Texas Entertainment and Sports Law Journal

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Entertainment & Sports Law Section

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In this Issue:

Notes...

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

Join the Section

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

Invitation to Publish.

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

Articles may be submitted to:

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From the Editor:

To all of those of you out there, almost 600 of you, who are Section Members, it is with an overdue "Hello!" from the Section Council, that we want you to accept the latest issue of the Entertainment & Sports Law Journal. It is also with a "Thank you!", for being patient with the Editor and Staff of the Journal in getting this issue to print and into your hands.

The current Staff of the Journal is composed of Matt Mitten, Articles Editor, Professor at South Texas College of Law, Steven Ellinger, Proofing Editor, and Ms. Julie Cadarette, Advertising Coordinator. Special thanks goes to Russell Rains of Austin, Texas. He was "drafted" to get an article from the entertainment area and secured for you the article written by Don E. Tomlinson.

We have tried in this issue to provide the Section Members with a variety of articles which would be of interest in both the sports and in the entertainment areas. As the reader may readily see, we are open to anyone who wishes to submit an article. So if you feel the urge, write an article and send it in. We will use our best efforts to include acceptable articles in an upcoming issue.

The Journal is published quarterly, and if you are not on the mailing list and wish to be included, forward your name and address to the State Bar of Texas and let them know that you wish to be included on our mailing list.

We are now accepting advertisements in the Journal. Anyone wishing to advertise in Journal, should contact Julie Cadarette for information on getting your ad in the Journal. Ad Rates are: 1/8 page: $50.00; 114 page: $100.00; 1/2 page: $150.00; 3/4 page: 175.00 and Full page: $200.00.

The immediate past Editor of the Journal is Ron Kaiser, Professor at Texas A&M University. We should all feel proud and thankful for the effort that Professor Kaiser put into the Journal during its formative years. As your new Editor, I will strive to continue the efforts in providing the Section Members with a timely and informative Journal.

-Sylvester R. Jaime

CHAIRMAN'S REPORT

On behalf of the Officers and Directors of our Section, I would like to welcome all of our 612 members, both new and returning, to another year. We will strive to provide to our members through our section Journal informative articles in the areas of Entertainment and Sports Law as well as other information in these areas. Additionally, the Council plans to sponsor a seminar in both of our areas of interest.

The entertainment law seminar held in conjunction with the State Bar will once again coincide with the annual SXSW music conference in Austin, Texas, on March 16, 1996. This is an outstanding opportunity to not only learn from some of the best Texas and national lawyers, but also to enjoy and network with the music industry. Watch for your announcement from the State Bar. Plan on spending a few days, I think you will enjoy it!

Our annual sports law seminar for 1996 is currently in the planning stages as we are revising the planned presentation to provide the most impact for our members. Watch for further details in our Journal and the State Bar Journal as they are finalized.

The section Journal is always in need of articles from our members. If you would like to be published or know of any articles of interest to our members, please contact Syl Jaime, our newsletter editor, or myself and we will consider inclusion in the Journal.

Finally, David Beck, President of the State Bar of Texas, has asked our Section to consider the issue of pro bono representation. The obvious need for such representation often lies in areas that are principally outside of entertainment or sports. However, the Council is strongly urging its members to join and participate in pro bono programs through your local bar associations and/or local organizations such as Lawyers & Accountants for the Arts. It appears that pro bono may well be the future so start planning now.

Thank you for your attention and should you need anything please feel free to contact myself or any of our Officers or Directors.

Darrell L. Clements
Chair 1995-1996

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JOE'S EATERY[1] VERSUS MUSIC COPYRIGHT OWNERS: NO PAY, NO PLAY?

by Don E. Tomlinson[1]

I. Introduction

A. The restaurant "problem"

If, in addition to food, a restaurant[2] serves a radio-station signal to its patrons, the copyright owners of the music being played on that radio station believe they should be compensated for helping the restaurant satisfy its customers.[3] The restaurant owner believes she owes no obligation to the copyright owners because the radio station already is paying a fee to the performing rights organizations[4] for the right to publicly perform the music.[5] In a nutshell, this is the underlying controversy between restaurants and music copyright owners that has spawned recent legislation in Congress, where bills have been introduced that would amend the 1976 Copyright Act[6] ("the Act") to exempt restauranteurs from any liability to copyright owners for music played which emanates from a radio station.[7]

Further, in nearly half the states,[8] including Texas,[9] bills have been introduced which encompass such issues as how agents of the performing rights organizations conduct themselves in relation to restaurants and the bases upon which fees should be calculated.[10] A highly controversial bill passed by the state legislature in New Jersey and which awaits Governor Christie Todd Whitman's action has caused a federal district court in New York to grant effective permission to music copyright owners to completely withdraw permission to play copyrighted music in restaurants and other businesses in New Jersey should the governor sign the bill;[11] in effect — no pay, no play.

Much of the time, when restauranteurs and other business owners discover that compensation is due music copyright owners for the music they play in their establishments,[12] they are incredulous.[13] However, court decisions interpreting the "public performance" right in the Act[14] have consistently held that, indeed, the performance of copyrighted musical works in business establishments is an infringement of the copyrighted works[15] unless a royalty is paid to the copyright owners.[16] Copyright owners view this obligation as important because it constitutes a significant source of public performance revenue for songwriters and music publishers.[17] To understand why songwriters and music publishers are compensated in this way through copyright law requires a brief visit to the history and evolution of copyright law in the U.S., especially in relation to music.

B. History of music copyright law

The framers of the United States Constitution thought enough of the concept of copyright to have included it in the original document. Article 1, Section 8, Clause 8 states: "The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[18] Neither the original law[19] passed by Congress in 1790 pursuant to the copyright clause nor the first two acts[20] that amended the original law, in 1802 and 1819, included music as a copyrightable work of authorship. In 1831, however, Congress replaced the original law and the amendments to it with a new comprehensive law which, for the first time, made musical compositions copyrightable.[21] It was not until 1891, however, that Congress amended copyright law to include the "public performance" right, granting to the copyright owner the exclusive right to perform the composition in public.[22] Music publishers soon learned, however, that individually licensing the public performances of each of their copyrights to each of the public users of the material was, as a practical matter, unworkable. What was needed was a collective of some sort.

C. The performing rights organizations

In 1914 in New York City, a group of songwriters and music publishers got together and formed the American Society of Composers, Authors and Publishers ("ASCAP"), an unincorporated membership association.[23] Broadcast Music, Inc. ("BMI"), a non-profit corporation, was formed as competition to ASCAP by a group of broadcasters in 1939.[24] ASCAP and BMI distribute all non-overhead revenue to their publisher and writer members.[25] There is a third, much smaller, for-profit performing rights organization in the U.S. known as SESAC.[26]

Here is how all this works, using a single song as a hypothetical example.[27] Songwriter Taz Sterling ("Sterling")[28] and Tomlinsongs Music ("Tomlinsongs"),[29] a music publishing company, have a contractual agreement whereby Sterling's copyright in a song he wrote titled "I'm Just Too Cool" ("Cool")[30] is conveyed to Tomlinsongs in return for Tomlinsongs' exploitation of Cool, resulting in Cool being recorded and released on a major label by a recording artist under contract to that label.[31] Sterling and Tomlinsongs, in this hypothetical example, are affiliated with ASCAP, meaning that they have contractually authorized ASCAP to collect royalties in their behalf for the public performance of Cool.[32] Cool then becomes a part of the ASCAP repertory, which ASCAP licenses to radio and television entities and, importantly in the context of this article, to restaurants and other such establishments that publicly perform music.[33] When payments by the licensees of the ASCAP repertory are made to ASCAP,[34] ASCAP deducts its operating expenses[35] and, using a complicated formula,[36] determines what portion of the remaining amount is owed to Sterling and Tomlinsongs for the public performances of Cool over the calendar quarter for which royalty payment is being made.[37] ASCAP sends half that amount to Sterling and the other half to Tomlinsongs.[38] While the revenue from restaurants amounts only to about two percent of the income of performing rights organizations,[39] in an industry[40] where the average income per working professional is quite low,[41] every little bit helps. Consequently, music publishers, and particularly songwriters, are quite concerned over any efforts, certainly to include federal legislative initiatives, to decrease public performance royalty income.

II. Legislation and Statutory Enactments

The legislation currently under consideration is of two

ignificantly different flavors. At the federal level, the copyright scheme would be amended to exempt restaurants and other types of businesses from any liability for most types of public performances of copyrighted music.[42] At the state level, the various bills generally deal with rate structures and with limitations on the practices of performing rights organization representatives in their relationships with restauranteurs and others.[43] So far, four bills at the state level have been passed and signed into law (Maryland, Oklahoma, Texas and West Virginia) and at least two other bills (New Jersey and Colorado) have made it through the legislative process and await gubernatorial approval or veto.[44] A bill on this subject also has become law in Virginia.[45] It was not included in the above list because it was drafted in association with (and consequently supported by) ASCAP.[46]

A. Federal

To date, Congressional action has been limited to committee hearings.[47] Beyond the basic feature of redefining the circumstances under which royalties are due, H.R. 789, known as the "Fairness in Musical Licensing Act of 1995," also

...establish[es] an arbitration system to resolve rate disputes. Under current federal copyright law, only the federal [district] court [in] the Southern District of New York is allowed to handle such disputes, which makes it expensive for business people elsewhere in the nation. The National Restaurant Association has long claimed that [the performing rights organizations] rely on the threat of costly court battles to force restauranteurs to comply with their fees.[48]

The Section of Intellectual Property Law of the American Bar Association will consider, at its annual section meeting in summer, 1995, a proposed resolution opposing H.R. 789,[49] and it will consider a proposed resolution opposing virtually all the bills filed in or passed by state legislatures in 1995.[50]

B. State

1. Maryland

The Maryland bill, S.B. 514 of 1995, was approved May 25 and contains, among other features, mandates requiring performing rights organization representatives to provide business proprietors — in advance of contracting — rate schedules and proposed contract terms, including those for similar businesses in the area; it requires such agents to identify themselves and their employer upon entering — for business purposes — any establishment covered by the law, and it prohibits the use by such agents of unfair or deceptive acts or practices.[51] It also provides for actual damages and injunctive relief to the entity affected by the violation of the law.[52] It does not require the performing rights organizations to supply any lists of it repertory.

2. Oklahoma

In most respects, the Oklahoma bill, H.B. 1254 of 1995, which also became law on May 25,[53] mirrors the Maryland bill, differing only in one major way. In addition to the damages and injunctive relief provisions in the Maryland bill, failure to comply with the Oklahoma law subjects the violator to a maximum $10,000 penalty to be enforced and collected by the state's Attorney General.[54]

3. Texas

The Texas legislation, S.B. 526 of 1995, approved May 23, requires the performing rights organizations to make available to business establishments "the most current available listing of the copyrighted musical works in [its] repertory (at the expense of the proprietor)" and "the most current available list of the members and affiliates represented by the society."[55] Otherwise, the Texas bill most closely approximates the Maryland bill.

4. West Virginia

The West Virginia bill, S.B. 499 of 1995, signed into law March 24, is the most different of the four "anti-performing rights organizations" bills that have become law.[56] Its sole requirement concerns considerable advance "notice [to affected businesses] of the royalty or fee rate and the means of its computation."[57] Under the bill, the failure of a performing rights organization to comply with the notice requirements constitutes a complete defense to any action brought by a performing rights organization against a business owner concerning the public performance of copyrighted music.[58]

5. Virginia

In the case of the Virginia bill, ASCAP was a part of the drafting process and supported passage of the bill.[59] S.B. 858 of 1995 was approved March 25 and stands in considerable contrast to the other new laws.[60] It requires that performing rights organizations doing business in Virginia file with the State Corporation Commission each year copies of all the rate schedules and contract provisions it has in place in Virginia, a copy of the "current available list" of its members and affiliates, and the "most current available listing of the copyrighted musical works in [its] repertory."[61] Another requirement is that these lists be made available to individual business proprietors "at the sole expense of the proprietor."[62]

A provision surely added at the request of ASCAP requires that performing rights organizations comply "with federal law and orders of courts having appropriate jurisdiction."[63] This, of course, means that in the case of ASCAP there would be no question that federal court orders flowing from the consent decree under which it operates would take precedence over anything contained in the state law. The bill contains the "identification" requirement and prohibits "any coercive conduct, act or practice that is substantially disruptive of a proprietor's business."[64] It also contains provisions relating to damages and injunctive relief.[65] Another passage that has the ASCAP imprimatur recognizes performing rights organizations' rights concerning "conducting investigations to determine the existence of music use by a proprietor or informing a proprietor of the proprietor's obligation under [federal copyright law]."[66]

6. Colorado

In Colorado, where H.B. 1242 was passed in May, 1995, and awaits action by Governor Roy Roemer, the bill focuses on "set[ting] a standard of professional conduct for agents of these performing rights societies"[67] and requiring identification upon entry "for the purposes of investigating the use of copyrighted music."[68] The bill also contains the

"song list" requirement.[69]

7. New Jersey

Among the requirements contained in the New Jersey bill are the edict that the performing rights organizations provide restauranteurs with a list of songs they represent, fee comparisons for nearby similar businesses, identification of employer and nature of visit by performing rights organization agents upon entering any restaurant or other business establishment, and an arbitration mechanism for rate disputes.[70] Reaction by ASCAP in federal court to these requirements has been, in part, that providing a repertory list to restauranteurs is not feasible[71] and that the arbitration feature is incompatible with the existing consent decree.[72] The court would seem to agree.[73]

III. The Restaurant Perspective

A. Individual sentiment

By no means do all restauranteurs have an intense dislike for paying royalties to the performing rights organizations or believe the tactics of such groups to rate right up there with Adolf Hitler,[74] but many do. The following is a representative example of the comments of individual restauranteurs on the subject. "They're just like the Syndicate. They want to smash you, crush you. They want to be feared."[75]

B. Trade associations

According to Jerald Jacobs of the American Society of Association Executives, "[h]undreds of complaints about harassment and intimidation tactics employed by music licensing societies have been lodged [with his office] by trade and professional associations"[76] on the general subject of "[u]ntrained commissioned field sales staff from the licensing groups routinely us[ing] offensive language in communicating with [various types of business owners]."[77] The various restaurant trade associations are mad as can be on behalf of their constituents — and say so. "We hate them, absolutely hate them."[78] "Restaurant owners all over the country have been infuriated by the bullying tactics of the huge music-licensing agents. Their outrage is palpable."[79]

In Canada, neither legislation nor court decision grants copyright owners the right to collect for public performances in restaurants. "[In 1992], intensive grass-roots lobbying by Canada's restaurant association killed a [legislative] proposal by SOCAN (Society of Composers, Authors and Music Publishers of Canada) to start charging restaurants for playing radios and TVs."[80]

Should legislative initiatives not work, seeking intervention by the Antitrust Division of the U.S. Department of Justice could be the next step for American restauranteurs. Later the same day of Judge Conner's ruling allowing ASCAP to pull out of New Jersey should Governor Whitman sign legislation aimed at ASCAP that the court called "onerous,"[81] New Jersey Restaurant Association officials "met with a representative of the [A]ntitrust [D]ivision of the U.S. Justice Department..., 'and we're hoping that the [A]ttorney [G]eneral will step in and file an antitrust complaint.'"[82]

IV. The Performing Rights Organizations Perspective

While representatives of the performing rights organizations do not use, at least in published quotations, the kind of invective used by so many people in the restaurant industry, they do, of course, respond. "That person who wrote that piece of music literally owns that piece of music, and they deserve to be compensated when the music is used. It's morally the right thing to do."[83] "The problem is (business owners) not understanding why they have to pay for music. It's property that comes from the factory of someone's mind that's just as real as a table or chair."[84] Further, on the subject of "tactics," ASCAP and BMI deny any improprieties. "ASCAP's president emeritus, composer Morton Gould,...angrily denied charges that ASCAP agents engage in 'Gestapo tactics' to pressure businesses to pay royalties."[85] BMI vice president and general counsel Marvin L. Berenson said: "We do not intimidate, harass or abuse."[86]

V. Other Perspectives

Newspaper columnist Ken LaFave, who wrote a column on this subject, is himself a songwriter. He admitted his bias in the column.

As an ASCAP member, I receive tiny honoraria for a few concert compositions. And we are talking small double digits per quarter, which is appropriate because my music is narrowly known. I wouldn't get any at all if not for the largesse of such folk as Bruce Springsteen and the members of Pearl Jam. The money collected from licensing their music[al compositions] and [the] music[al compositions] of other pop [composers] subsidizes the money given to us "classical" composers.

That occasional little check is important affirmation that my music is my property and should be recognized as such when performed. ASCAP secures this feeling of ownership for 6[5],000 members, of whom only about 10 percent make a living with their music.

I'm sure [the Congressmen who introduced the bills exempting restaurants from such payments] believe restaurant and tavern owners are getting a raw deal by having to pay a few hundred bucks a year to some agency that doesn't fork over a palpable product such as vodka or cream cheese. It must confuse them to have to pay for music....[87]

While there is no sure way from the below-quoted letter-to-the-editor itself to determine whether the author thereof is himself a songwriter or music publisher, it is clear that he favors the performing rights organization side of the controversy.

