

# E-mail Monitoring: A Legal Dilemma Sport Business Managers Must Address

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E-mail has become an increasingly common tool used by all businesses, including sport businesses. Posch (1996) states that approximately 60 million workers send nearly 2 billion messages each month. A survey conducted by *Inc. Technology* ("The *Inc. Technology FaxPoll* Results, 1996) revealed that 94% of all respondents use e-mail. Almost 20% of all respondents received between 11-30 messages daily. Unfortunately, widespread usage has provoked respondent superior concerns for the sport business manager and privacy-related concerns for the employee. It is important that sport business managers understand what acts are legally permissible as computers and related applications (e.g., electronic communication) continue to permeate the work place. Likewise, it is important that sport business employees understand their rights to have this communication protected. This paper discusses the benefits of e-mail (Part I), arguments justifying the privacy rights of the individual employee versus the sport business manager's right to monitor, censor, intercept or retrieve e-mail (Part II), legal challenges (Part III), solutions to e-mail privacy issues (Part IV), reminders to employees (Part V), and suggested policy inclusion components for sport business managers.<sup>1</sup>

## **Benefits of e-mail**

Sport businesses integrate e-mail capabilities into the work place because of numerous related benefits. Three primary benefits offered by e-mail include enhanced efficiency, lower expenses, and enhanced interaction.

### **Enhanced efficiency.**

E-mail enhances the efficiency of individual

employees. E-mail facilitates communication as messages can be immediately delivered and retrieved. The ability to send and retrieve messages at any time of the day reduces decision delays and information lags associated with traditional mail and "telephone tag." Eighty six percent of the respondents to the 1996 *Inc. Technology* survey indicated that e-mail saves time (The *Inc. Technology FaxPoll* Results, 1996). In addition, employee travel and absence are less costly as faculty members can maintain communications via portable computers. Paper, phone calls, and timely distribution efforts associated with meeting reminders, minutes, etc. can be all performed via e-mail. Efficiency is exponential as employees are able to forward messages to other individuals as necessary. Cross and Raizman's research (1986) exemplifies the efficiency realized by employees using e-mail. According to Cross and Raizman (1986), e-mail saved 3,000 employees at Manufacturers Hanover Trust, the fourth-largest U.S. commercial bank, an approximate 36 minutes each day. Senior management using e-mail saved 23 minutes per day whereas middle management saved 39 minutes per day. Similarly, secretaries employed by the United Service Auto Association increased productivity by 50% "while reducing the flow of interoffice memos by 10%" (Cross and Raizman, 1986, p. 8). Sport businesses using e-mail in the work environment would receive similar efficiency enhancements.

### **Decreased expense associated with traditional modes of communication**

E-mail reduces expenses associated with long distance telephone calls, paper, and postage. Cross and Raizman's research (1986) indi-

cates that e-mail can reduce expenses associated with office memos and telephone calls by 25%. Further, e-mail decreases expenses associated with the moving, storage, and retrieval of information. Additional costs savings can be realized by a reduction in support staff traditionally needed to type and disseminate committee minutes, coordinate communication, file papers, etc. These cost savings facilitate sustained competitiveness as sport businesses are able to reduce cost structure and realize higher net profits.

**Promotes the "democratic" organization, mentorship, while negating the traditional hierarchal structures.**

E-mail makes it easy for stakeholders to communicate with each other (Rudenstine, 1997). Administrators, for example, can easily solicit input from sport business employees without scheduling lengthy meetings or engaging in a paper-intensive, personnel laden survey. Employees, in turn, can avoid the difficulties of scheduling an appointment with busy administrators. E-mail enables sport business employees to access administrators to ask questions, present ideas, and register complaints. Further, e-mail capabilities serves as a distinguishable source of customer service. Sport businesses possessing the particular software capabilities can enable consumers direct access to company employees. Customer satisfaction is increased as consumers are better able to inquire, for example, about product usage, product limitations, and future product developments. The sport business benefits as customer concerns and complaints can be immediately investigated and addressed.

**Unsettled Territory: Balancing the Right of the Employer to Monitor versus the Right of the Employee to Have Communication Protected**

As noted above, e-mail enhances communication and efficiency while simultaneously decreasing costs. Unfortunately, e-mail can en-

courage frivolous and informal communication that would otherwise go unspoken. For example, jokes, innuendoes, frustrations, and grievances that would not be printed on letter head, an office memo, or communicated orally in a face-to-face encounter can now be easily and quickly conveyed to colleagues and friends both internal and external to the sport business itself. Unfortunately, e-mail communication can present a host of legal problems for a sport business and its employees.

Technological advancements enable the literate computer user to intercept messages and retrieve stored messages. Hitting the "delete" key or reformatting disk drives deceives many users into thinking that a particular message has been destroyed. Unfortunately, plain text files can be revealed to the "third party service provider; to computer technicians who have access to their contents; and in some companies, to the corporate office" (i.e., administrative offices) (Griffin, 1991, p. 499). In fact, small businesses have discovered a niche as many plaintiffs demand that e-mail messages be retrieved and used as evidence. Electronic Evidence Discovery, Inc. in Seattle, for example, specializes in the retrieval of deleted messages. Lavelle's article (1994) described a situation in which an Electronic Evidence Discovery (EED) was able to retrieve incriminating evidence useful to a plaintiff alleging sexual harassment against her employer. As explained by John Jessen, managing director of EED (Lavelle, 1994, p. B3),

The woman's boss said her firing was for economic reasons, but his recovered e-mail to her direct manager said, "I want you to get that (redacted) tight-assed bitch out of here. I don't care what you have to do."

Employees using e-mail as a way to humor colleagues with off-colored comments or to release pent up stress and tension caused by annoying colleagues should take caution.

The interception or retrieval of e-mail messages by unintended viewers angers many individual employees. Yet the issue of employee privacy to individual e-mail communications remains a highly debated issue between employers and employees. The following paragraphs discuss the dichotomy existing between the

sport business employer and the employee.

### **In defense of the sport business employee**

There are two primary arguments that favor the right of the sport business employee to have e-mail communication remain private. First, individual privacy rights represent a right recognized by society and legal scholars for over a century (Warren and Brandeis, 1890). A 1994 survey by the ACLU revealed that privacy issues in the work place represented the largest category of employee complaints (Lee, 1994). In fact, the use of e-mail generates more privacy concerns for both e-mail users and non-users than does the use of the telephone, FAX, or U.S. mail (Weber, 1997). According to a survey of 1,009 computer users conducted by Louis Harris and Associates, 59% of all respondents expressed concern about intercepted e-mail (Miller, 1997). The ability of technology to interfere with an individual's right to privacy was recognized by Samuel D. Warren and Louis D. Brandeis over a century ago. As forecasted by Warren and Brandeis in a highly publicized 1890 article, "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'" (Warren and Brandeis, p. 193). Regarding communication between individuals, Warren and Brandeis quote a 1769 comment from Yates stating,

It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.

Similar to the reasoning used by the Supreme Court in the 1969 case, *Tinker v. Des Moines Iowa School District*, privacy advocates argue that they should not have to shed their right to privacy when they walk through the office door.

Second, employee monitoring interferes with the empowerment of the sport business employee. Benefits associated with employee empowerment are well recognized. Productivity, morale, and efficiency are enhanced when employees operate as autonomous problem

solvers pursuing the overall mission of a particular sport business. Monitoring e-mail in a remote location runs counter to the empowerment movement taking place in America's sport businesses.

