



# Texas Entertainment and Sports Law Journal

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Entertainment & Sports Law Section

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The Journal Staff, on behalf of the Section and its members, wishes to express its sincere sympathies to the families and friends of those who perished at the New York World Trade Center and Washington D.C. tragedies on September 11, 2001. No words can express the deep sorrow and pain felt by all Americans for the families and friends who lost loved ones.

As Americans we are free to enjoy the entertainment and sports aspects of our lives. The diversity and breadth of this country's entertainment and sports industries give us all a chance to participate as we choose.

However, we must not lose sight that participation in entertainment and sports are rights we share as Americans and second to the right to live in this great land.

Sylvester R. Jaime  
Editor

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## MESSAGE FROM THE CHAIR

The “*Tongue Wagging Tango*”: Just Like Bogie and Bacall in “*The Big Sleep*”, Our Esteemed Eleventh Annual Entertainment Law Institute Will “*French Kiss*” the Exalted Austin Film Festival!

### Licensed to Skip Forthcoming Reports Authored by Yours Truly

This “*Much Ballyhooed Harmonic Convergence*” “*Kicks Off*” Our Beloved Section’s “*Fiscal Year*” with a “*Bang*” not to be matched until Yours Truly “*Goes to Stud*”. So Don’t Blow Your Chance at This “*Titanic*” Event. Then Expect Yours Truly to Make Some Other “*Big Announcement*” in Our Next Fine Journal!<sup>1</sup> Indeed, if you’re “*Busier Than Cher’s Plastic Surgeon*”, you won’t hurt the feelings of Yours Truly if you skip these Reports until it’s “*Stud Time*”. But, For Now, Don’t Let Any “*Scheduling Cornflakes*” Prevent You From Observing the “*High Holy Holidays*” of October Twelfth and Thirteenth.

### Preemptory Strike Against Your “*Lame Excuse*” That “*You Didn’t Know You Were Invited*”

Elsewhere in Our Fine Journal you will find your “*Invite*”. Yours Truly Will See You There!<sup>2</sup>

### Et Al.

For those of you who have attended meetings where Yours Truly “*Speaks Up*”,<sup>3</sup> you know “*All Too Well*” that they don’t “*Adjourn*”, they “*Melt*”. Suffice It to Say That This Report Has “*Officially Melted*”.<sup>4</sup>

<sup>1</sup>(Editor: *Faggeddabowdit!*) (Source: “*Goodfellas*”)

<sup>2</sup>If *We’ve Never Met, Just Look For a Your Warren Beatty.*

<sup>3</sup>(Editor: *Is There Any Other Kind?*)

<sup>4</sup>Or, *As the Genie Said in Walt Disney’s Aladdin:*

Well, I Can’t Do Any More Damage Around This Popsicle Stand.

<sup>5</sup>Caveat: *Yours Truly Hereby Expressly Reserves the Right to Assert the “Yogi Berra Defense” (a/k/a the “Leonard Marshall Defense”).*

(Editor: *When Confronted With His Numerous, Well-Documented Malapropisms (e.g., “Always Go to Other People’s Funerals; Otherwise, They Will Not Go to Yours”), Yogi Replied (As Only Yogi Could):*

*I Didn’t Really Say Everything I Said.*

And Leonard Marshall, a Former NFL Player, Claimed That He Was Misquoted in His Own Autobiography.)

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### Media Arts Conference 2001 October 5 - 6 in Houston

Hosted by Southwest Alternate Media Project (SWAMP)

Sponsored by the Texas Commission on the Arts, the Houston Film Commission, the Cultural Arts Council of Houston and Harris County, and the Farish Fund.

#### WHO SHOULD ATTEND?

- Film/Video/Digital Makers:
  - Independents
  - Documentary
  - Experimental
  - Visual Artists Who Use Media
  - Web
- Educators: Youth and University
- Programmers: Festivals, University, Broadcast TV, Cable, Museum
- Media Professionals: Administrators, Producers
- Students: RTVF, Communications
- Funders
- Aspiring Professionals and Media Makers

**WHEN:** OCTOBER 5 - 6, 2001

**WHERE:** HOUSTON, TEXAS (Conference Hotel Marriott West Loop, near the Galleria)

**SPONSORS:** With financial support from: The Texas Commission on the Arts with the Houston Film Commission and the Cultural Arts Council of Houston and Harris County. And with cooperation from: The Austin Film Society and the Video Association of Dallas.

<b>COSTS: Conference:</b>	<b>(by 8/31/01)</b>	<b>(after 3/31/01)</b>
Full Conference:	\$130	\$160
Fri or Sat only:	no discount	\$80
Students: (with ID)	\$100	\$130
Students: Fri or Sat	no discount	\$65

#### **COSTS: Hotel:**

Marriott West Loop (by the Galleria, 1750 West Loop 610 South)  
Conference Rate: \$79/night (make your reservations by September 14, 2001.) Attendees may make hotel reservations directly with the hotel at 800-228-9290 or 1-800-613-3982 or online <http://www.marriotthotels.com/houwl/> (Use group code: TMATMAA)

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## FOR THE LEGAL RECORD ...

The Section has endorsed and is co-sponsoring the 11th Annual Entertainment Law Institute: Legal Aspects of the Film and Television Industry, to be held in Austin, Texas on October 12-13, 2001. Enclosed in this issue of the Journal you will find an application and program outline. The Section's Institute Chairman Mike Tolleson again has coordinated a dynamic program and the members of the Section are encouraged to attend the Institute . . .

