



# Texas Entertainment and Sports Law Journal

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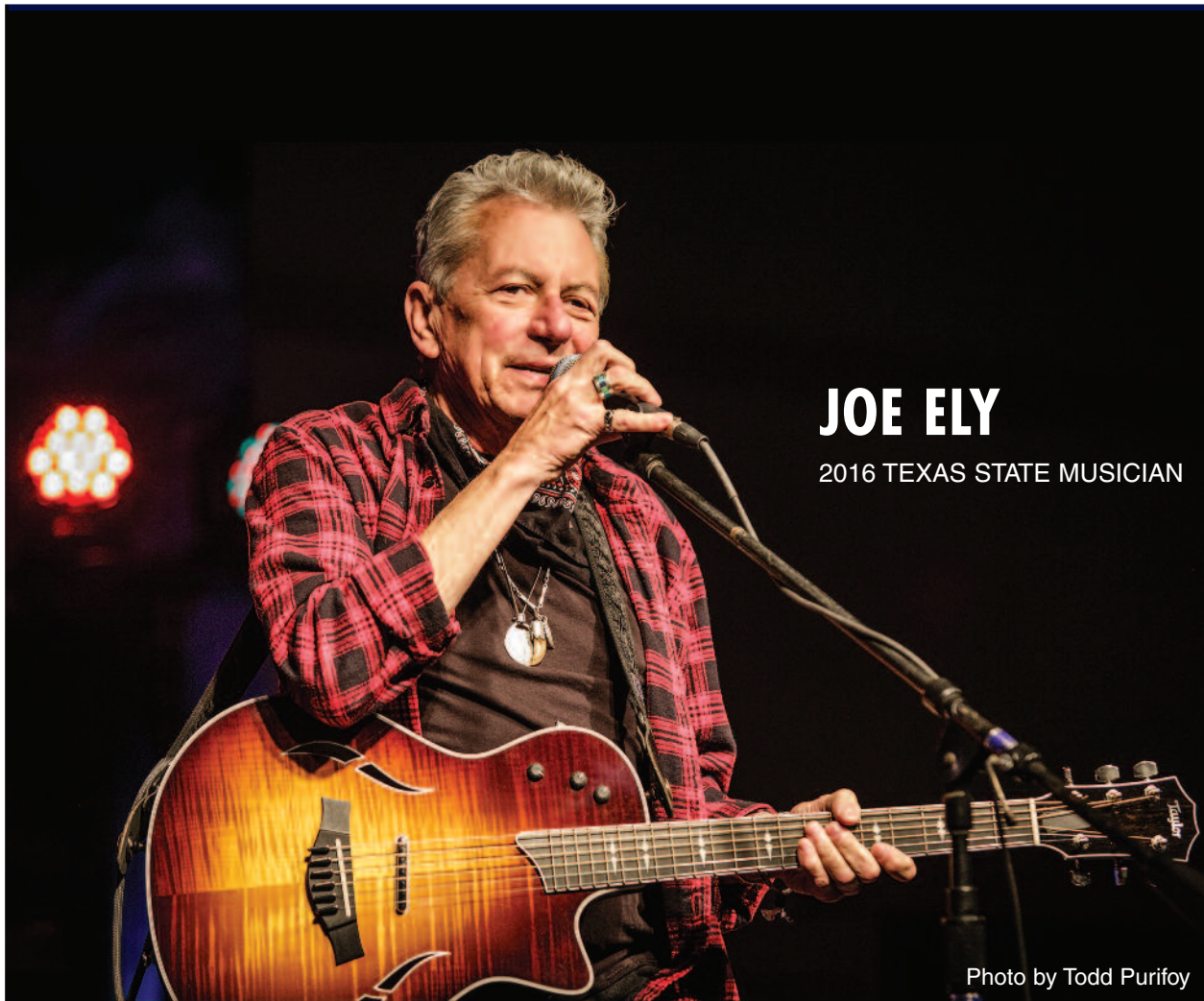
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State Bar of Texas  
Entertainment & Sports Law Section

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## JOE ELY

2016 TEXAS STATE MUSICIAN

Photo by Todd Purifoy

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**CHAIR'S LETTER****Greetings, TESLAW Members!**

Thank you to the State Bar of Texas and everyone who attended the 26th annual Entertainment Law Institute. It was a pleasure to meet so many of you face-to-face. Special thanks to Mike Tolleson whose tireless efforts over the years have kept ELI a not-to-be-missed CLE event in Texas. Congratulations again to Chris Castle for earning the Texas Star Award for his long-term artist advocacy work.



**Amy E. Mitchell**  
**Chair 2016-2017**

Looking ahead, I hope you will mark your calendars and join us this spring for our 7th annual TESLAW Mixer at SXSW. All section members are welcome to join us from 4-6 P.M. on Thursday, March 15, 2017 at Iron Cactus on Sixth Street to mix and mingle with other entertainment lawyers and industry professionals. Light refreshments and drinks will be provided. It's also an excellent opportunity to snag the latest TESLAW merchandise that Kevin Harrison has graciously lugged around for the last year or two.

If any of you are looking to get more involved in TESLAW, please don't hesitate to reach out to me or any of the Council members. There are numerous committee opportunities such as membership, social media, legislative (state & federal), merchandise, and more. We are also still actively looking for a web designer/programmer to refresh our website (teslaw.org) and add a shopping cart as well as to restore the attorney search functionality that was lost to a bad Wordpress update/plugin.

Finally, don't forget that TESLAW is always looking for new articles for the Journal and content for the quarterly e-newsletter, TESLAW Tidbits. If you have practice documents or case notes to share, or if you'd like to be considered for an attorney spotlight, please let us know!

I look forward to serving as your Chair and continuing to help raise the profile of Texas entertainment lawyers!

All the best,  
Amy E. Mitchell  
Chair 2016-2017

**TESLAW.ORG**

The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, book publishing, and collegiate and professional sports. The TESLAW website at [www.teslaw.org](http://www.teslaw.org) offers attorneys a chance to be listed with their focus area of practice in a publicly searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment and sports law. Join today to be part of a collegial organization growing the practice of entertainment and sports law in Texas; for new bar members, the first year's dues are free.

## EDITOR'S LETTER

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***Joel Timmer, Editor***

Welcome to the Fall 2016 issue of the Texas Entertainment and Sports Law Journal. We are happy to have two entertaining and informative pieces as our lead items this issue. First, we have an article from Kevin Harrison explaining the complicated history of the ownership of the copyright in Superman. Second, we have an excerpt from a book by Mike Farris—“A Death in the Islands”—covering the last trial of Clarence Darrow. (The book is currently available for purchase from booksellers everywhere.) We also have an overview of the Entertainment and Sports Law Section’s CLE sessions at the most recent Texas State Bar meeting, as well as a listing of recent publications of interest to entertainment and sports law practitioners.

This issue would not be possible without the assistance of many people. First and foremost, I want to thank our contributors. I also would like to thank the journal staff, including our student editorial assistants Kornel Rady and Megan Tholen. Finally I would like to thank those at the Texas State Bar, particularly Patsy Mallia, who put all of this together in its final form.

Happy reading!

Joel Timmer  
Journal Editor

# Men of Steal: The Complicated Question of Who Owns Superman

By Kevin Harrison



## Introduction

The law is a harsh mistress . . . or perhaps, as Mr. Bumble said in *Oliver Twist*, “the law is a ass . . . .” But the law is also the truth in an empirical way that extends beyond mere facts, figures, and memories. The law shapes truth unlike few other forces. A mere comma, witness, or abstract notion can forever determine whether a person is a murderer . . . or wasn’t even in the same state as a victim when a crime occurred.

Res judicata exists to settle issues in litigation. Without it, some parties could continue their suits endlessly, re-litigating matters until one or both were bankrupt, and the underlying disputes irrelevant. The problem with res judicata is that it settles not only the issue, but too often the truth itself.

“It came out at trial that . . .” is played as a terse, definitive reality, divorced from the color and context of proceedings that lawyers intentionally craft far more around the stories they wish to tell, rather than the ones that actually happened. When the falsity of settled issues is revealed, it generally happens around high-profile criminal trials in which an incompetent police force and vengeful DA pinned a flimsy case on an easy suspect, sending an

innocent man to death row only to release him seconds before his execution when the real killer is revealed. This scenario makes for far better television than demonstrating that 80 years ago two young men signed away their copyright on a contract promising \$130—a contract that was breached by a party that never paid that consideration . . . even though the young men’s creation is now worth billions.

Copyright is a strange, nuanced devil to the majority of the legal field. If one wants to confuse a roomful of attorneys, they need only explain there are always at least two copyrights in a recorded song—often owned and controlled by separate parties—and that the written composition is invariably worth more than the sound recording itself.

So when Superman’s creators fought for the return of their copyright in 1947 and 1973, the courts punted—drafting decisions that protected the status quo, ignoring the intrinsic intellectual property issues in expectation that a higher, more knowledgeable court would ultimately rule on the dispute.

