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# OUT OF “CONTROL”: THE OPERATION GOLD EXCEPTION AND THE NCAA’S SUSCEPTIBILITY TO LAWSUIT UNDER TITLE VI

Robert C. Burns\*

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## **OUT OF “CONTROL”: The Operation Gold Exception and the NCAA’s Susceptibility to Lawsuit Under Title VI**

### **I. INTRODUCTION**

Thousands of cameras pan down on the starting blocks, focused on the eight best sprinters in the world. The world watches breathlessly on millions of televisions around the globe. It’s summertime and each runner is poised and ready to explode off the block, striving for one of three medals but ultimately hoping to bring gold back home to their respective countries.

The starting gun sounds and the runners are off in the 100-meter dash in the 2016 Summer Olympics. This is the race that will determine the fastest man in the world; all eyes are on the two favorites – Liam and Mark. The spotlight shines brighter on these two not just because they posted the two fastest times in the preliminary rounds, but also because they are collegiate teammates at an NCAA Division I university.<sup>1</sup>

The runners reach the fifty-meter mark and glance over at each other. They are neck-and-neck at the front of the pack, which surprises neither of them. They have been training together every day for over three years, pushing each other in practice while balancing intense daily workouts with the rigors of collegiate schoolwork.

Seventy-five meters. The crowd roars with anticipation as Liam and Mark pull far enough ahead that it is clear that one will be bringing home the gold and the other will earn silver. They think back to all the time in the weight

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<sup>1</sup> NCAA universities are divided into three divisions based on desired levels of competition and financial aid. Division I is the highest level of intercollegiate athletics and contains “the largest programs that provide the most athletically related financial aid for student-athletes.” *About the NCAA – Membership*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new> (last updated Aug. 13, 2012).

room and on the track together. The 6:30 AM sprints, the three-hour practices in the summer heat. Then, they were friends and teammates, working together to help bring an NCAA championship to their university. Now, they are competitors, and each one wants nothing more than to bring home the gold medal for his country.

They cross the finish line side-by-side. It is only once they look up to the scoreboard that they realize Liam has won by one one-hundredth of a second. Mark, though disappointed, can't help but be happy for his friend as they climb up the podium to receive their medals. The New Zealand national anthem begins to play as Liam sings along with pride. Liam was born and raised in Wellington but decided to run collegiately in the United States on a scholarship, and now he has won the gold medal for Team New Zealand. Mark, standing at his side as he has for the past three years, is wearing the red, white, and blue from Team USA underneath his silver medal.

The two athletes return to their university as heroes and begin preparations for their senior season of collegiate track. Over the next few days, Liam and Mark each receive a call from their country's Olympic Committee with great news. Along with many other countries, New Zealand and the United States offer cash bonuses to athletes who win medals for their country in the Olympics,<sup>2</sup> and it is time for

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<sup>2</sup> See Sam Boyer, *Olympic Medals Worth Their Weight in Gold*, STUFF, <http://www.stuff.co.nz/sport/olympics/7442337/Olympic-medals-worth-their-weight-in-gold> (last updated Sept. 8, 2012, 5:00 AM) (describing New Zealand athletes' medal bonuses as \$60,000 NZD for gold and \$55,000 for silver or bronze); see also Chris Smith, *London Olympics Unpaid Athletes Fight for Rich Medal Bonuses*, FORBES (July 31, 2012, 1:13 PM), <http://www.forbes.com/sites/chris-smith/2012/07/31/london-olympics-unpaid-athletes-fight-for-rich-medal-bonuses/> (listing the United States medal bonuses as \$25,000 for gold, \$15,000 for silver, and \$10,000 for bronze).



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Liam and Mark to collect theirs. For his gold medal, Liam is due \$60,000 NZD (or roughly \$49,000 USD)<sup>3</sup> as a taxpayer-funded grant from New Zealand. Mark’s silver is worth \$15,000 from the United States Olympic Committee.<sup>4</sup> Understandably, both Liam and Mark are thrilled at this, their first major payday as track and field athletes. As student-athletes, the NCAA has previously forbidden either of them from receiving any income from their track and field pursuits<sup>5</sup>, and their intense training and academic schedules have prevented either from even having a part-time job while in college to earn spending money.<sup>6</sup>

Knowing that NCAA rules can often be confusing and not wanting to jeopardize their ability to compete in their senior season, Liam and Mark go together to their athletic association’s compliance department to confirm that they can accept their bonuses.<sup>7</sup> After a quick conversation with

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<sup>3</sup> Based on an exchange rate of 1 NZD to 0.818 USD as of Oct. 12, 2012. See *Current and Historical Rate Tables*, XE.COM, <http://www.xe.com/currencytables/?from=NZD&date=2012-10-12>.

<sup>4</sup> See Boyer, *supra* note 2; see also Smith, *supra* note 2.

<sup>5</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2 at 60-61 (2012-13), available at <http://www.ncaapublications.com/productdownloads/D1113.pdf> (declaring that a student-athlete loses amateur status and becomes ineligible for intercollegiate competition in a particular sport if the individual “uses his or her athletics skill for pay in any form in that sport”).

<sup>6</sup> According to a 2010 NCAA survey of 1,883 Division I student-athletes in men’s sports other than football, basketball, and baseball, they spend on average sixty-eight hours per week on athletic and academic activities during their sport’s season. See *Division I Results from the NCAA GOALS Study on the Student-Athlete Experience*, FARA ANNUAL MEETING AND SYMPOSIUM, 1, 20, 23 (2011), available at [http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/pdfs/2011/di\\_goals\\_fara\\_2011](http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/pdfs/2011/di_goals_fara_2011).

<sup>7</sup> See Bill Lubinger, *Violation or Legal? Do You Have What it Takes to be an NCAA Compliance Officer? Here’s Your Shot*, THE PLAIN DEALER (June 9, 2011, 11:59 PM), [http://www.cleveland.com/osu/index.ssf/2011/06/violation\\_or\\_legal\\_do\\_you](http://www.cleveland.com/osu/index.ssf/2011/06/violation_or_legal_do_you)

the compliance officer, they are left in shock.

Despite training together every day, working just as hard and pushing each other to be their very best, only Mark will be allowed to keep his check and continue to compete for his university. Liam, on the other hand, has just been informed that he will have to return his \$60,000 NZD if he wishes to continue participating with his university in NCAA competition. Due to NCAA rules, if he chooses to keep his winnings he will lose his amateur status, likely resulting in the forfeiture of his college scholarship.. Liam was very much looking forward to competing for his university for his final collegiate season and is left with a very difficult choice – one that his friend Mark does not have to make.

The sole reason for this discrepancy? The fact that Mark is from the United States and Liam from New Zealand. The NCAA allows student-athletes<sup>8</sup> to collect bonuses for winning medals for Team USA from the United States Olympic Committee without forfeiting their eligibility.<sup>9</sup> This exception only applies for American athletes, so Liam, the proud Kiwi who became a national hero thanks to his great achievement, has to tear up his check while watching his friend keep thousands of dollars.

Unfair? Absolutely. Arbitrary? It seems so. But what

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u\_have.html (noting that the NCAA Division I manual is 444 pages thick and even compliance officers, those employed to ensure compliance, often find them confusing and full of idiosyncrasies).

<sup>8</sup> The NCAA insists on referring to its athletes as “student-athletes”, a term with a very interesting history. Putting “student” before “athlete” helped diminish any possible workers’ compensation responsibilities of employers. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83-86 (2006) (explaining the history behind the NCAA’s use of “student-athlete”).

<sup>9</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2.

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about discriminatory?

### A. NO NEED TO DISCRIMINATE – THE ENORMOUS TASK OF THE NCAA

The NCAA’s task has become a large, and in many ways unenviable, one.<sup>10</sup> Founded in 1906 to help protect young people from "the dangerous and exploitive athletics practices at that time,"<sup>11</sup> the NCAA initially was made up of just 62 higher-education institutions.<sup>12</sup> It was initially a small institution, acting mostly as a discussion group and rules-making body – it did not even have an executive director or a national headquarters until the early 1950s.<sup>13</sup>

From that small organization, the NCAA has grown tremendously, now overseeing 23 sports and more than 400,000 student-athletes at over 1,000 colleges and universities.<sup>14</sup> With that great growth has also come unprecedented revenues.<sup>15</sup> The NCAA earned \$845.9

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<sup>10</sup> See David P. Bruton, *At the Busy Intersection: Title VI and NCAA Eligibility Standards*, 28 J.C. & U.L. 569, 570 (2002) (calling the NCAA's task of "regulat[ing] the relentless competition in higher education for athletes and victory and to rationalize it with other educational goals" the "thankless task of the NCAA").

<sup>11</sup> See *About the NCAA - History*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://ncaastudent.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history> (last updated Aug. 13, 2012).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *About the NCAA - Who We Are*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Oct. 12, 2012).