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### School News:

Southwest Texas State University is trying to upgrade its sports program to compete at the Division I level. Before the 2001 football season started, it appears that they have already become familiar with the dynamics of the NCAA at a higher level. Members of the football team, rated among the top 20 in NCAA Division I-AA, were suspended before the first game. The players were determined to have used some of their scholarship aid for the purchase of textbooks not required for the athletes' classes. The violations, discovered last spring, included baseball players, softball players and track and field athletes, but the football players had to wait until football season to face the sanctions. SWT self-reported the violations to the NCAA . . .

The University Interscholastic League Legislative Council Standing Committee on Policy voted to survey Texas superintendents on the issue of whether to permit foreign exchange students to participate in post-season competitions. Citing an obligation to protect "Texas students", Policy Committee member Don Rhodes, superintendent of Class A May Independent School District, acknowledged that foreign exchange students "bring something special to the school and the community." Currently the UIL permits foreign exchange students to compete unrestricted after receiving a waiver, which includes a provision that the student cannot be ranked or have competed on a national team in their home country. The survey is aimed at determining whether superintendents are in favor of limiting foreign exchange students to regular-season competition in individual sports and only non-district competition in team sports. UIL athletic director Charles Breithaupt was quoted as saying "The foreign exchange programs aren't as pure as in the past, and they're actually recruiting athletes. We're not wanting foreign exchange students to change the face of competition on the varsity level." Survey results will be considered by the Legislative Council at their October meeting . . .

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### Athletes and lawyers of note:

- U. S. District Judge Miriam Goldman Cedarbaum ruled in New York that heavyweight champion Hasim Rahman must immediately fight Lennox Lewis. Judge Cedarbaum did not accept Rahman's attorney's argument that the contract requiring a rematch was unenforceable. The judge also ruled that Rahman could not fight for 18 months if he did not grant Lewis the rematch. Lewis claimed he would retire if he lost the rematch . . .

- Former Dallas Cowboy Michael Irvin was charged with felony possession of cocaine. Irvin was arrested at a residence under watch by the Collin-Denton County Drug Task Force. When the FBI attempted to execute a federal warrant for someone else at the apartment, Irvin was found and arrested. Denton County assistant district attorney Lee Ann Breeding would not comment on why Irvin was at the apartment . . .

- The WWF's defamation claim against attorney Jim Lewis was allowed to proceed in federal district in New York. Lewis was defense counsel for Lionel Tate and argued outside the courtroom and at trial that Tate was just mimicking what he saw pro wrestlers doing on TV when he killed 6 year-old Tiffany Eunick in July 1999. Lewis, who was 12 at the time, was found guilty after the jury determined that the injuries were too numerous and too severe to have resulted from the kind of play actions that Tate witnessed. Attorney, Jerry McDevitt, in filing the multi-million dollar defamation lawsuit, said the WWF is only trying to protect itself and its reputation in bringing the action against Lewis, the Media Research Center, and the Parents Television Council. Lewis was critical of the lawsuit by the WWF and defended himself by saying "[H]e was trying to defend a teen-age client with a defense he believed to be true." Lewis' comments were critical of the WWF (which included blaming the WWF for the death of four children) when Lewis and the other defendants knew them to be untrue. McDevitt replied that "If you want to run with the big dogs, don't whine like a Chihuahua when they bite back." Lewis was unsuccessful in trying to subpoena WWF and World Championship Wrestling wrestlers, such as The Rock and Hulk Hogan, in Tate's defense to show how they fake wrestling moves on TV . . .

- After drivers complained of dizziness during practice runs, the Firestone Firehawk 600 was canceled and Texas Motor Speedway filed suit to get the return of its \$2.1 MM sanctioning fee. The track issued refunds, but has been unable to resolve its lawsuit for the sanctioning fee, promotion expenses and unrealized profits . . .

- High-profile agent Leigh Steinberg and his ex-partner David Dunn have sued each other. Steinberg's federal lawsuit alleges Dunn and his company Athletes First, used extortion and fraud to discredit Steinberg and steal Steinberg's clients. Steinberg and Dunn filed countersuits in California state court to commence the fight over representation of nearly 40 clients . . .

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- **For all you hunters**, some hunting regulation changes approved by the Texas Parks and Wildlife Commission for the 2001-02 season:

- hunters in east Texas get a 74-day duck season and 86-day goose season;
- canvasbacks will be legal game only during the final 25 days of the season; and
- daily bag limit for sandhill cranes in Zone C (mid-coast Texas) has been reduced to 2 per day . . .

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The Journal can be accessed on-line at [www.stcl.edu](http://www.stcl.edu)

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Sylvester R. Jaime — Editor

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The Entertainment and Sports Law Section wishes to thank and acknowledge Mr. Griff Morris of the Recording Academy and NARAS for their approval to reprint the article "NAPSTER Through Scope of Property and Personhood: Leaving Artists Incomplete People"? Zachery Gasck's article won first place at the NARAS national writing contest held during the year 2001 and was presented at the NARAS luncheon held in Austin, Texas on March 15, 2001.

