



Texas Entertainment and Sports Law Journal

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State Bar of Texas
Entertainment & Sports Law Section

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Notes...

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

Join the Section

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

Invitation to Publish

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

Comments on the Journal and articles may be submitted to:

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Chairman's Report

The Entertainment & Sports Law Section publishes this Journal three (3) times a year in an effort to provide quality reading and discussion about current issues to Section members. We hope that you find it useful in your respective practices. Our membership now totals 517 members including lawyers, law students, paralegals, industry personnel and other interested persons.

The Section an exciting CLE program at the Annual State Bar meeting in Fort Worth, Texas, on June 11, 1999. Prof. Matthew Mitten of the South Texas College of Law gave a presentation on current issues in Sports Law and Litigation. We also heard a "moving testimonial" from George Sanger, also known as the "Fat Man". George is the world's "biggest" composer and producer of computer-related music. George, with musical accompaniment, spread the "gospel" of interactivity of the high tech and entertainment worlds. It was quite an experience. The Fat Man and your Chairman then jetted to Austin to jam with the AMD band at the Austin airport to raise money for the United Negro College Fund.

On October 18, 1999 the Section was a co-sponsor with BMI, SESAC, UT Law School and the Texas Chapter of NARAS of a "music and money" seminar (including CLE) in San Antonio. Section members Yocel Alonso and Mike Tolleson were among the featured speakers.

The Section will once again, this March, along with UT Law School, co-sponsor the very popular Entertainment Law Institute to coincide with the South by Southwest Music Festival in Austin. Please plan to attend, and book early, it's a crazy, good time here in Austin.

I plan to attend the Grammys this winter as both a member of NARAS as well as the Section's representative. I hope to continue to promote Texas as a great place for the entertainment business.

Both this newsletter as well as NARAS are actively seeking articles for submission and possible publication, A press release about the Grammys' legal writing contest appears elsewhere in this newsletter.

Thank you for your participation. I look forward to a terrific year together.

Lawrence A. Waks

FOR THE LEGAL RECORD

Please join me in welcoming Professor Andrew Solomon as the Journal's new Articles' Editor. Professor Solomon replaces Professor Matt Mitten of the South Texas College of Law, who may now be contacted at Marquette University where he is the Director of the National Sports Law Institute and holds the position of Professor of Law ...

Also congratulations to Layla Danielle Elzner, the winner of the Journal's most recent Student Writing Contest. Ms. Elzner's article is published at page 7. Ms. Elzner is a law student at St. Mary's University School of Law, in San Antonio, Texas, where among various student activities she is a member of the Sports and Entertainment Law Society and editor of a bi-weekly student newsletter. As the winner, in addition to having the article published, Ms Elzner is entitled to attend a seminar sponsored by, or in conjunction with, the Section with the seminar tuition provided by the Section ...

It seems that the state of Washington is joining California in legal trend setting ...

For you agents who represent coaches, Rick Neuheisel's contract at the University of Washington is an eye-opener. The \$997,000 annual contract is the largest in the Pac-10, and makes Neuheisel one of the few million dollar coaches in the country. The contract includes the University paying-off the loan on Neuheisel's Colorado house, approximately, \$800,000, \$320,000 in the first payment and 3 additional payments of \$160,000 in years 2001-03, and, if Neuheisel is no longer the coach, he still collects the \$800,000, plus the guaranteed portion of his salary. The contract is for 5 years with a guarantee of \$1,260,000, and includes a two-year mutual option after the 2003 season. A few more highlights: i) \$812,000 university compensation (including a \$160,000 housing allowance), ii) \$85,000 outside compensation, including money from Nike, iii) \$40,000 if the Huskies play in a bowl game, iv) \$60,000 if certain graduation standards are met, namely: \$60,000 for a 75% or more graduation rate; \$40,000 for 70-74%; and \$20,000 for 65-69%, and the UW will not count transfers in the rate for graduations and will also require that athletes graduate by the summer of the school year when their eligibility is exhausted. The NCAA allows a 6 year time table for athlete graduation.

Calling it a "wonderful deal," Neuheisel also said he was "[N]ever ... really motivated by money." UW athletic director Barbara Hedges seems to have set the market value for coaches and a new and creative way to structure salaries to attract coaches...

Washington also appears to be the first state to sanction a boxing match between a man and a woman. The event took place on October 9, 1999 when 5' 3" Margaret MacGregor, a 36-year old woman professional fighter, beat Hector Morales, a 23 year old security guard in his pro debut. The match was billed as the first match between a man and woman in U.S. professional boxing history. The fighting lightweights were each to receive \$15,000 for the two minute per round four-round. Morales, before the loss, was quoted as saying "It's embarrassing to tell my mom I'm going to fight a woman." MacGregor outweighed the 1" taller Morales by 10 pounds, and agreed to the fight, saying that "I'm looking to improve. But it's not going to happen if I'm restricted to fighting only women. I'm not saying I want to fight women all the time, but I don't see why my options should be limited." The Washington State Department of Licensing agreed and approved the fight in accordance with the Professional Athletics Act, which provides the standards for fights based on weight, skill level, a physical-health test, vision exam, and blood and urinary tests. Gender is not consider a factor in approving a boxing match...

FOR THE LEGAL RECORD *Cont'd from page 2*

The Internal Revenue Service ruled that boosters can deduct most of their donations to lease stadium skyboxes, a boom for college sports, or at least its big time football programs. Nebraska native Rod French's case will allow boosters to deduct part of their contribution as a charitable donation if they receive the right to lease a skybox in exchange. Universities now will be able to support upgrades to their college facilities with revenue from skyboxes in football stadiums and surcharges on tickets...

Boneheads In the News:

Runners? With a chance to share the \$1 million bonus prize in the seven meet IAAF Gold League, Kenyan steeplechaser Bernard Barmasai admitted after the race that he asked countryman Christopher Koskel not to pass him in the 3,000 steeplechase at Zurich. Barmasai, undefeated after the first six races, was disqualified from the race, sanctioned by the IAAF and was prohibited from the opportunity to win or share in the \$1 million bonus awarded to the League's top seasonal performer ...

College football players? 14 UCLA football players used illegally obtained permits to park on campus. During the investigation of the charges, the players were found to have filed applications to the California Department of Motor Vehicles listing complaints such as: knee injuries, back injuries, back surgery, a torn ligament and asthma, to obtain the parking permits ... Former Iowa football player Ryan Loftin who faces extortion charges for allegedly making threats to expose violations in the football program which would subject the program to sanctions. Loftin's attorneys were attempting to negotiate a plea bargain to keep the former player from more serious charges ... Peter Warrick, former Heisman Trophy candidate, charged with grand theft, a felony, suspended from the Florida State No. 1 ranked football team, knowing that \$412.38 dollars of merchandise is worth more than \$21.40, and nevertheless accepting the goods from an accommodating Dillard's department store clerk ...

Pro football players? The NFL has admitted that when it negotiated tougher substance-abuse policies among its players, it agreed to overlook failed drug tests by at least 16 NFL players. Under the recently revealed deal, the league and the union agreed in October 1994 to overlook the abuses in exchange for the players' participation in the then new drug treatment program, requiring regular testing, treatment by professional counselors and physicians. The mandatory aspects of the program did not effect 6 of the players, who were eventually suspended for additional violations of the drug program ...