<sup>15</sup> See *Finances - Revenue*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Jan. 17, 2012), <http://www.ncaastudent.org/wps/wcm/connect/public/NCAA/Finances/Rev>

million in revenue for 2010-11, mostly from television and marketing rights fees and ticket and merchandise sales from its championships.<sup>16</sup> Sixty percent of this revenue gets distributed directly to Division I conferences, which give most of that money to their member universities to support their athletics programs.<sup>17</sup>

Despite all of this revenue coming to the NCAA, conferences, and universities because people want to watch their student-athletes compete at a high level, student-athletes do not get paid outside of receiving a partial or full scholarship,<sup>18</sup> and are forbidden from accepting practically any benefit, monetary or otherwise, relating to their athletic ability.<sup>19</sup>

This Note uncovers the unfair, discriminatory nature of one of the NCAA's exceptions to its general prohibitions of student-athletes receiving money - the Operation Gold Grant.<sup>20</sup> Most of the exceptions the NCAA allows are for so-called "actual and necessary expenses" incurred by the student-athlete for training and travel in specific circumstances.<sup>21</sup> What makes the Operation Gold Grant so

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enue (breaking down the NCAA's 2010-11 revenue, the most recent year audited numbers are available).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See NCAA DIV. I MANUAL, Bylaw 15.5.6 (detailing scholarship limits for football as eighty-five); *id.* § 15.5.5 (detailing scholarship limits for basketball as thirteen or fifteen); *id.* § 15.5.3.1 (detailing scholarship limits for other sports as being limited to 4.5 to 12.6 per team, which get divided up among all team members).

<sup>19</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2 (detailing the ways student-athletes may lose their amateur status and become ineligible to compete intercollegiately, along with certain exceptions to the general rule of not receiving any form of pay), *supra* note 5.

<sup>20</sup> See *id.* § 12.1.2.1.4.1.2.

<sup>21</sup> See NCAA DIV. I MANUAL (having over fifty bylaws allowing for exceptions for "actual and necessary expenses").

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significant is that Olympic medal bonuses are often worth tens of thousands of dollars, potentially the most money a student-athlete can receive for competing in his sport while in college.<sup>22</sup> Compared to the “actual and necessary expenses” limits, which do not allow the student-athlete to actually gain an income and instead simply allow them to get their expenses covered, student-athletes earning money under this exception are allowed to keep whatever bonuses they earn.<sup>23</sup>

### B. THE OPERATION GOLD GRANT IS DISCRIMINATORY IN VIOLATION OF TITLE VI

“The NCAA does not discriminate against any person regardless of race, color, national origin, education-impacting disability, gender, religion, creed, sexual orientation or age with respect to its governance policies, educational programs, activities and employment policies.”<sup>24</sup>

Despite the above statement appearing in its 2012-13 Guide for the College-Bound Student-Athlete, the NCAA does, in fact, discriminate on the basis of national origin with its Operation Gold Grant. By deliberately drafting the Operation Gold Grant to only allow NCAA Olympic athletes

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<sup>22</sup> See Chris Smith, *United States Tops Olympic Medal List, but is Third to China and Russia in Bonus Payouts*, FORBES (Aug. 13, 2012, 4:06 PM), <http://www.forbes.com/sites/chris-smith/2012/08/13/united-states-olympic-committee-to-pay-5-million-in-medal-bonuses/> (listing bonus payouts for different countries).

<sup>23</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5, at 62.

<sup>24</sup> See *2012-13 Guide for the College-Bound Student-Athlete*, NCAA ELIGIBILITY CENTER, at 3 (2012-13), available at [http://grfx.cstv.com/photos/schools/afa/genrel/auto\\_pdf/2012-13/misc\\_non\\_event/ncaaguide.pdf](http://grfx.cstv.com/photos/schools/afa/genrel/auto_pdf/2012-13/misc_non_event/ncaaguide.pdf).

competing for Team USA to accept medal bonus money, the NCAA discriminates against foreign student-athletes. These foreign student-athletes who are talented and driven enough to win Olympic medals are left with the difficult decision of either accepting the medal bonuses they earned or declining potentially tens of thousands of dollars and continuing to compete in the NCAA – a decision American athletes do not have to make.

This Note argues that the Operation Gold Grant is discriminatory in violation of Title VI of the Civil Rights Act of 1964, which the NCAA falls under because of its controlling authority over NCAA-member institutions. Part II of this Note examines the NCAA bylaws and its Operation Gold Grant, including with past Title VI and Title IX challenges to the NCAA. Part III analyzes why the NCAA should now be considered having controlling authority over its member institutions, how Operation Gold is discriminatory, and what relief should be available for potential plaintiffs who bring a claim against the NCAA.

## **II. BACKGROUND**

### **A. TITLE VI**

Title VI of the Civil Rights Act of 1964 states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>25</sup> In calling for its enactment, President John F. Kennedy stated that “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches,

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<sup>25</sup> 42 U.S.C. § 2000d (2014).

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subsidizes or results in racial discrimination.”<sup>26</sup> Title VI follows the Constitutional standard, prohibiting those forms of discrimination that would violate the Equal Protection Clause or the Fifth Amendment.<sup>27</sup>

The requirements necessary for a plaintiff to bring a lawsuit under Title VI were for many years unclear, especially in relation to a plaintiff’s private right to sue.<sup>28</sup> The confusion over what claims private plaintiffs could bring under Title VI was finally resolved by the Supreme Court in the 2001 case *Alexander v. Sandoval*.<sup>29</sup> In *Sandoval*, a driver’s license applicant brought a class action under Title VI challenging the Alabama Department of Public Safety’s official policy of administering its driver’s license examination in only the English language.<sup>30</sup> The plaintiff argued that this policy violated Title VI because it “had the effect of subjecting non-English speakers to discrimination based on their national origin.”<sup>31</sup> The case reached the Supreme Court on a writ of certiorari to review only whether

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<sup>26</sup> John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963*, THE AMERICAN PRESIDENCY PROJECT available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9283> (last visited Mar. 12, 2014).

<sup>27</sup> See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284-287 (1978) (describing how though the bill was written to confront the problem of discrimination against African-Americans, evidence shows that its supporters intended that the term 'discrimination' would be made clear by reference to the Constitution).

<sup>28</sup> See Andrew M. Habenicht, *Has the Shot Clock Expired? Pryor v. NCAA and the Premature Disposal of A "Deliberate Indifference" Discrimination Claim Under Title VI of the Civil Rights Act of 1964*, 11 GEO. MASON L. REV. 551, 563-564 (2003) (noting that the Supreme Court’s disjointed 1983 Supreme Court decision did not resolve whether a plaintiff had the private right to enforce Title VI through a lawsuit).

<sup>29</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>30</sup> *Id.* at 278-279.

<sup>31</sup> *Id.* at 279.

a private cause of action exists to enforce Title VI.<sup>32</sup>

The Court declared three essential aspects of Title VI which must be “taken as given,” two of which are important here.<sup>33</sup> First, private individuals may sue to enforce Title VI, both for injunctive relief and for damages.<sup>34</sup> The primary rationale for this declaration was that the Court had previously determined that an implied private cause of action existed to enforce violations of Title IX of the Education Amendments of 1972, and since Title IX was patterned after Title VI, an implied private cause of action must exist under Title VI as well.<sup>35</sup> Second, plaintiffs may only sue under Title VI for intentional discrimination, not for a mere disparate impact.<sup>36</sup>

*1. Proving Intentional Discrimination for Title VI Claims.*

With this background in mind, we now turn to what the plaintiff must prove for a Title VI claim. As determined by the Supreme Court in *Sandoval*, the plaintiff must show intentional discrimination.<sup>37</sup> An intentional discrimination claim alleges that “similarly situated persons are treated

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The third aspect which must be “taken as given” is that regulations promulgated under §602 of Title VI may validly forbid activities that have a disparate impact on racial groups. *Id.* Section 602 authorizes and directs federal departments and agencies “to effectuate the provisions of [§ 601] by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1. In *Sandoval*, the Department of Justice had issued a regulation “forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination.” *Sandoval*, 532 U.S. at 278. While important in many other contexts, such as challenging government regulations, this third aspect is of no concern to this Note.

<sup>34</sup> *Id.* at 279.

<sup>35</sup> *Id.* at 279-80.

<sup>36</sup> *Id.* at 280.

<sup>37</sup> *Id.* at 285-87.



