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Sports Law And Entertainment Law – Two Overlapping Practices

The Editor interviews ***Brian R. Socolow****, Partner in the New York office of Loeb & Loeb LLP and head of the firm's Sports Law practice area.*

Editor: Please define the broad scope of Sports Law. What does your practice comprehend?

Socolow: The sports industry is made up of a wide variety of individuals and companies. We represent players, teams, leagues, promoters, equipment manufacturers and others involved in the industry, and they all have different legal issues. Our sports law practice covers everything from drafting endorsement contracts for players to assisting with the purchase or sale of a sports property to negotiating television or digital rights deals. We're also heavily involved in intellectual property issues and, when necessary, litigation. With our knowledge of the sports industry, and our capabilities and expertise in the entertainment industry, we're able to add value to our sports clients as the two industries converge.

Editor: In a way you really can't separate the two practice areas because sports stars become entertainment stars per se. What other common issues do sports and entertainment law share?

Socolow: Intellectual property rights are extremely important in both practices because they are both so tied to promoting and protecting their stars' names and images. One of the key intellectual property rights for both sports and entertainment celebrities is the right of publicity, a property right that was first recognized in

Brian R. Socolow

a lawsuit about baseball trading cards. Part of our practice centers on how athletes can protect their name and publicity rights, and how other entities in the sports industry can gain value from their association with those athletes, often by endorsement contracts, which can be extremely lucrative for athletes, in many cases beyond what they make in the competitive aspects of their careers. On the other hand, companies in the sports industry looking to enter into some type of endorsement deal have to consider very carefully who it is they want to be associated with.

Editor: Have there been incidents when the endorser violated some of the athlete's legal rights?

Socolow: It does happen with some frequency, and athletes need to be proactive in protecting their names and publicity rights so that they can capitalize on them off the field. They have to know what their rights are, then monitor the use of their name or likeness so that their rights aren't violated. One example is Tom Brady, the MVP quarterback for the New England Patriots, who had an endorsement deal with General Motors that allowed the company to use his likeness and image. After his contract with GM ended, GM continued to use ads featuring Brady but they no longer had that right. That led to a dispute that was reportedly settled. Andre Agassi recently sued Target in a similar matter, claiming that it used his name on its line of sports sandals without his permission.

Editor: Are there areas outside of endorsements where athletes have legal issues concerning their name or likeness?

Socolow: Yes, the right of publicity provides a fertile ground for disputes involving athletes. One example involves a hockey player by the name of Tony Twist. A comic book writer decided to make Tony Twist, who was a player for the St. Louis Blues, a character in his comic book. This act led to a litigation in which Tony Twist claimed that his right of publicity was being violated because his name and likeness were being used without his permission. He won the case and a significant amount of money in damages. There's also been a lot of litigation involving the use of athletes' names and playing statistics in fantasy sports.

Please email the interviewee at bsocolow@loeb.com with questions about this interview.

Editor: Do you also counsel on transactional issues, such as buying and selling sports properties?

Socolow: Yes, my firm has been involved in a number of these transactions. I have recently been involved with the sale of a premier women's tennis tournament to the Women's Tennis Association and the sale of an interest in a minor league soccer team. Other attorneys at Loeb & Loeb have been involved in other types of sports franchise transactions, including financing for acquisitions.

Editor: Do you represent companies who are negotiating digital rights or webcasting deals?

Socolow: Yes. This is a perfect illustration of the convergence of sports and entertainment. You rarely hear about a deal involving rights to televise a sporting event without hearing about the ancillary digital rights for webcasts, distribution on cell phones or some other digital rights. All those rights can be extremely valuable. We are currently working with Burton Snowboards on a webcasting deal in which Burton's series of worldwide snowboard competitions will be webcast on the action sports website www.go211.com. It's exciting being part of the application of cutting edge technology to the sports world.

Editor: How does a sports or entertainment star protect his name so others cannot impersonate him or impinge on his fame?

Socolow: The first thing an athlete can do is enter into agreements with the company he is dealing with so that each side is clear on exactly how that athlete's name and likeness can be used. Beyond that, the athlete has to be very careful to monitor how others might be using the name and be ready to take legal action when necessary. Just like we help companies protect their trademarks or "brand image" from infringement, athletes have a "brand" that they have to protect also. Tiger Woods, for one, has done a very good job at seeking to prevent the unauthorized use of his image.

Editor: Some athletes have been disenfranchised by violating the intent and spirit of their endorsement contracts. Could you mention some examples of this behavior?

Socolow: Probably the most prominent athlete who comes to mind is Michael Vick, who had multimillion dollar contracts with Nike and other companies. Based on his guilty plea for dogfighting and his prison sentence, all of those contracts have been terminated and he has lost millions of dollars. Kobe Bryant was another athlete who was involved in scandalous behavior. He lost a significant amount of endorsement income but has recovered somewhat. Marion Jones is another recent example, based on her use of performance-enhancing drugs and involvement with a check counterfeiting scheme.

Editor: Tell us about the "morals clauses" in recent sports law contracts.

Socolow: Michael Vick and other athletes involved in scandals have made morals clauses a very pertinent topic these days. A company that chooses an athlete as its endorser often invests millions of dollars to build a marketing campaign around the athlete. The last thing a company wants is to be associated with an athlete who tarnishes that company's image. That defeats the entire purpose of having an endorsement contract. One contractual protection that companies can negotiate is a *morals clause*, which allows them to take some remedial action, or in some cases terminate the contract, if the athlete gets involved in a scandal. Among the big issues with morals clauses is what type of conduct is going to trigger the termination of a contract. Is it enough to be *charged* with a crime or does the athlete have to be *convicted* of a crime? Another big point of negotiation is: what is the remedy for being involved in some sort of scandal? Is it the termination of the contract or is it some type of monetary penalty or other type of discipline? Morals clauses may also be used by companies to protect themselves if their endorser gets caught in a scandal involving performance-enhancing drugs.

Editor: Where a claim against an athlete is made regarding performance-enhancing drugs although there is no contract provision in his team contract specifying the subject drug, does this mean the team club has a case against him?

Socolow: Thus far this has not been challenged, in part because the Major League Baseball Players Association is a strong union. If a Major League team tried to terminate a contract based on a player's use of performance-enhancing drugs at a time when baseball itself did not prohibit that use, certainly the union would put up a vigorous fight and it is uncertain whether that contract could in fact be terminated. Going forward, with stronger rules in place, it is certainly possible that a club will seek to terminate a contract on that basis and the club may have some good arguments that they have that right.

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Editor: Do you think the recent Roger Clemens/Andy Pettitte publicity will stand as a black mark on the professional game of baseball so that all athletes will be held to a higher standard? How can sports fans once again regain the high level of confidence in athletes as "heroes"?

Socolow: Sports fans usually forgive and forget when it comes to most types of misconduct by athletes. If the athlete apologizes, they usually get a second chance with the fans, and the game recovers. We'll have to see how it plays out with Roger Clemens and others named in the Mitchell Report, because there are some serious allegations of use of performance-enhancing drugs.

Editor: Are new codes of conduct or legislation needed?

Socolow: Congress might take action if the leagues themselves do not take further action fairly quickly. There has already been a trend over the last number of years for more stringent rules by the Leagues against performance-enhancing drugs and I expect that trend to continue. Whether that is enough for Congress remains to be seen, and it would not surprise me if Congress considers legislation that imposes more stringent drug-testing policies and penalties.