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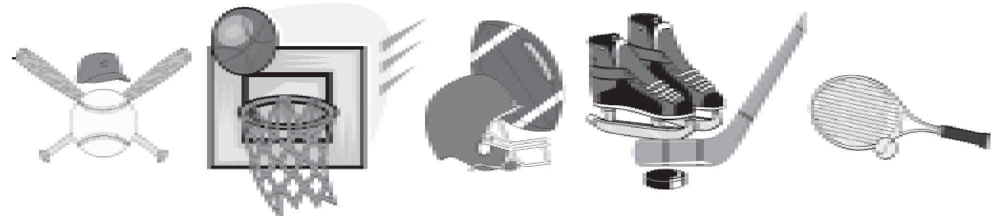

In this Issue:

1. **Telephone Seminar** ... 2
2. **For The Legal Record** ... 2
3. **Journal Staff** ... 2
4. **Nominations for Council** ... 3
5. **Soft Money** ... 4
6. **WNBA's Mandatory Education Policy** ... 11
7. **Birdies and Bogies in Beijing** ... 15
8. **Recent Cases of Interest** ... 20
9. **Recent Sports & Entertainment Publications** ... 22
10. **Section Membership Application** ... 24

Texas Entertainment and Sports Law Telephone Seminar: A Success Out of the Gate!

Supported by Ami Larson and the State Bar of Texas, the Entertainment and Sports Law Section co-sponsored the first sports law telephone seminar held in Texas, featuring former NBA player and coach John Lucas, sports agent and attorney Jeffrey Fried, family law specialist Katherine A. Kinser, and the attorney behind Houston's successful Super Bowl production, Denis Clive Braham.

Speaking on the topic of "Sport: Players, Success and the Law", the speakers presented, in a two hour format, their views on dealing with professional athletes and their success. Mr. Lucas brought a unique view of working with the successful athlete who has fallen from success and offered a blue print in aiding the athletes to get their life and profession back on the right path. Mr. Fried contrasted dealing with athletes in the sports of basketball and boxing, offering his insights in dealing with athletes on the U. S. and international playing fields. Ms. Kinser spoke on the issues which present themselves to athletes and their families. Having experienced a variety of family issues with highly successful athletes, Ms. Kinser's presentation offered examples of how family issues play a vital role in the athlete's private life away from the view of the fans. Mr. Braham offered a look behind the scenes in bringing the Super Bowl to Houston.

Making the seminar the first of its kind in Texas, the State Bar provided an opportunity for practitioners to participate in continuing legal eduction without leaving their offices. The CLE program was broadcast live on March 26, 2004 and may be accessed via www.TexasBarCLE.com.

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FOR THE LEGAL RECORD ...

Court Turns on the Prosecution! … U. S. District Judge David Sam didn't even let the prosecution finish its case.

Tom Welch and Dave Johnson, local leaders for Salt Lake City's efforts in securing the 2002 Winter Olympics, were acquitted of all charges by the federal judge. By selecting Salt Lake City for the Winter Games, the prosecutors argued that the former head of the Salt Lake City committee and his deputy spent lavishly with gifts to various of the International Olympic Committee delegates who selected the site.

Rolex watches, trips to Disneyland, guns, sports tickets and college scholarships gifts, did not persuade the court, which commented "[H]e had never seen a case so devoid of "criminal intent or evil purpose". Finding the evidence never met the legal standard for bribery, Judge Sam's ruling verified Messrs. Welch and Johnson's argument that "the gifts were merely business as usual in the Olympic bidding process."...

Rocker Gets Jailed!

A German criminal court sentenced rocker Michael Regener, 38, to 40 months in prison. The lead singer for the Neo-Nazi band Landser, its bass player and drummer were found guilty of violating the country's laws against discrimination. The band was found to be a threat to Jews and other of the country's African and Muslim immigrants. While the bass player and drummer got probation and community service, the lead singer was sentenced to prison after the band was found to be a criminal organization for espousing Nazism and inciting racial hatred.

The band takes it name from the German World War II word for "foot soldier". The group's songs praised skinheads and arson and murder against Germany's immigrants. Prosecutor Joachim Lampe, invoking the country's laws against discrimination, called the band members "terrorists with electric guitars." Using lyrics such as "Let's get the enemy, bombs on Israel ..." it drew its fan base from far-right radicals and neo-Nazis. Landser witness and neo-Nazi Thorsten Heise portrayed the lyrics as "radical, a little bit more thoughtful, ironic and full of humor." Because of Germany's discrimination laws, the band was forced out of the country to produce the discs which, after a six month trial, were found to incite racial hatred and tested the limits of Germany's rights of freedom of expression against its discrimination laws enacted after the Holocaust ...

Precedent Setters!

Breach of Contract: Tight-end Jerramy Stevens and the Seattle Seahawks may be setting precedent in their dispute over the team's move following Stevens' reckless driving conviction The case has been appealed to the NFL with Stevens arguing that despite his contract containing a penalty clause for a drunken driving conviction, he is not required to give up $300,000 of his $2.8 million signing bonus for the reckless driving conviction. Lawyers, agents and players will be watching to see if NFL teams will be allowed to get back from players a portion of their signing bonus when they are involved in brushes with the law. Stevens' contract contained prohibitions regarding "drunk driving and lesser include offenses." If the Seahawks prevail in arguing that "reckless driving is a lesser included offense", NFL Management and the Players' Association will likely have new ground for their next round of bargaining ...

Torts: Antonia Vernis was two years old when the car she was riding in was hit by a drunken football fan on his way home from a New York Giants game. Following the accident, the girl required a ventilator and was not able to use her arms or legs. Her parents

Continued on page 3

Continued from page 2

sued the NFL in Newark, New Jersey, arguing the league is responsible because it “promotes the kind of behavior” that led to the fan consuming fourteen beers at the game, driving home drunk and causing the accident resulting in the girl’s damages. Clubs and fans have an interest in the outcome. The Plaintiffs’ success may result in less consumption or more watchful security at pro football games ...

Antitrust: A Federal Court located in Cincinnati is allowing ardent fan Carri Davis and her lawyers to argue that as a taxpayer she can sue the National Football League because they extort new stadiums from cities in violation of antitrust laws. Citing the Bengals as example, Davis’ lawyers have convinced the court to allow her claims that the NFL illegally used its monopoly clout to “extort” cities. The results are new stadiums for the teams and higher tax burdens for the citizenry. Davis’ lawyers’ next step reportedly will be to attempt to get the league and the teams to turn over their financial records ...

Conspiracy: Connecticut was the venue, giving the Big East home ground, but Plaintiffs’ Connecticut, Rutgers, Pittsburgh and West Virginia could not convince the court that the Atlantic Coast Conference conspired with Miami and Boston College. Having accepted the ACC’s invitation, Virginia Tech, Miami and BC appear to have cleared all legal obstacles to joining their new league. Boston College, its athletic director and Miami still face the Big East’s lawsuit. But the momentum appears to leave the Big East looking for new members and the ACC looking to bigger television revenues ...

***NASCAR*:** Moving fast up the charts as a fan favorite, races will appear on prime time TV at least seven times in 2004, NASCAR appears to be cleaning up its actors. The organization issued twelve truck crew chiefs fines and warranted automotive lawyers spending time in the garage to value unapproved intake manifolds, air filter housing space, unapproved reinforcement for rear bumpers, and unapproved panels on a truck wheel well area. Handing out more than $30,000 in fines for violations, Dayton International Speedway was the situs and Craftsman Truck crew chiefs were the violators following the season-opening race held February 13. NASCAR identified the violations and issued the fines as fans and violators prepare for the new racing season and NBC looks for TV ratings from nighttime racing and prime time viewing. Nighttime racing is the NASCAR/NBC alliance’s new strategy to catch more than the “roots Saturday afternoon fans”. With ratings up from 5 to 5.2 percent, NASCAR and NBC sense a national trend in TV viewing ...

The Journal can be accessed on-line at www.stcl.edu....

Note that the Entertainment and Sports Law Section’s website is under construction and should be available soon.

Sylvester R. Jaime—Editor

NOTICE OF ANNUAL MEETING!

Free CLE - 2 Speakers!

San Antonio Convention Center
June 25, 2004
Check State Bar Announcements for time and place of meeting.
See You There!

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Student Writing Contest

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

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

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

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 1, 2004.

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

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

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

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

Soft Money: The Weapon of Choice for the Runaway Productions.

By Christopher H. Lytton

Christoper H. Lytton received a B.A. in history cum laude from U.C.L.A. and a J.D. from the Southern Methodist University of Law, where he was an editor of the Computer Law Review and Technology Journal, and a member of the Jessup International Moot Court Team. Mr. Lytton is an attorney with Morgan CreekProductions, Inc., where he works on production and finance matters.

When *Matrix Revolution* opened in one night, to the extraordinary figure of $43.1 million dollars worldwide, its success represented the culmination of a marketing and distribution juggernaut.[1] The film was unveiled to the world with the precision of a well-executed military maneuver , "the trilogy-capping action saga [was] launched in a synchronized, global-village-style opening at precisely the same hour in eighty countries and one hundred and seven territories. [Warner's] has booked "Revolutions" into 3,502 North American theaters, manufacturing more than 8,000 domestic prints and more than 10,000 international prints"[2]. These numbers meant that almost twenty-five percent of all the available 35,000 movie screens in the United States were showing the same movie.[3] With at least a few hundred million dollars spent on making the *Matrix* projects, not to mention the other tentpole films that have driven the box office to new records, it would seem that every gaffer, grip, and set decorator in Hollywood must be gainfully employed. However, there is a flaw in this theory: The *Matrix Revolution* was not filmed in Los Angeles nor was it even filmed in the United States.

For years, the entertainment industry, labor unions, government officials and pundits of all stripes have struggled with the epidemic of *runaway production*. Runaway production is a hot button topics that divides along ideological lines, with those who blame overbearing unions and the Byzantine bureaucracy of local and state governments on one side and greedy producers on the other. No matter your position along the great divide; this is no chimera, significant numbers of movies are now shot in foreign countries and other states like New Mexico and North Carolina. This exodus has been a consistent trend since the Great White North first introduced significant tax incentives for producers in 1989.[4] However, as California's business climate continues to drive small businesses out of the state, the impact of runaways in real dollars is more significant than ever. While many hope that Arnold will be able to reinvigorate the California production industry, the results of such efforts are far from certain.

With almost six billion direct production dollars spent worldwide in 2002, the production end of the entertainment business generated an estimated $42 billion dollars in total spending. Naturally, spending in this amount is a boon to any local economy lucky enough to snare a production. Greater Los Angeles, more than any other region, has lost significant revenues, jobs, and prestige due to runaways.[5] While one can argue the numbers and aggregate impact of runaways, it is injurious to the economy on the local, state, and national levels"[t]he attraction of subsidized feature film production outside the United States has led to losses for the U.S. economy of $4.1 Billion and 25,000 jobs in the past four years."[6] Unfortunately for local workers unless the star of the film requires a domestic production and is at the power level of now-Governor Arnold Schwarzenegger for example (rumor had it that Schwarzenegger required *T3: Rise of the Machines* be shot locally) chances are most producers will attempt to benefit from overseas or simply out-of-state incentives.[7]

Current runaway statistics notwithstanding, it is important to keep the issue in its historical context. While runaways have only recently become an issue of public discourse, it is not a new problem for the industry, as explained by Pamela Conley Urich and Lance Simmens in their recent article.

> In December 1957, the Hollywood American Federation of Labor ("AFL") Film Council, an organization of twenty-eight AFL-CIO unions, prepared a report entitled "Hollywood at the Crossroads: An Economic Study of the Motion Picture Industry." This report addressed runaway production and indicated that prior to 1949, there were an "insignificant" number of American-interest features made abroad. However, the report indicated a drastic increase in productions shot abroad between 1949 and 1957. At that time four major studios—Columbia Pictures, Inc. ("Columbia"), Twentieth-Century Fox, Inc. ("Fox"), Metro-Goldwyn-Mayer ("MGM") and United Artists, Inc. ("United Artists")—produced 314 films. Of these films, 159, or 50.6 percent, were shot outside the United States. It also revealed runaway films were shot primarily in the United Kingdom, Italy, Mexico, France and Germany. The report further identified factors that led producers to shoot abroad: 1) authentic locale; 2) lower labor costs; 3) blocked currencies; 4) tax advantages and 5) easy money and/or subsidies.[8]

Although the above seems to demonstrate that runaway productions may be somewhat cyclical in nature there are major differences between the biz in the in 1950s and today. The modern entertainment business is a global powerhouse and lost production dollars are now in the billions. While ideologues can argue philosophically about the causes of the runaways, the numbers show a black-and-white situation. In the aggregate, potential U.S. workers and the combined government entities lost an estimated $10.3 billion to runaway projects in 1998 alone.[9] Compounding the impact of the statistics is the fact that the entertainment industry is an extremely diverse employer, comparable to small-town government or a military base; therefore, the consequences of lost productions on the surrounding communities and support industries are significant. From cooks to lawyers, from carpenters to medical professionals, from printers to flower shops - the production of a film or television show is a multifaceted effort.[10] It has been stated that total combined losses in the U.S. for 2002 could be as high as sixteen billion dollars.

The reason that cities, counties, states, and even the federal government should be aggressively combating the runaway issue, is evidenced by these statistics. The following data is from the Center for Entertainment Industry Data & Research study released in 2002 that surveyed films produced between 1998 and 2001:

- worldwide production spending increased from $5.56 billion in 1998 to $5.6 billion in 2001;[11]
- United States feature spending declined 18% to $3.24 billion in 2001 from $3.93 billion in 1998;[12]
- U.S. films with budgets above $50 million dropped to $1.51 billion in 2001 from $2.3 billion in 1998;[13]

Continued on Page 5

Continued from Page 4

- Expenditures for features shot in Canada increased from $430 million in 1998 to $1.05 billion in 2001.[14]

In today's marketplace, runaways are even more harmful than in the period cited, due to recession and consolidation in the industry. The current unemployment rate is the highest Americans have seen in years.[15] While runaway production job losses in the entertainment sector pale in comparison to the hemorrhaging of jobs in the airline or manufacturing sectors; the combined job losses, in the industries that support productions, are consequential.[16] Further, with the health-care system in crisis and concerns over the solvency of Social Security, the loss of money contributions to the various unions' pension and health plans is also of consequence. Further, the consolidation of the studios and the convergence of television and film giants such as Universal and NBC make working in the filed more competitive.

