116th Session **Judgment No. 3287**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. N. against the World Intellectual Property Organization (WIPO) on 15 June 2011 and corrected on 19 September, WIPO's reply of 23 December 2011, the complainant's rejoinder of 11 April 2012, and WIPO's surrejoinder dated 12 July 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a staff member of WIPO, reported in August 2007 to his supervisor his suspicions that someone was unlawfully accessing his work e-mail account. An investigation was carried out by the Information Security Section and the Internal Audit and Oversight Division (IAOD). In September 2008 the complainant was informed by IAOD that the investigation report had been completed and submitted to the Human Resources Management Department (HRMD) and to the Office of the Legal Counsel. By a memorandum of 24 September he asked HRMD to keep him informed about the process. Having received no reply, he sent a memorandum to the

Legal Counsel on 16 December requesting to be provided with a copy of the investigation report dated 30 June 2008 and to be heard at any proceedings that might take place before the Joint Advisory Committee (JAC). The Legal Counsel, by memorandum of 23 December, informed him that his request came within the responsibilities of the IAOD and HRMD, respectively.

Meanwhile, on 8 December 2008, the complainant filed a criminal complaint with the Swiss authorities. When interviewed by the Swiss police, he was shown parts of the IAOD investigation report, a copy of which had been provided by WIPO to the Swiss authorities at their request. The interview served to clarify a discrepancy between the statement made by the complainant to IAOD during the investigation and what was mentioned in the report. It emerged that a typing error had been made by IAOD, so that the report incorrectly indicated that the complainant had admitted something which he had in fact denied.

In a memorandum to the Director General of 13 February 2009, the complainant referred to these events and asserted that the parts of the report that had been shown to him revealed several shortcomings. He noted in particular "a fundamental discrepancy" due to "a serious and compromising typing error made by IAOD", and expressed his concern that the report was "incomplete", that there was a "serious dysfunction" in the way the internal investigation had been carried out and that "the investigation was dreadfully biased to [his] prejudice". The complainant urged the Director General "to conclude as soon as possible this harmful and endless process".

On 6 April 2009 the complainant had a meeting with the JAC, during which he made a statement in relation to the disciplinary proceedings brought against Ms M., the staff member who had been identified as having unlawfully accessed his e-mail account and who had been charged with serious misconduct. In May he was asked to verify and sign a summary of his statement prepared by the Committee. In a memorandum of 22 May 2009 addressed to the Secretary of the JAC, the complainant asked why his statement had to be sent to Ms M. for comments. He also requested confirmation that

he would be provided with Ms M.'s statement as well as the IAOD investigation report. The Secretary of the JAC replied by memorandum of 25 May, explaining that the disciplinary proceedings were between the Organization and Ms M.; the complainant was not, strictly speaking, a party thereto and had appeared before the Committee only as a witness. As such, he did not have a right to receive a copy of the investigation report, nor of Ms M.'s statement. The Secretary also pointed out that Ms M., as a party to the disciplinary proceedings, had a right to see a copy of the complainant's statement because of the requirement to observe due process.

By a memorandum of 28 July 2009 HRMD informed the complainant that Ms M. had been found guilty of serious misconduct and that sanctions had been applied. By a memorandum of 31 July 2009 the JAC's Secretary explained in greater detail to the complainant the reasons for not providing him with a copy of Ms M.'s statement or with a copy of the report. He pointed out that the Staff Regulations and Staff Rules did not contain any provision on the interviewing of witnesses in disciplinary proceedings, but that a general principle of international administrative law required that a person faced with disciplinary proceedings be allowed to test the evidence of witnesses. The Secretary underlined that the complainant had requested to be heard by the JAC. The draft summary of the complainant's statement had been delivered to him on 11 May 2009 and the deadline had been extended twice for him to consider and sign the statement or submit any comments, but his statement had not been taken into account as it was considered withdrawn.

In August the complainant made an oral request to the JAC's Secretary to have a copy of the JAC report relating to the disciplinary proceedings against Ms M. The request was transmitted to the Director of HRMD, who refused it on the ground that the report was confidential.

