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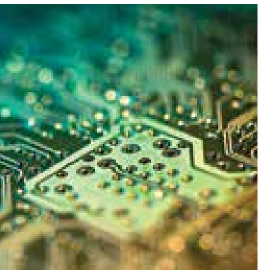



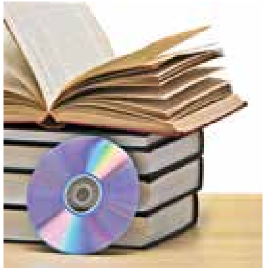

Ebb and Flow in Safe Harbors:

Some Exemplary Experiences Under One Old Statute and One New

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Introduction

What do a grand, rather old statute rooted in the gritty world of coal and steel and smokestacks (the National Labor Relations Act, also known as the Wagner Act) and a splendid, rather new statute rooted in the sparkly world of silicon and plastic and computers (the Online Copyright Infringement Liability Limitation Act, Title II of the Digital Millennium Copyright Act) have in common? A lot, of course, including this: neither contains "safe harbors" identified as such by Congress. And both contain "safe harbors" identified as such by other government actors. This article will explore some aspects of judges' and bureaucrats' discovery and development of safe harbors, comparing their long-term experience with the National Labor Relations Act (NLRA) and their shorter-term experience with the Online Copyright Infringement Liability Limitation Act (OCILLA).

I. Congress and "Safe Harbors"

First, there is the matter of why Congress almost never labels a statutory provision a "safe harbor." (If you search for "safe harbor" in the titles of U.S. Code sections you will turn up only a handful of hits.[1])

It is odd. After all, the term "safe harbor" is widely used in the law.[2] (If you search for "safe harbor" in the text of the U.S. Code Annotated you will turn up hundreds of hits in the annotations under hundreds of Code sections, and the hits are in the thousands in databases of commentaries, judicial opinions, and legislative histories.) Wide use of the term probably occurs because its definition is simple (*Black's Law Dictionary* says a "safe harbor" is "A provision (as in a statute or regulation) that affords protection from liability or penalty"), and useful (it identifies a common feature of modern laws), and there are no convenient substitutes (*Black's* offers no synonyms that do not include the words "safe" and "harbor"). Moreover, Congress has demonstrated a willingness and ability to label safe harbors as "safe harbors" from time to time (recall the sparse but non-zero results of the first search described above), and congressional committees refer in their reports to safe harbors with some frequency (recall the rich results in the legislative histories included in the second category of searches described above).

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"Safe harbors" have mostly been products of judicial interpretation and administrative implementation of legislation that is heavy on the delegation.

So, the scarcity of clearly labeled "safe harbors" is not a matter of terminological irrelevance or inconvenience, nor of legislators' ignorance or other incapacity. I know of no commentary on this subject (perhaps because it is unimportant), and I have no high-level theory to explain it (perhaps because I am not clever). But I do have a close-to-the-ground guess: "safe harbors" have mostly been products of judicial interpretation and administrative implementation of legislation that is heavy on the delegation, and that is why the words "safe" and "harbor" appear side-by-side routinely in the law made by judges and bureaucrats and rarely in the law made by legislators. In other words, Congress (usually with a bit of participation by the President) enacts laws specifying what must not, must, and might be done (often in broad or porous or vague terms). Other branches of government, in the course of doing their work in accordance with those laws, label some of those specifications—and some of the work product resulting from legislative delegations of authority to those other branches of government—"safe harbors."[3] Some legislators may hope or expect (and express those sentiments in committee hearings and reports, floor remarks, speeches, and the like) that certain enactments will be treated by courts and agencies as safe harbors, or that congressional delegations of authority will trigger

Before the rise of the modern delegation-intensive regulatory state, the term "safe harbor" appeared in reporters of federal judicial decisions and opinions only in its literal sense.

judicial or administrative creation of safe harbors, but the legislators delegate the specifics of identifying, developing, and labeling such things to the judges and bureaucrats.[4]

It should, therefore, come as no surprise that before the rise of the modern delegation-intensive regulatory state, the term "safe harbor" appeared in reporters of federal judicial decisions and opinions only in its literal sense—that is, as a refuge from open water for watercraft and the associated crews and goods.[5] (This was not because the term was a novelty. The *Oxford English Dictionary* has maritime citations back to the mid-16th century.[6]) It was only in the 1950s that "safe harbor" became a metaphor for a safe zone in which there would be no negative legal consequences for certain kinds of behavior.[7] And by the 1960s the courts were in the business of identifying both the existence[8] and the non-existence of "safe harbors" in statutes that did not themselves contain the term.[9]

II. Courts, Agencies and the "Safe Harbor"

Which brings us to our two exemplars: the NLRA and OCILLA. Why these two? First, both statutes are undeniably important. Second, both statutes are what might be called commercial diplomacy laws—they are products of congressional efforts to engage in statutory mediation, creating legal structures under which powerful and opposed commercial interests that have demonstrated tendencies to pillage each other when given the opportunity can co-exist peacefully (through a combination of compulsion and incentives), if not amicably. To state the obvious, the NLRA mediates between labor and management, and OCILLA mediates between copyright holders and online distributors (also known as internet service providers, or ISPs). So, the kinds of safe harbors we are likely to find are those conducive to the vindication of the policies underlying the statutes: the marking-off of areas of activity in which buoying the welfare of one side will not sink the other. Third, neither statute contains the term "safe harbor." And fourth, courts have identified and refined—and may well continue to identify and refine—"safe harbors" in both statutes.

