10

Intellectual Property

OBJECTIVES

Upon completing this chapter, you will:

1) understand the differences between copyright, trademark, and patent law, and how each influences sport;
2) recognize the rights of the copyright owner, including fair use;
3) appreciate the value of registering and licensing creative works;
4) understand the system the court uses in analyzing the violation of a trademark for confusion, dilution, trade dress, cancellation, or abandonment;
5) be aware that trademark infringement may be civil or criminal; and
6) know the value of intellectual property to the economics of sport.

INTRODUCTION

Chapter 9 discussed the importance of competition in the marketplace and the protection provided entrepreneurs by the United States government. The free enterprise economy of the United States is based on competition. Intellectual property laws such as copyright, trademark, right of publicity, and patent law protect those engaging in marketplace competition and reward the creators of such materials for the fruits of their labor with ownership rights. These rights are treated by the law as personal property; they can be contracted to others through traditional agreements. Copyrights and trademarks can be licensed, sold, loaned, or given to others. Patents receive the same treatment with some restrictions. Intellectual property laws include federal, state, and common law—the results of court decisions. In recent years, criminal laws have been added to the civil law enforcement.

COPYRIGHT

Copyright is a system for protecting the "original works of authorship fixed in any tangible medium" (Copyright Act, 17 USC 102). Required elements of copyright are that the work is original and that it is fixed in a tangible medium, such as in print, motion pictures, or sculpture. Works of authorship include:

- literary works;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic, and sculptural works;
- motion pictures and other audiovisual works;
- sound recordings; and
- architectural works. (17 USC 102)

With the fixation requirement for copyright protection, it is important to recognize that copyright protection for an original work of authorship does not extend to an "idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work" (17 USC 102). Copyright can be obtained for compilations and derivative works; however, the copyright covers only the materials attributed to the new author. The original materials continue to belong to the first author (17 USC 103).

While the Copyright Act of 1790 covered books and maps, technological changes necessitated an expansion of copyright protection to include electronics, films, computer programs, and choreography. In 1971, the law was extended to sound recordings. The Sonny Bono Copyright Term Extension Fairness in Music Licensing Act of 1998 extended copyright protection to the life of the author and 70 years beyond the life of the author. Works made for hire or commissioned by an employer are protected for 95 years following publication or for 120 years after their creation (17 USC 302). The Sensenbrenner Amendment to the law provides an exemption that permits music to be played, without royalty, in restaurants and malls.

The area of choreography is fully covered under the statute but not always recognized by the public. For example, when a broadcast of a "football game covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what that cameramen and the director are doing constitutes authorship" (Copyright Law Revision, H.R. Rep. No. 94–1476, 1976). However, courts have recognized that the underlying sporting event itself is not copyrightable since there is no authorship of the spontaneous event (*NBA v. Motorola*, 1997). Golf courses and unique sport venues usually involve architectural plans and drawings. When these fix plans are unique or custom designed, copyright protection is warranted.

Prior to 1976, all copyrighted materials had to contain a copyright notice such as the following: ©2010 Susan Jones. The 1989 Berne Convention, an international agreement, required participating nations to give copyright protection without formalities. This makes notice optional in the United States. To encourage the registration of copyrights in the United States the statute notes that the "certificate of registration is prima facie evidence that the copyright is valid" (Copyright Act, 17 USC 410).

Rights of Copyright Owners

The owner of a copyright has the exclusive right to do and to authorize any of the following:

- to reproduce the copyrighted work in copies or phonorecords;
- to prepare derivative works based upon the copyrighted work;
- to distribute copies or phonorecords of the copyrighted work to the public for sale or other transfer of ownership, or by rental, lease, or lending;
- in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. (17 USC 106)

The owner of a computer program may make a copy as an essential step in the utilization of the machine or for archival purposes. The owner of the computer program may not make a copy for another person (17 USC 117). Ownership of copyright passes at death as personal property.

Rights of Copyright Consumers—Fair Use

The fair use doctrine enables the public, under specific circumstances, to make use of a copyrighted work without infringing on the rights of the owner. Fair use is often associated with educational settings, and it has been applied from classroom materials to performances since 2002. For example, written materials, plays, and choreography may be used, without permission, by an "instructor in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction" (17 USC 110). Also, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (17 USC 107).

Infringement

In determining liability for infringement, courts look at:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) the nature of the copyrighted work;
3) the amount and the substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work. (17 USC 107)

Adapting a work into a different form is prohibited. Adapting a book into a play without permission, for example, is infringement. Remedies for infringement are injunctive relief (e.g., stopping the infringer's use of the copyrighted materials), monetary or compensatory damages, destruction of infringing articles, and criminal penalties. Monetary or compensatory damages are assessed to make the injured party whole. The copyright owner may elect to receive statutory damages rather than compensatory damages. Statutory damages, determined by the court, will not be less than $30,000.00 or more than $750,000.00 (17 USC 504).

Work for Hire

Section 101 of the Copyright Act defines a "work for hire" as:

1) a work prepared by an employee within the scope of his or her employment; or
2) a work specially ordered or commissioned for use as a contribution to a collective work ... if the parties expressly agree in a written document, signed by them, that the work will be considered a work for hire. (17 USC 101)

Work made under an independent contractor agreement is not considered work for hire unless it has been identified as a "work for hire" within the agreement.

Licensing

The owner of a copyright may license others to use or make copies of the copyrighted materials. These licenses are to be legal, written contracts. A license should state the protected rights of the owner and of the person receiving the license. Topics such as date of agreement, form in which the materials will appear, and other details are to be included. Failure to carry out the license as agreed constitutes breach of contract and infringement of copyright.

COPYRIGHT CASES

Definition

Copyright, by definition, is the right of an owner to a registered, original, and fixed document. *Curtis v. Benson et al.* (1997) and *Bouchat v. Baltimore Ravens Limited Partnership, et al.* (2008) are examples of court decisions addressing the definition of copyright. Curtis, the original architect for the Superdome, sued the owner of the building and recent building architects for reproducing and using his original drawings, without permission, for future work. Defendants claimed that when Curtis gave his registered architectural plans to Tulane University Architectural Archives, including the 1967 Superdome original drawing and the 1987 drawings for the renovation/modification of the Dome, all plans became part of the public domain. In 1997, the issues before the court were:

1) whether plaintiff's state law claims are preempted by the federal Copyright Act;
2) whether plaintiff's claim for statutory damages and attorney's fees pursuant to the Federal Copyright Act should be dismissed as a matter of law; and
3) whether Tulane University must be joined in these proceedings as a necessary or indispensable party. (*Curtis v. Benson, et al.*, 1997, 2)

The Court dismissed the plaintiff's state law claims and struck the request for statutory damages and attorney fees. This case identifies the need for an understanding of ownership of architectural drawings and other copyrighted materials in drafting building contracts.

The *Bouchat v. Baltimore Ravens, et al.* (2008) case has an interesting historical background. When the Cleveland Browns moved to Baltimore in 1995, they were forced to leave their logo and brand in Cleveland. Upon settling in Baltimore, the team began to explore a new team name and brands (i.e., team logos) that might accompany the new name. Bouchat, a security guard and amateur artist, took a real interest in the team and began to draw various logos for the names the team was exploring, including a wing shield for the name "Ravens." A few months later, when the team elected that name, Bouchat sent his shield drawing to the Maryland Stadium Authority, asking the authority to pass the drawing on to the Ravens' president. If the president decided to use the shield, Bouchat wanted a letter of recognition and a signed helmet. Bouchat received no response. "Through a series of misunderstandings, Bouchat's Shield Drawing was sent to the Stadium Authority Chairman's law office, forwarded to the Ravens' temporary headquarters, forwarded to the NFL in New York, and then to the commercial artists working on the Ravens project. There is no reason to believe that the Ravens or NFL intentionally caused the Shield Drawing to be provided to the artists. Nevertheless, the Shield Drawing was provided to the artists who used Bouchat's drawing as the basis for the 'Flying B Logo'" (*Bouchat v. Baltimore Ravens et al.*, 2008, 693).

The Ravens' new logo, the "Flying B," created by the National Football League Properties (NFLP), looked a great deal, if not exactly, like Bouchat's submission. The Ravens were unaware that the NFLP had taken the work from a third party. Bouchat sued the Ravens and the NFLP for infringing his copyright on the shield drawing and a number of other drawings. He asked for ten million dollars (*Bouchat v. Baltimore Ravens Football Club, Inc.*, 2003). The court bifurcated the case, trying the liability issue first and then the damages. A jury found for Bouchat because his shield drawing had been copied. The Copyright Act (17 USC 504) entitled him to actual damages and any profits that were not taken into account in computing the actual damages. The jury had difficulty in arriving at the appropriate damage award and ended by not making an award.

Bouchat appealed. He stated that he should at least get the statutory damage allocated in the law. Again, Bouchat was not clear about the actual losses he sustained from the infringement of his copyright, so the court denied monetary damages. Thus, the district court affirmed the trial court's decision. In 2007, Bouchat brought suit against all licenses of the NFLP. The United States Court of Appeals, Fourth Circuit, confirmed the district court's decision that statutory damages were not to be awarded because the artist had "failed to register his copyright before the infringement began" (*Bouchat v. Bon-Ton Department Stores, Inc. et al.*, 2007, 315).

Rights of Copyright Owners—Fair Use

The use of a registered copyright by another, without permission, was the issue in *Ticketmaster, LLC v. RMG Technologies, Inc. et al.* (2007) and The *Authors Guild, et al. v. GOOGLE, Inc.*, (2009). Ticketmaster filed for a preliminary injunction against RMG, alleging infringement for creating and selling an automated device that was able to access the Ticketmaster website to "snipe" tickets, a practice whereby scalpers use the software to inundate Ticketmaster's website with automated requests, enabling the scalpers to purchase large quantities of tickets before the general public. They cited copyright claims and infringement, claims under the Digital Millennium Copyright Act, breach of contract, computer fraud and abuse, and irreparable harm. The United States Court for the Central District of California, Western Division, granted Ticketmaster's request for an injunction and stopped RMG from using the automated device, gaining access to the Ticketmaster website, copying portions of the website in excess of the licenses granted by Ticketmaster, purchasing tickets from the website for commercial use, and otherwise accessing or using the website beyond its regular terms of use.

Fair use enables the public to use materials under copyright, particularly library holdings and music files, for research and education without a formal agreement. Google is an example of the work of an agency claiming fair use. In *The Authors Guild v. GOOGLE, Inc.* (2009), Google made arrangements with the libraries of Harvard, Oxford, Stanford, Michigan, and the New York Public Library to scan their volumes without author permission and put the holdings online, making them available to the public. The Authors Guild represented the publishers and individual authors of the publications. Google has been working with the parties involved, under court direction, to establish a system for providing royalty payments to known publishers, and establishing a Books Rights Registry to manage and distribute the royalty payments.

Licenses and Secondary Transmissions

Mob Music Publishing, et al. v. Zanzibar on the Waterfront, LLC, et al. (2010) was an action for copyright infringement against Zanzibar for giving "unauthorized public performances of six musical compositions" at their waterfront establishment (199). Mob Music Publishing represented a group of musicians who, as members of the American Society of Composers, Authors, and Publishers (ASCAP), have nonexclusive rights to license their copyrighted music. Zanzibar had a license to play ASCAP's music but lost the right when they failed to pay the agreed-upon fee. Zanzibar continued to play ASCP music and refuse to pay the fee. The establishment was checked a number of times by ASCAP personnel to determine what music were being played. ASCAP identified six musical compositions mentioned in the complaint. The plaintiff filed an action for statutory damages in the amount of $10,000 for each cause of action, an injunction to stop the playing of ASCAP music, and payment of reasonable fees.

The plaintiff had valid copyrights to each of the musical compositions at issue. The defendants also argued and lost First Amendment fair use defense claims. The court found the defendants liable for infringing behavior at $40,000 in statutory damages. The defendants were enjoined and restrained from performing any and all ASCAP music without proper authorization.