Clients who don't talk to their lawyer? Several black coaches were scammed out of more than \$100,000, when a con-artist posed as SWAC Commissioner Rudy Washington. The coaches were conned out of their money by being told that a nephew of the commissioner required emergency funds. After the money was wired, the NCAA and FBI were brought in, but none of the money was recovered ...

Clients who believe their lawyers? Less than 2 weeks after a mass exodus, the Major League Umpires Association sued to withdraw their resignations. The umpires elected to resign to avoid the no-strike clause of their current labor agreement. After the several of the umpires voted to stay, the owners hired minor league umpires, and the resigning umpires sued to get their jobs back. When U. S. District Court Judge J. Curtis Joyner urged the parties to negotiate a settlement at the hearing on the union's request for a preliminary injunction blocking the leagues from accepting the umpires' resignations, the union decided to accept a settlement with Major League Baseball owners, which did not include retention of the 22 umpires whose resignations were accepted by the American and National leagues ...

Pro basketball Players or their lawyers? Latrell Sprewell was ordered to pay the league's attorneys' fees and costs after refileing his lawsuit challenging his 68-game suspension. U. S. District Judge Vaughn Walker had

admonished Sprewell's attorneys that the lawsuit was worthless and advised them to seriously consider dropping the suit. Notwithstanding the warning, the lawyers refiled substantially the same case, and the Judge imposed monetary sanctions requiring the payment of the League's attorneys' fees and costs.

Basketball players? Agent Larry Fox said that client Lee Nailon, a star player on the Texas Christian's basketball team and second round draft pick of the Charlotte Hornets, was in the wrong place at the wrong time, when Nailon was arrested on drug possession and evading arrest charges. Despite being arrested at a suburban Fort Worth hotel with friends, the police finding several ounces of marijuana and other paraphernalia in the room, the smell of marijuana coming from inside the room, and despite one of the suspects being found by one of the officers, there to investigate a robbery that took place at the hotel, to be wearing a ring that was similar to one worn by a hotel guest, Fox dismissed the charges as being "blown out of proportion"...

Texas Boaters Beware. Effective Sept. 1, 1999, the Texas Legislature's setting for legal intoxication at a blood/alcohol reading of .08 for automobile drivers, will also be applied to boaters by the Texas Parks and Wildlife Department ...

Two University of Texas stalwarts, former baseball coach Cliff Gustafson and DeLoss Dodds are going at it in the 353rd Judicial District Court of Travis County. Gustafson is suing Dodds for fraud. Gustafson's claims involve former UT president Robert Berdahl and assert that Dodds doctored financial reports to coerce Gustafson to resign as coach in 1996. Gustafson's lawyer, Broadus A. Spivy, argues that the records are "not really something that would happen accidentally". The suit concerns the handling of annual income statements and income from summer camps. While Gustafson was coach at UT, the baseball teams won 1,427 games from 1968-96. Gustafson's teams won more games in NCAA Division I baseball history than any other coach ...

Members of the Texas state legislature have undertaken to have the legislature adopt a resolution to be presented to the Texas Supreme Court to support pre-game prayer at Texas high school football games ...

Amid rising competitive pressures and escalating programming costs, ABC is following Fox Broadcasting Co.'s move to have affiliates pay toward the cost of broadcasting the National Football League. ABC has warned the affiliates that ABC would take back local advertising and promotion time if the plan is rejected at the local level. As an incentive, ABC has offered additional prime-time commercials for stations to sell locally. Additionally, affiliates would be allowed exclusivity on some network programming, which would not be available to cable channels. ABC has approximately 200 affiliates and must compete with Fox, whose affiliates returned 22% of the local commercials to the network ...

Congratulations to Texas Wesleyan University School of Law on having been granted full accreditation by the American Bar Association. The school became part of Texas Wesleyan University in 1992 and received provisional accreditation in 1994. The School of Law joins 181 fully approved law schools in the U. S. and is the first fully accredited law school in Fort Worth ...

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

Sylvester R. Jaime—Editor

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law

Sports and Entertainment Law Society

Tamer Morsi, Student Casenote Editor

Defamation In Documentary Film???

According to the United States Supreme Court, the burden of proof required in a defamation case depends on whether the plaintiff is a public official or private individual. A public official can only recover damages for defamation relating to his official conduct if the defamatory statement is made with “actual malice.” In *HBO, A Division of Time Warner Entertainment Company, L.P. v. Harrison*, 983 S.W.2d 31 (Tex. App.—Houston [14th Dist.] 1998, no pet.), a court-appointed psychologist brought a defamation action against the television network (HBO) and its film makers alleging that a documentary film had unfairly and falsely criticized his handling of a child custody case. The trial court in Harris County denied the network and film maker’s motion for summary judgment. The network and film maker appealed, claiming that summary judgment should have been granted. Their appeal involved two main issues relating to defamation actions: (1) whether a court-appointed psychologist portrayed in a documentary film was a public official, and (2) whether the television network and film makers had acted with actual malice in portraying the actions of the court-appointed psychologist.

The Houston Court of Appeals struggled with the first issue because the Supreme Court has not devised a specific test for determining who constitutes a public official for purposes of defamation actions. However, the court ultimately held that the court-appointed psychologist was a public official because he had substantial control over the conduct of governmental affairs. Specifically, the court-appointed psychologist had the authority to determine who had parental rights in the custody case. This authority, which was granted to the psychologist by the judge in the underlying child custody case, was critical in establishing the psychologist as a public official. Thus, the psychologist was a public official even though he did not hold a formal public position, did not have a contractual relationship with the government, and was not on the government payroll.

Having found that the court-appointed psychologist was a public official, the court focused on whether the network and film makers had acted with “actual malice” in portraying the psychologist’s work. Actual malice requires proof that a statement was made with knowledge of its falsity or with a reckless disregard for its truth. The court found that separate affidavits from the co-producer and principal researcher of the film, the director of the film, and HBO’s vice president of documentaries confirmed that the film makers believed the

documentary truthfully portrayed the psychologist’s work in the underlying child custody case. Furthermore, the court found that the psychologist could not offer specific, affirmative proof that the film makers knew the information in the film was false or that they entertained serious doubts as to its truth. The court noted that editorial choices made by the film makers, differences of opinion between the film makers and the psychologist, and even the film maker’s failure to investigate, would not rise to the level of actual malice. Instead, for defamation of a public official to occur in a documentary film, there must be specific evidence that the film maker purposefully avoided the truth. Since there was nothing to show that the allegations about the psychologist contained in the film were so improbable that including them amounted to reckless disregard for the truth, the court awarded summary judgment to the network and film makers.

By: Estela Sandoval

Texas A&M University Not Liable for Stabbing During School Play

In the Spring of 1994, a student-actor suffered an injury while portraying “Dracula” during a play performed by the Texas A&M University at Galveston Drama Club. The directors of the play, two local residents from Galveston, decided that one of the play’s final scenes needed the use of a real knife because it required one of the characters to impale Dracula. Hoping to avoid any problems, they prepared a “stab pad” with a visible target and strapped it to Dracula’s chest. Unfortunately, on the night in question, the actor swung the knife, missed the stab pad, and stabbed Dracula in the chest causing a collapsed lung. The student-actor who had been stabbed brought a personal injury against the University, the directors, and two other faculty advisors for the Drama Club. The directors settled before trial. The jury found the directors and the faculty advisors were employees of the University and therefore held the University liable. In *Texas A&M University v. Bishop*, 996 S.W.2d 209 (Tex. App.—Houston [14th Dist.] 1999, pet. filed), the University challenged the jury’s verdict.