## **Napster Through the Scope of Property and Personhood: Leaving Artists Incomplete People**

**This paper discusses the theory of property as personhood, which dictates that individuals must have control over personal property in order to be complete "people". Because Napster deprives artists of control over their personal property, it strips them of the ability to fully experience personhood.**

**By Zachary M. Garsek, Southern Methodist University**

### **I. INTRODUCTION**

Less than a year removed from his high school graduation, eighteen-year-old Shawn Fanning wrote "the code that changed the world," the source code for Napster<sup>1</sup>. The concept behind Napster struck Fanning while he was relaxing in his Northeastern University dorm room in Boston, "hanging out with his bros, drinking a brew, and listening to his roommate whine about dead MP3 links." Essentially, MP3s are digital quality sound files, compressed into a smaller format. In Napster, Fanning developed a program that allowed "computer users to swap music files with one another directly, without going through a centralized fileserver or middleman."<sup>3</sup> "He'd heard. . . how so many of the pointers on websites offering current (which is to say copyrighted) music seem to lead only to dead ends."<sup>4</sup> Napster allows users to exchange music files while bypassing "the rat's nest of legal and technical problems that kept great music from busting out all over the World Wide Web."<sup>5</sup>

Due in large part to litigation initiated by members of the Recording Industry Association of America ("RIAA") against Napster for contributory copyright infringement, Napster's increasingly high-profile status has led to a significant amount of debate over the legality and morality of the widely popular system.<sup>6</sup> Since its inception, Napster has incited mixed, often emotional responses, most notably from the musicians whose music is shared via the system. Recording artists such as Limp Bizkit<sup>7</sup> and Chuck D of the rap group Public Enemy<sup>8</sup> have been vocal in their support of Napster. Conversely, Metallica has arguably been the largest opponent of Napster among the musicians whose work is "shared" by Napster users. In fact, Lars Ulrich, the band's drummer, spoke out against Napster before the United States Senate's Committee on the Judiciary.<sup>9</sup> Ulrich succinctly stated his case against Napster to the Committee: "Napster hijacked our music without asking."<sup>10</sup>

The strong reaction to Napster naturally leads to the question of whether the copyright holders protesting the dissemination of works via the Napster system own those works in the first place. Individuals in support of Napster follow "the info-anarchist's railing cry that 'information wants to be free.'"<sup>11</sup>

Conversely, those against the free transmission of MP3s adhere to the contrary position: "Information doesn't want to be free; only the transmission of information wants to be free. Information, like culture, is the result of labor and devotion, investment and risk; it has a value."<sup>12</sup> Whether Napster is "wrong" can be determined by deciding which philosophy should be followed.

In this paper, I will discuss the theory of property and personhood<sup>13</sup>, and address its applicability to the Napster controversy.

### **II. PROPERTY AND PERSONHOOD**

#### **A. Background: Property and Personhood**

"The premise underlying the personhood perspective is that to achieve proper self-development - to be a person - an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."<sup>14</sup> In her seminal paper outlining the property as personhood theory, Professor Margaret Radin offers the premise that, in order to reach the required state of liberty to be considered a person, individuals must practice self-identification through property ownership.

People possess "certain objects that they feel are almost part of themselves."<sup>15</sup> "These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."<sup>16</sup> It follows that objects such as wedding rings, portraits, heirlooms, and houses are closely tied with one's existence as a person, evidenced by the significant pain that would accompany the loss of such property. These objects give rise to a stronger moral claim than others do.

The level of importance that a piece of property has in establishing a sense of personhood, however, depends on who

*Continued from Page 4*

owns the property. “For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo - perhaps no amount of money can do so.”<sup>17</sup>

This leads to the division of property into two categories: personal and fungible. Depending on who owns the property, fungible property can become personal, and personal property can become fungible, or commodified.

The same claim can change from fungible to personal depending on who holds it. The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan’s own labor. Conversely, the same item can change from fungible to personal over time without changing hands.<sup>18</sup>

While there is no bright-line test for establishing to which category a piece of property belongs, the perspective of the property holder is the crucial factor in making this determination.<sup>19</sup> From the property holder’s perspective, the more personal a piece of property, the more that property becomes “intertwined” with that person.<sup>20</sup> Personhood attained through property rights results in personal liberty by affording one the ability to be a “person.” It follows that the more a piece of property creates a sense of personal existence, i.e., the more personal a piece of property, the broader the control an individual should be allocated with respect to that piece of property.<sup>21</sup> “Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement to control that property.”<sup>22</sup>

Ultimately, allowing a heightened level of protection for increasingly personal property affords an individual control of herself, as it is control over this type of property that provides personal liberty. “This case is strongest where without the claimed protection of property as personal, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.”<sup>23</sup>

Necessary protection is lost when the owner of personal property loses control over it and the property becomes commodified. Commodification, then, represents the destruction of an individual’s existence as a person, or the force that prohibits her from achieving personhood.

## **B. Application of the Property as Personhood Theory to Copyright**

### **1. Copyrighted Works as Personal Property**

“[W]e do not have a good grip on what constitutes the

‘personality’ or ‘personhood’ interests that may be present in a particular piece of intellectual property.”<sup>24</sup> While it is apparent that Professor Radin’s theory of property and personhood is applicable to tangible property, the theory must be expounded upon in the intellectual property and, more specifically, the copyright contexts. Perhaps the greatest differences between tangible property and copyrighted works are the role the owner has in the creation of each, and the excludability of tangible property as compared to intellectual property.

