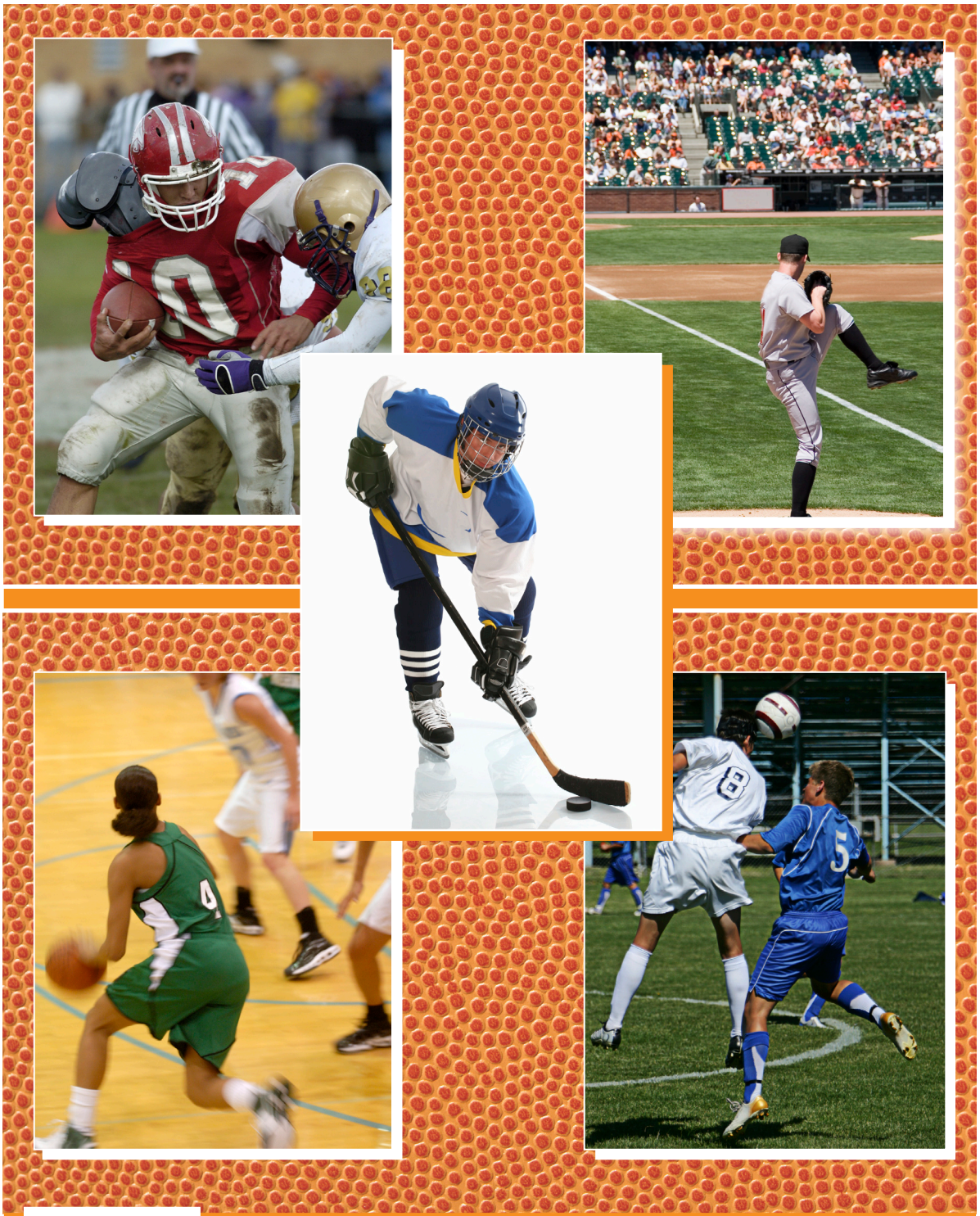
Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section
Vol. 17 No. 1, Spring, 2008



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CHAIR'S REPORT - SPRING 2008

The 2007-2008 year has been another successful one for the section. The 17th annual Entertainment Law Institute in Austin last October was well-attended and, as usual, featured many of the top practitioners in the country. This year was unique in at least two respects. First, the seminar offered two tracks of panels on each afternoon, providing a smorgasbord of choices of topics and levels of experience. Second, it devoted one of the tracks to sports law topics, featuring speakers from top pro franchises, top agencies, and the NCAA. The comments were overwhelmingly favorable, leading course director Mike Tolleson and the ELI planning committee to offer a similar format with equally compelling speakers, topics and tracks for the 18th ELI which is scheduled for October 2 & 3 at the Hyatt Regency in Austin.

Membership and interest in the section remain strong and has held steady over the past few years at well over 500 members. We have updated our committee members and chairs, most of which can always use more help, so please let one of us on the council know if you are interested in getting involved. Membership and committee involvement is a great way to broaden your network and familiarity with the entertainment & sports communities in Texas. If you have not joined the list-serve, I encourage you to take advantage of this great resource. This issue of the journal continues the exceptional quality offered, especially for a small-to-midsize section like ours. Congratulations to Sylvester Jaime and journal committee members.

We are nearing our Annual Meeting which will be held during the state bar's Annual Meeting on Friday afternoon, June 27, 2008, at the George R. Brown Convention Center in Houston. We will have a council meeting preceding the section meeting, and all members are welcome to attend both. At the section meeting, we will elect the new council for the 2008-2009 year. If you or someone you know is interested in serving on the council, please let us know as soon as possible, as the nominating committee is accepting resumes and needs to post its recommended slate by late May.

This year's Annual Meeting again features two terrific CLE panels: a panel featuring GCs from 3 major league baseball teams, and a panel featuring Music World Entertainment (Beyonce, Destiny's Child) founder and the company's outside GC Hank Fasthoff. We'll have the usual reception in between the two panels to allow everyone to visit and catch up with one another. More info is available elsewhere in this issue as well as at the SBOT Annual Meeting website: www.texasbar.com/annualmeeting.

I want to congratulate the section and the council on another fine year. It has been a privilege to work with you, and I look forward to seeing you at the Annual Meeting!

Craig Barker

Check out the Section's Website!

Check it out at www.teslaw.org. The password for members is "*galeria3*". Should you have any comments or suggestions to improve the site please feel free to e-mail Yocel at Yocelaw@aol.com or the editor at srjaimelaw@pdq.net …

ANNUAL MEETING OF THE ENTERTAINMENT & SPORTS LAW SECTION OF THE STATE BAR OF TEXAS

Friday, June 27, 2008 at the George R. Brown Convention Center in Houston, Texas

12:30 p.m. - 1:30 p.m. Section Council Meeting
(sections members welcome)

1:45 p.m. - 2:15 p.m. Section Membership Annual Meeting

- Reports from committees and chair
- Vote on 2008-2009 Officers and Council Members

2:15 p.m. - 3:15 p.m. CLE:

The Legal Management of a Major League Baseball Team
(Panel Presentation)

- Steven L. Johnston, General Counsel, Oakland Athletics
- Kate Jett, Associate Counsel, Texas Rangers
- Caleb E. Jay, Associate General Counsel Arizona Diamondbacks
- Moderator: Alan W. Tompkins, General Counsel Hunts Sports Group

3:15 p.m. - 3:45 p.m. Break (reception with snacks & beverages)

3:45 p.m. - 4:45 p.m. CLE:

Outside General Counsel for Music World Entertainment:
A Conversation with Mathew Knowles and Hank Fasthoff"

4:45 p.m. Adjourn

More info at www.texasbar.com/annualmeeting/

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FOR THE LEGAL RECORD ...

Honesty or merely the way of sports law ...

Kansas voted in the best interests of the children, when implementing rules that force recalcitrant parents to pay delinquent child support payments. Lawmakers aim at child support deadbeats who hunt and fish by barring license applicants with $5,000 or more in delinquent payments. No pay no hunting or fishing. The program is intended to have parents settle debts or set payment plans before taking their weekend or vacation fishing trips. State officials received payments from delinquent parents with $20,000 in arrearages. According to Kansas state statistics for 2006, the state is 36th in enforcing child support payments. The average debtor owes $7,127 in arrearage according to state records. State estimates are that nearly 3,000 would be barred from purchasing hunting or fishing licenses. The new policy also applies to existing license holders, who face revocation if they don't pay up. "We certainly hope it will be a further incentive to parents to get engaged in child support," said Michelle Ponce, communications director for the state's Department of Social and Rehabilitation Services ...

How about a bounty on your least favorite coach? UW big money booster, and lawyer, Ed Hansen put his money where his mouth is at. The multi millionaire, University of Washington alumnus and former three term Everett mayor wrote UW President Mark Emmert a missive "By this letter I hereby pledge to contribute a minimum of $100,000 towards a law school scholarship within 90 days, conditioned upon the termination of Ty Willingham as football coach. He also pledged "In addition, I hereby pledge a second $100,000 towards a law school scholarship within 90 days, conditioned upon the termination of Todd Turner as athletic director." After Turner was let go, but Willingham retained, it is unclear if Hansen nonetheless owes the UW $100,000? The Seattle Times received under a public records request showing Hansen's e mail offers to Emmert following the UW's third straight losing season under Willingham. The retention of Willingham and the departure of Turner, prompted Dan Luchtel, chair of the UW Faculty Senate, to write Emmert: "Yes! While there may be some dissenters, Hansen said he believed there was nothing inappropriate about his e mail: "If someone is willing to make a gift of money for a charitable purpose, they are entitled to put conditions on it. The UW is free to do what it will do, and Ed Hansen is free to make contributions to the UW if he likes the direction things are going." Asked if he planned to donate $100,000 now that Turner has resigned, Hansen said he'd never considered the possibility that Willingham would stay and Turner be gone. "Your call is making me evaluate that," Hansen told a reporter. Hansen purportedly responded, "I think, as you and I are talking, I will go ahead with the $100,000 I mentioned." Maybe other big contributor boosters throughout the country will take their coaches to task if it generates winning at their schools? ...

Vicktory ...

U. S. District judge David Doty, a former speaker at a seminar sponsored by the Entertainment and Sports Law Section, ruled that Michael Vick can keep $16.25 million of the bonus payments paid to him by the Atlanta Falcons ...

The Falcons wanted all of the bonus back after Vick plead guilty to charges related to dog fighting operations. Judge Doty did not accept the Falcon's argument that by financing the dog fighting operations, Vick financed illicit activities in violation of his 2004 contract. Vick has been indefinitely suspended without pay by the NFL following his guilty plea on the federal charges. In not having to return all but $3.75 dollars of the bonus money, Vick should be able to comfortably make it through his 23 month jail sentence...

2.85 Million Reasons to Settle ...

In hoping to put charges from the scandal caused by the school's athletics department when a group of football players and recruits crashed an off campus party at the University of Colorado in Boulder, the University of Colorado agreed to pay $2.85 million to two women who claimed they were raped by the football players. Despite no convictions of any of the players, the coach, athletic director, chancellor of UC Boulder and the president of the university system became targets in the scandal. A university panel found the school had improperly procured women and alcohol to lure football recruits to the school. Attorney Kimberley Hult proclaimed that it has been a priority "to make sure something like this didn't happen to another young woman." Seven women came forward to make charges against the football program, leading to the eventual departure of the university officials ...

Madison Square Garden settled a lawsuit with Courtney Prince, who claimed that when she was the former captain of the New York Rangers hockey team, that she was fired by MSG, the Madison Square Garden operator, after warning other cheerleaders that a member of management was a sexual predator. In settling the federal lawsuit, Prince, said the matter had been resolved "with no admission of wrongdoing on the part of any party." Prince alleged that a member of management attempted to kiss her and asked to have sex with her and made other disparaging comments about the sexual morals of the skater. Settlement of the sexual harassment suit came on the heels of the embarrassment caused by New York Knick's coach Isiah Thomas and the lawsuit against him and others accused of making unwanted advances to personnel ...

Fresno State finds itself facing a $19.1 million dollar jury award following a trial brought by former women's basketball coach Stacy Johnson Klien. Claiming gender discrimination, sexual harassment and retaliation, the university filed a motion to overturn the verdict. The university claimed Johnson Klien was fired because of her job performance ...

Lawyers Should Not Forget Advertising ...

Calling it the "most value ever offered, in the most expensive media market, and for two NFL franchises", Chicago sports marketing firm SportsCorp Ltd's president Marc Ganis, predicted that the deal advertising naming rights for the New York Giants and New York Jets new stadium in East Rutherford, New Jersey would go for $25 million to $30 million per year. The New York Mets recently completed a deal selling the naming rights to its new stadium to Citigroup, Inc. for $400 million over 20 years. A sports attorney needs to make sure he takes marketing 101 along with that first year contracts course. The Giants and Jets are seeking deals for each corner of the new stadium. They are betting that the select five corporations they are seeking will pay big money for the naming rights ...

Call of the docket:

Marion Jones, says she has been punished enough and should not have to go to prison for lying about steroids and check fraud. Despite her pleas, and forfeiture of her five Olympic medals, she was sentenced to prison ...

Yemi Babalola, and Brandon Joiner, the starting offensive tackle and freshman defensive end, were suspended from the Texas A&M football team. Both were arrested by College Station police and charged with aggravated robbery. The arrest resulted from a burglary in which the residents were held at gunpoint while small items were stolen. In executing search warrants at the residences of the former players, drugs and other controlled substances were found. Texas A&M athletic director Bill Byrne said, "The players will remain suspended until cleared of any wrongdoing" ...