Under Texas law, a governmental unit, such as a state university, is immune from tort liability unless the Legislature waives immunity. In the *Bishop* case, the main issue was whether the Legislature had waived immunity when it enacted the Texas Tort Claims Act. Under that Act, a governmental unit may be held liable when its employees cause personal

Continued from page 4

injuries. The Act defines an employee as a person who is “in the paid service of a governmental unit,” but excludes independent contractors. Thus, under the Act, Texas A&M University could be held liable only if the drama directors were employees, rather than independent contractors. More specifically, liability depended on whether the University controlled the details of the drama directors’ work because independent contractors, unlike employees, perform work without being subject to the control of their employer.

The court ultimately found the University immune from tort liability because the drama directors were independent contractors, rather than employees, at the time of the accidental stabbing. For two main reasons, the University lacked enough control over the drama directors to establish an employer-employee relationship. First, there was no contract explicitly giving the University the right to control the details regarding the direction of the play. Second, the University’s actual degree of control over the drama directors appeared to be minimal. It was limited to the University’s authority to terminate the directors’ work and to prohibit them from engaging in dangerous activities in violation of campus policy. As a result, the directors occupied the status of independent contractors as a matter of law and therefore the University was immune from suit.

The court also found that two other unpaid faculty advisors to the drama club were not employees under the Texas Tort Claims Act. Thus, even though the faculty members were paid employees of the University for their academic work, they were deemed unpaid volunteer advisors to the drama club. This was important because the actions of paid employees could have subjected the University to suit under the Texas Tort Claims Act.

By: Jemia Midget

School Prayer, The Establishment Clause, & Texas High School Football

During the 1990’s, the Fifth Circuit has frequently addressed whether certain school prayers violate the Constitutional protection of religious freedom. In *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), the court found that a student-selected and student-delivered nonsectarian and nonproselytizing benediction at a high school graduation did not violate the Establishment Clause of the First Amendment to the United States Constitution. The court found that such a nonsectarian and nonproselytizing graduation prayer was constitutional because it had a secular purpose, it did not advance one religion over another, and it did not excessively entangle government with religion.

More recently, two students filed suit alleging that their school district’s “Prayer Policy” violated the Establishment Clause when it (1) allowed student-selected and student-

delivered sectarian and proselytizing prayers at a school graduation, and (2) allowed student-selected and student-delivered nonsectarian and nonproselytizing prayers before a high school football game. *Jane Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999). The Santa Fe Independent School District officials claimed that the school’s policy complied with the guidelines set forth by the Fifth Circuit in *Clear Creek* because the prayers, even though sectarian and proselytizing, were selected and delivered by students. The court, however, disagreed and found that the new prayer policy was unconstitutional because it permitted sectarian and proselytizing prayers that did not further the secular purpose of solemnizing a graduation ceremony. According to the court, allowing such religious prayers “would alter dramatically the tenor of the ceremony, shifting its focus — at least temporarily — away from the students and the secular purpose of the graduation ceremony to the religious content of the speaker’s prayers.” Thus, the mere fact that the prayers were selected and delivered by students did not automatically ensure that one religion was not advanced over another religion.

The *Jane Doe* court then addressed the issue of prayer at a school sponsored athletic event. The court found that a student-selected and student-delivered nonsectarian and nonproselytizing prayer, similar to the one found constitutional for a graduation ceremony in *Clear Creek*, could not be used at a high school football game. The court emphasized that a “once-in-a-lifetime event” such as a graduation ceremony could be appropriately solemnized by a student delivered nonsectarian and nonproselytizing prayer. However, such a prayer would be unconstitutional in a far less solemn and extraordinary setting such as a high school basketball or football game.

In an even more recent development, on September 3, 1999, seven months after the Fifth Circuit’s ruling in *Jane Doe v. Santa Fe Independent School District*, Marian Ward, a seventeen year old Santa Fe Independent School District student who was selected to deliver her school’s traditional pre-game prayer at a football game under the school’s revised prayer policy, successfully challenged the district’s new guidelines passed pursuant to the Fifth Circuit’s decision. Ms. Ward, arguing before U. S. District Judge Sim Lake, obtained a temporary injunction enjoining Santa Fe Independent School District officials from taking any disciplinary action against her pursuant to her speech. In granting the injunction, Judge Lake said that the new district guidelines “favor atheism over any religion,” and therefore amounted to “state sponsored atheism.” Judge Lake differentiated Ms. Ward’s actions from other similar actions such as prayer in the classroom by noting that unlike students who are compelled by state law to attend classes, participants and fans attend school sponsored sporting events on their own free will.

By: Joe Clement

Student Writing Contest

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

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

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

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 15, 2000.

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

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

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

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

From the Editor

The Texas Entertainment and Sports Law Journal is published quarterly. If you are not on the mailing list and wish to be included, forward your name and address to the Section Treasurer along with a check for \$25 payable to the Entertainment and Sports Law Section and indicate that you wish to be included on our mailing list.

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

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Compensating the “Little Guy”: The Fairness in Musical Licensing Act as a Fifth Amendment Taking

by
*Layla Elzner

**Layla Elzner is a 3rd year law student at St. Mary's University School of Law in San Antonio. While at St. Mary's, Ms. Elzner who speaks French and Spanish, has made the Dean's List, competed in Mock Trial Competitions, served in both the Student Bar Association and Phi Delta Phi, and has performed services as a Tutor. Ms Elzner anticipates graduating in May, 2000. Congratulations to Ms. Elzner as this year's winner of the Section's writing contest!*

Introduction

The governance of copyright has been led through its brief history by the tenets of property law. Issues of ownership, the right to exclude others from the use of the property, and economic concerns regarding the buying and selling of property and licensing its usage have also guided the law regarding copyright, as well as other forms of intellectual property, including patents, trademarks and trade secrets. This centuries old governance of property law should continue to guide the law of intellectual property in the area of governmental takings, as deemed unconstitutional by the Fifth Amendment of the United States Constitution.

Takings by the government are generally defined as a taking of private property for public use, without just compensation made to the owner of the property for the deprivation. Although governmental taking of property is generally presumed to be that of the actual taking of a tangible object, the taking of the property, specifically in regard to intellectual property, may also be through legislative acts of Congress, which decline the value of, or disallow the use and right of exclusion of, the property. This type of action by the government would be similar to that of inverse condemnation. This cause of action against the government remains, although the actual use of the property by the government is less apparent.

The Fairness in Musical Licensing Act (“the Act”), passed by both houses of Congress, and signed into law by President William Jefferson Clinton in October of 1998, should be considered a taking by legislative act as described above. Although the government, under the tenets of the Act, does not actually use the copyright owned by artists and composers, it has allowed owners of restaurants and tavern to use the property of others for their personal benefit, without properly compensating the owners of the property for the usage. This type of action on the part of government officials should be viewed as an unconstitutional taking by the government of the property right of copyright.

