



# Texas Entertainment and Sports Law Journal

State Bar of Texas  
Entertainment & Sports Law Section

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## Notes...

The statements and opinions in the Texas Entertainment and Sports Law Journal are those of the editors and contributors and not necessarily those of the State Bar of Texas, or the Entertainment & Sports Law Section. This publication is intended to provide accurate and authoritative information with respect to the matters covered and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

## Join the Section

All members of the Entertainment & Sports Law Section are encouraged to make sure that their dues are paid. All dues payments are to be made directly to the Section's Treasurer. An application for joining the Section is provided in this publication.

## Invitation to Publish

Anyone think they have the talent to write an article? This is your invitation to put that talent to use. The Entertainment and Sports Law Journal is soliciting articles to publish in upcoming issues. Article formats vary from long footnoted analyses to more informal discussions, and topics may span the spectrum of the sports and entertainment fields. Contact the editor and discuss the possibility of writing an article on a subject that interests you.

Articles may be submitted to:

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## Chairman's Report

Our section on Entertainment & Sports Law publishes this Journal three (3) times a year in an effort to provide quality reading and discussion about current issues useful to Section members. The cost of publishing the Journal exceeds \$7,500 per year. We hope that you find it useful in your respective practices. We also hold a very popular Entertainment Law Institute annually in Austin to coincide with the South by Southwest Music Festival. We also sponsor a Sports Law Institute, also annually, which puts us in the unique position of holding annual seminars on two (2) topics that rarely see much attention by other state bar associations or organizations. Each of the 1998-1999 seminars have been sponsored by our Section on conjunction with the University of Texas Law School CLE Department and they have proven to be very popular.

Our membership approximates 500 members. We have always had membership between 500 and 600 lawyers, paralegals, industry personnel and interested persons. Unfortunately, our section always remains behind on its ability to match revenue with expenses. Therefore, we have asked and received approval to raise the Section dues to \$25.00. The increase of \$5.00 per member will allow us to continue to provide the quality services that you are used to receiving. We hope that you will not be turned off by the increase. It is necessary in order for the Section to provide these services. We hope that you will re-up with us again during the next Annual State Bar membership dues collection.

As a final matter, we are sponsoring an exciting CLE program at the Annual State Bar Meeting in Ft. Worth, Texas, on June 11, 1999 @ 1:00 p.m. We will have a presentation by Prof. Matthew Mitten of the South Texas College of Law affiliated with Texas A&M on current issues in Sports Law and Litigation. His presentation will survey current legal cases and issues that are abundant in sports law, both amateur and professional. He will review the "Law" decision involving the NCAA and present issues on youth in sports. Also, from the entertainment side we will hear a presentation from George Sanger, also known as "The Fat Man" of Big Fat, Inc., Fat Labs, etc. George is the world's biggest composer and producer of computer related music. He is also very entertaining as a speaker and are glad to have both of these speakers. Hope to see you there!

This is my last report as chairman of the Section. We have accomplished a lot but there is more to be done. Stay a member, become involved, and support your Entertainment & Sports Law Section.

Christopher A. Kalis

## FOR THE LEGAL RECORD

With this issue ends the tenure of our articles editor Professor Matt Mitten of the South Texas College of Law. Professor Mitten has been a stalwart in maintaining the Journal since 1995. Professor Mitten is headed to Marquette University where he will be the Director of the National Sports Law Institute and also hold the position of Professor of Law. Professor Mitten has coordinated the Journal's Student Writing Contest and submission of articles from students at South Texas College of Law. Many thanks to Professor Mitten for his contributions. We wish him well in his new endeavors.

Also headed for a new position is University of Houston Assistant Professor, Gil Fried. Among other things, Gil headed up the Sports and Fitness Administration Program at the University of Houston and authored *Safety Solutions*. Gil was instrumental in the University of Houston's co-sponsorship with the Section of several sports law seminars held in Houston. Gil is headed for a new position at New Haven University in Connecticut.

We wish both Matt Mitten and Gil Fried well and thank them for their contributions to the Journal and the furtherance of sports law and education in Texas.

*A new twist on coaching football?* Coach George O'Leary will be coaching from the press box for the 1999 football game at Navy. After the

NCAA committee on infractions determined that he had loaned former player C. J. Williams money, the Georgia Tech head football coach received recruiting sanctions and was barred from the sidelines for the fall opener ...

*An act of contrition?* The International Olympic Committee voted to permit corporate sponsors to terminate marketing agreements if the IOC does anything to harm the image of the Olympics. In an apparent response to the bribery scandal related to the awarding of the 2002 Games in Salt Lake City, the IOC adopted a so-called morals clause for the IOC. The IOC has placed itself in a position similar to professional athletes who are required to sign such provisions when contracting for businesses endorsements ...

*Void for vagueness?* Latrell Sprewell's playoff performance notwithstanding, U. S. District Judge Vaughn Waker was not impressed with Sprewell's lawsuit against the NBA. Sprewell challenged his 68 game suspension but the lawsuit was dismissed. The federal judge ruled that the lawsuit was so worthless that Sprewell was ordered to pay the league's court costs. Judge Walker advised Sprewell to seriously consider dropping the suit, but gave him one more chance to amend with more specific claims. Judge Walker found that the initial suit's factual claims were "too vague to prove any legal violations"...

*Some sports related legislative notes ...*

The University Interscholastic League apparently pre-empted State Rep. John Culberson's legislation that would have forced the UIL to amend its rules to avoid having a team disqualified for a team member's dishonesty. The UIL adopted rules that would penalize the individual rather than the team for some infractions. The new rules essentially adopt the legislation pushed by Culberson which would not disqualify the school if it verified the team member's eligibility based on the facts available. However, if a school allows the player to still verify grades and the player alters the grade(s), UIL executive director Bill Farney insisted that there still may be grounds for forfeiture. The focus is to have coaches (adults?) verify the grades with the teachers rather than allowing the student to certify his or her own grades...

The Texas Senate is forcing accountability on the Harris County-Houston Sports Authority. Houston Democrat, Representative Garnet Coleman, sponsored legislation to return many of the sports authority's powers back to elected government. Urging that the sports authority had become a "kingdom" with "the status of some major commission", Coleman's bill granted City Council and Commissioners Court oversight to confirm board members rather than just the mayor and the county judge. The legislation also imposed a new code of ethics on the sports authority and restricts its use of eminent domain. Coleman believes that the sports authority should be limited to financing and helping to manage sports facilities...

House Bill 579 should make sporting boat owners happier. Sponsored by Rep. Mike Krusee, R-Taylor, the bill would make the person or business selling a boat responsible for paying the sales tax on a boat if the buyer pays the sales tax to the seller. The bill would also allow a person to obtain a title for boat and/or motor upon presentation of proof that the tax was paid to the seller, even when the seller has not remitted the money to the state comptroller...

And the Texas Parks and Wildlife Commission has simplified fishing regulations which take effect September 1. The commission has, *inter alia*, opened deer hunting in five Panhandle counties and increased doe days in 36 others; established a youth-only squirrel season; and created an archery-only deer season. Changes in saltwater fishing were also made to increase size limits for king mackerel from 23 inches to 27 inches, and reduce red snapper daily bag limits from 5 to 4. The Commission also clarified the rights of fishermen near docks and marinas. TPW legal counsel Boyd Kennedy was quoted as saying that "The right to build or operate a marina, dock or other structure on or over public water does not carry with it the right to restrict boating or fishing from a boat." He added that "Harassment of a law-abiding fisherman is a crime punishable by fine and/or imprisonment."

Remember the Journal can be accessed online at [www.stcl.edu](http://www.stcl.edu)  
Sylvester R. Jaime

## RECENT CASES OF INTEREST

Prepared by the South Texas of Law Affiliated with Texas A&M University  
Sports and Entertainment Law Society  
Erik Karst, Student Casenote Editor

### The Chicken Decisions v. Barney the Dinosaur

In *Partnership L.P. v. Giannoulas*, 14 F. Supp. 2d 947, (N.D. Tex. 1998), the creator and owner of “Barney,” a children’s Tyrannosaurus Rex type dinosaur television character, sued the owner of “the Chicken” sports mascot for trademark infringement, false description, unfair competition, dilution of trademark, and copyright infringement. The court granted the defendants’ summary judgment motion and held that the Chicken’s parody of Barney is not actionable.

In 1994, defendant Giannoulas, who plays the Chicken, used a costume of a purple dinosaur to conjure up images of Barney for purposes of a comedy gag at a professional sporting event. The skit was a two-minute slapstick routine in which the putative Barney dances, hops, skips, waves, hugs, blows kisses, and is flipped, slapped, stood upon, tackled, wrestled, and otherwise subjected to aggressive physical conduct by the Chicken. At no time during the skit did the defendants inform the audience that the putative Barney was not the real Barney or that his use was unauthorized. Giannoulas intended to parody a number of characteristics of Barney while portraying Barney in an original and unexpected light.

The plaintiff asserted a claim under the Lanham Act which prohibits the use of a trademark in a manner likely to cause confusion. To determine the likelihood of confusion, a court considers a number of factors including: (1) the type of trademark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or service, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, and (7) any evidence of actual confusion. On the other hand, parody is a form of artistic expression protected by the First Amendment that permits the non-confusing use of another’s work.

The court balanced the public interest in free expression against the public interest in avoiding consumer confusion under the Lanham Act. The similarity of a mark is determined by comparing the mark’s appearance, sound and meaning. Therefore, the relevant inquiry is whether, under the circumstances of the use, the marks are sufficiently similar that prospective purchasers are likely to believe that the two uses are somehow associated. Although the putative Barney looked like the real Barney, the court found no likely confusion because the real Barney is kind and gentle; whereas, the putative Barney is aggressive and fights with the Chicken. The court concluded that spectators would not mistake the putative Barney as anything other than the target of parody.

The court also held that there was no claim for trademark dilution, which requires a showing of either blurring or tarnishment of plaintiff’s mark. Blurring was found not to occur because the defendants did not use Barney to identify any of their goods or services. Tarnishment was not found because Barney is not linked to products of shoddy quality or portrayed in an unwholesome context. Moreover, the defendants did not seek to ridicule Barney to sell more of their own products.

In addition, the court rejected plaintiff’s allegation that defendants copied and used costumes depicting images substantially similar to the copyrighted elements of Barney. Copyright infringement is established by showing: (1) ownership of a valid copyright; and (2) copying of constituent elements of a work that is original. The defendants admitted that plaintiff owned a valid copyright and that they use a costume bearing a substantial likeness to Barney. However, defendants claimed the affirmative defense of fair use of the copyrighted material for the purpose of parodying Barney. A parody may conjure up the original work and build on it by using the original as a known element of the modern culture while contributing something new for humorous effect or commentary.

In assessing fair use, the court considered: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work. It held that the use of the putative Barney added something new to the original Barney and qualified as a transformative by way of a skit. The court observed that the costume had not been merely duplicated, and that defendants merely conjured up enough of the original Barney to make the audience recognize the character.

By Erik P. Karst

### Par for the Course: Tour 18 Loses in One Hole Playoff

In *Pebble Beach Co. v. Tour 18 I Limited*, 155 F.3d 526 (5th Cir. 1998), the Fifth Circuit applied traditional trade dress analysis under the Lanham Act to golf hole design and held that Tour 18 has the right to copy plaintiffs’ golf holes, barring only its copying of a lighthouse that identified a particular golf hole. However, the court affirmed an injunction prohibiting Tour 18’s use of plaintiffs’ service marks in advertising and promotional materials.