Adam "Pacman" Jones plead no contest and received a one year probation following a Las Vegas strip club melee, which preceded a triple shooting. The Tennessee Titans' player appeared in Clark County District Court and made a pleas deal in turn for his testimony about the gunman who fired shots outside the club. Prosecutors dropped charges of coercion after Jones agreed to accept probation and not to contest a charge of conspiracy to commit disorderly conduct, a gross misdemeanor ...

Barry Bonds was indicted by a federal grand jury on four counts of perjury and one count of obstruction of justice, drawing comments from: Bud Selig, baseball commissioner: "... while everyone in America is considered innocent until proven guilty, I take this indictment very seriously and will follow its progress." Mike Rains, Bond's attorney: "It goes without saying that we look forward to rebutting these unsupported charges it." Donald Fehr, head of the players union: "We must remember ... that an indictment contains only allegations, ... every defendant, including Barry Bonds, is entitled to presumption of innocence unless and until such time as he is proven guilty beyond a reasonable doubt." ...

Your comments or suggestions on the Section's website may be submitted to Yocel Alonso at Yocelaw@aol.com and as always your comments regarding the journal may be submitted to your editor srjaimelaw@pdq .net ...

Sylvester R. Jaime Editor

THE REAL BCS:
Black Coach Syndrome and the Pursuit to Become a College Head Football Coach

By: Casey A. Kovacic[1]

"I truly believe that [African-Americans] may not have some of the necessities [to effectively manage a team]." [2]
Former Los Angeles Dodgers General Manager Al Campanis

I. INTRODUCTION

In the years since his infamous statement on national television about the abilities of African-Americans in sports managerial positions, Al Campanis has been repeatedly proved wrong. Countless racial barriers have been broken as African-Americans have coached teams to success in a wide range of sports and leagues. Most recently, this past February, two African-American N.F.L. head coaches faced off in the Super Bowl, perhaps the most recognized sporting event in the world. Despite increases in minority hiring in many major athletic leagues, the National Collegiate Athletic Association ("N.C.A.A.") Football Bowl Subdivision ("FBS")[1] has lagged behind. A quick look at the numbers clearly demonstrates that major college football has a problem:

- Out of 119 FBS member universities, only six currently employ African-Americans as head coaches of their football teams.[2]
- Of 197 coaching vacancies since 1996, only 12 have gone to African-American coaches.[3]
- Among the 414 coaching vacancies in Division I-A/FBS since 1982, only 21 African-Americans have been hired.[4]

These statistics become even more troubling when considering that minority student-athletes make up 53 percent of FBS football players (49 percent of whom are African-American).[5]

This article will discuss the possible reasons behind the troubling hiring practices of N.C.A.A. FBS universities, why there needs to be change, and possible remedies [both traditional and non-traditional] to give minority coaches better access to head coaching jobs. I will discuss the possibility of Title VII litigation (under the disparate impact and disparate treatment theories) and possible remedies under developing litigation stemming from "word-of-mouth" recruiting cases. I will also compare the situation in college football with that in college basketball and professional football. This discussion will specifically analyze the National Football League's recent implementation of the "Rooney Rule," how this rule has brought about dramatic progress for opportunities for minority coaches, and the effect that a similar rule could have in a college setting.

II. THE GOOD OL' BOY NETWORK: HIRING PRACTICES IN THE N.C.A.A.

As the statistics in the introduction demonstrate, there is a substantial disparity between the number of white head coaches and African-American head coaches. These numbers make it clear that the disparity can hardly be attributed to coincidence. So what is the reason for the gap?

In short, the answer can be explained by the close connection between money and running a major college football team. Whether trying to increase your team's exposure in order to secure a lucrative television contract or impress potential recruits with top-tier facilities, money is often at the root of decisions made by athletic directors and university presidents. Although some money comes from the government and the universities themselves, the majority comes from wealthy alumni and it is a priority to keep these boosters happy.[6] Terry Bowden, the former head coach at Auburn University, a traditional FBS powerhouse, says the cause of the hiring disparity is obvious:

> Quite simply, the 117 Division 1-A schools are white. They have a large majority of white students, with 95 percent of the schools with white presidents and 89 percent with white athletic directors. They also have a whole lot of white alumni who aren't afraid to let their opinions be known – especially the fact that they don't want a black head football coach.[7]

Bowden's former school, Auburn University, is a member of the elite Southeastern Conference and located in the Deep South, the undisputed epicenter of college football. Charlotte Westerhaus, the N.C.A.A.'s vice president for diversity and inclusion, argues that college football evolved in the segregated south, on campuses that were strictly white just a few decades ago, and this is a primary reason for the disparate numbers:

> The culture of football in the colleges was highly segregated and those traditions were almost fraternal in nature. I look at the customs, the pep rallies, the tailgating, the cheerleaders, the bands, look at the leaders who led them. They had no students-athletes of color. And football had a strong root system in the south, which included notions that are not based on reality or in fact.[8]

Despite the role the Deep South has played in college football's evolution from a campus game to a multi-billion dollar industry, Westerhaus says that this is no excuse for the current disparity between white and black coaches, "I gave you a history, but that history does not support an excuse of where we are today."[9]

So why are the numbers so disparate? One reason that is often mentioned as a reason for the disparity is the so-called "schmooze myth." The "schmooze myth" is based on the myth that athletic directors and college presidents believe that African-American head coaches cannot charm boosters and, in turn, raise money for a big time college football program the way white coaches can. If this is in fact a reason for the disparity, Westerhaus asks college football's hiring heads to look at the African American leaders of our country:

> If we can have two African-American Secretaries of State, Colin Powell and Condoleezza Rice, lead our country in mattes of foreign affairs and some of the most delicate and most imperative issues. If you can have an African-American, Barack Obama, a leading candidate for President of the United States and a big component of that is, of course, raising money, then how can any college president or athletic director or fan in 2007 say there are no 'African-American males' who can be a head football coach?[10]

Another reason is simply the presence of unconscious discrimination. The late Bill Walsh, former head football coach at Stanford University, said that filling coaching positions is "a fraternal thing. You end up calling friends."[11] The problem with this type of hiring process is

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obvious. With a vast majority of coaches, athletic administrators, and boosters being white, they naturally contact people in their same networks who are, most likely, also white. Jason Wright, the African-American vice president of RJR Nabisco, Inc., says whether it is the business world or college football, the situation is essentially the same: "The reality of life in America is that if you're white, most of the people you know are white. If someone says to you, 'Do you know anyone for this job?' the people you recommend will probably be white." This network has come to be known as the "good ol' boy" network and can seem impossible to join in eyes of prospective African-American head coaching candidates.[12]

In short, African-Americans have not been given the same opportunities as their white counterparts to obtain the experience and critical connections necessary to gain access to head coaching positions.[13] These powerful institutional and structural barriers to entry support the need for change that is long overdue.

III. COMPARING THE FBS OTHER MAJOR ATHLETIC LEAGUES.

By looking at the success that African-American head coaches have had in the N.F.L and NCAA Division I College Basketball, perhaps FBS universities can figure out ways to increase the number of African-American head coaches.

THE NFL:

The N.F.L. provides a natural comparison to the hiring practices and statistics of FBS universities. For years, the N.F.L. was faced with many of the same dilemmas currently facing the N.C.A.A. The first step to open up the N.F.L.'s hiring networks to African-American coaches took place in 1987, under the direction of Bill Walsh, then head coach of the San Francisco 49ers. Responding to the fact that there was not a single African-American head coach at the time, Walsh created the Minority Coaching Fellowship to help pave the way for future African-American coaches.[14] Among those who benefited from the fellowship included University of Washington head coach Tyrone Willingham, Cincinnati Bengals head coach Marvin Lewis, former NFL head coach Dennis Green, and Indianapolis Colts head coach Tony Dungy. The fellowship program Walsh created help trigger minority hiring and was eventually applied league-wide.

Even with Walsh's efforts, there was still a problem as recently as 2002, when the late Johnnie Cochran and Cyrus Mehri wrote a report on the N.F.L.'s employment practices. In response to their report, which pointed out the troublesome hiring practices of many teams, the N.F.L. adopted the "Rooney Rule."[15] The Rooney Rule mandates that any team with a head coaching vacancy must interview at least one minority candidate before making a decision.[16] Since its adoption, the number of African-American head coaches in the 32-team N.F.L. has risen from two to seven.[17] Like any progressive move to incite change, the Rooney Rule has its critics who argue that forcing football teams to interview African-American candidates is not really giving those candidates a fair shake.[18] But the Rooney Rule is a start. By enacting the rule, the N.F.L. at least admitted publicly that there was a problem and appeared proactive in seeking a solution, something the N.C.A.A. failed to do. Richard Lapchick, director of the Institute for Diversity and Ethics in Sport based at the University of Central Florida, has countered critics of the rule. Although the Rooney Rule "may lead to some bogus interviews," Rooney said, "I think it's been proven in the N.F.L. that when [minority] candidates are brought into the room under any circumstances they have surprised some people and gotten a real shot at a job."[19] The numbers support Lapchick's statement. The percentage of African-American head coaches in the N.F.L. is 18.75 percent, or more than three times higher than the percentage of African-American coaches at large universities.[20]

To be fair, the Rooney Rule is not the only reason for the recent moderate increase in minority hirings in the N.F.L. One aspect of the N.F.L. that differs dramatically from the N.C.A.A. is its basic structure. Specifically, N.F.L. teams are not dependant on boosters for money. Floyd Keith, executive director of the Black Coaches Association, summed up the situation well when he said, "The N.F.L. is a whole football field ahead of collegiate football. I think the N.F.L. gets it. I think one possible explanation is in the N.F.L., you're dealing with an owner and maybe the general manager, but usually one or two people. And in the collegiate ranks you're dealing with more influences. And I don't think all are positive."[21] Although certainly not an end-all cure, the N.C.A.A. could help break the glass ceiling placed above African-American coaches by enacting a similar hiring policy. [To be explored in detail in §VI]

The success that African-Americans have had in the NFL coaching ranks is also another possible reason for the small number of African-American college coaches. According to one investigative reporter "money and the sense that there are more opportunities in the pro ranks have caused talented young black coaches to leap to the N.F.L, rather than wait in line for a college coaching job."[22]

DIVISION I COLLEGE BASKETBALL:

For most universities, college basketball is the only revenue creating sport besides football, and thus hiring patterns in N.C.A.A. Division I college basketball present a natural comparison to FBS football. Like the N.F.L., Division I basketball demonstrates that the FBS is way behind the curve as far as hiring African-American head coaches. In Division I basketball, where the percentage of African-American participants is similar to FBS football (57 percent as compared to the 49 percent in FBS football), 25 percent of the head coaches are also African American (as opposed to the 6 percent in FBS football).[23]

So why is there such a disparity in the percentage of minority coaches in two college sports so closely related in both revenue and racial makeup? According to Lapchick, one reason is the failure of African-American college football coaches to act as leaders and spokesmen to incite change. Lapchick says that this is not the case in Division I basketball. "Men's basketball has leaders and spokesmen like John Thompson (former Georgetown coach and current television analyst). Football hasn't had that."[24] According to one reporter, "Thompson, and others, such as former Temple coach John Chaney, proved that black coaches could win and also pressed the issue of race at every opportunity. They never let the matter die, became symbols and laid the foundation for younger men (and women) of color coming behind them."[25]

This has not been the case with college football. The fact that the average fan would have a difficult time identifying any of the 6 current African-American head coaches speaks somewhat to the failure of these coaches to stand up and speak for change.

Another possible reason for the higher percentage of African-American head basketball coaches is the exposure they receive during "March Madness," the month-long post-season tournament. March Madness gives young African-American coaches national attention.[26] To the contrary, college football's postseason is made up of dozens of relatively meaningless bowl games, with a few big programs reaping all the exposure from the five BCS (Bowl Championship Series) games. According to Big Ten Commissioner Jim Delany, in March Madness "the stage is wider" and the N.C.A.A. tournament "tends to light up the individual."[27]

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IV. WHY IS CHANGE SO IMPORTANT?

Apart from the obvious reason of preventing blatant discrimination and the need to promote equality in college football hiring decisions, there are other reasons why the hiring practices of FBS universities need to change and diversify. As stated in the introduction, 49 percent of FBS college football players are African-American, while only 6 percent of head coaches are African-American.[28] With the amount of money and exposure that a college football team brings to a university, it is easy to forget about the people who make it possible – the student-athletes. It is also easy to forget that these young men do not come to college simply to play football, but also to grow as individuals. The coaches serve as more than drill sergeants and teachers of the x's and o's, but also to help these students through difficult times as they transition from boys to men. With a high percentage of African-American student-athletes coming from impoverished, single-parent backgrounds, it is often important to have a coach and role model who is familiar with the challenges faced by many minority student-athletes.