Copyright law should be governed by the law of property, including in the governance of property takings law. This comparative analysis of the governance of intellectual property law will be discussed initially. The government has, throughout history, asserted several defenses to the assertion of unconstitutional takings, including that of eminent domain, in which the government may take the property, or allow others to use the property, as long as the rightful owner is reasonably compensated. The strengths and weaknesses of this defense will be discussed, as well as the strengths and weaknesses of the defense of sovereign immunity of the federal government against liability for such a claim.

Finally, upon the decision that an unconstitutional taking has occurred, several possible remedies are available to the injured owner. Although injunctive relief may be available, this remedy may not properly compensate the owner of the copyright. Monetary damages may also be allowed. In the area of intellectual property, specifically within the scope of copyright, compensation may be valued in a variety of ways, many of which will leave the owner insufficiently compensated. These varied methods of fiscal compensation will be analyzed. Finally, an argument will be asserted that the only fully effective remedy to this legislation is remedial legislation by Congress, allowing the artists and composers to be properly compensated for their work, and the use of their property.

Although the Act reduces the amount of money owners of small businesses must pay to play music in their establishments, it also unfairly strips the owner of the music the rights in their work, and their rights in the ownership of the copyright. This action by the government should be considered a taking as, prohibited under the Fifth Amendment to the Constitution of the United States, allowing the owners of this copyright compensation by reimbursement of their lost funds. The legislation enacting this taking should be rewritten to assure that the owners of these copyrights are properly compensated for the performance of their work in these commercial establishments.

II. Copyright as Property

A. Comparison of Copyright Law with Patent Law

Although intellectual property laws including patents, copyrights, trademarks and trade secrets, has historically been recognized and governed by the legislature, this governance has undergone significant changes since the initial enactment of the protective laws, in the late 1700's. These changes have occurred through action by the legislature, as well as by order of the judicial branch. Throughout history, the first ruling of significance was that of establishing the right of intellectual property as similar to that of real or personal property. Although this designation may seem somewhat trivial today, the establishment of rights belonging to the owner of the intellectual property was a significant step on determining how the property should be regulated. Although the property rights of copyright and patent law are not designated according to the control of the physical form of the property, as that of real property or chattels, the legislature and judiciary determined that intellectual property should be equally protected. The legislature created this protection through the establishment of several rights that stem from ownership of the copyright. The legislature, through the permissive scope of Article I, Section 8 of the U.S. Constitution, determined that five specific rights follow the owner of a copyright; the right of reproduction, adaptation, distribution, display and public performance. In particular, the right to exclude others, which is a characteristic of ownership of intellectual property, has been determined by the Supreme Court as such a fundamental right of ownership in the property, that it may not be taken by the government without compensation.

Although copyright has been protected historically by the establishment of these exclusive rights, including the right to exclude others from use, the issue of protection of these rights from intrusion by the federal government has arisen throughout history. In the

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determination of whether the owner of the copyright should be protected from the unauthorized use of the right by the government, few distinct decisions have been made by the judiciary, and few laws guide the determination of whether an infringement has been committed by the government. Future guidance in this area may be made by a comparison of the law regarding the taking of patents, trademarks, and trade secrets by the federal government.

In the determination of patents as property equal to that of real property or chattels, the Supreme Court has varied in its analysis. The Court has, through its decisions, determined that patents should be treated similarly to other, more tangible forms of property. The Court, however, has rarely facially determined that the takings of patents should be treated in a similar fashion, relying only on the statement of dicta or procedural discrepancies by the parties to finalize the decision. Following the passage of the Tucker Act, however, the Court appeared more receptive to takings claims regarding intellectual property, including patents.

The Tucker Act, passed in 1887, expanded the jurisdiction of the Court of Claims to include constitutional claims, and claims based on acts of Congress, which could include claims of governmental taking. This Act by the government allowed jurisdiction for suit against the government involving a statute or regulation that would create a substantive right to monetary damages. A claim of unconstitutional taking by the government of the property of copyright would therefore fall under this Act. When compared to other forms of intellectual property, including patents, copyright should be allowed protection under the tenets of property law. Under the precedent of decisions regarding the intellectual property right of copyright, and the Tucker Act, suit should be allowed against the government for the recovery of compensation for the allowed uncompensated use of the copyrighted material by the federal government.

B. Comparison of Copyright Law with Trademark and Trade Secrets Law

Although patent law may be considered similar to that of copyright, there are distinct differences. Patent law addresses a similar right of exclusion from use by others; however, the basic definition of a patent is distinct from that of copyright. A patent regards the formation of an actual product which may be used; a novel, useful and nonobvious invention, which could be considered a more tangible object than that of a copyrighted work. A discussion of possibly less tangible forms of intellectual property therefore may allude to the right of protection from governmental usage of the copyright, that of the protection from usage of the trademark and trade secret.

The definition of a trade secret is in itself a description of the distinct difference in form from that of copyright or patent. In the law of trade secrets, the property itself is any information which may allow the owner any competitive advantage, as long as the information remains a secret. It was determined, in the case of *Ruckelshaus v. Monsanto*, that although trade secrets do not resemble real property in the physical form, they do share many common attributes of tangible property, including the assignability of the secret. Similar attributes are shared among the various types of intellectual property, including patents, copyrights, and trademarks.

Trademark law is similarly a law of exclusion from use. The object that is guarded from use by another may not be considered as distinct and tangible as that of patent or copyright. Yet, even in the law of trademark, the federal government has been prohibited from using, or allowing others the use of the secret that is protected.

Because the ownership aspect of these forms of intellectual property consists mainly of the right to exclude others from use, as similar to that of real property, the disallowance by the government of that ownership right is intrusive to the owner of the property. Intellectual property is similar to that of real property due to this similar right of exclusion; real property simply has an affirmative right to use as well. Because the judiciary has determined that this right to exclude others from use is so elemental to the ownership of intellectual property, the government's allowance of use of the property should be treated similarly to the allowance of an easement for public use over real property.

In determining that copyright should be governed similarly to real or personal property, an analysis of the methods of takings of property by the federal government should also be considered. There are two distinct methods of taking property, that of the actual governmental possession of the property, and the taking through the denial of economically viable use of property through a governmental act, such as by the passage of a regulation or law. Although a governmental taking is normally in the form of the taking or use of real property for a governmental purpose, such as the inverse condemnation of land for the building of a highway for public use, takings of intellectual property have also occurred through history. The possibility of a regulatory taking has recently arisen by the passage of the Act. This bill substantially changes the law of copyright to the detriment of the owners of the copyright.

The Act was initially designed to clarify the law regarding copyright, including how the owners of the copyrights were compensated for the use of their work by business owners. The previous compensatory system allowed the two major copyright organizations to charge the owners of businesses which broadcast music in their establishments a blanket fee, which would then allow them to play the music in their establishments. This law, however, created some confusion, since the regulation allowed exceptions for those businesses which were under a certain square footage or used equipment similar to that which was used in the home. Although the law was somewhat confusing, the artists and performers of the work used in these establishments were compensated for this use of the copyrighted material. Alternatively, small business owners argued before Congress that this method of compensation was unfair to those who rarely used the copyrighted work in their establishments, found the law confusing, or did not want to pay the blanket fee. With the support of a powerful lobby, and after two previous failed attempts at passing the controversial change in the law, the 105th Congress adopted the amendment to the law, 17 U.S.C.A. 110, by passing the Act.