### **In defense of the employer**

In contrast to the above argument supporting individual employee privacy rights, the sport business employer has three solid arguments justifying the practice of e-mail monitoring. First, the private sector has long supported the concept and practice of employers monitoring employee activities. Frederick Taylor advocated, and management adopted, timed performances, product quality accountability (i.e., defect rates), and the auditing of financial reports. Software is available to employers desiring to monitor "when, where, and how often employees go online" (Witham, 1997, p. 1A). Employer monitoring of e-mail simply represents a modern monitoring approach that has evolved with the evolution of technology. Existing literature provides support for the use of monitoring in the work place. For example, a MACWORLD survey of CEOs and MIS directors in 301 businesses revealed that 21.6% of all respondents searched employee files (Piller, 1993). The percentage increases to 30% for those companies with more than 1,000 employees. Forty one percent of the respondents monitored or read e-mail files as part of their search. Employee monitoring enables companies to ensure better that computer technology investments are used to further complement strategic objectives.

Second, sport business employees are using property provided by the sport business itself. For example, sport business employees are using the sport business's computer, computer software, desk, provided office, etc. It is reasonable to assume that the sport business employer should use or access his or her own property as desired; including the monitoring of employee e-mail.

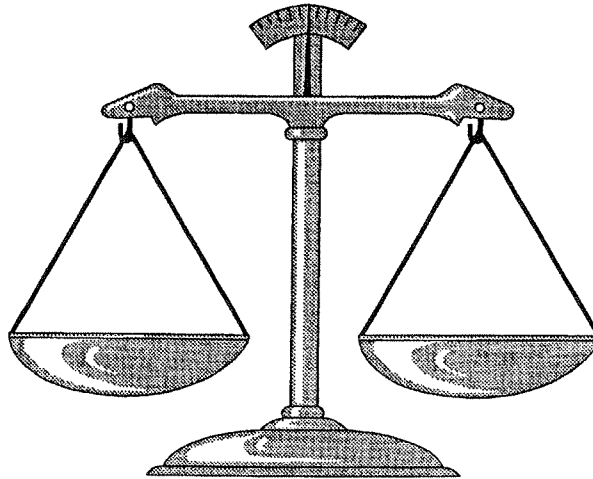
Third, e-mail monitoring, retrieval, and/or interception enables an employer to detect illegal and potentially problematic behaviors. The doctrine of respondeat superior makes this a very meritorious argument. For example, employ-

# SSLASPA

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*Editor's Note: The Resource List in 7(2) was a reprint of the 1996 edition. I apologize for any frustration or inconvenience this may have caused the membership.*

*The Society for the Study of Legal Aspects of Sport and Physical Activity*



## RESOURCE LIST

A Service for SSLASPA members  
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# SELECTED BOOKS/MATERIALS

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(Published in the past ten years, 1986 to date)

NOTE: Early publications contained in previous listings have been deleted.

- AAHPERD. *Legal Issues in Sport and Physical Education*. Strategies Courtside. Reston, VA: AAHPERD. 1992. A collection of 22 Courtside columns 1988-1992 in *Strategies*, Linda Carpenter, editor.
- Appenzeller, Herb. *Managing Sports and Risk Management Strategies*. Durham, NC: Carolina Academic Press, 700 Kent St., Durham, NC 27701 (919-489-7486), 1993, 284 pp. \$34.95
- \_\_\_\_\_, editor *Risk Management in Sport*. Durham, NC: Carolina Academic Press (919-489-7486), 1997.
- Baley, James A., and David L. Matthews. *Law and Liability in Athletics, Physical Education and Recreation*. Dubuque, IA: Wm. C. Brown Publishing, 1989, second edition, 467 pp. \$32.95
- Barnes, John. *Sports and the Law in Canada*. Salem, NH: Butterworths. (1-800-668-6481) Butterworths, 75 Clegg Road, Markham, Ontario L3R 9Y6, 1988, second edition. \$62.00
- Berlonghi, Alexander. *The Special Event Risk Management Manual*. published by author: P.O. Box 3454. Dana Point, CA 92629 (714-493-0529), 1994 revised, 346 pp., 8 x 11".
- Berry, Robert C., Gould, W. B. IV, and P. D. Staudohar. *Labor Relations in Professional Sports*. Dover, Mass: Auburn House Publishing Co. (1-800-225-5800, ext. 7234), 1986. \$45.00
- Berry, Robert C., and Glenn M. Wong. *Law and Business of the Sport Industries*. Vol. I - Professional Sports Leagues; Vol. II - Common Issues in Amateur and Professional Sports. Westport, CT: Praeger Publishers (Greenwood Publishing Group) (203-226-3571), 1986. \$45.00 each (Vol II only, second edition 1993, \$55.)
- Bird, Stephen and John Zauhar. *Recreation and the Law*. Scarborough, Ontario: Carswell/Richard De Boo Publishers, One Corporate Plaza, 2075 Kennedy Road, M1T 3V4 (1-800-387-5164), 1997, second edition, 256 pp. \$52.00
- Borkowski, Richard P. *Safety in School Sports and Fitness*. P.O. Box 658, Portland, ME: J. Weston Walch Publisher (1-800-341-6094), 1991, 124 pp. paperback, \$11.95
- Brice, Regina. *A Martial Artist's Guide to American Law*. Oberlin, OH: Sanshin Consulting International, Inc., P.O. Box 87, (216-774-4807), 1994, 537 pp. \$65.00
- Camp Fire. *Management of Risks and Emergencies, A Workbook for Program Administrators* (organized camps). Kansas City, MO: Camp Fire, 4601 Madison Ave., Kansas City, MO: 64112. Available from American Camping Association, 5000 State Road 67 North, Martinsville, IN 46151-7902, (317-342-8456), 1993, extensively revised edition, three-hole punched, 8 x 11", 379 pp. \$29.95
- Carpenter, Linda Jean. *Legal Concepts in Sport: A Primer*. Reston, VA: AAHPERD (1-800-321-0789). 1995, 134 pp. \$25.00
- Center for Sports Law and Risk Management, (see newsletters for address). Series of 3 risk management manuals used in risk management consultation may be purchased at \$200 each, subscribers to *From Gym to Jury*, \$149.50 each; Risk Review Manual for — Intercollegiate Athletic Programs, 79 pp; Collegiate Campus Recreation, Sports Clubs and Physical Education, 48 pp; Scholastic Athletic, Physical Education, Intramural Programs and Personnel, 101 pp. 1992, spiral bound, 8 x 11.
- Champion, Walter T., Jr. *Sports Law in a Nutshell*. St. Paul, MN: West Publishing Co., 610 Opperman Dr., P.O. Box 64526, St. Paul, MN 55164-0526 (1-800-328-9352), 1993, 325 pp. \$15.95
- Champion, Walter T., Jr. *Fundamentals of Sports Law*. Rochester, NY: Clark Boardman & Callahan (1-800-221-9428), 1990, 535 pp. \$85.00 Annual cumulative supplement. (Latest - December, 1995)
- Christiansen, Monty L. ed. *Play It Safe, An Anthology of Playground Safety*. Arlington, VA: National