On 10 October 2009 the complainant sent a memorandum to the Director General stating that, from a legal point of view, he had to be considered "as a core party to the proceedings", and not merely as a witness, since Ms M.'s actions had seriously impacted on his private

and family life. He requested the Director General to take a "final administrative decision" and to provide him with a copy of the investigation report. He also claimed compensation for moral and material prejudice in the amount of one year's salary.

Replying on behalf of the Director General, the Director of HRMD sent a memorandum to the complainant on 1 December 2009, pointing out that the correct procedure for challenging an administrative decision was to request the Director General to review that decision. He informed him that the Director General was not in a position to entertain his request, adding that even if his request were to be treated as a request for review, it would still be rejected as time-barred. The complainant had been notified of the decision denying him access to the investigation report in the JAC Secretary's memorandum of 25 May 2009, and the period of eight weeks within which he could request a review of that decision, under Staff Rule 11.1.1(b), had therefore expired. The Director reiterated that the complainant was not entitled to a copy of the report, that he had been given the opportunity to be heard during the course of the disciplinary proceedings and had been duly informed of the outcome of those proceedings by a memorandum of 28 July 2009. The complainant's request for compensation was likewise rejected.

By a letter dated 22 January 2010 the complainant's legal representative requested the Director General to review his decision of 1 December 2009. WIPO's Legal Counsel replied on 12 March 2010 that the Director General was unable to entertain the complainant's request for both procedural and substantive reasons. That decision was appealed by the complainant on 25 May 2010. The Appeal Board communicated its conclusions to the Director General in February 2011. Although the Board found the internal appeal receivable, it concluded that the Director General was justified in his decision not to provide a copy of the IAOD investigation report to the complainant, and to refuse the latter's request for damages. The Board recommended dismissing the appeal, which the Director General did, by a letter of 21 March 2011. That is the impugned decision.

B. The complainant argues that he has an "absolute right" to access the IAOD investigation report based on his status as a victim, but also as a staff member, according to the case law, as well as the Organization's own practice. He considers that the Administration committed an error of law in basing its decision on the WIPO Internal Audit Charter, which is designed to protect victims and whistle-blowers from retaliation, and not as a basis for refusing to provide the victim with a copy of a "slanderous and harassing statement" made by a staff member subject to disciplinary proceedings.

In addition, the complainant submits that the IAOD standards require that the quality of communications be "free from errors and distortions and […] faithful to the underlying facts". He points out that his stated purpose in requesting access to the IAOD report was to correct false information that has a negative impact on his well-being and that of his family, as well as his personal and professional reputation. Referring to the principles relating to the production of documents set out in the case law of the United Nations Administrative Tribunal (UNAT) and that of the United Nations Dispute Tribunal (UNDT), he contends that he should have access to the investigation report in order to be able to vindicate his reputation and to hold the authors of defamatory statements to account. Lastly, the complainant submits that WIPO's failure to provide the investigation report as well as its "manipulative delay of the release of the report" constitutes a breach of its duty of care and has caused him and his family tremendous material and moral injury, for which he is entitled to compensation under the Tribunal's case law.

The complainant asks the Tribunal to order the "immediate production without redaction of the 2008 IAOD report and all corresponding notes, attachments and annexes". He also claims material and moral damages for the injury he incurred in having to file this complaint in order to obtain the report, for the Administration's delay in providing it and for the damage to his professional and personal reputation. He seeks costs, and interest on all sums awarded.

C. In its reply WIPO submits that the complaint is time-barred, given that the complainant received written notification of the decision not to provide him with the investigation report in May 2009, but did not seek a review of that decision until January 2010, that is, outside the time limit established under Staff Rule 11.1.1(b)(1). The memorandum of 25 May 2009 from the JAC's Secretary was sent in response to the complainant's specific request for a copy of the investigation report and it conveyed in clear and unequivocal terms that he "d[id] not have the right to receive a copy" of the report. As evidenced by his request to the Director General to "make a final administrative decision" on the matter in October 2009 the complainant himself thought that the memorandum of May 2009 constituted an administrative decision, within the meaning of Staff Rule 11.1.1(b).