The Act substantially changed how artists were compensated for the use of their work. Substantially expanding the small business exception, Congress allowed all business owners, with establishments under a certain square footage, the right to play copyrighted works within their establishments without paying the required blanket fee to the copyright organizations, unless the business owner specifically

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charged customers to hear or see the broadcast. Although this regulation appears to compensate the copyright owner for the use of the work, this law substantially limits revenue the copyright owner should, and previously did, receive from these same businessmen and women. Rather than compensating the owner of the copyright for the broadcasting of the work in their establishment in the form of background music, as the previous law mandated, the business owners could now use the copyright in this function without compensation to the copyright owner. To emphasize the importance of this exemption, it is generally considered a rare circumstance when a business owner, such as the owner of a restaurant or tavern, will specifically charge his patrons to hear or see a broadcast. This may occasionally occur, but the owner may simply avoid paying a blanket fee by refusing to charge a door charge, or to charge patrons to specifically see or hear the broadcast, redistributing this cost through other means, such as by charging an increased price for food or drink. This type of activity by the business owner would substantially reduce the compensation to the copyright owner.

Although it appears to benefit the owners of small businesses who cannot afford to pay the blanket fee for the copyrighted material, this benefit comes at too high a price to the copyright owner. The Act strips from the owner of the copyright revenue that should be received from the performance of the work. The ownership of copyright includes, as discussed above, the exclusive right of public performance and display. Although the owner of the copyright may allow a license to the copyrighting agencies for the distribution of the work, he retains the exclusive right in the composition, and may continue to have the right of reversion in the property. By allowing business owners the ability to broadcast the copyrighted work in their establishment without compensating the owner of the copyright, the artist's right of public performance may be considered violated. Artists also would not be compensated for the use of their work, causing millions of dollars of revenue received under the previous law for the use of their work to be stripped away. Although the intent of the Act was to clarify a confusing law, the result was that of an expansion of the law, to the detriment of thousands of musicians in the form of loss of compensation for the use of their work.

The owners of copyright have a variety of arguments against the new law regarding the compensation requirements for the use of their work. One argument against the new law is the argument that the allowance by this legislation of the uncompensated use of their copyrighted work should be considered an unconstitutional taking by the federal government. Although the government is not itself using the property for its own benefit, through this legislation, it allows others to use the property for their benefit, without compensation.

III. The FMLA as a Taking under the Fifth Amendment

A. Wide View of Takings Law

The law of takings by the government is viewed by the judiciary as occurring on several levels, with varying results. Often, the initial question of whether the use or allowance of public use by the government constitutes a taking is a difficult hurdle to surpass. Courts, including the Supreme Court, may analyze the use of property through varied viewpoints to determine whether it may constitute an

unconstitutional taking. The first of these views is referred to as the expansive view of the takings clause. It is considered expansive, because under this view, most acts by the government allowing uncompensated usage of protected property would be considered a taking, as prohibited by the Fifth Amendment to the Constitution. This view has often been used in decisions regarding the taking of patents by the government. In the years preceding the Tucker Act, and additional legislation and case law allowing suit against the government for infringement of patent protection, the Supreme Court found that unauthorized use of patents by the federal government constituted a taking as prohibited by the Fifth Amendment. Although this view seems to allow the owner of intellectual property recourse against the government for any use of the protected material, the Supreme Court has limited this power of recovery in several cases, argued recently. Following these recent decisions, the Supreme Court dismissed the idea that any usage by the federal government of privately owned property, specifically in the area of patent law, would be considered an unconstitutional taking, preferring, instead, a more detail-specific analysis in its resolution of the takings claim. Justice Brewer, in his opinion in the *Schillinger v. United States* case, discourages the use of an expansive view of takings by the government, stating that:

“[T]his prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.”

Using the broad analysis of the expansive view to determine whether an act of legislation should be considered an unconstitutional taking, the owners of the copyrights being used by the business owners should be compensated for this use. Although the government itself is not taking full advantage of the copyright accessibility shared with the business owners, its action, in the form of legislation, may be considered to be the equivalent of permission to use the copyrighted material without cost. This permission denies the artist the right to exclude certain people from using the copyrighted material, and denies the artist the ability to control the public performance of his work. Under the expansive view, so attacked in the opinion of Justice Brewer, any use or allowance of use by the government should occur only upon the permission of the owner, without the denial of proper compensation to the owner of the copyright.

B. Middle View of Takings Law

As stated above, the expansive view of takings would cause the federal government to not only stop any forceful activity, but could also allow the total monopolization of copyrighted materials by the artist, regardless of the option of proper compensation upon the use of the property. The judiciary, in its analysis of intellectual property law takings cases, has used a second, less expansive view. This view, the middle view, should continue to be referred to by the

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courts in determining whether an unlawful taking has occurred.

The middle view was used in the *Ruckelshaus* case, an intellectual property case dealing with trade secrets. In this case, the Court determined that although not all governmental use of property should be regarded as a taking, upon a fact-sensitive analysis of a specific use of the property, a determination of a taking by the government may be made. In its analysis, the Court first determined the issue of whether trade secrets should be protected under the Fifth Amendment, in the same method as real property. After affirming this, the Court then approached the determination of whether a piece of legislation requiring the disclosure of trade secrets to the government should constitute a taking. The Court determined that although not all disclosure upon mandate by the government should constitute a taking, some mandated disclosure in the area of intellectual property may implicate Fifth Amendment protection.

The Court's recognition that trade secrets should be protected to the same extent as real property, and that an act of Congress may be considered a taking, should be applied to the Act. In the present case, copyright, which is a similar, if not a more tangible, form of property than that of its counterpart, the trade secret, should be, and likely would be, considered by the Court to be allowed similar protection under the Fifth Amendment. Similarly, the Act requires the owner of the copyright to surrender his compensation for the use of his work to the owner of the establishment, who uses this work in any fashion he so chooses. Although the government does not itself use the copyrighted material, it makes the material available to the public without the compensation the copyright owner rightfully deserves. The Act, and the possible detrimental results following the law, should be analyzed in their entirety, and the allowance by Congress of the free use of this protected material should be reviewed by the legislative and judicial branches of government.

C. Narrow View of Takings Law

Rather than determine that any use of property may be considered a taking, or use a fact-sensitive, particularized analysis, many courts have viewed takings principles on a much narrower scale. This view, held by a few courts and by various scholars, declines the application of takings principles to any taking or use by the government, which does not significantly diminish the value of the property, or take complete control of the property. Very few uses of intellectual property would fall under this category, since the government's use of the property would rarely completely or substantially devalue the property. Under this analysis, the owners of copyright would have a weaker case against the government, since Congress is not completely barring any use of the copyrighted work, nor are they substantially devaluing the property itself. The artists could argue that they are losing a substantial amount of money they would normally have received. This argument, however, would be countered by comparing the amount of revenue lost to the amount gained by use of the copyright through other means, such as the distribution of records, performance of the work, or performance through the broadcast medium.

