

# ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF THE ABA FORUM ON THE ENTERTAINMENT AND SPORTS INDUSTRIES

VOLUME 20, NUMBERS 1-2 • SPRING/SUMMER 2002

## Busted!

STEVE CRON

**R**epresenting celebrity clients arrested for criminal activity demands a special skill set of lawyers. Defending icons of the American cinema, television, pop music and sports means lawyers will face problems that do not arise in the normal course of transactional and criminal proceedings. The far-reaching implications of a celebrity arrest are far more significant than for a person whose life is lived away from the spotlight. The ongoing publicity can devastate even the most famous

stars. As the celebrity's lawyer, your job is not only to fight for a good result in the case, but also to protect your client's ability to keep performing in the public eye.

### Celebrity transactional lawyers need criminal law basics

As the client's transactional lawyer, you may never set foot in a criminal courtroom. But, if you are  
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# CHAIR'S COLUMN

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Virtually from the moment I took my first job following law school, I have been active in this Forum — professionally and personally. My involvement in this group has enriched my life so much. I will forever be grateful for the opportunity to work with and to get to know so many of you over these last years.

As the first year of my tenure as chair ends, I would like to acknowledge and thank the many wonderful people who support the Forum through their loyalty and commitment. In particular, past chairs Mike Rudell, Jay Cooper and Joel Katz continue to be active in and devoted to the Forum and its success and are true role models for those of us who aspire to be both gracious individuals and outstanding lawyers.

This year's division chairs Bobby Rosenbloum (Interactive Media and New Technologies), Ed Klaris (Literary Publishing), Horace Dawson (Merchandising and Licensing), Gary Watson (Motion Pictures and Television), Ken Abdo (Music), Phil Hochberg (Sports), Elliot Brown (Theater and Performing Arts) and Richard Greenstone (Visual Arts) take substantial time from their busy schedules to program the Annual Meeting, contact speakers and assemble materials for the attendees. The Annual Meetings are impossible without their hard work and the Forum owes each of them a debt of deep gratitude and thanks.

Bob Pimm has recently taken on the role of editor-in-chief of our Forum's newsletter, the *Entertainment and Sports Lawyer*. I know just how difficult a task it is to solicit and obtain articles, edit copy and ready the newsletter for publication four times a year having served as *E&SL* editor from 1996 to 1999. From the looks of his first issue, the *E&SL* appears to be in excellent hands.

The Governing Committee is pleased to announce the appointment of Clark Griffith as the new Sports Division chair and Myles Siltan as the new Merchandising and Licensing chair. Clark is a lawyer practicing in Minneapolis, an expert in antitrust law, whose family and he owned and managed the Minnesota Twins baseball franchise for many years; Myles is general counsel and vice president of business affairs of Signatures Network, the country's largest music and celebrity merchandiser. Both are welcome additions to the Governing Committee.

The Forum has two open positions on the Governing Committee beginning in 2003 as well as the chair-elect position to fill. A Nominating Committee has been selected to review candidates for these positions in the coming months (to be announced prior to and voted on at the Annual Meeting in Nashville). The three members of this year's Nominating Committee are David M. Given, Phillips & Erlewine LLP, One Embarcadero Center, 23rd Floor, San Francisco, CA 94111, fax 415/398-0911; Joel Katz, Greenberg Traurig, the Forum, 3290 Northside Parkway,

Atlanta, GA 30327, fax 678/553-2212; and Elliot Brown, Franklin, Weinrib, Rudell & Vassallo, 488 Madison Avenue, 8th Floor, New York, NY 10022, fax 212/308-0642.

I close by saying that the Forum has enriched my life in many ways. It is an honor to serve in the giant footsteps of those who came before me. I look forward with pleasure to my next year as this Forum's chair.

**David M. Given**

## ENTERTAINMENT AND SPORTS LAWYER

*Entertainment and Sports Lawyer* (ISSN: 0732-1880) is published quarterly by the Forum on the Entertainment and Sports Industries of the American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois 60611-4497. Address corrections should be sent to the American Bar Association, c/o Central Records Department.

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**Subscriptions:** For institutions such as libraries or for individuals not eligible for membership in the Forum, subscriptions are available for \$60 for the U.S. (\$75 foreign). Single copies may be obtained for \$15 each. To order, please call 800/285-2221.

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### Editor-in-Chief

Robert Pimm, Law Office of Robert G. Pimm,  
100 Bush Street, Suite 1250, San Francisco, CA 94104;  
415/438-1890; fax: 415/438-1899 rgpimm@aol.com.

### Assistant Editors

Robyn Freedman, Visual Arts, 415/788-1550  
Mark T. Gould, Sports, 203/624-9165  
Paul Karl Lukacs, Entertainment Litigation, 310/556-3501  
Edwin F. McPherson, Telecommunications, 310/553-8833  
Virginie Parant, International Law and Practice, 323/461-8997  
Christopher Sabec, Opinions and Editorials, 323/848-4900  
Dan Satorius, Interactive Technology/New Media, 612/333-1526  
Miriam Stern, Film and Television, 212/794-1289  
Peter Strand, Music, 312/715-5756  
Mark Traphagen, Government Affairs, 202/624-7389

### Forum Chair

David Given, Phillips & Erlewine  
One Embarcadero Center, 23rd Floor  
San Francisco, CA 94111, 415/398-0900

### Publications Chair

Richard J. Greenstone, 415/438-1890

### Editor

Ray DeLong

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## Busted

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primed for unexpected 3 a.m. jailhouse phone calls, you can save your client a tremendous amount of pain. Even a simple arrest can have long-lasting effects on a celebrity's career. The transactional lawyer can minimize the pain by alerting the client — in advance — to the many landmines that arise following an arrest.

The transactional lawyer should consider having a criminal lawyer standing by to consult with his or her clients about what to do in certain circumstances. While this might seem unduly pessimistic, college and professional sports teams do it all the time. You know what they say: "An ounce of prevention ..."

### DUIs, domestic abuse and sex crimes

If a celebrity client gets stopped for driving under the influence, the celebrity might not know which blood alcohol test to take or the ramifications of refusing to take such a test. Or, if the celebrity client gets arrested and decides to call his wife from jail to tell her how sorry he is that he gave her a shiner, he should know that the call may be monitored and/or tape recorded — and that this evidence can be used in court (and might also be released to the media).

In many cases where the alleged victim knows the defendant, especially in sex cases, a common investigative technique is for the police to instruct the alleged victim to telephone the defendant, while the call is monitored and tape-recorded. The victim brings up the allegations on the phone and tries to get the celebrity defendant to respond by admitting to various acts or at the very least, by failing to strenuously deny them. Such evidence is admissible in court and can be devastating even if the celebrity defendant remains silent in the face of such allegations. Advance warning of police tactics aimed at celebrities can save the celebrity client incredible embarrassment and many years of incarceration.

### Advance knowledge: posting bail, sex with minors

The transactional lawyer and the client should also have some basic understanding about how bail is posted. There are circumstances where the media are racing to get the first images of your client leaving the jail before the bondsman can whisk him or her out the back door. Advance knowledge of the bail process is important in controlling the media's interpretation of events.

Celebrity clients should also have advance knowledge of the implications of sex crimes with minors. A conviction for having sex with a minor results in mandatory lifetime sex registration. Thus, wherever the client lives, they will have to report to the local police that they are a registered sex offender. The celebrity client may get uninvited visits from the police whenever there is a sex crime in the neighborhood. Of course, if the client is a genuine pedophile, nothing a lawyer can tell them in advance will change their behavior. But, if the client is a pop star who likes young girls, perhaps some advance warning might cause him to check the girl's driver's license before jumping in the back of the limo.

## Nine Steps to Success

### Step 1— The Client

Before you search for the narrowest of legal windows for your client to fit through, you must first deal with the potential obstacle of the client himself or herself.

The public adores celebrities and celebrities are used to being loved and catered to. Unfortunately, when the prosecution alleges that your celebrity client has run over a person and left the scene or been caught with a controlled substance, the celebrity may be experiencing a first encounter with people who do not adore them. Many celebrities are not used to other people — especially authority figures — telling them what to do. Behavior that works

 Celebrities are used to being loved, but all of a sudden. . .

when making a film or captivating an audience on stage does not always succeed with the police, the judge or the district attorney.

The lawyer should gently help the celebrity client understand that, while you respect their artistic talents, they need to appreciate that each and every representative of the judicial process must be taken seriously and treated with respect. As any manager or agent can attest, staying on the happy side of a celebrity client isn't always an easy ride. This is particularly difficult when a celebrity (who is used to the best of everything) is languishing in a jailhouse holding tank next to some guy gnawing on a cheese sandwich and asking if your client can get him tickets to the next Lakers' playoff game.

At the first meeting with the client following an arrest, you have to make sure your client knows that the script he or she will be following allows no room for improvisation and it isn't likely to be a comedy. Before anything else, the celebrity needs to be very clear on the dangers of digging a deeper hole.

Assuming you speak with the client before the police, the client should always be advised not to make *any* statements without first consulting with counsel. It may turn out that the lawyer will allow the client to speak with the detective, but this decision should be made only after consulting with the lawyer and appropriate safeguards are in place.

For example, the lawyer may allow the client to talk, but might first insist on reviewing discovery. Or the lawyer might want the conversation recorded in order to ensure its accuracy and, in any event, the lawyer should always be present to make sure the

## The lawyer's in charge — not the client's mother.

client's rights are protected. The client may be an esteemed professional entertainer, but in most cases he or she is an amateur when it comes to being arrested and understanding all of the implications of the legal system.

If the client is in custody, the lawyer needs to speak with those in charge of the jail in order to ensure that the client is adequately protected from other inmates. Most jails have special areas for those who may need to be separated for their own protection. But, the jailer may not know who your client is and may not recognize his or her need to be kept away from the rest of the jail population.

When the client is ultimately released on bail, the lawyer must confer with the jailers to agree on a means of exiting the jail that will spare the client as much hassle and unnecessary embarrassment from the media as possible.

### Step 2 — The Team

Representing a celebrity in a high profile criminal prosecution often requires a team of professionals — not just legal experts. Although the transactional lawyer may not represent the client in the criminal case, he or she is often called on to assess the impact of the criminal proceedings on contracts the client may have for performances or endorsements. Additionally, most clients have agents and/or managers who will want to be involved in the decision-

making process because it affects the marketability of the client. Finally, the management team for a celebrity often hires a crisis-public-relations consultant to help the lawyer and client control the outflow of information to the media.

The crisis-public-relations consultant can be invaluable when it comes to spinning the news and portraying the client in the best possible light. There are only a few firms that do crisis P.R. Knowing who they are and having one on stand-by is good practice. That way you don't have to scramble around in the middle of the night trying to handle a P.R. crisis without the requisite professional on board. Interviewing potential crisis team players before there is a crisis is well worth the time.

When representing a celebrity in a high profile criminal case, the team must keep in mind that the disposition of the case is critical, but the public's "perception" of the disposition of the case may be even more important for the celebrity's future. For example, a client who is arrested for a shocking offense — such as child molestation — could ultimately be exonerated, yet still suffer a fatal blow to his or her career. Thus, a skilled crisis-public-relations person can keep a watchful eye on news flow to ensure that the client isn't winning the case — but losing in the court of public opinion.

