# Texas Entertainment and Sports Law Journal

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Entertainment & Sports Law Section

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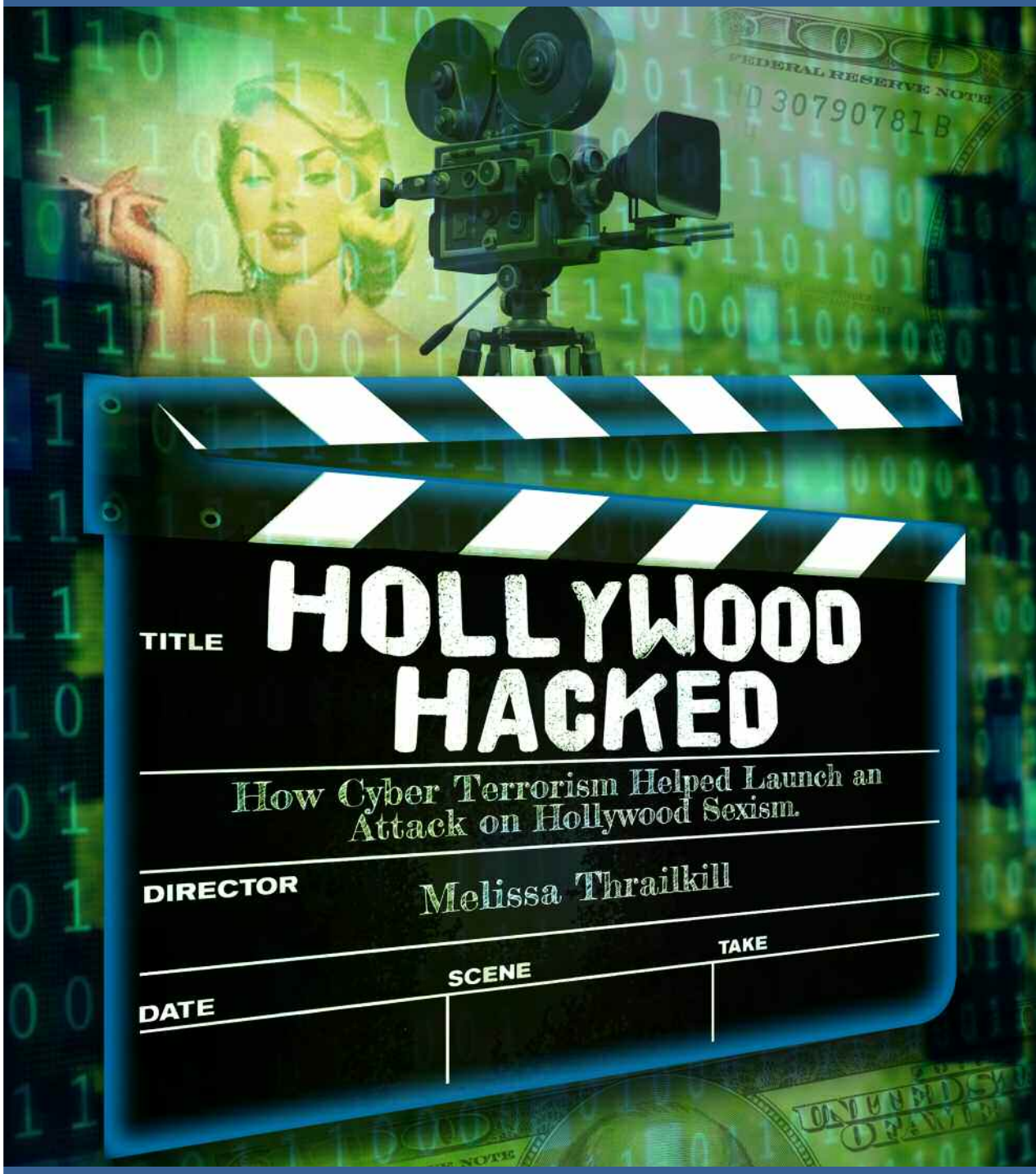


## INSIDE THIS ISSUE

# CHAIR'S REPORT

**Thank you for supporting TESLAW.**

We have had another productive year and this edition of our Journal is just one example. The next big event is our annual meeting on June 16th during the State Bar of Texas Convention in Fort Worth. Please join us at 12:30 pm for our annual meeting (when new Officers and Council members will be elected), followed by three hours of entertaining ethics CLE. Remember, TESLAW members do not need to pay the full convention costs to attend our annual meeting and CLE. So do come join us.

As my year as Chair comes to a close, I want to thank all the members who have contributed so much to TESLAW. I know I'll be leaving someone out, but special thanks and kudos go to (in no particular order) Joel Timmer, Amy E. Mitchell, Dena Weaver, Adam Mandell, Kevin Harrison, Melissa Thrailkill, Victoria Helling, Mike Farris, Steve Aguilar, and Brooks Rice. These are lawyers I knew I could always count on to get the job(s) done; plus—they are nice humans!

I look forward to seeing you in Fort Worth on June 16th and at TESLAW events in the future, including the Entertainment Law Institute on November 3 and 4 in Austin (mark your calendars now).

With appreciation and gratitude,

Sally Helppie
Chair 2015-2016

## 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 publicly searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment and sports law. Join today to be part of a collegial organization growing the practice of entertainment and sports law in Texas; for new bar members, the first year's dues are free.

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# EDITOR'S REPORT

*Joel Timmer, Editor*

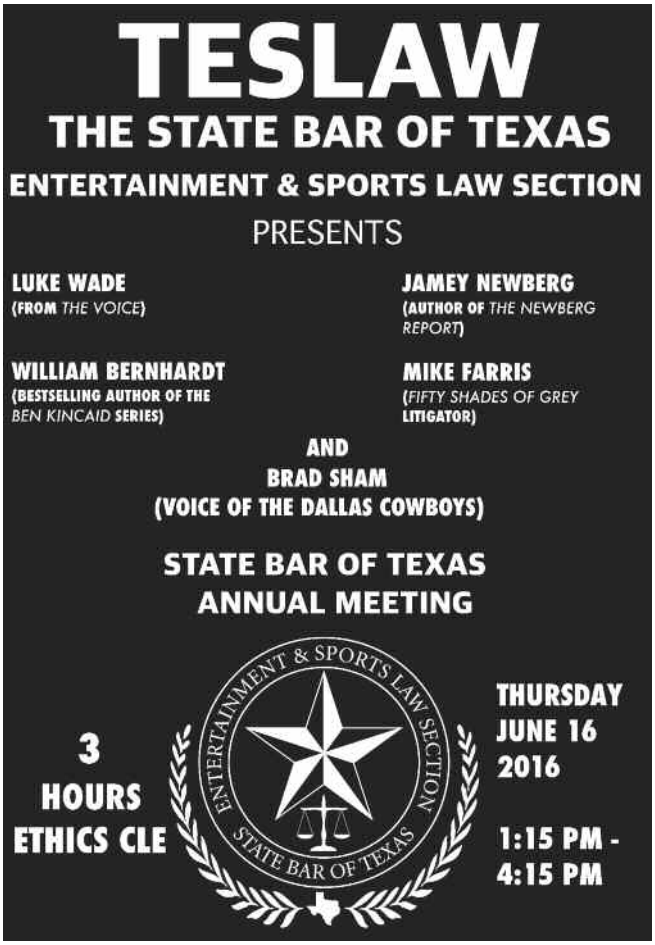
Welcome to the Texas Entertainment and Sports Law Journal, which is now entering its 25th year! We hope you will find this issue's contents useful and informative.

We are grateful to the contributors to this issue, particularly those that have prepared original content on timely issues. Melissa Thrailkill authored our lead article on the gender pay gap in Hollywood and efforts to address it. Dena Weaver has provided an overview of the new crowdfunding rules. Assistant Editor Stephen Aguilar has also prepared a legislative update on the status of entertainment and sports-related bills and laws in both the Texas legislature and the U.S. Congress.

We are pleased to have original contributions by two law students: Kornel Rady has prepared a bibliography on recent law review and journal articles on entertainment and sports law topics, while Matthew Longoria has provided an entertainment attorney profile. In addition, I want to thank Eric Bentley for allowing us to republish his recent article on the First Amendment rights of student-athletes.

We hope you enjoy this issue. Here's to another 25 years!

Joel Timmer
Editor

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# ATTORNEY PROFILE

*By Matthew Longoria*

**Diana Mata** is a 2011 graduate of St. Mary's University School of Law and is currently an Associate at FOX Networks Group in the Standards & Practices department. She is primarily responsible for overseeing content airing across all FOX Sports national cable channels.

**How did you become involved in Entertainment Law?**

I found myself in this field because of its dominance in Los Angeles. The prominence of the entertainment industry in L.A. is analogous to the energy sector in Texas. Consequently, the largest and most profitable corporations that make up L.A.'s economy are the major Hollywood film studios: Sony, Warner Bros., FOX, Universal, Paramount and Disney – commonly known as "The Big Six".

**How did you transition from Texas to California?**

My original plan was to stay in Texas and gain practical experience before relocating out of state. But because of a family matter, I moved to California immediately upon graduating from St. Mary's and took a chance on landing a job in the Los Angeles legal market.

During my job search, I learned about a temp agency that placed job seekers into positions on a contract basis within the "Big Six" studios. I decided to look into this option because I was less than thrilled with the document review position I was slated to begin in a few weeks at a large downtown L.A. firm. The agency offered me a temporary assignment as a legal assistant at FOX Studios, and I began the following week. I was patient and pursued opportunities as they arose. As a result, I was able to secure a permanent position in one of FOX's legal departments. What initially began as a temp job while awaiting bar exam results, turned into a great way to launch into an extremely competitive industry.

**Can you give us interesting client case details? Or something you've worked on in the past?**

I can't provide too much detail due to confidentiality reasons, but I can give you a few examples of the latest legal challenges I've experienced thus far.

Although copyright infringement and content protection have always been major concerns in the entertainment business, the latest advancements in technology have spawned new threats to content providers and TV broadcasters. Our latest victory against piracy came in the form of a 2014 Supreme Court decision in *American Broadcasting Companies v. Aereo, Inc*. The petitioners in this case included major network broadcasters such as CBS, NBC, ABC, FOX, Univision and PBS, among others. The Court held that Aereo, a startup TV streaming service, was violating copyright law by streaming broadcast signals to subscribers without paying for them. Unlike services like Netflix, Amazon and iTunes, who supply content pursuant to licensing arrangements, Aereo's business model was no more than a high-tech approach for stealing content. Needless to say, a decision in the other direction would have been detrimental to our business. We will always keep a watchful eye on companies similar to Aereo as technology and digital media continue to change the landscape of the way we consume television, movies and sporting events.

Other legal issues come from regulations issued by the Federal Communications Commission (FCC). Most recently, the FCC has been concerned with the misuse of the Emergency Alert System (EAS). The EAS is a warning signal emitted via television or radio to alert the public during emergencies or weather advisories. Any broadcast or transmission of the alert is a violation of FCC laws and heavy fines are imposed if the tone is used for non-emergency purposes.