Those early courts got it wrong, and Superman’s virtually penniless creators were barely able to afford competent representation, let alone an adequate appeal in the face of the mammoth company—indeed, an entire industry—their creation had spawned. Ultimately, their claims were barred, not by truth and justice, but by magistrates who initially failed to grasp the issues in front of them, and ultimately by res judicata.

What the courts decided was that Superman belonged to Detective Comics, Inc. (“DC”)—and its successors National Comics Publications, National Periodical Publications, and Warner Brothers—from 1938 until 1999 when the Siegel family received a partial copyright reversion, but the reality is stranger than litigation: DC legally owned Superman from 1948 until 1966. Before or after that is a whirlwind of contracts, litigation, and a judicially-created history that has little to do with what actually happened. In the face of judicial opinions and res judicata, the reality is almost unbelievable, even in the funny papers.

## A Brief History of Copyright Laws

At its core, copyright defines who has the right to copy an original, tangible expression, who owns that expression, and for how long. Legislatively created by the *Statute of Anne*, copyright has a more than 400-year history during which it has been repeatedly altered, updated, and complicated by further legislation. Under modern copyright law, a single work can often contain literally thousands of individual, separately owned copyrights, each of which might have different rights under multiple copyright acts depending on the nature and use of the underlying work. A right that began merely to protect the author of a book has morphed into the multi-headed, multimedia beast that we know today.

**Kevin Harrison** is an entertainment and small business attorney who lives and works in Denton, Texas.

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## Men of Steel: The Complicated Question of Who Owns Superman

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Passed into law on April 10, 1710, the *Statute of Anne* was the first act to grant creators the sole right to print copies of their own works. In other words, it granted these early creators the world's first exclusive, individual "right to copy." The stated purpose of the Statute was the "encouragement of learning," as well as to increase the liberty of creators who had too often seen ruin at the hands of publishers.<sup>1</sup> Prior to the *Statute*, the right to print could only be granted by a royal decree to printers. Since authors did not own or control their works, unscrupulous (or even scrupulous) publishers had free reign to use those works without compensation or permission of the authors.<sup>2</sup> The *Statute* granted a transferable copyright to authors for a period of fourteen years. If the author was still alive at the conclusion of that period, the work "return[ed] to the authors thereof . . . for another term of fourteen years."<sup>3</sup>

The concepts of an exclusive copyright and renewal period entered American law with the *Copyright Act of 1790*, which granted to creators of any "map[s], chart[s], book or books" a fourteen year copyright, followed by a reversion with a second fourteen year term to any creator(s), "his or their executors, administrators or assigns, for the further term of fourteen years" provided that the work was re-registered and published "within six months before the expiration of the first term of fourteen years."<sup>4</sup>

The *Copyright Act of 1831* extended the original term of copyright to 28 years, and the *Copyright Act of 1909* applied this 28-year term to copyright renewals.<sup>5</sup> The *1909 Act* also saw the first bifurcation of renewal rights. Where a work was created as a work-for-hire for a proprietor, the proprietor now had the exclusive right to renew the work. Where the copyright was originally owned by the creator, that work would revert to the creator when a renewal was made "within one year prior to the expiration of the original term."<sup>6</sup>

The *Copyright Act of 1976* extended the term of copyrights created after January 1, 1978, to the life of the author plus 50 years, and it dispensed with the renewal period for new works.<sup>7</sup> The *1976 Act* also allowed creators of works still in their first or renewal term which were published prior to 1978 to terminate any transfer of copyright 56 years after the date the copyright was first secured, so long as those works were not works for hire. The creator would then have a five-year window to do so. The *1976 Act* further required that creators serve notice of termination to the copyright owner between two and ten years in advance of the actual termination. Where the creator was deceased, this right extended to the author's widow or widower, children, or grandchildren.<sup>8</sup>

The *Sonny Bono Copyright Term Extension Act of 1998* extended copyrights to works created on or after January 1, 1978, to life of the author plus 70 years, and extended any copyright created before 1978 and which was still in its original or renewal term to "95 years from the date copyright was originally secured."<sup>9</sup> This *1998 Act* also allowed executors of estates to terminate and renew copyrights, and created an additional termination period between the 75th and 80th year following the initial publication of the renewed work, provided the owner, their heirs, or the executor served a notice of termination to the copyright owner between two and ten years in advance of the actual termination.<sup>10</sup>

Superman was first published in *Action Comics #1*, released April 18, 1938, and has been in continuous monthly—often weekly or even daily—publication ever since. The copyrights involved in Superman's creation weave a complex web across the 1909, 1976, and 1998 Acts, carrying with them a bevy of rights, agreements, and litigation.

### The Birth of Superman

Cleveland, summer 1933. Eighteen-year-old Jerry Siegel lies sleepless in bed, haunted by visions of a hero capable of wondrous feats. At dawn, Jerry runs twelve blocks from his family's home to that of his friend, Joe Shuster. That morning, the two bring to life a third man—a fictional hero destined to become one of the seminal icons of American culture . . . Superman, the Man of Steel.<sup>11</sup>

With Jerry writing and Joe drawing a series of comic strips, the two submitted Superman to virtually every comic strip syndicate in the world, and were universally rejected for their efforts.<sup>12</sup> These early publishers did not seem to understand the variety and universality of the themes Superman embodied, and they could not have foreseen that he would be the prototype for nearly every superhero to follow.

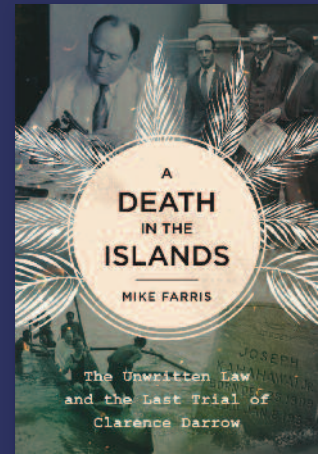
### Detective Comics, Inc.

In 1935, Jerry and Joe submitted their Superman comic strips to the Nicholson Publishing Company. It was rejected but they began submitting comic book stories to the Nicholson Publishing Company at a rate of \$9 per page.<sup>13</sup> In 1937, Nicholson went into receivership, and a group of investors formed Detective Comics, Inc. to purchase several of Nicholson's properties.<sup>14</sup> In December 1937, DC presented Jerry and Joe with an employment agreement and a raise to \$10 per page. The employment

## Book Excerpt: A Death in the Islands

By Mike Farris

In September of 1931, Thalia Massie, a young naval lieutenant's wife, claims to have been raped by five Hawaiian men in Honolulu. Following a hung jury in the rape trial, Thalia's mother, socialite Grace Fortescue, and husband, along with two sailors, kidnap one of the accused in an attempt to coerce a confession. When they are caught after killing him and trying to dump his body in the ocean, Mrs. Fortescue's society friends raise enough money to hire seventy-four-year-old Clarence Darrow out of retirement to defend the vigilante killers. The result is an epic courtroom battle between Darrow and the Territory of Hawaii's top prosecutor, John C. Kelley, in a case that threatens to touch off a race war in Hawaii and results in one of the greatest miscarriages of justice in American history.



### Chapter Twenty-Nine: Closing Arguments

“Three able men and a cold calculating woman . . .”

The night before closing arguments were to begin on the morning of April 26, John Kelley sat alone in the courtroom. Spread before him on the prosecutor's table was the physical evidence from the case: Joe Kahahawai's bloody clothes; the guns; the spent cartridge and casing; the rope that had bound Joe's body. The people of the Territory of Hawaii had entrusted him with a solemn job: to obtain justice for even the least of them, no matter the odds or the opposition, and no matter how much money, prestige, and influence were aligned against him. He felt for Thalia Massie. If indeed she had been raped, she deserved justice. But even if Joe Kahahawai had been guilty of her rape, justice was not a right that belonged solely to the privileged, and that excused them if they took the law into their own hands to mete out retribution as they saw fit. And if Joe Kahahawai was innocent of the charge of rape, as many believed, then his killing had been a massive *injustice*.

Kelley felt a heavy burden weigh on his heart as he held Joe's shirt and put his index finger through the bullet hole.

God! He needed a drink.

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Clarence Darrow and George Leisure sat at a table in Darrow's hotel suite, with the remnants of a half-eaten meal on a room service tray in front of them.

“It's a very simple matter, George,” Darrow said. “We must convince this jury to apply the unwritten law.”

“Unwritten law?”

“It's indelibly stamped in men's hearts, and has been since the beginning of time. A man has every right to avenge an attack on his wife. And that's all that happened here. Tommie Massie simply avenged his wife, who had been raped.”



**Mike Farris** is Of Counsel with the Dallas firm of Vincent Lopez Serafino Jenevein, P.C. He is also a published author and literary agent as well as chair-elect of the State Bar of Texas Entertainment and Sports Law Section.

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**Book Excerpt: A Death in the Islands**

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Leisure was troubled by what Darrow said, espousing justification for murder. Troubled, because it was hard to believe these words were coming from the same man who, in arguing for the lives of thrill killers Leopold and Loeb, had argued, “I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.”

“If she truly was raped,” Leisure said.

“It is enough that he believed she was raped.”

“And if she truly was raped by Joe Kahahawai.”

Darrow remained silent.