A. Safe Harbors in the NLRA

There is no "safe harbor" in the NLRA—the federal law with arguably the best claim to being the font of (or perhaps merely the inflection or tipping point into) the modern regulatory state. The NLRA was enacted in 1935, and its constitutionality was upheld by the U.S. Supreme Court in the spring of 1937. The Court ruled that economic activities qualify as commerce subject to federal regulation under the Commerce Clause of the U.S. Constitution if they have "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," even if those activities are "intrastate in character when separately considered."[10] This was an apt description of the NLRA's deep and sweeping regulation of the American workplace.

Nor is there a "safe harbor" in any of the many amendments the NLRA has undergone since 1935. Nevertheless, the federal judiciary and the National Labor Relations Board (NLRB)—the agency chiefly responsible for implementing the NLRA—have over the decades fairly festooned the statute with safe harbors they have discovered or created. While some are formulated in terms that sound relatively management-friendly—for example, safe harbors for postponement of employee benefits[11] and for discipline undertaken in good faith but mistaken belief[12]—and others seem tailored more to benefit labor—for example, safe harbors for all but highly egregious union activity[13] and for presumed union support[14]—most, if not all, turn out in practice to be two-edged swords (or perhaps two-entry harbors).[15] The safe-harbor-development practice is sufficiently well-established and consciously-exercised

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that it is even possible to find cases in which a federal court forthrightly instructs the NLRB to create a new safe harbor to foster compliance with the underlying statute and improve dispute resolution.[16]

For this exercise, however, we will focus on just two thought-provoking safe harbors. The first was crisply defined by Congress and, in its early years, vigorously and—practically speaking—absolutely buttressed by the NLRB and the courts. It has been tempered in more recent times by moderating interpretations and countervailing legal interests. The result: a narrowing of unions' latitude for arbitrary action. The second safe harbor was recently created by the NLRB and recognized by the courts as a necessary device to make sense of the Board's narrowing of employers' latitude for arbitrary action. In short, a big old safe harbor has eroded, and a brand-new safe harbor has been dredged.

i. A "safe harbor" slides: the garment industry proviso after 60 years

Two early and important rounds of major amendments to the NLRA occurred in 1947 with the passage of the Labor-Management Relations Act (LMRA, also known as the Taft-Hartley Act) and in 1959 with the passage of the Labor Management Reporting and Disclosure Act of (LMRDA, also known as the Landrum-Griffin Act). Two of the most important revisions under the LMRDA were those designed to prevent labor unions from engaging in what Congress considered to be unfair labor practices at the expense of employers and third parties: (1) the "hot cargo agreement" (an agreement between a union and an employer under which the employer agrees not to do business with another employer), and (2) the "secondary boycott" (pressuring a customer or supplier of an employer with which a union has a dispute to cease doing business with that employer). The LMRDA's language barring those two practices was included in what became section 8(e) of the NLRA (outlawing hot cargo agreements), with a cross-reference to section 8(b)(4) (outlawing secondary boycotts):

> (e) Enforceability of contract or agreement to boycott any other employer; exception
>
> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforc[e]ble and void: . . . [17]

Section 8(e) continued, however, with two provisos laying out conditions under which an otherwise "unenforc[e]ble and void" contract or agreement could be valid:

> Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further, That for the purposes of this subsection and subsection (b)(4)(B) [of this section, which prohibits "secondary boycotts,] the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.*[18]

The first, unitalicized proviso empowers unions and employers in the construction industry to enter hot cargo agreements under limited circumstances. The second,

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italicized proviso empowers unions and employers in the garment industry to enter hot cargo agreements, and also empowers unions in the garment industry to engage in secondary boycotts. There were specific public policy reasons for the provisos. The proviso for the garment industry was, in the words of the U.S. Supreme Court in 1967, "a justifiable exception which allows what the legislative history shows it was designed to allow, secondary pressures to counteract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors."[19]

The "garment industry proviso" (as it was known practically from the moment of enactment), was and remains a classic safe harbor in everything but name: it was an explicit, crisply defined carve-out written into a statute to permit a defined kind of entity to engage in certain activities that the statute strictly barred other entities from engaging in.

But that was not the end of the matter. Litigation over the scope and strength of the safe harbor started soon and persisted, and a body of law developed (and continues to develop) around it. Early on, for example, the courts and the NLRB reinforced the completeness and exclusivity of the garment industry's safe harbor. The U.S. Circuit Court of Appeals for the D.C. Circuit rejected an argument by unions in other industries "that § 8(e) is arbitrary and unconstitutional because of the special treatment of the garment and construction industries,"[20] and the U.S. District Court for the District of California declined to expand the proviso to cover the lithography industry, notwithstanding striking similarities between the conditions in the two industries as they related to the legislative anti-sweatshop policy underlying the proviso.[21]

And while the proviso's validity and limitation to the garment industry have been well-settled and unqualified for a half-century, it has over time become qualified in other respects, even as it has picked up the "safe harbor" moniker.

First, as the U.S. Court of Appeals for the Second Circuit explained unexceptionably in a recent case, "The Garment Industry Proviso . . . [is] to be construed in a manner that will advance the legislative purpose of the garment industry exemption to § 8(e) of the [NLRA]." As a result, the court applied what it called a "sliding scale" to determine whether a particular union activity fits within the "safe harbor" of the garment industry proviso or not:

> If the objected to clauses [in a labor contract] condone secondary boycotts, we follow the Board's methodology—used in construing the Construction Industry Proviso—to determine whether the clauses fall within the safe harbor of the Garment Industry Proviso. Under this approach, where the meaning of a clause is plain, we may determine its validity. If unlawful on its face—hence, not exempt under the Garment Industry Proviso—it makes no difference how a Local intended to apply the clauses. *See Bricklayers & Stone Masons Union, Local No. 2*, 224 N.L.R.B. 1021, 1025 (1976), *enforced*, 562 F.2d 775 (D.C. Cir. 1977). Where the plain meaning of the clause indicates it is not clearly unlawful, it is to be read as requiring no more than the law allows. On the other hand, where a clause is ambiguous, unlawfulness will not be presumed; instead, extrinsic evidence will be examined to decide whether it was intended to be administered in a primary or lawful manner or in a secondary or unlawful fashion.[22]

The garment industry proviso had, in other words, gradually become a sliding-scale, evidence-based safe harbor.

