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ANNUAL MEETING

JUNE 12 through 14th, 2003

George R. Brown Convention Center



“Plan to attend the annual meeting of the Entertainment and Sports Law Section featuring two speakers: one from the entertainment arena and one from the sports arena! See you there! FREE CLE!”

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CHAIRMAN'S REPORT

Though we've moved our Entertainment Law Institute away from coinciding with SxSW, many Council members and I will be making at least special appearances at the great music event. The Council will meet in Austin on March 14 to discuss, among other matters, program notes for this year's State Bar Convention. We're always looking for good presentation topics and dynamic presenters--so e-mail me with some suggestions.

One thing we do need is more participation at all levels by sports practitioners. If you're one of these, or know someone who is, please let me know. I'll put you to work, but you're guaranteed to become better acquainted with some of the most interesting lawyers you'll ever meet.

Finally, I've had a few questions about our Section website. Yes, it's still in development. But we're going to need some more money to finish it. As soon as we receive our next round of dues, we should be able to complete the job.

Evan M. Fogelman
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FOR THE LEGAL RECORD ...

Drugs and Athletes Don't Mix ... at Mens' USA national softball team tryout camp. U. S Anti-Doping Agency officials suspended Shawn Mandolesi for testing positive for steroids. The suspension for norandrosterone and noretiocholanolone use keeps the player out of the Olympic sport for 2 years starting September, 20, 2002 ...

Pick \$6MM or Prison Time? ... The Breeders' Cup was the focus in a White Plains, N.Y. federal court for a guilty plea. Twenty-nine year old Baltimore resident Derrick Davis pleaded guilty to wire fraud conspiracy. Magistrate Mark Fox recommended 3-4 years prison time during sentencing if Davis made restitution on the \$3MM payout on a Pix Six bet at the rigged horse race ...

N. Y. Horses Still in the Record ... Thoroughbred trainer Nick Zito's horse tested positive but he gets to pay the \$2M fine and do the 15-day suspension for Marks Minor's testing positive for lidocaine at Saratoga in August, 2000 ...

Fines and Suspensions for Coaches too ... the University of Alabama got some measure of revenge when whistleblowers and former high school football coaches Milton Kirk and Lynn Lang admitted their guilt in a conspiracy to have defensive lineman Albert Means of Memphis, Tennessee, play at Alabama. Kirk got 6 months in a halfway house for a guilty plea in federal court to conspiracy to pay Means to attend the university. The

plea included a \$1M fine, 200 hours of community service and 3 years of community service. Lang faces up to 5 years in prison and \$250M in fines after admitting he had someone else take Means' college entrance exam and that he took money from local Memphis businessman and Alabama booster Logan Young to steer Means to Alabama. The university football team was placed on probation for five years, reduced in scholarships by 21 over 3 years and banned from post season play for 2 years The NCAA Division I Committee on Infractions reduced the number of football scholarships, imposed recruiting restrictions and placed the University of Colorado on probation for 2 years for football program violations. They also reduced the University of Washington's recruiting efforts. Both schools received their punishment based on actions by former Colorado head football and current University of Washington head football coach Rick Neuheisel. Neuheisel cannot recruit off-campus from October 8, 2002, to May 31, 2003. Violations encompassed impermissible contacts in the periods 1995-96 and 1998-99. Violations were found regarding providing clothing to recruits, contacts with athletics representatives, excessive travel expense and entertainment expense reimbursements for recruits. The NCAA determined the major failure was Colorado's failure to adequately monitor the recruiting practices of its former football staff. The Committee found "this was a serious case in which a football coaching staff, led by the former head football coach, in a calculated attempt to gain a recruiting advantage, pushed beyond the permissible bounds of legislation, resulting in a pattern of recruiting violations." The pattern of violations escalated the case to the "major" level. A number of the findings involved contact with prospects, or "bumping," during non-contact periods in the spring when only player evaluation is permitted. "When viewed separately," the committee's report said, "each of these contacts might be considered secondary; however, taken cumulatively, they reach the level of a major violation." Neuheisel called the encounters "inadvertent" and often a high-school coach initiated the contact. Despite Neuheisel giving himself "house-arrest" by imposing a limitation on his own off-campus recruiting, the committee determined the number and nature of the violations supported extending Neuheisel's ban to May 31, 2003 ...

Mobsters get it too ... Venice Appeals Court is the venue and Alimzhan Takhtakhounov is accused of fixing Olympic figure skating at Salt Lake City. The United States seeks extradition and wants to file charges which could put the reputed Russian mobster on ice for 5 years. Luca Saldarelli is the lawyer for the accused in a hearing closed by Italian law to the public ...

Will MSU Star Get His Day on the Court? ... The admission by the NCAA that MSU basketball center Mario Austin was erroneously declared eligible resulted in Mississippi State University electing to not further play their 6'9" leading scorer and rebounder ...

Bobby Knight Still Fuss'n and Fight'n ... Indiana University had to see it coming? The heralded coach claims he

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lost more than \$2MM in income when IU fired him without case. Monroe County Circuit Court in Bloomington, Indiana, will be the site for the real "Hoosiers" story, when the university vigorously defends its handling of Knight's contract. Russell Yates, the current Texas Tech coach's lawyer, claims IU breached the contract and cost Knight money from TV and radio deals, basketball camps, shoe contracts and other sources for endorsement revenues ...

Rockets' Fastbreak to New Area May be Slowed ...

Facing a lease and an injunction, the Rockets' plan to move from Compaq Center before the 2003-04 season rests with what the Rockets' believe is the parties' agreement to use "best efforts to obtain from necessary third parties a release of [the] Tenant [Rockets] from any obligation to play its home games at the Compaq Center after the 2002/2003 NBA Season ...". Arena Operating Company president John Blalidsell, the Harris County-Houston Sports Authority and the Rockets agree that by virtue of the Rockets' lease the team is required to play all home games at the Compaq Center through November 30, 2003. HCHSA director Oliver Luck, Rockets President George Postolos and Blalidsell are in negotiations as to what the agreement entered into as part of their court injunction requires them to do to revolve whether the Rockets will leave early and the meaning of "best efforts" ...

August Winds at Augusta ... head of the National Council of Women's Organizations, Martha Burk, is clear in her "siege" of Augusta National's all-male membership rule. Augusta National Chairman Hootie Johnson is relying on America's public opinion, which he believes indicates that most people agree that the site of the Masters, one of the most famous golf tournaments in the world, "can set its own membership policies as a private club." Burk has focused NOW's efforts at Augusta's membership, many who sit on the boards of many of the Masters' major corporate sponsors, "demanding that they reconcile their membership at all-male Augusta National with their corporate policies against sex discrimination." Claiming that Augusta National "had enough money to go without sponsors indefinitely." Johnson has dropped at least 3 sponsors of the CBS Sports' broadcast of the Masters ...

Proof the System Works ... The University Interscholastic League relied on the efforts of the schools in voting 6-1 not to have the Channelview High School, Texas volleyball team, the Copperas Cove High School, Texas football team, and the Keller High School, Texas football team forfeit games. The Executive Committee's vote upheld the UIL's vote in favor of the due diligence of the respective schools in determining the eligibility of its students ...

The Journal can be accessed on-line at
www.stcl.edu/txeslj/txesljhp.htm....

In conjunction with South Texas College of Law, the Section attempts to maintain and update the Journal on-line. We apologize for any lag time between publication of the Journal and on-line up-dates.