Regarding the article about fees due ASCAP and BMI for playing recorded music in restaurants and bars: The two restaurant owners (who oppose paying... royalties) quoted in the article actually make persuasive arguments for [paying] such fees. If playing the music is "crucial" to their business, why is it such a big deal to pay $2 to $3 a day to stay within the law? There are several options available: They could hire someone to play [original, non-licensed] music; install a jukebox and play non-ASCAP/BMI-licensed material; or have no music at all. They should experiment with these options and let market forces work. If people are to make any sort of living in the "arts," they must have some control over how their works are

sed.[88]

VI. Conclusions

In my[89] nearly 20 years as a lawyer and five years as a mediator, I have come to realize that many disputes are borne of an unwillingness to view a situation or controversy from the perspective of the other party, and I believe this is what has occurred here. In other words, the dispute discussed in this article should not be a dispute. Very likely, the original mistake was made long ago and continues to be made by the performing rights organizations. Yes, copyright law says businesses such as restaurants must pay royalties for the public performance of copyrighted music, but there are two concepts that confront this legal requirement that should be understood by the performing rights organizations, especially in relation to the *thinking* of non-creators: 1) copyright law is known only superficially or not at all to many persons and is philosophically misunderstood or erroneously understood or both by most of those to whom it is known at only slightly higher levels (*i.e.*, most small-business owners);[90] and 2) violations of copyright law are not thought by most persons to carry any moral stigma.[91]

What this means is that the first job of the performing rights organizations is to educate, politely and effectively, the non-telecommunications users of music, such as restauranteurs. Why music copyright law exists and that it is the fundamental basis for the livelihood of songwriters is explainable, but I get the feeling that the performing rights organizations have not done a very good job of it. Second, where there is this much smoke, there must be at least some fire on the subject of tactics. It makes no sense whatever for performing rights organization representatives to conduct themselves in any kind of underhanded fashion under any circumstances in dealing with restaurants (and other music users), especially where the substantive law is as much on the side of the performing rights organizations as it is. Third, by their own admission, the fee structure for restaurants is like a "Chinese menu."[92] Clearly, such a situation is not conducive to good relations with restaurant owners, many of whom do not think they should be paying any such fee to start with.

In sum, the way many restaurant owners see it, they should not owe any money at all;[93] when they discover they do, many times it is through nefarious enforcement tactics used by performing rights organization representatives (described by one restaurant owner as being "like the bill collectors in the Bible, the scum of the earth");[94] and assuming restauranteurs are able to work their way through that problem, they are then faced with a crazy-quilt fee structure.[95] Restaurant owners and managers are by no means blameless here, however. Not to at least try to better understand the reasons for and the intangible nature of copyrights is considerably anti-intellectual and beneath the mental dignity of an otherwise intelligent industry. Both sides should understand that the answer is not major and extremely expensive fights in legislative and judicial venues.

Is this a settleable dispute? Absolutely! If I had the judicial authority, I would order these two industries to the bargaining table and make them stay there until a comprehensive settlement had been reached. Where the means for settlement is available and where the basis of the dispute is as much emotional as financial, there is no excuse not to reach an equitable agreement. This is a national problem requiring a national solution. Were I the chair of a Congressional committee holding hearings on the subject or were I an appropriately highly-placed figure in the federal executive branch, I would beseech the two industries to get together,[96] and I would propose a moratorium on federal legislation amending the Act at least until the industries had a serious opportunity to deal with each other more realistically.

This part of the copyright scheme has been developed over many decades, and it would be criminal, in my view, to legislate this revenue source out of existence just because the restaurant industry is mad (even if for good cause). Where I come from, that would be called "throwing the baby out with the bath water." Speaking of the bath water, though, I would propose no moratorium on state legislation carefully crafted to regulate the tactics used by what hopefully is nothing more than a few, which is a few too many, renegade performing rights organization representatives. I would, however, leave the fee structure and dispute resolution procedures and other such matters for resolution at the federal level where copyright law appropriately resides. In my view, the bottom line here is that these two industries should take a cue from the Lennon/McCartney composition and "work it out."[97]

Update

Since this article was originally published in the summer of 1995, there have been several significant developments, mainly including a controversy-ending compromise (at least at the federal legislative level) between the performing rights organizations and a large restaurant industry trade association. Other updating involves the New Jersey and Colorado legislation and favorable action by the Intellectual Property Section of the ABA on the proposed resolutions. First, the major compromise.

On October 31, 1995, just as lobbying was intensifying on capitol hill,[98] the National Licensed Beverage Association and its 20,000 members reached agreement with the performing rights organizations[99] on compromise federal legislation.[100] In lieu of enactment of the "Fairness in Music Licensing Act," still pending in Congress, the groups agreed to ask Congress to enact legislation that would exempt "bars and restaurants with less [than] 3,500 square feet of space" from any requirement under federal copyright law to compensate the performing rights organizations for the public performance of music.[101]

ASCAP spokesman Paul Skrabut said: "It takes care of small businesses and still preserves the right of songwriters to be paid."[102] NLBA spokesman Scott Wexler said: "It's fair and reasonable."[103] Skrabut added: "[That which the bars and restaurants must pay to the performing rights organizations is] a nominal fee, but it obviously causes so much resentment and transactional problems that ASCAP decided, for small businesses at least, it isn't worth the rancor."[104]

In the aftermath of the compromise, *The Nashville Tennessean* editorialized that restauranteurs

should count their blessings [because] the songwriters made them a generous compromise. [T]he agreement shows that songwriters are only asking for what is fair. It's often hard for people to understand that good music doesn't just come from thin air. It represents the hard work of creative artists. Those artists deserve their just compensation. In this case, songwriters have shown their understanding of the burdens on small business. The agreement displays a healthy willingness to negotiate. Congress should put its stamp of approval on the deal.[105]

The most controversial of the state legislation, the New Jersey bill, was "conditionally vetoed" by Governor Whitman on April 27, 1995.[106] In her veto message, Governor Whitman called the bill an "unconstitutional infringement on federal copyright law."[107] In particular, Governor Whitman objected to "sections that specified penalties and damage payments for violations and indicated it was `neither appropriate nor desirable' to interject the state attorney general into copyright matters governed by federal law."[108]

While ASCAP no doubt was pleased by Governor Whitman's veto, it was at the same time aware that New Jersey-style legislation could be enacted in any state, so it went back to court to ask Judge Conner to expand his ruling, and on May 11, 1995, he did just that, authorizing ASCAP to "pull out of states that enact New Jersey-style bills."[109] After Governor Whitman's veto, the two sides began working together on a compromise and may be "near an agreement."[110]

The Colorado bill was signed into law in June, 1995.[111] In New York, compromise legislation was enacted in June, 1995, that addresses the conduct of performing rights organization representatives and that calls for contracts between business owners and the performing rights organizations to be in writing but contains no provision for a hard-copy list of songs.[112]

In Missouri, a bill drafted by the National Restaurant Association and enacted in 1995 contains the most potentially severe language of any of the bills, calling for up to 15 days in jail for its violation.[113] After the bill became law, ASCAP, pursuant to Judge Conner's order concerning New Jersey-style bills enacted elsewhere, threatened to pull out of Missouri.[114] In an attempt to forestall ASCAP from withdrawing its licensed music from the state, Missouri Attorney General Jay Nixon "suggested that [Judge] Conner invalidate any parts of the Missouri law that conflict with federal statutes or court orders rather than allow ASCAP to pull out."[115]

Other than the criminal sanctions, the two provisions that are the most nettlesome to ASCAP are "[a] requirement to provide each proprietor with a list of ASCAP songs at the place of business [and a] ban on threatening legal action to get a license agreement."[116] The attorney general said that should ASCAP withdraw its music from the state, such a pullout "could result in harm to the general economy of Missouri."[117] That, it would seem, is precisely why the performing rights organizations feel so justified in arguing that the public performance of copyrighted music in business establishments is indeed commercial.

For the foreseeable future and assuming Congress enacts the compromise legislation described above, this controversy seems put to rest at the federal level. But things may be just heating up at the state level where the issues are different. Both sides have tasted success, *e.g.*: ASCAP has Judge Conner's rulings and seeming support; restauranteurs and other such groups introduced legislation in about half of the states and were successful to some degree in about a third of those states. Without doubt, similar legislation will be introduced when the remaining state legislatures — most of which are on hiatus now — (re)convene. And just when it seems reason is about to prevail, the "dissing" begins. Dave Overfelt of the Missouri Retailers Association: "It's a matter of civility."[118] Bill Thomas of ASCAP: "It's a matter of money. They don't want to pay it, and they resent people who tell them they must."[119]

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[2] While the controversy between *restaurants* and the performing rights organizations has taken center stage and is the focus of this article, it should be noted from the outset that the controversy exists, really, between the performing rights organizations and *all* establishments that play copyrighted and performing rights organization-licensed music for the enjoyment of their customers, especially where the source of the music is a radio station.

[3] *See* Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (7th Cir. 1981). While *Gap* involved a clothing store as opposed to a restaurant, the central issue is the same. "So long as there can be discerned a material tangible commercial profit in the rendition of musical compositions, such rendition is 'for profit' within [the Act]." Chappel & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (C.A.Pa. 1964).

[4] Music licensing entities which themselves operate under license from the music copyright owners, discussed considerably, *infra*.

[5] "...[S]ome members [of the New Jersey Restaurant Association] feel they don't owe them anything." Steve Brooks, "All Keyed Up," *Restaurant Business*, October 10, 1993, 74, quoting Larry Fidel, executive vice president of the organization. It bears mentioning in this context that the real underlying problem may be that many businesses that publicly perform music, regardless of the source of the music, simply believe music is or should be free and that copyright infringement is not morally wrong, *i.e.*, from their perspective, the issue may not be so much the details of how the relationship should work, but that there should be no relationship at all.

[6] 17 U.S.C. 101, *et. seq.*

[7] H.R. 789 of 1995, introduced by U.S. Rep. Jim Sensenbrenner, R-Wis., would "amend federal copyright law and exempt restaurateurs from paying licensing fees for background music from radios and television, for which they are now liable." Ron Ruggless, "Operators to Lawmakers: Now You're Playing Our Song," *Nation's Restaurant News*, February 27, 1995, 1. H.R. 3288 of 1994, H.R. 4936 of 1994 and S. 2515 of 1994, all of which died in committee when the sessions of Congress in which they were introduced adjourned, exempted all radio and TV broadcasts incidental to the main purpose of the restaurant unless a restaurant charges for the services, meaning that restaurants playing radios and televisions would no longer be engaging in the public performance of copyrighted musical compositions and, thus, not liable for royalty payments under the Act. Other provisions included a new rate arbitration feature and on-line access to repertory databases.

[8] "Similar bills [to H.B. 1242 of 1995 in Colorado] are pending in 21 other

ates." Bill Husted, "Eat, Drink and Pay the Piper," *Rocky Mountain News*, May 24, 1995, 2D. Restaurateurs seem at least as mad over what they view as "Syndicate-like" enforcement tactics as they are about the requirement to pay. "Even more than rates, the angriest complaints about ASCAP and BMI concern their treatment of owners, often described as 'bullying' and 'blackmail.'" Brooks, *supra* note 4, 79. "I've never met meaner, more intimidating, unreasonable people in my life." Husted, *supra* this note.

[9] S.B. 526 of 1995 and H.B. 1530 of 1995. S.B. 526 was passed and became law on May 23, 1995. It is discussed *infra*.

[10] Several of these bills, discussed *infra*, have become law.

[11] *See* "Conditional Order Would Relieve ASCAP of Licensing Obligations in New Jersey," ("Conditional Order") *BNA Patent, Trademark & Copyright Daily*, April 24, 1995, d2. Authority for this ruling from the bench by Senior United States District Judge William C. Conner derives from the continuing jurisdiction of the Southern District of New York in U.S. v. ASCAP, a 1941 antitrust action resulting in a consent decree now decades old.

[12] "Most [restaurateurs] don't even know they must pay the author of a copyrighted piece of music every time the work is performed." Dan Kane, "He Has an Ear for Copyrighted Music and a Solution," *Syracuse Herald-Journal*, March 23, 1995, A1.

[13] "Why should I pay for it? We're promoting their music. *We* should get paid (emphasis supplied)." Stephanie N. Mehta, "Enterprise: ASCAP to SAM: Play it Again, But Pay for It," *The Wall Street Journal*, September 27, 1994, B1, quoting Frank Panico. A restaurant owner in New Brunswick, New Jersey, Panico was sued successfully by ASCAP for refusing to pay when his lounge pianist played George Gershwin's "Rhapsody in Blue," an ASCAP-licensed composition. From the other side's point of view, ASCAP general counsel Bernard Korman says that "small-business owners don't always understand the reasons behind copyright fees." Anne R. Williams, "Songs Have a Price But Businesses with TVs Don't Want to Face Music," *Seattle Post-Intelligencer*, February 2, 1993, B1. Michele A. Reynolds, BMI's marketing director, points out that:

> The copyright law is pretty much considered an unknown law and businesses don't understand that when you use music you have to pay for it. Also, it has to do with the fact that music is considered free [by many people]. Music isn't free and those who create it are entitled to be compensated. When their work is used in a place of business to enhance the business, the profitability, the user has to take responsibility for that.

"Mall Music: No Free Lunch," *Stores*, May 1990, 41. In the case of a retail store owner, Reynolds says:

> That store owner is creating an atmosphere. It is just as if he called in a merchandiser to rearrange his entire stock to display it better so he can sell it. It's the same thing. He is going to pay for that and he is going to pay for using music. The merchandise you can see and touch; the music you can only hear.

Id.

[14] 17 U.S.C. sec. 106(4).

[15] With notable exceptions, such as the "homestyle exemption," which covers music played "on a single apparatus of a kind commonly used in private homes." 17 U.S.C. sec. 110(5). For one of many interpretations of this provision, almost all of which are favorable to copyright owners, *see* Hickory Grove Music v. Andrews, 749 F.Supp. 1031 (D.Mon. 1990). *See, also,* Bart A. Lazar, "Mere Reception in Public Under the Copyright Act of 1976: Exempt or Extinct?," 1 *Albany Law Journal of Science and Technology* 97 (1991) and David E. Shipley, "Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption," 29 *Arizona Law Review* 475 (1987).

[16] *See* Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 51 S.Ct. 410, 75 L.Ed. 971 (1931), where the U.S. Supreme Court held that a radio station played over loud speakers in a hotel constituted a separate public performance of the music played by the hotel, thereby subjecting the hotel to the obligation to pay royalties to the copyright owners of the music played by the radio station. This opinion constitutes the basis for many of the later actions of the performing rights organizations and decisions of various lower courts. With respect to the basic premise that copyright owners are due compensation when their music is publicly performed in a business establishment for the purpose of attracting and retaining customers, directly or indirectly, the Court was unequivocal in its view.

[17] The main source of public performance revenue is from license fees paid by radio and television stations and other entities. The other main source of revenue, in general, for songwriters and music publishers is "mechanical" royalties, or the royalties earned through record companies and other such entities from the sale of such as CD's, audiocassettes, etc., the rate for which is a matter of federal law.

[18] U.S. Const. art. I, sec. 8, cl. 8. Copyright law has been defended on two conceptual bases: 1) the "moral" right to control what one has created; and 2) the utilitarian ground that without such protection there would be little or no economic incentive to create and, thus, there would be little created. *See, generally,* Don E. Tomlinson, "Journalism and Entertainment as Intellectual Property on the Information Superhighway: The Challenge of the Digital Domain," 6 *Stanford Law & Policy Review* 61 (1994).

We protect copyrights, patents and other forms of intellectual property because, since the early days of the republic, the government has recognized the public interest in granting the inventor, researcher, author, producer or artist some form of exclusive control over the production, sale, or distribution of the new product, process or service. This control gives these creative people the incentive to risk investing the time and money necessary to innovate. Their books, films, inventions and other works add to the store of human knowledge and to the quality of our lives.

The arrangement breaks down, however, when "pirates" misappropriate the intellectual property by making, using or selling it for commercial gain without the owner's permission and without paying royalties to compensate the owner.

Eric Fleischmann, "The Impact of Digital Technology on Copyright Law," 23 *New England Law Review* 45, 51 (1988).

[19] Act of May 31, 1790, ch. 15, sec. 1, 1 Stat. 124 (1790).

[20] Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (1802) and Act of Feb. 15, 1819, ch. 19, Stat. 481 (1819).

[21] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831); codified presently at 17 U.S.C. sec. 102(a)(2).

[22] 1891 Copyright Act, ch. 565, sec. 4952, 26 Stat. 1107; codified presently at 17 U.S.C. sec. 106(4).

[23] ("Authors" is better read "lyricists.") *See* Buffalo Broadcasting v. ASCAP, 744 F.2d 917 (2nd Cir. 1984) ("Buffalo"). "[ASCAP] holds non-exclusive licenses for the non-dramatic performing rights to more than three million musical compositions." *Id.*

American music history changed in 1914 when operetta composer Victor Herbert walked into a cafe and heard his music being played. Herbert realized that he was receiving no money for a performance of his artistic property. Nor was there a way to effect remuneration. Being a practical man, Herbert changed that. He and some friends founded [ASCAP].... [a]fter [which], cafes and saloons and tea shops and juggling acts were no longer able to pay musicians to play music without also paying the composers of that music.

Ken LaFave, "Royalties Exemption Would Take Cash Out Of Composers' Pockets," *The Phoenix Gazette*, August 30, 1994, D3.

[24] Buffalo, *supra* note 22. "[BMI] has approximately 38,000 writer and 22,000 publisher affiliates. Its repertory, for which it holds non-exclusive licenses for non-dramatic performing rights, includes more than one million compositions." *Id.*

[25] With the exception of contingency and administrative reserves. *See* ASCAP and BMI promotional material.

[26] Because of its relatively small size, Nashville-based SESAC is not discussed here. It should be noted, however, that with the recent signings of Neil Diamond and Bob Dylan (including their entire songwriting catalogs to date), SESAC may be poised to join ASCAP and BMI in the major leagues of performing rights organizations. ("SESAC" originally stood for Society of European Stage Authors and Composers but today the letters are not used as an acronym.) *See* David Hinckley (New York Daily News Service), "Music Rights Company Scores Coup," *Austin American-Statesman*, February 7, 1995, E7.

[27] Of course, there are many variations on this theme. The hypothetical example given is the *basic* way these relationships work.

[28] A fictitious name. Any similarity to actual persons, living or dead, or to actual events or firms is purely coincidental.

[29] A fictitious music publishing company. Any similarity to actual persons, living or dead, or to actual events or firms is purely coincidental.

[30] A hopefully fictitious song title. Any similarity to an actual musical composition is purely coincidental.

[31] It is important not to confuse the royalties received by the recording artist with the royalties received by the songwriter and the music publisher. Recording artists receive royalties from the record company, on the basis of unit sales, for the artist's performance on the sound recording of the underlying musical composition. Songwriters and music publishers also receive royalties from the record company on the basis of unit sales, *and* they are legally entitled to royalties for the public performance of any sound recording (and all other types of public performances of the

underlying musical composition, such as live performances). Recording artists in the U.S. receive no public performance royalties. *See* William H. O'Dowd, "The Need for a Public Performance Right in Sound Recordings," 31 *Harvard Journal on Legislation* 249 (1994).