Second, more recently, and less gradually, federal courts have recognized that the garment industry proviso is limited by what is undoubtedly the most important judicial gloss on the NLRA—the duty of fair representation.[23] In 1967, in *Vaca v. Sipes*, the Supreme Court summarized the history and scope of a union's duty of fair representation to its members:

> It is now well established that, as the exclusive bargaining representative of the employees in [a] bargaining unit, the Union ha[s] a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . . The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged

> racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, . . . and was soon extended to unions certified under the N.L.R.A. . . . Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation [1] to serve the interests of all members without hostility or discrimination toward any, [2] to exercise its discretion with complete good faith and honesty, and [3] to avoid arbitrary conduct.[24]

It took almost half a century for the duty of fair representation and the garment industry proviso to meet in court, and when they did, the union's duty to "exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct" trumped the union's "safe harbor" for secondary boycotts. In 2003, in *Simo v. UNITE*—the first reported judicial decision addressing the relationship between the duty of fair representation and the garment industry proviso[25]—the U.S. Court of Appeals for the Ninth Circuit made the hierarchy clear, "the proviso is intended to exempt secondary pressure in the garment industry from unfair labor practice liability—as indicated by the proviso's focus on prohibiting the enforcement of secondary agreements—but not to immunize unions from DFR [duty of fair representation] liability whenever such secondary pressure is applied."[26]

The garment industry proviso has, in other words, has now become a sliding scale, evidence-based safe harbor that is subject to a duty of good faith and fair dealing.

None of which is to say that the "legislative purpose of the garment industry exemption" has run its course. It has not. Sweatshops are a live issue in the garment industry in the 21st century.[27] Nor is it to say that the continuing development of limits on the reach and force of the garment industry proviso means that courts have flipped from being reflexively friendly to union interests under the proviso to being reflexively hostile. Indeed, both the Second Circuit in *Perlman* and the Ninth Circuit in *Simo* ended up ruling in favor of the unions in those cases (though *Simo*, at least, looks like a close call).

So, the common thread in the development of the garment industry proviso is not the judicial protection of a safe harbor in the form of a fixed, unchanging zone of activity without legal liability—of "hot cargo" agreements and secondary boycotts on any terms chosen by unions and any collaborating employers and suppliers. It is, instead, the judicial honoring of the legislative policy underling the safe harbor, subject to doctrinal reconciliation with other interests, some of which are of equal or even greater importance—and weight in court—than the safe harbor itself.

The garment industry proviso had, in other words, gradually become a sliding-scale, evidence-based safe harbor.

ii. A "safe harbor" ebbs and flows: the representation management election

In 1998, in *Allentown Mack Sales and Service, Inc. v. NLRB*, the U.S. Supreme Court characterized as "nonsense" the NLRB's standard for employer withdrawal of recognition from a union representing the employer's employees.[28] The Court's problem was not with the standard itself, which was long-established (since 1951[29]), "rational and consistent with the [NLRA],"[30] and pretty straightforward: "the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, provided that the doubt is in *good faith*."[31] The problem was with the standard of proof for the good faith doubt. The Board seemed to have developed a habit of expressing a preponderance of the evidence standard, but then applying a clear and convincing evidence standard, and then explaining itself as follows:

> It is fair to say that the Board will not find that an employer has supported its defense by a preponderance of the evidence if the employee statements and conduct relied on are not clear and cogent rejections of the union as a bargaining agent, i.e., are simply not convincing manifestations, taken as a whole, of a loss of majority support. The opposite of "clear, cogent, and convincing" evidence in this regard might be fairly described as "speculative, conjectural, and vague" evidence that plainly does not meet the preponderance-of-the-evidence burden of proof.[32]

Understandably, the Supreme Court had trouble making sense of this, and went on at length about the numerous problems—for both the regulated and the regulators—with opaque, confusing, and misleading legal standards.

The garment industry proviso has now become a sliding scale, evidence-based safe harbor that is subject to a duty of good faith and fair dealing.

The Court ruled against the Board, but not on the basis of its troubling evidentiary standard. Instead, the Board lost on the more prosaic ground that it lacked substantial evidence in the record to support its decision to sanction Allentown Mack (the employer in the case) for engaging in an unfair labor practice in violation of the NLRA by withdrawing recognition from its employees' union.[33] The signals from the Court, though, were clear: if the evidence had been substantial, the Board might well have lost on the basis of its scrambled standards.

The Board responded in 2001, in the *Levitz Furniture Co.* case. It did not, however, revise its evidentiary approach for the "good faith" standard. Instead, the Board abandoned the 60-year-old test entirely and established a new standard under which good faith doubt about majority employee support for a union was not sufficient to justify withdrawal of recognition. Henceforth, the Board said, "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* [the 1951 case establishing the good faith doubt standard] and its progeny insofar as they permit withdrawal on the basis of good-faith doubt."[34] In addition, the Board recommitted itself to applying the preponderance of the evidence standard to the employer's proofs in the event of an unfair labor practice proceeding challenging a unilateral withdrawal of recognition.[35]

This new standard created two other problems, however, which would put employers in an impossible situation. The Board acknowledged both problems in *Levitz*. First, the Board had held (and been upheld by the Supreme Court) long ago that employer recognition of a union that lacks majority employee support is an unfair labor practice, even if the employer has a good faith belief that there is majority employee support for the union. And, second, Board precedent also established that continuing employer recognition of an incumbent union when that union has lost majority employee support is an unfair labor practice.[36]

You see the no-win situation. The new, tougher *Levitz* rule for unilateral withdrawal of recognition—actual loss of majority support (rather than the old, lower *Celanese* "good faith doubt" standard)—when combined with the existing precedents making it an unfair labor practice for an employer to deal with a union that lacks majority support, meant that an employer who had a good faith doubt about its employees' support for their union could either risk engaging in an unfair labor practice by continuing to deal with the union or it could risk engaging in an unfair labor practice by withdrawing recognition. (An employer might try polling its employees, but that involved its own set of unfair labor practice risks that would complicate the issue here without affecting the result.)