Sylvester R. Jaime--Editor

Music, Tunes, & Legal Notes

Turn It Up Landry's! ... Alleging that his song *Surfing' for Crabs* resulted in "... 20% to 25% of the Landry's profits ..." Scott Szabo sued. In denying his claimed damages for \$3MM, U. S. District Judge Lee Rosenthal dismissed expert testimony as "impermissibly speculative and unreliable." The infringement suit turned on the issue of first use, stemming from a 1-year license granted to Landry's which expired in July 1999. After Szabo's demand for a renewal fee of \$11,000 was not met, Szabo copyrighted the song in December 1999 and the original piece of music is at the heart of the parties' dispute. Szabo claimed that during the ensuring period, Landry's use was allowed while they negotiated, and Landry's first unauthorized use was April 2000 and Landry's countered the first post-license use was October 1999.....

Kid Wins in Norwegian Court! ... At the age of 15, Jon Lech Johansen developed, and in 1999, posted on the internet a program which the entertainment industry termed "digital burglary". The online program was capable of cracking the security codes on DVDs. In announcing the court's ruling, Judge Irene Sogn said, "People cannot be convicted of breaking into their own property ..." The Oslo City court, in acquitting Johansen, now 19, held that the prosecutors in this criminal trial did not prove that Johansen had used the program to access illegal pirated copies of films, but only to watch movies on a Linux-based computer that lacked DVD viewing software. After posting the program on the internet, the Motion Picture Association of America sought the prosecution of Johansen on criminal charges. Harvard University law professor Jonathan Zittrain saw the fight over Johansen's program, called DeCSS, "more symbolic" since the DVD cracking software developed by Johansen was not going to be a code allowing millions to "copy Hollywood's treasurers."...

Sylvester R. Jaime—Editor

JOURNAL LOOKING FOR WRITERS

The call is out for writers.

The *Journal* is looking for writers in the areas of women's sports and entertainment. With the wealth of subject matter, anyone interested in writing may contact the Editor with articles or ideas for an article.

Whose Line is it Anyway? - Jamming Culture with Negativland

*FREE APPROPRIATION IS INEVITABLE when a population bombarded with electronic media meets the hardware that encourages them to capture it.*¹

--opening statement excerpted from Negativland's Tenets of Free Appropriation.

*The author claims a defense of fair use of copyrighted materials, reprinted solely for educational purposes.

Marc Barenblat is a recent graduate from the University of Oregon School of Law. His primary areas of interest lie in intellectual property and international transactional matters. He spent his second year of law school overseas pursuing comparative studies in South Australia and Tokyo. Currently awaiting results of the Winter 2003 bar exam, he still idealizes maintaining some semblance of an entertainment law component as part of his professional practice.

Art continues to imitate life unimpeded, but art imitating art has fallen under increasingly considerable scrutiny. Rapid-fire technological advances are met with oftentimes ill-equipped legislative and judicial attempts at modification of traditional intellectual property jurisprudence, with only moderate success in containing or maintaining the subsequent quagmire of legal questions of first impression. At once, the Internet has proven itself both beauty and the beast: exponentially enhancing capabilities for unbounded dissemination of materials and information, while simultaneously allowing for previously unthinkable opportunities to infringe upon IP rights more ably protected in traditional distribution media. Therein lies the conundrum; therefrom have sprung the disputes.²

To be sure, Internet-based disputes have turned IP jurisprudence on its ear. While much of the newsworthy litigation of late has resulted from Internet-related concerns affecting longstanding intellectual property legal regimes, non-Internet-related technological advances have also sparked IP disputes, with the outcomes of Internet litigation serving to heighten standards of judicial scrutiny. Enter the Culture Jammers; specifically, enter Negativland, a collective of musicians-slash-social commentators, credited with coining the phrase to encapsulate their aims as Culture Jammers: "directing the tools of savvy sensationalist media pandering toward a general critique and specific active interruption of the global corporate juggernaut."³ Through an unordered unfolding of the remainder of Negativland's Tenets of Free Appropriation, this paper will examine the legal IP battle Negativland essentially lost to U2 label Island Records, emphasizing their failed fair use defense and a defense of that defense in the name of Culture Jammers and artists in general.

*THE URGE TO MAKE one thing out of other things is an entirely traditional, socially healthy, and artistically valid impulse which has only recently been criminalized in order to force private tolls on the practice (or prohibit it to escape embarrassment). These now all-encompassing private locks on mass media have led to a mass culture that is almost completely "professional", formalized and practically immune to any form of bottom-up, direct-reference criticism it doesn't approve of.*⁴

However loosely defined, Culture Jammers are undeniably artists. The sampling, or creative theft, which Negativland employs as a principal art form and mode of expression, has long endured greater tolerance as an acceptable if not necessary medium for artistic expression. Such a truism transcends all art forms, be they rooted in visual or performance art, but is most appropriately and

pointedly discussed here with respect to music. From the colorful histories of jazz and blues, through more blatant examples of the progression from rock and roll to rap music and 'hip-hop', such genres could not and would not exist were it not for the allowance and widespread acceptance of creative theft.⁵ Without such acceptance, folk music-by definition-would cease to exist.

Negativland seeks to build on (or off of) those existing works to create simultaneously music and social commentary. Negativland finds the environs wherein the majority of daily sensory input is "not focused on the physical reality around us, but on the media that saturates it, ripe for social commentary and criticism, which a democracy such as ours should allow unimpeded."⁶ Thus, Negativland looks to appropriate works: bits and pieces of existing works, to fight the threat they perceive in the corporate-funded media assault. Negativland sees a right, if not a duty, in appropriating from a media-saturated reality, tweaking it in a socially responsible yet critical manner, and sending it back out into the fray, all in the name of raising social consciousness.

*AS ARTISTS, our work involves displacing and displaying bites of publicly available, publicly influential material because it peppers our personal environment and affects our consciousness. In our society, the media which surrounds us is as available, and as valid a subject for art, as nature itself.*⁷

Negativland released its *U2/Negativland* EP in the fall of 1990. The 13-minute single sampled raw (in multiple senses of the word) underground out takes of Casey Kasem from his "Top 40" radio show, wherein Kasem colorfully and repeatedly flubbed attempts to introduce the band U2 to the US.⁸ Desiring to provide just the perfect backdrop to the piece, Negativland further sampled and interspersed actual U2 music: music further morphed through technology-aided mutations. The cover art depicted a U-2 spy plane; "Negativland" was written across the bottom while (the letter) U (and the numeral) 2 were exaggeratedly emblazoned across the cover, the latter of which Negativland admittedly hoped would make it look-at first glance-like a U2 record. But such hope is the impetus to their creative efforts: wanting to wake the sleepwalking brainwashed, consumption-driven masses to re-boot independent thought. To this end, the second part of *U2/Negativland* was captioned "Special Edit Radio Mix", in the Culture Jamming hope that deejays might give it airtime without first questioning or examining the content.⁹

OUR APPROPRIATIONS are multiple, transformative, and fragmentary in nature; they do not include whole works. OUR

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*WORK is an authentic and original "whole" being as much more than the sum of its samples. This is not a form of "bootlegging", "piracy" or "counterfeiting" intending to profit from the commercial potential of the subjects appropriated. The law must come to terms with distinguishing the difference between economic intent and artistic intent.*¹⁰

When U2 label Island Records called 'foul!'; Negativland counter-argued 'fair use!'. Giving parameters to the DMCA-sanctioned copyright infringement affirmative defense, §107 provides the following non-exhaustive list of factors to be considered:

- the purpose and character of the use, including whether such
- use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.¹¹

Two recent non-technology related (albeit highly publicized) copyright infringement cases illustrate the double-edge of the fair use sword.¹² *Harper & Row* stands for the proposition that, in analyzing the amount and substantiality of the portion of the copyrighted work used, courts will examine both quality and quantity of the infringing material. In this instance, the Supreme Court found that the 300-400 words at issue, while constituting a miniscule portion lifted from Gerald Ford's unpublished autobiography and published in *The Nation Magazine*, could not survive a fair use defense. The Court reasoned that the material excerpt (Ford's pardon of Nixon) constituted the heart of the manuscript and posed potentially substantial damages to eventual marketability of the publication.¹³

