Texas Entertainment and Sports Law Journal

Fall/Winter 2014 — Volume 23 • No. 2

24TH ANNUAL

ENTERTAINMENT LAW INSTITUTE

The Texas International Pop Festival was the first major rock festival in Texas. Held August 30 - September 1, 1969, two weeks after Woodstock, at the Dallas International Motor Speedway in Lewisville. Produced by Alex Cooley, Angus Wynne and Jack Calmes. Poster art by Lance W. Bragg.

INSIDE THIS ISSUE

Click Title to Jump to Page

TESLAW.ORG

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

CHAIR'S REPORT

Dear TESLAW Members,

First, I want to thank you for being TESLAW members. The officers and council members strive to make TESLAW active, informative and collegial. Second, I want to thank the TESLAW members for allowing me the honor to serve as Chair of the Section for 2014-15. I look forward to assuming the mantle with vigor and hope to continue a tradition of excellent leadership and continued development of TESLAW activities.

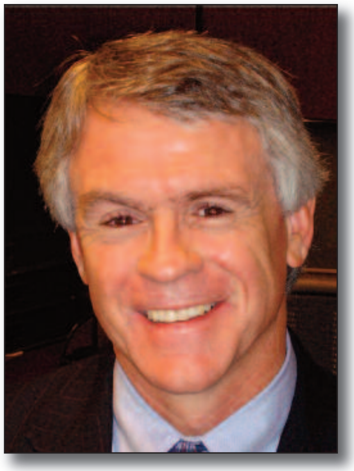
Lastly, I want to thank Mike Farris for his tremendous work as editor of the Texas Entertainment and Sports Law Journal. The Journal is TESLAW's flagship, and as such is recognized as a leading sports and entertainment law publication.

Speaking of activities, TESLAW will again be involved in the Entertainment Law Institute CLE, organized by Mike Tolleson, hosting a SXSW Mixer, and presenting a CLE event at the annual Texas State Bar Meeting. Please watch for details on each of these events. But most importantly, we anticipate to have new T-Shirts this year. While the Rock Star Attorneys Ts have conquered the legal world, we feel it's time for fresh designs – so keep an eye out.

I look forward to seeing you at the various TESLAW events, and please don't hesitate to let us know if you want to join the TESLAW leadership!

Craig Crafton

EDITOR'S REPORT



Mike Farris, Editor

As another year draws to a close and we enter the holiday season, I'm pleased to offer another volume of the Texas Entertainment and Sports Law Journal. As usual, we have received a number of quality submissions for this volume, but we're always on the lookout for more. Let me reiterate my previous request that, if any of you have any articles or papers you would like to submit, or if you would like to discuss ideas for submissions, please feel free to contact me. We're not only interested in scholarly articles, but also articles that simply may be of general interest to our members in the areas of sports and entertainment.

It was good to see many of you at the Entertainment Law Institute in Dallas, and I hope you enjoy this current volume of our Journal. Best wishes for a happy holiday season.

CAVEAT

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

MEMBER PROFILE

Helppie

How did you get interested/started in Entertainment Law?

I got my start when my older sister cast me as an Elf in her original Christmas script which we performed in the living room (I beat out my younger sister, who got the role of the reindeer). I performed on stage throughout high school and college, eventually moving to Los Angeles and experiencing the industry up close as both an actor and a temp worker at studios and production companies. I soon discovered that my talents were on the business side of the industry rather than in front of a camera. So I attended UCLA Law School with its renowned Entertainment Law program, and I've lived happily ever after.

Have any good client/case stories?

Of course, I can't divulge the best ones! But I've gotten to do a lot of fun things, including walking the red carpet at Cannes "with" Steve Carell, Mark Ruffalo and Channing Tatum for the "Foxcatcher" premiere last May. And I got to hang "with" Sylvester Stallone, Jason Statham, Arnold Schwarzenegger, Harrison Ford and Dolph Lundgren at a big party for "The Expendables 3."[Yes, I'm using "with" to mean I was there at the same time, not that we exactly sat together.]

Knowing your film background – can you tell us some films you've worked on?

I've performed legal work on many films, ranging from putting together the corporate and financial structures to clearing chains of title to dealing with the unions, guilds and bonding companies, to preparing numerous talent and production contracts. Some big films I've worked on are "Hugo," "Argo," "The Tourist," "The Rum Diary," "Edge of Darkness," and "The Young Victoria." I also performed much of the legal work on four films I produced in Texas: "Exit Speed," "Haunting at the Beacon," "Beyond the Farthest Star," and "9th Floor: Quest for the Ancient Relic." Please rent them on DVD or via VOD! In addition, I've done legal work on a number of scripted and unscripted television shows as well as several Texas-based films.

Favorite part of your practice?

Well, the most fun is being able to attend screenings because that's where all the pieces come together. But the two things I think I enjoy most are puzzling through corporate and financial structures to put a deal together and, on the opposite end of the spectrum, negotiating and litigating disputes when deals go bad.

Any advice for anyone wanting to practice entertainment law?

Learn as much as you can about the industry itself. It's important to understand the various structures, jobs, deals and interests within film, television and new media in order to effectively advise clients. Know what you don't know, both from a legal and an industry perspective. For example, I limit my work in the music industry to the role and use of music in audio/visual works; anything else gets referred out to those who practice music law on a regular basis. And don't be afraid to challenge opposing counsel who cite "customs" and "policies" rather than focus on the actual interests and needs of the clients. Entertainment is, by definition, a creative endeavor. The best entertainment attorneys also are creative in addressing legal and business issues, with an eye on reaching the end goal rather than relying on form contracts.

Who is in the Driver's Seat? Copyright in Software and the U.S. Auto Parts Network Decision[1]

By Shelly Rosenfeld

Employers could get some mileage out of the ruling in *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC,* 2012 U.S. App. LEXIS 18505 (9th Cir. Cal. Aug. 31, 2012). When a business creates and modifies its core business software over the course of many years, with multiple people working under various types of employment status, and there are transitions through more than one company, does the corporate successor own the resulting software? Under the facts of the recent *U.S. Auto Parts* case, the answer was "yes."

A Ninth Circuit court held if an employee's contribution is both a work for hire and a derivative work, then the employer owns the copyright. The significance extends beyond the court's holding, since the decision of who owns a copyright determines whether that party can have the standing to sue another for copyright infringement in the first place.

Taking a Hard Look at Software

In *U.S. Auto Parts*, a computer programmer licensed software he created to another company, Partsbin, which later hired him. As a Partsbin employee, he created enhancements to that software. When Auto Parts Network, Inc. ("Auto Parts") bought Partsbin, in addition to acquiring the company's IP rights, it also hired the programmer as an employee. At Auto Parts, he created even more enhancements of the software.

Shelly Rosenfeld is an attorney in the Los Angeles office of Lewis Brisbois Bisgaard & Smith LLP, specializing in Intellectual Property and Technology, and Entertainment. Before becoming an attorney, Ms. Rosenfeld worked as a television anchor and reporter.

When the programmer left the company and created software for Parts Geek, a competitor, Auto Parts sued Parts Geek for copyright infringement, claiming the software had "substantially similar features" to the software he created at Auto Parts. Auto Parts claimed it owned the copyright to software changes the programmer made at Auto Parts and Partsbin.

Work Made for Hire

Software source code is copyrightable. According to Copyright Act §201(a), the "author" of a work holds its copyright. The author is the individual creator, except in the case of a work for hire, in which case the employer is considered the author and owns the copyright. The Copyright Act §101 defines a work made for hire as one that an employee creates within the scope of his or her employment. Both parties can agree that the employee keeps the copyright if it is clearly stated in writing and signed by both parties.

The court held that the programmer worked as an employee of Partsbin and Auto Parts and based on his job description, he was hired to enhance the software code. The court held that a reasonable jury could conclude that the programmer's software enhancements were also a work for hire since they were created with a purpose to serve his employers and were customized to fit their business needs.

Derivative Work

The court also held that a reasonable jury could decide that changes to a computer program are "separately copyrightable as derivative works." Copyright Act §101 defines a derivative work as one that is based upon and transforms one or more preexisting

1 Republished from Lewis Brisbois Bisgaard & Smith Intellectual Property Newsletter, Fall 2012.

Continued on page 6.

Who is in the Driver's Seat? Copyright in Software and the U.S. Auto Parts Network Decision

Continued from page 5.

works. The copyright protection in a derivative work only extends to the original elements of the derivative work the author contributes. The preexisting work's author keeps the copyright in the underlying work. The example of a novel as a preexisting work, and a movie based on that novel as a derivative work, illustrates this distinction.

The court in *U.S. Auto Parts* held that a reasonable jury could decide that at least one of the software enhancements the programmer made was original enough to amount to a derivative work, and he lawfully used the preexisting work. According to Copyright Act §106(2), a copyright holder has the right to decide who is allowed to make the derivative work. Since the programmer complied with his employer's requests to create software enhancements, he granted Partsbin and Auto Parts "implied, non-exclusive licenses to create derivative work from that software."

Since the court decided that the company owned the original program, it did not need to apply Copyright §117(a)(1). The significance is that even if the original work were owned by the individual who authored it, the fact the company was in lawful possession of a copy would mean that it would have had the right to modify and maintain it.

Taking the Holding for a Test Drive

In contrast to the district court's holding that Auto Parts did not own the copyright at issue, the Ninth Circuit held that there was enough evidence for a jury to find that, indeed, the copyrightable software enhancements were a work for hire, meaning that Auto Parts would own the copyright. The Ninth Circuit remanded the case back to the district court. Now the district court will face the question of whether Parts Geek's use of the software infringed the Auto Parts' copyrighted enhancements that the programmer made.

This case can be considered for the important lesson it provides for businesses seeking to protect their intellectual property. Specifically, a business should make sure that any copyrightable materials their employees create, which includes derivative works, are works for hire. That way, if the employee who created the intellectual property leaves or a competitor uses the copyrighted material, the business can be confident it can establish the threshold issue of owning the copyright.

The Lowdown on the Upload: The Impact of *Viacom v. YouTube* On DMCA Takedown Notices[1]

By Shelly Rosenfeld

What do the shows, *Family Guy, The Daily Show,* and *MTV Cribs* have in common? These programs are just a few examples of copyrighted TV shows that Viacom and other plaintiffs claimed that YouTube knew were posted in ways that infringed copyrights, but that YouTube did not remove them "expeditiously," as required by the Digital Millennium Copyright Act ("DMCA") in *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir 2012).

On remand from the Second Circuit Court of Appeal, the district court in *Viacom Int'l, Inc. v. Youtube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013) held that the DMCA shielded the video-sharing site, YouTube, from liability.

> The court examined the following four inquries:
>
> (A) Whether, on the current record, YouTube had knowledge or awareness of any specific infringements (including any clips-in-suit not expressly noted in this opinion);
>
> (B) Whether, on the current record, YouTube willfully blinded itself to specific infringements;
>
> (C) Whether YouTube had the "right and ability to control" infringing activity within the meaning of § 512(c)(1)(B); and
>
> (D) Whether any clips-in-suit were syndicated to a third party and, if so, whether such syndication occurred "by reason of the storage at the direction of the user" within the meaning of § 512 (c)(1), so that YouTube may claim the protection of the § 512(c) safe harbor.

Viacom Int'l, Inc., supra, 940 F. Supp. 2d 110 at 113. The case underscores the importance of a well-crafted takedown notice.

Specific Instances Of Infringement

Since both sides were unable to determine whether there were specific instances of infringement because of the sheer volume of the material involved, the court reasoned this even further justified the requirement that the copyright owner has the burden of identifying the infringement by giving notice to the service provider, as specified by 17 U.S.C. § 512 (c)(3)(A).

Since the online service provider's "knowledge or awareness of specific infringing activity" is key in determining whether the service provider is able to utilize safe-harbor protections, DMCA notices should allege details directed towards establishing potential service provider liability.

Just because a TV network sends a DMCA-complaint notice to an online service provider, however, doesn't mean that the service provider loses the safe-harbor protection. Removing the safe-harbor protection based on mere knowledge of infringing material alone would lead to a Catch 22. No website operator would have incentive to fix a problem if it would be punished anyway. Rather, if the site learns it is hosting infringing material and acts quickly to remove it, the online service provider keeps the safe harbor protection. If the site doesn't remove the material quickly after it learns it exists, then it could face liability.

Willful Blindness

The question of willful blindness centers around whether a reasonable jury could conclude that YouTube had knowledge or awareness of infringing activity, such that it would be exempt from the DMCA (17 U.S.C. § 512) safe-harbor provisions.

1 Republished from Lewis Brisbois Bisgaard & Smith Intellectual Property Newsletter, Fall 2012.

Continued on page 8.

The Lowdown on the Upload: The Impact of *Viacom v. YouTube* On DMCA Takedown Notices

Continued from page 7.

The appellate court remanded the case to the district court to evaluate the issue of willful blindness. Willful blindness means that a service provider cannot bury its head in the sand to avoid information about infringing content. If the online service provider did engage in willful blindness, it could be deemed to have knowledge or awareness of infringement, and thus would be ineligible for the DMCA safe harbor protections. The district court held there was "no showing of willful blindness to specific infringements of clips-in-suit." *Viacom Int'l, Inc.*, supra, 940 F. Supp. 2d 110 at 117.

Right and Ability to Control

The DMCA safe harbor provisions also require that if an online service provider has the "right and ability" to control infringing activity, it cannot also profit from that infringing activity. The Court of Appeals said that the right and ability to control requires "something more" than the ability to merely remove access to materials posted on a website.

The district court determined that YouTube did not have the right and ability to control the alleged infringing activity on its site.

> "... [D]uring the period relevant to this litigation, the record establishes that YouTube influenced its users by exercising its right not to monitor its service for infringements, by enforcing basic rules regarding content (such as limitations on violent, sexual or hate material), by facilitating access to all user-stored material regardless (and without actual or constructive knowledge) of whether it was infringing, and by monitoring its site for some infringing material and assisting some content owners in their efforts to do the same. There is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity."

Id. at 121.

Storage at the Direction of the User

When infringing material resides on a network that the service provider operates, there's a safe harbor provision that is available when infringement occurs as a result of the storage at the direction of the user (§ 512(c)(1)).

The district court had initially found that that YouTube's software fell within this category. The Second Circuit affirmed with respect to the conversion of videos to YouTube's standard format and playing back the videos on the "watch" page, both of which the court considered to be automatic functions. The Second Circuit remanded to the district court as to the third-party syndication, such as when the videos uploaded to YouTube can be accessed on mobile devices, specifically licensed to Verizon Wireless.

> "... [T]he critical feature of these transactions is not the identity of the party initiating them, but that they are steps by a service provider taken to make user-stored videos more readily accessible (without manual intervention) from its system to those using contemporary hardware. They are therefore protected by the § 512(c) safe harbor."

Viacom Int'l, Inc. v. Youtube, Inc., supra, 940 F. Supp. 2d at 123.

Stay Tuned

YouTube's business model is built on user-posted and generated content. YouTube remains protected by the DMCA as long as it "expeditiously" removes infringing material after it is notified by the copyright holder. The appellate court has now moved the line for expeditious removal more in the favor of content owners. Content owners now sending DMCA notices thus stand to benefit by stating in their notices specific bases for the claim that the service provider is or has been made aware of the infringement, and how the service provider appears to be profiting from the infringement.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

By Sarah Sharrar

Sarah Sharrar is a May 2014 Marquette University Law School graduate and recently moved to Dallas, Texas this past summer. She has prior experience working for the Texas Rangers Baseball LLC and NIKE, Inc.

I. Introduction

Imagine paying millions of dollars to sponsor an event only to have your competitor and a non-sponsor swoop in and steal the marketing spotlight. It would be upsetting and aggravating, but most likely not illegal. This marketing tactic, where a "company attempts to capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of necessary parties"[1] is known as ambush marketing. Ambush marketing is very prevalent during major events, specifically the Olympics, and as of right now there is very little that official sponsors can do to prevent it in the United States. As long as non-sponsors create the association with the event without using the event's official marks and symbols, there is likely no liability.[2]

The current legal avenues for bringing a claim, the Lanham Act and the Amateur Sports Act (ASA), are insufficient and ill-adapted for the unique tactics of ambush marketing. The Lanham Act is inadequate because it requires consumer confusion regarding the source of the sponsorship, a threshold that is very difficult to meet.[3] The ASA is deficient because it does not provide protection over Olympic marks used in non-commercial speech.[4] Therefore, despite having two Acts in place to protect sponsors, there remains a gap in protection.

II. What is Ambush Marketing

Ambush marketing has grown to be of great importance to modern day advertising.[5] Techniques have evolved into innovative ways to hijack the consumer's mind through legitimate competitive behavior.[6] However, with the continuous evolution of marketing tactics, ambush marketing has been broadly defined. Many people have pegged ambush marketing as "any attempt by a non-sponsor to capitalize on the popularity of an event to promote its own products and services."[7]

This over-inclusive definition of ambush marketing creates problems because it encompasses a wide range of marketing practices with a presumed shadow of illegality, when in fact the company is doing nothing wrong.[8] To define ambush marketing in such a broad manner is inefficient and makes it impossible to defend against such a broad range of tactics. The most beneficial way to define ambush marketing is to put it into specific categories, in order to draw a clear line between permissible and impermissible marketing tactics.[9]

First, there are two types of ambush marketing: direct and indirect. Direct ambush marketing occurs when a non-sponsor uses trademarks or logos of an event or otherwise falsely represents an association with the event.[10] This category is often litigated under the Lanham Act since the sponsor is using protected marks. In direct ambush marketing cases, the Lanham Act does provide adequate protection because the Act's intended purpose is to protect from trademark infringement. For indirect ambush marketing, the marketer seeks to create an association with an event without the use of protected marks.[11] This type of ambushing marketing is more common and much harder to stop.

Second, indirect ambush marketing occurs when a non-sponsor creates an association with an event without the use of the event's protective marks. Indirect ambush marketing can be further broken down into six categories: (1) "sponsor media coverage of the event," (2) sponsor subcategories of the event, (3) "make a sponsorship-related contribution to the players' pool," (4) "purchase advertising time during the broadcast replay," (5) "engage in advertising to coincide with the timing of the event," and (6) dilution strategies.[12]

Continued on page 10.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing
Continued from page 9.

The first category, sponsor media coverage of the event, is widespread and occurs when ambushers purchase time to broadcast their advertisement during the event. Ambushers are able to do this because the event does not control the broadcast, and therefore, has no voice in the companies that are advertised during the broadcast.[13] The most famous example of this type of ambush marketing took place at the 1984 Los Angeles Olympics when Kodak ran advertisements during the broadcast of Olympic events to compete with the official sponsor Fuji film.[14] Fuji was left with no legal recourse or remedy.