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In both criminal and civil cases, the party with the burden of proof is permitted to “open and close.” In criminal cases, that means that the prosecution goes first in presenting its case, and in making closing argument to the jury. The defense goes next, and the prosecution is then given one last crack at the jury, to rebut whatever the defense’s case or argument might have been.

In a little bit of a departure from the norm, the first day of argument in the Massie case was devoted to the understudies. Barry Ulrich commenced for the prosecution, followed by George Leisure, who made the “opening” closing remarks. Clarence Darrow would speak the next day, with the “closing” closing remarks for the defense, and then John Kelley would finish. No one really paid much attention to the words of Ulrich and Leisure. Everyone, including a nationwide radio audience, was waiting for the two heavyweights the following day.

The heavyweights did not disappoint. Darrow took to the floor first, on the morning of April 27. He paced in front of the jury box and made eye contact, one by one, with all of the jurors.

“Gentlemen,” he said, “this case illustrates the working of human destiny more than any other case I have handled. It illustrates the effect of sorrow and mishap on human minds and lives, and shows us how weak and powerless human beings are in the hands of relentless powers. Eight months ago Mrs. Fortescue was in Washington, respected and known like any other woman. Eight months ago, Lieutenant Massie worked himself up to the rank of lieutenant in the navy, respected, courageous, and intelligent. His young wife, handsome and attractive, was known and respected and admired by the community.

“In that short space of time they are in a criminal court and the jury asked to send them to prison for life. What has happened is a long series of events, beginning at a certain time, ending we don’t know where. A whole family—their life, future, name—bound up in a criminal act committed by someone else in which they had no part.”

Darrow had the jury’s attention. Having planted the seeds of insanity at trial, Darrow watered them as he continued his argument.

“We contend that for months Massie’s mind had been affected by all that was borne upon him: grief, sorrow, trouble, day after day, week after week, and month after month. What do you think would have happened to any one of you under the same condition? We measure other people by ourselves. We place ourselves in this place and say, ‘How would we have acted?’ We have no further way of telling, except perhaps from the conditions of the life in which we live.”

Another pause, to ensure that his audience of twelve was listening. “Is there a more terrible story anywhere in literature? I don’t know whether there is—or who it was—or where I can find that sad tale but right here. You and all the other people in the city have been chosen to take care of their fate. I hope you will in kindness and humanity and understanding—no one else but you can do this.”

He moved from topic to topic, touching on insanity, appealing to sympathy for Thalia Massie, and sparking outrage at vicious rumors that surrounded her. “There have been people who spread around in this community stories I don’t believe true. They concocted these terrible stories, and what effect did they have on Massie? May I ask what effect they would have had on you and how you would have stood them? Massie attended to his days’ duties as best he could. He went back and forth, nursing his wife, working all day and attending her at night for weeks. It was all that any husband could do, or any man could do. He lost sleep. He lost courage. He lost hope. He was distraught. And all this load was on his shoulders.

“Any cause for it? Our insane institutions are filled with men and women who had less cause for insanity than he had. Everyone knows it. The mind isn’t too easy to understand at the best. But what happens to the human mind? It does one thing with one person and another thing with another. You know what it did to Massie’s. Do you think he is responsible, or has been, from that terrible night?”

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## Overview of Panel Presentations from TESLAW at the 2016 State Bar of Texas Annual Meeting

By Dena Weaver



TESLAW hosted another stellar series of panels focused on ethical issues in reality television, music, books, and sports at this year's State Bar of Texas Annual Meeting held June 16-17 at the Fort Worth Convention Center. Each panel consisted of either industry professionals or reality television contestants, along with David A. Grenardo, an ethics specialist and professor at St. Mary's School of Law. Mr. Grenardo shed light on the ethical implications of the personal experiences of the other panelists.

### Ethics, Music, and Television: There's a Song in My Heart

Mr. Grenardo led a lively discussion of behind the scenes action with Luke Wade, a top eight contestant on Season 7 of *The Voice*, and Victor Jih, an attorney at Irell & Manella LLP in California and the winner of Season 14 of *The Amazing Race*. Mr. Wade revealed that he was contacted by a casting agent from *The Voice* and asked to audition. Upon making it to the California auditions, contracts were signed within a very short time. The contestants were split into two groups, and each group had an attorney assigned to represent them. Mr. Grenardo explained the potential ethical concerns raised by joint representation and the fact that the show hired the attorneys to negotiate the contract for each group.

In contrast, Victor Jih did not even read his complete contract with *The Amazing Race*. Mr. Jih pointed out that there is no shortage of people vying to be contestants on the show, and attempting to negotiate likely

would result in his being replaced by other people. Mr. Jih focused on the confidentiality clause of the agreement and the various ways he found to notify his clients that he would be unavailable for 30-40 days. Mr. Grenardo pointed out and discussed various provisions in the Texas Disciplinary Rules of Professional Conduct that would be implicated in this situation and possible solutions.

### Ethics, Books, and What They Lead To: Worth the Paper It's Printed On

The second panel featured bestselling author, William Bernhardt, known for the "Ben Kincaid" series as well as other works. The panel also included Mike Farris, an attorney as well as the author of many successful books. Both Mr. Bernhardt and Mr. Farris discussed the difficulties in writing both fiction and non-fiction books. Writing based on real experiences and real cases, even if fictionalized, is wrought with potential risks. As Mr. Grenardo and the rest of the panel pointed out, the duty of confidentiality is broader than the attorney-client privilege and makes writing a story based on one's real cases difficult at best. The safest way is to not include any real-life facts about any person. However, no matter how hard one may try, coincidences still can occur, and someone will be convinced that the character is based on him.

In true non-fiction books, using a real client requires informed consent in order to avoid lawsuits. The panel engaged in a brisk discussion on the need to fact check and ensure everything is accurate, even if the book does not relate to the practice of law. As Mr. Grenardo explained, one could lose his or her bar card if a book is published that has not been carefully researched.

From a practical perspective, Mr. Bernhardt and Mr. Farris concluded with simple advice about writing: write every day, edit yourself, and use an outside editor when you feel the book is ready. Finally, stay away from writing about real people in order to avoid a number of ethical issues.

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**Entertainment & Sports Legislative Update**

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**Ethics and Sports: Stepping Onto the Field**

Mr. Christian Dennie of Barlow Garsek & Simon, LLP joined Mr. Grenardo as moderator of the last panel of the day. Other panelists were Jamey Newberg, author of *The Newberg Report* from Vincent Serafino Geary Waddell Jenevein P.C., and Brad Sham, known as the “Voice of the Dallas Cowboys”.

The panel focused on the allegations and issues of the administration of Title IX at Baylor University. A stimulating debate ensued about Title IX and what, if any, changes need to be made in light of the recent incidents at Baylor. The audience actively participated in the debate from the perspective of how women were and are generally treated when making allegations against male athletes. The panel touched upon the alleged actions or lack of actions by local police and whether one could consider them impartial.

Mr. Grenardo opined on the various ethical issues brought to light by the events at Baylor University, along with the ethical dilemmas faced by self-administering Title IX.

The panel compared and contrasted the Baylor incident with the scandal that rocked the Duke lacrosse team years ago. In that situation, players were falsely accused of assaulting a young woman. The prosecuting attorney repeatedly reported incorrect information and engaged in other behavior that resulted in disbarment. Though the allegations ultimately proved to be untrue, the reputations of the team and players were tarnished. The level of engagement between the audience and this panel illustrated how controversial the topic of Title IX is, and that there are no easy answers to the issues involved.

# Join

## TESLAW

The Texas Entertainment and Sports Law Section is a great way to network and commiserate. Members receive the Journal, access to the TESLAW listserve, invites to Section events and of course the right to purchase a Rock-Star Attorney t-shirt! Plus, TESLAW is always looking for those who want to be involved and become Section leaders.

To Join TESLAW go to [www.texasbar.com](http://www.texasbar.com), click on “About Texas Bar,” then “Sections and Divisions,” then “Sections,” or just click on this link:

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## RECENT PUBLICATIONS

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Compiled by Kornel Rady

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### Entertainment Bibliography:

#### Copyright

Anthony C. Eichler, *"Owning" What You "Buy": How iTunes Uses Federal Copyright Law to Limit Inheritability of Content, and the Need to Expand the First Sale Doctrine to Include Digital Assets*, 16 HOUS. BUS. & TAX L. J. 208 (2016).

Brian L. Frye, *Copyright in Pantomime*, 34 CARDOZO ARTS & ENT. L.J. 307 (2016).

Jeremy Aregood, *Blurring the Line: An Examination of Technological Fact-Finding in Music Copyright Law*, 16 J. MARSHALL REV. INTELL. PROP. L. 115 (2016).

Justin Hughes, *Motion Pictures, Markets, and Copylocks*, 23 GEO. MASON L. REV. 941 (2016).

Paige Clark, *The Invisible Defense Against Music Piracy*, 15 J. MARSHALL REV. INTELL. PROP. L. 297 (2016).

Stasha Loeza, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes*, 31 BERKELEY TECH. L.J. 725 (2016).