In contrast, the Eleventh Circuit recently vacated the preliminary injunction imposed on a publication found to "merely summarize most of the earlier work without any commentary or fresh ideas."¹⁴ On appeal, the Eleventh Circuit held that the plaintiff publisher had failed to meet its burden of establishing the prerequisites necessary to grant a preliminary injunction. As such, any injunction of the publication of *The Wind Done Gone*, intended as an unauthorized parodic social commentary rather than any alleged sequel to *Gone With the Wind*, was deemed unwarranted and an unlawful prior restraint.¹⁵ Just prior to the appellate decision, law professor Garrett Epps summed it well in ruminating on the disturbance to the "...American writer to realize that prior restraints on publication now depend on the literary taste of judges."¹⁶

But therein lies the rub: on appeal, *The Wind Done Gone* case was decided correctly. Such sound decisions notwithstanding, judges by mandate *are* afforded considerable leeway and deference regarding such concerns as prior restraint and fair use. As a telling example, the elements of consideration for a fair use defense as codified in the Digital Millennium Copyright Act at Section 107 allow for judicial discretion regarding the nature and amount and substantiality of the use of the infringing work in question. While obviously within the purview of the legislature, Congress wrote ambiguity into the law, at least with respect to this particular provision. Legislative intent herein could have been to allow for judicial discretion to this end on a case by case basis, potentially based on the belief that the judiciary would be better positioned to

make such decisions, thus in effect avoiding a hard line legislative stance.

As addressed in the tenet introduced at the outset of this section, *U2/Negativland* is a transformative, fragmentary original work that neither appropriated whole works nor intended to profit from U2's commercial potential. On the collective strength of these multiple fronts, Negativland should have prevailed in its fair use defense against allegations of copyright and trademark infringement. But as will be seen, other contentious forces at play stole the show.

*AS ARTISTS, the economic prohibition of clearance fees and the operational prohibition of not being able to obtain permission when our new context is unflattering to our samples should not diminish our ability to reference and reflect the media world around us. THERE IS NO DEMONSTRABLE NEGATIVE effect on the market value of the original works from which we appropriate or the cultural status or incomes of the artists who made the original works. Referencing a work in a fragmentary way is at least as likely to have a positive effect on these areas of concern.*¹⁷

Twelve years in existence at the time of the *U2* litigation, Negativland remains a small musician collective that, on its own relatively small-scale independent SST label, had released five albums, four cassette-only releases and one video prior to the EP release.¹⁸ With such limited resources pitted against the non-exhaustive resources of Island Records and (publisher) Warner-Chappell Music, presumably pursued in the interests of U2, Negativland found itself faced with unreasonable albeit unavoidable settlement terms, "...preferring retreat to total annihilation."¹⁹ These included the delivery to Island and subsequent destruction of *all* materials used in production and *all* existing copies of the single, whether on-hand as inventory or previously distributed: to this end, any recipient violating the notice to return would be subject to charges of contributory infringement.²⁰ Negativland further had to surrender its copyrights in the recordings and pay out \$25,000 plus half the wholesale proceeds from singles sold but not returned: all factors considered, Negativland estimated total costs at \$70,000-more money than the band had made since its inception.²¹ As such, Negativland could not afford the cost-prohibitive clearance fees for the works they (from their perspective) fairly appropriated, let alone what would have amounted to exorbitant ensuing litigious expenses.

*THE COURTS' often-espoused principle that "if it's done for profit, it can't be fair use", represents a thoughtless and carelessly misguided prejudice against the struggle of new art to survive. Making media- any media- is expensive. It requires substantial up front investments in time and manufactured goods to create, duplicate, and distribute anything. The courts' easy reliance on a not-for-profit standard for fair use ignores the reality that artists, no matter what they choose to do, need to support themselves and their work with a return on their investment just like everyone else. The currently applied 'nonprofit' standard simple assures that only the independently wealthy may dabble in fair use. If society values the challenging and reforming aspects of critical, fair use works that bubble up from independent grassroots thinking, the law should not condone the smothering of such works by disallowing their economic survival in our free marketplace.*²²

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In *Acuff-Rose*, the Supreme Court clarified that a finding of commercial use weighs against, but does not preclude, a determination of fairness.²³ Nevertheless, Negativland fell prey to a fate similarly dealt Napster. While Napster had operated from its inception as a free Internet service, internal documents revealed an eventual intention to profit from its user base, indicating a potential to unfairly compete with the record industry's traditional roles in music promotion and distribution.²⁴ The preliminary injunction issued in *Napster* was dubiously based in part on such economic forecasting, the speculative nature of which undoubtedly contributed to the remand on appeal to reassess the injunction that the Ninth Circuit labeled "over-broad."²⁵ To this end, the *Napster* District Court, in issuing the injunction, had rejected a 'non-commercial' usage fair use defense via questionably equating commercial usage with "economic advantages" gained by users obtaining for free what they would ordinarily have to buy.²⁶ Napster also struck out arguing that its service enhanced, rather than reduced CD sales, as the District Court reasoned that plaintiffs would still be deprived of royalties *despite* such noncommercial use that potentially enhanced retail CD sales.

Contrary to the holding in *Acuff-Rose*, a finding against Negativland of commercial use ended up precluding a finding of fairness. In a thinly-veiled attempt to distinguish the two cases, the nature of the sampling, as well as the cover art employed by Negativland, presumably strengthened the case for an intent to profit from U2's commercial potential. But such an ill-founded, conclusory outlook skirts the true *raison d'être* of the likes of Negativland, as well as Culture Jammers generally. Twelve years of eking out an existence yet maintaining their craft should serve to further the group's averment that monetary gain is far from the sole reason for which they create art.

Through (or potentially controlled by) commercial influences, IP laws and litigation of late have also served to contribute to the trend toward withdrawal of increasing amounts of intellectual materials from the public domain through ever-tightening restrictions therein.²⁷ Question the paradoxical, self-righteous claims to private ownership of mass culture. Granted, there is some merit to the claim that all artists need be compensated at some level to encourage further creative endeavors. However, infringement claims are brought by and oftentimes for the greater benefit of the copyright holder, as opposed to the creator or author of a given work, and industry lore is rife with tales of labels milking artists dry. If commerce is king, with the inherent power to influence the law, and trends continue as they have of late, what will serve as hope and incentive for the creative process, and the individuals truly responsible?

To this end, Negativland has proposed some copyright law revisions to preclude from infringement allegations (their practice of) fragmentary appropriation. They would restrict such claims to non-transformative, whole work copying, or for any form of use whatsoever by commercial advertisers, and would further loosely define that which constitutes a "'fragment'...to give the broadest benefit of the doubt to unpredictability."²⁸ From the author's vantagepoint, however, Negativland is merely seeking assessments of fair use truer to that which is codified in Section 107 of the DMCA, and truer to the Supreme Court's clarification in *Acuff-Rose* regarding commercial use. In so doing, Negativland modestly purports to seek their due protection under the law: that is, Negativland wants what Negativland feels it deserves. However,

Negativland might have gotten just that, or rather, Negativland might have been afforded the opportunity to attain such protection had it possessed the resources to present its case to a forum of precedent.