Plaintiffs Pebble Beach, Resorts of Pinehurst, and Sea Pines own and operate famous golf courses, including Pebble Beach Golf Links, Pinehurst, and Harbour Town Golf Links, respectively. Tour 18 owns and operates two golf courses consisting exclusively of golf holes copied from famous golf courses across the country. Tour 18 replicated golf holes from plaintiffs’ golf courses, including Harbour Town Hole 18 referred to as the “lighthouse hole.” On its replica of this hole, Tour 18 constructed a lighthouse in the background. Tour 18 also used plaintiffs’ service marks in advertising and promotional materials as well as on its scorecards, yardage guides, tee box signs, and restaurant menus. Plaintiffs brought suit against Tour 18 alleging federal service mark and trade dress infringement, trademark dilution, and state unfair competition law claims. The district court found that Tour 18 infringed and diluted plaintiffs’ marks and Sea Pines’ golf hole design and ordered injunctive relief.

To prevail on their claims, plaintiffs were required to prove that their golf hole designs and service marks qualified for legal protection, and that Tour 18’s use of them created a likelihood of consumer confusion. Plaintiffs’ PEBBLE BEACH, PINEHURST, and HARBOUR TOWN service marks clearly are protected marks. Golf hole designs must be nonfunctional and inherently distinctive or have acquired secondary meaning (i.e., associated with a certain golf course) to be protected.

Regarding the copying of plaintiffs’ golf holes, Tour 18 argued that golf hole design is functional and not subject to trade dress protection. By defining its product as a golf course that provides replicas of famous golf holes, Tour 18 claimed a legal right to copy famous golf holes in order to have any commercial success. Tour 18 then argued that every feature of a golf hole and its configuration affects how the hole plays, making any golf hole design functional. The court held that golf hole design is nonfunctional unless the features or combination of features have an effect great enough to significantly disadvantage competitors in ways other than consumer preference for a particular brand of product. Because there are an “unlimited number of alternative designs” to plaintiffs’ golf holes and no evidence that plaintiffs’ hole designs are superior to available alternatives, the court found that these designs qualify for trade dress protection.

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Pebble Beach and Pinehurst argued that their golf hole designs are inherently distinctive. The court rejected their claims because their golf hole designs are variations of common place themes in the design of golf holes that have not acquired secondary meaning. However, the Harbour Town “lighthouse” hole is protectable trade dress because it is the course’s “signature hole” that identifies a particular golf course in the public’s mind. The court required Tour 18 to remove the lighthouse from its course to stop infringing on Sea Pines’ trade dress rights. Tour 18 was not required to modify its Pebble Beach and Pinehurst golf hole designs.

The Fifth Circuit affirmed the trial court’s finding that Tour 18’s use of the plaintiffs’ service marks on advertisements and promotional materials created a likelihood of confusion regarding whether Tour 18 had permission to use plaintiffs’ marks and copy their golf holes. The court allowed Tour 18 to use Pebble Beach and Pinehurst’s marks only to identify the golf holes it copied on its scorecards, yardage guides, and tee box signs. The court modified the lower court’s injunction to also allow Tour 18 to use Sea Pines’ marks, other than its lighthouse, to identify the golf hole as one copied from Harbour Town Golf Links. The court also held the plaintiffs are not entitled to an accounting of profits or attorney’s fees.

By Stuart L. Brown

### **The Velvet Elvis’ Nightclub: Infringing Upon “The King”?**

During the 1990’s, “The Velvet Elvis” nightclub opened after its owner obtained a federal service mark for the restaurant/tavern with the United States Patent and Trademark Office. “The Velvet Elvis” parodied the faddish bars of the 1960’s and was not affiliated or sponsored by the official trademarker of Elvis Presley merchandise, Elvis Presley Enterprises. In fact, Elvis Presley Enterprises sued the owner of “The Velvet Elvis” for trademark infringement. Recently, the Fifth Circuit found that “The Velvet Elvis” nightclub had indeed infringed upon trademarks involving Elvis Presley’s name. *Elvis Presley Enterprises v. Capece*, 141 F.3d 188 (5<sup>th</sup> Cir. 1998).

According to the court, trademark infringement hinges upon whether a likelihood of confusion exists between the marks at issue. The court equated likelihood of confusion with probability of confusion, not just a mere possibility of confusion. To help determine whether confusion existed, the court set forth a non-exhaustive list of factors. These factors included: (1) the type of trademark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, and (7) any evidence of actual confusion. The court also concluded that both the name and advertising were relevant to the analysis of the likelihood of confusion factors.

The court ultimately found trademark infringement based on five of these factors. Each factor proved that “The Velvet Elvis” name and advertising scheme would probably confuse potential customers into thinking that the nightclub was affiliated with official Elvis Presley merchandise. First, the Elvis Presley Enterprise marks (“Elvis” and “Elvis Presley”) were a strong type of trademark because they had “worldwide fame and almost instantaneous recognition. Second, the two marks in question were similar in appearance, sound, and meaning especially since “The Velvet Elvis” had advertisements which used the image of Elvis Presley, had advertisements which bolded the word “Elvis” while making the word “Velvet” almost indistinguishable, and had references to Graceland, The King Lives, Viva la Elvis, and Elvis leaving the building. Third, Elvis Presley Enterprises showed that it could have gotten into products and services similar to the “The Velvet Elvis” nightclub especially in light of the popular success of entertainment and music-themed restaurants like Planet Hollywood and Hard Rock Café. Fourth, “The Velvet Elvis” name and advertising scheme showed an intent to confuse especially in the use of the image of Elvis, the references to Elvis,

and the emphasis placed on the word “Elvis.” Finally, Elvis Presley Enterprises proved the public’s actual confusion by presenting witnesses who believed that the nightclub was associated with Elvis Presley and might have “Elvis” merchandise for sale.

The court then ruled that parody was not a defense to a trademark infringement action, but rather another factor to be considered. Even though the court noted that a parody of the original trademark weighs against likelihood of confusion since it pokes fun at the original which should lessen actual confusion between the original and the parody, the court found that “The Velvet Elvis” parody of faddish bars of the sixties was irrelevant to the likelihood of confusion because a parody of faddish bars of the sixties did not require use of the “Elvis Presley” or “Elvis” names. Thus, since parody was not a defense to a trademark action and most of the factors pointed to confusion between “The Velvet Elvis” and the official “Elvis/Elvis Presley” trademarks, the court issued an injunction enjoining the nightclub’s use of “The Velvet Elvis” name. As a result, the nightclub currently operates under the name “The Velvet E” in Houston, Texas.

By: Tamer Morsi

### **The Dallas Cowboys: Getting Production (of Documents)**

On December 30, 1996, Erik Williams of the Dallas Cowboys became the subject of a Dallas police department investigation after Nina Shahraven filed a report alleging that she had been raped by Williams. According to Shahraven, Williams and another man raped her while Dallas Cowboy teammate Michael Irvin threatened her with a gun and videotaped the sexual assault. Approximately two weeks after filing her report with the police, Shahraven recanted her story and eventually pled guilty to making a false report to a peace officer.

Williams then initiated a lawsuit alleging that the City of Dallas, the Dallas police department, and various police officers had violated his rights under the Fourth and Fourteenth Amendments by engaging in reprehensible conduct following Nina Shahraven’s allegation. Williams specifically charged that: (1) the police knew that Shahraven was not a credible complainant since she had first reported her allegations to a tabloid-style television reporter known for attacking Dallas Cowboy football players, (2) the police knew that the physical examination of Shahraven did not corroborate her description of the violent sexual attack, (3) when applying for a search warrant, the police had mischaracterized Shahraven’s physical examination and omitted information that would have shed light on Shahraven’s lack of credibility, (4) the police improperly alerted the media about a search of Williams’ home, (5) the police violated department policy by announcing that Williams was a suspect in an alleged rape, (6) the police negligently or recklessly announced that Williams’ arrest was imminent, (7) the police announced that they had “no reason to doubt” Shahraven’s credibility even though the seized videotape showed a consensual sexual encounter, and (8) the police refused to return the videotape of the consensual sexual encounter and circulated it within the department for personal entertainment.

At about the same time that Williams initiated his action against the police in federal court, he also sued Griffin, Lin Television of Texas in Texas state court. Attorneys Babcock and Carter represented Griffin, Lin Television in that action, which was later settled. However, as part of the discovery process in Williams’ federal lawsuit against the police, he served the attorneys of the settled state lawsuit, Babcock and Carter, with a subpoena duces tecum “requiring the production of any and all documents relating to Erik Williams, Michael Irvin, and Nina Shahraven.” In *Erik Williams v. The City of Dallas, et. al.*, 178 F.R.D. 103 (N.D. Tex. 1998), the district court addressed Babcock and Carter’s motion to quash the subpoena. The district court ultimately modified the subpoena and allowed Williams to seek some of the information requested from Babcock and Carter (the attorneys for Griffin, Lin Television).

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Babcock and Carter first contended that the subpoena was facially overbroad and burdensome under Fed. R. Civ. P. 45(c)(3)(A)(iv) because Williams had not identified any specific document to be produced and the request was not limited in time or topic. The court agreed that the subpoena was overbroad. However, instead of quashing the subpoena, the court modified it and required only the production of documents relating to the false allegation of rape which gave rise to the federal lawsuit against the police.

Babcock and Carter also contended that Williams could obtain the requested materials from other sources, including the parties in the case. The court held, however, that the modified subpoena sought relevant materials and could not be quashed simply because Williams could obtain the materials from other sources. The court noted that the subpoena was not the product of a harassing animus, and the attorneys' status as nonparties did not establish that the subpoena imposed an undue burden.

Babcock and Carter further contended that the subpoena was overbroad because it required the attorneys to review thousands of documents and incur approximately \$9,000 in attorney's fees in so doing. The court ruled, however, that the subpoena was not overly burdensome for this reason because the court would award the attorneys their reasonable costs and expenses incurred in complying with the subpoena.

Babcock and Carter next contended that the subpoena should be quashed because it did not define the term "document," and could therefore be interpreted to include any type of information that related to Williams, Irvin, and Shahraven, regardless of whether the information was pertinent to the lawsuit. The court found, however, that the subpoena was not defective just because it did not define the term "document." The meaning of the term "document" could easily be ascertained by consulting the federal rules of civil procedure governing subpoenas (Rule 45) and the production of documents (Rule 34).

Finally, Babcock and Carter contended that the subpoena should be quashed because it required the production of documents protected by: (1) the attorney-client privilege (Fed. R. Civ. P. 45(c)(3)(A)(iii)), (2) the attorney work product privilege (Fed. R. Civ. P. 26(b)(3)), and (3) Texas' journalist's privilege. The court, however, ruled that the blanket assertion of these privileges did not warrant quashing the subpoena.

By Casey Harris

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## Student Writing Contest

The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are soliciting articles for our fourth annual writing contest for students currently enrolled in Texas law schools for the best article on a sports or entertainment law topic.

The winning student's article will be published in the Journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the Journal. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 15, 1999.