Two sport situations in which broadcast rights were questioned were *J&J Sports Productions, Inc. v. Live Oak Country Post No. 6119 Veterans of Foreign Wars, et al.* (2009) and *Innovative Sports Marketing, Inc. v. Medeles, et al.* (2008). In *J&J Sports,* the owner of an exclusive license for closed-circuit television fights filed a complaint against a lounge that intercepted the program without authorization. The court denied summary judgment "because there existed an issue of fact as to whether or not the lounge acted willfully" (1).

In *Innovative Sports Marketing,* the defendants also intercepted a soccer match on closed circuit TV. Here, however, the defendants failed to appear for a court hearing; thus, the plaintiff succeeded (*Innovative Sports Marketing, Inc. v. Medeles, et al.,* 2008).

TRADEMARKS

Trademarks are governed by the Trademark Act of 1946, more commonly known as the Lanham Act (2010), and the United States Code. Three distinct categories exist under the umbrella term trademark: trademark, service mark, and collective mark. They are distinguished by what they represent.

Trademark – "Any word, name, symbol, or design or any combination thereof, adopted and used by a manufacturer or merchant to identify his goods, and distinguish them from those manufactured or sold by others" (Lanham Act, 15 USC 1052)
Ex: Nike (trademark for sport clothing and equipment)

Service Mark – "A mark used in the sale of advertising of service to identify the services of one person and distinguish them from the services of others" (15 USC 1053)
Ex: International Management Group (IMG)

Collective Mark – Either a trademark or a service mark or both used by the "members of a cooperative, an association, or other collective group or organization and includes marks used to indicate membership in a union, an association, or other organization" (15 USC 1054)
Ex: The North American Society for Sport Management (NASSM)

A party wishing to obtain a trademark must file a formal application with the Patent and Trademark Office. The application is to include the dates of the first use of the mark and the first use of the mark in commerce, goods, or services. It should also include a drawing of the mark or an explanation of the service, an attestation that the mark is original, and areas in which the mark will be used (Lanham Act, 1051–1054). A certificate of registration is returned to the owner and is published in the Official

Gazette of the Patent and Trademark Office (15 USC 1051). The certificate is valid and prima facie evidence of the mark's existence (15 USC 1057). Registration is for ten years (15 USC 1058), and re-registration should occur prior to the end of the ten-year period. A registered mark may be assigned to another; however, the assignment must be in writing (15 USC 1060), be recorded with the U.S. Patent and Trademark Office, and be published in the Official Gazette, the United States Patent and Trademark Office's official journal (15 USC 1060).

A registration may be refused by the Patent and Trademark Office for the following reasons:

a) consists of or comprises immoral, deceptive, or scandalous matter, or matter which may disparage or falsely suggests a connection with persons, living or dead, institutions, beliefs, or national symbols, or brings them into contempt, or disrepute; …

b) consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof;

c) consists of or comprises a name, portrait, or signature identifying a particular living individual, except by written consent; or

d) consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office. (15 USC 1052)

Trademark owners are cautioned to monitor the Official Gazette for new applications for marks that could damage or infringe the owners' registered marks. If such a registration appears in the Gazette, the owner should file an opposition to the registration of the proposed mark in the Patent and Trademark Office. A hearing will be held by the Trademark Trials and Appeals Board and a decision will be made by the board. The decision can be appealed to a federal court. If the mark is successfully opposed the applicant is denied registration. A registered mark may be challenged in court because it was obtained fraudulently, was abandoned (i.e., not used for a significant period of time), misrepresented goods or services, or violated antitrust law (15 USC 1115). Courts will analyze the mark for the elements of confusion, dilution, trade dress, cancellation, or abandonment.

Confusion

Confusion is usually the result of either false designation of origin or false description of a product or program. The law states that

1) any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof or false designation of origin, false or misleading description of fact, or false or misleading representation of fact which

a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act. (15 USC 1125)

Dilution

Dilution is a claim brought by owners of famous marks who believe that another party's use of a similar mark will diminish or weaken the association that consumers have between their marks and their products or services. The claim is based on the likelihood that the public will become confused over common elements of two different marks. The major factor in the court's decision is whether the public will be harmed as a result of the confusion. Owners of marks used by others in parody have requested injunctions or sued for infringement; often, these sales involve altered forms of trademarks on T-shirts, caps, towels, and similar merchandise. Defenses to a dilution complaint are that the mark is confusingly similar but not the same, or that the element of distinctiveness cannot be satisfied.

To state a claim for dilution, the party must show:

1) that the plaintiff owns a famous mark that is distinctive;
2) that the defendant has commenced using a mark in commerce that allegedly is diluting the famous mark;
3) that a similarity between the defendant's mark and the famous mark gives rise to an association between the marks; and
4) that the association is likely to impair the distinctiveness of the famous mark or likely to harm the reputation of the famous mark in the context of blurring, distinctiveness refers to the ability of the famous mark uniquely to identify a single source and thus maintain the selling power. (15 USC 1125)

Congress passed the Federal Trademark Dilution Act (FTDA) of 1995, creating a federal cause of action for dilution. In 2006, dilution was further defined by the concepts of blurring and tarnishment (15 USC 1125). "Blurring takes place when a single term activates multiple, non-confusing associations in a consumer's mind … [and] involves relatively extended activation of two different meanings for a mark" (Tushnet, 2008, p. 519). Tarnishment differs from blurring in that the person immediately recognizes the difference between the two objects or associations.

Trade Dress

Trade dress is the overall appearance of a product, including the color, shape, size, logo, and other characteristics. The décor of vendors, ball parks, fitness chains, restaurants, stores, and other places of business may be trade dress. For example, the consistent exterior and interior of building designs may be protected under trade dress. While trademark law has not always been specific on trade dress, the case *Abercrombie & Fitch Company v. Hunting World Incorporated* (1976) identified the components of trade dress as generic, descriptive, suggestive, arbitrary, or fanciful (8). Generic marks are common descriptive names of objects. The mark is or becomes generic when it is the common name of the object. For example, the word "Kleenex" is routinely used in the English language to refer to a tissue. However, the manufacturers of Kleenex prevent the mark from becoming generic by running advertisements to reinforce in consumers' minds that they are the leading brand of this type of consumer product. Thus, this is a distinctive mark and is considered a strong mark. Other types of distinctive marks include suggestive, arbitrary, and fanciful marks. A suggestive mark "requires imagination, thought, and perception to reach a conclusion as to the nature of the goods" (*Abercrombie & Fitch Company v. Hunting World Incorporated*, 1976, 8). For example, Greyhound bus lines suggest speed. A fanciful mark is not a real word in the English language, but is invented to be used as a mark, such as Kodak or Clorox. An arbitrary mark applies a common word in an unfamiliar way. Puma is an arbitrary mark used to identify one source of athletic gear.

Descriptive marks, on the other hand, are considered weak marks because they lack secondary meaning. Since the mark is descriptive, it does not cause mental recognition in the buyer's mind about the source of the product. A mark is descriptive if it describes the product's features, qualities, or ingredients in ordinary language or describes the use to which the product is put. For example, onion rings describe the product, rather than identify the source of the product, whereas Ball Park Franks identify a unique source and brand of hot dogs rather than the general product category.

Cancellation

A registered mark can be canceled:

- by petition by the owner of a similar mark within five years of the registration of the mark;
- if the registered mark becomes a generic name for goods or services;
- if the mark has been abandoned; or
- if the mark was obtained fraudulently.

"The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of the goods and services on or in connection with which it has been used" (Lanham Act, 15 USC 1064). When a party has sustained a five-year period during which the mark has not been challenged, he/she may file to make the mark incontestable (15 USC 1065).

Relief can be injunctive (i.e., stopping the action), or compensatory. Compensatory relief may include recovery of defendant's profits, damage sustained by plaintiff, cost of court and appeal processes, and destruction of infringing articles. All court decisions become part of the Patent and Trademark Office records.

Abandonment

A mark is abandoned if its use has been discontinued with intent not to resume its use in regular trade. Nonuse for three years is prima facie evidence of abandonment (15 USC 1127).

Infringement

To recover for infringement of a registered mark under Section 32(1) of the Lanham Act,

> a plaintiff must establish first, that its mark is valid and second, that the defendant's use of the mark is likely to cause confusion. A defendant is then liable for infringement if he uses (1) any reproduction, counterfeit, copy, or colorable imitation of the mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution, or advertising of any goods; (5) where such use is likely to cause confusion or to cause mistake or to deceive (15 USC 1114 [1, a]) … Section 43(a) of the Lanham Act provides a civil cause of action for infringement of unregistered marks. In order for an unregistered mark to be protectable under section 43(a), the mark must be capable of distinguishing the plaintiff's services from those of others. (15 USC 1125[a])

Validity and likelihood of confusion are the two criteria examined closely for service mark infringement.

Criminal Acts in Trademark

Trademark counterfeiting or pirating of memorabilia, apparel, and equipment are serious crimes affecting the sport industry. In an effort to curb these multimillion-dollar losses in sales tax revenue, the Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), and the Department of Homeland Security have joined forces to curb, or at least control, the situation. The U.S. Border Patrol is also working with these organizations. "The Coalition to Advance the Protection of Sports Logos (CAPS), an alliance formed by the Collegiate Licensing Company (CLC), Major League Baseball Properties, NBA Properties, NFL Properties, and NHL Enterprises, works in conjunction with local law enforcement agencies to seize counterfeit property" (Grady, Clement, & Woishnis, 2009).

The Lanham Act allows manufacturers, sellers, and producers of goods and services to prevent a competitor from:

1) using any counterfeit, copy, or imitation of their trademarks (that has been registered with the U.S. Patent and Trademark Office), in connection with the sale of any goods or services in a way that is likely to cause confusion, mistake, or deception, (15 USC 1114) or
2) using in commercial advertising any word, term, name, symbol, or device, or any false or misleading designation of origin, or false or misleading description or representation of fact, which: (a) is likely to cause confusion, mistake, or deception as to affiliation, connection, or association, or as to origin, sponsorship, or approval, of his or her goods, services, or commercial activities by another person or (b) misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goals, services, or commercial activities. (15 USC 1125)

Potential penalties include an injunction to stop the use of the mark, destruction of articles containing the mark, and money damages. Treble damages are fines of three times the cost of the damage. Statutory damage under the Lanham Act are also available as an alternative to seeking defendant's profits or plaintiff's actual losses resulting from infringement in the amount of not less than $1,000 or more than $200,000 per counterfeit mark per type of goods or services sold (15 USC 1116–1118, 2010).

The Trademark Counterfeiting Act of 1984 provides that "whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services shall, if an individual, be fined or imprisoned" (18 USC 2320 [a], 2010). A violation of the federal counterfeiting statute requires that the following elements be established:

1) the defendant trafficked or attempted to traffic in goods and services;
2) that such trafficking, or the attempt to traffic was intentional;
3) that the defendant used a "counterfeit mark" on or in connection with such goods or services; and
4) that the defendant "knew" that the counterfeit mark was so used. (18 USC 2320 [a], 2010)

TRADEMARK CASES

The following trademark cases will be addressed under the categories of confusion, dilution, trade dress, cancellation, and abandonment.

Confusion

The word "Olympic" and the interlocking rings associated with the Olympics have been the subject of litigation since 1982. In the *United States Olympic Committee, et al. v. Intelicense Corp. S.A.* (1984), exclusive ownership of the word "Olympic" was given to the United States Olympic Committee (USOC). The decision, along with the Amateur Sports Act of 1978, a federal statute, gives exclusive ownership of the word and rings to the USOC.