Negativland portrays a current cultural state of affairs wherein "the market rules and money is power."²⁹ While an arguably accurate assessment, it is equally true that the power dynamics, be they depicted as cultural, artistic or otherwise, are not likely to shift in the near future. As such, it remains questionable at best whether such proposed revisions to copyright law might come to pass, further whether those most likely to benefit from such laws will have the resources necessary to engage in an ensuing battle, and finally whether such revisions would realize their desired effect. At this point, Negativland can only endeavor to raise consciousness and reasonable discourse regarding the interplay of art, law and commerce, which the final tenet, reprinted below, eloquently addresses.

*WE BELIEVE that artistic freedom for all is more important to the health of society than the supplemental and extraneous incomes derived from private copyright tariffs which create a cultural climate of art control and Art Police. No matter how valid the original intent of our copyright laws may have been, they are now clearly being subverted when they are used to censor resented works, to suppress the public need to reuse and reshape information, and to garner purely opportunistic incomes from any public use of previously released cultural material which is, in fact, already publicly available to everyone. The U.S. Constitution clearly shows that the original intent of copyright law was to promote a public good, not a private one. No one should be allowed to claim private control over the creative process itself. This struggle is essentially one of art against business, and ultimately about which one must make way for the other.*³⁰

¹ Negativland, Negativland's Tenets of Free Appropriation (visited March 30, 2002) <<http://www.negativland.com/riaa/tenets.html>>.

² See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D. Cal 2000); *UMG Recordings, Inc. v. MP3.com*, [2000] WL 1262568; *Panavision Intern., L.P., v. Toepfen*, 141 F.3d 1316 (9th Cir. 1998) (domain name disputes); *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y., 2000) (DVD decryption).

³ Harvey, D. 2000. "Tactical Embarrassment: the subversive cyber actions of @TMark" LA Weekly. Los Angeles, CA <<http://www.laweekly.com/ink/00/18/art-harvey.shtml>>. See generally, Dery, M. "Culture Jamming: Hacking, Slashing and Sniping in the Empire of Signs". Reuters. San Francisco, CA (visited March 30, 2002) <<http://web.nyu.edu/~mlaffey/cultcover.html>>.

⁴ Negativland, *supra* note 1.

⁵ Negativland, Fair Use (1992) (visited March 30, 2002) <<http://www.negativland.com/fairuse.html>>.

⁶ *Id.*

⁷ Negativland, *supra* note 1.

⁸ Francis Gary Powers Jr., prologue to Negativland, Fair Use: The Story of the Letter U and the Numeral 2 (Sealand 1992)

⁹ *Id.*

¹⁰ Negativland, *supra* note 1.

¹¹ Digital Millennium Copyright Act 1998 (U.S.C.) § 107.

¹² *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218 (1985); see also *Suntrust Bank v. Houghton Mifflin Company*, No. 01-1200 (5-25-01); *Suntrust Bank v. Houghton Mifflin Company*, Civ. A. No. 1:01-CV-701-CAP (4-20-01).

¹³ *Harper & Row at 568-69, 2234-35.*

¹⁴ *Suntrust Bank v. Houghton Mifflin Company*, No. 01-1200 (5-25-01); *Suntrust Bank v. Houghton Mifflin Company*, Civ. A. No. 1:01-CV-701-CAP (4-20-01).

¹⁵ *Suntrust Bank v. Houghton Mifflin Company*, No. 01-1200 (5-25-01).

¹⁶ Garrett Epps, *Writers Cramped: Judge Strikes Blow at Creativity*, L.A. TIMES & THE INT'L. HERALD TRIB., May 9, 2001.

¹⁷ Negativland, *supra* note 1.

¹⁸ Negativland, Press Release: U2 Negativland- the Case from Our Side (November 10, 1991)

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Negativland, *supra* note 1.

²³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 539, 584, 114 S.Ct. 1164, 1174 (1994).

²⁴ *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D. Cal 2000); *aff'd in part, rev'd in part by A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 2001 Copr.L.Dec. P 28,200, 57 U.S.P.Q.2d 1729, 1 Cal. Daily Op. Serv. 1255, 2001 Daily Journal D.A.R. 1611 (9th Cir.(Cal.) Feb 12, 2001) (NO. 00-16401, 00-16403), as amended (Apr 03, 2001).

²⁵ *Id.*

²⁶ *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d at 912. Contrast with "Key Dates in Copyright Law" <<http://dailynews.yahoo.com/h/20000906.html>> 6 Sept 2000, wherein it was revealed that the FTC had settled a price-fixing allegation case with the five major US labels just three months prior to the initial Napster litigation, estimating consumer overcharge at \$500 million over a four-year period.

²⁷ Aoki, K. "Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I", 18 Colum.-VLA J.L. & ARTS (1993).

²⁸ Negativland, *supra* note 5.

²⁹ Negativland, *supra* note 18.

³⁰ Negativland, *supra* note 1.

Notice:

The Journal will provide space for attorneys who are willing to provide their services, such as contract review or consulting, to entertainers, artists, athletes, etc., free or at a reduced fee. Space is limited and we will endeavor to include as many insertions as space permits. The Journal assumes no responsibility or liability for the services provided nor makes any representation concerning the persons providing the legal services.

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(COMPILED BY THE STATE BAR OF TEXAS' LEGAL ASPECTS OF THE ARTS COMMITTEE)

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www.fedcir.gov

Federal Trade Commission
www.ftc.gov

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

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

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

United States Copyright Office
www.loc.gov/copyright

United States Patent and Trademark Office
www.uspto.gov

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

Legislative

thomas.loc.gov

www.house.gov/judiciary

www.senate.gov/~judiciary

Scholarly & Research

Bureau of National Affairs
www.ipcenter.bna.com/

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

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

Kohn on Music Licensing
www.kohnmusic.com

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

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

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

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

International

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

Japanese Patent Office
www.jpo.go.jp

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

United Kingdom Patent Office
www.ukpats.org.uk

World Intellectual Property Organization
www.wipo.org

World Trade Organization
www.wto.org/english/tratop_e/trips_e/trips_e.htm

Interest Groups

American Bar Association – Section of Intellectual Property Law
www.abanet.org/intelprop/home

American Intellectual Property Law Association
www.aipla.org

American Society of Composers Authors and Publishers
www.ascap.com

Association for Independent Music
http://www.afim.org

Broadcast Music International
www.bmi.com

Computer Law Association
www.cla.org

Film Music (Online Magazine)
http://www.filmmusicmag.com

Intellectual Property Owner's Association
www.ipo.org

International Trademark Association
www.inta.org

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

Motion Picture Association of America
www.mpa.org

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

Recording Industry Association of America
www.riaa.org

SESAC
www.sesac.com

Software and Information Industry Association
www.siiia.net

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Student Writing Contest

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

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

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

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 1, 2003.

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.

Excessive Violence in Sports - Part I: The Hackbart Rule - Who got it Right, and Does it Even Matter?

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(Part one of two parts)

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I) Introduction

The crowd is electrified. The team is energized. The player is idolized. Media coverage, locker room and bar room gossip strongly suggest that the player who delivers a bone-crunching tackle or a cross-check that drives his opponent into the boards to advance his team's cause is the envy of both teammates and fans. Would it be wrong to assume that many children growing up playing sports have at one time or another fantasized about making a game-changing play in front of thousands of screaming, adoring fans? The reality is that such childhood visions are inspired by parents and coaches alike who are socially inclined to train young athletes to play a hard fought, physical game motivated by an intense desire to win.