**Length:** no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

**Endnotes:** must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

**Form:** typewritten, double-spaced on 8½ x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Matthew J. Mitten, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-1845.

## Fame, Fortune and Free Speech <sup>1</sup>

by Charles L. Babcock and Laura Lee Stapleton

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abiding the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.* (First Amendment to the U.S. Constitution)

### I. Introduction.

When the framers of the Constitution envisioned free speech, it was to protect their right to hear and voice differing political viewpoints so that they could control their own destiny and have the right to make informed decisions about their fate. In today's society, free speech is still the foremost freedom; however, the realm of protection extends far beyond politics. In fact, when looking at the events of the day, one would be hard pressed to decide who has a greater influence on today's youth — the politicians, the sports stars, or the entertainers. When considering what one person has the most significant impact on our society today, names like Bill Clinton, Michael Irvin or Oprah Winfrey might come to mind. All three individuals work in different industries, and all three people could be viewed as cultural icons in today's society. Shows like *Politically Incorrect* which feature prominent entertainment, sports, and political figures espousing their views on whatever is the political hot topic of the day, i.e. gun control, drug testing in schools, etc., demonstrate that it is not only politicians who are talking about politics and influencing people's views on such matters. The concept of this program and its popularity in today's culture exemplifies how the lines are being blurred between sports, entertainment and government. With the merging of these areas, prominent entertainment and sports figures have found themselves held to a higher standard when they complain about comments made about them (i.e. Michael Irvin), and, at the same time, they have become an ever-increasing target for libel claims to be brought against them for what they say publicly (i.e. Oprah Winfrey). In the free speech realm, fame and notoriety is a double-edged sword — famous persons' viewpoints are publicized, which makes them more susceptible to suit, but at the same time, a greater margin of error is permitted for statements made about famous people.

### II. A Historical Perspective of Free Speech.

When the progeny of First Amendment law began developing with *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the United States Supreme Court, emphasized this nation's profound historical commitment to robust debate on political issues.

The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 .... 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' *Stromberg v. California* 283 U.S. 359, 369. <sup>2</sup>

In an effort to protect criticism of public officials and public matters, the Court formulated the rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves by clear and convincing evidence that the statement was made with "actual malice". Actual malice means with knowledge that the statement was false or with reckless disregard <sup>3</sup> as to whether or not it was false. The purpose behind the implementation of this higher standard was to continue to protect and promote free debate of public issues. The Court deliberately

did not define "public official"; it did not decide to what extent the designation would descend into government ranks, and it did not determine the bounds of the official conduct concept.

In *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966), the "public official" designation was defined to include, at a minimum, those in the hierarchy of government employees (even if not elected) "who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs." In this case, the Court was considering a libel action brought by a former nonelected supervisor, employed by county commissioners, against a newspaper. The Court concluded that the "public official" designation does not apply to all government employees, but applies where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds that job, beyond the general public interest in the qualifications and performance of government employees as a whole.

Texas courts, like many other jurisdictions, have applied the *Rosenblatt* criteria to public school employees. Even though public schools are funded by the government, not all public school employees have been designated "public officials" for the purposes of libel actions. For instance, Texas courts have differentiated between the role of a public school teacher and the role of a football coach. In declaring a school teacher a "private figure"<sup>5</sup> and a high school athletic director and head football coach a "public figure"<sup>6</sup>, the courts have, if not explicitly, at least implicitly, recognized the significant impact sports has on our society and the greater access people involved in sports have to the media. Sports has always keenly captured the public's interest. The Amarillo court of appeals acknowledged this in the case of *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Text App. — Amarillo 1993, writ denied), when it stated "Ed Johnson was more than a school teacher; he also was the athletic director and head football coach. This dual position was ... of such apparent importance that the public had an independent interest in the qualifications and performance of the person who occupied the positions, beyond the general public interest in qualifications and performance of all government employees."<sup>7</sup> Even with an enrollment of only 130 people, Johnson acknowledged that high school football "is one of the major things the people look forward to, being something in which they are keenly interested and which is extremely important to them."<sup>8</sup> This is especially true in Texas.

Just three years after the *Sullivan* decision, the Supreme Court, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed.2d 1094 (1967),<sup>9</sup> extended the constitutional privilege embracing "public officials" to include "public figures." Interestingly, the *Butts* case dealt with a sports figure and was the first Supreme Court case to articulate what constitutes a "public figure" for First Amendment purposes. The defendant published an article accusing Wally then coach of the University of Georgia football team and Athletic Director at the University of Georgia and the late Bear Bryant, then coach of the University of Alabama football team of "fixing" a football game between their universities. Since Butts' salary was paid by a private alumni association and not the state, strictly speaking, the Court could not classify him as a "public official," instead the Court recognized that the constitutional privilege of *Sullivan* needed to be extended to protect non-public officials who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."<sup>10</sup>

The *Butts* Court also acknowledged the need to expand First Amendment protection to more than just political speech:

We are told that the public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons

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## Editor-in-Chief Commentary

We are proud to continue our relationship with the Entertainment and Sports Law Section of the State Bar of Texas by publishing our second annual edition of *The University of Texas Review of Entertainment and Sports Law*. The first few years in the life of a journal are always the most demanding, and we are indebted to Sylvester R. Jaime, Esq. and Russell Rains, Esq., for giving us the opportunity to publish the Review; Mike Tolleson, Esq. for his professional expertise in preparing the following articles; and, Professor David Simon Sokolow and Professor Wayne Schiess of The University of Texas School of Law for their academic guidance and advice in creating this Review.

Entertainment law looks even more vital this year than last. As entertainment converges with high technology, vast new legal and business opportunities are beginning to develop. These convergent areas are already the fastest growing industries in America today. As entertainment and sports law evolves, the mission of *The University of Texas Review of Entertainment & Sports Law* continues to be to provide analysis of issues relevant to practitioners involved in all areas of the field.

## Digital Transmissions and the Internet in the New Millennium:

### *The Impact of the Digital Millennium Copyright Act*

By: Scott Page

The extraordinary developments in internet technology over the last few years have resulted in a proliferation of digitized transmissions, often without remuneration to the holders of related copyrights.<sup>1</sup> For the most part, the application of existing copyright laws to the transmission and storage of digital works on the internet was uncertain and untested, until recently. The Clinton Administration's policy regarding the internet has been to promote internet commerce "through self-regulation and market-driven growth."<sup>2</sup> Therefore, President Clinton's signing of the Digital Millennium Copyright Act (DMCA) on October 28, 1998, represented a dramatic departure from this policy.<sup>3</sup>

The DMCA is one of the most significant revisions to the United States copyright law since the enactment of the Federal Copyright Revision Act of 1976 (Copyright Act).<sup>4</sup> In particular, it is the most extensive internet copyright legislation ever enacted in the United States.<sup>5</sup>

The primary purpose of the DMCA is to protect copyrights in digital environments. Although it has shortcomings, the DMCA provides the safeguards and certainty that owners of copyrighted works need to safely venture into e-commerce and the global digital superhighway. This Article explores the key provisions of the DMCA with a focus on the provisions that affect digital transmissions of copyrighted works over the internet.

## WIPO Treaties Implementation

Title I of the DMCA includes several provisions that implement two treaties adopted by the World Intellectual Property Organization (WIPO) in 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>6</sup> These two treaties provide the basic legal framework necessary to protect copyrighted works in the global digital environment.<sup>7</sup>

Thirty of the more than one-hundred nations that worked to get WIPO to adopt these two treaties must ratify each treaty before either will go into force.<sup>8</sup> However, every country must ratify these two new copyright treaties to ensure their effectiveness on a global basis.<sup>9</sup> Enactment of Title I of the DMCA represents the United States' effort to establish global protections.

Title I adds a new Chapter 12 to the Copyright Act.<sup>10</sup> It creates a new set of civil and criminal penalties for persons who directly or indirectly circumvent technological measures intended to protect copyrighted works.<sup>11</sup> Title I makes it illegal to circumvent technological measures designed to control access to a copyright-protected work.<sup>12</sup> In addition, Title I prohibits the manufacture, importation, or distribution of products, or provision of services primarily designed or produced to circumvent a technological measure that controls access to a copyrighted work or protects any right of a copyright owner.<sup>13</sup> These provisions give copyright owners protections, which provide the justification and incentive for developing methods to safely deliver their works over the internet.

Unfortunately, the language of this portion of Title I is subject to some interpretation. The prohibition of devices that circumvent copyright protection technology is limited to devices that are "primarily" designed or produced for the purpose of circumvention.<sup>14</sup> In other words, a device, such as a personal computer, may have a very attractive feature that allows an internet user to easily override the copyright protection technology. However, if that feature is determined to be merely a "subsidiary" function, the device and its manufacturer or seller may not be in technical violation of Title I.

In the example above, while the manufacturer and seller may be free from liability, the internet user's actions in circumventing the control measures by using the "subsidiary" device would constitute a violation of the DMCA. However, detecting such actions may be very difficult and cost prohibitive for the copyright owner. In addition, the ban on direct circumvention of the control measures does not take effect until two years after the enactment of the DMCA. The language and potential application of these provisions creates some uncertainty regarding the copyright owner's ability to protect against piracy and cheap dissemination of his/her works in the near future.

In addition to the shortcomings noted above, Title I includes a number of exemptions that further weaken the DMCA's impact.<sup>15</sup> Even assuming that the exempted parties need the right to circumvent technological measures, one must consider the potential pitfall these exemptions create. If these exempted classes can break technological barriers to gain access to copyright-protected works, then someone else may successfully argue for the right to legally manufacture and sell the countervailing technology that these groups need.<sup>16</sup> Unfortunately, the greater the accessibility to such countervailing technology, the greater the opportunity for abuse by non-exempt parties.<sup>17</sup> These exemptions make the difficult task of policing violations of the DMCA even more arduous.