The difference between tangible and intangible property is strikingly apparent in examining the role the property “owner” has in the creation of a piece of property.<sup>25</sup> With respect to tangible property, the property owner “probably had no role in the material object’s design or creation; most of us neither designed nor constructed the houses, furniture, and clothes we live with. Nonetheless, we come to identify with these objects and they come to be imbued with our ‘personhood.’”<sup>26</sup>

Conversely, the copyright holder has often had a direct hand in creating the intellectual property. Development of a valid copyright requires originality. This “originality” is the judicial equivalent to creativity: “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity.”<sup>27</sup> Thus, the standard for copyrightability requires some modicum of creativity.<sup>28</sup> Creativity is the predecessor, and in many ways the equivalent, of individuality. “We cultivate [creativity] in our children, linking it intimately with their development as autonomous individuals.”<sup>29</sup>

In developing copyrightable material, artists draw from personal experiences.<sup>30</sup> From painters, to writers, to singers, artists “‘have no choice but to describe where they live.’”<sup>31</sup> “The artist, who creates forms” is distinguished from “the artisan who copies forms.”<sup>32</sup> Copying of forms involves no originality and, hence, neither creativity nor individuality.

Therefore, it follows that in order to hold a valid copyright, the artist, as distinguished from the artisan, establishes herself as a person. This is accomplished in several steps: (1) the artist has personal experiences; (2) she bases her work on these experiences and ultimately creates new forms from them; (3) her work qualifies as creative (which is the functional equivalent of individuality); and (4) this creativity meets the requisite level of originality required to obtain a copyright. Thus, the artist realizes personhood through her development of individuality by creating a copyrighted work. “When we first encounter a res of intellectual property, instead of noting that an individual’s personality has moved into an existing object, we may note that an individual’s personality caused the object to come into existence.”<sup>33</sup>

With this framework in mind, applying property as personhood to copyrighted materials leads to a classification of

*Continued on page 6*

virtually all copyrighted material as personal property.<sup>34</sup> If, in order to achieve the creativity required for a work to attain copyright status, one inevitably bases her work on personal experiences, the intellectual property embodied in the copyrighted material is, by its very definition, personal. In turn, as personal (and non-fungible) property, copyright holders should be afforded the heightened level of control reserved for personal property.

Similar protection should be allotted to those who created copyrighted works as a part of a collaborative process. In fact, those working in collaborative efforts often realize a greater sense of individualism as a result of their efforts than do those working alone. “Scientists and engineers working in research teams have, as courts have noted, a tendency to remember their work on the team in a magnified form.”<sup>35</sup> Thus, those collaborating on copyrighted works may achieve an even higher sense of personhood through their efforts. Therefore, the personal investment in the development of collaborative copyrighted works dictates that this intellectual property be classified as personal property.

In applying the property as personhood theory to copyrighted works, the second major difference between tangible and intangible property is the level to which each is excludable. This distinction can best be viewed by analyzing a critique of the commodification portion of Professor Radin’s theory offered by Professor Stephen Schnably. “In Radin’s conception, commodification utterly disempowers people; the only solution is for the state to counter commodification by imposing rules of market-inalienability.”<sup>36</sup> But, Professor Schnably argues that “[a]ny measure that advances partial or complete decommmodification will be vulnerable to the charge that it disrespects the very objects of its protection by prohibiting them from entering into a market transaction to which they would otherwise agree.”<sup>37</sup> Therefore, the liberty offered by obtaining personhood through property is destroyed when individuals are stripped of control over their personal property.

Within the boundary of copyrighted materials, however, alienability is not an issue as the intangible nature of intellectual property does not lend itself to the same excludability as does tangible personal property. Intellectual property is “non-excludable” in that once one has had some access to intellectual property *res*, one cannot be completely separated from it. If a person were deprived from all his music and books, he would have a great sense of personal loss, but yet would still know Satie’s “Gymnopedies” by heart, would still remember much of Faulkner, and could still go to the library to read or listen to these favorites.

If one who has merely been exposed to copyrighted material “cannot be completely separated from it,” the same is true for the creator of intellectual property, only to an infinitely greater extent as she has lived the experiences on which her copyrighted work is based.<sup>39</sup> Thus, this non-exclusivity dictates that,

although copyrighted materials exhibit the personal property characteristics of alienable tangible property, copyrighted materials never need to be, nor can they practically be, subject to the rule of market-inalienability in order to preserve the intellectual property holder’s personhood status generated by property ownership.

## **2. Inapplicability of Property and Personhood’s Commodification to Copyrighted Works**

A further discussion of commodification in the context of intellectual property is necessary to understand the significance of how personhood can be realized through development of and control over a copyrighted work. Criticism of the view of the home as personal property closely aligned with personhood exemplifies that, while this attack on her theory may be applicable to tangible property, there is a meaningful difference between tangible and intangible property within the property and personhood context.

A critique of the role of the home points out that, while there are many legal doctrines that bolster “the personhood interest in the home, . . . [t]he vast majority of lower-income people who live in apartments are not protected by anti-eviction and rent control laws.”<sup>40</sup> This criticism is inapplicable to copyrighted works. While there may be differing statutes and ordinances pertaining to the home, once it is established that a valid copyright exists, copyright protection is the same for a wealthy home owner and a low-income apartment dweller. Equal protection for all copyrighted works evidences the sanctity of that intellectual property as an important tool through control of which people accomplish personhood.

### **C. Application of Property as Personhood to the Napster Controversy**

By providing the infrastructure through which copyrighted works are shared, Napster interferes with artists’ ability to experience personhood. Each artist whose copyrighted work is available on the Napster system created her work based on personal experiences. Unlike a piece of tangible personal property that has been commodified (converted into fungible property), the impact that her work has on her personhood still exists even if millions of people have purchased her album.<sup>41</sup> The immoral aspect of Napster is that it strips the artist of control over her copyrighted work, her personal property.