Everyone on the team needs to be on the same page, to dispense with their own egos and personal agendas and to work for the betterment of the celebrity client. The celebrity client's lawyer must be in charge of the case — not the client's mother, his wife or his manager. But, the lawyer must be aware of how many people depend on the client and should be sensitive to the fact that their very livelihoods may depend on a successful outcome to the criminal case. Keeping the team together and working for the common goal is paramount.

### Step 3 — The Theme

In any case involving a celebrity, you need a theme for your defense. Is the case about the celebrity's dog attacking the neighbor? Or is the case about the secret life of the neighbor? The theme should be something simple like: "My client is not a child abuser and we are confident that he will be exonerated once all of the evidence is made public." It may be that what you are trying to establish is that the client is not guilty of the child abuse charges, for which you expect him to be exonerated, but may be guilty of other unspecified charges. In any event, you want to repeat your theme often and use words in a way that states the celebrity's position in the most positive manner — without making statements that later prove to be false.

In the initial stages, you probably won't know much about the case other than what the client tells you. Therefore, it is vital to maintain a trusting relationship with the celebrity client so that they will be completely honest with you. Unlike transactional matters, the specific criminal allegations are something you may never talk about with your client. Demand complete client candor so there are no surprises later in court.

In a normal case, a defense lawyer has some time to evaluate the evidence and prepare a response before taking any action in court, so the lawyer and client have more time to establish a trusting relationship. In a high profile case, the lawyer will probably be confronted by swarms of media when walking out of the jail, perhaps after having spoken with the client for the first time on the criminal charge. The lawyer will be inundated with questions about the client and the case and any statements he or she makes will be aired again and again, sometimes to the client's detriment if they later turn out to be untrue.

Clearly, the burden is on the lawyer to be very cautious in talking to the media and in declaring the theme. But, if the client has misled the lawyer, misstatements can have a devastating effect on the credibility of the lawyer and by implication, the client. If the lawyer loses credibility in the media, most pundits will assume that his or her client misled the lawyer. Therefore, the client loses credibility long before he or she has a chance to testify in court.

Reinforcing a strong rapport with a celebrity client is critical, because once you circle the wagons, you may not have another chance. You must do everything possible to secure your client's confidence in the theme from the beginning by explaining why it is critical for him or her to be completely truthful. This level of confidence can be achieved best if the transactional lawyer, criminal lawyer and crisis-public-relations consultant meet the celebrity client before an arrest takes place. That way if an arrest happens in the future, when the team shows up at the jail, the client will be happy to see familiar faces. The client will also be able to help develop the case theme with the team much faster.

#### Step 4 — Spin Control

Once you have the theme, you have the backbone of spin control. Developing the theme and reducing it to a few key talking points early on is essential. If the lawyer lacks experience in dealing with the media, there are countless media consultants available to train and critique the lawyer. Many have their own video equipment so the lawyer can practice dealing with potential questions and issues and have

the opportunity to review his or her performance in the comfort of a private conference room before taking it public.

As publicity escalates, your theme becomes your mantra: "My client is not guilty of owning a 90-acre pot farm and has never owned property in Mendocino."

The media are often looking for short catchy audio or video clips for the evening news or the morning talk shows. The more creative and proactive the lawyer is, the more likely he'll get the sound bite he wants on television or radio.

For example, if the lawyer says, "My client denies possessing cocaine on Easter Sunday," he's less likely to be on the evening news spreading the word about his client's innocence. On the other hand, if he says, "How is it possible that my client could possibly be charged with a crime when he was home painting Easter eggs with his three little children and the family cocker spaniel?" his chances increase dramatically. Be prepared with the sound bite you want to be

**D**evelop a theme and then  
move on to talking points.

heard and read. Many lawyers are frustrated with the knowledge that the media will take their language and chop it and change it to suit the nightly news. Indeed, the media and the law do have a strange relationship. However, once you accept that their medium is powerful and unlikely to go away, you can provide them with information they can use and that will also help you get your message across.

If the media like you and believe you're trying to be honest with them, they can have a constructive effect on the way your client is perceived in the public's eye. If you have an existing relationship with the media from past cases, they will already know you can be trusted and that you can be counted on to be forthright with them while still protecting your client from overexposure to the media.

In the political arena, politicians have the time to assemble focus groups to see how slight variations in language influence their constituency. Unfortunately, in criminal cases involving celebrity clients, not only do you not have time, you don't have a definable constituency. Fans of celebrities can sweep across the social landscape and represent every demographic factor.

The lawyer must keep in mind that when dealing with the media, the lawyer is playing to countless constituencies, including: (1) the public that pays

money to see the client and will, hopefully, remain enamored of him or her, (2) the public that may be called to sit as jurors deciding your client's fate, (3) the judge who will make critical rulings and may end up sentencing your client and (4) the district attorney, often an elected official who will be looking at the public's perception of the client when deciding how to proceed with the case. Taking care of all of these constituencies when dealing with the media is challenging — nevertheless extremely important.

Learning how to provide "telegenic" footage for television news broadcasts is essential. When facing the cameras and tackling spin-control, your case theme is a comfortable fallback position when asked an uncomfortable question at a press conference — even if your answer to an uncomfortable question doesn't answer the question. For example:

Question: "Are you saying, Mr. Lawyer, that your client was not caught in the back seat of his limousine with a teen-age prostitute?"

**P**repare, so that you can deal with the theatrics.

Answer: "My client is happily married, is not a child molester and is not guilty of these charges."

Question: "Do you have any comment on recent reports that your client is wanted for murder in three states?"

Answer: "Well, as you know, there are certain things I am not allowed to talk about, but I do want to remind you that my client is happily married, is not a child molester and is not guilty of these charges."

Clearly, this approach will not work if the lawyer sits down for an in depth interview with Larry King, but it will work on the courthouse steps where one can expect a 10-15 second sound bite to be seen on the evening news.

Before agreeing to sit down for an in-depth live interview, the lawyer should carefully consider his or her case and be clear on the purpose for such an interview. It is very flattering to have national news media asking to put you on television, but one must resist the temptation for personal aggrandizement and first decide if it will benefit the celebrity client. There may be difficult questions that will prove embarrassing for the lawyer and devastating for the client in the world of public opinion.

If the decision is made to participate in the inter-

view, carefully rehearse. Hire professional media consultants with video equipment so that you can see how you look on television and prepare for the toughest questions. When talking with media, every word counts and the lawyer must carefully analyze the forum in which his or her words will be broadcast.

### Rules of professional conduct

There are also ethical rules to consider in handling the media. In California, California Rule of Professional Conduct 5-120 governs the conduct of lawyers with regard to trial publicity. The general rule as stated in subsection (A) is that a lawyer may not make extrajudicial statements that one would expect to be disseminated by public communication "if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

As with all such rules, there are many exceptions. Subsection (B) allows, among other things, for a lawyer to publicly disseminate the nature of the charges, the identity of the accused, details about the arrest, a warning of danger concerning the accused person's behavior and whether or not an investigation is continuing. Since the district attorney and/or police have the right to make all of the foregoing public, fortunately Subsection (C) allows a lawyer to make a statement that a reasonable lawyer would believe is "required to protect a client from the substantial undue prejudicial effect of recent publicity" that was not initiated by the lawyer or the client. Thus, in most cases where the prosecution publicly announces the defendant's arrest and the charges involved, a diligent lawyer will often feel compelled to speak out publicly to protect the client from the prejudice inherent from his or her arrest announcement.

Often during the course of a criminal case there may be breaking news that you may want to release publicly before a newspaper or magazine runs the story. For example, you learn that a newspaper has found out about your client's prior conviction for a similar offense. This type of an announcement should often be disclosed on a live television program such as "Today" or "Good Morning America," because then you know that the announcement will not be edited as happens in the editing room of a newspaper or local television station which only wants you on the air for a limited amount of time.

I had no specific training in dealing with media, but over the years, I have learned to cope. If you represent celebrities, try to prepare yourself in advance for criminal matters, so you can effectively

deal with the theatrics of the situation. By representing a celebrity, you too are in show business.

#### Step 5 — Implications: good news/bad news and the goal

Not every charge is what it seems. There are implications to certain charges that might be livable for one person, but unthinkable for a celebrity. For instance, team members who are not lawyers may suggest that the client agree to plead guilty to a lesser charge when you, as a lawyer, know that this charge requires mandatory narcotics or sex offender registration or deportation, any of which may be fatal to your client's career.

For example, the crisis-public-relations consultant may be OK with mandatory narcotics or sex offender registration and the client might imagine this as simply filling out a "Mickey Mouse" form, but the full legal implications of such registration must be presented to the team in order to make intelligent decisions.

The team must decide what the big-picture case management goal is. What can the team live with and what is going to cause the least damage to the celebrity client in the long-run? Often this is a discussion where the lawyer will have to educate the team members. It is also a point of potential team conflict. Strong leadership is required so the team represents the celebrity client by making a consistent response in court and in the public arena.

#### Step 6 — Image: court and the camera

With a celebrity, the lawyer has to always be aware that image is most important. As with the theme, a determination of what image is being presented will affect the overall goal. In high-publicity cases, the whole world may be watching. I recommend that high-profile celebrity clients in criminal cases should always project a low-key, respectful image.

Furthermore, the lawyer and client should present a careful image when they are together. If the celebrity client is a woman and you are a male lawyer, do you hold her hand? If you extend comfort and put an arm around a woman's shoulders, will you be considered too intimate? If the client is a man and you slap him on the back, will some journalist describe the two of you as good-ol' boys?

My rule is that if you like your client, it's OK to show your feelings and it's OK for the client to show his or her feelings to the world. One of the most common mistakes a lawyer can make is to let a client cover his or her face when dealing with the media. The public loves celebrities and hiding the celebrity client's face when being photographed makes the client look guilty.

#### Step 7 — Make it real

Even though your client may be a living legend, he or she is also a person with neighbors, family and friends. When it is time to go to court, those people who actually know your client may want to show their support.

If you are constantly whisking your client through separate entrances to avoid media, the media is not acknowledging those friends. If friends and family want to make signs and placards demonstrating their support, that's even better. Remember that everyone connected with the case, including the judge, the prosecutor and all of those potential jurors, watches news broadcasts. Judges and prosecutors are human and it makes it much harder for them to be tough on your client when they see how well respected and loved your client is in their neighborhoods and communities. Even those jurors who have not been following the case in the news may have some gut-level feeling about whether or not they like your client

**D**o they want to teach your client 'a lesson'?

based solely on the slant that the news media has taken toward your client.

#### Step 8 — Protecting the beloved mystique

Often law enforcement decides, even before the case begins, that your client is going to be made "an example." Sometimes, when a celebrity is perceived as "cocky," the media and the jury decide that the celebrity defendant "needs to be taught a lesson."

The celebrity client's lawyer should make sure that the media and the public recognizes that your client deserves no more and no less from the criminal justice system than any other civilian. You should strive to make it easy for judge and jury to give your celebrity client a fair trial. Never let yourself or the criminal justice system forget that underneath the fame is a citizen who may simply have made a mistake.