A prime example is University of Miami head coach Randy Shannon. After a particularly difficult stretch, in which the team's starting defensive end, Bryan Pata, was shot to death and several African-American players experienced tragedies off the field, Shannon was able to help consol the team because he had experienced a similarly difficult upbringing. The author of a recent article in Sports Illustrated made the following observation about the benefit of having a head coach like Shannon during such a traumatic time:

> [The players] took things to him that they wouldn't drag into white coaches' offices…nor even the offices of those black assistants who'd been raised by schoolteachers and ministers. Because those guys wouldn't get it…couldn't possibly know what it was like to have grown up with a mother on crack and a dad missing from his life (Miami Defensive End Javon Nanton), or to have three buddies who were shot and killed in separate incidents, all within a few weeks (safety Kenny Phillips). They'd tiptoe around the raw stuff, those assistants, trying to say the *correct* thing, or spoon out something straight from the coaches' can. Not Randy. Players would take the worst to him and the worst from him. They could talk to him in shorthand. They wanted what they could smell all over him: survival.[29]

Former University of Miami defensive lineman and current assistant coach Clint Hurtt is in a great position to observe the importance that Shannon plays in the development of his African-American players from difficult backgrounds:

> It's just a different deal, growing up as an African-American male. The only one who can really teach you what you need to know is an African-American male, but you don't get a chance to hear life experiences from older black men. They get closed off and don't communicate. Randy doesn't go into many details about himself with his players, but he doesn't have to. He gets it across. The relationship is deeper, and the passion's different, playing for someone who's been through the same fire that we have.[30]

Just recently, another Miami Hurricane faced a difficult hurdle, but this time it was by his own doing. Freshman quarterback Robert Marve was charged with resisting arrest and minor criminal mischief after police said he broke a mirror off a car and tried to evade police.[31] Rather than kicking Marve off the team, and no doubt sending him to an uncertain life with no college degree, Shannon's response was to help Marve through the problems. When asked at a press conference why he let Marve remain on the team, Shannon's responded:

> [Marve] really has some personal problems. We talked about it and at least the kid is being up front and honest with me about things. It's my job and the university's job to help the kid out. I think sometimes what we do is we just throw the kids to the wolves instead of helping them.[32]

The situation at the University of Miami is a striking example of the affect that an African-American head coach can have on a program's off-the-field success.[33] The state of University of Miami football was summed up well by former Hurricanes center and current radio analyst Don Bailey when he said, "He'll win a national championship. It's a matter of when, not if. But he'll win a million battles more important than a national championship along the way, he'll change lives. He'll save lives."[34]

V. TRADITIONAL [OR "LEGAL"] REMEDIES

The Black Coaches Association recently made headlines when they announced that they would consider filing a Title VII lawsuit.[35] Title VII, part of the Civil Rights Act of 1964, prohibits both intentional employment discrimination and practices that have the effect of discriminating on the basis of race, color, religion, sex, or national origin.[36] Although legal action would be a last resort, Richard Lapchick thinks that potential lawsuits might be the best way to bring about change. He notes that Title IX legislation was not initially enforced until a group of Brown University female gymnasts sued the school in the mid-1990s when the university planned to reduce the sport to club status.[37]

While Title VII has been widely used in "traditional" employment settings, the statute has rarely been used in sports.[38] There are many reasons why the statute has not been widely used in an athletic setting, but the major reason is that the hiring decisions of athletic teams are very subjective. Tulane Law School Professor Joel Friedman thinks the lack of litigation has to do with the creative reasons employers can devise for not hiring minorities. For instance: "'He just didn't appeal to me' or 'I didn't think he could be a fundraiser.' There are a million reasons [a hiring committee] could give."[39] Regardless, many believe that Title VII can be a valuable tool for minority coaches as well as a catalyst for change.

The basic question that must be asked is: Does the conduct of the N.C.A.A. or the individual universities constitute unlawful employment discrimination in violation of Title VII?

A. Who is the Proper Defendant: The N.C.A.A. or the Individual University?

The first step in analyzing potential legal remedies is to determine the proper defendant. One possible defendant is the N.C.A.A.. The N.C.A.A. states that its purpose is to "implement the rules and programs established by the membership [the colleges, universities, and conferences that make up the N.C.A.A.]."[40] The N.C.A.A. oversees the rules followed by member universities, but is not responsible for the hiring procedures at a given school. Although the N.C.A.A. can encourage member universities to adopt fair hiring policies and provide opportunities for African-American candidates, it is not responsible for a university's failure to implement specific policies. Therefore, absent overt discrimination by the N.C.A.A., an African-American seeking a head coaching job is more likely to find an effective legal remedy elsewhere.[41] The more viable defendant in a Title VII action is the individual university. The university is the legal entity that actually implements (or fails to implement) hiring policies and should bear the responsibility for such action or inaction.[42]

B. Can a Prima Facie Case be Established?

Having determined that the individual university is the more likely party for an African-American coaching candidate's claim of racial discrimination, the next step is for the candidate is to establish a

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prima facie case. The most important element in establishing a prima facie case under Title VII is that the defendant must have committed "an unlawful employment practice" that discriminates against the plaintiff. For the purposes of the statute, "discrimination" means that the plaintiff suffered an adverse employment action because of his or her race, color, religion, sex, or national origin. Such discrimination can be proved by establishing intentional conduct (called "disparate treatment"), which is actionable under §703(a)(1), or it can be the result of a facially neutral employment practice or policy (called "disparate impact"), which is actionable under §703(a)(2).[43]

1. Disparate Treatment

Disparate treatment claims arise from overt discrimination by employers.[44] Section 703(a)(1) of Title VII states that "it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual's race, color, religion, sex, or national origin..."[45] In the seminal case of *McDonnell Douglas Corp. v. Green*, the United States Supreme Court announced a four-pronged test to establish a prima facie case of racial discrimination. It must be established (1) that the plaintiff belongs to a racial minority, (2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants, (3) that, despite the plaintiff's qualifications, the plaintiff was rejected for the job, and (4) that, after said rejection, the position remained open and the employer continued to seek applicants with the plaintiff's qualifications.[46] Once a prima facie case has been established, "the burden...then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[47]

a. An African-American Coach's Ability to Establish a Prima Facie Case under a Disparate Treatment Theory.

Analyzing an African-American head coaching candidate's prima facie burden under the disparate treatment theory is fairly straightforward. The candidate would have to prove (1) that he is African-American, (2) that he was qualified for the coaching position, (3) that the university did not hire him, and (4) that the coaching position was held open for other candidates with the same qualifications after his rejection. The first and third elements are easy to establish. The second and fourth elements relating to the coach's qualifications may provide a more formidable hurdle. Experience and knowledge of the game necessary to be a head football coach are fairly subjective standards, especially if the candidate has not previously served as a head football coach at the same level of competition.

If the coaching candidate can make a prima facie case of discrimination, the burden of production shifts to the university, which would have the opportunity to produce evidence establishing a valid nondiscriminatory reason for not hiring the plaintiff.[48] A university could meet this burden with any number of reasons for not hiring the particular candidate. For example, the university could assert that the coach "just wasn't the right fit" or "did not have the number of years of coaching experience that the job required."[49] The list of reasons could be endless.

Such reasons offered by the university would place the burden back on the candidate to establish that the reasons given were actually a pretext for racial discrimination.[50] The burden placed back upon the plaintiff is likely the most challenging aspect for a coaching candidate under the disparate treatment theory.[51] It is the most challenging because the ultimate goal for the plaintiff is to prove the discriminatory intent of the employer and this requires establishing the actual motivation behind the employer's decision.[52] This can be very difficult without "smoking gun" evidence that expressly shows that a university used racially motivated hiring practices.[53] Therefore, success under the disparate treatment theory would depend largely on the plaintiff's ability to find conclusive evidence of discriminatory intent, which is often hard to obtain.

2. Disparate Impact

The more likely approach for an African-American coaching candidate is the disparate impact theory. Title VII disparate impact cases address the discriminatory effect of facially neutral employment hiring practices.[54] The primary reason a coaching candidate may be more successful under the disparate impact theory is that much of the discrimination that takes place in football coaching hiring is not intentional. Rather, it is the result of unconscious racism. Unconscious racism takes place when a person or institution is unaware of its racism. It is a failure to recognize the ways in which cultural experience influences beliefs about race and those beliefs affect actions.[55] Unconscious racism is not less harmful that intentional discrimination. In fact, it may likely be more harmful because it is frequently unrecognizable by the victim as well as the perpetrator.[56] This is arguably what has occurred in the hiring of head college football coaches. Although in many cases universities do not intend to discriminate, they are blatantly taking part in unconscious racism by refusing to allow African-Americans to enter the hiring networks.

a. An African-American Coach's Ability to Establish a Prima Facie Case under a Disparate Impact Theory.

The United States Supreme Court has established a three-step approach to prove disparate impact.[57] First, the coaching candidate must establish a prima facie case.[58] The basis for determining a prima facie case for a disparate impact claim was established in *Griggs v. Duke Power Company*.[59] The framework was later expanded in *Albemarle Paper Co. v. Moody*[60] and then completed in *Dothard v. Rawlinson*.[61] The Supreme Court concluded that, to establish a prima facie case, a plaintiff must prove the "respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[62]

In the case of a coaching candidate, the mere statistical representation of the extreme disproportionate numbers of African American head coaches to white head coaches would be helpful, but ultimately not enough to prove disparate impact. In *Wards Cove Packing Co. v. Atonia*, the Court stated:

> the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's workforce. The plaintiff must begin by identifying the specific employment practice that is challenged...to make out a prima facie case of disparate impact, a plaintiff may use statistics to show a disparity, but must still prove that a particular practice caused the discriminatory impact.[63]

Despite this hurdle, a coaching candidate could meet this burden by pointing to the specific hiring practices that caused the disparate impact.

At N.C.A.A. member universities, the hiring process usually involves the athletic director, university president, and/or a committee creating a "short list" of candidates to fill the vacancy.[64] Candidates are then brought in for interviews once they confirm that they are interested in the position.[65] After interviewing several candidates, a candidate is chosen and offered the job. This practice of creating short lists inadvertently creates a tremendous disadvantage for African-American candidates. First, the short lists compiled by the university cannot possibly include all candidates who are qualified for the head coaching position.[66] Second, the candidates on these short lists are usually directly related to the connections that

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the individuals in charge of hiring have with people throughout the football world.[67] Given that 94.2 percent of university presidents[68] and 92.7 percent of athletic directors are white, it is reasonable to conclude that the majority of their connections are also white, thus creating a pool of largely white candidates.[69]

Second, if a coaching candidate is able to establish a prima facie case of disparate impact, the burden of production shifts to the university to show why the hiring practice has a manifest relationship to the position in question.[70] A university could possibly meet this burden by arguing that the athletic director works so closely with the head coach that it is crucial that the two individuals be able to communicate and get along well with one another. Along the same lines, a university could also argue that the relationship between the head football coach and the athletic director is often very stressful and thus the athletic director must be able to hire someone with whom he or she is familiar and feels extremely comfortable.

Third, if the university proves that its hiring practice has a manifest relationship to the position at question, the burden again shifts to the coaching candidate. The candidate must establish that either the university is using the hiring practice as a mere pretext for discrimination or prove that equally effective alternatives to the hiring practice will not result in a discriminatory impact.[71]

There are several less discriminatory alternatives that a coaching candidate may argue are equally effective. One possible alternative is to create a standardized list of qualifications that the university is looking for in a coach. In the past, experienced African-American coaches have complained that they did not know the criteria being used to assess their potential as a head coach.[72] With a standardized list, coaching candidates would have a better idea of what a particular hiring committee is looking for and could pursue jobs that best match their qualifications. The candidate would know from the beginning of the process if a university wants a coach with a certain level or duration of experience.

Another possible alternative is to apply a version of the Rooney Rule, which has been so successful in the N.F.L. This would mandate that a university must interview at least one minority candidate before reaching a hiring decision. Although a university would not be compelled to hire an African-American coach under this rule, it would certainly open up hiring networks and could potentially influence hiring decisions.

The above analysis makes it clear that a coaching candidate may be able to pursue a legal remedy under the disparate impact theory if he is able to meet the challenges of each step. Thus, Title VII could significantly change the landscape of college football and provide minority coaching candidates with access through doors that have been shut for too long.

C. Word-of-Mouth Recruiting

1. Background

As mentioned above, the hiring practices of universities depend in large part on "word-of-mouth" recruiting rather than a traditional formal hiring process that would include a job posting in periodicals that target perspective applicants and interviews with most qualified candidates.[73] The problem with the use of word-of-mouth recruiting is that it relies on "the usual sorts of personnel mechanisms: connections, contacts, friends, cronies, old associates, candidates with powerful sponsors, candidates who 'feel' familiar and comfortable etc."[74] Furthermore, common sense points out another clear problem - when news of job openings is disseminated by athletic department employees to their friends in the industry, there is a high likelihood that a disproportionate number of people of similar ethnicity will learn about the openings while other capable candidates are not considered because they are unaware of or unable to break into the exclusive hiring network.