An example of litigation was the *United State Olympic Committee, et al. v. Xclusive Leisure & Hospitality, Ltd., et al.* (2009). The United States Olympic Committee (USOC), the International Olympic Committee (IOC), and the 2008 Beijing Olympic Games Organizing Committee sued beijingticketing.com for name confusion in their use of USOC and IOC marks protected under the Lanham Act (Lanham Act, 15 USC 1114) and the Amateur Sports Act (2010). The defendants had created a website using USOC and IOC logos to sell illegal tickets for the 2008 games. Unbeknownst to the illegal website owners was the fact that (a) many of the Beijing Official Olympic tickets, including the opening and closing ceremonies, contained microchips that identified the owner and that (b) ownership could only be transferred once through a complex process. Those who purchased tickets from the illegal site never received tickets. The lawsuit was the Beijing Organizing Committee's preferred method of stopping the illegal website from conducting further operations which may have been directing traffic away from the official ticket website. The United States Court for the Northern District of California found a likelihood of confusion and granted an injunction to close the website. The plaintiffs were also permitted to protect their marks and to seek damages, as well as to pursue possible criminal action.

The term "March Madness" has been the subject of ongoing litigation for nearly ten years. In a series of decisions beginning in 2001, the March Madness Athletic Association (MMAA), the National Collegiate Athletic Association (NCAA), and the Illinois High School Athletic Association (IHAA) sued Netfire, d/b/a Sport Marketing International (SMI), and Matthew Jones. In 2000, the Illinois High School Athletic Association sued Netfire for trademark infringement, dilution, and unfair competition. Later, the March Madness Athletic Association replaced the high school group in that suit and "amended its complaint to add a claim for cybersquatting, or using a domain name in order to profit dishonestly from the reputation of someone else's trademark" (*March Madness Athletic Ass'n, LLC. v. Netfire, Inc.*, 2005, 542). Netfire responded with claims for fraud, tortuous interference with contract and business relations, and conversion and civil conspiracy against IHSA and NCAA. The district court granted IHSA and NCAA summary judgment on SMI's counterclaims and sent the remaining claims to trial. In 2003, the U.S. Court of Appeals for the Fifth Circuit found for MMAA on infringement and cybersquatting and against MMAA on civil conspiracy (543). The court also found that the phrase "March Madness" was a protectable trademark, not a generic term. In addition, the court found that there was a likelihood of confusion between the protected trademark and the website. Factors examined in determining the likelihood of confusion were:

1) The type of mark allegedly infringed
2) The similarity between the two marks
3) The similarity of the products or services

4) The identity of the retail outlets and purchasers
5) The identity of the advertising media used
6) The defendant's intent
7) Any evidence of actual confusion. (*March Madness Athletic Ass'n, LLC,. v. Netfire, Inc.*, 2005, 49)

Ownership of the domain name was transferred from SMI to MMAA. In 2005, the parties appealed the 2003 decisions again to the Fifth Circuit believing that they had new information regarding false information. The court confirmed their earlier decision.

In 2008, Intersport, a corporation, was permitted by the Circuit Court of Cook County, Illinois, to retain the license to the trademark "March Madness" to advertise, promote, and sell videos of sports programming. The corporation had been distributing content to wireless communication devices and had used the mark "March Madness" since 1986. NCAA and March Madness Athletic Association appealed the decision to the Illinois Court, First District, Third Division. The court affirmed the lower court's decision, noting that the selling of videos was within the broad range of the license agreement (*Intersport, Inc. v. National Collegiate Athletic Association and March Madness Athletic Association, LLC*, 2008).

Even though ESPN did not have a registered mark, it sued Quicksilver, a manufacturer of clothing products for surfers, for the stylized X which each party claimed was its well-recognized trademark (*ESPN, Inc. v. Quicksilver, Inc.*, 2008). Quicksilver had begun using the "X" symbol on its products in 1986 and had a valid and protectable trademark that had been used in commerce. ESPN created the X Games, a sport competition featuring sports like skateboarding, snowboarding, and surfing. ESPN had a pending application for the X mark and sought to cancel Quicksilver's valid mark. The Court found for Quicksilver; ESPN's motion to dismiss Quicksilver's mark was denied. The case confirms that a registered mark usually takes precedence over an application for a mark.

On August 20, 2010, The Ohio State University (OSU) filed a motion for a temporary restraining order and preliminary injunction against Keith Antonio Thomas and GDS Marketing, LLC for trademark infringement. GDS had infringed eight of OSU's trademarks registered between 1981 and 1997 and a series of common-law trademarks, including the colors scarlet and gray, the website, and the block O (*The Ohio State University v. Keith Antonio Thomas, et al.*, 2010). OSU's licensing program was over 30 years old and had generated royalties of $35 million over the past five years. The defendants published two electronic magazines, "Buckeye Gameday" and "Ohio State Buckeye E-Book," freely using any and all of OSU's registered and common-law trademarks. The court found that OSU owned the marks, that the marks had been used in commerce, and that a likelihood of confusion existed. OSU was granted a temporary restraining order and a preliminary injunction; the defendants were required to stop their infringement.

A thirteen-year trademark battle existed between the University of South Carolina and the University of Southern California over the interlocking "SC" logo used by athletic teams at both schools. The University of Southern California owned the registered mark. The University of South Carolina petitioned the U.S. Trademark Trial and Appeals Board to cancel Southern California's registration of the mark, arguing that "SC" represented their state, South Carolina, and had been used prior to Southern California's use. The Board refused to register South Carolina's logo and also refused to cancel Southern California's trademark. The certiorari petition to the United States Supreme Court was denied (*University of South Carolina v. University of Southern California*, 2010).

Dilution

A recent decision that involved both confusion and dilution was *Dallas Cowboys Football Club, LTD., et al. v. America's Team Properties, Inc.* (2009). America's Team Properties (ATP), incorporated in Minnesota in 1998, took the assignment of the U.S. trademark, "America's Team" to be used in selling T-shirts and other apparel. The previous owner had obtained the mark in 1990; ATP purchased the mark for $100.00. In 1999, the owner of ATP ran an advertisement in *USA Today* in an effort to auction the mark to the highest bidder with a minimum bid of $500,000. ATP called the Dallas Cowboys to notify the team that the registration was for sale.

The Dallas Cowboys responded by filing suit alleging common-law rights against ATP for trademark infringement. They stated that the mark "America's Team" was protected and that they possessed priority over America's Team Properties. ATP filed a counterclaim against the Dallas Cowboys seeking a declaratory judgment that the registration was valid and sought cancellation of the mark on the basis that it had not been used. Two questions were raised at trial; would the common marks be confused by consumers (the likelihood of confusion) and, if both were retained, could the value of the mark be weakened (dilution)? The court concluded that a likelihood of confusion would exist as the marks were exactly the same; however, nearly all of the remaining factors favored the plaintiffs.

Trademark dilution was identified, by the court, "as the weakening of the ability of a mark to clearly and unmistakably distinguish the source of a product" (*Dallas Cowboys Football Club, Ltd. v. America's Team Properties, Inc.*, 2009, 642). In blurring, the court considered similarity, distinctiveness, and exclusive use of the mark. Tarnishment occurs when the mark represents poor-quality products or some other event such as an inferior website. When one of two marks is weak, and confusion exists, people will think of both products as weak. The Dallas Cowboys sensed both blurring and tarnishment as a result of the same mark and requested that the court cancel the ATP mark. The Court cancelled America's Team Properties' mark. An immediate injunction was ordered as was the removal of all products from the defendant's website.

In another case, 24 Hour Fitness, USA, Inc. sued 24/7 Tribeca Fitness, LLC, alleging trademark dilution under false designation of origin and unfair competition. Distinctiveness was measured by the following five categories: 1) generic; 2) descriptive; 3) suggestive; 4) arbitrary; or 5) fanciful, as discussed above in the *Abercrombie & Fitch*

Company v. Hunting World Incorporated (1976) case. As the names were found not to be similar, the court dismissed 24 Hour Fitness's claims of infringement against the name and mark. Judgment was entered in favor of 24/7; the likelihood of confusion was insufficient (*24 Hour Fitness USA, Inc., v. 24/7 Tribeca Fitness LLC, et al.*, 2000).

In 2000, the Heisman Trophy Trust entered into a settlement following Smack Apparel's sale of a shopping bag with a picture of a potential Heisman winner suspected of shoplifting superimposed on a picture of the Heisman Trophy. In the agreement, Smack Apparel stated that they would "cease and permanently reframe from manufacturing, displaying, selling, or offering for sale any clothing or merchandise bearing the Heisman marks" (*The Heisman Trophy Trust v. Smack Apparel Company*, 2009, 324). In 2008, Smack Apparel again produced thirteen Heisman Trophy-related T-shirts without permission, thus prompting a suit. The lawsuit alleged breach of contract regarding the breach of the 2000 settlement, trademark infringement, and dilution. The request was for a preliminary injunction. The court found a likelihood of confusion and granted the injunction.

In the case of *University of Kansas and Kansas Athletics, Inc. v. Larry Sinks, et al.* (2008), the University of Kansas and Kansas Athletics owned the registered marks "Kansas," "KU Jay Hawks," "Allen Field," "The Play," and several Jay Hawk designs for the university's name, nickname, and design. KU did not own a trademark for the crimson and blue colors. However, these colors had been used for over 100 years. KU licensed its trademarks to businesses and to apparel companies. The licensing was managed by Collegiate Licensing Company (CLC), a popular sport licensing firm that serves several high-profile collegiate athletic departments. Larry Sinks, owner of Midwest Graphics, a licensee of KU, sold Midwest Graphics and purchased Victory Sportswear. Victory Sportswear opened Joe-College under Sinks's management. Sinks approached KU for a license and was denied. The Joe-College store was only a few blocks from the University in Lawrence, Kansas. Joe-College sold inexpensive T-shirts and shorts that contained KU registered and non-registered marks and used KU colors with references to sex and alcohol. Signs were posted throughout the store (essentially acting as a disclaimer) alerting customers to the fact that these products were not licensed. Although Joe-College was not licensed by the university, the company submitted a federal trademark registration for Kivisto Field upon hearing of the name of the new university field.

In May of 2006, the director of athletics for the University of Kansas requested that Joe-College cease production of all KU apparel. He then sued Sinks, et al., d/b/a Joe-College for federal and state trademark infringement (*University of Kansas, et al. v. Larry Sinks, et al.*, 2008). One of the Kansas claims was similarity of marks; similarity was tested on sight, sound, and meaning. Would the marks be confusing to the public? Did the defendant intend to benefit from the reputation of the university? The court found many of the shirts to be similar and evidence provided actual confusion. The claims were confusion, unfair competition, and dilution. Under unfair competition KU established that most of their marks were registered and that those not registered had been used for an extended period of time.

In considering the trademark dilution claims, evidence was provided that KU's marks were widely recognized, and that the defendants had used their marks commercially without authorization. Also, the court found that the defendants' use of KU's marks, particularly those involving violent and abusive messages, had created a negative image for the institution. The court found that the marks "KU," "Kansas," and "Jay Hawks" were incontestable as the university had continuously used each mark for five or more consecutive years after the date of registration (Lanham Act, 15 USC 1065). The court granted summary judgment in part to KU Athletics and the University of Kansas. In 2009, after more litigation, attorney fees and expenses in the amount of $667,507.42 were eventually granted to the plaintiff.

Trade Dress

Golf courses may place service marks on their names and on distinguishing aspects of the course or on a particular hole on the course. *Pebble Beach Co. v. Tour 18 I, Ltd.* (1996) was an action for service mark and trade dress infringement, unfair competition, and false advertising. Confusion and dilution played an important role in the case. The action was brought by the owners of a number of famous golf courses against the developer of an 18-hole course in Humble, Texas. The Texas golf course consisted of replica holes from these famous courses. The developer for Tour 18 freely used the marks of Pebble Beach, Pinehurst, and Harbour Town. In response to the suit, Tour 18 asserted counterclaims under Texas law for unfair competition and interfering with an existing business. The developer claimed that the suit was a frivolous attempt to put Tour 18 out of business.

Pebble Beach and Pinehurst provided evidence of federal service mark registration for their marks; Sea Pines did not own a federal service mark for Harbour Town or the lighthouse at Harbour Town. Its exerted claim for protection was the common-law service mark under Section 43(a) of the Lanham Act. Tour 18 unsuccessfully argued a number of issues, among them the fact that Sea Pines no longer owned the lighthouse and had therefore abandoned the mark. Sea Pines continued to hold the mark after the sale of the lighthouse and had license agreements with the new owners to enable the new owners to use the mark in agreed-upon ways.