The second category, sponsor subcategories of the event, entails an ambusher sponsoring a piece of the event, but not the entire event.[15] In this category, the ambusher is involved with the event, but at a lower level then the official sponsor, and attempts to create the impression that it sponsors the event at a higher level.[16] For example, Adidas sponsored the 2010 World Cup, while NIKE sponsored several of the top athletes that were competing.[17] Also, several weeks before the 2010 World Cup started, NIKE released a video ad, "Write the Future," on its Facebook page.[18] The ad featured soccer's most famous players dressed in all NIKE gear imagining what their future would be if they were to make or fail to make a particular play in a game.[19] Because of this ad, NIKE enjoyed more than double the buzz associated with the World Cup than official sponsor Adidas.[20]

The third category, make a sponsorship-related contribution to the players' pool, occurs when a company offers prize money to a team or an individual.[21] For example, Speedo offered Michael Phelps one million dollars if he won a gold medal at the 2004 and 2008 Olympics.[22] By offering such a prize, Speedo was discussed in various media outlets and caused people to incorrectly associate Speedo with the Olympic Games.[23]

The fourth category, purchasing advertising time during the rebroadcast, is similar to the first category, except this may be a cheaper option since sometimes the live broadcast is on premium cable networks and can be very costly. Events are typically shown again and again and it may be easier for companies to gain access during the rebroadcasts.[24]

The fifth category, "engag[ing] in advertising to coincide with the timing of the event,"[25] includes themed advertising.[26] Themed advertising is done by using creative components that relate to the event in the promotion.[27] For example, Wendy's created a themed commercial in regards to the Winter Olympics, when it featured former Olympic figure skating champion Kristi Yamaguchi.[28]

The last category, dilution strategies, is done with the effort to dilute the advantage gained by the sponsor.[29] There are a few different techniques that would be included in this category. For example, a company can purchase tickets to an event and distribute tickets to customers or employees, or use them as prizes in contests.[30] Also, a non-sponsor can create its own event or sponsor an event that takes place in the venue where the main event is hosted, or it can distribute free t-shirts for individuals to wear at the event.[31]

A. *Successful Ambush Marketing Campaigns*

Ambush marketing is done in various ways, as discussed above, but it always has two goals: to create a false association with a particular event and to weaken or attack a competitor's official association with an event. Over the years there have been several successful ambush marketing campaigns. The following examples demonstrate how non-sponsors have beaten sponsors in the marketing game.

A well-known example, dating back to 1992, is when Pepsi ambushed Coke's sponsorship of the NHL. Coke was an official sponsor of the National Hockey League (NHL), which included the right to describe its product as "the official soft drink of the NHL."[32] Unfortunately for Coke, it did not also secure the right to advertise its products during televised NHL games.[33] Instead, exclusive broadcast rights for NHL games were sold to Molson Breweries of Canada for a five-year period.[34] Molson Breweries, in agreement with Canadian Broadcasting Corporation, broadcast at least one NHL game nationwide in Canada every Saturday.[35] These broadcasts are known as "Hockey Night in Canada" (HNIC) and "Molson granted Pepsi the right to be the

Continued on page 15.

Examining Morals Clauses in the Entertainment Industry

By Laurel Hearn

Laurel Hearn received her Bachelor of Arts, Magna Cum Laude, from Wake Forest University in 2011. She received her Juris Doctorate from the University of Texas School of Law in May 2014. She may be reached at laurelhearn@gmail.com

I. Introduction

In 1922, silent film star Roscoe "Fatty" Arbuckle was acquitted of charges that he had raped and murdered Virginia Rappe, an aspiring actress and model, during a party in a San Francisco hotel suite.[1] Although Arbuckle's name was cleared by the acquittal, his movie career was essentially over.[2] Blackballed by Hollywood film studios, Arbuckle, who previously had been a very popular actor with moviegoers, with a comedic talent compared favorably to Charlie Chaplin and Buster Keaton, would not win another acting role in the film industry for over a decade.[3]

Although Universal Studios was untouched by the scandal (Arbuckle performed exclusively for a competing studio, Paramount Pictures), the fall-out from the scandal led Universal to address the issue in its actor's contracts.[4] Specifically, Universal created a contractual provision (the "morals clause") that empowered the studio to terminate a contract with an actor when he or she behaved immorally.[5] The purpose of this new clause was to allow a studio to terminate an actor's employment for unlawful or outrageous public conduct without risking a successful contract breach claim by the actor.[6] Through the inclusion of the morals clause in its contracts with actors, the studio preserved for itself the right to terminate for cause the employment relationship when an actor behaved in a manner that embarrassed himself or offended the studio.[7] Universal's first morals clause read, "he (she) [the actor] shall not do anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry."[8] This model proved to be an industry catalyst that led quickly to the inclusion of comparable provisions in talent contacts throughout the entertainment industry.[9] Today, morals clauses are relatively standard, often boilerplate provisions in nearly all entertainment, sports, and sponsorship agreements.[10]

When Universal first began to include a morals clause in its actor's contracts, its purpose appeared to be largely prophylactic, with the clause serving as a sword that the studio could brandish in order to rein in those of its actors who engaged in risky behavior. The studios hoped that the threat of contract termination would deter actors from engaging in behavior that could damage the reputations of the actor and the studio.[11] It is fair to say, however, that the studios had a more pragmatic and limited expectation: namely, if the threat of termination proved to be insufficient leverage to change the behavior of the actors, the clause at least could be used to help minimize the potential reputational damage by allowing the studio to sever, without legal liability, its ties with the actor.[12] Actors are human beings with human failings, and studios certainly understood that the threat of termination might be no more effective in deterring completely immoral or embarrassing behavior than criminal statutes are in eliminating crimes.[13] Thus, from the time of its first use, a primary purpose of the morality clause was to protect the film industry.[14] A studio's quick reaction to terminate a relationship served a dual purpose: it sent a clear message to its other actors that there were potentially dire consequences that could arise from their misbehavior, and it bolstered the public's confidence that the studio did not endorse such behavior.[15]

One perceived advantage of a broadly drafted morals clause was that it covered future, unforeseen actions by the actor.[16] The very vagueness of the language empowered the studio to deem many types of behavior immoral, thus empowering the studio to respond quickly to limit the damage from actor misbehavior of all types.[17] This provision made perfect sense during the early Hollywood years, given that the success of the film industry and Hollywood was rooted in the public's belief that "stars were

Continued on page 12.

Examining Morals Clauses in the Entertainment Industry
Continued from page 11.

covered in fairy dust."[18] A star's bad behavior could "shatter" this illusion,[19] bringing down the glass facade that separated the imaginary lives of the stars from the everyday lives of ordinary filmgoers. When the average moviegoer flocked to the theater to escape the everyday, mundane details of their lives, studio executives feared, not illogically, the consequences to the entire industry if an actor's grossly immoral or unlawful acts became perceived by the public as a norm that the studios accepted. For studios concerned primarily with maximizing ticket sales, it was very important that the less savory side of their actors' lives did not undermine the fantasy world that Hollywood had created.

Today, it is an open question as to whether there is a continuing need or justification for this kind of provision. With the omnipresence of paparazzi engaged in "photo-journalism" and the constant media coverage of celebrities engaged in everyday tasks, including US magazines' popular feature, "stars, they're just like us!", the Golden Age of Tinseltown's personality-driven myth-building has long since ended. Today's audiences do not idolize performers like Gwyneth Paltrow and Anne Hathaway, who seem largely imperious and unapproachable.[20] Instead, they are fascinated by the everyday lives of more relatable actors like Jennifer Lawrence and Anna Kendrick.[21] Understanding this trend, studios and television networks (and the actors' publicists) seek to promote the personal lives of the actors and performers; in fact, in many cases they are eager to draw attention to, or at least tolerate, behavior that would have been considered well out of bounds in an earlier era.[22] It is fair to say that today many studios silently applaud the ever more outrageous conduct by its performers, like David Duchovny, Miley Cyrus, or Charlie Sheen, as long as the conduct holds the promise of translating into increased ticket sales or viewership.

Another important development that erodes the justification of morals clauses has been the significant change in the employment relationships between movie studios and actors during the past fifty years. Today, movie actors are rarely under exclusive employment contracts with a particular studio, instead working as independent contractors, using talent agencies to seek out roles with appealing scripts or high-profile directors.[23] It is true that long-term employment relationships continue to exist in television, where actors are often under contract with networks to perform one or multiple seasons of a program. However, unseemly behavior that would have likely resulted in the banishment of an actor in earlier years is now often promoted (sometimes openly, sometimes surreptitiously) as reason to watch a show. In particular, reality television executives purposefully scope out outrageous "talent" to attract viewers and increase ratings. With Honey Boo Boo and Mama June attracting millions of viewers every week, television networks and others in the industry do not condone "bad behavior," they exploit it.

This shift in the entertainment industry reflects a change in the attitude of the general public from revulsion to fascination with the personal lives and often bad behavior of celebrities. Given that studios and networks no longer attempt to shield the public from the private lives and foibles of their stars, there is little justification for the continued inclusion in studio contracts of boilerplate, broadly-drafted morals clauses. The ambiguous language of broad morals clauses leaves the entertainment industry with too much discretion to terminate the contractual relationship under circumstances where the performer has behaved in a manner that was often fully expected, or even endorsed and promoted, by the industry. Morals clauses are particularly objectionable when they are used not to punish an actor who has not behaved immorally, but rather to punish one who has expressed an unpopular or divisive opinion. If a morals clause is to continue to be viewed as a valid contractual provision, the law should require its language to be narrowed in order to be enforceable, with the clause clearly enumerating conduct that results in contract termination. In addition, the studio should have to demonstrate some real, and not just speculative, reputational damage or injury arising from the actor's conduct that would merit the termination of employment based on this clause.

II. The Morals Clause in the Entertainment Industry Today

As stated above, today's entertainment industry transformed from a star system, where actors are under exclusive performance contracts with studios, to a system more similar to free agency. Given the absence of lengthy employment relationships, the importance of the morality clause to protect the reputation of the entertainment industry has declined. Although this is less true of television, where it is customary for an actor to enter into an extensive employment relationship with television networks, even in these situations, actors are often free to perform in other venues during the offseason. Although this more binding contractual relationship between television actors, or, as seen below, a reality star, and a television network, may argue

Continued on page 23.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

By Austin Fax

Austin Fax is a third-year law student at the University of Missouri School of Law where he focuses on general civil litigation, dispute resolution, and trial advocacy. Upon graduation, Austin will return home to Springfield, Missouri as an associate at Lowther Johnson Attorneys at Law, LLC. In his free time, Austin enjoys spending time in the great outdoors, watching his favorite sports teams, and relaxing with family and friends.

I. INTRODUCTION

The case of *Vilma v. Goodell*[1], stemming from the National Football League's ("NFL") infamous "Bountygate" scandal, was in litigation for approximately eight months. But for sports fans and the court, the case felt "as protracted and painful as the [New Orleans] Saints' season itself."[2] On January 13, 2013, New Orleans Saints linebacker Jonathan Vilma ("Vilma"), the NFL, and the sports world at large received what it needed most from the Eastern District of Louisiana—closure.[3] As the NFL and its fans look to put this tumultuous chapter behind them, many questions remain regarding the future of the NFL's Collective Bargaining Agreement ("CBA"), the future of player discipline, and the power of the courts to decide both issues.

The facts underlying the *Vilma* dispute are simple. Linebacker Jonathan Vilma's claims arose out of an alleged "Bounty Program" run by the New Orleans Saints football team from 2009 to 2011.[4] Saints defensive coordinator Gregg Williams was accused of offering monetary incentives for players to injure opponents on the football field, including an alleged $10,000 bounty to injure superstar quarterbacks Kurt Warner and Brett Favre during playoff games in 2009 and 2010.[5]

Upon learning of this program, the NFL and its Commissioner, Roger Goodell, launched a full-fledged investigation into the Saints football team and eventually suspended Vilma, as well as linebacker Scott Fujita, defensive end Will Smith, and defensive tackle Anthony Hargrove for their respective roles.[6] On March 2, 2012, the NFL distributed a press release to all 32 teams documenting the alleged findings.[7]

The NFL claimed its findings were based on a review of more than 18,000 documents, including more than 50,000 pages of evidence.[8] Vilma, as co-captain of the defense, received the harshest penalty of any of the offenders.[9] On May 2, 2012, the Commissioner handed down a one-year suspension to Vilma for violating the terms and conditions of the league's CBA.[10] What followed was a series of appeals and challenges to a Commissioner who has been described as acting "with more power than any Commissioner in U.S. sports history" due to his implementation of new policies regarding player discipline.[11]

This Note will examine two specific implications from the court's decision in *Vilma*. First, this Note will examine the lengthy history of preemption under the Labor-Management Relations Act, including its application to the NFL, in determining whether the court made the right decision in *Vilma*. Next, this Note will analyze the history of the NFL's CBA and what changes might be on the horizon regarding player discipline and neutral arbitration following the case.

II. FACTS AND HOLDING

On May 17, 2012, New Orleans Saints linebacker Vilma filed suit against NFL Commissioner Roger Goodell ("Goodell" or "the Commissioner") in the Eastern District of Louisiana, alleging eleven separate counts of slander, libel, and intentional infliction of emotional distress.[12]

Continued on page 14.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 13.

Vilma's claims for slander, libel, and intentional infliction of emotional distress were based on six different statements made by Commissioner Goodell during the course of the bounty scandal investigation process.[13] The Commissioner moved to dismiss Vilma's allegation on the basis that Vilma had failed to state a claim upon which relief could be granted under FRCP 12(b)(6) and that Vilma's claims were preempted under the Labor-Management Relations Act ("LMRA").[14] Goodell also argued that Vilma's claims should be dismissed because the suit was barred under the dispute resolution provisions of the CBA.[15] Vilma countered that the Commissioner's statements were not made within the confines of the the displinary procedures in the league's CBA and were not part of the task or function of the Commissioner's office.[16]

On January 17, 2013, the court granted the Commissioner's 12(b)(6) motion to dismiss, finding that Vilma inadequately pled his causes of action and merely relied on conclusory statements and a "bare assertion of outrageous conduct."[17] The court also found that Goodell was acting within his duties as Commissioner when he made the aforementioned statements and was not acting in his individual capacity.[18] Therefore, Vilma's claims against Goodell were preempted under the LMRA because they required interpretation of the Commissioner's duties according to the CBA.[19] Though the court dismissed Vilma's claims, it rebuked the Commissioner for his actions, stating: "[H]ad this matter been handled in a less heavy handed way, with greater fairness toward the players and the pressures they face, this litigation and the related cases would not have been necessary."[20] The district court ultimately dismissed Vilma's case, finding no remedy in law for a football player accused of conduct detrimental to the game of football, despite the fact that these accusations were made outside of the disciplinary procedures found in the league's CBA.

III. LEGAL BACKGROUND

The NFL has had a long and turbulent history with labor disputes arising from its CBA. In order to fully understand the issues Vilma presents, it is important to contextualize the development of the LMRA, its application to the NFL, and how courts have handled preemption cases involving slander and defamation under the LMRA.

A. *The NFL and its History of Collective Bargaining*

In 1968, the NFL and the NFLPA entered into an initial CBA following the culmination of a labor stoppage at the beginning of the NFL's 1968 regular season.[21] The first strike in the history of professional sports allowed the players to acquire a pension fund for players and, eventually, higher salaries and minimum benefits.[22]

The framework for modern NFL CBAs came in 1993, where players agreed to a hard salary cap, in exchange for the right to unrestricted free agency.[23] Since 1993, the NFL's CBA has been extended without any major work stoppage or litigation.[24] The NFL's current CBA was ratified by the NFL and the NFLPA in 2011.[25] Article 46 of the CBA provides a process for player discipline and appeals.[26] Upon issuing notice to the players and consulting with the executive director of the NFLPA, the Commissioner may administer appropriate fines or suspensions based on the findings of his investigation into player misconduct.[27] Article 46 also provides that the Commissioner "shall appoint one or more designees to serve as hearing officers" in cases of appeal.[28] Unlike nearly all other major professional sports, the NFL's CBA does not require a neutral arbitration panel in cases involving player discipline.[29] In fact, the Commissioner "may serve as hearing officer in any appeal... at his discretion."[30] The majority of the provisions contained in Article 46 were untouched by the ratification of the new CBA in 2011.[31] Nonetheless, Article 46 has been described as "one of the most controversial parts" of the CBA because of the Commissioner's "iron fist approach to player conduct and discipline."[32] Article 46 has now stemmed a controversy in *Vilma*, not in the abstract sense, but because we have a case of actual harm to an employee of the NFL.