WIPO contends that the complainant has abused the Tribunal's filing deadline, as his original submission merely consisted of the complaint form, and was not accompanied by any brief, contrary to Article 6, paragraph 1(b), of the Tribunal's Rules. While the Organization recognises that the Tribunal's Rules expressly provide for the "correction" of complaints, it contends that this procedure should be limited to enabling complainants to correct their timely filed submissions, rather than allowing the belated introduction of an entire brief, which is the very essence of the complaint, since this would allow complainants to circumvent the clear filing deadline prescribed by Article VII, paragraph 2, of the Tribunal's Statute.

On the merits, WIPO points out that there is no basis for the complainant's belief that, because he triggered the internal investigation, he was somehow entitled to receive a copy of the confidential investigation report. It asserts that the Organization acted diligently by immediately investigating his complaint, by charging Ms M. with serious misconduct, by inviting him to appear as a witness in the disciplinary proceedings and by duly informing him of the result of those proceedings. WIPO notes that the complainant has not been able to point to a single provision in the WIPO Internal Audit Charter that states that he, as the person who reported the unauthorised access to

his e-mail account, is entitled to receive a copy of the investigation report. Contrary to the complainant's belief, the fact that the report contained an error resulting from an "innocent oversight", which has since been corrected, does not mean the report lost its confidential status.

As regards the case law of the UNAT and the UNDT, the Organization observes that it is subject to the jurisdiction of the Administrative Tribunal of the International Labour Organization and that the judgments referred to in the complaint are, in any event, not supportive of the complainant's case. WIPO stresses that the underlying rationale for protecting the confidentiality of information provided to IAOD, as well as the confidentiality of an investigation report itself, is to ensure that all parties who might shed light on the matter under investigation are forthcoming in the provision of information, without fear of reprisals, in order to ensure that the facts can be established. It points out that the refusal to provide the investigation report in this case is in accordance with its past practice as well as WIPO's recently issued investigation procedure manual.

WIPO points out that the report only contained one typing error and that, when the IAOD's Senior Investigator was informed of the error by the Swiss authorities, the report was immediately corrected and the corrected version sent to all authorised recipients. The Senior Investigator also sent an e-mail to the complainant to apologise, to which the complainant replied that "there is nothing to worry about provided that the error is corrected promptly". Moreover, a "reasonably intelligent" reader of the report would have immediately realised the error, when reading the sentence in context. WIPO therefore considers the complainant's claim of defamation to be wholly unfounded, especially as the circulation of the report was extremely limited due to its confidential nature. It objects to his unsubstantiated insinuations of malice or bad faith.

D. In his rejoinder the complainant presses his pleas. He adds that WIPO's reply is irreceivable, since it is the "Reply of the Director General of the World Intellectual Property Organization" and,

therefore, it has not been filed in the name of the defendant but in the name of an agent of the Organization, contrary to Article 5 of the Tribunal's Rules. Referring to the case law of the European Court of Justice, the complainant seeks the annulment of the impugned decision, and considers that it is receivable, on the ground that the claim for annulment is implied in and cannot be distinguished from his claim for damages. He indicates that his claim for the production of the investigation report is now moot, as he received a copy of the report during the proceedings before the Swiss authorities, but he still seeks an order for the production of all corresponding notes, attachments and annexes. He contends that WIPO's failure to inform him without delay of the name of the perpetrator prevented him from filing a timely complaint against Ms M. before the Joint Grievance Panel and before the Swiss authorities.

E. In its surrejoinder WIPO maintains its position in full. It objects to the complainant's attempts in his rejoinder to redefine the scope of the proceedings. The fact that he did not take steps to file a complaint in time is not something for which the Organization can be held responsible.

CONSIDERATIONS

1. In 2007 the complainant suspected his work e-mail account was being unlawfully accessed by someone else. He was then employed by WIPO. His suspicions were well founded. When he first came to believe his work e-mail account was being unlawfully accessed, he complained internally which resulted in an investigation by the Information Security Section of WIPO and its Internal Audit and Oversight Division (IAOD). The IAOD wrote a report dated 30 June 2008 (the IAOD report) that was submitted to WIPO's Office of Legal Counsel.