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differently because of their race, color, or national origin.”<sup>38</sup> Proving intentional discrimination by a facially neutral policy requires that the plaintiff show that the relevant decisionmaker adopted the policy at issue “because of, not merely in spite of, its adverse effects upon an identifiable group.”<sup>39</sup> A mere awareness of discriminatory consequences of an otherwise facially neutral policy does not suffice to show intentional discrimination.<sup>40</sup>

The Third Circuit has listed relevant factors a court may consider in deciding whether a discriminatory purpose was the motivating factor in adopting an allegedly discriminatory policy.<sup>41</sup> These considerations include the historical background of the decision and sequence of events leading up to it, departures from normal procedural sequence, the legislative or administrative history, and especially any statements made by members of the decisionmaking body.<sup>42</sup>

### *2. Intentional Discrimination Pleading Requirement.*

Questions of intent and state of mind are normally not amenable to summary adjudication, and courts have only reluctantly upheld the Rule 12(b)(6) dismissal for a claim alleging discrimination in the adoption of an otherwise facially neutral policy.<sup>43</sup> The plaintiff’s complaint need not

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<sup>38</sup> See U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL 43 (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/vimanual.pdf>.

<sup>39</sup> See *Pryor v. Nat’l Collegiate Athletic Ass’n.*, 288 F.3d 548, 562 (3rd Cir. 2002) (citing *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (internal quotations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 563 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* at 563-64 (listing cases where courts determined plaintiffs to have stated claims for intentional discrimination).

contain specific facts showing prima facie intentional discrimination, but only a "short and plain statement...showing that the pleader is entitled to relief."<sup>44</sup>

In *Pryor*, the Third Circuit reversed the dismissal of a complaint against the NCAA for intentional discrimination under Title VI.<sup>45</sup> By alleging that the NCAA purposely adopted an academic qualification policy because it would reduce the number of African-American athletes who would be eligible to compete, knowing via a report that the policy would have these adverse effects on African-Americans, the plaintiffs sufficiently stated facts showing intentional discrimination.<sup>46</sup> This reluctance to dismiss intentional discrimination claims early allows plaintiffs to reach discovery and attempt to uncover more information to prove that the questioned policy was the product of intentional discrimination.<sup>47</sup>

#### B. THE NCAA – “THE BEST MONOPOLY IN AMERICA”

The NCAA has been called everything from the “best

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<sup>44</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (discussing the pleading requirements under Federal Rule of Civil Procedure 8(a)(2) for claims alleging intentional discrimination).

<sup>45</sup> *Pryor*, 288 F.3d at 565 (holding “the complaint in this case does sufficiently state facts showing intentional, disparate treatment on account of race”).

<sup>46</sup> *Id.*

<sup>47</sup> See *Swierkiewicz*, 534 U.S. at 511 (noting that discovery often unearths relevant facts for use in intentional discrimination cases).

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monopoly in America”<sup>48</sup> to a “cartel”<sup>49</sup> for the way it manages to maintain moral high ground while greatly restricting the benefits student-athletes can receive for their participation, all in the name of amateurism.<sup>50</sup> Only amateur student-athletes are allowed to participate in NCAA collegiate athletics.<sup>51</sup> Once a student-athlete loses his amateur status in a particular sport, he is typically permanently deemed ineligible to compete in the NCAA in that sport.<sup>52</sup> While the concept of being an amateur might seem relatively straightforward, the NCAA has created its own ever-evolving and ever-complicated definition as it applies to collegiate athletics.<sup>53</sup>

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<sup>48</sup> See Robert J. Barro, *The Best Little Monopoly in America*, BLOOMBERG BUSINESSWEEK MAGAZINE (Dec. 8, 2002), <http://www.businessweek.com/stories/2002-12-08/the-best-little-monopoly-in-america> (listing the NCAA as the “clear choice for best Monopoly in America” over organizations such as the U.S. Postal Service, OPEC, and Microsoft).

<sup>49</sup> See ARTHUR A. FLEISHER ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 5 (1992) (noting economists generally view the NCAA as a cartel for the way it restricts both the number of games played and televised as well as the competition for student athletes).

<sup>50</sup> See Jason Whitlock, *Greedy NCAA Still Exploiting Athletes*, FOX SPORTS (Mar. 30, 2011, 6:50 PM), <http://msn.foxsports.com/collegebasketball/story/ncaa-amateur-concept-is-a-sham-that-exploits-players-032911> (noting that hypocrisy and immorality of the NCAA for restricting the ability of student-athletes to make money while the NCAA and its member universities receive billions of dollars in revenue).

<sup>51</sup> See NCAA DIV. I MANUAL, Bylaw 12.01.1 (2011-12), available at <http://www.ncaapublications.com/productdownloads/D112.pdf>.

<sup>52</sup> See *id.*

<sup>53</sup> See Kristin R. Muenzen, *Weakening It’s [sic] Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 259-263 (2003) (explaining the evolution of the NCAA definition of “amateurism” from 1906 to today).

*1. Amateurism.*

The NCAA Division I bylaws contain a long list of situations in which student-athletes can lose their amateur status, and thus be deemed ineligible to compete.<sup>54</sup> Most of these situations involve a student-athlete receiving money based on his athletic skill or participation in athletics.<sup>55</sup> It is the responsibility of the individual NCAA member universities to ensure that its student-athletes are amateurs who are able to compete in NCAA athletics.<sup>56</sup> If the NCAA later determines that a student-athlete who competed in a game had lost his amateur status, the NCAA has the ability to punish the student-athlete and the university for that violation.<sup>57</sup> Punishments often include the forfeiting of games that the non-amateur student-athlete participated in as well as significant fines,<sup>58</sup> regardless of how innocuous

the violation may seem.<sup>59</sup> The NCAA has often strictly

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<sup>54</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2 (2012-13) (listing situations in which a student-athlete can lose amateur status).

<sup>55</sup> *Id.*

<sup>56</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.1 (noting that is the responsibility of the institution to certify the eligibility of a student-athlete).

<sup>57</sup> See NCAA DIV. I MANUAL, Bylaw 19.5.2 (noting the punishments the NCAA Infraction Committee can impose).

<sup>58</sup> See generally, USC Ordered to Vacate Wins, Gets Bowl Ban, Docked 30 Scholarships, CBSSPORTS.COM (June 10, 2010), <http://www.cbssports.com/collegefootball/story/13506096/usc-ordered-to-vacate-wins-gets-bowl-ban-docked-30-scholarships/cbsnews> (describing the NCAA's imposed punishment on the University of Southern California).

<sup>59</sup> See *NCAA Places Georgia Tech on Probation*, ESPN (July 18, 2011, 1:53 PM), [http://espn.go.com/college-sports/story/\\_/id/6769894/ncaa-places-georgia-tech-yellow-jackets-four-years-probation](http://espn.go.com/college-sports/story/_/id/6769894/ncaa-places-georgia-tech-yellow-jackets-four-years-probation) (detailing how the receipt of \$312 worth of clothing by one player from a former teammate made him ineligible and led to Georgia Tech forfeiting three football wins

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enforced its definition of amateurism, to the severe detriment of universities and student-athletes, even when doing so might seem unreasonable.<sup>60</sup>

Beyond forfeiting games and fines for the university, the loss of amateurism, even for seemingly innocuous reasons, can have a severe detriment to the life of a student-athlete. Jeremy Bloom, a professional skier and college football star, was forced to give up his college football career with two years remaining after the NCAA declared him ineligible for accepting money from sponsors to help fund his training for the 2006 Winter Olympics.<sup>61</sup> This forced Bloom, who had been named a freshman All-American in 2002 and was known for his ability to return kicks,<sup>62</sup> to put his promising football career on hiatus for

two years.<sup>63</sup> He was later selected in the 2006 NFL draft, but a combination of his two years sitting on the sidelines and

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and a conference championship, as well as paying a \$100,000 fine to the NCAA).

<sup>60</sup> See Gordon E. Gouveia, *Making a Mountain out of a Mogul*, 6 Vand. J. Ent. L. & Prac. 22 (2003) (arguing that the NCAA’s interpretations of its amateurism provisions, when applied, to Jeremy Bloom, was unreasonable).

<sup>61</sup> See *Bloom v. National Collegiate Athletic Ass’n*, 93 P.3d 621 (2004) (upholding the NCAA’s determination that Jeremy Bloom had lost his amateur status and could not complete the final two years of his college football career.).

<sup>62</sup> See *FWAA Announces 2002 Scripps Freshman All-America Team*, FOOTBALL WRITERS ASSOCIATION OF AMERICA (Jan. 3, 2003), <http://www.sportswriters.net/fwaa/news/2002/allamerica030103.html> (listing Bloom as a freshman All-American return specialist).

<sup>63</sup> See Steve Dilbeck, *Two-Sport Star is Ready to Bloom*, DAILY NEWS (Feb. 10, 2006), available at <http://www.thefreelibrary.com/TWO-SPORT+STAR+IS+READY+TO+BLOOM.%28Sports%29-a0142025560> (noting Bloom’s two years spent away from football and preparations to enter the NFL draft).

untimely injuries led to him never appearing in a single NFL game.<sup>64</sup> Bloom's once-promising football career was over. While he was still able to finish a successful skiing career, retiring from skiing in 2010 after competing in two Olympics and securing eleven World Cup wins,<sup>65</sup> Bloom has expressed "disappointment" that he was not able to accomplish his football goals.<sup>66</sup>

The NCAA clearly takes its enforcement of amateurism seriously, even as many outside observers find its countless rules to be unreasonable. But what about when a bylaw crosses the line from "unreasonable" to possibly "discriminatory"?