B. *The Power of Preemption and The Supremacy Clause*

The crux of the *Vilma* decision turned on whether state law claims of slander, libel, and intentional infliction of emotional distress were preempted under the federal Labor-Management Relations Act.[33] The LMRA was enacted by Congress in 1947 in an effort to determine the rights and duties of employers and employees and to "provide orderly and peaceful procedures" for

Continued on page 33.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 10.

exclusive advertiser of soft drinks during the broadcast of all HNIC games."[36] Additionally, Pepsi also sponsored a contest, "Diet Pepsi $4,000,000 Pro Hockey Playoff Pool," that invited individuals to collect bottle cap lids that had scratch off's, and if the city or state that was home to an NHL team appeared, the individual won a prize.[37] To evade liability, Pepsi did not use official NHL logos or team names and included a disclaimer that Diet Pepsi was not associated with or sponsored by the NHL. The court found that consumers would not likely be confused or misled by Pepsi's advertisements or competition, and therefore dismissed the case.[38]

At the London Olympics in 2012, NIKE, a non-sponsor, used marketing assets that already belonged to it to take advantage of the gaps in the Olympic rules.[39] NIKE created a shoe known as the "Volt Shoe," and it was worn by over 400 athletes at the Olympic Games.[40] The shoe's bright yellow/green color was "scientifically designed to be a pupil-popping consumer magnet," because the human eye is most sensitive to the yellow/green color.[41] The shoe flirted with violating Rule 40 of the Olympic Charter, which "limits athletes competing in the Olympic Games from appearing in advertising during and shortly before the Olympic Games."[42] However, the rule does not prohibit athletes from wearing certain brands, just prohibits them from promoting the products.[43] While sponsors reportedly paid $155 million for its official London 2012 sponsorship, Nike stole the show for free.[44]

Also, during the London Olympics NIKE aired a commercial, "Find your Greatness," featuring different individuals training and participating in sporting games in various London cities throughout the world.[45] This commercial clearly alluded to the London Olympics, but since it never used Olympic marks or pictured London, England, there was no legal action that could be taken.[46]

Another famous ambushing campaign took place at the 2010 World Cup during the Holland versus Denmark match.[47] Budweiser was the official beer, but Bavaria Beer sent thirty-six attractive females to the match wearing short orange dresses bearing the Bavaria Beer logo. The group of women were ejected from the match, but not before Bavaria obtained the publicity it was seeking.[48]

More recently, Coke ambushed the 2014 Oscars. During the broadcast, Oscars host Ellen DeGeneres ordered pizzas from a local Los Angeles pizzeria Big Mama's & Papa's.[49] The pizzas were delivered and served to the first few rows of the audience and on each pizza box was a large Coca-Cola logo.[50] Coke had previously sponsored the Oscars, but decided to sit this year out and it paid off. Analytics determined that Coke's brand exposure was worth $1.4 million, and Coke got it for free while Pepsi paid out around $8.5 million to be an official sponsor.[51]

All of these examples are of successful ploys that non-sponsors have conducted to capitalize on the popularity of an event. These tactics have saved non-sponsors millions of dollars from paying high sponsorship fees while reaping the benefits of an official sponsorship. The ambushers have been diligent with their tactics—not using protected marks—and tiptoed along a blurry line avoiding legal ramifications

III. Defending Against Ambushers

There are two legal instruments a sponsor can use to bring an ambush marketing claim in the U.S.: the Lanham Act and, for the Olympics, a sponsor can use the ASA. Since ambush marketing is extremely similar to the concept of false association, it is often litigated under §43(a)(1)(A) of the Lanham Act. In addition to the Lanham Act, the United States Olympic Committee (USOC) was given a broader range of rights to protect Olympic trademarks than the already established trademark laws under the Lanham Act.[52] The USOC has exclusive control over Olympic trademarks and does not require consumer confusion, like the Lanham Act, but it is not absolute.[53] The ASA cannot prevent noncommercial use of protected Olympic marks.[54]

A. *Lanham Act*

The law on trademarks is ill-adapted to prevent ambush marketing because it requires a sponsor to prove consumer confusion.[55] The Act permits a civil action against any person who, on or in connection with any goods or services…uses in

Continued on page 16.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing
Continued from page 15.

commerce any word, term, name, symbol, or devise…or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods.[56]

The likelihood of confusion analysis often does not apply to the facts of ambush cases because ambushers do not use protected marks.[57] Therefore, the consumer confusion requirement often deters sponsors from bringing claims.

However, there has been one successful claim brought under the Lanham Act in *Boston Athletic Association (BAA) v. Sullivan*.[58] In this case the defendants had been selling T-shirts with terms associated with the Boston Marathon printed on them.[59] The BAA, the organization that conducts the Boston Marathon, registered "Boston Marathon" and "BAA Marathon" as protected marks.[60] The defendants did not use any of BAA's protected Marks on its shirts. Nevertheless, the BAA sued alleging the defendants T-shirts imprinted with the words "1986 Marathon" on the top, a picture of runners in the middle, and "Hopkinton-Boston" on the bottom infringed on its protected marks.[61] The District Court found that BAA's rights did not extend beyond the exact marks registered and that there was no consumer confusion.[62] The BAA appealed to the First Circuit, which stated that the central issue was consumer confusion.[63] For this case the court focused on "whether the purchasing public is likely to believe that the sponsor of the Boston Marathon produces, licenses, or endorses defendants' shirts."[64] The First Circuit held that even though the defendants did not use the protected marks, "there can be no doubt that the language and design on defendants' shirts intentionally calls attention to an event that has long been sponsored and supported by the BAA,"[65] and that the shirts were "clearly designed to take advantage of the Boston Marathon and to benefit from the good will associated with its promotion by [the BAA]"[66] Therefore, the First Circuit ruled in favor of BAA and found that the defendants violated the Lanham Act.[67]

The approach taken by the First Circuit in *Sullivan* greatly favors official sponsors. The court's inquiry closed the gap that ambushers had been previously sliding through by creating a misleading association with the event without directly infringing on protected marks. However, no other courts have followed this precedent.

During the 2000 summer Olympics, non-sponsor Nabisco launched a campaign for its Fig Newton cookies that had an ancient Olympian throwing the discus.[68] The ad read "[t]he ancient Olympians worshipped the fig and used it for energy during training."[69] Powerbar, an official sponsor, complained to the USOC that this ad infringed on its rights as an official sponsor.[70] Nabisco decided to discontinue the ad and settled out of court, so there was no evaluation of whether the ad violated the Lanham Act,[71] but as long as the claim that ancient Olympians ate figs was true, the ad would not violate the Lanham Act because there would likely not be consumer confusion.

While the Lanham Act appears on its face to provide protection for official sponsors, it clearly falls short. The Act does not extend to the indirect association that a company can create with an event simply by depicting or using images that are similar to the protected marks. The Sullivan case is the lone precedent for covering this gap and has yet to be followed by other courts.

B. *ASA*

While the ASA does extend trademark rights beyond the Lanham Act by not requiring sponsors to prove consumer confusion, it still fails to provide the necessary protection to sponsors. In order for a claim to be successful under the ASA, a non-sponsor has to use USOC protected marks and use them in commercial speech.[72] By requiring non-sponsors to use protected marks and the speech to be commercial, ambushers have easily found ways around the law. For example, the USOC sued American Media Inc. (AMI) for allegedly ambushing the 2000 Olympic Games by publishing a magazine entitled "OLYMPICS USA,"[73] using "the Olympic symbol and the word Olympic."[74] The USOC brought suit against AMI under the ASA.[75] "The USOC claimed that AMI had violated the ASA by using the USOC's marks for commercial speech and to create a false association between the USOC and AMI.[76] The USOC pointed to the fact that the magazine had the word "Olympic" on its cover and used various other unauthorized USOC protected marks.[77] The court found that, even though the magazine was sold for profit, that

Continued on page 17.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 16.

it was not commercial speech because "[a] profit motive…is irrelevant to the inquiry of whether the content of…speech…is…commercial."[78] The court held that the ASA was not applicable because it does not provide protection over the use of Olympic marks in non-commercial speech.[79]

Also, in *Stop the Olympic Prison v. USOC*, the court examined the scope of protection that is afforded to the USOC's protected marks.[80] In this case the plaintiff, Stop The Olympic Prison, or S.T.O.P, created a poster that had the words "STOP THE OLYMPIC PRISON" printed on the top and a picture of the Olympic rings behind five vertical steel-grey bars.[81] S.T.O.P. is a nonprofit organization that has sold some of the posters for a dollar, but mainly has given the posters away for free.[82] The purpose of the poster was to publicize and generate public opposition to the plans to convert the Olympic Village in Lake Placid into a prison.[83] The USOC wrote a cease and desist letter to S.T.O.P requesting that it stop using the word "Olympic" and the Olympic rings because it was violating the ASA.[84] S.T.O.P refused to comply and brought this suit against the USOC for declatory relief.[85] S.T.O.P claims that it has the right under the First Amendment "to print and distribute their poster," and "to the use of the word 'Olympic' and the symbol of the interlocking rings in expressing (their) opposition to the construction of the Raybrook (sic) prison."[86] Further, S.T.O.P claims that its use of the word "Olympic" and use of the interlocking rings does not violate any trademark rights.[87] The court found that ASA could not be interpreted to mean that only the USOC and its licensees may use the word Olympic and related symbols.[88] Therefore, the court found it necessary to determine a range of uses the USOC may restrict.[89] The court stated the Congress' objective was to establish strong protection for Olympic symbols to ensure a market value.[90] The court found that ASA appears to have been designed to prevent individuals from registering Olympic words and symbols as trademarks in connection with goods or services; therefore, the court concluded that the poster did not violate the ASA because it was not used "for purposes of trade."[91]

Converely, in *San Francisco Arts & Athletics Inc (SFAA) v. USOC*, the United States Supreme Court upheld the USOC statutory right under the ASA to prevent unauthorized use of Olympic marks.[92] SFAA was using the words "Gay Olympic Games" on letterhead, mailings, and in newspapers, as well as selling t-shirts, bumper stickers, and other merchandise with "Gay Olympic Games" written on it.[/] The USOC notified SFAA that its use of "Olympic" was in violation of the ASA, and USOC requested that it stop using the word Olympic to describe its planned game event.[94] SFAA failed to stop producing the materials, and the USOC brought suit under the ASA for injunctive relief.[95] The trial court granted summary judgment and permanent injunction, and the court of appeals affirmed, holding that the ASA "granted the USOC exclusive use of the word 'Olympic' without requiring the USOC to prove that the unauthorized use was confusing."[96] On appeal to the Supreme Court, SFAA tried to argue that the word "Olympic" is generic and cannot gain trademark protection and that the First Amendment prohibits Congress from granting trademark protection to a word.[97] The Court dismissed these claims and held that the word "Olympic" has commercial and promotional value because of the USOC's labor, efforts, and expense and therefore, Congress' decision to grant the USOC a limited property right in the word "Olympic" is within trademark law protections.[98] For the First Amendment claim, the Court stated that the First Amendment does not prohibit Congress from granting trademark protection to a word.[99] The Court stated that SFAA's unauthorized use of the word "Olympic" undercut the USOC's value in the word, a problem that the ASA was intended to protect against.[100]

While the ASA gives the USOC greater protection over its marks by eliminating the consumer confusion requirement, it still leaves a gap in protection. Ambushers are still able to use protected marks in non-commercial speech, and even without the use of protected marks, ambushers can create a false impression that it is associated with the Olympics. Neither the Lanham Act nor the ASA attack the heart of the problem with ambush marketing.

IV. Other Countries Ambush Marketing Laws

The United States is considered very lenient with its treatment of ambush marketing because it does not have any specific legislation that directly targets it. Many other countries have taken the steps necessary to provide sponsors with extra protection against ambushers by enacting anti-ambushing laws

Continued on page 18.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 17.

A. *South Africa*

South Africa has enacted the Trade Practices Act and the Merchandise Marks Act (MMA).[101] Additionally, the South African Advertising Standards Authority has included in part of its code a list of unacceptable sponsorship practices.[102] The Trade Practices Act:

> Prohibits certain types of advertisements, statements, communications, descriptions and indications and provides specifically that no person shall in connection with a sponsored event, make, publish or display any false or misleading statement, communication or advertisement which represents, implies or suggests a contractual or other connection or association between that person and the event, or the person sponsoring the event or cause such statement, communication or advertisement to be made, published or displayed.[103]

This Act puts a strong mechanism into place to attack the undesired interference of sponsorship created by ambush marketers by prohibiting any unauthorized statements or advertisements that create a false association with the event.

The MMA protects events that have been given "protected status" by the South African government.[104] The MMA prohibits, during the period of the event, any individual from using a trademark in relation to a protected event, which is intended to achieve publicity for that trademark.[105] The MMA adds another layer of protection by restricting the use of a company's trademark in association with an event. Further, any violation of the Trade Practices Act or the MMA is considered a criminal offense, which is punishable by a fine and/or imprisonment.[106] Moreover, civil liability can also stem from violations of the Acts when a sponsor brings an unlawful competition claim.[107]

For example, in *Fifa v. Metcash Trading Africa*, the High Court ruled against Metcash for its use of its trademark "2010 POPS" in combination with the African Flag and soccer balls.[108] The Court found that Metcash tried to obtain a special promotional benefit by alluding to the 2010 FIFA World Cup Tournament and therefore violated the MMA.[109] The court issued a restraining order against Metcash to prohibit any further efforts of competing unlawfully with FIFA.[110]

The Trades Practice Act and the MMA provide sponsors with adequate protection from ambushers. Both these Acts specifically target the issue of ambush marketing, deter free riding of an events popularity, and restore the value of an exclusive sponsorship.

B. *Canada*

In preparation for the 2010 Winter Olympics in Vancouver, Canada made a stand to protect its sponsors from the threat of ambush marketing.[111] The Canadian government adopted Bill C-47 entitled "The Olympic and Paralympic Marks Act."[112] Canada passed this Act to fill the gaps left by trademark and copyright infringement law.[113] Specifically, Section 4(1) of the Act addresses international efforts to impair official sponsorship rights by non-sponsors seeking to capitalize off of the Olympics goodwill.[114] Section 4 states:

> No person shall, in association with a trademark or other mark, promote or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that a person's business, wares or services are approved, authorized or endorsed by an Olympic organizing committee or that a business association between them exists.[115]

When determining if ambush marketing has occurred, the courts consider whether common expressions like "medals," "winter," and "games" are used.[116] This approach is similar to the analysis the First Circuit used in *Sullivan*: determining whether the words used in the marketing campaign call attention to the particular event, in attempts to capitalize on its good will.[117] Furthermore, the Vancouver Olympic Committee had established a list of acts that will automatically be considered ambush marketing. This

Continued on page 19.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 18.

list includes (1) Olympic related contests, such as using tickets to the Olympic Games as a prize in a contest, (2) congratulatory advertisements for athletes, (3) Olympic related giveaways (posters and stickers), (4) Olympic-related publications (magazines, calendars, etc), and (5) Olympic-related hospitality services.[118]

While Bill C-47 is quite comprehensive and provides extra protection against ambushers, the Act only covers the Olympics and does not apply to any other major events taking place in Canada. Furthermore, there has been concern that the Act is over-inclusive and punishes companies that are not ambushing, but whose actions still fall under the Act.[119] For example, during the 2010 Vancouver Olympics, the IOC tried to sue a small family-run restaurant because it was called "Olympia Pizza" and the IOC felt this name caused confusion with the protected "Olympic" symbol, despite the restaurant being open for years prior to the Olympics coming to Vancouver.[120] The IOC sent a letter to Olympia Pizza demanding that it change its name and remove a sign that depicts the Olympic rings, which have been part of the restaurant's logo for years.[121] This action received tons of media attention, resulting in bad publicity for the Vancouver Olympic Committee and the IOC.[122] This kind of bad publicity, for a hosting country's Olympic Committee and the IOC, can be very costly, therefore it is important to have a narrowly defined rule.

C. *New Zealand*

To try and eliminate ambush marketing, New Zealand passed the Major Events Management Act 2007 ("MEMA").[123] MEMA creates regulatory intervention in five areas: (1) ambush marketing by association, (2) ambush marketing by intrusion, (3) use of protected marks, (4) ticket scalping (the resale of tickets to events above the original ticket price), and (5) "pitch invasion and missile-throwing."[124] The latter two areas were added to the Act late into its passage and do not really enhance the protection of ambush marketing.[125] Similar to South Africa, New Zealand has enacted a broad framework that can be applied to a variety of events that have been declared worthy of protection.

MEMA exposes the deceitful tactics of ambush marketing and prohibits those tactics. MEMA is similar to South Africa's laws in that it pinpoints the essence of ambush marketing and restricts the company's attempt to create any association with an event, either through direct association or intrusion. The Act further prohibits ambushers from advertising within a defined geographical zone or anywhere visible from that zone, during a specified period.[126] This law does a great job of filling the gaps left by traditional trademark law.

V. Benefits of Anti-ambushing Laws

By constructing a precise and tailored anti-ambush marketing law, the United States courts would be able to adequately balance free speech interests in a competitive market with the interests of an official sponsor.[127] Anti-ambush marketing laws are necessary because official sponsors are losing out on association with the Olympics and other major events. For example, according to the Sochi 2014 Brand Marketing Outlook, ten of the top fifteen brands associated with the Sochi Winter Games were non-Olympic partners, a frightening fact for official sponsors.[128] An anti-ambushing law would ensure exclusivity of sponsorships and stop the scare of devaluation of sponsorships. It is critical for an event to be able to guarantee the value of a sponsorship because, if it loses that ability, sponsors may want reduced sponsorship fees or withdraw from the sponsorship altogether, both detrimental to the economic well-being of major events dependent on sponsorship money.

Sponsorships have three main functions: (1) creation of consumer awareness, (2) promoting consumers' action, and (3) enhancing sponsors image.[129] Ambush marketing interferes with all three of those functions. By enacting a law similar to the ambush marketing laws found in South Africa and New Zealand, the United States will be restoring the underlying interest of sponsorships and ensuring that official sponsors are the only companies gaining an advantage from the event.

Other countries have taken steps to protect against ambush marketing, particularly countries that are hopeful to host a major international event. The United States needs to follow in these countries' footsteps and provide the necessary protection to ensure the exclusivity of sponsorships and financial stability for major events.

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 19.

1 Brian Pelanda, Comment, *Ambush Marketing: Dissecting the Discourse*, 34 HASTINGS COMM. & ENT.L.J. 341, 354 (2011).

2 Jamie B. Bischoff, Jeffrey P. Curry, & Ingrida Berzins, *Dispatch From the Trademark Wars: Ambush Marketing and the Arena of Sports*, THE METRO. CORPORATE COUNSEL, Feb. 1, 2005, at 19.

3 *Id.* Emerging Issues Comm., *Policy and Advocacy Board Resolutions Ambush Marketing Legislation*, WWW.INTA.ORG, (Nov. 10, 2010), http://www.inta.org/Advocacy/Pages/AmbushMarketingLegislation.aspx.

4 USOC v. Am. Media, Inc, 156 F. Supp.2d 1200, 1204 (D. Col. 2001).

5 Bischoff, *supra* note 2.

6 Sudipta Bhattacharjee, *Ambush Marketing—The Problem and the Projected Soultions vis-à-vis Intellectual Property Law—A Global Perspective*, 8 J. INTELL. PROP RTS. 375, 375 (2003).

7 Bischoff, *supra* note 2.

8 Pelanda, *supra* note 1, at 343.

9 *Id.*

10 *d.*

11 *Id.*

12 SAM FULLERTON, SPORTS MARKETING 111 (2d ed. 2009).

13 *Id.*

14 *Id* at 112.

15 *Id.*

16 *Id.*

17 *Id.*

18 Elie Ofek, *The World Cup Brand Winner: Adidas or Nike?*, WWW.LOGS.HBR.ORG (July 9, 2010 10:25 A.M.), http://blogs.hbr.org/2010/07/the-world-cup-winner-adidas-or/.

19 *Id.*

20 *Id.*

21 Fullerton, *supra* note 12, at 112.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 111.

26 *Id* at 113.

27 *Id.*

28 *Id* at 113–14

29 *Id.*

30 *Id.*

31 *Id.*

32 NHL v. Pepsi-Cola Can. Ltd., 70 B.C.L.R.2d 27 (S.C.R. 1992).

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Noel Young, *How Nike Pulled off Brilliant Ambush Marketing in the Olympics*, WWW.THEDRUM.COM, (Aug 22, 2012), http://www.thedrum.com/news/2012/08/22/how-nike-pulled-brilliant-ambush-marketing-olympics.

