

Career Transitions: Q&A with Mark Avsec, Partner, Benesch, Friedlander, Coplan & Aronoff LLP

by Practical Law

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Q&A with Mark Avsec, a partner with Benesch, Friedlander, Coplan & Aronoff LLP and Vice-Chair of its Innovations, Information Technology & Intellectual Property (3iP) Practice Group. This Q&A is part of Practical Law's Professional Development Series: Career Transitions.

Education: 1994: J.D., Cleveland-Marshall College of Law; 1992: B.A., Cleveland State University.

Career in Brief: Mark is a partner with Benesch, Friedlander, Coplan & Aronoff LLP (Benesch) focusing on copyright and trademark transactions and litigation. Before becoming a lawyer, Mark was a professional musician performing on keyboards in many bands, including Wild Cherry and Donnie Iris and the Cruisers, and a hit songwriter. Mark has been named a ranked lawyer in Chambers USA and an Ohio "Super Lawyer" for intellectual property several times. He is active in the Federal Judicial Center's music infringement initiative and has taught courses in music and entertainment law in Cleveland law schools for nearly 20 years.

Can you provide a brief description of your current role and the work you do?

I am a partner at Benesch, and Vice-Chair of its Innovations, Information Technology & Intellectual Property (3iP) Practice Group. In that capacity, I have certain administrative duties, such as allocating department work, planning and budgeting, mentoring, and conducting performance evaluations.

My current practice is a blend of transactional and litigation work. It includes:

- Representing well-known brands (for example, Wrangler jeans) in licensing deals with music celebrities or large concert companies.
- Litigating copyright infringement cases, with a particular focus on music-related copyright infringement. I usually

have one or two copyright infringement litigations going on at any particular time, though not always music-related.

- Litigating trademark infringement cases.
- Sector-specific counseling, such as NASCAR and Ag Tech.

In addition to practicing law, I am heavily involved in the Federal Judicial Center's music infringement initiative. I recently finished co-teaching a seminar on music copyright infringement for that initiative with Professor Peter Menell (University of California, Berkeley School of Law), David Nimmer (Nimmer on Copyright), Judge Jon O. Newman (US Court of Appeals for the Second Circuit), and forensic musicologist Judith Finell (best known for the significant role her testimony played in the case involving the Robin Thicke song "Blurred Lines"). In connection with this seminar, I prepared a number of teaching videos where I dissect songs at a piano.

I also teach a class called "Law of the Music Industry" at Case Western Reserve University School of Law.

Before becoming a lawyer, you were a successful songwriter and musician. What made you decide to pursue a legal career?

Early in my career (when still in my early twenties), I was asked to join the band Wild Cherry (best known for their song "Play That Funky Music"). From there, I founded and began writing all of the songs and producing all of the recordings for Donnie Iris and the Cruisers. One of those



songs was “Ah! Leah!” As that song was bounding up the charts (the first time I was going to make some real money), a contingency lawyer and a plaintiff from Detroit filed a copyright infringement lawsuit against me, Donnie, and the record company. They said I stole the song. I had never heard the plaintiff’s song and the songs sounded nothing alike apart from the common words “here we go again” or “here I go again” (I cannot recall which was in the plaintiff’s song). I refused to settle. The case went to a jury trial. Donnie and I won (as we should have). But the legal fees ate up all of the royalties we had earned. In fact, my royalty account was tapped for years after the lawsuit ended to pay my lawyers. I decided to go to law school and become a music copyright lawyer to try and combat what I saw were real deficiencies and inequities in the way these cases were litigated and decided. So that’s what I did.

How did your prior experience as a professional musician prepare you for your current role?

I have an understanding of both the “business” of music and the “language” of music. Understanding the business of music helps me negotiate more effective deals for my clients when they are licensing music content or licensing rights from a celebrity. Understanding the language of music, that is, my knowledge of music itself (and the fact that I am fortunate to have perfect pitch) enables me to negotiate the best deals for my client in litigation. For example, there was one matter that remains confidential where the defendant’s general counsel was trying to blow smoke in comparing the similarity of the two music pieces at issue. I didn’t need an expert witness to tell him why he was wrong. The next day I received an almost seven figure settlement offer.