- Recreation and Park Association, 2775 South Quincy Street, Suite 300, Arlington, VA 22206-2204, 1992, 294 pp. \$40.00
- Clement, Annie. *Law in Sport and Physical Activity*. Indianapolis: Benchmark Press, 1988, 214 pp., paperback. \$18.95
- Clement, Annie. *Legal Responsibility in Aquatics*. Aurora, OH 44202 (P.O. Box 521): Sport and Law Press, 1996, 230 pp. \$40.
- Coalition of Americans to Protect Sports. *Sports Injury Risk Management and the Keys to Safety*. North Palm Beach, FL: CAPS (1-800-338-8678), 1992, 73 pp. & appendix, loose leaf notebook, program manual \$29.00, 96 min. VHS cassette, including instructor's guide, \$39.00.
- Cotten, Doyce J., and Mary B. Cotten. *Legal Aspects of Waivers in Sport, Recreation and Fitness Activities*. Canton, OH: PRC Publishing, Inc. (216-499-0205), 1997, paperback.
- \_\_\_\_\_. *Waivers & Releases for the Health & Fitness Club Industry*. Statesboro, GA: Sport Risk Consulting, 1996, 81 pp. monograph.
- Cotton, Doyce J., and T. Jesse Wilde, editors. *Sport Law for Sport Managers*. Dubuque, IA: Kendall/Hunt Publ. Co., 1997, 559 pp.
- DeCoster, Jules V. *Risk Management for Golf*. Canton, MO (Box 271): RIMAGO Co. (1-800-530-5112), 1993, loose leaf notebook.
- Dougherty, Neil J., editor. *Principles of Safety in Physical Education and Sport*. Reston, VA: AAHPERD, 1987, 189 pp., paperback. Focus on safety, chapters on specific sports.
- Dougherty, Neil, David Auxter, Alan Goldberger, and Gregg Heinzmann. *Sport, Physical Activity, and the Law*. Champaign, IL: Human Kinetics Publishers (1-800-747-4457), 1993, 328 pp. \$36.00
- Education Law Association (address under newsletters). *The Yearbook of Education Law*. Issued annually, contains chapter on Sport Law written by Linda Sharp. \$45.95 (\$35.95 members) Volumes available annually since 1989, prices vary.
- Fotiades, John. *You're the Judge! -- How to Understand Sports, Torts and Courts*. Worcester, MA: Edgeworth and North Books, (508-799-9860), 1989, 467 pp. \$24.95 hardcover; \$10.95 paperback.
- Gallup, Elizabeth M. *Law and the Team Physician*. Champaign, IL: Human Kinetics, 1995, 177 pp., 6 x 9" hard cover. \$29.00
- Goodman, Susan F., and Ian McGregor. *Legal Liability and Risk Management*. Risk Management Associates, P.O. Box 54538, 1712 Avenue Road, North York, Ontario, Canada M5M 4N5, 1994, spiral bound 8 " x 11", 83 pp.
- Grayson, Edward. *Sport and the Law*. Salem, NH: Butterworth Legal Publishers. (1-800-548-4001) 1998, \$50.00, British law.
- Greenberg, Martin, J. *Sports Law Practice*. Charlottesville, VA: Michie Co. (1-800-446-3410), 1993, 2 vol., 1203 pp. and 825 pp., respectively, \$180.00 Vol. 1, 1995 cum. supp., Vol. 2, 1995 supp.
- Grosse, Susan J., and Donna Thompson, eds. *Leisure Opportunities for Individuals with Disabilities: Legal Issues*. Reston, VA: AAHPERD, 1993, 100 pp., softcover \$19.95
- Hanna, Glenda. *Outdoor Pursuits Programming—Legal Liability and Risk Management*. Edmonton, Alberta, Canada T6G 2E8: University of Alberta Press (403-492-3662), 1991, 256 pp. \$16.95 + shipping (softcover); \$24.95 + shipping (hardcover)
- Hart, James E., and Robert J. Ritson. *Liability and Safety in Physical Education and Sport: A Practitioner's Guide to the Legal Aspects of Teaching and Coaching in Elementary and Secondary Schools*. Reston, VA: AAHPERD (NASPE), 1993, 209 pp., paperback. \$19.95
- Herbert, David, and William Herbert. *Legal Aspects of Preventive, Rehabilitative, and Recreational Exercise Programs*. Canton, OH: Professional Reports Corporation (1-800-336-0083), 1993, third edition, 400 pp., paperback. \$39.95

- \_\_\_\_\_. *Legal Aspects of Sports Medicine*. Canton, OH: Professional Reports Corporation (1-800-336-0083), second edition, 1995, 318 pp., paperback. \$39.95
- Hladczuk, J., S. Hladczuk, C. Slater, and Adam Epstein. *Sports Law and Legislation: An Annotated Bibliography*. Greenwood Press, 88 Post Road West, Westport, CT 06881, 1991.
- Houdek, Frank G. Researching the Law of Sports: A Revised and Comprehensive Bibliography of Law-Related Material. 13 *Hastings Comm. & Ent. L. J.* 589, 1991. 116 pp. bibliography of books, periodicals, government publications, ALR annotations, law review symposia, law review articles. Reprinted in *Forum on the Entertainment and Sports Industries, Bibliography 1992*, American Bar Association.
- Kaiser, Ronald A. *Liability and Law in Recreation, Parks and Sports*. Englewood Cliffs, NJ: Prentice-Hall, 1986, 271 pp. \$26.95
- Kelly, G. M. *Sport and the Law: An Australian Perspective*. Sydney, Australia: The Law Book Company Ltd., 44-50 Waterloo Rd., North Ryde, NSW, Australia, 1987, 472 pp.
- Koeberle, Brian E. *Legal Aspects of Personal Fitness Training*. Canton, OH: Professional Reports Corporation (1-800-336-0083), 1990, 185 pp., paperback. \$34.95
- Koehler, Robert W. *Law, Sport Activity and Risk Management*. Champaign, IL: Stipes Publishing Co., 1987, 143 pp., paperback. \$9.80
- Maloy, Bernard P. *Law in Sport -- Liability Cases in Management and Administration*. Indianapolis, IN: Benchmark Press, 1988, 202 pp., paperback, 8 x 11". \$14.95
- McGregor, Ian, and Joseph MacDonald. *Risk Management Manual for Sport and Recreation Organizations*. Corvallis, OR: NIRSA, 1990, 73 pp., paperback. \$29.95
- McKinnon, Matthew C., Robert A. McCormick and Darryl C. Wilson. *Sports Law*. Detroit: Lupus Publications, 12839 Grand Haven Drive, Sterling Heights, MI 48312 (313-978-9146) 1996, second ed., 564 pp., loose-leaf binder.
- Minor, Jacqueline K., and Vern B. Minor. *Risk Management in Schools*. Newbury Park, CA: Corwin Press, Inc. (Sage Publications) (805-499-0721) 1991, 82 pp., 3-ring binder. \$49.95
- Moriarty, Dick and Mary, Marge Holman, and Ray Brown. *Canadian/American Sports, Fitness and the Law*. Canadian Scholars' Press, 180 Bloor St. W., Ste. 402, Toronto, ONT M5S 2V6; (416-929-2774, FAX 416-929-1926) 1994, 504 pp., softcover. \$34.95
- Murrell, Dan S., and William O. Dwyer. *Constitutional Law for Park Law Enforcement Officers*. Durham, NC: Carolina Academic Press (919-489-7486), 1992, third edition, 180 pp., paperback. \$15.00
- Nafziger, James A. R. *International Sports Law*. Irvington, NY: Transnational Publishers (914-591-4288), 1988, 250 pp.
- NASPE. *Current Issues in Sport Law*. Reston, VA: AAHPERD, 1987, 94 pp., paperback, 8 x 11". Proceedings of 1987 Sport Law Symposium.
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- O'Brien, Dianne B., and James O. Overby. *Legal Aspects of Sport Entrepreneurship*. Morgantown, WVA: Fitness Information Technology, (1-800-477-4348), 1997, 468 pp., \$46.00.
- Orleans, Jeffrey H., and Edward N. Stoner, II, editors. *Legal Issues in Athletics*. Washington, DC: NACUA, 1989, 285 pp., paperback. Selected articles from *Journal of College and University Law*.
- Peterson, James A., and Bruce B. Hronek. *Risk Management for Park, Recreation and Leisure Services*. Champaign, IL: Sagamore Publishing Co., Box 673, Champaign, IL 61824-0673 (217-359-5940), Management Learning Laboratories, 1992, second edition, 151 pp., 8 x 11", paperback. \$21.95 + 3.50 shipping
- Public Risk and Insurance Management Association. *Risk Management Guide for Nonprofits*. Available from NRMII, address in Stone citation, 1987, 105 pp. & 187 pp. appendix, loose-leaf notebook. \$20