40 Bill Briggs, *Nike Takes Marketing Gold with Neon-yellow Shoes*, BUSINESS.NBCNEWS.COM (Aug. 10, 2012), http://business.nbcnews.com/_news/2012/08/10/13205163-nike-takes-marketing-gold-with-neon-yellow-shoes

41 *Id. see also* Olympic Rule 40.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 Promo Veritas, *The Best Ambush Marketing Campaigns of All Time*, WWW.PROMOVERITAS.COM (Nov. 11, 2013), http://www.promoveritas.com/Blog/Best-Ambush-Marketing-Campaigns.

48 *Id.*

49 Abe Sauer, *Coke Steals Pepsi's Thunder at Oscars Turned Ambush Marketing Awards*, WWW.BRANDCHANNEL.COM (Mar. 3, 2014), http://www.brandchannel.com/home/post/140303-Oscars-Ambush-Marketing.aspx

50 *Id.*

51 *Id.*

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 20.

52 Brian White, *Review Essay: Who are the Real Competitions in the Olympic Games*, 12 J. Contemp. Legal Issues 227, 228 (2001).
53 *Id*.
54 *Id*. at 229. *See also* Ted Stevens Olympic and Amateur Sports Act (ASA) 36 U.S.C § 220501 et seq. (2013). [hereinafter ASA].
55 Jean-Michel Marmayou, *Major Sports Events: How to Prevent Ambush Marketing*, Afr. Sports Law & Bus. Bull., 39, 44 (2013).
56 Lanham Act, 15 U.S.C. § 1125(a)(A) (2013). [hereinafter Lanham Act].
57 Jason K. Schmitz, *Ambush Marketing: The Off-field Competition at the Olympic Games*, 3 NW. J. Tech. & Intell. Prop. 203, 207 (2005).
58 Boston Athletic Ass'n v. Sullivan, 867 F.2d 22 (1st Cir. 1989).
59 *Id*. at 25.
60 *Id*. at 24–25.
61 *Id*. at 25.
62 *Id*. at 28
63 *Id*.
64 *Id*. at 28–29.
65 *Id*. at 33.
66 *Id*.
67 *Id*. at 34.
68 USOC v. Nabisco, Case No. C-00-3086, 10–11 (N.D. Cal., Aug. 25, 2000).
69 *Id*.
70 Pelanda, *supra* note 1, at 348.
71 *Id*.
72 ASA.
73 USOC v. Am. Media, Inc, 156 F. Supp.2d 1200 (D. Col. 2001).
74 *Id*.
75 Pelanda, *supra* note 1 at 348.
76 Am. Media, Inc., 156 Supp.2d at 1203.
77 *Id*.
78 *Id*. at 1208–1209 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations 93 S. Ct. 2553, 2558 (1973)).
79 *Id*. at 1209.
80 Stop the Olympic Prison v. USOC, 489 F.Supp. 1112, 1113 (S.D.N.Y Feb 15, 1980).
81 *Id*. at 1114
82 *Id*. at 1115.
83 *Id*.
84 *Id*. at 1116.
85 *Id*.
86 *Id*.
87 *Id*.
88 *Id*. at 1119
89 *Id*.
90 *Id*.
91 *Id*. at 1120–1121
92 107 S. Ct. 2971, 2977 (1987).
93 *Id*. 2982.
94 *Id*. at 2973
95 *Id*.
96 *Id*.
97 *Id*. at 2974
98 *Id*.
99 *Id*.
100 *Id*. at 2982.
101 Trades Practices Act 76 of 1976; Merchandise Marks Act 17 of 1941, § 15A (S. Afr.).
102 Spoor & Fisher, *Ambush Marketing*, Point (May 2010), at 7–8.
103 *Id*. at 8. (citing Trades Practices Act 76 of 1976).
104 *Id*.
105 *Id*.
106 *Id*.
107 *Id*.
108 *Id*. at 8–9 (citing FIFA v. Metcash Trading Africa, 2009 NO. 53304/07).

The Unofficial Sponsor: Why the U.S. Needs to Regulate Ambush Marketing

Continued from page 21.

109 *Id.* at 9.

110 *Id.*

111 Geneviéve Marcotte, Heenan Blaikie & Cindy Bélanger, *Canada: Bill C-47: Tackling Ambush Marketing in Canada in the Olympic Context*, www.gala-marketlaw.com, http://www.gala-marketlaw.com/archives-52004/85-americas/99-canada-bill-c-47-tackling-ambush-marketing-in-canada-in-the-olympics-context (last visited May, 8 2014).

112 *Id.*

113 *Id.*

114 The Olympic and Paralympic Marks Act, 41st Par., 1st Sess. (2011-2013), *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5822996

115 Cindy Bélanger, *Bill C-47: The New Olympics For Ambush Marketers*, www.ipadvocate.ca (Nov. 30, 2007), http://www.ipadvocate.ca/bill-c-47-the-new-olympics-for-ambush-marketers/.

116 *Id.*

117 Boston Athletic Ass'n , 867 F.2d 22, 33.

118 Bélanger, *supra* note 119.

119 *Ambush Marketing and "The Olympic and Paralympic Marks Act": What this means for Businesses and Olympic Marketing,* Adver. & Mktg. Bull. 2 (2007), http://mcmillan.ca/Files/AmbushMarketing_0707.pdf.

120 *Id.*

121 *Id.*

122 *Id.*

123 Wilson & Harle, Ambush Marketing Law in the Year of Rugby, 1 (2011), *available at* http://www.wilsonharle.com/assets/Ambush-Marketing-Law-MEMA-June-final-.pdf.

124 *Id.* (citing Major Events Management Act 2007 (N.Z.)).

125 *Id.*

126 *Id.*

127 Pelanda, *supra* note 1, at 362.

128 Emily Goddard, *Exclusive: Non-Olympic Partners Winning "Ambush Marketing" Race to Sochi 2014, says report*, www.insidethegames.biz, (Jan 5, 2014), http://www.insidethegames.biz/olympics/winter-olympics/2014/1017544-ambush-marketing.

129 Lingling Wei, *Legal Regulation of ambush Marketing: Where is the Base?,* www.epip.eu, http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Papers/WEI%20Lingling.pdf (last visited May. 8, 2014).

TESLAW Journal Articles Hypelinked

As part of our continuing effort to improve the TESLAW Journal we have added hyperlinks to many citations. Each hyperlink will take the reader to the State Bar of Texas' free research service, Casemaker. If not previously registered for Casemaker, a reader will need to subscribe using their bar card number.

Using the "remember me" function ensures that sign-in will not be necessary each time a reader clicks a hyperlink. Unfortunately, Casemaker does not support all secondary sources and out of Texas citations — so not all citations are hyperlinked. But we and Casemaker will get better with coming Journals.

Examining Morals Clauses in the Entertainment Industry

Continued from page 12.

in favor of the continued need for morals clauses in the television industry, the fact remains that the expectations of the public with respect to personal behavior of performers has changed greatly, and the burden should be on the networks to demonstrate good cause why reliance on a morals clause to sever an employment relationship is appropriate.

A. Case Study: *Duck Dynasty*

In December 2013, *GQ Magazine* published its interview of Phil Robertson, the *Duck Dynasty* patriarch. In the course of the interview, Robertson gave candid answers to a number of questions covering political and social issues, and he expressed his belief that blacks were "happier" in the pre-civil-rights-era South.[24] When asked, "[w]hat, in your mind is sinful?", Robertson replied, "[s]tart with homosexual behavior and just morph out from there. Bestiality, sleeping around with this woman and that woman and that woman and those men."[25] Paraphrasing Bible Scripture, specifically a letter from Saint Paul to the Corinthians, Robertson stated further, "[d]on't be deceived. Neither the adulterers, the idolaters, the male prostitutes, the homosexual offenders, the greedy, the drunkards, the slanderers, the swindlers – they won't inherit the kingdom of God."[26]

Not surprisingly, gay rights groups vociferously objected to the comments attributed to Mr. Robertson in the magazine story, with GLAAD issuing a statement reading, "Phil's decision to push vile and extreme stereotypes is a stain on A&E and his sponsors who now need to reexamine their ties to someone with such public disdain for LGBT people and families."[27] Fearing "backlash" from its viewers and, more importantly, its corporate sponsors, A&E suspended Robertson's contract indefinitely with the network.[28] While the specifics of Robertson's contract and the reason for his temporary suspension have not been released, A&E did release the following statement to *Entertainment Weekly*: "We are extremely disappointed to have read Phil Robertson's comments in GQ Magazine, which are based on his own personal beliefs and are not reflected in the series *Duck Dynasty*. His personal views in no way reflect those of A&E Networks, who have always been strong supporters and champions of the LGBT community."[29] Two logical inferences can be drawn from A&E's statement to *Entertainment Weekly*. First, it would not be surprising if A&E wielded the morals clause to suspend Robertson's contract indefinitely; second, A&E feared, based on its knowledge of its viewership, the dire consequences that could result from being perceived as endorsing Robertson's comments over any backlash from its religious right audience.

If A&E in fact used the morals clause to suspend Phil Robertson based on the statements he made in the interview, this is a dubious use, at best, of the clause. When A&E agreed to air *Duck Dynasty*, a show that celebrated the lifestyles of Phil Robertson and his family, it was well known that the Robertsons were born-again Christians who championed a conservative social agenda.[30] The network offered the family a television series specifically because of their controversial, bible-thumping personalities, expecting that an "outrageous" family would attract viewers, thus increasing ratings and drawing advertisers to the network. In hiring the Robertson family, A&E took a calculated risk that the quirky, backwards personalities and appeal of the Robertsons would deflect the public's attention away from some of their more controversial views. The network expected, and indeed hoped, the family would act in an outrageous way and that its calculated gamble would pay off. And, in fact, the decision by A&E paid off handsomely for several years, given that *Duck Dynasty* quickly became one of the most-viewed reality shows in the history of television.

However, after the interview was published, the network panicked, and it sought immediately to insulate itself from the public backlash. Essentially, A&E attempted to punish Phil Robertson for being true to his own values – the very same values that the network had not only accepted but sought to capitalize upon when it decided to air the series. This leads to an obvious question – should a network be allowed to use the morals clause to punish behavior that it knew about, and indeed encouraged, merely because the network miscalculated how the public would react to the actor's conduct, or, in the *Duck Dynasty* case, Robertson's personal religious beliefs?[31] Note that the network did not claim that Robertson acted in an immoral manner. Instead, its objection was based on Robertson's decision to publicly express a politically divisive religious belief. Are there circumstances where the network or studio should be held accountable for its own calculated business decisions? Put differently, is there an assumption of the risk argument to be made on the actor's behalf?

Continued on page 24.

Examining Morals Clauses in the Entertainment Industry

Continued from page 23.

B. When Must the Employer Assume the Risk?

Under certain circumstances, particularly when the television network or studio expects or endorses "misconduct" by an actor under contract, it seems reasonable that the studio should assume the risk, and be held to the contract, when its actor behaves consistently with expectations. This argument was initially proffered during the Red Scare, when the District Court for the Southern District of California ruled that the studio could not assert the morals clause to terminate a contract with an employee under circumstances where the studio had indicated to the actor that his "immoral" behavior had the studio's support.[32] Congress had charged Lester Cole, a screenwriter for Metro-Goldwyn-Mayer (MGM), with contempt of Congress because of his refusal to testify in a hearing by the Committee on Un-American Activities. His employer, Loews, Incorporated (operating under its trade name MGM), thereafter suspended his employment for breach of contract.[33] Loews claimed that Cole had breached the morals clause of his contract, which required the studio's employee to "conduct himself with due regard to public conventions and morals… and to not commit any act or thing that will tend to degrade him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community."[34] This morals clause also prohibited the employee from behaving in a manner that would "prejudice the product or the motion picture, theatrical or radio industry in general."[35] The jury entered a verdict in favor of Cole, answering in the negative every question presented as to whether Cole's conduct offended the public's conscience.[36]

Attaching his addendum to the jury's verdict, the district court judge agreed with the jury's conclusion, finding that Cole's acts did not warrant suspension under the morals clause.[37] In addition to agreeing with the jury's findings, the judge condemned Loews for its vacillation after the House Committee's action, including its delayed response in suspending Cole's contract.[38] Before the hearing, executives of Loews had allegedly made statements to Cole leading him to believe that they were unconcerned about allegations that he was a Communist. According to the district judge, Cole had relied on those statements "in deciding upon a line of conduct before the Committee."[39] In fact, Loews had initially indicated to Cole that it was entirely satisfied by his comments to the Committee, and only after "public uproar" did Loews try to save its own skin "by throwing these 'unfriendly' witnesses to the wolves."[40] Finding that Cole not only acted pursuant to Loews' rules, but with its support, the district court found his refusal to testify before the House Committee did not constitute breach of the morals clause of his employment contract.[41]

Although explicitly stated, a fairly strong inference can be drawn from the district court's opinion that morals clauses, like all other contractual provisions, come attached with the customary caveat that a party seeking to assert the clause must demonstrate that it has acted in good faith, and that it is not misusing the clause to escape a difficult situation partially of its own making. Put differently, a morals clause is not an unfettered termination right in the hands of the studio that is disconnected from the studio's own actions or expectations. If the studio supports (or, of relevance today, promotes) its employee's actions, and the employee continues to act in a certain way in reliance on the studio's support, the studio should be deemed to have waived the right to invoke the morals clause even in the wake of public discontent or uproar.

Unfortunately, this ruling was reversed by the Court of Appeals for the Ninth Circuit, which held that the jury had exceeded the scope of its authority since the only issue for the jury to decide was whether Cole was guilty of contempt of Congress. In the view of the Ninth Circuit, if the jury found that Cole was guilty of contempt, it was within Loews' authority to suspend Cole. Why? Because a violation of the law would be a separate event that would give rise to a termination right under the contract, particularly since a conviction would in nearly all circumstances be demonstrable evidence of a breach of the morals clause.[42] In other words, the jury had failed to properly consider whether Cole's actions gave Loews a right to terminate the contract because they were unlawful. Nevertheless, the views of the district court judge were instructive, because they demonstrated that a court might not be inclined to approve the use of a morals clause as an open-ended means for a studio to distance itself from an employee who had become publicly controversial.

C. Are Morals Clauses Ambiguous?

Setting aside the question as to whether an employer should be deemed to have assumed the risk of the behavior of its employees that it has previously endorsed, courts should reject broadly drafted morals clauses as invalid, due to their vagueness and ambiguity. It is important to note that employment relationships in the entertainment industry override the default rule

Continued on page 25.

Examining Morals Clauses in the Entertainment Industry

Continued from page 24.

that employment relationships are generally "at-will," with the employer having the right to terminate employment and end the relationship without a demonstration of cause[43] The overwhelming majority of employees in the entertainment industry (for the purposes of this paper, the talent) sign employment contracts with studios, television networks, or other participants in the industry. Unlike "at-will" employment, where the employer may terminate an employee for any reason or for no reason at all, employment contracts require employers who wish to terminate the employment relationship without further liability to establish the existence of an event constituting "cause," with the contract enumerating specific circumstances or events that constitute cause.[44] If the party breaches one or more of these terms, the employer will have the right to terminate the contract without financial consequences or liability.[45]

When contracts require the employer to demonstrate the existence of "cause" in order for the employer to terminate the relationship without incurring legal liability, the employee has little room for grievance because he was put on notice at the time of the creation of the contract of behavior or actions that will give rise to a right to termination of the relationship by the employer. Before signing the contract, the employee had the opportunity to negotiate the contract's terms, and if he did not wish to conform his behavior to the standards articulated in the contract, he had the right to either negotiate more lenient terms or refuse to enter into the contract. In other words, both parties were well informed of their contractual duties before they agreed to perform. However, the breadth of a vaguely worded morals clause does not pass this test. Instead of proscribing specific conduct, actors are expected to act in a manner that is not immoral, a standard with little objectivity or notice of behavior that is impermissible, particularly in an era of rapidly changing social norms.

As stated above, when the morals clause was introduced in the 1920s, a film studio principally used the provision as a device to outwardly project to the public that it did not condone a star's bad behavior, protecting its own reputation when a star did behave in a manner that would turn audiences away.[46] Understanding that a morals clause would not entirely curb bad behavior, the provision, therefore, wasn't intended solely to reform unwieldy stars. When morals clauses are drafted broadly, however, they carry the threat of providing the actor with inequitable results, particularly when the definition of unacceptable behavior has been stretched to cover opinions that are not necessarily "immoral," but unpopular. To invoke the morals clause in these cases should not be permissible, as the effect of the language is to undermine the parties' reasonable contract expectations by creating an unfair unilateral termination right in the hands of the studio.

When A&E allegedly invoked the morals clause to suspend Robertson's contract, the public's response, or at least the media's response, was uneasy, at best, and not only because A&E invoked the morals clause for an unpopular opinion. The discomfort was due in large part to the fact that the threat of employment termination was now being used to limit the exercise of free speech. The morals clause has long been questioned in entertainment contracts, with lawyers attempting to argue the clauses must not be given effect by the courts due to their ambiguity and vagueness. This strategy was offered in *Nader v. ABC Television*, with Nader's lawyers claiming that the morals clause should be unenforceable because it was "vague, overbroad and ambiguous."[47] The lawyers articulated that the parties had entered into a written contract; therefore, both sides did not intend for at-will employment. [48] Citing a Second Circuit opinion, the lawyers mused, "If this employment contract is to be read as one terminable at will, it may just as well never have been written."[49] In other words, a broadly drafted morals clause effectively allows the contract to be terminable at the unquestioned discretion of the employer, rendering largely meaningless the expected protection offered by this type of contract. For a termination clause to be exercisable, there should be "some objective benchmark against which [one] can measure the scope of the parties' contractual undertaking."[50] In the view of Nader's lawyers, because ABC had not established any "benchmarks" or boundaries as to what type of behavior would be deemed immoral, ABC should not have been permitted to invoke the morals clause to terminate Nader's contract. At the very least, ambiguous contractual language should render summary judgment improper, with the case to be decided by the jury.[51]

The Second Circuit rejected Nader's argument, holding that morals clauses have historically been held valid and enforceable despite their vague and ambiguous language.[52] However, bad facts can lead to bad law, as in this case, and the Second Circuit was likely swayed by the outrageousness of Nader's conduct, which was of the type that few reasonable persons would find morally acceptable. ABC had terminated Nader for selling cocaine to an undercover police officer, and the Court justifiably

Continued on page 26.

Examining Morals Clauses in the Entertainment Industry

Continued from page 25.

concluded that Nader's claim was without merit – clearly, his conduct fell within the scope of the contract's morals clause.[53] If Nader's conduct had been more borderline inappropriate, or at least not unlawful, the Court might have viewed Nader's arguments more favorably.