2. The complainant asked the Director General of WIPO to be provided with a copy of the IAOD report. This request was refused on 1 December 2009. The complainant sought a review of this decision,

which on 12 March 2010 was rejected. He appealed to the Appeal Board of WIPO. In a report dated 31 January 2011, the Appeal Board recommended the appeal be dismissed. By letter dated 21 March 2011, the complainant was informed that the Director General had decided to adopt the Appeal Board's recommendation. The decision referred to in the letter of 21 March 2011 is the impugned decision. The complainant filed his complaint in this Tribunal on 15 June 2011.

3. It is necessary to identify with some greater precision what was the subject matter of the impugned decision and the appeal which preceded it. The claims made by the complainant in the appeal to the Appeal Board, as summarised in its report, contained five elements. The first was the immediate production of the IAOD report (unredacted) and all corresponding notes. The second was an award for actual and moral damages for the injury the complainant incurred in having to bring the appeal and to obtain the investigation report, as well as damages for the Administration's delay and the harm to his professional and personal reputation. The third was reimbursement of legal costs and the fourth was interest on the sums claimed until paid. The fifth was "other relief determined to be just, necessary and equitable". The actual appeal was dated 25 May 2010.

4. In its reasons, the Appeal Board addressed the question of whether the complainant was entitled to a copy of the IAOD report. It also considered the question of whether the complainant had been defamed or his reputation otherwise injured by the dissemination of the report. The potential for this injury arose, in particular, from the following circumstances. The person who accessed the complainant's e-mails was a female subordinate of the complainant. She had told the investigators that she had an intimate relationship with the complainant. This was recorded in the IAOD report. The investigators spoke to the complainant. In the IAOD report, immediately following the account of what the woman had said about the relationship, it is recorded "[the complainant] says they did". The IAOD report recorded, in effect, the complainant as agreeing with the woman's account of the nature of the relationship. As it transpires, this was the

opposite of what the complainant had said and ultimately, as the Appeal Board noted in its reasons, the investigator in charge of the investigation acknowledged that the word "not" was omitted from the report. That is to say, the report should have read: "[the complainant] says they did not".

5. The IAOD were told of this error by the Swiss authorities who had interviewed the complainant. The Senior IAOD investigator thereupon apologised to the complainant and the report was corrected and copies of the corrected IAOD report sent to all authorised recipients. During the hearing of the appeal, the Appeal Board requested the Administration to provide a list of those recipients and a copy of the communications containing the correction. There was an issue, before the Appeal Board, whether people in addition to the authorised recipients had received the original (and incorrect) IAOD report and would not have received a corrected version. The Appeal Board appears, from its reasons, to have accepted that the report received limited circulation. It also said that it found "no evidence that any defamatory matter had caused the [complainant] to go down in the estimation of other persons nor any evidence supporting the [complainant's] assertion that his personal and professional reputation had suffered as a consequence". The Appeal Board, however, did later acknowledge that, as it saw things: "due to what it found to be an oversight, an impartial statement in the report had become highly defamatory since the incorrectly typed version implied that the [complainant] had admitted having an intimate relationship with the woman who accessed the e-mails". The Appeal Board appears to have accepted that some recipients (those who may have read the report in a cursory way) may have accepted the statement at face value, but the Board went on to note that steps were taken to ensure that all recipients of the IAOD report were informed of the error.

6. The Appeal Board concluded that the Director General had been justified in confirming the refusal of the complainant's request to be provided with a copy of the IAOD report as well as the complainant's request for compensation for moral and material damages.

7. In the complaint before the Tribunal the complainant sought relief substantially the same as the relief sought in the internal appeal (summarised above). As noted earlier, the complaint was filed on 15 June 2011. However all that was then filed was the completed complaint form and not the material that should have accompanied it. That material was submitted on 19 September 2011. In its reply WIPO argued that this involved an abuse of process and, therefore, that the complaint was not receivable, as it was filed beyond the time limit prescribed by Article VII, paragraph 2, of the Tribunal's Statute. However what was done by the complainant was consistent with a request by the Registrar, in accordance with Article 6, paragraph 2, of the Tribunal's Rules. This procedural argument should be rejected (see Judgment 3225, under 5).