## *2. The Olympics and the Operation Gold Grant.*

One notable NCAA amateurism bylaw, 12.1.2(a), explains that a student-athlete will lose amateur status if he "uses [his] athletics skill...for pay in any form in that sport."<sup>67</sup> Two forms of prohibited compensation included in the NCAA definition of "pay" are expenses, awards, and benefits<sup>68</sup> and payments based on performance<sup>69</sup>. However, the NCAA has carved out exceptions to these two forms of

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<sup>64</sup> See Jeremy Bloom Player Profile, NFL.COM, <http://www.nfl.com/player/jeremybloom/2506938/profile> (listing Bloom as never appearing in a single game during his brief career).

<sup>65</sup> See Joanne C. Gerstner, *Moguls Skier Jeremy Bloom Retires*, NEW YORK TIMES (Nov. 11, 2009, 4:53 PM), <http://vancouver2010.blogs.nytimes.com/2009/11/11/moguls-skier-jeremy-bloom-retires/> (describing Bloom's decision to retire from skiing).

<sup>66</sup> See *Bloom to Return to U.S. Ski Team Ahead of Vancouver Olympics*, ESPN (Nov. 24, 2008, 7:32 PM), <http://sports.espn.go.com/oly/skiing/news/story?id=3723749> (quoting Bloom as saying "[m]y goals were not accomplished. That was a disappointment to me").

<sup>67</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2(a), *supra* note 5, at 62-63.

<sup>68</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4, *supra* note 5, at 63-64.

<sup>69</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5, *supra* note 5, at 64-65.

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payment as relating to Olympic athletes.

First, student-athletes competing for any country in the Olympics may receive all *nonmonetary* benefits provided to members of that Olympic team, so long as the student-athlete does not receive any benefits not available to all other members of that team.<sup>70</sup> Second, student-athletes who are members of Team USA may receive both benefits and payment for performance administered by the U.S. Olympic Committee pursuant to its Operation Gold program (the “Operation Gold Grant”).<sup>71</sup> Operation Gold is a program where the U.S. Olympic Committee pays athletes for performance in international competition; for example, at the 2012 London Summer Olympic Games a gold medal was worth \$25,000.<sup>72</sup> There is no bylaw allowing for the receipt of similar monetary benefits by student-athletes competing in international competition for any country other than the United States.<sup>73</sup>

### *3. International Student-Athletes in the NCAA.*

Participation in NCAA athletics set an all-time high in the 2011-12 year, with over 450,000 student athletes competing in sports for which the NCAA has

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<sup>70</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.3.2, *supra* note 5, at 64.

<sup>71</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5, at 62. See also NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5.1, *supra* note 5, at 62.

<sup>72</sup> See USA TRACK & FIELD, *Operation Gold*, <http://www.usatf.org/groups/HighPerformance/AthleteSupport/OperationGold.asp>. (last visited Mar. 6, 2014). Awards also include \$15,000 for silver and \$10,000 for bronze.

<sup>73</sup> See generally NCAA DIV. I MANUAL, *supra* note 5.

championships.<sup>74</sup> Most of these student-athletes are from the United States, but the number of international athletes has been rising dramatically, up over 1,000% from 2000-2010.<sup>75</sup> In 2006-2007, for example, over 16,000 international student-athletes competed in the NCAA, and they accounted for 6.2% of all Division I athletes.<sup>76</sup> International student-athletes have a particularly strong presence in “Olympic sports,” which is the term given to sports that exist both in the NCAA as well as the Olympics.<sup>77</sup> In the 2006-07 year, 50% of women's tennis players, 38% of men's tennis players, 35% of women's synchronized swimmers, and 22% of women's skiers competing in NCAA Division I sports were international student-athletes.<sup>78</sup>

With so many excellent student-athletes competing in so many Olympic sports, it is unsurprising that many NCAA student-athletes often compete in the Olympics. In the 2012 London Summer Olympics, at least 132 current or

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<sup>74</sup> See NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 8 (2012), *available at* <http://www.ncaapublications.com/productdownloads/PR2013.pdf> (Oct. 2012) (finding that approximately 453,347 student-athletes competed in 2011-2012).

<sup>75</sup> See Michelle Brutlag Hosick, *International Prospective Student-Athletes Pose Challenges*, NCAA.ORG (Nov. 19, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/November/International+prospective+student+athletes+pose+challenges> (commenting on the difficulties of applying NCAA amateurism and academic rules to international student-athletes).

<sup>76</sup> See Steve Wieberg, *Influx of Foreigners Presents New Challenges for NCAA*, USA TODAY (Oct. 1, 2008, 11:36 PM), [http://www.usatoday.com/sports/college/2008-10-01-foreign-influx\\_N.htm](http://www.usatoday.com/sports/college/2008-10-01-foreign-influx_N.htm) (citing a 2008 NCAA study).

<sup>77</sup> See generally *Sports and Disciplines*, OLYMPIC.ORG, <http://www.olympic.org/sports> (last visited Sept. 25, 2012) (discussing notable NCAA sports that are not Olympic sports include football, baseball, and softball).

<sup>78</sup> See *id.*



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enrolled student-athletes competed, winning forty-seven combined medals.<sup>79</sup> Of these student-athlete Olympians, at least eighty-three were international students.<sup>80</sup> These international student-athletes trained and competed just as hard as the American student-athletes, but when it came time to collect rewards for their performance, NCAA bylaws prevented them from accepting bonuses that their American counterparts could accept.<sup>81</sup>

American NCAA student-athletes who won Olympic medals collected large cash bonuses, pursuant to Team USA’s Operation Gold program, in London for winning medals.<sup>82</sup> Missy Franklin was a high school swimmer who became a star of the Games, winning five

medals for Team USA.<sup>83</sup> For her performance, Franklin received over \$200,000 in bonuses from Team USA and

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<sup>79</sup> See *Student-Athletes Shine at Olympics*, NCAA.ORG (Aug. 13, 2012), <http://www.ncaa.org/about/resources/media-center/news/student-athletes-shine-olympics> (noting that NCAA student-athletes took home 22 gold, 11 silver, and 14 bronze medals from London).

<sup>80</sup> See *NCAA Olympic Qualifiers by School*, NCAA.COM (July 30, 2012), <http://www.ncaa.com/news/ncaa/article/2012-07-30/ncaa-olympic-qualifiers-school> (listing by school the 2012 Olympians who participate in NCAA sports).

<sup>81</sup> See NCAA DIV. I MANUAL, BYLAW 12.1.2.1.4.1.2, *supra* note 5, at 64.

<sup>82</sup> See U.S. MEDALISTS, CHICAGO TRIBUNE, *available at* <http://www.chicagotribune.com/media/acrobat/2012-08/71799588-12204807.pdf> (listing Team USA Olympic medalists and their corresponding bonus from the USOC).

<sup>83</sup> See Nicole Auerbach, *Senior Year? 17-year old Franklin to Return to Regular Life*, USA TODAY (Aug. 6, 2012, 12:43 PM), <http://www.usatoday.com/sports/olympics/london/story/2012-08-06/Senior-year-Franklin-17-to-get-back-to-life/56822404/1> (describing Franklin’s attempts to lead a regular life after Olympic success while beginning her senior year of high school).

USA Swimming, but thanks to the NCAA Bylaws' Operation Gold Grant<sup>84</sup> she still maintains her amateur status, giving her the option to swim in the NCAA in 2013.<sup>85</sup>

Many countries, including Russia, Ukraine, and Ghana among others, have Olympic medal bonus payment systems that are comparable to Team USA's.<sup>86</sup> However, international NCAA student-athletes are unable to collect these bonuses without violating their NCAA amateurism and eligibility as a "cash or equivalent award" for participation in competition under NCAA Bylaw 12.1.2.1.4.1.<sup>87</sup>

Derek Drouin, a junior high jumper from Indiana University, won a bronze medal for Team Canada in the 2012 Olympics<sup>88</sup>, which makes him eligible for a \$10,000 bonus through Canada's Athlete Excellence Fund.<sup>89</sup> However, accepting this bonus money would put him in violation of NCAA Bylaws and thus make him ineligible. This left Drouin with the unenviable choice of having to

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<sup>84</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5 at 64.

<sup>85</sup> See Darren Rovell, *Franklin can Remain Amateur Despite Bonus*, ESPN (Aug. 13, 2012, 1:24 PM), [http://espn.go.com/blog/playbook/dollars/post/\\_id/929/franklin-can-remain-amateur-despite-bonus](http://espn.go.com/blog/playbook/dollars/post/_id/929/franklin-can-remain-amateur-despite-bonus) (describing Franklin's bonus haul).