Under the likelihood of confusion analysis, the court stated that "while golfers at Tour 18 may not be confused as to the course since they will know they are playing a replica constructed by Tour 18 and not the real Pebble Beach Hole 14, they may still be confused into believing Pebble Beach sponsored or approved Tour 18's use of their service marks and golf hole designs" (*Pebble Beach Co. v. Tour 18 I, Ltd*, 1998, 1542). The court found that the plaintiffs had shown the validity of their respective marks, "Pebble Beach," "Pinehurst," "Harbour Town" and the lighthouse in Harbour Town; that the defendants, without the plaintiffs' consent, copied a colorable imitation of plaintiffs' registered marks; and that Tour 18's use of plaintiffs' marks was likely to cause confusion as to affiliation, sponsorship, and/or permission. Accordingly, the court found for the plaintiffs.

Trade dress was "the shapes of plaintiffs' golf holes, the length and width of the holes, the placement and shape of sand and water hazards, the size and shape of the greens, the slope and elevation of the holes, and the golf holes' surrounding vegetation" (1555). Also, the evidence indicated "that there is an unlimited number of alternative designs to plaintiffs' golf hole configurations. Additionally, while plaintiffs' design is particularly beautiful and challenging, there is no evidence to indicate that the designs are superior to the many available alternatives. Consequently, there is no need for Tour 18 to copy plaintiffs' golf hole designs to achieve the functions of a golf hole" (1556).

The issue under dilution was whether the uses of the mark would cause injury to the business reputation or dilute the distinctiveness of the owner's mark. The court found that only the 18th hole at Harbour Town and the lighthouse had the "strong, distinctive, source-identifying characteristics required for protection under the antidilution statute" (1567). Thus, the court found for Sea Pines in dilution.

The court "found Tour 18 liable for the following: service mark infringement, trade dress infringement, and unfair competition in violation of the Lanham Act" (1571). The plaintiffs were given permanent injunctive relief, preventing Tour 18's use of a replica of the Harbour Town Lighthouse, Harbour Town Golf Link Hole 18, Harbour Town Golf Links, Pebble Beach Golf Links, Pinehurst, or Pinehurst No. 2. Corrective action was also necessary to eliminate confusion between Harbour Town Hole 18 and the lighthouse and Tour 18's rendition. The defendants were required to place a bold disclaimer of any affiliation with the original golf holes in all of their advertisements. The court of appeals affirmed the lower court's decision in finding a likelihood of confusion from Tour 18's use of Pebble Beach and other marks (*Pebble Beach Co. v. Tour 18 I, Ltd.*, 1998).

In 2005, golf litigation turned to a golf video game (*Incredible Technologies, Inc. v. Virtual Technologies, Inc. d/b/a Global VR*, 2005). The golf game, *Golden Tee*, was a game played by many in bars. Incredible Technologies, Inc. was not happy when *PGA Tour Golf*, created by Virtual Technologies, became a competing game. Incredible Technologies sued Virtual Technologies for an injunction under trade dress. The request was denied and the decision was appealed. The court stated that "IT's expressions on its control panel are not dictated by creativity, but rather are simple explanations of the trackball system; at best, they are entitled to protection only from virtually identical copying; the video displays contain many common aspects of the game of golf and IT's trade dress is functional" (1010–1011). The court of appeals affirmed the earlier court's decision and found for Virtual Technologies.

Color schemes, such as a university's team colors, are entitled to protection as trade dress as a result of the decision in *Board of Supervisors of Louisiana State University, et al. v. Smack Apparel Co., et al.* (2006). In 2006, Smack Apparel, a manufacturer of humorous and occasionally irreverent T-shirts, was found by the U.S. Court of the Eastern District of Louisiana to have intentionally infringed on the marks owned by the Collegiate Licensing Company and those of The Ohio State University, Louisiana State University, University of Oklahoma, and University of Southern California. In 2008, the Fifth Circuit affirmed the Eastern District's decision, concluding that "the record established secondary meaning in the marks. Next, it found that plaintiffs possessed strong marks in their use of color schemes and other identifying indicia on college sports-themed merchandise" (*Board of Supervisors of Louisiana State University, et al. v. Smack Apparel, et al.*, 2009, 465). The Eastern District of Louisiana Court awarded the plaintiffs $38,912.37 for attorney fees and $7,312.73 for costs.

Cancellation

A mark can be canceled if it becomes common or generic, is offensive, or is successfully challenged by another party. It is considered to be abandoned if not used for a long period of time. In 1992, Susan Harjo petitioned the Trademark Trial and Appeals Board (TTAB) to cancel six Washington Redskin trademarks containing the word "redskin(s)" on the grounds that the word was offensive, scandalous, and disparaging to Native Americans. In 1999, the TTAB ruled in favor of Harjo and the Native Americans. Pro-Football brought suit to review the board's decision (*Pro-Football, Inc. v. Harjo, et al.*, 2000). Pro-Football argued that "the trademarks do not disparage Native Americans … [and] do not bring Native Americans into contempt or disrepute … [and] that the Native Americans' cancellation petition was barred by the doctrine of laches" (5–6). The claim, under laches, was the only issue discussed in the court proceedings. Laches bars relief to those who wait to file a claim. In this case, the view was that the agency holding the mark for twenty-five years had continuously invested time and money into the brand, and that if one wishes to contest a mark, it should be done in a timely manner.

To counter Pro-Football's laches defense and to obtain a judgment on the pleadings, Harjo asserted that "because a laches argument requires a showing of economic prejudice, they are entitled to broad discovery of Pro-Football's financial records" (*Pro-Football, Inc. v. Harjo, et al.*, 2002, 80). Pro-Football claimed the records were confidential. The court ruled on the documents and depositions that were obtained and agreed to continue litigation.

In 2003, after a lengthy trial, the United States Court for the District of Columbia reversed the TTAB's finding that disparagement was not supported by substantial evidence. The court found for the Washington Redskins. In 2005, the Native Americans appealed the District Court's decision to grant Pro-Football summary judgment. The United States Court of Appeals, District of Columbia Circuit found that the District Court applied the wrong standard in evaluating laches and returned the case to the District Court. In 2008, the parties returned to the court. Summary judgment was granted to Pro-Football, Inc. and was denied to Harjo. The court concluded that the owners established the opposing party's lack of diligence, with no excuses, in delaying contestation of the mark. The owners of the Washington Redskins were able to establish economic prejudice showing heavy investments in marketing and developing the brand. Cancellation of the marks was stopped.

RIGHT OF PUBLICITY

The term "right of publicity" was coined in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* (1953). The right evolved principally for entertainers, celebrities, and public figures who were facing either misappropriation of name, First Amendment invasion of privacy violations, or both. Misappropriation is "the unauthorized, improper, or unlawful use of ... property for a purpose other than that for which it is intended" (*Black's Law Dictionary,* 2009). McCarthy defines the right of publicity as the "right of everyone to control the commercial use of his or her identity" (McCarthy, 2000, p. 3:1).

In 1960, Prosser organized the right of privacy into four distinct torts: "(1) unreasonable intrusion upon another's seclusion; (2) public disclosure of private facts; (3) false light invasion of privacy; and (4) appropriation of another's name or likeness" (ABA Section of Intellectual Property Law, 2004).

RIGHT OF PUBLICITY CASES

The use of athletes' identity in fantasy sports games became an issue in professional sports in *CBC Distribution and Marketing, Inc. v. Major League Baseball Advanced Media L.P., et al.* (2005) and *CBS Interactive, Inc. v. National Football League Players Association, Inc., et al.* (2009) and later in collegiate sports in *Keller, et al. v. Electronic Arts, Inc., NCAA, and Collegiate Licensing Company* (2010). The media arm of Major League Baseball and the NFL Players Association (NFLPA) alleged that CBC Distribution and Marketing, a fantasy game company, had violated their license agreement by operating a fantasy game using players' identities without permission or a license. CBC provided not only the games, but also up-to-date information on players, most of which was available in newspapers. CBC entered into a license agreement with the NFLPA in 1995. The 2002 License Agreement, among other items, stated "that upon termination CBC would have no right ... to use in any way the Rights, the Trademarks, or any Promotional Material relating to the Licensed Products and that upon expiration or termination of the License Agreement, CBC shall refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly" (*CBC Distribution and Marketing, Inc.,* 2005, 8).

"Between 2001 and January 2004 Advanced Media offered the fantasy baseball game on MLB.com without obtaining a license and without obtaining permission from the Players Association" (*CBC Distribution and Marketing, Inc.,* 2006, 1081). When CBC anticipated a lawsuit, they filed a complaint against Advanced Media for declaratory judgment, stating that CBC had exclusive ownership of player statistics associated with players' names, and for injunctive relief that Advanced Media be enjoined from interfering with CBC businesses. Advanced Media and the NFLPA countered with contract violations based on the 2002 License Agreement and that CBC violated players' rights of publicity based on CBC's exploiting the identity of players, including their names, nicknames, likenesses, signatures, jersey numbers, pictures, player records, and biographical data. The contract issues were resolved.

The 8th Circuit found a violation of the right of publicity in that the players' identities had been used for commercial profit. However, they concluded that the right of publicity was secondary to CBC's First Amendment right to use the players' names and statistics. Names and statistics are facts and thus cannot be copyrighted, but under the First Amendment, names and statistics are available to the public and are therefore part of the public domain. Thus, CBC succeeded because the First Amendment was viewed as more important than the players' right of publicity. A petition for a Writ of Certiorari (an order to review the case) was denied (*Major League Baseball Advanced Media, L.P., et al. v. CBC Distribution and Marketing, Inc.*, 2008).

Another case examining the same issue was *CBS Interactive, Inc. v. National Football League Players' Association* (2009). CBS Interactive was a leading provider of fantasy football. Prior to the 2008/2009 season, the NFL had a license agreement with CBS Interactive to use the names, likenesses, pictures, photographs, voices, etc. of the individual players who had entered into the Group Licensing Agreement. In 2008, the NFL's licensing division, Players Inc., asked CBS Interactive to pay a licensing fee to the players. CBS refused, citing the decision in *CBC Distribution and Marketing*, discussed above. Players, Inc. "informed CBS Interactive that the Eighth Circuit's decision in the fantasy game litigation was wrongly decided and that if CBS Interactive failed to pay the licensing fees, Players, Inc. would file a law suit" (9). CBS Interactive's motion for partial summary judgment was granted, essentially permitting use of the players' names and stats without a license.

In *Keller, et al. v. Electronic Arts, Inc., NCAA, and Collegiate Licensing Company* (2010), the same issue was litigated at the collegiate level. Sam Keller, a former star quarterback for Arizona State, filed a class action suit on behalf of collegiate football and basketball players. The claims were on the alleged use of players' identities, without permission, in NCAA football, basketball, and March Madness video games. Even though players' names were not used, sufficient information was provided for the average sports fan to easily identify the players. The plaintiff's first claim was that the NCAA violated the Indiana Right of Publicity Law, a right to his likeness or image. The court did not support his position and the claim was dismissed.

The claim against Electronic Arts was analyzed using several different balancing tests, which are, in effect, defenses, to reconcile the competing interests of the athletes' rights of publicity and the First Amendment rights of Electronic Arts. The court first used the "transformative use" balancing test. Transformative use examines whether the likeness was original or the likeness had been transformed so that it no longer represented the celebrity. Electronic Arts (EA) stated that the video game had used transformative elements in depicting the athletes. In denying EA's transformative use defense, the court noted, "These cases show that this Court's focus must be on the depiction of plaintiff in 'NCAA Football' not the game's other elements" (*Keller, et al. v. Electronic Arts, Inc., et al.*, 2010, 18). Under public interest, California law states that "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." The defense argued that the names and statistics were public interest and were not part of the right of publicity. The court found that EA had used more than the mere names and the statistics; it had used athletes' physical characteristics and had moved far beyond what the court had considered in the *Major League Baseball Advanced Media, L.P., et al.* case. EA lost using the public interest test. Next, the court considered if the public affairs exemption was applicable. The public affairs exemption is provided in California civil law to avoid First Amendment concerns in the use of a person's name when the issue is a matter of public interest. The court found that, "although NCAA Football is based on subject matter considered public affairs, EA is not entitled to the statutory defense because its use of Plaintiff's image and likeness extends beyond reporting information about him" (24). *Keller, et al. v. Electronic Arts, Inc., et al.* is pending and has been consolidated with other cases raising similar claims by current and former student athletes, as *In re: NCAA Student-Athlete Name and Likeness Litigation* (2010).