A North Carolina District Court has recently considered whether morals clauses are properly invoked when they are in response to conduct that is not immoral, but unpopular. Rashard Mendenhall, a running back for the Pittsburg Steelers, had signed a series of subsequent endorsement contracts with Hanesbrands, with the second contract including a broadly drafted morals clause. After Osama bin Laden was killed by U.S. Navy Seals, Mendenhall criticized the public's celebration of bin Laden's death, asking, "What kind of person celebrates death? It's amazing how people can HATE a man they have never heard speak. We've only heard one side."[54] He further questioned the September 11th terrorist attacks, stating, "I just have a hard time believing a plane could take a skyscraper down demolition style."[55] Hanesbrands released Mendenhall following his remarks, citing breach of the contract's morals clause.[56]

After Mendenhall filed suit for unreasonable unilateral action taken by Hanesbrands, the district judge denied the motion to dismiss filed by Hanesbrands, finding that the company's disagreement with Mendenhall's twitter statements did not necessarily trigger termination rights under the morals clause.[57] Specifically, the Court found that even discretionary termination rights under the morals clause are "subject to the implied covenant of good faith and fair dealing." Under this promise of good faith and fair dealing, Hanesbrands was not permitted to act arbitrarily, irrationally, or unreasonably in exercising its discretion.[58] Because the conduct in dispute was an unpopular opinion expressed by Mendenhall, "mere disagreement with Mr. Mendenhall's comments would not have triggered Hanesbrands' termination rights" under the morals clause.[59]

Unfortunately for those who believe that morals clauses need revamping, Mendenhall and Hanesbrands settled the issue before trial. The courts have otherwise remained largely inert on the issue of breadth, vagueness, and ambiguity, typically referencing the long history of the morals clause to justify the broad contractual language and powerful leverage afforded to the employer. Certain employers, particularly private Christian schools, have reaped the benefits of the courts' reluctance to require more detailed language, with the Archdiocese of Cincinnati even expanding the morals clause in teachers contracts.[60] The new contract prohibits teachers from engaging in behavior that contradicts Catholic doctrine, and it specifically lists behavior that may be grounds for termination. While on the one hand the contract appears to be more definitive and therefore defensible because it defines particular behavior that will give rise to a right to termination, the contract goes on to say that these grounds for termination are merely illustrative, and that the Diocese has the right to invoke the morals clause for other grounds not listed.[61] In Lafayette, Louisiana, Catholic schools recently included broad morals clauses into employees' contracts, allowing employers to terminate teachers for homosexual behavior. Because Louisiana does not prohibit discrimination on the basis of sexual orientation, teachers who are now terminated "for cause" have no recourse in the state, as Louisiana courts continue to reject claims that morals clauses are too vague to be enforced.

As stated above, perhaps the real issue is that the right case that could properly challenge broadly drafted morals clause has not yet been brought to federal court. In *Nader*, and in other cases in which the conduct giving rise to the employee's termination was so reprehensible that no one would question its immorality, the court brushed aside the employee's argument that the morals clause was improper ground to achieve the equitable result. Until the *Duck Dynasty* scandal, the issue of invoking a vague morals clause when the conduct is not obviously "immoral" had not been brought to the forefront.

III. Finding Solutions to Morals Clauses

Before examining how morals clauses may be amended to better protect the interests of the signing "talent," it is important to note that are there still circumstances were a broadly drafted morals clause may be appropriate. For example, when a company contracts with a celebrity to promote the sale of its product, the need of the sponsor for the celebrity to conduct himself appropriately is apparent. Endorsement contracts, after all, are quite different from employment contracts for television shows, where misbehavior, and even vile behavior, is often celebrated or encouraged. In the aftermath of numerous revelations of Tiger Wood's marital infidelity, Gillette parted with Woods, claiming that he no longer "represent[ed] the athletic, clean-cut family-

Continued on page 27.

Examining Morals Clauses in the Entertainment Industry

Continued from page 26.

man such brands wish to be associated with."[62] Accenture and AT&T also ended their relationship with Woods, with Accenture stating, "Woods just wasn't a metaphor for high performance anymore."[63] Morals clauses have similarly been used by companies to sever sponsorship deals with Michael Vick and Kate Moss.[64] To preserve the brand and image of their products, companies who contract with celebrities in endorsement deals should continue to have the right to terminate a relationship with a celebrity whose immoral behavior has had or may have a negative impact on sales. Again, this issue is one of reasonable contract expectations of the parties at the time the contract is executed. The manufacturer wants his product to be presented in a favorable light without distraction, and the celebrity understands that his role is to promote the product, not himself.

However, when a television network contracts with an outrageous and potentially divisive "star" because it expects the star to increase ratings, the burden should be on the employer to demonstrate conclusively that the actor's behavior violated a well-accepted societal norm in a way that could not have been reasonably anticipated by the studio. Due to the potential for abuse by employers who would seek to sweep unpopular activity under the umbrella of immoral conduct, the actor is not placed on proper notice of which behavior will be punishable. Certainly, studios should have the ability to proscribe specific activities, giving the actor proper advance warning that engaging in those activities will be cause for termination. A studio, for example, should have the right to prohibit the actor from skydiving or riding a motorcycle if the studio intends to invest time and resources into a project and it wants the actor to act safely and responsibly to assure his availability to perform. Likewise, there is nothing offensive contractually with a studio prohibiting an actor from wearing a swastika on his sleeve, or allowing for contractual termination upon the actor's conviction for selling drugs or soliciting a prostitute. In all of these cases, the actor is put on notice of the behavior that is prohibited, and it is up to the actor to decide whether to enter into a contract with the studio containing these terms.

However, a studio's ability to otherwise invoke the broad language of a morals clause should be rare, available only if the conduct was so extreme that the entire community would find it to be vile and reprehensible, and where the studio had no reasonable advanced warning that the actor was prone to engaging in that type of activity. This is especially true when the actor expresses an opinion that may be controversial or unpopular but is consistent with his onscreen or off-screen personality. In these situations, when the network has crafted or exploited the "bad behavior" or the controversial lifestyle, the network should reap what it has sown. It is inequitable for the studio to draw the line arbitrarily between statements that the network endorses and those that it rejects, based solely on the intensity of the public's reaction to the statements. This is particularly true when a network or studio markets its actors to push boundaries for ratings (in contract jargon, the network has ratified the conduct). Here, the actor's conduct should not be punishable under a broad and ambiguous morals clause if the actor happens to stray beyond an unclear and potentially moving line.

With close-call morals clause cases not being considered until recently, scholars and the media have primarily concerned themselves with other mechanisms for bolstering the morals clause in contracts. One popular proposal for balancing the morals clause provision in entertainment and endorsement contracts is to include a reverse morals clause, so that both contracting parties may seek termination if the other party breaches for immoral conduct. This approach was recently considered in the media after the retailer Barneys engaged in racial profiling, and an online petition gained over 50,000 signatures calling for Jay-Z to end his collaboration with the organization.[65] Although Jay-Z accepted the formal apology from Barneys and did not invoke a reverse morals clause to disassociate from the retailer, other stars have used a reverse morals clause to terminate their relationships with corporate sponsors. Danica Patrick and Jillian Michaels, for example, terminated their endorsement deal with GoDaddy after its CEO released a videotape of himself killing an elephant while on an African safari.[66] While a reverse morals clause may prove to be a valuable option for certain entertainment contracts, and endorsement deals in particular, the provision will only be available when the contracting star has equal or greater bargaining power to the opposing party. It would not, therefore, have solved Robertson's issue, because he was the allegedly breaching party, not A&E.

To protect Robertson and other actors who may find themselves in breach of contract for their divisive or unpopular behavior while preserving the entertainment industry's ability to make critical business decisions, the language of a broadly drafted morals clause must be narrowed. This will remove the issue of ambiguity from the morals clause, clearly identifying the type of behavior that will be actionable. To start the process of revamping morals clauses, the parties should take cue from the first morals

Continued on page 28.

Examining Morals Clauses in the Entertainment Industry

Continued from page 27.

clause drafted in major league sports. When Babe Ruth contracted with the Yankees, the Yankees included in his contract a provision requiring Ruth to:

> refrain and abstain entirely from the use of intoxicating liquors and…shall not during the training and playing season in each year stay up later than 1 o'clock A.M. on any day without the permission and consent of the club's manager…[I]f at any time…the player shall indulge in intoxicating liquor or be guilty of any action or misbehavior which may render him unfit to perform the services to be performed by him hereunder, the Club may cancel and terminate this contract.

The contract term was appropriate for Babe Ruth's employment relationship with the Yankees. Babe Ruth understood the terms of the contract he was signing, and he was put on notice of those actions that could result in the termination of his contract by the Yankees. Therefore, if the Yankee's invoked this particular version of a morals clause after Ruth came intoxicated to the baseball field, he would not have been able to challenge the contract term on grounds that it was ambiguous and unenforceable.

For a morals clause to be enforceable, it is not necessary that the drafting party isolate specific conduct that will be grounds for termination. In Rashard Mendenhall's first endorsement contract with Hanesbrands, Hanes and Mendenhall agreed to the following: "If Mendenhall is arrested for and charged with, or indicted for any felony or crime involving moral turpitude, then [Hanesbrands] shall have the right to immediately terminate this agreement."[67] As indicated by Mendenhall's lawsuit discussed above, Hanesbrands renegotiated a subsequent contract providing for a more standard, broadly drafted morals clause that covered a wider array of terminable conduct.[68] The first contract, however, illustrates how morals clauses would not have to identify specific conduct, merely categories of conduct that could lead to contract termination. The point is to put the signing party on notice of what behavior will be punishable.

In Phil Robertson's case, to properly hold Robertson for breach of contract, the contract could have contained language forbidding Robertson and his family from speaking freely to reporters or publicly expressing their controversial beliefs. An unambiguous clause could have read, for example, "Phil Robertson agrees to abstain from making public statements to reporters or on social media regarding his religious beliefs without the prior approval of the studio. If, at any time, even when the series is on hiatus, Robertson makes any statements regarding his religious beliefs without studio approval, A&E may suspend or terminate his contract." Obviously, this is an extreme example, as neither party would have agreed to this provision, but the point is that A&E supported Robertson's lifestyle and outrageous behavior until it backfired. Robertson was given no advanced warning that his controversial statements would be punishable if there was a public uproar over his controversial statements.

IV. Conclusion

Morals clauses are not inherently unfair unilateral contract provisions in the entertainment industry. It makes sense to allow a studio or television network to protect itself when the conduct of one of its actors harms the studio or network's reputation. This was particularly true of Hollywood's Golden Age, when Hollywood's success was rooted in maintaining the fantasy of motion pictures, where moviegoers could purchase tickets to escape their everyday realities. Studio executives feared that an actor's bad behavior would cripple this illusion, bringing down ticket sales that the industry heavily relied on. This is less true today, as the glass wall between Hollywood and the rest of America has long since fallen, but it is reasonable for the industry to continue to have a right to preserve its reputation, particularly to maintain sponsorship deals and good rapport within the industry.

The issue is when the entertainment industry manipulates the morals clause to cover behavior that is not necessarily "immoral," but unpopular. This is particularly true when the television network or studio has supported or ratified the conduct (which is true of A&E's relationship with Phil Robertson), because the actor acted in reliance on the employer's support. In this case, there is an argument to be made that the employer assumed the risk and waived the right to invoke the morals clause, because the actor acted consistently with the employer's expectations. Even when the actor does not act pursuant to his employer's support, there is an argument to be made that morals clauses are too ambiguous to be enforceable, particularly when the actor engages in conduct that is not easy to label as immoral.

Continued on page 29.

Examining Morals Clauses in the Entertainment Industry

Continued from page 28.

There are several issues to be considered for the appropriateness of morals clauses in the entertainment industry. Because Robertson's suspension was recently lifted, his available claim will not be argued before a judge, but it is likely similar cases will appear in the future that will help transform the antiquated clause.

Bibliography

Case Law

Cole v. Loew's Incorporated, 8 F.R.D. 508 (S.D. Cal. 1948), *rev'd sub nom* 185 F.2d 641 (9th Cir. 1950)

Loew's, Incorporated v. Cole, 185 F.2d, 641, 656 (9th Cir. 1950)

Brief for Plaintiff-Appellant at 48, Nader v. ABC Television, Inc. 330 F.Supp.2d 345 (S.D. New York 2004) (No. 04-5034-CV), 2005 WL 3948605

Nader v. ABC television, Inc., 150 Fed. Appx. 54, 56 (2nd Cir. 2005)

Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 726 (M.D.N.C. 2012)

Legal Scholarship

ABA, *Hold That Tiger: After Woods Scandal, More Lawyers are Teeing Up 'Morals Clauses'* (John Gibeaut, ABA 2010). <http://www.abajournal.com/magazine/article/hold_that_tiger/>

CA Employment Lawyers, *Wrongful Termination*. <http://www.ca-employment-lawyers.com/Wrongful-Termination.htm>

CT Sports Law, *Phallout Phrom Phelps Pholly*, (Dan Fitzgerald, 2009). http://ctsportslaw.com/2009/02/12/phallout-phrom-phelps-pholly/

David Sloan & Lisa Mullikin Parcell, *American Journalism: History, Principles, Practices*. McFarland & Company, Inc., Publishers, 2002.

Donald E. Biederman, *Law and Business of the Entertainment Industry*. Greenwood Publishing Group, 2007.

Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contract Agreements,* 19 Seton Hall J. Sports & Ent. L. 347, 370 (2009).

Law Journal Newsletters, *Social Media and Negotiating Celebrity Endorser Morals Clauses* (Doug Wood, 2011).

Leavens, Strand & Glover, *Court Keeps NFL Athlete's Morals Clause Case Alive,* (Jerry Glover, 2012). http://www.lsglegal.com/index.php?option=com_content&view=article&id=145&Itemid=60

NCSL, *The At-Will Presumption and Exceptions to the rule.* http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx

Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 Colum. J.L. & Arts 235, 237 (2005).

Continued on page 30.

Examining Morals Clauses in the Entertainment Industry

Continued from page 29.

Wrongful Termination, Ca Employment Lawyers. http://www.ca-employment-lawyers.com/Wrongful-Termination.htm

Articles

"A&E Lifts Phil Robertson's 'Duck Dynasty' Suspension." *CBS News* 27 Dec. 2013 http://www.cbsnews.com/news/ae-lifts-phil-robertson-duck-dynasty-suspension/

"Archdiocese of Cincinnati expands Morals Clause to teacher contracts." *WLWT* 7 Mar. 2014, http://www.wlwt.com/news/archdiocese-of-cincinnati-expands-moral-clause-in-teacher-contracts/24846662

Berg, Robert N. "Termination 'without cause' – It's not Necessarily Termination 'Without Fault.'" *Lexology* 1 May 2012. http://www.lexology.com/library/detail.aspx?g=e2028301-e4a7-4c49-97d5-f649d06f7ef4

Carter, Bill. "A Calculated Push into Entertainment Lifts 'Duck Dynasty' Family's Fortune." *NY Times* 25 Aug. 2013. http://www.nytimes.com/2013/08/26/business/media/duck-dynasty-familys-fortunes-lifted-by-calculated-push-into-reality-tv.html?_r=0

"'Duck Dynasty' Cast versus A&E: Who Would Have Legal Advantage?" *On the Record, Fox News* 23 Dec. 2013. http://www.foxnews.com/on-air/on-the-record/2013/12/26/duck-dynasty-cast-versus-ae-who-would-have-legal-advantage

Edelman, Marc. "Rashard Mendenhall Settles Lawsuit with Hanesbrand over Morals Clause." *Forbes* 17 Nov. 2013. http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/

Herzfeld, Oliver. *"Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality." Forbes* 2 Jan. 2014. http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality/

Hibberd, James. "'Duck Dynasty' Star Suspended for Anti-Gay Comments." *Entertainment Weekly* 18 Dec. 2013. http://insidetv.ew.com/2013/12/18/duck-dynasty-robertson-phil/

Merrigan, Tara Wanda. "Readers React to GQ's 'Duck Dynasty' Story and Robertson's Indefinite Suspension." *GQ* 19 Dec. 2013 http://www.gq.com/blogs/the-feed/2013/12/readers-react-to-gqs-duck-dynasty-story-and-phil-robertsons-indefinite-suspension.html

Merritt, Jonathan. "The Real Duck Dynasty Scandal: Phil Robertson's Comments on Race." *The Atlantic* 19 Dec. 2013. http://www.theatlantic.com/politics/archive/2013/12/the-real-em-duck-dynasty-em-scandal-phil-robertsons-comments-on-race/282538/

Peterson, Anne Helen. "Jennifer Lawrence and the History of Cool Girls." *Buzzfeed* 28 Feb. 2014. http://www.buzzfeed.com/annehelenpetersen/jennifer-lawrence-and-the-history-of-cool-girls

Phillips, Matthew. "Morals Clauses and Ms. Spears." *Newsweek* 19 Dec. 2007. http://www.newsweek.com/morals-clauses-and-ms-spears-94295

Sheerin, Jude. "'Fatty' Arbuckle and Hollywood's First Scandal." *BBC News* 4 Sept. 2011. http://www.bbc.co.uk/news/magazine-14640719

Soares, Andrea. "Fatty Arbuckle-Virginia Rappe Trial: Q&A with Researcher Joan Myers." *Alt Film Guide*. Web. 4 Apr. 2014.

Continued on page 31.

Examining Morals Clauses in the Entertainment Industry

Continued from page 30.

http://www.altfg.com/blog/actors/fatty-arbuckle-virginia-rappe-trial-scandal/

Townsend, Megan. "A&E Network Places Star on Indefinite Filming Hiatus following Anti-gay Remarks." *GLAAD* 18 Dec. 2013. http://www.glaad.org/blog/ae-network-places-star-indefinite-filming-hiatus-following-anti-gay-remarks

Weinraub, Bernard. "Battle for the Stars Shapes Up at Talent Agencies." *NY Times* 5 Jun. 1995. http://www.nytimes.com/1995/06/05/business/battle-for-the-stars-shapes-up-at-talent-agencies.html

1 John Gibeaut, *Hold That Tiger: After Woods Scandal, More Lawyers are Teeing Up 'Morals Clauses'*, ABAJournal (Sept. 1, 2010, 2:50 AM), http://www.abajournal.com/magazine/article/hold_that_tiger/.

2 Ancrea Soares, *Fatty Arbuckle-Virginia Rappe Trial: Q&A with Researcher Joan Myers*, Alt Film Guide, http://www.altfg.com/blog/actors/fatty-arbuckle-virginia-rappe-trial-scandal/ (Apr. 4, 2014).

