusion.

B. The United States Decision: Tiffany Inc. v. eBay, Inc.

1. An Explanation of the United States Trademark Act

The Lanham Act¹⁶⁷ is the federal statute that governs trademarks in the United States.¹⁶⁸ The Lanham Act defines a trademark as:

any word, name, symbol, or device, or any combination thereof used by a person, or which a person has a bona fide intention to use in commerce¹⁶⁹ and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.¹⁷⁰

Trademark law includes both federal statutes and state laws and serves at least four main functions:

(1) They identify a particular seller's goods or services and distinguish them from those sold by others; (2) They signify that all goods or services bearing the mark come from or are controlled by a single source; (3) They signify that all goods or services bearing the same mark are of an equal level of quality; and (4) They serve as a primary method to advertise

166. *Id.*

167. The Lanham Act is codified at 15 U.S.C. § 1051 (2008).

168. 15 U.S.C. § 1127 (2008). For general background information on United States trademark law, see Anne Haring, *Basic Principles of Trademark Law*, 939 PLI/PAT. 51 (2008).

169. See 15 U.S.C. § 1127 (The word commerce means all commerce which may lawfully be regulated by Congress, otherwise known as interstate commerce).

170. MATTHEW BENDER, TRADEMARK AND UNFAIR COMPETITION DESKBOOK, 1-2 GILSON ON TRADEMARKS § 2.01 (2008). As currently defined by Section 43(a) of the Lanham Act, the term "trademark" refers to any word, name, symbol, or device, that indicates to the consumer both the source or origin of specific goods or services, and the quality associated with those goods and services. *Id.*

and sell goods and services.¹⁷¹

Trademark law affords owners of a trademark exclusive right over the use of the trademark, meaning registered common law trademarks cannot be used on or in connection with a product without permission from the trademark owner.¹⁷² Under the Lanham Act, a person may apply to register their trademark at the USPTO.¹⁷³

The touchstone of both common law and federal statutory trademark infringement claims is whether the manner of the defendant's use of the mark is likely to cause confusion, mistake, or deception among consumers.¹⁷⁴ Use of a registered trademark without permission from the mark owner can result in statutory legal consequences for the unauthorized use.¹⁷⁵ Mark owners can face financial and reputation damages if their mark is used outside of their control.¹⁷⁶ Therefore, "the most fundamental protection afforded by the Lanham Act prevents the unauthorized use of another's trademark for the same or related goods or services, since consumer confusion, mistake, or deception is inevitable in most cases where two sources put out related goods or services under the same marks."¹⁷⁷ Trademark law thwarts the use of identical or similar marks in a way that causes consumer confusion, mistake, or deception about the actual source of goods or services.

A trademark's main purpose is to be a source identifier that protects the investment made in a mark by its owner, thereby encouraging production of quality goods.¹⁷⁸ Generally, the more a mark owner invests in the trademark, the more "goodwill" there is built up in the mark.¹⁷⁹ A trademark serves as a symbol of the goodwill a business has acquired, and without the identification function performed by trademarks, buyers would have no way of returning to buy products that they prefer.¹⁸⁰ Therefore, Section 32(i) of the Lanham Act states that if the owner of a mark desires, it can "bring a civil action against a

171. Trafficking, *supra* note 31. See 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 3.2 (3rd ed. 2005).

172. Patent Office.com, <http://www.patentoffice.com/trademark-law.cfm?keywords=trademark+law&referrer=Adwords&camp=PatentOffice&group=trademark+law&keyword=french+trademark+law&traffictype=search&creativeid=858553582&sourcesite=> (last visited Feb. 26, 2010).

173. *Id.*

174. Keenan, *supra* note 111.

175. Patent Office.com, *supra* note 172.

176. *Id.*

177. Brett August, *Plus Ça Change . . . How a French Court may have Changed Internet Advertising Forever: Google France Fined for Selling Trademarked "Keywords"*, 2 Nw. J. Tech. & Intell. Prop. 5, 5-6 (2004).

178. Deborah F. Buckman, *Lanham Act Trademark Infringement Actions in Internet and Website Context*, 197 A.L.R. Fed. 17 (2004).

179. *Id.*

180. Trafficking, *supra* note 31. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3.2 (3rd ed. 2005).

person alleged to have used the mark without the owners [sic] consent”¹⁸¹ and if a court wants, it may grant an order authorizing the seizure of goods and counterfeit marks involved in such violation.¹⁸²

Unlike French law, United States trademark law has not been as willing to hold online auction sites liable for the sale of counterfeit goods.

2. *The United States Decision: Tiffany Inc. v. eBay, Inc.*

Tiffany Inc., a famous jeweler that registered TIFFANY® on the Principal Register of the USPTO,¹⁸³ brought an action against eBay for the sale of counterfeit TIFFANY® goods being sold on eBay’s website; namely, TIFFANY® silver jewelry.¹⁸⁴ The TIFFANY® brand is renowned as a high-quality, luxury good.¹⁸⁵ The TIFFANY® marks are indisputably famous, valuable assets owned by Tiffany, and the right to use the TIFFANY® marks in U.S. commerce has become incontestable.¹⁸⁶ Incontestability occurs when a mark owner registered on the Principal Registry has continuously used the registered mark in commerce for the goods or services listed on the registry for five consecutive years, subsequent to the date of such registration, and is still in use in commerce.¹⁸⁷ Tiffany, in its eBay lawsuit, alleged that counterfeit TIFFANY® silver jewelry was offered on eBay’s website from 2003 to 2006, and that the sale of these counterfeit goods cost Tiffany hundreds of thousands of dollars.¹⁸⁸ Among other claims, Tiffany charged eBay with direct and contributory trademark infringement by virtue of the assistance eBay gives to the individuals that sell Tiffany products and the profits eBay receives from those members selling counterfeit products.¹⁸⁹

181. *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 494 (S.D.N.Y. 2008). *See also* 15 U.S.C. § 1116 (2008).

182. *Tiffany Inc.*, 576 F. Supp. 2d at 493-94 (quoting *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 146 (2d Cir. 2007)). *See also* 15 U.S.C. § 1114(1)(a)-(b) (2008), stating that: “Any person who shall, without the consent of the registrant -- (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.”

183. *Tiffany Inc.*, 576 F. Supp. 2d at 471.

184. *Id.* at 469.

185. *Id.* at 471. “The protection of the quality and integrity of the brand and the trademarks is critical to Tiffany’s success as a retailer of luxury goods.” *Id.* at 471-72. *See* 15 U.S.C. § 1065 (2008) (“[T]he right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable . . .”). *See also* 15 U.S.C. § 1052(f) (2008) (Substantially exclusive and continuous use of mark in commerce for 5 years preceding application for registration, as prima facie evidence that mark has become distinctive.).

186. *Tiffany Inc.*, 576 F. Supp. 2d at 471.

187. *See* 15 U.S.C. § 1067 (2008).

188. *Tiffany Inc.*, 576 F. Supp. 2d at 469.

189. *Id.* at 470.

eBay denied that it helped facilitate the sale of counterfeit goods, especially with the way its business model is set up and the amount of money spent combating trademark infringement. eBay's business model is based on two components: the creation of listings and successful transactions between sellers and buyers. eBay makes its profits based on sellers' payment of an initial insertion fee and a final value fee based upon the final price for the item sold.¹⁹⁰ eBay does exercise control over the sellers by requiring all users to register with eBay and to sign a User Agreement forbidding users from violating any laws, third party rights, and eBay policies.¹⁹¹ If a user violates the agreement, the seller can be punished, which includes a warning, suspension, or expulsion.¹⁹² eBay can also restrict items being sold or listed on the auction website, and has a Trust and Safety Department, consisting of more than "[two hundred] . . . individuals focus[ed] exclusively on combating infringement, at a significant cost to eBay."¹⁹³ eBay has made significant investments in anti-counterfeiting initiatives and has invested around twenty million dollars each year on programs to advance safety on its website.¹⁹⁴

In order for Tiffany (or any company) to prevail on its trademark infringement claim, Tiffany had to establish that "(1) it has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) 'in connection with the sale . . . or advertising of goods or services,' (5) without the plaintiff's consent."¹⁹⁵ In addition, Tiffany had to prove that eBay's use of its mark was likely to cause consumer confusion, mistake, or deception as to the origin of the goods.¹⁹⁶ Tiffany failed to meet these standards by not proving that eBay knowingly encouraged others to dilute Tiffany's trademarks and by failing to demonstrate that eBay possessed knowledge or a reason to know of specific instances of trademark infringement or dilution as required under the law.¹⁹⁷

Taking both sides' liability into consideration, the court stated that the heart of the dispute was "who should bear the burden of policing Tiffany's valuable trademarks in Internet commerce."¹⁹⁸ Though eBay *may* have generally known that counterfeit Tiffany goods were being sold on its site, the

190. *Id.* at 475. "eBay's revenue is based on sellers using eBay to list their products and successfully completing sales through eBay." *Id.*

191. *Id.* at 476.

192. *Id.*

193. *Id.*

194. *Id.* See also eBay, Using Authentication and Grading Services, <http://pages.ebay.com/help/buy/authentication.html> (last visited Apr. 26, 2010) ("Buyers can get an item evaluated before purchasing it or get an evaluation of a recently purchased item. Sellers can boost bidder confidence by having items pre-authenticated before listing an item.").

195. *Tiffany Inc.*, 576 F. Supp. 2d at 495 (quoting *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 406-07 (2d Cir. 2005)).

196. *Tiffany Inc.*, 576 F. Supp. 2d at 495 (quoting *1-800 Contacts, Inc.*, 414 F.3d at 406-07).

197. *Tiffany Inc.*, 576 F. Supp. 2d at 526.

198. *Id.* at 469.

court held that eBay was not liable for contributory trademark infringement.¹⁹⁹ “The law [would] not impose liability for contributory trademark infringement on eBay for its refusal to take such preemptive steps in light of eBay’s “reasonable anticipation” or generalized knowledge that counterfeit goods *might* be sold on its website.” (emphasis added).²⁰⁰ Quite simply, the law demands more specific knowledge as to which items are infringing genuine luxury brands on eBay’s online auction site and which seller is listing those items before requiring eBay to take action.²⁰¹

Tiffany did acknowledge that the individual sellers, not eBay, were responsible for listing and selling the Tiffany counterfeit items. However, Tiffany believed eBay was obligated to investigate and control a seller’s illegal activity.²⁰² The court found, “In determining whether eBay is liable, the standard is not whether eBay could reasonably anticipate possible infringement, but rather whether eBay continued to supply its services to sellers when it knew or had reason to know of infringement by those sellers.”²⁰³ Therefore, the court did not use the “reasonable anticipation” standard.²⁰⁴ In fact, according to the court, eBay did everything in its power to stop infringers once it knew of the illegal activity.

On the other hand, the court did not believe that Tiffany did enough to stop counterfeit goods from being sold, stating that the company invested “relatively modest resources” to combat the issues.²⁰⁵ Three to five million of the fourteen million Tiffany budgeted over the last five years to combat counterfeiting was spent litigating this issue with eBay, and the court was unimpressed by the way Tiffany chose to spend its anti-counterfeiting money.²⁰⁶ Additionally, “Tiffany’s time dedicated to monitoring the eBay website and preparing [Notice of Claimed Infringement forms] was limited,” and it was not until 2006 that Tiffany began reporting violations on a daily basis to eBay.²⁰⁷ Tiffany also rejected the use of additional technology that had been suggested by eBay to help monitor and report violations, but it never attempted to develop its own technology to expedite the process of monitoring counterfeit products

199. LaLonde, *supra* note 76. See also *Tiffany Inc.*, 576 F. Supp. 2d at 514 (“There is no dispute that eBay was generally aware that counterfeit Tiffany jewelry was being listed and sold on eBay even prior to Tiffany’s initial demand letter.”).

200. *Tiffany Inc.*, 576 F. Supp. 2d at 470.

201. *Id.*

202. *Id.* at 469.

203. *Id.* at 469 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.* 456 U.S. 844, 854 (1982)).

204. *Tiffany Inc.*, 576 F. Supp. 2d at 469 (quoting *Inwood Labs., Inc.* 456 U.S. at 854 n.13 (1982)). “The standard is not whether a manufacturer ‘could reasonably anticipate’ possible infringement, but rather whether it knew or had reason to know that a third party is engaging in trademark infringement and continued to sell its products to that third-party.” *Tiffany Inc.*, 576 F. Supp. 2d at 503 (quoting *Medic Alert Found. United States, Inc. v. Corel Corp.*, 43 F. Supp. 2d 933, 940 (N.D. Ill. 1999)).

205. *Tiffany Inc.*, 576 F. Supp. 2d at 484.

206. See *id.*

207. See *id.*

on eBay.²⁰⁸ The court did not believe eBay's VeRO program was unduly burdensome and thought Tiffany's commitment to reporting infringing listings through the VeRO Program had been "sporadic and relatively meager."²⁰⁹ In sum, Tiffany's lackluster efforts to monitor its trademark convinced the court that Tiffany's idea of "combating counterfeit sales" was suing eBay rather than through its own monitoring.

Tiffany believed that it had adequately tried to inform consumers of counterfeiting problems on eBay. eBay encouraged rights owners, as an educational tool for consumers, to create an "About Me" webpage on the eBay website to inform eBay users about their products, intellectual property rights, and legal positions.²¹⁰ Tiffany took advantage of this tool and created a page in 2004, which said, "Most of the purported 'TIFFANY & CO.' silver jewelry and packaging available on eBay is counterfeit."²¹¹ "The "About Me" page explained that genuine Tiffany merchandise is available only through stores, catalogs, and Tiffany's own website, and that the manufacture and sale of counterfeit Tiffany goods on eBay is a crime."²¹²

Ultimately, the New York court emphasized that when a company has a trademark, it is not the job of other companies to be responsible for protecting that intellectual property. Trademark rights holders bear the primary responsibility to police their trademarks.²¹³ Tiffany argued that because eBay could potentially screen out counterfeit TIFFANY® goods more cheaply, quickly, and effectively than Tiffany, the trademark policing burden should shift to eBay.²¹⁴ According to the court, "Certainly, the evidence . . . failed to prove that eBay was a cheaper cost avoider than Tiffany with respect to policing its marks."²¹⁵ More importantly, the court also noted that, "Even if it were true that eBay is best situated to staunch the tide of trademark infringement to which Tiffany and countless other rights owners are subjected, that is not the law."²¹⁶ In fact, the law states that the trademark owner is responsible, and the burden lies solely with that owner.

208. *Id.* at 484.

209. *Id.* at 518.

210. *Id.* at 479.

211. *Tiffany Inc.*, 576 F. Supp. 2d at 479.

212. *Id.* at 498.

213. *Id.* at 518 (citing *MDT Corp. v. New York Stock Exch.*, 858 F. Supp. 1028, 1034 (C.D. Cal. 1994) ("The owner of a trade name must do its own police work."). *See also* *Hard Rock Cafe Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992) (explaining defendants are not required "to be more dutiful guardians of [trademark plaintiffs'] commercial interests").

214. *Tiffany Inc.*, 576 F. Supp. 2d at 518 ("[T]he corporate owners of trademarks have a duty to protect and preserve the corporation's trademark assets though vigilant policing and appropriate acts of enforcement"). *See also* *Inwood Labs., Inc.*, 456 U.S. at 854 n.13 (holding that imposing liability where manufacturers could reasonably anticipate trademark violations is a "watered down" and incorrect standard).

215. *Tiffany Inc.*, 576 F. Supp. 2d at 518.

216. *Id.*

The opinion did leave open the possibility for an online auction website to be liable for trademark infringement. If any manufacturer or distributor intentionally induces a person or company to infringe a trademark or continues to offer or supply its product to a person that is known to the company to be violating trademark rights of a genuine trademark, then the manufacturer or distributor is contributorily responsible for any harm that occurs as a result of the deceit.²¹⁷ The court emphatically stated, “Such blatant trademark infringement inhibits competition and subverts both goals of the Lanham Act. By applying a trademark to goods produced by one other than the trademark’s owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain.”²¹⁸ However, because eBay did take reasonable steps to subvert the malfeasance of trademark infringers, the court was very reluctant to place any liability on eBay.

This decision did not remove eBay from all potential liability because “eBay [does] have a legal obligation, once it [knows] of *specific instances of counterfeiting*, to stop *those sales*.”²¹⁹ Nevertheless, just because eBay had that obligation did not mean that Tiffany could abandon its responsibility to alert eBay to potentially infringing listings.²²⁰ Once sufficient efforts had been made by eBay to eliminate listings that it knew or had reason to know offered counterfeits, “Tiffany bore the burden to stop the sales of any other, more non-obvious counterfeits, those that eBay could not otherwise know or have reason to know were infringing.”²²¹

Tiffany was aware of the Louis Vuitton judgment at the time its lawsuit against eBay was being heard.²²² In a letter addressed to the court, Tiffany requested the New York court to recognize the decision issued on July 3, 2008, by the Commercial Court of Paris, France, and “give preclusive effect to factual determinations made therein.”²²³ However, for reasons not stated, Tiffany withdrew its request.²²⁴ This note is the first indication that the United States court knew of the Louis Vuitton decision and consciously disregarded the Commercial Court of Paris’ factual and legal determinations grounding the Tiffany decision solely in U.S. law.

217. *Inwood Labs., Inc.*, 456 U.S. at 854 (footnote omitted).

218. *Id.* at 855 n.14.

219. Anne Gilson LaLonde, *Gilson LaLonde on Tiffany Ultimately Responsible for Protecting its Marks, So No Contributory Infringement by eBay for Sale of Counterfeit Goods: Tiffany, Inc. v. eBay, Inc.*, Dec. 12, 2008, <http://law.lexisnexis.com/practiceareas/Insights--Analysis/Counterfeiting/FREE-DOWNLOAD-Gilson-LaLonde-on-Tiffany-Ultimately-Responsible-for-Protecting-its-Marks-So-No-Contributory-Infringement-by-eBay-for-Sale-of-Counterfeit-Goods-Tiffany-Inc-v-eBay-Inc>.

220. *Id.*

221. *Id.*

222. *Tiffany Inc.*, 576 F. Supp. 2d at 471.

223. *Id.*

224. *Id.* “A conference regarding this request was held with the Court on July 8, 2008. Tiffany subsequently withdrew the request by letter dated July 9, 2008.” *Id.*

C. Differences Between French and United States Trademark Law

The main difference between French and United States trademark law is the seemingly nationalistic nature of the French trademark system. In France, the “co-existing system combining Community-wide trademark rights and territorially-based national trademark rights are similar, but only in a general sense, to the trademark system in the United States.”²²⁵ Unlike the United States, France treats trademark rights similar to property rights.²²⁶ French Intellectual Property Code, Article L. 713-2 “provides that a trademark is infringed, even where there is no likelihood of confusion”, when “(1) defendant reproduces the characteristic elements of the mark, or (2) defendant uses the mark in any act of commercial competition conducted with a counterfeit mark.”²²⁷ Also, both the United States and French trademark law are concerned with the trademark owners’ goodwill and reputations, which require investment of financial and intellectual resources.²²⁸ However, the French may find infringement even in the absence of likelihood of confusion.²²⁹

Beyond each country’s own trademark laws, France and the United States are also bound to other states or treaties. The French, besides having national trademark laws, are bound to the rules of the European Union and treaties to which France is signatory.²³⁰ “Trademark rights are limited territorially and the applicable law depends on each national or regional regulation.”²³¹ For instance, “the owner of a French trademark cannot prevent the use and/or registration of its trademark by a third party outside France if it does not own foreign trademarks.”²³² Also, the United States system provides for nationwide registration under the Lanham Act, yet acknowledges state-granted registrations.²³³

Another distinction is that United States “law and public policy tend to favor consumer welfare and freedom of competition.”²³⁴ “This difference is reflected . . . in the stark contrast between France’s restrictive attitude toward comparative advertising and America’s far more permissive stance . . . [T]he

225. Keenan, *supra* note 111.

226. Patrick F. Nevins, *Is Google™ Doing Evil with Trademarks?*, 40 CONN. L. REV. 247, 265 (2007) (“[T]rademark rights are not property rights in gross, but limited entitlements to protect against uses that diminish the informative value of marks.”) (quoting Stacy L. Dogan & Mark A. Lemly, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 805 (2004)). See also MICHELET & BELLOUR, *supra* note 87, at § 58 (“Registration of a mark confers on its owner a right of property in that mark for the goods and services designated in the application.”).

227. Keenan, *supra* note 111.

228. *Id.*

229. *Id.*

230. *Id.*

231. Bretonnière & Cailac, *supra* note 96.

232. *Id.*

233. Keenan, *supra* note 111.

234. *Id.*

recent decisions illustrate some of the issues that businesses face in this developing area.”²³⁵ This difference has mostly been litigated in regard to search engines and keyword advertising.²³⁶

The United States and French trademark infringement laws do share some similarities, namely consumer protection where there is a likelihood of consumer confusion, mistake, or deception.²³⁷ For instance, French Article L.313-3 provides that a trademark is infringed where there is a likelihood of confusion²³⁸ and “(1) defendant reproduces a mark for products or services similar to those listed in the trademark registration, or (2) defendant imitates a trademark or uses an imitated trademark for goods and services that are identical or similar to those listed in the trademark registration.”²³⁹ Under the Lanham Act, the United States is also concerned with the likelihood of confusion, mistake, or deception as to the source, sponsorship, affiliation, or endorsement of a good or service.²⁴⁰

Despite any similarities in trademark law, the Tiffany and Louis Vuitton judgments clearly amplify differences between the two countries’ views regarding online auction site trademark infringement and how future litigations might be handled in each respective country.

III. ANALYSIS OF HOW THESE DECISIONS MIGHT AFFECT EUROPEAN AND UNITED STATES LITIGATION

A. *Was the United States or French Trademark Decision “Correct”?*

It is important to consider the merits of both the United States and French trademark judgments. Both decisions carry important information about the way these two countries view trademarks and the amount of responsibility necessary to maintain a trademark brand. So, is one decision more “correct” than the other, or can United States and French trademark law learn from each other to create a more uniform global approach to policing trademarks on online auction sites?

235. *Id.*

236. See, e.g., Alex Bainbridge, *Is UK Trademark Law more Similar to US [sic] or French Trademark Law?*, May 23, 2008, <http://www.tourcms.com/blog/2008/05/23/is-uk-trademark-law-more-similar-to-us-or-french-trademark-law/> (“The Lower Court of Nanterre required Google France to pay 70,000 euros (about \$81,400) to two companies that owned the rights to certain words. Google France sold the use of these words to advertisers through its AdWords program.”).

237. Keenan, *supra* note 111.

238. *Id.*

239. *Id.*

240. See 15 U.S.C. § 1125.

1. *Why the United States Decision was Correct*

Why should a company be responsible for monitoring another's trademark rights? This is a major question raised by *Tiffany Inc. v. eBay, Inc.*²⁴¹ The Lanham Act does not shift the burden for policing trademarks from one who owns the mark to one that facilitates the sale of goods (or services) in association with that mark.²⁴² The primary goal of United States trademark law is to protect consumers from confusion, mistake, or deception about the source or sponsorship or affiliation of goods and services,²⁴³ not for a non-trademark owner to seek out and prevent trademark violations.²⁴⁴ Though the French are concerned with protecting consumers, the *Louis Vuitton* decision did not appear to be as concerned with consumers as it did with protecting and limiting damage to the trademark owner.

eBay does not believe that LVMH is at all concerned about its consumers. In fact, eBay stated, "If counterfeits appear on [eBay's] site, we take them down swiftly,"²⁴⁵ meaning eBay is dedicated to protecting consumers from counterfeit goods by removing them as quickly as possible. eBay also said that the ruling is not about counterfeiting as much as an attempt by LVMH "to protect uncompetitive commercial practices at the expense of consumer choice and the livelihood of law-abiding sellers that eBay empowers every day."²⁴⁶ eBay's position was that the French court was more concerned about its well-known trademark brands, and less about consumers and legitimate sellers on its French eBay online auction site.

Additionally, making online auction sites police the trademarks of other companies has many unintended consequences. Companies that trade branded products would be potentially banned from accurately describing products by their brand name, even though this has been proven to be within the boundaries of trademark law in the United States.²⁴⁷ Besides difficulties in finding

241. *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 469 (S.D.N.Y. 2008).

242. *See generally* 15 U.S.C. § 1051.

243. MATTHEW BENDER, TRADEMARK AND UNFAIR COMPETITION DESKBOOK, 1-1 GILSON ON TRADEMARKS § 1.03 (2008).

244. *Tiffany Inc.*, 576 F. Supp. 2d at 515 (citing *Hard Rock Cafe Licensing Corp.*, 955 F.2d at 1149, which held that there is "no affirmative duty to take precautions against the sale of counterfeits. Although the 'reason to know' part of the standard for contributory liability requires [the defendant] to understand what a reasonably prudent person would understand, it does not impose any duty to seek out and prevent violations.").

245. Henry Samuel, *Counterfeit Luxury Goods Cost eBay \$61.7 Million in Damages*, THE DAILY TELEGRAPH (July 1, 2008), available at <http://www.nysun.com/style/counterfeit-luxury-goods-cost-ebay-617-million/80993/>. *See also* Carvajal, *supra* note 11.

246. Cnn.com, *eBay fined \$63m Over Fake Luxury Goods*, July 1, 2008, <http://www.cnn.com/2008/BUSINESS/06/30/louis.vuitton/index.html>. *See also* Carvajal, *supra* note 11.