Also, when I represent a client who I think is being unfairly treated, I draw from my own experience being wrongly sued. I relate to my clients in a very real way, which helps me to be a better advocate.

Are there particular skills or personality characteristics that are essential to being a successful music infringement lawyer or other type of copyright lawyer?

Having passion for the subject area is helpful. As a music infringement lawyer, my situation is somewhat unique in that I have perfect pitch and have lived most

of my life around music and musicians. While I believe my background is an asset, it is not required. There are probably plenty of great music copyright infringement lawyers who are tone deaf.

Some of the key skills and traits of successful copyright lawyers, regardless of background, include:

- A comprehensive knowledge of the Copyright Act, as it has been amended by the Music Modernization Act (Pub.L. 115-264 (2018)).
- An intimate familiarity with fair use case law, including how it has developed over time. Without this, a copyright lawyer won’t have a good “feel” for advising clients.
- The courage and ability to provide real direction to clients. Telling a client there is a 50-50 chance of success with no additional guidance is not helpful.

What have been the biggest challenges you’ve encountered in your legal career?

Succeeding in a major law firm, including developing my own clients and practice, was challenging. Just like everyone else, I had to find my way. The challenges were particularly acute for me, because I am not the typical Cleveland intellectual property lawyer. I have always been a copyright lawyer and, let’s be honest, Cleveland has not historically been a copyright town. Cleveland is a patent town stemming from its heyday in oil refining, chemical products, and manufacturing. Copyright practice is considered “soft IP,” and my music background differentiated me even more from the typical “soft IP” attorney. While lawyers in Silicon Valley and NYC and LA were interested in (and practicing in) areas that I was interested in, nobody else in Cleveland was doing this.

Another challenge was that Benesch, the firm I’ve been with my entire career, was an Ohio-focused firm when I joined in 1995. Fortunately for me, the firm has evolved and we now have offices in San Francisco, Chicago, and Delaware and do work for companies, such as DoorDash, Cisco, Kontoor/Wrangler Jeans. So whereas before I did not feel that I really fit in, now I feel like I have found my seat on the bus. The Federal Judicial Center video seminar is a good example of my career progression and recognition. I am told that district court judges will have an opportunity to look at our video every time a music infringement case shows up on their docket. So I am achieving my goal of affecting copyright policy.

What advice would you give to someone interested in making a significant career transition?

It depends. I became a lawyer at the age of 40. It is important to consider the opportunity cost of going to law school. More and more students are evaluating the economics of going to law school. That's a good thing. It's not helpful to graduate with a load of debt and not have a job that pays enough to support yourself and your family. Depending on a person's career and family life, each person will have to evaluate whether law school makes sense for them.

For me, it was absolutely the best choice to go to law school. I still play my music. I can still write songs should I choose to do so. I did not lose anything and I gained a whole professional world that is incredibly valuable to me. I have befriended a lot of terrific people who are lawyers and professors. My career success has involved a certain amount of luck, but for me, transitioning to a legal career was the right thing to do.

Is there any general advice that you wish someone had given to you at the beginning of your career that you can share?

I have taught Law of the Music Industry at Case Western Reserve University School of Law for 18 years and

I developed an interesting media and music practice out of Benesch's Cleveland office, but I am not sure that's something that can typically be done. I tell my students if they are intent on practicing music law, then get the best grades you can and see if you can get a job in LA, New York or Nashville. Don't get me wrong, I **love** Cleveland and am a big cheerleader for the city. But the fact is, other than hanging out a shingle or being the General Counsel for the Rock and Roll Hall of Fame, the major music law jobs are not in Cleveland. They are in the cities I just mentioned. Of course now that our ways of working have changed due to the pandemic, remote working is possible from anywhere, so that could change.

Do you still play music?

Absolutely. I play all of the time. I still play with Donnie Iris and the Cruisers. A few weeks ago we played with Styx at the Youngstown Foundation Amphitheater before 4,000 people. My colleagues often come to watch my shows and are some of my biggest fans. For example, a few years ago Joe Walsh, Jimmy Fox and Dale Peters asked me to play keyboards with The James Gang for a reunion at Cleveland venues, including the Allen Theater, the Rock and Roll Hall of Fame, and the Beachland Ballroom. The chair of my group at the time and our terrific paralegal were front and center at the Beachland and were totally into it.

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