Title I also prohibits the knowing falsification, alteration, or removal of "copyright management information" (CMI) with the intent to induce or conceal copyright infringement.<sup>18</sup> In addition, the knowing distribution of copies of works that contain false CMI is prohibited.<sup>19</sup> CMI is conveyed in connection with a copyrighted

work to help identify the work.<sup>20</sup> This information includes: the name of the author and/or the copyright owner; the terms and conditions of permissible use of the copyrighted work, and; any identifying numbers or symbols conveyed in connection with copies or phonorecords of a work, performance, or display.<sup>21</sup> This provision is intended to protect the digital identifiers that copyright owners can use to track the circulation of their works in digital environments.<sup>22</sup> These protections will facilitate the copyright owner's ability to monitor the payment of royalties and detect piracy.<sup>23</sup>

### **Online Copyright Infringement Liability Limitation**

Prior to the enactment of the DMCA, the extent to which an on-line service provider (OSP) could be held liable for acts of copyright infringement committed on its network was unclear.<sup>24</sup> This potential liability was a major source of concern for OSPs because of the difficulty in controlling materials transmitted through the OSPs' networks by subscribers and third parties.<sup>25</sup> Several cases left open the possibility that OSPs could be held liable under theories of vicarious liability or contributory infringement.<sup>26</sup>

Title II of the DMCA amends Chapter 5 of the Copyright Act to remove much of the uncertainty regarding the OSPs' potential liability. Title II creates safe harbors for certain transmissions and, in some cases, the storage of potentially infringing material.<sup>27</sup> These safe harbors significantly limit the liability of OSPs for acts of copyright infringement committed online by subscribers or third parties.<sup>28</sup>

An OSP will not be liable for monetary damages when users of its network transmit infringing material, provided that certain conditions are satisfied.<sup>29</sup> The subscriber or third party must initiate the transmission of the infringing material.<sup>30</sup> The OSP must transmit, rout, and store the infringing material using an "automatic technical process."<sup>31</sup> The subscriber or third party must select the recipient(s) of the infringing material.<sup>32</sup> The OSP cannot maintain a copy of the transmission that may be readily accessible to anyone other than the intended recipient(s), and the copy of the transmission cannot be maintained any longer than necessary to carry out the transmission.<sup>33</sup> Finally, the OSP must not modify the content of the infringing transmission in any way.<sup>34</sup>

Title II creates a similar protection for OSPs who permit users to "cache" or store infringing material temporarily on the OSP's network.<sup>35</sup> If the OSP merely stores the material until the intended recipient(s) request(s) the material, the OSP will incur no monetary liability.<sup>36</sup>

In the case of longer-term storage of infringing matter by the OSP, the exemption from monetary liability applies only where the OSP either: (1) has no actual knowledge that the material is infringing, (2) is not aware of any facts or circumstances from which infringing activity is apparent, or, (3) acts quickly to remove or block access to the infringing material once the OSP obtains such knowledge or awareness.<sup>37</sup> In addition, to escape liability, the OSP cannot derive any financial benefit directly attributable to the infringing activity; moreover, the OSP must remove or disable the infringing material upon receipt of written notice from the copyright owner.<sup>38</sup>

Title II also exempts OSPs from any liability to subscribers or

third parties that originally placed the material on the OSPs' networks.<sup>39</sup> This protects OSPs from any claims based on the deletion or disabling of material believed to be infringing.<sup>40</sup> This is true even if it is later proven that the material was legally transmitted.<sup>41</sup>

Proponents call this portion of the DMCA a "big step forward in freeing companies to expand into electronic commerce and deliver movies, music, and other content over the internet."<sup>42</sup> Unfortunately, these safe harbor provisions may tempt the OSPs to shun an active role in copyright enforcement even though the OSP may be in the best position to monitor activity on its network.<sup>43</sup> Title II removes the potential for liability for OSPs in most situations without imposing any express duty upon the service provider to actively police its site for acts of infringement. On the other hand, Title II increases the willingness of OSPs to resolve any doubts regarding potentially infringing material in favor of the complaining copyright owner.<sup>44</sup>

To keep some balance, Congress did not shield the OSPs from all liability. In certain situations, OSPs are subject to declaratory relief and seizure of equipment that facilitates infringement.<sup>45</sup> This remaining legal exposure should encourage OSPs to take an active role in protecting copyright works on the internet.<sup>46</sup> Moreover, the OSPs now realize that without security for copyrighted works, the creators of such works will refuse to make their works available for commercial use on the internet.<sup>47</sup>

Overall, Title II may be a mixed blessing for owners of copyright works that can be transmitted in digital form. Title II gives OSPs the ability to freely remove potentially infringing material from its system or network; however, it is still up to the copyright owner to find unauthorized copies of their works on the internet.

### **Title IV B Miscellaneous Provisions**

Title IV of the DMCA includes provisions that amend section 114 of the Copyright Act to create regulatory and statutory license requirements for the digital transmission of music over the internet, or "webcasting."<sup>48</sup> Entities that digitally transmit sound recordings over the internet, or "webcasters," must now obtain statutory licenses to continue operating.<sup>49</sup> In addition, these newly licensed webcasters must pay a statutory licensing fee to the owner of the sound recording copyright and follow certain procedures regarding play lists and play restrictions.<sup>50</sup>

These licensing provisions of Title IV attempt to clarify confusion regarding the application of the Digital Performance Right in Sound Recordings Act of 1995 (1995 Act)<sup>51</sup> to non-subscription digital transmissions.<sup>52</sup> Under the 1995 Act, webcasters were exempt from paying a performance royalty for sound recordings.<sup>53</sup> Such webcasters are no longer exempt; however, they may qualify for the compulsory license created by the DMCA if their primary purpose is "not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events."<sup>54</sup>

The actual rates for the statutory licenses created by Title IV are to be determined by the recording industry.<sup>55</sup> As required under Title IV of the DMCA, the United States Copyright Office published a notice on November 27, 1998, that provides the recording industry with a six-month period in which to negotiate rates for these

statutory licenses.<sup>56</sup> The rates and terms determined by the recording industry will be binding on all copyright owners of sound recordings and entities transmitting digital sound recordings over the internet.<sup>57</sup> If the recording industry is unable to reach an agreement, the parties will have sixty days following the end of the negotiation period to petition the Copyright Office to convene a three-judge arbitration panel to determine license rates and terms.<sup>58</sup>

In addition to the provisions concerning the digital transmissions of sound recordings, Title IV contains provisions that address “ephemeral recordings.”<sup>59</sup> Title IV expands the ephemeral recording exemption under Section 112 of the Copyright Act to apply to digital broadcasters.<sup>60</sup> This provision creates a narrow exception to the DMCA’s anti-circumvention rules, found in Title I. These changes allow a transmitting organization, such as a webcaster, to circumvent any technology the copyright owner has put into place to prevent copying, in order to make a copy of a song needed for a later broadcast. This exception allows digital broadcasters to exercise their pre-existing rights under the Copyright Act’s exemption.

Title IV significantly improves the position of owners of sound recording copyrights. This was done at the expense of internet music services. However, these provisions should result in increased availability of recorded music for commercial use on the internet, which, in turn, should increase the commercial opportunities for webcasters.

## Conclusion

The debate over technology and the interests of content providers is the very essence of copyright thought.<sup>61</sup> The difficulty lies in determining what the parameters of copyright legislation should be. This issue is of increasing importance as internet technology continues to move at an astonishing pace.

The DMCA establishes some strict regulations on internet activities. It protects technological measures that copyright owners need to control access to, track the use of, and collect royalties on digital transmissions of their works.<sup>62</sup> In addition, the DMCA sets up a system for easily removing copyrighted works that are illegally made available on the internet.<sup>63</sup> And, finally, the DMCA establishes statutory licensing to protect owners of sound recording copyrights and ensures that those owners are appropriately remunerated for the use of those works on the internet.<sup>64</sup>

The very best copyright laws have always protected the power of creators against the power of owners of technologies who earn money exploiting the creators’ works.<sup>65</sup> Content providers will only make their intellectual property available on the internet if their interests are adequately protected.<sup>66</sup> Although it has some shortcomings, the DMCA should improve the climate for e-commerce by providing greater protection to copyright owners in global digital environments.

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## Entertainment Contracts With Minors in Texas

By: Sinead Clifford

Currently, Texas has no legislation that specifically deals with a minor’s contractual capacity within the entertainment industry. This is because Texas’ film and music industries have not reached a state comparable to those of California and New York. However,

as the entertainment industry grows in Texas more attorneys may face problems with regard to the contractual capacity of clients who are minors.

The problem can be framed as two-fold. The first problem is that a minor needs to be protected when they make contracts with companies. They need to be protected from being used by the companies, but further, they need to be protected from their parents. This is because in Texas a parent is not required to set up a trust for a child who earns money in the entertainment industry, and the parent could spend all of the child’s earnings. Secondly, the problem must be viewed from the employer’s side. Entertainment companies do not sign contracts in Texas but instead fly the children out to California or New York. The reason is that Texas law does not afford the studios the protection against a minor’s disaffirmance of the contract like the entertainment statutes in California and New York. This note will provide examples of what has been done with regard to minor’s contracts in Texas. Furthermore, California and New York laws will be examined as possible models for Texas. Finally, the necessity of legislation in Texas will be discussed.

## What Has Been Done in Texas

Contracts between minors and entertainment companies have been guided by concerns from the entertainment industry about the security of dealing with minors in a state with no legislation that protects the company from a minor disaffirming the contract. In a few instances the issue of a minor’s contractual capacity with an entertainment entity has been before a Texas court. In these cases, the attorneys for the minor filed for guardianships to be created on behalf of the minor in the Probate Court.<sup>67</sup> The Probate Court is required to review and approve such contracts and to retain ongoing jurisdiction over the guardianship.<sup>68</sup> In these instances there was a need for guardianship because the entertainment contracts submitted by the Screen Actor’s Guild required a court to authorize the guardian’s approval of the contracts.<sup>69</sup> First the court examined the contract under Texas contract law, the Texas Probate Code (the primary source for creating guardianships of minor’s estates in Texas), and California law.<sup>70</sup> Next, the court appointed an attorney ad litem who had “extensive knowledge of the entertainment industry and its practices to represent the child and ensure a level playing field during negotiations.”<sup>71</sup>

The court considered three things in allowing the guardian to enter into the contracts:

- 1) fairness of compensation (according to industry standards)
- 2) protection of assets (the minor’s earnings) for the minor’s future use
- 3) possibility of exploitation of the minor’s person (the court reviewed and required safeguards for the minor’s safety in his working conditions and sufficient assurances that the minor’s education would continue and that his life would be disrupted as little as possible).<sup>72</sup>

Usually, a minor’s family would have to pay for an attorney in California and be subject to California jurisdiction, but in one of the probate cases the child actor was “in demand” and his family had some leverage to keep the proceedings in Texas where the family lived.<sup>73</sup> This arrangement was useful because any proceedings that may have arisen later on concerning the contract could be taken care of in Texas where the guardian (the child’s father) lived, thus, the guardian could meet with the attorneys rather than having to fly to California or be absent from the proceedings.

## The California and New York Approaches

### The California Legislation

Children have always been an essential part of the entertainment industry. Those businesses that contracted with minors in the early days of Hollywood ran the risk that the minor would disaffirm the contract. A studio would find an “unknown” child and hire her for a low salary. When the child became famous she would disaffirm the contract in order to procure a higher salary elsewhere.<sup>74</sup> This left employers in a state of uncertainty because they would never know if a minor would remain for the contract’s entire term.

In response to this problem California enacted California Civil Code section 36 (which applies to both performing artists and professional athletes).<sup>75</sup> The law was quite different from the common law approach that allowed minors to disaffirm their contracts even if they had already accepted the deal.<sup>76</sup> Section 36 gave the courts the ability to approve contracts made with minors, thereby binding the minor to the contract and protecting the studio from risks while cultivating potential young stars.<sup>77</sup> The employer of the minor employee can petition the court in the county where the minor resides or works, or where either party has its principal office for business.<sup>78</sup> A valid contract that is approved by the superior court severely limits the right of minors to disaffirm their contracts.