- Quirk, Charles E., editor. *Sports and The Law, Major Legal Cases*. New York: Garland Publishing, Inc., 1996, 305 pp. American Law and Society Series. \$55.00.
- Riffer, Jeffery K. *Sports and Recreational Injuries*. Colorado Springs, CO; Shepard's McGraw Hill (719-574-7901), 1985 with annual supplement (1995), 623 pp. \$95.00
- Robertson, Brian W., and Brenda J. Robertson. *Sport & Recreation Liability and You (for Parents Coaches & Sport Organizers)*. North Vancouver, BC V7J 1H1, 1481 Charlotte Road: International Self-Counsel Press, 1988, 151 pp. Self-counsel legal series. \$8.95
- Ruxin, Robert H. *An Athlete's Guide to Agents*. Boston: Jones and Bartlett Publishers (1-800-832-0034), 1993, third edition, 192 pp., paperback. \$14.95
- Schubert, George W., Smith, Rodney K., and Jessie Trentadue. *Sports Law*. St. Paul: MN: West Publishing Co., 1986, 395 pp. \$18.95
- Sharp, Linda A. *Sport Law*. Topeka, KS: NOLPE, see address under newsletters, (913-273-3550), 1990, 70 pp., paperback. \$15.50.
- Shivers, Jay S. *Recreational Safety, the Standard of Care*. Cranberry, NJ: Associated University Presses, 440 Forsgate Drive, Cranberry, NJ 08512 (609-655-4770), 1986, 324 pp. \$45.00
- Shoop, Robert J. and Dennis R. Dunklee. *Legal Manual for Educational Programming*. Research Report 237. LERN, 1550 Hayes Dr., Manhattan, KS 66502 (1-800-678-LERN), 1992, 3-ring looseleaf notebook, 206 pp. \$119.00 (LERN members \$95)
- Staudohar, P. D. *The Sports Industry and Collective Bargaining*. Ithaca, NY: ILR Press (607-255-2264), 1989, second edition, 217 pp. \$12.95
- Stone, Befron, and Carol North. *Risk Management and Insurance for Nonprofit Managers*. Chicago: First Nonprofit Risk Pooling, 1988, 157 pp., paperback, 8 x 11". Available from NonProfits Risk Management and Insurance Institute (NRMII), Publications, 1828 L St., NW, Suite 505, Washington, DC 20036 (202-785-3891), request list of publications. \$15
- Thygerson, Alton L. *Safety*. Boston: Jones & Bartlett Publishers, 200 Park Plaza, Boston, MA 02116, 1992, second edition, 331 pp. paperback. \$29.95
- Tremper, Charles R. *Reconsidering Legal Liability and Insurance for Nonprofit Organizations*. Lincoln, Nebraska: Law College Education Services, 1989, 213 pp., paperback available from NRMII, address in Stone citation. \$9.50
- Uberstine, Gary A. *Covering All the Bases: A Comprehensive Research Guide to Sports Law*. Buffalo, NY: William S. Hein Co., 1988, second edition, 260 pp., annotated bibliography of sport law sources.
- \_\_\_\_\_, and Kimarie Stratos, editors. *Law of Professional and Amateur Sport*. Deerfield, IL: Clark Boardman & Callahan. (1-800-221-9428), 1994, approximately 500 and 750 pp., respectively, loose-leaf style (regular book size, not 8 x 11"). \$230.00
- United Educators Insurance Risk Retention Group, Inc., Two Wisconsin Circle, Suite 1040, Chevy Chase, MD 20815-9913 Contact: Jill Langford, (1-800-346-7877). Two pamphlets (\$5 each):
- Managing Athletic Liability: An Assessment Guide*, 11 pp.
- Athletic Liability: Self-Assessment Audit*, 14 pp.
- Kumin, Laura, and Linda A. Sharp. *Managing Liability: Camps on Campus*, Monograph. 20 pp., \$10.00.
- van der Smissen, Betty. *Legal Liability and Risk Management for Public and Private Entities -Sports and Physical Education, Leisure Services, Recreation and Parks, Camping and Adventure Activities*. Cincinnati: Anderson Publishing Company, 1990, 3 vol., approximately 1500 pp., \$150.00; softcover edition (does not include Part B [Chps. 6-14] cases by specific activities, and Vol. III, appendix of annotated state and federal statutes and cases), approximately 800 pp. \$38.50, mid-'90's update (supplement).
- Wade, Steven C., and Robert D. Hay. *Sports Law for Educational Institutions*. Westport, CT: Greenwood



Press (1-800-225-5800), [Quorum Books], 1988, 207 pp. \$45.00

Weiler, Paul C., and Gary Roberts. *Sports and the Law: Cases, Materials, and Problems*. West Publishing Co. (612-687-7000), 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526, 1993, 798 pp. \$43.00. With 1993 Statutory and Documentary supplement, 162 pp. \$10.25

Wise, Aaron N., and Bruce S. Meyer. *International Sports Law and Business*. 675 Massachusetts Avenue, Cambridge, MA: Kluwer Law International (1-800-577-8118, e-mail: sales@kluwerlaw.com, fax: 617-354-8595) in 3 volumes -- vol. 1: Part I - The United States, and Part II - The Internationalization of Sport, 830 pp., \$200; vol. 2: Part III - Sports Law and Business in Selected Foreign Jurisdictions, 930 pp. \$225; vol. 3: Part IV - Broadcasting and Sports in Selected Jurisdictions, and Part V - Sports Marketing, 540 pp. \$175; all 3 vol. \$575.

Wittenberg, Jeffrey D. *Products Liability: Recreation and Sports Equipment*. New York: Law Journal Seminars - Press (1-800-888-8300, ext. 565), 111 Eighth Avenue, New York, NY 10011, 1985 with supplement, approximately 370 pp. \$90.00

Wong, Glenn M. *Essentials of Amateur Sports Law*. Westport, CT: Praeger Publishers Co. (1-800-474-4329), second edition, 1994, 808 pp. \$55.00

\_\_\_\_\_, and T. Jesse Wilde. *The Sport Lawyer's Guide to Legal Periodicals—An Annotated Bibliography*. Buffalo, NY: William S. Hein & Co. (1-800-828-7571), 1994, 678 pp. \$75.00

Yasser, Ray, James R. McCurdy, and C. Peter Goplerud. *Sports Law, Cases and Materials*. Cincinnati: Anderson Publishing Company, 3rd ed., 1997, 830 pp.