Although several scholars of the Constitution support this more narrow approach, the Supreme Court has failed to subscribe to the theory. The Court rarely takes, and would continue to decline arguments regarding de minimus takings of property;

unconstitutional takings of substance by the government would instead garner judicial attention. Under the first two methods of analysis, the expansive and medium viewpoint, the owners of copyright affected by the Act would likely have a strong cause of action against the federal government for unconstitutional takings of copyright. However, in suits brought in jurisdictions that subscribe to the more narrow view of takings analyses, the cause of action against the government would be substantially weaker.

IV. Possible Defenses Against the Takings Assertion

A. Sovereign Immunity

Although there may be a strong cause of action against the federal government for the unconstitutional taking of privately owned copyright, there are several defenses the government may assert on its own behalf. The first of these defenses would be that of sovereign immunity. The federal government may claim immunity, from certain causes of action brought by private individuals, under the authority of the Eleventh Amendment to the Constitution.

Under the Eleventh Amendment, federal or state governments may be sued only following a waiver of the immunity, or if Congress waives the immunity through the authority of another section of the Constitution. Whether the waiver has occurred may be the initial hurdle a plaintiff must surpass before the suit regarding the taking may be heard. Recently, following the case of *Seminole Tribe v. Florida*, the Supreme Court clarified the methods in which the state government may waive its immunity. These methods include consent by the state itself to the suit, the allowance of suit to enjoin actions by state officials that may violate the federal Constitution where there is no mandated congressional remedy, and to enjoin congressional legislation subject to the enforcement provision of the Fourteenth Amendment.

These methods, however, are available to state governments subject to suit for a taking of property; the federal government allows suits against itself under the statutory provision of 28 U.S.C. 1498. This statute allows plaintiffs a forum for suit against the federal government, and provides a limit to damages receivable, allowing reasonable costs and fees. The statute mandates that the suits against the government be heard by the Federal Court of Claims, or possibly the District Court, which has jurisdiction. Due to this allowance under Section 1498, suits regarding the issue of copyrights against the government may be heard without being subject to sovereign immunity. In the present case regarding the taking by the passage of the Act, the target of suit by the owners of the copyrighted material in question would be the federal government itself, in particular the legislature which passed the amendment to the current law. Because the legislators, working in their official capacity, passed the law in question, the federal government, as respondeat superior, should be subject to the cause of action.

B. Eminent Domain

The second defense, which may be asserted in the behalf of the federal government, is that of eminent domain. The federal government asserts this defense when there is a public policy mandating the taking for the public benefit, to the detriment of the owner of the property, and calls for "just" compensation for the use. This is often asserted as a defense by the government when real

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property is taken, such as in the case of the necessity to build a public thoroughfare through the property of a private citizen.

In the case of intellectual property, however, this necessity is not as distinct. Supporters of the Act argued before Congress that the legislation was necessary to clarify a law determining the compensation for use of copyright. The argument that this constituted a public necessity, however, would be weak. Rather than working for the public good, Congress, in the passage of this act, faced the task of amending a regulation to benefit or damage two factions of the population, the business owners versus the owners of copyright. The Act, however, failed to strike a just compromise between the two, arguably favoring the private business entities, by allowing the exemption.

Using eminent domain as a defense, the government must still face the issue of just compensation for the use of the work. The Fifth Amendment to the Constitution provides that just compensation be made to the owner of the property upon its taking by the government. As determined above, the allowance by the federal government to the private business owners the right to use copyrighted material, without the previous compensation to the rightful owner of the copyright, may be considered an unconstitutional taking. The cause of action, however, may call for the resolution of the suit, in the form of payment for the use of the copyrighted material.

The government must only provide “just compensation” for the property it takes. Although this determination may be easily conducted in the case of real property, determined by the value of the property itself, it can be a substantially more difficult task to determine the value of intellectual property, which is not as easily measured. Although it may be more difficult to determine the monetary remedy for the allowance of the use of the copyright, the Court should, and historically has, taken into its analysis the value of the property taken, including how that value is determined within the industry, and what damage has occurred to the owner. Generally, within the area of intellectual property, royalty rates previously established to compensate for the use of the copyright are used to determine the value of the taking.

V. Possible Remedies to the FMLA Takings Assertion

A. Damages/Royalties

Although the use of royalty rates would ease the task of determining the value of the copyright itself, the government may also struggle in determining how many times each owner of a restaurant or tavern has broadcast the copyrighted material within his establishment, which is necessary to pay the correct compensation for royalties. The copyright organizations, ASCAP, BMI and SESAC, have traditionally accomplished this task. These organizations maintain information regarding how many times a copyrighted work is used in places of business, and use complex mathematical equations to distribute the royalties from the broadcasts to the artists. The government, through the Act, removed a substantial portion of the responsibilities of the copyright organizations, by removing the requirement that many business owners pay the blanket fee. However, should the government assert the defense of eminent domain, the determination of how much to pay to who will shift from these designated agencies to the government itself.

The Court may also strive, through its awarding of compensation for the use of the copyright, to place the owner of the copyright in the position he would have enjoyed had the property not been taken. This is somewhat redundant to the argument that it will pay for the usage of the material taken, in regard to the compensation for copyright. Although it may be determined that property may be valued at a lower cost by the government than the owner could be compensated through private sale, this likely would not occur in the realm of copyright.

There are two general methods of compensation to the copyright owner. The first includes the owner’s lost profits, or the copyright user’s profits from that use. Using the method of calculating the lost profits the artist has lost due to the use would be the equivalent of what they were previously being paid by the copyright organizations. This amount would depend upon the frequency of airplay and the royalty rate they had previously agreed upon and received. The government, however, may argue that the profits the business owners received are only “incidental” to their business activities. This argument, however, is a presumption of the value of the addition the music may add to the business. There have been no distinct determinations of how much value should be placed on the improvement in the “atmosphere” of the business, or how the music, and related improved atmosphere, may increase the patronage and revenue the owner would receive. Although the argument may favor a reduction in the value of the compensation to be given artists for the use of the copyright, the amount of that reduction, or subsequently, the compensation for the increase in profits of the establishments using the protected material, is difficult to determine, and may not be considered just, in light of the value of the copyright itself.

The second method of calculation of damages in a copyright action is the statutory rate for royalty. The statutory rate could generate more or less of an award for the owner of the copyright, depending on the royalty rate initially agreed upon by the owner of the copyright. The issue of which method to use in determining damages is generally chosen by the owner of the copyright in copyright infringement cases. In takings cases, however, this determination would likely be made by the court in determining the proper rate to justly compensate the owner of the copyright.

Use of the second method by the courts, that of the statutory rate, may be considered a middle ground in the determination of what amount of compensation may be just. Although the statutory rate may not equal the full amount the copyright owner could receive from the controlled performance of his work, this amount could possibly be considered just to all parties involved. The amount of the rate is determined by statute, and is set for all artist whose works may be subject to the governmental taking, and subsequent use in the business establishments, yet may be adjusted by the court upon the determination of intentional or innocent infringement.