Our job is to make sure that every piece of content we broadcast does not contain a tone similar to the EAS warning. The purpose behind this law is that the EAS warning must remain unique so that people do not become desensitized to the tone or react adversely to a false tone.

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## Attorney Profile

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**Do you have any advice for attorneys who want to practice Entertainment Law?**

Entertainment is like any area of law you are attempting to break into. Educate yourself by researching the business and legal issues facing the sports and entertainment industry in today's very digital world. Stay up to date with cases and developments evolving within your specific area of interest under the umbrella of Entertainment Law (Intellectual Property, Contracts, Music Law, First Amendment, etc.). You can accomplish this by reading the industry trades such as the *Hollywood Reporter* and *Variety*. These publications provide an inside look at the latest business dealings as well as a "who's doing what" within the community. This is critical because the industry can be insular. It really is a niche practice of law, so it's beneficial to be aware of who the major players are.

Finally, I think it's important to accept any opportunity that you're given with an open mind. You may not start off at the position you initially desire, but take and appreciate these opportunities because you never know who you're going to meet along the way or where your next job will stem from. Always do your best work and people will take notice. A solid work ethic is the main thing that'll separate you from all the other viable candidates. Often times, doing non-glamorous "grunt work" may lead you down an exciting career path.

# *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 timmer.law.office@att.net or email this address 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 republication. The Journal does not restrict republication, 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.**

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# Hollywood Hacked: How Cyber Terrorism Helped Launch an Attack on Hollywood Sexism

***By Mellisa Thrailkill***

**Melissa Thrailkill** is a Dallas-based attorney licensed in Texas and California. After graduating UC-Berkeley School of Law (Boalt Hall), Melissa returned to her home state of Texas and began her career on the Texas/Mexico border. In 2012, she opened up her own private practice in Dallas, TX and provides services to families, individuals and small business owners in the areas of family, civil, entertainment and appellate law.

On November 24, 2014, Sony Pictures Entertainment ("SPE") found itself the victim of a devastating cyber attack.[1] Employees plugged in and working that morning suddenly heard sounds of gun shots coming from their computers' speakers, followed by a floating, ominous purple skeleton overtaking the computer's screen.[2] Then, helplessly, they watched their files disappear from their computers.[3] Those not yet plugged in were met with the message "No Operating System" when they tried to start their day.[4] Emails, internal documents, seemingly everything in the SPE system, had been compromised.[5]

The first concern of the entertainment company was whether the North Korean government had a hand in the hack—a direct response to the studio's upcoming release of *The Interview*, a comedy starring Seth Rogen and James Franco that ended with Kim Jong-Un's death by exploding helicopter.[6] Already, the studio had been doing damage control over the film, and North Korea warned that they viewed the film as an act of terrorism.[7]

Not long after the hack came the threats of September 11-type terrorist attacks on theaters showing the film, scheduled to open Christmas Day 2014.[8] SPE pulled the release of the film, and a debate ensued as to whether Hollywood had given in too quickly to terrorism.[9] After outcry from some in Hollywood and a rebuke from President Barack Obama, Sony decided to release the film for a few select theaters and also began finding companies that would make the movie available for streaming online.[10]

At the same time Hollywood became a focus of some of our biggest political and social fears—cyber attacks, terrorist attacks, and the threat to American way of life from foreign, undemocratic nations—so, too, did it become the focus of the gender pay gap debate. From the thousands of emails and corporate documents emerged specific details about executive and actor pay.[11] Then, just months after the hack, in front of Hollywood's elites and a large television viewing audience, actress Patricia Arquette called out for "wage equality once and for all and equal rights for women in the United States of America" when accepting her best actress Oscar for her role as a single working mom in the film Boyhood.[12] California State Senator Hannah-Beth Jackson jumped on the wave of public attention created by Arquette and introduced Senate Bill 358, or the California Fair Pay Act.[13] Less than 10 months after Arquette's speech and barely a year after the SPE hack, SB 358 became law, making California the first state to enact the nation's strongest wage equality laws.[14]

In less than a year, a cyber attack had completely shaken up the entertainment industry, inspired feminist activism among big-name actors, and prompted legislation that will make it harder for employers to justify a disparity in pay between their male and female employees. This article will give background to the Hollywood scandal and the passage of Senate Bill 358. It will then evaluate the equal pay movement during President Obama's presidency and current federal equal pay legislation. Finally, it will evaluate how California's law accomplishes what the United States Congress has been unable to achieve and how it might impact Hollywood.[15]

## No Going Back: Tinsel Town Protests Help Usher In the Nation's Strongest Equal Pay Law

### The Hack Sparks a Movement

In early December, the SPE hackers started uploading the massive Outlook email boxes of Steve Mosko, president of Sony Pictures Television, and Amy Pascal, co-chairman of SPE, to file-sharing sites.[16] It did not take long, or much digging, for journalists scouring the emails and corporate documents to uncover the company's gender pay gap, as well as the under-representation of female and non-white employees at all levels.

One of the first big reveals came when Kevin Roose, a journalist for *Fusion*, received an anonymous email with a link to a public Pastebin file with documents uncovered in the hack.[17] Among the files was a spreadsheet listing the salaries of 6,000 SPE

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## Hollywood Hacked: How Cyber Terrorism Helped Launch an Attack on Hollywood Sexism

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employees.[18] The spreadsheet included the names of employees, job positions, addresses, current salaries and bonus plans, and they revealed, in black and white, the disparity in pay between white men and anyone else not fitting that description at SPE.[19] After filtering the list based on "annual rate," Roose found that out of the 17 Sony Picture executives based in the United States and earning one million dollars or more, only one was a woman.[20] That woman was Amy Pascal, who at the time held the titles of co-chair of SPE and chairperson of SPE's Motion Picture Group, and who had the same salary as Sony Entertainment CEO Michael Lynton at $3 million.[21] The emails also revealed a Sony-owned company—Columbia Pictures—also paid Hannah Minghella, who holds the title of co-president of production at Columbia Pictures, a SPE owned company, $1 million less than her male counterpart, Michael DeLuca, who holds the exact same job.[22] White men made up most of the rest of the $1 million and above "club," as Roose could only confirm that one executive was an African-American male and one other was a South Asian male.[23] Considering that out of the top 17 earners at Sony Pictures, 95 percent were men and 88 percent were white, Roose reached the broad conclusion that SPE's diversity problem was worse than the problems in Silicon Valley and Wall Street.[24]

Next came other tidbits of typical Hollywood-style gossip. Of particular interest were the exchanges between Pascal and other Sony executives and producer Scott Rudin.[25] In some colorful email exchanges about the Steve Jobs biopic, *Jobs*, and Angelina Jolie's then-pet project, *Cleopatra*, Rudin denounced Jolie's talent and described her as a "spoiled brat" with a "rampaging spoiled ego."[26] SPE had quite a debacle on its hands. First, the fact it was the victim of such an extensive and vicious hack uncovered how awfully the international company protected its files, making it a poster child of precisely what not to do in terms of cyber security.[27] Second, it had a public relations disaster with its handling of the release of *The Interview*.[28] Finally, because of the extent of the corporate information revealed as a result of the hack, SPE became the face of Hollywood's gender and diversity gap problem.[29]

The emails released revealed, in black and white, that SPE had blatantly paid some of Hollywood's biggest female stars less than their male counterparts.[30] On December 12, 2014, *The Daily Beast* featured an article detailing specific email exchanges between SPE executives discussing the compensation arrangements of Jennifer Lawrence and Amy Adams and their male counterparts Bradley Cooper, Christian Bale, and Jeremy Renner for their parts in the movie *American Hustle*.[31] The article included an email play-by-play between SPE executives, which is printed below as it appears in the article and in the actual emails, including punctuation and grammatical errors:

> In an email dated December 5, 2013, Andrew Gumpert, President of Business Affairs and Administration for Columbia Pictures, wrote to Pascal and Doug Belgrad, President of SPE Motion Picture Group, about the "points"—or back-end compensation—that each actor was to receive on *Hustle*. (The "Amy" referred to is Amy Adams, "O'Russell" is director David O. Russell, "Renner" is Jeremy Renner, and "Megan" is Megan Ellison, head of Annapurna Pictures, which co-financed *Hustle*.)
>
> "Got a steve warren/gretchen rush call that it's unfair the male actors get 9% in the pool and jennifer is only at 7pts," the email reads. "You may recall Jennifer was at 5 (amy was and is at 7) and WE wanted in 2 extra points for Jennifer to get her up to 7. If anyone needs to top jennifer up it's megan. BUT I think amy and Jennifer are tied so upping JL, ups AA."
>
> Gumpert added, "The current talent deals are: O'Russell: 9%; Cooper: 9%; Bale: 9%; Renner: 9%; Lawrence: 7%; Adams: 7%."
>
> Pascal's email response to the news of Lawrence making less than her male colleagues—despite the fact that she's far and away the biggest star of the picture, since *Hustle* was green-lit after The *Hunger Games*—was: "there is truth here."[32]

Nothing in the email exchange details why the two women, both stars and proven box office draws, were set to receive fewer "points" than their male colleagues.[33] In October 2015, Lawrence, in her own words, opened up about the issue, publishing a blunt essay on Lena Dunham's feminist-oriented pop culture blog *Lenny*.[34] Titled "Why Do My Male Co-Stars Make More Than Me," Lawrence acknowledged that her experiences as a "working woman" were not "exactly relatable," considering she already had two multi-million dollar franchises.[35] Even so, she found a way in which she and many other working women could relate, and that was in their desire to be liked and to not be seen as pushy, or offending, or, worse yet, as a spoiled brat.[36]

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# Overview of New Crowdfunding Regulations

***By Dena Weaver***

**Dena Weaver** is a member of Weaver Law, PLLC located in Arlington, Texas, experienced in consumer bankruptcy law, securities law violations and commercial litigation. Ms. Weaver's current entertainment clients include a television show creator and aspiring authors.

**Background**

On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act ("JOBS Act") into law. Title III of the JOBS Act added a new Section 4(a)(6) of the Securities Act of 1933 ("Securities Act")[1] which provides an exemption from the Securities Act's Section 5[2] registration requirement for certain transactions commonly referred to as crowdfunding. Crowdfunding is a way for small companies to offer and sell securities to individual, including non-accredited, investors.

Small companies, including independent film producers, waited for the Securities and Exchange Commission ("SEC") to enact new rules to regulate and allow funds to be raised by crowdfunding. Finally, after three years, the SEC adopted final rules on October 30, 2015. The final rules ("Regulation Crowdfunding") will be effective on May 16, 2016, for issuers and individual investors. The process and forms that enable funding portals as defined by Regulation Crowdfunding to register with the SEC became effective on January 29, 2016. The question is whether Regulation Crowdfunding fulfills the expectations of independent producers to raise funds from individual investors at a reasonable cost.