*Warner Bros. Pictures v. Brodel* is cited as the leading case that upheld section 36.<sup>79</sup> In that case an actress who had reached the age of majority tried to disaffirm a contract that had been submitted to and approved by a court. The California Supreme Court reversed the trial court’s granting of demurrer to the actress saying “Section 36 confers upon the superior courts the power by their approval of contracts of minors to remove . . . the uncertainty that otherwise attends contract obligations of a minor because of his right of disaffirmance.”<sup>80</sup>

In 1939, section 36 was expanded to cover problems regarding a child’s earnings. The expansion was spawned by concern over child star Jackie Coogan, whose mother had spent all his money.<sup>81</sup> Section 36.1 gives the court the discretionary power to make the parties establish a trust fund or savings plan as a prerequisite to the court granting approval of the contract.<sup>82</sup> Section 36.2 gives the court continuing jurisdiction over the funds.<sup>83</sup> Courts usually prefer to be presented with a contract that includes a provision for earnings, so the court’s role is just to approve an existing arrangement.<sup>84</sup> Furthermore, California law expressly covers a minor’s contracts that transfer intellectual property rights. The California Code makes transfer of intellectual property under contract nondisaffirmable.<sup>85</sup>

Civil Code Section 36 was repealed and recodified into the California Family Code in 1994. Section 6750 provides for the application of the chapter. Section 6751 prohibits the disaffirmance of court approved contracts. Former Civil Code Sections 36.1 and 36.2 have been recodified as Family Code Sections 6752 and 6753.<sup>86</sup>

### The New York Legislation

The first New York regulations date back to the 1961 Domestic Relations Law, Section 74, which regulated the right of minors to disaffirm contracts in the entertainment industry.<sup>87</sup> Judicial approval for minors’ contracts is now covered under the New York Arts and

Cultural Affairs Law, Section 35.03.<sup>88</sup> Further, under section 35.01 it is illegal to employ or to exhibit any child unless a child performer permit has been obtained from the mayor or any other chief executive of the town where the work will take place.<sup>89</sup> The proceedings can be initiated by verified petition of a parent, interested person, or relative of the minor on his/her behalf to either the Surrogate’s Court in the county where the minor resides or is employed under the contract or to the Supreme Court.<sup>90</sup> This section also sets out a guide for establishing trust funds that is similar to California law. The court can withhold its approval under New York Arts and Cultural Affairs Section 35.03(3)(a) until the minor’s parent(s) or the minor (if entitled to his earnings) consents to a trust.<sup>91</sup> In addition, Section 35.03(3)(b) permits the courts to decide whether to set aside up to one-half of the minor’s net earnings.<sup>92</sup>

New York is different from California because it requires a limited guardian to be appointed if there is no guardian of the minor’s property.<sup>93</sup> Parents can be appointed as long as any interest in the minor’s property is made known, but after the parties file the petition the court may appoint a special guardian to represent the child at any time.<sup>94</sup> California does not require a limited guardian in the absence of a qualified guardian to protect the minor’s property.

Another important aspect of New York law that is not present in California is a duration limit. The length of the contract is limited to three years (including extensions by options) from the date of approval, but reasonable conditions may exceed three years.<sup>95</sup> The court explained the rationale for this three- year limit in *Bright Tunes Productions v. Lee*.<sup>96</sup> In that case the court said “to bind a talented infant beyond the above period may . . . create the opportunity to exploit him by limiting his earnings . . . to the term of a contract entered into when his capabilities were not too apparent.”<sup>97</sup> Moreover, when contracts are approved in New York, the parent may be liable as a guarantor or as party to the contract if : (1) the minor was a resident of the state at the time the contract was formed and liability is sought for the minor’s disaffirmance, breach, repudiation, refusal, or failure to perform, or (2) in any other case where the minor refused or failed to perform because the parent refuses to allow the required services to be performed.<sup>98</sup> Furthermore, New York gives the courts discretion to decide if the minor’s well-being is so at risk that court approval should be revoked.<sup>99</sup>

Some contracts that are not court approved are still enforceable against the minor. Perhaps the most famous case is *Shields v. Gross* in which model Brooke Shields wanted to disaffirm a contract that her mother made with a photographer on her behalf.<sup>100</sup> The court would not allow her to disaffirm the contract even though it was not court approved because children’s modeling, with its sporadic scheduling, was distinguishable from acting, and further, because the parent had the control to limit the contract at its formation the court felt the child had sufficient contractual protection.<sup>101</sup>

### Criticisms of New York and California

Most criticism of the New York and California approaches concerns the ease with which the court approval is avoided these days. It is important to remember that these laws were originally intended to give security to studios with long-term contracts to protect; then the laws expanded to protect the rights of minors.

However, the entertainment industry today has little incentive to seek out court approval of contracts. Today much of the work young actors and performers do is short-term, for example, television commercials. Thus, the employer often does not want to go through the trouble of gaining court approval for a few days of work.<sup>102</sup>

There is also criticism that the New York trust fund approach and California's "Coogan Laws" are less protective than the common law would be with a minor's contracts and earnings. The problem is that although many employers would benefit from court approval and protection from the minor's disaffirmance, court approval is not required.<sup>103</sup> Thus, any opportunity for courts to protect the minor's earnings while approving the contract is gone, and the minor is back to a common law rule where the earnings of the child go to the parents.

## Conclusion

Certainly, Texas' entertainment industry is not as large as California's and legislation may not be needed as yet. In fact, the process used by the Probate Court seems to address the two major issues concerning a minor's contractual capacity in forming entertainment contracts : 1) protecting the child's assets , and 2) providing employers with security.

The child's earnings are protected by the appointment of a guardian. Even though parents can serve as guardians to the estate, they would be required to get a bond approved at a "sufficient amount" to protect the minor's earnings.<sup>104</sup> California law requires an opening of a guardianship of a minor's estate (even when the child is not a California resident) to address the potential problem of parents using a child's earnings unwisely.<sup>105</sup> Currently, the guardianship process in the Texas Probate Code provides several provisions to protect a minor's estate.<sup>106</sup> Judge Guy Herman, Presiding Judge Travis County Probate Court No. 1, believes that in Travis County "a minor with a guardianship of the estate would receive adequate protection of earnings," but minors in "smaller counties without a statutory probate court might not have sufficient experience or resources to create and monitor guardianships of the estate."<sup>107</sup>

Further, in the few instances where minors have gone through Texas courts for approval of entertainment contracts, the entertainment employer was satisfied. The main concern for the company in one such case was to meet the stringent "Coogan Law" standards since it was a California corporation and subject to the California law.<sup>108</sup> The process with the Probate Court allowed all the California contract requirements to be met.

Even so, if Texas wants to attract more big entertainment corporations it must eventually make its own laws. This way entertainment companies could make all of their contracts under Texas law. Thus, the legislature may need to clarify specific contract rights because the creation of these contracts often requires an application of multi-jurisdictional law.<sup>109</sup> Perhaps in doing so Texas will take what is best from California's and New York's laws and also correct some of the flaws apparent in both of those states' laws. The greatest concern in proposed legislation should be mandatory court approval of contracts; that is the only way to ensure both sides will be protected and prevent litigation after contract performance has begun.

## Athletic Violence: An Analysis of Civil and Criminal Liability in Professional Sports

By: James Cris Cook

### Violence: Inherent to the Game?

On Sunday, January 3, 1999, Jerry Quarry died of pugilistica dementia, or, in layman's terms, severe boxing-related head trauma.<sup>110</sup> Despite the fact that he was essentially beaten to death, no one was held liable—all because Quarry was a boxer, and he had willingly consented to the beatings he took in the ring. Boxing and other professional sports such as football, hockey, baseball, and basketball, can attribute much of their popularity to America's age-old love: violence.<sup>111</sup> While arguably not the most accurate portrayal of American ideals, it does pose an intriguing invitation to delve further into the unique position that violence in sports assumes in our society and the minimization of liability attached to this violence because of its social acceptance.

This assertion of societal acceptance is unfortunately validated by the actions of athletes such as Mike Tyson, a heavyweight boxer, who bit his opponent's ear off, and Latrell Sprewell, a professional basketball player, who assaulted and strangled his coach. Shockingly, both of them are either presently engaged or have been reinstated in their respective sports! True, both athletes were suspended and fined, but under the guise of punishment of public admonishment and a monetary fine, it was well understood that neither would be held liable under normal common law judgments. Their actions, and the lack of true accountability for what they did, clearly demonstrates the reverence that professional sports and its participants commands in an otherwise civilized society.

The rules that typically define human interaction are not necessarily applied to athletic participation, especially to violence committed during the course of a sporting event. Athletic violence and the liability issues that arise from it have created a complicated mix of legal and social boundaries that have yet to be clearly defined. Society seems to implicitly approve of violence in sports, perhaps lending it legitimization because of society's internal need to vicariously vent its frustrations, aggressions, and anger that would otherwise remain internalized within normal societal parameters.

Because athletic competition enjoys such an exalted position, athletic violence is rarely seen as egregious or completely unacceptable behavior. Ironically, some of the most aggressive types of behavior occur within this socially accepted structure.<sup>112</sup> An action that would be considered outright battery if committed by the average citizen usually does not even draw a second glance, unless it is to watch in excitement and appreciation as the fists fly in a slow-motion replay. Ted Saretsky, a clinical psychologist, supports this idea, asserting that "[f]ights allow the audience to act out their fantasies."<sup>113</sup> In short, much of the violence in sports is socially rewarded behavior.<sup>114</sup>

"Violence during the course of a game is likely to be judged by a different set of standards than if the same acts took place under other conditions."<sup>115</sup> In fact, such violence "has been invested, traditionally, with an aura of legitimacy: collective judgment has decreed it 'right,' 'desirable,' 'justifiable,' and a system of informal and formal sanctions has enforced this judgment."<sup>116</sup>

By legitimizing such violence, however, society undermines the element of intent that underlies most civil and criminal claims. Has society therefore deemed that athletes lack the requisite intent

to harm or injure another participant? This article will address and reflect upon the reasoning behind and justifications for the legal and societal acceptance and approval of violence within the sporting context. It will look into the laws, penalties, and safeguards surrounding such activities with respect to civil and criminal liability as well as the various theories that have been adopted by the courts in their decisions.

### **Civil Liability:**

#### **When Are You Really Out Of Bounds?**

When deciding cases dealing with sporting events, some courts have adopted an assumption of the risk theory. For example, in 1991, the Texas Court of Appeals stated that a voluntary participant in a competitive contact sport expressly consents to and assumes any risk of injury, should that particular sport pose inherently dangerous activities.<sup>117</sup> In 1995, it went further when it stated that by voluntarily participating, an athlete essentially relinquishes all rights to recovery should he suffer any contacts, harmful or otherwise, as well as any foreseeable injuries that are inherent to that particular sport.<sup>118</sup> The New York Court of Appeals, meanwhile, stated that it is clear that, at the professional level, a participant knows and accepts that accidents, injuries, and unfortunate incidents can and will result as a matter of course and from other's carelessness, "particularly those [incidents] which result from the customarily accepted method of playing the sport."<sup>119</sup> Such incidents are known, apparent, and foreseeable dangers of the sport; consequently, an athlete cannot hold an offender liable for injuries.<sup>120</sup>

Assumption of the risk, however, has largely been subsumed by comparative negligence, and has lost much of its authority. Unless a football player decides not to wear his helmet, for example, it is difficult to imagine an instance where an athlete, acting in a manner consistent with the rules and regulations of the game, could contribute to his own injury. When asserting that an assumption of the risk theory should still be the proper standard, however, the Texas Court of Appeals held that it would enable the Court to dispose of the subjective state of the participant's mind, and instead concentrate on an objective determination of whether the actions were known, apparent, and foreseeable.<sup>121</sup>