The Board dealt with this situation by complementing its new withdrawal-of-recognition rule with a new safe harbor. Under the NLRA, there is one other way for an employer to resolve the question of whether a majority of its employees support a union. The employer can petition the Board to conduct what is called as a Representation Management (RM) election, in which employees vote by secret ballot to keep or dump their union. "Historically," the Board said in *Levitz*, we have

> employed the same standard for processing RM petitions as for allowing employers to withdraw recognition unilaterally, but . . . [g]iven our ruling above regarding withdrawals of recognition, . . . we think that processing RM petitions on a lower showing of good-faith uncertainty [the lowest level of certainty recognized by the Supreme Court in *Allentown Mack*] will provide a more attractive alternative to unilateral action. . . . With such a safe harbor available, an employer who withdraws recognition anyway can hardly claim that it was forced to do so for fear of committing an 8(a)(2) violation.

The common thread in the development of the garment industry proviso is the judicial honoring of the legislative policy underling the safe harbor.

Levitz was a substantial setback employers. The risks and potential costs of unilateral withdrawal of union recognition rose sharply. But employers did gain a small safe harbor—relatively easy access to a means of avoiding the no-win situation of choosing between paths to an unfair labor practice. And the Board added an extra level of safety by stating in *Levitz* that

> An employer with evidence of actual loss of majority status [but presumably, without sufficient evidence to be confident of the lawfulness of a unilateral withdrawal of recognition] can petition for an RM election rather than withdraw recognition immediately; we would not find that the employer violated 8(a)(2) [of the NLRA] by failing to withdraw recognition while the representation proceeding was pending.

In the only reported case to address the *Levitz* safe harbor, the U.S. Court of Appeals for the D.C. Circuit upheld the new construct, and went on to apply it in a passage that resonates gently with approval for the rational balance of clear alternatives and incentives:

> As *Levitz* recognized, raising the bar for unilateral withdrawal of recognition does mean that an employer "withdraws recognition at its peril." . . . But the Board intended that result, expecting that it would create less temptation for employers to act unilaterally. . . . The Board explained that the supposed "dilemma . . . is more apparent than real" because the employer's ability to petition for an RM election provides it with a "safe harbor." . . . An employer with reasonable good-faith uncertainty regarding the union's continuing majority status can petition for such an election, and the Board "would not find that the employer [committed an unfair labor practice] by failing to withdraw recognition while the representation proceeding was pending." . . .
>
> Anderson Lumber did not seek safe harbor here. Instead, it proceeded, at its peril, to unilaterally withdraw recognition. We conclude that the Board was not unreasonable in finding that, in so doing, Anderson ran aground on the shoals of an unfair labor practice.[37]

The NLRB has long been renowned for its tendency to shift back and forth between union-friendly policies and decisions (when a majority of the Board has been appointed by a President aligned with the Democratic Party) and management-friendly policies and decisions (when a majority of the Board has been appointed by a Republican President). The *Levitz* safe harbor has survived the most recent swing of the pendulum. The now-majority-Republican Board recently revisited *Levitz* in *Johnson Controls, Inc.*, and opted to leave the overall structure of *Levitz* intact (while making it a bit more difficult for a union to rebut an employer's evidence of actual loss of majority status).[38] So, citations to *Levitz* in the future are likely to be sparse, but instances of reliance on its safe harbor are not.

The Supreme Court had trouble making sense of this and went on at length about the numerous problems with opaque, confusing, and misleading legal standards.

So, the main themes in the path to the *Levitz* safe harbor have been increasing transparency in standards, both substantive and evidentiary (courtesy of the pressure the Court in *Allentown Mack* brought to bear on the Board) and improving incentives for employers to opt for a non-arbitrary, bilateral path to dispute resolution (courtesy of the Board's safe-harbor solution to the dilemma created by its own rule change).

Thus pass the decades in the life of the NLRA, like an ancient empire, with fortifications and other edifices rising in seeming permanence, only to erode, partially collapse, and become the foundations for the next century's builders. And then there is the new.

B. Safe Harbors in OCILLA

In some respects, obviously, OCILLA is strikingly new. It is part of a short period of extraordinary international and national diplomacy and lawmaking, at the very end of the 20th century and the beginning of the 21st intended to rationalize (to some extent) local and global markets in the protection, storage, and distribution of intellectual property. The results have, unsurprisingly, been mixed.