Litigation involving word-of-mouth recruiting is still developing and has not been applied in a case involving minority college coaching candidates. However, current case law makes it clear that the practice can fall under the scope of Title VII if certain factors are established. A case may arise under Title VII[75] and specifically the disparate impact theory to challenge hiring practices that are "fair in form, but discriminatory in operation."[76]

It is well-established by various courts that "word-of-mouth" recruiting is not *per se* discriminatory. Rather, the focus rests on the result of that practice.[77] The use of word-of-mouth recruiting becomes problematic when an employer's workforce does not reflect "the racial, ethnic, or sexual composition of the relevant labor market," because the word-of-mouth referrals will perpetuate a discriminatory pattern of employment[78] However, word-of-mouth recruiting in an employment setting comprised of primarily one race is not necessarily illegal. If such a practice operates as a "built-in-headwind" to minorities, its use "must be offset by affirmative steps reasonably calculated to encourage black employment and to break through the currently circumscribed web of information."[79] In *U.S. v. Georgia Power Co.*, the court gave examples of affirmative steps that have been successful in breaking through the "circumscribed web of information" such as advertisements of openings in newspapers and periodicals accessible to minorities and public notice that the company is an equal opportunity employer.[80]

2. Applying Existing Case Law to a Coaching Candidate's Ability to Establish a Prima Facie Case of Discrimination Due to Word-of-Mouth Recruiting

The initial burden is on the coaching candidate in a case of employment discrimination based upon the use of word-of-mouth recruiting practices by an athletic department hiring committee. Under Title VII's disparate impact theory, the coaching candidate must establish a prima facie case of discrimination by showing that a "substantial disparity" exists between the athletic department's work force and the relevant labor market.[81] In this type of case, a "substantial disparity" may be established through statistics alone or an accumulation of evidence including "statistics, patterns, practices, general policies, or specific instances of discrimination."[82]

Given the subjectivity that goes into hiring a head football coach, it is difficult for a coaching candidate to prove a substantial disparity exists between the athletic department and the relevant labor market. A court could find that a satisfactory relevant labor market is the current pool of assistant coaches with qualifications to be a head coach. The court could consider the experience of current head coaches before they took their respective jobs as a benchmark to establish this labor market. However, the ultimate number of qualified assistant coaches would be difficult to calculate. After the 2003-04 season, of the 1,572 assistant football coaches at the FBS level, 417 [or 26.52 percent] were minorities[83] However, this number does not distinguish between minority assistant coaches with years of relevant experience versus those with little or no experience. Given the subjectivity that goes into hiring a head football coach, the athletic department could point to any number of qualifications that the 417 current minority assistant coaches lack in order to become a successful head coach.

The relative subjectivity of hiring decisions, however, does not end a coaching candidate's case. In *E.E.O.C. v. American Nat. Bank*, the Fourth Circuit held that "evidence of word-of-mouth recruiting

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as the primary means used by [the bank] to fill vacancies, and the use of an all-white interviewing staff to make its subjective hiring evaluations tended to corroborate to some degree at least the prima facie showing of discrimination made by the static work force statistics."[84] Thus, if a coaching candidate is able to establish the requisite statistical disparity, the burden shifts to the employer to offset the discrimination by enacting affirmative steps "reasonably calculated to encourage black employment and to break through the currently circumscribed web of information."[85]

It is also crucial to note that, in addition to the use of statistics, courts have permitted candidates to prove a substantial disparity through the use of "patterns, practices, general policies, or specific instances of discrimination."[86] In a word-of-mouth case, "smoking gun" evidence of discrimination by a university would be very difficult to obtain because of the subjectivity nature of every hiring decision. However, it would not be impossible for a candidate to point to specific instances of discrimination. For example, a coaching candidate could point to an athletic department's failure to interview minorities for past head coaching positions.

In conclusion, it is difficult to determine a minority coaching candidate's likelihood of success in a word-of-mouth recruiting case because case law concerning the discriminatory impact of that practice is still developing. However, existing case law provides some support in situations where an athletic department depending primarily on word-of-mouth recruiting tactics fails to offset this practice with affirmative steps to encourage minority candidates to seek employment. Thus, the mere threat of a Title VII lawsuit may force athletic departments around the nation to consider more minority candidates and, in turn, increase the exposure of African-American assistant coaches to head coaching positions.

VI. UNTRADITIONAL [OR "NON LEGAL"] REMEDIES

Race based discrimination has evolved into more and more subtle expressions of bias, making it more difficult to identify and, in turn, combat.[87] Because of the presence of unconscious racism and the various evidentiary hurdles to overcome, it may be difficult for minority coaching candidates to combat discrimination through Title VII litigation. Case law has shown that traditional anti-discrimination norms such as Title VII can be ineffective tools for providing remedies for the harm caused by unconscious racism.[88] According to one expert, the reason for this is that,

> Employers in sports tend to use a series of subjective criteria that vary among employment decisions, with no elements necessarily being weighed more heavily than others. With no unique employment practice to target as discriminatory, it is difficult to bring an action under Title VII, no matter what the statistics show regarding the underrepresentation of any group at any job level[89]

In the absence of objectively quantifiable factors from which hiring decisions are made, it may be difficult for minorities to challenge university hiring decisions.[90]

But, even if a Title VII claim is struck down in court and fails to trigger a change in the hiring practices of FBS universities, coaching candidates can still pressure the N.C.A.A. and FBS universities to take action. Below are several current and possible strategies to provoke change:

A. The B.C.A.'s "Report Card"

One method being used as an attempt to provoke change is a rating system for evaluating how individual universities handle hiring decisions. The "Report Cards" are created by the Black Coaches Association and grades schools on several categories including the number of minority candidates interviewed for jobs, the composition of search committees, and compliance with the universities' affirmative action policies. In addition, schools that hire minority coaches received bonus points.[91] The report cards aren't intended to be used solely by universities in seeking ways to change. Floyd Keith, the executive director of the B.C.A., hopes that college recruits will also use the report cards to help make their college decision.[92]

Since the inception of the report card system, there has been marked improvement. This year the BCA awarded a record 12 "A's," which was almost as many as the previous two years combined (13), and the University of Buffalo and Southeast Missouri State University both earned perfect scores (A's in each of the five categories).[93] Thus, it appears that the B.C.A.'s report card system is having some effect on the way universities conduct their hiring process.

B. Adopting an N.C.A.A Version of the N.F.L.'s "Rooney Rule"

Another possible remedy is urging the N.C.A.A. to implement a version of the N.F.L.'s Rooney Rule. The N.C.A.A has been reluctant to enact such rule claiming that it would be unworkable because of the large number of autonomous universities that make up the organization.[94] This argument is weak, given that the rule would only have to be enforced against the small number of universities looking for new head football coaches each year.

The NCAA is not the only party skeptical of implementing such a rule. Several prominent African-American coaches have said that, despite the power of the rule to open up networks, they are concerned about the negative implications of being offered *too many* interviews. Randy Shannon is among those skeptical of forcing universities to interview African-American candidates, "You just have to make sure you're not interviewing somebody just to interview them," he said. "That's what kills you about the Rooney Rule."[95]

Before being hired at the University of Miami, Shannon was the university's defensive coordinator for six seasons. During this time, his name was often mentioned when jobs opened up, but he interviewed only once for a head coaching job at the University of Mississippi (a job that was eventually given to Ed Orgeron, a white assistant coach from U.S.C.). Although he did not get the job, Shannon thought that "Ol' Miss" gave him a serious look, but said that a coach could do himself a disservice by taking too many interviews. As an example, Shannon mentions the case of University of Florida co-defensive coordinator and assistant head coach Charlie Strong:

> "You can't just interview just to interview, you have to make sure you have a legit shot at a job. I remember one year he got six interviews. I think that may have hurt Charlie because you interview six times and then when other schools see that a guy interviewed six times and didn't get a job, everyone will say, 'Why didn't he get a job? Is something wrong with him?' And they may not have been interviewing Charlie for the job. Maybe just for window dressing."[96]

Randy Shannon is not alone in his belief that some schools may bring in African-American coaches for interviews that they are not seriously considering, just to meet the possible NCAA version of the Rooney Rule.

"It's a nice idea, but at times, that's just a token interview," University of California-Berkeley Defensive Backs coach R. Todd Littlejohn said. "Sometimes you see the writing on the wall and coaches turn down the interview. On the other hand, you'd hate to turn it down because you hope you can go in and change someone's mind."[97]

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According to Sylvester Croom, the African-American head coach at Mississippi State University, mandating diversity is the wrong approach. In his opinion, the road to diversity does not start at the top, but rather at the bottom, by focusing on getting more African-American coordinators and assistants in the game. According to Croom, "There's a constant chatter about hiring black head coaches, but before that happens, head coaches have to start hiring guys to be coordinators. I think in a lot of ways, we got the cart before the horse on this issue."[98]

Despite the few skeptics, the majority of critics and coaches think that the rule would be groundbreaking when applied in a college setting. Proponents of enacting the rule include Civil Rights lawyer Cyrus Mehri, a key figure in the N.F.L.'s adoption of the rule. Mehri believes that enacting a college version of the Rooney Rule may even be a good place to start rather than litigation.[99] Mehri has said, "Have this (the Rooney Rule) in the college ranks because they are struggling with coming up with a solution to the issue. What are the alternatives? The N.C.A.A. can't keep its head in the sand. The tools are right there from the N.F.L.; it's tried, true and tested."[100]

Another proponent is Turner Gill, the African-American coach at the University of Buffalo, who personally benefited from an interview. For Gill, it was not his interview at Buffalo that was so significant, but rather an interview for a head coaching job that he did not get at the University of Missouri that put him on the map. "I didn't get that job, but it allowed me to become part of the process. I got a chance. People need to hear who you are, what you are and what you have to offer. It's just getting an opportunity to interview that's so important."[101]

Given the statistics listed in the introduction, it is clear that *something* is needed to incite change – and the Rooney Rule might be the answer. A few "token" bad-faith interviews seems like a small price to pay for expanding the field of candidates and helping minority coaches gain access to the exclusive networking circles.[102]

C. Hiring More African-American University Administrators and Athletic Directors

Yet another way to increase the number of African-American head football coaches is to increase the number of African-American university presidents and athletic directors (the two positions that have the most say in who their universities hire). Says Lapchick, "You could go to virtually any Web site of any university and diversity would be one of the five values that you'll see as being paramount on their university campuses."[103] Yet the numbers tell a very different story about the implementation of those values. According to research conducted by the B.C.A., 94.2 percent of university presidents are white, 92.7 percent of faculty athletic representatives are white."[104] This past May, the N.C.A.A. released its "Biennial Study on Ethnicity and Gender Demographics for 2005-06." Its findings were essentially identical to the Black Coaches Association, and it recognized a problem that needs to be addressed. Said Charlotte Westerhaus, N.C.A.A. vice-president for diversity and inclusion,

> Overall, if you look at the growth of student-athletes of color who are involved in NCAA athletics, the big takeaway from this report is that the growth is not being reflected in the numbers of individuals who are either choosing or receiving the opportunity to become assistant or head coaches, directors of athletics and senior woman administrators. There appears to be a ceiling that's preventing growth and there's a need for some answers and action to remedy this,[105]

Thus, in order to provide equal opportunities for minority football coaches, universities need to look at themselves and diversify the makeup of key decision-makers on campus.

D. The N.C.A.A.'s Own Reactivity

After being noticeably silent for years on the subject of minority inequality in the coaching ranks, the N.C.A.A. has recently started to show a glimpse of the creative thinking it will need to spark a change. While it has not adopted the Rooney Rule yet, President Myles Brand of the N.C.A.A. seems open to the suggestion or, at least, consideration of a similar policy. Recently, Brand proposed that universities hire football coaches using the same "open, fair and in-depth" process that they use to hire professors.[106] One aspect of his proposal is for universities to name search committees that include athletes, the athletic department, faculty, administrators, boosters, and perhaps even members of the student body in an effort to develop "a broad and diverse pool of candidates."[107] Although it is just a proposal and not binding on the member schools, Brand has associated himself with the Black Coaches Association to make sure that this proposal has some "bite." With the N.C.A.A.'s support, the Black Coaches Association has started issuing an annual report card of hiring practices. If schools do not follow Brand's proposal, they will receive low grades and the final results of the report cards will be passed along to recruits, their parents, and the media.[108]

Another example of the N.C.A.A.'s recent commitment to seeking change is its creation of a position of vice president for diversity and inclusion in an attempt to increase minority hiring and awareness.[109] According to the N.C.A.A.'s website, Charlotte Westerhaus, the current vice-president for diversity and inclusion, works with both the N.C.A.A. and member universities "to develop and implement strategies that will increase representation of women and minorities in intercollegiate athletics leadership positions."[110] Although the position is unlikely to change immediately the numbers of minority coaches hired across the country, it is a start. Furthermore, with the seemingly endless amount of money provided by wealthy boosters, individual university athletic departments will perhaps follow suit and establish similar positions of their own.

In the most far-sighted of its growing efforts to bring diversity to the head coaching ranks, the N.C.A.A. recently held its first Future Coaches Academy for prospective head football coaches.[111] The aim of the academy is to instruct recently graduated players on various topics including networking, academic issues, booster relations, and financial planning.[112] Former University of Oregon and current Kansas City Chiefs defensive back Justin Phinisee was one of 31 individuals selected to participate in the academy.[113] Phinisee said, "I think it's a great idea for them to put something like this on. Me being a minority, what better way to change something than to actually be a solution to the problem?"[114]

In association with the American Football Coaches Association, the N.C.A.A. also has begun conducting annual workshops for emerging and more experienced coaches. Current Kansas State head coach Ron Prince attended the workshop in 2005 when he was the offensive coordinator at the University of Virginia. Prince said that he "was blown away by the experience. Everything I had done to prepare myself for 14 years was topped by those three days. It was the single most important program that helped me prepare for a head-coaching job."[115]

It is encouraging that the N.C.A.A. has begun to show progressive thinking that is more often associated with the N.F.L. by conducting these clinics for minorities and attempting to come up with solutions for a problem that has been ignored for much of football's century-long history. In addition, the effects of these clinics will trickle up to the N.F.L. ranks as well, as the networks between the N.F.L. and the N.C.A.A. often overlap.

