

DEUTSCH & LIPNER  
ATTORNEYS AT LAW  
1325 FRANKLIN AVENUE  
SUITE 225  
GARDEN CITY, NEW YORK 11530

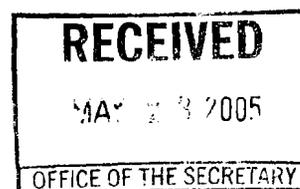
SETH E. LIPNER  
HERBERT M. DEUTSCH

TELEPHONE: 516-294-8899  
TELECOPIER: 516-742-9416

May 16, 2005

**FIRST CLASS MAIL**

Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549-0609



**Re: Petition of Daniel Solin**  
**SEC No. 4-501**

Dear Sir:

I write this Comment to the Petition for Rulemaking of Daniel Solin of May 6, 2005, SEC No. 4-501. In the Petition, Mr. Solin seeks a Rule requiring the NASD to make public, in an unrestricted fashion, its library of arbitration awards.

I am Professor of Law at the Zicklin School of Business, Baruch College, CUNY, where I teach Intellectual Property Law and Law and the Internet. I am also a member of Deutsch & Lipner, a Garden City, New York law firm which represents aggrieved investors in arbitration. I am a two-time past-President of the Public Investors Arbitration Bar Association ("PIABA"), and I have served on the NASD's National Arbitration and Mediation Committee.

The NASD's library of arbitration awards should be public, and the NASD (falsely) boasts that the library is public. But in fact, the NASD restricts the public's access to and use of its awards library.

The NASD purports to make the library public through its joint venture with Securities Arbitration Commentator and Commerce Clearing House ("SAC/CCH"), but access to the SAC/CCH "internet portal" is restricted by a very onerous "Terms of Use" Agreement which prohibits most uses.<sup>1</sup> The NASD also licenses its award library to Lexis, but it does so, again, under

---

<sup>1</sup> The NASD and SAC/CCH further restrict access by offering only a very poor search engine, which makes searching the database effectively impossible. (One can only search 1 month of awards at time).

DEUTSCH & LIPNER

onerous restrictions.

This restrictive licensing scheme is preventing members of the public, like Mr. Solin, from conducting research into arbitrators and arbitration awards. Mr. Solin wants not only to conduct research, but also to provide a service to arbitration attorneys (for a fee) to assist them in improving their arbitration selection methodologies. He is currently prevented from doing that by the NASD.

There can be no question that the arbitration awards themselves are not “copyrightable”, and even if they were, the NASD is neither the author nor owner of the copyright. The “compilation” of awards is likewise not copyrightable because the act of compiling a comprehensive collection is not an “original work of authorship”. See *Feist v. Rural Telephone Co.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). Thus, the NASD has no federal legal protection for its award library. As such, the library lacks the attributes of “property”, and it is incapable of being “owned”. See *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68(1918)(Brandeis, dissenting)(“The general rule of law is, that the noblest of human productions-- knowledge, truths ascertained, conceptions, and ideas--became, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery”).<sup>2</sup>

Lacking any property rights, the NASD (and its agents SAC/CCH and Lexis) seeks to monopolize its library of awards, to the detriment of the public. They thus use these restrictive “Terms of Use” click-through agreements to create pseudo-contracts. As a quasi-governmental agency which owes its existence and franchise to the United States government and this SEC, the NASD should not be permitted to restrict public access to this important library.<sup>3</sup>

The SEC should grant Mr. Solin’s Petition.

Very truly yours,



Seth E. Lipner

---

<sup>2</sup> Justice Brandeis’ views were adopted by the U.S. Supreme Court in the two 1950s cases *Sears Roebuck v. Stiffel* and *Compco v. Day-Brite*.

<sup>3</sup> The NYSE does not restrict access to its library in any way.