In analyzing a work’s impact on her personhood, the fact that one or one billion people own a particular album is non-consequential. What is crucial is that the artist have the ability to control the dissemination of her work, or at least have the power to appoint one to do this for her. Lars Ulrich’s statement to the Senate Judiciary Committee illustrates the pain occasioned by this loss<sup>42</sup> of control:

I don’t have a problem with any artist voluntarily distributing his or her songs through any means the artist elects - at no cost

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to the consumer, if that's what the artist wants. But just like a carpenter who crafts a table gets to decide whether to keep it, sell it or give it away, shouldn't we have the same options?<sup>43</sup>

The key to understanding the impact that Napster has on an artist's personhood is acknowledging that the artist's copyrighted works are personal property. These works, therefore, are entitled to the same heightened level of protection as tangible personal property. The *ability* to produce an infinite number of those works will not lessen the impact on the artist's personhood. It is an issue of control, not of compensation.

Only a system that provides the artist with the heightened level of protection to which her personal property is entitled will suffice.

This view of personhood also gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.<sup>44</sup>

Artists who distribute copyrighted works based on their personal experiences make the decision to make their work accessible to the public. But, depriving an artist of the ability to determine how her work is distributed denies her the necessary protection and control over her personal property required to experience personhood. Therefore, by stripping away this control Napster denies the artist the right to be a person.

### III. CONCLUSION

There is nothing inherently wrong with the Napster system. There is nothing immoral about sharing MP3 files. There is nothing improper about providing an infrastructure that allows for a quicker and easier mode of sharing information.

But, Napster's current operation is immoral as it deprives artists of the ability to fully and freely experience the personhood that each has rightly developed through creating copyrighted works. Personhood is attained when individuals exercise control over personal property, property that people feel is "almost a part of themselves."<sup>45</sup> Because achieving a valid copyright requires creativity, and because all copyrighted works are based on personal experiences, it is inevitable that in developing a copyrighted work an artist creates personal property.<sup>46</sup> Thus, artists are entitled to an increased level of control over their copyrighted works. Napster does the opposite: "Napster hijacked our music without asking."<sup>47</sup>

Because copyrighted works are personal property, individuals must be afforded an elevated level of control over those works; the alternative is embodied in Napster. Napster deprives artists of control over the dissemination of their personal property, hindering the artists' ability to develop into people.<sup>48</sup>

Thus, by providing an infrastructure that encourages the unauthorized distribution of peoples' copyrighted works, their personal property, Napster deprives those individuals of the ability to fully experience personhood.

<sup>1</sup> Karl taro Greenfeld, Meet the Napster, TIME, Oct. 2, 2000, at 61.

<sup>2</sup> *Id.* at 63.

<sup>3</sup> Greenfeld, *supra*, note 1, at 62; *see also A & M Records v. Napster Inc.*, 2000 WL 1182467, at \*1-2 (N.D. Cal. Aug. 10, 2000).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *A & M Records*, 2000 WL 1182467, at \*2.

<sup>7</sup> Jon Zahlaway, *Limp Bizkit Heads Free Napster Tour*, Live Daily, at (June 21, 2000). *See also* Dwight Silverman, *Napster Creating Lot of Legal Noise*, HOUSTON CHRONICLE, Apr. 28, 2000, available at 2000 WL 4295116.

<sup>8</sup> David Ferris, *Interview with Chuck D*, MACWORLD MAGAZINE, available at /chuckd.html (May 12, 2000); *see also* Silverman, *supra* note 7.

<sup>9</sup> Lars Ulrich, *Copyright Issues and Digital Music on the Internet: Before the Committee on the Judiciary*, 2000 WL 964353 (F.D.C.H.) (July 11, 2000) [hereinafter Ulrich Statement].

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<sup>11</sup> Adam Cohen, *A Crisis of Content*, TIME, Oct. 2, 2000, at 69.

<sup>12</sup> Edward Rothstein, *Swashbuckling Anarchists Try to Take the © Out of Cyberspace*, N.Y. TIMES, June 10, 2000, at B11.

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<sup>14</sup> *Id.* at 957.

<sup>15</sup> *Id.* at 959; *see id.* at 987.

<sup>16</sup> *Id.* at 959.

<sup>17</sup> *Id.* at 960.

<sup>18</sup> *See* Radin, *supra* note 13, at 987.

<sup>19</sup> *Id.* at 960.

<sup>20</sup> *Id.* at 988.

<sup>21</sup> *Id.* at 960.

<sup>22</sup> *Id.* at 986.

<sup>23</sup> *See* Radin, *supra* note 13, at 1015

<sup>24</sup> Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 81 (1998).

<sup>25</sup> *Id.* at 85.

<sup>26</sup> *Id.* at 86.

<sup>27</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

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

<sup>29</sup> *See* Hughes, *supra* note 24, at 88.

<sup>30</sup> *Id.* at 107.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 126.

<sup>33</sup> *Id.* at 87.

<sup>34</sup> *See* Radin, *supra* note 13, at 986.

<sup>35</sup> *See* Hughes, *supra* note 24, at 94.

<sup>36</sup> Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 379 (1993).

<sup>37</sup> *Id.* at 380.

<sup>38</sup> *See* Hughes, *supra* note 24, at 87-88.