<sup>86</sup> See Chris Smith, *London Olympics' Unpaid Athletes Fight for Rich Medal Bonuses*, FORBES (July 31, 2010, 1:13 PM), <http://www.forbes.com/sites/chris-smith/2012/07/31/london-olympics-unpaid-athletes-fight-for-rich-medal-bonuses/> (describing the bonus systems of various countries).

<sup>87</sup> See NCAA DIV. I MANUAL, *supra* note 5, at 63; *see also* NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5.1, *supra* note 5, at 64 (listing only Team USA athletes as being allowed to collect the medal bonuses).

<sup>88</sup> See *IU Junior Shares Olympic Bronze in High Jump*, INSIDE IU (Aug. 15, 2012), <http://inside.iu.edu/headlines/8-15-12-derek-drouin.shtml> (describing Drouin's accomplishment as well as his plans to compete for IU in the 2012-13 season).

<sup>89</sup> See *Paying Cash Rewards to Olympic Medalists*, CBC (Aug. 10, 2012), <http://www.cbc.ca/thecurrent/episode/2012/08/10/paying-cash-rewards-to-olympic-medalists/> (describing Canada's medal bonus system).

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choose either the \$10,000 or the opportunity to compete in his senior season at Indiana.<sup>90</sup>

Deon Lendore, a freshman sprinter for Texas A&M University,<sup>91</sup> was left in an even more difficult position than Drouin for his part in Trinidad & Tobago’s bronze medal winning 4x400 relay team.<sup>92</sup> Trinidad & Tobago's eight bronze medalists, including Lenore, were all honored after the conclusion of the Olympics in a ceremony and a cash reward of \$300,000 TTD (over \$46,000 USD) each.<sup>93</sup> Lenore, however, was unable to accept this reward since it would have put him in violation of NCAA bylaws and made him ineligible to complete his remaining three years of eligibility at Texas A&M.<sup>94</sup>

### C. THE NCAA AND FEDERAL FINANCIAL ASSISTANCE; TITLE VI AND TITLE IX SUITS

Historically, more discrimination lawsuits have been brought against the NCAA for violations of Title IX of the

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<sup>90</sup> See *IU Junior Shares Olympic Bronze in High Jump*, *supra* note 88.

<sup>91</sup> See *Deon Lendore Bio*, TEXAS A&M TRACK AND FIELD (last visited Sept. 26, 2012), [http://www.aggieathletics.com/ViewArticle.dbml?DB\\_OEM\\_ID=27300&ATCLID=205398995](http://www.aggieathletics.com/ViewArticle.dbml?DB_OEM_ID=27300&ATCLID=205398995).

<sup>92</sup> See *T&T's Olympic Bronze Medalists Get Their National Awards*, GUARDIAN MEDIA (Sep. 15, 2012), <http://www.guardian.co.tt/sport/2012-09-15/tt%E2%80%99s-olympic-bronze-medallists-get-their-national-awards> (noting Lenore’s accomplishment).

<sup>93</sup> *Id* (explaining the ceremony for Trinidad & Tobago Olympians).

<sup>94</sup> E-mail from Brad Barnes, Assistant Dir. of Athletic Compliance, Texas A&M University, to [FIRST AND LAST NAME], Student, University of Georgia School of Law (Sept. 26, 2012 4:02PM) (on file with author) (stating that Lenore has not accepted any Olympic medal award money and "understands that he may not accept such an award if it is offered").

Education Amendments of 1972.<sup>95</sup> Title IX prohibits discrimination on the basis of sex by any education program or activity receiving federal financial assistance.<sup>96</sup> Except for the substitution of the word “sex” to replace “race, color, or national origin” in Title VI, the language of Title VI and Title IX is identical.<sup>97</sup> In fact, Title IX was patterned after Title VI, and “[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been.”<sup>98</sup> Because of their similar goals and language, courts often look at Title VI cases for guidance in interpreting Title IX controversies, and vice versa.<sup>99</sup> Therefore, it is important to look at both Title VI as well as Title IX cases against the NCAA in resolving its liability under Title VI.<sup>100</sup>

For an entity to be amenable to a suit under Title VI, it must be a recipient of federal funding.<sup>101</sup> Individual universities are widely accepted to be covered under Title VI because of the federal funding they receive from the government.<sup>102</sup> Plaintiffs have repeatedly attempted to bring suits against the NCAA under Title VI, often as a result of

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<sup>95</sup> See generally Sue Ann Mota, *Title IX, the NCAA, and Intercollegiate Athletics*, 33 J.C. & U.L. 121 (2006) (explaining the history of the NCAA in relation to Title IX).

<sup>96</sup> 20 U.S.C. § 1681 (2012).

<sup>97</sup> See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979).

<sup>98</sup> *Id.*

<sup>99</sup> See *Habenicht*, *supra* note 28, at 583.

<sup>100</sup> *Id.* at 599 (noting that since Title VI and Title IX share nearly every legal principle, the plaintiffs in *Pryor* used the two statutes together in stating their claim against the NCAA).

<sup>101</sup> See 42 U.S.C. § 2000d (2012).

<sup>102</sup> See generally *Cureton v. Nat'l. Collegiate Athletic Ass'n*, 198 F.3d 107 (3d Cir. 1999).

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its connection to and control of its member universities.<sup>103</sup>

### *I. Smith.*

The NCAA has historically been found not to be a recipient of federal funding, and thus not liable for suits under Title VI.<sup>104</sup> In *Nat’l Collegiate Athletic Ass’n v. Smith*<sup>105</sup>, the plaintiff was a female collegiate volleyball player who alleged that she was denied the opportunity to continue her playing career on the basis of her sex, in violation of Title IX of the Education Amendments of 1972.<sup>106</sup>

Smith argued that the NCAA qualified as a recipient of federal funding because it received dues from its member universities that receive federal funding.<sup>107</sup> The Court rejected this argument, holding that there was no evidence the universities paid their NCAA dues with federal funds earmarked for that purpose, and “[a]n entity that receives dues from recipients of federal funds does not thereby become a recipient itself.”<sup>108</sup> Therefore, the NCAA could not be brought under Title IX on those grounds.<sup>109</sup> The Court declined to address Smith’s two other arguments for bringing the NCAA under Title IX—including that “when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient”—since

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<sup>103</sup> See, e.g., *Id.*; *Pryor v. Nat’l Collegiate Athletic Ass’n.*, 288 F.3d 548 (3rd Cir. 2002); *National Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999).

<sup>104</sup> See, e.g., *Smith*, 525 U.S. 459 (1999); *Cureton*, 198 F.3d 107 (3rd Cir. 1999).

<sup>105</sup> 525 U.S. 459 (1999).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 460.

<sup>108</sup> *Id.* at 461.

<sup>109</sup> *Id.*

those arguments were not brought up at the lower court.<sup>110</sup>

2. *Cureton and Tarkanian*.

This “controlling authority” argument was seen as promising, however, and was looked at by the Third Circuit just a few months later in *Cureton v. Nat’l Collegiate Athletic Ass’n*.<sup>111</sup> Here, the plaintiffs alleged that an NCAA Division I rule specifying a minimum-required score on the SAT that prospective student-athletes had to reach to become eligible had an unjustified disparate impact on African-Americans in violation of Title VI.<sup>112</sup> The district court, noting that the Court in *Smith* left open the possibility of the NCAA being subject to Title IX coverage on the two theories it declined to address, held that NCAA member universities had ceded control over federally funded programs to the NCAA by allowing it to promulgate rules the members are obliged to obey and enforce, making the NCAA subject to Title VI regardless of whether it was a recipient itself.<sup>113</sup> On appeal, the Third Circuit noted that “the controlling authority argument can be sustained, if at all, only on some basis beyond the NCAA’s mere receipt of dues” from member institutions.<sup>114</sup> The court, in analyzing this argument, found the Supreme Court’s decision in *National Collegiate Athletic Ass’n v. Tarkanian*<sup>115</sup>, while

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<sup>110</sup> *Id.* The other argument was that that the NCAA should be brought under Title IX because it received federal funds indirectly through the National Youth Sports Program.

<sup>111</sup> 198 F.3d 107 (3rd Cir. 1999).

<sup>112</sup> *Id.* at 111.

<sup>113</sup> *Id.* at 114. The district court also concluded that the NCAA was subject to Title VI as an indirect recipient of federal funds through the National Youth Sports Program. The Third Circuit disagreed with that determination and reversed on that point. *Id.*

<sup>114</sup> *Id.* at 116.

<sup>115</sup> 488 U.S. 179 (1988).