For independent producers, Regulation Crowdfunding allows them to raise funds for projects from individual investors without the requirement that the investor be accredited. That opens up an entirely new population that could invest and make the independent producer's dream a reality. In theory and reality, this is an obvious advantage in an age when fundraising for small projects is difficult at best. But at what cost?

Regulation Crowdfunding places a number of responsibilities and limitations on all issuers, particularly new ones for independent producers. A large number of independent producers have depended upon gifts from family to produce films or may have even illegally sold "securities" due to lack of knowledge regarding securities laws. Sometimes, the independent producer is not formally organized as an entity and does not maintain a business plan or financial statements other than a budget for a film.

For independent producers that have previously made films in this manner, Regulation Crowdfunding is overwhelming. Issuers are required to file with the SEC and disclose information, including, but not limited to, details of the crowdfunding offering along with information about the entity organization, its financials, officers, directors, and certain shareholders. Issuers must maintain financial records and provide annual reports and financial statements. The size of the offering dictates whether an independent auditor must review and audit the financial statements. In addition, the issuer must have a website for the purpose of publishing annual reports and for directing investors or potential investors to the intermediary's platform. Other specifications are found in the intermediary's disclosure requirements. Although an issuer is not responsible for an intermediary's disclosure requirements, the intermediary depends in some instances on representations made by the issuer.

All of these requirements cost money. There are fees involved in forming an entity. Other costs include hiring staff to maintain and process all of the financial information such as hiring an independent auditor in certain situations. Creating, hosting, and maintaining a website is yet another expense. Though not addressed in detail, there are costs associated with intermediaries.

Because an offering is not complete until the target offering amount is met prior to the deadline, the independent producer may expend the funds for a crowdfunding offering without receiving any funding. The SEC's protection of the individual investors can make it difficult to monitor the true progress for meeting the target offering amount. Keep in mind that individual investors may cancel their investment commitment any time prior to the 48-hour period before the offering deadline. Unless

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## Overview of New Crowdfunding Regulations

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there is a larger individual investor or some kind of news that highlights the risks of either your project or films in general, ideally the cancellations will be few and not affect the target.

Additionally, the SEC protects the individual investors in the event of a material change. The independent producer must carefully consider whether to make any material changes to its crowdfunding offering. A material change triggers a provision that requires each investor who has already made an investment commitment to reaffirm its intent before the original investment commitment is valid.

Another consideration for an independent producer is the advertising limitations. Assuming that there is a large number of entities offering crowdfunding securities, independent producers must find a way to stand out from the competition. One cannot assume that investors will scan through an intermediary's portal and find the independent producer's project. Even with the advertising limitations, there are ways to boost the project's visibility. Independent producers should consider publishing a notice that is permitted under Regulation Crowdfunding to a variety of outlets, including social media. A notice on Facebook has the potential to be reposted and reach people other than the independent producer's "friends." Similarly, a short notice with a direct link to the intermediary can be sent as a tweet. Again, there is the potential that followers may retweet, and the notice will reach more people. The same principle applies to LinkedIn and other internet apps not discussed here.

Crowdfunding may be the best way for independent producers to raise funds for a project. The project will reach investors that independent producers would not have access to without crowdfunding. There is potential that the independent producers could produce more expensive films and add stunts, special effects, or higher quality post production elements that they have been unable to afford in the past.

Independent producers, however, need to carefully evaluate whether a crowdfunding offering is right for them. The offering is not without costs, and there is no guarantee that the target offering amount will be raised. After the rest of Regulation Crowdfunding becomes effective on May 16, 2016, and enough time has passed for issuers to complete some crowdfunding transactions, the entertainment community should have a better view of whether crowdfunding works as everyone hopes it will.

Therefore, independent producers should be cautiously optimistic about crowdfunding and educate themselves on the requirements and risks associated with a crowdfunding offering. Details of Regulation Crowdfunding are provided below.

### Overview of Regulation Crowdfunding

#### *Issuer Offering Limits and Eligibility*

Regulation Crowdfunding limits the amount of money that may be raised in any 12-month period by an issuer and disqualifies certain issuers from participating in crowdfunding. An issuer may have multiple crowdfunding offerings but not raise a maximum aggregate amount in excess of $1,000,000 in a 12-month period.[3]

Some companies are ineligible to take advantage of the Regulation Crowdfunding registration requirement exemption. These include:

- Foreign companies;[4]
- Companies already required to file reports pursuant to the Securities Act of 1934 ("Exchange Act");[5]
- An "investment company, as defined in section 3 of the Investment Company Act of 1940…, or is excluded from the definition of investment company by section 3(b) or section 3(d) of that Act…";[6]
- Companies disqualified under 80 Fed. Reg. 71549 –50 (to be codified at 17 C.F.R. § 227.503(a));[7]
- Companies that failed to comply with Regulation Crowdfunding annual reporting requirements during the two years immediately prior to the filing of the offering statement;[8]
- Companies with no business plan;[9] or,
- Companies that plan to merge with or acquire an unidentified company or companies.[10]

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# Entertainment & Sports Legislative Update

*By Stephen Aguilar*

**Stephen Aguilar** is a Partner and Director, San Antonio, of MWR Legal.

## Texas – Passed

**SB 633, HB 3613 –** Relating to certain event trust funds and the abolishment of the special event trust fund.

- Events Trust Fund (ETF) moved from Comptroller to Economic Development and Tourism Division of Office of Governor. The ETF applies gains from taxes to pay costs associated with hosting events. This was done for efficiency purposes.
- Event fund helps pay for costs related to preparing for or conducting an event, such as the Super Bowl, Final Four, X-Games, professional All-Star games, World Cup, NCAA Bowl games, National Rodeo Events, Country Music Awards, General Presidential debates, political conventions, F1 Races, etc.
- Cannot use funds to relocate teams, construct stadiums, or conduct usual and customary maintenance of a facility.
- Funding is provided through State revenue and sponsoring municipality's hotel tax/mixed beverage tax.

PASSED: Signed by Governor June 18, 2015; effective September 1, 2015.

**HB 975, SB 898 –** Relating to charitable raffles conducted by professional sports teams.

- Authorizes charitable raffles by professional sports teams in which a raffle winner can draw a cash prize of not more than 50% of the gross proceeds collected from the raffle ticket sales.
- Makes it a criminal offense to:
  - Accept anything other than U.S. currency for raffle ticket.
  - Sell or offer to sell ticket to a minor (under 18), unless minor misrepresented their age, in which case the minor is charged.
  - Purchase a ticket using government financial assistance.

PASSED: Signed by Governor May 21, 2015; approved by voters November 3, 2015; effective January 1, 2016.

**HB 1040 –** Relating to the liability of certain sports officials and organizations.

- Providing limitation of liability for civil damages related to act, error, or omission that results from a risk inherent in the nature of the competitive activity.
- Sports officials are not liable for civil damages unless they were a result of their gross negligence or intentional misconduct.
- Failing to enforce rules, failing to call a penalty, etc., are not sufficient for liability.

PASSED: Signed by Governor June 9, 2015; effective immediately.

**HB 598 –** Relating to the designation of a segment of State Highway 21 in Nacogdoches County as the Bob Luman Memorial Highway (country and rockabilly musician born in Blackjack and raised in Nacogdoches).

PASSED: Signed by Governor June 1, 2015; effective September 1, 2015.

## Texas – Pending

**SB 1319, HB 3359 –** Relating to youth sports coaches

- Requires background checks, two hours of sports specific training, and two hours of non-skills based training for youth sports coaches (from kindergarten to 6th grade).

Left pending in Business & Commerce committee April 16, 2015.

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**SB 213, HB 3189 –** Relating to the functions and duties of the University Interscholastic League

- Discontinues statewide steroid testing but maintains steroid education.
- Requires report from school district superintendent stating:
  - District or school has formed a concussion oversight team;
  - The name and occupation of everyone serving on concussion oversight team and confirmation that they have received the required training;
  - That the concussion oversight team has established and is using the "return-to-play" protocol;
  - The number of full-time athletic trainers employed by the district or school; and
  - The number of coaches employed by the district or school who have received the required concussion training and those who have not received the training.
- Clarifies that each student athlete must complete physical and medical history form.

Passed Senate May 4, 2015; referred to House Public Education Committee May 19, 2015.

**HB 4040 –** Relating to the licensing and regulation of sports betting websites, providing penalties; requiring a license; allowing a fee.

- A criminal offense if providers do not obtain license.
- Might include fantasy sports: includes outcome of a sporting event or participation in a competition based on performance of players in an event or series of events.

In House. Referred to Licensing & Administration Procedures Committee May 23, 2015.

**SB 1533, SB 1399, HB 2707 –** Music, Film, Television, and Multimedia Office (Office) in the office of the Governor.

- Abolish the office and the moving image industry incentive program.

Left pending in Economic & Small Business Development committee April 30, 2015.

**HB 2786 –** Relating to incentives for the production of video games (grant program).

Referred to Economic & Small Business Development March 16, 2015; scheduled for public hearing; no action taken in committee.

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# Strike One…You're Out! A First Amendment Analysis of Whether College Athletes Possess a First Amendment Right to Strike[1]

*By Eric D. Bentley*

**Eric D. Bentley** is Associate General Counsel for the University of Houston System and is an adjunct faculty member in the UH Department of Health and Human Performance who teaches sports law.

On December 14, 2015, Missouri Representative Rick Brattin proposed a bill that would have revoked the scholarship of "any college athlete who calls, incites, supports, or participates in any strike or concerted refusal to play a scheduled game" and would have fined "any member of a coaching staff who encourages or enables a college athlete to engage in behavior prohibited [above]."[2]

This proposed Missouri law, which was subsequently withdrawn, was an obvious reaction (or, as some might put it, overreaction) to a series of events that captivated the collective college athletic and academic world in November 2015. With racial tensions at a boiling point at the University of Missouri where protests and a highly publicized hunger strike were conducted by students in an effort to force the removal of then President Tim Wolfe, the college world took a collective gasp as some thirty Missouri football players did what no other college athletes have ever done: they refused to participate in any practice or game during the middle of the football season until President Wolfe was removed.[3]

The college world began asking, can the football players do that? Should they do that? What will the University do? What would happen if the football team is forced to forfeit their game against BYU where, at a minimum, the $1 million guarantee[4] to be paid to the University would be lost?

Almost immediately, head football coach Gary Pinkel came out in support of his players by tweeting a photo of white and black Mizzou students standing arm in arm with the caption, "The Mizzou Family stands as one. We are united. We are behind our players."[5] The very next day after Coach Pinkel demonstrated his support of his players, Missouri President Wolfe resigned, followed soon after by the resignation of Chancellor Loftin.[6] Some praised the Missouri football players for taking a stand and having such leverage to set forth change. Others were not so impressed, which obviously included Representative Brattin whose bill would have taken the decision-making out of the hands of university officials and automatically revoked the scholarship of the athlete who boycotts a game, as well as fine the coaches who supported the boycott.