247. *See Tiffany Inc.*, 576 F. Supp. 2d at 473-74 (quoting *Dow Jones & Co. v. Int'l Sec. Exch., Inc.*, 451 F.3d 295, 308 (2d Cir. N.Y. 2006)), finding that:

While a trademark conveys an exclusive right to the use of a mark in commerce in the area reserved, that right generally does not prevent one who trades a

counterfeit sellers, eBay would have to contend with complex international jurisdictional and enforcement issues.²⁴⁸ “Making eBay definitively responsible for the sale of counterfeit products merely reduces the efficiency of its business model and may lead to resentment towards active litigants from consumers who use eBay for legitimate trading.”²⁴⁹

Even the French are a bit shocked by the results of the LVMH decision.²⁵⁰ Alexandra Neri, head of Intellectual Property for Herbert Smith, stated, “From a legal point of view the judgment doesn’t make any sense. Before this decision eBay obtained 18 others that said the company wasn’t liable.”²⁵¹ Because the French are so protective of intellectual property rights, especially of famous brands,²⁵² the decision has seemingly become too nationalistic, protecting brand owners at the expense of free trade and consumer choice.

eBay is acutely aware of the counterfeit sales and has taken measures on its website to combat the issue. eBay provides intellectual property rights owners, through its VeRO program, the opportunity to report, and have eBay remove, listings on the site that infringe on their rights.²⁵³ Although reporting violations requires constant monitoring by intellectual property rights owners, especially since millions of sales go through eBay, it is much cheaper than suing eBay and asking eBay to do the same type of monitoring.²⁵⁴ It is more advantageous for intellectual property rights owners to retain control of reporting violations, because if they do not eBay would have to “pull every suspect listing even if to do so would be detrimental to the reputation of the

branded product from accurately describing it by its brand name, so long as the trader does not create confusion by implying an affiliation with the owner of the product.

248. Actuate IP, *supra* note 66.

249. *Id.*

250. See Ben Moshinsky, *French Court Hits eBay with €40m in Fines for Trading in Counterfeits*, THE LAWYER (July 7, 2008), available at http://www.intangiblebusiness.com/store/data/files/419-Ebay_fined_for_counterfeits_The_Lawyer_7_July_2008.pdf. See also Counterfeiting on the Internet – [e]Bay held Jointly Responsible for the sale of Counterfeit Goods for the First time in France, <http://bakerxchange.com/ve/ZZ6790g8661U62mQ27923> (last visited Feb. 26, 2010), which commented that:

This constitutes a major turn in French case-law since the previous decisions ruling on similar cases did not convict eBay or other auctions platforms on the basis that they were merely “*technical intermediaries*” and/or “*hosting services providers*”. Indeed, pursuant to French law, Courts ruled that eBay as a hosting services provider had neither the obligation nor the possibility to control the contents of its websites and had no responsibility in this respect except in very specific circumstances

251. Moshinsky, *supra* note 250.

252. See *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 9, available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Cr%20Decision.pdf> (finding that Louis Vuitton had exceptional worldwide recognition after decades of hard work, placing them among the most prestigious brands in the world).

253. Actuate IP, *supra* note 68.

254. *Id.*

intellectual property rights owner.”²⁵⁵ It would be a great detriment to force online auction sites to monitor trademarks, because it gives the mark owner free reign to stop diligently policing their trademark and blame another entity for counterfeiting problems. Notably, the New York court stated that even though eBay might have known of past infringements, that should not mean that trademark owners can use that generalized knowledge as ammunition to force eBay into prospectively policing its online auction site to prevent any *future* infringements.²⁵⁶

Communication has been globally expanded thanks to online sales. However, “if intermediaries have to take on the burden of policing trademarks, many internet service providers will take the easy route and remove any posting that is even remotely suspicious. That would effectively quash the extraordinary growth of online commerce and speech.”²⁵⁷ Forcing online auctions to police trademarks could expand the trademark legal regime and threaten the success and viability of online auction site businesses and e-commerce generally.²⁵⁸ Also, if an online service provider is suddenly liable for its users violating trademark laws, the online auction sight might decide to remove anything and everything that could be an infringing item.²⁵⁹ Removing these items might be “[t]hat slippery slope [which] will turn service providers into censors, potentially leading to removal of creative and lawful online conduct and speech.”²⁶⁰ Tiffany, like all retailers and distributors, would like the opportunity to control the distribution channel.²⁶¹ However, if this decision had gone the other way, it could have led brand owners to be less vigilant about their trademarks and more vindictive towards online marketplaces that did not, or could not, remove all possibly infringing items.²⁶²

2. *The Virtue of the French Decision*

Though eBay was outraged over the *Louis Vuitton* decision, LVMH

255. *Id.*

256. Eric Goldman, *Tiffany v. eBay District Court Opinion Analysis* (Feb. 29, 2008 22:30 EST), http://blog.ericgoldman.org/archives/2008/07/tiffany_v_ebay_1.htm.

257. *Jewelry Company Quest to Expand Trademark Law Could Quash Internet Commerce*, U.S. FED. NEWS (Dec. 4, 2008), available at 2008 WLNR 23390608.

258. Brief for Amazon.Com, Inc., Google Inc., Information Technology Association of America, Internet Commerce Coalition, Netcoalition, United States Internet Service Provider Association, and United States Telecom Association as Amici Curiae in Support of Defendant-Appellee [eB]ay, Inc., Tiffany (NJ) Inc. and Tiffany and Company v. eBay Inc., Dec. 2, 2008, http://www.eff.org/files/filenode/tiffany_v_ebay/amazonetalamicus.pdf.

259. Law Updates.com, Oliver A. Taillieu & D. Dennis La, Esq., *Tiffany v. eBay: A Trademark Owner Must Police Its Own Marks on the Internet*, Sept. 26, 2008, http://www.lawupdates.com/commentary/itiffany_v_ebay_i_a_trademark_owner_must_police_its_own_marks_on_the_intern.

260. *Id.*

261. *See Should Online Marketplaces be the Trademark Police?*, Nov. 14, 2007, <http://blog.netchoice.org/2007/11/should-online-m.html>.

262. *Id.*

brought up major deficiencies in the eBay auction model. For example, even if eBay caught a counterfeit seller, “it is easy for the traders caught out to do exactly the same again using a different name.”²⁶³ Approximately 178 infringing sellers relisted infringing items after eBay caught them selling those goods, demonstrating that eBay did not (or could not) take the proper steps to stop its service to those specific infringers.²⁶⁴ Without requiring a social security number or another unique identifier, counterfeit sellers could keep changing personal information and eBay would be none the wiser.

Beyond just controlling the sellers, a French judge gave an example of how eBay could control the actual sale of counterfeit goods: “the company should consider asking for the certificates of authenticity and serial numbers of luxury goods items for sale on its site to make sure the goods are genuine.”²⁶⁵ Another suggestion was requiring sellers to guarantee that products offered for sale were authentic, or, after the first violation of selling counterfeit products, permanently closing the account of any offender.²⁶⁶ The French judge did not require eBay to take greater steps in preventing counterfeit sales at this time, but his comments suggest that French courts may apply higher standards to eBay in the future.²⁶⁷

The next major deficiency, according to the French court, was that eBay’s anti-counterfeiting model required companies to financially contribute to eBay’s VeRO program.²⁶⁸ LVMH was upset that its company, and other similar companies, would constantly be spending tremendous resources and time policing an online auction website they have no control over.²⁶⁹ The French court explained that eBay should not be permitted to ask companies to contribute financially when they are the victims of counterfeiting.²⁷⁰ In fact, according to LVMH, ninety percent of the Louis Vuitton bags and Christian Dior perfumes sold on eBay are actually fakes²⁷¹ and profits have been hurt by the sale of these fake goods.²⁷² Such a large percentage of fake items,

263. *Watchdog Buys Counterfeit Goods from eBay’s ‘Most Trusted’ Sellers*, BBC (June 11, 2006), available at http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/11_november/06/watchdog.shtml.

264. Elizabeth Varner, *Tiffany Inc. v. Ebay [sic], Inc.: Justice White’s Outdated Guide to Trademark Infringement will Likely Result in Appeals*, 11 TUL. J. TECH. & INTELL. PROP. 157, 173 (2008).

265. *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 7 available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf>.

266. *Id.*

267. See Richard Waters, *Ebay [sic] Hammered on Fake Luxury Goods*, FIN. TIMES (July 1, 2008), available at http://www.ft.com/cms/s/0/86254028-4707-11dd-876a-0000779fd2ac.html?ncklick_check=1.

268. See *Louis Vuitton*, RG 2006077799 at 10.

269. *Id.* at 12.

270. *Id.*

271. Carvajal, *supra* note 11.

272. Suzy Jagger, *Ebay [sic] Braced for Wave of Copycat Lawsuits over Internet Fakes*, THE TIMES (July 2, 2008) at 42, available at <http://business.timesonline.co.uk/tol/>

according to some sources, are not entirely covert; in fact, it is downright obvious. An example of the blatant counterfeiting on eBay, there was one day where shoppers could pick from more than 2,500 "supposedly genuine" Louis Vuitton handbags; the company's French site, by contrast, listed just 80.²⁷³ If only ten percent of items sold on eBay are genuine, LVMH did not see how contributing financially would stop the sale of counterfeit goods.

Shoppers are also not silent about receiving fake products. Currently, as many as 125 consumers have filed complaints with eBay because they believed the Tiffany items they purchased are counterfeits.²⁷⁴ The combination of blatant counterfeit sales and consumer complaints puts some of the onus on eBay and not the trademark owner. Because fake merchandise is so readily available to consumers, it does not seem unreasonable to take inexpensive measures to enhance the security on eBay's website.

eBay's motivation to combat counterfeiting might be suspect, given that it makes a profit from each sale. Even though trademark owners are vigorously fighting and spending money to stop the sale of their counterfeit products, eBay is making a profit off of those sales because "[e]Bay takes a small percentage of the value of every sale on its site, as well as a flat fee, and thus earns money from counterfeits sold on its site as well as genuine items."²⁷⁵ Though eBay reports that less than one in every 10,000 items generates a fraud complaint,²⁷⁶ the company listed 1.7 billion items in 2005, meaning that "eBay averages more than 460 fraudulent listings every 24 hours -- each of which can stay active for days and snare multiple buyers."²⁷⁷ Selling 1.7 billion items adds up to a lot of transaction fees, and the French were rightly upset at eBay's conflict of interest because stopping the sale of counterfeit goods on eBay means that the company loses commissions.

With the combination of eBay's lack of control over sellers, making companies financially contribute to a business model they have no control over, and the collection of commission off of counterfeit products, it is not surprising that the French court believed their LVMH decision was justified. The French eBay site blatantly marketed and sold products that were counterfeit, and the explanation that they were merely a site host that facilitated transactions was not a good enough reason for the French to relieve eBay of liability.

business/industry_sectors/retailing/article4251692.ece.

273. Waters, *supra* note 267.

274. Tiffany Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 487 (S.D.N.Y. 2008).

275. *eBay's Legal Woes Handbagged*, THE ECONOMIST (June 19, 2008), available at http://www.eiu.com/index.asp?layout=ib3Article&article_id=1623470147&country_id=&pubtypeid=1122462497&industry_id=&company_id=380070438&channel_id=&rf=0.

276. Jim Wyss, *Cyber-Sleuth Making a Bid to Wipe out Scams on Ebay: A Miami Springs Man has made it His Mission to Ferret Out Online Thieves and Scammers on eBay*, MIAMI HERALD (Sept. 16, 2005), available at 2005 WLNR 14585049.

277. *Id.*

B. How These Polarized Decisions Will lead to International Forum Shopping

One of the United States' leading intellectual property lawyers predicted that Louis Vuitton's victory over eBay could possibly prompt designers to start a chain of lawsuits looking to stop the sale of their fake goods on the Internet.²⁷⁸

Since the French court determined they had jurisdiction over French eBay, this could set off a chain of French luxury brands, or any trademark holder who meets French jurisdictional criteria, engaging in international forum shopping. Forum shopping is the process by which a plaintiff chooses among two or more courts that have the power--technically, the correct jurisdiction and venue--to consider his case. This forum decision is based on which court is likely to consider the plaintiff's case most favorably.²⁷⁹

Plaintiffs could consider the most favorable jurisdiction to their case, and would unlikely be hampered by an Internet server's location. The way that the Internet's hardware and software structure is designed ignores, rather than acknowledges, a geographic location.²⁸⁰ Therefore, "[i]t is easy to understand the unique problem that the Internet poses in jurisdictional matters . . . [because] [t]he very infrastructure of the internet makes it difficult to determine some facts fundamental to the exercise of jurisdiction."²⁸¹ There is a lack of geographic boundaries on the internet.²⁸² Businesses are aware of this difficulty but are unlikely to cut off domestic e-commerce business simply to avoid international liability.²⁸³ Businesses have already begun to try and geographically limit access to their online commercial offerings through measures like click-wrap agreements or software bars, albeit not that successfully.²⁸⁴

Due to a lack of geographical boundaries, the Louis Vuitton ruling could "encourage a number of other designers to sue eBay as well."²⁸⁵ Additionally, eBay might become more vulnerable to counterfeit claims outside of the luxury goods market because the Louis Vuitton decision set the precedent for all trademark owners, not just luxury goods owners.²⁸⁶ It may become very

278. Jagger, *supra* note 272.

279. Nolo.com, <http://www.nolo.com/definition.cfm/Term/6A51B5C1-469D-4D5E-BBFB579BBFB0496C/alpha/F/> (last visited Mar. 8, 2009).

280. Brian D. Boone, *Bullseye!: Why a "Targeting" Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally*, 20 EMORY INT'L L. REV. 241, 246 (2006).

281. *Id.* at 245.

282. *Id.*

283. *Id.* at 249-50. Germany is another potential location favorable to trademark owners. See *supra* notes 16-17 and accompanying text.

284. Boone, *supra* note 280, at 249-50.

285. Jagger, *supra* note 272. See also Carvajal, *supra* note 11.

286. Vidya Ram, *eBay Branded by French Ruling*, FORBES (June 30, 2008), available at http://www.forbes.com/2008/06/30/eBay-lvmh-closer-markets-equity-cx_vr_mp_0630markets46.html.

expensive for eBay to run international online auction sites if other countries have the same jurisdictional criteria as France, making eBay liable if their online auction site is directed at the country's population and is the place where the counterfeit harm occurs.²⁸⁷ eBay could be constantly litigating matters across the globe, which might eventually run the company into the ground. Though there is no indication that the Louis Vuitton decision was anything more than a protection of French trademarks, such a judgment of this type of litigation could lead other trademark owners to believe they could be successful as well.

IV. POTENTIAL SOLUTIONS

The most practical solution to these polarized decisions would be for the United States and France to harmonize their online auction site trademark laws and policies in the appeals process of these cases. Not only would this make it easier for eBay and other online retailers to conduct business internationally, but it would also cater to the general long-term goals of trademark owners to seek uniformity in worldwide trademark laws.²⁸⁸ Due to globalization, it is imperative to harmonize international trademark laws and procedures because greater uniformity of these laws will "reduce costs, expedite registration and help ease administrative burdens on trademark owners."²⁸⁹ Treaties, use of model templates, and the passage of preemptive legislation are all means available to harmonize trademark laws.²⁹⁰ This, however, is a lofty goal. Organizations such as INTA have created a model anti-counterfeiting bill to harmonize laws,²⁹¹ and perhaps it will take an entity like INTA to harmonize worldwide trademark laws. It is also important to note other countries in Europe may not follow France's lead in favoring trademark owners.²⁹² Despite efforts to harmonize trademark laws across the European Union,²⁹³ it has not yet occurred. Therefore, since harmonization of international trademark laws is unlikely to happen anytime soon, it is important to find some realistic solutions to the counterfeit problem on online auction sites that will appease both sides.

287. *Id.* See *Louis Vuitton*, Tribunal de commerce [T. Com.] [Commercial Court of Paris] Paris, June 30, 2008, RG 2006077799 (Fr.), at 2, available at <http://www.qbpc.org.cn/uploads/download/LVM%20vs%5B1%5D.%20eBay%20Paris%20Commercial%20Ct%20Decision.pdf> (finding that Article 46 allows a party to use the jurisdiction of the place where the damaging fact occurred or the place where the damage has been suffered, jurisdiction was deemed proper in France).

288. Kimbley Muller, *INTA and Model Law/Examination Guidelines*, 93 TMR 141 (2003).

289. INTA, Harmonization, http://www.inta.org/index.php?option=com_content&task=view&id=130&Itemid=146&getcontent=3 (last visited Apr. 26, 2009).

290. Muller, *supra* note 288.

291. See INTA, Model State Anti-Counterfeiting Bill: An Act to Provide for the Protection of Trademarks against Counterfeiting, http://www.inta.org/index.php?option=com_content&task=view&id=1439&Itemid=146&getcontent=3 (last visited Apr. 26, 2010).

292. Keenan, *supra* note 111.

293. *Id.*

It is undeniable that fraudulent activity occurs on online auction sites. The question is what practical, reasonable steps can be taken to curb the counterfeiting and how online auction site policies and regulations can be amended to require these changes. This is a straightforward argument about whether “online auction sites should be pro-active in policing the property being sold on their sites.”²⁹⁴ eBay has taken measures to prevent fraudulent behavior, but is it enough? Though shoveling all the liability on online auction sites is not the solution, eBay should not be given a get out of jail free card for hosting illegal counterfeit activity. Greater, more cost-efficient measures need to be implemented by eBay to curb behavior that forces brand owners to police their trademarks so inefficiently.²⁹⁵ Additionally, some responsibility must be placed on the consumer, because counterfeiting luxury goods would not exist if there were not a market to purchase them.

A. Making the Online Auction Site more Liable

The main problem with placing all trademark policing responsibilities onto the trademark owner is the potential for willful blindness from eBay. Since online auction sites make a profit off of counterfeit sales, there may not be an incentive to be as diligent in removing counterfeit items. If online auction sites were only responsible for “general” anti-counterfeiting measures, they might fail to investigate specific infringement, even though the online auction site might have the knowledge that specific trademarks were being infringed.²⁹⁶

eBay’s conflict of interest between stopping counterfeit activities and making a profit becomes more apparent the further one digs into its business practices. In the Tiffany case, eBay recognized and admitted that its “buyers [were] very interested in brands”²⁹⁷ and in order to attract potential buyers to its website, eBay dedicated a significant amount of time to assisting the growth of eBay sellers in the Jewelry & Watches category.²⁹⁸ In fact, eBay considered itself to “be a competitor of Tiffany and the principal source of ‘value’ pricing of Tiffany jewelry,” and eBay “regularly conducted promotions to increase bidding on auctions and to increase sales of fashionable and luxury brands, including Tiffany.”²⁹⁹ Though the New York court did not find this information detrimental to eBay, on a broader scale it is detrimental to

294. See Adrian Portlock, CheckMEND Service Addresses Online Auction Sites’ Problems: Need for Stronger Solutions Underscored by eBay Counterfeits Ruling in France; US [sic] Decision Imminent, <http://blog.recipero.com/category/checkmend-usa/> (July 3, 2008).

295. See, e.g., Varner, *supra* note 264, at 172. (“[e]Bay was willfully blind to the trademark infringement on its Web site. The court’s finding that eBay was not willfully blind because it conducted general anticounterfeiting procedures on its Web site is incorrect.”).

296. See *id.* at 172.

297. Tiffany Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 480 (S.D.N.Y. 2008).

298. *Id.*

299. *Id.*

trademark brand owners. Because eBay used the phrase “value pricing,” it is puzzling how the court applauded their anti-counterfeiting measures when Tiffany’s “About Me” page and business practice advised consumers the sale of products is tightly controlled and that there is never value pricing.³⁰⁰ Making an online auction site more prone to liability might provide an incentive for online auctions to police their markets more carefully.³⁰¹

Nevertheless, “while it may be tempting to force eBay into changing its business practice to better suit intellectual property rights owners, it is unlikely to have any long-term effect on an issue which really needs a well-structured rights protection regime to resolve.”³⁰² eBay can implement some well-structured measures as a site host to further reduce the sale of counterfeit goods without completely revamping its online auction website. First, eBay can force consumers to check a disclaimer box every time a bid is placed indicating that the sale might not be authentic. Additionally, it could include a disclaimer saying that the only way to assure a genuine product is to purchase the product from the brand owner itself, and the consumer risks the chance of buying a counterfeit item. eBay can prompt the consumer to go to the “About Me” pages,³⁰³ which list the manufacturers and, if the consumer desires, he or she can contact the manufacturer to make sure the item being purchased is indeed genuine.³⁰⁴

Another possible solution is not allowing the sale of brand new luxury items on eBay, or, if there were brand new items sold, the luxury brand owner would be the exclusive seller. This would allow products to be authenticated either directly on the online auction site, or by some other means, such as a verification e-mail from the manufacturer or eBay. Non-manufacturer sellers, or consumers who are just re-selling products on eBay, could advertise the sale of products as “like new” or “unused,” or comparable language, protecting both the consumer and the brand owner.

However, not everyone agrees that this type of authentication would be fruitful. “[I]f eBay [loses] its appeal in France it would likely have to reach an agreement with the luxury goods companies to track serial numbers,” which would perhaps be too unwieldy and/or expensive, and eBay would lose all control of its pricing policy.³⁰⁵ In the worst case scenario, eBay might have to

300. See LaLonde, *supra* note 76 (“Tiffany sells its new silver Tiffany jewelry in the United States only in its retail stores or through its catalogs, web site or Corporate Sales Department; the court referred to its distribution chain as tightly controlled. It never sells overstock merchandise or puts its products on sale at lower prices.”).

301. Varner, *supra* note 264, at 174.

302. Actuate IP, *supra* note 68.

303. eBay did eventually provide a disclaimer for Tiffany, but eBay should perhaps implement this policy throughout the entire website for all brand owners. See *Tiffany Inc.*, 576 F. Supp. 2d at 491 (“The warning message also provided a link to the Tiffany ‘About Me’ Page. If the seller continued to list an item despite the warning, the listing was flagged for review.”).

304. See *Tiffany Inc.*, 576 F. Supp. 2d at 491.

305. Ram, *supra* note 286.

give up selling certain luxury lines altogether.³⁰⁶

Despite concerns, this type of sales model has already been implemented with the website *Portero.com*.³⁰⁷ *Portero.com* provides shoppers with the security of having the items sold authenticated, therefore removing the concern of selling counterfeit goods for both the consumer and the retailer.³⁰⁸ This idea of having a portion of eBay that exclusively sells luxury goods authenticated by trademark brand owners is an option that could cut down the cost of litigation and uncertainty facing the online auction website today.³⁰⁹ Having a portion of the online auction site allow for authentication should not be anymore burdensome to the online auction site than the twenty-million already spent³¹⁰ in combating counterfeit practices.

However, what message does that send to the world in terms of keeping the Internet free and open to force an online platform to take responsibility for counterfeited goods? Take the Global Online Freedom Act of 2008, the goal of which was “to use United States influence – both governmental and commercial – to advance Internet freedom in repressive regimes.”³¹¹ Making an online auction site more liable might force countries around the world into censorship and surveillance of the internet to avoid lengthy lawsuits and counterfeit goods from flowing freely across borders.³¹² Though this Act is meant to focus on political freedom of the internet, countries could easily use this ability to block websites for counterfeit goods as a political platform. The European Union sees censorship as a trade barrier.³¹³ Therefore, blocking

306. *Id.*

307. See *Portero.com*, <http://www2.portero.com/about-portero> (last visited Apr. 26, 2010) (“[Portero Luxury]’s collection of certified pre-owned, vintage and collectible merchandise - including handbags, watches, jewelry and accessories - features brands such as Chanel, Hermès and Rolex. Since 2004, Portero Luxury’s core values of customer service and guaranteed authenticity have placed it at the forefront of online luxury retailers.”) [hereinafter *About Portero.com*]. See also Kathryn Tuggle, *Strange Ways to Get out of Debt*, *FOXBusiness.com* (Oct. 27, 2008), available at <http://www.foxbusiness.com/story/personal-finance/online-topic/debt/strange-ways-debt-work/> (“At *www.Portero.com*, an online auction house for luxury items like jewelry and accessories, individuals can sell items that range in cost from \$400 to \$50,000.”).

308. See *About Portero.com*, *supra* note 307 (“In certain cases [Portero.com] partner[s] with selected brands (such as Kwiat, Lalique, and Robert Lee Morris) or retailers (such as Tourneau) to assist in certifying authenticity, and those partnerships are noted in the item listing.”).

309. See *Portero.com*, *Authenticity*, <http://www2.portero.com/authenticity> (last visited Mar. 7, 2009) (“We determine authenticity by drawing on the experience of our in-house category specialists, by working with outside product experts, and in some cases by partnering with selected luxury brands and other leading luxury companies . . .”).

310. *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 4766 (S.D.N.Y. 2008).

311. Center for Democracy and Technology, *Analysis of the Global Online Freedom Act of 2008 [H.R. 275]: Legislative Strategies to Advance Internet Free Expression and Privacy Around the World* (May 2, 2008), available at <http://www.cdt.org/international/censorship/20080505gofa.pdf>.

312. *Id.*

313. Eric Bangeman, *EU May Begin Treating ‘Net Censorship as a Trade Barrier*, <http://arstechnica.com/news.ars/post/20080227-eu-may-begin-treating-net-censorship-as-a->

internet sites is not the answer, but regulating their content and how goods are sold is a more practical and cost-effective solution.