The more you allow your celebrity client the freedom to be human, to drop the trappings that are so rigorously demanded by the entertainment and sports industries, the greater the chance for fairness in the criminal justice system. When a lawyer treats a celebrity client like a real person, the client may lose some of the glitter, but they will also feel more relaxed throughout the process. When the lawyer treats the client the same as any other person, the

*(continued on page 23)*

# Plaintiffs in the Stands

GIL FRIED

**A**ssumption of risk and the limited duty rule have been the traditional defenses against plaintiffs injured in the stands by projectiles leaving a baseball field.<sup>1</sup> Numerous articles have been written and cases decided supporting the notion that if a projectile hit you, it was your own bad luck.<sup>2</sup>

Are all these cases slam dunks for the defense? Based on changes inherent in professional sports, the author raises several strategies for forming pleadings that can help change the traditional view afforded to such cases. These changes are based on the inherent changes in the sport spectator viewing style, the nature of fan marketing, and the changes developed in stadium safety materials. This article first provides a basic overview of how courts normally rule in these cases and how the courts might be primed for a change. The article then examines techniques for crafting the pleading to hopefully avoid summary judgment and allow the case to proceed to a jury.

## The law

### Assumption of risk

Assumption of risk has been the hallmark for most defense assertions in spectator injury cases. “[n]o one of ordinary intelligence could see many innings of the ordinary league [baseball] game without coming to a full realization that batters cannot and do not control the direction of the ball.”<sup>3</sup> Another court wrote “[v]isitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation and may be held to assume the risk.”<sup>4</sup> Because foul balls are such a common occurrence and anyone attending a game should know about balls entering the stands, spectators assume the risk of being hit by a ball or bat if they do not seek protection.

### Limited duty doctrine

Courts have opted to provide a greater degree of protection for team owners and facilities through providing them with a limited duty. Under the limited duty doctrine a team would only be liable for a spectator’s injury if the team had failed to provide appropriate screening in the most dangerous part of the stadium for those that might reasonably want to sit in the screened area.<sup>5</sup> Teams can safely operate their stadium and know that they will be protected if they have an adequate amount of screened seats in the most dangerous areas of the stadium and the screen is in good condition.<sup>6</sup>

### When plaintiffs prevail

The cases in which plaintiffs have prevailed traditionally center around the screen not being long/high enough or the screen being in poor physical condition.<sup>7</sup> Other courts have allowed plaintiffs to recover — such as two cases in Illinois in the 1990s — however these loopholes have often been closed through legislative means.<sup>8</sup>

The initial cases attempted to defeat the limited duty rule by claiming that inadequate warnings prevented fans from fully appreciating the risk of injury from foul balls. For example, spectators can claim that if they had been warned they might have sat in a screened section. However, most courts have been holding that under a negligent failure to warn theory, proximate cause cannot be established unless it is shown that the warning, if adequate, would have prevented the injury by altering the spectator’s conduct. If the plaintiff sat in the seat regardless of any warning, a “lack of warning claim” would fail.<sup>9</sup> If inadequate signage cannot abrogate the limited duty rule, it is possible that changes in the game — and how the game is watched and marketed — might pierce the armor afforded by the limited duty rule.

### Viewing patterns

The cases highlighted as reference points for most court opinions are frequently more than 50 years old. For example, in the recently published case *Benejam v. Detroit Tigers Inc.*, the court referenced cases from 1961, 1953, 1951, 1950, 1931, 1914 and 1908.<sup>10</sup> While precedents are essential in common law, the beauty of common law is its ability to adapt to changing times. The times — as they relate to sport viewership — have significantly changed, but most courts have yet to embrace this change.

Pictures from the 1920s to the 1960s showed fans in their suits sitting nicely and watching a game. That is no longer the case. Fans come in numerous shapes, sizes, outfits and mannerisms. Fan watching is one of the entertaining aspects of the event attendance experience.<sup>11</sup> Fans are enthralled by a comprehensive experience ranging from doing the wave to locating vendors, to watching other distractions. There technically is no problem with such activities that are all part of the event’s experience.

However, by watching all these visual stimuli, a spectator might not be able to fully concentrate on the game. Fans can suffer from sensory overload. While fans of yes-

teryear could be held responsible for their own assumption of risk associated with being hit by a projectile leaving the field, such a finding was predicated on the fact that the injured fan was watching the game rather than being distracted and turning their attention away from the game. While it is easy to make such a statement and a judge and/or jury can be shown footage of crowds from various decades to highlight the difference, this argument needs another element to really make it a valid claim.

### Distraction theory

If a fan is reading their game program or is “people-watching,” and they are injured by a foul ball — it is their own actions that distracted them from the game on the field and the inherent risks associated with that game. For example, if a fan were watching a blimp rather than the game, the distraction would be self-initiated since the blimp was not necessarily brought to the stadium by the team, but possibly by an advertiser. A murkier case would exist if the fan were injured while reading the game program, which sale benefited the team. But fans do not necessarily need to read the program at the game.

A different result occurs if the team uses a marketing instrumentality that intentionally or indirectly distracts the fan. Thus, in *Kozera v. Hamburg* (1972) the court concluded that a spectator assumes the risk inherent to the baseball game “so long as those risks are not unduly enhanced by the owner of the ball park.”<sup>12</sup> This concept has been referred to in other cases as the distraction theory. In a case where a softball player was injured by an errantly thrown ball, the court concluded that the “distraction theory” provides that for the facility owner to be liable the owner must have created the distraction and not be self-induced by the plaintiff’s lack of attention to the obvious risk.<sup>13</sup>

### The risk of the unknown

The concern associated with distractions was reinforced by cases such as *Brown v. San Francisco Ball Club Inc.* (1950) where the court held that spectators subject themselves to certain risks necessarily and usually incident to and inherent in the game.<sup>14</sup>

Thus, it has been held that a spectator might not know that there is a risk of being knocked over by fans scrambling for a foul ball since that is not an inherent risk in the game of baseball and it is not common knowledge that these injuries occur especially if no one had previously been injured in that manner.<sup>15</sup>

Just because an element is new or unknown does not immediately obviate the limited duty rule. In several cases in the 1930s and ’40s, courts held that night baseball games held under lights do not represent an extraordinary hazard as the lighting does not materially alter the

game, even though it might require additional vigilance compared with day games.<sup>16</sup> Thus, the courts appear to examine whether extemporaneous activities outside the inherent activities of a baseball game affect a spectator’s ability to assume the risk of injury from foul balls.

Whether intentional or unknown risks, the manner in which games and ancillary activities are presented needs to be scrutinized. If the ancillary activities in fact enhance the risk of injury, then those activities should be the focal point of plaintiff claims and for defendants’ risk management planning.

### Fan marketing

The critical element that should help a plaintiff’s case is the fact that many of the distractions inherent in the entire experience are developed, initiated and deployed by the team. The team uses such efforts to entertain the spectator and either enhances the viewing experience so the patron will have a good time and return for a subsequent game or to get the patron to spend more money. Either way, the team is using a marketing technique to increase its potential revenue.<sup>17</sup> While these elements are

**B**aseball is secondary;  
entertainment is No. 1.

not technically necessary for the game to be played, they enhance the game experience from a marketing perspective. In sports marketing circles the technique is called the “sizzle.” The game itself is the “steak” (core element) and all the ancillary activities (extended elements) are the “sizzle” that make the “steak” that much more enjoyable.<sup>18</sup>

The “sizzle” has increased in intensity as teams are maneuvering through the clutter of entertainment events to attract a spectator’s dollars.<sup>19</sup> As stated by one assistant general manager for a minor league team: “[B]aseball is secondary; entertainment is number one.”<sup>20</sup> Another executive echoed those sentiments: “we don’t target them (baseball fans) — we market to those who may have no interest in the game and hope they have such a great time that they’ll become baseball fans.”<sup>21</sup>

Based in part on a 1989 Professional Baseball Agreement that set forth minimum facility standards for ballparks, major and minor league parks are being rebuilt to accommodate a more family friendly atmosphere.<sup>22</sup> This atmosphere can be created with such amenities as picnic areas or playgrounds designed so parents can watch both their kids and the game at the same time.<sup>23</sup> These and other areas are often referred to as “alternative areas of revenue,” since they are designed to generate revenue and bring in the nontraditional fans who go for the experience, not the game.<sup>24</sup>

Examples of distracting, but revenue-generating areas of team/facility owned or operated activities, which can and do distract fans, include:

- video display monitors on the back of seats,
- food ordering displays attached to seat or accomplished with Palm Pilots or similar devices,<sup>25</sup>
- binoculars attached to the seats that can be rented for the game,
- various contests on and off the field
- various entertainment activities such as vendors using humorous techniques to deliver food (hot dog cannons),
- outfield distractions such as hot tubs, carousels, trains, slides and a number of other attractions,
- sideline barbecue areas or picnic tables where some individuals are seated with their backs to the game,
- cheerleaders and sideline-walking entertainers and
- team mascots designed to provide strolling entertainment.

The new Comerica Park in Detroit was opened in 2000 and contained the following features:

- a 10-story scoreboard including large screen video display, growling mechanical tigers on the scoreboard,
- a fountain that produces a liquid fireworks type display to changes in music and lights,

 **ascots are needed to make money, not to play the game.**

- a Ferris wheel ride with baseball-shaped cars and
- a baseball-themed carousel.<sup>26</sup>

The planned new Padres ballpark in San Diego is using technology to “enrich the game day experience for fans.”<sup>27</sup> Fifteen different technological applications are being installed including data wireless, fan applications, high speed data-wired, smart cards, kiosks, community intranets, ATMs and other features. All these innovations are designed to make the facility operate more efficiently, but also help make the game day experience more enriched.

The new minor league park in Reading, Pa., GPU Stadium, has a \$1.4 million pool pavilion with a 1,000-square-foot multi-level heated pool included, water cannons and water falls. The pool is part of a picnic area off the right field and the picnic area also boasts 31 tables, each with its own closed-circuit TV.<sup>28</sup>

### Can activities and distractions affect liability?

The answer is yes. In one noted case, the Rancho Cucamonga Quakes’ mascot — a dinosaur — did his dance to entertain the fans.<sup>29</sup> Unfortunately during his

gyrations his tail bumped a spectator. That spectator turned around to see what had happened. At that instance, the spectator was hit in the head by a foul ball. The team brought a summary judgment motion, which was granted by the trial court based on the limited duty rule. The spectator appealed based on the fact that he was distracted.