3 David Sloan & Lisa Mullikin Parcell, American Journalism: History, Principles, Practices 192 (2002).

4 Gibreaut, *supra* note 1.

5 *Id.*

6 Doug Wood, *Social Media and Negotiating Celebrity Endorser Morals Clauses*, Law Journal Newsletters (Jun. 2011), http://www.lawjournalnewsletters.com/issues/ljn_entertainment/26_6/news/155335-1.html.

7 Gibreat, *supra* note 1.

8 Oliver Herzfeld, *Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality*, Forbes (Jan. 2, 2014, 9:24 AM), http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality/.

9 *Id.*

10 *Id.*

11 *See* Matthew Philips, *Morals Clauses and Ms. Spears,* Newsweek (Dec. 19, 2007, 7:00 PM), http://www.newsweek.com/morals-clauses-and-ms-spears-94295 (explaining that morals clauses are as a "preventative measure" by studios who do not "want to be embarrassed").

12 *Id.*

13 *Id.*

14 *See* Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 Colum. J.L. & Arts 235, 237 (2005) (explaining that morals clauses were also included in contracts to avoid Congressional oversight of the film industry. In the 1920s, Senator Henry Myers had called for imposing restrictions on the content of film and regulation of actors due to the recent licentiousness of certain stars).

15 *See Id.* (noting that morals clauses were used by studios to disassociate from scandal-plagued stars).

16 Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contract Agreements,* 19 Seton Hall J. Sports & Ent. L. 347, 370 (2009).

17 *Id.*

18 Jude Sheerin, *'Fatty' Arbuckle and Hollywood's First Scandal*, BBC News (Sept. 4, 2011, 12:03 AM), http://www.bbc.co.uk/news/magazine-14640719.

19 *Id.*

20 *See* Anne Helen Peterson, *Jennifer Lawrence and the History of Cool Girls*, Buzzfeed (Feb. 28, 2014, 9:02 AM), http://www.buzzfeed.com/annehelenpetersen/jennifer-lawrence-and-the-history-of-cool-girls

21 *See Id.,* (noting that "Hathaway seems like a very talented, very well-programmed *machine*, while Lawrence seems like a weird, idiosyncratic, charismatic *human."*).

22 *Id.*

23 *See* Bernard Weinraub, *Battle for the Stars Shapes Up at Talent Agencies*, NY Times (Jun. 5, 1995), http://www.nytimes.com/1995/06/05/business/battle-for-the-stars-shapes-up-at-talent-agencies.html (noting that the break up of the star system paved the road for talent agencies).

24 Tara Wanda Merrigan, *Readers React to GQ's 'Duck Dynasty' Story and Robertson's Indefinite Suspension,* GQ (Dec. 19, 2013, 4:30 PM), http://www.gq.com/blogs/the-feed/2013/12/readers-react-to-gqs-duck-dynasty-story-and-phil-robertsons-indefinite-suspension.html.

25 *Id.*; *See* Jonathan Merritt, *The Real Duck Dynasty Scandal: Phil Robertson's Comments on Race,* The Atlantic (Dec. 19, 2013, 2:45 PM), http://www.theatlantic.com/politics/archive/2013/12/the-real-em-duck-dynasty-em-scandal-phil-robertsons-comments-on-race/282538/, (Remarking that his comments on homosexuality were predictable, but the "firestorm of media and public outrage over [his] comments on sexuality," have buried his statements on slavery that should have elicited the same outrage).

26 *Id.* note 10.

27 Megan Townsend, *A&E Network Places Star on Indefinite Filming Hiatus following Anti-gay Remarks,* GLAAD (Dec. 18, 2013), http://www.glaad.org/blog/ae-network-places-star-indefinite-filming-hiatus-following-anti-gay-remarks.

28 *'Duck Dynasty' Star Phil Robertson Suspended by A&E*, Fox News (Dec 19, 2013), http://www.foxnews.com/entertainment/2013/12/18/phil-robertson-suspended-after-comments-about-homosexuality/. Phil Robertson's contract and since been reinstated, and production has started on their new season of the show. *A&E Lifts Phil Robertson's 'Duck Dynasty' Suspension*, CBS News (Dec. 27, 2013, 5:51 PM), http://www.cbsnews.com/news/ae-lifts-phil-robertson-duck-dynasty-suspension/.

29 James Hibberd, *'Duck Dynasty' Star Suspended for Anti-Gay Comments,* Entertainment Weekly (Dec 18, 2013, 7:34 PM), http://insidetv.ew.com/2013/12/18/duck-dynasty-robertson-phil/.

Continued on page 32.

Examining Morals Clauses in the Entertainment Industry

Continued from page 31.

30 *See* Bill Carter, *A Calculated Push into Entertainment Lifts 'Duck Dynasty' Family's Fortunes,* NY Times (Aug. 25, 2013), http://www.nytimes.com/2013/08/26/business/media/duck-dynasty-familys-fortunes-lifted-by-calculated-push-into-reality-tv.html?_r=0 (explaining that A&E viewed a tape of the family on an Outdoor Channel and believed they could produce a modern-day cross between 'the Beverly Hillbillies' and 'The Waltons').

31 Greta Van Susteren of Fox News has asked his same question, arguing that "A&E has waived any ability to get rid of Robertson on a morals clause because… they were not scandalized by [his comments]." *'Duck Dynasty' Cast versus A&E: Who Would Have Legal Advantage?* (On the Record, Fox News Television broadcast Dec. 23, 2013), http://www.foxnews.com/on-air/on-the-record/2013/12/26/duck-dynasty-cast-versus-ae-who-would-have-legal-advantage.

32 Cole v. Loew's Incorporated, 8 F.R.D. 508 (S.D. Cal. 1948), *rev'd sub nom* 185 F.2d 641 (9th Cir. 1950).

33 Donald E. Biederman, Law and Business of the Entertainment Industry 111 (Greenwood Publishing Group, 2007).

34 *See* Cole v. Loew's Incorporated at 513.

35 *Id.*

36 *Id.*

37 *See Id.* at 522 (explaining that Cole had received no warning by MGM and that the ground for his termination wasn't even a 'twinkle in the eye' of MGM when the contract was initially negotiated. Only when MGM was "placed in a position where they had to find a legal cause", did the "dear old morality clause" terminate Cole's contract).

38 *Id.* at 517.

39 Loew's, Incorporated v. Cole, 185 F.2d, 641, 656 (9th Cir. 1950).

40 *Id.*

41 *Id.*

42 *See The At-Will Presumption and Exceptions to the rule*, NCSL*, available at* http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (explaining that the presumption of employment relationships are at-will in 49 states).

43 *See* Robert N. Berg, *Termination "without cause" – It's not Necessarily Termination "Without Fault",* Lexology (May 1, 2012), http://www.lexology.com/library/detail.aspx?g=e2028301-e4a7-4c49-97d5-f649d06f7ef4 (exploring that in health care employment agreements will contain a laundry list of grounds for termination, some objective and some subjective. The same can be said of employment contracts in the entertainment industry).

44 *See Wrongful Termination,* Ca Employment Lawyers, *available at* http://www.ca-employment-lawyers.com/Wrongful-Termination.htm (stating the employment contracts in California (where the majority of entertainment contracts are signed) are presumed to be "at-will" unless specified otherwise through contract or oral assurance of an employment agreement. If the employment relationship is not "at-will", the employer must establish good cause for termination else face wrongful termination liability).

45 Gibreaut, *supra* note 1.

46 Brief for Plaintiff-Appellant at 48, *Nader v. ABC Television, Inc.* 330 F.Supp.2d 345 (S.D. New York 2004) (No. 04-5034-CV), 2005 WL 3948605.

47 *Id.* at 49.

48 *Id.*

49 *Id., citing* Greater Easter Transport, LLC v. Waste Management, 211 F.Supp.2d 499 (SDNY 2002).

50 *Id.*

51 Nader v. ABC Television, Inc., 150 Fed. Appx. 54, 56 (2nd Cir. 2005).

52 *Id.*

53 Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrand over Morals Clause*, Forbes (Nov. 17, 2013, 12:02 PM), http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/.

54 *Id.*

55 *Id.*

56 Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 726 (M.D.N.C. 2012).

57 *Id.*

58 *Id.*

59 *Archdiocese of Cincinnati expands Morals Clause to teacher contracts,* WLWT (Mar. 7, 2014, 11:23 AM), http://www.wlwt.com/news/archdiocese-of-cincinnati-expands-moral-clause-in-teacher-contracts/24846662.

60 *Id.*

61 Defne Gunay, *Morals Clauses: Tiger Woods and the Death of Sponsorships,* Fordham University School of Law: Intellectual Property, Media & Entertainment Law Journal (Mar. 4, 2010), http://iplj.net/blog/archives/1368.

62 *Id.*

63 Dan Fitzgerald, *Phallout Phrom Phelps Pholly*, CT Sports Law (Feb. 12, 2009), http://ctsportslaw.com/2009/02/12/phallout-phrom-phelps-pholly/.

64 Herzfield, *supra* note 9

65 *Id.*

66 Jerry Glover, *Court Keeps NFL Athlete's Morals Clause Case Alive,* Leavens, Strand & Glover (Apr. 30, 2012), http://www.lsglegal.com/index.php?option=com_content&view=article&id=145&Itemid=60.

67 *Id.*

Continued on page <None>.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 14.

resolution of labor disputes.[34] Specifically, the LMRA grants employees the ability to self-organize and to bargain for collective rights granted by their employers, using a system of representatives.[35]

Once a labor union is formed under a CBA, the law treats any agreement as a contract between the parties and provides a specific avenue for relief under the LMRA.[36] The United States Supreme Court has consistently interpreted Section 301 of the LMRA as "a congressional mandate" to the federal courts to create a common law system of governing labor disputes.[37] Furthermore, Supreme Court case law indicates that Congress intended Section 301 "uniformly to prevail over inconsistent local rules."[38] This power of preemption is found in Article VI of the United States Constitution[39] and relinquishes CBA-bound employees to the provisions of the LMRA at the expense of many common law state claims.[40]

The seminal case for interpretation of LMRA claims was decided in 1985.[41] In *Allis- Chalmers Corp. v. Lueck*, the United States Supreme Court set out to determine the scope of preemption provided by Section 301 of the LMRA.[42] Respondent Roderick Lueck was an employee of the Allis-Chalmers Corporation ("Allis-Chalmers") and a member of Local 248 of the United Automobile, Aerospace and Agricultural Implement Workers of America.[43] Lueck suffered a non-occupational injury, notified his employer, and subsequently filed a disability claim with Aetna (the insurance company), as was required by the CBA.[44] Lueck claimed that Allis-Chalmers forced Aetna periodically to stop his disability payments, but Lueck failed to follow the arbitration standards set forth in the CBA to resolve the dispute.[45] Instead, Lueck filed suit in Wisconsin, claiming that Allis-Chalmers circumvented its duty to act in good faith under the CBA by instructing the insurance company to avoid paying Lueck's disability claim.[46]

The Wisconsin trial court granted summary judgment for Allis-Chalmers on the grounds that Lueck stated a claim under Section 301 of the LMRA and, alternatively, that the state law claim for bad-faith dealing was preempted by the LMRA.[47] The Wisconsin Supreme Court reversed the summary judgment and remanded the case for further proceedings, finding that interpretation of the parties' CBA was "irrelevant to the issue of whether the defendants exercised bad faith" and therefore, was not preempted by Section 301 because it did not arise out of the contract.[48]

In a nearly unanimous decision,[49] the United States Supreme Court overturned the Wisconsin decision, holding that Roderick Lueck's claims were preempted by the LMRA.[50] In finding for Allis-Chalmers, the Court determined a two-part test for future preemption claims under the LMRA.[51] First, a court must determine whether the decision of the state tort claim is "inextricably intertwined with consideration" of the terms of the CBA.[52] If the claim is "inextricably intertwined" with the contract, then the court must determine whether state law defines the essence of the contract relationship.[53] If both prongs are met, federal law under the LMRA preempts the claim.[54]

The Court determined that Lueck's claim of bad-faith dealing was inextricably intertwined with consideration of the terms of the CBA because the duties and rights of the parties were understood only in light of the terms of the contract.[55] More specifically, the Court reasoned that, "under Wisconsin law it appears that the parties to an insurance contract are free to bargain about what 'reasonable' performance of their contract obligation entails."[56] Therefore, Lueck's claim was defined by the terms that the parties had negotiated for and must be evaluated by federal law.[57]

The Court also gave a bevy of policy reasons for holding that the LMRA preempts state law tort claims of the aforementioned kind.[58] First, the Court stated that Congress must have intended Section 301 to preempt derivative tort claims in order to preserve "the central role of arbitration in our 'system of industrial self-government.'"[59] Allowing Lueck to avoid arbitration under the CBA would have rendered future arbitration clauses effectively useless and federal courts would lose their power to decide cases involving breach of contract involving CBAs.[60] Next, the Court implied that allowing state law claims like *Lueck* to proceed would open up the door for a flood of litigation from parties wishing to avoid their contractual obligations to arbitrate.[61] Pragmatic concerns were of utmost importance, because plaintiffs who wished to avoid the terms of a CBA could just restate a breach of good faith dealing as a tort claim under state law.[62]

Continued on page 34.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 33.

Finally, the Court found that broadening the scope of preemption in derivative tort cases advanced consistency in labor law.[63] The Court reasoned that, in order to maintain a unified body of federal labor law, preemption would be appropriate in cases that were subject to varying interpretations.[64] In light of these policy considerations and the Court's evaluation of Congressional intent, the court found that the LMRA preempted Roderick Lueck's state law claim of bad-faith dealing.[65]

C. *The NFL and the LMRA*

The NFL also has a history of litigation under the LMRA.[66] In *Smith v. Houston Oilers, Inc.,*[67] the Fifth Circuit Court of Appeals held that two players' claims of coercion were preempted under the LMRA.[68] Sherman Smith and Tracy Smith each signed separate one-year contracts with the NFL's Houston Oilers when they each suffered injuries causing them to miss significant playing time.[69] The Oilers coaching staff required both Smiths to submit to a rehabilitation program, which was sanctioned under the league's CBA.[70] At the time, the league's CBA prohibited teams from discharging players who were recovering from injury.[71] The Smiths believed that this rehabilitation program was a thinly veiled attempt to force them into quitting the organization, seeing as they were subjected to intense workouts coupled with threats by the Oilers organization to "blackball" the players if they did not comply or resign.[72]

The essential argument brought forth by the Smiths was that the actions of the organization were so outrageous that the CBA could not have possibly condoned them.[73] Therefore, the court did not need to interpret the CBA.[74] The court disagreed, stating that the outrageousness of the organization's rehabilitation program could only be determined by looking at what was allowed under the CBA, making the two "inextricably intertwined."[75] The court added that "players can legally consent to challenging workouts and rigorous rehabilitation sessions."[76] Because of this, the court could only determine the extent to which the Oilers had a legal right to require the players to endure the workouts by analyzing the governing contract.[77] Because the contract in question was the NFL's CBA, federal law governed.[78] Therefore, the Smiths' claims were preempted under the analytical framework in *Lueck*.[79] The Smiths were limited to seeking a remedy under the CBA.[80]

In 2009, the Eighth Circuit faced a similar preemption problem when two Minnesota Vikings defensive linemen brought state law claims under the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA") and the Minnesota Consumable Products Act ("CPA").[81] Kevin Williams and Pat Williams had tested positive for blumentanide, a diuretic that was banned under the NFL's drug testing policy (a provision governed by the league's CBA) and were immediately suspended.[82] The players claimed that the NFL's drug testing policy was "unfair and violative of the players' fundamental and guaranteed rights."[83]

The court in *Williams* found that Section 301 did not preempt the players' DATWA and CPA claims because they were independent rights not governed by the league's CBA.[84] Specifically, the court noted that there was no need to interpret the CBA to resolve the claims. Instead a court would need only to "compare the facts and the procedure" that the NFL used for drug testing of the Players with DATWA's and CPA's requirements for determining whether the players had a remedy at law.[85] Quoting heavily from the United States Supreme Court's decision in *Lueck,* the Eighth Circuit found that the players had cognizable claims under DATWA and the CPA because the state laws gave the plaintiffs rights to protection under state law that could not be altered or waived by the provisions of the league's CBA.[86] Therefore, Pat and Kevin Williams were free to pursue their claims under state law.

D. *Verbal Conduct Under the LMRA*

Much like the scenario presented in *Vilma*, several previous cases have held that claims involving defamation, slander, and libel are considered to be preempted by the LMRA.[87] In *Bagby v. General Motors Corp.,*[88] the Fifth Circuit held that statements made in accordance with actions taken pursuant to a CBA were not actionable under a state law claim of defamation.[89] Thomas Bagby was an employee of General Motors ("GM") who was temporarily suspended after being accused of stealing a piece of

Continued on page 35.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 34.

equipment from the local plant where he worked.[90] The applicable CBA provided GM employees with a grievance procedure for appealing temporary suspensions, and Bagby eventually was reinstated to his job upon completion of an internal investigation.[91] Bagby failed to utilize this grievance procedure, and instead opted to file suit in Texas alleging that GM defamed him by suspending him and removing him from the premises upon his initial suspension.[92]

In affirming GM's motion for summary judgment on the basis of preemption, the court held that the defamation in this case was based solely on the GM employees following the procedures set forth within the CBA.[93] Because the defamation did not exist independently of these procedures, Bagby's only remedy would be for breach of contract under the LMRA.[94] The court went on to add that holding a company guilty of defamation after they followed procedure set forth in the CBA would undermine the company's ability to investigate a disciplinary situation "in routine and proper ways."[95]

Other courts have not been so quick to dismiss state law claims for defamation because of preemption under the LMRA.[96] In *Tellez v. Pacific Gas and Electric Co.*, the Ninth Circuit applied the test in *Lueck*, finding that an employee's claims under state law were actionable outside the grievance procedure established in the parties' CBA.[97] The employee, Thomas Tellez, appealed a grant of summary judgment for his employer after he was investigated and suspended for possessing and using cocaine while on the job.[98] Pacific Gas and Electric found that Tellez's suspension was not for just cause, and Tellez subsequently sued his employer for defamation in California. Tellez's theory was based on two letters distributed during the course of his investigation that improperly indicated that he had possessed cocaine while on the job.[99] The letters were distributed to more than 11 different managers at Pacific Gas and Electric Company.[100]

The court in *Tellez* focused on different language from the *Lueck* decision than their counterparts in the Fifth Circuit, stating that claims under the *Lueck* test were not preempted if they merely "tangentially involv[ed] a CBA."[101] Even though the letters distributed in this case were as a result of the disciplinary proceedings contained within the CBA, the court nonetheless found that they were not inextricably intertwined with the agreement.[102] The court stated that the CBA was "silent on work conditions, and vague on disciplinary formalities" and that the CBA "neither require[d] nor regulate[d] suspension letters."[103] Therefore, an analysis of the CBA would be unhelpful in resolving the dispute and the state law claims were not preempted under the LMRA.[104] In looking at the decisions since *Lueck*, it is clear that courts have taken different approaches in resolving collective bargaining disputes under the LMRA. Suits involving the NFL and its CBA have been no exception. Now, we turn to look at the instant decision at hand.