Obviously the N.C.A.A. has made great strides in recent years to increase the experience and exposure of minority head coaching

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candidates. But, according to Eugene Marshall, deputy athletic director of the U.S. Military Academy, "things will change, when it starts hitting people's pocketbooks."[116] Thus, while non-legal solutions may slowly bring about changes, minority coaches will gain meaningful access to FBS head coaching jobs only after successful legal challenges penalize universities for discriminatory practices.

VII. CONCLUSION

Tony Dungy, coach of the 2007 Super Bowl winning Indianapolis Colts, said after the victory, "When I was young watching the Super Bowl, I thought about being a player. I never thought about being a coach. It never seemed real. I think it will seem real to kids in the future."[117] Although his success has been a bright light for African-Americans and other minorities who pursue head football coaching positions, this statement is somewhat troublesome. The sports industry represents a microcosm of society. As Professor Harry Edwards commented, "The first principle of sport sociology is that sport inevitably recapitulates the character, structure, and dynamics of human and institutional relationships within and between societies and the ideological values and sentiments that rationalize and justify those relationships."[118] Watching college football on Saturday afternoons is practically an American pastime. If the parallels between sports and society are true, consider the effect on children of color who notice that while the majority of the players on the field are African-Americans, the coaches on the sidelines and the team executives in the suites are still predominantly white. What message does this send to these children about their imminent future as employees trying to climb the ladder in any business structure? The legal remedies that are provided for minority coaching candidates who have been the subject of discrimination, as well as the N.C.A.A.'s current efforts to remedy the situation, can provide effective methods for the underrepresented to break through the ceiling that restrains so many qualified minority candidates.

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22 Weiner, *supra* note 4
23 *Id*.
24 *Id*.
25 *Id*.
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28 Alesia, *supra* note 7
29 Gary Smith, *Hiding in Plain Sight*, Sports Illustrated, Sept. 10, 2007 at 68.
30 *Id*.
31 Jorge Milian, *Growing Pains*, Palm Beach Post, Nov. 9, 2007 at 9B.
32 *Id*.
33 It is no secret that the University of Miami has been college football's black sheep for the past several decades. Known by some as "Thug U" the Hurricanes have had several embarrassing occurrences under white head coaches who were often criticized for having no control over their players. One defining incident, fondly remembered by one writer as "the night college football went to hell" occurred under white head coach Jimmy Johnson at the 1987 Fiesta Bowl, which began with the team's arrival at airport dressed in military fatigues (in contrast to their opponent Penn State, who, under the tutelage of the notoriously classy Joe Paterno, arrived in suits and ties) and ended in a classless performance on the field and a loss to the Nittany Lions. (Michael Weinreb, http://sports.espn.go.com/espn/eticket/story?page=fiesta87, (last checked, Nov. 17, 2007).
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OPTIONS FOR SUSTAINABILITY OF MUSICIANS:

A LOOK AT VIABLE OPTIONS FOR MUSICIANS TO MAKE A LIVING WITHOUT SELLING THEIR SOUL TO THE MAJOR RECORD COMPANIES.

by Leslie Sultan[1]

Leslie Sultan, J.D. candidate, CUNY School of Law, 2008. *Special thanks to Professor Debbie Zalesne, and my mentors Quetzal, Bruce Colfin and Jeffrey Jacobson.*

INTRODUCTION

Most people are surprised to learn that a musician can sell a "Gold Record" (500,000 copies of an album) in America and earn only $7.36.[2] This happens as a result of an accepted culture within the music recording industry that allows record company contracts to exploit musicians for the financial gain of the record company. The end result is that a disproportionate percentage of record sale profits go into the pockets of record company executives and a tiny proportion of those profits actually go to the musician. Voices of protest against record companies' treatment of musicians, have long claimed that record deals take advantage of musicians and that record company executives are only concerned with taking home a big paycheck while the musician starves.[3]

In response, many well-known musicians have attempted to change this practice by using the courts. Some cases have exposed record companies that have improperly withheld money from musicians.[4] It appears that record companies were able to take advantage of musicians because they were not well informed of the consequences of industry contracting terms. Musicians, especially those new to the industry, seeking a deal with a traditional record company, need to understand music contract terms in order to properly negotiate reasonable terms for selling their music. To make informed decisions about their record deals, musicians must have basic knowledge of record company contract customs, understand options for contracting and distributing their music product, and prepare for the legal ramifications for such options.

Interestingly, traditional record company contracts are no longer the only way to exploit music into the market. Musicians should be aware that due to advancing technology, they are able to be more independent and creative when it comes to choosing how they want to release their music into the market. Nonetheless, contracting laws are still extremely important even when musicians do not deal with a major record company.

This Comment looks at various contracting options and methods of sustainability in order to aid musicians in determining whether entering into a contract with a major record company is their best option. Part I reviews important contract clauses that record companies insert into contracts that may not be noticed or understood by the novice musician. This Part also emphasizes how a musician's clout and leverage can be used as a negotiating tool for choosing the right contracting option and for receiving a higher percentage of their record sales.

Part II examines a few court cases that demonstrate successful claims of unpaid royalties, bankruptcy and involuntary servitude that have impacted the music business industry and influenced the current state of the law with regards to musicians' rights and options. Often, such lawsuits are brought as a strategy for musicians to avoid their overwhelming contract obligations with record companies. Consequently, not all claims are successful and this part also highlights cases in which musicians took their claims to court and lost. In reviewing the legal issues unsuccessfully argued, future musicians can learn to avoid the contracting options and mistakes made in those examples as well as avoid the attendant costs and tolls of litigation.

Part III discusses alternative contracting options available to musicians, including licensing options, independent financing options, and innovative contracting models. This part reviews copyright ownership options, risks and benefits to both the record companies and the musicians.

The article concludes in Part IV with analysis of recent evolutions in the music industry based on claims brought by musicians in court and ways to assess the best contract options for musicians. Ultimately, musicians will feel more empowered when they are well informed of their options, have a basic knowledge of contract law, and can utilize all leverage and clout for negotiating reasonable terms. Hopefully, such empowerment will lead to less misunderstanding, frustration and costly litigation in the music industry.

I. ROYALTIES AND OTHER CLAUSES IN MAJOR RECORD COMPANY CONTRACTS

Traditional economic practices in the music business are heavily stacked in favor of the record companies.[5] As a result, musicians typically have much less bargaining power and almost always become susceptible to unequal contract arrangements, even when accompanied by legal representation. However, the music industry of the 21st Century has evolved somewhat from this uneven playing field. Part of this evolution stems from technological advances that have weakened record companies bargaining power and from outrage by popular musicians who are tired of being exploited and have learned to leverage their bargaining power to negotiate terms in their contracts that benefit them.[6] Consequently, today's musicians have far more contracting options available to them than their musical predecessors who fell victim to the greed and deceit of the music industry when it was first developing.

A musician's ability to negotiate a contract begins with a basic understanding of some standard contract terms used in major record company contracts. Record companies pay what is called an "artist royalty" to the recording musician.[7] A royalty is a share of the proceeds from the sale or performance of a work paid to musicians after they sell the rights to the work.[8] This royalty is based on the number of records that are sold, not the number manufactured.[9] Currently, the average musician royalty is between 12% and 16% of the suggested retail list price (SRLP).[10] Record companies know that the bargaining power of musicians is weakest at the beginning of their careers, and therefore offer them lower royalty rates. If musician begins to sell platinum albums, the bargaining power shifts to the musician.[11] Some major musicians with leverage, i.e., "superstars," are able to command a rate between 18% and 21%.[12]

Royalty rates are integral to music contracts because they structure the percentage of earnings designated for the record company and the musicians.

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> Proper royalty accounting has a direct bearing on a recording artist's profitability. It determines whether an artist will make money or owe money to the record company. The record company must recoup all money it has advanced to a recording artist before the artist is paid any money… for the recording. Recording artists usually see their royalty earnings twice a year, in a statement where their earnings are added up and then deducted from the total cost owed to the record company. The result is an unrecouped or recouped balance.
>
> In addition, proper royalty accounting has a direct and significant effect on the relationship and leverage between artists and their record company during the recording contract term and any subsequent renegotiation of the contract. To the extent that an artist is unrecouped, the record company has an economic hold on the artist, and vice versa.[13]

The smaller the royalty rate the record company pays the musician, the larger the record company profits. An understanding of the factors that are considered in determining royalty rates and how they are negotiated requires an understanding of some record company contract deductions that eat away at a musician's earnings. These deductions are intended to reimburse the record company for expenses it will incur in promoting the musician's product. However, a close look at some of the contracted deductions reveals that the record companies do not take into account recent evolutions in the music industry. Such deductions result in unnecessary loss of earnings for musicians and reimbursement of expenses to the record company that it may not have incurred.

While there are no industry standard contracts or clauses for musicians, many contracts include specific deduction clauses pertaining to "New Technology Configuration" and "Packaging." Most record companies deduct fifteen to twenty-five percent of the SRLP for "packaging" or "container" costs.[14] These terms refer to the physical enclosure that contains the sound recording, typically the jacket, CD jewel box and booklet, or tape cartridges.[15] Despite the high percentage deduction that the record company takes from the musician's royalty rate to reimburse itself, packaging costs generally cost the record company a fraction of the amount it deducts from the musician.[16] These charges can even be included in a musician's contract for sales of albums by electronic transmission, even though the album has no actual container.[17]

Record companies also developed the New Technology Configuration clause to deal with the fact that when new technology is first introduced (such as the production of compact discs after the custom of recording to a record or cassette tape), its implementation is expensive.[18] If a musician has clout, the royalty rate for a record sold in a New Technology Configuration can be as much as 80 percent of the otherwise applicable royalty rate set forth in the contract.[19] This means that if a musician is receiving a twenty percent royalty rate on every record sold, he or she will then only receive eighty percent of the twenty percent royalty rate for that record sold in the new technology format (i.e. CD). Even when technology is no longer "new" and can be manufactured at a fraction of their cost, the record companies have no reason or incentive to remove this clause from their contracts.

II. MUSICIANS TURN TO THE COURTS: LEGAL CHALLENGES TO CONTRACTUAL TERMS

New musicians can understand the strategies used by record companies to withhold funds from musicians by studying legal challenges to the music industry's contracting practices. These cases also demonstrate how courts will interpret recording contracts and award money to musicians when record companies have misrepresented record sales or ownership rights despite contract terms. Such examples can be used to ensure that new musicians are prepared to understand their contract terms. Subsection A, below, highlights successful claims brought by musicians who did not receive their due royalties from record companies. These claims are followed by strategies used by musicians in bankruptcy courts to avoid restrictive or undesirable contract terms, discussed in subsection B. Subsection C briefly discusses attempts by musicians to cancel recording contract through another strategy involving claims of involuntary servitude and invocation of labor laws. As this section outlines, musicians' strategies have not all been successful and Subsection D provides clear examples of failed attempts by musicians to reject their contracts using the strategies discussed. This subsection will also address abuse or bad faith that may arise in bankruptcy claims.

A. Successful Claims of Unpaid Royalties.

One way in which most musicians have made successful legal challenges is to claim that the record company failed to pay the musician his or her due royalties.[20] Musicians must be careful to monitor receipt of their agreed upon royalty rates. One recent settlement, finalized in June 2002, demonstrated a victory for musicians when the court approved a $4.75 million settlement in a class-action suit brought by the late singer Peggy Lee against Decca Records, accusing the record company of using questionable accounting practices to cheat musicians out of their royalties for more than four decades.[21] Other members of the class included the estates of those considered to be among the greatest musical performers of all time - Louis Armstrong, Billie Holiday, Patsy Cline, Ella Fitzgerald, Bill Haley, Mary Martin, and Pearl Bailey. The lawsuit represented more than 300 musicians, all of whom recorded for Decca Records before January 1, 1962. Vivendi Universal, the largest record company of the world's music conglomerates, who acquired Decca Records, settled the class-action suit without admitting any wrongdoing.[22]

Courts are vigilant when record companies engage in contracting that shortchanges musicians. Therefore, when musicians file lawsuits based on unpaid royalty claims, typically courts will read the terms of recording contracts closely to determine what rights were given away and what royalties are to be paid out. A case that demonstrates the court's analysis of these situations is *Greenfield v. Philles Records*.[23] In the early 1960s, a singing group known as "The Ronettes," met a music producer and composer and signed a five-year "personal services" music recording contract with a production company,[24] Philles Records, Inc.[25] The contract involved a standard agreement widely used in the 1960s by music producers signing new musicians and showed that the Ronettes (without the benefit of counsel) agreed to perform exclusively for Philles Records and in exchange, Philles Records acquired an ownership right to the recordings of the Ronettes' musical performances.[26] After signing with Philles Records, the Ronettes received a single collective cash advance of approximately $15,000.[27]

In the case of the Ronettes, the music producers began to capitalize on a resurgence of public interest in 1960s music by making use of new recording technologies and licensing master recordings of the Ronettes' vocal performances for use in movie and television productions, a process known as synchronization. The most notable example was when the producers licensed "Be My Baby" in 1987 for use in the motion picture "Dirty Dancing" and licensed master recordings to third parties to produce, distribute and sell compilation