The appellate court overturned the summary judgment ruling and remanded the case to the trial court. In its ruling, the appellate court concluded that a jury should determine whether the spectator should have assumed the risk based on the fact that he was distracted. The court specifically held that a triable issue of fact remained, “namely whether the Quakes’ mascot cavorting in the stands and distracting plaintiff’s attention, while the game was in progress, constituted a breach of that duty.”<sup>30</sup>

The appellate court’s decision was based in part on the fact that “mascots are needed to make money ... but are not essential to the baseball game.”<sup>31</sup> The court focused on the fact that the “game” of baseball could be played without a mascot. Since a mascot is not integral to the game, by introducing the mascot into the stands the team was in fact changing the viewing environment (increasing the inherent risk to fans) and creating a distraction that does not benefit the “game” itself. The court even pointed out that the mascot could have been on the sidelines and avoided contact with the fans and this accident could have been completely avoided because the fan would not have been distracted from the “playing field.”<sup>32</sup>

Other cases or incidents have produced similar results. One such case involved a young boy who was hit by a line-drive foul ball during batting practice before a Florida Marlins game.<sup>33</sup> He was by the bullpen with a group of other children as part of a special promotion. His lawyer successfully argued that the pre-game program was incidental to the game, diverted his attention from the field and the program should not have taken place during batting practice.<sup>34</sup> The decision was appealed to the Court of Appeal of Florida, Fourth District, where the court in *South Florida Stadium Corporation v. Klein* (2001) affirmed the lower court’s verdict.<sup>35</sup>

Other cases have also arisen based on inappropriate or negligent performance of activities ancillary to the game. *Gil-Rebollo v. Miami Heat* (1996), was another mascot case that produced a plaintiff’s award.<sup>36</sup> The plaintiff was physically taken onto the basketball floor against her wishes. The case turned on jury bias and was remanded for a retrial, but demonstrated that ancillary activities present a potential concern beyond the distraction theory. In another case involving a Florida team, the Marlins’ and their mascot were sued for personal injuries to a fan. The fan claimed he suffered permanent eye damage when the mascot used an air cannon to fire a rolled-up T-shirt into the stands.<sup>37</sup>

An injured spectator, whose view is blocked by a foam finger, hat or other objects, could raise numerous additional claims. If the plaintiff could not clearly see the field through no fault of their own, how can they still be assuming the risk? Another potential concern entails individuals moving down to the unprotected area by the dugouts in order to participate in between-innings promotional events. If a fan were asked to move from a protected seat down to an unprotected seat, they might have a valid distraction claim since they would not have moved, but for the team asking them to move.

While distraction can be raised concerning someone who was not watching the game, not every plaintiff is in fact distracted. What claim can a plaintiff raise if they were not distracted? The two options include not having a sufficient number of screened seats or that the screens that are currently used are not technologically sufficient to provide adequate protection.

### Premium seats

Case law has clearly established that a baseball stadium needs to provide enough screened seats for those who might wish such protection. In *Kavafian v. Seattle Baseball Club Ass'n*, the court concluded that when a patron "could have chosen among a number of vacant seats in the screened portion of the grandstands ... and was injured by a ball, he cannot recover, having been negligent or having assumed the risk."<sup>38</sup> It is assumed that in the early part of the 20<sup>th</sup> century a fan could move to vacant seat behind the screen if they wanted that protection and a seat were available. That is not necessarily the case today. Defendants can be asked if their security personnel allow fans to move from an unscreened seat to a protected seat (especially if there is a disparity in ticket prices).

This concern is especially acute if balls hit into the unscreened seats are traveling faster than those balls hit directly behind the screened home plate area. An expert in physics can be retained to examine the speed by which a ball might have been traveling (especially if there is television/video coverage of the incident). Traditionally balls hit straight back are hit from underneath the ball and take off some of the speed. In contrast, line-drive fouls (most frequently right down the foul lines) are normally hit flush and send the ball at a faster speed down the lines and into the stands.<sup>39</sup>

Empirical or other data can be used to show that the types of balls or bats increase the potential risks compared to the equipment from before the 1960s. For example, in 1975 there were only 2,698 home runs hit in that season while there were 5,693 home runs hit in 2000.<sup>40</sup>

A baseball stadium needs to examine the location where foul balls are primarily landing and whether enough protected screened seats are really available in

the "most dangerous" locations and for those that might reasonably expect to obtain such seats. These concerns raise an issue with another marketing technique that has changed the nature of viewing habits: premium seats.

Premium seating started in the late 1980s and has been implemented in almost every sports facility.<sup>41</sup> Premium seats are traditionally located in what is the most desirable location for viewing the event. In some sports it is going to be in the mid-field or mid-court section. In baseball it is located right behind home plate. The area between the first and third base lines and directly behind home plate is traditionally the area in a stadium where there exists the greatest likelihood of foul balls or thrown bats entering the stands. This location is often the most protected and most of the screened seats are in that area.

Comerica Park has 3,000 premium seats called "On-Deck Circle" seats at the bottom row of seats encircling the area immediately behind the first and third base lines, requiring a payment in addition to the regular ticket price. The problem with this arrangement is that there exists an entire group of individuals who will not have access to these screened seats because the seats are reserved. Spectators can be precluded from these sections based on ticket price, long-term contracts to secure seat location and event-security personnel. Fan migration is a serious concern and those who pay \$100 per ticket do not want someone who pays \$10 for a ticket sitting next to them.

That is one reason why ushers or security personnel often spend more time patrolling these areas compared to the "nose bleed" sections.<sup>42</sup> Fan migration also represents a safety concern for overcrowding and that is one

**F**an migration among seats  
is a safety concern.

reason why the National Fire Protection Association has mandated a standard of one trained crowd manager/supervisor for every 250 fans in a stadium.<sup>43</sup> However, plaintiffs claiming overcrowding or poor seating arrangements have traditionally not fared well in court.<sup>44</sup>

Thus, while a facility is supposed to have enough screened seats for those that might reasonably be expected to request them, especially in the most dangerous areas, the individuals who might want such protection might have a hard time in fact obtaining such a seat without paying a significantly higher price. The type of seat made available can also produce a liability concern.

Most premium seats are preformed molded plastic individualized seats. However, some stadiums have plank

seats where 10-20 fans can sit on each row. These seats are usually numbered and can be protected by screens. However, if they are not protected, one argument for an injured plaintiff could be the amount of space available for patrons.

Traditionally plank seating allowed approximately 20 inches of width for comfortable seating. In order to fit some additional patrons into the stands, stadium operators have reduced the space available for each patron. For example, the University of Wisconsin reduced the space available from 18 inches to 17 inches in the general seating area of Camp Randall Stadium.<sup>45</sup> Besides potential discomfort, cramped seats can limit a fan's ability to watch a game, react to foul balls or even be able to watch a game if they disabled (such as being extremely obese).

Thus, a plaintiff should examine the number of available seats in the stadium, the number that are screened, the number and location of the injuries, the prices of seats around the lower bowl (closest to the field) and the number of seats not available to everyday fans because of pre-existing ticket contracts. Another potential concern could entail whether enough screened seats exist for dis-

**S**o just where are the most dangerous seats?

abled fans or if the accommodation seating areas are all exposed sections. These facts can help determine whether enough seats were available for fans in the most dangerous area of the stadium.

### Safety solutions

Screening has changed significantly from the hemp-woven screens used years ago that often had deterioration or other wear and tear problems that needed to be examined. Today, screens are made with lightweight polymers that are much thinner than the gauges used in the past with a longer life and stronger tensile. For example, one company, Stan Mar, offers several types of nets, mainly nylon nets of different sizes dipped in a UV protection solution.

Some nets are made from Spectrafiber, manufactured by Allied Signal, which is considered by some to be the new standard in the industry for professional stadiums. The netting is very strong and was tested this past year when a drunk fan fell in Comiskey Park and landed on the net above the plate. The netting held his 200+ pound body and he was safely removed.<sup>46</sup> Several of the stadiums that have recently installed these nets include:

Professional baseball:

- Bank One Ballpark, Phoenix

- Busch Stadium, St. Louis
- Comiskey Park, Chicago
- Edison, International Field, Anaheim, Calif.
- Kauffman Stadium, Kansas City, Mo.
- Pacific Bell Park, San Francisco
- Turner Field, Atlanta, and
- stadiums under construction in San Diego, Denver and Seattle

College baseball:

- Brest Field-Jacksonville University, Jacksonville
- Frank Meyers Field-Kansas State University, Manhattan, Kan.
- Harmon Stadium-University of North Florida, Jacksonville
- McKethan Stadium-University of Florida, Gainesville

Minor league baseball:

- Binghamton Municipal Stadium, Binghamton, N.Y.
- Cashman Field, Las Vegas
- Dunn Tire Park, Buffalo, N.Y.
- Louisville Slugger Field, Louisville, Ky.
- Raley Field, Sacramento, Calif.
- Sec Taylor Stadium, Des Moines, Iowa
- Sioux Falls Stadium, Sioux Falls, S.D.
- Tropicana Field, St. Petersburg, Fla.

The vice president of marketing at Stan Mar estimates that most facilities run the nets 20-30 feet high and mainly end the nets at the start of the dugouts, with the wall closest to home plate.<sup>47</sup> Some fields try to draw a line from third base across the plate and end the net where that imaginary line enters the stand. The same approach is used for the other side of the diamond. This location scheme was highlighted in a major expose, but the article and diagrams went on to show that this area was not the most dangerous. Rather the most dangerous areas were down the first and third base line for a significant distance past the dugouts.<sup>48</sup>

Plaintiffs should examine existing potential screen standards in terms of the extent of safety coverage. Standardization is difficult because almost every field is different in terms of the seating configuration or the distance the stands are from the field. However, the American Society for Testing and Materials (ASTM) has established a standard guideline for ball field fences that requires:

6.5.1 [T]he top of the fence shall be a minimum of 8 feet, 0 inches (2.44m) above grade or a greater dimension that ensures protection of spectators from a fouled line drive or related trajectory.

6.7.4 [T]he backstop height and width may vary depending on the type of ball being played, the size and height of the spectator area around it. ... The minimum width of the panels is dependent on the structural design supporting the chain-link or net fabric.

7.3 [T]he spectator fence shall be located where spectators will congregate to watch the game or in front of bleachers of an 8-foot height or of a sufficient height to protect spectators at the highest point of the bleachers.<sup>49</sup>

Very few stadiums meet this height requirement, especially in any grandstand areas that extend beyond the dugouts. However, some fields also run the net 3-5 feet above the dugout and then end all their screening.<sup>50</sup> The lack of sufficient screening was identified in one case where former California Angels' pitcher Matt Keough was hit by a ball while in his team's Scottsdale Stadium dugout. The suit was settled out of court and one month after the accident netting was placed at the top of the dugout to protect fans and the screen behind home plate was increased from 17 feet to 26 feet.<sup>51</sup> Furthermore, a similar incident launched the Don Zimmer rule instituted by George Steinbrenner after Coach Zimmer was hit in the head by a foul ball and requires Zimmer to wear a helmet while in the dugout.<sup>52</sup>

Besides height, screen length is an important consideration to determine sufficiency. In addition to the standard calculation of the percentage of seats behind the backstop and the expected percentage of fans that might want to have such protection, the screen length should be examined. Major league baseball fields average from 50 feet of protection to 250 feet. Some teams provide less protection, such as the Oakland Coliseum, which has 47 feet of screening.<sup>53</sup> Some fields try to add an even greater amount of protection. Florida State University purchased 275 feet of the netting because they wanted more of the stands to be protected.<sup>54</sup>

## Conclusion

While numerous lawyers have stayed away from spectator injury cases for fear of running afoul of the limited duty or assumption of risk doctrines, there might exist some opportunities to get around these hurdles. If a lawyer can uncover:

- significant activities designed to distract fans,
- fans had limited or no choice in obtained protected seats and
- that safer screening options are available, there is a possibility that we will see more opportunities for settlement or cases being allowed to go the jury.