Due to the competitive nature of sports, it is virtually impossible to find a coach who is willing to tell their players to gently tackle the quarterback or not play with the physical enthusiasm necessary to win. But what happens when a player overly interprets the intent of skill training and motivation drills and carries their coach's instruction for aggressive behavior too far? For example, what if the tackle is accomplished after the whistle has already blown the play dead and the action is an obvious blatant attempt to injure the opposing player; or even more frightening, there appears to exist a willful desire to put the opposing player out of commission not just for the game but for the entire season (or longer)? What if instead of a legal cross-check to the player's body the player uses his hockey stick to take a swing at the opposing players head as if he were trying to chop down a tree? Should an act of this nature be considered the act of an over-enthusiastic player and a logical extension of learned role-training patterns that lead to over-aggressive field behavior? Are such actions inherent to all sports (or specific sports) and therefore to be perceived as an inherent part of the game? Does this premise extend to regarding the injury as a reasonably foreseeable risk to the athletes? Are such actions acceptable despite the potential consequence for permanent physical debilitating injury or even death?

As will be shown, it is with rare exception that conduct considered criminal off the playing field has subjected athletes who commit similar offenses during the heat of sports' battle to criminal penalties. More often, assaultive sports' behavior (otherwise considered as criminal conduct in certain situations) results only in a minor consequence to the player such as a penalty assessed during the game, league fines and suspensions.

The tolerance shown over the years to players who deviate from the norm and commit acts of excessive violence in the sport's arena is a subject that has been discussed at length. Unfortunately, discussion without real consequence to the player beyond minor sanctions has done little to diminish the number of serious infractions that occur weekly. In spite of public outrage to the recurring infractions of league rules regarding overly aggressive play or outright violations of non-permissible field conduct, discipline through league self-regulation remains the most prominent manner of dealing with the problem of excessive violence.

The primary focus of this paper is placed on the differences of opinion between the District Court in *Hackbart v. Cincinnati Bengals, Inc.*,¹ and the Court of Appeals² on review; bringing

attention to the effect these opinions have had on the sport's world's current response to handling violence on the field. The central issue the courts addressed was whether the court system is capable of regulating violence on the playing field or if the sports' leagues are better suited to police, punish and therefore deter acts of excessive violence in sports.

In reviewing the case law, the effect *Hackbart* has on the NFL (National Football League) and the NHL (National Hockey League) is closely scrutinized because of the comparative arguments that can be made between violent behaviors committed by the actions of players from these similarly combative sports. For example, analyzing hockey regulations and rule violations are a logical extension of the *Hackbart* (football) decision because of the physical and contact demand similarities prescribed by owners and coaches of the NHL and those owners and coaches of the NFL. Further, because of the scarcity of court cases involving NFL players and excessive violence, a discussion of violence within the NHL is essential to discuss the effects of *Hackbart*; and provides a better understanding of the general challenges faced by courts regarding handling cases of excessive violence.

The opinion of the District Court in *Hackbart*, and the response to its' reasoning by the Court of Appeals, including a summation of which court was right is first presented. Second, the current barriers to prosecution of acts of excessive violence are briefly mentioned and summarized. Third, relevant cases of violence in the NHL (briefly touching on incidents involving minor league affiliates) are discussed, including what sanctions, if any, were imposed upon the involved players. This is followed by a discussion of the current trends within the NHL (U.S) and NHL (Canadian) leagues on handling violence and the effect of those actions on potential future court interaction. Finally, the guidance provided by the courts and the leagues regarding the manner in which violence should be handled in accordance with the cited opinions is presented.

II) *Hackbart v. Cincinnati Bengals, Inc.*

A) The Incident

The *Hackbart* civil lawsuit resulted from an incident during the 1973 NFL season involving Dale Hackbart of the Denver Broncos, and Charles "Booby" Clark of the Cincinnati Bengals.

In the second quarter, close to halftime, the Bengals were driving deep into Broncos' territory. The Bengals attempted a pass play, which was subsequently intercepted by the Broncos. Because his team had intercepted the ball, Hackbart turned into an offensive player, and Clark turned into a defensive player. After blocking Clark, Hackbart fell to the ground and proceeded to watch the play from one knee. Out of frustration, Clark took his forearm and hit Hackbart in the back of the head, causing both of the players to fall to the ground. No penalty was called on the play (the referees apparently did not see the offense), nor did Hackbart retaliate. Both players went to their respective benches and continued to play the rest of the game. Although his neck hurt, Hackbart did not inform

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the team doctors. However, several games later, Hackbart was released from the team. Hackbart later discovered that he had a neck injury and because of an injury clause in his contract, received his full salary for the year from the Broncos. Hackbart did not seek to recover damages from Clark, but from Clark's employer, the Cincinnati Bengals, Inc.

The Hackbart case is critical to the discussion of excessive violence in sports because of the divergent views of the District Court, and the Court of Appeals regarding the ability of courts to adjudicate cases regarding acts of excessive violence on the field (which off the field would likely give rise to liability and/or criminal charges).

B) Hackbart v. Cincinnati Bengals, Inc. - The District Court Decision

The nature of the sport makes violence an acceptable aspect of professional football. However, the question presented in this case regarding excessively violent acts left the court in a precarious position, as the decision could have far-reaching effects on the way the sport of football (and possibly other sports where violence is an inherent part of the game) is played. Today, as well as at the time of the incident described in Hackbart, players that commit infractions within the league are subject to penalties in the form of yardage on the field, fines, and suspensions for acts considered excessive violence. The initial question the court asked was whether the Cincinnati Bengals, Inc., were liable to Dale Hackbart for the injuries he suffered as a result of the actions of its employee, Charles Clark. In asking this question, the court recognized that a larger question was at issue, "whether playing field action in the business of professional football should become a subject of the courts."³

The approach taken by the court was that if the defendant were to be held liable, it would be under tort law principles. To determine whether tort law principles should apply to professional football, the court relied on the following words of wisdom stated by Justice Oliver Wendell Holmes: "The business of the law of torts is to fix the dividing line between those cases in which a man is liable for harm which he has done, and those in which he is not."⁴ Based on the plaintiff's claim that his injury was caused by reckless misconduct, or at the least the negligence of Clark, the court said "both theories are dependent upon a definition of duty to the plaintiff and an objective standard of conduct based upon the hypothetical reasonably prudent person."⁵ Thus, the question posed to the court was, what would a reasonably prudent professional football player be expected to do under the circumstances confronting Charles Clark in this incident?⁶

Testimony regarding the conduct of players on the field was given by two NFL coaches, each of which emphasized that the players received no training with respect to their responsibility for the well being of other players or with any regard for the safety of other players. Further, both stated that aggressiveness was a key trait that they looked for when selecting a player.⁷ Due to such testimony, the court realized how intensely difficult it would be for the courts to allocate fault in the context of a professional football game.⁸ In the end, the Court's determination was based on its regard for the ambiguous language contained in the NFL players' rules and the application problems that would arise in determining the extent of a player's behavior.⁹ Important to its finding, the court shunned the possibility that a football player owed a duty to an opposing player or that on field conduct can be measured by a standard of reasonableness:

It is wholly incongruous to talk about a professional football player's duty of care for the safety of opposing players when he has been trained and motivated to be heedless of injury to himself. The character of NFL competition negates any notion that the playing conduct can be circumscribed by any standard of reasonableness. *Hackbart*, 435 F. Supp. at 356

In deciding whether Clark was liable for Hackbart's injuries, the court found that Hackbart knew of the violence of the sport, and the potential for emotional outbursts that were inherent to the game of football. Due to this knowledge, Hackbart assumed the risk that he could be hurt, and neither Clark nor the Bengals as his employer were liable for Hackbart's injuries.