#### Labor

Vanessa Padula, *Whitewashed Runways: Employment Discrimination in the Fashion Modeling Industry*, 17 BERKELEY J. AFR.-AM. L. & POLY 117 (2016).

#### Music

Caitlin Kowalke, *Eli Winner-Survey Says: "Blurred Line" Call for Reliable Aid in the Adjudication of Composition Infringement Actions*, ENT. & SPORTS LAW., Summer 2016.

Danielle Ely, *Don't Believe Me Just Watch: A 100% Licensing System Would Stifle Collaboration and Creativity Among Songwriters*, ENT. & SPORTS LAW., Summer 2016.

John Baldivia, *A Stream of Hope: Why Music Streaming Licenses Will Turn Around China's Music Industry in Spite of the Rampant Piracy of Music*, 22 SW. J. INT'L L. 163 (2016).

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#### Photography

James E. Bibart, *Metadata in Digital Photography: The Need for Protection and Production of This Silent Witness*, 44 CAP. U. L. REV. 789 (2016).

#### Television

Inna Kaminer, *Set the Statutes Straight: Amending the Lanham Act to Dispel the Confusion Regarding Reverse Confusion*, 36 LOY. L.A. ENT. L. REV. 71 (2016).

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agreement transferred to DC, Inc., all rights in the Siegel and Shuster strips “The Spy” and “Slam Bradley,” and in “all rights to any materials produced by [them] under it and prohibited [them] upon termination of the agreement from in any way using any of the characters, plots or materials so produced.” The agreement also gave DC a 60-day right of first refusal on any new work Jerry and Joe produced.<sup>15</sup>

Prior to this agreement, however, Siegel and Shuster submitted their Superman strips to DC, but DC did not review these strips until after the employment agreement was signed. In 1938, DC discovered the Superman strips, and requested Jerry and Joe expand them into a 13-page feature for publication in a new comic book, *Action Comics*.<sup>16</sup> For the young creators, the deal was a dream come true, and America had its first true costumed, super-powered superhero.

The Superman comic strips were pasted and expanded into thirteen comic book pages, and DC mailed the two a check for \$130 at their standard rate of \$10 per page.<sup>17</sup> The check itemizes this \$130 as “Superman,” and was accompanied by a contract dated March 1, 1938, that read<sup>18</sup>:

I, the undersigned, am an artist or author and have performed work for strip entitled SUPERMAN.

In consideration of \$130.00 agreed to be paid me by you, I hereby sell and transfer such work and strip, all good will attached thereto and exclusive right to the use of the characters and story, continuity and title of strip contained therein, to you and your assigns to have and hold forever and to be your exclusive property and I agree not to employ said characters by their names contained therein or under any other names at any time hereafter to any other person firm or corporation, or permit the use thereof by said other parties without obtaining your written consent therefor. The intent hereof is to give you exclusive right to use and acknowledge that you own said characters or story and the use thereof, exclusively. I have received the above sum of money.<sup>19</sup>

Jerry and Joe signed the agreement and returned it on March 3, 1938.<sup>20</sup> The first issue of *Action Comics*, which featured Superman on the cover, sold an unprecedented half million copies. Superman appeared on the cover lifting a car over his head and smashing it into a boulder. *Action Comics* continued selling at unprecedented numbers. A survey of newspaper vendors revealed that children were asking for “the book with Superman in it.”<sup>21</sup>

In 1938, DC signed Jerry and Joe to a five-year contract with a five-year renewal option. This agreement gave DC a six-week right of first refusal for any stories and characters submitted to them. The agreement did not purport to transfer rights to Superman, but stipulated that DC was “the exclusive owners of comic strips known by the titles ‘Superman’ . . . , and to the rights to publish comics carrying said titles and characters contained therein, and continuity thereof.”<sup>22</sup>

In 1939, this agreement was further amended. The amendment increased pay and royalty rates for Jerry and Joe, and once again stipulated that “[W]e, Detective Comics, Inc. are the sole and exclusive owner, of the comic strip entitled SUPERMAN . . . . We have all right of copyright and all rights to secure copyright registration in respect of all such forms of reproduction either in our own names or others at our exclusive option.”<sup>23</sup>

By 1941, *Action Comics* sold over 1 million copies monthly, and Superman had given birth to the superhero tradition in comic books, spawning dozens of imitators. Soon, Superman was featured in three comic books, starred in a thrice-weekly radio show, and appeared in animated short films, daily comic strips, and on countless toys and advertisements.<sup>24</sup>

However, there was tension between the creators and DC almost from the very beginning. Siegel and Shuster felt they’d had their creation stolen from them, and they were forced to watch others make millions from Superman while they found themselves punished for requesting a simple raise. DC dismissed them as inexperienced young men who “grossly exaggerated the importance of Superman.”<sup>25</sup>

It is estimated that between 1938 and 1947, Jerry and Joe made \$400,000—the equivalent of \$4–6 million in 2016—which was split between them, five ghost artists, and rental on a tiny Cleveland studio. Meanwhile, DC income from Superman from 1940–1941 is estimated at over \$1.5 million—approximately \$25.8 million in 2016.<sup>26</sup> Despite this, when Jerry and Joe inquired about their unpaid 1940 royalties, DC responded with a letter claiming the company had actually lost money on Superman in 1940, but out of appreciation for “you boys” DC enclosed a check for \$500.<sup>27</sup>

In both 1938 and 1940, Jerry submitted a series of Superboy stories featuring the adventures of Superman’s childhood. DC did not respond to either pitch, and its right of first refusal lapsed. Nevertheless, in 1945 DC began publishing its own Superboy stories beginning in *More Fun Comics* #101.<sup>28</sup>

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### The 1947 Litigation

In 1947, Jerry and Joe took DC to court in a failed attempt to regain the rights to Superman and Superboy, enjoin DC from further publishing Superman, and recover unpaid royalties. The case was filed in the Supreme Court of the State of New York, in Westchester County with Justice J. Addison Young presiding. Jerry and Joe argued that there was no consideration for the March 1, 1938 agreement transferring their rights in Superman to DC, that their pay and royalties had been fraudulently induced by DC's insistence that it owned Superman, and that Superboy was an unauthorized character which was the property of Jerry Siegel.<sup>29</sup>

Justice Young found that the \$130 check was in consideration for the 13-page story that had already been completed, and remained insufficient consideration for the transfer in the Superman character. However, the Court found consideration for the transfer because "the plaintiffs desire to see Superman in print and the realization of that desire by DC's acceptance of the strip for publication and actually publishing it were the most vital elements or consideration supporting the instrument dated March 1st, 1938."<sup>30</sup>

Justice Young further found that Superboy was a distinctly separate character from Superman and was owned by Jerry Siegel, as "DETECTIVE COMICS, INC. did not within six weeks after the submission of [Jerry's twice-submitted] script or scenario indicate its election to publish the said comic strip SUPERBOY."<sup>31</sup> Justice Young also ordered an accounting of Jerry and Joe's royalties.<sup>32</sup>

DC settled in a stipulation which paid Jerry and Joe \$94,000 in exchange for their recognition that DC owned all rights to Superman and Superboy.<sup>33</sup> On May 21, 1948, a final judgment was entered which reflected the stipulation, and declared DC the exclusive owner of Superman and Superboy. The judgment also enjoined Jerry and Joe from using the terms "Superman," an imitation of "Superman," or the word "Super" to identify future works.<sup>34</sup>

In 1948, Jerry and Joe's contract with DC expired, and DC chose not to renew it. Still young men, Superman's creators found themselves unemployed.<sup>35</sup>

### The 1969–1974 Litigation

Jerry and Joe went on to collaborate on several short-lived comic books, but Joe's eyesight was failing, and both were embittered by their treatment at the hands of DC. Nevertheless, the pair took anonymous staff jobs at DC, Inc., in 1957 with the caveat that they were no longer allowed to sign their work.<sup>36</sup>

These jobs were terminated in 1965 after Jerry and Joe filed a copyright renewal on Superman in compliance with the *Copyright Act of 1909*. They received a termination and reversion of the copyright in *Action Comics* #1. Nevertheless, Jerry and Joe were unable to use their Superman copyright as the 1948 judgment still enjoined them from using the terms "Superman," an imitation of "Superman," or "Super" to identify future works.<sup>37</sup> Further, as Superman daily strips and monthly comic books became available for renewal, Jerry and Joe found themselves in a daily race with DC to file renewals for each new work.<sup>38</sup>

Jerry Siegel and Joe Shuster filed suit against DC in 1969 seeking to enjoin DC from publishing Superman, force the disgorgement of all infringing income derived from Superman, a declaration that Siegel and Shuster were the sole owners of Superman, and that Siegel and Shuster were no longer enjoined from using the terms "Superman," an imitation of "Superman," or the word "Super" to identify their future works.<sup>39</sup>

DC won after the court granted its motion for summary judgment. The District Court for the Southern District of New York wrote that section 2 of the 1937 employment contract stated Jerry and Joe would provide exclusive services producing "Slam Bradley" and "The Spy" and "all of these products and work done by said Employee for said Employer during said period of employment, shall be and become the sole and exclusive property of the Employer." Section 4 of the agreement provided that "new or additional features" must be submitted to DC that would have a 60-day option to accept them.<sup>40</sup>