## LEGAL JOURNALS/LAW REVIEWS

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### *Journal of Legal Aspects of Sport*

Society for the Study of Legal Aspects of Sport  
and Physical Activity  
Dr. Tom Sawyer, editor  
5840 South Ernest Street  
Terre Haute, IN 47802  
812-237-2186  
published three times a year

### *Entertainment and Sports Law Review*

University of Miami Entertainment and Sports  
Law Review  
P.O. Box 248087  
Coral Gables, Florida 33124-8087  
two issues per volume

### *Marquette Sports Law Journal*

National Sports Law Institute  
Marquette University Law School  
1103 W. Wisconsin Avenue  
Milwaukee, WI 53233  
published twice a year

### *Seton Hall Journal of Sport Law*

Seton Hall University School of Law  
1111 Raymond Blvd.  
Newark, NJ 07102  
201/623-6216  
published twice a year

### *Journal of College and University Law*

NACUA  
Suite 620, One Dupont Circle  
Washington, DC 20036  
published quarterly

### *Education Law Reporter*

West Group  
610 Opperman Dr.  
P.O. Box 64526  
St. Paul, MN 55164-0526  
800/328-9352  
bi-weekly

### *The Sports Lawyers Journal*

Sports Lawyers Association  
11250 Roger Bacon Dr., Suite 8  
Reston, VA 22090-5202  
Phone: 703/437-4377  
FAX: 703/433-4390  
Annual journal for articles by students  
Edited by Tulane Law School's  
Sports Law Society

### *Loyola of Los Angeles Entertainment Law Journal*

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## VIDEOS

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Camp White Cloud Goes to Court. 75 min. Video with instructor's handbook, used for risk management training of camp staff. Publication LT23, \$124 (\$99 ACA members) American Camping Association, 5000 State Road 67 North, Martinsville, IN 46151-7902, 317-342-8456.

Sports Injury Risk Management and The Keys to Safety produced by Coalition of Americans to protect Sports, 1992. The Athletic Institute, 200 N. Crestwood Dr., North Palm Beach, FL 33408, 1-800-933-3355. \$39.95.

The Liability Seminar on Aquatics and Water Recreation Liability. 3 volumes. Vol. I. General Liability Principles; Vol. II. Lifeguard Liability and Open Water Drowning Liability; Vol. III. Shallow Water Diving Liability and Recreational User and Trespasser Immunity/. Center for Recreation Resources Policy, George Mason University, 4400 University Dr., Fairfax, VA 22030.

Sports on Trial. (VHS 60 min.) Coalition of Americans to Protect Sports (CAPS), 200 Castlewood Dr., North Palm Beach, FL 5697, 407-842-4225, \$29.00

Sports Risk: You Be the Judge (VHS 21 min.) CAPS (see above), Video and instructional manual, \$50.00.

Informed Consent. Universal Dimensions, Inc., 4621 N. 16th St., Suite 608, Phoenix, AZ 85016, 601-266-4972.

### **NATIONAL RECREATION AND PARK ASSOCIATION (NRPA)**

The NRPA has video taped some of their conference and institute sessions and are making them available. They also are giving CEU's for certain instructional programs related to the videos. RECOMMEND preview before purchase. Request their NRPA Legal Resources brochure from publications:

National Recreation and Park Association  
22377 Belmont Ridge Road  
Ashburn, VA 20148  
(703) 858-0784

ers argue that discrimination, harassment, stalking, gambling, etc. can be curtailed better and prevented if monitoring is allowed to occur. In 1995, for example, Chevron Corporation settled a sexual harassment lawsuit for \$2.2 million when plaintiffs alleged that e-mail records contained jokes about why "beer is better than women" ("Mind your tongue," 1997, p. 18A). The litigation brought against Citibank, R.R. Donnelly & Sons, and Morgan Stanley & Co. further illustrate the problems associated with informal e-mail communication and the alleged need for monitoring. In these three cases, racist e-mail jokes were sent among colleagues via e-mail. The jokes are part of the plaintiff's evidence supporting their claims of alleged race discrimination (McMorris, 1997; Markels, 1997). The suit against Citibank seeks both compensatory and punitive damages and is also pursuing class action status "on behalf of all current and former black employees of Citibank who were supervised or evaluated by managers who spread the e-mail" (McMorris, 1997, p. B5). Lawsuits facing Morgan Stanley involving the e-mail distributed racist jokes amount to a \$70 million (Witham, 1997). The lawsuit against R.R. Donnelly & Sons is a class action suit brought by more than 500 black workers (Markels, 1997). A 1996 survey of Fortune 1000 companies revealed the growing concern of the employer. As indicated by survey results, 10% of surveyed employers had been involved in litigation as a result of an employee's use of information technology (Peak, 1996). Employers argue that monitoring e-mail may better prevent or curtail the use of e-mail for inappropriate activity that can cause havoc both on a sport business's cost structure as well as on established goodwill and public relations.

### **Legal Challenges**

There are a variety of legal challenges that plaintiffs could use when alleging that a sport business manager engaged in illegal e-mail monitoring practices. The potential legal allegations discussed are important as they communicate to the sport business employer what they can and cannot do while communicating to the sport business employee what rights they

possess, if any. The following paragraphs discuss the legal challenges that could arise as a result of e-mail monitoring.

### **Violates the Fourth Amendment of the Federal Constitution**

Individuals employed in public positions (e.g., university coaches, sports information directors, park and recreation department employees) have recourse under the federal constitution. The Fourth Amendment of the U.S. Constitution protects public employees from unreasonable government intrusion. Early case law (e.g., *Goldman v. United States*, 1942; *Olmstead v. United States*, 1928) denied the allegation that electronic monitoring violated the Fourth Amendment when the government did not engage in a physical trespass or physical intrusion. In other words, a sports information director, for example, would have no recourse if a university administrator monitored e-mail from a remote location. The Supreme Court revolutionized Fourth Amendment interpretations in the 1967 case, *Katz v. United States*. In *Katz* (1967), the FBI listened to and recorded conversations in which the petitioner transmitted gambling information across state lines in violation of federal laws. The Court concluded that the electronic monitoring of a plaintiff's telephone conversation from a public telephone booth infringed on the plaintiff's privacy rights in violation of the Fourth Amendment. The *Katz* (1967) case is significant to the e-mail privacy issue for two reasons. First, in contrast to prior Supreme Court decisions the Supreme Court held that it was of "no constitutional significance" that the electronic monitoring device did not penetrate the telephone booth. In other words, as explained by Samoriski, Huffman, and Trauth (1996, p. 65), the *Katz* case ruled that "a physical intrusion did not have to take place in order for an unwarranted intrusion to occur."

Second, the Court recognized the significance of an individual's expectation of privacy. As stated by the Court (*Katz*, 1967, p. 512), One who occupies it (the telephone booth), shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the

words he utters into the mouthpiece will not be broadcast to the world.

The expectation of privacy issue is an important issue addressed in subsequent Supreme Court cases (see *U.S. v. Knotts*, 1983). Pertaining to e-mail, the use of individual passwords needed to access individual e-mail accounts presents the perception that e-mail conversations will remain private (*United States v. Maxwell, Jr.*, 1995). As evident from the *Katz* (1967) case, sport business employees working for the government clearly have a right to recourse under the Fourth Amendment when e-mail has been monitored in an unreasonable fashion.