Addressing the issue of whether the courts should rule on the player's behavior on the field within the context of a professional football contest, the court felt that the volume of litigation would weigh down the court system (due to the multitude of cities in which the NFL sponsors teams) and that the differences of opinion between different state court systems would make it increasingly difficult for the NFL to fashion its rules to accommodate all of the divergent views.¹⁰

The court also concluded that gauging the acts of players to determine if the act was excessively violent was one not best suited for the court system, but for the legislature.^{11 12} This holding left the leagues to determine whether a player's action was excessively violent, and what league sanctions would be appropriate on a case-by-case basis. (The holding was limited to apply to only those players who had engaged in conduct that was not intended to injure in a league-approved game involving consenting adults who were under contract.)

C) Hackbart v. Cincinnati Bengals, Inc. - The Appellate Court Decision

The first concern of the appellate court was that the district court's decision improperly insulated NFL players (and possibly players in other leagues in the future) from liability for their actions which appeared to be excessive even if they were intentional—because the sport was a species of warfare where the force and magnitude of physical activity is such that it is not actionable in court.¹³

Next, in countering the district court's position that tort law was not applicable because the injury occurred during a football game, the appellate court stated "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."¹⁴ The court further supported its statement by providing evidence that the NFL player rules (in which the district court said it was too ambiguous to draw lines between which conduct is excessive and that which is not) prohibit the type of conduct that took place in this case. The crux of the referenced rule is that intentional punching or striking of another is not conduct that is approved by the general customs of football.¹⁵

The most important aspect of the court's reasoning is why and how on-field violence could (and should) be handled by the courts. Starting with the definitions of assault and battery,¹⁶ the court presumed that the district court felt it could not prove the intent necessary to show assault and battery (because of the nature of the game), and therefore tort law was not appropriate for the court in the area of sports violence. However, the appellate court exemplified

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how another area of tort law beyond assault and battery (although it did not rule out assault and battery) could (and should) be applied in this type of case. It went on to argue that because of the nature of the game and its physical ferocity, attempting to show that the actor intended to injure another is difficult but that other areas of tort law also include difficult decisions that are nonetheless made every day. In contrast, whereas the district court felt that reckless misconduct was an inappropriate standard because “playing conduct could not be circumscribed to any standard of reasonableness,”¹⁷ the appellate court felt this was a very appropriate standard for judging player conduct.

To show the viability of recklessness as a standard for judging player’s actions, the appellate court defined recklessness as “an action *intended* by the actor, however, the actor does not intend *to cause the harm* which results in it.”¹⁸ From this definition, recklessness requires only that the actor realized or should have realized that there was a strong possibility that his action could result in harm.¹⁹

In this case, the district court found Charles Clark’s conduct to be borne out of frustration and anger but without intent to injure. The appellate court relied on the definition of recklessness and felt the district courts interpretation of the incident fit the definition perfectly. Therefore, the appellate court held that recklessness was the proper standard to measure Charles Clark’s behavior. On a grander scheme, the court implicitly stated that the standard could also be used to gauge future instances of questionable excessive violence. Thus, the question presented to the court was answered in the affirmative, arguing that playing field action in the business of professional football (and possibly other sports) is a proper subject for the courts and is not a subject that causes problems of line drawing more prevalent than in other areas of law.²⁰ While the court made it clear that recklessness was the proper standard to measure Charles Clark’s behavior and other cases of violence where the requisite intent of harm is difficult to show, the court left open the possibility that assault and battery could be used in a cause of action.

D) Summing up *Hackbart*: Who was Right?

The main distinction between the district and appellate court opinions was the appellate court holding that the playing field action in professional football was a subject the courts could handle, and the district court did not. The district court felt that the nature of the game, the training of the players and the frequency of violence within the league made all conduct within the sport legal. The court felt that the lines of reasonableness that would need to be drawn regarding the safety of other players was too ambiguous, especially since players are required to put their own physical condition at risk as a condition of employment relative to the sport. The appellate court sharply disagreed, saying that professional football players should not be regarded as jungle animals whose conduct cannot be regulated. The appellate court made clear that the court system handles many aspects of tort law where drawing lines becomes complicated and noted that difficulty in drawing the lines of reasonableness does not mean that the reasonableness of a player’s actions cannot be measured by an objectively reasonable juror. In concluding this, the court determined that sports violence was a proper subject for the courts. Both courts did not extend its respective holdings to other sports, but implicit in the language and reasoning of the appellate court is that the principles can bring about a logical extension to other sports in which violence is an

inherent part of the game.

This leads to the rhetorical question, who got it right in *Hackbart*, the appellate or district court? Ironically, the appellate decision has done little or nothing to increase the actual amount of prosecutions for excessive violence committed on the playing field. In fact, over the course of the twenty-plus years since the *Hackbart* decision, even where it was found that a player’s intent was to injure²¹ an opposing player, prosecution of an NFL athlete has not gone forward. Irrespective of the clear standard the appellate court delineated in *Hackbart*, it now appears that the issue of excessive violence in football was better suited in being determined outside of the court system and that the district court had it right all along. This is not to say that the appellate court was wrong, but only that there is the clear observation that excessive violence in sports is a subject the U.S. courts have seemingly kept its hands out of since *Hackbart*. It is noted that a situation similar to *Hackbart* has not since been adjudicated (in regards to football) and it is therefore difficult to say whether another court would follow the district court’s opinion or the appellate courts holding. However, it is difficult to believe that with the hundreds of injuries that occur throughout the NFL each season, not one injury has since resulted from an act similar to that committed by Charles Clark. Although it is evident that the *Hackbart* decision may have alerted NFL players to the potential of liability (outside the league), formal prosecution appears to be an action of last resort if taken at all. The absence of excessive violence cases supports the notion that the decision in *Hackbart* was not strong enough or that the language in league rules is not cogent enough for victims of excessive violence to bring action against other players (their attackers).

As relates to the above, there are four main obstacles that cause hesitation in bringing action against a player for apparent on-field misconduct in the United States. They are: consent, prosecutorial hesitancy, league self-regulation, and overcrowded dockets. Again, while *Hackbart* was a case involving NFL players, because of the similarities in the two sports, violence within the NHL will be discussed at length.

III) Barriers to Prosecution for “Excessive” On-Field Violence

A) Consent and Assumption of the Risk

Since players are cognizant that NFL and NHL games are inherently violent, it is evident that consent²² is the main barrier to prosecution of on-field (or rink) violence.²³ Assumption of the risk²⁴ brings forth the same barriers to prosecution as the consent defense, as the two are invariably tied together. The principal question in determining whether an act of violence occurred is deciding where the court is able to draw the line between what types of violence a player did or did not consent. Although the appellate court in *Hackbart* established that the standard of recklessness should be applied to this type of conduct [violence], a difficulty remains in distinguishing between reasonably foreseeable conduct and injurious non-foreseeable conduct.²⁵

Even where it can be shown that a player intended to swing, punch or tackle a player in a way that can be deemed excessive, the question still remains whether the conduct was reasonably related to the sport, and as such was therefore a foreseeable risk to which the victim consented, and assumed the risk for by playing the sport. For example, a subject of recent debate in the NFL is the rash of helmet-to-helmet hits being leveled by safeties (players) around

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the league. Is the helmet-to-helmet collision in which serious neck injury has resulted an inherent part of the game, one in which players consent to as well as assume the risk? Like many of the hits that occur daily in the NFL, helmet-to-helmet hits are technically illegal, and prohibited by league rules. Yet, in many cases they are ignored unless flagged by the official or it is evident that the collision of the players was of significant force to have caused or may potentially have caused serious injury. The NFL has begun to crack down on these types of hits,²⁶ but the fact that they remain an inherent part of the game is quite clear and perhaps, due in part to the failure by the league to make them illegal until 1995. Detroit Lions President, Matt Millen, supported the argument that helmet-to-helmet hits are an inherent part of the game, to which players consent and assume the risk with the following:

I don't know that you can undo 20 or 25 years of teaching the game a certain way. For years, we've taught guys to lead with their heads. . . . And now we're telling people that they can't do that. And we're asking them to make split decisions, to change direction in mid-air, like a high-wire act. I'm all for safety, but some stuff just can't be done.