The "Tony Twist" sequence of court decisions provides an interesting analysis of the interplay between an athlete's right to his/her name and image, and the public's First Amendment rights. Anthony R. Twist was "regarded as one of the most violent 'enforcers' in hockey and attained a national reputation for violence on the ice hockey rink" (*Doe, a/d/a Tony Twist v. TCI Cablevision, et al.*, 2002, 3). Todd McFarlane, a comic book writer, created a comic book series called *Spawn* that featured a superhuman creature of the same name. Later, he introduced a character, Tony Twist, as an antagonist to Spawn.

Anthony Twist became aware of the comic book character, and he subsequently filed suit against McFarlane and others for damages and an injunction for defamation and misappropriation of name. McFarlane countered that neither the contents nor description in the Spawn book identified the plaintiff. The trial court, using the First Amendment, dismissed the defamation claim and found that the misappropriation of name claim did not apply. The misappropriation claim was sent to the jury. The jury awarded Twist $24.5 million. The judge overruled the jury verdict, stating that there was insufficient evidence of intent (*Doe v. TCI Cablevision, et. al.*, 2002, 2). In 2003, the Missouri court identified, for the first time, the difference between the use of a person's name and identity for expression versus for commercial purposes. Under the First Amendment, protection exists for expression but does not exist for commercial use (Grady, McKelvey, & Clement, 2005). The Supreme Court of Missouri ordered a new trial. McFarlane's Petition for Certiorari to the United States Supreme Court was denied. In 2007, the case was settled for a reported $5 million.

PATENT LAW

Like copyright and trademark law, patent law evolved from Article I of the United States Constitution. It grants Congress the power to "promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries" (U.S. Const., Article I, Section 8, Clause 8). The Patent Act of 1952 states that a patent is obtained by "whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement of the above" (Patent Act, 35 USC 101). A person is entitled to a patent unless:

a) the invention was known or used by others in this country … or
b) the invention was patented or described in a printed publication in this or a foreign country … or
c) he has abandoned the invention or …
d) he did not himself invent the subject matter sought to be patented. (35 USC 102)

Also, "a patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 …, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains" (35 USC 103). A patent is infringed when someone "without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent" (35 USC 271). Damages for infringing on a patent are to be adequate to compensate for the infringement or a reasonable royalty. A court may increase the damage award to three times the damage assessed (35 USC 284).

Patent applications need to demonstrate that the invention or discovery is novel and non-obvious. The application is expected to describe the object of the patent in detail. Patent law does not cover laws of nature, physical phenomena, or abstract ideas (*Diamond v. Kiehr,* 1981; Patent Act, 35 USC 101). According to Harkins (2008), a patent gives the owner a monopoly on the registered object. Currently, the life of a patent begins on the date of issue and ends twenty years from the date of application (Patent Act, 35 USC 154).

The majority of patents received in sport throughout the years have been for equipment. For example, the reader can trace the evolution of golf club and tennis racket patents as the selection of materials and the precision of mechanics changed the trajectory of the golf club swing and the sweet spot of the tennis strings. The reader who checks the patent registrar for sport equipment will be impressed with the volume of awards for sport in any one year.

PATENT LAW CASES

Everything Baseball v. Wilson Sporting Goods Company, et al. (2009) and *Aqua-Lung America, Inc. v. American Underwater Products, Inc.* (2009) are sport examples of patent infringement. Everything Baseball sued Wilson Sporting Goods Company and others, alleging that Wilson was infringing their patent No. 6,161,226, a baseball chest protector. Wilson and others, including Rawlings and Riddell, moved for summary judgment; the patent was invalid as anticipated by three prior art references. The three prior art references were: No. 5,530,966, issued to Joseph West; a chest protector, manufactured and sold by Douglas under the West patent; and the "hang tag" attached to a chest protector, manufactured and sold by Wilson under the West patent. All three chest protectors were compared and found to be different from Everything Baseball's chest protector. As a result, the defendant's motion for summary judgment was denied.

Aqua-Lung America, Inc. v. American Underwater Products, Inc. (2009) concerned the design of a scuba tank valve that was intended to link the first stage (tank-end) regulator to the scuba tank. At issue were three patents: the 674 Patent, a device called the pressure responsive element (PRE); the 958 Patent, discussing a device called a "retractable valve member;" and the 609 Patent referring to the PRE as a "retractable filter cover." Oceanic contended that Aqua-Lung's Kronos, Legend, and Titan families of regulators each included valves employing an "automatic closure device" that infringed on Oceanic's patents. Aqua-Lung's complaint sought a declaratory judgment that their valve does not infringe the three patents in suit. Aqua-Lung also sought a declaratory judgment of invalidity as to all three Oceanic patents.

Patent infringement analysis involves two steps: 1) claim construction; and 2) application of the properly construed claims to the accused device or method. The court completed the first step, a question of law, with the claim construction order. Next, the court determined if there had been patent infringement, it would have been a question of fact. To prove infringement, a patent holder must show that the accused device or method meets each claim limitation, either literally or under the doctrine of equivalents. The court granted Aqua-Lung's motion for summary judgment on its non-infringement claim with respect to the 958 and 609 Patents and denied Oceanic's motion for summary judgment or infringement of these patents. Aqua-Lung's motion for summary judgment or invalidity also was denied with respect to all three patents.

Process Sport Patents

Technology has had a profound impact on patent law and is directly responsible for many of the recent changes in the law. The 1998 decision in *State Street Bank and Trust Co. v. Signature Financial Group, Inc.*, however, identified a new avenue for patent registration in the sport industry. Signature Financial Group, Inc. was the assignee of a patent called the Data Processing System for Hub and Spoke Financial Services Configuration. It was a

> data processing system (the system) for implementing an investment structure which was developed for use in Signature's business as an administrator and economic agent for mutual funds.... The system ... facilitates a structure whereby mutual funds (Spokes) pooled their assets in an investment portfolio (Hub) organized as a partnership. The investment configuration provided the administrator of a mutual fund with the advantages of a partnership. (*State Street Bank and Trust Co. v. Signature Financial Group, Inc.*, 1998, 1370)

The term process was defined as "a process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material" (Patent Act, 35 USC 100). The question was whether HUB and SPOKE could receive a patent; the court said no, it was an idea, not a process. The court of appeals reversed, holding "that the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price … produces a useful, concrete and tangible result" (1373). The petition to the United States Supreme Court was denied.

While the public championed the decision of the court of appeals as an invitation to the software industry to patent achievements, the sport industry saw it as a means to secure rights to strategy and skill innovations. Following the decision, a number of authors suggested that sport strategies and movements could receive not only copyright and trademarks, but protection under patent law as well. Robert Kunstadt (1996), a partner in a law firm representing the National Basketball Association (NBA) and the United States Olympic Committee (USOC), led this bold initiative for broader intellectual property protection of sport moves with his article titled "Are Sport Moves Next in IP Law?" Other authors, including Griffith (1998), Kukkonen (1998), Smith (1999), Das (2000), and Maurer (2001), provided influential approaches to the potential for placing patents on sport skill sequences and strategies. Bambauer (2005) described ways patents might be acquired in professional sport and sport training programs.

Clement and Hartman (2000) built a case for patent and/or copyright for the open/closed system of classifying human movement devised by Poulton (1957) and refined by Knapp (1963) and Robb (1972). "Closed movements are planned sequences of movement repeated in the same manner every time. They are predetermined routines. Open movements are movements executed in response to the movement of others. They are used to react to the movements of others. Performers in open movement know many different movements and strategies; they do not, however, know the actual movement that they will execute in any event until the opponents begin to make their plays. Gymnastics, figure skating, and archery represent closed movements; basketball, fencing, and tennis favor open movements" (Clement & Hartman, 1994, p. 21). All closed movements and original routines of such movements that are new and unique are easily fixed and thus readily suitable for copyright; some may also meet the requirements of a patent. Open movements will be more difficult to copyright or patent; however, newly created strategies should qualify.

Griffith (1998) argued for the value of patents for sport skills and techniques as a matter of economics, suggesting that as sport skills and strategies increased in monetary value while technology was making it easier to copy creative accomplishments, athletes should take steps to secure their innovations. It is not difficult for an enthusiastic synchronized swimmer to film the performance of a recent Olympic championship routine, play the stunts and sequences frame by frame, and eventually replicate the performance. Das (2000) and Maurer (2001) placed an emphasis on guiding young performers toward seeking a patent for their original creations (inventions and discoveries) and a copyright for their routines. Das provides an in-depth analysis of sport plays (strategies) as viable subjects for both patent and copyright, while Maurer concentrates on the economics of sport patents.

Among the more recent writers on the patenting of sport skills and sequences are Bambauer (2005), Magliocca (2009), McJohn (2009), and McFarlane and Litts (2010). Bambauer suggests how patents would work in professional sport and sports training. He cites the Arena Football League, U.S. Patent, No. 4,911,443, issued in 1990, as an example of such a patent. His work also recommends that patent agencies may wish to distinguish between "methods used in competition and methods used to prepare for it" (p. 422, p. 423). Magliocca (2009) advances the idea that the concept in sport of a level playing field prohibits the patenting of sport skills. His thesis is that no one should hold a monopoly on a key aspect of sport; it violates the idea of competition. This approach to process patents seems to conflict with all patents held by companies on various sport equipment. McJohn (2009) and McFarlane and Litts (2010) provide detailed discussions of recent court decisions in patent law.

There are a number of issues that have been discussed recently that may have an impact on the future of patents as they relate to sport. Patent law is expected to change considerably in the next few years. With passage of the Leahy-Smith America Invents Act in 2011, the U.S. patent system in 2013 will switch from a "first to invent" to a "first to file" system, bringing the U.S. in line with other countries who predominantly use "first to file." The new law will also eliminate inference proceedings and develop post-grant opposition in patent disputes.

SUMMARY

Intellectual property is the body of laws that a) protect the creative aspects of the sport industry and b) reward investment by sport properties, organizations, and manufacturers that develop a recognizable brand in their products or services. The law also protects the commercial aspects of a celebrity athlete's persona, but not facts or statistics that are already in the public domain. With innovations in technology, the ability to create digital images of star athletes will raise new concerns about how to sufficiently protect these athletes' brands. Intellectual property rights are property rights that can be licensed, sold, or transferred to others. Infringement of copyright, trademark, and patent by competitors is often the focus of litigation involving this rapidly evolving area of law.

DISCUSSION QUESTIONS

1. Explain the identification, evaluation, and control system used in risk management.
2. What are the major differences between risk management and disaster management and recovery?
3. What is the difference between a release signed by a minor and a release signed by the minor' parents?

11

Risk, Disaster, and Recovery Management

OBJECTIVES

Upon completing this chapter, you will:

1) know the difference between risk management and disaster management;
2) be able to prepare a recovery plan;
3) recognize that a release is a contract;
4) be conversant with the identification, evaluation, and control system in risk management; and
5) know where to look for up-to-date materials on disaster and recovery management.

INTRODUCTION

The goal in risk management is to avoid those dangers that one can envision. Disaster management, in contrast, is a plan for experiencing or facing hazardous situations and living through them. Disaster management includes recovery management—a system of rehabilitation of people, property, and businesses damaged or destroyed by a disaster.