With the large scale civil unrest that occurred in 2014 regarding the police shooting of a black man in Ferguson, Missouri (just a two hour drive from the University of Missouri), still fresh in most everyone's minds, and the racial tensions that appeared to be present at the University of Missouri in the fall of 2015, it seems unfair to play Monday morning quarterback and second guess the actions of Missouri's response to the football player's strike. However, the events at Missouri beg the question of whether student-athletes at public schools[7] have a First Amendment right to strike, and whether a law such as the proposed Missouri law that would have penalized a student-athlete and coach for participating in or supporting a strike is constitutional.

Long before social media provided an instant stage on which anyone with fast moving thumbs and a smartphone could proclaim to millions the conditions and reasons for a student-athlete strike, students were forced to resort to "old school" methods of protest. For example, in the seminal case of *Tinker v. Des Moines Independent Community School District,* the U.S. Supreme Court decided a case in 1969 in which two high school students protested the Vietnam War by wearing anti-war armbands to school.[8] Believing this was a disruption to the school, the school suspended the students who wore the anti-war armbands, and the students sued the school claiming their First Amendment rights were violated. The Supreme Court held that the students possessed a First Amendment right to wear the anti-war armbands, the students' actions were not a substantial disruption to the school's activities, and in one of the Court's most often quoted opinions regarding First Amendment school cases, stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] However, the Court carved out a materially disruptive category of unprotected speech by noting that a school can discipline students for expressive activity "by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."[10]

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## Strike One…You're Out! A First Amendment Analysis of Whether College Athletes Possess a First Amendment Right to Strike

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As a result, a student-athlete who tweets "Black lives matter" or wears a t-shirt with that caption on campus would clearly have the First Amendment right to do so and that would likely not be considered a disruption under the standard set forth in *Tinker*. However, what standard would apply to student-athletes who wish to protest during a game or who go on strike and refuse to practice or play in a game?

In 1972, the Tenth Circuit decided a case in which several black University of Wyoming football players indicated they would wear black armbands during an upcoming football game against BYU in protest of the religious school's apparent beliefs on racial matters.[111] In response to only the proposed protest and potential for disruption during the upcoming game against BYU, the University of Wyoming dismissed the players from the football team, and the football players sued the university. The Tenth Circuit upheld the actions by the University of Wyoming by stating that the actions "denied only the request for the armband display by some members of the team, on the field and during the game [and that] [i]n these limited circumstances…the Trustees' decision was in conformity with the *Tinker* case and did not violate the First Amendment right of expression of the plaintiffs."[12]

Subsequently, in 1987, a Kansas District Court decided a case in which several black football players at Washburn University of Topeka decided to boycott team practices in protest of how they believed they were being treated in a racially discriminatory manner by the coaching staff and administration.[13] The football players who boycotted practice were kicked off the team, and they brought suit against the university arguing, in part, that their First Amendment rights were violated. The university responded by claiming the removal of the football players from the team was not a violation of the First Amendment because the football players' actions constituted a disruption to the school. The district court denied the university's motion for summary judgment on the First Amendment issue, due in large part to the admission of the coach during his deposition that the student-athletes were excused from practice during their protest. Because of the coach's admission that the athletes were excused from practice, the court held that the boycott of football practice could not be considered a disruption under the *Tinker* standard.[14]

However, "we're not in Kansas anymore," and this is not 1987. College football has become a multi-billion dollar industry and the thought of forfeiting a college football game at the financial expense of the university because a group of student-athletes are protesting a social issue is hard for some athletic departments to stomach.[15] As a result, a coach may voluntarily decide he or she will not excuse an athlete from practice or a game when the athlete is engaging in a protest. What would a court likely rule today if a football player refused to practice or participate in games and missing these team functions was not excused by the coach?

The Tenth Circuit's decision in *Williams* with regard to the University of Wyoming football players is instructive. If it was not a First Amendment violation for the University of Wyoming to remove its football players from the team who wanted to wear black armbands to a game to protest their opponent's racial viewpoints, a university would likely be found to possess the right to kick players off the football team who refuse to participate in practice or games. Under the *Tinker* disruption standard, it is hard to imagine how, for example, a starting quarterback who refuses to show up for a week of practice and an upcoming game because he is protesting would not be a material disruption to the team or the university. Moreover, student-athletes are bound by their scholarship agreements, which, in part, require attendance at team functions including practice and games. Just like refusing to attend classes as required by the scholarship agreement would result in the removal of a student-athlete's scholarship even if the student was missing classes to engage in protests, the refusal of a student-athlete to participate in required practice and games because of a protest could result in the removal of the student's scholarship; in such a case, the student-athlete's First Amendment claim against the university would likely fail.

In addition to applying the *Tinker* disruption standard, a court may apply a *Garcetti*-like analysis to student-athlete speech. In *Garcetti*, the U.S. Supreme Court held that a public employee who is speaking as an employee pursuant to his or her official job duties does not have First Amendment protection, but if the public employee is speaking as a private citizen on a matter of public concern, the employee may enjoy First Amendment protection.[16] Similarly, a court applying the *Garcetti* framework could conclude that a student-athlete who speaks as a private citizen on a matter of public concern (e.g., engages in a protest in the middle of campus after practice) has First Amendment protection; however, a student-athlete who engages in speech as a student-athlete (e.g., boycotts team practice or games) is not entitled to First Amendment protection.

As for the right to strike as a unionized employee, the Northwestern football players petition to be treated as employees and be allowed the right to unionize (and ultimately the right to strike) was dismissed in August 2015 via a unanimous decision by the National Labor Relations Board (NLRB).[17] It should be noted that even if the National Labor Relations Board had determined that the Northwestern football players enjoyed the right to unionize, public colleges and universities would not be bound by

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## Hollywood Hacked: How Cyber Terrorism Helped Launch an Attack on Hollywood Sexism

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This relatable issue, Lawrence explained, is why, when she found out how much less she was "being paid than the lucky people with dicks," she didn't get mad at Sony, but instead "got mad" at herself.[37] She had failed at negotiation, because she didn't keep fighting.[38] While "Jeremy Renner, Christian Bale, and Bradley Cooper all fought and succeeded in negotiating powerful deals for themselves," Lawrence was "busy worrying about coming across as a brat."[39] She concedes that maybe this had nothing to do with her "vagina," but she pointed to the leaked "spoiled brat" comment by Rudin of Jolie as proof that she was not far off in her belief that opinionated women in Hollywood were described in ways that men doing the same thing, more than likely, would never be described.[40]

With her statement on *Lenny*, Lawrence became somewhat of a hero for other female actors and in the ensuing months actors of both genders began weighing in on Lawrence's message. Just days after Lawrence's piece appeared on *Lenny*, Bradley Cooper, her male co-star who had taken home more pay for his part in *American Hustle*, and who also co-starred with Lawrence in the film S*ilver Linings Playbook* (Lawrence won an Oscar for her performance in that film), publicly stated his support for Lawrence.[41] Cooper discussed his dismay about the pay gaps, expressed a hope that other female actors would be encouraged to speak up, too, and announced his willingness to alter his approach to negotiating his pay on projects by first cooperating with his female co-stars on salaries.[42]

Actor Jessica Chastain, who had tweeted her support for Lawrence's essay when it was published, talked to journalist Jorge Ramos, along with director Guillermo del Toro, about the film *Crimson Peak*, a project on which Chastain said was the first time she believed her pay was completely fair.[43] The reason, she said, was because Del Toro had "gone to bat" for her.[44] Del Toro further explained that because *Crimson Peak* was so female-centric, he had trouble getting financing and, thus, because of the Hollywood norm of paying female actors less, his film with Chastain struggled with a nine-year production delay.[45] This film was not the first time Del Toro had hit such a roadblock, he explained, as studios had limited his budget on other movies for the explicit reason that "they called for female leads."[46]

More and more female actors and Hollywood insiders began making statements regarding the pay gap. Rooney Mara, star of *The Girl With the Dragon Tattoo*, revealed she had sometimes made less than half of what her male counterparts took home, and Sienna Miller told how she was offered less than half of the pay of her male co-star for a part in a play.[47] Needless to say, she walked away.[48]

It would be Arquette's acceptance speech, however, that would help propel the California Fair Pay Act into the California legislature. Arquette accepted her Oscar and made her statement for equal rights on February 22, 2015, and the next day Senator Hannah-Beth Jackson announced her intention to introduce her bill aimed at closing the wage gap in California.[49] As leader of the Women's Caucus in the California legislature, Senator Jackson had already begun working on a package of bills aimed at improving the lives of women and children in California, and one of those bills included the California Fair Pay Act, but when she saw Arquette's speech on Oscar night, she decided to move quickly, positioning her bill to stand in the spotlight created by Arquette's speech.[50] Utilizing the star power, glamour and current feminist activism in Hollywood, Senator Jackson announced her bill on February 24, 2015, and in less than a year, the nation's strongest equal pay law would come into effect.[51]

What's telling about the California experience here is not only the speed in which the bill jumped all hurdles to become law, but also the wide-ranging, bipartisan support the bill garnered.[52] Senator Jackson's bill somehow managed to accomplish what the federal government had been, and is still, unable to do—pass an equal pay law with real teeth for the employee.[53]

### II. Equal Pay in the Obama Years

While the Hollywood activism played a role in making the California legislation a reality, the continued need for stronger equal pay laws has remained a hot topic in public policy debates for most of the 2010s. President Barack Obama made his feminist leanings toward equal pay well-known, declaring his desire for an America in which his daughters would be paid like their male colleagues and peers.[54] Obama found an opportunity to bring America closer to his goal of equal pay when he signed the Lilly Ledbetter Fair Pay Act—his first law to sign as President.[55] The law was Congress's direct response to the United States Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[56] In that case, the Court ruled 5-4 that Lilly Ledbetter, an employee at Goodyear from 1979–1998, had filed her complaint about years of discriminatory pay too late.[57]

Shortly after her early retirement from Goodyear, Ledbetter brought her suit against the company under Title VII of the Civil Rights Act, claiming that her supervisors gave her poor performance reviews because of her gender, and that this had resulted in years of lower pay, as compared to her male counterparts.[58] Ledbetter had provided evidence that Goodyear had engaged in such employment practices, but Title VII required that she file a complaint with the Equal Employment Opportunity Commission

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("EEOC") within 180 days after the "alleged unlawful employment practice" occurred.[59] The case hinged on the Court's view of what constituted an "employment practice" under the statute, as well as when the "unlawful" practice "occurred," as envisioned by the statute.[60]

Writing for the majority, Justice Alito determined that disparate treatment claims under Title VII occur only when the employer engages in intentional discriminatory acts.[61] Further, these intentional acts must also be the result of purposeful intent.[62] Thus, to successfully state a claim, a plaintiff had to assert that there was an unlawful employment practice simultaneously accompanied by a present discriminatory intent.[63] Under the majority's reasoning, the unlawful employment practice "occurred" when her supervisor made the decision on her salary and not when the eventual paycheck based on that discriminatory practice was actually issued.[64] Because the supervisor's decision on salary occurred more than 180 days before Ledbetter filed her action, her claims were barred by the statute of limitations in Title VII.[65]