For our purposes, however, we start with a satisfying status quo: As with the NLRA, there is no safe harbor in OCILLA. Nevertheless, the term has appeared in cases interpreting

The Board dealt with this situation by complementing its new withdrawal-of-recognition rule with a new safe harbor.

the statute since shortly after its enactment as Title II of the Digital Millennium Copyright Act in 1998.[39] The source, not in the Act itself, is obvious and well known. Many of the most important OCILLA cases cite Senate Report No. 105-190, "The Digital Millennium Copyright Act of 1998," by the Committee on the Judiciary (Senate Report). By my count, the term "safe harbor" appears 15 times in passages of the Senate Report discussing OCILLA, and nowhere in the rest of the report.[40]

And thus, the provisions of the U.S. Code to which those "safe harbor" passages refer have come to be known to the judicial, regulatory, scholarly, and journalistic communities as, you guessed it, safe harbors. There are several of them, all ensconced in 17 U.S.C. § 512, under the title "Limitations on liability relating to material online," and they are elaborate, interconnected, and not entirely pellucidly clear. There are generally understood to be four main safe harbors in § 512—covering, to extents and in ways that the courts are working out, claims of copyright infringement based on (a) "Transitory digital network communications," (b) "System caching," (c) "Information residing on systems or networks at direction of users," and (d) "Information location tools"[41]—but there are also arguably some smaller slips of safe harbors in there, and a few lengthy and elaborate subsections of qualifications and ramifications.[42]

For this exercise, however, we will focus on just two peripheral but thought-provoking elements of the OCILLA safe harbors. First there is the seemingly dry, technical, and unavoidable matter of "standard technical measures" that ISPs must accommodate, not interfere with, in order to be eligible for the main safe harbors. (This requirement will turn out to be, as is probably obvious from this set-up, squishy, non-technical, and easy to dodge.) Second, there is the seemingly squishy "red flag" knowledge of infringement exception to the third main safe harbor—"Information residing on systems or networks at direction of users." (This exception will turn out to be, of course, so exceedingly sharp, technical, and narrow that it practically vanishes from the statute.)

i. A standard technical "safe harbor": whence consensus?

Section 512(i), "Conditions of eligibility," is relatively compact. It provides as follows:

> (1) Accommodation of technology.—The limitations on liability established by this section shall apply to a service provider only if the service provider—
>
> (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and
>
> *(B) **accommodates and does not interfere** with standard technical measures.*
>
> (2) Definition.—As used in this subsection, the term *"standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and—*
>
> *(A) have been developed pursuant to a **broad consensus** of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;*
>
> (B) are available to any person on reasonable and nondiscriminatory terms; and
>
> (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

The key passages for present purposes are italicized and underlined, and the essential terms are also bolded.

What does an ISP need to do in order to evade this requirement? Nothing. Really, truly nothing. Here is

***Levitz** was a substantial setback for employers. But employers did gain a small safe harbor—relatively easy access to a means of avoiding the no-win situation.*

why: *expressio unius est exclusio alterius*.[43] Section 512(i)(2) defines a "standard technical measure" developed pursuant to a broad consensus, but it does not explicitly impose any duty or responsibility of any sort on anyone to make any effort of any sort to participate in the development of a standards process or in the achievement of a "broad consensus" via any such process. Indeed, § 512(i)(2) does not prohibit anyone from interfering in or refusing to accommodate anyone or anything that might help with the development of standard technical measures. It is only once a standard technical measure has been developed via a broad consensus under § 512(i)(2) that the duties in § 512(i)(1) come into play, requiring ISPs to accommodate and not interfere with a standard technical measure that has actually been developed pursuant to a broad consensus. If Congress had wanted the duties of accommodation and non-interference to apply to § 512(i)(1) as well as § 512(i)(2), those duties would have been inserted either in both sections or above them.

In at least one court, the U.S. Court of Appeals for the Second Circuit, there appears to be some support for this reading. In his opinion concurring in the result in *BWP Media USA Inc. v. Polyvore, Inc.*, Judge John Walker appears to take two positions that might make the achievement of a "broad consensus of copyright owners and service providers" nearly impossible. First, he rejects BWP's evidence of a broad consensus based on a list that includes Adobe, Apple, Canon, Microsoft, Nokia, and Sony on the ground that, "Even if some of these companies do function as ISPs, BWP has not put forth evidence definitively showing that all of these companies 'offer[] the transmission, routing, or providing of connections for digital online communications,' 17 U.S.C. § 512(k)(1), sufficient to show that the views of these companies alone indicates a 'consensus' of 'service providers.'"[44] But § 512(i)(2) does not require that all participants in a broad consensus be service providers. On the contrary, it requires that both copyright owners and service providers be involved. (I suppose a willful reader could insist that only participants that both hold copyrights and provide internet services may participate, but that seems like a wacky stretch.) Second, Walker emphasizes the inadequacy of BWP's evidence by adding a single indicator of what might convince a court that a properly broad consensus has been achieved: "a '*broad* consensus'" (emphasis added in the opinion). BWP's list of six big companies may well be inadequate, but for it to be inadequate either because it includes non-ISP copyright holders or because its breadth is not worthy of italicization does not bode well for the development of standard technical measures.

Thus pass the decades in the life of the NLRA, like an ancient empire, with fortifications and other edifices rising in seeming permanence, only to erode, partially collapse, and become the foundations for the next century's builders.

So, as drafted and at least sometimes as read, § 512(i) provides ISPs (and perhaps copyright holders too) that do not desire standard technical measures (or at least believe that the downside odds to themselves outweigh the upsides) both an incentive and a license—remember, this is part of the "safe harbors" provisions of OCILLA—to resist. To insist, for example, on sticking with their own proprietary systems.[45]

This is intriguingly inconsistent with at least one of the legislative purposes of OCILLA, as spelled out in the Senate Report. Yes, Congress seems to have decided that, "Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers." That sentence has been cited in recent decisions by both the U.S. Court of Appeals for the Second Circuit[46] and the U.S. Court of Appeals for the Ninth Circuit.[47] But that is only part of the story. The same section of the report also says: "Title II [OCILLA] preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." Only the Ninth Circuit flagged that passage.[48]

The intense emphasis in the Second Circuit on maximizing safe harbors at the expense of the legislative policy favoring strong incentives for cooperation under OCILLA might bring to mind the Second Circuit's different approach to "The Garment Industry Proviso . . . [which is] to be construed in a manner that will advance the legislative purpose of the garment industry exemption to § 8(e) of the [NLRA]." That was the court's preface to its application of a "sliding scale" to determine whether a particular union activity fit within the "safe harbor" of the garment industry proviso or not.[49] Could it be that decades of experience with the ins and outs of labor-management conflict, cooperation, and collusion in the garment industry under a well-worn statutory scheme informed the nuance and sophistication with which the court dealt with that industry?