8. It is convenient to deal now with the other procedural argument raised by WIPO. It was to the effect that the complainant did not lodge his request for review of the decision not to provide him with a copy of the IAOD report within the time limit specified in Staff Rule 11.1.1(b) and that was said by WIPO to render the complaint before the Tribunal irreceivable. That was because the complainant has not satisfied the requirement in Article VII, paragraph 1, of the Statute to exhaust the internal remedies available. This submission is based on observations of the Tribunal in Judgment 1256, consideration 3, about the need to comply strictly with time limits concerning internal appeals. However that case concerned a situation where the internal appeal body had concluded that the complainant had failed to meet the applicable time limit for lodging the internal appeal and rejected the appeal as irreceivable. In the present case the complainant's internal appeal was heard and determined on its merits by the Appeal Board. This argument of WIPO should be rejected.

9. It appears that the complainant has, since he filed his complaint before the Tribunal, obtained a copy of the IAOD report in proceedings before the Swiss Courts. This led to a concession in the complainant's rejoinder that the complainant's claim to be provided with a copy of the IAOD report was moot. It has long

been the approach of the Tribunal not to address issues that are moot (see, for example, Judgments 2784, consideration 7, and 3179, consideration 3).

10. It is therefore necessary to determine what issues, on the pleadings, remain to be resolved. The question of whether the complainant should have been provided with a copy of the IAOD report potentially remains a live issue because his claim for damages arising from the delay in providing it has to be resolved. Similarly his claim for damages because of damage to his reputation has to be resolved. But in the complainant's rejoinder, his case was substantially recast.

11. In the rejoinder, the complainant sought the annulment of the decision to not provide him with a copy of the IAOD report. Even assuming this relief falls within the purview of the case as originally framed, it is as equally moot as the original relief sought, namely an order requiring that he be provided with a copy of the IAOD report. This claim should be rejected.

12. Also, in the rejoinder, the complainant sought damages for "the prejudice caused to him by the misdeeds of another official", namely the conduct of Ms M. who unlawfully accessed his e-mail account. This was not a claim prosecuted before the Appeal Board. The relief sought before the Appeal Board was confined to damages caused to the complainant's reputation. Accordingly, the complainant has not exhausted internal remedies and, in this respect, his claim is irreceivable because of non-compliance with Article VII, paragraph 1, of the Tribunal's Statute. A similar issue was recently considered by the Tribunal in Judgment 3222. That matter contained parallels to the present case insofar as a challenge to a decision to refuse to provide documents became, in the Tribunal, an attempt to obtain damages on various bases which had not been adequately ventilated in the internal appeal process.

13. It is instructive to repeat what the Tribunal said in Judgment 3222, considerations 9 and 10:

> "9. Article VII(1) of the Tribunal's Statute serves several related purposes. One is to ensure that grievances are, before they are considered by the Tribunal, considered in internal appeals. It is commonplace for Staff Regulations to provide detailed procedures for the prosecution of internal appeals. Those procedures ordinarily serve a multiplicity of purposes. One is to provide a fair hearing process both for the benefit of a complainant and also the benefit of the organisation to resolve the dispute. Another is to ensure that the subject matter of the grievance and internal appeal is identified with some particularity. If the subject matter of the internal appeal is an administrative decision, the appellant would be required to identify the decision which would ordinarily include by whom it was made, when it was made and the content or effect of the decision. Yet another purpose is to ensure that the issues raised in the internal appeal are properly identified, relevant evidence concerning the issues presented and the issues and evidence appropriately addressed by the parties and properly considered by the internal appeal body. Yet another is to ensure that, in appropriate cases, the ultimate decision-maker will have the considered views of the internal appeal body that will have been informed by the coherent presentation of evidence and argument.
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> 10. Another purpose of Article VII(1) of the Statute is to ensure that the Tribunal does not become, *de facto*, a trial court of staff grievances and to ensure it continues as a final appellate tribunal. The Tribunal is ill-equipped to act as a trial court and its workload could, potentially, become intolerable or unmanageable if its role was not confined in this way. From the perspective of the parties, Article VII(1) should ordinarily operate to protect the parties against the cost and administrative demands of litigating issues, for the first time, before the Tribunal."