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albums containing performances by the Ronettes.[28] While the production company earned considerable compensation from such licensing and sales, no royalties were paid to any of the Ronettes.[29]

The Ronettes claimed that while their contract gave Philles Records unconditional ownership rights to the master recordings, the contract did not provide Philles Records with the right to license the master recordings for synchronization and domestic redistribution because the contract was silent on these topics.[30] Philles Records argued that the agreement granted them absolute ownership rights to the master recordings and permitted the use of the recordings in any format.[31] Philles Records further claimed that absence of specific references to synchronization and domestic licensing is irrelevant because where a contract grants full ownership rights to a composition, the use of such property is only restricted by the grantor/artist's explicitly enumerated restrictions (in this case, royalty rights).[32]

In response to the ambiguity issue, the court wrote in its opinion, "Despite the technological innovations that continue to revolutionize the recording industry, long-settled common-law contract rules still govern the interpretation of agreements between artists and their record producers."[33] In this light, the court considered whether the agreement was construed in accord with the parties' intent.[34] The court agreed with Philles Records, holding that the unconditional transfer of ownership right to a work of art includes the right to use the work in any manner, unless those rights are specifically limited by the terms of the contract.[35] The court found that because the contract did not explicitly reserve any rights for the musicians, the musicians' transfer of full ownership rights to the master recordings of their musical performances carries with it the unconditional right of the producer to redistribute those performances in any technological format.[36] A contract's silence on synchronization and on domestic licensing of recordings to third parties for production and distribution in the United States, does not create an ambiguity.[37] Inasmuch as there is no ambiguity in the parties' contract, the court found that Philles Records was entitled to exercise complete ownership rights (including rights to reproduce the performances by any current or future technological methods, for use in visual media, such as movies and television commercials or broadcasts, and for domestic release by third parties in audio formats), and the Ronettes were entitled to all royalties due for all sales of records, compact discs and other audio reproductions by entities holding domestic third-party distribution licenses from Philles Records.[38]

The Ronettes' case outlines the process that courts will look at when considering rights a musician has given away and royalties that should be paid to them. Many other musicians, including Tom Petty, Don Henley, John Fogerty, Tom Waits, and Merle Haggard also claim to have been underpaid royalties by their record companies.[39] One recent success story includes a sizeable settlement made to rock singer Meat Loaf. His record company, Sony, paid approximately $10 million to Meat Loaf in exchange for dropping his royalty suit, after he claimed that Sony's breach of contract owed him more than $14 million in underpaid royalties.[40] Raising federal copyright and state law claims, Meat Loaf had argued that despite selling millions of copies of his records, the distribution agreement with Sony failed to pay any royalties to Meat Loaf during an eight-year period.[41] Cleveland Entertainment, Inc., with whom Meat Loaf had the recording agreement, was also included in the suit. Cleveland allegedly failed to collect and pay royalties due to Meat Loaf and did not demand an audit of Sony's books and records on behalf of Meat Loaf during this time period.[42] When Cleveland finally demanded the audit, Sony allegedly did not make all the reports available.[43]

In addition to the breach of contract claim, Meat Loaf's copyright claim stated that he is not and never was an "employee for hire"[44] and that Meat Loaf had the rights to the copyrights in the master recordings, preventing Cleveland from seeking reversion of all rights to the master recordings to Cleveland.[45] Cleveland argued that Meat Loaf's claim should be dismissed because such allegations were untimely and failed to point out why Meat Loaf could not be deemed an "employee for hire." The court agreed and dismissed the federal copyright claim.[46]

Cleveland then proceeded to claim that Meat Loaf's state law claim to compensation of unpaid royalties was frivolous and was brought for an improper purpose and should be dismissed from the federal court.[47] The court ruled that the state law claim was not frivolous; nor was there evidence that the action was brought for an improper purpose.[48] The court denied Cleveland's motion to dismiss the complaint, which led to the settlement in favor of Meat Loaf.

Meat Loaf's success points to the importance for other musicians to review their royalty statements and audit the record company's accounts. One thing to note, however, is that while musicians are technically allowed to conduct audits to verify residuals, unless they negotiate otherwise, many contracts contain clauses that restrict the auditing process and prohibit musicians from auditing and determining accurate numbers of how many CDs are sold, given away, bartered for radio airplay or discounted to Clubs.[49] Once an audit is performed, it is not uncommon to uncover around 10% to 30% of underpaid royalties.[50] Singer Tom Petty routinely performs audits on his record company.[51] "I personally have turned up millions of dollars missing [in royalties] - money that I would not have been paid without an audit."[52] Unfortunately, as seen in the cases, an audit alone is not necessarily enough to make the record company pay the owed amount.[53] But the good news is that the courts will not require musicians to prove underpayments with certainty in order to calculate damages when a record company fails to maintain and produce documents necessary to calculate due royalties.[54] A musician need only demonstrate a stable basis for making the estimates, which could result in the musician receiving a judgment that exceeds the amount of royalties that were actually due.[55]

B. Use of Bankruptcy to Avoid a Music Contract

Some musicians have resorted to bankruptcy court to break their contract with a record or production company.[56] Bankruptcy courts can void existing contracts if they interfere with a debtor's ability to recover financially.[57] Bankruptcy law has thus armed musicians seeking to renegotiate their contracts with a potent tool in their dealings with sometimes recalcitrant companies.[58] Some claim that in the music business, lawsuits are often just negotiations by other means.[59] To avoid abusing the system, a good faith requirement has been applied under virtually every bankruptcy law since 1898.[60] The Bankruptcy Code does not particularly define good faith, but many courts have held that a showing of honest intention is enough to satisfy the requirement.[61]

One case example of this arose when female R&B group TLC filed bankruptcy to get out of their contract.[62] A producer managed TLC and the group had the standard low royalty rate new musicians start with.[63] In addition, the contract with the record company, Pebbitone, gave the manager a substantial share of profits. When TLC wanted more control and profits, they found that the only way to terminate their contract with Pebbitone was to file bankruptcy."[64] The filing was deemed not to be abusive and the court allowed the group to reject their recording contract.[65] Once TLC settled with Pebbitone, it signed another recording contract with a different company at a higher royalty rate.[66] Similarly, in 1993, the members of the rap act Run-D.M.C. filed for bankruptcy and emerged from the proceeding with a new contract with Profile Records.[67]

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Musicians have also used bankruptcy claims to strategically leverage negotiating power. R&B singer Toni Braxton accomplished this when she filed a bankruptcy claim in order to avoid her contract with recording company, Arista/LaFace.[68] Braxton apparently implemented the bankruptcy action in an attempt to extricate herself from what she viewed as an inequitable contract, while the recording company claimed that Braxton contractually owed the label more albums.[69] She asked the court to rule that her contract with Arista/LaFace was no longer enforceable.[70] Initially, the bankruptcy court ruled in Braxton's favor by denying the dismissal of the claim filed by Arista.[71] Ultimately, Braxton withdrew the bankruptcy claim when she got a new contract deal with Arista that paid her more money.[72]

While claiming bankruptcy, as a strategic move, was successful for Braxton and others, it is risky because there is no guarantee that the bankruptcy court will reject the contract in question.[73] It can also imperil a musician's career and financial well-being as there is no guarantee that a musician will emerge with the new deal sought.[74] Furthermore, some critics argue that the manner in which musicians utilize bankruptcy is considered an abuse and manipulation of the law.[75]

C. "Seven-Year Statute" Strategy to Avoid Involuntary Servitude

In another strategy to cancel a recording contract, some musicians have tried to invoke California Labor Code Section 2855, the so-called "Seven-Year Statute."[76] Section 2855 permits employees to terminate personal service contracts after seven years.[77] While section 2855(a) has been interpreted by the courts to allow movie actors the ability to negotiate new contracts based on fair market value,[78] section 2855(a) has had a different effect in the recording industry context - a context in which the provision has not yet been tested in court.[79] In theory, a musician would be able to exit a contract with a record company after seven years without fulfilling the album delivery requirement.[80]

While such an option would benefit musicians, record companies would be disadvantaged by their lost monetary investments and promotion spent on musicians who no longer have to fulfill their contract obligations.[81] Consequently, section 2855(b), a 1987 amendment to section 2855 that applies only to musicians, purports to allow record companies to sue musicians for undefined damages after the musicians invoke their rights under section 2855(a).[82] According to the record companies, section 2855(b) allows them to sue musicians for speculative lost profits on undelivered albums.[83]

Most of the controversy around section 2855(b) relates to a claimed ambiguity in the damages provision of section 2855(b)(3). Record companies have asserted that courts should interpret "damages" in this context as lost profits even though the term is defined neither by the statute nor by any case law.[84] In contrast, one commentator suggests an alternative basis for damages would be a record company's actual investment in a musician.[85] This theory would allow a musician who invokes section 2855(a) after having received an advance or other recoupable costs from the record company, but who has not recorded the album associated with that advance or used the funds specified, to be liable for the advanced amount.[86]

In 1999, Courtney Love, frontwoman for the band Hole, invoked section 2855(a) to terminate Hole's contract with their record company.[87] Hole had a contract with Geffen Records, a subsidiary of Universal to deliver two albums to Geffen and gave Geffen three options for delivery of an additional five albums.[88] Love claimed that Hole signed with Geffen based on its inducement to be a "safe haven for rock artists" and that Geffen was obligated to market and promote Hole's albums in the Geffen manner and could not assign its obligations to an entity whose philosophy was not completely compatible with Geffen's.[89] When Geffen assigned its rights to Universal, Universal did not retain Geffen's rock music priorities and did not market Hole's music or perform the obligations that Geffen had promised.[90] Love therefore claimed, among other things, improper assignment of agreements and failure to market Hole's product.[91] In response, Geffen and Universal claimed that it had the right to refuse to promote or exploit Hole's work and sued Love under section 2855(b), contending that Hole owed damages for the five undelivered option albums.[92] Love cross-complained, challenging the constitutionality and applicability of section 2855(b).[93] She asserted that Universal sought her involuntary servitude[94] because the company requested an injunction to prevent Love from working for anyone else until all five additional albums were delivered to it.[95] This case was not resolved in court however, because Love, facing mounting legal costs and legal setbacks, settled with Universal in September 2001.[96]

Other musicians who have filed suits similar to Love's have settled out of court, especially when faced with the record companies' explicit or implicit threats of endless litigation over millions of dollars in profits supposedly lost by the record companies.[97] Therefore, the seven-year statute strategy tends to weigh in favor of the record companies who are in the final position to offer enticing settlements--including higher royalty percentages--preventing musicians from successfully challenging Section 2855(b) and causing musicians to continue forced service after seven years.[98]

D. Cases Gone Bad for Musicians

The successful cases described above demonstrate that once in a music contract, despite the limited terms and constraints placed on musicians by record companies, there are possibilities for musicians to wiggle free of their restraints and negotiate better contract terms. However, musicians should be extremely cautious when pursuing this route as a means to terminate a contract. Some musicians may risk a court ruling their claim one of abuse, bad faith or unconscionability.

Recording Industry Association of America (RIAA) is quite suspicious of bad faith and abuse by musicians and recently sought to include a provision in a federal bankruptcy bill that would have prevented musicians from ending recording contracts by using bankruptcy law.[99] The RIAA officials declared that such claims are a "growing problem" of musicians either threatening bankruptcy or filing bankruptcy papers to get out of their contracts.[100] Because they unfairly singled out recording artists, the RIAA's initial attempts were opposed and the RIAA later redrafted the language of the provision to narrow its scope to musicians who abuse the bankruptcy code.[101] Today a federal bankruptcy court will look to find abuse or bad faith on the part of the musician to determine whether the contract is enforceable.[102]

An example of this was seen when recording artist and former actress, Tia Carrere, filed a bankruptcy claim to terminate her contract with ABC-TV.[103] Carrere's primary motivation in seeking the protection of the court was to reject the contract with ABC so as to enter into the more lucrative contract with A Team.[104] ABC claimed that this motivation represented bad faith.[105]

Because of the good faith requirement, rejection of a contract is not allowed if the debtor is not financially distressed and if the sole purpose of filing the bankruptcy was to reject the contract.[106] The court was concerned with the good faith issue of allowing Carrere to file for the primary purpose of rejecting her personal services contract and therefore dismissed her bankruptcy claim.[107] Bankruptcy court is a court of equitable remedy[108] and a personal

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services contract is unique in that money damages will not adequately make the employer whole. Therefore, the court weighed the rights of ABC to require performance against the right of Carrere to refuse to perform.[109] Because Carrere sought to prevent ABC from requiring her to perform, terminating Carrere's contract would prove inequitable, as it would "allow a greedy debtor to seek the equitable protection of this court when her major motivation is to cut off the equitable remedies of her employer."[110]

Courts tend to consider public policy doctrine when assessing claims of unfairness. When reviewing a contract, there in no guarantee that the court will sympathize with a musician just because the terms were unfair to the musician. While clout and stardom may help a musician negotiate favorable terms in a contract, it does not guarantee a victory in court. Singer George Michael's lawsuit is a case in point .[111]

In November 1992, when he had just earned more than £15 million[112] in a single year from record royalties and concert ticket sales, George Michael sued Sony record company, claiming that the terms of his eight-album deal amounted to "professional slavery,"[113] that his contract with Sony was an unenforceable restraint of trade, and that there was lack of reciprocity because Sony could terminate the agreement at the end of each contract period yet George Michael did not have any comparable right.[114] George Michael pointed out that Sony made £2.45[115] in revenue from every one of his CDs they sold while George Michael made just £.37.[116] In response, Sony claimed that there was no oppression, no misuse of bargaining power, and no compulsion on George Michael to enter into any contract with Sony.[117] On the contrary, says Sony, George Michael was advised and represented by a leading lawyer and negotiator and was not only willing but "perfectly happy" to enter into a contract with Sony.[118]

The court stated that it did not appear that there was oppression or a misuse of bargaining power resulting in unfair terms on behalf of either party.[119] The court found that all previous agreements made between the parties were made in good faith and were "entirely genuine and bona fide."[120] This allowed the court to reason that because there is a public interest in upholding genuine and proper communication, the public policy rationale outweighed George Michael's restraint of trade claims, particularly when George Michael obtained substantial commercial benefits from his previous negotiations with Sony.[121]

The opinion also discussed the nature of recording contracts, the practice of renegotiation and inequality of bargaining power.[122] Under this analysis, the court found that because the agreement was governed by the amount of product that George Michael agreed to sell, George Michael had some control over the duration of the agreement.[123] The court further concluded that the contract terms were reasonable and that because George Michael's claims did not alter the balance of unfairness and unconscionableness in any way, "it would be unfair to Sony Music and unconscionable to allow for Mr. Michael to assert that the . . . agreement is unenforceable . . ."[124] Therefore, the court dismissed George Michael's claims.