Although the method of calculation of damages aforementioned may assist in the determination of “just” compensation, the owners should assert their full right of copyright; specifically, the right to exclude others from use, and the performance right. However, the assertion of this remedy should serve not only as a remedy of an unconstitutional taking, but also as an example of the danger and illegitimacy of the Act. The government’s defense of eminent domain

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would merely put the copyright owners in their original position, and shift the burden of determining how much the owner of the copyright should be paid, as well as the financial burden itself, from the business owners to the federal government.

B. Injunctive Relief

Additional remedies may be available to the owners of the copyrights illegally used. In many copyright cases, the injured party may request from the court injunctive relief. The award of this remedy is particularly suitable for infringements of copyright, as well as other forms of intellectual property. The ability to stop the illegal use of copyright, and enjoin the user from future infringement of their right is often a necessary remedy. In takings cases, however, this remedy may not be as suitable. Under 28 U.S.C. 1428, injunctive relief is not available to the injured party in a suit against the government. The only remedy the copyright owner may request is that of monetary damages, or “just compensation” for the use of the property. Therefore, injunctive relief, although necessary for private copyright infringement cases, is not available to the injured copyright owners in claims of takings by the federal government.

C. Remedial Legislation

A final alternative is available to those losing revenue by force of the mandated free use of their property, that of remedial legislation. Changing the law protecting copyrights must achieve a balance of interests between those of the owners of copyright, as well as the businesses who use the copyright in their establishments. Additionally, another balance must be reached: a balance between the governmental interest supporting protection of creativity, and discouraging a monopoly of the use of the created product.

In achieving this balance, proposed legislation could include, with a reversion to the previous system of compensation, mandates requiring more disclosure of information to the owners of the small businesses regarding the method of calculation of the fees for the usage. This information would allow business owners more involvement in the calculation process, and could possibly ease the burden on both parties to a legal challenge regarding the reasonableness of the fees.

Another possible remedy could include changing the exemption regarding businesses under a certain square footage. Under the Act, restaurants and taverns under 3750 square feet, and all other retail businesses under 2000 square feet are exempted from paying licensing fees for their use of copyrighted material through the medium of radio and television. This exemption could be reduced to a smaller area, allowing only the true small business owner the free use of the copyrighted work. Although the amount paid to the owners of the property would still be reduced, the reduction would be substantially less, and the loss suffered by the owners by this taking of their property would be minimized. This type of remedial legislation could strike a balance between the interests of all parties involved.

Finally, in addition to a possible reduction in the size of establishments exempted from the licensing fees, a distinction in the type of establishment exempted could also strike a balance between the conflicting interest. Prior to the passage of the Act, a bill was suggested, and subsequently rejected, which would allow only eating and drinking establishments to be exempted under the new law. Although this suggestion could remedy the overly broad exemption,

substantial revenue could still be lost to the detriment of the owners of copyright. By allowing only eating establishments to fall under an exemption, the taking of the copyright would be de minimus, and therefore allowable. Although other types of small businesses would likely reject this type of remedial legislation, it could be argued that eating establishments rely less on the use of the protected works to create “atmosphere” in their establishments, in comparison to bars and taverns.

Although a legislative remedy would be a challenge to achieve, a substantial number of citizens face the possibility of losing millions of dollars in revenue because of this amendment. This loss of rightful compensation should work as a catalyst among those affected to face the daunting task of convincing the legislature to remedy this regulation. Although the musicians, artists, and composers of these works may not form a majority of the population, an allowance of uncompensated takings in the intellectual property rights of those citizens may someday face the remaining population in their own professions or interests. By asserting the rights of ownership in the copyright, and by pressing those in power to amend this discrepancy, the millions of dollars in lost revenue may one day rest in hands of the rightful owners, the owners of copyrights.

VI. Conclusion

Proponents of the change in the law, under the heading of the Act, argue that the law strikes a balance to benefit small business owners who may not be able to pay the blanket fees formerly required to play the music, and clarifies any confusion in the law. However, in the words of Mac Davis, speaking before the House Judiciary Subcommittee on Courts and Intellectual Property, “there is no smaller businessman or business woman than a songwriter”. In striking a balance, the federal government as a whole must strive to work with all parties involved. This has not occurred in the passage of the Act. The ultimate small businessperson is being stripped of his property without adequate compensation for the use of the work by the federal government, by allowing private citizens to use the work without compensation. This action must be addressed and remedied in a way that benefits all involved, rather than stripping one group of their rightful property, the property of copyright.

Endnotes

- 1 See MARK HALLORAN, *THE MUSICIAN'S BUSINESS & LEGAL GUIDE* 60 (1996).
- 1 See U.S. CONST. Amend. V (“Nor shall private property be taken for public use, without just compensation.”).
- 2 See David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 *Notre Dame L. Rev.* 717, 723.
- 3 See *Fairness in Musical Licensing Act*, 17 U.S.C.A. 110 (1998).
- 4 See Kurt E. Springmann, *The Impact of Seminole On Intellectual Property Infringement By State Actors: The Interaction of Article I, Article III, The Eleventh Amendment, and the Fourteenth Amendment*, 29 *Ariz. St. L.J.* 889, 904-905.
- 5 See Eric J. Schwartz, *Outline of Domestic Copyright Law*, 527 *PLI/Pat* 293.
- 6 Springmann, *supra* note 5, at 901.
- 7 See generally Julie B. Raines, *The Fairness in Musical Licensing Act: The Tavern Bill Casts a Shadow*, 20 *Hastings Comm/Ent L.J.* 169.
- 8 See Paul Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property By State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines*, 5 *Wash. & Lee L. Rev.* 849, 856.
- 9 *Id.* at 855.
- 10 Schwartz, *supra* note 6, at 311.
- 11 Heald & Wells, *supra* note 9, at 856.
- 12 See Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 *Fla. L. Rev.* 529, at 537.
- 13 *Id.* at 543.
- 14 See Charles Alan Wright, et al., 14 *Federal Practice & Procedure, Jurisdiction and Related Matters* §3657.
- 15 *Id.* at 3.
- 16 *Id.* at 3.