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*Gil Fried (gilfried@earthlink.net) is an associate professor in the Management of Sports Industries Program at the University of New Haven and of Counsel, Maher & Murtha, LLC, Bridgeport, Conn. He has written extensively on sport law related topics including three books, has spoken at numerous industry related conferences, serves as general counsel for several sport facility associations and has been an expert in numerous spectator related cases*

## Endnotes

1. See generally Gil Fried, *Safe at First* (1999), Marshall Tanick and Martin Munic, "Baseball Law in Minnesota: From Foul Balls to Family Court," *The Bench & Bar of Minnesota*, April 1988, 17-22. See also, *Ratcliff v. San Diego Baseball Club of the Pacific Coast League*, 81 P.2d 625, 626 (D.C. Appl, 4th Dist, CA, 1938)
2. See id. Francis Gregory II and Arthur Goldsmith, "The Sport Spectator as Plaintiff," *Trial*, March 1980, 26-29. See generally Walter Champion, *Sports Law* (1993).
3. See *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 240 NW 903, 904 (MN, 1932).
4. See *Blakely v. White Star Line*, 118 NW 482 (??, 1908).
5. See Champion, *supra* note 2, at 105-107.
6. See Fried, *supra* note 1 at 314.
7. See Fried, *supra* note 1 at 316. See also *Edling v. Kansas City Baseball & Exhibition Co.*, 168 S.W. 908 (K.C. C. Appl., MO 1914).
8. See Fried, *supra* note 1 at 311-2. *Coronel v. Chicago White Sox, Ltd.*, 595 N.E.2d 45 (Ill.App.1 Dist. 1992).
9. Gil Fried, Robin Ammon, Jr., "What is Appropriate Signage for the Sports Industry." 11 J. *Legal Aspects of Sports*, 401-428 (2001).
10. *Benejam v. Detroit Tigers Inc.* (No. 217727, Wayne Circuit Court, LC No. 96-618356-NI, July 10, 2001).
11. Bernard J. Mullin, Stephen Hardy, William A. Sutton, *Sports Marketing*, second edition, 58 (2000).
12. *Kozera v. Hamburg*, 337 NYS.2d 761 (S.C. 4th NY 1972).
13. *City of Milton v. Broxon*, 514 So.2d 1116 (Fla. App. 1987).
14. *Brown v. San Francisco Ball Club Inc.*, 222 P.2d 19 (1st Dist., CA 1950). See also *Hunt v. Thomasville Baseball Co.*, 56 SE 2d 828 (CA, GA 1949) and *Neinstein v. Los Angeles Dodgers Inc.*, 186 Cal.App.3d 176 (2nd Dist. CA 1986).
15. *Lee v. National League Baseball Club*, 89 NW 2d 811 (SC, WI 1958).
16. See generally, "Liability to spectator at baseball game who is hit by or injured as a result of other hazard of game," 91 *A.L.R.*3d 24, Sect. 2b, citing *Hummel v. Columbus Baseball Club Inc.* 49 NE 2d 773 (10th Dist., CA, OH 1943). The A.L.R. specifically encourages counsel for spectators to look for unusual or noncustomary activities surrounding the circumstances of plaintiff's injuries. *Id.*
17. *Id.* At 217
18. *Id.* At 118. See generally *Mullin*, *Supra*, note 11.
19. Tom Verducci, "Safety Squeeze," *Sports Illustrated*, April 1, 2002, at 64-65
20. Kelli Anderson, "Not So Minor Attractions," *Recreation Management*, March 2002, at 34-41.
21. *Id.* at 37.
22. *Id.* at 38.
23. *Id.* at 38.
24. *Id.* at 39.
25. "Palm Pilot Enters the Sports Arena," *Connecticut Post*, Oct. 1, 2000, at F5.
26. [http://tigers.mlb.com/NASApp/mlb/det/ballpark/det\\_ballpark\\_history.jsp](http://tigers.mlb.com/NASApp/mlb/det/ballpark/det_ballpark_history.jsp), Oct. 2, 2001.
27. "Padres' BAT-lab hits out for game day technology," *Stadia*.
28. Kelli, *Supra* note 18 at 40.
29. *Lowe v. California League of Prof. Baseball*, 56 Cal.App.4th 112 (4th Dist., Div II, CA 1997)

(continued on page 18)

# the ART of the DEAL

American Bar Association  
Forum on the Entertainment and Sports Industries



## 2002 Annual Meeting

October 11-12 | Opryland Hotel | Nashville, TN

### PROGRAM schedule

**Thursday, October 10, 2002**

**3:00 pm – 6:00 pm**  
**Registration**

**Friday, October 11, 2002**

**7:00 am – 5:30 pm**  
**Registration**

**8:00 am – 9:00 am**  
**Continental Breakfast**

**8:45 am – 9:45 am**  
*Law Student and New Lawyer  
Orientation to Entertainment and  
Sports Law: Your Questions Answered*

**Richard J. Greenstone,**  
Moderator  
*Law Office of Richard  
J. Greenstone*  
San Francisco, CA

**Nicole Harvat**  
*Lerch Sturmer, LLP*  
San Francisco, CA

**Robert G. Pimm**  
*Law Office of  
Robert G. Pimm*  
San Francisco, CA

**8:45 am – 9:45 am**  
*Legal Ethics for Entertainment Lawyers,  
Including their Regulation When Acting  
as Sports and Talent Agents*

**Kenneth Abdo**  
*Abdo, Abdo, Broady &  
Satorins, P.A.*  
Minneapolis, MN

**David M. Given**  
*Phillips &  
Erlewine LLP*  
San Francisco, CA

**10:00 am – 11:15 am**

**MUSIC New Media Deals**

**Laverne Evans**  
*BMG*  
New York, NY

**Robert A. Rosenbloum**  
*Greenberg Traurig*  
Atlanta, GA

**Kirk T. Schroder**  
*LeClair Ryan*  
Richmond, VA

**Jim Talbott**  
*Talbott & Talbott*  
Santa Monica, CA

**Leslie Jose Zigel**  
*BMG Latin America*  
Coral Gables, FL

**Lon Sobel**  
*Entertainment  
Law Reporter*  
Santa Monica, CA

**John Simson**  
*Sound Exchange*  
Washington, DC

*(program continued on next page)*

Dear Colleague,

We look forward to seeing and visiting personally with you at the American Bar Association's Forum on the Entertainment and Sports Industries annual meeting Friday and Saturday, October 11th and 12th, 2002. Our meeting this year will be held at Opryland Hotel in the country-music capital of the world, Nashville, Tennessee.

This year we have maintained the expanded program on Friday to include literary publishing, merchandising, theater, and visual arts, in addition to the usual full day programs on music, sports, and motion pictures and television. The theme of this year's meeting is *The Art of the Deal*, with an emphasis on the transactional deal-making in each of these fields. The plenary session for all attendees on Saturday will focus on issues affecting deal-making at the industry-wide level, with top practitioners and experts speaking to how changes in our field are transforming the way business is done in the entertainment, arts and sports industries.

We are pleased to offer meeting attendees the opportunity to purchase excellent tickets to the Phantom of the Opera being performed at the Tennessee Performing Arts Center. Please contact Laura Gutt at [guttl@staff.abanet.org](mailto:guttl@staff.abanet.org) for additional information on how to purchase tickets. In addition, a music industry showcase is scheduled for Friday night. Information on that event will be provided to you at a later date.

As you can see, the Governing Committee has assembled an outstanding group of industry and legal experts in the field of entertainment, arts and sports law who come to us from all over the country. We believe that the programs and the plenary session will be attended by a variety of practicing attorneys, business leaders and corporate executives that represent and lead the entertainment and sports industries.

We hope you will join us for what promises to be an excellent program and a wonderful gathering of entertainment, arts and sports law colleagues.

On behalf of the Forum's Governing Committee, we look forward to seeing you in Nashville.

Sincerely,

**David M. Given**  
Forum Chair

**If you have questions,  
or would like to request  
a meeting brochure  
please call the Forum at  
312-988-5666 or email  
[guttl@staff.abanet.org](mailto:guttl@staff.abanet.org).**