<sup>39</sup> *Id.*

<sup>40</sup> *See* Schnably, *supra* note 36, at 380.

<sup>41</sup> *See* Hughes, *supra* note 24, at 87-88.

<sup>42</sup> *See* Radin, *supra* note 13, at 959.

<sup>43</sup> *See* Ulrich Statement, *supra* note 9.

<sup>44</sup> *See* Radin, *supra* note 13, at 968.

<sup>45</sup> *Id.* at 1015.

<sup>46</sup> *See supra* Part II.B.a.

<sup>47</sup> *See* Ulrich Statement, *supra* note 9.

<sup>48</sup> *See* Radin, *supra* note 13, at 960.

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## *RECENT CASES OF INTEREST*

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

### **Supreme Court Finds *Martin* Up To Par**

The ongoing saga of professional golfer Casey Martin has finally reached the 18<sup>th</sup> hole. The Supreme Court of the United States recently granted Martin the right to use a golf cart during professional golf competitions on the Professional Golf Association (PGA) tour. *PGA Tour, Inc. v. Martin*, 121 S.Ct 1879 (2001). The Court found that the American with Disabilities Act (ADA) applied to PGA tour golfers and that Martin's use of a cart would not fundamentally alter these PGA golf tournaments.

Martin suffers from Klippel-Trenaunay-Weber Syndrome, a disorder that impedes blood circulation throughout his body. As a result of the disease, his right leg has severely atrophied, causing him extreme pain and fatigue from the lightest walking. Martin's disease has progressed to the point whereby any walking puts him in great danger of hemorrhaging and breaking his leg so badly, it would most likely need to be amputated. Due to this condition, Martin has needed to use a golf cart for much of his amateur career. The PGA, however, requires all competitors to walk from hole-to-hole, without the assistance of a cart. Martin was allowed the use of a golf cart while trying to qualify for the PGA tour. He then petitioned the PGA to make an exception to the walking rule, upon achieving his tour eligibility. The PGA denied his request, and Martin brought a cause of action against the PGA for refusing to follow Title III of the ADA. The PGA made two arguments. The PGA first claimed that the tour's golfers were not members of the class of people protected by Title III of the ADA. Alternatively, even if the golfers were part of the class of people protected by the ADA, the PGA argued that the use of a cart was not required by the ADA because that legislation did not allow modifications which would "fundamentally alter" competitions.

The Court first found that the ADA applied to golfers at the PGA events. The PGA argued that the ADA did not apply to its golfers even though those events occurred at places of "public accommodations" (golf courses). The PGA admitted that the ADA required the organization to not discriminate at the golf courses because they were places of public accommodations. According to the PGA, this duty only extended to the spectators and not to the golfers since the ADA only applied to "clients and customers" at places of public accommodation. The Court, however, found that both spectators and golfers at the PGA events were "clients and customers" of these events. The Court rejected the PGA's interpretation because it would allow the PGA to racially discriminate against golfers under a provision of the Civil Rights which was analogous to the

ADA provision at issue.

Once it was determined that the ADA applied to the PGA golfers, the only remaining question was whether the PGA's "walking only" rule discriminated against those with physical disabilities. According to Title III of the ADA, discrimination occurs when an entity fails "to make reasonable modifications in policies, practices, or procedures. . . to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." The PGA admitted that a golf cart was a reasonable modification in Casey Martin's case, but argued that the use of the golf cart would "fundamentally alter the nature" of the PGA's events. According to the PGA, the walking policy was implemented on the professional level to induce the element of fatigue. This fatigue, along with the mental stresses of playing before large crowds and TV cameras, was an essential element of the golf competitions. This sentiment was affirmed through testimony by three legendary golfers – Arnold Palmer, Jack Nicklaus, and Ken Venturi. As a result, the PGA argued that allowing Martin to use a golf cart would fundamentally alter the game by removing the essential element of fatigue and give him an unfair advantage over the other players.

The Court agreed that it could not enforce requirements which would "fundamentally alter" the game and thereby provide a disabled player with an unfair advantage over others. However, the Court accepted the lower court's expert testimony showing that Casey Martin experiences more fatigue than the other players on the course, even with the use of a golf cart. The Court stated that to consider Martin's use of a cart an advantage, is a "gross distortion of reality." The fundamental nature of the game was not changed because Casey Martin did not have an unfair advantage over his fellow competitors as a result of his use of a golf cart.

The Court's decision allows Casey Martin to use a golf cart on the PGA tour, but its future implications remain uncertain. As the dissenting opinion points out, the decision opens the doors to more litigation over the protection of disabled athletes in professional and amateur sporting events. In time, we will know the course of that litigation and the impact of this decision.

By: Doug Richards



Continued from page 8

### **NFL Player Agents Can Agree To Private Arbitration Of Disputes**

The United States District Court for the Northern District of Texas recently ruled on a dispute between two NFL player agents. *Weinberg v. Silber*, 140 F. Supp.2d 712 (N.D. Tex. 2001). The dispute arose from various oral joint venture agreements between two agents. The agreements concerned recruiting clients and splitting fees. After the agreements fell through, both agents filed lawsuits against each other and then agreed to arbitrate their disputes. After the arbitration hearing, one of the agents negotiated a lucrative, long-term contract for Stephen Davis of the Washington Redskins, one of the players in dispute. The arbitrator awarded one-half of the agent's fee in the Stephen Davis contract to the agent who had not negotiated the contract. The arbitrator also ordered that each agent take nothing with respect to the other clients subject to the dispute.