The District Court found that Superman was "a 'work for hire' within the meaning of the *Copyright Act*, 17 U.S.C. § 26." Citing *Picture Music, Inc. v. Bourne*, the court wrote that Superman sprung from an employment relationship which included "the payment of wages or other remuneration, the 'right of the employer to direct and supervise the manner in which the work is performed,' and the 'existence of an express contract for hire, especially one calling for an author to devote his exclusive artistic services to his employer.'"<sup>41</sup> The court stated the 1937 employment contract referenced features "Slam Bradley" and "The Spy" and stated Jerry and Joe would "give their exclusive services as artists" to produce these features and that "any new and additional features which Employees produce for use in a comic magazine are to be first submitted to Employer, who reserves the right to accept or reject same within a period of Sixty days"<sup>42</sup>

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The court concluded that in this instance “the employer supervised and directed the work of plaintiffs in connection with Superman,” that a work for hire relationship exists if done “at the instance” of one who commissioned the work, and that prior to DC’s request, the Superman concept “consisted of ‘a few panels suitable for newspaper syndication’, and that the strip was suitable for magazine publication only after plaintiffs ‘resubmitted such revised and expanded material’ to Detective.”<sup>43</sup>

Curiously, the District Court determined the “Westchester court found that the March, 1938 release represented an exercise of that option for the Superman strip. The release transferred ‘such work and strip, all good will attached thereto and exclusive right to the use of the characters and the story, continuity and title of [the] strip . . . to [Detective] and [its] assigns to have and to hold forever and to be [its] exclusive property.’”<sup>44</sup>

Finally, the court denied that Jerry and Joe had any rights to a renewal because, “Detective was staffed by thoroughly experienced businessmen who surely would have explicitly referred to the renewal term in the various agreements between the parties had it actually been bargained for.”<sup>45</sup> In other words, since the right of renewal was never explicitly retained, the court determined it was therefore transferred to DC.

### You Will Believe a Man Can Fly

In 1975, Warner Communications—which then owned DC Comics—announced the production of a \$55 million dollar Superman movie. Jerry Siegel sent out a press release detailing his and Joe’s treatment at the hands of DC, calling for a boycott of the movie. Eventually, the story was reported in *The New York Times*, and fearing a boycott, DC pledged to pay the two an annual stipend of \$20,000 (reportedly raised to over \$100,000 by the time they passed away), provide health insurance for them and Jerry’s spouse, and henceforth credit Jerry and Joe as Superman’s creators in every Superman story.<sup>46</sup>

In the 1990s, Jerry and Joe died, survived by their creation, but still largely unknown and unappreciated. However, the *1976 Copyright Act* made the Siegel family eligible to file a termination of their half of DC’s Superman copyright between April 18, 1994 and April 18, 1999.<sup>47</sup> On April 3, 1997, Joanne Siegel and Laura Siegel Larson notified DC Comics of their right to terminate under the *1976 Act*, and this termination became effective on April 16, 1999.<sup>48</sup> Although an earlier court had found that Superman was the result of a work for hire, and the reversion rights in the *1976 Copyright Act* specifically did not apply to works for hire, a 2009 Court determined that Superman was not a work for hire (discussed in more detail below), allowing the Siegel heirs to receive their half of the Superman copyright.<sup>49</sup>

Likewise, under the *1998 Copyright Act*, Joe Shuster’s executor was finally able to terminate DC’s remaining Superman copyright between 2013 and 2018, with a termination notice served to DC Comics between 2003 and 2016.<sup>50</sup> On November 7, 2003, Joe Shuster’s nephew, Mark Warren Peavy, served DC Comics with a notice of termination. However, the Central District of California denied this termination as void under a 1992 agreement between DC Comics and Joe’s sister, Jean Peavy, which prevented all future terminations/reversions by her or her heirs.<sup>51</sup>

The relationship between the creators’ families and DC remains contentious. Since 2001, DC has consolidated all control over the right to use Superman that has resulted in six rounds of litigation between 2004 and 2016. The one thing that is certain is that the copyright to the first issue of *Action Comics* is set to expire on April 18, 2033, 95 years after it was first published. On that day—and absent some additional extension to copyright terms—the Superman that appeared in *Action Comics #1* will enter the public domain, along with his super strength, super speed, secret identity, 1938 costume, Krypton, Lois Lane, and Metropolis.

### Superman Was Not a Work For Hire

In 1999, the U.S. Copyright Office granted the Siegel family a copyright termination and reversion under *17 U.S.C. §304(c)*, which allows for termination and reversion to the creator of any copyright created prior to January 1, 1978, at the end of its first or second term, *unless that copyright is in a work made for hire.*<sup>52</sup>

The U.S. District Court for the Central District of California further ruled in 2009 that the Siegels “have successfully recaptured (and are co-owners of) the rights to the following works: (1) *Action Comics* No. 1 (subject to the limitations set forth in the court’s previous Order); (2) *Action Comics* No. 4; (3) *Superman* No. 1, pages three through six, and (4) the initial two weeks’ worth of Superman daily newspaper strips.”<sup>53</sup> These rulings are in direct contradiction to the 1973 Southern District of New York ruling that granted summary judgment for DC because it found that Superman was a work for hire, and that Jerry and Joe’s grant of “all rights” in the transfer included all renewal rights.<sup>54</sup>

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It is clear by these subsequent procedures and rulings that the 1973 court plainly failed in its duty to understand the intellectual property law before it. That court wrote that Superman was a work for hire within the meaning of the *1909 Act*, stating that while Superman was created and submitted prior to the 1937 employment agreement, it was not more than a few panels, and these were transformed into a comic book at DC's guidance and insistence.<sup>55</sup> However, DC's guidance constituted this January 10, 1938 letter from DC editor, Vin Sullivan:

Dear Jerry:

No doubt you're quite surprised to be hearing from me from the above address [...] Nicholson Pub. is now in the hands of receivers, [...] due to the taking over of the publication by Detective Comics by the firm to which Mr. Liebowitz is business manager, etc.

I have on hand now several features you sent to Mr. Liebowitz. [...] the one feature I liked best, and the one that seems to fit into the proposed schedule is that "Superman." With all the work Joe is doing now (and that includes the features he drew for Fun and Adventure) could it be possible for him to still turn out 13 pages of this new feature?

Joe, of course, seems to have the proper touch in putting your stories on drawing paper [...] I'd like to have him turn out this "Superman" for the new magazine. He is handling 27 pages for the other three magazines. Adding another 13 to his already filled schedule is loading him up to the neck. Please let me know immediately whether or not he can do this extra feature.

Best Regards,  
Vin Sullivan<sup>56</sup>

This was DC's only contribution. Meanwhile, Jerry and Joe not only adapted and submitted Superman as a comic book story in 1933 for Humor Publishing—which went bankrupt prior to publishing the story—but these "few panels" of Superman strips contained Superman, his distinctive costume, his origin as the last survivor of the dying planet Krypton who was sent to Earth by his scientist father, Superman's super strength, speed, and invulnerability, and his secret identity known as Clark Kent.<sup>57</sup> (Author's note: Mr. Kent requests that you keep this information confidential.)

### The Employment Agreement

"When performance of a duty under a contract is due any non-performance is a breach."<sup>58</sup> The transfer agreement is clear that Jerry Siegel and Joe Shuster were to receive \$130 for all rights to Superman. Only one check for \$130 was supplied, and it remains undisputed that this was payment for work performed at the rate set by the 1937 employment agreement.<sup>59</sup> The 1948 court further recognized that no such payment had ever been paid for the rights to Superman.<sup>60</sup> In this case, Jerry and Joe could have declined to sign the transfer agreement, and the \$130 check paid by DC would still constitute payment for 13 pages of comics under the employment agreement. Merely publishing these pages would not have created additional benefits or duties for either party.

The court may construe an obligation where an agreement's consideration is vague or lacking.<sup>61</sup> Here, the 1948 court found consideration in the transfer agreement because Jerry and Joe saw their work realized in print. The court's analysis both oversteps and understeps the bounds of those obligations. It oversteps because it was implicit in the employment agreement that Jerry and Joe desired to see their work in print, and since their accepted work did actually see print, this fails as consideration for the transfer agreement. Likewise, the court understeps because nothing in the documents, or in the court's rulings, requires that DC actually print the work following acceptance. There is no legal standard of consideration of "the desire to see one's work in print" unless the other party is in some way obligated to print the work, or obligated in some other way to compensate the party from which it benefits.<sup>62</sup> As a result, consideration was not vague or lacking. DC simply failed in its promise to pay \$130, or to compensate Jerry and Joe in any way for the benefit DC received.