IV. INSTANT DECISION

The court in *Vilma* determined, based partially on the Plaintiff's own complaint,[105] that the Commissioner's statements were "directly related" to his decision to suspend the players pursuant to the terms of the CBA.[106] The court disagreed with Vilma's characterization that the statements were not made "within the confines of any forum or procedure created by the NFL–NFLPA CBA."[107] Rather, the court reached three conclusions with regards to Vilma's claims.[108] First, Goodell's statements were made within the scope of his employment.[109] Second, the statements made involved disciplinary action that was based on the investigation into the Saints and the 'Bounty Scandal' in question.[110] Finally, because of the previous two conclusions, Goodell's decision could only be evaluated in light of the league's CBA.[111]

The court relied heavily on the Fifth Circuit decision in *Bagby*, finding case law involving fraudulent inducement and retaliatory discharge to be wholly unpersuasive.[112] The court took careful consideration of the CBA's grant of power to the Commissioner to suspend for anything he believed to be "conduct detrimental" and found that "Vilma's claims for defamation and intentional infliction of emotional distress have to be evaluated through the lens of what the CBA allows Goodell to do."[113] Since the defamation claim could not survive if it arose out of an arbitration proceeding involving discipline, the court found that Vilma's claims were preempted under the LMRA and granted the Commissioner's motion to dismiss.[114]

Continued on page 36.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 35.

V. COMMENT

Following the court's decision to dismiss Jonathan Vilma's ("Vilma") claims for slander, libel, and intentional infliction of emotional distress against NFL Commissioner Roger Goodell, many new questions arose with regards to the NFL, the league's CBA, and the role of the courts in interpreting questions under the league's CBA.

A. *The Court Punts on Preemption Grounds*

In preliminary hearings, the court indicated an inclination to rule in Vilma's favor by stating that "the proceedings [under the CBA] were neither transparent nor fair."[115] In light of this inclination, it appears the court could have used a different application of the doctrine of preemption under the LMRA. The *Vilma* court found the holding in *Bagby* to be persuasive in dismissing the plaintiff's claim.[116] *Bagby* represents a traditional application of the doctrine of preemption in cases involving a CBA. Plaintiff Thomas Bagby was temporarily suspended following an investigation of his alleged theft of equipment from the General Motors plant where he was an employee.[117] Bagby's only claim for defamation was based on the fact that he was escorted out of the plant by security guards.[118] The court in *Bagby* was correct in concluding that allowing the plaintiff to pursue his cause of action would effectively undermine a corporation's ability to follow a CBA's provisions for disciplinary procedure. Collectively bargaining for disciplinary procedures would effectively become useless if an employee could easily undermine the process that was established. Furthermore, to determine whether an employee was properly escorted out of the plant, a court would have to interpret the CBA of the parties involved. This is precisely the type of situation the preemption doctrine attempts to avoid.

Unlike *Bagby*, Jonathan Vilma's claims present a substantially more complex application of the doctrine of preemption. First, Vilma's claims were based on statements that were made outside of the disciplinary proceedings bargained for in the CBA. The statements contained in Vilma's complaint were a mixture of press releases, television interviews, and internal memoranda to all 32 NFL teams.[119] Though internal memoranda might have been useful in the disciplinary process, it is hard to imagine how a series of press releases or an interview with the NFL Network would be useful in furthering the disciplinary process pursuant to the terms of the CBA.

Moreover, the court is unclear as to how exactly the statements made by the Commissioner required interpretation of the CBA. The court says that, in order to determine whether Vilma had a claim for defamation, it must interpret "multiple portions of the CBA, not just the non-suit provision."[120] But the court does not give any indication as to what portions of the CBA would need to be interpreted, nor does the court give any explanation as to how those portions would need to be interpreted to decide a defamation claim. Article 46 of the league's CBA provides the disciplinary procedure for when the Commissioner determines that a player has acted with conduct detrimental to the game of football, but is silent on the procedures for distributing memoranda to the league and to the media.[121] Because the CBA contains no procedures for distributing memoranda, the court would have nothing to interpret in deciding a claim for defamation.

Instead of elaborating on which portions of the CBA would need to be interpreted to decide Vilma's claims for defamation, the court states that the CBA authorized the Commissioner to "suspend a player for what he considers 'conduct detrimental.'"[122] The CBA also allows the Commissioner to "investigate actions that he suspects constitute 'conduct detrimental.'"[123] But none of the statements contained within Vilma's complaint were made in furtherance of any investigation or according to the CBA's procedures for discipline, as was the case in *Bagby*. Again, the court points to the fact that the Commissioner's statements were made in his official capacity and that the claims were "directly related" and "made in connection" with the underlying investigation.[124] But this does not satisfy the test set forth in *Lueck*, where the United States Supreme Court determined that, in order for a claim to be preempted under the LMRA, the conduct complained of must be "inextricably intertwined" with consideration of the CBA in question.

Continued on page 37.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 36.

In *Tellez*, the Ninth Circuit determined that internal memoranda distributed to 11 members of Pacific Gas and Electric's staff were not preempted by the LMRA.[125] The letters in question for Tellez's claim of defamation contained a report of his alleged wrongdoings, along with an opinion from management that Tellez was, in fact, responsible for the wrongdoings.[126] The court in *Tellez* would be preempted from determining issues of whether the suspension was for just cause, but not preempted on issues involving defamation because issues of defamation were "totally distinct" from the remedies available under a defamation claim.[127] Furthermore, footnote three in *Tellez* offers an interesting distinction from other cases that have found internal memoranda to be preempted by the LMRA.[128] The footnote suggests that the memoranda distributed went beyond those with any employment interest in the allegedly defamatory statements and that the letters were published "beyond the 'need to know' level" and that this was an important distinction to the court.[129]

Much like the memoranda in *Tellez*, the statements made by the Commissioner to the NFL Network were certainly distributed beyond the 'need to know' level because they reached the media and the general public. Furthermore, the remedies available for Jonathan Vilma under a claim of defamation would have been substantially different than those available under Article 46 of the league's CBA. Because the Commissioner's statements were made in his official capacity, they certainly were related to the underlying investigation of the bounty scandal. But following the language in *Tellez*, this relationship would merely be tangentially related to the disciplinary procedure in Article 46. Therefore, Commissioner Goodell's statements would not be inextricably intertwined with considerations of the league's CBA. Finally, because of the high-profile nature of the NFL, the Commissioner's statements were given to an audience that was substantially larger than that in *Bagby* and, therefore, the scope of the CBA did not possibly contemplate the reach of these statements.

None of the aforementioned case law suggests that the Fifth Circuit should be bound in any way by the decision in *Tellez* or any of its progeny. The doctrine of preemption under the LMRA has been murky, at best, and several cases have been distinguishable ever since the United States Supreme Court's decision in *Lueck*. But if the court in *Vilma* were serious in wanting to overcome the hurdle of dismissal under the doctrine of preemption, the framework in *Tellez* and similar cases in the Ninth Circuit would have been helpful in distinguishing the facts in Vilma's complaint from the facts in *Bagby*. In this case, it appears that the court prematurely punted on the issue of preemption under the LMRA.

B. *The Future of Article 46*

As has previously been mentioned, the NFL is the only one of the four major professional sports in America that has not developed a system in which a neutral arbitrator is called upon in cases of appeal to decide issues of fairness and proper cause for discipline.[130] In the past, the National Basketball Association has witnessed its Commissioner hand down suspensions to high profile players, such as Jermaine O'Neal and Latrell Sprewell, only to have those decisions overturned by a neutral arbitrator on the basis of what was considered "just cause."[131]

Major League Baseball has dealt with neutral arbitrators overturning decisions handed down by its Commissioner, as well.[132] The basic argument against neutral arbitration in cases involving professional sports is that the arbitrators are not situated in a position to decide the unique standards and conduct to be exercised by its competitors. For example, in response to a reduction of Texas Rangers' pitcher Kenny Rogers's 20 game suspension for assaulting a cameraman during a game, Commissioner Bud Selig stated, "There is a standard of behavior . . . expected of our players, which was breached in this case. The arbitrator's decision diminishes that standard."[133] So, what is the NFL to do with regards to Article 46 and its own personal conduct policy?

Professor Rick Karcher, director of the Center for Law and Sports at the University of Florida Coastal School of Law, suggests that answer for the NFL may be found by evaluating the amount of discretion given to the league's Commissioner.[134] Karcher says that, in reviewing its disciplinary policy, the NFL should keep three different considerations in play.[135] First, the NFL should consider whether the discipline is related to the NFL's business.[136] When suspending a player for "conduct detrimental" resulting from conduct that is outside the playing field, the Commissioner is entering into dangerous territory because of his unchecked power. This danger is especially present in cases where players are punished for alleged crimes where they have not been convicted.

Continued on page 38.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 37.

Though Vilma's case allegedly involved on-field conduct, it is relatively easy to picture a scenario in which a player could be suspended by the Commissioner for conduct detrimental to the game of football for off-field actions that were never prosecuted by law enforcement. Under the NFL's current scheme of justice, the Commissioner has the ability to unilaterally deny a player the opportunity to play, without any recourse to his decisions. And this authority is extremely important given the uniqueness of the profession of football.

Professor Marc Edelman, an expert in the fields of contract and antitrust law, suggests that the NFL is unlike any traditional workplace governed by a CBA, because the NFL is a collection of all relevant employers in a specialized field of employment.[137] Edelman posed the following hypothetical to emphasize his point:

> "What about if every law school in the country, through the American Bar Association, agreed not to hire any law professor that ever engaged in dog-fighting? Thus... any professor who ever engaged in dog-fighting would be prohibited from teaching law— even after he served time, paid off his debt to society, and is rehabilitated... The NFL is not a single employer. Rather, it is a collection of thirty-two separate businesses. So, when the NFL bans a worker, it is not like DePaul Law School banning a worker or Barry Law School banning a worker, but more like all the law schools in the country together banning a worker."[138]

Edelman believes that provisions of the NFL's personal conduct policy may violate the Sherman Act because it illegally restrains trade and because the personal conduct policy "was never a product of arms-length collective bargaining between the NFL teams and their players union, nor was it ever ratified, in writing, by the players union."[139] Because of the Commissioner's unbridled power to suspend under the CBA, and because of the antitrust issues in play, it is important to ensure that the player conduct policies are aimed at ensuring fairness and due process.[140]

When a player like Vilma engages in conduct that is considered detrimental to the game of football, the Commissioner has the ability not only to suspend him from a single organization, but also to effectively keep him from pursuing all employment in his field of choice. Options exist in Canada and overseas for football players, but the NFL offers substantially more benefits, higher salaries and marketing options for its employees. If the NFL wants to continue to grant the Commissioner the power to keep players from these employment opportunities, it is essential to make sure these standards are not carried out arbitrarily.

Professor Karcher argues that the NFL should evaluate whether these suspensions are really having the desired impact on the conduct they are looking to deter.[141] Since Goodell has taken over as Commissioner, he has made a conscious effort to crack down on what he sees as a growing discipline problem in the league.[142] But Karcher opines that no data exists to support the presupposition that player discipline is eroding, and that efforts to crack down on player discipline are therefore unnecessary.[143] The majority of former Commissioner Tagliabue's suspensions resulted from conduct that was triggered by a conviction, or its equivalent.[144] In contrast, Commissioner Goodell has handed down suspension for anything he determines to be conduct detrimental to the game of football, regardless of whether this punishment is triggered by a conviction.[145]

Finally, and most importantly, Karcher says that the Commissioner should keep in mind whether the appeals process ensures fair and consistent disciplinary action following the standards of neutral arbitration.[146] This may include factoring in a version of the "just cause" standard used by neutral arbitrators, or it may even include the Commissioner being willing to recuse himself in cases where apparent bias may exist. Karcher argues that discipline should follow precedent and adds, "It's arbitrary to impose an overly aggressive disciplinary action upon an individual player with an ulterior motive of sending a message to all players that 'this is not to be tolerated.'"[147]

Karcher's analysis is spot-on with regards to how the NFL should evaluate enforcement of its personal conduct policy under the league's CBA. Commissioner Goodell should look at applying a more neutral arbitration standard in handing out punishment because the league's CBA is unlikely to change any time in the near future. The NFL's current CBA was ratified in 2011 and runs until the year 2020.[148] This CBA is the longest in the history of the four major American sports.[149] Unlike previous CBAs, neither party may opt out of the provisions contained within this current CBA.[150]

Continued on page 39.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46
Continued from page 38.

Though Commissioner Goodell has been in charge since 2006 and exercised an increasing unilateral authority since that time, no major changes were added to Article 46 in 2011 in an effort to rein in the Commissioner's power.[151] The only change regarding Article 46 in the 2011 CBA related to the Commissioner's power to impose fines in proportion to a player's current salary.[152] Ultimately, the decision of who has the final say in player discipline is a question of authority. It is unlikely that the Commissioner will be willing to give up his authority without certain concessions under the CBA. Similarly, it is unlikely that the players will be willing to make such concessions. Therefore, given the length and terms of the current CBA, substantial change to Article 46 or the NFL's personal conduct policy is unlikely anytime soon.

Given the antitrust implications and the improbability of any major changes to the league's disciplinary power structure, it is essential that the Commissioner exercise discretion in how he chooses to implement player discipline in the future. Without such discretion, the league may see many more cases like *Vilma* in the future.

VI. CONCLUSION

The case of Jonathan Vilma and his teammates on the New Orleans Saints presented a unique opportunity for the Eastern District of Louisiana to evaluate the role of courts in enforcing the league's Collective Bargaining Agreement and their role in interpreting the Labor- Management Relations Act. The court had the opportunity in this case to exercise its outside authority against a Commissioner who has been described as the "judge, jury, and executioner of NFL justice."[153] Though the outcome favored the NFL, Commissioner Goodell should evaluate the policies behind enforcement of the player conduct policy with regards to future cases. Because of the antitrust concerns in play and the unlikelihood for change in the near future, Commissioner Goodell's authority will only be viewed as legitimate and durable if it is neutrally and fairly applied.

---

1 917 F. Supp.2d 593.
2 *Id*. at 597.
3 *Id*.
4 Christopher R. Deubert, A Summary of the NFL's Investigation into the New Orleans Saints Alleged Bounty Program and Related Proceedings, 9 DePaul J. Sports L. & Contemp. Probs. 123 (2013).
5 *Id*. at 129.
6 *Id*. at 126.
7 *Id*. at 123.
8 *Id*.
9 *Id*.
10 *Id*. Scott Fujita was suspended for three games. *Id*. Will Smith was suspended for four games. *Id*. Anthony Hargrove was suspended for eight games. *Id*.
11 Michael McCann, "Why Vilma v. Goodell is Much More Than Just A Defamation Lawsuit." Sports Illustrated.
12 Jonathan VILMA, Plaintiff, v. Roger GOODELL, Defendant., 2012 WL 1758565 (E.D. La. 2012).
13 Vilma v. Goodell, 917 F. Supp.2d 593. The claims included statements from the following: "(1) statements in the March 2, 2012, NFL press release alleging that Saints executives, coaches, and defensive players violated the "Bounty Rule" in 2009, 2010, and 2011; (2) statements in the March 2, 2012, report to the 32 NFL Clubs that Saints defensive players pledged money toward the "Bounty Program" and targeted certain opposing players for injury; (3) statements in the March 21, 2012, NFL press release detailing punishment imposed on the Saints and Saints personnel and implicating unnamed defensive players; (4) statements in the March 21, 2012, memorandum to the 32 NFL Clubs concerning the reasons for the punishment of Saints personnel; (5) statements in an April 24, 2012, interview on the NFL Network that the players were involved in a Bounty Program; and (6) the May 2, 2012, NFL press release detailing punishment imposed on four players, including Vilma." *Id*.
14 *Id*.
15 *Id*.
16 *Id*. at 595.
17 *Id*. at 597.
18 *Id*.
19 *Id*.
20 *Id*. at 597.
21 Chris Deubert, et. al., All Four Corners: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League, 19 UCLA Ent. L. Rev. 1, 7 (2012).
22 *Id*.
23 *Id*. at 12.

Continued on page 40.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 39.

24 *Id*. (The CBA from 1993 has been extended with changes in 1998, 2001, 2006 and 2011).

25 *Id*.

26 National Football League Collective Bargaining Agreement. Art. 46, § 1. The CBA provides, in part, that "All disputes involving a fine or suspension imposed upon a player for conduct on the playing field... will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player with a copy to the NFLPA. Within three business days following such written notification, the player affected thereby, or the NFLPA, with the player's approval, may appeal in writing to the Commissioner." *Id*.

27 *Id*.

28 *Id*. at § 2.

29 *See* Thomas A. Baker, III & Dan Connaughton, The Role of Arbitrability in Disciplinary Decisions in Professional Sports, 16 Marq. Sports L. Rev. 123, 153 (2005).

30 *Id*.

31 *All Four Corners*, 19 UCLA Ent. L. Rev. 1, 64 (2012).

32 Deubert, 9 DePaul J. Sports L. & Contemp. Probs. at 126.

33 *Id*.

34 29 U.S.C. §141 (1947).

35 29 U.S.C. §157 (1947).

36 29 U.S.C. §185 (1947). "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter... may be brought in any district court of the United States having jurisdiction of the parties." *Id*.

37 Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985).

38 Loc. 174, Teamsters, Chauffeurs, Warehousemen and Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 104 (1962). *See also Lueck*, 471 U.S. at 210. 0 *Lueck*, 471 U.S. 202.

39 U.S. Const. art. VI, cl. 2. The Supremacy Clause of the Constitution provides, in part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id*.

40 *Lueck*, 471 U.S. 202.

41 *Id*.

42 *Id*.

43 *Id*. at 203-4. Employees at Allis-Chalmers were bound by a Collective Bargaining Agreement, which allowed for a four-step grievance procedure for contract disputes. *Id*. The grievance procedure concluded with a final and binding arbitration hearing pursuant to the terms of the Collective Bargaining Agreement. *Id*.

44 *Id*. at 205.

45 *Id*.

46 *Id*. at 206.

47 *Id*.

48 *Id*. at 207.

49 Justice Powell took no part in the decision of the case. *Id*.

50 *Id*.