These case examples highlight ways in which a musician can lose a claim in court and subsequently be stuck in a restrictive contract. Ideally, musicians and their representatives will develop a heightened critical eye to scrutinize complex record contract provisions that may be unfavorable to their interests. After all, the best way to avoid losing a claim in court is to avoid misunderstandings or agreeing to contract options that a musician will want to breach in the future. Lawsuits are expensive and as demonstrated, do not guarantee victory for musicians. Savvy counsel and personal involvement in negotiations are paramount to a musician gaining a full understanding of the contractual provisions detailing the future implications of costs and obligations.[125] With such tools, musicians can make informed decisions and negotiate terms acceptable to them while avoiding lengthy and expensive litigation that may frustrate and possibly ruin a musician's career.

III. CONTRACTING OPTIONS AVAILABLE TO MUSICIANS

Musicians should be well informed about ownership of music copyrights. Most record companies include in their contracts a clause to allow them to buy copyrights to songs created by the musician. Ordinarily, after a musician writes an original song and the song is "fixed in a tangible medium of expression" (on paper, tape, or CD), the musician is the "author" of the song and the initial owner with legally enforceable privileges that include the exclusive right to make and sell copies of the song and to publicly perform it.[126] When a record company buys the copyright, the musician has transferred ownership to the record company in return for the record company's promise to pay royalties. A musician can rarely get this copyright back. This means that the record company can forever sell and make money off of the song long after the contract deal has ended.

While it may seem completely unfair for a musician, who has done all the creating, who possesses the talent, and in most cases paid for the master recording,[127] to give up so much profit to huge multi-billion dollar corporations, there are some reasonable explanations for why record companies conduct business in this manner. One writer on the topic explains that the music business is unique because the four giant music corporations[128] risk billions of dollars on untested musical acts, only 5% of which ultimately turn a profit, and they are subjected to constant and unpredictable change in consumer preferences characterized by the short life cycle of its products, with profits based on the impact of individual hit records rather than brand loyalty to individual record companies.[129] Musicians become dependent on these companies who specialize and tend to control marketing and promoting records to mass audiences because the companies have the capital to take huge financial risks to advance a musician.[130] "Record companies [necessarily] operate on the premise that because they take such … large financial risks and have such a low rate of success, they should have the right to maximize their return when they [actually] do score a hit."[131] Apparently these record companies further justify this custom because failed musical acts in which the record companies have invested significant amounts of money, are often able to walk away debt-free. Thus record companies argue that they must formulate an industry contract that takes into account the risks to each party.[132]

To secure their earnings, a standard contract will give a record company the option to demand four to six and sometimes up to seven albums from one musical act, without which they claim they would not be able to make a profit, even on successful musicians.[133] Since no musician is able to turn out seven albums within seven years, considering the restrictions put on them by the companies themselves to take two years between record releases, this clause is virtually impossible to fulfill and locks musicians into personal service contracts for at least fourteen years.[134] On top of this, contracts generally require exclusivity. Exclusivity restricts musicians from recording for any other company without the record company's consent until released from the contract or the stipulated number of albums is recorded.[135] On the other hand, without such clauses, industry lobbyists claim that record companies would not have the incentive to underwrite such risky enterprises.[136]

Record companies claim that the economic structure of the industry is fair to musicians because they have the option of putting

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out their own recordings and if they do sign with a company, they do so voluntarily and are paid fair royalties based on "time-honored practices."[137] Moreover, "artists who produce hits . . . typically renegotiate for even larger advances"[138] and have the option of exploiting their newfound fame to rake in money from other financial opportunities like commercials, concerts, and acting deals, none of which go to the record companies.[139]

A. Licensing Options

Some alternative options that musicians have pursued to avoid the selling of their copyrights for life, involve leasing copyrights for a period of years, which leaves the musicians with ownership of their masters. Once a musician composes a song, the musician can then enter into a contract with a music publisher. This contract would serve as a license, allowing the publisher to temporarily have ownership of the musician's song in exchange for a share of the song's revenues.[140] The publisher's job is to market the song commercially, which includes contracting with record companies to record the song in exchange for royalties, a share of which is then passed on to the musician.[141] For a musician who writes but does not perform songs, a copyright lease to a publisher will allow the publisher to contract with other musicians who will perform and record the song. Musicians who write and record their own songs, now often serve as their own publishers.[142]

When a publisher enters into contracts with record companies for their songs, the record company will produce and manufacture a sound recording of the publisher's song(s).[143] This agreement again gives the recording company the bulk of the revenues from sales of the sound recording while passing on royalties to the publisher. However, here, the publisher maintains ownership of the songs and the record company will have complete ownership only of the sound recording. This creates two sets of rights: those of the owner of the original piece of music and any accompanying lyrics, and those of the owner of the recording of the song.[144]

Musicians who would prefer not to license their works individually, can chose to join a licensing association, such as American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music, Inc. (BMI). These associations grant "blanket licenses" that give the licensee the right to perform any music or to make any reproductions of artworks in the association's repertory at any time during the period in which the license is effective.[145]

Musicians can agree to grant to the association the right to license their work, in return for the advantages of membership. One benefits of membership is that the associations have the resources and ability to monitor use of music throughout the nation, to detect most copyright infringement and to audit licensees' books to ensure that the licensees are properly distributing to the association on behalf of its members all royalties that their work has earned.[146] The associations are also required to grant nonexclusive licenses.[147] A nonexclusive licensing system allows users who desire access to music in the association repertory but do not want to purchase the blanket license to negotiate a license directly with the copyright owner, thus bypassing the association entirely.[148] Therefore a musician who is a member of an association benefits from the association's licensing activities while remaining free to license directly.

B. Independent Financing Options

Musicians may find that there are various ways to independently finance their music projects.[149] The best way to retain full control of a project is for musicians to use their own money because it leaves them free of financial obligations to lenders and gives maximum artistic and financial control.[150] On the flip side, this option means musicians must bear all the risks of the project, which may not be financially reasonable for all musicians.

Another technique that has been suggested is borrowing money via a loan and agreeing to repay that sum plus a specified percentage of interest.[151] While loans still provide the musician with maximum artistic and financial control, they are an absolute obligation that must be paid back whether or not the project is successful. Depending on one's credit and the interest rates, such loans are not necessarily attainable or reasonable.

Some musicians may be lucky enough to take advantage of a third option that involves profit-sharing via investors. In such a situation, an individual or a company may be willing to invest money in the musician's project in return for a large share of the profits for an extended period of time. Contracting options under Copyright law allow a musician to work with an active[152] or passive[153] business partner via the "joint work" doctrine[154] or the "work made for hire" doctrine[155] that determines who owns the copyrights in those situations. One way this might play out would be for a musician to seek an investor to fund the recording and producing of a song. If the musician then names the investor as a joint author in a joint work for copyright purposes, both the investor and the musician will each have an independent right to use or license the copyright song and each will have to share profits with the other owner.[156] While, the contributions of each party to the final product need not be equal in order for the parties to be joint authors, one cannot become a joint author by merely contributing ideas toward the project.[157] Thus, a musician seeking to enter into a partnership with an investor should be willing to share ownership of the songs with the investor under 17 U.S.C. § 201,[158] either (1) directly with the investor or via a partnership between the musician and the investor, or (2) if the musician transfers ownership of the copyrighted works to the partnership under 17 U.S.C. § 204(a).[159] If the musician is not willing to share the ownership of the songs, he or she should expect to share a large profit with the investor for an extended period of time to allow the investor to profit off his or her risk.

A musician will want to stay away from creating a work for hire, however. Where a work is one for hire, the employer holds the copyright in the work unless the parties agree otherwise in writing.[160] Under this doctrine, a musician creates a song for an investor who will be considered an employer and all copyrights will vest in the employer, depriving the musician of any standing to sue for infringement by use of the song.[161] Courts have found that a musical composition created by a musician at behest of a corporation was a work made for hire.[162] Although the contract providing the musician with some royalties and a fixed sum, these facts were not sufficient to overcome the great weight of contractual evidence that indicated a work for hire relationship.[163] Therefore, a musician that enters an agreement with an investor that looks like an employer/employee relationship[164] should design a contract that expressly states that the musician will retain and not transfer ownership of copyrights in the songs.

C. Innovative Models

One innovative, new option for musicians might be to start a nonprofit record company. Nonprofit organizations operate by distributing excess revenues throughout the nonprofit enterprise to be used to further the nonprofit's activity as opposed to a for-profit enterprise that distributes earnings to the owners or shareholders.[165] As tax-exempt organizations, nonprofits are not subject to federal income tax and are often exempt from paying property tax.[166] Such tax exemption would save a musician on taxes associated with overhead costs relating to owning a record company. The drawbacks of such an option is that it requires a clear intent to use any of its net earnings in a way that provides community service via education, charity or other enumerated tax-exempt options, rather than for the benefit of any private shareholder or individual.[167]

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While there are not many models of nonprofit ventures for musicians, there is room for creativity. For example, one non-profit model that benefits musicians combines music production and art with community-based approaches to addressing major social issues. In the case of Blacksmith Records, Inc., the non-profit produces recordings, concerts, and events by socially conscious musicians that funnel the money back into the communities by buying properties to house homeless and low-income individuals.[168] Such an organization can solicit money from foundations and private donors with no requirement to pay the money back (and the money donated is tax-deductible for the donor). This serves as way that musicians desiring to disperse their earning amongst a larger community may do so without relying on loans or major record company contract provisions.

Musicians should keep in mind that times are changing for the music industry. Recent innovations with the Internet allow music fans from all over the world to access songs by their favorite musicians with just the click of a button. This new ability of fans to purchase songs directly from musicians has thrown a wrench into the cogs of the huge record companies that have traditionally been a musician's only option for record distribution, production and promotion. Today a musician can independently distribute, promote and sell their music online via the Internet.[169] Online, musicians profit by making their music available for downloading, streaming audio, and selling physical CDs and tapes. There are also innovative groups, such as The Future of Music Coalition, that discover ways for musicians to get paid in the online music environment.[170]

A word of caution goes out to musicians who make their music available online. The courts have seen recent cases in which non-musicians use an online media distribution system to download songs and distribute or make available for distribution to others, the musician's copyrighted sound recordings without the musician's authorization, despite the musician's exclusive rights to reproduce and distribute their copyrighted sound recordings.[171] While a court will likely award damages to the musicians in such a situation, musicians should be aware of and protect against these occurrences.

IV. CONCLUSION

The history and practices of the music industry have not been fair to musicians. As demonstrated in the cases discussed above, musicians have been locked into restrictive contracts, lost their rights to ownership of their songs, and in some cases, not been paid their proper earnings. With the advancement of technology and independent means for musicians to market their music, there now exist more contracting options available for musicians.

A musician who has clout or achieved stardom will likely be able to leverage more bargaining power to command higher royalties. Such a musician will have greater options available and a major record company may be willing to pay more to sign. However, clout and leverage do not guarantee a musician will receive their proper earnings. As seen in the cases of the Ronettes and Meat Loaf, musicians do not always receive their proper earnings. Fortunately, there exists legal remedies and case precedent through which a musician can claim unpaid royalties, though they have their own transaction costs. Most importantly, musicians should know what their proper royalty percentage amounts to, minus deductions, when and how often they can conduct audits on their record sales, and how much they have actually been paid. If they have not received proper payment, a musician can take the record company to court. Once in court, the judge will review the terms of the contract to determine proper royalty payments. If underpayment is established, the courts will not require extensive calculations owed, but rather an estimate that may result in payment to the musician that exceeds the amount actually due.