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The employment agreement itself fails to transfer the rights to work other than “The Spy” and “Slam Bradley” to DC, Inc. Section 2 of the agreement states:

The Employees agree to give their exclusive services as artists in producing features known as “Slam Bradley” and “The Spy” during said period of employment, to the Employer, and agrees that all these products and services done by said Employee for said Employer during said period of employment, shall be and become the sole exclusive property of the Employer, and the Employer shall be deemed the sole creator thereof, the Employee acting entirely as the Employer’s employee.<sup>63</sup>

The work transferred to DC under this section is explicitly limited to Slam Bradley and The Spy. No mention is made of “new features” in this section. In fact, the only mention of such work is in Section 4, which merely states:

It is understood that any new and additional features which the employees produce for use in a comic magazine are to be first submitted to the Employer, who reserves the right to accept or reject same within a period of Sixty days.<sup>64</sup>

This language constitutes a right of first refusal, but does not purport to transfer these “new and additional features” to DC, or to direct in any way the production of these features. Revised employment agreements signed by the parties on September 22, 1938, and December 19, 1939, also state Jerry and Joe’s belief they sold their rights to Superman under the failed transfer agreement, but they nevertheless fail to remedy that defective transfer.<sup>65</sup>

Only three legal documents exist actually transferring the rights to Superman from Jerry and Joe to DC. The first is the 1938 transfer agreement, the second is the 1948 stipulation between the parties, and the third is the 1948 final judgment reflecting that stipulation. This final judgment declares valid every agreement between DC and Jerry and Joe *except the 1938 transfer agreement*.<sup>66</sup> Rather, the judgment restates the rights of the parties under the transfer agreement, and it was this stipulation and judgment that first made DC the exclusive owner of Superman. The renewal rights in the transfer agreement were never mentioned by the court in the stipulation, suggesting the creators did not waive their right to renew the copyright.

A copyright renewal creates a separate, distinct right from the original copyright and is not transferred in absence of overt language or intent stating otherwise.<sup>67</sup> Neither the 1948 stipulation nor judgment mentions the renewal or the transfer; therefore, Superman would and did validly revert to the creators under the *1909 Act*.

The 1973 court found the stipulation’s mere mention of “all rights” included reversion rights, but in determining this, it relies exclusively upon *Geisel v. Poynter Products, Inc.*<sup>68</sup> While *Geisel* is an instructive case on the transfer of derivative rights, and while copyright renewal is mentioned in the case three times, *Geisel* never actually argued against his publisher’s right to renewal, thus renewal was never a matter considered by the court. There is nothing in *Geisel* that is instructive on the rights of a party to terminate and renew a copyright.

In relying on *Geisel*, the 1973 court ignores Jerry and Joe’s argument “that general language of assignment does not convey the renewal copyright unless the intention to convey it appears by unambiguous extrinsic evidence.”<sup>69</sup> This is telling in light of the 1938 transfer agreement that says DC has Superman “to hold forever.”<sup>70</sup> This “forever” language was removed in both the 1948 stipulation and the judgment which reiterated the transfer agreement. The 1973 court points out both parties were represented by “distinguished counsel” in 1948, so the only conclusion is that the language changed because the parties intended for Jerry and Joe to retain a renewal right rather than waive it.<sup>71</sup>

### But Will \$130 Plus Interest Fix This?

“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”<sup>72</sup> On March 1, 1938, DC sent Jerry and Joe a check with the notation “Superman” for \$130 for work they had already completed and an agreement purchasing Superman “in consideration for \$130.”<sup>73</sup> It is difficult to ascertain the intent of the parties 80 years after the fact, but one thing is undeniable: Jerry and Joe were never paid this \$130 for the transfer agreement.

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The 1973 court describes DC as “experienced businessmen.”<sup>74</sup> Would the court also have us believe these “experienced businessmen” decided all rights to Superman were worth exactly the same amount as the 13 Superman pages, but simply failed to mention this calculation or cut a second check for \$130 specifically for these rights? It is virtually unthinkable that DC would make this kind of mistake without remedy up to and including the 1947 litigation unless DC intended for Jerry and Joe to rely on the \$130 payment for “Superman” as consideration for the pages *and* the transfer agreement. This promise and failure to pay \$130 was a material misrepresentation to an inexperienced party unrepresented by counsel, yet transferred the Superman copyright to DC while lacking any consideration to Jerry and Joe. In the case of material misrepresentation, rescission was the proper remedy for the 1948 court, rather than finding specious consideration in the “desire to see Superman in print.”

### Res Judicata Binds The Court . . . Except When It Doesn't

The 1973 court found “the issues which [Siegel and Shuster] want to litigate in this action could have been raised in the [1948] Westchester action, and consequently are barred by *res judicata* as well, so that summary judgment must be entered on this ground in addition to those we are about to discuss.”<sup>75</sup> In New York in 1973, “[w]hen a case has gone to judgment on the merits and the same cause arises in a later action between the same parties or their privies, *res judicata* precludes attack upon a finding on any issue that was raised in the former suit, or that might have been.”<sup>76</sup>

The 1973 court's reliance on *res judicata* can only be described as odd. The court's opinion is informed primarily by Justice Young's 1948 Findings of Fact. Citing these 1948 Findings nine times in a six-page opinion, the court determined Superman was a work for hire. However, and contrary to the 1948 Findings, Justice Young never determined that Superman was a work for hire. In fact, if Superman had been a work for hire, then Jerry and Joe's transfer of the Superman copyright would have lacked consideration for the 1938 transfer agreement because *DC would have already owned Superman under the employment agreement.*

Instead, the 1948 court found the transfer agreement valid stating, “[P]laintiffs transferred to DETECTIVE COMICS, INC. all of their rights in and to the comic strip SUPERMAN.”<sup>77</sup> While the 1973 court states that it barred from reconsideration this conclusion or any conclusions by *res judicata*, the 1973 court extensively reinterpreted the 1948 court's findings. In fact, the 1973 court schizophrenically applies both the transfer agreement *and* the 1948 court's interpretation of the transfer agreement which is what the parties stipulated to in their settlement. These new findings effectively invalidated much of the 1948 court's ruling *and* invalidated the stipulation between the parties. The court's conclusion ignores the very premise of *res judicata* by barring further litigation while effectively vacating the original judgment.

Moreover, the 2009 court determined that under the *1909 Act*, the “Superman material in question had been crafted by the artists years before the relationship between its authors and its ultimate publisher existed. The creation of this material was not done at the instance and expense of anyone other than the artists themselves.”<sup>78</sup> As to the issue of *res judicata*, the court only mentioned it in regards to the first two weeks of Superman strips that were never mentioned (or transferred) under any agreement or prior litigation.<sup>79</sup>

Thus, in the Superman cases, *res judicata* barred courts from hearing previously litigated issues, or issues which could have been litigated . . . *except where these courts decided they were not barred from rehearing or reinterpreting those issues.*

### SUMMARY

Copyright renewal is largely an administrative function. A party that submits the proper notice and filings will receive a reversion. Improper or contradictory rights appear to be the domain of the courts rather than of the Library of Congress. Disputes must be hammered out by judges who may understand the special nuances and complexities of copyright law, or possibly by judges who continue to punt.

Justice J. Addison Young of the 1948 case and District Judge Morris E. Lasker of the 1973 case had indisputably distinguished legal careers, but these courts clearly failed in their duties to uphold the rights of the parties. Justice Young, on the one hand, prevented Jerry and Joe from ever using the term “super” in the naming of future creations, while almost certainly unintentionally removing Jerry and Joe's barrier to a reversion right. Later, District Judge Lasker justified the denial of Jerry and Joe's renewal based on new judicial conclusions which—under his own interpretations—should have been barred by *res judicata*, and then relied on an otherwise unrelated case that makes a mere mention of copyright renewals.

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In fact, Justice Young's argument of consideration in the transfer agreement fails so completely that it is akin to arguing there is consideration when someone pays for shoes with an IOU then defaults on that debt after mass producing and selling copies of those shoes for considerable profit, because what the original owner really wanted was for someone to wear his shoes. The very notion is not only absurd, but it is in contradiction to law and public policy. This ruling was only sustained because of *res judicata* and the parties' willingness to settle the matter.

The duty of the judicial system is to ensure justice, and the stated purpose of the Copyright Acts are to encourage and protect creators of an original expression. However, the judges in these cases merely protected the status quo, which had a detrimental impact on the creators these laws were enacted to protect.

Jerry Siegel and Joe Shuster created Superman in 1933. In 1937, they submitted the strips to DC, and later signed an employment agreement. DC then discovered the submission and requested that the strips be expanded into a comic book story. Jerry and Joe expanded these strips into a 13-page story, and were paid. They also received a contract granting DC the rights to Superman. They signed and returned this agreement, but they were never paid.

These facts are indisputable. They are history and *res judicata*, but they are also where the history begins to break down, because *res judicata* creates its own irrefutable record. Whether it happened or not, the judicial opinion is an official story of the events. These opinions are the records which are admissible in court, and which prevent the introduction of all other evidence or potential rulings to the contrary. It is these cases that can still be cited decades later to deny creators their rights to termination and reversion even today. *Res judicata* becomes the courts' only truth, even when it openly defies justice, history, and the protection of creators—and even in the face of the very symbol of truth, justice, and the American way: Superman.