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itself not a Title VI or Title IX case, to be “instructive.”<sup>116</sup>

In *Tarkanian*, the Court held in a 5-4 decision that even though the NCAA had threatened the University of Nevada, Las Vegas (UNLV) with sanctions including suspending the plaintiff, the university’s men’s basketball coach, for two years, the NCAA had not acted as a state actor.<sup>117</sup> The Court reasoned that though the NCAA could threaten UNLV with sanctions if they did not suspend Coach Tarkanian, they did not have the power to fire him themselves.<sup>118</sup> It was ultimately up to UNLV what action they wished to take – suspend him and avoid sanctions, retain him and risk possible sanctions (including expulsion from the NCAA), or voluntarily withdraw from the NCAA altogether.<sup>119</sup> Therefore the NCAA did not control UNLV’s decision to suspend the coach.<sup>120</sup>

The court in *Cureton* analogized the African-American athletes’ case with *Tarkanian*, saying that similar to how UNLV made the ultimate decision to suspend Coach Tarkanian, “the ultimate decision as to which freshmen an institution will permit to participate in varsity intercollegiate athletics and which applicants will be awarded athletic scholarships belongs to the member schools.”<sup>121</sup> Since NCAA member universities had the option of risking sanctions or withdrawing from the NCAA if they wished to

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<sup>116</sup> *Cureton*, 198 F.3d at 117.

<sup>117</sup> *Tarkanian*, 488 U.S. 179, 195 (holding that “a State may delegate authority to a private party and thereby make that party a state actor,” but UNLV had not delegated the authority to make employment decisions to the NCAA).

<sup>118</sup> *Tarkanian*, 488 U.S. 197.

<sup>119</sup> *Id.* (noting “that UNLV’s options were unpalatable does not mean that they were nonexistent.”)

<sup>120</sup> *Id.*

<sup>121</sup> *Cureton*, 198 F.3d at 117.

allow non-qualifying student-athletes to compete, the member universities had not ceded controlling authority to the NCAA by giving it the power to enforce its eligibility rules directly against students.<sup>122</sup> Without the NCAA exercising controlling authority over a recipient of federal funding, the NCAA was not subject to the plaintiffs' Title VI suit.<sup>123</sup>

In a dissenting opinion, Judge McKee that the NCAA, in fact, could be found to have controlling authority over its member institutions and could be subject to Title VI.<sup>124</sup> First, the dissent noted that the NCAA constitution requires member institutions to "effectively cede authority over their intercollegiate athletic programs to the NCAA" by stating that these institutions must operate "in compliance with [the NCAA's] rules and regulations."<sup>125</sup> Second, the dissent argued that *Tarkanian* actually shows the extent of actual control the NCAA has, rather than the lack of control as argued by the majority.<sup>126</sup> The actual issue in *Tarkanian* was whether the NCAA had transformed into a state actor, not the control the NCAA had over member institutions. Therefore, the majority looked at *Tarkanian* "through the wrong end of the telescope."<sup>127</sup> Also, "[t]he fact that UNLV was coerced into accepting the only viable option among the three choices left it by the NCAA's ultimatum, [firing Coach Tarkanian], in that case demonstrates just how much control the NCAA has over member institutions' athletic programs."<sup>128</sup>

The Third Circuit remains the only circuit court to

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<sup>122</sup> *Id.* at 117-118.

<sup>123</sup> *Id.* at 118.

<sup>124</sup> *Id.* at 118-125.

<sup>125</sup> *Id.* at 121-122.

<sup>126</sup> *Id.* at 122-125.

<sup>127</sup> *Id.* at 124.

<sup>128</sup> *Id.*



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address the question of whether the NCAA should be considered a recipient of federal funding for Title VI or Title IX purposes. The Supreme Court has not yet resolved whether a federally funded entity ceding control over one of its programs makes the controlling authority subject to Title VI or Title IX.<sup>129</sup>

### *3. The Eleventh Circuit Disagrees?*

More recently, some courts have become more receptive to an organization such as the NCAA potentially being liable under Title VI as a controlling authority. The Eleventh Circuit, in *Williams v. Bd. of Regents of Univ. Sys. of Georgia*<sup>130</sup>, remarked favorably about the controlling authority argument, noting that “if we allowed funding recipients to cede control over their programs to indirect funding recipients but did not hold indirect funding recipients liable for Title IX violations, we would allow funding recipients to receive federal funds but avoid Title IX liability.”<sup>131</sup> In *Williams*, the plaintiff was attempting to bring a suit under Title IX against both the University of Georgia, which both parties agreed received federal funding, and the University of Georgia Athletic Association, to which the plaintiff alleged UGA had ceded controlling authority over its athletic department while providing it with significant funding.<sup>132</sup>

The Eleventh Circuit determined the plaintiff could survive a summary judgment motion concerning the Athletic Association’s status as a federal funding recipient.<sup>133</sup> The

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<sup>129</sup> See *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1294 (11th Cir. 2007).

<sup>130</sup> 477 F.3d 1282 (11th Cir. 2007).

<sup>131</sup> *Id.* at 1294.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1294.

court held that the plaintiff had alleged sufficient facts about the controlling authority to treat the Athletic Association as a federal funding recipient and remanded the case to let the discovery process and the district court make that determination.<sup>134</sup>

In 2010, the United States District Court for the Northern District of Alabama looked at the “controlling authority” argument, this time in the context of an athletic conference.<sup>135</sup> The plaintiffs were members of Samford University’s softball team and alleged Title IX violations against the Southern Conference for reducing the number of postseason teams in the softball playoffs.<sup>136</sup> Plaintiffs alleged that the Southern Conference was a federal funding recipient under Title IX because it “govern[ed], regulate[d], operate[d], and control[led] the intercollegiate athletics of its member schools and those schools delegate and assign [to the Southern Conference] the authority to do so.”<sup>137</sup>

The Southern Conference cited the Third Circuit in *Smith* and *Cureton* in defense of its position that it should not be considered a recipient of federal funding.<sup>138</sup> However, noting that *Williams* post-dated the Third Circuit decisions, the court determined that these allegations, similar to those in *Williams*, were sufficient to allege that the Southern Conference was a recipient of federal funding.<sup>139</sup>

#### D. THE NCAA’S INCREASING IMPACT ON MEMBER INSTITUTIONS

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<sup>134</sup> *Id.*

<sup>135</sup> *Barrs v. S. Conference*, 734 F. Supp. 2d 1229 (N.D. Ala. 2010).

<sup>136</sup> *Id.* at 1235.

<sup>137</sup> *Id.* (internal quotations omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

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Since the arguments in *Smith* and *Cureton* arose, there has been even more control exerted by the NCAA due to the significant impacts it has on universities. One primary impact comes from the revenue college athletics brings. As previously mentioned, the NCAA distributes 60% of over \$850 million in revenue to its member institutions each year.<sup>140</sup> Further, many universities’ athletics departments generate significant income through ticket sales, merchandise, donations, and a variety of other income-generating activities.<sup>141</sup> In 2010-11, The University of Alabama and Penn State University each earned over \$31 million in net income.<sup>142</sup> In all, thirteen athletics departments earned over \$10 million, and thirty-five athletics departments earned over \$1 million in net income in 2010-11.<sup>143</sup>

Outside of a financial impact, success in big-time college athletics can also positively impact universities as a whole by causing a dramatically increase in undergraduate applications to the school.<sup>144</sup> This phenomenon has been noted for years, dating back to the 30% increase in applicants

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<sup>140</sup> See *supra* Part I.A.

<sup>141</sup> See Alicia Jessop, *Highest Net Income Amongst Athletics Departments*, BUSINESS OF COLLEGE SPORTS (Mar. 21, 2012), <http://businessofcollegesports.com/2012/03/21/highest-net-income-amongst-athletics-departments/> (listing each NCAA member institution that earned a profit in 2010-11, calculated by subtracting their reported expenses from reported revenues).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Chad McEvoy, *The Impact of Elite Individual Athletic Performance on University Applicants for Admission in NCAA Division I-A Football*, THE SPORTS JOURNAL (2006), available at <http://thesportjournal.org/article/the-impact-of-elite-individual-athletic-performance-on-university-applicants-for-admission-in-ncaa-division-i-a-football/> (using statistics to determine the increase in undergraduate applications after success in NCAA athletics).

to Boston College following quarterback Doug Flutie winning the Heisman Trophy in 1984.<sup>145</sup> Other universities seeing similar application jumps have been Northwestern University, who saw a 21% increase in applicants in 1995, one year after winning the Big Ten conference football championship, and Gonzaga University, who saw a 59% increase in the late 1990s following three years of unprecedented basketball success.<sup>146</sup> A recent study additionally found that "an increase of football winning percentage of greater than .250 resulted in an average 6.1% increase in undergraduate applicants."<sup>147</sup>

At the same time, the NCAA has the ability to dramatically influence its member institutions in a negative way. On July 23, 2012, after acting without a formal investigation and with unprecedented speed, the NCAA imposed significant sanctions on Penn State for its role in the Jerry Sandusky child sex abuse scandal.<sup>148</sup> Among these sanctions was a \$60 million fine for the university.<sup>149</sup> While Penn State, at least prior to the Sandusky scandal, runs a profitable athletics department, a fine of this caliber will undoubtedly affect many aspects of the university, as the university noted that it might have to use reserve budgets and an "internal bond issue" to cover the cost.<sup>150</sup> While Penn

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See Pete Thamel, *Sanctions Decimate the Nittany Lions Now and for Years to Come*, NEW YORK TIMES (July 23, 2012), available at <http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html?pagewanted=all> (describing the sanctions imposed on Penn State after a relatively quick investigation by former F.B.I. director Louis J. Freeh, rather than the typically longer NCAA-led investigation).