Justice Ruth Bader Ginsburg's dissent called on Congress to repair the damage she thought the Court had done to Title VII and its purpose of discouraging discrimination in the work place.[66] In her dissent, Ginsburg explained in more detail the pervasive discrimination at the Goodyear plant at which Ledbetter had worked. By concluding that the issuance of the paycheck was not the unlawful employment practice, but rather a result of the unlawful employment practice of discriminatory salary reviews, the Court ignored how "fundamentally different" pay disparity cases are from "the discrete acts listed in Title VII."[67]

Discrete acts, as defined by the statute, included actions like termination, or failure to promote or refusal to hire—acts that an employee can more easily identify. Pay disparity practices, however, were more difficult to recognize because employees don't usually have a way to compare their pay to others' pay.[68] Goodyear, for example, kept salaries confidential, and Ledbetter's pay, on par with her male counterparts at hire, decreased over her 19 years of employment as compared to her male counterparts who were getting the benefit of positive performance reviews and increases in salary.[69] Given that discriminatory pay happens slowly over the course of an employee's term with an employer and that employees rarely have an opportunity to investigate the salaries of all of the company's employees, Justice Ginsburg argued that it would be within Title VII's purpose and language to consider the issuance of each paycheck a "discrete, actionable act" of an unlawful employment practice.[70] Justice Ginsburg called on Congress to act and overturn the majority's holding.[71]

Although Congress heeded the call, with the House of Representatives Committee on Education and Labor holding a hearing to specifically address the majority's opinion in *Ledbetter*, nothing would happen until after the election of President Obama.[72] The bill signed by Obama in 2009 did not extend the number of days in which a Plaintiff could bring suit. Instead, it specifically defined discriminatory compensation and when it "occurs."[73] The Lilly Ledbetter Fair Pay Act helps alleviate the timing problem as it exists for pay discrimination plaintiffs, due to the inherent difficulty in accessing salaries and knowing when one may have been a victim of a discriminatory employment practice.[74] The law specifically states that, in regard to "discrimination in compensation" cases, an unlawful employment practice occurs:

> [W]hen a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[75]

The law further ensures that Title VII discriminatory pay plaintiffs have the chance to file in time by making it clear that the period begins to toll when the unlawful employment practice is "adopted," when the employee "becomes subject" to the practice, or when an employee is "affected" by the practice.[76] In the case of *Ledbetter*, had the law been in place, the issuance of paychecks based on a discriminatory employment practice of gender-based poor performance reviews would have been an actionable event, as Lilly Ledbetter was affected by that employment practice when the paycheck was issued by Goodyear, and each paycheck issued would have been a discrete act, starting the tolling period. The Lilly Ledbetter Fair Pay Act went to the heart of those delicate issues inherent in the pay discrimination claims by allowing plaintiffs an opportunity to act if and when they discover that they have been paid unequally based on their gender.[77]

### Congress Stalls After *Ledbetter*

While Congress was able to muster the wherewithal and the votes to answer Justice Ginsburg's call to action to overrule the majority's ruling in *Ledbetter*, it has had a more difficult time passing the Paycheck Fairness Act ("PFA"), a bill aimed at addressing

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the continued wage gap between men and women doing equal work.[78] Since 1997, Democrats in Congress have been trying to pass this legislation but have consistently failed.[79] The purpose of the bill is to "provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes."[80]

In sum, the bill attempts to do much of what the California Fair Pay Act accomplishes, specifically revising when an employer could rely on "any other factor other than sex" to justify the disparity in wages between male and female employees.[81]

The bill also adds remedies for plaintiffs bringing an action under the law and requires the EEOC to collect wage information from employers, among other requirements.[82] After the re-election of President Obama in 2012, Democrats relied heavily on the Paycheck Fairness Act to sway voters in the midterm elections by making it one of the party's central points in its overall theme of "a fair shot for everyone."[83]

Despite their continued efforts to pass the legislation and arguments that the legislation was needed to tackle the pay disparity problem by forcing employers to affirmatively take action in curing discriminatory employment practices in pay, the bill never made its way out of the Senate and it failed again in April 2014.[84] The Sony Hack would happen later that year, throwing pay disparity in the hot seat again and, just over a year after the proposed federal legislation failed, California would become the first state to test what happens to business practices and the wage gap when the barriers to overcoming discriminatory compensation are the targets of the legislation.[85]

### California Charts the Way to Realizing Equal Pay

In a press release announcing her bill, Senator Jackson highlighted Arquette's speech, using it as a springboard to announce legislation that had already been in the works for months.[86] Much like the Paycheck Fairness Act, the California Fair Pay Act, Senator Jackson's office explained, is necessary to address the pervasive problem of a wage gap between men and women in a way that California's state equal pay laws had failed to accomplish.[87] Despite the Equal Pay Act and Title VII, in 2014, a woman working full-time, year round in the United States made only 79 cents for every dollar paid to a man similarly situated.[88] For women of color, the gap was even wider, with African American women earning 60 cents and Hispanic women earning 55 cents to every dollar earned by a white, non-Hispanic man.[89] From 2005–2014 the gap closed by only 2 percent.[90]

Women in California fared a little better than women nationally, earning 84 cents for every dollar a man took home.[91] For women of color, however, the story was bleaker than the national average. Latina women, for example, made only 44 cents to every dollar made by a white, non-Hispanic male, the worst gap for Latina women in the nation.[92] Citing the difficulty in bringing a "successful claim" under California's previous equal pay law enacted in 1949, coupled with the secrecy usually involved around wages, Senate Bill 358 intended "[t]o eliminate the gender wage gap in California" by improving the "state's equal pay provisions and laws regarding wage disclosures."[93] The legislation set out to close the loopholes in existing equal pay laws by broadening the definition of equal work, forcing employers to justify pay disparities, and providing protection for employees who take action to uncover how their wages stack up against their male counterparts.[94]

First, the Fair Pay Act amended California's then current equal pay law by doing away with the "equal pay for equal work" terminology and, instead, specifying that employers in the state must pay employees the same for doing "substantially similar work."[95] Before the change, plaintiffs would have to show their job titles were similar to those being performed by a male colleague with a higher salary before they could succeed on a pay discrimination claim.[96] Now, where the male and female employees' work requires similar skills and responsibilities and is completed under similar working conditions, the employer must pay them equally, regardless of title or geographic location of the employee.[97]

Second, the bill added a brand new burden of proof on the employer to justify the difference in pay.[98] It maintains the defenses of the old law, allowing an employer to justify its pay difference by showing it is a result of a seniority system, merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex, such as education, training, or experience.[99] The bill strengthens this last factor by adding new specific affirmative defenses to the catch-all "bona fide factor other than sex" exception.[100] In order to rely on this specific defense, an employer will have to show that the "bona fide factor" is not "based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, *and* is consistent with a business necessity."[101] Business necessity is defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose" it is intended to serve.[102] If an employee can show that an alternative business practice exists and would serve the same purpose without resulting in a pay differential, then the employer cannot rely on the "business necessity" defense.[103] Finally, to use any of these affirmative defenses, the employer must also show that these factors account for all of the pay difference, not just part.[104]

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Third, the Fair Pay Act strengthens the protections afforded employees taking any action to "invoke" the enforcement of the law, which includes discussing wages with other employees, inquiring into the salaries of others, or "aiding or encouraging any other employee to exercise his or her rights" under the law.[105] The legislation also creates a new cause of action for an employee who experiences retaliation for engaging in the conduct protected by this section of the law.[106] Thus, if an employee asks about her wages, the employer must provide her the information and cannot take any negative action against her for taking that initiative.

Finally, enforcement of the law falls on the California Division of Labor Standards Enforcement ("California Division of Labor"), which can investigate and can also administer and oversee the payment of damages to the employee.[107] Unless waived, the agency has the right to bring a civil suit against the employer.[108] An employee can also choose to waive the California Division of Labor's right to act on her behalf and can bring her own civil suit instead.[109]

The California law's strength is apparent on its face. It expands the limited reach of the Federal Equal Pay Act and goes above and beyond the Lilly Ledbetter Fair Pay Act by recognizing that an employee "can't fight what [she] doesn't know about."[110] The California law makes it easier for employees to obtain the information regarding their salaries and forces employers to evaluate the various aspects of different positions in their company to determine if they are engaging in discriminatory pay in violation of the statute.[111]

Unlike the Federal Paycheck Fairness Act, the California legislation flew through that state's legislature with bi-partisan support from politicians and public institutions.[112] Jackson had managed to reach across the aisle by drafting a bill that had much of the teeth of the Federal Paycheck Fairness Act, but with fewer regulations.[113] For example, the Paycheck Fairness Act requires employers to report salaries to the EEOC and also allows for punitive damages.[114] The California Fair Pay Act, however, does not mandate employers to report to any state department, it does not allow for punitive damages, and it offers an alternative to civil litigation by giving the Division of Labor Enforcement investigative and enforcement power.[115]

### How Will Hollywood Deal?

In some businesses and industries in California, the Fair Pay Act is already having its intended effects. Several businesses and government agencies have voluntarily begun evaluating their business practices and addressing issues that could lead to lawsuits.[116] When Salesforce.com, Inc., began looking at its salaries shortly after California Governor Jerry Brown signed the legislation, it found disparities and the company spent $3 million to increase the salary of women and some men to meet the law's pay parity requirements.[117] The law may encourage other employers to conduct such pay audits and self-adjust, as well as to evaluate the various roles in their businesses and assess whether they would be able to prove that their pay differentials are based on a "bona fide factor other than sex."[118] It could also shift the way employers make salary decisions from a case-by-case basis to a standard formula or set salary schedule.[119]

While these types of adjustments might be easier to implement in the executive suites of the entertainment industry, or for those "below-the-line workers," complying with the law and closing the gap between female and male actors, writers, and directors will require a "radical readjustment."[120] Senator Jackson made it no secret that she had Hollywood in her crosshairs when pushing for passage of her bill.[121] The hack had put everyone paying attention on notice that Amy Adams and Jennifer Lawrence received two percent less pay than their male counterparts, even when the inequity was brought to the decision makers' attention.[122] Alluding to this fact, Jackson said: "If you're going to pay them less, you're going to have a pretty hard time explaining that now. We've set a pretty high bar."[123] How the industry will change to meet the high standards set by the California law will likely take time to reveal itself but, no matter, as the industry will not be able to ignore the requirements of the law.

### "This is the bottom line: The Old Hollywood can no longer exist."[124]

Unlike other corporations and businesses, which have come out and revealed how they are proactively addressing their practices, Hollywood has remained mum.[125] Using the Lawrence and Adams pay disparity as an example, if the California Fair Pay Act had been in effect, both actors would have a pretty good case against SPE. The email exchanges between the company's executives, in which the pay disparity was specifically called out, looked a lot like intentional discrimination.[126] If Lawrence and Adams had lodged complaints against SPE, then the company would have the burden of proving that the pay disparity was based on bona fide reason other than sex.[127] In this scenario, it would be doubtful the company could meet that burden.