B. Focus more on Consumer Education

Although these decisions have focused primarily on the liability of the online auction site and the trademark owner, perhaps it should be recognized that more responsibility needs to lie with the consumer. At some point, online auction sites and luxury brand owners have no recourse if consumers are unwilling to cooperate and continue buying luxury knock-offs. Counterfeiters know that consumers crave cheap luxury goods, and as soon as a new design comes out, counterfeiters around the globe churn out fake versions and have no trouble selling them.³¹⁴ Shoppers pick up these knock-offs for one-tenth of the cost and then pass off the good as genuine.³¹⁵

Consumers around the globe do not seem to grasp the implications of buying a counterfeit good. For instance, in the United Kingdom ("UK") in 2006, twenty-eight percent of the UK population purchased a genuine designer item, yet in the same year, about three million people bought a fake luxury item.³¹⁶ Consumers see fake items as "bargains," and in the UK sixty-four percent of people admitted to friends and colleagues that their "genuine" item was not real.³¹⁷ Perhaps if consumers were better informed as to the criminal links in counterfeiting and the potential implications of buying a counterfeit good,³¹⁸ the fashion industry might have a chance of beating the counterfeiters.³¹⁹

Similarly, in the United States, "one in four people in Los Angeles County knowingly bought, copied, or downloaded illegal goods in the last year."³²⁰ Those who purchased these goods viewed their purchase of these products as a victimless crime.³²¹ Most consumers do not know that the sale of counterfeit T-shirts may have helped finance the 1993 World Trade Center bombing,³²² or that counterfeiting profits are one of the main sources of income supporting international terrorism.³²³ Counterfeiting schemes are run by criminal organizations also dealing in narcotics, weapons, child prostitution,

trade-barrier.html (Feb. 27, 2008, 11:07 EST).

314. Dana Thomas, *Terror's Purse Strings*, N.Y. TIMES (Aug. 30, 2007) at A23, available at <http://www.nytimes.com/2007/08/30/opinion/30thomas.html>.

315. *Id.*

316. Melinda Oliver, *Give Fakers a Reality Check*, DRAPERS (Nov. 17, 2007), available at <http://www.drapersonline.com/news/give-fakers-a-reality-check/291987.article>.

317. *Id.*

318. See *supra* text accompanying notes 55-59.

319. Oliver, *supra* note 316.

320. Richard Verrier, *Fake Goods come Easy, Survey Finds - One in four Angelenos Knowingly buy Pirated Products because they are Cheap and Easily Attainable, Study Shows*, L.A. TIMES (Aug. 20, 2007) at Business, available at <http://articles.latimes.com/2007/aug/20/business/fi-counterfeit20>.

321. *Counterfeit Bags May Have Links To Organized Crime, Terrorism*, WISN.com (May 8, 2003) <http://www.wisn.com/news/2191330/detail.html>.

322. LaLonde, *supra* note 76.

323. *Id.*

human trafficking, and terrorism.³²⁴

Consumers need to stop focusing on the goods and start focusing on the merchants. Instead of choosing bad merchants they need to be able to identify the good merchants³²⁵ by either researching who they are purchasing goods from or informing online auction sites that they are unsure of a seller. Luxury brands also need to do a better job teaching the consumer about what is and is not genuine.³²⁶ If consumers stop knowingly buying fakes, the supply chain will dry up and counterfeiters will go out of business.³²⁷ None of this is possible without collaboration between the online auction site, luxury brand owners, and consumers alike.

V. CONCLUSION

Counterfeit litigation regarding the policing of trademarked goods is far from over for eBay. eBay still plans on appealing the ruling of the French court,³²⁸ and Tiffany still plans on appealing the New York District court's decision, as well.³²⁹ Interestingly, the United States court did not decide whether eBay or Tiffany was more capable of stopping the sale of counterfeit goods on eBay, calling it an "open question left unresolved by this trial."³³⁰ Perhaps the appeal will shed more light on this question.

Additionally, even if the United States requires eBay to implement more stringent procedures on its online auction site, there is no guarantee that the sale of counterfeit goods will not migrate to other online auction sites,³³¹ or that France will believe the United States is being stringent enough. Not all online

324. *Id.*

325. Brown, *supra* note 27.

326. LaLonde, *supra* note 76.

327. *Id.*

328. See, e.g., Matheson Ormsby Prentice, *[e]Bay – A Fashion Victim in On-Line Counterfeiting [sic] Cases*, Sept. 2008, <http://www.mop.ie/dynamic/files/IP%20Ezine%20EBAY%20A%20fashion%20victim%20in%20on-line%20counterfeiting%20cases%20September%202008.pdf>, predicting that: On appeal eBay is likely to challenge the finding in relation to the alleged breach of LVMH's exclusive distribution network on the basis that any product put freely on the EU market by the right holder may be bought and resold by anyone else as long as it does not infringe trademark rights. It will also challenge the Court's conclusion that eBay was a broker under the E-commerce [sic] Directive. If this appeal is unsuccessful the decisions could have considerable impact on on-line [sic] auction websites as those businesses will have an obligation to monitor products sold and to increase control over users.

329. See Bennet Kelley, *Measuring the 110th Congress at Twilight*, 12 No. 4 J. INTERNET L. 25 (2008); Jeff Meisner, *Tiffany Keeps Hammering at eBay Lawsuit*, E-COMMERCE TIMES, Aug. 8, 2008, <http://www.ecommercetimes.com/story/64131.html?wlc=1236454181>.

330. See LaLonde, *supra* note 76 ("It appears that Tiffany was in the best position to know if specific listings offered counterfeit goods because its employees have the expertise to determine whether listed goods were counterfeit and eBay was in the best position to warn its sellers not to counterfeit, to educate them on counterfeiting and its consequences, and to delete listings and suspend sellers.")

331. Rob Bates, *Ebay [sic] Case: Tiffany Knocked out over Knock Offs*, JCKONLINE.COM, July 15, 2008, <http://www.jckonline.com/blog/870000287/post/1640029964.html>.

sites that sell goods have invested as much time and money into fighting counterfeit goods as eBay.³³² It is important that reasonable safety measures be put in place to help regulate the sale of goods on all online auction sites. Therefore, the appeals to the United States and French eBay decisions must broadly implicate all online auction sites, not just eBay. Pursuing litigation on all online auction sites is not economical, since some smaller, less efficient websites will not be as diligent as eBay in their anti-counterfeiting measures.³³³

Without harmonizing online auction site regulations, international forum shopping might occur with luxury brand owners suing online auction sites to recover large damages awards, countries might begin censoring (blocking) online auction sites to avoid lengthy litigation, and consumers will still lose out in the end. With no harmonization on the horizon and no resolution as to whether online auction sites are responsible for policing trademarks, it could be the end of open online auction internet sales between France and the United States, and the beginning of strained relationships between eBay and other countries with similar jurisdictional criteria as France.

Ultimately, harmonization of online auction site regulations comes down to whether other countries are likely to believe that online auction sites such as eBay are more akin to a traditional retail store, or merely an online facilitator between buyers and sellers.³³⁴ Realistically, with 3.5 million new auctions every day, it would be impossible for eBay to police every sale.³³⁵ eBay is a marketplace, not a retailer, and it does not own or take possession of any of the products.³³⁶ There is no way for eBay to know whether something violates trademark rights unless the rights' owners themselves inform eBay.³³⁷ eBay cannot be willfully blind to violations, but having a zero-tolerance policy across the globe for stopping counterfeit goods is also unrealistic for online auction sites.

The courts must be aware that policing trademarks is a difficult task. Ultimately, the United States must implement more stringent policies for online auctioneers to ensure the authenticity of the goods sold and create a safer environment for consumers. Online auction sites are in the best position to install measures on their individual sites to help combat the sale of counterfeit goods. Though there is no easy solution, this area of the law will continue to evolve in the coming years, optimistically in a manner that ultimately protects consumers and trademark holders alike.³³⁸

332. See Richard, *supra* note 3 ("There are many Web sites that advertise products that purport to be the genuine article that are not.").

333. See Bates, *supra* note 331.

334. Braden Cox, *Should Online Marketplaces be the Trademark Police?*, Nov. 14, 2007, <http://techliberation.com/2007/11/14/should-online-marketplaces-be-the-trademark-police/>.

335. AJ Park, *Brand Owners Versus eBay*, Aug. 15, 2008, http://www.ajpark.com/articles/2008/08/brand_owners_versus_ebay.php.

336. *Id.*

337. *Id.*

338. See, e.g., Clayton, *supra* note 149 ("This area of law will continue to evolve, as courts apply (or change) principles of secondary liability developed decades before the establishment of the Internet.").

LEVELING THE TRADE PLAYING FIELD: THE AILING U.S. MANUFACTURING SECTOR AND THE NEED FOR TRADE PARITY

Zachary T. Lee*

INTRODUCTION

Does U.S. manufacturing need saving? It would seem so, given recent rhetoric from Washington. The discussion dominated the debates leading up to the 2008 presidential election,¹ and many government officials have made “‘saving U.S. manufacturing’ and ‘leveling the playing field’ on trade for American business” their top priority.² The proponents of reform cite current trade policies as a significant contributor to the decline of the U.S. manufacturing sector and the loss of employment accompanying that decline.³ The fear is that the U.S. manufacturing sector is slowly eroding, and that this could have serious, long-term consequences for the rest of the economy. With President Obama settling into office, the question remains what actions, if any, will ultimately be taken to deal with this so-called “problem?”

Currently, most discussions concerning the viability of U.S. trade policy focus on the North American Free Trade Agreement (NAFTA) and its dramatic effect on the U.S. economy. The sheer scope of the agreement, and its subsequent influence on other trade agreements, has made it something of a lightning rod. On the one hand, NAFTA’s opponents directly attribute the downfall of U.S. manufacturing to the rapid movement of labor jobs to Canada and Mexico that occurred after the agreement was signed.⁴

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1. Elisabeth Malkin, *Revisiting NAFTA in Hopes to Cure Manufacturing*, N.Y. TIMES, Apr. 22, 2008, at C7.

2. Willard M. Berry, *A Trade Agreement for U.S. Manufacturers*, J. COM., Aug. 18, 2008, at 76.

3. Many economists cite the trade policies that developed during the last decade of the 20th century as a significant contributor to American jobs being moved to prominent U.S. trading partners. This movement has particularly affected the U.S. manufacturing sector. *See generally infra* notes 66-93.

4. *See* JOSH BIVENS, TRADE DEFICIT AND MANUFACTURING JOB LOSS: CORRELATION AND CAUSATION (Econ. Policy Inst., Briefing Paper No. 171, 2006), *available at* <http://www.epi.org/publications/entry/bp171/>; *see* ROBERT E. SCOTT, HIGH PRICE OF FREE TRADE: NAFTA’S FAILURE HAS COST THE UNITED STATES JOBS ACROSS THE NATIONS (Econ. Policy Inst., Briefing Paper No. 147, 2003), *available at* <http://www.epi.org/>

These commentators commonly cite the nation's ballooning trade deficit, which exploded after the passage of NAFTA,⁵ as having a direct correlation to significant manufacturing job losses.⁶ On the other hand, NAFTA's proponents tend to focus on the benefits of the agreement and free trade in general.⁷ These individuals either claim that the decline in manufacturing jobs is the natural evolution of the U.S. economy or that the claimed losses are wildly overstated.⁸ In many ways, the NAFTA debate is representative of the controversy currently surrounding trade reform, and while it has produced convincing statistics on each side, the effect of free trade on U.S. manufacturing is becoming increasingly more difficult to deny.⁹

Although President Obama has yet to commit to a trade reform strategy, he has indicated that job creation is one of his foremost objectives.¹⁰ Specifically, after the U.S. employment sector lost a significant number of jobs in the last four months of 2008,¹¹ President Obama detailed his plan to stimulate job growth.¹² It is unclear, however, if this plan directs any aid towards U.S. manufacturers. The aim of this Note is to emphasize that the debate raging over current trade policy in Washington and President Obama's quest for job creation go hand in hand. Additionally, it seeks to shed light on Trade Agreement Parity (TAP),¹³ legislation that could simultaneously stimulate the job growth sought by President Obama and aid in the revitalization of the U.S. manufacturing sector.¹⁴ With this legislation, Washington can once again make U.S. manufacturing a viable option for business while adding much-needed jobs

publications/entry/briefingpapers_bp147/; see ROBERT E. SCOTT ET AL., REVISITING NAFTA, STILL NOT WORKING FOR AMERICAN WORKERS (Econ. Policy Inst., Briefing Paper No. 173, 2006), available at <http://www.epi.org/publications/entry/bp173/>; see JOHN J. AUDLEY et al., NAFTA'S PROMISES AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 2003 (detailing the link between free trade policies and the alleged correlation in the loss of jobs), available at <http://www.rrojasdatabank.info/naftaintro.pdf>.

5. See generally BIVENS, *supra* note 4.

6. See *id.*

7. See Robert A. Blecker, *The North American Economies After NAFTA: A Critical Appraisal* INT'L J. POL. ECON. (Special Issue) (Carnegie Endowment for International Peace, 2005), available at http://www.carnegieendowment.org/pdf/Blecker_NAFTA_paper_final.pdf.

8. *Id.*

9. See JOSH BIVENS, SHIFTING BLAME FOR MANUFACTURING JOB LOSS: EFFECT OF RISING TRADE DEFICIT SHOULDN'T BE IGNORED 5 (Econ. Pol'y Inst., Briefing Paper No. 149, 2004), available at http://www.epi.org/publications/entry/briefingpapers_bp149/ (claiming that the number of U.S. manufacturing jobs is at its lowest level since 1958).

10. *Id.*

11. David Goldman, *Worst Year for Jobs Since '45*, CNN MONEY, Jan. 9, 2009, available at http://money.cnn.com/2009/01/09/news/economy/jobs_december/?postversion=2009010908.

12. *Id.*

13. See Letter from Bill Pascrell, Jr., U.S. House of Representatives, Put U.S. Manufacturers First (June 26, 2008), <http://naftz.org/docs/news/TAP%20Colleague%20Letter.pdf> [hereinafter Letter].

14. See *infra* notes 154-76 and accompanying text.

to the U.S. economy.

This Note has two goals. First, it seeks to highlight the current state of U.S. trade by focusing on the proliferation of U.S. free trade agreements (FTAs). Specifically, it looks to NAFTA and suggests that, regardless of the other benefits offered by the agreement, it has devastated U.S. manufacturing.¹⁵ It suggests that under the current system, U.S. manufacturers are unable to effectively compete in the global economy, and that the resulting shift in employment away from the manufacturing sector has had a significant impact on displaced individuals as well as the rest of the economy.¹⁶ Finally, it concludes that free trade is a direct threat to the U.S. manufacturing sector and any discussion about “saving” U.S. manufacturing must specifically address this threat.¹⁷

Secondly, this Note highlights TAP, a trade proposal aimed directly at the U.S. manufacturing sector. It addresses the proposal’s ability to look past the free trade debate and target a key incentive causing U.S. manufacturers to leave the U.S. economy. Furthermore, it suggests that TAP will immediately reinvigorate the United States Foreign Trade Zone (FTZ) program by providing aid to U.S. manufacturers competing in the global economy.¹⁸ Finally, it emphasizes that TAP is one example of how U.S. trade policies can be retooled to benefit the American worker without artificially constraining the benefits of free trade.¹⁹

Part I discusses the United States’ trade policies and the current push toward pursuing free trade agreements with additional countries. Part II looks at the controversy surrounding NAFTA and discusses NAFTA’s effect on the U.S. manufacturing sector. Part III discusses the effects of the shift of employment from the U.S. manufacturing sector to other sectors of the economy. Part IV discusses the debate between the promotion of free trade and the protection against the harmful effects of practicing free trade. Part V describes the TAP proposal and the potential benefits offered by the legislation. Finally, Part VI proposes that Congress immediately consider the passage of TAP.

PART I: THE CURRENT STATE OF U.S. TRADE

Before asking the question, “Does U.S. manufacturing need saving,” we must first clearly define that which threatens it. A popular answer focuses on the attractive incentives currently offered to U.S. manufacturers

15. See *infra* notes 60-88 and accompanying text.

16. *Id.*

17. See ROBERT E. SCOTT ET AL., *supra* note 4, at 2.

18. Foreign-Trade Zone Resource Center, A Brief History of the U.S.-Foreign Trade Zones Program, <http://www.foreign-trade-zone.com/link01p.htm> [hereinafter History] (last visited Apr. 22, 2010).

19. See Berry, *supra* note 2.

who move their production facilities out of U.S. territory.²⁰ Many economists blame current free trade agreements for introducing these incentives into the U.S. economy.²¹ While it is unclear how much of the manufacturing sector has been lost to the practice of free trade, several estimates attribute over one million jobs to NAFTA alone.²² Because these estimates stand in direct opposition to both the net increase in U.S. employment that has occurred over the last two decades,²³ and the undeniable benefits of free trade in general,²⁴ perhaps it is easy to dismiss these losses as a necessary casualty of globalization. However, clearly defining the United States' role in the international free trade arena should aid in appreciating the nature of this growing threat to U.S. manufacturing.

With the passage of the U.S.-Israel Free Trade Agreement in 1985,²⁵ the United States formally became a player in the free trade movement.²⁶ It was not long after the passage of this agreement that the United States sought expansion of its trade relationships with its geographic neighbors, Canada and Mexico.²⁷ Ultimately, these discussions culminated in the passage of the largest trade agreement the United States is party to, NAFTA, in 1993.²⁸ The United States' pursuit of free trade rapidly accelerated after the passage of NAFTA. In particular, the U.S. government actively expanded free trade relationships during the George W. Bush administration.²⁹ After the passage of Trade Promotion Authority (TPA) in 2002,³⁰ the Bush administration was able to "fast track" a total of six free trade agreements.³¹

Today, the United States maintains free trade relationships with

20. See generally *supra* note 4 and accompanying text.

21. *Id.*

22. BIVENS, *supra* note 9, at 5; SCOTT, *supra* note 4, at 4.

23. Gary Clyde Hufbauer & Jeffrey J. Schott, *NAFTA Revisited*, POLICY OPTIONS, Oct. 2007, at 83, available at <http://www.irpp.org/po/archive/oct07/schott.pdf>.

24. See JEFFREY J. SCHOTT, *THE NORTH AMERICAN FREE TRADE AGREEMENT: TIME FOR A CHANGE?* (Peterson Inst. for Int'l Economics, 2008), available at <http://www.iie.com/publications/papers/20081218schott.pdf>.

25. See Office of the United States Trade Representative, *Israel Free Trade Agreement*, http://www.ustr.gov/Trade_Agreements/Bilateral/Israel/Section_Index.html (last visited Jan. 21, 2010).

26. See generally Office of the United States Trade Representative, *Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Jan. 21, 2010).

27. Canada-U.S. Free Trade Agreement, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281 (entered into force Jan. 1, 1989).

28. See *North American Free Trade Agreement*, 19 U.S.C. §§ 3311-3473 (2008).

29. See Office of the United States Trade Representative, *Free Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Apr. 2, 2010).

30. See J.F. HORNBECK & WILLIAM H. COOPER, *TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL* (CRS Report for Congress 2007); See generally *Bipartisan Trade Promotion Authority Act of 2002*, 19 U.S.C. § 3804 (2002).

31. *Id.*

fourteen nations.³² These nations include: Israel, Canada, Mexico, Jordan, Chile, Singapore, Australia, Morocco, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Bahrain.³³ Additionally, agreements with Peru and Oman are pending implementation, and agreements with Columbia, Panama, and the Republic of Korea are awaiting Congressional approval.³⁴

The United States' pursuit of free trade has been so rapid that it has become somewhat of a standardized process. Specifically, the National Security Council has developed set criteria that govern the selection of trading partners.³⁵ Additionally, the agreements with the countries listed above share common elements and the general framework pioneered by NAFTA.³⁶ With each agreement, the United States successfully implements a specific model that expands free trade while mandating certain absolute requirements.³⁷

Given the debate surrounding the viability of NAFTA, and its influence on subsequently adopted trade agreements, hopefully it is clear why studying NAFTA in particular has merit. Even so, there are several additional reasons why the following discussion focuses on NAFTA. First, it is the largest free trade agreement to which the United States is currently a party and it represents a significant portion of the country's total trade.³⁸ Additionally, the agreement created the largest free trading block in the world, and closely linked the U.S. economy with the economies of Mexico and Canada. Furthermore, the United States' NAFTA partners directly benefited from the erosion of the U.S. manufacturing base that occurred after the agreement was passed. Finally, President Obama has recently added to the NAFTA controversy by suggesting that one million jobs have been lost as a direct consequence of the agreement.³⁹ Engaging each side of the NAFTA debate as it pertains to U.S. manufacturing highlights the path

32. See J.F. HORNBECK & WILLIAM H. COOPER, TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL (CRS Report for Congress 2007); See generally Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3804 (2002).

33. See *id.*

34. See *id.*

35. *Id.* The requirements include: country readiness; economic/commercial benefit; benefits to the broader trade liberalization strategy; compatibility with United States' interest; congressional/private sector support; and U.S. government resource constraints. *Id.* "According to officials . . . these criteria are broad and, as a result, the administration has considerable discretion in choosing potential FTA partners." *Id.*

36. See United States Government Accountability Office, *International Trade: An Analysis of Free Trade and Congressional and Private Sector Consultations under Trade Promotion Authority*, at 12 (2007) (reporting to the Chairman, Committee on Finance, and the United States Senate), available at <http://www.gao.gov/new.items/d0859.pdf>.

37. *Id.* at 18.

38. See U.S. Census Bureau, Foreign Trade Statistics, <http://www.census.gov/foreign-trade/www> (last visited Feb. 21, 2010).

39. SCHOTT, *supra* note 24, at 6.

to compromise that must be pursued to effectuate trade reform.⁴⁰

PART II: THE NAFTA CONTROVERSY--A LOOK AT NAFTA AND ITS EFFECT ON U.S. MANUFACTURING

NAFTA was a pioneering agreement that famously linked the U.S. economy with those of Mexico and Canada.⁴¹ The countries signed the agreement in December of 1993 and it marked the creation of one of the largest trading blocs in the world.⁴² The impact NAFTA has had on all three of its members is significant. Through October of 2008, the United States was importing 26.5% of its goods and exporting 31.8% of its production to its NAFTA partner countries.⁴³ Although the United States enjoys healthy trading relationships with several other countries, NAFTA goods make up the single largest portion of its trade.⁴⁴

When NAFTA became effective on January 1, 1994, the architects of the agreement had many stated goals.⁴⁵ These goals are reflected in Article 102 and include: “[p]romote trade and investment; [i]ncrease employment and improve working conditions and living standards; [m]anage trade relations and disputes; [s]trengthen and enforce labor and environmental laws and regulations; [c]ooperate in regional and multilateral trade forums.”⁴⁶ The United States Trade Representative (USTR) has all but declared these goals met. Specifically, it describes the agreement as “an example of the benefits that all countries could derive from moving forward with multilateral trade liberalization.”⁴⁷ Additionally, it has indicated that NAFTA benefits all sectors of the economy stating that “[F]armers, workers and manufacturers benefit from the reduction of arbitrary and discriminatory trade rules, while consumers enjoy lower prices and more choices.”⁴⁸

The USTR also points to substantive benefits of NAFTA. In 2007, it issued a policy brief stating that NAFTA has translated into a \$350 to \$930

40. *See generally id.*

41. *See generally* Office of the United States Trade Representative, North American Free Trade Agreement (NAFTA), <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Apr. 22, 2010).

42. *Id.*

43. *See supra* note 32.

44. *See* U.S. Census Bureau, Foreign Trade Statistics, <http://www.census.gov/foreign-trade/www> (last visited Feb. 9, 2009).

45. *See* SCHOTT, *supra* note 24, at 3.

46. *Id.*

47. The United States Trade Representative (USTR) is a government body with specialized experience in many aspects of trade policy. Perhaps its most crucial duty is to negotiate with foreign governments regarding trade agreements. *See* Office of the United States Trade Representative, About Us, <http://www.ustr.gov/about-us> (last visited Apr. 22, 2010).

48. *Id.*

annual benefit to the average family of four.⁴⁹ It further estimates that the implementation of the trade agreement has meant that an average family of four has paid \$210 less in taxes annually.⁵⁰ Finally, the USTR directly refutes claims that NAFTA has hurt the American manufacturing base.⁵¹ It emphasizes that under NAFTA, U.S. manufacturing output has risen some 58%, with exports reaching an all-time high in 2007, valuing \$982 billion.⁵²

Considering these claims, it would seem that NAFTA has met the lofty goals initially set, and its threat to U.S. manufacturing is overstated. However, many economists have vehemently opposed the USTR's position. In fact, many predicted that the agreement would be harmful to U.S. employment from the very beginning. Famously, former presidential candidate Ross Perot claimed that NAFTA would produce "a great sucking sound" characterized by the number of jobs leaving the United States.⁵³ Furthermore, since the agreement's inception it has been a consistent target of attack by commentators citing the negative reverberations felt in various sectors of the economy.

In short, the two sides of the NAFTA debate can be characterized as those seeking to promote free trade versus those concerned with protecting against its harmful effects. Looking at each side of the argument in the NAFTA context sheds light on the actual, if uncertain, impact U.S.-FTAs are having on the U.S. manufacturing sector.

A. Opposition to NAFTA

Several economists believe that NAFTA can be directly linked with job loss and growing inequality between socio-economic classes.⁵⁴ These economists generally disagree with the USTR's claim that NAFTA has been an undeniable success. Jeff Faux, former president of the Economic Policy Institute, specifically takes issue with how the agreement was sold to the citizens of all three nations.⁵⁵ He claims that each nation promised their citizens that the agreement "would bring large net benefits in better jobs and faster growth,"⁵⁶ and that these promises were not necessarily delivered.