**Register online at: <http://www.abanet.org/forums/entsports/programs.html>**



# PROGRAM schedule

## 2002 Annual Meeting

October 11-12 | Opryland Hotel

### MOVIE/TV

*Negotiating Back End Deals in the Motion Picture and Television Industries*

**Samuel Bramhall**  
Senior Vice  
President, Business  
& Legal Affairs  
*Twentieth Television*  
Los Angeles, CA

**Michael Plonsker**  
*Alschuler Grossman  
Stein & Kahan*  
Los Angeles, CA

**Peter Dekom**  
*Dekom & Associates*  
Santa Monica, CA

### LITERARY PUBLISHING

*Multi-Million Dollar Book Advances: The Art & Science Behind The Deals*

**Robert Barnett**  
*Williams & Connolly*  
Washington, DC

**Edward J. Klaris**  
*General Counsel  
The New Yorker*  
New York, NY

**Jon Fine**  
*Vice President  
and Asst.  
General Counsel  
Random House*  
New York, NY

**Michael I. Rudell**  
*Franklin Weinrib  
Rudell & Vassallo*  
New York, NY

**11:15 am – 11:30 am  
Break**

**11:30 am – 12:45 pm**

### MUSIC *Indie Deals*

**Orville Almon**  
*Zumwalt, Almon  
& Hayes*  
Nashville, TN

**Peter Strand**  
*McBride Baker  
& Coles*  
Chicago, IL

**Paul Brown**  
*Broken Bow Records*  
Nashville, TN

### SPORTS *The State of the Law*

**Prof. Robert Covington**  
*Vanderbilt Law  
School*  
Nashville, TN

**The Hon. Bart Gordon (Invited)**  
*Member, United  
States House of  
Representatives  
(D-TN)*  
Washington, DC

**Philip R. Hochberg**  
*Verner Liipfert  
Bernhard McPherson  
& Hand*  
Washington, DC

**MOVIE/TV *Motion Picture Soundtrack Albums – The Motion Picture Company and Record Company Deal***

**David M. Given**  
*Phillips &  
Erlewine LLP*  
San Francisco, CA

**Nancy McCullough**  
*Capitol Records*  
Hollywood, CA

**Robert Holmes**  
Former Executive  
Vice President  
*Sony Pictures*  
Los Angeles, CA

### MERCHANDISING *Making the Licensing and Merchandising Deal*

**William R. Bradley, Jr.**  
*Glanker Brown*  
Memphis, TN

**Jean S. Perwin**  
*Law Office of  
Jean S. Perwin*  
Miami, FL

**Horace G. Dawson**  
*Akerman Senterfitt*  
Orlando, FL

**12:45 pm – 2:00 pm  
Luncheon**

**2:15 pm – 3:30 pm**

### MUSIC *Major Label Deals and Renegotiations*

**Bertis Downs**  
*University of Georgia  
School of Law*  
Athens, GA

**Kathy Woods**  
*BMG*  
Nashville, TN

**Robin Mitchell Joyce**  
*Bass Berry & Sims*  
Nashville, TN

### SPORTS *Coming to Town – Once a Year and For Good*

**Richard Anderson**  
*PGA Tour*  
Ponte Vedra  
Beach, FL

**Clark Griffith**  
*Law Offices of  
Clark Griffith*  
Minneapolis, MN

**Jack Diller**  
*Nashville Predators*  
Nashville, TN

### THEATER *Broadway to Your Town: The Legal "Road"*

**Elliot H. Brown**  
*Franklin Weinrib  
Rudell & Vassallo*  
New York, NY

**David Lazar**  
*Clear Channel  
Entertainment*  
New York, NY

**Henry E. Hildebrand III**  
*Lassiter Tidwell &  
Hildebrand*  
Nashville, TN

**3:30 pm – 3:45 pm  
Break**

**3:45 pm – 5:00 pm**

### MUSIC *Mega Deals and Mega Trends*

**Jay L. Cooper**  
*Greenberg  
Traurig, LLP*  
Santa Monica, CA.

**Ken Levitan**  
*Vector Management*  
Nashville, TN

**Joel A. Katz**  
*Greenberg Traurig, LLP*  
Atlanta, GA

**W. Michael Milom**  
*Bass Berry & Sims*  
Nashville, TN

### SPORTS *Legal Issues of NFL Clubs*

**Vicky Neumeyer**  
*New Orleans Saints*  
New Orleans, LA

**Paul Vance**  
*Jacksonville Jaguars*  
Jacksonville, FL

**Steven Underwood**  
*Tennessee Titans*  
Nashville, TN

**MOVIE/TV *The 5 Most Litigated Terms of Motion Picture and TV Contracts***

**Jeffrey Huron**  
*Huron Law Group, LLP*  
Los Angeles, CA

**Gary A. Watson**  
*Huron Law Group, LLP*  
Los Angeles, CA

### VISUAL ARTS *What's the Deal in Art?*

**Sarah Conley**  
*Steiner Conley*  
Beverly Hills, CA

**Christine Steiner**  
*Steiner Conley*  
Beverly Hills, CA

**Richard J. Greenstone**  
*Law Office of Richard  
J. Greenstone*  
San Francisco, CA

**5:30 pm – 7:30 pm**

**Reception (Open to all registrants)**

**10:00 pm – 1:00 am**

**Music Industry Showcase**

**Saturday, October 12, 2002**

**9:00 am – 10:00 am**

**Continental Breakfast**

**9:45 am – 10:00 am**

***Opening Remarks from the Chair and Welcome and Introduction to the Plenary Session***

**David M. Given**  
*Phillips & Erlewine LLP*  
San Francisco, CA

**10:00 am – 1:00 pm**

***Industry-wide Deals***

**Jay L. Cooper**  
*Greenberg  
Traurig, LLP*  
Santa Monica, CA

**Michael I. Rudell**  
*Franklin Weinrib  
Rudell & Vassallo*  
New York, NY

**Edward Klaris**  
*General Counsel  
The New Yorker  
Magazine*  
New York, NY

**Lionel S. Sobel**  
*Entertainment Law  
Reporter*  
Santa Monica, CA

**David Lazar**  
*Vice President,  
Business Affairs  
Clear Channel  
Entertainment*  
New York, NY

**Ty Votaw**  
*LPGA Commissioner*  
Daytona Beach, CA

**Gary A. Watson**  
*Huron Law Group, LLP*  
Los Angeles, CA

# The Story of GigaLaw.com

DOUG ISENBERG

I founded and launched the GigaLaw.com Web site in January 2000, just months before many dot-com bubbles began to burst, but GigaLaw.com has survived and continues to thrive as a comprehensive source of information about Internet and high-technology law for lawyers, businesspeople, information technology workers and consumers.

The site was created to fill a gap I had perceived while practicing law at a large firm before dot-coms even became popular. In the mid 1990s, when many Internet companies were just starting and their short-term successes were unclear, I saw that some of them had difficulty gaining the legal representation they deserved. Because many high-tech companies began small and offered nontraditional goods or services, some law firms were reluctant to represent them because they thought the risk was greater than the reward.

The meaning of Internet law has greatly expanded.

Of course, the short history of law firm representation of Internet companies shows that the pendulum quickly swung — twice — with firms eventually trying to represent (and sometimes take equity interests in) their high-tech clients, then running away from them as they failed.

## What is GigaLaw.com?

It is a Web site that provides a variety of sources all relating to Internet and high-technology law. Among other things, it offers:

- Articles written exclusively by lawyers and law professors on topics relating to Internet law. The articles are quite unlike those found in law reviews or bar journals: They contain no case citations, no footnotes and limited legal language. Instead, they're clear, concise and timely.

- Daily news updates delivered via the Web and e-mail on the latest developments in Internet law. The news updates provide links to other sources on the Net where the topics are covered in depth and include everything from the well known (such as developments in the Microsoft antitrust case) to the obscure (such as China's crackdown on Internet cafes).

- An active discussion forum where lawyers and non-lawyers can interact with each other to discuss basic and advanced issues relating to high-tech law.

- A bookshelf with recommendations of mainstream books on Internet law, including in many instances excerpts and author interviews.

GigaLaw.com also offers a number of less-important but interesting features, such as polls (Do you read a Web site's privacy policy before using the site?) and a small e-commerce store with GigaLaw.com merchandise.

GigaLaw.com is not a general-interest legal Web site. Instead, it focuses exclusively on "Internet law," a label that has grown to be quite broad. In the late 1990s, when the phrase "Internet law" was born, it originally described intellectual property (copyright, trademark, patent and trade secret) law, as well as some First Amendment matters (particularly as Congress sought to place restrictions on Internet content with the Communications Decency Act, portions of which were found to be unconstitutional by the U.S. Supreme Court in 1997).

Through the years, though, Internet law has grown to mean much more than intellectual property and the First Amendment. It also includes issues such as privacy, advertising, contracts, employment law, taxes, jurisdiction and even real estate and, of course, bankruptcy.

The content on GigaLaw.com covers all of these, with articles on the most elementary topics (The Basics of U.S. Copyright Law) to the more advanced (Domain Names and Trademark Issues in the European Union); from the pervasive (The Impact of State Anti-Spam Laws) to the particular (Analyzing the Supreme Court's Opinion on the Child Online Protection Act); from the obvious (To Post an Online Privacy Policy or Not) to the inevitable (How to Buy the Assets of a Failed Dot-Com).

### How has GigaLaw.com changed?

In many ways, GigaLaw.com is today the same Web site it was when it first appeared in January 2000, because it still covers the same topic (high-tech law) with the same approach (keep it simple). But in many ways, the site has changed.

The biggest change is simply its growth. What began as a site with a half-dozen articles has grown into a significant resource with hundreds of articles, continuing (and archived) discussions, a history of news references and thousands of pages.

Still, at least one formerly significant part of GigaLaw.com has been nearly eliminated: the law library. When the site was launched, relatively few courts published their opinions online, so I decided to make some of the more important and relevant cases available. In March 2000, for example, we were the first site to publish an important ruling in the case *Ticketmaster v. Tickets.com*, on the issue of whether “deep-linking” on the Web is legal. (GigaLaw.com also published a later ruling in the same case, in August 2000, in which the judge said the opinion was not intended for publication but recognized, “While the court cannot prevent publication, such is not done with the permission or desire of the court — and also with the hope that any typos are corrected.” Indeed, I personally attended to the typos.)

Today, however, the number of courts that publish their own opinions online has grown dramatically and in general the resources for finding case law online have multiplied. As a result, GigaLaw.com’s necessity in publishing opinions has shrunk and I consider this a good thing, since greater access to the law is beneficial for everyone.

### What has the site accomplished?

One of the greatest rewards of any undertaking is the favorable recognition of others. Fortunately, GigaLaw.com has achieved its share, including:

- Yahoo lists it as one of the “most popular” sites for information about Internet law.
- The book *The Essential Guide to the Best (and Worst) Legal Sites on the Web* (published by American Lawyer Media) gave GigaLaw.com a five-star rating — the highest possible.
- The *Internet Lawyer*, a professional publication about Internet law, awarded it four stars, a category reserved for sites deemed to be “exceptional.”
- The Scout Project, located in the Department of Computer Sciences at the University of Wisconsin-Madison, included GigaLaw.com in its weekly Scout Report, which highlights Web sites with “high-quality content” that are “of interest to researchers and educators.”

- Netlawtools, a Web site that provides lawyers with information about using technology, called it the “MVP Site” of the month.

### Who uses the site?

The original intended audience for GigaLaw.com was solely nonlawyers, specifically, businesspeople and information technology workers who needed or wanted to learn about how the law affects their work. These groups still comprise a significant portion of its users.

Surprisingly, lawyers also comprise a large part of GigaLaw.com’s audience. I had thought that lawyers would not be attracted to it, because the site is a non-traditional legal publication — that is, unlike professional publications, it is free; unlike law reviews, it is concise and timely; and unlike bar journals, it is wide-reaching. Although lawyers are unaccustomed to such a site, they appreciate all of these qualities. As a result, lawyers — both in private practice and in-house — find it a useful resource.

Because of the Internet’s inherent global nature, the site reaches a worldwide audience. I often field inquiries from lawyers and businesspeople outside the United States — from Europe, Australia, Asia and even such exotic locations as Kuwait and Trinidad and Tobago. People in these countries use it to learn about U.S. legal issues.

### What is the site’s business model?

Because I started GigaLaw.com as a side venture while still engaged in the private practice of law, the Web site has never had a sophisticated business model. As the sole member of the limited liability company that publishes GigaLaw.com, I have chosen to let it grow according more to my own vision for it than a desire to satisfy investors’ interest in the bottom line. While that may seem foolish to some, the truth is that this model has allowed it to outlast many Internet start-up companies and traditional publications.

Still, the site is profitable and always has been, thanks in large part to the minimal financial expenses needed to build it and keep it running. The largest expense is “sweat,” that is, the time and energy I put into it.

The site derives revenue from many of the same sources as other online publications: advertising, affiliate relationships and sponsorships. In addition, GigaLaw.com generates revenue by providing private-label e-mail newsletters for law firms and others who want to outsource the primary content and all of the back-end technology. These newsletters provide firms and other companies with a simple, cost-effective way to stay in touch with clients and reach potential clients while eliminating many of the burdens of traditional

newsletters, such as using valuable lawyer and support staff time for creation and distribution.

### How can lawyers benefit?

Sports and entertainment lawyers might mistakenly think that GigaLaw.com would not interest them because the site is focused on Internet and technology law. However, because the Net is so vital to the entertainment and sports industries, the site has a lot to offer.

Among many other things, for example, it provides articles and news about laws and trends in the e-book publishing industry; disputes over domain names involving celebrity names; copyright issues relating to digital distribution of music, movies and television programming; and online defamation of well-known people and companies.

GigaLaw.com offers sports and entertainment lawyers two great benefits, for free:

- As users of the site, sports and entertainment lawyers can find easy-to-read and up-to-date information about the legal issues that affect their clients or their businesses.
- As lawyers who want to market their practice and promote their work to potential clients and other lawyers, sports and entertainment lawyers can write an article for the GigaLaw.com Web site about a topic that may interest others. As those lawyers whose articles have been published on the site can attest, the exposure can be significant.

### What is the future?

Given the constant development of and uncertainty created by the Internet, high-tech legal issues are not going away; indeed, they're only getting more prevalent. As Congress and the courts struggle with how to apply the

Sometimes the old can work  
for the new.

law to today's technology, GigaLaw.com's relevance only continues to grow. Although some issues may fade (see the Napster litigation), new ones will rise (see the Digital Millennium Copyright Act).