Although a right to recourse has been recognized in the *Katz* case (1967), the ability to succeed as a plaintiff is extremely difficult. The *O'Connor v. Ortega* case (1987) illustrates the obstacles presented to the sport business employee seeking legal redress. In the *O'Connor* case (1987), a state hospital searched the office, desk, and file cabinets of the chief of professional education due to suspected work-related misconduct involving the improper acquisition of a computer and sexual harassment suspicions. The respondent alleged violation of his Fourth Amendment rights. The Supreme Court echoed an argument voiced frequently by both public and private sector employers. First, the Supreme Court recognized that warrantless searches and seizures are often necessary to maintain efficient operations. As expressed by *O'Connor* court (1987, p. 1501),

Public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.

The increasing use of e-mail to support claims of harassment and discrimination is powerful evidence that monitoring should occur in an effort to maintain efficient operations in a non-hostile work environment (Witham, 1997). Second, the *O'Connor* (1987) Court clearly distinguished "public" property versus "private" property. The Supreme Court (*O'Connor*, 1987, p. 1497) stated that ". . . offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed

personal items in them, . . ." In comparison, the Court recognized that items such as briefcases and purses were "private" in nature and not subject to government intrusion. Computers and e-mail messages sent, retrieved, and stored can be viewed as government property open to searches by government officials (i.e., university administrators) (Stern, 1995).

In *Schowengerdt v. U.S.* (1991), the Court of Appeals (9th Circuit) concluded that a government employee engaging in secret weapons-related projects had diminished expectations of privacy regarding materials in his office and desk due to the "extremely tight security and constant searches and surveillance of employees" (*Schowengerdt*, 1991, p. 483). The *Schowengerdt* case has two important implications to the issue of e-mail monitoring in the workplace. First, the Court of Appeals echoed earlier Supreme Court holdings and concluded that the maintenance of efficient operations justified intrusion. As stated by the Supreme Court (*O'Connor*, 1987, p. 1497),

Public employees' expectations of privacy in their offices, desks and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.

The legitimacy of preventing harassment, stalking, discrimination, and other illegal behaviors is again supported by the Court of Appeals (9th Circuit) in the *Schowengerdt* case. Second, the Supreme Court recognized the right of the employer to engage in a search when necessary to retrieve work-related materials or to investigate violations of workplace rules" (*O'Connor*, 1987, p. 1494). This holding provides for a rather broad interpretation and justifies intrusion in a variety of situations. For example, it would be reasonable for other university employees to read the files of a Sports Information Director if the individual was unavailable and a story or related facts needed to be retrieved to meet media deadlines. Private or personal e-mail messages encountered in the retrieval process presumably would be overlooked due to the reasonable need to conduct the search itself.

## **Violates the First Amendment of the Federal Constitution**

An aggrieved individual working in the public sector who had e-mail monitored, retrieved or intercepted by an employer could also allege that his or her first amendment rights were violated (*Plymouth Police Broth. v. Labor Rel. Com'n*, 1994). For example, in the *Plymouth* case (1994), the police union contested a five day dismissal of a police officer arguing that the e-mail message disseminated was a matter of public concern protected by the first amendment. Reference to the Supreme Court decision in *U.S. v. O'Brien* (1968) sheds light on the current debate regarding e-mail monitoring and censorship. In *United States v. O'Brien* (1968) the defendant burned his selective service registration certificate in violation of a federal law prohibiting such destruction. The defendant claims his act was protected as symbolic speech under the First Amendment. As explained by the Court, First Amendment rights can be violated where the governmental interest is "compelling; substantial; subordinating; paramount; cogent; strong" (*United States v. O'Brien*, 1968, p. 1679). The *O'Brien* Court (1968) recognized the substantial interest of the government to ensure that individuals available to serve in the military can be quickly and readily identifiable. Similar to the *O'Brien* case (1968), public employers could argue that they have a "compelling" need to monitor e-mail. As mentioned before, e-mail monitoring and censorship may prevent various illegalities from occurring within the confines of the work environment (e.g., harassment, discrimination, stalking).

The Communications Decency Act, signed by President Clinton in February of 1996, represented the attempt to balance the right to monitor with freedom of speech. The CDA prohibited e-mail users from sending indecent" or "patently offensive" material to minors and from making such material available in a manner available to a person under 18 years (CDA, 1996). Similar to the *O'Brien* (1968) decision, the Justice Department argued that although the legislation censors certain speech, the legislation served a compelling purpose and is necessary to protect the minds of the young. In June, 1996

a three judge panel declared the CDA unconstitutional. In June, 1997 the Supreme Court agreed with the earlier three judge federal panel. In a 7-2 decision, the Supreme Court held that the law violates the freedom of speech rights guaranteed by the federal constitution (Felsenthal and Sandberg, 1972; O'Connor, 1997).

The facts in *White v. Davis* (1975) are directly applicable to the random monitoring, censorship, interception or retrieval of e-mail messages by other colleagues or university administrators. The particular complaint was filed by a professor of history, Professor White. In the *White* case (1975), police officers posing as students enrolled in university courses at the University of California at Los Angeles for the purpose of covertly recording class discussions and compiling "records" on professors and students *regardless of suspected or actual illegal activity*. The Supreme Court of California held that this activity was in violation of Professor White's First Amendment rights. As succinctly stated by the *White* court (1975, p. 230),

To impose any straight jacket upon the intellectual leaders in our colleges and university would imperil the future of our Nation....scholarship cannot flourish in an atmosphere of suspension and distrust. . . . Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement.

Citing the above *United States v. O'Brien* (1968) case, the Court held that there was no "compelling" state interest justifying the intrusion. Although e-mail messages may regard "personal" or "private" issues, one can still argue that the dialogue regarding these issues stimulates the mind, contributes to the marketplace of ideas, breeds tolerance, and broadens the collective knowledge and insights possessed by the mail's recipient(s).

## **Violates the Fifth and Fourteenth Amendment of the Federal Constitution**

Another argument available to public em-

ployees protesting interference with sent or stored e-mail messages is provided by the Fifth and Fourteenth Amendments prohibiting the denial of life, liberty, or property without due process. In the 1974 case of *Procurier v. Martinez*, the plaintiffs challenged the arbitrary censorship of prisoner mail. The *Procurier* (1974) court recognized that the prisoner's interest in uncensored mail was "plainly a "liberty" interest within the meaning of the Fourteenth Amendment" (*Procurier*, 1974, p. 1814). The Supreme Court again recognized that liberty rights could only be denied for compelling and substantial government reasons. Similar to the censorship of United States postal mail, sport business employees working for the government could argue the monitoring or interception of e-mail represents a violation of individual liberty rights without due process protected by the Fifth and Fourteenth Amendment.