49. United States Trade Representative, NAFTA Facts, http://ustraderep.gov/assets/Trade_Agreements/Regional/NAFTA/Fact_Sheets/asset_upload_file202_14592.pdf (last visited Feb. 11, 2010).

50. *Id.*

51. United States Trade Representative, FTA Facts, http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/Fact_Sheets/asset_upload_file202_14592.pdf (last visited Feb. 11, 2009). *Id.*

52. *Id.*

53. Robert B. Zoellick, *Stop the Complaints: With NAFTA, Everyone Wins*, L.A. TIMES, July 31, 2001, available at <http://articles.latimes.com/2001/jul/31/local/me-28624>.

54. See generally *supra* note 4 and accompanying text (detailing the net results of the NAFTA agreement).

55. SCOTT ET AL., *supra* note 4, at 1.

56. *Id.*

Faux argues that the net result of the agreement was not the introduction of better jobs, but the net loss of jobs and a shift in the proportion of income toward the wealthiest social classes.⁵⁷ Faux believes this movement has displaced significant numbers of manufacturing workers, many of whom have less than a college education.⁵⁸ Because of this limited education, Faux argues that these displaced laborers are unable to gain access to the specialized jobs that are actually being created by free trade. Consequently, Faux concludes that a major portion of the population is not able to benefit and is, in fact, injured by NAFTA and free trade in general.⁵⁹

Faux is not alone in linking NAFTA with the decline of the U.S. manufacturing sector. Several commentators have reached a similar conclusion pointing to the nation's growing trade deficit as the link between NAFTA and manufacturing job loss.⁶⁰ These commentators point to the very basic principle that "[I]ncreases in U.S. exports tend to create jobs in this country, but increases in imports tend to reduce jobs because the imports displace goods that otherwise would have been" produced domestically by U.S. workers.⁶¹ Because the U.S. trade deficit ballooned after the passage of NAFTA, these critics blame the agreement for manufacturing job losses.⁶²

Economist Robert Scott, who believes job losses from NAFTA have totaled more than one million,⁶³ seems to believe that initial estimates as to NAFTA's impact on the trade deficit were flawed. He highlights the fact that the predicted benefits of NAFTA were conditioned upon the belief that "U.S. exports to Mexico would grow faster than imports."⁶⁴ In other words, the thought was that NAFTA would have a positive effect on the U.S. trade deficit. Specifically, Scott cites an estimate that claimed the trade deficit would be improved by nine billion dollars once NAFTA took effect.⁶⁵ In reality, the deficit was not improved at all. One study reflects that the deficit rose \$107.3 billion between 1993, when the agreement was passed, and 2004.⁶⁶ Scott argues that this trade deficit has limited the positive

57. *Id.*

58. *Id.* at 1-2.

59. *Id.*

60. SCOTT, *supra* note 4, at 2.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 5 (Scott estimates that one million jobs have been lost as a result of NAFTA. Additionally, he believes that roughly one million more job opportunities have been lost, with losses affecting all fifty states); ROBERT E. SCOTT & DAVID RATNER, NAFTA'S CAUTIONARY TALE: RECENT HISTORY SUGGESTS CAFTA COULD LEAD TO FURTHER U.S. JOB DISPLACEMENT (Econ. Pol'y Inst., Issue Brief No. 214, 2005), available at <http://www.epi.org/publications/entry/ib214/>.

65. SCOTT ET AL., *supra* note 4, at 5.

66. *Id.*

effects of NAFTA and in turn caused massive job loss.⁶⁷

While Scott believes the U.S. trade deficit has impacted all areas of the economy, he thinks the manufacturing sector, in particular, has been affected.⁶⁸ He claims that “[R]apid expansion of the U.S. trade deficit with Mexico, Canada, and the world as a whole since NAFTA took effect in 1994 has contributed to the contraction of U.S. manufacturing industries, which lost 3.3 million jobs between 1998 and 2004.”⁶⁹ He believes that the effects of the trade deficit on U.S. manufacturing are finally receiving attention now that job growth has dried up in other areas of the economy.⁷⁰ Furthermore, Scott emphasizes that one effect of the agreement was the widespread shift of assembly positions in the U.S. manufacturing sector to our NAFTA partners.⁷¹ He argues that the United States has been relegated to an exporter of parts and components to other countries where they are assembled into final products before returning to the United States for consumption.⁷² In other words, Scott believes that the workers once employed to assemble parts on U.S. soil have lost their jobs to assembly facilities abroad.⁷³

Although arriving at a slightly different conclusion, Josh Bivens, an economist with the Economic Policy Institute, has made similar findings concerning the nation’s trade deficit.⁷⁴ He concludes that the trade deficit that exploded after the passage of NAFTA is one of the major causes of the rapid decline of U.S. manufacturing.⁷⁵ Bivens cites evidence showing that trade imbalances in manufacturing have accounted for 58% of the total decline in manufacturing employment since 1998.⁷⁶ While he does not believe the losses have been exclusively caused by the growing trade deficit, Bivens believes that NAFTA’s trade imbalance is directly responsible for manufacturing job loss.

Bivens supports his findings by identifying three factors that influence the number of manufacturing positions available at a given time.⁷⁷ These factors are demand, productivity, and international trade.⁷⁸ He does not believe that the domestic demand for manufactured goods has declined and therefore cannot explain job loss.⁷⁹ Similarly, Bivens does not believe

67. *Id.* at 9.

68. *Id.*

69. *Id.* at 12.

70. SCOTT, *supra* note 4, at 3.

71. *Id.* at 2.

72. *Id.*

73. *Id.*

74. *See generally* BIVENS, *supra* note 9 (detailing the effects of the growing U.S. trade deficit).

75. *Id.*

76. *Id.*

77. *Id.* at 5.

78. *Id.*

79. *Id.* at 6-7.

productivity could have increased enough to account for the sheer quantity of manufacturing losses.⁸⁰ This leads him to blame international trade for causing U.S. manufacturing output to decline to 76.5% of domestic demand, a 14% decline compared to the average production statistics between the years of 1987 and 1997.⁸¹ Bivens concludes that international trade, specifically the growing number of net imports, is responsible for the decline of domestic output and therefore, at least one of the causes of U.S. manufacturing job loss.⁸²

B. Advocates of NAFTA

Other economists oppose the findings of NAFTA's critics, choosing to focus on the benefits of the agreement. Some have adopted the findings of the USTR, while others claim that if nothing else, the agreement accelerated and codified a process of economic integration that was already taking place in North America.⁸³ Jeffrey Schott, an economist at the Peterson Institute for International Economics, has devoted much of his time to defending the benefits that the agreement has secured for the country.⁸⁴ In a 2008 publication, Schott argues that NAFTA has largely met the lofty claims set by the architects of the agreement.⁸⁵ He asserts that the three member nations have become sufficiently integrated, and the goals set forth in NAFTA's Article 102 have been met.⁸⁶ Schott cites statistics showing that the trilateral merchandise trade has tripled since the inception of the agreement in 1993.⁸⁷ These numbers reflect that in 1993, trade between the three countries, including both imports and exports, totaled \$300 billion.⁸⁸ That number was projected to approach one trillion dollars in 2008.⁸⁹

Typically, NAFTA proponents believe that the agreement has benefitted the U.S. employment picture.⁹⁰ Schott believes that overall employment has risen in all three countries since the agreement's inception.⁹¹ He cites statistics that show U.S. employment rising from 120

80. *Id.*

81. *Id.* at 1.

82. *Id.* Bivens estimates that between the years of 1998 and 2003, 3.04 million jobs were lost in manufacturing and rising net imports accounted for roughly 1.78 million of those losses. *Id.* at 5. Between the years of 2000 and 2003, Bivens claims 2.7 million jobs were lost in manufacturing and rising net manufactured imports explain roughly 935,000 of that decline. *Id.*

83. BLECKER, *supra* note 7, at 1.

84. SCHOTT, *supra* note 24; *See* Hufbauer & Schott, *supra* note 23.

85. SCHOTT, *supra* note 24, at 1.

86. *Id.* at 3.

87. *Id.* at 5.

88. *Id.*

89. *Id.*

90. *See id.*

91. *Id.* at 6.

million in 1993 to 145 million in 2008.⁹² Additionally, Schott emphasizes the low unemployment rate that the United States has enjoyed throughout much of NAFTA's existence and refuses to blame the agreement for recent unemployment increases.⁹³ Instead, he solely attributes the current increase in unemployment to the economic crisis on Wall Street.⁹⁴ As far as the specific effects on U.S. manufacturing employment, Schott attributes some losses to NAFTA, but emphasizes that even in the worst year of NAFTA-related job losses, these losses represent less than one percent of U.S. annual job loss.⁹⁵

Several economists refute the charge that the nation's trading deficit is a sign of NAFTA's failure.⁹⁶ Robert Blecker, a professor of economics at American University, believes that the trade deficits the United States has accumulated with both Mexico and Canada must be viewed in the context of a growing U.S. trade deficit with all trading partners.⁹⁷ In other words, Blecker is not ready to blame NAFTA exclusively for the escalating trade deficit. He suggests that this phenomenon is not directly attributable to the effects of the agreement alone because the United States has growing deficits with all of its trading partners.⁹⁸

Blecker contends that when comparing the trade deficits with Mexico or Canada, neither is greater than any other major U.S. trading partner from 1993 to 2003.⁹⁹ From this, Blecker concludes that "trade within North America (and indeed, with the entire western hemisphere) is relatively more of a two-way street for the United States than trade with most other countries and regions, and this has been true since before NAFTA went into effect."¹⁰⁰ Blecker does not deny that a significant number of U.S. manufacturing jobs have been lost since NAFTA's passage, but he believes that the U.S. labor sector has been affected by other factors independent of NAFTA, and therefore, refuses to blame the agreement.¹⁰¹ In his view, the extent of labor dislocation is more affected by the performance of the economies of each member nation rather than the impact of the liberalization of trade between them.¹⁰² Like Schott, Blecker emphasizes that NAFTA related job losses are only a small percentage of overall U.S. job loss. He claims that less than 0.7% of U.S. workers have actually lost

92. *Id.*

93. *Id.* The U.S. unemployment rate is projected to be 8.5 percent for 2009, the highest of any year since NAFTA has been effective. *Id.*

94. *Id.*

95. *Id.*

96. See *supra* notes 54-82 and accompanying text (discussing how NAFTA's opponent commonly identify the trade deficit as a sign of NAFTA's failures).

97. BLECKER, *supra* note 7, at 4.

98. *Id.*

99. *Id.*

100. *Id.* at 4-5.

101. *Id.* at 3.

102. *Id.*

their jobs from U.S. participation in NAFTA.¹⁰³

In sum, NAFTA proponents tend to believe that international trade has been a minimal factor in U.S. job loss.¹⁰⁴ Because of this, many oppose changing or restricting the benefits of free trade agreements in any way. Instead of focusing on the effects of trade, NAFTA proponents believe the focus should be on several other factors that have contributed to the steady loss of manufacturing jobs over the last half-century. For example, and in direct contrast to Bivens' findings,¹⁰⁵ some commentators have found that the steady loss of manufacturing jobs is largely attributable to massive productivity growth that occurred over the same period of time.¹⁰⁶ Brink Lindsey¹⁰⁷ summed the argument up by saying, "[T]rade is only one element in a much bigger picture of incessant turnover in the U.S. job market."¹⁰⁸

PART III: EFFECTS OF THE U.S. MANUFACTURING JOB SHIFT

In the context of U.S. manufacturing, the two sides of the NAFTA debate, and the larger free trade debate in general, are not entirely incompatible. Each seems to agree that NAFTA, at least to some degree, has affected the U.S. manufacturing sector.¹⁰⁹ The main difference between the two views is how significant the decline in U.S. manufacturing employment is, and furthermore, whether NAFTA's benefits outweigh the negative effects of these losses.¹¹⁰ While there may be no consensus, simply ignoring the displacement of manufacturing workers in favor of a focus on NAFTA's "net" results on U.S. employment marginalizes a major concern.¹¹¹

Taking a brief look at statistics illustrates the potential problem with focusing on "net" employment results. In 2003, roughly 14.3 million U.S.

103. *Id.* at 8-9.

104. See Martin Baily, Address at the Joint Conference of the Cato Institute and The Economist on Trade and the Future of American Workers (Oct. 7, 2004), available at <http://cato.org/events/tradeconference/index.html>.

105. See *supra* notes 74-82 and accompanying text (discussing how Bivens does not link U.S. manufacturing job losses with the increase in productivity since NAFTA's passage).

106. Greg Mankiw, Address at the Joint Conference of the Cato Institute and The Economist on Trade and the Future of American Workers (Oct. 7, 2004), available at <http://cato.org/events/tradeconference/index.html>.

107. Brink Lindsey is a senior fellow at the Cato Institute and director of its Center for Trade Policy Studies; BRINK LINDSEY, JOB LOSSES AND TRADE: A REALITY CHECK 1, (Cato Inst., Trade Briefing Paper No. 19, 2004), available at <http://www.freetrade.org/pubs/briefs/tbp-019.pdf>.

108. *Id.* at 2.

109. See *supra* notes 54-109.

110. See *id.*

111. See generally William Cunningham & Segundo Mercado-Llorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. & EMP. L.J. 413, 414 (1993).

citizens held manufacturing jobs.¹¹² That number represents the lowest level of workers employed in the U.S. manufacturing sector since 1950 and is a sharp decline from the number of manufacturing jobs available at NAFTA's inception.¹¹³ This number remains relevant today given that growth in the U.S. manufacturing sector has largely been stagnant since 2003.¹¹⁴ Given the high employment levels relative to the NAFTA timeline, it is difficult to make a coherent argument that these workers have not been shifted to other sectors of the U.S. economy. Furthermore, while such a shift maintains desirable employment statistics, it says nothing about the salaries available to those workers being shifted away from the manufacturing sector. Specifically, questions remain as to what types of jobs these displaced workers were able to procure after leaving the manufacturing sector, and what effect, if any, does this shift have on the rest of the economy?

Statistics suggest that the impact has been substantial.¹¹⁵ The American Manufacturing Trade Action Coalition (AMTAC) claims that the average manufacturing job produces an income some 33% higher than a service sector job, and that industrial job losses have had a drastic impact on wage growth for U.S. employees.¹¹⁶ The impact on wage growth is caused when a work-capable individual loses their high paying manufacturing job and is funneled into low paying positions in the service sector.¹¹⁷ A recent U.S. government forecast reveals that job creation in the next decade will be dominated by low-end service sector positions in the restaurant and retail sectors of the economy.¹¹⁸ This prediction supports the claim that a substantial portion of the U.S. manufacturing workforce is shifting into lower paying employment positions.

A decrease in earning power by a significant portion of the population has obvious effects on other economic sectors. For example, less earning and, therefore, less spending could be detrimental to the retail industry. However, apart from these obvious correlations, there are other costs that are not so obvious. Specifically, while most manufacturing jobs offer good benefits like health insurance and pensions, many service sector jobs do not.¹¹⁹ Such developments increase the burden on federal agencies as outsourced workers and their families become dependent on government entitlements such as welfare, Medicaid, unemployment benefits, and worker

112. *Id.*

113. *Id.*

114. BIVENS, *supra* note 4.

115. See American Manufacturing Trade Action Coalition, The Hidden Cost of Free Trade, <http://www.amtacdc.org/Policy%20Issues/Pages/toefreetradehiddencost.aspx> [hereinafter The Hidden Cost] (last visited Apr. 22, 2010).

116. *Id.*

117. See *id.*

118. *Id.*

119. *Id.*

retraining programs.¹²⁰ Furthermore, it is not uncommon for employers in the service industry to encourage their employees to utilize these government assistance programs.¹²¹

The shifting of manufacturing jobs has also negatively impacted wages in what remains of the manufacturing sector. Bivens emphasizes that earning power is on the decline even for those manufacturing workers lucky enough to have kept their jobs.¹²² He suggests that global integration between 1973 and 2006 has “lowered the wages of U.S. workers without a four-year college degree (the majority of the U.S. workforce) by 4%.”¹²³ Four percent does not appear significant until you consider that the wages of this group only increased two percent over the same time period.¹²⁴ In other words, without the widespread economic integration delivered by U.S.-FTAs, workers without a college degree could have seen their wages rise 100% more than they actually did during the same time period.¹²⁵

While it is hard to draw concrete conclusions about the connection between free trade and U.S. manufacturing job loss, it is perhaps even more difficult to quantify the negative effects of such a shift in manufacturing employment. Most research concerning these effects can be criticized for methodological limitations and complexities.¹²⁶ It should be noted, however, that NAFTA related job loss was deemed significant enough to create a government assistance program to aid displaced workers. As of 2003, the NAFTA Trade Adjustment Assistance Program had certified 525,094 workers as having lost their jobs to NAFTA.¹²⁷ While certainly concrete, this statistic is still not representative because it assumes that everyone displaced actually sought, or knew of the program's existence. Even so, the potential impact of shifting such a large quantity of people to other employment sectors of the economy is likely significant. This may be best illustrated by the U.S. government's recent and frantic action to save General Motors, a company of 325,000¹²⁸ employees.¹²⁹ NAFTA has likely

120. *Id.*

121. See Christina Laun, Note, *The Central American Free Trade Agreement and the Decline of U.S. Manufacturing*, 17 IND. INT'L & COMP. L. REV. 431, 444 (2007).

122. JOSH BIVENS, TRADE, JOBS, AND WAGES (Econ. Policy Inst., Pol'y Brief No. 244, 2008), available at <http://www.epi.org/publications/entry/ib244/>.

123. *Id.*

124. *Id.*

125. *Id.*

126. See Michael Abbott, *The Impacts of Integration and Trade on Labor Markets: Methodological Challenges and Consensus Findings in the NAFTA Context* 3 (Comm'n Labor Cooperation, Working Paper No. 1, 2004), available at http://naalc.org/english/pdf/WP_Eng.pdf.

127. John J. Audley et al., *supra* note 4, at 28.

128. See generally *What If GM Did Go Bankrupt...: How Investors, Customers, and Suppliers Might Fare Under Chapter 11*, Bus. Wk., Dec. 12, 2005, available at http://www.businessweek.com/magazine/content/05_50/b3963114.htm (claiming General Motors consists of 325,000 employees).

129. See Posting of Andrew M. Grossman to The Foundry,

resulted in losses equivalent to *at least* two General Motors Corporations. It is not hard to imagine that moving such a large class of workers to lower paying jobs has some negative impact on the economy.

PART IV: THE FREE TRADE DEBATE—TRADE PROMOTION VS. TRADE PROTECTIONISM

It seems that free trade has negatively impacted U.S. manufacturing, at least to some degree. However, should the Obama administration take steps to protect U.S. manufacturing jobs moving forward? The history of U.S. trade policy indicates the answer is no. So-called “protectionist” actions commonly risk significant damage to other sectors of the economy while providing little, if any, benefits. In recent history, the United States has implemented various policies that could be classified as “protectionist.”¹³⁰ Like the current concern over the U.S. manufacturing sector, these policies were similarly aimed at protecting specific sectors of the U.S. economy from the negative impacts of foreign competition. In many instances, the policies backfired, inflicting far more harm than good.

It is widely believed that the imposition of protectionist policies in the form of the artificial inhibition of free trade leads to an array of negative consequences. The Vice Chairman of the Federal Reserve has specified a few consequences of protectionist policies that include: the reduction of variety and increased costs for consumers, the distortion of the “allocation of resources in the economy by encouraging excessive resources to flow into protected sectors,” and the fostering of inefficiency through the reduction of competition.¹³¹ Vice Chairman Ferguson suggests that other related and “highly egregious” consequences of protectionist actions are of even more consequence to the general public.¹³² He first identifies the risk that protectionist policies in the form of “import barriers” may destroy jobs in “downstream” sectors, in many cases offsetting the number of jobs protected.¹³³ Secondly, Ferguson claims that protectionist policies provide large benefits to a very small number of producers in a given sector, while providing almost no benefits to the majority of producers in the same and other sectors.¹³⁴ A third concern highlighted by Ferguson is that through

<http://blog.heritage.org/2009/02/17/gms-17-billion-wishlist/> (Feb. 17, 2009, 19:01 EST) (discussing the current federal loans already extended to General Motors and the need for more in the future).

130. See generally Jagdish Bhagwati, *Protectionism*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (Libr. of Econ. and Liberty, 2d ed.) (discussing the history of protectionist policy), available at <http://www.econlib.org/library/Enc/Protectionism.htm>.

131. Roger W. Ferguson, Jr., Vice Chairman, The Fed. Res. Board., Remarks at the Conference on Trade and the Future of American Workers (Oct. 7, 2004), <http://www.federalreserve.gov/boarddocs/speeches/2004/20041007/default.htm>. (last visited Apr. 22, 2010).

132. *Id.*

133. *Id.*

134. *Id.*

the restriction in "the supply of certain types of imports to the United States, quotas may benefit those foreign producers who retain the right to sell to U.S. markets by raising the prices of their goods."¹³⁵ Finally, Ferguson claims that trade actions "often invite the threat of foreign retaliation that would hurt American workers in export industries."¹³⁶

One of the first instances of protectionist policies implemented by the U.S. government was the Smoot-Hawley Tariff Act of 1930.¹³⁷ Economists have blamed the legislation for significantly contributing to the Great Depression.¹³⁸ The Act itself set prohibitively high tariff rates on foreign goods at a time when U.S. producers feared losing U.S. market share to foreign competitors.¹³⁹ In response to these tariffs, U.S. trading partners retaliated with their own tariff restrictions, severely burdening international trade.¹⁴⁰ The results culminated in a deep and prolonged depression, paralyzing the economic powers of the world.¹⁴¹

Unfortunately, the history of U.S. protectionist policy did not end with the Great Depression. More recent examples have manifested the negative consequences highlighted by Chairman Ferguson. These include the Steel Tariffs of 2002, the protection of the U.S. sugar industry, and the recent protection of consumer goods such as shoes and apparel.¹⁴² The traditional concerns associated with protectionist policies were manifested in each situation, and the study of these policies should educate lawmakers considering future policy choices.

Looking at the Steel Tariffs of 2002 in particular illustrates the danger of protectionist policies and the consequences of introducing artificial barriers to the free flow of commerce. In 2002, the Bush administration authorized a system of steel tariffs to stem the effect of strong foreign competition to the U.S. steel industry.¹⁴³ The policy implemented tariffs on select foreign steel bound for the United States that averaged 30%.¹⁴⁴ Shortly after the imposition of these tariffs, steel prices rose across the board by as much as ten percent which raised the costs to U.S. consumers of various steel goods.¹⁴⁵ Critics of these tariffs, such as U.S. Senator John

135. *Id.*

136. *Id.*

137. The Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930).

138. HORNBECK & COOPER, *supra* note 32; *see also* STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 32 (1996).

139. HORNBECK & COOPER, *supra* note 32, at 2.

140. *Id.*

141. *Id.*

142. Hillary E. Maki, Note, *Trade Protection vs. Trade Promotion: Are Free Trade Agreements Good for American Workers?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 883, 889-95 (2006).

143. *See* Kevin K. Ho, Comment, *Trading Rights and Wrongs: The Bush 2002 Steel Tariffs*, 21 BERKELEY J. INT'L L. 825, 825 (2003).

144. *Id.*

145. *Id.* at 833.

McCain, estimated that “for every steel-producing job the tariffs attempted to save, thirteen others in steel-consuming industries were endangered by the tariffs.”¹⁴⁶ While the steel tariffs were quickly rolled back, the Consuming Industries Trade Action Coalition (CITAC) estimates that “[s]teel consumers have lost more jobs to higher steel costs than the total number employed by steel producers in December 2002.”¹⁴⁷

The Steel Tariffs of 2002 should serve as a warning to President Obama and other policy makers currently under pressure to protect the U.S. manufacturing sector. Just as the steel tariffs had the unintended consequence of eliminating jobs in other sectors of the economy, taking steps to protect U.S. manufacturing jobs could likely have negative costs for the rest of the economy. While the question of whether any actions can be taken to save U.S. manufacturing is still up for debate, new ideas are starting to trickle out of Washington that would provide aid without burdening the benefits of free trade.

PART V: SOLUTIONS--TRADE AGREEMENT PARITY AND THE U.S. FOREIGN TRADE ZONE PROGRAM

A. Trade Promotion Authority Proposal

To his credit, President Obama has recently warned of the potential consequences of showing any signs of protectionism.¹⁴⁸ In a time of economic uncertainty, Obama believes that there will be a strong impulse for economies of the world to adopt such policies, which, as seen with the Smoot-Hawley legislation,¹⁴⁹ can only exacerbate the problems of a depressed economy.¹⁵⁰ The question remains then, are there any steps that President Obama can take to ease the harm to the U.S. manufacturing sector that he directly attributes to the effects of free trade?¹⁵¹ Furthermore, how can aid be provided without showing any “signals of protectionism” which he has recently warned against?

One example of the new thinking coming from Washington is Trade Agreement Parity (TAP). TAP is a trade bill proposed by Representative Bill Pascrell from New Jersey.¹⁵² Put simply, Rep. Pascrell has not aimed at limiting the negative impact of foreign trade but rather at reforming one

146. Maki, *supra* note 142, at 890.

147. See generally JOSEPH FRANCOIS & LAURA M. BAUGHMAN, THE UNINTENDED CONSEQUENCES OF U.S. STEEL IMPORT TARIFFS: A QUANTIFICATION OF THE IMPACT DURING 2002, at 12 (Trade Partnership Worldwide, LLC, 2003), available at http://citac.info/remedy/2002_Job_Study.pdf.