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17 Cotter, *supra* note 13, at 530.
 18 *Id.* at 533.
 19 *Id.* at 534.
 20 Heald & Wells, *supra* note 9, at 860.
 21 Cotter, *supra* note 13, at 534.
 22 *See id.*
 23 Cotter, *supra* note 13, at 560.
 24 *See id.*
 25 Heald & Wells, *supra* note 9, at 865.
 26 Fairness in Musical Licensing Act, 17 U.S.C.A. §110(5) (1998).
 27 Raines, *supra* note 8, at 182.
 28 *Id.* at 179.
 29 *Id.* at 185.
 30 *See generally* ASCAP Legislative Matters (February 1999) http://www.ascap.com/legislative/legis_timeline.html.
 31 Fairness in Musical Licensing Act, 17 U.S.C.A. §110(5) (1998).
 32 *See* ASCAP Legislative Matters (February 1999) http://www.ascap.com/legislative/legis_qa.html.
 33 *See* Raines, *supra* note 8, at 187.
 34 *Supra* note 14.
 35 *Id.*
 36 Schwartz, *supra* note 6, at 311.
 37 Raines, *supra* note 8, at 182; *see also* Schwartz, *supra* note 6, at 302.
 38 Schwartz, *supra* note 6, at 302.
 39 *See supra* note 34.
 40 *Id.*
 41 Heald & Wells, *supra* note 9, at 864.
 42 Cotter, *supra* note 13, at 538.
 43 *Id.* at 539.
 44 *Id.* at 539.
 45 *Id.* at 550.
 46 *See* 155 U.S. 163 (1894); *see also* Cotter, *supra* note 13, at 545.
 47 *Music Licensing: Hearings on H.R. 789 Before the House Judiciary Subcommittee on Courts and Intellectual Property*, 105th Cong. (1997) (statement of Mac Davis, musician, On Behalf of Broadcast Music Inc.).
 48 *See generally* Cotter, *supra* note 13, at 553.
 49 *See id.* at 550.
 50 *See* Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984).
 51 Cotter, *supra* note 13, at 550.
 52 *Id.* at 552.
 53 *Id.*
 54 *See generally* Heald & Wells, *supra* note 9, at 855.
 55 Raines, *supra* note 8, at 199.
 56 Cotter, *supra* note 13, at 555.
 57 *See id.* at 556.
 58 *See generally id.* at 558.
 59 *Id.* at 555.
 60 *Id.*
 61 Springmann, *supra* note 5, at 892.
 62 Deb Asimus & Michelle Reese, *Clarifying the Boundaries of Eleventh Amendment Immunity*, 27-DEC Colo. Law. 51, 51 (1998).
 63 *See generally* Springmann, *supra* note 5, at 895.
 64 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); *see also* Heald & Wells, *supra* note 9, at 881.
 65 *See* 28 U.S.C.A. §1498; *see also* Springmann, *supra* note 5, at 904.
 66 Springmann, *supra* note 5, at 905.
 67 *See* 28 U.S.C.A. §1498.
 68 Springmann, *supra* note 5, at 905; *see also* Ira S. Matsil, *Government Seizures of Trade Secrets: What Protection Does the Takings Clause Provide?*, 48 SMU L. Rev. 687, 715 (1995).
 69 *See* Peggy H. Luh, *Pay or Don't Play: Background Music and the Small Business Exemption of Copyright Law*, 16 Loy. L.A. Ent. L.J. 711, 712 (1996).
 70 *See* Springmann, *supra* note 5, at 901.
 71 U.S. CONST. amend. V. "Nor shall private property be taken for public use without just compensation."
 72 *See* Springmann, *supra* note 5, at 901.
 73 *See generally* David G. Oberdick, *The Taking of Trade Secrets: What Constitutes Just Compensation?*, 48 U. Pitt. L. Rev. 247, 262 (1986).
 74 *See* Springmann, *supra* note 5, at 901.
 75 Raines, *supra* note 8, at 191.
 76 *See* Springmann, *supra* note 5, at 901.
 77 *See* Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 Wm. & Mary L. Rev. 1585, 1605 (1998).
 78 Raines, *supra* note 8, at 190.
 79 Raines, *supra* note 8, at 191.
 80 *See generally* *Music Licenses: Hearing on H.R. 789 Before the House of Representatives Committee on Small Business*, 105th Cong. (May 8, 1996) (statement of Charles F. (Rick) Rule, Esq.).
 81 Blair & Cotter, *supra* note 78, at 1605.
 82 *Id.*

83 *Id.* at 1606.
 84 *See generally* James Thompson, *Permanent Injunctions in Copyright Infringement: Moral and Economic Justifications for Balancing Individual Rights Instead of Following Harsh Rules*, 7 S. Cal. Interdisciplinary L.J. 477, 483 (1998).
 85 Heald & Wells, *supra* note 9, at 903.
 86 *Supra* note 70; *see also* Springmann, *supra* note 5 at 905.
 87 *Id.*
 88 *Supra* note 34.
 89 *Id.*
 90 *Supra* note 32.
 91 *Supra* note 34.
 92 *Supra* note 50.

On The Web**From: George Noelke—gnoelke@onr.com**

... Of interest to sports practitioners, the Noelke Texas Supreme Court Opinion Report is accessible on the web. The website is designed to notify readers of the latest Texas Supreme Court opinions.

1) As reported by Noelke at the site is the case of NCAA v. Joel Casey Jones, wherein the Texas Supreme Court reversed the lower court of appeals for finding as moot an appeal from the temporary injunction granted the Texas Tech University football player. Despite Jones having played out the season and his eligibility completed, the lower court will now address whether the NCAA may enforce NCAA Operating Bylaw 19.8, the so-called "Restitution Rule", whereby the NCAA is authorized to impose retroactive sanctions if an ineligible student-athlete competes under an injunction that is later voluntarily vacated, stayed or reversed, or found by the courts to have been improperly granted. After the NCAA appealed, the court of appeals declined the NCAA's request to expedite the appeal. As a result, Jones played out the season and completed his eligibility before the appeal was resolved.

2) The Ninth Circuit U.S. Court of Appeals heard oral arguments in the Casey Martin vs. PGA Tour case. "In an elite athletic competition, certain rules must apply equally to everyone," said PGA attorney Andrew Hurwitz. Here are a few links related to the case.

ESPN at: <http://espn.go.com/golfonline/news/pga/1999/990504/00000697.html>.

The Oregonian at: <http://www.oregonlive.com/sports/99/05/sp050509.html>.

Finally, TTU Law Professor and State Bar Disability Issue Committee Chair Brian Shannon's amicus brief on behalf of the Klippel Trenaunay Group is at: <http://www.onr.com/user/gnoelke/ktbrief.htm>.

To subscribe to the Noelke Texas Supreme Court Opinion Report, send an e-mail to: gnoelke@onr.com and place the words "Supreme Court" in the text of the message. Please make sure your name appears in the message ...

From: George A. Sanger a/k/a the FatMan: <http://fatman.com>

... People can currently make a living making music. This fluke may not last through the internet's upcoming expansion. However, this product will help lawyers to expand the time that it does last.

This fella Michal Robb(robb@cognicity.com) worked for a company called Cognicity.

They have a product called "audiokey" (<http://cognicity.com/products.htm>) which watermarks audio files for use on the internet. Its robustness is so amazing that EVEN LINDA was impressed.

Their next product will allow use of a watermark for a musical transaction over the internet. In real time, it will add to your watermark, copyright info, etc. the name of the purchaser, and a transaction number, and will at the same time update your database. The private watermark does not affect the audio quality, and it remains in the audio through all kinds of horrible re-recording and re-sampling abuses ...

... Game developers: Want an incredibly easy and inexpensive way to put lots of great music in your game? Composers: Want to get your music heard and get compensated fairly for it? see <http://www.GamePlayMusic.com> ...

"Cybersquatters"

... Legal action against "cybersquatters", who are they? People who steal names for websites. There is currently no law against registering internet domains with names identified with someone other than yourself. The idea is to register a name and sell it back to a company whose trademark has been taken by the cybersquatter. Because trademark lawsuits are expensive, paying ransom to the cybersquatter may be easier and cheaper. Current congressional proposals are to allow trademark owners to seek injunctive relief and damages for "bad faith" registrations, defined as "deliberately causing confusion or deception, or diluting the distinctive quality of a trademark." More to come ... see <http://thomas.loc.gov.Trademark> Cyberpiracy Prevention Act (H.R. 3028) ...

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