### ENDNOTES

- 1 Statute of Anne, 8 Anne, c. 19 §§ pmb. 1-2 (1710).
- 2 Bruce D. Epperson, *From the Statute of Anne to Z.Z. Top: The Strange World of American Sound Recordings, How It Came About, and Why It Will Never Go Away*, 15 J. Marshall Rev. of Intel. Prop. L. 1, 4 (2015).
- 3 Anne at § 11.
- 4 Copyright Act of 1790, 1 Stat. 124 § 1 (repealed 1831).
- 5 Copyright Act of 1831, 4 Stat. 436 § 1 (repealed 1909); Copyright Act of 1909, 5 Stat. 1075 (repealed Jan. 1, 1978) (hereinafter "1909 Act").
- 6 1909 Act at § 23.
- 7 Copyright Act of 1976, 17 U.S.C. § 302(a) (1976) (hereinafter "1976 Act").
- 8 *Id.* at § 304.
- 9 The Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 302(a) (1998) (hereinafter "1998 Act").
- 10 *Id.* at § 304.
- 11 Finding of Fact 9, *Jerome Siegel and Joseph Shuster vs. Nat'l Comics Publ'ns Inc. et al.* 18, 20–21 (New York Supreme Court 1948) [hereinafter "1948 Case"]. - Author's Note: The 1948 Case and the related complaint, findings of fact and law, judgments, stipulation, and other related legal documents relate to a single legal procedure which occurred between 1947–1948. "1948 Case" is used to collectively refer to all the cited documents that were a part of this process.
- 12 Dennis Dooley, *The Man of Tomorrow and the Boys of Yesterday*, in *Superman at 50: The Persistence of a Legend* 31 (Dennis Dooley and Gary Engle eds. 1988).
- 13 Finding of Fact 14 at 21.
- 14 Brad Ricca, *Super Boys: The Amazing Adventures of Jerry Siegel and Joe Suster—The Creators of Superman* 147 (2013).
- 15 Finding of Fact 15 at 21–22.
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- 17 Finding of Fact 23–24 at 24.
- 18 Finding of Fact 24–25 at 24–25.
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- 20 Finding of Fact 26 at 25.
- 21 *Id.*
- 22 September 22, 1938 Employment Contract at 1, available at <https://www.scribd.com/doc/299156332/Sept-22-1938-Contract> (last viewed Oct. 8, 2016).
- 23 Exhibit B to Complaint at 36–37, 1948 Case, *supra* note 11.
- 24 Dooley, *supra* note 12, at 32.
- 25 *Id.* at 33.
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- 27 Gerard Jones, *Men of Tomorrow: Geeks, Gangsters, and the Birth of the Comic Book* 185 (2005).
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- 30 Finding of Fact 34, *supra* note 11, at 26.
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- 32 Nov. 21, 1947 Opinion, 1948 Case, *supra* note 11, at 6, 17.
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- 34 Final Judgment, 1948 Case, *supra* note 11, at 1–7.
- 35 Dooley, *supra* note 12, at 33.
- 36 Ricca, *supra* note 14, at 243.
- 37 Complaint at 1–8, *Jerome Siegel and Joseph Shuster v. Nat'l Periodical Publ'ns, Inc.*, Case No. 69 Civ 1429 (USDC SDNY 1969)

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## Men of Steal: The Complicated Question of Who Owns Superman

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- 38 *Id.* at 3, \*14.  
 39 *Id.* at 6–8.  
 40 *Jerome Siegel and Joseph Shuster v. National Periodical Publications, Inc.*, 364 F.Supp. 1032, 1034 (S.D.N.Y. 1973) (hereinafter “1973 Case”).  
 41 *Picture Music, Inc. v. Bourne*, 314 F. Supp. 640, 650–51 (S.D.N.Y. 1970).  
 42 1973 Case at 1036.  
 43 *Id.*  
 44 1973 Case at 1037 (quoting 1948 Case, *supra* note 11).  
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 46 Dooley, *supra* note 12, at 34.  
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 50 1998 Act at § 304(d)(2).  
 51 *DC Comics v. Pacific Pictures Corp. et al.*, Case No. CV 2:10-cv-03633 ODW 1, 10 (C.D.C.A. 2010).  
 52 Copyright Act, 17 U.S.C. § 304(c) (1998).  
 53 2009 Case at 1094.  
 54 1973 Case, *supra* note 40, at 1038.  
 55 *Id.* at 1037.  
 56 Ricca, *supra* note 14, at 148–49.  
 57 Ricca, *supra* note 14, at 97–98.  
 58 Restatement (Second) of Contracts § 235(2) (1981).  
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 60 *Id.*  
 61 *Wood v Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).  
 62 See also Restatement (Second) of Contracts §§ 18–20 (1981).  
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 71 1973 Case, *supra* note 40, at 1038.  
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 73 Finding of Fact 23–24, *supra* note 11, at 24.  
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 76 Maurice Rosenberg, *Collateral Estoppel in New York*, 44 St. John's Law Rev., 165, 169–70 n. 2 (Oct. 1969)  
 77 1973 Case, *supra* note 40, at 1035 quoting Finding of Law 1, *Jerome Siegel and Joseph Shuster vs. Nat'l Comics Publ'ns Inc. et al.* 18, 54 (New York Supreme Court 1947).  
 78 2009 Case at 1094.  
 79 2009 Case at 1088–89.

## CAVEAT

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**Book Excerpt: A Death in the Islands**

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Back, once again, to the insanity that sparked Tommie Massie's act and the phony pregnancy of Thalia. "Here is a man—his wife—she is bearing inside of her the germs of—who? Does anybody know? Not he, but some one of the ruffians who assaulted her and left a wreck of her."

Now it was time to move on to Grace Fortescue, whose beloved daughter had been so brutally attacked. Darrow was perhaps at his most eloquent—and bombastic—on this point. "Gentlemen, I wonder what Fate has against this family anyhow? And I wonder when it will get through taking its toll and leave them to go in peace, to try and make their own life in comfort for the rest of their days.

"Here is the mother. What about her? They wired to her and she came. Poems and rhymes have been written about mothers. I don't want to bring forth eulogies which are more or less worthwhile, but I want to call your attention to something more primitive than that. Nature. It is not a case of the greatness of a mother. It is the case of what nature has done. I don't care whether it is a human mother, a mother of beasts or birds of the air, they are all alike.

"To them there is one all-important thing and that is a child that they carried in their womb. Without that feeling which is so strong in all life, there would be no life preserved upon this earth. She acted as every mother acts. She felt as your mothers have felt, because the family is the preservation of life. What did she do? Immediately she started on a long trip to her daughter. The daughter was married and a long way off, but she was still her daughter. I don't care if a mother is seventy-five and her daughter fifty, it is still the mother and the child.

"Everything else is forgotten in the emotion that carries her back to the time when this was a little baby in her arms which she bore and loved. Your mother was that way and my mother, and there can be no other way. The mother started on a trip of five thousand miles, over land and sea, to her child. And here she is now in this courtroom waiting to go to the penitentiary.

"Gentleman, let me say this: If this husband and this mother and these faithful boys go to the penitentiary, it won't be the first time that a penitentiary has been sanctified by its inmates. When people come to your beautiful islands, one of the first places that they will wish to see is the prison where the mother and the husband are confined because they moved under emotion. If that does happen, that prison will be the most conspicuous building on this island, and men will wonder at the injustice and cruelty of men and will pity the inmates and blame Fate for the cruelty, persecution, and sorrow that has followed this family.

"Gentlemen, you are asked to send these people to the penitentiary. Do you suppose that if you had been caught in the hands of Fate, would you have done differently? No, we are not made that way. Life doesn't come that way. If comes from a devotion of mothers, of husbands, loves of men and women, that's where life comes from. Without this love, this devotion, the world will be desolate and cold and will take its lonely course around the sun alone! Without a human heartbeat, there will be nothing except thin air. Every instinct that moves human beings, every feeling that is with you or any of your kin, every feeling that moves in the mother of the animal is with us in this case. You can't fight against it. If you do, you are fighting against nature and life. If on top of all else that has been heaped upon the devoted heads of this family, if they should be sent to prison, it would place a blot upon the fair name of these islands that all the Pacific seas would never wash away."

Turning back to Tommie Massie, he appealed to the unwritten law, the imprimatur on every husband's heart to avenge his wife. "Poor Massie, strong and vigorous, when all of these things were heaped on him. What did he do? He began to rid his mind somewhat of his own troubles and of the persecution of the men who performed this deed. He began to think of vindicating his wife from this slander. She had been lied about, she had been abused with talk.

"He wanted to get a confession. For what? To get somebody imprisoned? No—that did not concern him—he was concerned with the girl, whom he had taken in marriage when she was sixteen—sweet sixteen. Mrs. Fortescue was worrying about the delay of what she thought was justice, and what other people thought was justice. I fairly well know what law is, but I don't often know what justice is. It is a pattern according to our own personal conceptions. Mrs. Fortescue, too, believed it necessary to get a confession. The last thing they wanted to do was shoot or kill."

Then back to Tommie's mental state. As the saying went in the sport of boxing, "If the left don't get you, then the right one will." Darrow was relying upon a left-right combination of justification and insanity.