### **Federal Statutory Violations**

The Electronic Communications Privacy Act (ECPA) represents a federal statute that attempts to balance the privacy rights of all workers (public and private sector) with the rights of the employer to maintain an efficient work environment. The ECPA was passed in 1986 as an amendment to the Omnibus Crime Control and Safe Streets Act (OCCSSA) of 1968. The OCCSSA is commonly referred to as the "wiretapping" statute. The OCCSSA prohibits the interception of wire (i.e., telephone) and face-to-face communication without either a court order or consent. Between 1968 and 1986, however, the OCCSSA only applied to aural communications. The ECPA attempted to modernize the OCCSSA. As described by Samoriski, Huffman, and Trauth (1996, p. 67),

The ECPA addressed the gaps created by advances in technology. Computers, cordless and cellular phones, and the development of the technology to intercept communications called for appropriate measures to deal with what Congress Described as the loss of America's ability to "lock away personal and business information" . . . In particular, Congress noted . . . protection for e-mail was "weak, ambigu-

ous, or non-existent" (quoting the ECPA, 1986, p. 3).

The ECPA prohibits the intentional interception of any wire, oral, or electronic communication when such communications are sent over public networks (e.g., MCI Mail, Prodigy, CompuServe) and effect interstate commerce. Two exemptions within the ECPA, however, legalize the monitoring and intercepting e-mail messages while simultaneously nullifying the protection provided to the individual employee. One exemption is consent (section 2511(2)(d)). Sport business employees who consent, either expressed or implied, have no recourse under the ECPA. Consent could be inferred via a sport business handbook, policy manual, and/or through language used in interoffice memos. Courts have not recognized the plaintiff-employee argument that consent is coerced and therefore invalid and in violation of individual privacy rights (*Jennings v. Minco Technology Labs, Inc*, 1989). In other words, if the employee does not want to work at a sport business requiring consent to e-mail monitoring and censorship, for example, that individual is free to go work somewhere else. A second exemption of the ECPA worth noting is that of the "business use" exemption (section 2511(2)(a)(i)). Sport business employers could argue that the monitoring or intercepting of e-mail is allowed under the business use exemption. For example, the monitoring of e-mail could be viewed as an attempt by to protect the sport business's investment. In other words, e-mail monitoring, censorship, retrieval, or interception represents an effective, and necessary management tool to prohibit system abuse and ensure that employees do not spend time on in either wasteful, illegal, unethical, or unprofessional improprieties.

Although of limited precedential value, the case of *Epps v. St. Mary's Hospital of Athens, Inc.* (1986) illustrates the latitude given to the employer. In this case, one employee overheard the conversation of other employees in which disparaging comments were made about supervisors. The employee decided to intercept, tape, and record the conversation. The plaintiffs who had their conversation recorded sued alleging violation of the federal wiretapping law. The

court of appeals (11th Cir.) denied the plaintiffs allegation. In defending the interception of communication, the court explained (Epps, 1986, p. 417),

It (the call) occurred during office hours, between co-employees, . . . and concerned scurrilous remarks about supervisory employees in their capacities as supervisors. Certainly the potential contamination of a working environment is a matter in which the employer has a legal interest.

As mentioned earlier, e-mail users often find the informality of e-mail communication provides a quick and cost effective means of discussing pent up frustrations with friends and colleagues. However, according to the courts conclusion in the *Epp's* case (1986), this communication could be "open" for censorship due to the need to maintain a healthy work environment free of negativity. In addition to an employer's rebuke, a sport business employee making the statements could also face claims of insubordination, defamation, harassment, and intentional infliction of emotional distress.

In *Deal v. Spears* (1992), the United States Court of Appeals (8th Cir.) held that the reading of personal e-mail in its entirety is not representative of a legitimate business purpose. In the *Deal* case (1992), employers decided to monitor employee calls in an effort to find out information regarding a recent burglary. The employers thought the burglary was an "inside" job. In the process of attempting to gather evidence, the employers recorded phone messages without the consent of the employee. In fact, the employers recorded 22 hours of personal calls made by plaintiff and her lover. A key factor expressed in the court's analysis is that a call *cannot* be intercepted in the ordinary course of business *except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not*. In other words, once a sport business employer intercepts an e-mail message, that message should only be read to the extent that one can determine the nature of its message (i.e., business or personal). The reality of this, however, is tenuous as there is little (if any) way to discern if a particular message was, or was not, read in

its entirety. Further, the ability to discern what is truly "personal" appears non definitive. As explained in the *Epps* case, personal comments regarding supervisors (or the work environment in general) may not be protected. On the other hand, as the *Deal* case implied, "other" personal comments such as those spoken between lovers do tend to be protected. One can foresee much difficulty in defining "personal" communications in subsequent case law. For example, where does personal communication between dating colleagues (seemingly private and protected) cross the line and represent evidence contributing to sexual harassment allegations?

### **Violations of State Statutes**

A variety of state states duplicate the intent and spirit of the ECPA by trying to balance the privacy rights of the employee with the rights of the employer to monitor and control the work environment. State statutes, however, are limited in their effectiveness. First, many statutes tend to reflect the earlier OCCSSA law and pertain to only communication that can be heard. Second, the statutes mirror the ECPA and provide exemptions for consent and business use. Third, state statutes are limiting due to their lack of uniformity. Similar to other state-by-state laws (e.g., product liability, ticket scalping, athlete agent representation), non-uniformity makes compliance difficult and cumbersome and recovery uncertain.

Two cases illustrate the limitations of state statutes. In a highly publicized case, Alana Shoars brought a \$1 million wrongful termination suit against her employer and a \$75 million class action suit on behalf of herself and other employees for invasion of privacy and violation of the state wiretapping statute. Shoars alleged she was fired when questioning her boss's practice of routinely reading employees e-mail messages. The case at the trial court level was decided in favor of the defendant. As summarized by Samoriski, Huffman, and Trauth (1996, p. 69).

In June of 1990, California Superior Court Judge Barnet M. Cooperman dismissed most of the class action suit against Epsom. Judge Cooperman said the statute under which Shoars filed her suit pertained only



to telegraph and telephone interception and did not apply to e-mail.

Similarly, employee-plaintiffs in the unpublished 1993 California case of *Bourke v. Nissan Motor Corp. in U.S.A.* alleged violation of the California electric eavesdropping law when "each shown a stack of their E-mail ... and told to stop their nonwork-related E-mail" (Nash and Harrington, 1991, p. 88). Summary judgment was awarded to the employer-defendant based upon employee-signed computer-user registration forms stipulating that the company-owned hardware and software were to be used for company business only (Traynor, 1994).

### **Violations of State Constitutions**

Many state constitutions protect the privacy rights of their constituency (e.g., Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New York, Pennsylvania, S. Carolina, Washington). California's constitution (Article I, Section I) states,

All people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy (quoted in *White v. Davis*, 1975, p. 233).

California and Montana provide a cause of action for private as well as public sector employees (Schmitt, 1996). In fact, the California constitution appears to prohibit the type of invasion resulting from increased and improved technology. As stated by the *White* court in reference to California's privacy constitutional provisions (1975, p. 233),

The moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment of personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individual's some measure of protection against this most modern threat to personal privacy.

It is likely that other state constitutions containing similar clauses would limit the use of tech-

nological interception and retrieval devices that could be used in an improper fashion or without the consent of the sender.

### **Invasion of Privacy (tort) Violations**

In the absence of, or in combination with, federal or state constitutional protection, an aggrieved plaintiff can resort to common law for recourse. The "unreasonable intrusion into a person's seclusion" cause of action is most applicable to the plaintiff alleging that the reading or monitoring of his or her e-mail was legally prohibited. The U.S. Court of Appeals (3rd Cir.) reversed the district court opinion which failed to recognize the privacy claim in *Vernars v. Young* in 1976. In the *Vernars* (1976) case, a corporate officer opened and read the e-mail addressed to another person without consent. In reversing the district court decision regarding a claim for invasion of privacy, the appellate court opined (*Vernars*, 1976, p. 969),

Just as private individuals have a right to expect that their telephone communications will not be monitored, they also have a reasonable expectation that their personal mail will not be opened and read by unauthorized persons. Recognition of a cause of action for violation of that expectation seems particularly fitting under the right of privacy doctrine.