51 *Id*. at 213.

52 *Id*.

53 *Id*.

54 *Id*.

55 *Id*.

56 *Id*. at 217.

57 *Id*.

58 *Id*.

59 *Id*. at 219 (citing Steelworkers v. Warrior & Gulf Navigation Co*.,* 363 U.S. 574, 581 (1960)).

60 *Id*.

61 *Id*.

62 *Id*.

63 *Id*. at 220.

64 *Id*.

65 *Id*

66 *See* Williams v. Natl. Football League, 582 F.3d 863 (8th Cir. 2009), Smith v. Houston Oilers 87 F.3d 717 (5th Cir. 1996).

67 87 F.3d 717 (5th Cir. 1996).

68 *Id*. Sherman Smith and Tracy Smith also added claims of duress, extortion, assault and battery, and intentional infliction of emotional distress to their claim of coercion against their former employer. *Id*.

69 *Id*. at 718.

70 *Id*.

71 *Id*.

72 *Id*.

73 *Id*.

74 *Id*.

Continued on page 41.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 40.

75 *Id*.
76 *Id*. at 721.
77 *Id*.
78 *Id*.
79 *Id*.
80 *Id*.
81 Williams v. Natl. Football League, 582 F.3d 863 (8th Cir. 2009).
82 *Id*. at 870. The NFL's drug testing policy is governed by the league's CBA. *Id*.
83 *Id*.
84 *Id*. at 873.
85 *Id*. at 877.
86 *Id*. at 880.
87 *See* Weber v. Lockheed Martin Corp., 2001 WL 274518, at *7 (E.D.La.2001), Bagby v. General Motors Corp., 976 F.2d 919, 921 (5th Cir.1992). *Cf.* Wells v. General Motors Corp., 881 F.2d 166, 173 (5th Cir.1989) (claims for verbal fraudulent inducement, independent of the CBA); Jones v. Roadway Express, Inc., 931 F.2d 1086 (5th Cir.1991) (retaliatory discharge claim did not require an interpretation of the CBA).
88 976 F.2d 919 (5th Cir. 1992).
89 *Id*.
90 *Id*. at 920.
91 *Id*.
92 *Id*.
93 *Id*.
94 *Id*.
95 *Id*. at 921. (quoting Strachan v. Union Oil Co., 768 F.2d 703, 706 (5th Cir. 1985)).
96 Tellez v. Pacific Gas and Electric Co., 817 F.2d 536 (9th Cir. 1987).
97 *Id*.
98 *Id*. at 537.
99 *Id*.
100 *Id*.
101 *Id*. at 537-38.
102 *Id*.
103 *Id*. at 539.
104 *Id*.
105 In his complaint, Vilma identified Goodell as the commissioner of the National Football League at the time these statements were made.
106 *Vilma*, 917 F.Supp.2d 591, 595.
107 *Id*. at 595.
108 *Id*.
109 *Id*.
110 *Id*.
111 *Id*.
112 *Id*. at 595-96.
113 *Id*.
114 *Id*.
115 Deubert, 9 DePaul J. Sports L. & Contemp. Probs. at 130. The statements made were in response to Vilma's motion for temporary relief in order to be reinstated for training camp. *Id*. Judge Berrigan added, "If I can [reinstate Vilma] legally, I will." *Id*.
116 *Vilma*, 917 F.Supp.2d 591.
117 *Bagby*, 976 F.2d 919.
118 *Id*.
119 *Vilma*, 917 F.Supp.2d at 593.
120 *Id*. at 594.
121 *See generally* National Football League Collective Bargaining Agreement. Art. 46 (2011).
122 *Vilma*, 917 F.Supp.2d at 594.
123 *Id*.
124 *Id*.
125 *Tellez*, 817 F.2d 536.
126 *Id*. The letters stated, in part, "You were observed to purchase cocaine from another employee at units 7 and 8. Although you denied this allegation during the December 13 interview, we are satisfied that the transaction did occur." *Id*.

Continued on page 42.

Intentional Grounding—An Analysis of the Saints Bounty Scandal and the NFL Commissioner's Power to Suspend Under Article 46

Continued from page 41.

127 *Id*.
128 *Id*. at n. 3.
129 *Id*.
130 *See generally* Thomas A. Baker, III & Dan Connaughton, The Role of Arbitrability in Disciplinary Decisions in Professional Sports, 16 Marq. Sports L. Rev. 123, 153 (2005).
131 *Id*. at 124, 150.
132 *Id*. at 150.
133 *Id*.
134 Rick Karcher, Does the NFL's New Personal Conduct Policy Afford the Commissioner Too Much Discretion?,
135 *Id*.
136 *Id*.
137 Marc Edelman, Speech: A Different Look at Compliance in Professional Sports: Why the NFL Personal Conduct Policy Might Be More Illegal Than the Very Conduct It Seeks to Regulate, 7 DePaul J. Sports L. & Contemp. Probs. 89, 92 (2011).
138 *Id*.
139 *Id*.
140 *Id*.
141 Rick Karcher, Does the NFL's New Personal Conduct Policy Afford the Commissioner Too Much Discretion?,
142 *Id*.
143 *Id*.
144 *Id*.
145 *Id*.
146 *Id*.
147 *Id*.
148 *All Four Corners*, 19 UCLA Ent. L. Rev. 1, 72 (2012).
149 *Id*.
150 *Id*.
151 *Id*. at 64.
152 *Id*.
153 Michael McCann, "Why Vilma v. Goodell is Much More Than Just A Defamation Lawsuit." Sports Illustrated. http://sportsillustrated.cnn.com/2012/writers/michael_mccann/05/17/vilma.goodell.suit/index.html#ixzz2gcRU9W1

RECENT PUBLICATIONS

Compiled by Monica M. Ortale, Associate Director of Reference and Public Services
The Fred Parks Law Library, South Texas College of Law

Sports Bibliography:

AMATEUR SPORTS

Charles Bahlert. *College football, electronic arts, and the right of publicity: reality-mimicking run amok*, 18 Intell. Prop. L. Bull. 149 (2014).

K. Adam Pretty. Note. *Dropping the ball: the failure of the NCAA to address concussions in college football*, 89 Notre Dame L. Rev. 2359 (2014).

M. Alexander Russell. Note. *Leveling the playing field: identifying a quasi-fiduciary relationship between coaches and student-athletes*, 43 J.L. & Educ. 289 (2014).

ANTITRUST

Justin B. Bryant. Note. *Analyzing the scope of Major League Baseball's antitrust exemption in light of ...* (San Jose v. Office of the Commissioner of Baseball, No. C-13-02787 RMW, N.D. Cal., Oct. 11, 2013.) 89 Notre Dame L. Rev. 1841 (2014).

Vincent J. DiForte. Note. *Prevent defense: will the return of the multiyear scholarship only prevent the NCAA's success in antitrust litigation?* 79 Brook. L. Rev. 1333 (2014).

Marc Edelman. *A short treatise on amateurism and antitrust law: why the NCAA's no-pay rules violate section 1 of the Sherman Act*, 64 Case W. Res. L. Rev. 61 (2013).

Edward H. Grimmett. Comment. *NCAA amateurism and athletics: a perfect marriage or a dysfunctional relationship?* — *An antitrust approach to student-athlete compensation,* 30 Touro L. Rev. 823 (2014).

ARBITRATION

Brian A. Dziewa. Comment. *USADA the unconquerable: the one-side nature of the United States Anti-Doping Administration's arbitration process*, 58 St. Louis U. L.J. 875 (2014).

Stephen F. Ross, etal. *Judicial review of NCAA eligibility decisions: evaluation of the Restitution Rule and a call for arbitration*, 40 J.C. & U.L. 79 (2014).

Sam B. Smith. Note. *Show me the mediation!: introducing mediation prior to salary arbitration in Major League Baseball*, 42 Hofstra L. Rev. 1007 (2014).

CONSTITUTIONAL LAW

Samantha Levin. Comment. *Tweet tweet: a First Amendment wakeup call regarding social media in the sports arena*, 30 J. Marshall J. Info. Tech. & Privacy L. 117 (2013).

CONTRACTS

Bryan Gottlieb. Comment. *Avoiding contractual liability to baseball players who have used performance enhancing drugs: can we knock it out of the park?* 77 Alb. L. Rev. 615 (2013-2014).

Continued on page <None>.

Recent Publications
Continued from page 43.

DISPUTE RESOLUTION

Scott Kestenbaum. Note. *Uniform alternative dispute resolution: the answer to preventing unscrupulous agent activity*, 14 Pepp. Disp. Resol. L.J. 55 (2014).

ENVIRONMENTAL

Thomas J. Grant, Jr. Comment. *Green monsters: examining the environmental impact of sports stadiums,* 25 Vill. Envtl. L.J. 149 (2014).

John Loughney. Note. *Major League Baseball and the green revolution: a market-based approach to maintaining competitive balance in the face of environmental regulations*, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 709 (2014).

GAMBLING

Daniel Bernard. Note. *The NFL's stance on gambling: a calculated contradiction*, 4 UNLV Gaming L.J. 273 (2013).

Caitlin D. Buckstaff. Note. *Covering the spread: an assessment of amateurism and vulnerability of student-athletes in an emerging culture of sports wagering*, 16 Vand. J. Ent. & Tech. L. 133 (2013).

Evan Simonsen. Note. *Against the spread: the legality of full-service sports wagering kiosks*, 4 UNLV Gaming L.J. 241 (2013).

GENDER

Christopher Marquis. Note. *An equal playing field: the potential conflict between Title IX & the Massachusetts Equal Rights Amendment*, 34 B.C. J.L. & Soc. Just. 77 (2014).

Jennifer Pusch. Comment. *Urban struggles: an analysis of Title IX and urban high school athletic opportunities for girls*, 29 Wis. J.L. Gender & Soc'y 317 (2014).

Rachel Schwarz. Note. Timeout! *Getting back to what Title IX intended and encouraging courts and the Office of Civil Rights to re-evaluate the three-prong compliance test*, 20 Wash. & Lee J. C.R. & Soc. Just. 633 (2014).

HUMAN RIGHTS

Chad Nold. Student article. *Olympic-sized opportunity: examining the IOC's past neglect of human rights in host cities and the chance to encourage reform on a global scale*, 11 Loy. U. Chi. Int'l L. Rev. 161 (2014).

INTERNATIONAL

Matt Kalthoff. Note. *Out of sight, out of mind: confronting the legal, economic and social issues raised by Major League Baseball's peculiar treatment of foreign talent*, 29 Conn. J. Int'l L. 353 (2014).

MEDICAL

Erin P. Andrews. Note. *Avoiding the technical knockout: tackling the inadequacies of youth concussion legislation*, 58 N.Y.L. Sch. L. Rev. 417 (2013/2014).

Thomas Wyatt Cox. Note. *The international war against doping: limiting the collateral damage from strict liability*, 47 Vand. J. Transnat'l L. 295 (2014).

Martin Hardie. *Making visible the invisible act of doping*, 27 Int'l J. for Semiotics L. 85 (2014).

Josh Hunsucker Comment. *Buckle your chinstrap: why youth, high school, and college football should adopt the NFL's concussion management policies and procedures*, 45 McGeorge L. Rev. 801 (2014).

Continued on page 45.

Recent Publications

Continued from page 44.

PROFESSIONAL SPORTS

Sam Ivo Burum. Comment. *Yes, NBA players should make more money: how the NLRB can change the future of collective bargaining agreements in professional sports*, 63 Am. U. L. Rev. 845 (2014).

Jonathan H. Koh. Note. *Performance-enhancing drugs in boxing: preventing the sweet science from becoming chemical warfare*, 87 S. Cal. L. Rev. 335 (2014).

Thomas J. McQueeney. Comment. *Fourth and long: how the well-established system of workers' compensation poses a substantial threat to the financial stability of the NFL*, 43 U. Balt. L. Rev. 307 (2014).

SYMPOSIA

Concussion Conundrum, 20 Jeffrey S. Moorad Sports L.J. 347-380 (2013).

New Normal in College Sports: Realigned and Reckoning, 41 Pepp. L. Rev. 209-438 (2014).

TORTS

Jack Anderson. *The right to a fair fight: sporting lessons on consensual harm*, 17 New Crim. L. Rev. 55 (2014).

John Guccione. Note. *Moving past a "pocket change" settlement: the threat of preemption and how the loss of chance doctrine can help NFL concussion plaintiffs prove causation*, 22 J.L. & Pol'y 907 (2014).

Christopher Miner. Comment. *Fantasy sports and the right of publicity are under further review*, 30 Touro L. Rev. 789 (2014).

Entertainment Bibliography:

ART

Gregory Day. *Explaining the art market's thefts, frauds, and forgeries (and why the art market does not seem to care*), 16 Vand. J. Ent. & Tech. L. 457 (2014).

Swift Edgar. Note. *Standing by your Man Ray: troubles with antitrust standing in art authentication cases*. (Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., 2009 WL 1457177, 2009.) 37 Colum. J.L. & Arts 247 (2014).

M. Elizabeth Petty. Note. *Rauschenberg, royalties, and artists' rights: potential droit de suite legislation in the United States*, 22 Wm. & Mary Bill Rts. J. 977 (2014).

Jessica Schubert. *Prisoners of war: Nazi-era looted art and the need for reform in the United States*, 30 Touro L. Rev. 675 (2014).

COPYRIGHT

Carol M. Kaplan. *Once more unto the breach, dear friends: Broadway dramatists, Hollywood producers, and the challenges of conflicting copyright norms,* 16 Vand. J. Ent. & Tech. L. 297 (2014).

Olivia Su. Note. *Odor in the courts! Extending copyright protection to perfumes may not be so nonscentsical: an investigation of the legal bulwarks available for fine fragrances amid advancing reverse engineering technology*, 23 S. Cal. Interdisc. L.J. 663 (2014).

INTELLECTUAL PROPERTY

Paige Holton. Note. *Intellectual property laws for fashion designers need no embellishments: they are already in style,* [Includes photographs.] 39 J. Corp. L. 415 (2014).

M.C. Miller. Note. *Copyrighting the "useful art" of couture: expanding intellectual property protection for fashion designs*, 55 Wm. & Mary L. Rev. 1617 (2014).

Continued on page 46.

Recent Publications

Continued from page 45.

INTERNATIONAL

Kimberly L. Alderman & Chelsey S. Dahm. *National treasure: a comparative analysis of domestic laws criminalizing illicit excavation and exportation of archaeological objects*, 65 Mercer L. Rev. 431 (2014).

Zsuzsanna Veres. *The fight against illicit trafficking of cultural property: the 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 Santa Clara J. Int'l L. 91 (2014).

MISCELLANEOUS

Rohini Roy. Note. *Louboutin v. Yves Saint Laurent*: *the Second Circuit's functionality faux pas*. (Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., 696 F.3d 206, 2012.) 33 St. Louis U. Pub. L. Rev. 519 (2014).

MOTION PICTURES

Jessica J. Hwang. Note. *From spectacle to speech: the First Amendment and film censorship from 1915-1952*, 41 Hastings Const. L.Q. 381 (2014).

Jason Shachner. Note. *Unwrapped: how the Los Angeles County Safer Sex in the Adult Film Industry Act's condom mandate hurts performers & violates the First Amendment,* 24 Health Matrix 345 (2014).

MUSIC

Adam Vukovic. Note. *"Please don't stop the music": the need for fairness in digital copyright*, 65 Hastings L.J. 1419 (2014).

Michael Zaken. Note. *Fragmented literal similarity in the Ninth Circuit: dealing with fragmented takings of jazz and experimental music*. (Newton v. Diamond, 388 F.3d 1189, 2004.) 37 Colum. J.L. & Arts 283 (2014).

SYMPOSIA

Visual Semiotics of the Spaces We Inhabit, 27 Int'l J. for Semiotics L. 1 (2014).

TAX

Amelia Hurt. Comment. *Hollywood on the bayou: an optimal tax approach to evaluating and reforming the Louisiana Motion Picture Investor Tax Credit*, 74 La. L. Rev. 581 (2014).

Riane Lafferty. Note. *Workin' on our Nite Moves: a pole-arized application of a sales tax exemption to exotic dance* (677 New Loudon Corp. v. State of N.Y., 979 N.E.2d 1121, 2012.) 64 Syracuse L. Rev. 171 (2014).

TELEVISION

Andrew Fraser. Note. *Television a la carte*: *American Broadcasting Cos. v. Aereo and how federal courts' interpretations of copyright law are impacting the future of the medium*, (American Broadcasting Cos. v. Aereo, 2012 WL 2848158, 2012.) 20 B.U. J. Sci. & Tech. L. 132 (2014).

THEATRE

Karen H. Rothenberg, McDonald-Merill-Ketcham Lecture. *Setting the stage: enhancing understanding of bioethical challenges with theatre*, 11 Ind. Health L. Rev. 1 (2014).

TORTS

Roy S. Gutterman. *New York Times Co. v. Sullivan*: *no joking matter—50 years of protecting humor, satire, and jokers,* 12 First Amend. L. Rev. 497 (2014).

TRADEMARKS

Jessica M. Kiser. *To bully or not to bully: understanding the role of uncertainty in trademark enforcement decisions*, 37 Colum. J.L. & Arts 211 (2014).

Continued on page 47.

Recent Publications

Continued from page 46.

VIDEO GAMES

Martin Guggenheim. *Violent video games and the rights of children and parents: a critique of Brown v. Entertainment Merchants Association,* 41 Hastings Const. L.Q. 707 (2014).

Ryan Wallace. Comment. *Modding: amateur authorship and how the video game industry is actually getting it right*, 2014 BYU L. Rev. 219.

WRITERS

Pamela Kalinowski. Note. *The fairest of them all: the creative interests of female fan fiction writers and the fair use doctrine*, 20 Wm. & Mary J. Women & L. 655 (2014).

Submissions

All submissions to the TESLAW Journal are considered. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. As general guidelines, articles should be no more than twenty-five typewritten, double-spaced, 8 ½" x 11" pages, including any endnotes; however, longer articles will be considered. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles via e-mail in word or similar format to mfarris@vilolaw.com or to discuss potential topics.

Once an article is submitted, the Journal does not request any additional authorization from the author to publish the article. Due to the number of submissions and the number of potential publications in the marketplace, it is nearly impossible to monitor publication of submissions in other publications. It is up to the author to assure that we are notified should there be any restrictions on our use of the article. This policy has been implemented to assure that our Journal does not violate any other publication's limitation on re-publication. The Journal does not restrict re-publication, and in fact encourages submission of an author's article to other publications prior to or after our election to publish. Obviously, the Journal will make the appropriate attribution where an article is published with the permission of another publication, and request such attribution to the Journal if we are the first to publish an article.