In a similar vein, OCILLA imposes a good faith requirement on copyright holders in the context of take-down notices sent to ISPs, but it does not impose any good faith requirements on ISPs. Does this mean ISPs have no good faith obligations under § 512(i) (or under any other part of OCILLA, for that matter)? Again, experience with the garment industry proviso might be instructive. Recall that it took the courts about 50 years to superimpose the duty of fair representation on the garment industry proviso.[50] Could there be a duty of good faith under § 512(i) in OCILLA's future? The courts may be prioritizing sturdy safe harbors over incentives to cooperate now, but there is a bit of precedent in the Second Circuit, at least, for a judicial approach favoring "'safe harbors for certain good faith acts on the Internet.'"[51]

ii. A subjectively or objectively "safe harbor": the red flag of knowledge

The opening portion of § 512(c), "Information Residing on Systems or Networks At Direction of Users," includes the provisions (italicized and underlined) that make up the "red flag" knowledge of infringement exception to that safe harbor:

> (1) In general.—*A service provider shall not be liable* for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, *if the service provider*—
>
> (A)
>
> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
>
> (ii) *in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent;* or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

But, conversely, if the ISP "is . . . aware of facts or circumstances from which infringing activity is apparent," then it loses the protection of this safe harbor.

The current, dominant standard for that "actual knowledge" is, as the U.S. Court of Appeals for the Second put it in *Capitol Records, LLC v. Vimeo, LLC*,

> Our court explained in *Viacom* [*Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012)] that, in order to be disqualified from the benefits of the safe harbor by reason of red flag knowledge under § 512(c)(1)(A)(ii), the service provider must have actually known facts that would make the specific infringement claimed objectively obvious to a reasonable person.
>
> > The difference between actual and red flag knowledge is . . . not between specific and generalized knowledge, but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person.
>
> *Viacom*, 676 F.3d at 31.
>
> The hypothetical "reasonable person" to whom infringement must be obvious is an ordinary person—not endowed with specialized knowledge or expertise concerning music or the laws of copyright.[52]

Then, after a discussion of the many ways in which that ordinary person could be or become unqualified or improperly equipped or otherwise incapable of having

What does an ISP need to do in order to evade this requirement? Nothing. Really, truly nothing.

actual knowledge under that standard, and the associated burdens of proof, the court wrapped up that part of its opinion with an implied nod to the extraordinary characteristics of its ordinary person: "It is of course entirely possible that an employee of the service provider who viewed a video did have expertise or knowledge with respect to the market for music and the laws of copyright."[53]

The court acknowledged that its definition of "red flag" knowledge exception to the safe harbor under § 512(c)(1)(A)(ii) was barely distinguishable from the "actual knowledge" exception to the safe harbor under § 512(c)(1)(A)(i). But, the court said, while "it may not be vast, it is nonetheless a real difference."[54]

But, like the NLRB standard marked down as "nonsense" by the Supreme Court in *Allentown Mack*, the Second Circuit's ordinary person who can spot and identify the "red flag," is the kind of creature that only the Second Circuit, not an ordinary copyright holder subject to OCILLA, will be able to identify pre-litigation.

Just as the garment industry proviso—with its close doctrinal connections to a clear and specific legislative purpose, and its recent entanglement with a venerable duty of good faith—might be seen as casting an instructive shadow on current treatment of § 512(i), so the evolution of evidentiary burdens and safe-harboring in the relationship between withdrawal of union recognition and the management representation elections under the NLRA might shed useful light on the standards for "red flag" knowledge of infringement under OCILLA.

The NLRB was confronted with the declining effectiveness of its interpretation of the NLRA as a means of inspiring regulated entities to intelligently choose between valid, potentially desirable options within the bounds of the federal labor-management legislative scheme. The Board clung to its established doctrine for a while, until it was rebuffed (albeit on other grounds) by a higher authority (the Supreme Court) and also jawboned to re-think its reading of its organic law, the NLRA. By shifting its stance slightly and self-consciously, the Board regained its footing, and its institutional standing.

And so, perhaps, the most important phrase in the passages quoted earlier from the Senate Report is not "safe harbors" and not "strong incentives"—because courts and agencies identify and mold and modify safe harbors and incentives without reliance on legislative use of magic words. The most important phrase is "leave current law in its evolving state"—because safe harbors do that too. Safe harbors under the NLRA and under OCILLA are safe . . . for now. They are safe until they are modified, at which time the modified harbors will be safe . . . until they are modified again. The tides of law and policy may work more slowly upon the sturdy breakwaters of safe harbors than they do upon the sandy beaches of the common law, whether of the traditional sort or of the age statutes.[55]

Of greater practical importance may be the apparent long-term tendency of courts to treat safe harbors as havens for sailors traveling in good faith, not for pirates, no matter what disguises they don.

III. Safe Harbors on the Horizon

Perhaps the best that can be said about safe harbors—and this is good, at least some of the time—is that they are rhetorically irrebuttable exemptions from broad prohibitions, and practically rebuttable presumptions subject to interpretive exceptions and glosses applied by courts and agencies in light of the policies underlying both the exemptions and the prohibitions. And that is what makes safe harbors distinctive: the duality of those policies and the laws implementing them. The samples from the NLRA suggest the endlessness of the search for balance between prohibitions and exemptions of this process (like much of statutory interpretation), and the samples from OCILLA suggest legislatures are not well-equipped to specify that balance clearly for judges upfront. And that may explain where we started, with the scarcity of "safe harbors" in statutes. Of greater practical importance may be the apparent long-term tendency of courts to treat safe harbors as havens for sailors (of whatever sorts) traveling in good faith, not for pirates (of any sort), no matter what disguises they don.