Risk management is the identification, evaluation, and control of loss to property, clients, employees, and the public. A risk management program requires a systematic examination of the environment, with the identification of potential for exposure to loss and legal liability in all facets of the organization. The purpose of risk management is to make the sport and physical activity environment as safe as possible for participants and spectators, and the business as efficient as possible using accepted business practices. Many people view risk management solely as a means of reducing legal liability; however, a safe, honest, and efficient environment will not only reduce legal liability but will enhance the positive reputation of the business. Disaster management involves the identification of threats and vulnerabilities to natural and manmade hazards. Once the threats and vulnerabilities are identified, they are evaluated, and plans are prepared to meet, control, and survive the hazards that may occur. In recovery, the object is to return people, property, and businesses to the level at which they were before the incident. While risk management is driven by the desire to reduce accidents and possible litigation, disaster and recovery management are driven by the need for the survival of people, property, and businesses.

Persons who hold the positions of safety coordinators and committee members are to have an understanding of safety in the business of the agency. Further, staff handbooks are to contain policies and procedures relevant to safety, risk, and disaster management. An understanding of the components of a lawsuit are important to these areas (see Introduction).

RISK MANAGEMENT

Risk and disaster management must be comprehensive. This means that the entire league, team, management company, agency, business, school, or corporation participates in all components of the plan. Even if an agency refuses to plan for risks or disasters, professionals should create their own plans and programs. Insurance companies have been known to demand that ongoing risk management systems be present before providing coverage to a business or other agency; other companies have reduced rates when such programs are instituted.

This text has provided numerous illustrations of liability in sport and physical activity. Each of the major topics presented included an overview of the applicable law. Hypothetical examples and real cases illustrated most of the legal theories. This information, coupled with the student's practical experiences, is to be used to devise risk, disaster, and recovery management programs.

The risk management system consists of the identification, evaluation, and control of risks. The following risk management system was created for the first edition of this text (Clement, 1988).

Identification

The first step of risk management is to identify all areas of potential exposure to risk. Exposure means any and every event that could cause an agency to become vulnerable to a particular risk. The following is a list of elements that might be used in creating a risk management audit. This list is not meant to be comprehensive, nor has it been tailored to a specific agency or service. However, an effort has been made to demonstrate the vast array of topics a professional might consider in devising an audit. The elements include: local, state, and federal codes and regulations; professional organizations and other industry standards; policies and procedures; facilities; equipment; personnel; supervision; instruction; participant education; fiscal issues; and contracts.

Local, State, and Federal Regulations

Local, state, and federal laws, codes, and regulations that affect sport and physical activity and/or the agency under study are identified. The laws are published as health, safety, bathing, buildings, waste disposal, water pollution, medical emergency, weather, fire, crime, swimming pools, electrical, heating, refrigeration, air conditioning, industrial hygiene, and others. Agencies of importance include the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Department of Agriculture. Building codes are important. Waterslide regulations, for example, are found in amusement parks. Other examples are elevator codes and agriculture regulations. The agency's status—"for profit" or "not for profit"—will, on occasion, affect its standing under a law.

All laws, codes, and regulations are to be posted, made available to employees, and reviewed with each worker whose job is impacted. They must also be retained on file, brought up to date yearly, and strictly enforced. For example, fire safety regulations, including alarms, extinguishers, and sprinkler systems, are to be in order and must meet local codes. Enforceable provisions for electrical failure are to be made. Systems for evacuation for tornadoes, hurricanes, and severe storms are to be planned and posted, and staff must be prepared to carry them out. Employees must be educated about the differences between codes, laws, regulations, and guidelines. They should know that laws, codes, and regulations must be followed, whereas guidelines are followed on a volunteer basis. Failure to follow a *code* can result in civil punishment; failure to follow a *guideline* will not result in civil punishment. A court can, however, ask why the professional ignored a guideline. Agencies choosing to ignore popular guidelines should document their knowledge of the guideline and the reason(s) for rejecting it.

Professional Organizations and Industry Standards

Managers need to know professional certificates and guidelines that affect their businesses. They are to be aware of professional organizations related to each aspect of their agencies. The literature and services of such organizations are to be evaluated and a commitment made to track the offerings of selected organizations. Records of job competencies, verifications of employee certificates and test results, and attendance at safety meetings are to be on file. Staff credentials are checked in initial employment and periodically throughout job tenure. Criminal and other background checks are conducted, and drug testing is required when appropriate. Industry standards are known and maintained. Should a professional or an agency choose to differ from industry standards, reasons for the differences are documented. Often, professionals adhere to standards that are higher than industry standards—such quality is to be encouraged.

Policies and Procedures Common to the Industry

Policies for employees, participants, facility management, and conduct of activities exist in writing and are readily available, widely known, and enforced. Employee handbooks contain all policies and procedures—including behavior, appearance, attendance, and alcohol/drug use. Policies for participants also address alcohol and drug use. Due process systems (described in Chapter 4, U.S. Constitutional Amendments) exist and are explained to employees and participants.

Facilities

The facility is to be given major attention in any sport or physical activity risk management program. This is because it has been a primary subject of litigation. The following standards should be met:

1) A record of all property, including its condition and (if possible) value, exists and is readily available in the event of a fire, tornado, riot, attack by terrorists or vandals, or other loss. These lists are a requisite for insurance collection.
2) A detailed system for checking facilities exists and is used routinely. Hazards and cleanliness are but two of the topics. Frequency of inspection and name of the inspector are identified for each part of the audit. The facility audit process is reviewed bi-yearly by the same administrators who examine the results of injuries and emergency maintenance.
3) Facilities meet all code requirements, including lighting. Emergency lights for electrical failure easily lead people to exterior exits. Ground fault circuit interrupters are found in wet areas and locker rooms.
4) Verifications of building compliance with codes are on file.
5) The general condition of a facility is compared with appropriate guidelines (i.e., the American Council of Sports Medicine [ACSM], the National Intramural-Recreational Sport Association [NIRSA], etc.).
6) Protocols for repair, follow-up, and the closing of a facility in need of repair exist, and are used. These protocols are reviewed at least bi-yearly.
7) Parking lots, entrances, exterior traffic patterns, and internal structures meet the Americans with Disabilities Act (ADA) requirements.
8) Facility designs that create hazards are identified and remedied.
9) Exit and entrance signs are lit and visible to all. Entrances are secure and participants' safety is of the utmost importance.
10) A system for opening and closing the building each day is in writing, is followed, and is monitored by management.
11) Where appropriate, the facility is monitored hourly by a person with current CPR and first aid credentials.

Equipment

Equipment risk management demands that the purchaser be able to communicate with the seller. Furthermore, it requires that the purchaser comprehends the warranties and the proper uses of the equipment. Maintenance appears to be a primary cause for equipment to become part of the pattern in litigation. The following are equipment-related requirements that need to be included in any risk management plan:

1) A master list of equipment exists.

2) The equipment—permanently mounted or free standing—is cleaned and inspected routinely. Signed inspection documents are retained.
3) Any requests for equipment repair are in writing. When necessary, equipment is taken out of service if it cannot be repaired immediately.
4) The equipment is maintained as specified by manufacturers. All equipment with warranties that dictate specific repair and service are honored. Equipment is repaired and cleaned according to accepted industry practices.
5) All of the manufacturers' warnings and instructions are posted in a conspicuous place on equipment or on walls near equipment so participants can see them. The statements by manufacturers and retailers about the use of equipment are honored.
6) The staff is trained in the use of new equipment. New employees receive training before beginning work.
7) The equipment meets the standard established by the sport.
8) The statutes of the state, with reference to equipment, are known and followed.
9) All rescue equipment meets acceptable standards and is clean and ready to use.
10) Safety equipment is provided or required of participants; when participants do not have appropriate safety equipment, they do not participate. Safety equipment fits properly to assure the safety for which it was designed.

Personnel

Audit components for personnel are organized into three categories:

- employing, evaluating, and terminating;
- employee education; and
- staff training.

Employing, Evaluating, and Terminating

1) Written procedures for advertising jobs and soliciting candidates are designed, used, and recorded.
2) Job descriptions—including tasks, appropriate experience, and credentials to carry out the tasks—exist for each position. Job descriptions explicitly identify safety responsibilities. These descriptions are used for evaluation and termination. Employees are given copies of their job description.
3) Employee records contain:
   a) minimum and advanced qualifications for each employee with reference to responsibilities;
   b) contracts, references, and observations; and
   c) evaluation, performance, and attendance.

4) Employers verify that
   a) agencies licensing or certifying employees adhere to acceptable professional standards;
   b) employees know and adhere to the duty of care recommended by their profession, licensure, and certifications; and
   c) professionals know and apply the latest research, when appropriate.
5) Employee evaluation, retention, and termination policies exist and are used, and records are kept. Evaluations support quality, and a due process system is available and used.
6) Termination procedures include:
   a) warnings of inadequate or poor-quality work, and evidence that these flaws are in tasks contained in the employee's job description;
   b) opportunity for rehabilitation and change; and
   c) termination, after a continued pattern of incompetence, following rehabilitation.

Employee Education

1) The employees know and understand their job descriptions.
2) The staff members understand legal liability in the tort, civil rights, and business components of this text and how each relates to their job descriptions and routine tasks.
3) The members of the staff understand the risk management system and the role they play in the system.
4) The employees know of injuries inherent in sport and physical activity and recognize the characteristics of participants who might be vulnerable to injuries.
5) The staff members understand the standard of care inherent in their jobs and how the standards would be evaluated by peers and a court of law.
6) Professionals who are engaged in the supervision or coaching of competitive athletes know they could be held for an intentional tort as a result of teaching the violation of a game rule.
7) The staff is capable of performing all safety techniques requisite to the job.
8) There are employee and participant handbooks, and these documents contain detailed information on emergency and injury protocol. Employees are asked to sign a statement that they have read and understood the information, and that they will comply with the policies and procedures contained in the manual.
9) Employees and participants know the drug and alcohol rules and agree to abide by them.

10) A system for release of employee and client documents has been devised and is used. It identifies when, why, and to whom each category of document can or should be released. Employee privacy rights are secured.
11) The staff knows about the company's/facility's insurance coverage.
12) The work environment is safe for employees and they are encouraged to report unsafe conditions.

Staff Training

1) Staff training is formal, occurs during work hours, and is mandatory.
2) Orientations are provided for new personnel.
3) Evidence of the content and attendance at all meetings involving safety education and skill training are retained and available for inspection.

Supervision

The majority of the lawsuits in physical activity specifically state that there was no supervision or that the supervision was inadequate. Whether supervision should exist in a particular activity becomes part of the standard of care. When the standard demands supervision, the supervision must be adequate.

1) Rules are prepared, reviewed, and reformulated at least yearly.
2) Rules are posted.
3) Signage meets codes and is easy to read and understand.
4) A detailed written description of the supervision process exists. It identifies the role of each employee and is contained in each employee's job description.
5) A system for crowd control exists and is rehearsed periodically.
6) Actions have been taken to eliminate horseplay.
7) Advertised standards are maintained.
8) A code of behavior exists and is in writing.
9) Penalties are established to punish participants who behave in an unsafe manner. The penalties are sufficient to deter participants from continuing unsafe behavior.
10) Control in the activity environment is maintained at all times.

Instruction and Coaching

Faulty instruction has been found in physical activity and coaching litigation. The following suggestions should be considered in the creation of risk management plans involving instruction and coaching:

1) Instructional content is used by those prepared to use the content. Licenses, certificates, and college degrees are often required to interpret educational content. An understanding of the application of physiology and biomechanics

is essential to the successful interpretation of instructional materials in sport, physical activity, and the coaching of athletics.

2) Instructional content is selected with knowledge of the client's capabilities in mind. An instructor is able to explain the physical demands placed on the performer.
3) Planning is documented. Courses of study, curricular programs, lesson plans, learning sequences, routines, and other planning materials that could be presented to a court of law, if requested, are preserved.
4) Records document the client's major learning benchmarks. Records document the learner's readiness for advanced risk-taking skills.
5) When possible, computer printouts or schedules of a participant's progress are retained.
6) The following elements are considered in program planning:
   a) Performers are matched when body contact is involved.
   b) Appropriate safety equipment is used.
   c) Athletes are properly hydrated at all times.
7) The methodologies employed for instruction meet the test of peer scrutiny.
8) Official games are played according to recognized rules and officials are used. Officials are responsible only for officiating.