After the arbitration award, the agent who negotiated Stephen Davis' contract brought a motion to vacate the award. This agent first argued that the arbitration award was void because an NFL Player's Association rule mandated that an NFL arbitrator settle all contract disputes. The agents had used a private arbitrator, not an NFL arbitrator. The court rejected this argument because the agents had agreed to the private arbitrator and had failed to raise this problem prior to the arbitrator's ruling. As a result, the agent waived his right to raise this issue.

The agent then argued that Stephen Davis' contract should not have been a part of the arbitration because it was not a part of the agents' joint venture agreements. The court, however, upheld the arbitrator's finding that Stephen Davis' contract was a part of the joint venture agreement. The court refused to engage in "Monday morning quarterbacking" with respect to the arbitrator's interpretation of the numerous documents and correspondence between the agents, or the arbitrator's conclusion as to exactly when the relationship between the agents legally disintegrated. The court limited its review to the fundamental fairness of the arbitration process, not the accuracy of the arbitrator's findings. The court then found that the arbitration process was fundamentally fair because the first agent never proved that the arbitrator refused to hear evidence that was pertinent and material to the controversy. Also, the court found that the arbitrator properly included the Stephen Davis matter as part of the process because the agents "agreed to settle all disputes relating to numerous named athletes," which included Stephen Davis. The court did, however, remand the case to the arbitrator for certain clarifications regarding exactly how much money was owed to the agent who had not negotiated the contract under various circumstances related to Stephen Davis' contract.

By: Brandon Yancey

### **Copyright Act Protects Authors' Rights In Articles Re-Published In Computer Databases**

The Supreme Court in *New York Times Company, Inc. et. al. v. Tasini et. al.*, recently addressed a copyright suit brought by freelance authors ("Authors") who had written articles originally published in the *New York Times*, *Newsday*, and *Time Magazine* ("Publishers"). 121 S. Ct. 2391 (2001). In the original contract signed by the Publishers and Authors, the Authors did not explicitly consent to the future placement of their articles into electronic-computer databases. The Publishers, however, licensed the Authors' articles to various computer and CD-ROM databases. The articles were published in these databases as individual pieces. There were no links to other stories that were originally published with these articles in the printed periodical editions. The Publishers believed this was proper because they had registered "collective work" copyrights for each periodical edition in which the articles originally appeared.

After the articles appeared in the computer databases, the Authors filed suit alleging copyright infringement because the Copyright Act specifically states that "copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." 17 U.S.C. § 201(c). In response to the suit, the Publishers claimed the privilege accorded "collective work" copyright owners under the Copyright Act. According to this privilege, the owner of the copyright in a collective work has "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Thus, the dispute centered around whether the Authors' articles were being reproduced and distributed as part of the collective work or a revision of that collective work.

The Court concluded that the articles in question were not being reproduced and distributed as part of the original collective work or a revision of that original collective work. Instead, the articles were being placed within the computer databases devoid of any context or connection with the original collective work. When accessing the Authors' articles in the computer databases, the users did not see the other material published on the other pages of the original periodical. The Court reasoned that since there was a demand for the Authors' articles "standing alone" or as part of a new and different collective work, the Copyright Act allows these Authors to benefit from this new demand. Thus, the Court ruled that the Publishers had infringed upon the Authors' copyrights.

By: Lori Calhoun

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8:00 Registration

8:30 Welcoming Remarks and  
Program Introductions  
Mike Tolleson, *Austin*  
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8:45 **Acquiring and Protecting  
Literary Property**

*1 hr (.25 hr ethics)*

A discussion of copyright protection, literary options and purchase agreements, WGA issues, profit participations, life story rights and book acquisitions

#### Moderator

William Nix, *New York, NY*  
Baker Botts L.L.P.

David G. Wille, *Dallas*  
Baker Botts L.L.P.

9:45 **Film Financing Through  
Private Investment** .75 hr

A review of various methods of private film finance, appropriate use of corporations, LLC's and limited partnerships, developing the

business plan and private offering documents.

Michael Norman Saleman, *Austin*  
Law Offices of Michael Norman Saleman

10:30 Break

10:45 **Film Production Agreements**

**Overview** *1.5 hrs (.5 hr ethics)*

A presentation of various agreements encountered in the course of producing a motion picture including agreements with producers, directors and actors.

Tom Hunter, *Beverly Hills, CA*  
Law Office of Thomas F. Hunter

Jeff Korchek, *Beverly Hills, CA*  
Broder, Kurland, Webb, Uffner

12:15 Lunch (on your own)

1:30 **Music for Film and Television** *1.5 hrs*

The panelists will discuss composer deals, music licensing and soundtrack albums from both sides of the table. Discussions and syllabus materials will focus on:

- a producer's negotiations with a composer
- dealing with music publishing and record companies for licensing
- the role of the music supervisor
- how and why soundtrack album deals can be mutually beneficial to all parties

#### Moderator

Steve Winogradsky, *North Hollywood, CA*  
President, The Winogradsky Company

Christopher Brooks, *Sherman Oaks, CA*  
Crossfade Music, Inc.

Cindi C. Lazzari, *Austin*  
Phillips & Prikryl, L.L.P.