<sup>149</sup> *Id.*

<sup>150</sup> See Susan Snyder & Diane Mastrull, *How Will Penn State Sanctions Affect School, Community*, PHILADELPHIA INQUIRER (July 24, 2012),

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State accepted these penalties when the university was presented them by the NCAA, the consequences of choosing not to accept the penalties were even worse.<sup>151</sup> Had the university not accepted the penalties, the NCAA told them that a formal investigation would begin, where the university would have faced fines far greater than \$60 million and a multiyear “death penalty” – forcing the university to shut down the football program completely.<sup>152</sup> Penn State president Rodney Erickson was insistent on avoiding the death penalty due to the “devastating economic impact” no football games would have on both Penn State as well as central Pennsylvania as a whole.<sup>153</sup> Penn State is just one of many universities whose football programs are very valuable to small towns and regions.<sup>154</sup>

### III. DISCUSSION

The “controlling authority” argument is the closest the NCAA has come to being found by the courts to be susceptible to suits under Title VI. While the Third Circuit held in *Cureton* that the NCAA did not have controlling

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[http://articles.philly.com/2012-07-24/business/32805670\\_1\\_rodney-erickson-penn-state-ncaa-penalty/2](http://articles.philly.com/2012-07-24/business/32805670_1_rodney-erickson-penn-state-ncaa-penalty/2) (quoting a university spokesman).

<sup>151</sup> See Don Van Natta Jr., *Penn State Faced 4-year Death Penalty*, ESPN (July 26, 2012), [http://espn.go.com/espn/otl/story/\\_/id/8199905/penn-state-nittany-lions-rodney-erickson-said-school-faced-4-year-death-penalty](http://espn.go.com/espn/otl/story/_/id/8199905/penn-state-nittany-lions-rodney-erickson-said-school-faced-4-year-death-penalty) (describing many NCAA presidents as supporting a four year death penalty for Penn State football).

<sup>152</sup> *Id.* (quoting Penn State president Rodney Erickson as saying the “figures that were thrown around” as a possible fine were “quite large”).

<sup>153</sup> *Id.*

<sup>154</sup> See John Grupp, *State College may pay price for PSU problems*, TRIBLIVE NEWS (July 22, 2012), <http://triblive.com/news/2202207-74/football-state-impact-million-penn-college-economic-per-game-season#axzz2FXy4ZRET> (listing the economic impact of football on Auburn, AL, Blacksburg, VA, and Clemson, SC as over \$30 million per season).

authority, this was not a universally held view. Indeed, the district court believed that the member institutions had “vested the NCAA with controlling authority over federally funded athletic programs”.<sup>155</sup> Further, the Third Circuit’s holding was only by a 2-1 margin, with Judge McKee writing a strong dissenting opinion arguing in favor of controlling authority.<sup>156</sup> This Part of the Note will explain why the district court and Judge McKee were right, especially due to recent developments with the NCAA and its power over member institutions.

A. THE NCAA SHOULD BE SUSCEPTIBLE TO TITLE VI DUE TO ITS CONTROLLING AUTHORITY

Due to its significant growth and its authority over these member institutions, the holding in *Cureton* needs to be reversed and the NCAA needs to be found to be susceptible to suit under Title VI on the “controlling authority” theory. As mentioned in Part II.D.2 of this Note, the Third Circuit in *Cureton* remarked that this controlling authority must come from some basis beyond those member institutions paying dues to the NCAA, since the Supreme Court in *Smith* has previously determined that there is no evidence schools are paying their NCAA dues with earmarked federal funds. Instead of dues, this controlling authority can be seen through the NCAA’s power to impose significant punishments on member institutions and those institutions’ practical inability to leave the NCAA to avoid sanctions, as well as fairness concerns.

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<sup>155</sup> *Cureton*, 198 F.3d at 112.

<sup>156</sup> See *infra* Part II.D.2.

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### *1. Bylaws, Punishments, and Nowhere to go.*

The Third Circuit’s reliance on *Tarkanian* as the basis for holding that the member institutions had not ceding controlling authority of its athletic programs to the NCAA is misguided. If anything, as noted by Judge McKee in the *Cureton* dissent, *Tarkanian* provides compelling evidence that the NCAA does exercise controlling authority. Despite the *Cureton* majority’s strong reliance on it, *Tarkanian*’s subject matter was not related to Title IX, Title VI, or any type of controlling authority, instead Coach Tarkanian was arguing that the NCAA was a “state actor”, acting under the color of state law when it investigated and eventually coerced UNLV into punishing him.<sup>157</sup> While UNLV and the NCAA being “adversar[ies]”, rather than “partners” during the investigation of Coach Tarkanian, including UNLV’s steadfast opposition of the sanctions, was used extensively by the *Tarkanian* majority to prove that the NCAA was not a state actor<sup>158</sup>, that adversarial nature is key in showing how much controlling authority the NCAA has.

To compete in NCAA Division I athletics, member institutions must follow a lengthy set of bylaws, many of which are arbitrarily written and arbitrarily enforced.<sup>159</sup> The NCAA has recently shown, especially with its unprecedented sanctions imposed on Penn State, that it possesses immense power over its member institutions to enforce infractions of these bylaws, and it is willing to use that power even while bypassing its traditional investigation

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<sup>157</sup> See *Tarkanian*, 488 U.S. at 199.

<sup>158</sup> *Id.* (“[i]t would be ironic indeed to conclude that the NCAA’s imposition of sanctions against UNLV – sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings – is fairly attributable to the State of Nevada”).

<sup>159</sup> See *supra* Part II.B.

techniques.<sup>160</sup> When conducting an investigation against a university for alleged bylaw violations, “the NCAA is properly viewed as a private actor at odds with the State.”<sup>161</sup> The fact that the university feels it must act adversarial reflects on its knowledge that the NCAA can, and very well may, inflict sanctions upon it that have the potential to cripple the athletic association, the university, and in situations as extreme as the Penn State case, the entire community.<sup>162</sup> The NCAA and the university are bound to have competing interests – the NCAA to enforce its bylaws and represent the interests of its entire membership, and the university to protect itself from seriously crippling sanctions.

When a university goes against the directions of the NCAA during an investigation, no matter how innocently, the NCAA has shown that it can and will impose significant penalties for “imped[ing] the enforcement staff investigations.”<sup>163</sup> When a Georgia Tech player improperly received \$312 worth of clothing, the NCAA imposed a \$100,000 fine and stripped the school of a conference championship.<sup>164</sup> The NCAA justified the large punishment in part because the school's athletic director had disobeyed a minor NCAA order during the investigation.<sup>165</sup> As the

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<sup>160</sup> See *supra* part II.D.

<sup>161</sup> *Id.* at 196 (analogizing any hypothetical NCAA against university situation with a state-compensated public defender, who is acting in a private capacity when representing a private client in a conflict against the State).

<sup>162</sup> See *supra* note 153 and accompanying text.

<sup>163</sup> See *supra* note 59 and accompanying text (describing how the NCAA dramatically increased its punishment of Georgia Tech after determining that the Georgia Tech athletic director had gone against NCAA wishes during an investigation by telling a coach that two of his players would be interviewed).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*



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NCAA has shown it does not take disobedience lightly, despite having adversary interests and being unhappy to be under investigation by the NCAA, many universities attempt to show good faith and comply with NCAA investigations.<sup>166</sup> These schools often self-impose penalties on themselves, in an effort to show the NCAA that they regret their behavior and to possibly avoid the NCAA coming down on the university with even greater punishments.<sup>167</sup> Even when the NCAA’s determination may seem unreasonable to the university, such as the case with Jeremy Bloom,<sup>168</sup> the university is basically powerless and must comply with the NCAA’s determination of eligibility status.<sup>169</sup>

If the NCAA did not have any controlling authority over these university’s athletic programs, the university would have no reason to act in an adversarial manner or to attempt to comply for fear of possible greater sanctions. Instead, the university could choose to simply ignore the NCAA’s directions and risk possible expulsion or to voluntarily leave the NCAA altogether. These other

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<sup>166</sup> See Scott Wolf, *Cooperation Could Help USC Limit NCAA Sanctions*, SAN GABRIEL VALLEY TRIBUNE (Sept. 3, 2012, 10:20:51 PM), [http://www.sgvtribune.com/news/ci\\_21462617/cooperation-could-help-usc-limit-ncaa-sanctions](http://www.sgvtribune.com/news/ci_21462617/cooperation-could-help-usc-limit-ncaa-sanctions) (explaining that after acting defiantly with the NCAA during a 2008-2010 investigation, which resulted in the school being hit “pretty hard”, the University of Southern California has fostered a close relationship with the NCAA to show their good intentions and desire to follow the rules, which should reduce future sanctions).