Len Pasquarelli, *No Easy Answer on Helmet-to-Helmet Hits*, http://espn.go.com/nfl/columns/pasquarelli/_len/1453891.html (accessed 11/01/02).

In large part, NFL players share these same sentiments²⁷ and if true, it would seem that prosecutors would find it a difficult task to prove that players are not aware of risk from excessive violence for this type of hit (helmet-to-helmet). In essence, while violent conduct is foreseeable whether by intent or accident, the difficulty of drawing the line between what is foreseeable violent conduct and acceptable and what is excessively violent conduct and therefore unacceptable is what makes the concept of consent and assumption of the risk powerful defenses for the professional athlete. These defenses make prosecutorial hesitancy to file formal charges relating to an athlete's excessive on-field violence somewhat routine.

B) Prosecutorial Hesitancy

Consent to an unprivileged contact, and the difficulty of conviction that results, is one of the main reasons why U.S. prosecutors have demonstrated an unwillingness to pursue criminal charges for on-field violence.²⁸ As earlier discussed, another contributing factor is the ambiguity of the definitions contained in the NFL players' rules (which leads to difficulty in prosecuting). Further, attempts by the legislature to make excessive violence susceptible to criminal penalties have failed because of the subjective nature of the interpretation of the terms used to define excessive violence (unreasonably violent, best interests of the game, etc.). This ineptness on behalf of the legislature to enhance the understanding of the principles that govern violence or to describe what exactly constitutes "excessive violence" is a good reason for prosecutors to hesitate to prosecute the professional athlete. If the court cannot clearly discern between an action that is purposeful to injure and one that results in injury due to the inherent risks of the game, proving another test such as reasonableness of a player's actions is most certain to fail.

Also in question is whether or not prosecutions of on-field violence would satisfy a public interest. As earlier noted, it is only the player that takes a foreseeable risk and consents to an action

that could lead to injury. Thus, the harm that occurs as a result of on-field violence (sometimes excessive) is confined to the knowing athlete who is assumed to be aware of the inherent risk relative to their occupation and respective sport. In general, criminal law has one main function: to protect the public.²⁹ Since the public is not subject to the acts of violence committed on the field (beyond seeing), a rightful question to be posed is whether prosecuting athletes serves the purpose of protecting the public?

Berry & Wong outlined three theories as to whether criminal sanctions should be imposed on athletes.³⁰ The first theory is prevention, primarily the provision for sanctions that are so severe (jail) that the athlete is deterred from ever breaking the rules again as a repeat offender. However, a major problem with the prevention theory is that because many athletes' careers are relatively short, if a trial is delayed and the sentencing phase is prolonged, the delay may have the effect of eclipsing the athlete's career, and thus have no effect on keeping him from becoming a repeat offender in the interim. The second theory, deterrence, really has more to do with the impact of the sentence on a potential offender more than the person charged with the offense. The deterrence theory carries the message that similar behavior not in accordance with the rules or laws will not be tolerated and is likely to result in harsh punishment. However, like the prevention theory, court delay is a major concern, along with the problem of the doling out of punishments that are less severe than those imposed by the league. If this is the case, that deterrence will have little if any value. Finally, it can be said that the educational theory which includes publicity surrounding a trial and its providing of direction regarding right and wrong behavior does have valuable implications. However, measuring the actual educational effects of a criminal trial involving an athlete who committed an act of excessive violence on the playing field and determining its value or impact on the public (specifically youth sports participants) would be very difficult if not impossible to determine.

C) League Self-Regulation

The NFL since day one has been a self-regulated business. Other sports leagues in existence in the U.S. are also self-regulated and contain provisions for sanctioning their members. For example, the Collective Bargaining Agreements (C.B.A.) and Uniform Player Contracts (UPC) in the respective leagues contain sections which give broad powers to the league commissioners to discipline players for violence towards another player, which is deemed to be excessive.³¹ Importantly, prosecutorial hesitancy partially exists due to the belief that league self-regulation is more effective than the court system as leagues are not only more educated about the intricacies of its respective sport but have appropriate internal mechanisms in place to punish athletes who have committed excessive acts of violence.

Because of this, league officials, unlike attorneys, judges or juries, are more familiar with the rules and customs of their sports and are more prepared to determine when an aggressive act exceeds the norm. They are also more aware of acceptable conduct and the risks players assume.

Linda S. Colvert Hanson, Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?* 6 Seton Hall J. Sports L. 127, 151 (1996).

i) **A Case Example** - One of the few and most recent cases in

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which a violent act went to trial (although it was civil, not criminal) in the U.S. involved a minor league hockey player who was hit by an opposing player after the referee twice blew his whistle.³² The player sued the hockey club of the opposing player, not the player individually. The court ruled in the hockey club's favor for two reasons: (1) Rough play is commonplace in hockey, and; (2) professional leagues have internal mechanisms for penalizing players and compensating injuries.^{33 34} The court in this case deferred to the leagues internal discipline system,³⁵ even though the injury did not occur during play, nor did it result from an incident in which the victim provoked the opposing player.

In the above case, the severity of the incident (the player was knocked unconscious) gave the court the perfect opportunity to apply the recklessness standard derived by the court in *Hackbart* (because of the similarities between professional hockey and football, and similarities in fact between both cases), yet the court chose to defer to league self-regulation. (Note: Although the holdings of the *Hackbart* decision are transferable to the actions of professional hockey players in the NHL and its minor league affiliates for discussion purposes, there was no intention by the court to extend this holding to other sport's leagues as the NFL had the added component of being an independent commercial entity.)

While deferment to league self-regulation may have been a prudent response by the court in the above case, critics of prosecutorial hesitation and court deference complain that this type of system gives the players a private system of justice.³⁶ Further, because the commissioner of the individual league may have ulterior motives (keeping a popular player on the field in order to maintain high attendance) a bias could arise and hesitancy to punish the actor severely may result.³⁷ In light of the above differences of opinion, the former Director of Northeastern University's Center for Sport in Society, Richard Lapchick, may be the person who best sums up the present thinking regarding self-regulation:

The leagues rather than the court system are better places to penalize a player for on-field violence. I think that what should happen is that the league should have such severe penalties that it would be sanction enough. To be arrested or charged under these circumstances is a signal that society is not going to tolerate [extreme violence], although fans go to games to see it. But to single out one player seems unfair.

Karen Goldberg Goff, *Insight on the News, Should Courts Referee Violence in Sports?* http://www.findarticles.com/cf_0/m1571/12_15/54246307/print.jhtml (March 29, 1999).

ii) The Commercial Aspect of Sports and its Hypocritical Role in Policing Excessive Violence

While leagues are arguably best equipped to handle and deter excessive player-to-player violence within its respective sport, the fact that the leagues are commercial entities places the league in a conflict-of-interest if not outright hypocritical position regarding league violence and its attempts to market the game. It should be pointed out that the actual game of playing football is only a small part of the money making conglomerate that professional teams comprise. An example of such hypocrisy regards the previously discussed crackdown on helmet-to-helmet hits (*supra*, n.26), and league-licensed video games that the NFL markets³⁸. The following is an excerpt from an article by Rick Reilly in *Sports Illustrated*; describing the action that takes place in a particular NFL licensed video game:

Oakland Raiders quarterback Rich Gannon was on the ground, writhing in pain, when New York Giants defensive end Michael Strahan took a flying leap onto Gannon's chest! And Gannon was out-of-bounds at the time! Then Strahan kicked him – and no flag!³⁹

In his article, Reilly strongly suggests that the league is being hypocritical when it is fining players for helmet-to-helmet hits, but at the same time stuffing wads of cash into their own pockets from video game licensing fees endorsed by the league! As such, players recently suspended for such hits have raised this issue with Gene Washington, the NFL's disciplinarian.⁴⁰ Could this mean that the players are suggesting that NFL-endorsed violent video games provide credence that the league promotes excessive violent behavior? The actuality of this implication is extremely doubtful. In the first place, most owners who consider players to be their property just as they would a concession stand or football stadium make a significant investment in each player. Protecting these players (from physical harm) is therefore analogous to protecting their property. Second, just because the league supports violence within an NFL sponsored, commercial *video game* should not give the players the impression that they have carte-blanc exception to independently revoke the rules of real play and act irresponsibly on the playing field. As a matter of common sense, the players should be able to draw the line between what is real and what is fantasy.