3:00 Break

3:15 **Post Production and Film Distribution**  
*1.5 hr (.25 hr ethics)*

A discussion of "deliverables" required by film distributors and related issues such as pre-selling distribution rights, bank loans, completion bonds, negative pick-up deals, E&O insurance and producer reps to be followed by a review of various distribution channels and their deal structures including tactics and strategy in negotiating distribution agreements, typical terms and pitfalls to avoid. Also, how to protect

filmmakers by adding performance incentive, default penalties and arbitration clauses.

Harris Tulchin, *Los Angeles, CA*  
Harris Tulchin & Associates  
Mark Litwak, *Beverly Hills, CA*  
Mark Litwak & Associates

4:45 **Q & A with Panelists** .5 hr

5:15 Adjourn

### Saturday 3.5 hrs. (.5 ethics)

8:30 **Film Production/Distribution Case  
Study** *1 hr (.25 hr ethics)*

Well known Attorney/Executive Producer, John Sloss, and friends talk about their experience with financing, producing and securing distribution for their films.

John Sloss, *New York, N.Y.*  
Cinetic Media

9:30 **Negotiating Television Deals**  
*1.5 hrs (.25 hr ethics)*

General overview of issues and practical problems arising in the negotiation and documentation of a variety of television deals including the sale or acquisition of literary properties or other source materials as the basis for television productions, writer/show runner deals, consultant deals, acting deals and program licensing agreements.

Roger L. Armstrong, *Los Angeles, CA*  
Manatt, Phelps & Phillips, L.L.P.

11:00 Break

11:15 **The Representation of International  
Athletes and Celebrities:**

**Lance Armstrong - A Case Study** *1 hr*

Lance Armstrong's manager/agent discuss the role of the attorney, manager, agent in representing a sports figure as he becomes an international celebrity crossing over into all media

Bill Stapleton, *Austin*  
General Partner, Capital Sports Ventures, Inc.  
Longtime Agent & Attorney for Lance Armstrong

12:15 Adjourn

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## Make Travel Arrangements Early

**Hotel rooms**, on a space available basis, have been blocked at special rates. To make a reservation, call Jessica at 1-800-310-3378 before **September 20, 2001**. After this date, you must contact the hotel directly. (at the Austin Film Festival office)

Omni Austin Hotel: \$139/night  
 Stephen F. Austin Hotel: \$149/night  
 Driskill Hotel: \$165/night

**Discount on Airfare** through Continental Airline. Call 1-800-468-7002 and reference account code #134PQL. **Transportation from the Airport:** SuperShuttle is providing rides from the Airport to conference hotels at a rate of \$9 each way. Call SuperShuttle at 512-258-3826

# REGISTRATION INFORMATION

## Register Early!

We encourage early registrations because they help us ensure that sufficient course books, seating, and refreshments will be available.

Registrations are accepted on a space-available basis. As a preregistrant, course materials and seating will be reserved for you until the start of the first presentation. You can register online at: **www.TexasBarCLE.com**

## Payment

should be made by check (no trust/escrow accounts, please) payable to the **State Bar of Texas** or charge to your Visa, MasterCard, AMEX or Discover. If you use a credit card, you may fax your registration to **512-463-7387**. No confirmation will be sent; pick up your name tag and program materials at the program.

## Are you a member of the Entertainment and Sports Law Section?

This course is cosponsored by the Entertainment and Sports Law Section of the State Bar of Texas. If you are a current member of that section, or you agree to become one by the date of the presentation that you plan to attend, you may register at a special discount. See the registration form for details.

If you wish to join the section, please contact the State Bar's Sections

Coordinator, Kathy Casarez, at 800-204-2222, x1425. Please do not send payment for the section membership with your registration fee.

## If You Register But Cannot Attend

and would like a refund, mail or fax (512/463-7387) your refund request so that it is received by us **at least** one business day before the program. Registrants who do not attend will be sent the written materials.

## Full-Time Judges

have a non-transferable privilege to attend complimentary if space is available after admission of all paid registrants. Judges must actually attend to receive the written materials.

Only judges retired under the judicial retirement system and full-time judges may exercise this privilege, **provided the course is directly related to the jurisdiction of their tribunal.**

This privilege does not extend to receivers, trustees, court staff, or persons serving part-time in any judicial capacity.

## Persons With Disabilities

who need special accommodations to attend should contact us as soon as possible at **1-800-204-2222 x2097**.

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Mark A. Reutter. *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99 (2001).

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Brooke J. Egan. Comment. *Lanham Act Protection For Artistic Expression: Literary Titles and the Pursuit of Secondary Meaning*, 75 TUL. L. REV. 1777 (2001).

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Michael J. Frank. *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race of Color BFOQ?* 35 U.S.F. L. REV. 473 (2001).

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Rob Sanders. Note. *The Second Circuit Denies Music Publishers the Benefits of the Derivative Works Exception*. (Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc., 155 F.3d 17, 2d Cir. 1998.) 29 SW. U. L. REV. 655 (2000).

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*Symposium: Ownership and Protection of Heritage: Cultural Property Rights For the 21st Century*, 16 CONN. J. INT'L L. 177 (2001).

## Student Writing Contest

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

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

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

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than May 15, 2002.

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

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

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

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-2905.

**ENTERTAINMENT & SPORTS LAW SECTION**  
**of the STATE BAR of TEXAS**  
**MEMBERSHIP APPLICATION**

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

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

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of \$25.00 (made payable to ENTERTAINMENT & SPORTS LAW SECTION) to Susan Benton Bruning, Treasurer, 1227 Strathmore Drive, Southlake, Texas 76092

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