Finally, as many dot-coms that survived the bursting of the bubble have learned, sometimes everything old is new again. While many high-tech companies are looking for old-fashioned (read tried and true) ways to recast their businesses, GigaLaw.com, too, is taking advantage of some pre-Internet ideas for its own growth, including book publishing.

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Doug Isenberg ([disenberg@gigalaw.com](mailto:disenberg@gigalaw.com)) the founder of GigaLaw.com, practices intellectual property, technology and Internet law as a sole practitioner in Atlanta. He is the author of *The GigaLaw Guide to Internet Law* (Random House, October 2002).

## Plaintiffs in the Stands

(continued from page 13)

30. *Id.*, at 114.
31. *Id.*, at 119.
32. *Id.*, at 120, 124.
33. Elmore, Charles, "Boy Hit by Foul Ball Awarded \$1 Million." *The Palm Beach Post*, April 6, 2000, at 6C.
34. "Boy Injured by Batted Ball Wins \$1 Million from Marlins, Stadium," *The Associated Press State and Local Wire*. Lexis-Nexis Web.... April 6, 2000. [http://proxy-server.newhaven.edu:2053/universe/document?\\_m=f7eee5027da4a08d24dd58b814bb0543&\\_docnum=2&wchp=dGLSzS-ISIAI&\\_md5=10cb1b18f8236a292f557df033a28afd](http://proxy-server.newhaven.edu:2053/universe/document?_m=f7eee5027da4a08d24dd58b814bb0543&_docnum=2&wchp=dGLSzS-ISIAI&_md5=10cb1b18f8236a292f557df033a28afd)
35. *South Florida Stadium Corporation v. Klein*, 789 So.2d 1002 (CA. 4th, FL 2001).
36. *Gil-Rebollo v. Miami Heat*, 949 F. Supp. 62 (U.S.D.C., Puerto Rico, 1996).
37. "Marlins sued by spectator who says flying T-Shirt injured him. *The Associated Press State and Local Wire*, LEXIS\_NEXIS Web.... January 23, 2001 [http://proxy-server.newhaven.edu:2053/universe/document?\\_m=966401c0c57d0055d1ff797c6ff47655&\\_docnum=4&wchp=dGLSzS-ISIAI&\\_md5=57d0efbc14742d8bc32aedf9258359c1](http://proxy-server.newhaven.edu:2053/universe/document?_m=966401c0c57d0055d1ff797c6ff47655&_docnum=4&wchp=dGLSzS-ISIAI&_md5=57d0efbc14742d8bc32aedf9258359c1)
38. *Kavafian v. Seattle Baseball Club Ass'n*, 181 P. 679, 679 (S.C., WA, 1919).
39. See generally, Verducci, *Supra* note 19.
40. Mark Hyman, "The Trouble with Barry." *Business Week*, Oct. 15, 2001, at 100.
41. Peter Farmer, Aaron Mulrooney and Rob Ammon Jr., *Sport Facility Planning and Management*, 1996, 29. See also E.M. Swift, "Hey, Fans: Sit on It!," *Sports Illustrated*, May 15, 2000, 69-85.
42. Farmer, *Supra* note 41.
43. Ron Cote, Editor, *Life Safety Code Handbook*, 12.7.5 (2000).
44. See generally, 91 A.L.R.3d 24, Sect. 18d. citing *Shaw v. Boston American League Baseball Co.*, 90 N.E. 2d 840 (SC, MA 1950).
45. George Kaiser and Greg Hyer, "Safety Improvement Recommendations Resulting from a Review of the Camp Randall Stadium Incident on October 30, 1993," April 21, 1994, at Appendix A.
46. Personal interview with Dave Benn, VP sales, Stan Mar Sports Nets, Jan 10, 2001.
47. *Id.*
48. Verducci, *Supra* Note 19.
49. *Standard Guide for Fences for Ballfields and Other Sports Facilities*, American Society for Testing and Materials. F-2000-00a (2000).
50. See *Supra* note 46.
51. Judi Villa, 1992 "Foul-Ball Lawsuit Settled Scottsdale Stadium Injury Ends Career of Pitcher Keough," *The Arizona Republic/The Phoenix Gazette*, Feb. 16, 1996, 3.
52. Ronald Blum, "Lasorda Hit By Broken Bat," July 10, 2001. Web-  
<http://sportsserver.com/spec/bbo/01allstar/story/40943p-645864c.html>
53. See *Supra* note 46.
54. Dick Howser Stadium Program, Florida State University, 2000-1 season.

# EDITOR'S COLUMN

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## Protection Racket: Are Copyright Lawyers and Their Clients Shaking Down the Public?

**W**hat if copyright is not property at all? And what if copyright lawyers are deliberately aiding and abetting a shakedown of the public's property? A protection racket is defined as money extorted by racketeers posing as a protective association. A racketeer obtains money by an illegal enterprise usually involving intimidation. With the advent of digital file sharing over the Internet, hard-hitting tactics by copyright owners and their lawyers are beginning to look a lot like intimidation. Thus, when BigCo sues JoeAverage for lending digital content to a friend, it starts to cast doubt on the fundamental legitimacy of BigCo's rights.

Even though a debate about the legitimacy of copyright continues to rage in academia, most copyright lawyers and their clients presuppose that copyright is justifiable. Why worry about the legitimacy of copyright when under Section 8 of U.S. Constitution, Congress may enact laws and regulations:

*To promote the Progress of Science and useful Arts, by securing for limited Terms to Authors the exclusive Right to their respective Writings and Discoveries.*

But attitudes of indifference are beginning to change. For example, appearing recently on the front page of a California legal newspaper was the headline "Split IP Bar Feuds Over Copyright Law." The story recounts how members of the American Bar Association's Intellectual Property Law Section cannot agree on the merits of *Eldred v. Ashcroft*, 01-618, a case now before the U.S. Supreme Court, challenging the constitutionality of Congress' extension of copyright protection by 20 years.

The language of the U.S. Constitution places copyright firmly within utilitarian philosophy — namely an instrument for the promotion of progress and the useful arts. But, as such, copyright is not an inalienable right. It is not a *natural* right. Government invented the copyright monopoly for a specific purpose. It is merely a means to an end — a policy decision. But, to paraphrase biblical language, "What utilitarianism hath given, utilitarianism can taketh away." When something invented by government goes awry, government might un-invent — as governments routinely do.

Zealous measures taken by copyright lawyers on behalf of copyright owners may be transforming "the promotion of progress" into outright "extortion." The measures to which I allude add up to a daily litany of frantic steps by

copyright owners to stem the tide of digital technologies. For example, (as this is being written), according to *The Washington Post*, Rep. Howard L. Berman, D-Calif., has proposed legislation that would give the entertainment industry broad powers to secretly hack into consumers' computers and knock them offline entirely if they are caught downloading copyrighted material.

Also in the news, at the behest of film studios and television networks led by Disney, a federal magistrate in Los Angeles ordered SonicBlue to conduct surveillance of its ReplayTV video recorder customers. The court ordered SonicBlue to keep track of every show that customers watch, every show they record, every commercial they skip and every program lent to a friend. Then SonicBlue must provide the results of their surveillance to the film studios and television network plaintiffs that are suing SonicBlue for facilitating copyright infringement.

What's more, the Recording Industry of America just went to Congress requesting that your tax dollars be used to create specific copyright infringement "squads" or "units" for a Justice Department program called CHIP — a government computer surveillance system to monitor the public's computer activities. Every day copyright owners initiate new and bolder actions to shield copyright from the advancement and progress of digital technologies.

### Political convergence

There is currently a unique convergence of alarm about the extension of copyrights shared by both the political left and the political right. The practical effect of the escalation of aggressive copyright protection has been to re-focus the public's attention on copyright. Across the political spectrum the "value proposition" of copyright is being questioned. The stifling of technological development and thus the failure to promote progress — something copyright is meant to encourage — has led free-market tech company leaders like Marc Andreessen to enter the fray and question current copyright protection efforts. As other natural rights are trampled by copyright (such as liberty and privacy) government may well revisit copyright to decide if it is worth having at all.

Is copyright justifiable? The debate about the justification for copyright is lively and intricate. It is a debate that is intense although it is approached in a different way by the political left and the political right.

### The political right

According to the political right, liberty and copyright are incompatible. This argument centers on the fundamental nature of property. Copyright is not equivalent to other property rights because copyright is ownership of an "ideal object" — such as an expression of an idea —

while traditional property is ownership of a “tangible object” — such as land. The justification for property rights is to prevent conflict over “scarce” resources and property rights should *only* apply to scarce resources. Copyrights are deemed “ideal” resources because they are intangible and thus are not scarce. Stories, games, software, music and photos are infinitely reusable without diminishing their quantity and can be reproduced by digital means at minimal cost.

The oft-quoted remark of Thomas Jefferson sums up the scarcity concept as applied to ideas: “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” The use of someone’s idea does not deprive someone of its use, however, the use of someone’s land deprives someone of its use.

In this way, ideas are not scarce in the same way that land is scarce. Property rights are inapplicable to copyright because there is no scarcity and no resulting conflict that must be prevented. Rightist critics of copyright depict it as an arbitrary monopoly imposed by government on its citizens. Copyright is arbitrary because it rewards only a small group of creative people. And copyright discriminates between classes of intellectual creators. For example, why does copyright fail to protect philosophical, mathematical or scientific truths? When copyrights are granted, it creates an artificial, government-mandated scarcity. Copyright

unnecessarily restricts one’s liberty to use resources that are infinitely abundant. Copyright interferes with the freedom of others to use their bodies and their justly acquired tangible property.

### The political left

On the other hand, the political left maintains that the government’s power to grant copyright monopolies is corrupting. It is large corporate owners of copyrights that pressure Congress to expand copyright beyond the underlying rationale for copyright’s existence. If you follow the money, the substantial rewards of copyright protection only go to a few large media conglomerates and a handful of celebrities.

Also, copyright is merely another way for wealthy Western nations to oppress poorer nations and to transfer riches away from developing countries. The goal of leftist critics of copyright is to achieve a free society where copyright is unnecessary and where anyone can share all published works for the “common good” with no law dictating use of any work.

Of interest here is the open-source “copyleft” movement — a scheme first tried by software developers in an attempt to resolve the perceived improper exploitation of programming ideas. Linux is the most celebrated of the open-source software released under copyleft principles. Copyleft cleverly turns copyright law on itself in an effort to create “free” works. At first glance, the easiest way to create a free work is to simply put the work into the public domain. However, someone might make a change to the work, copyright the result, then charge a fee to subsequent consumers for using a work that was originally put into the public domain for free. By using the copyleft scheme, all derivatives of a free work must remain free.

A copyleft license requires anyone who redistributes copylefted work to pass along the freedom to further copy and change the work. Copyleft transforms works into free works and it requires all modified and extended versions of the work to also be free. Copyleft argues that because all data and information is not physical, data exists in constant relative abundance. For example, unlimited copies of a computer program source code can be made without disadvantage — no scarcity is created by its use. When you copy data, the original is neither changed nor destroyed.