While the fact that the league has dual purposes, and that it acts hypocritical at times by marketing the sport as opposed to regulating the sport, this should by no means take the power to discipline away from the leagues. The leagues still are arguably in the best position to decide what violence is acceptable and within the rules and what violence is excessive. [see footnote for NFL's response to players criticism of league hypocrisy regarding violence]⁴¹

D) Overcrowded Dockets

Unfortunately, one of the strongest arguments supporting deference to league self-regulation may actually arise due to the difficulty the courts would face in ascertaining what indeed is reasonable as opposed to excessive violence. For example, violence may be considered reasonable even if it shown to be outside the customary bounds of what is considered normal for the sport. Making such determinations would likely prove to be a difficult burden in most instances, a task that would unduly flood the courts with severe backlog. At present, the dockets in the courts around the U.S. are already severely overcrowded and delayed. While sport's related excessive violence cases would likely take years to reach the docket, league self-regulation assures management, players, the public and the injured party that the results can be swift, certain, and severe—the entire point behind an effective system of criminal adjudication. Self-regulation therefore has promise in a structured, league system that is willing to impose uniform and predictable sanctions. This same result is not easily achieved within different courts in different states, even for comparable violations of league restrictions. Again, the *Hackbart* decision, while a landmark case in all respects, has not proved to further prosecutions for on-field violence, an outcome related to the barriers discussed above.

* *Part II of Justin Reiner's article, along with its footnotes, will appear in the next issue of the Journal.*

RECENT CASES OF INTEREST

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

The Copyright Term Extension Act Deemed Constitutional

The Copyright Term Extension Act of 1998 amended various provisions of the Copyright Act of 1976 by extending certain existing copyrights for an additional twenty years. In the case of *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), the Plaintiffs filed suit challenging the constitutionality of the Copyright Extension Act. The Plaintiffs were corporations, associations, and individuals that utilized works in the public domain for both profit and non-profit purposes. More specifically, the Plaintiffs were a non-profit association that distributed free electronic versions of books in the public domain over the Internet; a company that reprinted rare, out-of-print books that had entered the public domain; a vendor of sheet music and a choir director, who respectively sold and purchased music that was relatively inexpensive because it was in the public domain; and a company that preserved and restored old films. The Plaintiffs alleged that the Copyright Extension Act violated the First Amendment, and the Copyright Clause of the U.S. Constitution which authorizes Congress “to promote Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” After the district court upheld the constitutionality of the Copyright Extension Act, the Plaintiffs appealed arguing that the Act went beyond the power of Congress and was therefore unconstitutional.

The D.C. Circuit first acknowledged that prior Supreme Court decisions, as well as its own prior decisions, embraced the idea that “copyrights are categorically immune from challenges under the First Amendment.” See *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). This obviated the need for further inquiry under the First Amendment.

The D.C. Circuit then found that the Copyright Extension Act can extend existing copyrights because the originality requirement does not have to be met for a second time. The Plaintiffs had argued that since originality was a constitutional requirement for a copyright, a copyright could only be extended by meeting the originality requirement again. The Court held, however, that existing copyrights had already satisfied the originality requirement of the Copyright Clause and need not do so again for the copyright to extend.

Finally, the D.C. Circuit held that the Copyright Extension Act did not violate the Copyright Clause requirement that copyrights endure only for “limited Times.” The court noted that if Congress had made the copyright protection permanent, rather than for an extended twenty years, this would have exceeded the power of for “limited Times” vested in it by the Copyright Clause. However, the Copyright Extension Act was a proper exercise of congressional power because it only extended copyrights for “limited Times.”

The United States Supreme Court has accepted review of the case and recently heard oral arguments. *Eldred v. Ashcroft*, 534 U.S. 1126 (2002)

By: Sherin Babu

The Standard For Liability In Texas Sports Injury Cases Remains Undecided

Although the Texas Supreme Court could have provided guidance on the proper standard for liability in “sports injury” cases, the Court only provided dicta about the possible standards and left the decision for another case. *Southwest Key Program v. Gil Perez*, 81 S.W.3d 269 (Tex. 2002).

In *Southwest Key*, Carlos Gil-Perez was a resident of La Esperanza Home for Boys, which was owned and operated by Southwest Key. The Southwest Key supervisor took a group of boys to a local stadium to participate in various athletic endeavors. The supervisor agreed to let the boys participate in a game of tackle football. On the last play of the game, Gil-Perez suffered a dislocated knee.

Gil-Perez filed suit against Southwest Key alleging negligence because the supervisor allowed him to play tackle football game without protective equipment. Southwest Key urged the court to apply a heightened standard for recovery, requiring reckless or intentional conduct rather than negligence, since this case involved a “sports injury.” The trial court rejected Southwest Key’s claim, applied a negligence standard, and awarded the injured boy \$75,000. This judgment was affirmed by the Texas Court of Appeal and then brought before the Texas Supreme Court.

Southwest Key’s appeal to the Texas Supreme Court made two contentions: (1) “sports injury” cases should be judged by either the “inherent risk” or “reckless/intentional” standard, rather than a negligence standard, and (2) even under ordinary negligence, there was no evidence to support the jury’s finding that Southwest’s negligence proximately caused the boy’s knee injury.

The Texas Supreme Court first recognized that three standards for liability in “sports injury” cases have emerged in other jurisdictions: (1) the “inherent risk” standard, (2) the “reckless/intentional” standard, and (3) the negligence standard. Under the “inherent risk” standard, the co-participant and non-participant defendants owe no duty to protect a participant from risks inherent in the sport or activity in which the participant has chosen to take part. There can be no liability under this standard. By contrast, under the “reckless/intentional” standard, an injured plaintiff must prove that the participant-defendant’s conduct was either reckless or intentionally injurious. The majority of states have adopted this standard. Finally, the Court noted that a few states still adhere to the traditional negligence standard, under which a defendant owes a duty of ordinary care.

After recognizing the existence of these three standards, the Court declared that it would not decide which standard governs Texas “sports injury” cases. Instead, the Court ruled that the current claim failed even the negligence standard making a decision about the proper standard for future “sports injury” cases unnecessary. More specifically, the Court held that the evidence did not support a finding of negligence because the Plaintiff failed to produce convincing evidence that protective equipment would have prevented the injury. The Court found that the injured party’s own medical expert failed to establish a causal nexus between the absence of protective equipment and the knee injury. Thus, the Court determined that the “but for” causation, necessary for standard negligence cases, was not proven.

The interesting point of the case, from a sports law perspective, was the Court’s discussion of the three possible standards for liability in “sports injury” cases. Although the analysis of these three standards was nothing more than dicta, the Court provided an important foundation for future cases. These three standards for liability should serve as a framework for future litigants in “sports injury” cases.

By: Matthew Todd Banister & Sabrina Joy Mommers

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