ENDNOTES

* Professor of Law, Antonin Scalia Law School, George Mason University. Thanks to the Center for the Protection of Intellectual Property for research support, and to Robert Brauneis, Kevin Madigan, Peter Menell, Lateef Mtima, and Zvi Rosen for helpful comments. Copyright 2020 Ross E. Davies.

1 For example, Section 1304 of the Children's Online Privacy Protection Act of 1998—titled "Safe Harbors." 15 U.S.C. § 6503.

2 As well as in legal and non-legal maritime contexts.

3 See, e.g., Saul Levmore, Double Blind Lawmaking and Other Comments on Formalism in the Tax Law, 66 U. Chi. L. Rev. 915, 920 (1999) ("We often see a fuzzy statute generating adaptive behavior by those it regulates and, in turn, by regulators—but then judges intervene and turn the earlier standards into ex post rules, or at least half-rules in the form of safe harbors.").

4 There is another, comically fundamental problem with the term "safe harbor" that is beyond the scope of this article: If in fact every "provision (as in a statute or regulation) that affords protection from liability or penalty" is a "safe harbor," then every law that provides that an act is permissible is a safe harbor, and labelling every such laws as a "safe harbor" would uselessly entail attaching the "safe harbor" label to thousands, perhaps millions, of a fantastic variety of laws. A few scholars have done interesting work on the place of safe harbors in the rules-standards discussion. See, e.g., Levmore, supra; Emily Cauble, Safe Harbors in Tax Law, 47 Conn. L. Rev. 1385 (2015). But, in a world in which the term "safe harbor" is applied in both extremely rule-like contexts (measurable maximum speed requirement, for example) and extremely standard-like contexts (requirements of good faith, for example) it is meaninglessly super-encompassing. As Professor Robert Brauneis observed in a useful critique of this paper (about which I plan to say more in a sequel), "safe harbor rules provide relief from uncertainty regarding liability under vague standards . . . *not* by replacing the existing standards altogether . . . *rather*, by supplementing them with alternative rules that parties can follow to avoid liability." The question, then, is the extent to which such statutory supplementations are safe harbors in all but name. I would agree that they are, but only to the extent that they are applied by courts and regulators to serve that purpose. As the examples drawn below from experiences with the NLRA and OCILLA show, applications can and do vary and evolve.

5 See, e.g., Clarke v. The Dodge Healy, 5 F.Cas. 949, 949 (C.C.E.D. Pa. 1827).

6 See "safe, adj. (and int.)," OED Online (Oxford University Press Sept. 2019, https://www-oed-com.mutex.gmu.edu/view/Entry/169673?redirectedFrom=safe+harbor&.

7 See, e.g., Mitchell v. Blanchard, 272 F.2d 574, 577 (5th Cir. 1959) (Fair Labor Standards Act: "We have heretofore commented on the reliance by employers in good faith on the advice of counsel as an element to be considered in these cases. Here no such reliance can be urged as to most of the violations. Moreover, such reliance, even in good faith, is not to be considered a safe harbor in every storm. It, of course, can be considered by the trial court. Here, however, even after counsel filed his response to the petition for subpoena it is apparent that there was no good faith reliance on advice from counsel that he was not subject to the act.").

8 See, e.g., McGinty v. C.I.R., 325 F.2d 820, 821 (2d Cir. 1963) (Marshall, J.) (referring to "the so-called 'safe harbors'" in 26 U.S.C. § 302(b)(2) and (3) of the tax code) Himmel v. C.I.R., 338 F.2d 815, 818 n.4 (describing 26 U.S.C. § 302(b)(2) and (3) as "safe harbors").

9 See, e.g., Haserot v. C.I.R., 46 T.C. 864, 869 (T.C. 1966) ("Indeed, if petitioner's position is sound regarding the consequence of a change from a brother-sister to a parent-subsidiary relationship, a valid business purpose could be imported into every section 304 [of the tax code] transaction involving interrelated business operations. We doubt that Congress intended to provide such an extensive safe harbor in enacting that section."), affirmed sub nom. C.I.R. v. Stickney, 399 F.2d 828 (6th Cir. 1968); Chauffeurs, Teamsters and Helpers, Local 633 of New Hampshire v. NLRB, 509 F.2d 490, 494 n.17 (D.C. Cir. 1974) (National Labor Relations Act: "The Supreme Court approved the Board's remand effort apparently as a 'safe harbor' for the employer who, under prior Board authorization card practice, might be between the devil and the deep blue sea when deciding whether to recognize an authorization card proffer. NLRB v. Gissel Packing Co., [395 U.S.] at 609. The need for this safe harbor is considerably lessened by the Board's new practice on authorization cards announced at oral argument in Gissel, 395 U.S. at 594, and is eliminated altogether by the Board's most recent shift in authorization card policy rejected by this Court.").

10 National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).

11 800 River Road Operating Co. LLC v. NLRB, 784 F.3d 902, 908 (3rd Cir. 2015).

12 See, e.g., Ozburn-Hessey Logistics, LLC v. NLRB, 833 F.3d 210, 221 (D.C. Cir. 2016) (citing Sutter East Bay Hospitals v. NLRB, 687 F.3d 424 (D.C. Cir. 2012).