14. We return to consider the question of whether the complainant is entitled to damages for the delay occasioned by the refusal to provide him with a copy of the IAOD report. The anterior question is whether he should have been provided with a copy of the IAOD report at all. Judgments relied on by the complainant concerning the production of documents in litigation are of no particular relevance. The central issue in this matter is whether paragraph 10 of the WIPO Internal Audit Charter constrained the Organization and justified its refusal to provide the complainant with a

copy of the IAOD report. That paragraph and the preceding paragraph provide:

> "9. The right of all staff to communicate confidentially with, and provide information to the Internal Auditor, without fear of reprisal, shall be guaranteed by the Director General. This is without prejudice to measures under WIPO Staff Regulations and Staff Rules, where information is transmitted to the Internal Auditor with knowledge of its falsity, or with willful disregard of its truth or falsity.
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> 10. The internal Auditor shall respect and keep the confidential nature of any information gathered or received that is applicable to an audit, investigation or inspection, and shall use such information only in so far as it is necessary for the performance of an audit."

15. The complainant cited one judgement of the United Nations Administrative Tribunal to support a request for the provision of documents in a broadly analogous situation: *Mink v. the Secretary General of the UN*, Judgement No. 1043. However the complainant cited no judgment of the Tribunal or another international administrative tribunal that has held, in the face of a provision such as paragraph 10, that an organisation must or even should make available a report containing confidential information gathered from various sources during an investigation to a person who requested it even if that person is centrally involved in the investigation. Paragraphs 9 and 10 are fundamental to maintaining a system of internal investigation that is likely to be effective and reveal to the Administration the true position surrounding any particular issue or matter which is the subject of internal audit. It is true that there is a general trend in the case law of the Tribunal towards the production rather than non-disclosure of documents in an Administration's possession which may bear upon a staff member's position within the organisation (see, for example, Judgment 1756, consideration 10(b)).

16. But, in our opinion, this case provides an example of where a specific provision effectively denying disclosure for the purposes of promoting confidential communications with an internal auditor should be maintained fully and given effect. The complainant relies on the final sentence in paragraph 9. An unstated premise in the

complainant's argument is that the statement made by the staff member who unlawfully accessed the complainant's e-mails that she had had an intimate relationship with the complainant, is false. However this is a matter about which there is no evidence before this Tribunal and a matter about which we cannot express a view. Or, put slightly differently, the complainant has not demonstrated that the statement made by this employee was false or made with wilful disregard of its truth or falsity. The complainant had no right to be provided with a copy of the IAOD report and accordingly there was no relevant delay for which he may be entitled to damages.

17. Plainly enough there was an error in the IAOD report in that it wrongly recorded, in substance, that the complainant acknowledged he had had an intimate relationship whereas, in truth, he had denied such a relationship. The error in the report was corrected in January 2009 when the error was drawn to the attention of the Senior Investigator. On the Organization's account of events, the original IAOD report had limited circulation and the recipients of the original, and erroneous report, received notice of the correction in January 2009. That the IAOD report had limited circulation was accepted by the Appeal Board. It concluded there was no evidence that the error had caused the complainant to go down in the estimation of other persons nor any evidence that his personal and professional reputation had suffered.

18. However what the error did do was render more prominent Ms M.'s claim of having had an intimate relationship with the complainant. As noted earlier, this Tribunal is not in a position to adjudicate on whether this claim was true. However it is more probable than not that the undisputed error in the original IAOD report did damage to the complainant's reputation when the report was originally circulated though there is no evidence to support the complainant's case that the original IAOD report was circulated more extensively. The correction doubtless contained that damage but did not eliminate it.

19. In these circumstances, the complainant is entitled to modest damages for the damage done to his reputation. Those damages are assessed at 6,000 Swiss francs. The complainant is entitled to costs in the amount of 3,500 francs.

20. Lastly, the parties' submissions and the evidence they adduced are sufficient to permit the Tribunal to reach an informed decision. Accordingly, the application for an oral hearing is rejected.

DECISION

For the above reasons,

1. WIPO shall pay the complainant 6,000 Swiss francs in damages.
2. It shall also pay him 3,500 francs in costs.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet