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Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section
Vol. 20 No. 2, Fall/Winter, 2011

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CHAIR'S REPORT

Thank you for being a member of the State Bar of Texas Entertainment & Sports Law Section, also known as TESLAW! The 2011-2012 State Bar year is in full swing and the new TESLAW leadership plans to build on our past success while continuing to work towards increasing the membership benefits that you receive in exchange for your TESLAW dues. As a member of TESLAW, you are currently entitled to: 1) receive the acclaimed Texas Entertainment and Sports Law Journal; 2) join the TESLAW list-serve; 3) earn free CLE credits; 4) receive a discount on the cost of the annual Entertainment Law Institute (ELI); and 5) become part of the growing Texas-based entertainment and sports law community. In the year ahead, the TESLAW leadership will strive to make the www.teslaw.org website the first place for TESLAW members as well as for out of state attorneys to visit to retrieve Texas, national and international entertainment and sports lawyer resources. Plus, you can now find us on facebook.com!

On June 23, 2011, TESLAW held its Annual Meeting and CLE during the State Bar Convention at the Grand Hyatt San Antonio and the Henry B. Gonzalez Convention Center. The Section elected new officers to serve during the 2011-2012 fiscal year. The current Council members and officers are identified on the front cover of this journal. Our CLE program focused on both major motion pictures and famous arenas. Jed Lackman, Vice President, Business & Legal Affairs, Universal Studios Home Entertainment, discussed the "Evolving Film Distribution Windows" and Casey Coffman, Executive Vice President, Business Development and Operations, The Madison Square Garden Company, spoke on "New York and the World's Most Famous Arena: The Legal Issues Surrounding a Transformation".

This fall, the 21st Annual Entertainment Law Institute will be held at the Hyatt Regency Austin on October 20-21, 2011. ELI is the premier event for Texas entertainment lawyers. More detailed information about the program is found in this journal. This year's ELI offers 14 hours of CLE, including 1.5 hours of ethics. It also provides an excellent opportunity for you to network and a chance to get your practice questions answered. Early bird registration ends October 6, 2011 – so don't hesitate. Of course, we'll have our famous "Rock Star Attorney" t-shirts available for sale. Don't worry, you do not have to be an entertainment lawyer to purchase one.

Finally, there are excellent opportunities to serve and get involved with committees and planning the future of TESLAW. Some of the areas in which you can serve are legislative (state & federal), merchandising, website, social networking, activity planning, marketing and more. We hope you will decide to volunteer for something in which you are interested. Please join us at our next TESLAW Council meeting at ELI in Austin in October. I hope to see you there!

Mitzi Brown,
Chair

Check out the Section's Website!

Check it out at www.teslaw.org. The password for members is "*galeria3*". Should you have any comments or suggestions to improve the site please feel free to e-mail Kenneth W. Pajak at ken@bannerot.com or the new editor, Craig Crafton, at ccrafton@cozen.com…

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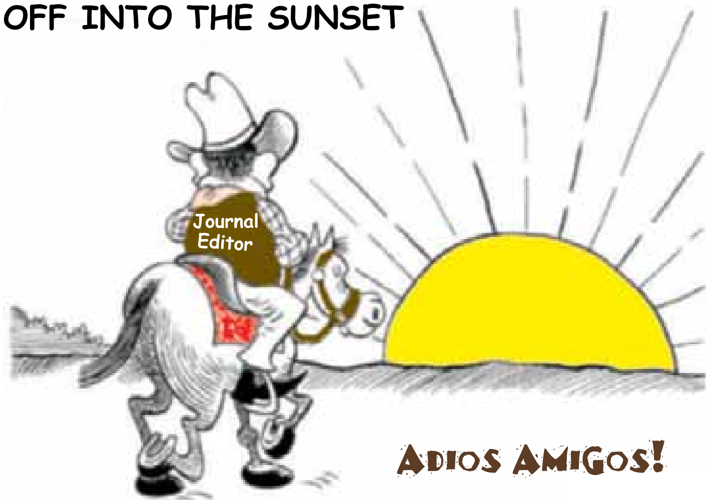
FOR THE LEGAL RECORD ...

Sylvester R. Jaime, Editor

OFF INTO THE SUNSET



Well folks this is it, the last Journal for which your editor will be the editor. First issue was Vol. 5 No. 1 Winter 1995 and this one Vol. 20 No. 2, *"This is the last one"* -- 16 years and 31 issues! Been fun and hope that you have benefited or at least found 1 or 2 issues enjoyable reading.

Special thanks for the writers who contributed over the years and to Professor Andrew Solomon and the students and librarian at South Texas School of Law who have provided articles of interest and the bibliography included in the Journal over the years. And thanks to the Section and its members for allowing me to serve as editor. Thanks for the opportunity.

LEGAL OBSTACLES IN SHIFTS TO THE SPORTS LANDSCAPE SHIFTS:

The Aggies finally getting out from UT's vast shadow. Or maybe Baylor has lawyers with a different objective? Former federal prosecutor, federal judge & current Baylor president Ken Starr refuses to let Texas A&M leave easy, or maybe not at all? In an effort to keep the Big 12 alive (or bargain for a better exit strategy) Baylor is relying on the SEC's only condition: no threats of lawsuits from Baylor or other remaining members of the Big 12, to halt a quick exit by the Aggies from the Big 12. Having approved entry of the Aggies into the SEC, the change in conferences faces a potential lawsuit unless the Aggies can satisfy Baylor, et al., that its in the best interests of the Big 12 to let go without a fight. Big 12 Commissioner Dan Beebe wrote a letter to the SEC which indicated that "the Big 12 and its members had agreed not to sue anyone over A&M's move to the SEC." But Baylor (joined by other Big 12 schools) has not agreed. Nebraska & Colorado got out of the Big 12 with just paying an exit fee. Is Baylor holding A&M "hostage" for more? Meanwhile Oklahoma is assessing its own strategy. David Boren, OU president, said, "… the Sooners had no intention of simply being a wallflower" on the league alignment. Whether that means OU will be in the Pac 12, Big 12 or elsewhere remains to be seen. If the Big 12 topples, is a college scene with only 4 super conferences composed of 16 teams each far behind? And what happens to bowl games?

The Big 12 & the SEC know that even conferences are not immune to being sued. ESPN sued Conference USA. The league is alleged to have violated the contract by filing to negotiate in good faith and by striking a new agreement with Fox Sports Group. The suit was filed in Manhattan federal district court. ESPN wants to have the court enforce the contract that specifies how a new contract is to be negotiated. ESPN wants the court to award it $21 million in damages plus attorneys' fees if the Conference does not comply with the contract. The contract with FOX is a 5-year deal worth $43 million through 2016. ESPN believes it had an agreement to pay for 10 football games, 6 men's basketball games and the league title games for football and basketball at half of the FOX contract. ESPN's senior vice president, Burke Magnus, said, "We believe we had reached an agreement after a long negotiation, and they changed their position out of the blue and went back on the agreement."

C-USA commissioner Britton Banowsky countered "We are very disappoint that ESPN has taken this action. We have had the benefit of legal counsel throughout this process and we disagree with the positions they have taken. We are prepared to vigorously defend any litigation initiated by them. ESPN did not include

Continued on page 4

Continued from page 3

FOX in the suit but the FOX deal provides for Fox to broadcast at least 20 regular season football games, 10 men's basketball games and 3 women's basketball games per year. In comparison the ESPN 5 year agreement was for $21.9 million, expired following the 2010-11 season, covered 10 football games, 6 men's basketball games, and 3 women's basketball games per season. ESPN claims that it had the right for first negotiation/first refusal on a new deal. ESPN also alleged that C-USA was required to exclusively negotiate in good faith during the time C-USA was negotiating with Fox.

Feds blew it, but they are not giving up. Denying Roger Clemens' motion to dismiss, U. S. District Judge Reggie Walton is also examining whether the defense team, led by Houston attorney Rusty Hardin, violated a court order not to contact jurors after declaring a mistrial. The Washington Judge is considering the prosecutors request to not only talk to the jurors but also to examine the defense teams juror contact information. After declaring a mistrial because prosecutors presented the jury with inadmissible evidence, a new trial was set for April 2012. Once again Roger Clemens faces charges of lying under oath to Congress in February 2008. Prosecutors have accused Clemens with lying when he told Congress that he never used performance-enhancing drugs during his career as a major league pitcher, accusations which Clemens has denied. In asking the judge to require the defense to turnover its interview notes, Judge Walton has requested briefs for authority for him to grant the request in the perjury trial.

The NFL appears to be on the cutting edge in drug testing its players. The league is seeking to test players for human growth hormones. DeMaurice Smith, NFLPA executive director, said the players question the reliability of the test and have requested the World Anti-Doping Agency to provide the results of the safety and reliability of the testing. "The one thing that we don't know is what that population test looks like." said Smith. "We will not agree to the test until the [test are tuned over]." Smith's comments were made at a Santa Clara University sports law symposium. He went on to say, "Who was included in that study? Were they tested or was that population testing in conditions or similar situations that would mirror professional football athletes … that's information that they (WADA) refuse to turn over."

While the debate continues, it may portend testing in other professional sports. The NFL's action addresses a world wide drug issue seen in Major League Baseball, rugby, and world class cycling. German Patrick Sinkewitz was suspended for a positive drug test; Terry Newton received a two-year ban from the British International Rugby League for a positive test after admitting to HGH use; and Mike Jacobs was suspended for a positive HGH test under baseball's minor league testing program. The 30-year-old Jacobs said he took HGH "to overcome knee and back ailments." The first basemen received a 50 game suspension from Major League Baseball but lost his job when he was released by the Colorado Rockies. Jacob's said "Taking [HGH] was one of the worst decisions I could have ever made, one for which I take full responsibility."

Your comments or suggestions on the Section's website may be submitted to the Section's Webmaster Kenneth W. Pajak at ken@bannerot.com or to your new editor Craig Crafton at Ccrafton@cozen.com

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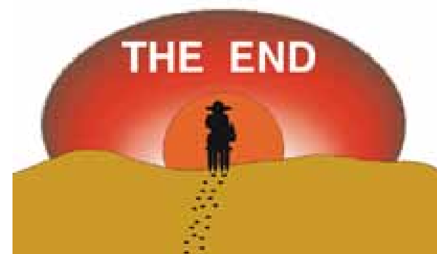
Adios Amigos!

Sylvester R. Jaime--Editor

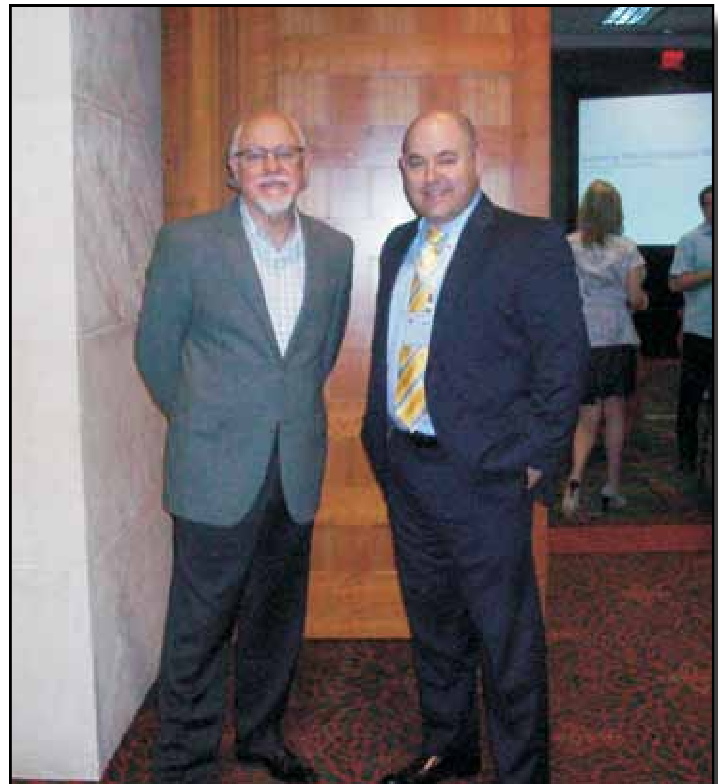


HIGHLIGHTS FROM THE 2011 SECTION MEETING AT THE STATE BAR CONVENTION

On June 23, 2011, TESLAW held its Annual Meeting and CLE during the State Bar Convention at the Grand Hyatt San Antonio and the Henry B. Gonzalez Convention Center

Council Meeting – Immediate Past Chair Don Valdez presenting Section issues.

Break b/w Council Meeting & Section Meeting

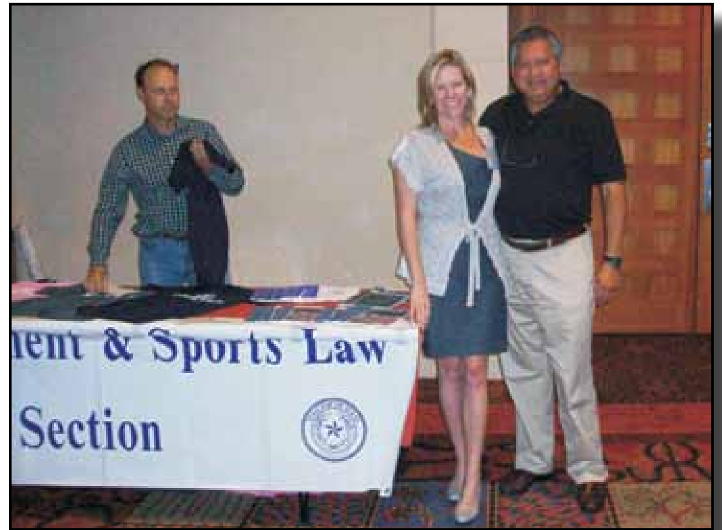


Mike Tolleson, ESLI Chair and Speaker Jed Lackman, Universal Studios Home Entertainment

Speaker Presentation at Section Meeting

Speaker Casey Coffman Presentation "New York and the World's Most Famous Arena: The Legal Issues Surrounding a Transformation" at Section Meeting re Madison Square Garden

Craig Baker - Selling Section T-Shirts at State Bar Convention

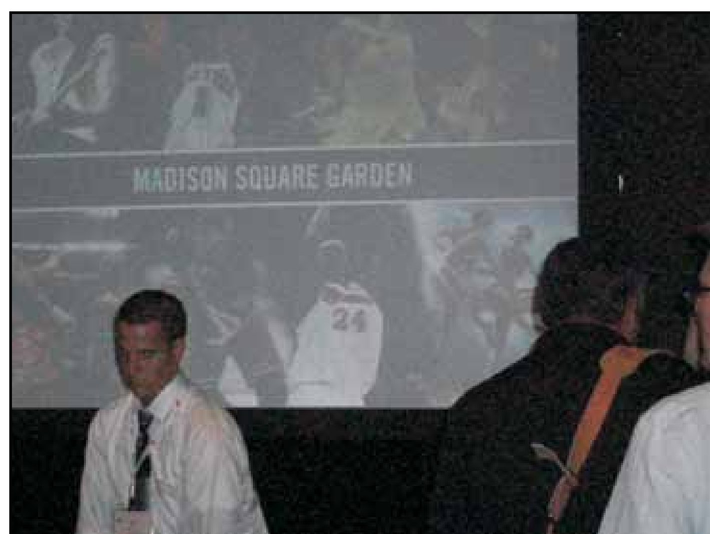


Speaker Casey Coffman and Immediate Past Chair Don Valdez

Chair – Mitzi Brown, & In-coming Chair Shannon Jamison -- at Section Meeting mingling & discussing latest Section happenings.

Speaker Jed Lackman Presentation " "Domestic Film Lifecycle – Windows of Distribution Pre 2010"

Picture of Madison Square Garden and Section participants at Section meeting



Pictures of Madison Square Garden

COVER PHOTOS: ***The Legends of Texas***

1. **Charles Goodnight** 1836-1929
   Rancher & Trailblazer
2. **Quanah Parker** 1845-1911
   Last Great Comanche War Chief
3. **Sam Houston** 1793-1863
   President of the Republic of Texas
4. **Stephen F. Austin** 1793-1836
   The Father of Texas
5. **Jose Antonio Navarro** 1795-1871
   Signer of Texas Declaration of Independence from Mexico
6. **Mildred "Babe" Dickerson** 1912-1956
   Wold's Greatest Woman Athlete

TESLAW SXSW MIXER A SUCCESS!

Thanks to everyone who attended TESLAW's first official SXSW Mixer at The Melting Pot on March 17, 2011. For those of you who couldn't make it, a happy gathering of 75 local and out-of-state attorneys, industry folks, musicians, and music business owners mixed and mingled for more than three hours while feasting on unlimited cheese and chocolate fondue! (Not too shabby for what was scheduled to be a 2 hour event.) We also increased TESLAW membership and raised money through sales of our favorite (and currently only) merchandise -- the Rock Star Attorney tee.

Thanks again, and please stay tuned for details on next year's mixer!

All the best,
Amy E. Mitchell, TESLAW Treasurer

SUBMIT YOUR ARTICLES

The editors of the *Texas Entertainment and Sports Law Journal ("Journal")* are soliciting articles on a sports or entertainment law topic for publication in the TESLAW Journal.

All submitted articles will be considered for publication in the *Journal*. Although all submitted articles may not be published, we may choose to publish more than one article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All articles should be submitted to the editor and conform to the following general guidelines. Articles submitted for publication in the Spring 2012 issue of the journal must be received no later than November 1, 2012.

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.

If you have any questions concerning the *Journal*, please email Craig Crafton, Editor, Texas Entertainment & Sports Law Journal, at Ccrafton@cozen.com

CAVEAT

Articles appearing in the Journal are selected for content and subject matter. Readers should assure themselves that the material contained in the articles is current and applicable to their needs. Neither the Section nor the Journal Staff warrant the material to be accurate or current. Readers should verify statements and information before relying on them. If you become aware of inaccuracies, new legislation, or changes in the law as used, please contact the Journal Editor. The material appearing in the Journal is not a substitute for competent independent legal advice.

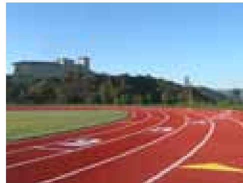
NOTICE:

Art-friendly journal seeking budding artist to display artwork on cover! If you would like to see your (or your client's, mother's, spouse's, friend's, etc.) artwork on the cover of our journal, please submit a JPEG or EPS file (no less than 300 dpi) along with a PDF of the artwork to Craig Crafton at Ccrafton@cozen.com.

LEGAL NOTES

• **Female athletes** and gender verification tests are still one of the focuses of the IAAF. The international sports association adopted rules to determine female athletes eligibility. Seeking to address the controversy stemming from South African **Caster Semenya** after wining the 800-meter world championship in 2009, the IAAF approved new rules for testing female athletes with hyperandrogenism. The rules require female athletes with the condition involving overproduction of male sex hormones to receive clearance from the IAAF to compete in women's events. Commencing May 1, 2011, gender verification will be required by the IAAF track and field governing body.

• South African double-amputee sprinter **Oscar Pistorius**, received clearance to compete in the Adidas Grand Prix by meeting the world championships "B" 45.61 seconds standard in a race in Rustenberg, South Africa. He qualified for the New York meet where he wound up competing against 400-meter Olympic champion Jeremy Wariner, among others, Pistorius met the 45.25 qualifying standard for the world championship, where he made it to the semi-finals before being eliminated.



• Former New York Giants football star **Lawrence Taylor** was declared a low-risk sex offender. Taylor had plead guilty to charges of sexual misconduct and patronizing a 16-year-old prostitute and Rockland County New York **Judge William Kelly** said, "Taylor was not targeting children and was unlikely to commit the same crime." As a result of the finding the former New York Giants All-Pro avoided being placed on New York's public sex-offender registry. The Giants' former linebacker said the girl told him she was 19.

• **Oh to be young again!** Naturalized U. S. citizen **Guerdwich Montimere**, 23, posed as a teenager and played basketball in Odessa, Texas. He was sentenced to 3 years in prison after a plea bargain. With Ector County District Attorney **Bobby Bland**. **Montimere** graduated from high school in Florida after emigrating from Haiti. He enrolled as a 9th grader under the name "Jerry Joseph" and made the high school basketball team. He plead guilty to 2 counts of sexual assault and 3 counts of tampering with government records.

• Two high school baseball players took to sacrificing chickens to improve their games. The 15 & 16 year old were charged with **cruelty to livestock** in a Tarrant County, Texas juvenile court. The youths in an effort to break out of a slump allegedly caused the death of 2 baby chickens. They were also asked to leave the Western Hills High baseball team.

• **Castle Rock, Colorado prosecutor** and 2 other parents were charged with 3rd degree assault and disorderly conduct at a baseball tournament for 12-year olds. A fight involving at least 6 adults lead to one player being taken to a hospital and **Christy Asumus**, a prosecutor contracted by the town, was one of 3 adults facing criminal charges following the baseball game.

• **The USC/Utah score changed from 17-14 to 23-14 two hours after it ended**. USC scored on the last play of the game and the score 17-14. The Utah field-goal attempt was blocked and returned for an apparent touchdown. A penalty flag was thrown for unsportsmanlike as the USC bench cleared in jubilation during the runback. The teams left the field with the score 17-14. Two hours later, PAC-12 officials changed the score of the game deciding the penalty did not apply because the game had ended. Sports books in Nevada protested to the Nevada Gaming Control Board. SC was favored by 81/2 points and made payouts accordingly. After the score was changed, **Jerry Markling**, chief enforcement officer for the Board, received calls from gamblers and casinos in an effort to get the board to resolve the dispute with the PAC-12. As of print time, no odds were posted as to the favorite in the dispute. ■

ARMSTRONG BEATS 60 MINUTES BY A TWEET: LESSONS FOR LAWYERS

By: Miranda Sevcik

Ms. Sevcik is a former television journalist and current principal of Media Masters, a Houston- based litigation communications and legal PR firm that caters exclusively to lawyers and legal professionals. Miranda worked with defense attorney Ed Chernoff as the media liaison and spokesperson for the defense of Dr. Conrad Murray. http://www.mediamastersonline.net.

When Lance Armstrong's teammate claimed in a *60 Minutes* segment he witnessed the Tour de France legend taking performance-enhancing drugs, many journalists anticipated Armstrong's career-ending fallout. But instead of pleading his case in front of media cameras, three days before the segment aired, Lance Armstrong tweeted: "20+ year career. 500 drug controls worldwide, in and out of competition. Never a failed test. I rest my case."

History shows drug tests can fail to recognize performance-enhancing chemical compounds as often as athletes fail the tests. In fact, world-class track and field superstar Marion Jones passed over 160 drug tests over her 10-year career, she never tested positive. Yet on October 5, 2007, Jones pleaded guilty to lying to federal investigators about her use of the drugs, and later spent six months in prison.

Lance Armstrong turned the tables on the impending media allegation with a preemptive strike. The result, Armstrong's tweet took the air out of his teammate's allegation and the *60 Minutes* episode fell flat.

As an attorney representing a client faced with the dilemma of "no comment" versus shout-it-from-the-rooftops innocence declarations, which is the safest bet? Particularly when there is a chance a client's statement could be contradicted by fact later?

Thankfully, social media has offered new Internet avenues that didn't exist five years ago. These social media tools help attorneys in court and in the court of public opinion, if lawyers plays by the rules.

TANGLING THROUGH TWITTER

Celebrities, businessmen, and God knows, politicians love to share on Twitter. Maybe it's the gladiator ego, the fawning fans, or the greedy desire for more "followers". Probably, it's a bit of all three. Many attorneys agree most of their high profile clients should just give up their accounts altogether, particularly the sports stars.

Major league football, basketball and hockey have all banned players from using social media before and during the game. Some of the shutdown comes from worries tweets from a game in progress may affect the outcome or aid sports gaming interests. But even with these bans, the leagues have fined many players whose verbal or digital outbursts step over the line.

Included in the most recent Tweet fines:

- Minnesota Vikings quarterback Brett Favre, $50,000 for "sexting."
- NASCAR driver Denny Hamlin, reportedly $50,000 for a tweet rant.
- Dallas Mavericks owner Mark Cuban fined $25,000 for protesting a referee's call on his Twitter account.

The most expensive sports tweet goes to Larry Johnson, former Kansas City Chiefs running back, who was suspended one game, at a cost of $213,000, for gay slurs he directed at a Twitter heckler.

Businesses understand the many dangers posed by Twitter and take the threat very seriously. Recently *The New York Times* published a story claiming that thanks to a series of loopholes GE pays nothing in taxes. The story said: "[GE's] American tax bill? None."

GE immediately issued a statement saying the allegation wasn't true—and took to Twitter to make its point.

The *GE Public Affairs Twitter account* released a number of aggressively worded tweets telling journalists to stop repeating the *Times's* claims and insisting the paper was wrong. Strangely, reports indicated GE didn't ask the *Times* for a correction.)

Here is an example:

@Jwesty5 Claiming that GE's American tax bill is "none" is simply not true. GE pays payroll, property, sales use & value added taxes, etc. **GE Public Affairs**
GEpublicaffairs

GE even sent *The Business Insider* (TBI) messages, one of which said: "Stop the misleading attacks."

Ultimately the website conceded in the assault and allowed GE to give its side. GE made it a priority to spin their side because they understood the danger of a one-sided tax evasion allegation out on the Internet for the world to see.

"The ethical rules set forth by the State Bar still apply, they don't change based on social media,"says state District Judge Susan Criss.

Continued on Page 11

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Judge Criss presided over the sensational murder trial of Robert Durst in 2002. The Durst high profile case made national and international headlines. Criss says lawyers can best serve their clients by understanding the basic ethical guidelines found in the Texas Disciplinary Rules of Professional Conduct, especially Texas Rule 3.07.6, but lawyers also have to understand the reputation-protection needs of their well-known clients.

"With high profile clients (lawyers) need to understand their name is their business brand. It's not just litigation but the public image of a company. But anything they write could come back to haunt them. High profile clients are more comfortable dealing with their public image, but they don't understand these comments can telegraph to the other side what their case is and hurt them in court later on."

SIDEBAR:
Texas Disciplinary Rules of Professional Conduct, Rule 3.07.6

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Thus, Rule 3.07 sets out a "substantial likelihood of material prejudice" standard in governing a lawyer's extrajudicial statements. Most obviously, a lawyer should not make statements intended to influence the judge or jury or to affect the outcome of a trial. Such statements will surely subject that lawyer to discipline by the State Bar. On the other hand, Rule 3.07, Comment 3, advises that whether or not there is material prejudice can often depend on the circumstances in which the statement is made. For example, a statement may be allowed if it used to counter the unfair prejudicial effect of another public statement.

If an attorney is tweeting for a client or advising a client on what to say about an impending legal issue, Judge Criss says the safest rule of thumb is to have attorneys speak to what has been publicly filed and allow the client to speak to their personal feelings on the matter.

A proper chain of communication allows the legal media team to hold true to the critical ingredients of a social media campaign, credible, consistent and controlled messaging.

THE YOU TUBE PULPIT

"I want to thank all of my patients and friends who have sent such kind emails, letters and messages to let me know of your support and prayers for me and my family…" said Dr. Conrad Murray in a *videotaped statement* release on You Tube 8 weeks after the death of Michael Jackson.

"We really had to get something out there. In the beginning, Dr. Murray was being vilified on an hourly basis. The TV stations were camped out in his neighborhood just to get a tiny snippet of shadowy video. Dr. Murray had ceased to be a human being, and had turned into some kind of prey," says lead defense attorney Ed Chernoff.

As my firm, Media Masters, worked with Dr. Murray's lawyers during these early days, we witnessed first-hand the ballooning media interest and money at stake for the first images of the doctor suspected in the death of the King of Pop.

Tammy Kidd, media consultant with Media Masters took hours of daily calls from the media and Murray's patients asking about the truth to rumors Murray was suicidal, dead or had skipped town.

"It just got to be ridiculous. Media outlets would buy into some rumor going around that Dr. Murray had fled the country, or killed himself. Then they'd publish it as fact on a blog somewhere and the phone would start ringing off the hook. We knew we had to do something to assure his patients he was okay and convince the world Dr. Murray was a real live human being, not some shadowy figure hiding out of guilt."

Ed Chernoff remembers the desperate hours and days following the release of the Murray video. Amazingly, after posting the clip on You Tube it only took 10 minutes for the first reporter to find it and call for confirmation.

"Am I seeing who I think I'm seeing?" questioned a Las Vegas reporter in the first phone call to us.

"The result was tough to handle at first," says Chernoff. "A bunch of legal 'consultants' got on TV to blast our method of using YouTube. But soon thereafter we observed a sea change in the coverage. I'm not saying the presumption of innocence predominated the coverage, but the pressure was relieved. Everybody stopped insinuating that Dr. Murray was hiding out in the woods to escape the hang man."

Psychologists say there is something about human nature that makes us want to feel compassion for an individual asking for it directly.

"Thanking people for prayers and support in a general sense is fine. As long as the client is not talking about the specific facts of the case," says Judge Susan Criss.

State-specific rules matter, but if the client makes the statement, 'I'm not guilty, we believe the evidence will support that and the system will work' I can say that I would not have a problem with that."

A simple videotaped statement from a client expressing thanks and concern with a plea for patience, peace and any other appropriate emotion is a perfect way to start leveling the often-unfair media playing field.

A well-produced video with a simple background, short message that doesn't delve into the facts of the case and includes a plea for understanding and prayers is usually the safest bet.

The video can then be posted to You Tube, the client's website, the pressroom website, included in a statement to the media and distributed among family, friends and supporters for a from-the-horse's-mouth unfiltered public statement.

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LOOSE LIPS SINK SHIPS
ONLINE PERSONAL PROFILES

Thanks to Facebook, Linkedin and a myriad of other social networking sites, the dangers of cocktail talk are especially pronounced now that seemingly everyone is sharing so much of their personal lives online. Personal details ranging from what was for breakfast to what's happening at work are updated sometimes minute by minute. And it can be almost irresistible to share details that seem innocent if you have inside information on a case in the news.

Studies from Forrester, Pew Research and the Altimeter Group have shown how important the trend for sharing content is *PRESSfeed, the social media newsroom* studied the websites of U.S. companies and found 34 percent of Fortune 100 companies have share buttons on their website.

"(Social networking) has made it much harder for judges to be more diligent about what jurors are exposed to. I've revised my instructions to the jurors seven times. As soon as they walk in the room, no devices are allowed," says Judge Criss.

"These jurors could be Googling, or Twittering. You have to make sure they're not getting into or putting out there too much information. It is such a cultural thing now to share everything I have to threaten them more with contempt. In the Casey Anthony trial a juror even hired a publicist to sell their interview right after the verdict."

The best way to ensure against information being shared that shouldn't is also the simplest among the legal team. Keep the lines of communication open at all times.

As the attorney, its safest to NEVER assume the client, the legal team or individuals surrounding the client know what should and should not be shared. This step seems elementary but it is almost always the first step skipped when the pressure of a high stress case hits the news.

Establish on a weekly or even daily (if need be) basis what can and can't be said among the team. Develop talking points that can be communicated in accordance with the restrictions of the litigation timeline and strategy. Make crystal clear particularly with the team spokesperson what cannot be shared. Have the client encourage those around them to share these messaging points as well.

Remember that a consistent, repeated message is likely to resonate in the minds of the public.

REPUTATION INSURANCE

Keeping up with online chatter about a client or case can be a full time job, but thankfully Google has introduced a tool that helps manage search results for names and other keywords better than ever before.

`The tool, "Me on the Web," is now included on the *Google dashboard* in between account information and analytics. "Your online identity is determined not only by what you post, but also by what others post about you — whether a mention in a blog post, a photo tag or a reply to a public status update," Google *explains*.

The new dashboard section encourages the user to keep tabs on these mentions by setting up search alerts for data points included in their Google profile, like name and email address.

Google's new tool also includes links to resources about *managing online identity* and *removing unwanted content*.

Through the use of this powerful, yet free tool, diligent attorneys can now track, and protect a case and client's reputation better than ever before.

The World Wide Web can make or break a client's future long before the judge's final gavel has dropped. There is no reset button for a tarnished reputation, but by taking steps ahead of time to protect what you can, lawyers can help ensure a client has a life to return to after their day in court.

ANOTHER SIDEBAR
(If you are interested)

A lawyer should be aware of United States and Texas Supreme Court decisions regarding lawyers and their own free speech rights in talking to the media. The United States Supreme Court, in *Gentile v. State Bar of Nevada*, ruled that a State Bar can properly regulate the speech of lawyers by not allowing public statements that will have the substantial likelihood of material prejudicing an adjudicative proceeding. The Court explained that the "substantial likelihood of material prejudice" standard is a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

The Texas Supreme Court, in *Davenport v. Garcia*, addressed the propriety of entering a so-called "gag order," a court order forbidding public reporting or commentary on a case currently before the court. A gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and the judicial action represents the least restrictive means to prevent that harm. Some judges will issue a gag order in high profile cases if they feel that media attention will make it hard to find an impartial jury pool. ■

THE *JOURNAL'S* TOP TEN

Auburn, college football's reigning National Champion, was in the news and on the NCAA radar when 4 former ***Auburn*** football players reported in interviews with HBO's Real Sports they received thousands of dollars while being recruited by or playing for the defending national champs. ***Stanley McClover, Troy Reddick, Chaz Ramsey*** and ***Raven Gray*** disclosed to Bryant Gumbel they received book bags, envelopes and handshakes containing cash. HBO confirmed they had no proof to any of the claim, but Auburn contacted the NCAA & the SEC "as soon as these allegations surfaced" said Auburn athletic director ***Jay Jacobs***. He added, "We have engaged outside counsel to investigate this matter and will spare no resources to find the truth." Former coach Tommy Tuberville, Auburn coach during the recruitment of the interviewed players, declined to make any comment.

Ohio State former football head coach ***Jim Tressel*** told the NCAA that he would take the same punishment that the NCAA imposed on 5 players who took benefits and were suspended for 5 games. The NCAA denied OSU's appeal on behalf of the players. Tressel was handed a 2 game suspension by the school after it was a discovered he had not notified the NCAA or the school that he was aware of the improper benefits to the players. The investigations eventually resulted in Tressel resigning as head coach. Ohio State President ***E. Gordon Gee*** had been quoted after the school had suspended the coach and before the resignation as saying in response to whether the coach should be fired "No. Are you kidding? I'm just hoping the coach doesn't dismiss me."

Notre Dame was fined $77,500 by the Indiana Occupational Health and Safety Administration for safety violations tied to 20 year-old Declan Sullivan's death. The ***Rev. John Jenkins***, Notre Dame's president, said the school would review the report and take necessary actions to protect students and staff. "None of these findings can do anything to replace the loss of the young man with boundless energy and creativity." Jenkins said. "As I said last fall, we failed to keep him safe, and for that we remain profoundly sorry." The junior from Long Grove, Ill, was killed when the hydraulic lift being used to film the football team practice collapsed in gusts up to 53 mph. The IOHSA report included statements from ***Reuel Joaquin***, assistant video coordinator, that "Sullivan wasn't happy when he found out the team would be practicing outside." Joaquin also told the IOSHA investigator that it was decided not to put a female videographer on a lift until midway through practice because it wasn't necessary and "so we would not scare her." The school replaced the use of lifts with remote-controlled cameras following the incident.

Miami joined the NCAA in investigating 15 of the school's athletes for allegedly accepting improper benefits from a booster. The football players came under investigation after ***Nevin Shapiro*** was convicted of operating a Ponzi scheme. Shapiro identified 12 football players on Miami's roster and 1 basketball player as receiving money, gifts and other items from him. Shapiro said to Yahoo Sports that he paid one of the basketball recruits signed with the Hurricanes. Miami president ***Donna Shalala*** while endorsing the investigation said, "The process, however, must be deliberate and through to ensure its integrity." Shapiro's attorney, Maria Elena Peres, said that among other favors, Shapiro provided players with the use of a yacht.

LSU was found to have committed major violations in recruiting a football player from the junior college ranks. The recruit never played a down for the Tigers. LSU imposed on itself a reduction of 2 scholarships for the 2010-11 academic year and a 10% reduction in official visits and recruiting calls. Although NCAA Committee on Infractions chairman ***Dennis Thomas*** said LSU's infractions all were considered "major" the NCAA did on impose any postseason bans or loss of scholarships beyond those imposed by LSU. Thomas said, "The committee really felt that the LSU

Continued on Page 14

Continued from page 13

compliance staff and institution did an excellent job and that they assisted the (NCAA) enforcement staff in the investigation regarding these violations." In addition to finding that Tiger ex-coach ***D. J. McCarthy*** violated rules in arranging for transportation and housing for the recruit, the investigation determined that more than 3,600 telephone calls were made by 3 non-coaching staff to or from high school coaches and administrators, prospects and family members of recruits.

North Carolina was investigated by the NCAA for improper benefits and academic misconduct. As a result, head football coach Butch Davis was fired 9 days before the football team's first practice. ***Chancellor Holden Thorp*** stated that the decision was not "prompted by any changes in the ongoing NCAA investigation but said he "lost confidence in our ability to come through this without harming the way people think of this institution. Thorp went on to say, "Our academic integrity is paramount, and we must work diligently to protect it."

University of San Diego was investigated first by the FBI then the NCAA. ***Brandon Johnson***, former basketball player for the Hurricanes, was arrested in Houston, and along with 8 other people, stands accused of trying to influence the outcome of USD basketball games in 2010. Johnson faces bribery charges for taking money and soliciting others. Johnson is the school's all-time leader in points and assists. ***Julie Roe Lach***, NCAA vice president of enforcement, said "The FBI is leading the investigation, and we will stand by and let them do their work because they have more tools in their tool boxes to get at what's going on than we do. After they conclude their investigation, we will begin ours." Former San Diego assistant coach Thaddeus Brown and former player Brandon Dowdy, as part of the FBI investigation were ordered not to have contact with current or former college basketball players. While FBI agents indicated that there was no evidence the former assistant coach was involved in illegal activity while coaching at USD in 2006-07, he and ***Dowdy*** were alleged in the indictment to have solicited someone to influence the outcome of a USD game against UC-Riverside in 2011.

Boise State has grown from a Division II football school to become a Top 25 program. And to prove it, the NCAA placed the school on 3 years probation. The school imposed a reduction in the number of scholarship they can offer by 3 for the 2013-14 season and permitted fewer contact practices in spring practice for the next 3 years. The sanctions also involved the women's tennis team. The NCAA investigation determined that there were numerous major violations involving athletes in 5 sports. Boise State's president ***Bob Kusta*** attributed the results of the investigation to the program's rapid growth from an "upstart Division II program" leading to the school's inability to keep tabs on compliance with NCAA rules.

Oregon gave street sports agent Willie Lyles $25,000 for recruiting services. Athletic Director ***Rob Mullens*** confirmed that the NCAA has undertaken an investigation into the Duck program. The Ducks have retained a law firm to assess the payment to Lyles. Lyles supposedly ran a Houston-based recruiting service and provided scouting reports for colleges such as Oregon. Following an initial review the reports from Lyles the scouting reports provide by Lyles to the Ducks were outdated. Head football coach ***Chip Kelly*** said, "I would love to talk about it, and when we have a chance after the report comes out, I will be able to clear up any questions that anyone has about the whole situation."

University of South Carolina head football coach ***Steve Spurrie***r suspended one of his assistant coaches after the assistant was arrested in Greenville, South Carolina. 42 year-old ***G. A. Mangus***, was a 3rd year quarterbacks coach and was arrested for urinating on a downtown street. The former Gamecocks assistant coach Mangus faces a $470 fine if convicted.

The University of North Dakota is mandated by state law to keep the nickname ***"Fighting Sioux."*** The North Dakota Board of Higher Education voted to retire the mascot name. The vote will require a vote of the legislature during a special session in November. North Dakota ***Governor Jack Dalrymple*** and legislative leaders met with NCAA ***President Mark Emmert*** to discuss the NCAA allowing the university to keep the nickname without penalty to the school. All interested parties expect the lawmaker to repeal the law and the school to have a new nickname. ■

Entertainment Law Institute

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Thursday 7.75 hours (1 ethics)

7:45 **Registration**

8:15 **Welcoming Remarks**
Course Director
Mike Tolleson, *Austin*
Mike Tolleson & Associates

8:30 **Recent Court Decisions Affecting the Entertainment Industry** *1 hr*
Stan Soocher, Esq., *Denver, CO*
Editor-in-Chief, "Entertainment Law & Finance"
Associate Professor, Music & Entertainment Industry Studies
University of Colorado Denver

9:30 **Get Your Act Together! Practice Tips, Precautions and Pitfalls of Properly Organizing the Emerging Band or DIY Artist** *1 hr (.25 ethics)*
Learn how to deal with conflicts, identify the best business structure for your client, address IP ownership issues, and avoid disputes commonly encountered when a DIY artist or band breaks.

Buck McKinney, *Austin*
Attorney at Law

Kenneth W. Pajak, *Austin*
The Bannerot Law Firm

10:30 **Break**

10:45 **Ethics - Professional Liability Insurance and Malpractice Issues for Entertainment Lawyers** *.5 hr ethics*
An examination of the policies, fees, terms, and choices when considering professional liability insurance for an entertainment practice.

Nancy Randolph Kornegay, *Houston*
Brown & Kornegay

11:15 **7 Deadly Sins of Boiler Plate** *1 hr (.25 ethics)*
When and why you should include certain "boiler plate" provisions in your contracts. A review of selected provisions typically found in entertainment industry agreements.

D. Hull Youngblood, Jr., *Austin*
Youngblood and Associates

12:15 **Break - Lunch Provided**

12:30 **Texas Star Award Presentation**

12:45 **The 'Compleat' Entertainment Lawyer** *.5 hr*
Lionel "Lon" Sobel, *Santa Monica, CA*
Editor, Entertainment Law Reporter
Visiting Professor, University of San Diego School of Law
Summer-Abroad Program

1:15 **Break**

1:30 **Pitching Music for Film and Television: Agreements with Reps & Publishers** *1 hr*
A proliferation of new companies offering to pitch music to film and television producers requires a fresh look at the role they play, the terms of agreement, and the advantages or disadvantages they offer to your artist/writer/publisher client.

Tamera H. Bennett, *Lewisville*
Bennett Law Office

Steven Winogradsky, *Studio City, CA*
Winogradsky/Sobel

2:30 **Copyright Terminations** *1 hr*
The right to terminate copyright transfers after 35 years is soon to have a large impact on the entertainment industry. The law, issues, and procedures are reviewed by experts in the field.

Eric Custer, *Los Angeles, CA*
Partner - Entertainment
Manatt, Phelps & Phillips

Lionel "Lon" Sobel, *Santa Monica, CA*
Editor, Entertainment Law Reporter
Visiting Professor, University of San Diego School of Law
Summer-Abroad Program

3:30 **Break**

3:45 **Direct Licensing of Performance Rights vs. Blanket Licensing via BMI, ASCAP and SESAC: Critical Considerations for Writers and Publishers** *1 hr*
Panel discussion on the trends and strategies developing for payment of public performance of musical compositions.

Moderator
Steven Winogradsky, *Studio City, CA*
Winogradsky/Sobel

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Jeff Brabec, *Beverly Hills, CA*
Vice President of Business Affairs
BMG Chrysalis

Matthew J. DeFilippis, *New York, NY*
Vice President, New Media & Technology
ASCAP

Christopher S. Harrison, *Austin*
DMX Music

4:45 **Website Agreements for Artists**
.75 hr
A discussion of issues to consider in building out a web-site with music and visual image content, including agreements with developers, terms of use, privacy policies, domain name disputes, credit card processing, cloud services, and appropriate licenses for use of sound recordings, musical compositions and visual art.

Edward A. Cavazos, *Austin*
Bracewell & Giuliani

5:30 **Adjourn**

Friday 6.25 hours (.5 ethics)

8:00 **Announcements**

8:15 **Federal and State Legislation Affecting the Entertainment Industry** *1 hr*
Moderator
Todd Brabec, Esq., *Los Angeles, CA*
Former Executive Vice President ASCAP
Author: *Music Money and Success*
Adjunct Associate Professor, *USC*

Christian L. Castle, *Los Angeles, CA*
Christian L. Castle, Attorneys

Jay Rosenthal, Esq., *Washington, DC*
Senior VP and General Counsel
National Music Publisher's Association
Berliner, Corcoran & Rowe

9:15 **Film Production Agreements**
1 hr
A review of typical agreements with directors, actors, writers, crew, and other service providers associated with film production.

Deena B. Kalai, *Austin*
Deena Kalai, PLLC

10:15 **Break**

10:30 **Finding the Safe Harbor for Fair Use in Non-Fiction Books and Films** *1 hr*
When can you use a portion of a copyrighted work without permission from the owner? This question arises routinely in the creation of audio/visual works using samples, photos, music and film clips. The answer is often not clear but guidelines have been developed for best practice and the securing of errors and omission insurance.

Michael C. Donaldson, Esq., *Beverly Hills, CA*
Donaldson & Callif

11:30 **Right of Publicity** *1 hr*
A look at the latest developments in litigating in this fast-evolving area of rights to artist name, voice, likenesses and related personal indicia. Includes discussion of domicile and choice of law, statute of limitations, First Amendment defenses and assessing right of publicity damages.

Barry E. Mallen, *Los Angeles, CA*
Manatt, Phelps & Phillips

Stan Soocher, Esq., *Denver, CO*
Editor-in-Chief, "Entertainment Law & Finance"
Associate Professor, Music & Entertainment Industry Studies
University of Colorado Denver

12:30 **Lunch on your own**

1:45 **Issues to Consider When Launching an Arts/Entertainment-related Nonprofit Organization**
.75 hr

Erin E. Rodgers, *Houston*
Law Office of Al Staehely
Texas Accountants and Lawyers for the Arts

Greg McRay, *Nashville, TN*
President, Foundation Group

2:30 **Advertising, Solicitation, and Social Media** *.5 hr ethics*
A review of the current rules and code of ethics related to attorney advertising and promotion.

Gene Major, *Austin*
Director, Advertising Review
State Bar of Texas

3:00 **Recording Agreements: Negotiating the 360 Deal** *1 hr*
Dina LaPolt and Doug Mark return for a lively discussion of the current environment at record labels and a mock negotiation of a 360 recording agreement plus tips for building the artist's brand.

Dina LaPolt, *West Hollywood, CA*
LaPolt Law

Doug Mark, *Los Angeles, CA*
Mark Music & Media Law

4:00 **Adjourn**

about the **ARTIST**

Freddie King, (1934-76) born in Gilmer, Texas, raised in Chicago, died in Dallas, considered one of the three "Kings" of blues guitar players, known for his instrumental hit "Hide Away" and influence on Eric Clapton, Mick Taylor, Jeff Beck, Stevie Ray and Jimmie Vaughan, and others, regularly sold out shows at the Armadillo World Headquarters in the early seventies.

Jim Franklin, iconic Austin artist, in the forefront of the Austin poster art movement in the 60s and 70s, resident artist and co-founder of the Armadillo World Headquarters who established the Armadillo as a symbol for Texas popular culture continues to produce innovative fine art from his studios in Austin, France and Moab, Utah.

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5

2011 Texas Star Award Recipient LON SOBEL

LIONEL "LON" SOBEL is the Editor of the *Entertainment Law Reporter,* www.entertainmentlawreporter.com, and a Visiting Professor in the summer-abroad program of the University of San Diego School of Law for which he has taught International Entertainment Law in London and International Copyright Law in Florence. He was the Chair of the American Bar Association's Forum Committee on the Entertainment & Sports Industries from 2007 to 2009.

He authored the current "Law of Ideas" chapter for *Nimmer on Copyright Law*. He also is the author of: *International Copyright Law*, a casebook; *International Entertainment Law*, a casebook (written with the late Donald Biederman); *Professional Sports and the Law*, a text; and co-editor of the Third Edition of the casebook *Law and Business of the Entertainment Industries* as well as the author of chapters in several other books.

He received a B.A. degree in Economics from the University of California, Berkeley, in 1963, and a J.D.degree from UCLA School of Law in 1969.

He started his career as an associate with Loeb & Loeb before forming his own firm and then joined the faculty of Loyola Law School in 1982. He has been a member of the faculty or lecturer at UCLA School of Law, Boalt Hall, the Berkeley Center for Law & Technology, and Southwestern Law School.

NOTICE

21ST ANNUAL ENTERTAINMENT LAW INSTITUTE
HYATT REGENCY AUSTIN
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LEGAL BATTLES IN ENTERTAINMENT AND SPORTS

Lawyers and agent make sure you are up on the **35-year Rule**. Copyright law revised in the 70's allow creators of "works of art" to regain control of their work. Requiring that creators apply 2 years in advance to exercise their "termination rights" U.S. copyright law permits artists to regain ownership of their works. 1978 is the magic date for artists like **Bruce Springsteen, Billy Joel, Kenny Rogers, Funkadelic**, and others to regain control of their master recordings for hits such as Darkness on the Edge of Town, 52nd Street, Minute by Minute, Gambler and One Nation Under a Groove, hits which made millions for music labels. "In terms of all those big acts …, the recording industry has made a gazillion dollars on those matters, more than the artists have." said **Don Henley**, founder of the **Recording Artists Coalition. Henley**, also a founder of the music group the **Eagles**, is seeking to assist other artists to protect their legal rights. An advocate of artists regaining ownership of their works, **Henley** went onto say, "So there's an issue of parity here, of fairness. This is a bone of contention, and it's going to get more contentious in the next couple of years."

Records companies have controlled the master recordings and many believe they owed the recordings in perpetuity rather than the artists. The labels seek to brand the works "works for hire," rather than "compilations created by independent performers." Calling it "[A] situation where you have to use your own common sense." **June Bese**k, executive director of the **Kernochan Center for Law, Media and the Arts** at the Columbia University School of Law, asks, "Where do [the artists] work? Do [the labels] pay social security for them? Did the record company withdraw taxes? Did they get paychecks? Under those kinds of definitions it seems pretty clear that your standard kind of recordings artist from the '70s and 80s is not an employee but an independent contractor." The majors, Universal, Sony BMG, EMI and Warner, are not giving up their rights without a fight. "This is a life-threatening change for them, the legal equivalent of Internet technology." said **National Academy of Recording Arts and Sciences** lawyer Kenneth Abdo. Abdo has filed claims for recording artists in the recording industry that has seen sales drop to $6.3 billion from $14.6 billon since 2009. Fortunately for the artists, their side includes heavyweights such as **Bob Dylan, Tom Petty, Loretta Lynn, Kris Kristofferson** and **Charlie Daniels**, who have resources to fight with the recording labels. The first recordings are from 1978, but with 1979 hits such as Eagles' The Long Run and Donna Summers Bad Girls, the battlefield will expand. ■

Entrepreneurs won on the legal battlefield when a federal court jury rejected **Mattel**'s claims that it owns the copyright to **Bratz** dolls. **MGA Entertainment**'s victory in the copyright right was awarded $88 million in damages. "If Mattel had won this lawsuit, MGA would have been wiped out, and that's what Mattel wanted to do," MGA attorney **Jennifer Keller** said. MGA regained control of the Bratz doll, which in 2001 came out to fight with Mattel's **Barbie** doll. Isaac Larian, MGA chief executive, questioned whether Bratz dolls would be able to regain its position prior to the lawsuit. "Mattel killed the Bratz brand. It is never going to be the same level as it was before," he said. Terming Mattel a "bully" and labeling itself as a "small-time entrepreneur" MGA denied Mattel's copyrights claims and countersued for misappropriation of trade secrets and unfair business practices. MGA claimed that Mattel engaged in corporate espionage at toy fairs and conspiracy to keep Bratz products off retail shelves. While Mattel managed a victory on the issue of whether MGA and Larian interfered with Mattel's contractual relations with the doll designer Cartier Bryant, the jury found that Mattel should have discovered the interference and despite having a window to make its claim while Bryant worked for Mattel. In winning a $100-million 2008 jury verdict, Mattel alleged that Bryant secretly took the Bratz doll to MGA while he was employed by Mattel. After developing the first-generation Bratz doll, MGA was enjoined from producing or marketing nearly all Bratz dolls that were substantially similar. After the Mattel verdict was overturned, and following a 3-month jury trial, Mattel was found to have acted willfully and maliciously in misappropriating MGA's trade secrets. The jury decision exposes Mattel to treble damages of the jury's award. ■

How much privacy do you surrender if you have a **smartphone**? What is the responsibility of the smartphone maker to protect your private information? Should smartphone users be worried?

iPhones and **iPads** collect location information on users. What other information do they collect? Does **Apple** & other cellular service providers reveal to its customers that they collect information and if so, the kind of information they collect? The tracking systems on the handheld computers track users' physical coordinates, which with the right motivation a hacker, suspicious spouse, or law enforcement agency can find without a warrant. The information is stored in the device but also in the computers of the service providers. Usually the

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argument is that the data is collected and stored to operate the device more smoothly and target advertising. The data cannot only tell where a user has been but also the user's inclination for purchases. Apple typically stores a year's worth of data including detail for a user's traveling itinerary. What is the risk that the database may be hacked? **Google**'s collection and retention practices are similar to Apple's. **Alex Levinson**, a security expert for Katana Forensics, works with law enforcement agencies to access location data. "Users still have to approve location access to any application and have the ability to instantly turn off location services to applications inside the settings menu on their device," said Levinson. But the data is now easier to find because of the way iPhone applications access the data. While researchers such as **Alasdair Allan** and **Pete Warden** raise concerns during technology conferences about privacy being surrendered by smartphone users, alarms are raised because the data collected and retained is often unencrypted making it attractive to hackers, snoopy spouses and law enforcement officials. ■

A female student sued the **University of Northern Iowa** after 3 hung juries in the criminal trial involving her assailant. Seeking damages for the loss of her access to an education at UNI, the former student also is seeking in the lawsuit filed in 2007 to order the university to reform policies on assault and harassment.

At the time of the assault by 2 football players, the plaintiff was an 18-year old freshman. Calling UNI a "culture where football recruits are more likely to show violence toward women" her attorney alleged in the civil lawsuit that the university was guilty of mistreating her and mismanaging its athletics department.

While denying the allegations, the Iowa Attorney General sought to obtain details of the woman's history on social media sites, requesting information from as far back as 2003. The AG also sought records about her employment as a dancer at a strip club, a copy of her personal journal, personal photos, records dealing with her mental health treatment, and documents regarding her father's death when she was a child. AG spokesperson defended the request for personal information about the woman's background saying 'the plaintiff must substantiate their claims for monetary damages." Geoff Greenwood defended the state's actions as "pretty standard" in this type case and "We're defending UNI and ultimately the state."

Former UNI football player **Baylen Laury** said he had consensual sex with the woman and arranged for his then roommate **Joseph R. Thomas III** to also have sex with the woman. Thomas pled guilty to third-degree sexual abuse and was a witness against Laury. Laury pleaded guilty to misdemeanor assault with intent to inflict serious injury after the third hung jury. The woman's suit alleged that most university administrators treated her with "great animosity" after the assault. The university sent her tuition bill, which was unpaid after she left school, to a collection agency. The lawsuit also alleged that the UNI dean of students told her she was disappointed "she didn't tough it out." ■

NBA AGENTS WORKING FOR THEIR CLIENTS:

What do Italy, Spain, Russia, Lithuania, Turkey, and China have in common? The National Basketball Association's lockout of its players has made international locations a boom for agents and teams looking for top NBA talent. While foreign teams often have limits on the number of USA players on a roster, they often provide a NBA player with an opportunity to continue playing with little commitment and risk. Deron Williams, point guard for the New Jersey Nets, Detroit Pistons' DaJuan Summers, Atlanta Hawks center Zaza Pachulia, Memphis Grizzlies forward Rudy Gay, Golden State Warriors guard Stephen Curry, and Toronto Raptors, Sony Weems, have agents considering opportunities if the NBA lockout continues into the NBA season. "From a functional standpoint, it might not be a situation that's beneficial to both sides," said agent Bernie Lee. Lee placed 19 clients with foreign teams last season. However, while money may be limited, the chance to continue to play, traveling, and getting paid may offer an attractive solution to not playing if the lockout continues. "In the eyes of coaches, general mangers and owners, European professional basket ball is not lesser or subservient to the NBA in any way, Lee said. "It's not easy, trust me," said Pachulia. "It's not always how good of a player you are. It's a different lifestyle, language, traveling, training camp. Everything is different." Counters Roger Montgomery, Weem's agent, "Where, when and how much?. It's not going to be a difficult transition for those who want to go overseas. The difficult part will be for those who don't really want to go but have determined the (NBA) season is going to be lost."

The sides do not appear to be close to ending their standoff.

Owners proposed, among other things, that total player compensation would never dip below $2 billion over the 10-life of the proposed deal being but the players consider that proposal to be unacceptable since it would be less than the more than $2.1 billion paid in salaries and benefits during the recent season. The owners also initially proposed that no contract could be fully guaranteed. Countered, Kevin Durant of the Oklahoma Thunder, "In this league, teams can easily just say, 'We don't want this guy on our team anymore.' I think the security of having that contract goes a long way because you're taking care of your family, you've got a lot of things you're doing, and this is your way of living." After heated discussion, the owners dropped the proposal.

The players declined to offer a new economic proposal after offering to reduce salaries by $500 million over five years.

The league and the players continue to negotiate. ■

RECENT CASE OF INTEREST

Prepared by the South Texas College of Law Students
South Texas College of Sports Law & Entertainment Society

U.S. SUPREME COURT FINDS VIDEO GAME STATUTE UNCONSTITUTIONAL

Recently, in an opinion written by Justice Scalia, the United States Supreme Court decided that a California statute's restriction on the sale of video games was an unconstitutional limitation of free speech. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

In 2005, California passed a statute which sought to prohibit the sale or rental of "violent video games" to minors. Cal. Civ. Code Ann. §§ 1746-1746.5 (West 2011). The statute prohibited games that gave players the option to kill, maim, dismember, or sexually assault the image of a human being if "a reasonable person, considering the game as a whole, would find [the game] appeals to a deviant or morbid interest of minors." Id. In response to the statute, an association that represented the video game and software industries sought and received an order enjoining enforcement of the prohibitive statute on the basis that it violated the First Amendment of the Constitution. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009) (affirming the district's order enjoining the enforcement of the statute).

Upon review, the Supreme Court first clarified that video games are protected by the First Amendment and reasoned that "like the protected books, plays, and movies that preceded them, video games communicate ideas." Brown, 131 S. Ct. at 2733. The Court noted that several limited exceptions, including obscenity, prohibit the government from restricting forms of expression based on their message, idea, content or subject matter. Id. However, the obscenity exception "does not cover whatever a legislature finds shocking, but only depictions of sexual conduct." Id. at 2734. Thus, the violent depictions that the statute intended to restrict were much broader than the scope of the obscenity exception. Id.

Because the California statute imposed a restriction on the content of a protected medium which did not properly fit into any exception, the Supreme Court applied the strict scrutiny test which requires that such a restriction be justified by a compelling state interest and be narrowly tailored to serve that interest. Id. at 2738.

In applying the strict scrutiny test, the Court first noted that California could not demonstrate a causal link between violent video games and harm to minors. Id. Despite several psychological studies indicated such a link, the Court found that these tests, at best, demonstrated a mere correlation between violent entertainment and real world effects, such as aggression. Id. at 2738-39.

The Court then explained that the statute was underinclusive in regard to its asserted goal of protecting children from violent depictions. Id. at 2740. Here, California was singling out sellers of video games, while not attempting in any way to limit the distribution of violent depictions in other traditional mediums. Id. The Court found that the video games' interactive nature, where the player participates in and conducts violent actions, did not differentiate them from other mediums because all literature is interactive, and that video game depictions were no more violent than those contained in established stories such as Grimm's Fairy Tales, The Odyssey, and The Divine Comedy. Id. at 2736-37. The Court also found the statute underinclusive in the sense that it could be defeated by a parent or guardian who merely consented to their minor playing the games. Id. at 2740. The Court wondered how these violent depictions could be such a serious social problem if California allowed a parent or guardian to simply bypass the restriction without even a simple verification requirement. Id.

Next, the Court questioned California's contention that the statute's restrictions furthered the substantial need of parents wishing to restrict their children's access to violent games. Id. The Court believed that the video game industry's voluntary rating system was an adequate device to alert parents to game content and noted that, according to the Federal Trade Commission, the rating system was ahead of both the music and film industry in restricting children's access to mature rated products at retail. Id. at 2741.

Finally, the Court found the California act was seriously overinclusive in that it abridged "the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime." Id. at 2742. Thus, in restricting access to minors of all parents and not just those parents who wanted protection, the California statute supported what the state thought all parents ought to want and not what they actually wanted. Id. at 2741.

Based on its analysis, the Supreme Court held that the California statute failed to meet the strict scrutiny test and thus was an unconstitutional limitation on free speech. Id. Although it sought to protect seemingly legitimate interests, the state failed to justify the need to restrict a minor's access to violent content in video games as opposed to similar content readily available and accessible through other mediums. Id.

By: Evan Howze, South Texas College of Law Student

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