For example, it is likely that studios could continue to rely on box office performance, awards draw, an actor's popularity, and other hard-to-measure creative and industry-specific factors to justify the pay disparity.[128] With the Fair Pay Act, however, the studios will still have the burden of demonstrating how these factors, when applied, justify a wage gap between a project's

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female and male stars.[129] Going back to Lawrence and Adams, before *American Hustle*, the two actors had been proven box office draws, and were recognized with award nominations and wins under their belts. Each also received Oscar nominations for their performances in *American Hustle*, and both won a Golden Globe for their roles. Thus, it's highly unlikely that SPE could rely on any of the 3 named exceptions and would instead have to rely on the bona fide factor other than sex exception, an even more onerous burden to meet. Again, the email exchanges show no discussions of the reason why Lawrence and Adams should only receive 7%, while the three male actors received 9%.[130] At no point did it seem fathomable to the executives that they could propose that Lawrence or Adams had the right to an equal percentage as their male co-stars.[131] There appeared to be no business necessity for the pay disparity on *American Hustle*.

In addition, female-focused films also happen to draw some of the biggest audiences and return for entertainment companies.[132] Looking at the box office grosses of the top 25 highest-earning films from 2006 to October 2015, a box office hit about a man grossed roughly $80.6 million, while a film that focused on a woman brought in, on average, $126.1 million.[133] Going back to Lawrence, one study shows that she is the "most profitable star out there . . . bringing in $50 for every $1 in salary from her last three motion pictures."[134] Therefore, even if the industry continues to rely on the factors such as an actor's box office draw or awards won as a way to set pay, it should still force the pay scale up for female stars like Lawrence and Adams, who, based on these factors, likely should have been paid equally, if not more, than their male costars in *American Hustle*.

Another aspect of setting pay for actors that will probably not change, but still require adjustment under the new law, is in the negotiating of contracts. Usually, it's an actor's agent or business manager cutting the deals on the actor's behalf.[135] Even so, the law will force changes in that process, as studios will have to be cognizant of what they are paying, and the agents will have ammunition—the law—to start asking for more for their clients.[136] That is, the status quo acceptance that the girls get paid less than the boys has to be smashed.[137] For female actors, the law gives them room to get past the need to be likable when making deals, and to take initiative to "fight" and to be okay in deciding to "walk away" when the company decides "to be stingy and not be equal."[138] Jennifer Lawrence was willing to do just that when negotiating her contract for the film *Passengers*, in which she stars alongside Chris Pratt.[139] The actor held her ground and threatened to walk away if Sony did not agree to pay her $20 million for the film.[140] It proved successful, as she landed the deal and is being paid a rate much higher than her male costar.[141]

### Limitations on the Law: The Opportunity Gap and #OscarsSoWhite

The tactic of choosing "not to work for less money," to "walk away," and to not be so "grateful for jobs" may be easier for those in Lawrence's position, but for those with less pull, the idea of walking away may still be a frightening proposition.[142] This is especially true when considering that women, overall, have less opportunity to land a deal because they have fewer lead roles available to them.[143] Not only do they have fewer roles overall, but their peak earning years, like women across the country, come earlier in their lives and do not last as long as their male counterparts.[144] These realities create a culture in which female actors accept the lower pay for the simple fact that they want to work.[145]

For female directors, the opportunity gap is even bleaker: in 2014, out of the 250 top grossing films, only 7 percent had female directors, and females directed only 16 percent of TV episodes in the year 2014 to 2015.[146] This has also sparked a movement among female directors to speak out. After the ACLU of Southern California sent correspondence to the EEOC about the "serious gender disparities in opportunities" they uncovered in their investigation of female directors in Hollywood, the federal agency began asking female directors to come in to their offices for interviews.[147] Without the roles or opportunity, the Fair Pay Act will not address some of the realities of Hollywood business that also contribute to the wage gap.

Similarly, the law will not address the lack of diversity between actors of color and their white counterparts.[148] The SPE hack revealed the lack of diversity in the executive suites of SPE, and the 2016 Oscars called attention to the lack of opportunity for and recognition of people of color in Hollywood.[149] The whitewashing of the 2016 Oscars caused a political statement with black actors vowing to boycott the event and the launch of the hashtag #OscarsSoWhite.[150] As with women, Hollywood does not provide a lot of opportunity for people of color, and no wage gap law can address this historical bias that limits particular classes of actors' ability to land roles, to direct, and to write, and, thus, to contribute to Hollywood.[151] Thus, like women, people of color start at least one-step behind their white male colleagues, without any justification other than "business as usual."[152] And, while the California Fair Pay Act may help women of color get equal pay once they are hired on a project, it will not close the opportunity gap and the prevalent lack of diversity on and behind the big screen.[153]

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### Conclusion

The SPE hack thrust Hollywood into a geopolitical debate on terrorism and cyber security, as well as a national debate on sexism and discrimination. The company's quick reaction to pull the release of *The Interview*, the movie they feared encouraged North Korea to infiltrate their servers, put the company under immediate fire for giving in and allowing the terrorists to threaten free speech and the American way of life.[154] At the same time, the hack also revealed a disturbing reality about the Hollywood way of life, which involves a history and acceptance of paying males and females differently, as well as the history and acceptance of an overall lack of diversity in all areas of the entertainment industry.[155]

Armed with the black and white proof of the discrimination, female actors started speaking out, and a politically charged Oscar speech actually sparked a push to pass the California Fair Pay Act, one of the strongest equal pay laws in the country.[156] While it will take time to understand precisely how the law will impact Hollywood, the influence of the industry has helped bring focus and energy behind the equal pay fight.[157] Cutting it down to basics, the experiences of the Lilly Ledbetters of the world are not that different from the Jennifer Lawrences of the world, as all women face the consequences of historical gender biases in pay.[158] The biggest impact the California Fair Pay Act may have on Hollywood and for women, overall, is the protection it provides to employees who peek behind the curtain to see who is getting paid what. It is that transparency that will force Hollywood and California businesses to make changes, or else be prepared to explain why their disparate pay practices are justified.[159]

Arquette's role as a single working mom in *Boyhood* inspired her to take the fight for equal pay to the Oscars and to the statehouse.[160] In appearances since the passage of the Fair Pay Act, she continues to reiterate that her acceptance speech was never solely about her or Hollywood, and she is following that up by putting her star power behind the decades-long fight for passage of the Equal Rights Amendment.[161] Female actors, directors, and writers in Hollywood will continue to face barriers, and they will have to adjust their attitudes toward asking for more for their work, as will their agents, but laws like the California Fair Pay Act give them the backing of the government in a way the U.S. Congress has repeatedly failed to do. That backing could prove to be what women in Hollywood and across the nation need to make real headway in closing the wage gap.[162]

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## Overview of New Crowdfunding Regulations

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***Individual Investors – Investment Limits***

The SEC through Regulation Crowdfunding seeks to protect the individual investors by imposing the following investment limits:

- Individual investors may invest in a 12-month period in a crowdfunding offer up to the following aggregate amounts:
  - If their net worth or annual income[11] is less than $100,000, then the investor may invest the greater of $2,000 or 5 percent of the lesser of their net worth or annual income;[12] or
  - If both their net worth and annual income are equal to or greater than $100,000, then the investor may invest 10% of the lesser of their annual income or net worth subject to a $100,000 investment cap.[13]

***Individual Investors – Other Protections***

To further favor and protect the individual investor, the investor has ample opportunity to cancel any investment commitment under Regulation Crowdfunding as follows:

- Any time before the 48-hour period prior to the offering;[14] or
- A material change is made to the offering that is not confirmed by the investor.[15]

***Issuer Disclosures***

Issuers that offer or sell securities in reliance on the crowdfunding exception must provide initial information to the investors and relevant intermediary, as well as file with the SEC the following:

- Issuer's name, legal status including form, date, and jurisdiction of its organization, physical address and web address;[16]
- Names of issuer's directors and officers and any other person in a similar position, all positions and offices held by named individuals along with the length of time in each position, and their business experience in the last three years;[17]
  - Business experience includes each named person's principal employment and occupation along with whether person is working for another employer;[18] and
  - "Name and principal business of any corporation or other organization in which such occupation and employment took place;"[19]
- Names of each person "who is a beneficial owner of 20% or more of the issuer's outstanding voting equity securities" as of the most recent practicable date but within 120 days prior to the date the offering statement is filed;[20]
- Description of issuer's business and issuer's anticipated business plan;[21]
- Current number of issuer's employees;[22]
- "Discussion of the material factors that make an investment in the issuer speculative or risky;"[23]
- Target offering amount and deadline to reach that amount, along with a statement that if investments do not reach or exceed the target amount, all investment commitments will be cancelled and funds returned;[24]
- Whether issuer will accept more than the target offering amount and, if so, the maximum amount that will be accepted, along with the method of allocating oversubscriptions;[25]
- Description of intended use and purpose of the funds raised in the offering;[26]
- Description of the process to make or cancel an investment commitment, including that:
  - Investors may cancel a commitment until 48 hours prior to offering deadline;[27]
  - An intermediary will notify investors when target amount is reached;[28]
  - An issuer may close an offering early if the target amount is reached and the issuer provides notice of the new deadline at least 5 business days before the new deadline, unless there is a material change that would require an offering extension and reconfirmation of each investor's commitment;[29]
  - If the investor fails to cancel prior to 48 hours before the deadline, its funds will be released on the deadline date and will receive securities in exchange;[30]

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- Name, SEC file number and Central Registration Depository of the intermediary handling the offering;[31]
- Either the price to the public of the securities or the method used to determine the price, provided that every investor will receive the final price and required disclosures before the sale of the crowdfunding security;[32]
- "Description of the ownership and capital structure of the issuer."[33] This includes a number of disclosures related to the terms of the securities; how rights of principal shareholders could affect investors; the previously mentioned list of those owning 20% or more of the issuer's outstanding voting securities; the method of offering and valuing securities; restrictions on securities' transfers; and various risks to the investors;[34]
- Description of any intermediary's financial interest in the issuer or issuer's transaction.[35] This includes compensation to the intermediary, the intermediary's direct or indirect interest in the issuer, or any arrangement that allows the intermediary to acquire an interest;[36]
- Description of the material terms of an issuer's indebtedness;[37]
- Description of any exempt offerings conducted by the issuer within the prior three years.[38] The description must include the offering date, the exemption that the issuer relied upon, the type of offered securities, the amount sold and how proceeds were used;[39]
- "Discussion of the issuer's financial condition, including, to the extent material, liquidity, capital resources and historical results of operations;"[40]
- Various disclosures including financial statements and whether the statements must be audited by independent auditor based on the aggregate targeted offering amounts in the prior 12-month period;[41]
- Progress updates regarding meeting the target offering amount;[42]
- Location on investor's website of the issuer's annual report and the date it will be available;[43]
- Whether issuer or its predecessors "previously failed to comply with the ongoing reporting requirements" in the final rule to be codified at 17 C.F.R. Part 227.202;[44] and
- Material information necessary to make statements not misleading.[45]