Similar to postal mail, a sport business employee could argue that the monitoring, censorship, interception or retrieval of e-mail constituted an illegal invasion of privacy. The sport business employee's likelihood of success when alleging invasion of privacy rests upon three main issues. To win a claim of privacy, the plaintiff must prove (a) that the defendant intentionally intruded or violated his or her privacy; (b) that the plaintiff had a right to expect that his or her e-mail would remain private; and (c) that the invasion would be highly offensive to another reasonable person (Brunn, 1988; Freedman, 1987). First, the affirmative act of monitoring or intercepting an employee's e-mail messages infers intent. Second, the use of individual passwords known and used only by the individual employee infers that the sport business employee has an expectation of privacy in the use

of his or her e-mail account. Third, the use of passwords, common industry practices, and a paucity of communicated policy-related factors pertaining to e-mail monitoring and interception would likely cause the larger society to agree with the employee regarding privacy right expectations.

## **Proposed Solutions**

### **Legislation Attempting to Offer Employee Protection**

The passage of the ECPA in 1986 was an attempt to provide legislation that would balance the rights of the employer with the rights of the employee. However, many suggest that the ECPA contains too many weaknesses and a "new" uniform federal law has been advocated by many. The Privacy for Consumers and Workers Act (PCWA) of 1993 addressed the monitoring of employees by employers. The Act was introduced by Pat Williams of Montana in the House of Representatives and Paul Simon of Illinois in the Senate in 1993 (Privacy for Consumers and Workers Act, 1993). The main tenant of the PCWA was to provide employees with a "right to know" when and if monitoring was going to take place. The PCWA also defined who could be monitored and for what duration monitoring could take place. The PCWA also defined who could be monitored and for what duration monitoring could take place. For example, the Act limited monitoring of new employees to two hours during one week. The PCWA prohibited the monitoring of individuals employed for a duration of five years or more. Further, monitoring had to be relevant to the individual's job requirements and employees had the right to access collected information. The act was never passed. Federal intervention, although favored by many, fails to represent an efficient solution. The efforts taken to get the law enacted, in addition to the ability to monitor and enforce the particular act, appear overwhelming.

### **Encryption**

Encryption has become a popular, yet controversial, solution to e-mail usage and related

legal infringements ("Encryption standards," 1996). Encryption, as explained by Samoriski, Huffman, and Trauth (1996, p. 71),

Involves the breaking down of e-mail messages into individual codes so that only the receiver with a special key is able to decode it.

Encryption software is currently available through a variety of commercial software packages.

### **Extend postal regulations to e-mail**

Samoriski, Huffman, and Trauth (1996) suggest that the United States Code which prohibits the obstruction or interference with postal mail be extended to encapsulate e-mail. As mentioned earlier, one could presume that similar protections given to postal mail should also be given to *electronic mail*. A second option suggests Samoriski, Huffman, and Trauth (1996) would be to change the term *electronic mail* to *postcard mail*. This change in terminology would reflect diminished privacy expectation.

It is worth noting that the post office began experimenting with an electronic postmark in August, 1996 (Auerbach, 1996). As explained by Auerbach (1996),

By paying 22 cents, you would ensure that your e-mail would be stamped with a time and date, given a tracking number and copied into an archive.

The U.S. Post Office offers the sender more security versus encryption, for example, as a result of the potential criminal penalties associated with the interception or tampering with U.S. mail (Cole, 1996). Due to the expense and elaborate security measures, small sport businesses are not a likely target market for the electronic postmark.

## **Suggestions to Sport Business Employees**

### **Think of, and prepare, e-mail messages as any other type of written document.**

All sport business employees, regardless of rank or position, should be cognizant of the potential peril associated with informal and per-

sonal e-mail communications. As explained by a plethora of recent literature, e-mail is becoming an increasingly popular tool to solicit damaging evidence. The advice of a Boston consulting firm is this, "Think of e-mail as a corporate CB radio" (Thackery, 1994, p. B4). In other words, remember that anything transmitted by e-mail could be reproduced and used against the sender and/or retriever in a court of law.

**Prior to sending an e-mail message, consider whether the message could withstand intense public scrutiny.**

Sport business employees caught in a quandary regarding what to say and what not to say on e-mail should ask themselves, "How would I feel if this message appeared on the front page of tomorrow's paper, in trial transcript, or featured in a news story?" In most situations this question alone will provide guidance to the employee contemplating the sending of a rather private, personal, harassing or other inappropriate e-mail message. Sport businesses which provide warnings to the computer user each time he or she logs on can serve as subtle reminders regarding prohibited use.

**Read the university policy regarding employer e-mail privileges.**

Ideally, each sport business should have adopted and communicated the monitoring policies to the stakeholders. As mentioned in this paper, an important defense is being able to argue that employees had no expectation that their e-mail communications would remain private (*Valley Bk. of Nev. v. Superior Ct. of San Joaquin Cty.*, 1975). However, research reveals that fewer than 50% of existing companies have e-mail policies (Allerton, 1996; Cappel, 1993; Stipe, 1996). In a survey conducted by law firm Gordon & Glickson, 82 percent of respondents indicated that written policies need to be strengthened (Peak, 1996).

A generic policy that can be tailored to most all sport businesses would include (a) an introductory statement, (b) ownership of the e-mail hardware and software belongs to the sport business, (c) language stating that e-mail is to be used for business purposes only, (d) prohibited activities, and (e) language stating that the

sport business retains the right to monitor at all times, and (f) information retrieved or discovered can be used to support disciplinary actions.

It is a good idea to add the name and phone number of a person and within the organization who can answer related questions and concerns. As stated by business man Patrick Vice, "You can write stuff until you're tired, but if you don't at least have a vehicle to ask questions, you're not doing yourself any service" (Stipe, 1996, p. 103). The following policy statement, signed by the employee, includes the above elements and would tend to diffuse privacy allegations of a plaintiff-employee.

**SportsPark, U.S.A.**

**E-mail Policy Statement**

(a) To safeguard the property of our employees, our customers, and SportsPark, U.S.A., and to help prevent illegal activity or activity prohibited by SportsPark, U.S.A. on SportsPark, U.S.A. premises, SportsPark, U.S.A. reserves the right to monitor, censor, retrieve, or intercept employee e-mail. (b) No individual passwords used for e-mail access purposes represent an expectation of privacy on behalf of the employee. (c) All property (including e-mail) is to be used for business purposes only. The use of property for personal benefits is prohibited. (d) Electronic mail which would be offensive to other individuals is prohibited. For example, indecent, lewd, harassing, or other messages deemed unlawful by federal or state laws or company policy are prohibited. (e) Monitoring, censorship, retrieval, or interception of employee e-mail by the sport business manager(s) may be initiated without prior notice and conducted at times and locations deemed appropriate by the sport law business. (f) Information gained through such searches may be utilized by SportsPark, U.S.A. to administer discipline, up to and including discharge.

I, (employee), have read the above policy. I understand the above policy and have had an opportunity to ask questions. All my questions and concerns have been answered or addressed by the sport business manager. My signature