Participant Education

Participants are to be informed of the risks of activities, particularly those involved in competitive sport. Warnings are to be provided to persons engaging in high-risk activities. Much of this risk management information is provided in a form often referred to as a waiver, warning, release, etc. The statement can be a legal document that results in a contract or merely an information sheet. Under contract law, an adult can, in many states, contract for almost anything—including contracting away his/her rights. By signing a statement and fully understanding the ramifications of the risks described, adults can contract away their rights to be reimbursed for any injury. A minor cannot contract away the minor's rights. Parents signing a statement for their child to engage in an activity cannot contract away the child's rights. They can, however, contract away their rights as a parent. Items such as statements and waivers are often used merely to alert parents to the risks involved in physical activity and to make it known that their offspring are engaged in a hazardous undertaking.

In negligence situations, the courts have tended to uphold a waiver when the party signing the contract was an adult and fully understood what he/she was releasing. Under no circumstances have the courts upheld a statement absolving an agency or a person from an intentional tort.

Information statements provide an ideal method of alerting participants to the potential of catastrophic injury as well as to the serious risks involved in various physical activities. The statements should be clear, easy to understand, specific to the activity, and they should describe the situation in detail. The documents should clearly outline the participant's responsibility for his/her own safety and for the safety of other participants. A note should be made that rules will be enforced and that participants are to adhere to rules or be denied entrance to the activity or event. The information statements should not only deal with the possibility of injury but should also include the personal safety required of the participant and a description of how the participant will be treated in an accident setting. These statements are to be read, understood, and agreed to by the signer of the document. Contracts and information statements are to be reviewed by legal counsel to be sure they accomplish the objectives desired and are in conformity with state law and recent court decisions.

Fiscal Issues

As mentioned earlier, the best business practices need to be used at all times in sport and physical activity in both for-profit and non-profit organizations. The following items provide a model to use in thinking through the risks one's agency might encounter:

1) In programs in which gate receipts or the staging of major events are essential to revenue generation, the risk of a riot, terrorist attack, or other hazard has been assessed.
2) When possible, contracts spread liability among vendors and users. All contracts are drafted by legal counsel who will be expected to defend the contracts.
3) Leases and/or contracts are required for groups using facilities.
4) State and local statutes and regulations with respect to fiscal and contract obligations are followed.
5) When transferring risks to others by contract, the transferee knows what he/she is signing. If a part-time employee is asked to sign an independent contractor agreement, the employee knows what is involved in being an independent contractor.
6) Avoid signing hold-harmless or indemnification agreements with manufacturers or retailers of athletic equipment. A hold-harmless agreement is a contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility. Indemnification is securing another against loss or damage. Professionals need to be sure they have not assumed—by contract—the liability for a product. Should such a contract have been signed, the agency or person signing is liable for injury, loss, or damage incurred by anyone as a result of using the equipment. All contracts are to be reviewed by legal counsel before they are signed.

7) Medical examinations are recommended and, when appropriate, required. These records are examined by the staff and are used in program and participation decisions. Written medical clearance is required for injured athletes returning to play.

Evaluation

Risks are identified. Each is evaluated for probability, severity, and magnitude to determine the amount of risk that exists. The continuums shown in Figure 11.1 are used to make judgments about the potential risks.

FIGURE 11.1: Risk Continuums

PROBABILITY

A--B

A. Low probability of injury or harm
B. High probability of injury or harm

SEVERITY

A--B

A. Minor discomfort
B. Serious injury or death

MAGNITUDE

A--B

A. Few people injured
B. Many people injured

A risk may have a high probability of occurring, but should it occur only a few people will suffer minor discomfort. A risk may have a low probability of occurring, but should it occur there is a good chance someone will die. An activity scoring high on any one of the characteristics is to be given serious thought. Even minor discomforts for large populations of people can result in a public relations disaster. A single death can be devastating to an agency.

Control

Control is the third essential component in successful risk management programs. Liability can be controlled by:

1) accepting the risk and assuming the responsibility;
2) retaining the activity and transferring the risk through contracts or insurance;
3) altering the activity to reduce the risk; or
4) eliminating the activity.

Accepting the Risk and Assuming the Responsibility

When a decision is made to retain the risk or maintain a program vulnerable to litigation or negative public image, a defense strategy is devised. The two most important components of the defense strategy are (1) a comprehensive safety or compliance check so the agency and other interested parties realize that every effort had been made to take all precautions with reference to the risk, and (2) an assessment of the cost of maintaining the risk or vulnerable program.

Transferring the Risk Through Insurance or Contract

When the decision is made to maintain an area that appears vulnerable to risks, risks can be transferred by insurance or contract. Insurance is obtained when the purchaser believes that there is a chance injury could occur and as a result, he/she is willing to pay insurance premiums to cover an injury and the need to defend, should litigation occur. The purchase of insurance is one means of transferring the risk of loss that might occur should a participant be injured. A number of different kinds of insurance are available. They include a regular policy with an insurance carrier, a regular policy with a high deductible, self- insurance, and a risk management pool.

Self-insurance involves a group of similarly situated professionals who put an identified sum of money in escrow in case one of them should sustain a catastrophic incident. The money is invested but easy to obtain. Should an incident occur, the money is paid to the investor involved; should none of the investors draw on the money, the money becomes an asset of the investors. Self-insurance—or small group pooling of monies for insurance—is particularly valuable when none of the parties has had a major incident in 10 or 15 years and when regular insurance rates are established by mixing high-incident-rate groups with accident-free populations.

Regular insurance policies with large deductibles combine the options of self-insurance and regular insurance. Individuals or agencies self-insure for minor losses and carry regular insurance for major disasters. Significant reduction in premiums usually accompanies these policies. A risk management insurance pool is the grouping of many like agencies in a common pool under an insurance carrier. As this is a new trend, many agencies requiring similar insurance against common potential losses are forming groups and going to insurance brokers to obtain coverage. These groups usually keep statistics on their injury rates. In addition, employers are contracting their risks to employees through independent contractor arrangements. They hire personnel to conduct risk activities that are independent from the agency with which they are working. The independent contractor carries insurance and is liable for incidents that occur under his/her direction.

Changing the Activity to Reduce Potential Injury

An alternate program may meet the goals of the program considered vulnerable. When such a substitute is available, the prudent manager will accept the alternate program. Sometimes, merely changing components of the activity can result in a substantially safer activity. Improving injury recordkeeping, instituting safety procedures, changing or improving supervision, or training employees can reduce the injury rate.

DISASTER MANAGEMENT

Risk management is avoidance; disaster management is facing, surviving, and returning to normal following a disaster. Disaster management requires comprehensive knowledge of the effect of previous disasters in similar facilities and situations. Planning for a disaster is anticipating an event that is difficult to imagine. Hurricanes and winter storms will often have one or more days of warning, allowing people to prepare. Tornados, gas leaks, fire, and lightning strikes give limited or no warning and must therefore be anticipated at all times. Preparation for a disaster involves many different problems ranging from biological weapons to floods and rockslides. It includes identifying, preparing for, facing and surviving the event, as well as recovery after the event.

Identification

The first step is to identify the threats and vulnerabilities in an environment (and its surroundings) to natural and man-made hazards and disasters. With the use of information from one or more of the agencies listed below, identify natural and man-made hazards and disasters for your agency.

1) Examples of natural disasters are hurricanes, wind and snow storms, floods, tornadoes, rockslides, lightning strikes, earthquakes, and fires.
2) Examples of man-made disasters are violent attacks against individuals and groups of people; contagious and non-contagious biological agents (including smallpox and anthrax); and chemical, radiological (dirty bombs), and nuclear agents.
3) Natural and man-made disasters often result in gas leaks, fire, washed-out roads, contaminated water, damage to electrical circuits, chemical spills, dead animals, etc.
4) Location within the United States influences the potential for certain natural disasters. Population density, media coverage, psychological impact, ease of success, and financial destruction drive man-made hazards.

Preparation

Preparation for a disaster—whether it is weather-related, geologic, or man-made—prompts different plans. One or more persons become safety and security coordinators; adequate staff and time are available for them to engage in the preparation. In an anticipated incident, staff remains in operation headquarters and is ready to face the incident. In light of the fact that many incidents cannot be anticipated, those in charge of safety and security are to provide back-up persons to do their jobs if they will not be available for a period of time. Safety and security professionals and first responders need to know their roles as business owners in collaboration with: law enforcement, fire service, emergency medical, hazardous materials, and public works. Following are some of the many questions that will be addressed in planning:

1) What will be the size of the population affected by the disaster?
2) How long will an evacuation site be used? A storm may be over in a day or two; a man-made attack may consume a week.
3) Will evacuees have a place to return to?
4) Will evacuees remain in place following the event?
5) Will sport facilities become evacuation centers?
6) Will a particular facility be used for emergency care and rescue? If so, how will it be prepared and who will provide adequate food, water, first aid supplies, sleep arrangements, and hygiene facilities?
   a) How often will the facilities be cleaned?

b) How many people can any one facility accommodate? If everyone within a fifty-mile radius needs evacuation, will the facility selected be adequate?

c) Should people be warned to seek shelter early? Is it possible or necessary to turn away people immediately before an event?

d) In the event of damage to an emergency facility, will movement to another facility be possible? How will the move be handled?

7) How will medical and emergency personnel coordinate activities to avoid overloading of a particular care facility?

The following are tips to aid personnel in preparation for the event:

1) Design a mail handling procedure to avoid contaminated deliveries.
2) Back up all Internet properties and store them off the premises; if possible, store one close and one far away from the home or business.
3) Be sure all locks, alarms, surveillance, and lighting are up to standards.
4) Limit access points and control those that exist.
5) Maintain a high standard for basic housekeeping. Avoid items that could be used to store hazardous materials.
6) Screen employees carefully.
7) Encourage high standards for disaster management security.
8) Discover organizations or individual members that are targets for man-made attacks.
9) Discover organizations or persons in your neighborhood that could cause an incident.
10) Identify sensitive data that might be attractive to terrorists.
11) Assess whether an incident in your surroundings would attract greater media attention than would an incident in another setting.
12) Develop scenarios and rehearse situations with a focus on safety, health, and survival.
13) Work closely with local authorities. When possible, conduct training and rehearse with these agencies. Be sure the agencies are aware of your planning.
14) Convince people to become physically fit in an effort to withstand injury, to flee rapidly if needed, and to become certified in first aid and emergency care. An alert and fit public will make the difference in the survival of the masses.
15) The most sophisticated communication devices are to be in the hands of professionals and used to locate the injured. A system of alerts and anticipated priorities in decision-making is practiced by all who have such technology.

16) The role of medical personnel, first responders, grief counselors, and volunteers is well understood. Communication supervisors are prepared to guide these people to the locations where they are most needed.
17) Always include media in rehearsals of incidents.
18) Have prepared a communication plan with the media that emphasizes the importance of their role and support to respond accurately to local and national audiences.

There are many agencies available to assist a person in creating the most up-to-date plan for meeting both personal and business needs and responsibilities for every kind of disaster imaginable. Monitor selected agencies for up-to-date information as plans are revised and rehearsed. Be aware of the work of the National Institute of Standards and Technology on Public Safety and Security. Some of the books that have analyzed 9/11 and Katrina may provide suggestions for increasing safety in your personal and business environments. The following are suggestions for locating materials on the Internet for use in planning.