Courts will also look to see what rights have been transferred. A musician should know that most contracts with record companies require payment of royalties in exchange for ownership to all songs recorded. It is important to understand how much ownership is being transferred to the record company and which rights the musician retains. If a contract does not explicitly reserve any rights for the musician, the contract will likely give the other party the unconditional right to use the music in any format desired.

When a musician has signed a contract and received royalties that are not sufficient to make a living, bankruptcy may be another way that a musician can obtain relief from a restrictive contract. Assuming the musician is not abusing the bankruptcy court in order to terminate an unsatisfactory contract, a court may find that the requirements of a music contract at a low royalty rate should be terminated if it would interfere with the musician's ability to recover financially. However, these claims do not always result in victory for the musician. A bankruptcy claim brought solely to terminate an exclusive contract in hopes of signing a better contract will not likely pass the good faith test, as seen in Tia Carrere's case. Nor will a claim of unenforceable restraint of trade, as argued by George Michael, likely succeed if the musician agreed to the contract terms in good faith and under non-oppressive terms. These cases reinforce the importance of understanding the contract options and terms prior to negotiating and signing a contract.

Contracting with a major record company involves knowledge of not only copyright ownership, but also exclusivity and licensing. For those musicians who choose to pursue a more independent approach, there are many options that have evolved. With the ongoing advancement of the Internet and developing alternative practices, musicians are gaining more control and autonomy over their music. Pursuing these alternative contract options may require more financial investment by the musician and or more monitoring of copyright infringement. Clearly, such independence has its advantages and disadvantages.

In determining the best option for marketing one's music, a musician should first consider long terms music career goals. A major record company may not provide a lot of financial incentives for musicians, but it can provide tremendous promotion, advertisement and resources that musicians may not be able to achieve on their own. In some situations, it may be in a musician's best interest to start his or her career with a major record company and then move on to explore independent options.

With a good career plan and a little creativity, musicians can find the music industry to be rewarding. As the industry evolves, hopefully musicians and record companies will develop other options that are mutually beneficial to one another. Most importantly, a musician who stays up to date with current contract trends and industry custom will avoid frustration and expensive legal hassles. The more musicians know, the better they will be at reviewing their own contracts and being able to assist their lawyers in quick and efficient handling of business deals and contracts.

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14 Morrow, *supra* note 3, at 46.
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16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
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23 *98 N.Y.2d 562 (N.Y. 2002).*
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27 *Id.*
28 *See id.*
29 *Id.*
30 *Id.* at 567-8.
31 *Id.* at 569.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.* at 572.
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108 Equitable remedy is one in which the court can only enter injunctions (commanding or preventing an action) or specific performance. Black's Law Dictionary 648 (8th. ed. 2005).
109 *In re* Tia Carrere, *supra note 104, at 159-60.*
110 *Id.* at 160.
111 *See* Panayiotou v Sony Music Entertainment, (1994) 13 Tr. L. 532 (Ch.).
112 The equivalent amount in November 1994 dollars was approximately $22.9 million. Historic values are calculated using x-rates.com, Historic Lookup, British Pounds to American Dollar on November 2, 1994, http://www.x-rates.com/cgi-bin/hlookup.cgi (last visited August 30, 2007).
113 David Thomas, *TAKING THE MICHAEL!*, Daily Mail (London), Mar. 12, 2004.
114 *Panayiotou*, 13 Tr. L. 532. *See also*, *British Court Upholds George Michael's Contract with Sony Music*, *Ent. L. Rep., V.16, n.5 (1*994) [hereinafter *George Michael's Contract*].
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117 *See Panayiotou*, 13 Tr. L. 532.
118 *Id.*
119 *Id.*
120 *Id.*
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129 *Id.*
130 *Id.* at 15-16.
131 Chuck Philips, *Courtney Love Seeks to Rock Record Labels' Contract Policy*, L.A. Times, Feb. 28, 2001, at A1.
132 *Id.*
133 Chang, *supra* note 128, at 16.
134 *Id.*
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137 Chuck Philips, *Record Company Chorus: High Risk, Low Margin Music: With stars questioning their deals, the big companies make their case with numbers*, L.A. Times, May 31, 2001, at A1.
138 *Id.*
139 *Id.*
140 *See* Frisby, *supra* note 24, at 321.
141 *Id.*
142 *Id.*
143 *Id.* at 322.
144 *Id.*
145 *See* Maralee Buttery, *Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*, 83 Colum. L. Rev. 1245 (1983) (explaining that two major types of blanket licenses currently in use are common blanket license and per program license, with the main difference being the base used to calculate the association's license fees).
146 *Id.* at 1257.
147 *Id.*
148 *Id.* at 1258.
149 *See* Edward (Ned) R. Hearn, *How to Set Up a Money Deal*, *in* The Musician's Business & Legal Guide, 34, 34 (Mark Halloran, Esq. ed., 2001).
150 *Id.* at 35.
151 *Id.*
152 Active financing participants include general partnerships, joint ventures, corporations and limited liability companies, in which the profits and losses of such businesses are shared among the participants according to the nature of their agreement. *Id*. at 37.
153 Passive investors provide money for the project but take no role in the management and affairs of the project and their returns based on the success of the project. This creates the sale of a "security" that must meet requirements of state and federal securities statutes. While this option gives an artist more control, the artist has the legal burden to make certain that investors are getting a fair deal and fully understand the risks involved. *See Id*. at 38-39.
154 17 U.S.C. § 101 (2007) (stating a "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole).
155 A "work made for hire" is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work…if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire…. 17 U.S.C. § 101.
156 *See, e.g., Community for Creative Non-Violence v. Reid, 490 US 730 (1989).*
157 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 6.07 (1990).
158 In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. 17 U.S.C. § 201(b).
159 The Copyright Act states that a transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. 17 USCS § 204(a)(2007). In addition to the statutory definition, courts have developed several tests for determining whether parties are joint authors. One test suggests three criteria for determining, in the absence of a contract, whether a contributor should be considered a joint author: (1) whether he controls the work and "'creates, or gives effect to the idea,'" (2) whether the parties have objectively manifested an intent to be coauthors, and (3) whether "the audience appeal of the work turns on both contributions and 'the share of each in its success cannot be appraised.'" (internal citations omitted). The Second Circuit instead found only two essential requirements for joint authorship: (1) that each author make an independently copyrightable contribution, and (2) that the parties objectively intend to be coauthors. Brown v. Flores, 297 F. Supp. 2d 852 (D.N.C. 2003).
160 17 U.S.C. § 201 (2007)**;** *see also Brown*, 297 F. Supp. at 853.
161 *See* Moran v. London Records, Ltd., 827 F.2d 180 (7th Cir. 1987).
162 Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1142 (9th Cir. 2003).
163 *Id.*
164 For purposes of 17 U.S.C. § 101(1), "employee" does not refer only to formal, salaried employees. *See Community for Creative Non-Violence*, 490 U.S. at 7365.
165 This is referred to as the "non-distribution constraint" requirement of non-profit organizations. *See* Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835 (1980).
166 *See* I.R.C. § 501(c)(3). In order to be considered non-profit, the organization must normally apply for recognition of tax exempt status with the Internal Revenue Service (IRS) and must agree that no part of its net earnings can inure the benefit of any private shareholder or individual.
167 *Id.*
168 http://www.blacksmithrecords.org/.
169 One example is available at http://cdbaby.com/.
170 Peter Spellman, *Getting Started as an Internet Artist*, *in* The Musician's Business & Legal Guide, 217, 225 (Mark Halloran, Esq. Ed., 2001). See also http://www.futureofmusic.org.
171 *See, e.g., Warner Bros. Records, Inc. v. Jackson, 2006 U.S. Dist. LEXIS 43160, 2-3 (D. Neb. 2006); Maverick Recording Co. v. Habib, 2006 U.S. Dist. LEXIS 50802 (W.D. Okla. 2006); ARISTA RECORDS v. SHOWERS, 2007 U.S. Dist. LEXIS 16857 (E.D. Mo. 2007).*

RECENT CASES OF INTEREST

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

Michael Vick's Roster Bonuses Are Not Subject To Forfeiture

The United States District Court for the District of Minnesota recently found that the Atlanta Falcons could not recover roster bonuses paid to Michael Vick because ' 9(c) of the 2006 Collective Bargaining Agreement (CBA) precluded the forfeiture of those bonuses. White v. NFL, ____ F.Supp.2d ____, 2008 WL 304885 (D. Minn. 2008). The court also found that the Atlanta Falcons were not entitled to pursue other legal or equitable theories for the recovery of those roster bonuses because the CBA protected those bonuses from forfeiture. Id.

The case arose after the NFL Management Council and the Atlanta Falcons sought repayment of $22.5 million in roster bonuses paid to Michael Vick. Vick received the roster bonuses for being on the team's 80-man roster at the beginning of several seasons. The NFL Management Council and Falcons sought repayment on two theories: (1) CBA provisions allowed for forfeiture of roster bonuses because such bonuses were signing bonuses and thus subject to forfeiture, or (2) even if the CBA did not allow for forfeiture of the roster bonuses, other legal and equitable recourse allowed for such forfeiture.

The court first noted that the roster bonuses in question required Vick to be a part of the yearly 80-man roster. Once Vick did so, he earned the roster bonus and the Falcons could not later demand its forfeiture under the CBA. More specifically, under the CBA, these roster bonuses, which were earned by being part of the yearly 80-man rosters, were considered "salary escalators" that had "already been earned" and thus were not subject to forfeiture. Id.

The court then ruled that the Falcons could not recover Vick's bonuses under state law claims of fraud or fraudulent inducement. The court specifically found that ' 9(c) of the CBA prohibited all forfeitures and that "it is well established that state law does not exist as an independent source of private rights to enforce collective bargaining agreements." Id.

The ruling, although benefitting a convicted felon, followed existing precedent and the language of the CBA. As the NFL continues to be staunch with punishments for poor off-the-field behavior, this section may be amended at the next collective bargaining sessions. The NFL Management Council may bargain for an exception that allows for forfeiture for off-the-field behavior or, alternatively, seek a different calculation of team salary whereby bonuses not subject to forfeiture might be excluded. In the immediate future, teams may be less willing to put such large salary escalators and roster bonuses into contracts for players with questionable backgrounds, or young players coming out of school.

By David M. Lodholz

Gross Negligent Standard Applies to Sports-Injury Cases

The Texas Fourteenth District Court of Appeals recently addressed the scope of tort liability in sports-injury cases. Chrismon v. Brown, ____ S.W.3d ____, 2007 WL 2790352 (Tex. Ct. App.B Houston [14 Dist.] 2007, no pet. h.). The court specifically addressed the standard of conduct to apply to a personal injury claim brought by one sports participant against another sports participant.

The case arose after a volunteer assistant coach for a girls softball team, Mrs. Robin Chrismon, sustained serious injuries when a bat slipped out of the hands of the volunteer head coach, Harold Brown. During practice, the bat hit Mrs. Chrismon in the face; she suffered a fractured jaw, lost several teeth, and has undergone more than seven surgeries. Mrs. Chrismon sued Brown and Registered Teams of the Amateur Softball Association of America asserting negligence, gross negligence, and assault. Registered Teams filed for summary judgment asserting that Mrs. Chrismon presented no evidence of a legal duty, a breach of duty, and damages stemming from a breach. Harold Brown also filed for summary judgment asserting the affirmative defense of immunity under the Charitable Immunity and Liability Act of 1987. Although beyond the scope of this case summary, Chrismon's husband, Lonnie, also unsuccessfully asserted claims for loss of household services, loss of consortium, and mental anguish. The court affirmed the summary judgment motions, thereby dismissing all of Mrs. Chrismon's claims.

On the issue of the proper duty for sports-injury cases, one of first impression in the state of Texas, the court settled upon two different tort standards B depending upon whether the sports-injury was "inherent in the nature of the sport." For injuries that resulted from risks that were not inherent in the sport, the participant owed a duty to refrain from negligent conduct. For injuries that resulted from risks that were inherent in the sport, the participant owed a duty to refrain from grossly negligent or intentional conduct. The court rejected a simple negligence standard for injuries that resulted from risks that were inherent in the sport. In applying these standards, the court upheld summary judgment because Mrs. Chrismon's injuries resulted from risks that were inherent in the sport (a bat slipping from a participant's hand) and no evidence showed that Coach Brown had acted in a grossly negligent or intentional manner. All of the evidence, including Mrs. Chrismon's testimony, showed that Coach Brown was hitting ground balls in a routine way and that the incident was purely accidental.

For the first time, the court also established the proper standard for immunity under section 84.004(a) of the Texas Civil Practice & Remedies Code, which grants immunity to a volunteer of a charitable organization who commits an act which occurs in the course and scope of the volunteer's duties, and that results in death, damage, or injury. The code has one exception B it does not grant immunity to a volunteer who acts with intent, willful negligence, or with conscious indifference or reckless disregard for the safety of others. Mr. Brown, as a volunteer head coach, claimed immunity under this section. Although the Act was twenty years old, no Texas court had interpreted the statutory exception. However, many Texas courts, including the Texas Supreme Court, had equated similar statutory language with a gross negligence standard. The court adopted these similar rulings and found that immunity existed so long as the volunteer did not act with gross negligence. In applying that standard, the court found that Coach Brown was entitled to immunity because Mrs. Chrismon had failed to provide any evidence that Brown's alleged acts or omissions constituted gross negligence.

By: Jason M. Betensky & Kevin McDaniel

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