Though not within the scope of this article, it is worth noting that issuers have ongoing reporting requirements that must be posted on their websites and filed with the SEC including annual reports, financial statements and certain other disclosures located in the final rule to be codified at 17 C.F.R. Part 227.201.[46]

### *Crowdfunding Offerings*

Any offerings must be made through an intermediary that is subject to a number of obligations and duties in connection with a crowdfunding offering. Pursuant to the rules, the intermediary must be:

- A broker registered with the Commission "under section 15(b) of the Exchange Act[,]" or a new entity known as a funding portal under the requirements of 17 C.F.R. Part 227.400;[47] and
- "Be a member [of] a national securities association registered under section 15A of the Exchange Act."[48]

Intermediaries must use a platform to make any crowdfunding offering. Any offering must use only a single intermediary. A platform is defined as:

- "[A] program or application accessible via the Internet or other similar electronic communication" which an intermediary utilizes in the offer or sale of crowdfunding securities pursuant to section 4(a)(6) of the Securities Act.[49]

### *Intermediary Disclosures – Educational Materials*

Intermediaries are mandated to disclose a large amount of materials designed to educate investors as to the crowdfunding offering, investment limitations, and the process to invest in the offering. Educational materials, which must be written in plain language and then be sent to the investor upon account opening,[50] include:

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## Overview of New Crowdfunding Regulations

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- Risks associated with purchasing crowdfunding offerings and "the process for the offer, purchase, and issuance of securities through the intermediary;[51]
- The types of crowdfunding offerings available for purchase through the intermediary's platform and the risk for each type of security, including possible limited voting power due to dilution;[52]
- Resale restrictions for crowdfunding securities[53];
- Investment limitations;[54]
- Circumstances that may arise that allows the issuer to cancel an investment commitment;[55] and
- Need for the investor to evaluate whether investing in the specific crowdfunding offering is appropriate for them.[56]

Finally, the intermediary's current version of the above educational materials must be available on its platform. If any material changes are made, the revised materials must be available to all investors before accepting any additional investment commitments or conducting any further transactions in the crowdfunding securities offered and sold.[57]

### *Additional Funding Portal Requirements*

Funding portals are new entities that exist for the sole purpose of offering and selling crowdfunding offerings. As such, they have limitations on their actions. The limitations are as follows:

- May not offer recommendations or investment advice;[58]
- May not "solicit purchases, sales or offers to buy the securities displayed" on its platform;[59]
- May not compensate persons, including but not limited to current employees and agents, for such solicitation or "based on the sale of securities displayed or referenced on its platform;[60] or
- May not "hold, manage, possess, or otherwise handle investor funds or securities."[61]

### *Advertising*

Regulation Crowdfunding limits the type of advertising for any crowdfunding offering. The final rules are as follows:

- An issuer may not advertise the terms of a crowdfunding offering either directly or indirectly unless the notice meets certain requirements;[62]
- "A notice may advertise any of the terms of an issuer's" crowdfunding offering … if it directs investors to the intermediary's platform and includes no more than the following information:"[63]
  - Statement that issuer is offering crowdfunding securities along with the name of the intermediary and a direct link to the intermediary's platform;[64]
  - Terms of the offering; and[65]
  - Factual information about the issuer limited to issuer's name, address, phone number, location of issuer's website, e-mail address of issuer's representative, and brief description of issuer's business.[66]
- Notwithstanding the advertising prohibition, "an issuer, and persons acting on behalf of the issuer, may communicate with investors and potential investors" regarding the terms of the offer on a communication channel on the intermediary's platform. The issuer must identify "itself as the issuer in all communications," and those "acting on behalf of the issuer must identify their affiliation with the issuer in all communications on the intermediary's platform."[67]

There are many other provisions, including an intermediary's registration necessary to offer crowdfunding securities, liability provisions for issuers and intermediaries, and amendments to offering statements and other financial reporting.[68]

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### ENDNOTES

1 15 U.S.C. § 77d(a)(6).
2 15 U.S.C. § 77e.
3 Crowdfunding, 80 Fed. Reg. 71537 (Nov. 16, 2015) (to be codified at 17 C.F.R. § 227.100(a)(1)).
4 *Id.* (to be codified at 17 C.F.R. § 227.100(b)(1)).
5 *Id.* (to be codified at 17 C.F.R. § 227.100(b)(2)).
6 *Id.* (to be codified at 17 C.F.R. § 227.100(b)(3)).
7 *Id.* (to be codified at 17 C.F.R. § 227.100(b)(4)).
8 *Id.* (to be codified at 17 C.F.R. § 227.100(b)(5)).
9 *Id.* at 71538 (to be codified at 17 C.F.R. § 227.100(b)(6)).
10 *Id.*
11 Net worth and annual income are to be calculated in the same way as calculated for purposes of determining accredited investor status. The calculation for a single investor may include a spouse. *See* Crowdfunding, 80 Fed. Reg. 71537 (to be codified as Instruction 1 and Instruction 2 to 17 C.F.R. § 227.100(a)).
12 Crowdfunding, 80 Fed. Reg. 71537 (Nov. 16, 2015) (to be codified at 17 C.F.R. § 227.100(a)(2)(i)).
13 *Id.* (to be codified at 17 C.F.R. § 227.100(a)(2)(ii)).
14 *Id.* at 71538 (to be codified at 17 C.F.R. Part 227.201(j)(1)).
15 *Id.* (to be codified at 17 C.F.R. Part 227.200(k)).
16 *Id.* (to be codified at 17 C.F.R. Part 227.201(a)).
17 *Id.* (to be codified at 17 C.F.R. Part 227.201(b)).
18 *Id.* (to be codified at 17 C.F.R. Part 227.201(b)(1)).
19 *Id.* (to be codified at 17 C.F.R. Part 227.201(b)(2)).
20 Crowdfunding, 80 Fed. Reg. 71538 (to be codified at 17 C.F.R. Part 227.201(c)).
21 *Id.* (to be codified at 17 C.F.R. Part 227.201(d)).
22 *Id.* (to be codified at 17 C.F.R. Part 227.201(e)).
23 *Id.* (to be codified at 17 C.F.R. Part 227.201(f)).
24 *Id.* (to be codified at 17 C.F.R. Part 227.201(g)).
25 *Id.* (to be codified at 17 C.F.R. Part 227.201(h)).
26 Crowdfunding, 80 Fed. Reg. 71538 (Nov. 16, 2015) (to be codified at 17 C.F.R. Part 227.201(i)).
27 *Id.* (to be codified at 17 C.F.R. Part 227.201(j)(1)).
28 *Id.* (to be codified at 17 C.F.R. Part 227.201(j)(2)).
29 *Id.* (to be codified at 17 C.F.R. Part 227.201(j)(3)).
30 *Id.* (to be codified at 17 C.F.R. Part 227.201(j)(4)).
31 *Id.* at 71539 (to be codified at 17 C.F.R. Part 227.201(n)).
32 Crowdfunding, 80 Fed. Reg. 71538 (to be codified at 17 C.F.R. Part 227.201(l)).
33 *Id.* (to be codified at 17 C.F.R. Part 227.201(m)).
34 *Id.* at 71538–9 (to be codified at 17 C.F.R. Part 227.201(m)(1)–(6)).
35 *Id.* at 71539 (to be codified at 17 C.F.R. Part 227.201(o)).
36 *Id.* (to be codified at 17 C.F.R. Part 227.201(o)(1)–(2)).
37 *Id.* (to be codified at 17 C.F.R. Part 227.201(p)).
38 *Id.* (to be codified at 17 C.F.R. Part 227.201(q)).
39 *Id.* (to be codified at 17 C.F.R. Part 227.201(q)(1)–(4)).
40 *Id.* (to be codified at 17 C.F.R. Part 227.201(s)).
41 *See* Crowdfunding, 80 Fed. Reg. 71539–40 (to be codified at 17 C.F.R. Part 227.201(t)); *see* also Crowdfunding, 80 Fed. Reg. 71539–40 (to be codified at 17 C.F.R. Part 227.201(t)(1)–(3)).
42 Crowdfunding, 80 Fed. Reg. 71541 (to be codified at 17 C.F.R. Part 227.201(v)).
43 *Id.* (to be codified at 17 C.F.R. Part 227.201(w)).
44 *Id.* (to be codified at 17 C.F.R. Part 227.201(x)).
45 *Id.* (to be codified at 17 C.F.R. Part 227.201(y)).
46 *See Id.* (to be codified at 17 C.F.R. Part 227.202).
47 *Id.* at 71542 (to be codified at 17 C.F.R. Part 227.300(a)(1)).
48 Crowdfunding, 80 Fed. Reg. 71542 (to be codified at 17 C.F.R. Part 227.300(a)(2)).
49 *Id.* at 71543 (to be codified at 17 C.F.R. Part 227.300(c)(4)).
50 *Id.* (to be codified at 17 C.F.R. Part 227.302(b)(1)).
51 *Id.* (to be codified at 17 C.F.R. Part 227.302(b)(1)(i)).
52 *Id.* (to be codified at 17 C.F.R. Part 227.302(b)(1)(ii)).
53 *Id.* (to be codified at 17 C.F.R. Part 227.302(b)(1)(iii)).
54 Crowdfunding, 80 Fed. Reg. 71543 (to be codified at 17 C.F.R. Part 227.302(b)(1)(v)).
55 *Id.* at 71544 (to be codified at 17 C.F.R. Part 227.302(b)(1)(vi)).
56 *Id.* (to be codified at 17 C.F.R. Part 227.302(b)(1)(vii)).
57 *Id.* (to be codified at 17 C.F.R. Part 227.302(b)(2)).
58 *Id.* at 71543 (to be codified at 17 C.F.R. Part 227.300(c)(2)(i)).
59 *Id.* (to be codified at 17 C.F.R. Part 227.300(c)(2)(ii)).
60 Crowdfunding, 80 Fed. Reg. 71543 (to be codified at 17 C.F.R. Part 227.300(c)(2)(iii)).
61 *Id.* (to be codified at 17 C.F.R. Part 227.300(c)(2)(iv)).
62 *Id.* at 71542 (to be codified at 17 C.F.R. Part 227.204(a)).
63 *Id.* (to be codified at 17 C.F.R. Part 227.204(b)).
64 *Id.* (to be codified at 17 C.F.R. Part 227.204(b)(i)).
65 *Id.* (to be codified at 17 C.F.R. Part 227.204(b)(ii)).
66 Crowdfunding, 80 Fed. Reg. 71542 (to be codified at 17 C.F.R. Part 227.204(b)(iii)).
67 *Id.* (to be codified at 17 C.F.R. Part 227.204(c)).
68 *See Id.* at 71537–71611.

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## Entertainment & Sports Legislative Update

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**SB 1951** – Relating to the promotion of tourism related to the musical heritage of the state; creates the Texas State Music History Museum.