148. Jonathan Weisman, *Obama, in Canada, Wars Against Protectionism*, WALL ST. J., Feb 20, 2009, available at <http://online.wsj.com/article/SB123504260038621641.html>.

149. See *infra* note 187-189 and accompanying text.

150. Weisman, *supra* note 148.

151. See *id.*

152. Letter, *supra* note 13.

aspect of U.S. Customs trade policy that currently disadvantages U.S. manufacturers. Rep. Pascrell touts the bill as a trade agreement for U.S. manufacturers,¹⁵³ and believes that the policy will aid U.S. manufacturers in competing in an increasingly globalized economy.¹⁵⁴ The key aspect of the proposal lies in the fact that it provides immediate aid to U.S. manufacturing without implementing artificial limits on free trade.

To stay competitive in today's globalized economy, manufacturers need to use parts from around the world while balancing both quality and price.¹⁵⁵ This conforms to traditional notions of free trade given that it is most efficient to take advantage of those trade relationships in which components can be the most cheaply obtained.¹⁵⁶ The effective practice of this concept passes savings on to the public and increases the revenue for the producer. This would seem to be the theory behind NAFTA and other U.S.-FTAs. However, U.S. manufacturers have been disadvantaged under the current framework requiring them to pay higher tariffs on imports than their FTA competitors.¹⁵⁷ In essence, many U.S. trading partners currently "allow components to enter their countries duty-free, so their manufacturers can produce high quality goods at competitive prices."¹⁵⁸ In contrast, U.S. manufacturers are not extended similar advantages on imported components.¹⁵⁹ In many cases, the tariff incentives are enough that a U.S. producer has no other choice but to move its production to take advantage of the incentives.

Tariff incentives created by U.S.-FTAs are the equivalent of an unlevel playing field.¹⁶⁰ The resulting inequity of this playing field is the artificial incentive for U.S. manufacturers to leave the United States, taking many jobs with them. The genius of TAP is its ability to look beyond the greatest threat to U.S. manufacturing, free trade, and target a specific disadvantage to U.S.-based companies. TAP levels the playing field by addressing the gap in U.S. Customs policy that is left by U.S.-FTAs.¹⁶¹ While U.S.-FTAs provide natural benefits in the form of lower labor, input, and distribution costs to U.S. manufacturers willing to move production to an FTA partner, they are not designed to encourage the decline of U.S. manufacturing by offering tax breaks to all those willing to exit the U.S.

153. *Id.*; see also Berry, *supra* note 2.

154. Letter, *supra* note 13.

155. Editorial, *A Democrat's Good Idea*, WALL ST. J., July 12-13, 2008 [hereinafter *Good Idea*], available at <http://www.naftz.org/docs/news/2009%20Lobbying%20Packets.pdf>.

156. See generally *Adam Smith (1723-1790)*, in THE CONCISE ENCYCLOPEDIA OF ECON. (Libr. of Econ. and Liberty, 2d ed.) [hereinafter *Adam Smith*], available at <http://www.econlib.org/library/Enc/bios/Smith.html>.

157. *Good Idea*, *supra* note 155.

158. *Id.*

159. *Id.*

160. See Berry, *supra* note 2.

161. *Id.*

economy.¹⁶² The latter is an artificial benefit, and U.S. trade policy should not encourage domestic manufacturers to move production abroad.

The following example illustrates the problem.¹⁶³ Under NAFTA, an automobile assembled in Mexico, consisting of components from Asia that were not taxed prior to their admission to Mexico, may potentially be shipped to the U.S. market without the manufacturer having paid any taxes.¹⁶⁴ Conversely, the same automobile consisting of the same components, but assembled in the United States, may be subjected to tariffs for the Asian-sourced components not taxed when the assembly occurred in Mexico. The current regime has effectively stacked the deck against U.S. manufacturers. TAP is aimed at remedying this inequity.¹⁶⁵

TAP removes the artificial incentive created by U.S.-FTAs by applying “fresh thinking to a well-established if underutilized government program—the U.S. foreign-trade zone program.”¹⁶⁶ The U.S. foreign trade zone program has existed in this country for over 70 years “encouraging U.S.-based companies to keep their manufacturing operations in the states by allowing them to defer, reduce or eliminate Customs duties . . . on products admitted to a zone.”¹⁶⁷ By expanding the current scope of U.S.-FTZ benefits to offer U.S. manufacturers access to the same tariff rates available to U.S.-FTA competitors, those manufacturers are more likely to retain operations on U.S. soil.¹⁶⁸

TAP aids in the stabilization of the U.S. manufacturing sector. The byproduct of this stabilization will be the creation of high paying jobs on U.S. soil.¹⁶⁹ Rep. Pascrell suggests that leveling the playing field allows U.S. manufacturers to effectively compete with foreign-based companies, producing many benefits for the rest of the economy.¹⁷⁰ Taking a look at the development of the U.S.-FTZ program and the pivotal role it plays in

162. *Id.*

163. *See generally Good Idea, supra* note 155, for the discussion underlying this example.

164. The possibility exists if the product shipped to the United States complies with the rules of origin requirements codified in NAFTA. *See generally* Lawrence M. Friedman, *NAFTA Rules of Origin*, BARNES/RICHARDSON GLOBAL TRADE L., Jan. 1, 2003 (discussing the requirements for certifying goods as “originating” under NAFTA), *available at* <http://www.barnesrichardson.com/nafta/articles.aspx?ArticleID=000320883605>.

165. Mark Drajem, *Democrat Pushes Bill to Expand Duty-Free Status for Trade Zones*, BLOOMBERG, June 27, 2008, *available at* [http://www.naftz.org/docs/news/Democrat%20Pushes%20Bill%20to%20Expand%20FTZs%20\(Bloomberg%206-27-08\).pdf](http://www.naftz.org/docs/news/Democrat%20Pushes%20Bill%20to%20Expand%20FTZs%20(Bloomberg%206-27-08).pdf).

166. Berry, *supra* note 2.

167. *Id.*

168. *Id.*

169. *See generally* DEAN A. DE ROSA & GARY C. HUFBAUER, *THE ECONOMIC IMPACT OF TRADE AGREEMENT PARITY FOR MANUFACTURING FIRMS OPERATING IN US FOREIGN-TRADE ZONES* (Peterson Inst. of Int’l Economics, 2008), *available at* <http://naftz.org/docs/news/2009%20Lobbying%20Packets.pdf> (discussing the potential for TAP to create 95,000 new jobs in U.S.-FTZs).

170. Berry, *supra* note 2.

the U.S. economy aids in understanding Rep. Pascrell's proposed changes.

B. The United States Foreign Trade Zone Program

"The Foreign Trade Zone is an area inside United States territory which, for customs purposes, is considered outside of United States Customs territory."¹⁷¹ The U.S.-FTZ program has always been a way to mitigate some of the adverse effects resulting from increased participation in free trade relationships.¹⁷² "For more than five decades, the U.S. government's Foreign-Trade Zone (FTZ) program has promoted American competitiveness by encouraging companies to keep and expand their operations in the United States."¹⁷³ "[Foreign] trade zones were not available in the early stages of economic development in the United States,"¹⁷⁴ but a U.S.-FTZ program was put in place with the passage of the Foreign Trade Zone Act of 1934 and has remained in place since its passage.¹⁷⁵ The FTZ program has grown significantly over the past several years, and today there are over 500 zones in operation, including one in every state.¹⁷⁶

Unique economic conditions resulted in the creation of the U.S.-FTZ program. In the early stages of the 20th century, the United States was struggling to effectively and efficiently participate in the growing global economy.¹⁷⁷ By the time the Great Depression took hold, the government began evaluating the prevailing economic policies that were in place.¹⁷⁸ Trade policies in particular were targeted, largely due to the fact that "re-

171. William G. Kanellis, *Reining in the Foreign Trade Zones Board: Making Foreign Trade Zone Decisions Reflect the Legislative Intent of the Foreign Trade Zone Act of 1934*, 15 NW. J. INT'L L. & BUS. 606, 607 (1995). See also Anne Bond Emrich, *Foreign Trade Zones Boost Economic Activity*, GRAND RAPIDS BUS. J., June 23, 2008, available at [http://www.naftz.org/docs/news/Foreign%20Trade%20Zones%20Boost%20Economic%20Activity%20\(Grand%20Rapids%20Business%20Journal%206-23-08\).pdf](http://www.naftz.org/docs/news/Foreign%20Trade%20Zones%20Boost%20Economic%20Activity%20(Grand%20Rapids%20Business%20Journal%206-23-08).pdf) (discussing the benefits offered by U.S.-FTZs). "If you do import or export and are looking to cut some money out of your expense side, you might want to think about foreign trade zones." *Id.*

172. History, *supra* note 18.

173. National Association of Foreign-Trade Zones, Trade Agreement Parity (TAP) Initiative Endorsement Statement, <http://naftz.org/docs/news/Endorsement%20Statement%20on%20Letterhead.pdf> [hereinafter Initiative Statement] (last visited Apr. 22, 2010).

174. John J. Da Ponte Jr., Variations on the Freeport Theme—A U.S. Perspective (Foreign Trade Zone Board 1995), available at <http://ia.ita.doc.gov/Ftzpage/articl95.html>.

175. See 19 U.S.C. § 81 (a)-(u) (2009).

176. Pierre Duy & Elizabeth Whiteman, U.S. Foreign-Trade Zones Offer Flexibility in a Changing Environment 5 (Foreign Trade Zone Staff) (citing U.S.-Foreign-Trade Zone Board, Data for fiscal year 2006), available at http://ia.ita.doc.gov/ftzpage/info/March2008_article.pdf.

177. See generally Kanellis, *supra* note 171, at 610 (explaining that U.S. ports could have helped the United States benefit from the global economy but were burdened by customs procedures).

178. *Id.*

exports”¹⁷⁹ had fallen from “147 million dollars worth of activity in 1920 to less than 63 million dollars in 1930.”¹⁸⁰ The decline in re-exports was traced directly to the Smoot-Hawley Tariff Act of 1930, which imposed a prohibitively high set of tariff rates.¹⁸¹ Passed in 1934 by a near three to one margin,¹⁸² the FTZ program was intended to limit the harmful effects of Smoot-Hawley, by that time considered an economic disaster.¹⁸³

The prevalent theme of FTZs in America was borrowed from the historic free port paradigm.¹⁸⁴ Although the framework “was inspired by the historic free port archetype, the U.S. version of the free [trade] zone was viewed not as a restatement of the classic form, but rather as a variation of it – a sort of new world opus.”¹⁸⁵ The program was designed to aid businesses in dealing with various customs requirements and eventually to jumpstart American trade.¹⁸⁶ This resulting structure has proven very resilient to changes in the global economy throughout the 20th century and has also proven to be a useful tool in controlling several aspects of the U.S. economy.¹⁸⁷

Congress originally intended FTZ legislation to make the United States a major player in international trade. Specifically, Congress believed that the creation of FTZs, along with the United States’ ideal location, would encourage the rest of the world to utilize the United States as a critical trans-shipment point for international trade.¹⁸⁸ Ultimately, the intent was for the increased capital investment in U.S.-based operations, due to international eagerness to take advantage of the favorable tariff and tax benefits, to promote significant job growth in the country.¹⁸⁹

The Foreign Trade Zone Board is responsible for administering the benefits of U.S.-FTZ operation.¹⁹⁰ The Board is comprised of the Secretary of Commerce and the Secretary of Treasury.¹⁹¹ The Commissioner of U.S.

179. “[R]e-export’ means to temporarily move a foreign product into a country for combination with other products and subsequent export.” *Id.*

180. Kanellis, *supra* note 171, at 610 (“To ‘re-export’ means to temporarily move a foreign product into a country for combination with other products and subsequent export.”). *Id.*

181. See Hornbeck & Cooper, *supra* note 32, at 3 (explaining the details of the Smoot-Hawley Act).

182. Kannellis, *supra* note 171, at 610.

183. *Id.*; see also Hornbeck & Cooper, *supra* note 32, at 2-3.

184. See John J. Da Ponte, Jr., *The Foreign-Trade Zones Act: Keeping up with the Changing Times*, BUS. AM., Dec. 1997, available at http://findarticles.com/p/articles/mi_m1052/is_1ai_20097704.

185. *Id.*

186. *Id.*

187. See generally Kanellis, *supra* note 171.

188. *Id.* at 611.

189. *Id.*; see also History, *supra* note 18.

190. United States Foreign Trade Zones Board Glossary of FTZ Terms, <http://ia.ita.doc.gov/ftzpage/info/board.html> (last visited Jan. 21, 2010).

191. *Id.*

Customs and Border Protection also plays a key role on the Board.¹⁹² The Board's primary job is to authorize the creation of Foreign Trade Zones and permit corporate applicants to operate within them.¹⁹³ The Board has the ability to exclude "any goods or process of treatment that, in its judgment, is detrimental to the public interest, health, or safety."¹⁹⁴ These broad powers reflect Congressional intent for the Board to play a significant role in U.S. trade policy.

1. Evolution of the U.S.-FTZ Program

Only recently has the U.S. -Foreign Trade Zone program been widely utilized.¹⁹⁵ When passed in 1934, it was hoped that the program would produce an immediate impact; however, actual effects did not manifest until many years later.¹⁹⁶ In fact, U.S.-FTZs were underutilized until well after the Second World War.¹⁹⁷ Many attributed the dearth of popularity to the prohibitions against manufacturing and exhibition reflected in the original legislation.¹⁹⁸ The program was not producing the results originally intended, and as worldwide trade developed and changed, the need to modify the U.S-FTZ program became clear.¹⁹⁹

The General Agreement on Tariffs and Trade (GATT)²⁰⁰ was passed in 1947, and with it came many changes that would affect the use of U.S.-FTZs. As producers looked for ways to take advantage of the newly developed conditions for international trade, the interest of GATT member nations in the potential of the U.S.-FTZ program was revitalized.²⁰¹ Business leaders began complaining that U.S.-FTZs were not comparable to those found in other countries, believing they lacked protections that would allow successful participation in the global economy.²⁰² Responding to this growing pressure, Congress passed the Boggs Amendment in 1950.²⁰³ The

192. *Id.*

193. *See* 19 U.S.C. § 81b(a) (2009).

194. *Id.*

195. *Id.*

196. *Id.*

197. History, *supra* note 18.

198. Kannellis, *supra* note 177, at 613 (citing a report to the Chairmen of the House Ways and Means Committee).

199. *See* History, *supra* note 18.

200. *See* Meredith A. Crowley, *An Introduction to the WTO and GATT*, ECON. PERSPECTIVES, 4Q/2003, at 42, available at http://www.chicagofed.org/digital_assets/publications/economic_perspectives/2003/4qeppart4.pdf. GATT was the predecessor to the World Trade Organization (WTO) and was aimed at reducing tariff and other trade barriers among member nations. *Id.* The original agreement was signed by twenty-three member countries whereby those nations agreed to a set of rules to govern trade with one another, specifically maintaining reduced import tariffs for the other members of the organization. *Id.*

201. History, *supra* note 18.

202. Kannellis, *supra* note 171, at 613.

203. *Id.*

Boggs Amendment marked the first time manufacturing was allowed in U.S.-FTZs, and it marked the last Congressional modification of the U.S.-FTZ program.²⁰⁴

2. Advantages Offered by the FTZ Program and Its Current Popularity

Because U.S. Customs only collects duties on products that enter U.S. Customs territory and U.S.-FTZs are considered outside of U.S. Customs territory, products manufactured within a U.S.-FTZ are not subject to duties if shipped directly to the international market.²⁰⁵ The ability to avoid U.S. Customs tariffs is the chief benefit of manufacturing within a U.S.-FTZ.²⁰⁶ Additionally, a company manufacturing within a U.S.-FTZ benefits from the ability to defer applicable duty payments on those items bound for the U.S. market.²⁰⁷ These benefits allow U.S. manufacturers to circumvent U.S. Customs requirements up until the time when that product reaches Customs territory, if it ever does.²⁰⁸

The U.S.-FTZ program rapidly expanded in the later stages of the 20th century.²⁰⁹ This expansion was a result of U.S. manufacturers needing the benefits offered by the program to effectively compete in the developing global economy. While only eighteen U.S.-FTZs were in operation in 1973,²¹⁰ there are more than 500 U.S.-FTZs being utilized by U.S. manufacturers today.²¹¹ The 2,650 companies operating within U.S.-FTZs are responsible for employing more than 340,000 Americans.²¹² It is estimated that the use of these zones produces roughly \$500 billion in annual economic activity, and the benefits of that money are experienced in all fifty states.²¹³

C. TAP Applies Fresh Thinking to the U.S. FTZ Program

Rep. Pascrell's legislation proposes to alter the U.S.-FTZ program making TAP benefits available to those operating within a U.S.-FTZ.²¹⁴ TAP enables these manufacturers to acquire the same tariff treatment as producers operating within a U.S. free trade partner without requiring them

204. *Id.* at 615-16.

205. *See generally id.* at 618-22.

206. *Id.*

207. *Id.*

208. 15 C.F.R. § 400.1(c) (1991).

209. History, *supra* note 18; *see id.*

210. Kanellis, *supra* note 171, at 607.

211. Berry, *supra* note 2.

212. *Id.*; *see also* DUY & WHITEMAN, *supra* note 176, at 5.

213. Initiative Statement, *supra* note 173.

214. *See generally* Berry, *supra* note 2.

to move to those nations to access them.²¹⁵ Instead of moving manufacturing abroad to circumvent U.S. duties, TAP offers the opportunity to effectively participate in the U.S. economy without sacrificing valuable U.S. manufacturing jobs, the original intent of the U.S.-FTZ program.²¹⁶

The U.S.-FTZ Board, an administrative body within the Commerce Department, will act as the gatekeeper to TAP benefits.²¹⁷ Just as a U.S. manufacturer has to apply to the Board for the traditional benefits of operating within a U.S.-FTZ, manufacturers will also have to apply to receive the benefits of TAP.²¹⁸ The burden will fall on the company to demonstrate the merits of their proposal, and furthermore, that the application of TAP benefits are in the "public interest."²¹⁹ TAP and the Board will limit the availability of benefits and "if there is no meaningful competition from a particular FTA country, there would be no tariff policy correction needed to level the playing field—and no reason for the FTZ Board to permit the rules of origin of that particular FTA."²²⁰ However, if a U.S. manufacturer does face competition from a U.S. free trade partner, an application for TAP benefits will be granted as long as doing so serves the public interest.²²¹ Like other U.S.-FTZ benefits, the Board will have a considerable degree of control over the availability of TAP benefits.²²²

TAP does have limitations. The legislation is not designed to give U.S. based manufacturers any more of a benefit than already available to them by operating within a U.S. free trade partner.²²³ Such action would not qualify as "leveling the playing field," but rather slanting it in the opposite direction. U.S. manufacturers can apply for the benefits of a specific U.S.-FTA that has disadvantaged them, and if granted, will be limited to the benefits of that particular U.S.-FTA.²²⁴ In effect, this means that the rules of origin codified in the U.S.-FTA will apply to the U.S. based manufacturer.²²⁵ An example better illustrates this point. If a product assembled in Mexico consists of components from all over the world and

215. See National Association of Foreign Trade Zones (NAFTZ), *The Truth About Trade Agreement Parity* (H.R. 6415): Checking the Facts about TAP, <http://www.naftz.org/docs/news/2009%20Lobbying%20Packets.pdf> [hereinafter *The Truth About TAP*] (last visited Apr. 22, 2010).

216. See *supra* notes 171-76 and accompanying text.

217. See *supra* notes 190-93.

218. See *The Truth About TAP*, *supra* note 215.

219. *Id.*; See 15 C.F.R. § 400.31(b) (1991).

220. *The Truth About TAP*, *supra* note 215.

221. See *generally id.* (discussing the limits to a grant of TAP benefits).

222. See *supra* notes 190-194 and accompanying text.

223. See *generally supra* notes 148-70.

224. See *id.* The TAP legislation will not allow applicant to "cherry pick" which U.S.-FTA offers the best tariff rates on a given product. *Id.*

225. See *generally* *The Truth About TAP*, *supra* note 215.

does not comply with NAFTA's rules of origin,²²⁶ U.S. Customs will tax that product if shipped to the United States. Furthermore, if a U.S. manufacturer uses the same components, it will not be permitted to use TAP as a shield from the same tariffs. TAP is only capable of providing the benefits actually accessible to a manufacturer under an existing U.S.-FTA.

PART VI: PROPOSALS

A. Congress Should Immediately Consider and Pass TAP

"TAP is the single-best job creation plan for American manufacturing workers that Washington can offer today."²²⁷ It avoids implementing harmful protectionist policies, but limits the competitive advantage offered to companies that relocate manufacturing jobs outside of the United States. As more U.S.-FTAs are passed and pursued, the U.S. manufacturer is put at a growing disadvantage. Under TAP, serving the domestic and global economies from a manufacturing base within the United States will once again be a viable option. Without TAP, or similar legislation, the competitive advantage offered to those manufacturers producing goods abroad will continue to escalate.

TAP will provide immediate and significant benefits to the American economy.²²⁸ A recent study commissioned by the National Association of Foreign Trade Zones (NAFTZ) reflects these benefits.²²⁹ The study, conducted through the Peterson Institute for International Economics²³⁰ by economists Dean DeRosa²³¹ and Gary Hufbauer,²³² estimates that TAP's implementation will result in a \$530 million annual gain to the U.S. economy.²³³ Perhaps more important given the current concerns of the Obama administration, the study estimates that 95,000 new jobs will be created within existing U.S.-FTZs.²³⁴ Other benefits from TAP's

226. See Friedman, *supra* note 164 (discussing NAFTA's rules of origin requirements).

227. National Association of Foreign Trade Zones (NAFTZ), Trade Agreement Parity (TAP) Legislation, <http://www.naftz.org/docs/news/2009%20Lobbying%20Packets.pdf> (last visited Apr. 22, 2010).

228. See The Truth About TAP, *supra* 215.

229. DEROSA & HUFBAUER, *supra* note 169.

230. "The Peter G. Peterson Institute for International Economics is a private, nonprofit, nonpartisan research institution devoted to the study of international economic policy." Peterson Institute for International Economics, About the Institute, <http://www.petersoninstitute.org/institute/aboutiie.cfm> (last visited Apr. 22, 2010).

231. "Dean DeRosa is a visiting fellow at the Peterson Institute for international Economics and Principal Economist, ADR International LTD." DEROSA & HUFBAUER, *supra* note 169.

232. "Gary Clyde Hufbauer is Reginal Jones Senior Fellow, Peterson Institute for International Economics. He has written extensively on international trade, investment, and tax issues" *Id.*

233. Berry, *supra* note 2.

234. *Id.*

implementation include "a [twenty] percent increase in U.S. shipments for companies in FTZs and \$25 billion in additional fixed-asset investment inside the zones."²³⁵

The real benefits from TAP may not be quantified in the study. Specifically, TAP may have some success in reversing the domino effect that occurs when a U.S. manufacturer leaves the United States. Currently, once a manufacturer is given enough incentive to move production abroad, a natural domino effect impacts part and component manufacturers down the economic line. By making it less likely for the first company to leave, TAP may stem the domino effect and, in fact, influence some dominos to fall in the opposite direction.²³⁶ As manufacturing prospers within U.S.-FTZs, part and component manufacturers operating both in and out of U.S.-FTZs will also benefit.²³⁷ This probability suggests that the estimated 95,000 jobs created in U.S.-FTZs by TAP are not fully representative of the ultimate impact TAP will have on U.S. employment.

1. The Need for "Real" Free Trade

Currently, trade is not "free" for U.S. manufacturers because of tax penalties associated with operating in the United States.²³⁸ Some may argue that it is the natural progression of an economy to move from a manufacturing and industrial power to more of a service power, exporting the production of goods for the efficiency of the overall economy. These arguments are consistent with the rationalization for integrated world economies and free trade agreements in general.²³⁹ Adam Smith,²⁴⁰ perhaps the world's first economist, expressed the logic of these views:

It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. . . . If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.²⁴¹

While this reasoning may be sound, the current tariff structure

235. *Id.*

236. *See* The Truth About TAP, *supra* note 215.

237. *See id.*

238. *See supra* notes 148-70.

239. *See generally* Alan S. Blinder, *Free Trade*, in THE CONCISE ENCYCLOPEDIA OF ECON. (Libr. of Econ.s and Liberty, 2d ed.), available at <http://www.econlib.org/library/Enc/FreeTrade.html>.

240. *See Adam Smith, supra* note 156.

241. *Id.*

introduces artificial factors into the calculation. The choice to serve the U.S. economy from outside of the United States is no longer a natural progression but an economic necessity in order to remain competitive. Perhaps absent the disincentive of the current tariff structure, some manufacturers would never have chosen to leave the United States. The natural effects of free trade agreements combined with the current tariff structure have provided the American worker with a jarring introduction to the global economy.

TAP is not a silver bullet for the ailing manufacturing sector, but it is a substantial step towards making U.S. manufacturers competitive again. TAP cannot remove the benefits of favorable employment and operation costs available in U.S. free trade partners, and it should not. Even if there were no free trade agreements, U.S. manufacturers would still look to invest in developing economies like China and Mexico.²⁴² In many cases it will still be more efficient for them to do so.²⁴³ However, removing current tariff incentives will once again make the United States market a viable option for U.S.-based manufacturing.²⁴⁴ By removing one incentive to serve the U.S. market from abroad, the cost-benefit analysis of leaving the United States shifts and the chances of the United States retaining domestic manufacturing companies and attracting new ones becomes much greater.