13 See, e.g., Media General Operations, Inc. v. NLRB, 394 F.3d 207, 213 (4th Cir. 2005).

14 See, e.g., San Miguel Hospital Corp. v. NLRB, 697 F.3d 1181, 1187 (D.C. Cir. 2012).

15 See, e.g., New York University Medical Center v. NLRB, 156 F.3d 405, 410-11 (2d Cir. 1998) (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)).

16 See, e.g., Alleghany Ludlum Corp. v. NLRB, 104 F.3d 1354, 1363-64 (D.C. Cir. 1997) (ordering development of safe harbor); Alleghany Ludlum Corp. v. NLRB, 301 F.3d 167, 173-74 (3rd Cir. 2002) (approving and applying new safe harbor).

17 29 U.S.C. § 158(e).

18 Id. (emphasis added); see generally Holly R. Winefsky and Julie A. Tenney, Preserving the Garment Industry Proviso: Protecting Acceptable Working Conditions Within the Apparel and Accessories Industries, 31 Hofstra L. Rev. 587 (2002).

19 National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 637-39 (1967).

20 Truck Drivers Union Local No. 413, International Brotherhood of Teamsters v. NLRB, 334 F.2d 539, 549 (D.C. Cir. 1964).

21 Brown v. Local No. 17, Amalgamated Lithographers of America, 180 F.Supp. 294, 305-06 (N.D. Cal. 1960).

22 R.M. Perlman, Inc. v. New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union Local 89–22–1, I.L.G.W.U., AFL–CIO, 33 F.3d 145, 154 (2d Cir. 1994).

23 Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944) ("'[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf…. The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries.'").

24 Vaca v. Sipes, 386 U.S. 171, 177 (1967).

25 There was one earlier, unpublished opinion that dealt with the subject briefly. See Mui v. UNITE, 213 F.3d 626 (table), 2000 WL 669670 (2d Cir. 2000).

26 Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council, 322 F.3d 602, 613 (9th Cir. 2003).

27 See, e.g., Shirley Lung, Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers, 34 Loy. U. Chi. L.J. 291 (2003).

28 Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 375-76 (1998).

29 Celanese Corp. of America, 95 NLRB 664 (1951) (cited in Johnson Controls, Inc., 368 NLRB No. 20 (2019), and Levitz Furniture Co., 333 NLRB 717 (2001)).

30 Allentown Mack, 522 U.S. at 361, 364-66.

31 Celanese Corp. of America, 95 NLRB at 672 (emphasis in original).

32 Laidlaw Waste Systems, Inc., 307 NLRB 1211, 1211-12 (1992) (quoted in Allentown Mack, 522 U.S. at 375).

33 Allentown Mack, 522 U.S. at 376-80.

34 Levitz Furniture Co., 333 NLRB 717.

35 Id.

36 Levitz Furniture Co., 333 NLRB 717 (citing International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 738 (1961); Maramont Corp., 317 NLRB 1035 (1995)).

37 Pacific Coast Supply, LLC v. NLRB, 801 F.3d 321, 335 (D.C. Cir. 2015) (Garland, C.J., joined by Griffith and Kavanaugh, JJ.).

38 Johnson Controls, Inc., 368 NLRB No. 20 (2019).

39 See, e.g., A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 919 n.24 (N.D. Cal. 2000).

40 Senate Report No. 105-190 (May 11, 1998) at 19-21, 48-49, 67, 69.

41 17 U.S.C. § 512(a)-(d).

42 17 U.S.C. § 512(e)-(n).

43 NLRB v. SW General, Inc., 137 S.Ct. 929, 940 (2017).

44 BWP Media USA Inc. v. Polyvore, Inc., 922 F.3d 42, 56 n.10 (2d Cir. 2019) (Walker, J., concurring).

45 See, e.g., Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 41 (2d Cir. 2012).

46 Viacom Int'l, 676 F.3d at 27.

47 UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1028 (9th Cir. 2013).

48 Id. at 1021-22.

49 R.M. Perlman, Inc., 33 F.3d at 154.

50 Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council, 322 F.3d 602, 613 (9th Cir. 2003).

51 Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 87 (2d Cir. 2016) (quoting United States Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings (2011), available at http://copyright.gov/docs/sound/pre-72-report.pdf). The addition of a good faith requirement to a safe harbor is not unique to the labor laws, nor is it an inevitably straight path. Compare, e.g., Lopez v. First Union Nat. Bank of Florida, 129 F.3d 1186, 1192-93 (11th Cir. 1997) ("The first safe harbor provision protects a financial institution's 'disclosure of any possible violation of law or regulation.' 31 U.S.C. § 5318(g)(3). As the use of the adjective 'possible' indicates, a financial institution's disclosure is protected even if it ultimately turns out there was no violation of law. In order to be immune from liability, it is sufficient that a financial institution have a good faith suspicion that a law or regulation may have been violated, even if it turns out in hindsight that none was. By extending immunity to a financial institution's disclosure of a suspected violation of law or regulation, the first safe harbor encourages financial institutions to voluntarily play a role in combating money laundering and other crimes."), with Lee v. Bankers Trust Co., 166 F.3d 540, 544-45 (2d Cir. 1999) ("Lee urges us to ignore the plain meaning of the Act . . . and to accept the analysis suggested by the Eleventh Circuit in Lopez v. First Union Nat'l Bank, 129 F.3d 1186 (11th Cir.1997). In Lopez, the court stated that the safe harbor provision protects institutions only if they have 'a good faith suspicion that a law or regulation may have been violated.' Lopez, 129 F.3d at 1192–93. Lopez did not explain where the requirement of a 'good faith suspicion' came from, or why it was necessary to its decision. We decline to import a good faith requirement into the statute.").

52 Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 93-94 (2d Cir. 2016).

53 Id. at 97.

54 Id.

55 See Guido Calabresi, A Common Law for the Age of Statutes (1982).

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