Thus, according to the political left, the granting of copyrights creates an artificial government-mandated scarcity in favor of moneyed interests to the disadvantage of the poor.

### Conclusion

There is no empirical evidence to support the hypothesis that copyright actually provides an incentive to innovation. After all, most of the “classics” were created when no  
*(continued on page 24)*

#### Selected further reading

“Against Intellectual Property,” N. Stephen Kinsella, *Journal of Libertarian Studies*, Vol. 15, No. 2 (2001).

“Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects,” Tom Palmer, *Harvard Journal of Law and Public Policy*, Vol. 13, No. 3 (1990).

“Copyright’s Highway,” *The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*, Paul Goldstein, Hill and Wang (1994).

“Copyrights and Copywrongs,” *The Rise of Intellectual Property and How It Threatens Creativity*, by Siva Vaidhyanathan, New York University Press (2001).

“Copywrong,” *Reason* 7.01 (2001).

“Hollywood vs. the Internet: Why Entertainment Companies Want to Hack Your Computer,” *Reason* 5.02 (2002).

*Information Liberation*, Brian Martin, Freedom Press (1998).

*Open Sources: Voices from the Open Source Revolution*, Edited by Chris DiBona, Sam Ockman and Mark Stone, O’Reilly (1999).

*The Economics of Copyright and the Digital Agenda*, Hans Hoegh Guldberg, Copyright Agency Limited (2001).

# BOOK REVIEW

## The Law of Electronic Commerce

By Jane Kaufman Winn, Benjamin Wright  
Publication cycle: Supplemented annually  
Fourth Edition; list price: \$198  
ISBN: 0735516480

### Reviewed by Bob Pimm

With the collapse of the dot-com boom, entertainment and sports lawyers may ask if there still is such a thing as “electronic commerce.” This exceptionally comprehensive one-volume treatise answers that question with a resounding “Yes.” Now in its fourth edition, the work has been published since 1990.

Notwithstanding the troubles of so many dot-com companies, commercial exploitation of the Internet continues to grow dramatically. According to Internet growth monitoring, use of the Net grew 58 percent from July 2001 through July 2002 — and that follows a 72 percent growth during the same time period the previous year. Although the “rate” of growth may be slowing, the factual rate of the growth is still staggering. Moreover, as entertainment and sports lawyers well appreciate, their clients are hurriedly expanding their use of the Internet to exploit the commercial value of their intellectual property. Thus, the need for Internet-savvy legal advice is escalating considerably.

*The Law of Electronic Commerce* analyzes and comments on a full range eCommerce legal issues including domain name conflicts, shrink wrap agreements, Internet security, digital signatures, encryption and biometrics. The book also tackles traditional contract principles as filtered through the eCommerce environment, including the statute of frauds and the battle of the forms. There is even reference to electronic records in litigation, including authentication, the best evidence rule and special hearsay problems.

Furthermore, the book addresses eCommerce record-keeping requirements, including state and federal laws for taxation, banking, securities and health care. The book also takes up the liability of service providers, confidentiality and control of data and state and federal regulation of electronic markets.

The lead author, Jane Kaufman Winn, is a professor of law at Southern Methodist University in Dallas. She is widely published in commercial law and before joining the faculty of SMU, practiced law in New York at Shearman & Sterling. Co-author Benjamin Wright, a business lawyer in Dallas, is an authority on eCommerce and is a consultant to many start-up companies comprising the Fortune 1000. With a combined academic and practical business background, the authors set out to provide a functional refer-

ence manual that can be used by lawyers of all levels.

The authors take lawyers from the sources of eCommerce law (commercial law, federal policy and legislation, standard-setting organizations and international treaties and foreign legislation), through standard transactions, all the way to references for additional information.

Part I of the treatise begins by reviewing Internet jurisdictional issues in a treatment that is all embracing, including a useful digest of recent cases applying the *Zippo* sliding scale of interactivity analysis. Conflicts-of-law rules are clarified. Also explained is the newer Internet dispute resolution systems of domain name registrars as well as the Internet Corporation for Assigned Names and Numbers (ICANN).

Part II covers electronic contracting. Here, the authors describe the application of the Statute of Frauds and the Mailbox Rule in the context of eCommerce activities. There is also a discussion of e-sign legislation and the UCC rules and revisions designed to govern eCommerce transactions.

A section of the book that is both informative and entertaining concerns the law applied to Internet auction sites such as eBay (the most profitable “conventional” business so far on the Internet). For example, in bricks-and-mortar auctions “... the acceptance of a buyer’s bid is denoted by

 here do Internet auctions  
fit in to the law?

some audible or visible means (such as the fall of the hammer), which indicates to the buyer that he or she is entitled to the property on payment of the amount bid ...[and]... bricks and mortar auctions are normally regulated by state governments, which frequently require anyone conducting an auction to obtain a license.”

But, on the Internet, a visible sign to all bidders does not make the acceptance of a bid. Nor are Internet auctions seemingly regulated as a brick-and-mortar auctioneer. The sites seem to merely facilitate individual auctioneers. Thus, most Internet auction sites consider themselves communities or marketplaces, not auction houses. However, French courts have recently barred some Internet auction sites from operating because they failed to use French state-licensed auctioneers and also failed to pay value-added tax.

Part IV of the treatise is of special interest to entertainment and sports lawyers as it delves into trade secrets, domains names in trademark law, copyright, anti-circumvention technologies, as well as licensing and privacy issues related to the collection of information from cus-

tomers. Of course, the authors describe the Digital Millennium Copyright Act (DMCA) — in all its glory — and they include a useful discussion of the prohibitions against tampering with copyright management information (CMI), "... The DMCA prohibits intentionally providing or distributing false CMI or intentionally removing or altering CMI or distributing content for which the CMI has been illegally modified." Thus, this part of the DMCA does not focus on protecting technologies from interference, but rather focuses instead on empowering copyright owners and distributors of copyrighted material to legally "track" the use of the copyrighted material by consumers.

Entertainment and sports lawyers should be aware that

this treatise does not contain forms and sample documentation. There is no computer disk or CD-ROM accompanying the book. Also, there are several sections that will either not apply or only apply peripherally to the entertainment and sports law practice area.

Some topics, such as Internet jurisdiction, are complete. Others serve more as an introduction — therefore most lawyers will want additional materials to supplement the topics covered in the book. Thus, the book is more of a basic reference manual. No one treatise seems to be able to capture the full range and breadth of how the Internet has affected the law. However, this effort by Winn and Wright is commendable in its scope and accessibility.

## ENTERTAINMENT AND SPORTS LAWYER

# Like your information electronically?

Check out the Entertainment and  
Sports Industries Forum's home page:

<http://www.abanet.org/forums/entsports/home.html>

## Busted

(continued from page 7)

courtroom and public are presented with a model that allows them to get past the celebrity and to also treat your client like the person next door.

However, in a high-publicity case, we know that the public is not the only audience. As noted above, there is also the media and they are not all that interested in the guy next door — so be wary.

The public wants glimpses of their beloved star. The lawyer must help the client maintain their celebrity status while at the same time asking him or her to hunker down and be just a regular person. How do you reconcile that inherent contradiction? By encouraging the celebrity to explore and “own” whatever feelings they have of regret or dismay, but also to know that even though they may have made a mistake, the public still loves them. There is no reason to hide behind hands, to slam limo doors or to ignore the media and the public. That’s like ignoring a shark. It’s a recipe for being eaten alive.

More and more celebrity criminal cases are tried in the media. When a celebrity is accused of a crime, the media feeds on the event to a greater extent than noncelebrity criminal cases. The court of public opinion can dominate the proceedings. But the media and the court of public opinion can be influ-

**M**ore and more celebrity cases are tried in the media.

enced to focus on the innocence, or at least the good will, of the celebrity client. It’s not who the celebrity *is*, but something the celebrity *did*, that was wrong — and yet an understandable mistake, for which the celebrity will pay a fair price.

### Step 9 — Perception vs. reality

The last and probably most important step in celebrity representation is being able to navigate your own internal terrain during all the twists and turns a celebrity trial may take. You want and need the public to perceive that you will succeed on behalf of the celebrity client. The public must grasp that you are tough and that you are capable of returning the celebrity icon unscathed to the screen, stage or playing fields. But in reality, you also need to be calm and to hold the celebrity’s hand — something that is rarely required in a corporate or real estate or general entertainment transaction.

You need to be perceived as a heavy hitter in the

courtroom, but a nice guy nonetheless. Of course, none of this perception would matter if the case were not being tried on television. But, because a celebrity case is the dirty laundry this world loves to feast on, the lawyer needs to balance that perception of “going for the jugular” when he or she is dealing with the prosecution, with the “gentleness of a caregiver” when dealing with the client.

If the public decides at any point that you are a jerk, that you are too much of a pit bull or that you are too much of a goody-two-shoes, they will decide almost as a single body that you are not the “right” representation for the celebrity. This low standing in the public eye can sometimes motivate a celebrity client to change lawyers. That can damage not only your reputation, but derail the case and cause a lose-lose situation for both you and the celebrity.

### Conclusion

To get through a celebrity trial, my goal is to always remain calm, to be the one person that everyone on the team can turn to as their fears mount and the outcome seems uncertain.

The lawyer needs to be confident, credible and in control. A great sense of humor is also a must, especially for those days when you think your parents might have been right about medical school instead of the law. Believe it or not, how you come across in the media can often make or break your client’s career.

Finally, the lawyer needs an extreme sensitivity to the crisis-public-relations aspect of celebrity criminal cases and must devote as much thought and preparation to dealing with the media as he or she does in preparing a legal defense to each element of the charges. The result will be a success in court as well as in the court of public opinion.

This article does not reflect the author’s experiences with any particular client, but is a compilation of experiences gained from representing many celebrity clients over a career of more than 28 years. No inference is made or intended to reflect the author’s experiences with any particular client.

*Steve Cron (smcron@aol.com) represents high-profile celebrity clients as a member of Cron, Israels & Stark in Santa Monica, Calif.*

### Call for articles

If you have an article idea for the *Entertainment and Sports Lawyer*, contact Bob Pimm at [rgpimm@aol.com](mailto:rgpimm@aol.com) for a free copy of our *Submissions Guidelines*.

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## Editor's Column

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copyright existed. Thus, it is merely a speculative utilitarian justification that sustains copyright — a justification that now threatens real losses to liberty, privacy and innovation.

As owners of copyrights overpower natural rights and the promotion of progress, a ferment of discontent is bubbling across the political spectrum. By definition, utilitarianism demands that any theoretical gain in utility be balanced against real loss. The current expansion and harsh enforcement of copyright is tilting the utilitarian equation toward loss. Because copyright is just a government policy decision, I wonder: What would copyright lawyers and their clients do if government returned to a world without copyright?

**Bob Pimm**  
*Editor-in-Chief*

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# ENTERTAINMENT AND SPORTS LAWYER

Forum on the Entertainment and Sports Industries  
American Bar Association  
750 N. Lake Shore Drive  
Chicago, IL 60611-4497  
Volume 20, Number 1-2, Spring/Summer 2002  
ISSN: 0732-1880  
**Membership and Subscription Information:** 800/285-2221

Nonprofit Organization  
U.S. Postage  
PAID  
American Bar  
Association