2. The "Old" Concept of "Trade Parity"

Trade parity is not a new concept in the arena of international trade. In the past, it has been strived for by many economies in North America.²⁴⁵ It most recently has been at the forefront of the push for free trade expansion under the Bush administration.²⁴⁶ After broad trade and economic benefits were granted to Mexico through NAFTA, the majority of similarly situated North American economies expressed aspirations of trade parity or "NAFTA parity."²⁴⁷ These nations sought benefits equivalent to those which Mexico enjoyed. Specifically, they hoped for equitable access to two of the largest economies in the Western Hemisphere, the United States and Canada.²⁴⁸

242. Elizabeth Becker, *FIVE QUESTIONS for Peter Hakim; How Free Trade Will Alter a Hemisphere*, N.Y. TIMES, Jan. 12, 2003, available at 2003 WLNR 5670815.

243. *Id.*

244. See DEROSA & HUFBAUER, *supra* note 169.

245. See generally J.T. O'Neal, *A Handshake Not a Hand-Out: Extending NAFTA Parity to Textile Imports from the Caribbean Basin Countries*, 9 FLA. J. INT'L L. 497 (1994); Thomas W. Slover, *The Quebec Summit: A Summary of Recent Progress Toward Western Hemispheric Integration*, 7 L. & BUS. REV. OF THE AM. 135 (2001).

246. See generally Slover, *supra* note 245, at 139-40 (explaining that Latin American and Caribbean countries have looked to Mexico as an example of how they should become integrated in the North American economy).

247. See O'Neal, *supra* note 245, at 498.

248. Larry Rohter, *Blows From NAFTA Batter the Caribbean Economy*, N.Y. TIMES, Jan.

Recent initiatives for trade parity can, at least in part, be attributed to the passage of the most recent regional trade agreement to which the United States has become party,²⁴⁹ the Central American Free Trade Agreement (CAFTA).²⁵⁰ Furthermore, another trade agreement is currently under negotiation, the Free Trade Areas of the Americas (FTAA),²⁵¹ that seeks to expand "NAFTA-parity" to even more nations. The battle cry of nations seeking trade-parity is that they are "not seeking handouts, but only the opportunity not to be prevented from taking full advantage of the North American market."²⁵² The countries fighting for such parity fear that "unless the United States grants NAFTA tariff parity . . . their political stability will suffer greatly."²⁵³

The benefits for countries seeking "NAFTA parity" can be summed up as a "leveling of the playing field." They only ask for the opportunity to effectively compete with countries like Mexico to serve the larger economies of North America. With the passage of TPA and the flood of FTAs that followed,²⁵⁴ many of these nations have been granted this opportunity.²⁵⁵ In fact, over much of the last decade delivering trade parity to U.S. trading partners has dominated U.S. trade policy.²⁵⁶

While it has been a top priority to ensure that other nations in North America have the ability to compete in the U.S. economy, little attention has been paid to the domestic manufacturers burdened by the similar disadvantages. Like those nations seeking "NAFTA-parity," the U.S. manufacturing sector does not need a handout to remain competitive in the global economy. They simply need to operate on a level playing field with their competition. Like "NAFTA-parity," TAP delivers the ability to compete in the North American market to U.S. manufacturers.

30, 1997, at A1, available at 1997 WLNR 4884838.

249. See also Laun, *supra* note 121; see generally Slover, *supra* note 245; O'Neal, *supra* note 245.

250. See also Laun, *supra* note 121, at 435 See generally United States Trade Representative (USTR), Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (last visited Apr. 22, 2009) (summarizing the CAFTA agreement).

251. See generally United States Trade Representative (USTR), Free Trade Areas of the Americas, <http://www.ustr.gov/countries-regions/americas> (last visited Apr. 22, 2009) (for an overview of the FTAA negotiations).

252. Rhoter, *supra* note 258.

253. O'Neal, *supra* note 245, at 498.

254. See *supra* notes 29-37 and accompanying text.

255. *Id.*

256. I say this in response to the rapid expansion of U.S.-FTAs after NAFTA and the recent push from other nations to achieve "NAFTA-parity". See Slover, *supra* note 245, at 139-40.

B. TAP's Critics and the Need for Strict Regulation

1. Points of Contention

“American companies that have put operations in Canada and Mexico won’t want to lose their protectionist advantage.”²⁵⁷ Many of these companies have expressed concern over several of TAP’s key aspects.²⁵⁸ Perhaps the most significant of these is the charge that TAP could violate the United States’ obligations to the WTO by granting FTA benefits to companies in non-FTA countries.²⁵⁹ It is true that the structure of the WTO requires “that FTAs not unduly discriminate against non-FTA members.”²⁶⁰ However, this criticism represents a fundamental misunderstanding concerning TAP’s implementation. Currently, U.S. tariff benefits are already available to non-FTA countries.²⁶¹ Whenever a rule of origin permits the use of a non-FTA nation’s part or component in a product that later qualifies for U.S. tariff benefits, the non-FTA nation is indirectly benefitted.²⁶² TAP only extends benefits to non-FTA content that would already be benefitted by an existing U.S.-FTA.²⁶³

Additionally, critics claim that TAP’s reduction of U.S. Customs’ revenue will offset many of the benefits of the agreement.²⁶⁴ U.S. Customs’ revenue will in fact be reduced under TAP due to some goods no longer qualifying for applicable taxation. However, the projected benefits of TAP far outweigh this estimated \$186 million loss in U.S. Customs revenue.²⁶⁵ Because of TAP’s broad benefits, this loss in Customs revenue is an acceptable trade off. Furthermore, the NAFTAZ staunchly defends the estimated \$530 million annual gain as being soundly based on accurate theory of U.S.-FTZ usage.²⁶⁶ The unquantifiable benefit to the economy that an influx of new and higher paying jobs will provide further outweighs the concern over these losses.

2. Regulations

If unregulated, TAP will not realize the benefits it is capable of. It is critical that the FTZ Board effectively condition the reception of TAP benefits on the manufacturer’s ability to benefit the public interest.²⁶⁷ There

257. *Good Idea*, *supra* note 155.

258. *See The Truth About TAP*, *supra* note 215.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *See id.*

264. *Id.*

265. *Good Idea*, *supra* note 155.

266. *See The Truth About TAP*, *supra* note 215.

267. *See* 15 CFR § 400.31(b) (1991).

is potential concern that without this regulation, TAP's implementation could actually *contribute* to the decline in U.S. manufacturing jobs.²⁶⁸ If TAP benefits were universally available, a producer operating inside a U.S.-FTZ could simply import duty free parts and components to the detriment of U.S. based producers. However, the FTZ Board's charge to restrict or prohibit any product or activity that it finds "detrimental to the public interest,"²⁶⁹ gives it the necessary tools to limit these potential abuses.

The Board's strong regulation of TAP will ensure the maximum benefit for U.S. manufacturers, but there are additional safeguards. Any U.S. company fearing harm from an individual grant of TAP benefits is permitted to directly object to the Board's grant of those benefits.²⁷⁰ This mechanism, along with the Board's strict regulation, will ensure that no application for TAP benefits will be granted if it risks sacrificing jobs in another sector of the economy. Strict application of the Board's "public interest" requirement in both of these situations will ensure that only companies manufacturing in the United States and creating jobs for U.S. workers will receive the beneficial aspects of TAP legislation.

C. Conclusion

Current U.S.-FTAs have created a tariff structure that provides benefits to those manufacturers that leave U.S. territory.²⁷¹ Government encouragement of our own manufacturers to leave, and take thousands of U.S. jobs with them, is an unacceptable consequence of free trade. The current administration should push for the passage of TAP as a way to remedy the situation. "TAP is a win-win for U.S.-based companies and U.S. workers, and deserves strong bipartisan support in Congress."²⁷² Ultimately, even if TAP is not passed, a bill that levels the playing field for U.S. manufacturing is needed. Not only would this initiative aid the quest of many politicians seeking to "save manufacturing,"²⁷³ it would create a substantial number of jobs, the current emphasis of President Obama.²⁷⁴ To "save" U.S. manufacturing, Congress must take steps to once again make U.S. manufacturing a viable choice. Trade Agreement Parity has the ability to deliver just that.

268. See The Truth About TAP, *supra* note 215.

269. See 15 CFR § 400.31(b)(1991).

270. See The Truth About TAP, *supra* note 215.

271. See *supra* notes 148-58 and accompanying text.

272. Rep. Pascrell Introduces Trade Agreement Parity Bill to Boost U.S. Manufacturing; Legislation . . . BUS. WIRE, June 27, 2008 (quoting National Association of Foreign Trade Zones President Williard M. Berry), available at <http://www.allbusiness.com/government/government-bodies-offices-us-federal-government/11389127-1.html>.

273. See *supra* notes 2-3 and accompanying text.

274. *Id.*

FOOD-BORNE ILLNESSES STRIKE U.S. FOOD SUPPLY:

A DISCUSSION OF INADEQUATE SAFETY PROCEDURES AND REGULATIONS IN THE U.S. AND ABROAD

Elizabeth A. Trachtman*

INTRODUCTION

Globalization of the food trade industry has led to substantial increases in the number of food products traveling across the United States' borders.¹ This increase can be attributed to recent public information campaigns encouraging Americans to consume more fruits and vegetables.² Americans are now eating more fresh produce than ever before and desire its availability year round.³ In certain seasons, over 75% of fresh produce in the U.S. market is imported.⁴ The heightened demand for these products has led to an increase in the number of shipments the United States receives from countries with lenient sanitary standards.⁵ Additionally, globalization of the food trade allows American food manufacturers to acquire products from less developed countries at lower prices.⁶ Specifically, in 2002, 23.3% of fresh fruit and vegetables consumed by Americans were imported.⁷ As a result, the United States' food supply has become particularly vulnerable to contamination as these food products travel from their countries of origin to U.S. food processing centers.⁸

The Center for Disease Control ("CDC") estimates that food-borne

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1. F. K. Käferstein, *Foodborne Disease Control: A Transnational Challenge*, 3 EMERGING INFECTIOUS DISEASES No. 4, at para. 15 (Oct.-Dec. 1997), available at <http://www.cdc.gov/ncidod/eid/vol3no4/kaferste.htm>.

2. *Id.*

3. Marian Burros, *Produce Becoming Increasing Source For Food Illnesses*, N.Y. TIMES, Nov. 23, 2003, at para. 4 available at <http://query.nytimes.com/gst/fullpage.html?res=9A04E1D6133BF930A15752C1A9659C8B63&scp=1&sq=produce+becoming+increasing+source+for&st=nyt>.

4. Käferstein, *supra* note 1, at para. 15.

5. Burros, *supra* note 3, at para. 4.

6. Alexei Barrionuevo, *Food Imports Often Escape Scrutiny*, N.Y. TIMES, May 1, 2007, at para. 7, available at <http://www.nytimes.com/2007/05/01/business/01food.html?res=1&scp=1&sq=Food+imports+escape+scrutiny&st=nyt>.

7. Burros, *supra* note 3, at para. 18.

8. Eric M. Goldstein, *Infecting the Hands that Feed Us: Requiring U.S. Quality For All Imported Foods*, 7 WASH. U. GLOBAL STUD. L.R. 137, 138 (2008).

illnesses of all types sicken 76 million Americans and cause 5,000 deaths annually.⁹ While in the public's eye, food-borne illness outbreaks are generally linked to meat and seafood products, recent contamination problems have been connected to a variety of food sources that are not typically perceived as high risk.¹⁰ In fact, Americans are now more likely to get sick from eating contaminated produce than from any other food source.¹¹ Of the 3,000 outbreaks that occurred between 1990 and 2003, contaminated produce was the source of the greatest number of individual illnesses, more incidents than those linked to eggs and beef combined.¹² Over this short period of time, the Center for Science in the Public Interest ("CSPI") found that fresh produce was linked to 428 outbreaks resulting in 23,857 illnesses.¹³ The CSPI further stated that this data represents only the tip of the iceberg because food poisoning is vastly under-reported.¹⁴

The manner in which produce is consumed has contributed to the large number of outbreaks associated with fruits and vegetables, and is one of the difficulties of tackling contamination problems involving produce. Unlike meat, fresh produce is particularly susceptible to contamination because produce is often consumed raw.¹⁵ This presents a unique food safety challenge because there is no cooking or "kill step" to rid the produce of bacteria.¹⁶ In addition, consumers may fail to take additional steps such as washing the fruits and vegetables to eliminate pathogens.¹⁷ The manner in which produce is often consumed is likely to have contributed to the large number of outbreaks associated with fruits and vegetables and presents one of the difficulties of tackling contamination problems involving produce.

As a result of the recent outbreaks of food-borne illnesses, the American public has become increasingly concerned with food safety.¹⁸

9. Press Release, Ctr. For Sci. in the Pub. Interest, Contaminated Produce Top Food Poisoning Culprit (Apr. 1, 2004) [hereinafter CSPI] (on file with CSPI Newsroom).

10. Matthew Kohnke, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce & the Regulatory Response*, 12 DRAKE J. AGRIC. L. 493, 498 (2007).

11. CSPI, *supra* note 9.

12. Kohnke, *supra* note 10, at 498-99 (citing Daniel Akst, *Big Farms Will Keep Spinach on the Table*, N.Y. TIMES, Oct. 15, 2006, available at <http://www.nytimes.com/2006/10/15/business/yourmoney/15cont.html>).

13. CSPI, *supra* note 9.

14. *Id.* at 2.

15. Kohnke, *supra* note 10, at 500 (citing Marian Burros, *E. Coli Fears Inspire a Call for Oversight*, N.Y. TIMES, Dec. 9, 2006, at B1, available at <http://www.nytimes.com/2006/12/09/nyregion/09produce.html>).

16. Anny Shin, *Outbreaks Reveal Food Safety Net's Holes*, WASH. POST, Dec. 11, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121000903.html>.

17. Kohnke, *supra* note 10, at 500 (citing Robert E. Brackett, Dir., Ctr. For Food Safety & Applied Nutrition, Statement to the Committee on Health, Education, Labor and Pensions (Nov. 15, 2006), available at <http://www.fda.gov/NewsEvents/Testimony/ucml10926.htm>).

18. Kohnke, *supra* note 10, at 499.

According to recent surveys performed by the Food Marketing Institution, consumer confidence in the safety of food purchased in stores and restaurants has declined by 16%, and furthermore, 61% of consumers were concerned about food products imported from the country of Mexico.¹⁹ These concerns are not surprising based on the number of serious outbreaks of food-borne illnesses that have occurred over the past twelve years. In 2003, contaminated green onions from Mexico served in a Pennsylvania restaurant sickened over 555 people and caused three deaths.²⁰ Preliminary investigations by the Food and Drug Administration (“FDA”) indicated that the contamination occurred because the green onions were grown under conditions that allowed the crops to be exposed to human waste.²¹ From 2000 to 2002, three multi-state Salmonella outbreaks linked to Mexican-grown cantaloupe were identified.²² The FDA determined that there were several possible sources of this contamination problem, including “sewage-contaminated irrigation water; processing (cleaning and cooling) with Salmonella-contaminated water; poor hygienic practices of handlers; pests in packing facilities; and inadequate cleaning and sanitizing of equipment that came in contact with the cantaloupe.”²³ Another incident occurred in the spring and summer of 1996, when Guatemalan raspberries contaminated with *Cyclospora* resulted in more than 1,465 illnesses.²⁴ After researching the distribution system for the raspberries, the CDC concluded that the contamination most likely occurred at the farming stage.²⁵

The most recent major contamination incident occurred in the summer of 2008, when jalapeno and serrano peppers grown on farms in Mexico caused an outbreak of Salmonella that caused two deaths and sickened 1,442 people between April and August.²⁶ This outbreak was the largest reported incident of food-borne illnesses in the past ten years.²⁷ The CDC stated that the cause of this outbreak was the use of contaminated water to irrigate a batch of the peppers.²⁸ Both the CDC and the FDA

19. Press Release, Center For Science In The Public Interest, Crisis and Consensus: Modernizing U.S. Food Safety Law (Sept. 25, 2007) (on file with House Committee on Appropriations).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Linda Calvin, *Response to U.S. Foodborne Illness Outbreaks Associated with Imported Produce*, in INTERNATIONAL TRADE AND FOOD SAFETY: ECONOMIC THEORY AND CASE STUDY 74, 80 (Jean C. Buzby ed., 2003), available at <http://www.ers.usda.gov/publications/aer828/aer828g.pdf>.

25. *Id.*

26. Amanda Gardner, *FDA Faulted for Lack of Produce Oversight*, WASH. POST, Sept. 29, 2008, at para. 5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092602505.html>.

27. *Id.*

28. Mike King, *Sick Food-Safety System*, THE ATLANTA J. CONST., Aug. 1, 2008, at para 2, available at <http://www.ajc.com/opinion/content/opinion/stories/2008/08/01/fdaed.html>.

advised consumers to avoid consuming raw peppers from Mexico.²⁹ The issuance of this warning was delayed because food safety officials incorrectly targeted the tomato industry as the source of the outbreak.³⁰ Industry representatives stated that the erroneous warnings prompted tomato growers to plow crops and destroy millions of tons of produce ready for sale.³¹ In a congressional hearing, the representatives testified that the industry lost 300 million dollars because of the misidentification.³² This outbreak represents a failed test of the U.S. food safety system.³³ In July, people were still consuming contaminated peppers even though some health departments had evidence that the crop was the true source of the outbreak, and tomatoes were still being destroyed because of the erroneous warnings.³⁴ The mishandling of this outbreak and the economic losses associated with the CDC's misidentification of the contamination's source illustrate the seriousness of food contamination issues and the need for a food safety system that will prevent contamination and limit the scope of damages if an outbreak occurs.

The purpose of this Note is twofold. The first initiative is to raise awareness of the susceptibility of the United States' food supply to contamination from imported produce. These contaminations result from poor agricultural practices, relaxed regulations in foreign nations, and the diminishing capabilities of U.S. regulating agencies. Secondly, this Note illustrates how the failures of our current food safety system can be remedied through the adoption of stricter food safety procedures by foreign nations and the enactment of domestic legislation to increase the capabilities of regulatory agencies by requiring stricter standards for food safety. Part I of this Note will outline the foundation of our food safety system and the respective jurisdictions of the regulating agencies. This part will also examine how imported fruits and vegetables are handled upon their entry into the United States and the protocols followed by each agency. It particularly focuses on the differences between the two government agencies that regulate food products, the Food Safety and Inspection Service ("FSIS") and the FDA, based on their jurisdiction, level of authority, and standard safety procedures. This analysis will illustrate the inability of the FDA to regulate fresh produce because of the agency's limited budget, limited personnel, and lack of statutory authority to fully enforce U.S. safety standards and procedures upon foreign nations.³⁵

Part II of this Note will analyze the 2002 bioterrorism bill that was enacted after September 11, 2001, to strengthen the United States' safety

29. *Id.*

30. *Id.* at para. 3.

31. *Id.*

32. *Id.*

33. *Id.* at para. 9.

34. *Id.*

35. *See generally* Goldstein, *supra* note 8, at 147-49.

regulations and protect the nation's food supply from a bioterrorism attack.³⁶ This part will discuss the purpose of the bill, which contained provisions that would have required more stringent inspection and record-keeping procedures, and the actual effect of the passed legislation, which was watered down by the Bush Administration.³⁷ Part II will also examine the influence of the food industry's resistance to changes in the regulations regarding safety procedures and enforcement tools.³⁸

Part III of this Note will discuss the agricultural practices and regulations that are followed in foreign nations from which the United States receives its produce. In particular, Part III will focus on the food safety procedures that were adopted in Guatemala to overcome the multiple outbreaks of *Cyclospora* that plagued the country's raspberry crop.³⁹ This part will discuss the success of Guatemala's new regulations and the potential for other nations to implement similar food safety programs.

Part IV of this Note will discuss the repercussions of contamination problems that have resulted in a growing number of outbreaks linked to imported fresh produce. In particular, this part will focus on the economic losses that are suffered by the industry of the contaminated product or an industry that has been identified as a possible source of the outbreak.⁴⁰ The main concern addressed in this part is the detrimental results of the food safety system's lack of an efficient trace-back system that prevents the source of an outbreak from being quickly identified and removed from the market.⁴¹ This shortcoming exacerbates the damage that these outbreaks can cause, including continued consumption of unidentified contaminated products and severe economic losses due to false reports of product contamination.⁴²

Part V of this Note will present several recommendations for preventing the contamination of produce, quickly managing any contamination problems that do occur, and creating and enforcing legislation that would require the implementation of stricter controls on the global food safety system. The first of these recommendations entails strengthening the capabilities of the FDA by increasing funding for the agency and enacting legislation that would give the agency "equivalency

36. Press Release, Chris Richard, Voice of Am., U.S. Food Indus. Gears Up for Tougher Inspections in Fight Against Terror (Nov. 26, 2003) (on file with Voice of America), available at <http://www1.voanews.com/english/news/a-13-a-2003-11-26-12-US.html>.

37. *Id.*

38. See Robert Pear, *Food Industry's Resistance Stalls Bill to Protect Food*, N.Y. TIMES A22, Apr. 16, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9A03E1DA113CF935A25757C0A9649C8B63&scp=1&sq=Food+Industry%27s+Resistanc e+Stalls&st=nyt>.

39. Calvin, *supra* note 24, at 80.

40. See King, *supra* note 28, at para. 3; Calvin, *supra* note 25, at 81-82.

41. See King, *supra* note 28, at para. 6-9.

42. *Id.*, *supra* note 28.

authority” to enforce the United States’ safety standards on foreign nations.⁴³ This section will also explain the need for a reliable trace-back system that would allow the source of an outbreak to be quickly identified and removed from the market, while allowing erroneously targeted items to be eliminated as a suspects.⁴⁴ The second recommendation is directed at foreign nations who export food products to the United States, requiring these countries to improve their agricultural practices to ensure that the produce grown is safe for consumption.⁴⁵ Finally, this Note recommends that these changes be implemented during the Obama Administration through federal legislation modeled after the Government Accountability Office’s (“GAO”) food safety recommendations discussed in its report released on June 12, 2008, and the Safe Food Act, which was proposed at the committee level of Congress in 2007.⁴⁶

PART I: AN EXPLANATION OF THE UNITED STATES’ FOOD SAFETY SYSTEM AND ITS TWO REGULATING AGENCIES

The FSIS and the FDA work side by side to ensure the safety of the United States’ food supply, but can hardly be considered equal partners in accomplishing this task. The FDA has been denied the resources and authority delegated to the FSIS and consequently does not have the capability to protect consumers from contaminated food.⁴⁷ This disparity makes the FDA unable to sufficiently monitor the food supply and is partially to blame for recent outbreaks in the United States associated with contaminated food products.⁴⁸

A. *FSIS and the FDA*

The responsibility of ensuring the safety of the United States’ food supply is delegated to two government agencies: the FSIS, which operates under the U.S. Department of Agriculture (“USDA”), and the FDA.⁴⁹ The FSIS provides regulations for meat, poultry, and some egg products, while the FDA has jurisdiction over all other food sources.⁵⁰ As a result, the FDA

43. Press Release, U.S. Gov’t Accountability Office, Federal Oversight of Food Safety: FDA Has Provided Few Details on the Resource and Strategies Needed to Implement its Food Protection Plan (June 12, 2006) [hereinafter GAO] (on file with author); Goldstein, *supra* note 8, at 141.

44. King, *supra* note 28, at para 1-2.

45. CSPI, *supra* note 9.

46. Press Release, Ctr. For Sci. in the Pub. Interest, Testimony of Caroline Smith DeWaal, Crisis and Consensus: Modernizing U.S. Food Safety Law (Sept. 25, 2007) (on file with author); GAO, *supra* note 43.

47. See Goldstein, *supra* note 8.

48. *Id.*

49. *Id.* at 139.

50. *Id.*

is responsible for the quality of 80% of the United States' food supply, including all fruits and vegetables.⁵¹ Both the FSIS and the FDA must ensure that shipments under their jurisdiction entering the United States comply with our nation's standards for safety and wholesomeness.⁵² In order to mandate the compliance of foreign nations, the FSIS uses its legislatively granted "equivalency authority."⁵³

According to the U.S. Government Accountability Office ("GAO"), equivalency authority allows the FSIS to ensure compliance with U.S. standards by requiring that "foreign food production systems operate under standards equivalent to those enforced domestically before a country may export its food to the United States."⁵⁴ As a result of this regulating power, in 2006, only thirty-two countries were authorized to export meat and poultry to the United States.⁵⁵ But, the FDA has not been granted equivalent authority and food products under its jurisdiction, such as fresh produce, can be exported from any country without FDA approval of their safety standards.⁵⁶ The FDA's lack of authority to force compliance with U.S. standards is one of the several ways in which the FSIS and the FDA differ and has been recognized as one of the FDA's major deficiencies.⁵⁷

The FSIS and the FDA have different protocols for handling food shipments that arrive at U.S. borders. These differences stem largely from the FDA's lack of both equivalency authority and necessary resources to sufficiently monitor incoming food products.⁵⁸ When a shipment is received under the jurisdiction of the FSIS it must be delivered to one of the agency's warehouses for re-inspection.⁵⁹ The FSIS refers to this stage in the processing of the shipment as re-inspection because essentially the first inspection occurs when the FSIS conducts an investigation of the exporter's facilities to ensure they meet U.S. safety standards.⁶⁰ At the warehouses, FSIS inspectors visually examine every shipment to determine that the products are not damaged and their documentation and labeling is accurate.⁶¹ If a shipment fails this inspection, it is stamped with the words "U.S. Refused Entry" and is returned to the exporter, destroyed, or possibly turned into animal food, within forty-five days.⁶² The importer and customs

51. *Id.*

52. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO/RCED-98-103, FEDERAL EFFORTS TO ENSURE THE SAFETY OF IMPORTED FOODS ARE INCONSISTENT AND UNRELIABLE 47 (1998), available at <http://www.gao.gov/archive/1998/rc98103.pdf>).

53. Goldstein, *supra* note 8, at 139.

54. *Id.* at 140.

55. *Id.*

56. *Id.* at 140.

57. *Id.* at 148-49.

58. *Id.* at 143.

59. *Id.* at 144.

60. *Id.*

61. *Id.*

62. *Id.*

are also notified that the particular shipment did not pass its inspection and the product is not released from the warehouse unless documentation is produced showing that arrangements for the product's disposal have been made.⁶³ If a shipment passes inspection, it is stamped as having been reviewed by the USDA and is released to the importer for market distribution.⁶⁴

B. The Significance of Equivalency Authority

A product imported under the jurisdiction of the FDA is handled in a much different manner than shipments received under the jurisdiction of the FSIS. The FDA electronically screens all the shipments that arrive at the U.S. border; however, the FDA releases a majority of these shipments without conducting an inspection.⁶⁵ In 2001, less than 1% of FDA-regulated shipments arriving in the United States were physically inspected.⁶⁶ Five years later, FDA inspectors examined just 20,662 shipments out of the 8.9 million shipments that arrived at U.S. borders.⁶⁷ This equals 0.23% of all inspected products. This minimal scrutiny can be partially explained by the FDA's lack of statutory authority to hold the imported food products in FDA-controlled warehouses for inspection.⁶⁸ It can also be explained by the FDA's lack of equivalency authority which forces the agency to spread its resources thin because it cannot shift the burden of compliance onto the exporting nations and must solely shoulder the burden of inspecting the products at the border.⁶⁹ This responsibility would be alleviated if the exporting nation was required, under equivalency authority, to ensure that its facilities and exported food products met U.S. quality standards.⁷⁰ This is what allows the FSIS to focus on inspecting the shipments for proper labeling and superficial transport damage, as opposed to quality issues.⁷¹ The FDA does not have this capability, which results in FDA-regulated shipments arriving at the border without any information regarding how the products were grown, produced, handled or shipped.⁷² Therefore, the FDA is forced to make quick determinations and decide if the food is safe for consumption.⁷³

63. *Id.*

64. *Id.* at 144-45.

65. *Id.* at 145.

66. *Id.* (citing John D. Dingell, Ranking Member, House Committee on Energy and Commerce, Remarks Before the Consumer Federation of America's 25th Annual National Food Policy Conference: Food Safety and the Bioterrorism Legislation (Apr. 23, 2002).

67. Barrionuevo, *supra* note 6, at para 3.

68. Goldstein, *supra* note 8, at 145.

69. *Id.* at 147.

70. *Id.* at 148.

71. *Id.*

72. *Id.* at 148-49.

73. *Id.* at 149.

C. Budget and Personnel Concerns

Another hurdle the FDA must overcome to protect the nation's food supply is a limited budget that has led to reductions in staff and a limited number of inspections that can be performed.⁷⁴ According to a report written by three members of the FDA's advisory board, "[O]ver the last two decades, the agency's public health responsibilities have soared while its appropriations have barely budged. The result is that the FDA is falling farther and farther behind in carrying out its responsibilities"⁷⁵ Although the FDA oversees 80% of the nation's food supply, the agency receives only 38% of the federal food safety budget.⁷⁶ Of this budget, the FDA estimates that only 3% of its funding is spent on regulating fresh produce.⁷⁷ In addition, according to the GAO's report, "The FDA has no formal program devoted exclusively to fresh produce and has not consistently and reliably tracked its fresh produce spending"⁷⁸

The FDA's budget limitations force the agency to operate understaffed at the expense of food safety. In the past three years, the FDA has reduced its science staff by 20% and has cut 600 food safety inspectors.⁷⁹ According to Caroline Smith DeWaal, Food Safety Director for the CSPI, "The reality of [the] FDA's situation is they don't have the basic inspectors to inspect the food supply they're in charge of"⁸⁰ In 2007, the FDA employed only 1,750 food inspectors who were responsible for all U.S. ports and domestic food processing plants.⁸¹ There are so few inspectors that most domestic food plants receive only one visit every five to ten years.⁸² And in 2001, the FDA employed only 150 inspectors who were responsible for monitoring 207 U.S. ports, while the FSIS employed 9,000 inspectors to oversee food products under its jurisdiction.⁸³ The FDA's budget prevents the adequate examination of imported food products because if no inspector is present at the port when a shipment arrives, the food passes through to the market unchecked.⁸⁴ And even if an inspector is present, it has been estimated that inspectors only have thirty seconds to

74. See Barrionuevo, *supra* note 6, at para 15; Shin, *supra* note 16.

75. Gardiner Harris, *Advisers Say F.D.A.'s Flaws Put Lives at Risk*, N.Y. TIMES, Dec. 1 2007, at para. 4, available at <http://www.nytimes.com/2007/12/01/washington/01fda.html>.

76. Goldstein, *supra* note 8, at 146-47 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-05-549T, OVERSEEING THE U.S. FOOD SUPPLY: STEPS SHOULD BE TAKEN TO REDUCE OVERLAPPING INSPECTIONS AND RELATED ACTIVITIES 8 (2005), available at <http://www.gao.gov/new.items/d05549t.pdf>).

77. Gardner, *supra* note 26, at para. 6.

78. *Id.* (quoting a GAO report).

79. *Id.* at para. 15.

80. Shin, *supra* note 16.

81. Goldstein, *supra* note 8, at 150.

82. Barrionuevo, *supra* note 6, at para. 11.

83. Goldstein, *supra* note 8, at 150.

84. *Id.*

determine whether hundreds of shipments meet quality standards.⁸⁵ It is difficult to understand why an agency that oversees products which account for 25% of every U.S. dollar spent by consumers is so poorly equipped handle this large burden; however, it is clear that this process is insufficient to ensure the safety of the nation's food supply and must be changed.⁸⁶

The problems caused by the FDA's low budget are exacerbated by the agency's lack of equivalency authority. Equivalency authority could relieve the already stretched FDA staff of some of the responsibility for determining the safety of the large numbers of imported food products that arrive at U.S. borders. Additionally, FDA inspectors would be able to spend less time examining each shipment because they would already have information regarding the food product when it arrives.⁸⁷ According to John Swann, FDA historian, this would enable the FDA to inspect more shipments each year by "ameliorating the pressure to conduct exhaustive inspections by providing a presumptive assurance of safety and quality."⁸⁸ Equivalency authority is also beneficial because visual inspections at ports are often ineffective at detecting contaminated products, and inspection of the production facilities in the foreign nations would be more effective at guarding against contamination problems.⁸⁹ Without equivalency authority, the FDA will continue to have difficulties ensuring the safety of imported products and preventing contaminated food sources from entering the market.

Another problem experienced by the FDA is the agency's lack of the basic resources needed to record and monitor food products under its jurisdiction.⁹⁰ The computer systems used by the FDA are aging and breaking down. The inspectors' reports are still handwritten, and the system for regulating imported produce is unable to communicate with U.S. customs and other government systems.⁹¹ This information was revealed in a report written by three members of the FDA's Science Board, and according to one of the report's authors, "[t]his was the first time that a group of people got together and really looked at all the areas that the F.D.A. has to cover. . . [w]e were shocked at the scope of its responsibilities, we were shocked at how little its resources have increased, and we were surprised at the conditions those in the F.D.A. had to work under."⁹²

85. *Id.* at 145.

86. John Swann, *History of the FDA*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm124403.htm>, (last visited April 23, 2010). Bad link, I think I replaced it with the correct one.

87. *Id.*

88. *Id.*

89. *Id.*

90. *See Harris, supra* note 75.

91. *Id.* at para. 9-10.

92. *Id.* at para. 8.

D. Mishandling of Contaminated Products

The FDA's shortcomings also extend to its procedures for when a contaminated product has been identified. Unlike the FSIS, the FDA does not have a "U.S. Refused Entry" stamp or a comparable marking to identify a shipment that has been deemed unacceptable.⁹³ When a food product does not pass inspection, the FDA sends out a notice to both U.S. Customs and the importer.⁹⁴ Thereafter, the importer has ten days to produce evidence that the shipment is admissible.⁹⁵ If the FDA rejects this testimony, the importer is given another chance to show that the product meets U.S. standards by having a sample of their product examined in a laboratory.⁹⁶ If the FDA is still not satisfied that the shipment meets quality standards, the importer must return the product to U.S. customs for re-export or destruction.⁹⁷ Unlike the protocol of the FSIS, under FDA regulations, the shipment remains in the control of the importer throughout the inspection process.⁹⁸ This is due to the FDA's lack of authority to mandate the use of FDA-controlled storage facilities.⁹⁹ This inability makes the FDA's system vulnerable to manipulation because the importer is allowed to select the sample of its product for re-inspection and decide in which laboratory to conduct the testing.¹⁰⁰ This control could potentially enable importers to substitute a safe product for an unsafe one during the testing process.¹⁰¹

Finally, this protocol allows products that were rejected by the FDA to find their way into the stream of commerce.¹⁰² This occurrence is often the result of communication breakdowns between the FDA and U.S. customs.¹⁰³ In some cases, the FDA's decision to reject a shipment is not made until the agency receives the laboratory test results from a product that had arrived days, possibly weeks, earlier.¹⁰⁴ By the time the product is deemed unsafe by the FDA, the importer may have already released the product into the market or simply refused to re-export the shipment.¹⁰⁵ In the customs surveillance operation "Bad Apple," it was noted that "about 40 percent of the imported foods [the] FDA checked and found in violation of U.S. standards were never redelivered to Customs for disposition. These

93. Goldstein, *supra* note 8, at 145.

94. *Id.* at 146.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 145.

99. *Id.*

100. *Id.* at 151.

101. *Id.*

102. *Id.* at 152.

103. *Id.*

104. *Id.*

105. *Id.*

foods were not destroyed or exported as required and presumably were released into U.S. commerce.”¹⁰⁶

The inability of the FDA to close this hole within the nation's food safety system has produced disastrous results for both sides of the food trade industry. Consumers have lost trust in the regulating agencies to protect the nation's food supply from contamination, and the food industries, both foreign and domestic, are feeling the effects of this loss of trust and the erroneous warnings that have accompanied several recent outbreaks.¹⁰⁷ Most significantly, outbreaks of food-borne illnesses linked to fresh produce have greatly increased, and the FDA is not currently equipped to handle the responsibility of protecting the nation's food supply.¹⁰⁸ According to William Hubbard, former Associate Commissioner of the FDA, “[t]he public thinks the food supply is much more protected than it is . . . If people really knew how weak the F.D.A. program is, they would be shocked.”¹⁰⁹

PART II: THE BIOTERRORISM ACT OF 2002: A FAILED ATTEMPT AT REFORM OF THE UNITED STATES' FOOD SAFETY SYSTEM

Although enacted to strengthen regulations governing food safety in the wake of the September 11, 2001, attacks, the Bioterrorism Act of 2002 has done little to improve the United States' food safety system. Cost concerns and resistance from the food industry caused the Act to become watered down during the lawmaking process and the relaxed standards have been unable to remedy the existing problems with the nation's food safety system.¹¹⁰

A. *Post-September 11, 2001, Legislative Initiative*

The Bioterrorism Act was passed in 2002 as an aspect of the Homeland Security effort in response to the terrorist attacks of September 11, 2001.¹¹¹ The Act was designed to implement stringent requirements for the inspection and record-keeping of imported food products.¹¹² Under the original Act, foreign exporters had to register with the FDA and notify officials twenty-four hours in advance of when a shipment would arrive at

106. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, Rep. No. GAO-02-47T, FOOD SAFETY AND SECURITY: FUNDAMENTAL CHANGES NEEDED TO ENSURE SAFE FOOD 7 (2001), available at <http://www.gao.gov/new.items/d0247t.pdf>).

107. Calvin, *supra* note 24, at 74.

108. Goldstein, *supra* note 8, at 147.

109. Barrionuevo, *supra* note 6, at para. 5.

110. See Richard, *supra* note 36; see Pear, *supra* note 38.

111. Richard, *supra* note 36, at para. 1; Goldstein, *supra* note 8, at 153.

112. Richard, *supra* note 36, at para. 1.

U.S. borders.¹¹³ This notice requirement allows the agency to schedule inspections for products vulnerable to tampering or from areas posing terrorist threats.¹¹⁴ In addition, farmers and shippers were required to record everyone who handles the food items from the field to the packing company.¹¹⁵ The legislation was intended to increase the number of inspections that take place each year and allow the FDA to detain food products in their warehouses without a court order.¹¹⁶ According to Robert Pear, this change in the regulations would have been “the most significant expansion of federal authority over the food industry in more than six decades.”¹¹⁷

As with many post-September 11th initiatives, the Bioterrorism Act soon lost its urgency.¹¹⁸ Although it quickly passed through both houses of Congress, the Bill stalled during the House-Senate conference committee in the face of strong resistance from the food industry.¹¹⁹ While the conference committee is designed to allow lawmakers to work out their differences, it largely remains a secretive part of the legislative process.¹²⁰ According to Senator Richard Durbin (D-IL), “Many of the food trade associations are too embarrassed to oppose this bill publicly. They wait until the conference committee meets late at night or work through Congressional staff members to oppose sensible and meaningful safety provisions.”¹²¹ The National Food Processors Association, which represents companies such as Kraft, H. J. Heinz and ConAgra, argued that the legislation was not needed, citing the government’s current legal authority and enforcement mechanisms to ensure the safety of the nation’s food supply.¹²² Another group, Lawyers for the Grocery Manufacturers of America, drafted amendments to the Bill that would limit the number of companies required to register with the government and reduce the penalties imposed for violations of the Act.¹²³ Similarly, the Food Marketing Institute, which represents grocery stores such as Safeway, Kroger and Wal-Mart, lobbied to exempt its stores from the stringent requirements of the Act.¹²⁴ Instead of a new broad authority for regulator agencies to monitor imported food products, industry leaders essentially wanted to narrow the focus of the Act to terrorism alone.¹²⁵ According to DeWaal, “Congress let

113. *Id.* at para. 11.

114. *Id.* at para. 6.

115. *Id.* at para. 3.

116. Pear, *supra* note 38, at para. 3.

117. *Id.* at para 5.

118. *Id.* at para 2.

119. *Id.* at para 1.

120. *Id.* at para 9.

121. *Id.*

122. *Id.* at para 6.

123. *Id.* at para. 7.

124. *Id.* at para 8.

125. *Id.* at para. 9.

[the] industry set the parameters in the current debate, and the industry is trying to keep [the] F.D.A. as weak as possible."¹²⁶

On October 9, 2003, the FDA announced its revised regulations based on the decision by the Bush Administration and food industry leaders that the Bioterrorism Act as proposed would be "too cumbersome and costly."¹²⁷ Industry officials cited the change as a good outcome, stating that "the government . . . significantly softened earlier proposals" and "head[ed] off what could have caused chaos for haulers of food and agricultural commodities."¹²⁸ The revised regulations included less stringent registration requirements for exporters and more flexible deadlines for informing the FDA that a shipment would be arriving at the U.S. border.¹²⁹ The original Act required shippers to give agency officials twenty-four hours notice that a shipment was going to be arriving, but because of the industries' protests, in 2003 this requirement was reduced to only two hours.¹³⁰ According to DeWaal, companies may even arrive at a different border crossing than the one the company reported to the FDA.¹³¹ She stated that this is not what Congress intended with the bioterrorism bill because the:

FDA hasn't given itself enough margin of protection to insure that they can identify all the high-risk food shipments and actually get inspectors to the ports to check them. Congress intended for the legislation to result in strong protections. But FDA, after intensive lobbying by the food industry, has significantly weakened these protections.¹³²

In addition, under the current regulations, produce processors and distributors are only required to keep track of where their products come from and go for one step backward and forward in the process.¹³³ This requirement does not apply to restaurants or farms and the record-keeping can be done on paper in many different formats.¹³⁴ This protocol makes

126. *Id.* at para. 20.

127. CSPI, *supra* note 9. Press Release, Whitt Flora, Transport Topics, U.S. Eases Border Rules (Oct. 20, 2003) (on file with Transport Topics); King, *supra* note 28, at para. 12.

128. Flora, *supra* note 127, at para. 2.

129. *Id.* at para. 5.

130. Richard, *supra* note 36, at para. 11.

131. *Id.* at para. 12.

132. *Id.*

133. Bina Venkataraman, *Amid Salmonella Case, Food Industry Seems Set to Back Greater Regulation*, N.Y. TIMES, July 31, 2008, at para. 13, available at <http://www.nytimes.com/2008/07/31/health/policy/31outbreak.html>.

134. *Id.* at para. 14.

tracing contaminated produce quite cumbersome.¹³⁵

The shortfalls of the Bioterrorism Act are largely a result of the purpose of the Act, which is a security, rather than a safety, measure.¹³⁶ By simply focusing on the contamination of the nation's food supply through a terrorist attack, the government is ignoring the possibility of accidental contaminations, which can have the same devastating effects. The Act also fails to address issues such as the sanitation standards of foreign producers and the lack of the FDA's equivalency authority to ensure that foreign nations are in compliance with U.S. standards.¹³⁷ These holes in the current legislation illustrate the need for a comprehensive food safety system that will protect the nation's food supply from both terrorist attack and accidental contamination.

PART III: FOOD SAFETY SYSTEMS IN EXPORTING NATIONS: SUCCESSES AND FAILURES

Many of the contamination problems that have plagued the United States have been linked to the poor agricultural practices used in the countries from which the United States imports its produce.¹³⁸ The growing practices in these nations vary greatly from farms having very deficient safety systems that are essentially unregulated to other producers adopting safety practices that are mandated by government programs.¹³⁹ The successes and failures that have accompanied these various systems are useful as guidance for determining how to best establish safety procedures capable of preventing contamination problems.

A. Lack of Food Safety Regulations and Unsanitary Growing Conditions in Mexico Linked to Recent Outbreaks

In 2008, an outbreak of Salmonella associated with Mexican peppers sickened at least 1,440 people and caused two deaths.¹⁴⁰ This incident can be explained by the lack of food safety regulations in Mexico and the poor growing conditions that exist on some Mexican farms and processing centers.¹⁴¹ For example, at a processing plant for peppers in northern Mexico suspected by the FDA to be associated with the 2008 Salmonella outbreak, workers are not required to separate peppers based on the sanitary

135. *Id.*

136. Goldstein, *supra* note 8, at 153.

137. *Id.*

138. See Mark Walsh & Olga L. Rodriguez, *Few Safeguards for Mexican Produce Heading North*, ASSOCIATED PRESS, Sept. 14, 2008, available at <http://www.commondreams.org/headline/2008/09/14>.

139. *Id.*; see Calvin, *supra* note 24.

140. Walsh, *supra* note 138, at para. 2-3.

141. *Id.* at para. 5.

conditions under which the produce was grown.¹⁴²

This protocol is not unusual; neither the United States nor Mexico require Mexican produce growers and processing plants to adhere to any specific safety requirements.¹⁴³ Therefore, although some growers operate under good sanitary conditions, others do not and their produce is shipped to the United States regardless.¹⁴⁴ Some farms and processing plants choose to operate under better sanitary conditions so that they may sell their produce to U.S. supermarket chains that refuse to buy products that are not certified by private companies.¹⁴⁵ However, according to Cesar Frago, President of Mexico's Chili Peppers Growers Association, most growers do not bother to have their products certified because their crops are sent to distributors without knowledge of where their products will end up.¹⁴⁶ The only requirement for a Mexican company to be able to ship their products to the United States is that the company must be registered online.¹⁴⁷ This process prevents the FDA from identifying which products are at risk for contamination due to poor sanitary conditions and makes it impossible for consumers to know which products are more likely to be safe for consumption.¹⁴⁸

In Mexico, there is a wide range in the amount and type of safety precautions that are taken at the farming level.¹⁴⁹ For example, some Mexican farms grow their crops in fenced-off fields, use fresh water to irrigate the plants, and pack the products in clean processing plants where the workers are dressed in protective gear.¹⁵⁰ Other farms operate without these precautions, allowing wildlife to roam in unfenced crop fields and use untreated, and sometimes sewage-laced, water for irrigation.¹⁵¹ Although most major produce buyers attempt to avoid products grown under these conditions by requiring their growers to be certified through a third-party, not all buyers operate under the same rules.¹⁵² According to Kathy Means, Vice President for the U.S. Produce Marketing Associations, food safety is not regulated by the government, so it is up to the individual companies to require the growers to be certified.¹⁵³

The existence of a non-mandatory certification process poses a problem for those growers who adopt the safety procedures necessary to meet the qualifications for certification. Growers in their region which do

142. *Id.* at para. 3.

143. *Id.* at para. 5.

144. *Id.* at para. 6.

145. *Id.* at para. 7.

146. *Id.* at para. 14.

147. *Id.* at para. 6.

148. *Id.* at para. 8.

149. *See id.* at para. 10.

150. *Id.* at para. 10.

151. *Id.*

152. *Id.* at para. 20.

153. *Id.* at para. 21.

not operate under proper sanitary conditions may offer contaminated crops that are then associated with the entire country.¹⁵⁴ The extent of the impact on trade when a food-borne illness is linked to a country's crop depends on how quickly the country corrects the contamination problem and their ability to convince other countries that their product does not pose a health risk.¹⁵⁵ For example, after multiple incidents of food-borne illnesses outbreaks were linked to Guatemalan raspberries in the 1990s, the United States' demand for blackberries from Guatemala decreased even though blackberries were never identified as a source of the outbreak.¹⁵⁶ This reaction may be attributed to the desire of buyers to purchase all of their berries from one region, which was not possible when Guatemala was prohibited from exporting its raspberries to the United States during the height of its contamination issues.¹⁵⁷ However, the decreased demand also illustrates how the effects of a contamination problem can extend well beyond the producer of the food product at issue affecting other areas of the country's produce industry. This wide scope of damages further illustrates the need to prevent contaminated products from entering the market and causing injury to consumers and exporters.

Produce may also become contaminated in foreign nations at the distribution level. This is particularly true given that produce often passes through several distributors before reaching the marketplace.¹⁵⁸ According to William Hubbard, former FDA official, "It is very common for distributors to receive products from numerous sources, numerous farms and in some cases multiple countries That's just the way produce moves."¹⁵⁹ This process increases the opportunities for contamination to occur and makes tracing the source of an outbreak more difficult.¹⁶⁰

The lack of government oversight in Mexico's current food safety system illustrates the need to reform the country's safety procedures. In particular, the sanitary conditions, growing practices, and the ability to trace an item of produce back to its source, must be improved. Although the voluntary certification process appears to validate the quality of crops from some farms, not all farms receive certification and contaminated produce is still slipping through the cracks and making its way into the market. This occurrence is detrimental to consumers and producers alike and must be prevented.

154. *See id.* at para. 27.

155. Calvin, *supra* note 24, at 74.

156. *Id.* at 82.

157. *Id.*

158. Walsh, *supra* note 138, at para. 15.

159. *Id.* at para. 16.

160. *Id.* at para. 15.

B. Guatemala Overcomes Series of Food-Borne Illness Outbreaks Through Implementation of a Rigorous Food Safety Program

Like Mexico, Guatemala has been associated with multiple outbreaks of food-borne illnesses resulting from its contaminated crops.¹⁶¹ These outbreaks led to large economic losses and for a period of time ruined the country's reputation as a safe producer.¹⁶² However, unlike Mexico, Guatemala was able to change its food safety system by implementing the Model Plan of Excellence ("MPE"), which involved the use of strict regulations to ensure that the country's exports were safe for consumption.¹⁶³ Although this reform was not perfect, the system vastly improved the quality of Guatemala's produce, and has allowed the country to somewhat overcome the devastating effects of being associated with multiple outbreaks over a short period of time.¹⁶⁴

Guatemala's first incident involving food-borne illnesses occurred in 1996, when an outbreak of *Cyclospora* in the United States sickened more than 1,465 people.¹⁶⁵ Although the outbreak was first linked to California strawberries, it was later discovered that raspberries from Guatemala were the source of the outbreak.¹⁶⁶ By the time the raspberries were identified as the source, the growing season for the berries was over and no immediate action was taken.¹⁶⁷ The FDA and the CDC sent investigators to Guatemala to examine the raspberry farms and gain a better understanding of the local industry.¹⁶⁸ The FDA determined that the contamination likely occurred at various farms throughout the country.¹⁶⁹ The FDA recommended that the industry implement Good Agricultural Practices ("GAPs"), Good Manufacturing Practices ("GMPs"), and sanitation procedures.¹⁷⁰ The agency also provided advice and technical assistance in making these changes.¹⁷¹ In response to the 1996 outbreaks, the Guatemalan Berry Commission ("GBC") developed a plan to categorize the berry farms based on their level of risk of contamination and only allowed certain farms to export their produce.¹⁷² Despite the GBC's efforts, in 1997 another outbreak of *Cyclospora* was linked to the country's raspberries and the GBC voluntarily agreed to halt its raspberry exports mid-season.¹⁷³ It is

161. See Calvin, *supra* note 24, at 80-83.

162. *Id.*

163. *Id.* at 82.