The Department of Homeland Security's National Incident Management System (NIMS), originally devised by the Federal Emergency Management Agency (FEMA), is a good model for use in planning. NIMS

> provides a systematic, proactive approach to guide departments and agencies at all levels of government, nongovernmental organizations, and the private sector to work seamlessly to prevent, protect against, respond to, recover from, and mitigate the effects of incidents, regardless of cause, size, location, or complexity, in order to reduce the loss of life and property and harm to the environment. NIMS works hand in hand with the National Responses Framework (NRF). NIMS provides the template for the management of incidents, while the NRF provides the structure and mechanisms for nation-level policy for incident management. (NIMS Resource Center)

Their preparedness is for natural hazards, technological hazards and terrorism, and recovery from disaster. Their recovery system for individuals is particularly outstanding and a must for planning.

The International Association of Assembly Managers, Inc. (IAAM), through the Academy for Venue Safety and Security, provides comprehensive risk and disaster management programs, and training opportunities for persons managing and employed in sport facilities and arenas. Structures, personnel, spectators, and services are addressed in IAAM packages for facilities. IAAM works closely with Homeland Security, Health and Human Services, and numerous state and federal agencies.

The National Counter Terrorism Security Office provides many publications on specific topics that will aid the protection of sport interests. Their publication for Stadia and Arenas was published in 2006.

The Centers for Disease Control and Prevention (CDC) and the U.S. Department of Health and Human Services Office of the Assistant Secretary for Preparedness and Response have taken over the role of the agency for health care research and quality and will provide information on bioterrorism and public health emergencies.

The University of Southern Mississippi National Center for Spectator Sports Safety and Security (NCS4) provides detailed information for evacuation of spectator sport sites. Their materials, training, and advice include identifying vulnerability and threats, creation and implementation of protective systems, emergency response and recovery, evacuation capabilities, role of ushers as first responders, and evacuation drills.

The Centre for the Protection of National Infrastructure is a United Kingdom approach to the securing of facilities and the infrastructure that supports public buildings including stadiums and arenas. They conduct vulnerability and protection research; provide information on threats, incidents, and mitigation; and work closely with security programs in the United States, Canada, Australia, New Zealand, and Europe.

Meet, Control, and Survive an Incident

Immediately following the incident, all persons assess the human situation: deaths, life-threatening injuries, and illnesses. One or more command centers are established for agencies and persons designated to respond as efficiently as possible given the known circumstances of the incident.

1) If possible, designated first responders and those who remain healthy should quickly identify the survival territory. People may work in pairs or some other combinations. The nature of the disaster dictates the size of a group. An open area may allow persons to work alone or in pairs, while it may take a number of people to remove building parts in order to free the injured.
2) First aid supplies and other equipment are to have been positioned at strategic locations prior to the event. If such positioning is inefficient, healthy persons, not first responders, will move equipment to the best sites and keep first responders supplied according to their needs.
3) Hopefully, medical personnel will be available to make priority decisions on rescue. Some persons will be pronounced dead at the scene; many will have non-life-threatening injuries, and those with life-threatening injuries and illnesses will require immediate evaluation and care.
4) Within an hour of the incident, first responders and medical professionals will find heart problems and severe psychological stress among survivors, especially among those with non-life-threatening conditions.
5) If the incident is a chemical, radiological (dirty bomb), nuclear, or biological event or if one or more of these threats was part of other attacks, first responders must be able to recognize the symptoms of each, timing of recognition, and most appropriate assistance. Homeland Security continuously updates

information on the threats on its website. The website needs to be checked periodically, or a communication line should be established with a source to provide such information as soon as it becomes available. All of these incidents require a quick response.

6) Low-lying clouds and haze, without fog, and strange odors may signal chemical conditions.
7) Unexplained illnesses within the following days or weeks may be related to the incident.

Recovery Management

Recovery is returning people, property, and businesses to what they were prior to the event. The needs of people, then property, and finally businesses are to be addressed. Considerable preplanning must exist for recovery to be systematic and efficient.

People

1) Nearest medical facilities are ready for those with physical injuries and diseases.
2) Systems are in place to treat physical and psychological problems faced by people over the anticipated period of time the facility will be in use. In some situations, people able to return to their homes may need to continue to use the facilities for these services.
3) Ultimately, physical and psychological services may be provided and continued for the first responders, those engaged in search and rescue, and those who clean up the mess.
4) Information must be provided to those who experience biologic, fire, or other physical properties that may create long-term health risks. Efforts are to be made to restore persons suffering from long term illnesses created by the disaster.
5) Information about returning to homes, if that is possible, is to be provided. When will utilities be restored? What will be the process for evaluating home security?
6) The NIMS system provides a detailed analysis of home precautions, including such information as properly pumping out a water-filled basement and ridding the home of unwanted wild animals.

Structures

1) Can the owner or renter return to his/her home or will new quarters need to be obtained? And for how long?

2) Can the owner or renter return to the property to secure whatever remains? Will they be guided by police and security personnel or can they return on their own? This assumes that community forces are prepared for looters.
3) Total architectural and building revision plans, and total interior descriptions are to be secured in an off-business or home location that is perceived to be safe from fire, weather, and hazardous activity. Should hazards become more significant, all documents need to be secured in at least two very different locations.
4) Will structures be cared for by personal insurance or is the damage such that FEMA and other help will be essential?

Businesses

1) Business buildings and facilities are to be checked much as a home would be examined.
2) Financial records for the past three to five years are to be stored off location. The owner of the business should be able to accurately evaluate the damage to the business and be ready to make claims to insurance companies.
3) Insurance policies, tax returns, employee information, and other pertinent information should have been stored prior to the incident.
4) Plans for running the business in the interim are necessary and to be implemented within a few days of the disaster. For businesses with multiple U.S. and international offices, transfer of business responsibilities should be made as businesses close before the disaster, immediately after the disaster occurs, or otherwise as soon as possible.
5) Businesses should be sensitive to the needs of employees.

EMERGENCY PLANS

The results of litigation suggest that when liability can be found for managers of physical activity for foreseeable injuries, an emergency action plan is demanded. *Kleinknecht v. Gettysburg* (1991, 1992) was the case that brought the need for an emergency plan to the public. Since that time, health spas in at least three states have been found liable for failure to provide adequate emergency care. Emergency action plans must accommodate severe injuries, apparent drowning, heart attacks, fires, power failures, fights, robberies, vandalism, chemical discharges, bomb threats, severe weather, and other problems. Injuries that require emergency services at the scene of the accident and those that require medical service at a later date are evaluated. The emergency action system consists of research, planning, learning the system, rehearsal, and follow-up.

Research

1) Become aware of the types of injuries that might occur.
2) Simulate emergency care for each of the injuries.
3) Create an injury surveillance system. The surveillance system can classify emergency incidents as cuts and bruises, injuries that might be serious, and serious injuries. Serious injuries are those for which emergency care is required.
4) Where appropriate, medical clearance—including health histories and examinations—are analyzed in light of the incidents.
5) Litigation in the institution and in similar institutions is examined. Legal counsel and insurance representatives are invited to review injury-reporting procedures.

Planning

1) Create an emergency action plan. Put the plan in writing.
2) The plan includes three phases of response:
   a) Identification of injured person.
   b) Further identification of injury and initiation of first aid; decision to seek external emergency support is made.
   c) External emergency support is obtained.
3) Phase one, immediate and temporary care, is handled by competently trained personnel in CPR, first aid, and when appropriate, water rescue. For example, under American Red Cross standards, the staff is to be prepared in infant and adult CPR, community first aid, and prevention of communicable diseases.
4) Phase two is the recognition of an injury requiring emergency medical assistance.
5) The emergency plan is executed by telephone. The telephone has the emergency number or the usual 911 on the phone or on a card next to the phone. When the phone is on a wall or desk, this message is posted immediately above the phone and in a position that will make it easy to read. The following information is available:
   a) Appropriate number (i.e., 911) to summon emergency medical care. If numbers differ for fire and chemical exposure, list them.
   b) Exact name and address of facility.
   c) Location of door where vehicle will be met.
   d) Number of the telephone in use.
   e) Approximate time needed for emergency unit to reach facility.
6) The following instructions are to be used when making a call:
   a) Dial 911.

b) Remain calm.

c) Give your name and title.

d) State the emergency medical care sought, the exact address of the facility, and the location of the facility relative to highways and obvious structures. This information must be clear and concise.

e) The injury is (give general description). Note whether the victim is conscious or unconscious. Be able to provide the approximate age of the victim.

f) You are calling from (give number).

g) Who will meet emergency medical or fire staff?

h) Do not hang up until the operator hangs up.

Learning the System

1) Identify each employee's role in the emergency action plan.
2) Simulate various situations and identify how each will be handled.
3) First aid kits, rescue equipment, and other emergency equipment and supplies are adequate and appropriately packed for use. The equipment is checked daily and carefully repacked after each use.
4) The staff knows how to use all equipment.
5) The system is created with input from emergency medical and fire departments.

Rehearse

1) The plan is rehearsed with the staff and with the emergency medical and fire department. The approximate times required to reach the facility are determined by each of these agencies. These times will be compared to times used in an actual event to see if personnel were able to make decisions and obtain assistance in a reasonable amount of time.
2) The rehearsals are to be held periodically and whenever new staff is employed.
3) The records of all practices are retained.

Follow-up

1) Identify follow-up procedures for seriously injured persons.
2) Have on record the persons who should be contacted if a staff member or a participant sustains a serious injury.
3) Be sure that staff members are aware of workers' compensation and company insurance.
4) Parents of minors are to be notified and informed.

5) A means of working with the media exists. Often the members of the media come in response to the 911 call.
6) The entire system is known by all, rehearsed often, and periodically monitored for flaws.

ACCIDENT REPORTS

Accident reports become the first description of the incident and are often the most accurate description. Accident reports must be objective and accurate. Rescuers should freeze the incident in their minds, creating a snapshot of the incident in order to visualize it from start to finish. To be successful in this venture, one must practice freezing routine situations and being able to recall all aspects of an incident. Was anything observed prior to the incident? Commit the image to paper as soon as possible. Often, this cannot happen until the emergency care vehicle door has been closed and the professional can return to his/her office.

1) Provide immediate and temporary care.
2) Attend to the needs of the victim. Do not make a statement.
3) If possible, contact management at once. Management needs to be contacted immediately after contacting the external emergency medical personnel.
4) Accident reports must be readily available.
5) Complete the accident report as soon as practical following the incident.
6) If possible, obtain a statement from the victim; copy that statement exactly as the victim made the statement, using quotation marks, etc.
7) Obtain the names and locations of at least three witnesses to the incident. If possible, obtain statements from these people immediately after taking care of the victim.
8) Note all emergency care on the accident report. Attend to the needs of the victim.
9) Retained attorney should be familiar with the accident report form and believe it provides the best protection. Avoid after-the-fact descriptions of the incident.
10) Contact insurance carrier. Know when your insurance carrier will want a full-scale investigation.
11) Copies of completed accident reports are to be given to administrators within one hour of the incident.
12) Staff is to be debriefed as soon as possible following the incident.
13) Decisions about closing the facility or continuing the facility in use—given certain incidents—are a part of the emergency action plan. Arrangements are made to relieve staff directly involved in the incident and the rescue.

SUMMARY

Risk management is a comprehensive system of identification, evaluation, and control of risks. The identification system consists of the examination of local, state, and federal regulations; professional organizations and industry standards; policies and procedures; facilities; equipment; personnel; supervision; instruction; participant education; fiscal issues; and contracts. Each of these risks is evaluated in light of its probability, severity, and magnitude. A system of control includes avoiding or eliminating the activity; accepting the risk and assuming responsibility; changing the activity to reduce the risk; or transferring the risk through contract or insurance.

In disaster management, threats and vulnerabilities to natural and manmade hazards become the concerns. Often, it is impossible to avoid the risks so efforts are made to experience the incident as safely as possible and to engage in rescue and survival. Once the incident has occurred and rescue is complete, rebuilding lives, houses, physical structures, businesses, and industry becomes the goal.

ACTIVITIES

1. Prepare a disaster checklist for an open air sport facility that may experience a chemical or biological hazardous attack.
2. You have been invited to give a thirty-minute presentation to the ushers in a high school football stadium on how to handle crowd control in a lightning situation. What would you say?
3. Prepare a risk management plan for a basketball facility.

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