What is a participant's recourse, however, when those actions are not so easily classified as known, apparent, and foreseeable? Many courts addressing this issue have chosen to adopt some form of a reckless or an intentional conduct standard, duty of care standard, or a "negligence is not enough" theory when determining liability for injuries that occur during an athletic contest, all with basically the same result.<sup>122</sup> In Ohio and Kentucky, for example, a cause of action arises only from injuries sustained by reckless or intentional conduct.<sup>123</sup> In New Jersey and New York, the duty of care is defined as being only that of avoiding the infliction of injury from reckless or intentional conduct.<sup>124</sup> Missouri and Illinois, meanwhile, feel that negligence is not enough and that liability must be predicated on some form of recklessness.<sup>125</sup> As stated above, Texas has not adopted these standards in any form, as Texas courts are wary of requiring a court to determine the defendant's state of mind as a question of fact rather than as a question of law.<sup>126</sup> Several recent Texas appellate court cases, however, have applied the "reckless or intentional" standard to sports such as polo, golf, and baseball.<sup>127</sup>

In arguing for an adoption of a reckless- or intentional conduct-standard of care, it has been asserted that such a standard will maintain civility and relative safety in team sports without dampening the competitive spirit of the participants.<sup>128</sup> This idea incorporates the relevant public policy consideration that surrounds sports injuries that arise from team contact sports and limits the defendant's responsibility to only those injuries that are the result of his own reckless or intentional conduct.<sup>129</sup> Accommodating this underlying public policy consideration of not imposing unreasonable legal burdens on athletes while at the same time imposing at least some civil restraints upon overzealous participation, however, has proved difficult.<sup>130</sup> Arguably, once a balance has been achieved, athletes could compete as before, secure in the knowledge that redress in extraordinary circumstances was available, yet without the fear of litigation altering the way in which they play or the fundamental nature of the game.<sup>131</sup>

The reckless- or intentional-conduct standard as applied to players in a sporting activity is also supported by the Restatement (Second) of Torts, Section 500.<sup>132</sup> Section 500 of the Restatement provides that:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.<sup>133</sup>

Courts following the Restatement have acknowledged that, "in the heat of an athletic contest, normal energetic conduct may include accidentally careless behavior."<sup>134</sup> Furthermore, the courts have recognized that if an athlete violates a rule of the game and is subjected to internal sanctions, that penalty will not alter the vigor and competitiveness that the participant brings to the game as the imposition of a formal legal liability would.<sup>135</sup> Subjecting a player to civil and criminal penalties might well change the character of the sport itself.<sup>136</sup>

The main difficulty with the Restatement standard is distinguishing between actions that are reckless or intentional, and therefore actionable, with actions that are merely negligent or careless, and therefore, not actionable. Granted, sports such as hockey and football are extremely physical, and violent conduct is a part of the game. However, a hockey player consenting to being hit in the head with a hockey stick is highly doubtful. Nevertheless, courts continue to insist that participants should expect, or at least acknowledge the possibility, that an injury to their body may occur as a result of their participation.<sup>137</sup> Whether this injury is the result of conduct that is in violation of the rules of the sport is irrelevant: all that matters is that the conduct was not reckless or intended specifically to injure.<sup>138</sup>

One can see that the theories of the courts are varied and often inconsistently applied. The majority of courts do attempt, however, to impose liability where recklessness or intentional conduct is found, rather than where just careless or negligent conduct is found. They have been wary of intervening and holding athletes liable for several reasons: "1) the normal expectations of participants in the sport in which [they are] engaged, 2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants,

[and] 3) the avoidance of increased litigation.”<sup>139</sup> Thus, in the courts’ reasoning, participants in contact sports owe a duty to other participants only to refrain from reckless or intentional conduct with proof of mere negligence being insufficient to create liability.<sup>140</sup> Beyond that, the general consensus seems to be that holding a participant civilly liable for ordinary careless conduct would detrimentally impact the sport and its appeal; thus, liability should be reserved only for instances where the conduct was reckless or intentional.<sup>141</sup>

### ***Criminal Liability:***

#### **Overzealousness or Intent to Harm?**

While strides towards imposing civil liability upon sporting participants who act in a reckless or intentionally harmful manner have been made, criminal liability, on the other hand, has rarely been imposed. Bowie Kuhn, a lawyer and a former Major League Baseball commissioner, once stated, “[i]t would have to be an extremely flagrant case to warrant criminal action. A certain amount of intentional contact is permitted in all sports.”<sup>142</sup> Clarence Campbell, a former National Hockey League commissioner, reinforced this point when he asked, “[a]t what stage do you intervene with civil authorities and when don’t you? So long as the game . . . is kept within the bounds prescribed by society, do you send a policeman to every game?”<sup>143</sup>

While the general public occasionally decries an athlete’s actions and demands justice in certain situations, decisive legislation or prosecution has failed to materialize.<sup>144</sup> So far, Congress has been unable to determine what action within a sporting event would constitute so flagrant a violation of the rules that criminal proceedings would be warranted. The Sports Violence Arbitration Act of 1985 was intended “to deter and punish acts of excessively violent comportment that continues to plague professional sports.”<sup>145</sup> Furthermore, it defined excessive violent conduct to be “physical force or contact that creates a risk of injury and is unnecessary for effective participation in the sport; is intended to injure; or, is intended to create a threat of injury.”<sup>146</sup> While the bill was only to be applied to professional sports, it was thought that by altering the style of play at the professional level, conduct of young athletes across the nation would be positively reinforced as well.<sup>147</sup> Unfortunately, Congress’ attempt to answer that question did not meet with the approval of its majority.<sup>148</sup>

In contrast, Great Britain and Canada have made some actual progress in the imposition of criminal liability of professional athletes, most notably in the sports of soccer and hockey.<sup>149</sup> Determining that internal regulations are largely ineffective, especially when establishing where the fine line between acceptable and unacceptable conduct has been crossed, courts in England (soccer) and Canada (hockey) have taken a much more assertive and hands-on approach to imposing liability and deciding what, if any, the punishment should be.<sup>150</sup> However, there is a presumption that if the participant is playing within the normal boundaries of the game, he does not possess the necessary intent to cause injury and therefore should not be found guilty.<sup>151</sup> Juries are instructed that an act is unlawful if the participant intended or had reason to know that his actions would cause severe hurt or injury and that they should find him guilty if such a culpable mental state exists.<sup>152</sup> In essence, the rules or practice of a game do not in and of

themselves make an otherwise illegal action legal, and athletes should not be allowed to act with impunity merely because of the context in which the crime was committed.<sup>153</sup>

In summary, it seems quite difficult, if not impossible, to accurately determine the subjective mental state of an athlete engaged in a sport in which violence is an integral part of the game. While gross indiscretions might readily be identifiable, it is quite likely that the majority of cases involving suspect conduct will fall into a rather amorphous, gray area that has yet to be coalesced into any tangible form.

### ***Society and Sports:***

#### **Where Do We Go From Here?**

The complexity of athletic violence has made it difficult for courts to clearly delineate what is or is not acceptable and when liability should attach. Is this because the “blood lust of the spectator is a true reflection of the values of society?”<sup>154</sup> Hopefully not, but the existing perception of professional sports and its athletes does little to dispel this notion, but rather encourages and fosters this notion as unnecessary violence and aggression become more frequent.<sup>155</sup>

While there is no clear answer, I think that there is a viable solution. First, it is vital that in those rare instances that cry out for criminal prosecution, authorities prosecute the athlete to the fullest extent of the law. This will not alter the vigor or enthusiasm for the game, as such conduct should not be a part of the game in the first place. It will, however, make those athletes who might be thinking about intentionally harming another participant reconsider their actions before committing to them. Second, a definition of exactly what the “nature of the game” truly is would enable athletes to conduct themselves accordingly. Essentially, this would merely amount to holding athletes to the same standard as that of the ordinary citizen. Athletes *are* ordinary citizens, and should be treated as such when it comes to their actions, irrespective of the circumstances surrounding those acts.

While an athlete does consent to the inherent dangers of the game in which he participates, he does not consent to the intentional or reckless actions of fellow participants that result in harm to himself. The use of the reckless and intentional standard as the general rule, therefore, is probably the most practical with respect to athletic competition; however, it must be applied more rigorously and have more impact than the imposition of a simple fine or suspension. To have any effect, furthermore, it must be applied equally to all athletes, without consideration of who committed the act. This will not, as some fear, diminish an athlete’s ardor to compete and win, but will rather restrain their ardor to win at any and all costs, which, thus far, has never been too high.

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involved in it equivalent to the protection afforded discussion of public officials.

The Court decided people, such as Butts, who are involved in issues in which the public has a justified and important interest are considered “public figures,” and, as such, they too would have to overcome the more stringent standard of proving, by clear and convincing evidence, actual malice before they can recover on the grounds of defamation.<sup>11</sup> In his concurring opinion, Chief Justice Warren stated that citizens are often as concerned with public figures’ views and actions with respect to public issues and events as with those of public officials.<sup>12</sup> In his view, persons outside the government were increasingly intimately involved in the resolution of important public questions. He also observed that, as a class, “public figures” have as ready access as public officials to mass media communication, both to influence policy and to counter criticism of their views and activities. The Court determined “Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of public officials.”<sup>13</sup> Thus, with the *Butts* decision fame and notoriety, not just elections, began to bring with them a higher hurdle for the famous to overcome when claiming defamation.

As time went on, the Courts began to expand upon the concept that it was not just political debate that needed to be protected but all forms of conversation, and it was not just politicians who drew large audiences when they spoke, but all persons of fame or notoriety — some of whom were catapulted to that position by sports or entertainment. In *Time, Inc. v. Hill* 385 U.S. 374 (1967), the Supreme Court held that the guarantees for speech and press are not to preserve political expression or comment upon public affairs alone but are to maintain freedom of all discussion. Free speech and press “must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>14</sup> As the Court in *Hill* explained, such an outlook carries out the intent of the Founders who felt that a free press would advance “truth, science, morality and arts in general,” as well as responsible government.

In 1974, the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336-337 (1974) explained further the rationale for extending the *New York Times v. Sullivan* rule to “public figures.” It was twofold. The first reason is that public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective “self-help” remedies. They usually enjoy significantly greater access than private individuals to channels of effective communication. This enables them, through discussion, to counter criticism and expose the falsehood and fallacies of defamatory statements. The second reason is a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have “voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.” The Court identified two ways in which a person may become a public figure for purposes of the First Amendment:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.<sup>15</sup>

*Gertz* teaches that the determination of whether one is a public figure is made by “looking to the nature and extent of an individual’s participation in

the controversy giving rise to the defamation” or looking at a plaintiff’s media power or public involvement at the time of the alleged defamation. Thus, since the actual malice standard was adopted for public officials and public figures, a reporter without a high degree of awareness of their probable falsity, may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official or public figure.<sup>16</sup> This makes it very difficult for a celebrity to recover for defamation.

### III. The Length to Which the Public Official and Public Figure Designation Has Been Extended in Sports and Entertainment.