"It is of no consequence who fired that shot. I am arguing the facts, and the only facts as you get them. Is there any reason in the world why Massie, on top of all these other troubles, should assume the added burden of assuming the responsibility of this killing? When Kahahawai said, 'Yes, I done it,' everything was blotted out—here was the man who had ruined his wife. No man can judge another unless he places himself in the position of the other before he pronounces the verdict. If you can put yourself in his place, if you can think of his raped wife, of his months of suffering and mental anguish, if you can confront the unjust, cruel fate that unrolled before him, then you can judge—but you cannot judge any man otherwise.

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**Book Excerpt: A Death in the Islands**

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*Continued from page 20.*

“If you put yourself in Tommie Massie’s place, what would you have done?” He pointed a finger from juror to juror. “I don’t know about you, or you, or you, or you, but at least ten out of twelve men would have done just what poor Tommie Massie did. The thing for which you are asked to send him to prison for the rest of his life.”

He let that soak in. It was known as the Golden Rule argument, and would later be outlawed in virtually all states, but in 1932, it was fair game to ask jurors to put themselves in the shoes of a party and to decide the case based upon what they, themselves, might have done had they been in the same position.

“I shan’t detain you much longer,” Darrow said as he neared the end of his argument. “Again I say I cannot understand why the prosecution raises a doubt as to who fired the shot and how. Massie was there! He rose! The picture came before him! He doubtless shot! One bullet was shot and only one. Massie saw the picture of his wife pleading, injured, raped—and he shot. There could have been nobody else.

“You are a people to heal, not to destroy. I place this in your hands asking you to be kind and considerate both to the living and the dead.”

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By the time he finished, Darrow had spoken for four hours and twenty minutes, lengthy by some standards, although it paled in comparison to his three-day closing argument in the Leopold and Loeb case. He rested at 2:23 p.m., and the court took a brief recess. John Kelley shifted in his chair as he waited for the judge and jury to return. His white linen suit had wilted in the heat and humidity, and he was weary, but knew that he was not alone. He figured that Darrow had pretty well worn out the jury. Were they still alert? They had listened, raptly, to Darrow, but even with a lunch break, four hours can wear a man out. Would they even care what he had to say? Part of him wanted to ask Judge Davis to grant an extended recess, rather than a mere ten minutes, and resume in the morning, so the jurors, and he, would be refreshed and rested. But he also didn’t want the jurors to go home for the night with the words of Clarence Darrow the last thing they had imprinted on their minds.

He rose to his feet at 2:38 p.m. He faced the jury and cleared his throat. “Gentlemen of the jury, I would imagine that you are approaching a state of argument amnesia, or verbal psychosis. I will not detain you with a long plea.” Legalese for “I know you’re tired and I won’t take long.”

“I stand for the law and opposed to those who have violated the law, and I ask you to do so.”

With that introduction, he began pacing in the well, the portion of the courtroom between the judge’s bench and the lawyer’s tables, in front of the jury box. “Are you going to decide the case on the plea of a man who for fifty years has stood before the bar of justice which he belittles today, or are you going to decide this case on the law? Are you going to follow the law of the Territory or the plea of Clarence Darrow and George Leisure?”

Kelley spoke with every bit as much passion and zeal as had Darrow, with every bit as much indignation and outrage. Where Darrow urged that the defendants be excused from the law, Kelley demanded that they be held accountable under the law. Innocent until proven guilty, a primary tenet of American justice. And a tenet that applied to Joe Kahahawai just as much as it did to Grace Fortescue, Tommie Massie, Edward Lord, and Albert Jones. It applied just as much to the *kanaka* as it did to the *haoles*.

“The same presumption of innocence that clothes the defendants in this case also clothes Joseph Kahahawai, way down deep in his grave,” Kelley said. “They have removed, by their act, the possibility of his ever being anything but innocent in the Ala Moana case and ‘not guilty’ on the records of this court.”

He moved from passion to ridicule, as necessary. “They ask you why should Massie take upon himself the blame for shooting Kahahawai. Because he couldn’t hide behind the skirts of his mother-in-law. He couldn’t stand up and blame these two men whom he had inveigled into this affair.”

For each point Clarence Darrow had made, Kelley had a counterpoint. Where Darrow asked the jurors to put themselves in the shoes of Tommie Massie, to ask if they would have done anything different, Kelley said, “Are you going to give Massie a free pass in this case? If you do, they’ll make him an admiral. I say, to hell with the admirals.”

Where Darrow begged the jurors to listen, with sympathy, to the testimony of Tommie Massie—“How could you sleep, hearing the words of Lieutenant Massie?”—Kelley attacked. “The best you can say for Massie is that he lied like a gentleman and has a very convenient memory.”

Where Darrow proclaimed that visitors to Hawaii would clamor to see the building “where the mother and husband are confined,” Kelley countered, “Hawaii is on trial. Is there to be one law for strangers and another for us? Are strangers to come here and take the law into their own hands? As long as the American flag flies on that staff, without an admiral’s pennant over it, you must regard the Constitution and the law.”

*Continued on page 22.*

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**Book Excerpt: A Death in the Islands**

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*Continued from page 21.*

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Where Darrow begged for mercy for the poor defendants who have “suffered enough,” Kelley called them out for what they were. “Three able men and a cold calculating woman let a man bleed to death in front of them.” His voice crescendoed with outrage. “They aren’t kids. They’re brought up in an atmosphere of guns. They’re taught the art of killing, also of first aid. But they let him die. They dragged him into the bathroom and let him die like a dog.”

He turned briefly toward Darrow, the great orator of the courts. “In the Leopold-Loeb case, Darrow said he hated killing, regardless of how it was done. Always had, always will.” Kelley paused to let that sink in. “And now he comes before you and says a killing is justified and is not murder.”

Where Darrow pleaded for healing, to bind up the wounds of racial strife, Kelley warned that God has a say-so in the affairs of man. “They almost got away with it. Another five minutes, a shade up in the window of the car, and the body of Joseph Kahahawai would have been consigned to the deep forever. But an omnipotent God said, ‘Thou shalt not kill,’ and the hand of fate saved Kahahawai’s body from the sea so that it might rest in a Christian grave.”

And lastly, where Darrow talked of mothers sanctifying the penitentiary, Kelley had another reminder of motherhood. “Mr. Darrow has spoken of mother-love. He points to Mrs. Fortescue as ‘the mother’ in this courtroom. Well, there is another mother in this courtroom.” He paused for his point to soak in.

“Has Mrs. Fortescue lost her daughter? Has Massie lost his wife?” He pointed to Thalia Massie. “No, she sits there between them.”

He turned and looked at Esther Anito, then back at the jury. “But where is Joe Kahahawai?”

When he paused, the only sound in the courtroom was Esther weeping for her son.

## *Submissions*

All submissions to the TESLAW Journal are considered. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. Articles of any length are considered, but as a general guideline should not exceed twenty-five typewritten, double-spaced, 8 ½” x 11” pages, including any endnotes; however, longer articles will be considered. Endnotes must be concise, placed at the end of the article, and in Harvard “Blue Book” or Texas Law Review “Green Book” form. Please submit articles via e-mail in Word or similar format to [timmer.law.office@att.net](mailto:timmer.law.office@att.net) or to discuss potential topics.

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Sarah L. Holzhauer, *To Educate or to Make A Profit: Compensating College Athletes’ Families for Travelling Expenses*, 23 JEFFREY S. MOORAD SPORTS L.J. 509 (2016).

William M. Chace, *Intercollegiate Athletics: An Immense Scandal with Legal Implications. A Review of Jay M. Smith and Mary Willingham’s Cheated: The UNC Scandal, the Education of Athletes, and the Future of Big-Time College Sports*, 42 J.C. & U.L. 221 (2016).

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Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

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Elizabeth Steyngrob, *Real Liabilities for Fantasy Sports: The Modern Inadequacies of Our Archaic Legal Framework*, 18 U. PA. J. BUS. L. 1207 (2016).

Garrett Greene, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY’S L.J. 821 (2016).

Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117 (2016).

Scott J. Gregory, *Don’t Bet on It? Economic and Legal Implications of Legalized Sports Betting and Daily Fantasy Sports in the United States*, 10 OHIO ST. BUS. L.J. 217 (2016).

**Intellectual Property**

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Marc Edelman, *From Meerkat to Periscope: Does Intellectual Property Law Prohibit the Live Streaming of Commercial Sporting Events?*, 39 COLUM. J.L. & ARTS 469 (2016).

Stephen McKelvey et. al., *The Air Jordan Rules: Image Advertising Adds New Dimension to Right of Publicity-First Amendment Tension*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 945 (2016).

Victoria Roessler, *College Athlete Rights After O’bannon: Where Do College Athlete Intellectual Property Rights Go from Here?*, 18 VAND. J. ENT. & TECH. L. 935 (2016).

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Owen Blood, John-Michael Porretta, *Litigating Sports Brain Injuries: The New Ball Game*, 104 ILL. B.J. 28 (2016).

Taylor Adams, *The Repercussions of Concussions in Youth Football Leagues: An Analysis of Texas's Concussion Law and Why Reform Is Necessary*, 18 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 285 (2016).