164. *Id.*

165. *Id.* at 80.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 81.

173. *Id.*

estimated that stopping the shipment of raspberries in the middle of the growing season resulted in a ten million dollar loss for the industry.¹⁷⁴

With two consecutive years of contamination problems, the GBC and the government of Guatemala realized stricter controls and enforcement measures had to be implemented.¹⁷⁵ In the fall of 1997, the Guatemalan government developed a commission to head the initiative and gave the GBC enforcement power that was critical for the success of the export plan.¹⁷⁶ Despite the changes, the FDA was not convinced that Guatemala had resolved its contamination problems. It required all shipments from the country to be detained without physical examination (“DWPE”) and denied the shipments entry into the United States.¹⁷⁷ This procedure was an unusual response, generally only exercised when all other means of regulating the product have proved ineffective.¹⁷⁸

In 1999, the United States began to allow shipments of raspberries produced under the MPE to enter the country.¹⁷⁹ The MPE is a joint program of the Guatemalan government and the GBC.¹⁸⁰ Under the program, farmers that wish to participate must comply with specific food safety practices and pass government inspections and FDA audits.¹⁸¹ The safety procedures required by the MPE include filtering the water used for irrigation and creating better worker hygiene facilities.¹⁸² The MPE also requires each clamshell of raspberries to be coded, allowing the product to be traced back to its farm of origin in case of a contamination problem.¹⁸³ This capability makes it possible for the MPE to revoke export authority from specific farms that have food safety issues, which helps maintain the program’s integrity.¹⁸⁴

The trace-back ability created by the MPE has been successful in limiting the spread of food-borne illnesses and helping correctly identify the source of an outbreak.¹⁸⁵ In 1999, several *Cyclospora* outbreaks in the United States and Canada were linked to raspberries; however, the GBC was able to show, by utilizing the tracking feature of the MPE, that Guatemalan raspberries were not the source of the outbreak.¹⁸⁶ In 2000, two outbreaks were linked to Guatemalan raspberries and were traced to a

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 82.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

specific farm that was then removed from the MPE program.¹⁸⁷ Since this outbreak, there have been no further incidents involving Guatemalan raspberries.¹⁸⁸ The success of the MPE program in remodeling Guatemala's food safety system and halting the contamination problems associated with the country's raspberry crop illustrates the potential for other countries to similarly reform their safety regulations and resolve their contamination problems.

PART IV: ECONOMIC CONSEQUENCES OF REOCCURRING OUTBREAKS

Over the past twelve years, outbreaks of food-borne illnesses have been frequent and severe.¹⁸⁹ These contamination problems have not only sickened many people but also have led produce growers to experience huge economic losses.¹⁹⁰ Furthermore, the repeated occurrences of these outbreaks, and the erroneous warnings that often accompany them, have led American consumers to distrust the ability of the FDA to protect the nation's food supply.¹⁹¹

For example, in the summer of 2008, an outbreak of Salmonella was initially identified by U.S. food safety officials to be linked to tomatoes.¹⁹² However, on June 17, 2008, the FDA lifted its warning about contaminated tomatoes and identified jalapeno peppers from Mexico as the true source of the outbreak.¹⁹³ This second warning did not come in time to prevent the fear of tainted tomatoes which prompted growers to destroy their crops, and ruined millions of tons of produce that was ready to be sent to the market.¹⁹⁴ Meanwhile, jalapeno peppers, the true source of the outbreak, were still being consumed in July of 2008 even though some state and local health departments had evidence the peppers were contaminated.¹⁹⁵ Industry representatives estimated that the false identification of tomatoes as the source of the 2008 Salmonella outbreak resulted in a loss of 300 million dollars.¹⁹⁶ Similarly, in 1996, California strawberries were misidentified as the source of an outbreak of Cyclospora, which led to a sixteen million dollar loss in revenue for strawberry growers in the month of June alone.¹⁹⁷ According to Representative Dennis Cardoza of California, "You can describe our current food safety system as 'outbreak roulette.'"¹⁹⁸ The

187. *Id.*

188. *Id.*

189. *See supra* INTRODUCTION.

190. *See generally* Part IV.

191. *See id.*

192. King, *supra* note 28, at para. 3.

193. *Id.* at para. 4.

194. *Id.* at para. 3.

195. *Id.* at para. 9.

196. *Id.* at para. 3.

197. Calvin, *supra* note 24, at 80.

198. King, *supra* note 28, at para. 5.

current uncertainties in the FDA's announcements must be resolved in order to prevent the devastating effects of erroneous warnings and having contaminated products remain unidentified in the market. The FDA serves an important role in preventing contaminated products from reaching consumers. This position is far too significant to allow these inaccuracies to persist.

PART V: RECOMMENDATIONS FOR REMODELING THE GLOBAL FOOD SAFETY SYSTEM

Taking measures to protect the global food supply must begin on the farms of foreign nations who export produce and extend to regulatory agencies in the United States and abroad. Both the United States and foreign nations must strengthen their food safety systems through stricter regulations, more extensive monitoring by the regulatory agencies, education about safe practices, and new legislation.

This multi-tiered approach is necessary because, although the U.S. food industry has stated that it can monitor itself, the current system is clearly not working.¹⁹⁹ The creation of a revamped food safety system in the United States will involve greatly expanding the capabilities of the FDA and making substantial changes to the current legislation governing food safety procedures.

Vernon Tesh, professor of microbial and molecular pathogenesis at Texas A&M University, suggests that remodeling the United States' food safety system will essentially require a "two-pronged attack."²⁰⁰ First, the FDA must be capable of performing better inspections, then, when a problem is detected, there must be a means for enforcing the regulations.²⁰¹ In order to tackle a contamination problem once it occurs, a centralized food-tracking system is needed. This trace-back ability would allow food safety officials to keep tabs on which countries the food products are coming from and where the products have been placed in the market.²⁰² This change would allow the FDA to quickly remove contaminated products from the market and limit the number of consumers affected by outbreaks of food-borne illnesses. Furthermore, the enactment of new legislation is needed to ensure that the FDA has sufficient resources to adequately monitor incoming food products and mandate compliance with the agency's regulations.

There are several aspects of the food safety systems in the foreign nations from which the United States receives produce shipments that must be addressed. Contamination problems often begin on the farms where the

199. *Id.* at para. 6.

200. Gardner, *supra* note 26, at para. 16.

201. *Id.*

202. King, *supra* note 28, at para. 6-7.

produce is grown; therefore, it is important to examine the growing practices used at the farming level. GAPs are capable of preventing contamination problems altogether and must be adopted to prevent the spread of illness and maintain the reputation of these countries as safe producers. Secondly, the producers must be educated about these farming practices and be monitored to ensure that their agricultural practices meet the applicable standards set forth by the country's regulating agency or food safety program. This substantial change would best be implemented by legislation that would establish agencies to police the farms and ensure their cooperation with newly implemented food safety programs. Changes of this nature would significantly improve foreign countries' ability to protect its exports and would assist these nations in maintaining good trade relations with other countries. Preventing contamination problems will benefit consumers and the food industry in these countries by limiting the frequency and severity of outbreaks of food-borne illnesses.

A. Increased Authority and Resources for the FDA.

The FDA plays a significant role in preventing contaminated food products from entering the U.S. market. However, despite the agency's importance, it has continually been denied the authority and resources that have been granted to the FSIS.²⁰³ In order to protect the nation's food supply it is imperative that the FDA be granted equivalency authority to match that of the FSIS's and be supplied more resources, primarily in the form of personnel and funding, to exercise its authority.²⁰⁴

Equivalency authority is the ability of a regulatory agency to require foreign countries to operate under safety standards equivalent to those required domestically before a nation may export its products to the United States.²⁰⁵ Although the FSIS has this ability, the FDA does not.²⁰⁶ This difference between the agencies has a large effect on the capabilities of the FDA to adequately protect the nation's food supply.²⁰⁷ If the FDA were to receive equivalency authority through new legislation, a significant portion of the burden of ensuring compliance with U.S. food safety standards would be shifted to the exporting countries.²⁰⁸ This change would limit the number of countries who could send their products to the United States and would relieve the FDA border inspectors of the task of determining on the spot if a shipment is safe for consumption.²⁰⁹ Through the use of equivalency authority the FDA could operate like the FSIS and concentrate

203. See Goldstein, *supra* note 8, at 139-40, 149-50.

204. *Id.* at 141.

205. *Id.* at 140.

206. *Id.*

207. See *supra* Part I.B.

208. Goldstein, *supra* note 8, at 148.

209. *Id.*

its resources on inspecting the farms and facilities used in the foreign countries, as opposed attempting to catch contaminated products at the border.²¹⁰

Because food products under the jurisdiction of the FSIS arrive at the border with the guarantee that the item was produced under adequate safety standards, the FSIS is primarily concerned with detecting damaged shipments and labeling mistakes at the border, as opposed to contamination issues.²¹¹ As a result, the FSIS is better able to conserve its resources and expend its funding and personnel towards monitoring potential sources of contamination.²¹² The FDA would similarly benefit by being able to focus its limited resources on correcting contamination problems, as opposed to merely trying to catch problems before they affect the food supply.

Equivalency authority would also assist the FDA by preventing shipments from reaching the U.S. border with essentially no information regarding how the product was grown, produced, handled or shipped.²¹³ Currently, the burden of acquiring this information is on the FDA, and the agency must ascertain these facts during border inspections.²¹⁴ Equivalency authority would make this task unnecessary and would allow FDA inspectors to examine a larger percentage of shipments that arrive at the border.²¹⁵ The use of equivalency authority “would allow FDA inspectors to spend less time on each shipment, thereby allowing them to inspect more shipments each year and thus ameliorating the pressure to conduct exhaustive inspections by providing a presumptive assurance of safety and quality.”²¹⁶ Currently, the FDA is only capable of inspecting a small number of the shipments that arrive at U.S. borders and is only able to spend a short amount of time examining each shipment.²¹⁷ This process of relying heavily on hastily conducted border and port inspections is ineffective in preventing contaminated products from entering the United States.²¹⁸ In addition, relying solely on information provided by the exporting nations, without actually inspecting the farms and facilities in these countries, creates an opportunity for the exporting nations to manipulate the FDA’s inspection system.²¹⁹ Furthermore, many conditions that make food products unsafe for consumption are undetectable by visual inspections. Therefore, inspections at the farming and production level are

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 150.

216. *Id.*

217. *See supra* Part I.B.

218. Goldstein, *supra* note 8, at 150.

219. *Id.* at 150-51.

necessary to effectively guard against contamination problems.²²⁰ Finally, equivalency authority would allow the FDA to operate like the FSIS by sending shipments to FDA-controlled warehouses for inspections and use a "U.S. Refused Entry" stamp on shipments that were rejected upon inspection to make sure they do not enter the market.²²¹ Granting the FDA equivalency authority through new legislation will be the best means to achieve these objectives and conserve resources.

One of the biggest problems with the FDA's lack of equivalency authority is that it requires the agency to spread its resources thin while trying to inspect the large amounts of shipments that arrive at U.S. borders every day.²²² Although granting the FDA equivalency authority would partially relieve the budget concerns which plague the FDA, the agency must also receive more funding in order to keep up with the increasing number of imports by hiring additional personnel to conduct inspections of farms and facilities in foreign nations and at the border.²²³ According to a report released by the FDA's Science Board in 2007, the "FDA is not positioned to meet current or emerging regulatory needs . . . [and] does not have the capacity, such as staffing and technology, to ensure the safety of the nation's food supply."²²⁴ According to the report, the "resources have not kept pace with [the FDA's] increasing responsibilities, and this disparity has made it increasingly 'impossible' for FDA to maintain its historic public health mission."²²⁵ Former Associate Commissioner of the FDA, Bill Hubbard, stated that in 2007, the FDA employed only 450 inspectors who were responsible for screening almost 20 million imports, which averages to 44,000 shipments per inspector.²²⁶ The inadequacy of the FDA's resources is not a secret. This problem has been identified by the FDA and other agencies, and must be resolved through legislative reform.²²⁷ In order to fully protect the nation's food supply, it is estimated that the FDA's base budget will need to increase by 755 million dollars by 2013, beginning with a 128 million dollar increase in 2009.²²⁸ This substantial increase can only be achieved through the enactment of legislation which forces the FDA's budget increase to become a priority.

The GAO, the CSPI, and the FDA have all expressed the need for the FDA to receive equivalency authority and increased resources.²²⁹ In 2004,

220. *Id.* at 151.

221. *Id.* at 152; see *supra* Part I.A.

222. See *supra* Part I.B.

223. See Goldstein, *supra* note 8, at 149-51.

224. Press Release, Lisa Shames, GAO, Federal Oversight of Food Safety (June 12, 2008) (on file with GAO).

225. *Id.*

226. *Id.*

227. Goldstein, *supra* note 8, at 156.

228. Shames, *supra* note 224.

229. Goldstein, *supra* note 8, at 156.

the GAO recommended that the FDA make it a priority to establish equivalency agreements with the United States' trading partners in order to shift some of the FDA's oversight burden to these countries.²³⁰ In 2007, the FDA released its Food Protection Plan, which requested "Congress allow the agency to enter into agreements with exporting countries to certify that foreign producers' shipments of designated high-risk products comply with FDA standards."²³¹ As of 2008, the FDA has been unable to enter into these agreements.²³² Members of Congress have also recognized the need for changes in legislation, as evidenced by numerous proposed bills.²³³ None of the bills, however, have advanced beyond the committee level.²³⁴ In order to alleviate the FDA's current oversight burden and increase the productivity of the agency, legislation must be passed which will grant the agency sufficient funding and the authority to pursue the equivalency agreements with foreign nations.

Another aspect of the United States' food safety system that needs to be strengthened is the FDA's ability to trace the origin of a product once it has been identified as contaminated. This trace-back ability would enable the FDA to identify the sources of an outbreak sooner and promptly eliminate regions and products that may have been mistakenly suspected.²³⁵ Early identification is becoming particularly important as the countries from which the United States receives imports move towards industrialization and produce on a larger scale.²³⁶ Under the Bioterrorism Act of 2002, processors and distributors are only required to keep track of where their food products come from and are sent to for one step forward and one step backward in the process.²³⁷ This procedure has limited application because "those rules do not apply to farms or restaurants. And the records can be kept on paper and in a multitude of formats, making the tracing of fresh produce, which has a short self-life, a cumbersome task."²³⁸ This checkerboard process must be replaced by a more efficient, computerized system, which would consist of a single database to contain all records for food products under the jurisdiction of the FDA.²³⁹ Congress must pass comprehensive legislation to accomplish these objectives. In particular, producers, distributors and retailers must be held accountable for better oversight of their products as they travel through the market, and the FDA must be given greater authority to investigate and recall contaminated food

230. Shames, *supra* note 224.

231. *Id.*

232. *Id.*

233. Goldstein, *supra* note 8, at 156.

234. Goldstein, *supra* note 8, at 156 n.135.

235. Venkataraman, *supra* note 133, at para. 13.

236. Käferstein, *supra* note 1, at para. 12.

237. Venkataraman, *supra* note 133, at para. 14.

238. *Id.* at para. 15.

239. King, *supra* note 28, at para. 8-9.

products.²⁴⁰

Of the proposed bills, the Safe Food Act, which was introduced by Senator Durbin and Representative Rosa DeLauro (D-CT) in 2007, seems to have the most potential to successfully reform the nation's food safety system.²⁴¹ This Act would effectively streamline the food safety system by consolidating the FDA, USDA, the Center for Veterinary Medicine, the Environmental Protection Agency ("EPA") and several other agencies in order to create a unified Food Safety Administration.²⁴² The Act would also modernize the outdated inspection program and give the Administration clear authority to implement safety programs at the farming level. The Act is premised on "preventative control systems implemented by the industry and performance standards monitored and enforced by the government."²⁴³ Under the Act the administration would have equivalency authority, which would allow it to certify an exporting nation's food safety system and ensure that its procedures are equivalent to the United States' standards.²⁴⁴ The Administration would also have the authority to audit the certified countries every five years for compliance and conduct routine inspections to ensure that the exports are safe for consumption and properly labeled.²⁴⁵ Furthermore, the Act would give the Administration authority to issue civil and criminal penalties for violating food safety regulations and provide protection to whistleblowers that reveal violations.²⁴⁶ Overall, the Act would ensure that "foods would no longer have an 'open visa' to enter the U.S. without inspection or regulation."²⁴⁷ The Safe Food Act should be implemented in order to remodel the United States' food safety system in a way that will provide proper government oversight and the resources necessary to maintain the safety of the nation's food supply.

The United States would not be the first country to reform its food safety system in this manner.²⁴⁸ In 1999, the United Kingdom established a single Food Standards Agency, which has been effective in reducing the number the food-borne illness outbreaks and building consumer confidence in the country's food safety system.²⁴⁹ Within the first three years of creating the Agency, food-borne illnesses declined by 18% and public confidence in the wholesomeness of the country's food supply increased from 44% to 60%.²⁵⁰ The Food Standards Agency was established during a

240. *Id.* at para. 13.

241. CSPI, *supra* note 9.

242. *Id.* at 9.

243. *Id.* at 10.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *See id.* at 8.

249. *Id.*

250. *Id.*

time when the United Kingdom was experiencing food safety problems similar to those which have plagued the United States recently.²⁵¹ The food scares in the United Kingdom illustrated the need for change and encouraged the reaching of a compromise.²⁵² The United States should react similarly and take action now to remodel its food safety system.

B. Implementing Good Agricultural Practices

Exporting food products is a major industry in Mexico and the safety of its exports is crucial to the country's continued participation in this trade.²⁵³ If the country of Mexico

is not able to improve processing and self-controls, and the government does not implement the required measures for the governments of the importing countries to be confident that requirements are met, then exports will encounter difficulties to remain the same or increase, and the impact on the capital inflow, the employment rate, and the possibilities of development will be severely affected.²⁵⁴

In order to remain in trusting relationships with its trade partners and grow its industry, Mexico and other exporting nations must ensure that their products do not become associated with food-borne illness outbreaks.²⁵⁵ Preventing contamination problems in these nations will require the use of GAPs, stricter sanitary procedures, and government oversight of these new measures. Furthermore, producers and distributors must be educated about these practices and the best ways to implement these new procedures at their facilities.²⁵⁶ Through these efforts, exporting countries will be able to continue to expand their industries, meet the demands of their trade partners, and prevent the devastating effects of being identified as a producer of a dangerous product.²⁵⁷

A producers' first line of defense for preventing contamination problems is the adoption of GAPs.²⁵⁸ According to the FDA, GAPs involve the use of sanitary water for irrigation and washing; controlling the potential hazards which accompany the use of manure; maintaining worker

251. *Id.*

252. *Id.*

253. José Luis Flores Luna, *Communication and Participation: The Experience in Mexico*, in FAO/WHO GLOBAL FORUM OF FOOD SAFETY REGULATORS 194, 195 (Food and Agriculture Organization of the United Nations 2002), available at <http://www.fao.org/docrep/MEETING/004/Y2122E.HTM>.

254. *Id.*

255. *See supra* Part III.B.

256. *See* Luna, *supra* note 253, at 196.

257. *See supra* Part IV.

258. Calvin, *supra* note 24, at 89.

health and hygiene; and the use of sanitation procedures in the field, packing facilities and during the transportation process.²⁵⁹ Although some producers in foreign nations will have adopted these practices, others have not, and their products pose a risk for contamination.²⁶⁰ The first step in implementing GAPs is to educate farm managers and employees on the safety procedures recommended by the FDA to prevent contamination.²⁶¹ Education about these practices can be provided in a number of ways. For example, in 2000, a training program was held in Chile for 50 representatives from the Chilean fresh produce industry, government and academia.²⁶² The training program consisted of presentations on produce safety conducted by the United States' FDA and their Chilean counterparts and an on-site visit to a fruit packing facility and a clinic for agricultural workers.²⁶³ The program primarily focused on good growing and handling practices, general principles of working hygiene and safety, quality assurance programs, safe use of pesticides and agrochemicals and new technologies in produce sanitizing.²⁶⁴ Programs such as the one conducted in Chile should be held in every country that exports fresh fruits and vegetables and will be necessary if a country must meet U.S. safety standards under equivalency agreements.

Providing foreign countries with the training to establish GAPs is not the end of the battle. The United States, through equivalency agreements, and the governments and agencies in these countries must monitor the conditions under which their products are grown and ensure that the recommended safety standards are being followed. In Mexico, a federal produce safety law was enacted in 1994, but is rarely enforced by the government.²⁶⁵ In addition, although some producers choose to have their safety standards certified by a third party so that they may sell to major produce buyers in the United States, the certification is not government-regulated or required.²⁶⁶ This lack of oversight is unacceptable, and will stand in the way of improving the safety procedures in these nations.

Government oversight in these exporting countries can be provided through several means. First, the government can create a program that

259. U.S. Department of Health and Human Services, Food and Drug Administration, Centers for Disease Control and Prevention, *Guide to Minimize Microbial Food Safety Hazards For Fresh Fruits and Vegetable*, Oct. 26, 1998, <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/ucm064574.htm> (last visited Apr. 23, 2010).

260. See *supra* Part III.A.

261. See U.S. Department of Health and Human Services, *supra* note 259, at para. 19.

262. Daniel Trachewsky, *Report on Evaluation of Good Agricultural Practices Training Program*, at para. 1, <http://www.cfsan.fda.gov/dms/fschconf.html> (last visited Apr. 24, 2010).

263. *Id.*

264. *Id.* at para. 10-14.

265. Walsh, *supra* note 138, at para. 20.

266. *Id.* at para. 21-22.

requires the adoption of GAPs and instills consequences on farms and facilities that do not adhere to the program.²⁶⁷ This approach was followed with successful results in Guatemala after repeated outbreaks were linked to the country's raspberry crop.²⁶⁸ The MPE was established in Guatemala in 1999 and required growers to adhere to a detailed program of safety procedures and pass frequent inspections conducted by Guatemala's Integral Program for Agricultural and Environmental Protections and the FDA.²⁶⁹ If a grower did not participate in the program, or it was discovered that a grower's crop was the source of the outbreak, the farm would be unable to export its product.²⁷⁰ Furthermore, the MPE required the use of filtered water for irrigation, better worker hygiene facilities, and mandated that a code be applied to each case of raspberries so the product could be traced back to the grower in the event of a contamination problem.²⁷¹ Requiring a tracking code would assist regulating agencies in limiting the scope of damages once an outbreak occurs and would identify farms that are having contamination problems in order to remove their authority to export.²⁷² The mechanisms used in the MPE allowed the government of Guatemala to play an active role in the food safety system and ensure that their growers met the requirements of the program. This hands-on approach served the country of Guatemala well and could produce the same results in other countries.²⁷³

Another means a government could use to oversee its nation's food safety system is to require the country's growers to be certified through an accredited private certifying agency. In March of 2008, the House Committee on Energy and Commerce released the Food and Drug Administration Globalization Act ("FDAGA"), which would create a voluntary certification program for foreign governments, state and regional authorities, cooperatives, and other third-party agents.²⁷⁴ These groups would be able to apply to become certifying agents who would be permitted to perform regular inspections on behalf of the FDA to determine whether facilities were in compliance with safety standards.²⁷⁵ The FDAGA would also provide incentives to encourage growers to seek certification, such as

267. Calvin, *supra* note 24, at 82.

268. *See id.* at 80-84.

269. Linda Calvin, Luis Flores, & William Foster, *Food Safety in Food Security and Food Trade, Case Study: Guatemalan Raspberries and Cyclospora*, INT'L FOOD POL'Y RES. INST. (2003), <http://www.ifpri.org/2020/focus/focus10.asp> (last visited Apr. 24, 2010).

270. Calvin, *supra* note 24, at 82.

271. *Id.*

272. *Id.*

273. *See supra* Part III.B.

274. David Plunkett & Caroline Smith Dewaal, *Who is Responsible for the Safety of Food in a Global Market? Government Certification v. Importer Accountability as Models for Assuring the Safety of Internationally Traded Foods*, 63 FOOD & DRUG L.J. 657, 663 (2008).

275. *Id.*

subjecting their products to less stringent laboratory testing.²⁷⁶ This Act should be adopted to provide a means for foreign governments to be responsible for inspecting and certifying the farms and facilities in their countries. The transfer of this authority would benefit the global food safety system by shifting some of the burden of ensuring compliance with safety standards to the governments of the exporting nations and require the governments to oversee their food safety systems.

CONCLUSION

Outbreaks of food-borne illnesses have become a common occurrence in the global food market and have inflicted harm on consumers, the food industry, and exporting nations.²⁷⁷ The scope of these damages is wide and the ramifications are often long-lived.²⁷⁸ The urgency of tackling this problem cannot be ignored. The United States must join with its trade partners to improve the global food safety system by strengthening U.S. regulating agencies, providing education on good farming practices, and pushing exporting nations to take responsibility for implementing and overseeing their food safety systems.²⁷⁹ In order to maintain and expand their food industry, the exporting nations must enter into equivalency agreements with their trade partners and hold their growers accountable for adopting better sanitation and agricultural practices.²⁸⁰ Through these measures, the global food safety system will be strengthened and the risk of contamination problems will be minimized. As the food market further expands and the importation of products continues to increase, the necessity of a new approach to food safety will become apparent. However, the time to act is now.

276. *Id.*

277. *See supra* INTRODUCTION.

278. *See supra* Part IV.

279. *See supra* Part V.

280. *Id.*