[32] Once Cool has been recorded and is about to be released by a record company. Tomlinsongs sends a form to ASCAP indicating the impending release and indicating that Sterling is its sole author and that Tomlinsongs is its sole publisher.

[33] For various reasons, it is not feasible for an establishment engaging in the public performance of music to contract with only one of the performing rights organizations, not the least of which reasons is that many thousands of publicly performed songs were co-written by one writer affiliated with ASCAP and another affiliated with BMI. For example, "This Old Porch," recorded by Lyle Lovett, was co-written by Lovett, who is affiliated with ASCAP, and Robert Earl Keen, who is affiliated with BMI. "...[I]t would be very difficult to play any music while making sure not to include an ASCAP tune." Linda A. Anderson (Associated Press Writer), "Copyright Fight May Stop Music in New Jersey," *The Baton Rouge Advocate*, March 28, 1995, 13A.

[34] Payments are received by ASCAP at various intervals depending on the particular contractual relationship between ASCAP and the paying entity. *See* ASCAP (and BMI) promotional material.

[35] About 20% of revenues. In ASCAP's case, 81% of revenues is distributed to songwriters and music publishers; in BMI's case, the figure is 83%. *See* Brooks, *supra* note 4, 73.

[36] The collected money is

pooled and split among [the] members according to a calculus of whose music [is] played most often. The calculus has gotten a lot more complicated in this age when music is everywhere you go.... [b]ut the principle is the same: collect money from music [users] and pay the music [publishers and composers].

LaFave, *supra* note 22.

[37] Public performance royalties from foreign sublicensing income are paid on a semi-annual basis. *See* ASCAP and BMI promotional material.

[38] Depending on the extent of public performance of Cool, the royalty checks, if any, sent to Sterling and Tomlinsongs could be for as little as a few dollars or for as much as hundreds of thousands of dollars. *See* ASCAP (and BMI) promotional material.

[39] "Of the $390 million ASCAP grossed in 1992, only about 2% came from [restaurants]." Brooks, *supra* note 4, 73-74. As the controversy escalates, however, the figure seems to rise. For example, ASCAP officials were quoted in 1995 as saying that "[c]utting off...payments [from taverns, restaurants and other retailers] would reduce a songwriter's royalties by up to one-fifth." Patrick Jasperse, "Businesses sound sour note on music royalty payments," *The Milwaukee Journal*, February 3, 1995, 1A, quoting Bill Thomas, public affairs director of ASCAP. ASCAP officials also said: "ASCAP predicts [the bills filed in Congress] could reduce by half the income of composers, endangering songwriting as a profession." Anderson, *supra* note 32. While the "2%" figure quoted above is from restaurants only, and the "one-fifth" and "by half" figures also include "taverns and other retailers" and "bars and other establishments," respectively, the percentage figure ASCAP seems to be indicating it is collecting from restaurants alone appears to be rising rather quickly and rather significantly.

[40] Songwriting, not music publishing.

[41] Of ASCAP's 65,000 members, "only about 10 percent make a living with their music." LaFave, *supra* note 22.

[42] H.R. 789 of 1995.

[43] For example, S.B. 526 of 1995, Texas, titled the "Copyright Royalty Collection Practices Act."

[44] Conditional Order, *supra* note 10, and Husted, *supra* note 7.

[45] S.B. 858 of 1995.

[46] "We sat down with legislators and restauranteurs in Virginia and together were able to write a statute...." Joe Tyrell, "Music Licensing Firm Wins Round in Court," *The Star-Ledger*, March 21, 1995, 1995 WL 5207235, quoting ASCAP attorney I. Fred Konigsberg.

[47] *See, e.g.*, "Reforms to Music Performance Licensing are Urged by Witnesses at House Hearing," ("Reforms") *BNA Patent, Trademark & Copyright Law Daily*, March 8, 1994, d3, and "Intellectual Property: Performing Rights Groups, Restaurant Owners Clash Over Music Royalties," ("Performing Rights") *BNA Patent, Trademark & Copyright Law Daily*, February 24, 1994, d2.

[48] Ruggless, *supra* note 6, 91.

[49] Proposed Resolution 301-1 reads:

Resolved, that the Section of Intellectual Property law opposes, in principle, the broadening of the existing exemptions in 17 U.S.C. sec. 110(5) regarding nondramatic public performances of copyrighted musical compositions or the interference in existing marketplace relations between interested parties by requiring mandatory arbitration of license fees, reduction of available remedies for infringement, and imposition of standard forms of licenses and license terms; and Specifically, opposes H.R. 789, 104th Cong., 1st Sess. (Sensenbrenner).

Section of Intellectual Property Law, American bar Association.

[50] Proposed Resolution 301-2 reads:

Resolved, that the Section of Intellectual Property law opposes, in principle, any state legislation which makes it impracticable for creators and owners of copyrighted musical compositions to license the nondramatic public performance of their copyrighted works by requiring licensors to disclose to licensees' competitors actual fees paid by licensees, by authorizing state courts to determine the "reasonableness" of license fees, and by imposition of standard forms of licenses and license terms; and Specifically, opposes: California, A. 1389 (Setencich); Colorado, H.B. 1242 (Tool); Florida, H.B. 1209 (Edwards); S.B. 2242 (Bankhead); Georgia, S.B. 426 (Balfour, Langford); Illinois, H.B. 1923 (Lang); S.B. 813 (Haukinson); Iowa, H.B. 230 (Heaton, Brunkhorst); Maryland, H.B. 533, S.B. 514 (Arnick, Kryslak); Minnesota, H.B. 732 (Pugh); Missouri, H.B. 729 (Copeland); S.B. 355 (McKenna); New Hampshire, H.B. 419 (Lozeau); New Jersey, S.B. 1282 (Bennett), A. 1610 (Kavanaugh); Oklahoma, H.B. 1254 (Kirby); Rhode Island, S.B. 1293 (O'Leary); Texas, S.B. 526 (Lucio), H.B. 1530 (Eiland); Virginia, S.B. 858 (Beneditti); Washington, S.B. 5845 (Sutherland); West Virginia, S.B. 499 (Craigo, Chafin, Anderson); Wyoming, H.B. 0242 (Hanes) and similar legislation.

Section of Intellectual Property Law, American Bar Association.

[51] S.B. 514 of 1995, General Assembly of Maryland.

[52] *Id.*

[53] H.B. 1254 of 1995, People of the State of Oklahoma.

[54] *Id.*

[55] S.B. 526 of 1995, Legislature of the State of Texas.

[56] S.B. 499 of 1995, Legislature of West Virginia.

[57] *Id.*

[58] *Id.*

[59] Tyrell, *supra* note 45.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Ruggless, *supra* note 6, 91, quoting Pete Meersman, executive director of the Colorado Restaurant Association.

[68] *Id.*, quoting Meersman.

[69] "The reason we want to have lists available is that, say, you're an operator, and you don't want to pay royalties or a blanket licensing fee to all these groups. You want to know what is...covered under your agreement. In other words, you want to know what you are paying for." *Id.*, quoting Meersman.

[70] *Id.*

[71] "[Fred] Konigsberg [an ASCAP attorney] said a printed list of all ASCAP songs would be a stack of paper five feet high. He suggests requiring just one copy to be filed with the state." Anderson, *supra* note 32.

[72] *Id.*

[73] Clearly, Judge Conner does not care for the bill.

At the March 20[, 1995,] hearing, Judge Conner remarked that there are provisions in the New Jersey proposal that "would be extremely onerous," citing the requirement of providing every restaurant with a printed or electronic copy of the list of ASCAP compositions. If all owners asked for that list[,] it could drive ASCAP out of business in New Jersey, the court suggested. The penalties for failure to comply with the bill "could far exceed any royalties that ASCAP would conceivably expect to obtain from New Jersey restaurant owners," Judge Conner observed.

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Judge Conner went on to point out that the licensing scheme devised under the consent decree is a "bargain" compared to the transaction costs of going to each individual copyright owner and getting a license. He admitted that, as a blanket license, it creates antitrust problems. However,

Continued P.10

From P.9

it's the only practical way of getting copyright licenses into the hands of all those who want them and the only way of protecting the rights of the composers and publishers."

***

I think the New Jersey statute as it currently stands is so onerous that if it is signed into law, it will be my expectation to excuse ASCAP from the provisions of the consent decree insofar as continued licensing of the restaurant owners and other small users in New Jersey is concerned. And you may tell that to Governor Whitman, and [if] it influences her decision, fine; I hope that it will.

Conditional Order, *supra* note 10.

[74] Not all ASCAP representatives seem to have problems with restauranteurs or vice versa. ASCAP representative Chris Russo said "he finds most businesses...pay for the licensing fee without much discussion." *** "In Russo's seven years covering a nine-county region [in upstate New York], [only] a few have flouted the copyright laws." Kane, *supra* note 11.

[75] Brooks, *supra* note 4, 73, quoting restauranteur Sam Maglares of Naperville, Illinois.

[76] Reforms, *supra* note 46.

[77] *Id.*

[78] Brooks, *supra* note 4, 73, quoting Marcia Harris of the Restaurant Association of Maryland.

[79] Ruggless, *supra* note 6, 1, quoting Herman Cain, president of the National Restaurant Association.

[80] Brooks, *supra* note 4, 74.

[81] Conditional Order, *supra* note 10.

[82] Tyrell, *supra* note 45, quoting New Jersey restauranteur Jack O'Connor.

[83] Jasperse, *supra* note 38, quoting Bill Thomas, public affairs director of ASCAP.

[84] Anderson, *supra* note 32, quoting Marilyn Bergman, chairwoman of ASCAP's Board of Directors and a "well-known songwriter who co-wrote the hit 'The Way We Were.'" *Id.*

[85] Performing Rights, *supra* note 46.

[86] *Id.*

[87] LaFave, *supra* note 22.

[88] Dave Tovey (of San Diego), "Artists must be able to retain some control over their works," *The San Diego Union-Tribune*, May 11, 1995, B13:1.

[89] While a bit unusual, it was decided that it would be more appropriate for this section to be written in the "first person" because of the awkwardness of "third person" writing in this context.

[90] "Music is something that you can't see, so it's a difficult concept for a lot of people. It's not something that they hear about in school. They hear about copyrights, but they don't really know how they work." Kane, *supra* note 11, quoting Jim Steinblatt, ASCAP's communications manager in New York City. *See, also,* Mehta, *supra* note 12.

[91] "Without doubt, the greatest obstacle that copyright owners must overcome is the...attitude that copyright infringement carries no moral implications" (citation omitted). Tomlinson, *supra* note 17, 66.

[92] "It's a Chinese menu." Brooks, *supra* note 4, 78, quoting BMI spokesman Steven Blinn.

[93] Mehta, *supra* note 12.

[94] Brooks, *supra* note 4, 73, quoting restauranteur Kelly Clark.

[95] "The matrix of fees is confusing. There's no uniformity. It's ad hoc, the way they determine what fee you're going to pay." *Id.*, 78, quoting John Chwat, a lobbyist for the National Licensed Beverage Association. "The manner in which they charge is hard to understand, and the manner in which they do it is unbelievable." *Id.*, quoting a Columbus, Ohio, restauranteur.

[96] As did U.S. Rep. Carlos Moorhead, R-Calif., who, at a House hearing in 1994, begged the two sides to "get together to work this out without a legislative solution." Performing Rights, *supra* note 46.

[97] "We Can Work It Out." Copyright 1965 Northern Songs and Maclen Music, Inc.

Try to see it my way
Do I have to keep on talking 'til I can't go on?
While you see it your way
Run the risk of knowing that our love may soon be gone

Think of what you're saying
You can get it wrong and still you think that it's all right
Think of what I'm saying
We can work it out and get it straight or say goodnight

Try to see it my way
Only time will tell if I am right or I am wrong
While you see it your way
There's a chance that we might fall apart before too long

We can work it out, we can work it out

Life is very short
And there's no time for fussing and fighting, my friend
I have always thought
That it's a crime, so I will ask you once again...

Id.

[98] Bob Dart, "Songwriters fight cut in royalties," *Austin American-Statesman*, October 25, 1995, E13.

The nation's songwriters are singing the blues over legislation they believe could cost them $100 million a year in lost royalty payments. But restauranteurs and tavern keepers claim they have a financial hangover from the current complex system of royalty collection, and they are urging Congress to drastically change it. In this lobbying cacophony, popular songwriters such as Vince Gill and Billy Joel claim their musical compositions are in jeopardy of being hijacked. But the bill's advocates say greedy composers now collect multiple royalties from venues, broadcasters, cable systems and businesses ranging from bars to dentists' offices that play radio or TV music for their customers' entertainment.

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While Congress is occupied with the federal budget, it is unlikely the Fairness in Music Licensing Act will be voted on before next year. However, the issue is being debated in full-page ads in *Roll Call* and *The Hill*, tabloids that cover the Congressional community.

Id.

[99] ASCAP, BMI and SESAC all are signatories to the compromise.

[100] Sandra Sobieraj (Associated Press Writer), "Bar Owners and Songwriters Reach Agreement Over Royalties," *Tulsa World*, November 3, 1995, 2. The National Restaurant Association, which is much larger than the NLBA, was not involved in the agreement. *Id.*

[101] *Id.* "Larger businesses that limit the number and size of televisions and radios used to play music also would be exempt." Sandra Sobieraj, "Bars, Restaurants Reach Licensing Agreement With Songwriters," The Associated Press, October 31, 1995.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] "Fair deal for songwriters," *The Nashville Tennessean*, November 6, 1995, 10A.

[106] Steve Brooks, "ASCAP and BMI are turning up the volume; the music copyright agencies are fighting reform," *Restaurant Business*, July 1, 1995, 14. *Author's note*: Assuming the correctness of the date of veto, the veto occurred well before the original publication of this article and should have been included therein. The author apologizes to the original readers of the article for the oversight but is pleased the oversight was not compounded by omission from this update.

[107] *Id.* To the author's knowledge, Governor Whitman is the first to argue that the legislation was unconstitutional. Perhaps it is, but the constitutional issues do not seem apparent. Of course, one could argue that copyright's inclusion in the U.S. Constitution is a federal preemption that would preclude any kind of legislating at the state level — countered, of course, by the argument that the state legislation does not concern copyright law itself, only matters that flow quite indirectly from it.

[108] Joe Tyrell, "Restauranteurs see progress in talks on music royaltycollection reform," *The Star-Ledger*, July 9, 1995, 1995 WL 8861092.

[109] Brooks, *supra* note 105, 14.

[110] Tyrell, *supra* note 107.

[111] Bill Husted, "The sound of music," *Rocky Mountain News*, June 14, 1995, 2D.

[112] Tyrell, *supra* note 107.

[113] Virginia Baldwin Hick, "Royalty Mess: Group Representing Composers Threatens to Muzzle Missouri," *St. Louis Post-Dispatch*, September 24, 1995, 01A.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

RECENT CASES OF INTEREST[1]

Drug Testing of High School Athletes Upheld

In *Vernonia School District v. Acton*, 115 S.Ct. 2386 (1995), the United States Supreme Court upheld a drug screening policy for public high school athletes. Justice Scalia, writing for a five-member majority, found that drug testing of high school athletes does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.

James Acton, a seventh grader in the Vernonia School District in Oregon, signed up to play football at his school. After his parents refused to allow him to be tested for drug usage, he was not allowed to participate in sports. His parents filed suit for declaratory and injunctive relief, claiming that the policy was unconstitutional on both federal and state grounds. The District Court, at 796 F. Supp. 1355, dismissed their claims on the merits. The Ninth Circuit reversed and held that the policy violated the Fourth and Fourteenth Amendments as well as Oregon's Constitution. 23 F.3d 1514 (1994).

Following *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), the Supreme Court held that drug testing, because it requires an analysis of bodily fluids, constitutes a "search" under the Fourth Amendment. Applying the Fourth Amendment to state public schools and their officials through the Fourteenth Amendment, the Court noted that when warrant and probable cause requirements for searches are impracticable, "reasonable" searches are constitutional if "special needs" arise. In prior decisions the Court found that "special needs" may arise in either the public school or drug screening context. A warrantless search is reasonable if the promotion of legitimate government interests outweighs the invasion of an individual's privacy interests.

The *Acton* majority concluded that a public high school athlete's objective, reasonable expectations of privacy are lower than those of an adult or non-athlete student. Although athletes do not leave all constitutional rights "at the schoolhouse gate," an athlete should expect some intrusion upon her/his privacy rights. Voluntary athletic participation subjects students to a heightened degree of regulation, from which certain consequences flow such as communal undress, heightened grade requirements, and regimented physical training standards. The manner of collecting urine from athletes (in school restrooms under monitoring) is no more intrusive than a normal student would experience in a public restroom. Testing the urine for certain illegal drugs was found to be a minimal and narrow search.

The Court held that a public high school has a compelling state interest in deterring drug use by children, curing recurring disruption in the school district's classrooms, and preventing injuries to athletes caused by drug use. Balancing student-athletes' decreased expectations of privacy and the relative unobtrusiveness of urine testing with these compelling interests, the Court concluded that drug testing without probable cause under these circumstances is constitutional. The Court remanded the case to the Ninth Circuit to determine whether the school district's drug testing policy violated the Oregon Constitution.

By Tim Williams

Joe Montana's Misappropriation Suit Dismissed

In *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App.4th 790, 40 Cal. Rptr.2d 639 (Cal. App. 1995), the California Court of Appeals dismissed Joe Montana's action against the San Jose Mercury News for common law and statutory commercial misappropriation of his name, photograph, and likeness. The Court held that the reproduction of newspaper pages displaying Montana's photograph and an artist's rendition of him and sale as posters are protected by the First Amendment, thereby affirming summary judgment for the newspaper.

The San Jose Mercury News issued a special "souvenir section" to celebrate the San Francisco 49ers' 1990 Super Bowl victory against the Denver Broncos containing an artist's rendition of Montana on the front page. Within two weeks after the original printing in the newspaper, each page of the souvenir section was reproduced in poster form and sold to the general public.

Montana conceded that the original publication of his picture in the newspaper was a matter of public interest that was entitled to First Amendment protection. The Court concluded that the posters are entitled to the same protection "because Montana's name and likeness appeared in the posters for precisely the same reason they appeared on the original newspaper front pages: because Montana was a major player in contemporaneous newsworthy sports events." The Court also held that a newspaper has a right to republish its front page sports stories "to show the quality of its work product."

By Kevin Joyce

Exclusive Recording Agreement Held Terminable at Will

In *Ichiban Records, Inc. v. Rap-A-Lot Records, Inc.*, 1995 WL 457494 (Tex. App.—Houston [1st Dist.] 1995), a Texas court of appeals held that the trial court abused its discretion by finding that a recording company had a valid, exclusive recording contract with a rap artist justifying a temporary injunction against future breach of that agreement. On October 15, 1988, Willie Dennis signed a recording contract with Rap-A-Lot Records (RAL) in which he agreed to exclusively render his services as a performing artist for the making of albums. The term of the agreement ran for a first contract period, ending nine months after Dennis' completion of an album. RAL was granted nine separate options to extend the contract nine additional contract periods, and each such option was deemed to be exercised by RAL and to commence immediately upon the expiration of the current contract period unless RAL gave notice to the contrary at least ten days prior to the expiration of the current contract period.

On October 19, 1994, RAL sued Dennis for breach of his exclusive recording contract by appearing on a 1993 "Sho" album and sought to enjoin the upcoming release of "Play Witcha Mamma" recorded by Dennis with Ichiban Records and Wize Up Records. The trial court enjoined Dennis and Ichiban from violating the terms of RAL's exclusive recording agreement, which it found to be valid and in effect.

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Houston Oilers Relocation Litigation Settled

by Matthew J. Mitten*

After local government officials refused to ensure public financing for a new domed football stadium, Houston Oilers owner Bud Adams entered into exclusive negotiations with Tennessee and Nashville officials to move his team to Nashville. Thereafter, Harris County commissioners appointed three private Houston attorneys as special counsel to protect the County's legal rights if the Houston Oilers relocated to Nashville prior to the expiration of a lease agreement to play home games in the Astrodome through the end of the 1997 National Football League season. Harris County owns the Astrodome, which is managed and operated by Houston McLane Company, Inc., d/b/a Astrodome USA, pursuant to a long-term lease. Astrodome USA subleases the use of the Astrodome to the Houston Oilers.

In response to the County's appointment of special counsel to represent its interests and media reports that litigation would be used to prevent the Oilers from moving to Nashville, the Oilers filed suit in federal district court in Houston against the County, City of Houston, and Astrodome USA. The Oilers alleged that defendants conspired to infringe the franchise's right to relocate to another city in violation of its federal Constitutional rights to engage in interstate commerce, travel interstate, and contract without government interference as well as interfere with prospective contractual relations. The Complaint asked for an injunction prohibiting defendants from interfering with the Oilers' efforts to relocate and a declaratory judgment that the Oilers have the legal right to relocate its franchise after expiration of its Astrodome sublease in 1997.

On August 22, 1995, Judge Lynn Hughes issued a temporary restraining order enjoining defendants from initiating any litigation or administrative action against the Oilers to prohibit or burden its efforts to relocate its franchise pending a hearing. Two days later Judge Hughes dissolved the temporary restraining order but denied defendants' motion to dismiss the suit on jurisdictional grounds. On August 19 a preseason exhibition game between the Oilers and San Diego Chargers was canceled when the Astrodome playing field was deemed to be unplayable and in an unsafe condition by Oilers and NFL officials.

After Judge Hughes denied a request to certify his refusal to dismiss the Oilers' complaint for immediate appeal to the Fifth Circuit, the County filed an action against the Oilers and Bud Adams in state district court in Houston. This suit alleged that the Oilers orchestrated cancellation of the preseason game with the Chargers as a pretext to breaking its lease agreement to play in the Astrodome through the 1997 football season and requested an order prohibiting the Oilers from moving to Nashville or playing home football games in another city before the end of the 1997 NFL season. On August 31, Judge William Bell issued a temporary restraining order prohibiting the Oilers and Adams from attempting to move the Oilers franchise prior to the expiration of the Astrodome sublease or playing any scheduled home football games in any stadium other than the Astrodome without his permission.

On September 13, after two weeks of intense negotiations, the parties settled both the federal and state court law suits. The Oilers agreed to play all regular and post season football games in the Astrodome through the end of the 1997 NFL football season, and the County, City, and Astrodome USA agreed not to attempt to prevent the Oilers from relocating thereafter. The Oilers promised to negotiate with Houston government officials on a non-exclusive basis about keeping its franchise in Houston if no agreement is reached to move the franchise to Nashville. The Oilers and Astrodome USA agreed not to sue each other regarding legal liability for the condition of the playing field or cancellation of the Chargers preseason game until efforts to resolve this dispute by discussion or mediation are unsuccessful by a stated time. Both lawsuits were dismissed, with Judge Hughes retaining jurisdiction to interpret and enforce the parties' consent decree.

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"The toughest thing about success is that you've got to keep on being a success. Talent is only a starting point in business. You've got to keep working that talent."

Irving Berlin

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In an unpublished opinion, the appellate court concluded that the RAL contract's exclusivity provisions operate as a negative restriction in a personal services contract. The court found that Dennis' recording contract had no time limitation; therefore, it is terminable at will by either party, as is any employment agreement without a definite term. Therefore, RAL was not entitled to enjoin Dennis from breaching the recording agreement in the future. The appellate court vacated the temporary injunction and remanded the case for resolution of breach of contract issues arising from Dennis' past conduct.

By Stephen Kang

[1] *Summarized by student members of the South Texas College of Law Sports and Entertainment Law Society.

UNIVERSITY DUTY TO PROVIDE EDUCATIONAL OPPORTUNITY TO STUDENT-ATHLETES *

by Timothy Davis **

*This article is drawn from a longer article by the same title that appeared in 69 Denver U L. Rev. 57 (1992).

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I. Introduction

The state of intercollegiate athletics continues to generate substantial study and intense debate.[1] In 1990, the Knight Commission released a report which recommended major reforms and structural changes in intercollegiate athletics.[2] The compromise of academic integrity was specifically identified as one of the critical issues confronting intercollegiate athletics.[3] Similarly, an institution's commitment to academic integrity is one of four factors which the NCAA's certification program examines.[4] In addition, student-athletes[5] have taken steps to protect and promote their interests in the form of private actions challenging the quality of the academic instruction they received during college.[6] A lawsuit asserted by a former basketball scholarship student questioned Drake University's educational commitment to student-athletes.[7] Shortly thereafter, a decision was rendered in Ross V. Cretan University,[8] an educational malpractice lawsuit asserted by a student-athlete. In dismissing Ross's complaint, the Seventh Circuit aligned itself with the majority of courts that refuse to recognize a cause of action for educational malpractice.[9]

This Article examines whether a doctrinal basis exists for legally recognizing an educational malpractice claim in tort for student-athletes against colleges and universities. Part II begins this inquiry by summarizing the precedent for the result reached in Ross.[10] In this regard, the Article reviews the history of educational malpractice actions in the United States.[11] As a part of this examination, the public policy considerations adopted by courts declining to legitimate educational malpractice claims are closely scrutinized.[12] This assessment reveals that although policy considerations implicate valid social and legal concerns, they are often based on invalid assumptions and have not been subjected to in-depth judicial evaluation.[13] This section concludes by suggesting that the judiciary's unjustified reliance on dubious policies serves as a convenient means by which courts evade determination of the critical issue — whether the academic interests of particular plaintiffs warrant protection against the conduct of academic institutions.[14]

Part III of this article focuses on this critical issue within the context of the student athlete/university relationship. It first notes that the weakness of the policies relied on by courts to reject educational malpractice claims may alone be sufficient to warrant imposing a duty on universities in favor of student-athletes. This part also concludes that liability has been imposed on universities in situations where a traditionally recognized special relationship is present between academic institutions and particular students.[15]

The Article next discusses the policies on which these special relationships are founded.[16] Notions of dependency and mutual dependency generally underlie special relationships. The Article concludes by proposing that the dependency and vulnerability of student-athletes in their relationship with colleges create a special relationship. This relationship is viewed as sufficiently similar to those traditionally recognized in tort to justify imposing a duty on colleges and universities to provide an educational opportunity to student-athletes.[17]

II. THE HISTORY OF EDUCATIONAL MALPRACTICE

A. Judicial Refusal to Recognize Claim

A review of educational malpractice jurisprudence in the United States is the first step in understanding the competing legal and policy issues implicated in assessing whether to recognize a tort of educational malpractice in favor of student-athletes. This section summarizes the treatment the judiciary has afforded educational malpractice claims. What appears in the case law is a common theme of judicial reluctance and hesitancy to intervene in disputes questioning the substantive quality of the education conferred by institutions on their students.

1. Educational Malpractice Defined

Educational malpractice refers to complaints against academics and academic institutions alleging professional misconduct analogous to medical and legal malpractice.[18] Educational malpractice has been viewed as premised on the notion that academic institutions have a legal obligation to instruct students in such a manner as to impart a minimal level of competence in basic subjects.[19] The theory behind educational malpractice has also been described as placing a duty on schools to provide that standard of education appropriate for the particular student.[20]

In bringing to the forefront the alleged failure of colleges to provide educational opportunity to students,[21] lawsuits by student-athletes are premised on a similar if not the same theory. Student-athletes desire an opportunity to derive substantive educational benefits during their college careers.[22] They argue that institutional conduct, both passive and affirmative, interferes with their ability to make academic progress and acquire useful skills.[23]

2. Primary and Secondary School Educational Malpractice

Educational malpractice suits in the context of student or parental claims against elementary and secondary schools[24] typically arise in two factual contexts.[25] In one group of cases, secondary school students allege negligent acts or omissions by their schools resulting in the conveyance of inadequate basic academic skills or intellectual damage.[26] These cases can be properly classified as pure educational malpractice actions because students challenge the quality of the academic instruction they receive. The second category of cases typically involves grade school students alleging improper placement in special education programs according to their academic and physical needs. For

example, in Hoffman v. Board of Education,[27] a child placed in classes for the mentally retarded after he was misdiagnosed sought damages for injury to his emotional well-being and his inability to obtain employment. Relying on a broadly stated policy of noninterference in academic matters, the New York Court of Appeals dismissed plaintiff's educational malpractice claim.[28] Central to these cases is the belief that schools possess a duty to properly evaluate and place each child in a learning environment appropriate to his or her needs [29]

Peter W. v. San Francisco Unified School District,[30] the seminal educational malpractice case,[31] also represents the quintessential pure educational malpractice case.[32] The plaintiff was a functionally illiterate[33] high school graduate[34] who alleged that defendant's acts and omissions deprived him of basic academic skills such as reading and writing. This, according to plaintiff, resulted from defendant's negligent[35] performance of its duty to provide him with adequate instruction and counseling in basic academic skills.[36] Focusing on the duty[37] element of a cognizable negligence cause of action,[38] the court rejected plaintiff's assertion that the school district owed such a duty.[39]

In so ruling, the court linked its determination of whether the school district owed a duty to plaintiff to broader issues of public policy.[40] Relying upon Rowland v. Christian,[41] the court first discussed general policy considerations critical in evaluating whether to recognize a duty regardless of the factual context in which the issue arose.[42] The court next delineated policy considerations specifically applicable to the factual scenario before it. The primary policy concerns[43] were characterized as the nonexistence of a standard of care for educators and the improbability of a court arriving at such a standard.[44] Another policy consideration was the difficulty of establishing the causal connection between defendant's conduct and plaintiff's injuries due to the multiplicity of factors affecting academic performance.[45] Finally, the court was concerned about the adverse financial impact countless numbers of claims might have on school systems.[46]

Later courts have relied upon these and additional public policy considerations to reject educational malpractice claims.[47] In Donahue v. Copiague Union Free School District, plaintiff's school authorities promoted him from grade to grade despite knowledge of his learning disabilities and awarded him a diploma, notwithstanding his failure to acquire basic academic skills.[48] The court concluded plaintiff had failed to state a cause of action, buttressing its decision with a policy of judicial noninterference in academic affairs. The court defined the policy of noninterference as founded on the judiciary's perceived lack of acumen in matters involving education policy, as well as a lack of competence to oversee day-to-day administration of public schools.[49]

Rich v. Kentucky Country Day, Inc.,[50] involved alleged educational malpractice stemming from improper evaluation and placement.[51] Addressing an issue of first impression in Kentucky,[52] the Kentucky Court of Appeals relied on policy justifications articulated in Peter W. and Donahue to conclude that plaintiff's complaint failed to present a justifiable controversy. [53] This decision illustrates the current judicial attitude toward educational malpractice claims, and suggests that courts will not soon depart from the stance taken in Peter W., Hoffman, and their progeny.[54]

3. University Educational Malpractice

Historically, student claims against colleges and universities have fallen into a few broad categories. Students have most often turned to the judiciary for relief for injuries resulting from disciplinary[55] or academic[56] decisions made by post-secondary institutions.[57] Typical examples include a student alleging denial of an academic right, such as dismissal for poor grades,[58] or allegations that an institution engaged in improper disciplinary action, such as suspension for cheating. [59]

College students pursuing pure educational malpractice claims, like their primary and secondary school counterparts, allege denial or deprivation of a certain quantum of substantive educational benefits. Unlike their counterparts, however, college students premise educational malpractice actions not only on tort, but other substantive theories such as breach of contract and misrepresentation. However, the judiciary, relying on the policies established in cases involving claims against primary and secondary academic institutions, has refused to recognize educational malpractice regardless of its basis as a viable claim against colleges and universities.

Pure educational malpractice claims require a court to engage in an evaluation of the quality of the academic instruction provided by an institution. By contrast, some claims labeled as pure educational malpractice can properly be denominated as quasi-educational malpractice cases since the issues raised do not directly implicate the substantive quality of education provided by colleges and universities.[60]

Quasi-educational malpractice claims at the post-secondary level typically include those in which students allege institutions breached an express contractual commitment or exercised academic discretion unfairly. Woodruff v. Georgia[61] provides an illustration of a quasi-educational malpractice case since it arose in an academic context but failed to require the court to evaluate the quality of the education in order to reach a decision. There, a student alleged inter alia that the university negligently supervised her graduate studies program.[62] Couching a claim in this manner suggested a pure educational malpractice claim hinging on the failure of a student's instructors to provide the guidance necessary for her to benefit academically. The gist of plaintiff's lawsuit, however, was that certain of the university's professors refused to submit recommendations required for her to proceed from a masters to a doctoral program of study.[63] Thus, the central issue in Woodruff was whether the academic decision rendered by the university violated plaintiff' s due process rights or, as stated by the court, whether relief could be granted for alleged impropriety in teachers' academic assessment of plaintiff's work.[64]

The same quasi-educational characterization can be given to Smith v. Ohio State University.[65] There, a

graduate student sued the university on theories of negligence and breach of contract alleging that defendant failed to provide timely advice with respect to there searching and drafting of his master's thesis.[66] Once again, despite the plaintiff's couching of his claim, the heart of the action was unrelated to the nature, quality or adequacy of the education defendant conveyed to plaintiff.[67]

A survey of the few pure educational malpractice cases at the post-secondary educational level reveals a strong judicial disinclination to sustain such claims in tort. In rejecting educational malpractice claims at this level, the judiciary has relied on the policy justifications developed by courts which refuse to embrace educational malpractice in the primary and secondary school context.

In Moore v. Valderloo,[68] an educational malpractice action arose out of unique circumstances. The action was asserted not by a student of the defendant but by a patient of a graduate of a chiropractic college. The plaintiff alleged that her injuries could have been avoided if the college had properly instructed its former student on the risks attendant to certain techniques.[69] The court viewed plaintiff's claim as implicating the quality of the education provided, thereby creating an issue of educational malpractice.[70] In concluding that there was no justifiable controversy, the court adopted the rule of law established in cases such as Peter W and Donahue and the policy justifications set forth therein.[71]

Wilson v. Continental Insurance Co.[72] established the precedent, later relied upon by the Ross court, that educational malpractice claims at the post-secondary level fail to present justifiable controversies. In Wilson, a former law student initiated a negligence action against Marquette University.[73] Wilson alleged he suffered serious mental problems resulting from his participation in a mind-control program aimed towards minority students entering the university's law school with lower admissions standards than white students.[74] He further alleged that the law school coerced students into participating in the program (by giving special grading consideration to participants) despite the program's adverse recommendation from the university's counseling center.[75] The court focused on the reasonable foreseeability of the risk of harm and concluded defendant could not be held liable for offering a course and failing to discover the possible adverse psychiatric and psychological effects on particular students.[76] The court further stated that it was not prepared to impose a duty on schools to conduct psychiatric or psychological evaluations of students in order to ascertain possible negative susceptibility to particular educational offerings. The court enunciated the following additional policy considerations as further support for its holding:

[B]ecause of the demands society places upon schools this court will not promote a legal doctrine which would require educational systems to litigate every suit claiming negligence in the selection of curriculum, teaching methods, teachers or extra curricular activities. To rule otherwise would subject schools to constant harassment in the courts. We cannot foist such an unreasonable burden upon our schools without being fearful of the irreparable harm that might be done to public and private education.[77]

Even though the court made no reference to educational malpractice, the above quoted statement is a reiteration of the fear of litigation rationale relied upon by courts refusing to impose a duty on schools.

Courts presented with educational malpractice claims against colleges and universities[78] have followed the approach taken by courts confronted with this issue at the primary and secondary school levels. Finstad v. Washburn University of Topeka[79] presented an educational malpractice claim before the Kansas Supreme Court as an issue of first impression.[80] The educational malpractice claim stemmed from students' inability to pass standardized tests, as well as complaints about the quality of instruction from a specific instructor.[81] The court cited the policy reasons articulated in Ross and Donahue in refusing to recognize a cause of action for educational malpractice.[82] In so doing, these courts have not made an independent assessment of whether the differences in the factual circumstances warrant reaching a different result. Moreover, they have not undertaken a critical analysis of the soundness of the policies on which educational malpractice claims have been denied.

B. Examining Public Policy Considerations

Peter W, Donahue and their progeny clearly illustrate that courts have uniformly rejected a cause of action for educational malpractice.[83] Existing precedent also makes it apparent that the foremost obstacles to plaintiffs asserting educational malpractice claims are concerns such as establishing a duty of care, the courts' perceived inability to arrive at a standard for assessing breach of that duty and demonstrating causation.[84] In other words, the question of whether academic institutions owe a duty to impart a minimum level of proficiency[85] has been analyzed by the judiciary as a question of law dependent on public policy considerations.[86] In refusing to impose a duty on educators, courts effectively conclude that policy considerations militate against imposing such a duty. The following examination reveals, however, that these and other policy concerns identified by courts cannot withstand critical evaluation.

1. Inability to Create a Standard of Care

A plaintiff asserting a negligence claim must show: (1) the existence of a legally

recognized duty of care on the part of the defendant; (2) a breach of that duty by the defendant; (3) that the breach was the proximate cause of plaintiff's injury; and (4) injury to plaintiff.[87] Thus, assuming educators owe a duty of care to students, a standard of care must be developed in order to determine a breach of duty.[88] The perceived impossibility of establishing such a standard of care has been emphasized by courts refusing to recognize educational malpractice claims.[89] The Peter W. court articulated this concern stating: "We find in this situation no conceivable 'workability of a rule of care' against which the defendants' alleged conduct may be measured...."[90]

Apprehension over the feasibility of establishing a workable standard of care is somewhat justified due, in large part, to the amorphous nature of the education

rocess. Educators often disagree as to pedagogical techniques employed in the educating process as well as the content of instruction comprising the education process.[91] Since a breach of the standard of care in cases involving professional malpractice is established by expert testimony,[92] critics of educational malpractice claims assert that this lack of consensus results in the inability of experts to provide an applicable standard of care.[93]

Notwithstanding the merit[94] of judicial concern over the inevitable difficulties associated with developing and evaluating a standard of care, courts deciding educational malpractice claims have made no serious effort to create such a standard.[95] Courts have not made an in-depth analysis of what they have come to consider the inherently impossible task of developing a standard of care to measure an educator's breach of duty.[96] The resulting judicial approach automatically forecloses the possibility of assessing whether, in a given situation or context, a workable standard of care can, in fact, be devised.[97] This policy concern, therefore, becomes a convenient justification for a blanket rule of non-liability.

Moreover, the judiciary has exaggerated the ambiguous nature of the education process in buttressing its conclusion that a standard of care cannot be devised.[98] Despite differences as to pedagogy, it is likely that experts could agree on the basic goals of education as well as the most effective methods of teaching.[99] In addition, a well-developed body of law involving professional malpractice in other areas is available to assist the judiciary in devising a model standard of care for educational malpractice.[100]

2. Difficulty of Establishing Causation

Intertwined with the concern of developing a standard of care is the judiciary's perceived difficulty of establishing causation. Although courts in educational malpractice cases rarely reach the question of causation, they nevertheless identify it as another consideration militating in favor of nonrecognition of educational malpractice claims. The argument underlying this policy concern is that a school's negligence is but one possible cause of a student's academic failure.[101] In Donahue, the court identified such factors as the "student's attitude, motivation, temperament, past experience and home environment" as playing critical roles in the process of learning.[102]

Indeed, the broad range of factors which potentially contribute to a student's educational failure present a serious obstacle for a plaintiff asserting an educational malpractice claim. Nevertheless, the law does not require that a defendant's conduct be the sole cause of the plaintiff's injury in order to establish the causation element in a negligence cause of action. The plaintiff is only required to make a showing that the defendant's conduct was a substantial factor in causing the particular injury.[103] "The test for causation is one of significance, rather than of quantity."[104] In short, the issue of causation is one of proof[105] and, as such, courts should not rely upon it as a rationale to automatically reject educational malpractice claims.[106]

In summary, the resolution of the standard of care and causation issues poses certain difficulties which, in a particular case, would bar recovery. Resorting to these difficulties as a rationale for adopting a broad rule of nonliability, however, is totally unsatisfactory in as much as courts conveniently dispose of educational malpractice actions without assessing the interests of the alleged victims. Finally, this approach precludes a case-by-case determination of educational malpractice claims and the possibility of recovery by a student who could otherwise establish a standard of care and causation.[107]

3. Non-Interference Premised on Judicial Incompetence

Courts buttress their refusal to recognize a tort action for educational malpractice by pointing to a policy of noninterference in matters of education. This policy is premised on the belief that courts lack the expertise to formulate workable standards for teaching and learning[108] or to address the types of complex educational issues inevitably involved in educational malpractice suits.[109] This argument serves as a surrogate for the basic policy consideration: the legitimacy of the judiciary to participate in matters of educational policy.[110]

As is true of policy concerns relating to causation and standard of care, the courts exaggerate the lack of judicial expertise rationale as a justification to reject educational malpractice claims.[111] This argument loses its force in view of judicial involvement in the areas of medicine, law, accounting, psychiatry and other professional fields where courts are willing to review policy making-activities.[112] Moreover, courts intercede in matters requiring the assessment of the quality of educational programs and substantive educational issues such as those in desegregation cases. For example, courts must evaluate the quality of education in racially segregated schools and, in financing cases, assess the impact financing has on the quality of the education meted out.[113]

This rationale also rests on the unsound premise that those with special expertise should be afforded absolute deference to safeguard the various interests which the law protects.[114] Although the "formulation and implementation" of educational practices and policies are best left to school teachers and administrators, courts should not afford total deference and abandon the problem of educational malpractice to educators.[115]

4. Excessive Litigation

The final specific policy concern influencing courts is the fear of adverse consequences to the educational process if educational malpractice causes of action are legally recognized. This concern has typically been expressed in terms of the potential imposition of unlimited liability on school systems.[116] Those who agree with this concern argue that recognizing an educational malpractice cause of action would burden schools with substantial damage awards and further divert resources available to provide education.[117] In other words, courts fear a flood of claims, many of which would be either frivolous or feigned.[118] The court in Peter W. summarized this objection as follows:

To hold them to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers. They are

already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared .... The ultimate consequences, in terms of public time and money, would burden them — and society — beyond calculation.[119]

Despite the legitimacy of this concern, justice should not be denied and wrongs should not go uncorrected simply because of an increase in litigation.[120] It is inappropriate for a court to deny a meritorious claim due to uncertainties related to how such claims will be handled or because such claims will lead to the filing of other meritorious claims.[121] In addition, the time and expense of such litigation — attorneys fees, expert witness fees and court costs — render it unlikely that a flood of litigation would ensure if this cause of action was given recognition.[122] Moreover, imposing liability for educational malpractice might encourage institutions "to develop... effective internal procedures for the fair out-of-court resolution of conflicts over.. educational injuries."[123]

C. Policy Concerns in the Student-Athlete/University Context

The foregoing criticism of the policy reasons given to reject educational malpractice actions apply with equal, if not greater, force in the student- athlete/university context. First, the types of misconduct alleged by student-athletes do not in fact challenge educational methods.[124] Rather, student-athletes complain of active and passive institutional conduct that impedes their ability to acquire an educational opportunity. Improper conduct by colleges appears in the following forms: failure to provide sufficient study time or independent and satisfactory counseling and tutoring, disregard of student-athletes' progress towards education, channeling student-athletes into classes which lack substantive education merit and passing student-athletes to higher levels to maintain their academic eligibility.[125]

The above-described conduct also assists in establishing the causation element of negligence that presents a significant evidentiary hurdle that the student-athlete must traverse.[126] The evidentiary burden arising from the necessity of establishing causation is justifiable inasmuch as the student-athlete shares the responsibility for his or her education.[127] Nevertheless, the joint nature of the responsibility does not lead to an inescapable conclusion that a causal connection cannot be established between the university's conduct and its failure to afford the student-athlete an educational opportunity.

The principle that causation can be established notwithstanding the existence of several contributing factors is equally applicable to this context.[128] Therefore, to establish causation, a court would be required at a minimum to focus on two categories of conduct —that of the student-athlete and that of the institution. With respect to the former, the student-athlete would be required to proffer evidence demonstrating the intellectual capacity to learn and the motivation, diligence and intention to pursue a course of study, which would result in the acquisition of basic educational skills. [129]

Proving that the institution's conduct was a substantial factor in the resulting harm can be accomplished through evidence focusing on several factors including:

(1) the breadth of the student athlete's curriculum; (2) the type of guidance offered; (3) the number of absences occasioned by athletic commitments;(4) completion of exams, papers and assignments; (5) a record of complaints by the student and/or his guardian; (6) the school's standing and reputation in a given athletic sport; (7) evidence of passing grades in courses never attended; and (8) evidence tending to show that the student placed an inordinate degree of trust in the coach and his staff.[130]

Evidence related to these and other forms of the institution's conduct will enable the trier of fact to determine the causal connection between the conduct and the student-athlete's failure to obtain an educational opportunity. Moreover, due to the nature of the alleged harm, creating a standard of care will not constitute an insurmountable task. Whether a university breached its duty of care could be determined by focusing on the above-described conduct. All of these instances of improper conduct are capable of assessment under professional standards commonly used in education such as state accreditation standards and the educational standards the student-athlete's university has adopted.[131]

In addition, colleges would not be subjected to the same potential exposure as public schools.[132] First, the duty imposed on universities would be limited to student-athletes and thus would create a smaller pool of possible litigants.[133] Second, the scope of the duty could be defined to balance and protect the interests of the student-athlete and his or her school. Defining the duty as providing an educational opportunity instead of a guarantee would limit the potential liability of the institution.[134] Finally, student-athletes would have to overcome evidentiary obstacles in proving their claims. "In order to succeed in asserting educational malpractice, a student would have to withstand evidence that he or she did not attend class, missed tutoring sessions, failed to complete assignments, showed anon-cooperative attitude, and didn't [sic] participate in class or tutoring sessions."[135]

D. Consequences of Focusing on Policy Concerns

The foregoing discussion illustrates the basic weaknesses in policy rationales traditionally employed by courts to justify denial of educational malpractice claims. By adhering to what has become a blanket rule of non-liability for educational malpractice, courts automatically preclude meritorious claims from consideration.[136] This is particularly disturbing given that victims of educational malpractice incur real and measurable injuries.[137] One writer observed:

[R]efusal to recognize the cause of action is incompatible with accepted tort principles, and that a cogent theory supporting nonrecognition cannot be articulated within the confines of the accepted principles and the general policies upon which those principles are based. If special policies justifying nonrecognition exist, then that result should be legislatively prescribed, rather than judicially pronounced in a manner that is antithetical to the recognized, traditional tort principles.[138]

Equally disturbing is that undue reliance on these dubious policy considerations channels the judiciary away from the ultimate issue — whether a particular plaintiff's interests are entitled to protection against the defendant's conduct. The remainder of this Article focuses on this critical issue in the context of the student- athlete/university relationship.

III. ESTABLISHING A SOURCE OF DUTY

A duty recognized by law is the threshold element of a negligence cause of action.[139] As a general proposition, general duty exists to protect another absent a special circumstance.[140] This rule of law has been applied to absolve universities from liability to students, although not without exception. Courts demonstrate a willingness to impose a duty on colleges to protect students where a special relationship exists. These circumstances and the justifications for imposing a duty of care are discussed below.

A. University Special Relationship with Students

In the 197Os and 198Os, courts manifested a willingness to impose tort liability on post-secondary institutions for physical injuries to students.[141] Institutional liability has been limited to those instances where a special relationship exists between a college and a student.[142] It is important to note, however, that the arguably unique relationship between students and colleges is not the basis of the pecial relationships on which liability has been premised.[143] In other words, courts have turned to special relationships which exist independent of any relationship arising merely from a plaintiff's status as a student.[144] Judicial reluctance to recognize a special relationship arising merely out of the student/university relationship is premised on the belief that institutions are not insurers of student safety since students are considered adults capable of caring for themselves.[145]

Therefore, courts have turned to traditionally recognized tort "special relationships" as a basis for imposing a duty on universities to protect the interests of students.[146] For example in Peterson v. San Francisco Community College District,[147] the California Supreme Court determined whether a college possessed a duty to protect a student from anon-campus physical assault.[148] In holding for the plaintiff, the court first explained that as a general matter a duty might be found where: "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection. "[149] It concluded that the student's status as an invitee and the college's status as a possessor of premises created a special relationship sufficient to impose a duty on the latter in favor of the former.[150] Thus, in finding a duty of care on the part of the college, the court turned to a long-recognized special relationship—that between a possessor of land and an invitee.

In Bearman v. University of Notre Dame,[152] plaintiff sued his college for injuries sustained after she was knocked down by a drunken person after a football game.[153] The issue on appeal was whether the University owed a duty of care to plaintiff for injuries resulting from the acts of a third party. The court answered affirmatively, holding that the university's duty to plaintiff arose out of the duty of a landowner to protect an invitee from the harmful acts of third persons.[154]

Notwithstanding the foregoing illustrations, in the majority of cases involving suits brought by students, courts have refused to impose negligence liability on colleges and universities for injuries students have sustained. Even in denying liability, however, the judiciary has recognized that the existence of a special relationship is a sufficient basis on which to impose duty on colleges and universities. This is illustrated in the leading case of Bradshaw v. Rawlings,[155] where the Third Circuit denied recovery to a college student injured in an off-campus automobile accident, which occurred on his return from a class picnic.[156]

The college's liability hinged on whether it owed the student a duty of care.[157] After discussing the evolution of the student/university relationship and the demise of the doctrine of in loco parentis, the court held that, absent a special relationship, plaintiff was incapable of establishing a duty owed by the university to him. The court went on to reject the notion that beer-drinking by underage college students alone created a special relationship upon which to predicate liability.[158] By so concluding, the court denied the existence of a unique special relationship between a student and university, which could provide the foundation of a duty of care owed by universities to their students. Nevertheless the court left the door open for liability to be premised on a traditionally recognized special relationship such as that found in section 320 of The Restatement (Second) of Torts, which creates a special relationship when a person takes custody of another under circumstances where the other is deprived of his normal power of self protection.[159]

B. Policy Considerations

In a notable case, University of Denver v. Whitlock,[160] the Colorado Supreme Court refused to hold a university liable for personal injuries to a student, but recognized that liability could be premised on a special relationship. The court framed the dispositive issue as whether the university owed the student a duty of care to take measures to protect him from the injuries he sustained.[161] Differentiating nonfeasance from misfeasance,[162] the court held that with the former, liability can only attach if there is a special relationship between the parties, which imposes a duty to act on the defendant.[163] Identifying certain recognized special relationships,[164] the court noted that underlying the recognition of a duty of care in situations involving a special relationship are the notions of dependence and mutual dependency.[165]

Similarly, the court in Beach v. University of Utah,[166] in refusing to hold a university liable to a student absent the existence of a special relationship discussed the assump-

tions that underlie special relationships. According to the court, judicially recognized special relationships arise when one assumes responsibility for another's safety or when one deprives another of normal opportunities to protect his or her interests.[167] The Beach court further stated that at the heart of these special relationships is the idea of dependence by one party upon the other or mutual dependence between them.[168] The court concluded that the student/college relationship alone does not constitute a special relationship.[169]

C. University Special Relationship With Student-Athletes

The foregoing discussion leads to the critical inquiry: whether the student- athlete/university relationship has attributes that warrant its designation as a special relationship. If such a relationship exists, it arguably provides a prerequisite for imposing tort liability on post secondary institutions for failing to provide student-athletes with an educational opportunity.

The student-athlete/university relationship is generally recognized as based upon an express contract.[170] The Letter of Intent and the Statement of Financial Aid,[171] which the parties execute, operate as the primary sources of this express contractual relationship.[172] These documents define the formal relationship between student-athletes and universities and set the parameters of their respective rights and obligations.[173] For example, by executing a Letter of Intent, a student-athlete commits to attend a particular school and restricts his ability to participate in intercollegiate athletics at other schools.[174]

While documents evidencing the express contract provide some indicia of the essence of the student-athlete/university relationship, they fail to present a complete picture. A complete understanding of this relationship is achieved by examining the circumstances surrounding, and the conduct that manifests during, the performance stage of this relationship.[175] An analysis of the parties' conduct reveals attributes—mutual dependence between student-athletes and their institutions with the latter as the dominant party in the relationship—that justify denominating the relationship as special. Therefore, while the contract creates the relationship between student-athletes and their colleges, the duty on the part of the latter can be viewed as arising independently of the implied or express terms of the contract by virtue of the special relationship between them.[176]

A college's dependency on its student-athletes arises out of the institution's need for the athletic abilities and services that student-athletes bring to the relationship. In short, colleges depend on student-athletes engaged in revenue producing sports to provide services that in turn generate revenues from intercollegiate competition.[177] Student-athletes are dependent on their schools to provide them with an education.[178] Athletic scholarships enable student-athletes to gain access to the potential academic benefits, which are found at colleges and universities.[179] Yet the formal attributes of this relationship fail to reflect the pervasive nature of student-athletes' dependency on their schools. It also creates the illusion of a reciprocal relationship where neither party is in a position of dominance and obscures the magnitude of the subservience of the student-athlete in this relationship.

The degree of student-athlete dependency arises out of the pervasiveness of the control and dominance that schools through their athletic departments exert over every aspect of a student-athlete's college life. In the academic realm, this dominance manifests itself as considerable influence over academic decision-making. The end result of athletic department control is limited autonomy of student-athletes over academic decisions[180] and their inability to handle such matters independently.[181]

This relationship of dependence and trust which develops in the academic arena also appears in the social aspects of student-athletes' lives. For example, student-athletes are required to participate in athletically related social activities such as booster functions that divert time away from studying and social activities of their choosing.[182] More important is the role of coaches who exert control and influence over both the social and academic spheres of student-athletes' college careers.[183] Coaches often become surrogate parents for student-athletes who can significantly influence their social identities during their college tenure.[184] Moreover, because of their role, coaches assume they can influence both academic and nonacademic decisions made by student-athletes."[185] As one author notes, because young people "tend to internalize personal-social characteristics of adults whom they admire and respect, coaches have the potential for powerfully influencing attitudes and values of their athletes."[186] Coaches can exert this influence in a number of ways, including discouraging particular majors because the resulting time demands might conflict with a student-athlete's time commitment to his sport.[187]

D. Tort Liability Based on Special Relationship

The foregoing demonstrates that, while the student-athlete/university relationship is one of mutual dependency, the institution is clearly the dominant party in the relationship. The extent of the control which institutions exert over their student-athletes was recently noted by the Colorado Supreme Court in University of Colorado v. Derdeyn.[188] The court provided the following summary of the testimony of Colorado's athletic director:

"'[T]he athletes that eat at training tables are football and men's basketball and the other athletes eat in dorms or at their off-campus residences'; that some coaches within their discretion impose curfews; that athletes are required to show up for practice; that athletes are 'advised ... on what they should take for classes'; and that it is 'fair to say that athletes are fairly well regulated.'"[189]

In short, colleges and universities exercise dominion and control over the affairs of student- athletes. As such, a quasi-fiduciary relationship is created, which mandates that these institutions give at least as much attention to protecting the interests of student-athletes as to protecting their

wn interests.[190] In the academic realm, such attention in a particular case may require the institution to engage in affirmative conduct to assist student-athletes in taking advantage of the educational opportunities colleges offer. The requirement that institutions engage in affirmative conduct is particularly justifiable given the economic advantages that accrue to colleges and universities as a result of their relationships with student-athletes.[191]

Thus, the student- athlete/university relationship contains all of the elements to which courts look in determining whether to characterize a relationship as special for purposes of imposing a duty of care. Because of the trust and dependence that student-athletes place in their institutions, the latter possess a moral and legal obligation to engage in affirmative conduct to provide student-athletes with an educational opportunity. Failure to engage in such conduct should constitute actionable negligence.

Indeed in a recent case, Kleinknecht v. Gettysburg College,[192] the Third Circuit characterized the student-athlete/university relationship as "special" in regard to the institution's obligations to provide for the physical well-being of its student-athletes. The court found that the college's recruitment of the student-athlete to participate in intercollegiate athletics gave rise to a special relationship.[193]

IV. CONCLUSION

The Ross court's failure to inquire into the true essence of the student- athlete/university relationship eliminated from consideration the concept of special relationships as the precedent the court believed was required for it to recognize an educational malpractice action on behalf of student-athletes. Yet, within the student athlete/university relationship are attributes justifying its judicial recognition as a special relationship. Indeed, such an expansion is not unwarranted as exhibited by recent instances where courts have relied upon the concept of the special relationship to create a duty of care and hereby impose tort liability.[194] Doing so would provide a legal basis for holding universities liable if they fail to provide a meaningful educational opportunity to student athletes.

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1. Several comprehensive studies examining various aspects of intercollegiate athletics have been published. The Knight Foundation Commission released a report examining the state of college athletics on Mar. 19, 1991. Gerald Eskenazi, Panel Tells College Heads to Take Control of Athletics, N.Y. TIMES, Mar. 20, 1991, at D25. On July 3, 1991, the National Collegiate Athletic Association (NCAA) released the first parts of a study examining graduation rates for student-athletes. NCAA Findings from its Study of 3,288 Athletes, USA Today, July 3, 1991, at 9C.

Professor Murray Sperber provides a comprehensive examination of the financial, ethical and academic issues confronting intercollegiate athletics in MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY(1 990). The role at intercollegiate athletics plays in American society is examined in JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS (1994). Additional studies and surveys are identified in Timothy Davis, A Model of Institutional Governance for Intercollegiate Athletics, 1995 WIS. L. REV. 599.

2. REPORT OF THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS (1991) [hereinafter KNIGHT COMMISSION REPORT].

3. Id. at 14-18.

4. NCAA COMM. ON ATHLETIC CERTIFICATION, 1993-94 DIVISION I ATHLETICS CERTIFICATION HANDBOOK 6 (1994).

5. "Student athlete" refers to college students who attend post-secondary institutions on athletic scholarships. Derek Quinn Johnson, Note, Educating Misguided Student Athletes: An Application of Contract Theory, 85 COLUM. L. REV. 96 n. 1(1985).

6. Suits by student-athletes asserting educational malpractice claims against post- secondary institutions include: Fortay v. University of Miami, No. 94-385-Civ-Moreno(S.D. Fla. filed Aug. 4, 1993); Jackson v. Drake University, 778 F. Supp. 1490 (S.D. Iowa 1991); Ross v. Cretan Univ., 740 F. Supp. 1319 (N.D. Ill. 1990); Jones v. Williams,431 N.W.2d 419 (1988), appeal denied, 432 Mich. 931(1989); Echols v. Board of Trustees of Cal. State Univ. & Colleges, No. 266-777 (Cal. Super. Ct., L.A. County, Oct.22, 1979).

7. In Jackson v. Drake Univ., 778 F. Supp. 1490 (S.D. Iowa 1991), a student-athlete asserted breach of contract, negligent misrepresentation and civil rights claims against Drake University. The gravamen of Jackson's lawsuit was Drake's alleged failure to afford him an opportunity to acquire a meaningful education and to participate athletically.

8. 957 F.2d 410 (7th Cir. 1992)

9. Ross, 957 F.2d at 414 (citing cases rejecting educational malpractice as a viable cause of action in the context of elementary and secondary education).

10. See infra text accompanying notes 29-82.

11. Id.

12. See infra text accompanying notes 83-123.

13. See infra text accompanying notes 136-38.

14. Id

15. See infra text accompanying notes 141-59.

16. See infra text accompanying notes 160-69.

17. See infra text accompanying notes 170-194.

18. Kimberly A. Wilkins, Note, Educational Malpractice: A Cause of Action in Need of

a Call for Action, 22 VAL. U.L. REV. 427, 429 (1988)

19. Richard Funston, Educational Malpractice: A Cause of Action in Search of a Theory, 18 SAN DIEGO L. REV. 743, 746-47 (1981).

20. J. COLLIS, EDUCATIONAL MALPRACTICE: LIABILITY OF EDUCATORS, SCHOOL ADMINISTRATORS, AND SCHOOL OFFICIALS 7-8 (1990). This definition emphasizes that the peculiar needs of individual students, or groups of students, may be particularly pertinent in the context of educational malpractice claims brought by student-athletes. Arguably, student-athletes' needs are distinctly different from those of other students due to the circumstances that often accompany their attendance at college as well as the essence of their relationship with their schools.

21. Student-athletes seek to impose a duty on colleges and universities to provide them with an educational opportunity in contrast to a duty to educate. See Timothy Davis, An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes,28 HOUS. L. REV. 743, at 788-89 (1991), and sources cited therein for a discussion of the ramifications of defining the duty as one to provide an educational opportunity rather than a duty to educate.

22. See id. at 789.

23. Id

24. COLLIS, supra note 20, at 79, 88; Funston, supra note 19, at 750.

25. COLLIS, supra note 20, at 325, 335; Wilkins, supra note 18, at 442.

26. Illustrative "pure" educational malpractice cases include: Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976); Donahue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979) (refusing to recognize claim alleging plaintiff was permitted to obtain degree without having acquired basic academic skills); Helm v. Professional Children's Sch., 431 N.Y.S.2d 246 (N.Y. App. Term. 1980) (extending policies of Donahue in refusing to recognize educational malpractice claim bought against a private school).

27. 400 N.E.2d 317 (N.Y. 1979); see Catherine D. McBride, Note,

Educational

Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Malpractice, 1990 U. ILL. L. Rev. 475, 479 (finding Hoffman, paradigmatic of the second category of educational malpractice cases). In Hoffman, the court framed the controlling issue as whether public policy considerations precluded recovery for the allegedly negligent evaluation of a student's intellectual capacity. Hoffman, 400 N.E.2d at 318. Relying on a broadly stated policy of noninterference in academic matters, which it had articulated in Donahue, the Court of Appeals reversed the Appellate Division's affirmance of a jury award in favor of plaintiff. In dismissing plaintiff's educational malpractice claim, the court acknowledged a distinction between educational malpractice cases involving nonfeasance, such as Peter W and Donahue, and those involving the type of misfeasance raised by plaintiff. Yet the court rejected any notion that this distinction should alter its determination not to recognize a cause of action for educational malpractice. Id. at 319. The court held the policy concerns expressed in Donahue were equally applicable to an educational malpractice claim alleging misfeasance. Id.

Other cases illustrating the second category of malpractice claims include: D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981) (complaint alleging failure to discover learning disability and improper placement dismissed for failure to state claim); Hunter v. Board of Educ., 439 A.2d 582 (Md. 1982) (holding educational malpractice claim asserting negligent evaluating failed to state justifiable controversy in light of evaluating relevant public policy considerations); Torres v. Little Flower Children's Servs., 474 N.E.2d 223 (N.Y. 1984), cert. denied, 474 U.S. 864 (1985) (public policy reasons justify dismissal of functionally illiterate student's educational malpractice claims).

Notwithstanding the preceding authority, in one particularly shocking case of alleged improper placement, the court held for plaintiff but sidestepped creating a new tort of educational malpractice by finding that school employees acted as medical personnel. Snow v. State, 469 N.Y.S.2d 959 (N.Y. App. Div. 1983), aff'd, 475 N.W.2d 454 (N.Y.1984); COLLIS, supra note 20, at 482.

28. Hoffman, 400 N.E.2d at 319-21.

29. See cases cited supra note 27.

30. 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

31. Judith H. Berliner Cohen, Note, The ABC's of Duty: Educational Malpractice and the Functionally illiterate Student, 8 GOLDEN GATE U.L. REV. 293 (1978).

32. The two categories of educational malpractice claims have been differentiated as follows:

Hoffman represents not only the extension of Donahue to claims arising from special education, but also represents a second category of cases alleging educational malpractice. Peter W and Donahue can be thought of as presenting claims for negligence in the process of educating, while Hoffman is better viewed as an action for negligence in educational evaluation.

Eugene R. Butler, Comment, Educational Malpractice Update, 14 CAP. U.L. REV. 609, 613 (1985).

33. "Functional illiteracy" refers to inadequate application of basic academic skills such as reading, writing and arithmetic to practical problems encountered daily. Wilkins, supra note 18, at 429 n.11.

34. Despite having attended public schools for 12 years, plaintiff attained only a fifth grade reading level. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 856 (Cal. Ct. App. 1976).

35. Plaintiff sought recovery based upon theories sounding in misrepresentation, breach of statutory duty and breach of constitutional duty. Id. at 856, 862; COLLIS, supra note 20, at 83.

36. Specifically, allegedly negligent acts included defendant's: (1) failure to apprehend plaintiff's learning disability; (2) assigning plaintiff to classes for which he was academically inadequately prepared; (3) promotion of plaintiff to higher grade levels despite knowledge of plaintiff's unpreparedness to succeed academically at these levels;and (4) permitting plaintiff to graduate from high school even though he read at a fifth grade level. Peter W., 131 Cal. Rptr. at 856.

37. Plaintiff identified three possible sources for imposing such a duty on defendant: (1) defendant's obligation to exercise with reasonable care its assumption of the educational function; (2) the special relationship between the student and teacher; and (3) common law duty requiring teachers to exercise reasonable care in instructing students. Id. at 858.

38. Id. at 857.

39. Id. at 861.

40. Funston, supra note 19, at 751.

41. 443 P.2d 561 (Cal. 1968).

42. These policies included: (1) the foreseeability of harm resulting from defendant's deviation from the standard of care; (2) establishing injury with sufficient certainty; (3)the closeness of the causal connection between defendant's conduct and the injury suffered;(4) the moral culpability of defendant's conduct; (5) the policy of deterring future harm;and (6) the consequences to the community of imposing a duty to exercise care with resulting liability for breach. Peter W, 131 Cal. Rptr. at 859-60; see also Rowland, 443 P.2d at 564.

43. Wilkins, supra note 18, at 437.

44. The court stated, "we find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct can be measured (citation omitted)..." Peter W, 131 Cal. Rptr. at 861.

45. The court identified physical, neurological, emotional, cultural and environmental as the factors external to the formal teaching process that may affect academic performance.Id.

46. Id., McBride, supra note 27, at 476.

47. McBride, supra note 27, at 476; COLLIS, supra note 20, at 102 (noting that courts deciding similar cases have cited Peter W. and Donahue as persuasive authority).

48. 391 N.E.2d 1352 (N.Y. 1979).

49. Id. at 1355. According to the court, recognition of an educational malpractice action would not only require the court to develop general education policies but would require it to "sit in review of the day-to-day implementation" of those policies. Id

50. 793 S.W.2d 832 (Ky. Ct. App. 1990).

51. Id. at 834.

52. Id.

53. Id. at 836.

54. B.M. v. State, 649 P.2d 425 (Mont. 1982), represents the single instance where a court recognized educational malpractice as a tort cause of action. The plaintiff alleged that she was negligently placed in a special education program when she was six years old. Id. at 425. A sharply divided court held that a duty of care arose out of the regulations and statutes governing student placement in special education programs. Id. at 427. The court also concluded, however, that absent a clear statutory declaration, public policy considerations relating to judicial reluctance to interfere in the administration of a special education program justify refusal to recognize the duty. Id.

55. See, e.g, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (disciplinary decisions of a public college were subject to the Fourteenth Amendment Due Process Clause). The court held that students expelled for participating in off-campus demonstrations were denied due process when they were neither given notice of the charges against them nor afforded a hearing. Id. at 158-59; see also Goss v. Lopez, 419 U.S. 565 (1975). Dixon is widely recognized as the first case in American jurisprudence to constrain the previously unfettered discretion universities exercised over students. Gerard A. Fowler, The Legal Relationship Between the American College Student and the College; A Historical Perspective and the Renewal of a Proposal,13 J.L. & EDUC. 401, 408-09 (1984).

56. Examples of suits brought alleging injurious academic decisions by colleges or universities include: Banks v. Dominican College, 42 Cal. Rptr. 2d 110 (Cal. App. 1 Dist. 1995) (student challenging improper grading which led to her dismissal); Bilut v. Northwestern University, 645 N.E.2d 536 (Ill. App. 1 Dist. 1994) (Ph.D candidate brought suit alleging that private university breached its contract with her when it did not award her a degree); Lekutis v. University of Osteopathic Medicine and Health Sciences, 524 N.W.2d410 (Iowa 1994) (student brought action against medical school challenging his dismissal); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988)(former student alleging improper denial of degree); Abbariao v. Hamline Univ. Sch. of

aw, 258 N.W.2d 108 (Minn. 1 977)(court holding that student claiming arbitrary dismissal from law school stated a claim for relief).

57. See Fowler, supra note 55, at 401.

58. Audrey Latourette & Robert King, Judicial Intervention in the Student-University

Relationship: Due Process and Contract Theories, 65 U. DET. L. REV. 199, 203 (1988).

59. Id. Latourette and King conclude that notwithstanding the "notion of judicial noninterference in college affairs," students enrolled in public colleges are afforded due process protection in regard to disciplinary and academic matters, albeit to a lesser extent with respect to the latter. Id. at 220, 227-29. They also conclude that relying upon contract principles, private college students achieve the same, if not greater, due process protections afforded public college students. Id. at 231.

60. The "quasi" designation may be applied to cases that arise in both factual contexts — the primary/secondary and post-secondary school levels — because of the indirect nature of the challenges to substantive adequacy of the education. It should be noted, however, that these factual settings produce different forms of student dissatisfaction and accordingly different types of claims. The discussion below explains that quasi-educational malpractice claims against colleges typically involve allegations of breach of express contractual commitments and abuse of academic discretion. As discussed above, Hoffman is the paradigmatic quasi-educational malpractice claim at the primary and secondary school levels.

61. 304 S.W.2d 697 (Ga. 1983).

62. Id. at 698.

63. Id.

64. Id. at 699.

65. 557 N.E.2d 857 (Ohio Ct. Cl. 1990).

66. Id. at 859.

67. See also Chevlin v. Los Angeles Community College Dist., 260 Cal. Rptr. 628 (Cal. Ct. App. 1989) (although characterized as an educational malpractice claim, the gist of the action appears to have been wrongful dismissal, which involves an exercise of academic discretion). Abbrariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108 (Minn. 1977) (in addition to alleging wrongful dismissal, student alleged breach of contract).

Quasi-educational malpractice cases involving allegations that the institution breached an express contractual promise include: Peretti v. State of Mont., 464 F. Supp.784 (D. Mont. 1979); Ianniello v. University of Bridegeport, NO. 2-748-100009, Second Circuit Court, County of Fairfield at Bridgeport (Aug. 22, 1974); Zumbrun v. University of

S. Cal., 101 Cal. Rptr. 499 (Cal. Ct. App. 1972); and Stad v. Grace Downs Model and Air Career Sch., 319 N.Y.S.2d 918 (N.Y. City Civ. Ct. 1971).

68. 386 N.W.2d 108 (Iowa 1986).

69. Id. at 113.

70. Id.

71. First, the court was persuaded that the absence of a standard of care by which to measure the defendant's conduct militated against imposing a duty. It deemed itself unprepared to determine what a reasonable chiropractic institution should have taught its students. Id. The court credited Peter W. as establishing a justification for not recognizing an educational malpractice cause of action. Id. Second, the court relied on the perceived inherent uncertainty in determining proximate causation in educational malpractice suits.

Id. Quoting from Donahue, the court stated "[w]e agree with the New York Court of Appeals' observation that although it may assume too much to conclude that proximate causation could never be established, that 'this element might indeed be difficult, if not impossible to prove.'" citations omitted) (emphasis in the original). Id. The burden which ould be placed on schools and judicial reluctance to interfere in the daily operations of educational institutions were noted as two other justifications for not recognizing educational malpractice claims. Id. at 114-15. See also Swidayic v. Saint Michael's Medical Center, 493 A.2d 641 (N.J. Super. Ct. Law Div. 1985) (Relying in part on Peter W and Donahue policies as justifications for rejecting educational malpractice claim).

72. 274 N.W.2d 679 (Wis. 1979).

73. Id. at 680-81.

74. Id. at 681.

75. Id.

76. Id. at 684.

77. Id. at 686.

78. The quality of the education provided by a post-secondary institution was also attacked in Huckabay v. Netterville, 263 So.2d 113 (La. Ct. App. 1972). A law school graduate, who had failed a state bar examination on three occasions, alleged that his failure resulted from the inferior education he received from Southern University School of Law.

Id. at 114. The court was able to dispose of the case without making a determination of the ultimate issue. It upheld the lower court dismissal of the action on grounds that there had been no legislative waiver of immunity, which would permit the action to go forward against the named defendants. Id. at 116.

In Beaman v. Des Moines Area Community College, No. 158532, Polk County, Iowa (Sept. 28, 1976), plaintiffs asserted a negligence action against the community college. Their action arose out of defendant's alleged negligent failure to comply with standards and guidelines regarding the qualifications of instructors and classroom equipment. Assessing the case as one presenting a novel legal issue, the court held in favor of defendant due to plaintiffs' inability to establish the duty element of a negligence claim.

79. 845 P.2d 685 (Kan. 1993).

80. Id. at 693.

81. Id. at 687-88.

82. Id. at 692-93.

83. COLLIS, supra note 20, at 8 (concluding no plaintiff has prevailed in a pure educational malpractice claim); Butler, supra note 32, at 609 (stating that only one court has recognized educational malpractice as a viable cause of action against public educators).

84. See Cohen, supra note 31.

85. Funston, supra note 19, at 747-48; Joan Blackburn, Educational Malpractice: When Can Johnny Sue?, 7 FORDHAM URB. L.J. 117, 119 (1978).

86. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 37, at 236 (5th ed. 1984); Blackburn, supra note 85, at 119-20.

87. KEETON ET AL., supra note 86, at 164-65.

88. Id. at 205; William F. Foster, Educational Malpractice: A Tort for the Untaught?,

19 U. BRIT. COLUM. L. REV. 161, 205 (1985); Blackburn, supra note 85, at 126; Nancy L. Woods, Comment, Educational Malfeasance: A Cause of Action for Failure to Educate?, 14 TULSA L.J. 383, 396 (1978).

89. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976).

90. Id.

91. Funston, supra note 19, at 780; Terrence P. Collinsworth, Applying Negligence Doctrine to the Teaching Profession, 11 J.L. & EDUC. 479, 494 (1982); Alice J. Klein, Note, Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?, 13 SUFFOLK U.L. REV. 27, 39 (1979);

92. KEETON ET AL., supra note 86, at 188-89.

93. One commentator articulated this argument: "In medical malpractice cases, an expert witness can take the stand and provide evidence on the correct and accepted standard of performance to which the particular doctor should have adhered. No such expert can offer a single clear-cut educational standard for the teacher to follow." Blackburn, supra note 85, at 127.

94. Foster, supra note 88, at 190-91.

95. Id. at 191; Collingsworth, supra note 91, at 489 (arguing the Peter W court should have attempted to define a standard of care).

96. Foster, supra note 88, at 191.

97. Id. One advocate of imposing a duty of care on educators suggests that courts' conclusions regarding the standard of care are based on dubious assumptions.

First, it is assumed without any deliberation that the appropriate standard of care is that of the reasonable man on the street and not a

standard drawn from the profession or occupational group to which educators belong. Secondly, it is assumed that if there exists no consensus about how best to engage in or pursue a certain activity, about whether the activity should be undertaken at all or about the goals of the activity, then there can be no standard of care. Id.

98. Collinsworth, supra note 91, at 494.

99. Foster, supra note 88, at 221 (remarking most educators attest the sufficiency of their knowledge and experience to determine whether teaching methods, practices or policies are unacceptable). Also, if within a particular field there are various schools of thought, a professional's conduct is judged in accordance with the standard common to the field to which he or she subscribes. Edmund J. Sherman, Note, Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Cretan University, 11 LOY. ENTER. L.J. 657, at 680 (1991).

100. Collingsworth, supra note 91, at 496; see also Foster, supra note 88, at 224-26 (suggesting ways to establish negligent conduct by an educator); Blackburn, supra note 85, at 126 (suggesting an analogy can be drawn to the standard of care in medical malpractice cases that requires physicians to "exercise the care and skill ordinarily exercised by other members of the profession"); Wilkins, supra note 18, at 457 (arguing the courts in these cases, as in other professional negligence cases, will avail themselves of highly qualified expert witnesses both to establish and assess the standard of care).

101. The Peter W. court expressed its concern with the plaintiff' 5 likelihood of establishing causation: Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are [sic] influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

Peter W, 131 Cal. Rptr. at 861.

102. Donahue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J., concurring).

103. KEETON ET AL., supra note 86, at 267.

104. Blackburn, supra note 85, at 267.

105. Collingsworth, supra note 91, at 498; Foster, supra note 88, at 234 (concluding this ultimate question of proof is the most serious impediment to educational malpractice claims).

106. As noted by one scholar:

It is one thing to recognize that establishing cause in fact in many educational malpractice situations may be difficult and that, in a particular case, the difficulties may prove insurmountable. It is quite another thing to conclude that merely because difficulties may be encountered in showing causation no educational malpractice actions must be entertained and the defendant, a consequence, should be relieved from liability.

Foster, supra note 88, at 237.

107. Id. at 91.

108. Funston, supra note 19, at 797. Critics of educational malpractice argue that the judiciary lacks training in substantive educational policy issues to make informed evaluations. Id. The critics claim that "[t]he determination of the requisite level of instructional quality within a school system and how to attain it is a fundamental policy making function that educators are better equipped to handle than are courts. The judicial process, therefore, should eschew discretionary decisions of educator competence." Id. at

798.

109. Funston, supra note 19, at 793; McBride, supra note 27, at 485; Wilkins, supra note 18, at 431-31 (judicial reluctance to intervene in matters of education stems from the complexities of the education process, which require educators and administrators to exercise professional judgements on a daily basis).

110. Klein, supra note 91, at 37.

111. Id. at38.

112. Id. at 40; John Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching, 73 Nw. U.L. Rev. 641, 670 (1978) (suggesting the difficulty in understanding issues related to educational malpractice is likely to be less than that encountered in determining issues involved in complex cases such as antitrust, patent infringement and products liability).

113. Robert H. Jerry II, Recovery in Tort for Educational Malpractice: Problems of Theory and Policy, 29 KAN. L. REV. 195, 203 (1981); COLLIS, supra note 20, at 367 (the judiciary has decided matters in the education sphere ranging from school finance, expulsion and discrimination to teacher incompetency and dismissals); McBride, supra note 27, at 489.

114. Elson, supra note 112, at 669.

115. Id. at 677-78.

116. Funston, supra note 19, at 793; McBride, supra note 27, at 486 (stating the potential expense to public schools is another reason for denying educational malpractice claims).

117. Funston, supra note 19, at 801; McBride, supra note 27, at 492.

118. Funston, supra note 19, at 793.

119. Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1 979) (citations omitted).

120. Collingsworth, supra note 91, at 504 (arguing a fear of increased litigation does note justify leaving a deserving plaintiff without a remedy); Wilkins, supra note 18, at 439.

One educational malpractice critic disagrees and argues that these generalized objections to the excessive litigation rationale lose their muster when particularized to the educational malpractice context. Funston, supra note 19, at 795-96. Professor Funston asserts that these critics overlook the sheer number of potential litigants if educational malpractice becomes a viable cause of action. Id. at 796. But see Foster, supra note 88, at 195 (arguing there is a lack of empirical evidence to support such a conclusion). Professor Foster also attempts to discredit this concern by arguing that educational institutions are in a considerably better position than students to distribute the losses resulting form educational malpractice. Id

121. COLLIS, supra note 20, at 384; accord WILLIAM L. PROSSER, LAW OF TORTS 51 (1982) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.").

122. COLLIS, supra note 20, at 504 (arguing a fear of increased litigation does not justify leaving a deserving plaintiff without a remedy); Wilkins, supra note 18, at 439.

123. Elson, supra note 112, at 657.

124. Sherman, supra note 99, at 682.

125. See Davis, supra note 21, at 789-90; Sherman, supra note 99, at 679-80 (identifying the types of negligence typically alleged by student-athletes).

126. See Johnson, supra note 5, at 121 (noting the onerous evidentiary burden confronting the student-athlete); Sherman, supra note 99, at 684 (difficulties inherent in establishing causation provide a defense institutions can assert against these claims).

127. Johnson, supra note 5, at 121.

128. See supra text accompanying notes 99-104.

129. See Foster, supra note 88, at 238-39; Johnson, supra note 5, at 121; Sherman, supra note 99, at 684; Michael N. Widener, Note, Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity, 24 ARIZ. L. REV. 467 481(1982).

130. Johnson, supra note 5, at 121.

131. See Sherman, supra note 99, at 681.

132. Id at 682.

133. Davis, supra note 21, at 785-86 (discussing the justifications for limiting the university's duty to student-athletes). The author of a student note argues that it is improper to compare high schools to universities. The latter are under no obligation to engage in intercollegiate competition but do so because of the benefits perceived as flowing from college athletics. Since colleges voluntarily create major sports programs to further these objectives, they should not be able to take advantage of the fear of litigation rationale as a shield to potential liability arising out of the manner in which they conduct their sports programs. Sherman, supra note 99, at 682-83.

134. Davis, supra note 21.

135. Sherman, supra note 99, at 683.

136. Woods, supra note 88, at 395. Commentators have been troubled

y the courts' failure to allow an action for educational injuries given the plight of illiterate high school graduates who cannot read at a level sufficient to function in a modern, information-intensive work environment. Klein, supra note 91, at 39-40.

137. Wilkins, supra note 18, at 432.

138. Jerry, supra note 113, at 196.

139. KEETON ET AL., supra note 86, at 164-65.

140. Theodore C. Stamatakos, Note, The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship, 65 IND. L.J. 471, 472 (1990).

141. Stamatkos, supra note 140, at 485.

142. Stamatakos, supra note 140, at 485.

143. Tia Miyamoto, Comment, Liability of Colleges and Universities for Injuries During Extracurricular Activities, 15 J.C. & U.L. 149, 151-52, 175 (1988); Barbara J. Lorence, Note, The University '5 Role Toward Student Athletes: A Moral or Legal Obligation? 29 DUQ. L. REv. 343, 353 (1991) (claims premised on student status have been unsuccessful). One author notes:

Thus far, courts have not held institutions liable for extracurricular injuries occurring off campus. Courts have been willing to hold institutions liable for injuries sustained by students in a limited number of cases. This disparity in treatment is largely due to the fact that in an on-campus injury case, the plaintiff can argue that the institution's status as landowner imposes a duty of care. This duty has been more readily recognized in the higher education context than a duty arising from the in loco parentis doctrine, a duty to supervise, or a duty to control third persons. . Stamatakos, supra note 140, at 486-87.

144. Lorence, supra note 143, at 353.

145. Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Miyamoto, supra note 143 at 162, 175

146. Miyamoto, supra note 143, at 162. The special relationships 'fficient to impose liability are those articulated in the RESTATEMENT ECOND) of TORTS § 315 (1965). For example,

[u]nlike the argument that a special relationship exists between a post secondary institution and its students which warrants a duty to control another, the duty arising from an institution's landowner status has clearly been recognized by the courts, as exemplified by Stockwell and Mortiboys. However, the acceptance of the landowner duty in the college and university context has nothing to do with the unique relationship between post secondary institutions and their students.

Miyamoto, supra note 143, at 173 (citing Stockwell v. Board of Trustees of Leland Stanford Junior Univ., 148 P.2d 405 (Cal. Ct. App. 1944); Mortiboys v. St. Michael's College, 478 F.2d 196 (2d Cir. 1973)).

147. 685 P.2d 1193 (Cal. 1984).

148. Id. at 1195.

149. Id. at 1196 (citations omitted).

150. Id. at 1198.

151. RESTATEMENT (SECOND) OF TORTS § 344.

152. 453 N.E.2d 1196 (Ind. Ct. App. 1983).

153. Id. at 1197.

154. Id. at 1198. The special relationship relied on by the court to impose a duty on the college is defined in RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965). See also Nieswand v. Cornell Univ., 692 F. Supp. 1464, 1469 (N.D.N.Y. 1988) (the court refused to recognize a special relationship between a student and a university but found that liability could be based on the university's status as a landowner in operating, maintaining and supervising its dormitories).

155. 612 F.2d 135 (3d Cir. 1979).

156. Id. at 137.\

157. Id at 138.

158. Id. at 142. The court refused to impose such a duty based in part on the substantial burden that would be placed on colleges. Other courts ave adopted the view that liability will not be imposed absent a special ationship. See Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993) (female student was sexually assaulted in coed residence hall and court held that a special relationship existed in the landlord/tenant context); Albano v. Colby College, 822 F.Supp. 840 (D. Me. 1993) (College coach had no duty to prevent adult student from becoming excessively intoxicated while on a college sponsored trip); Booker v. Lehigh University, 800 F.Supp. 234 (E.D. Pa. 1992) (suit against university for injuries sustained at a fraternity party); Fox v. Board of Supervisors of La. State Univ., 576 So. 2d 978, 981-82 (La. 1991) (since the university was not the insurer of student safety, it was not liable for failing to supervise activities of a rugby tournament during which a student from another college was injured absent a showing of a special relationship between the visiting student and university); Crow v. State, 271 Cal. Rptr. 349, 358 (Cal. Ct. App. 1990) (university not liable for negligent supervision of intoxicated third-party student who assaulted another student since university did not stand in a special relationship with either student); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (the relationship placing the university under obligation to protect students from unforeseeable harm); Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227, 232 (Ind. Ct. App. 1986) (nonexistence of a special relationship precluded injured student from recovering damages from college); Allen v. Rutgers Univ., 523 A.2d 262, 266 (N.J. Super. Ct.App.Div.) (facts established university neither sold nor served alcoholic beverages to an intoxicated person), cert. denied, 527 A.2d 472 (N.J. 1987).

159. Bradshaw, 612 F.2d at 140. See RESTATEMENT (SECOND) OF TORTS § 320 (1965) which defines the duty of a person having custody of another to control the conduct of third persons.

For criticisms of the Bradshaw court's holding that the evidence did not support the existence of a special relationship, see Miayamoto, supra note 143, at 165-66; Comment, The Student-College Relationship and the Duty of Care: Bradshaw v. Rawlings, 14 GA. L. REv. 843, 854 (1980).

160. 744 P.2d 54 (Colo. 1987). In Whitlock, injuries resulting from a trampoline accident rendered plaintiff a quadriplegic. The trampoline was located on a fraternity's premises. Reversing the trial court's order granting defendant judgment notwithstanding the verdict, the Colorado Court of Appeals held that the university owed the student a duty to either remove the trampoline from the fraternity premises or supervise its use. Id. at 56; see Whitlock v. University of Denver, 712 P.2d 1072 (Colo. Ct. App. 1985).

161. Whitlock, 744 P.2d at 57.

162. The court distinguished the concepts as follows:

In determining whether a defendant owes a duty to a particular plaintiff~ the law has long recognized a distinction between action and a failure to act-'that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from harm [nonfeasance] . . . .' Liability for nonfeasance was slow to receive recognition in the law. 'The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.'

Id (quoting KEETON ET AL., supra note 86, § 56, at 373).

163. Id at 58.

164. The court noted that judicially recognized special relationships include "carrier/passenger, innkeeper/guest, possessor of land/invited entrant, employer/employee, parent/child, and hospital/patient." Id.

165. In concluding that the student/university relationship is not based on dependence, the court relied on the Bradshaw analysis and rationale. Id at 59-61.

166. 726 P.2d 413 (Utah 1986).

167. Id. at 415 (quoting Restatement (Second) of Torts § 3 14A (1964).

168. Id. at 415 (quoting RESTATEMENT (SECOND) OF TORTS § 314A (1964)).

The concept of dependence as the essence of special relationships was also noted by the court in Baldwin. 176 Cal. Rptr. at 814, where the court refused to impose liability on a college for personal injuries suffered by a student during an accident that occurred in the aftermath of drinking on college grounds.

169. Beach, 726 P.2d at 416, 419.

170. Davis, supra note 21, at 769 (citing to cases recognizing, and commentators arguing, that a student-athlete's relationship with his school is contractual).

171. For a description of these documents as well as an analysis of their legal effect, see Michael J. Cozzillio, The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name, 35 WAYNE L. REv. 1275, 1290-92 (1989).

172. See Cozzillio, supra note 171, at 1290.

173. See Davis, supra note 21, at 777 (arguing that due to the vague expression of institutions' educational commitment to student-athletes, it is appropriate to utilize the duty of good faith and fair dealing as an interpretative tool to define the substance and breadth of this commitment).

174. See Cozzillio, supra note 171, at 1290 (student-athlete waives right to participate in sports at another college by executing the Letter of Intent).

175. The strictly contractual relationship may also evidence a relationship marked by dominance and dependence. The first indicator occurs during the bargaining stage where student-athletes are presented with standard-form agreements; the parties do not engage in negotiations over the terms of the boiler-plate agreement. In short, universities are in a superior bargaining position with student-athletes and their parents. JAMES V. KOCH, The Economic Realities of Amateur Sports Organization, 61 Ind. L.J. 9, 23-24 (1985) (arguing the ability of student-athletes to bargain with their schools is constrained by collusion between and among universities and noting the inability of student-athletes to negotiate the terms of these standard contracts); Alfred D. Mathewson, Intercollegiate Athletics and the Assignment of Legal Rights, 35 ST. Louis U. L.J. 39, 74-75 (1990) (recognizing that student-athletes, and those acting on their behalf, are at a bargaining disadvantage with universities); David A. Skeel Jr., Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA, 1995 WIS. L. REV. 669 (discussing the inequities in the bargaining process and the superior bargaining position of universities).

It may also be argued that the restrictions placed on student-athletes by the express contract denote not only the inequality of the bargaining process, but are consistent with a relationship of dominance and dependence. SPERBER, supra note 1, at 239-40 (identifying NCAA restrictions which tilt the relationship in favor of universities); id. at 207-10 (discussing how one year renewable scholarships vest institutions with significant control over student-athletes); Johnson, supra note 5, at 114-16 (arguing the Letter of Intent protects and promotes the university's interests by inflicting severe consequences on student-athletes who wish to play for another school, and noting that universities reserve the right to retract athletic scholarships).

176. Note, however, that the contract itself may provide additional grounds for liability.

See Davis, supra note 21.

177. Lorence, supra note 143, at 353 (discussing the financial dependency of institutions on their athletes); see Davis, supra note 21, at 748-51 (exploring the financial attributes and implications of the student-athlete/university relationship); Koch, supra note 175, at 11 (characterizing colleges as university-firms creating products such as athletic entertainment, which require the input of people, the most essential of whom is the student-athlete). See generally PATRICIA A. ADLER & PETER ADLER, BACKBOARDS & BLACKBOARDS: COLLEGE ATHLETES AND ROLE ENGULFMENT 83 (1991) (observing that student-athletes perceive themselves as quasi-employees of colleges); SPERBER, supra note 1, at 208 (providing a detailed account of the intricacies of intercollegiate finances, and arguing that since the services of student-athletes are essential to college athletic programs they are akin to employees of the institutions).

178. Lorence, supra note 143, at 353.

179. Performing athletic services for institutions allows student-athletes access to education. SPERBER, supra note 1, at 353.

180. Id at 221. Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 NOTRE DAME L. REv. 206, 256-57 (1990) (asserting academically unprepared student-athletes are channeled by schools into "gut" courses that devalue their education); Widener, supra note 129, at 472 (describing the effects of athletic department control over student-athletes).

181. Adler and Adler state as follows:

> The players, uninvolved in academic decision-making, had little direct contact with professors (beyond simple class attendance), academic counselors, or academic administrators. As a result, the players did not learn how to handle these academic matters, nor—in many cases— were they interested in doing so. They did not worry that these academic decisions were being made for them, or that they did not have to process their own academic paperwork; they took it for granted that this was the way things were.

ADLER & ADLER, supra note 177, at 130. The authors argue that this assumption of responsibility by athletic departments not only creates a relationship of trust, but reinforces the importance of student-athletes' athletic identities to the detriment of their academic identities. Id. The overall consequence of this and other conduct on the part of institutions is to change the educational orientation of student-athletes from one that might have prepared them for careers after college to one that maintains their athletic eligibility. Id. at 221. The ultimate impact is that student-athletes are "partly socialized to failure." Id at 230.

The adverse consequences of this dependency may extend beyond academics. "I have seen so many football players struggle with the basics of day-to-day living once they were out from under their coaches' wings—players who had trouble renting apartments, showing up for work on time, simply doing things on their own." RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT 103 (1989).

182. Id. at 95.

183. Coaches develop a relationship of trust and confidence with student-athletes that typically begins during recruitment. See ALEXANDER WOLFF & ARMEN KETEYIAN, RAW RECRUITS 136 (1990); Davis, supra note 21, at 786-87.

184. ADLER & ADLER, supra note 177, at 85, 120-25. One author asserts that coaches are "experts at brainwashing, at keeping their players subservient." TELANDER, supra note 187, at 90.

185. Steven G. Poskanzer, Spotlight on the Coaching Box: The Role of the Athletic Coach Within the Academic Institution, 16 J.C. & U.L. 1, 19 (1989).

186. Id. at 10 (quoting SAGE, AN OCCUPATIONAL ANALYSIS OF THE COLLEGE COACH, IN SPORT AND SOCIAL ORDER: CONTRIBUTIONS TO THE SOCIOLOGY OF SPORT, 418-19 (Donald W. Ball & John W. Loy eds., 1975)).

187. Christopher J. Allesandro, Note, The Student-Athlete Right-To-Know Act: Legislation Would Require Colleges to Make Public Graduation Rates of Student-Athletes, 16 J.C. & U.L. 287, 293 (1989).

188. 863 P.2d 929 (Cob. 1993).

189. Id. at 940-41.

190. See generally Skeel, supra note 175 (characterizing the relationship as fiduciary).

191. Special relationships typically involve some existing or potential economic benefits to the defendant. Id.

192. 989 F.2d 1360 (3rd Cir. 1993).

193. Id. at 1367, n.5.

194. Story v. Bozeman, 791 P.2d 767, 776 (Mont. 1990)(breach of contract may give rise to tort damages where special relationship exists); Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993) (female student was sexually assaulted in coed residence hall and court held that a special relationship existed in the landlord/tenant context); Prasad v.County of Orange, 604 N.Y.S.2d 677 (N.Y. Sup. 1993) (direct contact element of special relationship required for tort liability was satisfied, and county had special duty to class of day-care attendees to notify them that home was no longer suitable for child care); Arnold v. National County Mutual Fire Insurance Co., 725 S.W.2d 165, 167 (Tex. 1987)(special relationship between insured and insurer creates duty of good faith and fair dealing which may give rise to tort liability); Tedder v. Raskin, 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987)(expanding special relationship concept to impose duty on landlord to protect tenants from third-party crimes committed on premises).

In addition, the notion of the special relationship as the source for requiring a party to engage in affirmative conduct to protect the affairs of another is a well-recognized legal doctrine. Consequently, imposing a tort duty on colleges and universities in favor of student-athletes would not be novel and unprecedented as it might first appear. To the contrary, creating such a duty is consistent with and falls within the contours and structures of well-recognized tort doctrine. Thus, it renders ineffective and inapplicable to the student-athlete/university context the analysis and justifications that the judiciary has traditionally employed in rejecting educational malpractice claims.

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RECORDS OF LEGAL INTEREST:

College Sports: The NCAA Presidents Commission is supporting a requirement that football and men's basketball players transferees from two-year colleges must sit out one year before playing at NCAA Division I colleges. Low graduation rates for transfer students are the basis for the rule change. The Commission also will consider an amendment to exempt two-year transferees who have completed 40% of the requirements for the bachelors degree program they have entered. Members will vote on the proposals at the January 1996 convention in Denver.

Got a complaint against the NCAA? If so, file suit and get an injunction. New Mexico basketball recruit Kenny Thomas was granted an injunction against the NCAA allowing him to play during the 1995-96 season, unless the NCAA appeals. Texas Pan American basketball coach Mark Adams was granted a TRO enabling him to return as head coach. The NCAA accused Adams of helping recruits with correspondence course work and providing free medical treatment, lodging, and transportation. The NCAA also alleged that Adams held illegal off-campus basketball camps, arranged for the special use of gym facilities and disregarded NCAA and university instructions on investigating conduct.

Can anyone really disagree that the NCAA continues to maintain an involuntary servitude system when the teams in the Hall of Fame game (Michigan and Virginia) are paid at least $650,000 each and the players are required to participate in an extra week's work out but receive no payments?

Are illegal loans and payoffs necessary for college athletes to be admitted to college and participate in the "full college experience"? In its proceedings involving two former Baylor assistant basketball coaches, a federal court in Waco, Texas, found that institutions of higher learning allowed correspondence students to gather credits by passing exams that could easily be taken by stand-ins, and that admissions standards were stretched to sign jocks. The basketball coaches were sentenced to probation in connection with their conviction on wire fraud charges related to falsification of test scores to secure the eligibility of junior college recruits.

Liberty University, citing discrimination on the basis of religion, filed a lawsuit against the NCAA challenging a new interpretation of the excessive celebration rule that forbids praying on the field. The new rule calls for a 15-yard penalty if a player kneels in prayer following a touchdown. The rule is intended to curb excessive celebrations by players following big plays, excessive taunting, and unnecessary showing off.

Pro Football: Houston, looking for a way to keep the Oilers and Astros, should learn from Cleveland that

ven a "sin tax" will not prevent teams from moving. Browns' owner Art Modell will move his team to Baltimore despite 71 % of the vote total being in favor of a county tax on alcohol and tobacco products to renovate Cleveland Stadium. Despite approval of the tax, Modell still could not pass on the lucrative deal from Baltimore.

Jerry Jones countersues the NFL in response to the $300 million lawsuit filed by NFL Properties. Jones and the Cowboys seek $200 million in actual damages (trebled under federal antitrust laws, plus $150MM in punitive damages). If Jones wins, individual NFL teams would have the right to license club trademarks and logos and determine the apparel and marks worn by players and coaches, which might lead to American arenas (and players?) looking more like European arenas.

Pro Basketball: NBA players kept their union and the NBA will keep its fee. The NBA Players Association voted to not dissolve the union despite support for dissolution from Michael Jordan and Patrick Ewing. However, U. S. District Court Judge Hubert L. Will ruled that super station WGN and the Chicago Bulls will be required to pay a fee to the NBA for telecasting the Bulls games into the national market. The fees ($1.2M for 1994-95) will be computed under a formula set by the court. The court ruled that the Bulls and WGN would be able to pay lower fees than the fees sought by the NBA. The court stated that the NBA already received enough (over $2MM a year) in copyright payments and decided that the Bulls and WGN should pay the NBA only half of the revenue from broadcasts outside of the Chicago area, about $40,000 per game rather than the over $100,000 per game sought by the NBA.

Weekend Warriors Beware: All you plaintiffs' lawyers looking to enter the sports field, take note:

After two appeals including one to the New Jersey Supreme Court, "former friends" settled their lawsuit resulting from injuries in a "recreational sport". The plaintiff alleged that he suffered torn ligaments when the defendant slid into home during their weekly pickup softball game. "He never even came over and said he was sorry." complained the plaintiff. After the Supreme Court sent the appeal back for a new trial, the parties settled the lawsuit for $22,000. So who needs to represent professional athletes?

The California Supreme Court threw out a plaintiff's case, who sued after her hand was stepped on during a touch-football game held at half time at a Super Bowl party. The plaintiff's little finger was amputated after three unsuccessful operations. In dismissing the case, the court wrote: "In the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. Lawsuits are appropriate only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally, outside the range of the ordinary activity involved in the sport.

However, the Wisconsin Supreme Court ruled that damages can be awarded even for negligence. A jury verdict was upheld for a plaintiff who injured his leg after colliding with the other team's goalie. The goalie allegedly was "a fiercely competitive guy and was willing to take some risks in order to win the game," complained the plaintiff. Quoting an Illinois court, the Wisconsin court said "some of the restraints of civilization must accompany every athlete onto the playing field."

A Connecticut superior court suggested that different sports need different legal standards. In a suit by a softball player against a fellow player who allegedly "submarined" a ball at him while he was sliding into second base, the court, in not dismissing the case, ruled that "softball players may have broad rights to sue because the game isn't a contact sport, and people aren't expecting rough play."

Who are the experts anyway? In a Nebraska case, a lawyer hired a habitual pickup basketball player to testify as an expert witness. The plaintiff claimed he was shoved backward by another player during a lunch time basketball at the local YMCA, and that he suffered fractures in both wrists when he reached backwards to break his fall. The Nebraska Supreme Court agreed with the defendant's attorney in questioning the qualifications of the "expert witness" and excluded his testimony.

(The above items were taken from a Wall Street Journal Article of June 23, 1995.)

U I L: Texas public school students will have a new no-pass no-play format for the 1995-96 school year and local school districts and school boards will have more control and freedom in the way they operate high school athletics. In Senate Bill 1, legislators reduced the suspension period for failing students from six weeks to three weeks and also allows no-pass no-play casualties to continue working out with their team. After sitting out 3 weeks, failing students can return, provided they regain their eligible status. Grades of 70 and above will continue as passing marks and grades below 70 will be failing scores.

Got a complaint against the UIL? If so, file suit and get an injunction. The West Brook Booster Cub sought an injunction ordering the replay of the final 2 minutes and 32 seconds of the game between West-Brook and Katy. Following the ejection of their starting quarterback, West-Brook lost a fumble by their backup quarterback that was recovered in the end zone for a 31-28 Katy win. The starting quarterback was ejected from the game and West-Brook was hit with two unsportsmanlike conduct penalties. West Brook contended that following a review of the game films, they should have been assessed only one

Continued P. 30

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unsportsmanlike conduct penalty and thus avoid a situation where they wound up on their own three yard line (following which the fumble occurred). UIL regulations forbid teams from protesting officials' rulings after a game. Katy went on to beat Converse Judson in the Class SA Division I semifinal.

Misc: "Air McNair" (a moniker used by Houston No. 1 draft choice Steve McNair) was sought to be licensed with the U. S. Department of Patents and Trademarks by three employees of a San Diego television station. In denying the registration, the Department did not buy the trio's "willingness to work with [McNair]" in the use of his name. Although the trio apparently were the first to file an application to register "Air McNair", by denying the application McNair thus did not lose the commercial rights to the nickname used during his college career.

And finally, is there anyone in Texas who will justify the mega deal contracts for Shaq and the relative lack of commercial endorsements for Hakeem Olajuwon? If so, contact Mr. Ralph Green, executive vice president of Barakaat Holdings Ltd. in Houston. Mr. Greene, Olajuwon's marketing representative, hopes that additional deals will follow the repeat MVP performances by Hakeem in the NBA finals. Shaq's deals with companies such as Reebok International Ltd., and Pepsi, are slamdunks compared to the endorsement deals made by Hakeem.

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 600 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 $20.00 (made payable to ENTERTAINMENT & SPORTS LAW SECTION) to Steven Ellinger, Treasurer, 3501 West Alabama, Suite 201, Houston, Texas 77027.

NAME: _____

ADDRESS: _____

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_____

BAR CARD NO: _____

Calendar Of Events

February 22-23, 1996 -

First Annual Conference on Interactive Sports. Mark Hopkins Intercontinental , San Francisco, CA. Reservations: (800) 647-7600 Fax (212) 421-7325

March 16, 1996 -

Mark your calendar, March 16, 1996 for the Section's next seminar, entitled, "Legal Aspects of The Entertainment Industry." The seminar will once again be held in Austin, in conjuction with the 10th Anniversary of South by Southwest Music Media Conference, to be held during the week of March 8-17, 1996.

March 16, 1996 -

The next meeting of the Entertainment and Sports Law Section Council.

June 18-21, 1996 -

State Bar Association Convention, Dallas, Texas.

June 20, 1996 -

Annual Section Meeting.

Student Writing Contest

The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are seeking articles relating to sports and entertainment law issues of interest to the Entertainment and Sports Law Section's approximately six hundred members. Any interested student or faculty member is invited to submit original articles to us for consideration and possible publication.

We are sponsoring an annual writing contest for students currently enrolled in Texas law schools for the best article on a sports or entertainment law topic. The winning student's article will be published in the journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee, and the student's article will be included in the appropriate seminar materials.

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

All faculty and student articles should be submitted to me at the address below and conform to the following general guidelines. Length: no more than thirty, typewritten double-spaced pages, excluding footnotes. Footnotes 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 8-1/2" X 11" paper and submitted in triplicate with a diskette. Authors of accepted articles must supply a brief (75 words or less) biographical sketch that will appear in connection with their article.

The next Journal publication date is during the spring of 1996. All articles submitted will be considered for publication.

Student articles submitted for the writing contest must be received by me no later than June 1, 1996. The Journal will be published three times a year, and all other articles may be submitted at any time. Due to the editors' time constraints, no significant editing likely will be done on published articles.

I look forward-to receiving articles from you and your students. If you have any questions concerning the contest or any other matter, please call Matthew J. Mitten, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-1646-1845.

Legal Aspects Of The Entertainment Industry

Saturday, March 16, 1996 - Austin - Raddison Town Lake

The Section has a great program lined up for the 6th Annual Entertainment Law Seminar. The seminar, entitled "Legal Aspects of the Entertainment Industry", is formatted to provide concurrent presentations in such areas as multimedia, music, television, copyright, and tax planning. The program includes presentations by Lois J. Scali, a partner in the Los Angeles law firm of Irell & Manella, Robert Steinberg, also a partner in Irell & Manella, and Alex Aben, Director of Business Affairs and General Counsel of Starwave Corporation. Ms. Scali specializes in entertainment and intellectual property transactional work in television, film, multimedia and music. With the emergence of the multimedia industry, much of Ms. Scali's work focuses on the convergence of entertainment media and technology. Mr. Steinberg represents a variety of high-technology companies, including companies in the multimedia industry such as Packard Bell, Disney, and Times Mirror. Mr. Aben has served as Director of Business Affairs at Orion Pictures and as Associate General Counsel at Warner Bros. Also featured will be Don Passman, author of the current best-selling book entitled, "All You Need To Know About The Music Business." Mr. Passmn will talk about current trends in record deals with independent and major labels.

The seminar will once again be held at the Raddison Town Lake in Austin. The seminar is scheduled for Saturday, March 16, 1996 and as in previous years will coincide with the SXSW. Members are encouraged to make early reservations! The Registration Fee is still only $150. The seminar is expected to be one of the best programs in the fine line of programs put together by program coordinator Mike Tolleson. If you have any questions, please feel free to call the State Bar of Texas, Professional Development Office at (800) 204-2222.

8:00 AM - Registration

8:45 AM - Moderator/Welcoming Remarks

Mile Tolleson, *Austin*, Institute Director, Attorney at Law

9:00 AM - Concurrent Sessions -

Multimedia: Negotiating Development and Publishing Deals,

Lois J. Scali, *Los Angeles*, Irell and Manella

Robert Steinberg, *Los Angeles*, Irell and Manella

Musi Biz 101: An Overview of the Industry

Ernie Gammage, *Austin*, President, Gambini Global

11:00 AM - Break -

11:15 AM - Concurrent Sessions -

Television Program Production & Distribution: The Barney Story

Susan Benton Bruning, *Richardson*, Counsel, The Lyons Group

Copyright and Trademark Basics for the Music Industry

Shannon T. Vale, *Austin*, Arnold, White & Durkee,

Tax Planning for Entertainers

Gregory Marishak, *Dallas*, Certified Public Accountant

12:15 PM - Lunch - (on your own)

1:30 PM - ***Acquisition of Motion Picture Rights In Literary Works and Life Stories***

F. Richard Pappas, *Austin*, Attorney at Law

Tax Planning For Entertainers

Gregory Marishak, *Dallas*, Certified Public Accountant

Anatomy of a Songwriter Agreement

Robert R. Carter, Jr., Austin, Attorney at Law

2:30 PM - Concurrent Sessions -

Current Trends in Record Deals With Independent and Major Labels

Donald S. Passman, Hollywood,

Gang, Tyre, Ramer & Brown

Cyberspace Entertainment: Doing Business on the Internet

Alex Alben, Bellvue, Director of Business Affairs and General Counsel, Starwave Corp.

Entertainment Litigation: Send Lawyers, Guns and Money

Lawrence A. Waks, Austin, Sutherland, Asbill & Brennan

3:30 PM - Break

3:45 PM - ***Mock Negotiation of a Songwriter/Publisher Deal***

Steven Winogradsky, Granada Hills, President, The Winogradsky Company,
Jeff Brabec, Los Angeles, Vice President, Business Affairs, Chrysalis Music.

5:00 PM - Ajourn -

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