Despite the historical statistics, since the tragic aftermath of the attacks on September 11, 2001, world events have slowed the flood of runaway dollars that characterized the 1990s.[17] Such things as global terrorism, war against Iraq, and unrest in the Middle East and a less appealing exchange rate have made stars and executives less apt to jump on a plane to Morocco. Further, Canada's misguided, although short-lived effort to terminate its tax shelter helped to effectuate an increase in domestic production. However, history, and the economics of movie and television making indicate that, once a modicum of political stability returns, producers will follow the soft money and cheaper costs outside of California and even the USA. When analyzing U.S. production issues the appropriate case study is California—Southern California in particular. The Los Angeles area has always been and continues to be the dominant geopolitical player in the entertainment industry. Before looking specifically at Southern California, we will examine statewide issues.

THE CALIFORNIA LANDSCAPE:

While the October revolution has installed an entertainment insider as the Governor of the Golden State, Arnold has a great deal of work in the days ahead to assist the California entertainment economy. In the past, California has not done enough to secure its relationship with the entertainment business. Whether from a sense of entitlement or simply malaise, for over a decade, Sacramento watched entertainment jobs and tax dollars exit the state. However, California has recently become more active in its efforts to save such jobs. One state organization that is positioned to advance statewide efforts is the California Film Commission.

The **California Film Commission**'s mandate is essentially to keep production dollars in California. The commission has an advisory board of twenty-one members, appointed by the governor, Senate pro tem, and speaker of the assembly.[18] While these are political appointments, the CFC is not just a figurehead organization, as it has a strong mandate to keep productions local. The following is a partial list of programs and services instituted by California.

Financial Incentives[19]

- Film California First (FCF). A multimillion dollar incentive program that provides up to $300,000 per project in rebates to qualified production companies filming in California. The only incentive program of its kind, FCF reimburses the cost of public labor and greatly reduces location site fees when filming on public property.
- The State Theatrical Arts Resources (STAR) Partnership. A unique program that offers filmmakers access to unused state properties (e.g., health facilities, vacant office structures, prisons) for a nominal fee or at no charge, thus helping production companies to substantially cut below-the-line expenses.

Tax Incentives[20]

- No state hotel tax on occupancy. Most cities or counties that impose a local hotel tax have a tax exemption for occupancies in excess of thirty days.
- No sales or use tax on production or postproduction services on motion pictures or TV films. No sales or use tax on services including writing, acting, directing, casting, and storyboarding. Five percent sales tax exemption on the purchase or lease of post-production equipment for qualified persons.

Services Provided[21]

- Free permits for California state properties.
- One-stop film office for California state properties.
- On site location library and CinemaScout (www.cinemascout.com), a web-based location finder for sites throughout California. The Location Scout is used by production personnel to access images and text on California properties that might meet specific film location needs.
- On site California Highway Patrol (CHP) Film Liaison available to assist with filming on state freeways and highways. This liaison also arrange for CHP officers to monitor film shoots.
- On site California state fire marshal available to provide advice and approval for pyrotechnics and other special effect permits for state properties.
- Coordination with more than fifty-five in-state film commissions. CFC will fax a production's location requests to designated film commission offices.
- Production and troubleshooting assistance.

Programs such as the FCF, which proposed investing forty-five million dollars over three years to offset production costs, are insufficient. Spending fifteen million dollars per year when California is missing out on a large percentage of some sixteen billion dollars is the embodiment of penny wise, pound foolish.

Yet, even in the face of evidence that the CFC has positively affected as many as 130,000 below-the-line jobs in the past year, the organization has become a casualty of California's financial crisis. Inexplicably under Governor Davis' last budget, the CFC was set to operate in 2004 with 90 percent of its budget slashed, even though its rebate program has been used by some 2,800 productions.

Los Angeles

While the state bureaucracy struggles with its sinful deficit and the management of a state in crisis, Southern California must act on its own out of self-preservation to protect a crucial industry. In 1992, former film czar Beth Kennedy uttered the dire prediction that, if new, preventative measures were not taken, "L.A. will

Continued on Page 6

Continued from Page 5

become to the entertainment industry what Detroit signifies to the automobile industry." Now ten years later, Los Angeles still dominates the global entertainment industry; it is no dinosaur. However, sufficient measures have not been taken to increase or retain Los Angeles-based productions.

In Southern California, steps have been taken to streamline the film permitting process in an effort to create a cooperative environment[22] between government and industry. At the core of this endeavor is the Entertainment Industry Development Corporation ("EIDC"). The EIDC was created through the joint efforts of the Los Angeles City Council and the Los Angeles County Board of Supervisors to be the one-stop permitting authority in Los Angeles. The EIDC wants to be an effective, results-oriented organization as seen from the mission statement on their web site.

> EIDC's mission is as straightforward as they come. We deliver Los Angeles to the global entertainment industry. It's an easy assignment - the region offers unparalleled services, locations and resources. The more projects that are produced in the region, the more commerce and economic growth flows to many local communities. And this local community development is an integral part of the EIDC mission. It's a win for both sides. The EIDC provides services, solutions and answers to the varied challenges and questions that are raised when filming in the real world.[23]

In a similar effort, the Orange County Chamber of Commerce & Industry created the Orange County Film Office.

> The mission of the Film Office was to market Orange County to the motion picture and allied industries, expand production throughout the area and simplify the permitting and regulatory process in the thirty-two separate jurisdictions of Orange County.

While streamlining bureaucracy is sure to provide some incentive to would be filmmakers, the financial incentives are the real carrot and neither Los Angeles, nor California nor the U.S. have begun to fight that battle in a meaningful way. What is it that drives the independent producer and often times the major studios to manufacture such blockbusters as *Lord of the Rings,*(New Zealand)[24] *Master and Commander* (Mexico)[25], and *Matrix* (Australia)[26] outside the entertainment capital of the world? While there are often multiple reasons for these decisions, and each film has its own story, it boils down to money.

Producers may prefer a certain crew in Canada, a location in Malta, or a facility in Australia, but the high price of everything from unionized labor to residuals to duct tape in the United States make other countries more financially appealing. For instance there are significant costs which a studio must pay simply for shooting in Los Angeles which do not exist in Australia or South Africa. An example of this is, if a production films in Los Angeles the producer will be responsible to pay the I.A.T.S.E employees residuals, known as Post-60s, which can amount to nine percent of ancillary revenues.[27] While this alone might not drive a producer to Australia, it is the aggregation of high costs of doing business which drive productions out of our cities. Add to higher costs, the temptation of soft money opportunities and it is no wonder that foreign productions continue to thrive.

With a generally strong dollars and pliant locales, producers have the opportunity to feel like sultans in Malta, and barons in Prague. After all, when the king of a north African country offers you his army as extras, it's more interesting than driving to a stage in Burbank.

Soft money is a powerful lure, but what is it? When a tobacco company or teachers' union donates a large sum of money to a political candidate's campaign for public office, we call it *soft money*. The connotation is that *soft* is not as reputable as *hard*. Often times soft is used to imply *weak*, such as "the mayor was soft on crime," or Winston Churchill referring to Italy as the "soft underbelly of Europe," meaning that invading Italy would be less costly than tackling the Atlantic Wall of the channel coast. Other times we intimate that soft is contaminated, that is, soft money has too much influence in politics.

What *is* this soft money and why is it so important?

The opportunities for independent film finance have gone through a series of difficult changes over the past years and soft money plays a major role in the business of independent filmmaking. The circumstances surrounding the independent producer's struggle to finance films was accurately outlined by Patrick Frater in his January 2003 article featured in *Screen Magazine*:

> Over the last four years, the independent film production sector has suffered a series of collapses that have successively removed most of the planks on which their businesses were built. One after the other, the insurance-backed funding business, gap financing, the pre-sales market and Europe's free and pay-TV sectors have shrunk or disappeared. Add to that the overnight collapse of the wildly over-optimistic Neuer Markt, which briefly led many German enterprises and investors to take leave of their senses, and the increasingly risk-averse mood of US buyers, and the staple sources of funding for independent films have all disappeared since 2000. Into the void left by the collapse of the prior finance regime, whether it be German money or insurance backed money, the governments of numerous countries, states, and cities have stepped into the breach to draw production dollars to their areas.

Given this environment, producers have been forced to look to new sources for funding and since the prize of a feature film is a serious value for any locale, it is no wonder that soft money became such a popular mechanism in film finance. The value of a production is clear, this is because for every dollar of production funds spent in a given territory, an additional seven in ancillary revenues are generated. The prospect of bringing such a windfall to a locale has motivated the efforts of politicians and businesspeople worldwide. However, this is an ever-changing landscape that will continue to evolve as old money sources recede from the scene and new sources take their place.

Such a change was recently witnessed when an established source of independent funding evaporated, just as another source was making its presence felt. First, the Canadian pension fund CDP announced that its would no longer invest in Hollywood. "CDP is reducing its private equity investments and reconsidering its Hollywood strategy out of concern that the assets have not been productive."[28] Shortly thereafter it was announced that the state of Louisiana had teamed with Los Angeles-based Samy Boy Entertainment to create a fifty million dollar production fund, called LA Squared.

> The fund intends to back 10-12 pics, all of which will be shot in Louisiana. Equity comes from Sam Nazarian's Samy Boy and the Louisiana Economic Development Corp. The Louisiana Institute of Film Technology (LIFT) arranged debt financing. LA Squared comes on the heels of legislation enacted last August designed to put Louisiana on par with Germany, Canada and the U.K. when it comes to film production tax credits (*Daily Variety*, Aug. 26). Qualifying productions can earn tax credits of up to 15% of the total production expenditures in Louisiana. While Louisiana is the first state to invest in a

Continued on Page 7

Continued from Page 6

film production fund, New Mexico is an equity investor in the Cruise/Wagner Prods./Intermedia production "Suspect Zero." New Mexico allows productions to borrow up to $7.5 million interest-free.[29]

As this ensemble cast of characters continues to transform itself, even talent agencies are looking at ways to participate in the indie finance game. The recent announcement of the creation of El Camino Pictures demonstrates that major talent brokers like William Morris are believers in soft money and creative financing.[30]

Soft money comes in different forms, all of which attempt to reward a production for spending some of that multibillion dollar pool in a given area. The following is a glossary prepared by Frater of the terms that define the most popular soft money mechanism in use.

Soft sell: different sorts of soft money

- **Tax credits**. A system whereby a state offers a producer a rebate on film production costs spent in that country. The two most established systems of this type exist in Luxembourg and Canada. Both Australia and Iceland offer *tax offsets,* which also fit this category and appear to have taken their countries' attractions to a new level. Malta also uses it. The system can be likened to going shopping abroad and claiming back the value-added tax (VAT) at the airport. The producer needs to be able to pay out the full cost of production before claiming a refund. This hurdle can be circumvented by use of specialist banks that are willing to discount the value of the future claim. Some countries are also much quicker than others in reimbursing tax already paid.
- **Tax allowances**. The most widespread and potentially biggest source of soft money for film-making. It works by giving a tax incentive either to private individuals or to companies that invest in production companies or one-off film productions, sometimes through acquisition. The German system famously works this way by creating film funds. The Netherlands' CV system of limited-liability partnerships also fits this mold, as does France's Soficas. As no film at the project stage and few film companies have sufficient income to use the tax allowances, the trick is to turn the allowance into something which producers can use to make their films. Alternatively these can be looked at as tax deferral schemes or simply as interest-free loans from the tax authorities. There will usually be some kind of criteria determining which films qualify for tax allowances. Germany, unusually, does not disqualify foreign productions, but the German tax advantages are only at their most efficient if all the 'losses' incurred at the production stage are attributed to the country. The fund also needs to be able to have some considerable influence on the production.
- **Loan support**. Loans made by government institutions on generous interest or repayment terms not normally available on the open market. The United Kingdom and Italy operate this kind of soft loan at a national level, while Germany's many Laender, or regions, provide loans. Alternatively, the same end may be achieved by government underwriting. In France, the state covers half the losses of some specialist film discounting agencies, while Italy and Spain have been the first recipients of guarantees from the EU-backed European Investment Bank.
- **Box-office rebates**. A number of countries have systems that return a proportion of the box-office proceeds to producers. France has the most developed system, through its *compete de soutien* system, but Spain and some of the Scandinavian countries are also notable practitioners. (Some parts of the Media Plus program use rebates to help distributors and exhibitors.) They have the advantage of transparency, being automatic rather than subjectively awarded, and do little to distort the distribution market because it is commercial success, not failure, that is rewarded. Films need to qualify either through nationality or have nationality delivered through a co-production. Money from this kind of system is returned at the recoupment stage and is intended for reinvestment in future pictures. As it is not possible to be sure how much will be returned by the tax office until a film is released, this system can be tricky to use to finance a current project.
- **Subsidy**: Most European countries provide some form of cash injection to film productions on cultural or, more rarely, economic grounds. They may be administered at national or local level, have some strings attached, such as a requirement to shoot in the territory, but reimbursement is not necessarily expected. On the other hand, with the exception of Scandinavia, they rarely amount to significant chunks of a film's production budget. The EU's Media Plus program offers all sorts of nonproduction subsidy, notably for script development and training.
- **Cheap facilities/barter**. Facilities ranging from entire studios and locations to cheap scouting may all be arranged or provided by national or local organizations. Studios may take an equity or co-production position in a film without putting up any cash. Rather, they discount or provide their services for free. In other cases, such as those of Romania, South Africa, or China, the costs of labor or studio hire is so much lower than those in Western Europe or the United States that, although the producer cannot harness cash to put into a production budget, it amounts to soft money by any other name.
- **Co-productions**. Can be considered soft money as their purpose is generally to combine different national support systems for the benefit of a single project. They can be set up either under international treaties agreed by countries that encourage dual nationality film-making (Canada holds the record for having signed the most co-production treaties) or under the European Convention on Cinematographic Co-production. The Eurimages scheme rewards tripartite productions and bipartite financial co-productions.

But how do these concepts and definitions get converted to become useable cash for production? In a recent survey by the staff of *Variety* and *Daily Variety* entitled "Tax Incentives Around the Globe" the contributors answered this question. The ensemble of writers synopsized some of the more popular soft money opportunities outlining how we go from conceptual money to money in the bank.[31]

AUSTRALIA

12.5% tax credit

DATE: Introduced in Sept. 2001

DETAILS: Rebate is granted to producers of films and miniseries that spend at least $A15 million ($9.7 million) and 70% of their total budgets Down Under. The 70% requirement is waived for films that outlay more than $32.5 million. Government estimates the average savings is 10% of the total coin spent in Oz.

CANADA

Film/Video Production Services Tax Credit

DATES: Tax credit for foreign producers shooting in Canada was

Continued on page 8

Continued from page 7

introduced in 1997 and has no end date.

DETAILS: It's essentially a rebate on Canadian labor expenditures and can be redeemed by filling out paperwork obtained from the federal government's culture ministry, Heritage Canada. The credit was raised from 11% to 16% earlier this year, after intense lobbying from Canadian producers who often work on these films in tandem with non-Canadian producers. In addition, all of Canada's provinces also have similar tax credit programs for foreign producers. The federal tax credit can provide from 6%-8% of the overall budget. When federal and provincial credits are added together, a producer could save between 12%-16% on a given budget.

GERMANY

DATES: Tax funds have existed since the '70s, but film investment experienced a boom in the '90s. A recent amendment in the law will change the way funds operate in the future.

DETAILS: Unlike other European tax shelters, the German tax funds are not tax-driven initiatives set up by the government to encourage local film production. The schemes are based on loopholes in commercial laws that enable top-tier taxpayers to take money that otherwise would have gone to taxes and invest it into relatively high-risk funds. As a result, the setup does not require any German expenditure and has become a major source of finance for Hollywood productions. Yet, because little of the money was actually returned to the German economy, the government recently called for an amendment. Rules for the funds were tightened and, next year, investors will have to display a real entrepreneurial involvement in their fund (i.e. they will have to become more active in the greenlighting process). How this will work in practice remains to be seen. Some players have already bowed out. Meanwhile, those fund managers who remain have become tough bargaining partners, keen to generate profits for their investors (without which tax relief is lost), and the days of "silly German money" are definitely over.

IRELAND

Section 481 Relief

DATES: Introduced in 1997, expires in December 2004

DETAILS: Section 481 provides a fiscal incentive to Irish taxpayers to invest in film production. To qualify, a film must have an Irish co-producer on board, and 75% of the production work must be done in Ireland. Sums raised are typically 66% of pic budgets of up to $5.2 million and 55% of budgets $7.4 million and up. The ceiling for 481 investments is at $12.2 million. The scheme was due to expire in April 2005, but the government recently changed its plans and announced Section 481 will cease at the end of next year. Among the reasons cited: abuses of the system, as well as too few benefits to the local industry justifying the losses to the local tax base. So far, no plans have been announced for a replacement scheme.

LUXEMBOURG

< Certificate Investment>

DATES: Introduced in 1999, ends in 2007

DETAILS: The scheme provides a cash guarantee on part of the production costs incurred in Luxembourg. Foreign producers must team with a local company and get official approval from the government. A producer must prove that a certain percentage of the production costs will be spent in Luxembourg. After an evaluation, the government issues a certificate for a certain sum that may be cashed at a Luxembourg bank. (The bank then uses the certificate toward its taxes due.) The producer may cash the benefit when the film is completed and the actual local spending is known; some banks will provide a credit for the amount. The net value of the scheme for the producer is 25% on every euro spent in Luxembourg. In addition, above-the-line costs may be reduced, as income tax (which is much lower than in most other countries) can be paid locally. This only works if the home country of a foreign director or actor has a double taxation agreement with Luxembourg.

UK Options: A Model for Maximizing Soft Money.

The financial incentives for spending production dollars or pounds in the United Kingdom under sections 42 and 48 of the Finance Act are an example of how multiple countries have become creative and sophisticated in their efforts to attract film production. The UK model seems to represent a viable approach to production incentives, which could be adopted in the United States. Under the current structure, a "British" film can be made under the terms of one of the United Kingdom's official co-production treaties with Germany for example and such a film could be eligible for benefits in both Germany and the United Kingdom. One of the more popular devices created to maximize the UK benefit is the UK Sale and Leaseback. A film may qualify as a British film under either Schedule 1 to the Films Act of 1985 as amended in 1999, or by operating through one of the applicable UK bilateral treaties with territorial Co-Production partners or through the multilateral European Convention on Cinematographic Co-Production. This multilateral treaty is intended to encourage multilateral film co-productions with any European country that has ratified the Convention. In the United Kingdom, the Department of Culture Media and Sport[32] (DCMS) is the entity that confirms the qualifying British film.

Once a producer determines she can make a so-called British film, the production will then be eligible for a Sale and Leaseback. A UK sale and leaseback transaction brings together producers and investors for their mutual financial benefit. The United Kingdom's sale-and-leaseback scheme works by selling the entire copyright of the film to an outside investor who claims the tax rebate. The film is then leased *back* to the producer, allowing investors to cover their acquisition costs and the producer to get the film distributed.[33]

> The financial benefit of these transactions is typically paid to the producers once a DCMS Certificate, confirming the film is a qualifying British Film, has been issued, that is, when the film has already been completed. However, producers invariably need the cash up front during production. As a result banks are increasingly being asked to treat the sale and leaseback transaction as akin to a distribution agreement and to discount the benefit payable on completion, in other words, to use the sale and leaseback as additional collateral. However, unlike the standard discounting of distribution agreements, banks and producers need to consider the following issues when considering the discounting of sale and leasebacks. The net benefit of these deals currently available to producers is about 10 to 12.5 percent of the purchase price. However, in looking at the collateral value of the sale and leaseback, certain deductions need to be made. These may include an amount in respect of any moneys already received by the producer from distributors or co-producers, the amount of the bank guarantee fee and any legal and audit costs that will be incurred by the producer.[34]

Although the sale-and-leaseback scheme is conservative in its payout compared to opportunities available in other countries, the UK model is flexible and only certain elements of the film actually need to be British.

While soft money is not available to all productions, it is no wonder that foreign incentives continue to chip away at America's

Continued on page 9

Continued from page 8

market share of production dollars. However, while foreign soft money has its appeal it would not be difficult for California or New York with their onerous state taxes, to emulate soft money funds by offering a meaningful tax incentive to film and television investors in an effort to create jobs and revenue for the state.

SOLUTIONS

A positive attempt at reform has come from the federal level, where members of Congress David Dreier (R-San Dimas) and Howard Berman (D-Van Nuys) joined by a bipartisan group of forty-four members of the House of Representatives reintroduced legislation that provides wage-based tax relief for film and television projects produced in the United States: The United States Independent Film and Television Act of 2003, H.R. 715.[35] HR--715 is currently in the House Ways and Means Committee.[36]

OVERVIEW[37]

The bill provides a federal income tax credit designed to address the issue of runaway film and television production. It would encourage film and television production in the United States and employment of U.S. small business workers on such productions.

DESCRIPTION

The wage credit would be structured as a general business credit in the tax code (like other business credits), and would be a dollar-for-dollar offset against any federal tax liability. Like other business credits, it is nonrefundable to the extent a taxpayer has no further tax liability. If the credit is not used in one year (because the taxpayer had no tax liability) it can be carried back one year or carried forward up to twenty years.

AMOUNT

There would be two tiers of credits: a credit amounting to 25 percent of the costs of *qualified wages and salaries*, those wages and salaries paid or incurred by an employer to *qualified employees* (members of targeted group) involved in a *qualified U.S. production* (targeted activity); (2) or a credit amounting to 35 percent of such costs if incurred in a low-income community (similar to the existing definition for the New Markets Tax Credit).

DOLLAR LIMIT

The credit would only be available on the *first* $25,000 of qualified wages and salaries, that is, all employees would qualify, but only on the first $25,000.

QUALIFIED EMPLOYEES (Targeted Group)

The credit would only apply to the wages of any employee who performs substantially all of his/her services in connection with a qualified U. S. production.

QUALIFIED FILM PRODUCTION IN THE U.S. (Targeted Activity):

Eligible productions would be any public entertainment or educational motion picture film (whether released theatrically or directly to video cassette or other format), television or cable programming, miniseries, episodic television, movies of the week, or pilots that were produced in the United States.

QUALIFYING TAXPAYERS

The credit would be targeted to the segment of the market most effected by **runaway production** and, therefore, has additional limits:

- The credit would only be available if total *wages* (labor costs) are more than $200,000 and less than $10 million; and
- The credit would not be available to a production subject to the reporting requirements of 18 USC 2257 (reporting of books, films, or other material with sexually explicit conduct).

H.R. 715 is an example of potential legislation that may produce real results; it appears that other proposals will be coming from the legislative branch in the near future. However, tax credits are just one form of incentives that the government could implement.

CONCLUSION

The old adage is true: It takes money to make money. California must invest in common sense measures that financially reward productions for making movies in the state. A wide spectrum of opportunities exists. Some ideas are more conservative, like increasing the limits of the FCF program. Other ideas are more daring, such as emulating the U.K. Sale and Leaseback or the New Mexico interest free loan program. It is in the interest of the public that all of these concepts be considered.

From the public relations standpoint, more must be done to show Californians that it is not simply highly paid crew personnel and unions that are suffering because of runaways. Rather, the loss of jobs is hurting the baker and metal shop in their neighborhood and the loss of tax dollars is hurting their roads, police departments, and schools.

At times, it seems as though the U.S. film business is locked in a time warp, living in the days before business globalization and the technology revolution. As times change, so too must the unions, governments, studios, and citizens otherwise, the outsourcing of entertainment jobs overseas will continue.

It is time for the state of California to forge an aggressive strategy to keep production jobs and money in California. Californians can neither wait for the federal government to solve this problem nor adopts a wait and see attitude. This is not an alarmist attitude, this is a pragmatic one. If effective steps are not taken, California movie studios will slowly but surely become obsolete. There may be studios in California for the foreseeable future but, then again, there are still factories in Detroit.

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Continued on page 10

Continued from page 9

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[15] http://louisville.bizjournals.com/louisville/stories/2003/09/01/daily37.html
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Federal Circuit
www.fedcir.gov

Federal Trade Commission
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Texas Commission on the Arts
http://www.arts.state.tx.us

Texas Film Commission
http://www.governor.state.tx.us/film/index.htm

Texas Music Office
http://www.governor.state.tx.us/music

United States Copyright Office
www.loc.gov/copyright

United States Patent and Trademark Office
www.uspto.gov

United States Trade Representative
www.ustr.gov/sectors/intellectual.shtml

LEGISLATIVE

thomas.loc.gov
www.house.gov/judiciary
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Bureau of National Affairs
www.ipcenter.bna.com/

FindLaw
www.findlaw.com/01topics/23intellectprop

Franklin Pierce Intellectual Property Mall
www.ipmall.fplc.edu/

Intellectual Property Law Server
www.intelproplaw.com

IP Law Practice Center
http://www.law.com/jsp/pc/iplaw.jsp

IP News from Questel Orbit
www.questel.orbit.com/EN/Resource/index.htm

Kohn on Music Licensing
www.kohnmusic.com

MegaLaw
www.megalaw.com/top/intellectual.php

QuickLinks: Daily Update on IP and Internet Law
www.qlinks.net/quicklinks/index.shtml

Stanford University Libraries
www.fairuse.stanford.edu/

The Center for Popular Music (MTSU)
http://popmusic.mtsu.edu/research.html#top

The John Marshall Law School -
Review of Intellectual Property Law
www.jmls.edu/ripl

INTERNATIONAL

European Patent Office
www.european-patent-office.org

Japanese Patent Office
www.jpo.go.jp

United Kingdom Copyright Office
www.hmso.gov.uk/copyhome.htm

United Kingdom Patent Office
www.ukpats.org.uk

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www.wipo.org

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www.wto.org/english/tratop_e/trips_e/trips_e.htm

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Links to music publishers and record labels
http://www.writerswrite.com/songwriting/markets.htm

Motion Picture Association of America
www.mpaa.org

National Music Publisher's Association/Harry Fox
www.nmpa.org

Recording Industry Association of America
www.riaa.org

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ANALYZING THE LEGAL AND SOCIETAL EFFECTS OF THE WNBA'S MANDATORY EDUCATION POLICY

By C. Keith Harrison

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Introduction

In recent years, many professional sports leagues have considered implementing a minimum age and education requirement for players seeking to enter their league.[2]

Many motivations exist for age/education requirements. Oftentimes, leagues state their motivation for age/education requirements as coming from a league-wide desire to improve player decorum. However, other reasons why leagues consider age/education requirements include: minimize training costs, tacit non-competition agreements with the National Collegiate Athletic Association (NCAA), and societal pressure to employ "role model athletes".[3]

While the legal environment is especially hostile toward age and education requirements within the four premier, professional sports leagues[4], one newer professional sports league – the Women's National Basketball Association (WNBA) – has unilaterally implemented a college-graduation requirement, which affects all its players. As a single-entity league, the WNBA avoids many of the antitrust law concerns that inhibit traditionally structured leagues from implementing education requirements.[5]

Obviously, all the players employed by the WNBA are female. Therefore, when analyzing the WNBA education requirement, it is important to consider issues of feminism and women's rights as well as those of antitrust and social policy.

This article discusses the WNBA education requirement from both a legal and an ethical perspective. The first part of this article discusses the WNBA landscape and education policy. Part 2 explains the legal concerns that emerge from the WNBA college-graduation requirement. Part 3 discusses the impact if courts allowed the WNBA to maintain its college-graduation requirement, if the requirement were to be challenged in court.

I. The WNBA Landscape and its Mandatory Education Policy

Founded in 1996, the WNBA consists of 14 teams, is more mature in terms of age than the NBA, and in terms of ethnic diversity is approximately 60% African American and 40% White American.[6] Based on WNBA statistics, 95% of the players have earned a bachelor's degree from a four-year institution and 5% have earned graduate degrees. This culture of professionals, which in essence requires WNBA players to earn college degrees, is in stark contrast to their peers in the National Basketball Association (NBA), National Football League (NFL), Major League Baseball (MLB), and the National Hockey League (NHL). The goals of this league focuses on maturity and recruits from primarily the collegiate levels (some global immigration).

Opportunity as pro athletes in a male-dominated culture (athletically) is well documented in terms of resources, popularity and historical discrimination of women's athletics.[7] Until recently, professional athletics was primarily for men. With the late integration of women into the professional sport context, the balance of academics and athletics from a less commercial collegiate environment has set up a different type of athletic representation.

The relationship between women in sports and their impact on young girls indicates that image can be everything. Female participation in athletics is at an all-time high. If the majority of these women participate in a sport opportunity structure that favors the men in terms of economic opportunities and leadership roles in sport organizations, then education becomes the tool for liberating the sport experience. While Title IX is a major "player" with cultivating women's athletics the last thirty years, the age limitation policy by the WNBA may contribute to a whole culture of scholarly women that happen to play ball.

II. Legal Implications of the WNBA Education Policy

The WNBA age/education policy has not been challenged in the United States courts. However, if challenged, the policy might be overturned as a violation of federal antitrust law, despite the policy's positive effect on encouraging scholar-athletes.[89]

Section One of the Sherman Act states that every contract, combination or conspiracy, in the restraint of trade or commerce is illegal.[10] Accordingly, any concerted refusal to deal with a supplier, customer, or employee class (sometimes referred to as a group boycott) might be found to violate Section One of the Sherman Act.[11]

The public policy rationale behind a ban of group boycotts is long established. As explained in the 1914 Supreme Court case *Eastern State Retail Lumber Dealers' Association v. United States*,[12]

> "An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and it may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."[13]

The innate danger of concerted agreement is that a consumers' freedom of choice is affected.[14] When the boycotting firms have market power, a consumer loses the option to use her purchasing power to indicate preference toward the boycotted product, materials or labor source.[15]

Based on this standard, although any single professional sports team may independently implement a minimum age or education level mandatory for employment, teams generally may not concertedly agree to implement minimum age or education requirements without violating federal antitrust laws.[16]

The first challenge to age/educational requirements in professional sports occurred in the 1970 case, Denver Rockets v. All-Pro Management Inc.[17] In Denver Rockets, basketball player Spencer Haywood filed an antitrust suit against the National Basketball Association (NBA), alleging the agreement among NBA teams to deny eligibility to all players less than four years removed from high school violates antitrust law's per se ban on group boycotts.[18]

Continued on Page 12

Continued from Page 11

In Denver Rockets, Haywood contended that he merited a hardship exemption from the NBA's rule because the NBA's age/educational restriction was effectively a concerted refusal among teams to prevent him from practicing his trade.[19] While awarding Haywood summary judgment, the court found three types of harm emerged from the NBA's age/educational restriction.[20] First, the victim of the boycott, here Haywood, is hurt by being excluded from the market he seeks to enter.[21] Second, competition in the market in which Haywood attempts to sell his services, here the professional basketball labor market, is injured by not permitting a qualified employee from securing employment.[22] Third, pooling their economic power, the individual members of the NBA have established overall industry governance based on their share monopoly power over the professional basketball market.[23]

Applying a *per se* rule against group boycotts, the court in Denver Rockets rejected the legal applicability of the NBA's three affirmative defenses – financial necessity,[24] desire to promote advanced education,[25] and cost-effectiveness of allowing the college system to bear costs of training young players.[26] While the court acknowledged that educational requirements are "commendable", the court acknowledged that the benefits of promoting educated professional athletes are not among the factors that antitrust law may consider.[27]

Six years after Denver Rockets, professional sports' age/educational restrictions were again challenged, this time in hockey. In Linseman v. World Hockey Association,[28] a 19-year old, amateur Canadian hockey player, Kenneth Linseman brought a preliminary injunction suit against the World Hockey Association (WHA), contending the league's prohibition of players under twenty years old similarly violated Section One of the Sherman Act.[29] Therefore, according to Linseman, he should be ordered eligible to play professional hockey.[30]

Consistent with the decision in Denver Rockets, the Linsman court found the WHA age restriction amounted to an illegal refusal to deal,[31] that there was not any valid purpose to the twenty-year-old rule,[32] and that antitrust law does not admit exceptions for economic necessity.[33]

Age/education restrictions were overturned for a third time in the 1984 case Boris v. United States Football League,[34] which challenged the United States Football League (USFL) rule that required players to exhaust their college eligibility before being drafted.[35] Once again, the age/education restriction was overturned by the court as a concerted refusal to deal.[36]

Even though age/education requirements have been found illegal in three men's professional sports leagues, the WNBA education policy does not necessarily also violate antitrust law.[37] While most precedent lies against the WNBA, there are three reasons why a court may find the WNBA policy different from that of the NBA, WHA and USFL.

First, antitrust law has moved away from *per se* rulings where concerted refusals to deal involve professional industries.[38] Instead, today's courts favor the full-blown rule of reason analysis,[39] which often considers additional factors, for example, any pro-competitive effects,[40] and any perceived interests of young players.[41]

Second, unlike the NBA, WHA and USFL, the WNBA is structured as a single entity business, rather than an independent union of teams.[42] By implementing a single-entity business structure, the WNBA may have shielded itself from liability under Section One of the Sherman Act. Although the Supreme Court has not decided whether Section One of the Sherman Act governs single-entity sports leagues, the First Circuit in Fraser v. Major League Soccer, L.L.C.[43] recently held that in certain circumstances, single-entity sports leagues may be exempt.[44]

Third, even if the Fraser defense is denied, if the WNBA Players' Association were to consent to a league-wide education policy in collective bargaining, then the policy is shielded from antitrust scrutiny based on antitrust law's non-statutory labor exemption,[45] and therefore, challengeable only under federal labor law.[46] Applying federal labor law, a plaintiff would have to file suit against the WNBA players' union and show that the union unfairly represented prospective players without college degrees.[47] In the sports context, this would be a case of first impression.[48]

III. Analyzing the Social Impact of the WNBA Education Policy

A. *Advantages of Maintaining the WNBA Education Requirement*

There are three firm advantages to upholding the WNBA education policy despite the implication of antitrust. First, college-educated professional athletes have avoided many of the legal problems that have plagued professional athletes without college degrees. WNBA players are rarely cited in the newspapers for criminal conduct whereas their NBA counterparts – free from any education requirement – are cited sporadically for crimes involving alcohol, drug use and violence. While a correlation between education and legal trouble is not necessarily the same a causation, even within the NBA, the young superstars without college degrees were more likely arrested, whereas the NBA players with college degrees were more likely winners of the NBA Citizenship Award.[49]

In addition to issues of decorum, the WNBA education requirement also helps to prepare its players for non-basketball careers upon retirement or dissolution of the league. WNBA salaries are significantly lower than those of the four premier professional sports leagues. WNBA salaries are unlikely to increase in upcoming seasons as WNBA stadium, broadcast, and licensing revenues significantly lag behind those of the more established leagues. Further, post-retirement opportunities in coaching or announcing games for the WNBA may not exist if the league disbands, as it has threatened, based of non-profitability. Consequently, the WNBA education requirements prepare WNBA players for jobs that will help supplement their income post-retirement – a near necessity based on the lower annual salaries of WNBA players.[50]

Third, college-educated WNBA players serve as positive role models, especially to young girls. Hence, their image is the synergy of academics and athletics. One of the missions behind the WNBA was to encourage American girls to explore athletic opportunities. However, another mission of society is to encourage girls to pursue educational opportunities, especially in light of that education was for years denied from women. By maintaining a graduation requirement for WNBA players, the league promotes a message that not only can females excel in athletics, but also that females can excel academically.

B. Social Problems Arising from the WNBA Po*licy*

While there are three, clear advantages to the WNBA education policy, the policy is also subject to several criticisms. First, the WNBA policy prevents adult women from making their own choice between college and professionalism. By denying women basketball players' right to choose between education and career opportunities, these womens' individual interests are subordinated to society's overall will. Furthermore, since the WNBA has a monopoly over women's professional basketball opportunities, by denying young women the opportunity to enter the WNBA draft, the WNBA denies them the opportunity to play professional basketball at any capacity in the United States of America, which is a form of concerted restraint on trade.[51]

Continued on Page 13

Continued from Page 14

Second, the WNBA policy inhibits young women from securing financial independence. The WNBA starting salary is $40,000. While $40,000 today's economy that is not a huge amount of money, that income is sufficient to allow a young woman to independently support herself. By denying young, female basketball players the opportunity to pursue financial independence, these women remain monetarily tied down to others – such as parents and potentially the men in their lives. Without financial independence, these women are therefore made subservient *vis-à-vis* their economic providers. Such an outcome is dangerous in modern American society, especially in light of generations past where young women played a subservient role in society, where they were often encouraged to remain in the home and denied the opportunity to pursue their own business pursuits.

Third, the WNBA policy mandates that female basketball players develop their career through the NCAA – an institution that profits from student-athletes' work-product while limiting student-athletes' economic freedom.[52] While the NCAA states as its mission is to protect student-athletes from exploitation, today's NCAA actually does more to exploit student-athletes than to protect them.[53] Student-athletes travel around the country competing in high-revenue events, yet the NCAA does not allow students to share revenues.[54] Additionally, student-athletes are not allowed to profit from their athletic prowess even independently from NCAA-organized activities.

Fourth, consumers of women's professional basketball games are forced to attend an inferior brand of basketball competition than if the restrictions on less-formally educated women's basketball players were removed. From a consumer perspective, the purchased product is harmed by denying some of the best labor sources the opportunity to participate in the WNBA.[55]

CONCLUSION

WNBA Commissioner Val Ackerman takes great pride in that nearly all WNBA players have college degrees. On one hand, the WNBA education requirement is a great accomplishment. The education requirement helps to yield WNBA players that conduct themselves professionally on-and-off the court, are prepared to transition into non-basketball careers, and serve as effective role models for young girls in America.

However, the WNBA education requirements are also problematic because they reduce female basketball players' autonomy, hamper female basketball players' economic opportunities, cajole female basketball players to participate in NCAA basketball and reduce the quality of the women's basketball product placed in the market.

Weighing all these factors, it seems the WNBA education requirement yields some positive results and therefore, it would be unfortunate if antitrust law overturned the WNBA policy in its entirety.[56] Future research and policy analysis in this genre should focus on how the policy of early entry discriminates against the educational development of male athletes, and whether the WNBA policy may in fact be superior.

[2] See Interview with Marc Edelman (Apr. 22, 2003). See also Marc Edelman, Clarett's Run to Court no Sure Score, **Sports B. J**. 32 (Sept. 22, 2003).
[3] See
Interview with Marc Edelman (Apr. 22, 2003).
[4] Namely, Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL) and the National Hockey League (NHL).
[5] See Interview with Marc Edelman (Apr. 22, 2003).
[6] See generally R. Lapchick & K. Matthews, **Racial and Gender Report** (2001). See also http://www.wnba.com.
[7] Andrew Zimbalist, **Unpaid Professionals** 54 (1999).
[8] See Interview with Marc Edelman (Apr. 22, 2003).

[9] See Interview with Marc Edelman (Apr. 22, 2003).
[10] 26 Stat. 209 (1890), codified as amended, 15 U.S.C. §§ 1-7. However, the Court has since moved away from the per se rule against group boycotts in favor of a rule of reason standard, as first set forth in Northwest Wholesale Stationers v. Pacific Stationary and printing Co., 472 U.S. 284 (1985). The Supreme Court has since somewhat retracted from its stance in Klor's.
[11] See E. Thomas Sullivan and Jeffrey L. Harrison, **Understanding Antitrust and its Economic Implications** §4.13 (3rd ed. 1998). See generally Klor's Inc. v. Broadway Hale Stores, 359 U.S. 207 (1959). In Klor's Inc. v. Broadway-Hale Stores Inc., the Supreme Court states its strictest standard forbidding group boycotts. See Klor's 359 U.S.at 219. In Klor's the Court states:"Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances …"Id.
[12] 234 U.S. 600 (1914).
[13] Eastern State Retail Dealers' Association, 234 U.S. 600 at 614.
[14] See generally **Sullivan & Harrison** at 160-61. See also Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941).
[15] See generally **Sullivan & Harrison** at 164.
[16] See Denver Rockets v. All-Pro Management Inc., 325 F.Supp. 1049 (C.D.Cal. 1971); Linseman v. World Hockey Ass'n, 439 F.Supp. 1314 (D.Conn. 1977); Borris v. United States Football League, 1984-1 Trade Cases (CCH) ¶ 66,012 1984 WL 894 (C.D.Cal. 1984). See also Paul Weiler and Gary Roberts, **Sports and the Law** 175-76 (2nd ed. 1998); Interview with Marc Edelman (Apr. 22, 2003). An exception to this general rule exists for baseball, which is historically exempt from antitrust scrutiny. Baseball's antitrust exemption was set forth by the Supreme Court through a series of three cases, often known as the Baseball Trilogy. See Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922); Toolson v. New York Yankees Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). In 1998, Congress documented this antitrust exemption as the Curt Flood Act – a bill jointly initiated by baseball clubs and players, intended to clarify baseball's non-statutory exemption. See Curt Flood Act, 15 U.S.C. §27. See also Marc Edelman, Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig's Contraction Plan was Never a Sure Deal. 10 **Sports L. J.** 1, 13-16 (Spring 2003)(discussing evolution of baseball's antitrust exemption.)
[17] 325 F.Supp. 1049. Denver Rockets, 325 F. Supp. at 1059.
[18] See id. One of the sections of NBA bylaws challenged under Denver Rockets specifically stated:"A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college."
[19] See Denver Rockets, 325 F. Supp. at 1061.
[20] See Denver Rockets, 325 F. Supp. at 1061.
[21] See Denver Rockets, 325 F. Supp. at 1061.
[22] See Denver Rockets, 325 F. Supp. at 1061.
[23] See Denver Rockets, 325 F. Supp. at 1061.
[24] See Denver Rockets, 325 F. Supp. at 1066.
[25] See Denver Rockets, 325 F. Supp. at 1066.
[26] See Denver Rockets, 325 F. Supp. at 1066.
[27] See Denver Rockets, 325 F. Supp. at 1066.
[28] 439 F.Supp. 1315 (D.Conn. 1977).
[29] See Linseman v,. World Hockey Ass'n, 439 F.Supp. at 1317.
[30] See Linseman v,. World Hockey Ass'n, 439 F.Supp. at 1317.
[31] See Linseman, 439 F.Supp. at 1325-26.
[32] See Linseman, 439 F.Supp. at 1321-22.
[33] See Linseman, 439 F.Supp. at 1322.
[34] 1984-1 Trade-Cases (CCH) ¶66,012 1984 WL 894 (C.D. Cal.1984).
[35] See **Weiler & Roberts** at 175.
[36] See id.
[37] See Interview with Marc Edelman (Apr. 22, 2003).
[38] See e.g. FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (holding that the per se rule was inappropriate to analyze an agreement among competing dentists to withhold patient X-rays from insurance companies). See also Northwest Wholesale Stationers, 472 U.S. 284 (1985) (rejecting the per se categorization of concerted refusals to deal, except for a narrow range of cases.) See also Marc Edelman, Clarett's Run to Court no Sure Score, **Sports B. J.** 32 (Sept. 22, 2003).
[39] A rule of reason analysis considers "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. … [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint." Nat'l Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)
[40] See generally **Weiler & Roberts** at 176
[41] See generally id.
[42] See Marc Edelman, Clarett's Run to Court no Sure Score, **Sports B. J**. 32 (Sept. 22, 2003). See also Mike Terry, Breaking Up is Hard to Do, **The Los Angeles Times**, Feb. 10, 2003, at part 4, p. 3;
[43] 284 F.3d 47 (1st Cir. 2002). See also Sharon Robb, Lack of Support Scuttles the Sol, **Sun-Sentinel** (Fort Lauderdale, FL), Nov. 28, 2002, at 1C; David Woods, Fifth Season Begins with Hope, **The Indianapolis Star**, May 27, 2001, at 1C.
[44] In Fraser, the court held that Major League Soccer's LLC structure, which included investor-operators owning shares of the league, was exempted from Section One of the Sherman Act under the Copperweld doctrine, which states that a parent and a wholly-owned subsidiary are a single entity incapable of combining or conspiring under Section One of the Sherman Act. See Fraser, 284 F.3d at 56-58, 61. See also Copperweld Corp. v. IndependenceTube, 467 U.S. 752 (1982); **Sullivan & Harrison** at 198.
[45] See Marc Edelman, Clarett's Run to Court no Sure Score, **Sports B. J.** 32 (Sept. 22, 2003). This shield is known as the non-statutory exemption from antitrust law. See generally United Mine Workers v. Pennington, 381 U.S. 657 (1965). The Supreme Court first set out the non-statutory exemption in United Mine Workers v. Pennington, where it stated, "in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to antitrust laws. Id. at 710. These mandatory subjects of employment include wages, terms and conditions of employment. See Mackey v. National FootballLeague, 543 F.2d 606, 614 (8th Cir. 1976).
[46] See Marc Edelman, Clarett's Run to Court no Sure Score, **Sports B. J.** 32 (Sept. 22, 2003). See also Wood v. National Basketball Association, 809 F.2d 954 (2nd Cir. 1984). In Wood, the court held that basketball player Leon Wood could not bring an antitrust suit against NBA teams for concertedly agreeing to cap rookie player salaries because the National Basketball Players Association (NBPA) had consented to a rookie salary cap in collective bargaining. See id. at 959-60. However, Judge Winters also implies in his holding that Wood might have a remedy if he filed suit against the NBPA for unfair representation on new employees under the National Labor Relations Act. See id. at 960. See also **Weiler & Roberts** at 203.
[47] See generally id. See also Interview with Marc Edelman (Apr. 22, 2003)
[48] See Interview with Marc Edelman (Apr. 22, 2003).
[49] See Marc Edelman, Reevaluating Amateurism Standards in Men's College Basketball, **Michigan J. of L. Ref**. 861, 879, note 128 (Summer 2002).
[50] See Interview with Marc Edelman (Apr. 22, 2003).
[51] See Interview with Marc Edelman (Apr. 22, 2003).
[52] See Marc Edelman, Reevaluating Amateurism Standards in Men's College Basketball, **Michigan J. of L. Ref.** 861, 871-77 (Summer 2002).
[53] See Marc Edelman, Reevaluating Amateurism Standards in Men's College Basketball, **Michigan J. of L. Ref.** 861, 872 (Summer 2002).
[54] See Marc Edelman, Reevaluating Amateurism Standards in Men's College Basketball, **Michigan J. of L. Ref.** 861, 864-65 (Summer 2002).
[55] See Interview with Marc Edelman (Apr. 22, 2003).
[56] See Interview with Marc Edelman (Apr. 22, 2003).

BIRDIES AND BOGIES IN BEIJING: WHO IS INTERNATIONAL GOLF AND WILL THEY MAKE THE 2008 OLYMPIC PROGRAM?

by Robert J. McEwan

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I. Introduction

Anyway you say it, ptica, ptácek, passaro, uccellino, pájaro, birdie, it's one of the sweetest words in all of sports.[1] With over 60 million participants worldwide,[2] the international popularity of golf has exploded over the past half-century, especially the last decade.[3] Beyond the sport and recreational value of golf, the U.S. golf industry includes jobs, commerce, economic development, and tax revenues amounting to $62.2 billion worth of goods and services.[4] Why then is an immensely popular sport that prides itself on consistent operation worldwide not part of the largest sporting event in the world, the Olympic Games?

Despite the industry's tremendous size, little scholarship is available identifying the key administrators that drive this fascinating machine. Traditionally, the only legal subjects covering the sport of golf include tortuous liabilities,[5] disability law,[6] antitrust,[7] and public/private nuisance.[8] In order to identify who the key players are in international golf, the sport's process for inclusion in the Olympics will be examined. This broad observation will identify how golf is structured internationally and who the key players are that will hopefully drive golf into the Olympics.

II. The Framework of International Golf

A. Scottish roots – the Royal & Ancient Club and the United States Golfer's Association

While St. Andrews, Scotland is traditionally considered the home of golf, the exact origin of the game is a mystery clouded with conjecture.[9] What is certain is that golf was played at St. Andrews in the early 1400s.[10] During the mid-15th century while Scotland was preparing to defend itself against an English invasion, the population's enthusiastic pursuit of golf and soccer to the neglect of military training (archery primarily) caused the Scottish parliament of King James II to ban both sports in 1457.[11] The ban was reaffirmed in 1470 and 1491, although people largely ignored it.[12] Only in 1502 with the Treaty of Glasgow was the ban lifted with King James IV (James 1 of England) himself taking up the sport.[13]

Golf firmly established itself at St. Andrews in 1754 with the founding of the Royal & Ancient Club (R&A).[14] It began as a small private society and has evolved through two and a half centuries to become one of the two leading authorities.[15] Today, the R&A has four areas of responsibility: the running of the Open Championship (the British Open – known to the Scottish as "the Open"); the encouragement and development of the game in existing and emerging golfing nations; the operation of a private club with almost 2,400 members; and the administration of the Rules of Golf, in conjunction with the United States Golf Association (USGA).[16]

Prior to the organization of the R&A, the first known Rules of Golf were composed by the Honourable Company of Edinburgh Golfers in Scotland in 1744.[17] The development of a book of rules encouraged the playing of the game and later furthered the spread to America. Golf was first played in America as early as the 1770s in Charleston, S.C., although golf would not get a firm grip until the 1880s when the USGA was founded on December 22, 1894.[18] Today, the USGA facilitates governance of golf in America in conjunction with over 130 local, regional, and national associations.[19]

With the establishment of two amateur golf organizations on both sides of the Atlantic, international competition was inevitable. In the wake of World War I, after two international matches between the U.S. and Canada in 1919 and 1920, British and American amateurs began competing in one another's national amateur championship.[20] This convinced both the R&A and the USGA that international team matches would be a significant boost for the game. While no record can be found detailing the origins of the relationship between the R&A and the USGA, this seems to be the first occasion of joint modification of the Rules of Golf, which is today a conjoined effort.[21] Among the participants of the organizing campaign was George Herbert Walker, USGA President in 1920.[22] Upon his return to the U.S., Walker rallied the USGA around the idea of an international amateur competition and even donated a trophy, which led the press to dub the competition the Walker Cup.[23] In 1921, the USGA invited all golfing nations to send teams to compete, but Great Britain was the only country able to accept.[24] Initially the competition was annual, but in 1924 financial difficulties forced the matches into a biennial event. Still today, the competition remains a celebrated battle between Great Britain's and the United States' best amateurs.[25]

B. International Golf Federation (formerly the World Amateur Golf Council)

Not only did the creation of the Walker Cup encourage great competition among the two top golfing countries, but demand for other international matches eventually forced the USGA to propose international team competitions that all countries would be eligible to compete in.[26] Two months after the USGA first discussed the idea with the R&A, where it was well received, representatives from 35 countries met in Washington, D.C. to formally organize the World Amateur Golf Council.[27] The Council's guiding principle was ratified and is today inscribed on the Eisenhower trophy (Men's Team Amateur Champion): "To foster friendship and sportsmanship among the Peoples of the World."[28]

The first championship was hosted by the R&A in October 1958 at St. Andrews' Old Course and was won by the Australian team that defeated the U.S. team captained by Bobby Jones, America's traditional great amateur golfer.[29] Six years later, the French Golf Federation hosted twenty-five teams at the first Women's World Amateur Team Championship.[30] Following the success of the event, the Council agreed thereafter to sponsor and conduct the Women's event.[31] The Council proceeded to conduct the men's and women's tournament unchanged until 2003 when its name was amended to the IGF.[32] As the official international federation of golf,[33] this change was perhaps due to pressures to include professionals and

Continued on page 15

Continued from page 14

not amateurs if golf is to be part of the Olympics. After all, a primary objective of the IGF is, "[t]o promote golf as an Olympic sport and to act as the Federation for golf in the Games."[34] However, the IGF's only current tournaments involve amateur competition.[35]

To complicate the relationship between professionals and the IGF even more, the primary administrators of the IGF include top executives of the R&A and the USGA, both pure amateur organizations. The IGF is headed by an administrative committee that is located in the same office of the USGA.[36] This committee includes two Joint Chairmen, who are generally the heads of the R&A and the USGA, and two Joint Secretaries that are appointed by the administrative committee.[37]

C. Professionals and the IGF

While the IGF only conducts amateur tournaments, one characteristic of the IGF bonds its amateur nature to professional golf. Unlike other international federations, the rules of the game are co-administered by the USGA and R&A,[38] both national governing bodies of their respective countries. The Rules of Golf are universally used in every country, on every course (except where noted otherwise), and in every tournament (even professional). The Rules are reviewed every four years, with the most recent changes taking effect at the beginning of 2004 considered the largest in twenty years.[39] Most significantly, the sharp revisions include specific directives on bad etiquette and a shorter waiting period of two years instead of three for professionals wishing to be reinstated as amateurs.[40] This reduction is most likely due to a recent growth in the number of amateur reinstatement applications[41] and not necessarily to accommodate PGA Tour members who may want to compete in the Olympics. In fact, the USGA's Rules of Amateur Status may not even allow PGA Tour members to apply for amateur reinstatement, which essentially bars them from Olympic competition.[42] This is the general predicament for all PGA players because the Rules of Amateur Status are co-administered by the USGA and the R&A and are recognized as a prerequisite for membership in the IGF.[43]

All is not lost for international PGA members. After losing the 1988 semifinal basketball game against the Soviet Union, the rules of FIBA (IOC recognized International Federation of Basketball) were changed to allow NBA players to compete.[44] Suggestively, this move was made not to regain U.S. dominance but to restore competitive balance since other countries were using professionals.[45] The change was suggested by FIBA Secretary-General Boris Stankovic who thought that not allowing NBA players to compete was unfair.[46] As a result, FIBA rules were changed to allow professional players, who participate in professional leagues that are members of a national federation,[47] to compete in the Olympic Games without remuneration.[48] Even though U.S. representatives were content to be represented by amateurs, the NBA was officially invited to join USA Basketball, and since then NBA players have represented the U.S. in the Olympics and World Championships, while collegiate and younger players compete in all other international competitions.[49]

If golf were to be included in the Olympics and professionals were to compete, the Rules of Amateur Status would need to be changed much like the changes made by FIBA. FIBA's definition of "amateur" allows participants to contract with a club for payment but does not allow remuneration for performances during the Olympics. These rules force players to surrender all media rights attached to their participation. These rights include players' personal sponsorships, except for IOC approved manufacturers,[50] and use of a player's person, name, photograph, or sports performance for advertising purposes, except those with prior agreement of FIBA, the national federation, or the respective National Governing Body.[51] Unlike basketball players who contract with a team under a collective bargaining agreement, PGA Tour golfers are independent contractors and rely heavily on private sponsors. Essentially, golfers are walking billboards.

D. Independent Contractors

An independent contractor is a person who contracts to perform services from their own independent business instead of depending upon an employer.[52] Independent contractors are masters of their own economic fate by means of direct control of the amount of money they make through the quality and quantity of their work.[53] Not only are player earnings contingent upon week-to-week success, but professional golfers must also pay their own bills, make their own travel arrangements, and run their own lives.[54] Their whole life is driven by where they can go and make the most money.[55] This control allows golfers to contract to their own wants and needs and their own conscience.[56] The only limitations professional golfers must follow are those established by their respective PGA Tour. The two major restrictions of the PGA Tour (of America) are the Conflicting Events Rule and the Media Rights Rule.

As a member of the PGA Tour, a professional golfer's personal financial success is subject to the success of the whole. The Conflicting Events Rule prevents PGA Tour members from competing in another event on a date when a PGA Tour cosponsored tournament or event for which such member is exempt is scheduled.[57] This rule allows the PGA Tour to fulfill its contractual obligations concerning representative fields.[58] Exceptions will be made when a member obtains a written release from the Commissioner, but no conflicting event releases will be approved for tournaments held in North America.[59] Though waivers are overwhelmingly granted,[60] the Commissioner may deny any particular request if he determines that such a release would cause the PGA Tour to be in violation of a contractual commitment to a tournament sponsor or would otherwise substantially harm the PGA Tour and such sponsors.[61]

In addition of being told where and when a member can compete, PGA members surrender all media rights associated with their participation in a PGA Tour cosponsored or coordinated event.[62] All media, whether in television, radio, or motion picture, of a member's participation in a tournament becomes the exclusive property of the Tour. However, individual marketing rights, such as promotions, endorsements, and licensing, are not restricted in any way by the Media Rights Rule.[63] The restrictions of the Conflicting Events Rule and the Media Rights Rule are in place to guarantee quality players for televised events and exclusivity of professional golf telecasts as requested by advertisers and title sponsors. By doing so, the PGA Tour enables itself for success in securing lucrative broadcast agreements and elite title sponsors, both of which are essential for production of a PGA Tour event.

E. PGA Tour

The PGA Tour operates as a business league or trade association in regulating, promoting, and improving the business of professional tournament golf.[64] As a private membership organization, the PGA Tour must self-regulate to ensure its personal and its members' financial success. Nonetheless, the PGA Tour does not conduct tournaments but merely sponsors by providing talent and the collective contracting of the required parties. First, the PGA Tour contracts with a local sponsor or "title sponsor."[65] The local sponsor is generally a local nonprofit organization that donates the net receipts to charity, purchases large portions of network advertising, and underwrites most or all of tournament purses.[66] The sponsor then contacts local charities that arrange and ensure that the course meets PGA Tour specifications and staff the event.[67] Finally, the PGA Tour contracts with a television or cable network that pay rights fees for the right to broadcast the tournament.[68] "As a result of the PGA Tour's commitment to sponsors, networks and advertisers … the broadcast coverage of

Continued on page 16

Continued from page 15

golf [has] expanded rapidly and an increasing number of Americans [are today] able to watch and follow professional golf competition."[69]

F. World Golf Championships

With some arguing that international golf is now the best golf has to offer,[70] the five major professional tours – the PGA Tour, The European Tour, the South African Tour, the Australasian Tour, and the Japan Tour – formed an association in 1996 to create four annual tournaments where eligible international players, based on World Golf Rankings,[71] would compete in varied formats (match play, stoke play, and team).[72] This idea was originally the brainchild of Greg Norman who proposed eight $3 million tournaments – four in the U.S., and one in each Canada, Japan, Scotland, and Spain – with between 30 to 40 players.[73] However, PGA Tour Commissioner Tim Fenchem quickly responded by stating that any player who participates, "barring some unique circumstances," "would be suspended" from the PGA Tour.[74] Furthermore, Finchem made clear that if the world tour were not PGA Tour cosponsored, the Tour would enforce the Conflicting Events Rule and was willing to defend its enforcement in court.[75]

Today, the association is known as the International Federation of PGA Tours, and has as its major purpose the development of a structure of competitive international golf.[76] To achieve this purpose, three objectives were set: (1) the formation of the International Federation of PGA Tours; (2) the joint sanctioning by the member of the International Federation of PGA Tours of significant competitions, including some at the world championship level, for the game's top players; and (3) a structure for a generally accepted worldwide ranking system.[77] Though television ratings and player appearances are not as good when tournaments are played overseas, the World Golf Championships have been quite successful in only five years, with the largest crowds being in Japan and Argentina.[78] This is most likely due to the infrequent gathering of the world's best players in foreign events.[79]

The World Golf Championships have proven that international PGA members are willing and eager to compete against the best in the world. Additionally, in only a few years the World Golf Championships have shown that there is a strong international desire for elite golf, and it has provided a process for international ranking of professionals. However, division remains between the governing body of international amateur golf and the governing body of international professional golf. Traditionally, the only connection among the two is the Rules of Golf. If golf were to be included in the Olympics and professionals were to play, the interests of the IGF to secure the best players must compromise with the International Federation of PGA Tours' interests in providing the best possible players for their events, pursuant to the Conflicting Events Rule. Yet still, even if the IGF were to change the Rules of Amateur Status to allow PGA professionals to compete and the International Federation of PGA Tours were to waive player responsibilities, would the Olympics want golf as an Olympic sport?

III. The Process for Inclusion in the Olympics and Administrative Barriers

A. To Include Means to Exclude

Among the fundamental principles of the Olympic movement is the premise that sport is for everyone. Olympism seeks to encourage sport as an example of orderly conduct, notwithstanding cultural differences, for the promotion of a peaceful society.[80] The current Olympic program includes 35 sports and 400 events, with 28 of the events occurring during the summer Games.[81] Additionally, the IOC recognizes certain sports when their respective international federation's statutes, practices, and activities conform to the Olympic Charter.[82] Of the 28 recognized sports, golf is one of four that was formerly part of the Olympic program (1900 and 1904).[83] In fact, America's first female Olympic champion was Margaret Abbott, who in 1900 captured a silver bowl for her defeat of 10 other competitors in women's golf only appearance in the Olympics.[84]

Because the IOC refuses to increase the number of Olympic sports above 28, golf can only be admitted if another sport is dropped.[85] An assessment of sports that should be included and/or excluded falls into hands of the Olympic Programme Commission, which is responsible for reviewing and analyzing the program of sports, disciplines and events, and the number of athletes in each sport for the summer and winter Games.[86] However, the ultimate decision to remove or add a sport remains with the Executive Board, headed by the IOC President.[87] In fact, the current President, Jaques Rogge, recently asked the Olympic Programme Commission to review and report on possible changes for the 2008 summer Games in Beijing.[88] Surprisingly, with over a dozen sports vying for inclusion, only golf and rugby were proposed to replace such sports as baseball, softball, and the modern pentathlon.[89] The only condition to golf's entry was that the IGF and the appropriate bodies, i.e. PGA Tours, guarantee the participation of the best athletes.[90] Obviously, this requires the commitment of PGA players.

Why then is Tiger Woods not gearing up for a gold medal? Though the recommendation was made that golf be included in the Olympics, no decision has yet been given, by either the IOC or IGF, confirming or denying the inclusion of golf in the 2008 Olympics. However, the probability of its inclusion is unlikely since the Olympic Charter requires at least seven years notice, after which no changes are allowed.[91] Effectively, this removes any chance of golf's inclusion in the 2008 Games.

B. Maybe just an Event

Nevertheless, golf still has a chance to be part of the 2008 Games if the IOC considers it an event. An event is a competition in an Olympic sport[92] resulting in ranking that gives rise to the award of medals and diplomas.[93] Since golf is a recognized Olympic sport and a former part of the program, it seems reasonable that a single stroke play could be considered an event. To be included, an event must have recognized international standing and have been included at least twice in world or continental championships.[94] Additionally, the IOC requires that an event be practiced by men in at least fifty countries and on three continents, and by women in at least thirty-five countries and on three continents.[95] Clearly golf meets this final standard since the IOC considers it one of the world's most popular sports played in over 100 countries.[96] As to the former, with the establishment of the World Golf Championships, stroke play competition is included twice in professional golf's only world championships.[97] Furthermore, events are admitted four years, not seven, before specific Olympic Games,[98] and even then, in exceptional cases the IOC may depart from this time restriction to include an event for one specific Olympiad.[99] This may seem as a long-shot, but if the IOC wants golf as a permanent part of the Olympic Program, it seems logical to perform a small test run to gauge popularity.

C. Venue

The question then becomes: Can Beijing host a golf match? Even before Beijing was chosen to host the 2008 Olympics, all three finalists, including Toronto and Paris, stated that they had suitable golf courses.[100] Possible courses in China include Shanghai Silport Golf Club, Yalong Bay Golf Club, and Mission Hills Golf Club, each host to a 2003 Asian PGA Tour event.[101]

Even if these courses are not selected, the Executive Committee may consider the building of a new venue. To support

Continued on page 17

Continued from page 16

this idea, the Olympic Games Study Commission, in its Report to the 115th IOC Session, argued that "[v]enue planning and venue usage is not always optimized and not enough consideration is given to post-Games needs and means of limiting the costs."[102] One of golf's most valuable contributions to its host city would be the addition of a new golf course, which can add a tremendous boost to a local economy with new jobs, homes, and tourism.

D. The Golfers' Point of View

Assuming that the IOC finds a suitable course, are the top players, as conditioned for golf's inclusion, willing to participate? This is perhaps the most difficult question to answer. Since golfers are independent contractors, looking to win as much money as possible, they may not want any part of another non-remunerative tournament, even if it is every four years. South Africa's Ernie Els, Scotland's Colin Montgomerie, and Northern Ireland's Darren Clarke, each a top international player, emphatically stated their lack of interest considering their hectic schedules and the Presidents Cup and Ryder Cup, both non-remunerative and PGA cosponsored.[1] Conversely, America's Tiger Woods has said that he would like the chance to win an Olympic gold medal,[2] along with Australia's Greg Norman[3] and Spain's Seve Ballesteros.[4] Even the LPGA, the American female professional tour, has expressed its interest in participating,[5] considering that four of the top nine players are of Asian decent[6] and the recent success of Sweden's Annika Sorenstam, who became the first woman to compete in a PGA Tour event in 58 years.[7]

Timing could be the biggest hurdle in securing the top players. Players feel that the Olympics, which is usually held in the summer, would conflict with their schedules because it would come between two Majors, the British Open and U.S. PGA Championship.[110] "Traveling to Beijing would indeed disrupt their preparation for the Majors" and players generally are not willing to travel more that they have to.[111] It has also been suggested that golf could perhaps suspend play like hockey, especially considering it would happen only every four years. This issue would have to be resolved by the PGA Tour Commissioner and his application of the Conflicting Events Rule. Whichever tournament became affected would most likely require substantial compensation considering the likelihood that the world's top players would not be able to compete. However, player participation is never guaranteed. Players would also need to be willing submit to random drug testing, an issue not generally connected with professional golf.

E. Drug Testing

According to the Olympic Charter, in order for an International Federation to be recognized, as the IGF is, the organization must adopt and implement the World Anti-Doping Code (WADA).[112]

However, examination of the Articles of the IGF demonstrates no such conformity.[113] Also, even though golf is a recognized sport, to be included in the Olympic program a sport must adopt *and* implement the WADA code.[114] While the PGA Tour has an alcohol and substance abuse policy, it does not conduct random drug testing (only testing with probable cause).[115] Even more, the "LPGA has no official policy on performance enhancing drugs and does not conduct testing."[116]

In the past, drug testing has only become part of the professional golf landscape with accusations that many of the top world's golfers were using beta-blockers, used by high blood pressure patients to slow the heart rate and calm nerves.[117] Several medical experts have acknowledged that beta-blockers could have a positive effect on golfers seeking calmer nerves, especially when putting.[118] Further speculation looms that some players are resorting to steroids to keep up with stronger competitors and the trend of lengthening courses.[119] A number of players, analogizing to mandatory equipment testing, openly support random drug testing to quell any lingering doubts that long-hitting players are pumping up.[120]

In response, the European Tour recently tested for the first time after the final round of the French Open in June 2003 (results unknown).[121] But do not expect any changes from the R&A or the PGA Tour. The R&A has said that it is unlikely to accept global anti-doping, but the club is open to discussing mandatory drug testing, despite obvious member opposition.[122] Additionally, PGA Tour Commissioner Tim Fenchem does not plan to test for any performance-enhancing drugs, including the new "designer" steroid THG, without conclusive data showing such drugs actually improve a golfer's ability.[123] Even though the IGF is the recognized international federation and golf is a recognized sport, the lack of widespread testing is a major policy impediment to golf being included in the Olympics and will be a primary issue if golf is given the chance to compete.[124]

Although the administrative barriers of inclusion may seem insurmountable, the opportunity for the IOC to host one of the world's most popular sports might provide enough internal pressure to solve necessary issues. Furthermore, even though some golfers have openly opposed participation, many more are sure to support the idea if given the chance, and while drug testing is not part of international golf, enough coercion from the IOC and WADA will surely tip the scales in favor of urinalysis.

IV. Legal Considerations for Representation and Sponsorship of Olympic Golfers

A. A Rare and Valuable Commodity

An athlete's ability to secure top sponsorships directly relates to athletic success. For an Olympic athlete, this creates a unique opportunity to increase worldwide popularity and, in turn, sponsorship and endorsement contracts. Considering the infrequency of the Olympics, to represent an Olympic athletic is a rare and unique opportunity.[125] Even as popular as Tiger Woods may be, if he were to compete in the Olympics, his international stature would surely receive a tremendous boost. While most Olympic athletes, especially Winter Game participants, are virtually unknown and whose success is highly unpredictable,[126] the opportunity to sign a well-known Olympic professional golfer may be to enticing to pass up.

Nevertheless, this rare opportunity is not without its share of legal issues. Three governing bodies regulate propaganda and advertising for each Olympic athlete: the IOC, the respective National Olympic Committee (NOC), and the athlete's specific team.[127] By far, the IOC is the least restrictive because it delegates the authority of regulating an athlete's sponsors to the NOC.[128] For U.S. athletes, the USOC Charter is silent on the issue of individual athlete's receipt of sponsorships that potentially conflict with USOC corporate sponsors.[129] "This silence has opened the door to athletes' obtaining conflicting sponsorships, assuming that such sponsorships do not violate any of the rules of the athlete's specific team."[130]

B. Compensation

Under the USOC Charter, each individual team or National Governing Body is empowered to create its own guidelines.[131] While no such guidelines have been proposed by the USGA, an excellent example of a current problem are the new contract proposals the USA Basketball team members are being asked to sign. Apparently, the original Dream Team of 1992 and the predecessor 1996 team, both received compensation from sponsorships and endorsements.[132] In fact, the 1992 team reportedly split $1 million dollars among such well known players as Michael Jordan, Magic Johnson, and Larry Bird.[133] However,

Continued on page 18

Continued from page 17

the 2004 team has found that no such compensation will be allowed and all endorsements are suspended while competing for USA Basketball.[134]

But, would the lack of compensation and suspension of endorsements discourage professional golfers from playing? When Tiger Woods was asked which tournament was more important to him, the five million dollar World Golf Championship or the Ryder Cup, he responded in support of the former.[135] Being pushed to explain why, Tiger replied: "A million reasons."[136] A hint of arrogance or greed cannot be blamed for this response, but rather PGA Tour eligibility is determined, in part, from a player's yearly tournament earnings.[137] If a golfer were to compete during the Olympics, they would not receive compensation and their future eligibility could be compromised. This does not necessarily mean that golfer's *must* be paid for play, but one suggestion for the PGA Tour Commissioner to examine is whether a credit of money could be given in exchange for participation.

C. Headgear

Though Olympic athletes may not be compensated for their participation, one specific area of a golfer's attire remains fair game. Advertising on an athlete's helmet, headgear, or hat is commonly referred to as "headgear".[138] "It is the most important advertising space on an athlete because the head and face of an athlete receive the most exposure and certain teams allow athletes to sell the space to any sponsor, so long as the sponsorship conforms with all of the team's guidelines."[139] For example, the U.S. Skiers Association's (USSA) regulations stipulate that the athlete's headgear sponsor cannot be a hard goods sponsor, an alcohol or tobacco sponsor, obscene, and cannot conflict with any existing USSA sponsors.[140] So, what is headgear worth to sponsors? For younger players receiving exemptions for a PGA Tour event, the space is worth about $50,000.00.[141] On the other hand, Tiger Woods is currently in a five year $100 million endorsement contract with Nike, including headgear.[142]

D. Ambush Marketing

Whereas athletes may be allowed by their team to sell their headgear, professional athletes have also become marketing tools for non-Olympic sponsors using a strategy known as "ambush marketing." Ambush marketing is a phrase that describes the actions of companies who seek to associate themselves with a sponsored event without paying the requisite fee.[143] The ambush consists of giving the impression to consumers that the ambusher is actually a sponsor or is somehow affiliated with the event.[144] For example, Coca-Cola paid $33 million to be an official sponsor of the 1992 Barcelona Games.[145] Pepsi ambushed Coca-Cola by airing a commercial during the Games featuring Magic Johnson, a well-known member of the Dream Team.[146]

In response to ambush marketing, host cities are taking preventative measures to protect their IOC guests. Beijing recently issued a municipal government decree to protect Olympic-related intellectual property rights.[147] The decree stipulates that all Olympics-related intellectual property in terms of logo, brand, patent and other productions are under strict protection.[148] The Beijing organizing committee is going so far as to create a hot line where the public can call to confirm Olympic sponsors and report ambush marketing.[149] Eligible participants must also keep in mind that the Olympic Charter does not allow competitors, coaches, trainers, or officials who participate in the Games to allow the use of their person, name, picture or sports performance for advertising purposes during the Games.[150]

The nature of professional golfers as independent contractors separates them from other major professional athletes. In general, they are not paid for their participation but rewarded for their accomplishments. This requires tremendous reliance on sponsorships and endorsements. However, if professional golfers are to compete in the Olympics, special attention must be given to the restrictions of the IOC, the NOC, and the team. For an Olympic athlete's representative this requires precise navigation and meticulous negotiation of limited sponsorship and endorsement possibilities.

V. Closing remarks

It is almost certain that golf will be included in the Olympics, either in 2008 or more likely in 2012. Before this can happen, several issues must be worked out among the IOC, the IGF, the PGA Tours, and the professional golfers. The solution to these issues will seek to compromise the competing interests of all parties, and like professional basketball and hockey, international professional golf will soon become part of the Olympic landscape. Instead of oversized novelty checks, golfers will be competing for perhaps the greatest prize in all of sports, the title of Olympic champion.

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[1] This scheme was inspired by an advertisement for the World Golf Championships. See Golfweek, Nov. 11, 2003, at 7.
[2] Press Release, International Golf Federation (IGF), IGF Applies for 2008 Olympic Games (June 22, 2001), at http://www.internationalgolffederation.org/Press/2002_games.html (last visited Nov. 30, 2003).
[3] See SRI Int'l, The Golf Economy Report (2002), at http://www.golf2020.com/golfeconomy/resources/2020_GER_F.pdf (last visited Nov. 30, 2003).
[4] Id. at 4.
[5] See e.g. Hames v. State, 808 S.W.2d 41 (Tenn. 1991).
[6] See e.g. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).
[7] See e.g. Toscano v. PGA Tour, Inc., 201 F. Supp. 2d 1106 (E.D. Cal. 2002).
[8] See e.g. J.H. Cooper, Golf Course or Driving Range as a Nuisance, 68 A.L.R.2d 1331 (1959).
[9] Id.
[10] St.AndrewsGolf.com , St. Andrews Golf History, at http://www.standrewsgolf.com/st-andrews-golf-history.htm (last visited Nov. 30, 2003).
[11] GolfEurope.com, A History of Golf since 1497: part 1, at http://www.golfeurope.com/almanac/history/history1.htm (last visited Nov. 30, 2003).
[12] Id.
[13] Id.
[14] Randa.org, The Royal and Ancient Club of St. Andrews, at http://www.randa.org/index.cfm?cfid=1412481&cftoken=71087254&action=randaclub.home (last visited Nov. 30, 2003).
[15] Id.
[16] Id.
[17] USGA.org, USGA: Traditions, Legends, Myths and Heroes, at http://www.usga.org/history/index.html (last visited Nov. 30, 2003).
[18] Id.
[19] USGA.org, USGA Associations, at http://www.usga.org/associations/index.html (last visited Nov. 30, 2003).
[20] See WalkerCup.org, History of the Walker Cup, at http://www.walkercup.org/2003/history/index.html (last visited Nov. 30, 2003).
[21] See id. (stating that the initial meeting among the Royal & Ancient Club and the USGA was to look at the advisability of modifying various rules of the game.)
[22] Id.
[23] Id.
[24] Id.
[25] See id. Though most Walker Cup players are collegians, each nations' top amateurs are equally eligible for participation.
[26] IGF, On IGF History, at http://www.internationalgolffederation.org/History/Index.html (last visited Nov. 30, 2003).
[27] Id. The Council began with 32 Member Organizations when the governing articles were established.
[28] Id.
[29] *Id*.
[30] Id.
[31] Id.
[32] Id.
[33] Olympic.org, The International Federation of Golf, at http://www.olympic.org/uk/organisation/if/fi_uk.asp?Id_federation=45 (last visited Nov. 30, 2003).
[34] The Articles of the IGF, II.2, available at http://www.internationalgolffederation.org/articles.html (last visited Nov. 30, 2003).
[35] Id. at II.1
[36] Id. at IX.1 and IX.8. The Administrative Committee of fifteen persons, composed of the Chairman of the Women's committee and fourteen other persons representing twelve Member organizations; four Member Organizations in each of the three respective Zones, shall be represented with at least one of the Member Organizations in the European-African Zone being from the Continent of Africa. Each such person shall be a citizen or normally a resident of the country of the Member Organization he/she represents. Any country entertaining a future Championship that is not represented in the Administrative Committee shall be entitled to one representative to serve on the Committee in a non-voting capacity.
[37] Id. at X.1. (The current Joint Chairmen are David Harrison, Chairman of the General Committee of the R&A, and Fred Ridley, president of the USGA; and the Joint Secretaries are Peter Dawson, Secretary of the R&A, and David Fay, Executive Director of the USGA); See also Steve Elling, Nomination stokes Augusta debate, Orlando Sentinel, Nov. 12, 2003, available at http://www.orlandosentinel.com/sports/golf/orlsptusga12111203nov12,1,861242.story?coll=orl-sports-headlines-golf (suggesting that the real power of the USGA remains with the Executive Director, David Fay).
[38] Id. at III.1(a).
[39] Stephan Nasstrom, R&A Sharply Revises Etiquette Rules, Twincities.com, Oct. 30, 2003, available at http://www.twincities.com/mld/twincities/sports/golf/7142484.htm (last visited Nov. 30, 2003).
[40] Id.

Continued on page 19

Continued from page 18

[41] See Press Release, USGA, Amateur Reinstatements Reach Seven-Year High (Jan. 9, 1997), at http://www.usga.org/press1997/150.html; Amateur Reinstatements Top 500 for Second Year (Nov. 24, 1998) at http://www.usga.org/press/1998/61.html; and Amateur Reinstatements Top 500 for Third Straight Year (Dec. 13, 1999), at http://www.usga.org/press/1999/1999_98.html (last visited Nov. 30, 2003).
[42] See USGA's Rules on Amateur Status § 9(1)(c), available at http://www.usga.org/rules/am_status (Players of national prominence who have acted contrary to the Rules of Amateur Status for more than five years normally will not be eligible for reinstatement).
[43] Compare id. at § 1(a) (stating that the R&A and the USGA are the governing bodies of the Rules of Amateur Status) with § 1(b) (stating that membership is open to any national golf federation or union that observes the Rules of Golf and Rules of Amateur Status of either the R&A or the USGA).
[44] Their Rightful Spot, USABasketball.com, at http://www.usabasketball.com/news/pros_olympics.html (last visited Nov. 30, 2003).
[45] Id.
[46] Id.
[47] FIBA, Internal Regulations World Edition, R. 2.7 at 55, available at http://www.fiba.com/asp_includes/download.asp?file_id=208 (last visited Nov. 30, 2003).
[48] Id., R. 2.8 at 55.
[49] Their Rightful Spot, supra note 49.
[50] FIBA, supra note 52, R. 2.9 at 56.
[51] FIBA, supra note 52, R. 2.10 at 56.
[52] Stephen Fishman, Pros and Cons of the Independent Contractor's Life, NOLO.com, at http://www.nolo.com/lawcenter/ency/article.cfm/objectID/221FE3AA-D933-4595-B0ACEAA2082BC06F/catID/0D973BC0-3287-4CA1-944DC75DE82DC59F (last visited Nov. 30, 2003).
[53] Id.
[54] Lorne Rubenstein, Independent as they Wanna Be, GolfWeb.com (Mar. 25, 1999), at http://services.golfweb.com/library/lorne/tpc990325.html (last visited Nov. 30, 2003).
[55] Martin Blake, US Tour is Devouring Golf: Elkington, TheAGE.com.au (Dec. 2, 2003) available at http://www.theage.com.au/articles/2003/12/02/1070351580548.html (last visited Dec. 5, 2003).
[56] Rubenstein, supra note 59.
[57] PGA Tour 2003 Player Handbook, V.2.
[58] Id.
[59] Id. V.2(a); See also, V.2(b) (allowing for participation in a tournament or event cosponsored or approved by and held in the territory of the PGA section with which the member is affiliated or employed) and V.2(c) (allowing for participation in the PGA Club Professional Championship, and PGA winter tournaments for professionals).
[60] Charles R. Daniel, The PGA Tour: Successful Self-Regulation or Unreasonably Restraining Trade, 4 Sports Law J. 41 1997, 46 (1997) (citing John Hawkins, FTC Probe a Thorn in PGA Tour's Side, Wash. Times, Jan. 22, 1995, at C1).
[61] V.3(b); See also V.3.(c) (stating that in making factual determinations contemplating waivers, the commissioner will consider: (1) The overall makeup of the field from which the member seeks to be released; (2) The member's standing on the current and previous year's Official PGA Tour Money List; (3) The number of tournaments that the member has played in, or committed to play in, for the current year; and (4) The member's record of participation in the tournament from which he seeks to be released.)
[62] V.B.1
[63] V.B.2(a)
[64] Daniel, supra note 65, at 42.
[65] Id. at 43-44.
[66] Id.
[67] Id. at 43
[68] Id.
[69] Id. at 45.
[70] Lorne Rubenstein, World Tour: It's Time, GolfWeb.com, at http://services.golfweb.com/library/lorne/lorne960919.html (last visited Nov. 30, 2003).
[71] See OfficialWorldGolfRanking.com, at http://www.officialworldgolfranking.com/about_us/default.sps?iType=425 for a detailed analysis of how the system works (last visited Nov. 30, 2003).
[72] International Federation of PGA Tours, World Golf Championships History, at http://www.worldgolfchampionships.com/overview.html (last visited Nov. 30, 2003).
[73] Rubenstein, supra note 75.
[74] Id.
[75] Lorne Rubenstein, Finchem Shows who Controls World Golf, GolfWeb.com (Oct. 31, 1997), at http://services.golfweb.com/library/sirak/worldtour971101.html (last visited Nov. 30, 2003).
[76] International Federation of PGA Tours, supra note 77.
[77] Id.
[78] Doug Ferguson, World Golf Championships Still Growing, Golfserv.com, at http://sports.yahoo.golfserv.com/gdc/news/article.asp?id=18543 (last visited Nov. 30, 2003).
[79] See id.
[80] International Olympic Committee (IOC), Olympic Charter Fundamental Principles, at 9 (July 4, 2003) available at http://multimedia.olympic.org/pdf/en_report_122.pdf (last visited Nov. 30, 2003).
[81] See IOC, Sports on the Olympic Programme, at http://www.olympic.org/uk/sports/index_uk.asp (last visited Nov. 30, 2003).
[82] See IOC, Recognised Sports, at http://www.olympic.org/uk/sports/recognized/index_uk.asp (last visited Nov. 30, 2003).
[83] See IOC, Olympic Sports of the Past, at http://www.olympic.org/uk/sports/past/index_uk.asp (last visited Nov. 30, 2003).
[84] Chris Millard, An American in Paris, GolfOnline.com, at http://sportsillustrated.cnn.com/golfonline/seniorgolfer/sep00/olympics.html (last visited Nov. 30, 2003).
[85] GolfWeb.com, IOC takes another step toward golf in 2008 Olympics (Sept. 3, 2002), at http://www.golfweb.com/u/ce/multi/0,1977,5673122,00.html (last visited Nov. 30, 2003).
[86] IOC, Olympic Programme Commission, at http://www.olympic.org/uk/organisation/commissions/programme/index_uk.asp (Nov. 30, 2003).
[87] Olympic Charter, supra note 85, R. 52.7 at 83.
[88] BBCSport.com, IOC awaits Sports Audit (May 24, 2002) at http://news.bbc.co.uk/sport1/hi/front_page/2007068.stm (last visited Nov. 30, 2003).
[89] IOC, Olympic Programme Commission: Report to the 114th Executive Board, at 11-18 (Aug. 2002), available at http://multimedia.olympic.org/pdf/en_report_527.pdf (last visited Nov. 30, 2003).
[90] Id. at 17.
[91] Olympic Charter, supra note 85, R. 52.1.1.4 at 81; see also IOC, Olympic Games Study Commission: Report to the 115th IOC Session, at 22 (June 29, 2003) (Recommendation 1.02: stating that sports should not be changed seven years prior to the Games), available at http://multimedia.olympic.org/pdf/en_report_725.pdf (last visited Nov. 30, 2003).
[92] "Olympic sports" are not necessarily those on the Olympic program. Though the definition of "Olympic sport " is not offered within the Olympic Charter, a clear distinction is made between "Olympic sports" and sports that happen to be part of the "Programme." See Olympic Charter, supra note 85, R. 52.1 at 80.
[93] Olympic Charter, supra note 85, R. 52.3.1 at 81.
[94] Id., R. 52.3.2 at 81.
[95] Id., R. 52.3.3 at 81.
[96] See Olympic Sports of the Past, supra note 88.
[97] See International Federation of PGA Tours, supra note 77.
[98] Olympic Charter, supra note 85, R. 52.3.4 at 81.
[99] Id., R. 52.2.6 at 81.
[100] BBCSport.com, Golf's Olympic Flame (May 16, 2001), at http://news.bbc.co.ok/sport1/hi/golf/1334662.stm (last visited Nov. 30, 2003).
[101] See AsianPGA.com, 2003 Schedule, at http://www.asianpgatour.com/en/schedule/index.asp (last visited Nov. 30, 2003).
[102] Olympic Games Study Commission: Report, supra note 96, at 23.
[103] GolfToday.com, Top Players not keen on Olympic Golf, at http://www.golftoday.co.uk/news/yeartodate/news02/olympics3.html (last visited Nov. 30, 2003).
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[105] Melanie Hauser, Norman Wants Olympic Golf, PGA.com, Aug. 15, 2000, at http://dev.pga.com/champ00/news/norman.html (last visited Nov. 30, 2003).
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[111] AsianPGA.com, supra note 114.
[112] Olympic Charter, supra note 85, R. 29 at 51.
[113] See The Articles of the IGF, supra note 39, at II.2.
[114] Olympic Charter, supra note 85, R. 52.1.1.3 at 81.
[115] Ron Kroichick, Lab Scandal brings issue of steroids in sports to forefront: Drug use appears throughout pro ranks, including tennis, golf, San Fran. Chronicle, Oct. 26, 2003, available at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/10/26/SPG732JK2K1.DTL (last visited Nov. 30, 2003).
[116] Id.
[117] Id.
[118] See id.
[119] Paul Newberry, Norman Calls for Drug Testing in Golf, Cincinnati Enquirer, July 17, 2003, available at http://www.enquirer.com/editions/2003/07/16/spt_wwwsptglf1anot16.html (last visited Nov. 30, 2003).
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[121] Id.
[122] SI.com, Storms finally arrive at Royal St. George's, July 16, 2003, at http://sportsillustrated.cnn.com/golfonline/2003/british_open/news/2003/07/16/notebook_ap (last visited Nov. 30, 2003)
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[125] See Evan Morgenstein, Olympic Athlete Representation: 101, SI.com, June 13, 2001, at http://sportsillustrated.cnn.com/olympics/2002/news/2001/06/13/morgenstein_one (last visited Nov. 30, 2003).
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[130] Id.
[131] Id.
[132] See Frank Hughes, Should the play (and get paid) for their country?, ESPN.com, Mar. 7, 2003, at http://sports.espn.go.com/espn/print?id=1519803&type=columnist (last visited Nov. 30, 2003).
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[135] GolfToday.com, supra note 107.
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[137] PGATour.com, All-Exempt Tour Priority Rankings, available at http://www.pgatour.com/tournaments/2003_pga_exempt.html (last visited Nov. 30, 2003).
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RECENT CASES OF INTEREST

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

Violating A Student-Athlete's Rights Under The ADA – Who Must Pay?

In *Bowers v. National College Athletic Association, et al*, 346 F.3d 402 (3rd Cir. 2003), the Third Circuit recently addressed the issues of whether state universities have immunity as arms of the state under the Eleventh Amendment and whether Title II of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act entitled Temple University the right to contribute. The Court declined to address the issue of immunity, and then held that Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act did not entitle Temple University to a right to contribution by other universities.

The NCAA Eligibility Clearinghouse provides that students must complete thirteen core courses in order to be considered for collegiate athletic eligibility and scholarships. The plaintiff, a high school football player, was recruited by Division I and II state schools until they learned that he suffered from a diagnosed learning disability that prevented him from completing several of those core courses. All of the schools stopped recruiting the student-athlete when they learned of his disability. The student-athlete brought suit alleging that the NCAA, NCAA Initial Eligibility Clearinghouse, and some of the schools that stopped recruiting him (including Temple University) violated the ADA and Rehabilitation Act in their treatment of him. Temple then filed a third-party complaint against the other schools that had been recruiting him, but which were not named in the student-athlete's original complaint. Temple University believed that these other schools should have to contribute financially if Temple and the other defendants were deemed liable to the student-athlete.

The Third Circuit first addressed whether state universities have immunity under the Eleventh Amendment as arms of the state. The district court had held that the universities did not have immunity for two reasons: (1) they waived immunity by accepting federal funding, and (2) Congress abrogated their immunity by enacting Title II of the ADA. The Court of Appeals, however, decided to reserve judgment on Eleventh Amendment immunity issue because it resolved the case on other grounds and in favor of the universities that had sought immunity.

The court then addressed the issue of Temple's right to contribution under the ADA and Rehabilitation Act. The court presented two ways in which a right to contribute can be found: (1) by express wording in the statute or (2) by looking at analogous statutes and the legislative history surrounding the formation of the statute. First, the court ruled that the ADA statutes did not explicitly grant the right to contribute. Second, the court decided that no right to contribution existed based upon analogous statutes to the ADA or the legislative history of the ADA. In making this ruling, the court relied upon the provision closest in structure, purpose, and intent to the ADA provision in question, which was an analogous provision from the Civil Rights Act of 1964. The court found that the United States Supreme Court had ruled that this analogous Civil Rights Act provision did create a right to contribution, and therefore the ADA provision in question did not create a right to contribution. Thus, the court concluded that Temple University did not have the right to contribution from the other schools because the student-athlete did not sue them directly. Although the court did not address the merits of the ADA claim, the court did stress that the ADA's goals are clear: to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

By: Jennifer Falk

The NFL Draft Is Open To All – Or Is It?

Today's National Football League (NFL) began operating in 1920 as the American Professional Football Association, comprised of twenty-three member clubs, and has since grown into an unincorporated association of thirty-two member clubs. Although there are other professional football leagues in North America—including the Arena Football League and the Canadian Football League—the NFL dominates. The NFL consistently outperforms all other professional football leagues, not to mention the other professional sports leagues, in both revenues and television ratings.

Not surprisingly, the NFL's fiscal success also benefits its players. In 2003, the average NFL player earned $1,258,800 and the average starting NFL running back earned $1,578,275. The minimum salary that a rookie may be paid is $225,000. In contrast, the salary cap in the Canadian Football League — the total amount of money that a team can pay its entire 50-man roster — was approximately $1,700,000 for the 2000 season. Similarly, the 2003 team salary cap in the Arena Football League was $1,643,000. In other words, the average starting running back in the NFL makes only slightly less than the salary paid to an entire team in the CFL and AFL. In short, the NFL represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.

The NFL's eligibility Rule (the Rule) prohibiting college underclassmen from participating in the draft has been in force—in one form or another—for decades. It was originally created after Harold "Red" Grange, the University of Illinois's star running back, left school at the end of the 1925 college season to join the Chicago Bears for a reported $50,000. The original Rule precluded a player from joining the NFL unless four seasons had elapsed since his high school graduation, and that original rule stood until 1990 when the requirement was changed to three seasons from high school graduation.

On May 6, 1993, the NFL's current Collective Bargaining Agreement (CBA) went into effect. According to the NFL, "[d]uring the course of collective bargaining that led to the 1993 CBA, the eligibility Rule itself was the subject of collective bargaining." On the same day that the CBA became effective— the National Football League Players Association (NFLPA) and the National Football League Management Council (NFLMC) executed a document acknowledging that the NFL's Constitution and Bylaws applied to the CBA. These Bylaws included comprehensive rules describing who was eligible to play in the NFL. The Bylaws provided that a player became eligible if he exhausted his eligibility to play college football or graduated from college. A player was also eligible if he was five years removed from his first enrollment in college (or four years removed, if he never played college football), regardless of whether he had any remaining college eligibility. Finally, the NFL Commissioner had the authority to grant "Special Eligibility" to a player not otherwise eligible.

Continued on page 21

Continued from page 20

With respect to the 2004 draft, in order to receive consideration for the League's principal college draft, any application for special eligibility must have been in the Commissioner's office no later than January 6 of that year. For college football players seeking special eligibility, *at least three NFL seasons must have elapsed since the player graduated from high school*. Although by its plain language the Rule requires the "special permission" of the Commissioner, that permission appears to be routinely granted where a player falls within the Rule's primary requirement (*i.e.,* when he is three years removed from his high school graduation).

In the Summer of 2002, Maurice Clarett began his collegiate football career at The Ohio State University (OSU) as a starter, an honor that eluded many of the Buckeye running back greats that preceded him, including Heisman Trophy winners Archie Griffin (twice) and Eddie George. After being named USA Today's high school offensive player of the year as a high school senior, Clarett became the first freshman since 1943 to open a season as OSU's starting running back. Clarett would finish his freshman campaign with 1,237 yards rushing and 16 touchdowns, including the game-winning touchdown in OSU's 31-24 win over the University of Miami in the Fiesta Bowl, securing OSU's first national championship in thirty-four years. When all was said and done, Clarett led OSU to a 14-0 record, and was named the Big Ten Freshman of the Year.

In July of 2003, the New York Times reported that Clarett was allowed to take an oral exam after walking out of a midterm exam. Later that month, OSU officials would confirm that the NCAA was investigating Clarett's claim that more than $10,000 in clothing, CDs, cash, and stereo equipment was stolen from a car he borrowed from a local dealership. After admitting that he exaggerated this police report, Clarett was charged with a misdemeanor for falsifying the police report about the theft. Soon after, OSU suspended Clarett for the 2003 season after revealing that Clarett received special benefits worth thousands of dollars from a family friend and that he repeatedly misled investigators working on his case.

Facing a one-year suspension—and with the likelihood of him ever playing again on the collegiate level seriously in doubt—the NFL appeared to be his best option for playing football in 2004. Thus, in September 2003, Clarett filed suit against the NFL challenging the league's rule that a player must be out of high school three years to be eligible for the draft. Clarett v. National Football League, _____ F.Supp.2d _____, 2004 WL 24547 (S.D.N.Y. 2004). Clarett sued the NFL under section 1 of the Sherman Antitrust Act and section 2 of the Clayton Act (private plaintiffs cannot sue directly under the Sherman Act, but section 2 of the Clayton Act creates a private right of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."). Clarett alleged that the NFL's Rule "[wa]s an illegal restraint of trade because the teams have agreed to exclude a broad class of players from the NFL labor market, thereby constituting a 'group boycott.'" Although open to some debate, there seems to be little doubt that Clarett is an NFL-caliber player who would be drafted if he were eligible to participate in the process. Thus, only the Rule stood between Clarett and the opportunity to play in the NFL next year.

The question for the court was whether the NFL's Rule, which prohibits him from playing in the NFL for another year, violated antitrust law. Clarett's challenge to the Rule raised serious questions about the intersection of labor and antitrust law, and the intersection of college and professional football. The court needed to address whether Clarett's right to compete for a job in the NFL overcame the NFL's right to exclude players that the League felt were not yet ready to play. The NFL defended itself by asserting that the Rule was the result of the collective bargaining agreement between the NFL and the players union and was therefore immune from antitrust scrutiny, and that Clarett did not have standing under antitrust law to bring his suit.

The court ultimately ruled that the NFL could not prevail and sacked the Rule as a violation of antitrust laws. In response to the NFL's arguments, the court first held that "[b]ecause the Rule does not concern a mandatory subject of collective bargaining (wages, hours and conditions of employment), governs only non-employees, and did not clearly result from arm's length negotiations, it is not immune from antitrust scrutiny." The court then held that Clarett had standing to sue because his injury flowed from a policy that excludes all players in his position from selling their services to the only viable buyer—the NFL. Finally, the court found the NFL could not justify that Clarett's exclusion, and the Rule itself, enhances competition. Indeed, Clarett had alleged the very type of injury—a complete bar to entry into the market for his services—that the antitrust laws were designed to prevent.

Because Clarett established the anti-competitive effect of the Rule, the burden shifted to the NFL to offer a pro-competitive justification. *First,* the NFL argued that the Rule protected young players because they "[we]re not sufficiently mature, either physically or psychologically, to endure the rigors of professional football." *Second*, the NFL argued that the Rule protected NFL teams who might suffer financial adversity resulting from younger players' peculiar susceptibility to injury. *Third*, the NFL argued that the Rule protected the League and its "entertainment product from the adverse consequences associated with such injuries." *Finally*, the NFL argued that the Rule protected young players who, if they declare but are not drafted, would lose their eligibility to play college football and, in turn, their athletic scholarship; thus, the Rule protected young players who might over-train or experiment with performance-enhancing drugs in an attempt to speed their athletic development.

While the court noted that these may be reasonable *concerns,* none were deemed reasonable *justifications* under antitrust law. The NFL's desire to protect younger athletes from injury or over-training was dismissed with limited discussion. The court noted that antitrust laws require a *pro-competitive* justification in the face of a demonstrably anti-competitive rule. The NFL's concern for the health of younger players while deserving of praise, did nothing to promote competition. Further, the NFL's desire to protect the League and its teams from the costs associated with injuries was also deemed ineffective.

The court noted that all of the League's justifications for the Rule boiled down to the same basic concern: younger players are not physically or mentally ready to play in the NFL. But as one of the NFL's own representative conceded, the "time frame" for a player's physical and psychological maturation "varies from individual to individual." The judge added in her ruling that, "Age is obviously a poor proxy for NFL-readiness, as is restriction based solely on height or weight." Alternatively, medical examinations and tests are available to measure an individual player's maturity. The League could easily use those tests to screen out players who are not prepared to play in the NFL, as well as to assist dreams in the draft process. While some would argue that such tests are "intrusive," there is little doubt that potential draftees would voluntarily submit to testing in order to compete for a spot in the NFL and potentially improve their draft stock. By requiring draft prospects to submit to these examinations, the League could provide valuable information about player maturity to its teams and allow them to decide whether a prospect is worth selecting. In such a scenario, no player would be automatically excluded from the market and each team could decide what level of risk it is willing to tolerate. The fact that there is a less restrictive alternative only underscores that there is no pro-competitive justification for the Rule, and that it violates the antitrust laws. Thus, the court mandated that Clarett be made eligible for the April 24-25, 2004 NFL draft.

By: Jeffrey Dean Tobin

[1] On Tuesday, March 30, 2004, the Second Circuit Court of Appeals agreed to hear the NFL's appeal of the decision described in this recent case summary. This case summary only addresses the district court's decision to allow Maurice Clarett and others to enter the NFL Draft. The Second Circuit's decision will appear in the next Journal edition.

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Continued on page 23

Continued from page 22

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