As a result of *New York Times v. Sullivan*, *Curtis Publishing v. Butts* and *Gertz v. Welch*, entertainers and sports figures are finding it difficult to recover for defamation. In performing its role, the press covers not only political events and public controversies, but also sports and entertainment. Entertainers and sports figures typically put more of themselves in the public view than their actual performances, including their relations, their political views, their contract negotiations, etc. The courts have determined that public figures must prove malice in defamation actions in order to give the media “breathing space .. in fulfilling its role of reporting, analyzing and commenting on well-known persons” who have invited attention and comment.<sup>17</sup>

People in whom the public has a continuing interest and who have taken steps to attract such interest, include professional athletes and entertainers and, as such, they are considered public figures.<sup>18</sup> Applying the principals espoused in *Gertz*, the Third Circuit commented that “professional athletes, at least as to their playing careers, generally assume a position of public prominence. Their contractual disputes, as well as their athletic accomplishments, command the attention of sports fans,”<sup>19</sup> so too, does an athletes’ misconduct.<sup>20</sup> This is something Erik Williams and Michael Irvin had an opportunity to learn first hand last year.

What one might not have anticipated, though, is that in addition to professional athletes, persons affiliated with athletes and athletic programs, such as sports agents<sup>21</sup> and coaches<sup>22</sup> have oftentimes been found to have held such prominence in a community so as to also declare them public figures for the purposes of defamation law. Even medical consultants to sports teams<sup>23</sup> and sports announcers<sup>24</sup> have been declared public figures. Perhaps indicative of the role athletics take in our society ahead of academics, though, is the fact that an academic coach of a debate team is still considered a private figure.<sup>25</sup> In addition, athletic organizations who advocate on behalf of athletes, such as the United States Olympic Committee (U.S.O.C.), have been found to be public figures for purposes of libel. In *Stop the Olympic Prison v. United States Olympic Committee*, 489 F. Supp. 1112 (S.D. N.Y. 1980), the Court found that the U.S.O.C. was enough of a public figure to require it to prove actual malice in order to recover for libel. The Court explained:

The U.S.O.C. has statutory responsibilities to ‘establish national goals for amateur athletic activities,’ and to ‘exercise exclusive jurisdiction ... over all matters pertaining to the participation of the United States in the Olympic Games ... and over the organization of the Olympic Games ... when held in the United States. Thus, it would appear that it is statutorily obliged to ‘thrust’ itself and its views ... into public controversies that involve ‘goals for amateur athletic activities’ and ‘the organization of the Olympic Games when held in the United States’ ... Moreover, the U.S.O.C. appears to have had ‘regular and continuing access to the media,’ ... on matters involving the Olympics.

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The key is whether the person has gained such notoriety either generally or concerning a particular important public controversy and whether that same individual has sufficient access to the means of counter arguing comments such that they are able to expose through discussion any falsehoods or fallacies in statements made about them. The New York Court in *James v. Gannett Co., Inc.*, 40 N.Y. 2d 415, 353 N.E. 2D 834, 386 N.Y. S. 2d 871 (1976)<sup>26</sup> may have described it best when it said:

The category of “public figures” for purposes of invoking [actual malice] requirement in defamation action, is of necessity quite broad and includes many types of public performers such as professional athletes, night club and concert signers, television and movie actors and recording artists; although such persons have not necessarily taken active part in debates on public issues, they remain, nevertheless, persons in whom the public has continuing interest.

Thus, it is clear in today’s society sports icons and entertainers influence the public’s opinions and pique the public’s interest and, as a result, are considered public figures for libel cases.

#### IV. “Guilt” by Association with Politicians, Entertainers and Athletes.

The lines get blurred even further when the Courts consider associates or friends of prominent people who have gained notoriety as a result of their relationship with that person. Some courts have determined that one can become a “public figure” for libel purposes through one’s association with famous people. In the case of *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5<sup>th</sup> Cir. 1981), the Court found that the friend of former president Richard Nixon was a public figure for purposes of a defamation action. The court stated:

The record in this case contains sufficient undisputed facts to show that Rebozo, at the time of publication, was a public figure. As is well known, Rebozo was President Nixon’s closest friend while Nixon was in the White House. While this in and of itself has considerable significance, we need not decide whether a confidential relationship with the President of the United States automatically converts one into a public figure, since the record indicates Rebozo had in other ways voluntarily exposed himself to the risk of close public scrutiny.

Rebozo played a substantial role in the former President’s financial affairs, acting as the President’s agent in the management of the President’s bank accounts at the Key Biscayne Bank, and in the purchase of two homes. Plaintiff also played a role in the purchase and sale of other investments for the former President. In addition Rebozo’s relationship with the President was not confined to counseling on business and financial matters. Rebozo freely admitted he offered his opinions to President Nixon on various matters, and transmitted to the former President the views of other important people on certain policy matters. The two discussed the Watergate situation when it began to arise in late 1973.<sup>27</sup>

Rebozo not only played an active role in the President’s 1972 re-

election campaign, helping to arrange major contributions for the President’s political benefit, but also received press coverage focused on his own business and personal affairs. Although the public’s interest in his activities certainly was enhanced by his connections with the former President, Rebozo himself recognized “When you are traveling in the circles that I have traveled in, there are press people all over the place.”<sup>28</sup>

In view of these issues, the Court found Rebozo qualified as a public figure. First, he enjoyed significantly greater access to the channels of effective communication and hence had a more realistic opportunity to counteract false statements than private individuals enjoy. Second, on the basis of his voluntary activities, the communications media were entitled to act on the assumption he had voluntarily exposed himself to the risk of close public scrutiny. Rebozo’s activities including his association with President Nixon, taking part in his financial affairs, and involvement with the re-election effort made him a prime subject of public comment.<sup>29</sup>

In *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 6 Med. L. Rep. 2025 (5<sup>th</sup> Cir. 1980), Anita and John Brewer, a non-political but still famous (by association) couple brought a defamation action against a newspaper in connection with a story concerning their marital status and the allegations of the wife having a romantic encounter with Elvis Presley. Anita had dated Elvis Presley for approximately five or six years prior to marrying John. She had regional and nationwide television exposure, and stories about and references to her relationship with Presley continued to be written about even after the relationship ended. John Brewer, Anita’s husband, was a member of the Ole Miss football team the year it was ranked number one in the nation. He was named to an All-SEC squad, and he still held an Ole Miss school record at the time of the trial. He played professional football with the Cleveland Browns for seven years and was with the New Orleans Saints for approximately three more years. In a published interview he was quoted as saying that his football career had made his name well-known enough to open business opportunities for him for the rest of his life; at trial he agreed he had made the statement.<sup>30</sup> After retiring from professional football, he ran advertisements referring to his successful sports career in an attempt to establish his real estate business. He also ran for the Mississippi House of Representatives. Eventually, he opened a restaurant which displayed sports memorabilia from his career. Finally, he spoke at high school banquets where the press covered his appearances, and he organized a school sports program and coached a team. The Court found that even though Anita’s entertainment career was over and her relationship with Elvis was over and, even though John’s sports career was over because the evidence showed that both of them at one time or another vigorously and successfully sought the public’s attention or gained notoriety for their own achievements, both achieved “pervasive fame or notoriety” at least regionally.

The Court explained a sports or entertainment career clearly does not necessarily involve any public controversy, nor would we categorize a romantic relationship with a famous entertainer, but both entered professions that by their nature require public appearances and invite press attention. Anita’s relationship with Presley was not, and probably could not have been, kept out of the press. This relationship coincided with a portion of her career as an entertainer and it appears that during this time she invited press coverage, at least of her career. Further, as discussed above, her relationship with Presley advanced her career and it is clear from the exhibits that much press coverage focused both on the relationship and on her career, some items detailing a purported connection between the two aspects of her life.

A final example is in the case of *Carson v. Allied News Co.*, 529 F.2d 206, 209-10 (7<sup>th</sup> Cir. 1976), the court labeled Johnny Carson and his wife

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Joanna Holland “all purpose” public figures because they occupy positions of such pervasive power and influence that they are deemed public figures for all purposes and in all contexts.” Carson, like Oprah Winfrey today, was an entertainer with an international reputation.

## V. Conclusion.

The bottom line is what a celebrity says is scrutinized more by the public because of the sheer breadth of the dissemination of the message; while, on the other hand, what is said about the celebrity is given greater latitude than what is said about a private person — this is the First Amendment price one pays for fame.

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### Endnotes:

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<sup>2</sup> *Id.* at 267.

<sup>3</sup> In *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968), the United States Supreme Court equated “reckless disregard of the truth” with subjective awareness of probable falsity. A further amplification was offered in *Gertz* with the comment “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Gertz*, 418 U.S. 323, 334 (1974).

<sup>4</sup> *Id.* at 85-86.

<sup>5</sup> *Poe v. San Antonio Express News Corp.*, 590 S.W. 2d 537, 540 (Text Civ. App.—San Antonio 1979, writ ref’d n.r.e.) (The trial court erred in holding that Donald Poe, a high school science teacher, was a public official).

<sup>6</sup> *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2D 182 (Text App. — Amarillo 1993, writ denied). Individual who was high school athletic director, head football coach, and classroom teacher was a “public official” because he had substantial responsibility for and control over conduct of “governmental affairs.” The fact that Ed Johnson was a school teacher did not, in and of itself, render him a “public official” for purposes of libel action. Johnson’s contact with the public concerning his official duties generated interest in his qualifications and performance independent of public’s interest in qualification and performance of all government employees. Johnson’s position was one which invited public scrutiny and discussion of him entirely apart from that occasioned by the newspaper article which was subject of action.

<sup>7</sup> *Id.* at 186.

<sup>8</sup> *Id.*

<sup>9</sup> *Butts* has a companion case entitled *Associated Press v. Walker*, 388 U.S. 130, 162, 87 S. Ct. 1975, 1995, 18 L. Ed. 2d 1094 (1967) which involved a retired general who had actively participated in disturbances surrounding the admission of James Meredith to the University of Mississippi. Because *Butts* was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a “public official” under *New York Times*. Like *Butts*, however, *Walker* was declared a “public figure.” Commenting on both men, the Court explained: “*Butts* may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counter argument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.” 388 U.S. at 155, 87 S. Ct. at 1991.

<sup>10</sup> *Id.* at 164.

<sup>11</sup> *Id.* at 134.

<sup>12</sup> *Id.* at 162.

<sup>13</sup> *Id.* at 164.

<sup>14</sup> *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

<sup>15</sup> *Id.*, 418 U.S. at 345, 94 S.Ct. at 3009.

<sup>16</sup> *Times Mirror Co. v. Harden*, 628 S.W. 2D 859, 8 Med. L. Rep. 1194, (Text App. Eastland 1982, writ ref’d n.r.e.).

<sup>17</sup> *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1291-1292 (D.C. Cir. 1980).

<sup>18</sup> Professional athletes have been held to be public figures in virtually all jurisdictions. See *Time Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971) (former member of the Philadelphia Warriors basketball team who later became a college basketball coach was a public figure..By

offering his services to the public as a paid performer he had, according to the court, assumed the risk of good or bad publicity so far as it concerned his public performance.); *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F.2d 417 (9th Cir. 1968) cert. denied, 393 U.S. 840 (1968) (famous baseball player was public figure); *Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254 (E.D. Pa. 1997), aff’d 595 F.2d 1265 (3rd Cir. 1979) (en bane) (professional football player was a public figure based on his starting position with the Philadelphia Eagles, his well-publicized trade from Los Angeles, and a publicly sustained injury that triggered a contract dispute); *Bell v. Associated Press*, 584 F. Supp. 128, 10 Med. L. Rep. 1489 (D.C. 1984) (at least with respect to professional athletes, charges of criminal misconduct are a subject of public controversy and professional football player who filed a claim against news service for incorrectly identifying him as being arrested could not recover when it was merely an innocent mistake). *Howe v. New York Post Co., Inc.*, 23 Med. L. Rep. 1955 (N.Y. Sup. Ct. 1995) (pitcher for the New York Yankees is a public figure); *Wilsey v. Saratoga Harness Racing, Inc.*, 140 A.D. 857, 528 N.Y.S.2d 688, 15 Med. L. Rep. 1446 (1988) (harness driver was a public figure); *James v. Gannett Co., Inc.*, 40N.Y.2d415 (1976); *Gomez v. Murdoch*, 475 A.2d 622 (193 N.J. Super. 595 (1984) (professional jockey is a public figure because “he chose to perform publicly in a sport which commands widespread interest, and regarding which the communications media regularly report.”); *Rood v. Finney*, 418 So. 2d 1 (La. Ct. App. 1982), cert. denied, 460 U.S. 1013 (1983) (professional golfer is a public figure); *Dempsey v. Time, Inc.*, 252 N.Y. S.2d 186 (N.Y. Sup. Ct. 1964), aff’d 254 N.Y. S.2d 80 (N.Y. App. Div. 1964) (professional boxer is a public figure).

<sup>19</sup> *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en bane).

<sup>20</sup> *Bell v. Associated Press*, 584 F. Supp. 128, 131-32 (D.C. 1984) (Professional athletes can hardly be permitted to hold themselves out as public figures, seeking a maximum amount of publicity for themselves and their terms with respect to their athletic achievements, while successfully claiming strictly private status when misconduct is charged or proved).

<sup>21</sup> *A. J. Faigin v. Kelly*, 978 F. Supp. 420, 26 Med. L. Rep. 1208 (D. N.H.1997) (sports agent is a public figure); *Woy v. Turner*, 573 F.Supp.35, 9 Med. L. Rep. 2447 (1983) (a baseball agent who holds news conferences to attract media attention for himself and his client is a public figure in that context).

<sup>22</sup> *Vandenbus v. Newsweek*, 441 F.2d 378 (5th Cir. 1971) (track coach at the University of Texas at El Paso is a public figure); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 10 Med. L. Rep. 1809 (N. D. Cal. 1984) (head basketball coach at state university who voluntarily accepted a position with a program that was already surrounded by investigations and a national controversy was deemed to be a limited purpose public figure); *Hoffman v. The Washington Post Co.*, 433 F. Supp. 600, 3 Med. L. Rep. 1143 ( D.C. 1977) (weight lifting coach who achieved general fame or repute throughout the nation in the field of protein supplement products, who was an outspoken advocate of the use and value of such products, who served as editor and publisher of a health magazine, and who had written at least 67 books, had given thousands of lectures, had appeared thousands of times on the radio and television is a public figure with respect to a public controversy surrounding the high protein supplements); *Maynard v. Daily Gazette Co.*, 447 S.E.2d 293,22 Med. L. Rep. 2337 (W. Va. 1994) (former director of university’s athletic program and basketball coach stipulated to being a limited purpose public figure); *Brewer v. Rogers*, 439 S.E.2d 77, 22 Med. L. Rep. 1180 (Ga. App. 1994) (high school football coach is a public figure); *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31, 517 N.E.2d 1365, 523 N.Y.S.2d 480, 14 Med. L. Rep. 2200 (1987) (high school football coach conceded public figure status); *Basarich v. Rodeghero*, 321 N.E. 2d 739, 24 Ill. App. 3d 889 (1974) (teachers and athletic coaches in community high school were public employees, hired by the school board and paid with public funds, as such they maintain highly responsible positions in the community and are viewed as public officials or public figures in cases involving defamation claims); *Grayson v. Curtis Publishing Co.*, 436 P.2d 756,72 Wash.2d 999, (1967) (college basketball coach was not a public official, but was a public figure). But see, *Folse v. Delgado Community College*, 776 F. Supp. 1133 (E.D. La. 1991) (former basketball coach at community college was not a public figure); *Moss v. Stockard*, 580 A.2d 1011 (App. D.C. 1990) (women’s basketball coach at public university was not a public official because she was a subordinate employee with minimal control over or responsibility for policy matters); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 17 Med. L. Rep. 1785 (Ky. 1990) (assistant college basketball coach was not limited purpose public figure — “as an assistant university basketball coach, [plaintiff] did not assume the type of prominence that head coaches presiding over controversial sports programs or professional athletes on the field attain”).

<sup>23</sup> *Hunter, M.D. v. Hartman and CBS, Inc.*, 545 N.W.2d 699, 24 Med. L. Rep. 2004 (Minn. App. 1996) (medical consultant for university football team is a limited purpose public figure).

<sup>24</sup> *Myers v. Boston Magazine Co., Inc.*, 389 N.E. 2d 779, 7 Mass. App. Ct. 676, 5 Med. L. Rep. 1401, aff’d 403 N.E. 2D 376, 380 Mass. 336, 6 Med. L. Rep. 1241 (1980) (television sports announcer is a public figure).

<sup>25</sup> *Cantrill v. The Herald Co.*, 1992 WL 119135 (N.D. N.Y. 1992).

<sup>26</sup> In the *James* case, the Court found a nightclub belly dancer who invited publicity concerning her performances was a public figure as to newspaper accounts concerning her stage performances.

<sup>27</sup> *Id.* at 379.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 380.

<sup>30</sup> *Id.* at 1248.

## TEXAS ACCOUNTANTS AND LAWYERS FOR THE: ARTS FILM PROJECT

By Jamie K. Baker \*

The Texas film industry is blooming like a field of bluebonnets. It seems everywhere you look these days there is a nod of approval for our state's newly-acknowledged foray into filmmaking. More than ever, people are taking an interest in the Texas film industry and the people who are making it work. In the last few years there have been a number of interesting activities supporting independent filmmaking throughout the state. These small efforts are collectively making a substantial contribution to local industry growth. One of particular interest to Texas attorneys is the development of the "Film Project".

### "TALA" and *The Business of Filmmaking*

Texas Accountants and Lawyers for the Arts ("TALA"), was founded in 1979 to provide free legal and accounting services on arts-related matters to non-profit arts and cultural organizations and to individuals who meet income guidelines and work in the arts. Until recently there was no real consideration given to the needs of the film community because there just was not much of a community to serve.

In 1997, however, after participating in a film seminar focusing on business issues facing independent filmmakers, TALA established its "Film Project" TALA's Film Project volunteers now provide specialized accounting and legal services to low-budget filmmakers located throughout Texas. TALA's Film Project serves four main purposes:

- Assist local, low budget filmmakers with accounting and legal needs and act as a resource for general information relating to the business of filmmaking in Texas,
- Educate TALA members and the local population on the topic of independent filmmaking in order to (a) increase audience appreciation of the art form and (b) develop as a more discriminating and involved market;
- Promote Texas as being a great place to film in order to bring greater recognition and industry monies to the region; and
- Provide interested attorneys and accountants with an opportunity to assist filmmakers with their legal and accounting needs while learning "hands-on" the specialized areas of entertainment law and accounting.

### We're All In This Thing Together

Having initiated its Film Project TALA immediately realized it was in an ideal position to coordinate efforts relating to film appreciation, as well as the promotion of the State of Texas as a film site, with co-existing arts, business, and legal groups already serving the film community with similar goals. For example, TALA has been presenting a continuing legal education seminar entitled *This Business of Filmmaking!* for the past two years in Houston and anticipates "taking it on the road" in 1999-2000. Previously, in 1958, TALA sent a representative to the Taos, New Mexico "Talking Pictures" Film Festival. In return, a Talking Pictures festival executive came to Texas to teach filmmakers about submitting their works for competition. TALA and Landmark Theatres in Houston recently completed a six month co-sponsored educational activity called "The Movie Club" for TALA members and others interested in learning more about film as an art form. Movie Club members screened previews held at Landmark Theatres and

then met to discuss their impressions of the movie over dinner. The class was a huge success and will be repeated in the fall.

Earlier this year, TALA made its first appearance at the South by Southwest Film Festival in Austin and co-sponsored a happy hour. In this way, local low-budget filmmakers learned about the *pro bono* professional services available to them through TALA's volunteers. TALA's Film Project is now being promoted in San Antonio - one of the state's hottest new filming locations.

Increased interest in independent films brings more lawyers and accountants into TALA's volunteer fold on a state-wide basis. Working with TALA's volunteer lawyers and accountants is cost-effective for the artists and stimulating for the professionals. At the end of the day, the more the Texas community is exposed to the film industry, the better for everyone. For additional information on Texas Accountants and Lawyers for the Arts' Film Project please call 800/526-8252 or 713/ 526-4876.

#### *\*About the Author:*

*Jamie K. Baker is an insurance attorney with Jones Kurth & Andrews, P.C. in San Antonio, Texas and is the head of TALA's Film Project. She has written numerous articles about independent filmmaking issues in Texas. She maybe contacted at 210/308-4685.*

## From the Editor

The Texas Entertainment and Sports Law Journal is published quarterly. If you are not on the mailing list and wish to be included, forward your name and address to the Section Treasurer along with a check for \$25 payable to the Entertainment and Sports Law Section and indicate that you wish to be included on our mailing list.

**We are now accepting advertisements in the Journal. Anyone wishing to advertise in the Journal, should contact the Editor for information on getting your ad in the Journal. Ad rates are: 1/8 page: \$50.00; 1/4 page: \$100.00; 1/2 page: \$150.00; 3/4 page: \$175.00 and full page: \$200.00.**

## RECENT PUBLICATIONS

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### ANTITRUST

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Jack Achiezer Guggenheim. *Tigers, Tornados, And Titans: Trademark Implications Of Renaming The National Football League Oilers*, 76 U. DET. MERCY L. REV. 45 (1998).

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### COPYRIGHT

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### SYMPOSIA

*Reclamation Of Cultural Property On The International Front: Is Home Where The Art Is?* 5 Vill. Sports & Ent. L.J. (1998).

**Entertainment & Sports Law Section, State Bar of Texas - CLE Program**  
**Friday, June 11, 1999, 1:00 p.m. – 3:30 p.m.**  
**Ft. Worth Convention Center, Ft. Worth, Texas**

**Program**

**Title:** Sports Litigation Update: NCAA; Professional Sports; ADA, and Other Pertinent Issues in Sports Law (will include presentations on youth in sports)

**Speaker:** Matthew Mitten, Prof. at Law, South Texas College of Law

**Title:** "Convergence" - Where High Tech Meets Entertainment

**Speaker:** George Sanger - a/k/a "The Fat Man" of Big Fat Inc., Fat Labs etc. - the worlds biggest composer, producer of computer-related music.

The following are nominations of the nominating committee of the Entertainment & Sports Law Section:

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|--|--|

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**of the STATE BAR of TEXAS**  
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The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has over 500 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

The "Entertainment & Sports Law Journal", published three times a year by the Section, contains articles and information of professional and academic interest relating to entertainment, sports, intellectual property, art and other related areas. The Section also conducts seminars of general interest to its members. Membership in the Section is from June 1 to May 31.

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of \$25.00 (made payable to ENTERTAINMENT & SPORTS LAW SECTION) to Lawrence A. Waks, Treasurer, 816 Congress Ave., Ste 1600, Austin, Texas 78701-2443

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