Left pending in Natural Resources and Economic Development committee.

**SB 650** – Relating to the audits of the music, film, television and multimedia fund; state auditor shall conduct audits of the music, film, television, and multimedia fund.

Referred to Natural Resources & Economic Development Committee February 24, 2015.

### Federal – Pending

**S.662** – Songwriter Equity Act of 2015.

- Amends copyright law regarding the exclusive rights of sound recording copyright owners to remove a provision that prohibits license fees payable for the public performance of sound recordings, by means of a digital audio transmission, from being taken into account in any administrative, judicial, or governmental proceeding to set or adjust royalties payable to copyright owners of musical works for the public performance of their works.
- Requires Copyright Royalty Judges (CRJs), when setting royalty rates under the compulsory license available for the reproduction and distribution of musical works (commonly referred to as a "mechanical license"), to establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and seller.
- Requires CRJs, in establishing such rates and terms, to base their decision on marketplace, economic, and use information presented by the participants. Allows consideration of comparable uses and circumstances under voluntary license agreements.

**Referred to the committee on the judiciary, March 4, 2015.**

**S.977** – American Royalties Too Act of 2015.

- Expands copyright owners' exclusive rights, in the case of a work of visual art, to include the right to collect or authorize the collection of a royalty if the work is sold by a person other than the author for at least $5,000 in an auction.

Referred to committee on the judiciary, April 16, 2015.



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## Strike One…You're Out! A First Amendment Analysis of Whether College Athletes Possess a First Amendment Right to Strike

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such a decision as the National Labor Relations Act (NLRA) does not apply to state agencies and the NLRB does not have jurisdiction over state entities.[18] As a result, a student-athlete does not have the right under the NLRA to engage in a strike as student-athletes are not considered employees for purposes of the NLRA.[19]

Although a university would likely be able to survive a First Amendment claim if it disciplined or removed a student-athlete's scholarship for refusal to practice or participate in a game, a university would be treading on thin First Amendment ice if it were to revoke the scholarship from a student-athlete who "supports…any strike or concerted refusal to play a scheduled game" as contemplated by the bill that was initially proposed by Missouri Representative Brattin. If the student-athlete does not refuse to participate in a practice or a game, it is hard to see how merely encouraging another student athlete to do so would meet the disruption standard set forth in *Tinker*. Additionally, under a *Garcetti*-like analysis, the student-athlete would be speaking as a private citizen on a matter of public concern and would be entitled to First Amendment protection.

In summary, student-athletes do not possess the First Amendment right to engage in materially disruptive behavior that is in violation of their scholarship agreements, such as boycotting practice or games. A court would likely be hesitant to second-guess the actions of an athletic department that in good faith believes an athlete who misses practice or a game is a material disruption to the program. As the Texas Supreme Court concluded in *NCAA v. Yeo*, "judicial intervention in [student athletic disputes] often does more harm than good."[20] The Fifth Circuit has also stated that judges are not "super referees," and the U.S. Supreme Court indicated "courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[21] As such, a coach could discipline a player up to and including the removal of the player's scholarship for failure to participate in team practice or games even if the absences are due to the student engaging in a protest. However, if a student-athlete is not missing practice or games in furtherance of his or her protest, but is expressing political views via methods outside of his or her official responsibilities as an athlete (e.g., a demonstration or rally on campus that complies with reasonable campus rules or a social media posting), the student-athlete would have a First Amendment right to engage in this expressive activity. To that end, a coach should not discipline an athlete for merely "supporting" another player who wants to boycott practice or a game as such support would likely be considered protected speech under the First Amendment.

### ENDNOTES

1 This piece is adapted from an article that was first published in *Inside Higher Ed*.
2 House Bill No. 1743, 98th General Assembly, http://www.house.mo.gov/billtracking/bills161/billpdf/intro/HB1743I.PDF (last visited December 16, 2015).
3 Michael Pearson and Joe Sutton, Black Football Players at Missouri: We'll Sit out Until System President Resigns, http://www.cnn.com/2015/11/08/us/missouri-football-players-protest/ (last visited December 16, 2015).
4 A game guarantee is an amount that is paid by a home team to a visiting team as an incentive for agreeing to participate in the game. For the game guarantee contract, *see* http://www.kansascity.com/sports/college/sec/university-of-missouri/article6148809.ece/binary/Missouri-BYU%20FB%20Contract%202015%20&%202020.pdf (last visited December 16, 2015)
5 *See supra* Note 3.
6 Susan Svrluga, U. Missouri President, Chancellor Resign Over Handling of Racial Incidents, https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/missouris-student-government-calls-for-university-presidents-removal/ (last visited December 16, 2015).
7 It is well settled that in order for an individual to bring a valid First amendment claim (or any other claim under the U.S. Constitution), there must be state action (in this case, action taken by an employee of a public university). *See Bryant v. Miss. Military Dep't.*, 519 F. Supp. 2d 622, 627 (S.D. Miss. 2007), *aff'd sub nom, Bryant v. Military Dep't of Miss.*, 597 F.3d 678 (5th Cir. 2010) ("A claim for violation of the First Amendment to the United States Constitution must be brought pursuant to 42 U.S.C. § 1983, which requires state action. To state a claim under § 1983, a plaintiff must allege facts showing a person acting under color of state law deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution or the laws of the United States.")
8 *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).
9 *Id.* at 504.
10 *Id.* at 505.
11 *Williams v. Eaton*, 468 F.2d 1079, 1079–84 (10th Cir. 1972).
12 *Id.* at 1084.
13 *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 942 (D. Kan. 1987).
14 *Id.* at 946.
15 Marcy Tracy and Tim Rohan, What Made College Football More Like the Pros? $7.3 Billion, for a Start, http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?_r=0, (last visited December 16, 2015).
16 *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).
17 Ben Strauss, N.L.R.B. Rejects Northwestern Football Players' Union Bid, http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html?_r=0 (last visited December 16, 2015).
18 *See* 29 U.S.C.A. § 152 (2) ("The term 'employer'…shall not include…any State or political subdivision thereof…"); *see also* https://www.nlrb.gov/rights-we-protect/jurisdictional-standards (indicating the NLRB only has jurisdiction over private sector employers).
19 *See supra* Note 16.
20 NCAA v. Yeo, 171 S.W.3d 863, 870 (Tex. 2005).
21 *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir.1985); Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

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## Recent Publications

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### Antitrust

Geoffrey Rapp, *Is It Time to Give Up on Antitrust Law for Pro Sports?*, 72 Wash. & Lee L. Rev. Online 203 (2015).

Jo-Annie Charbonneau, *A Comparative Analysis of American and Canadian Antitrust and Labor Laws As Applied to Professional Sports League Lockouts and Potential Solutions to Prevent Their Occurrence*, 26 Marq. Sports L. Rev. 111 (2015).

Marc Edelman, *In Defense of Sports Antitrust Law: A Response to Law Review Articles Calling for the Administrative Regulation of Commercial Sports*, 72 Wash. & Lee L. Rev. Online 210 (2015).

Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 Ariz. L. Rev. 475 (2015).

Stephen Shaver, *Unnecessary Roughness: Why the NCAA's Heavy-Handed Amateurism Rules Violate the Sherman Antitrust Act*, 48 Wash. U. J.L. & Pol'y 347 (2015).

Valerie Kaplan, *UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications*, 29 Emory Int'l L. Rev. 799 (2015).

### Fantasy Sports

Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 Marq. Sports L. Rev. 5 (2015).

Richard Pandorf, *A Billion Dollar Industry's Billion Dollar Question: Are Fantasy Sports Actually Legal?*, 42 N. Ky. L. Rev. 519 (2015).

### Intellectual Property

Dave Zimmermann, *College Athletes As Trademarks: How Did We Get Here, and What Happens Next?*, 17 Duq. Bus. L.J. 229 (2015).

### Professional Sports

Anna Kaminsky, *A Major Smuggle Struggle: It's Time for Major League Baseball to Step Up to the Plate and Alleviate Its Cuban Smuggling Problem*, 24 Cardozo J. Int'l & Comp. L. 193, 194 (2015).

Azadeh Erfani, *Kicking Away Responsibility: FIFA's Role in Response to Migrant Worker Abuses in Qatar's 2022 World Cup*, 22 Jeffrey S. Moorad Sports L.J. 623 (2015).

Candy P. Reyes, *Aereo, Sports Leagues' Favorite Cookie?: An Analysis of Its Impact on Professional Sports Leagues' Exclusive Rights, Technological Innovation, and Consumer Welfare*, 26 Marq. Sports L. Rev. 221 (2015).

Charlotte S. Alexander & Nathaniel Grow, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act*, 49 U.C. Davis L. Rev. 123 (2015).

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*Game-Changers: An Insider Look at A Volatile Year in Sports*, 22 Jeffrey S. Moorad Sports L.J. 353 (2015).

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Hammad Rasul, *The Washington Redskins' Deflating Hope: The Lanham Act Survives the First Amendment Challenge*, 26 MARQ. SPORTS L. REV. 159 (2015).

John T. Wendt, John J. Miller, *"Ref, Is This the Final?" Concussion Issues at the 2014 FIFA Men's World Cup: A Case Study*, 25 J. LEGAL ASPECTS SPORT 1 (2015).

Mark Stanton, *"Juuuussst A Bit Outside": A Look at Whether MLB Owners Can Justify Paying Minor Leaguers Below Minimum Wage Without Violating the Fair Labor Standards Act*, 22 JEFFREY S. MOORAD SPORTS L.J. 727 (2015).

Melissa Hewitt, *An Unbalanced Act: A Criticism of How the Court of Arbitration for Sport Issues Unjustly Harsh Sanctions by Attempting to Regulate Doping in Sport*, 22 IND. J. GLOBAL LEGAL STUD. 769 (2015).

Mindi Friedman, *Continuing Disclosure Requirements and the Continued Use of Municipal Bonds in Sports*, 26 MARQ. SPORTS L. REV. 91 (2015).

Nick J. Sciullo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT L.J. 201 (2015).

Patrick Doughty, *Pound for Pound: A Legal Analysis of the Gambling, Alcohol, and Taxation Issues the NFL Must Weigh As It Expands to London*, 22 JEFFREY S. MOORAD SPORTS L.J. 593 (2015).

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Tehrim Umar, *Total Eclipse of the Tweet: How Social Media Restrictions on Student and Professional Athletes Affect Free Speech*, 22 JEFFREY S. MOORAD SPORTS L.J. 311 (2015).

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Brooke de Lench & Lindsey Barton Straus, *Standard-Setting by Non-Governmental Agencies in the Field of Sports Safety Equipment: Promoting the Interests of Consumers or Manufacturers?*, 10 J. BUS. & TECH. L. 47 (2015).

John Grady, Anita M. Moorman, *The Americans with Disabilities Act 25th Anniversary: Assessing Progress, Opportunities, and Challenges*, 26 J. LEGAL ASPECTS SPORT 1 (2016).