<sup>167</sup> See, e.g., *NCAA Sanctions LSU on Recruiting*, ESPN (July 20, 2011, 9:44 AM), [http://espn.go.com/college-football/story/\\_/id/6784149/ncaa-hits-lsu-one-year-probation-recruiting-restrictions](http://espn.go.com/college-football/story/_/id/6784149/ncaa-hits-lsu-one-year-probation-recruiting-restrictions) (stating that the NCAA accepted LSU’s self-imposed sanctions for bylaw violations, and noting that the NCAA Committee on Infractions chairman said the punishment could have been much worse if LSU had not cooperated).

<sup>168</sup> See *supra* Part II.B.1 (discussing Bloom in greater detail).

<sup>169</sup> See Gouveia *supra* note 60.

alternatives, however, are simply not viable, and the universities are forced to comply with the NCAA.

Other than choosing to accept the NCAA's penalty, UNLV's other alternatives of either ignoring the NCAA and risk "heavier sanctions", or pulling out of the NCAA completely, were referred to by the Court in *Tarkanian* as "unpalatable", due to UNLV's desire to remain one of the country's premiere basketball programs, but not "nonexistent".<sup>170</sup> Calling the option of leaving the NCAA not "nonexistent", was an understatement in 1976, when UNLV was making its decision, and is even more of one today.

In the late 1970s, the NCAA was still a relatively small operation, earning \$6.6 million in revenues in 1977-78.<sup>171</sup> As mentioned in Part I.A of this Note, the NCAA has grown tremendously since then, with \$845.9 million in revenue in 2010-11, with 60% of that distributed to the member institutions.<sup>172</sup> If it was "unpalatable" to leave the NCAA in the late 1970s, revenue growth of over 12,000% has now all but made that option nonexistent. Even in just the thirteen years since *Cureton* was decided, NCAA revenues have increased over 200%. Leaving the NCAA would cause the university to lose their share of that NCAA revenue, a significant hit to the university's budget. These dramatic increases in revenue show that the context in which the *Tarkanian* and *Cureton* decisions were made has starkly changed in the direction of making it all but impossible for a university to be able to pass up on that revenue and leave the NCAA. This change in context merits a reconsideration and reversal of *Cureton*'s holding.

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<sup>170</sup> *Tarkanian*, 488 U.S. at 198 n.19.

<sup>171</sup> See David Meggyesy, *Athletes in Big-Time College Sport*, 37 SOCIETY 3, 24 (noting NCAA's 8,000% increase in revenue from 1976 to 2000).

<sup>172</sup> See *supra* note 15 and accompanying text.

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Leaving the NCAA would likely also force the university to cancel its intercollegiate athletics programs altogether, since it is not likely any opposing team would be willing to play a non-NCAA affiliated university in a game that does not count. These cancellations would have two primary consequences that make them leaving the NCAA not a feasible alternative for any university to consider. First, the university would stand to lose the millions of dollars of revenue the university generates through merchandise and ticket sales.<sup>173</sup> Second, as mentioned in Part II.C of this Note, success in big-time college athletics can lead to a significant increase in the number of applicants to a university.<sup>174</sup> As universities continue to face massive budget cuts from States<sup>175</sup>, the loss of applicants due to losing its athletics program could greatly hinder the university’s budget.

### *2. Fairness and the Eleventh Circuit.*

The Eleventh Circuit’s point in *Williams* that “if we allowed funding recipients to cede control over their programs to indirect funding recipients but did not hold indirect funding recipients liable for Title IX violations, we would allow funding recipients to receive federal funds but avoid Title IX liability”<sup>176</sup> cannot be overstated enough. Allowing the NCAA to continue to narrowly avoid Title VI and Title IX liability does little to promote President

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<sup>173</sup> See *supra* notes 141-143 and accompanying text.

<sup>174</sup> See *supra* note 144 and accompanying text.

<sup>175</sup> See Jens Krogstad, *State Colleges Look at Tuition Freeze to Recoup Funding*, USA TODAY (Nov. 11, 2012, 8:06 PM), <http://www.usatoday.com/story/news/nation/2012/11/11/state-universities-tuition-freeze-budget-cuts/1698379/> (noting several years of steep reductions of state dollars to universities, causing budget-cutting measures).

<sup>176</sup> *Williams*, 477 F.3d at 1294.

Kennedy's initial goal for Title VI, to prevent public funds from being spent in "any fashion" which encourages discrimination.<sup>177</sup> The words "any fashion" need to be read to include when an entity such as the NCAA exercises such sustained control over government-funded universities. If the current NCAA-member institution relationship, with strict bylaw enforcement, severe punishments, and significant revenue generation, is not enough to show controlling authority, it is difficult to think of that relationship ever logically growing into one that would fall into that category and bring with it Title VI susceptibility, absent something so illogical and extreme as the NCAA joining the university's board of directors.

The more recent cases of *Williams* and *Barrs* show that some courts seem today to be much more inclined to hear a controlling authority argument concerning the NCAA than the Third Circuit has been. In these cases, the court held that plaintiffs showed enough facts to survive motions to dismiss concerning the controlling authority possessed by an athletic association and an athletic conference, respectively, over a university's athletics program. Both an athletic association as well as an athletic conference have similarities to the NCAA in how they control a university's athletics programs. All three of these entities have bylaws governing the university and student-athletes, generate revenue, and possess the ability to severely punish the teams and student-athletes.<sup>178</sup> Perhaps notably, both *Williams* and *Barrs* were decided years after *Cureton*, after college athletics revenues

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<sup>177</sup> See *supra* note 26 and accompanying text.

<sup>178</sup> See, e.g., Thomas O'Toole, *Big Ten Adds More Penalties to Penn State*, USA TODAY (July 23, 2012, 12:59 PM), <http://content.usatoday.com/communities/campusrivalry/post/2012/07/big-ten-more-penalties-penn-state/1#.UKMrYodYJTI> (explaining the sanctions the Big Ten imposed on Penn State, amounting to a \$13 million fine over four years).

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continued to skyrocket throughout the late 2000s. The changing attitude from these courts must also be adopted by the Third Circuit to ensure that the NCAA does not indirectly receive any federal funding while avoiding Title VI or Title IX liability. It is simply unfair for the NCAA to control and receive so much from its member institutions, without whom the NCAA would not exist, yet avoid the same standards regarding usage of federal funding that these institutions are held to. To avoid such inequality, *Cureton* must be reversed, and courts need to determine that the NCAA does exercise controlling authority over its member institutions that causes it to be susceptible to suit under Title VI.

### **B. THE “OPERATION GOLD” GRANT IS DISCRIMINATORY**

After determining that the NCAA is susceptible to suit as an indirect recipient of federal funds under Title VI, it is clear that a plaintiff should have the opportunity to prove that the Operation Gold Grant is discriminatory in violation of Title VI. Private individuals may sue under Title VI for injunctive relief or damages<sup>179</sup>, so anyone being discriminated against by the Operation Gold Grant, such as Liam from Part I of this Note, could bring suit against the NCAA. Discrimination includes when similarly situated persons are treated differently because of their national origin.<sup>180</sup> Thanks to the Operation Gold Grant, two student-athletes such as Mark and Liam from Part I of this Note, identical outside of their national origin, get treated very differently in regards to collecting Olympic medal bonus money that they earned. This discrimination is fairly significant, as since great time commitment required to

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<sup>179</sup> See *supra* note 34 and accompanying text.

<sup>180</sup> See *supra* note 38 and accompanying text.

compete at a high level often prevents student-athletes from getting jobs,<sup>181</sup> the \$10,000 and \$46,000 that Drouin and Lenore, respectively, had to decline, would have been an enormous benefit.

The major obstacle for a plaintiff attempting to prove that the Operation Gold Grant is discriminatory is that to sue under Title VI the plaintiff must show intentional discrimination, rather than the more lenient disparate impact standard.<sup>182</sup> To show intentional discrimination, the bylaw must have been adopted "because of, not merely in spite of, its adverse effects upon an identifiable group."<sup>183</sup> However, similar to in *Pryor*, where the plaintiffs were able to get past a Rule 12(b)(6) motion by pleading a "short and plain statement...showing that [they were] entitled to relief" despite a lack of specific facts showing prima facie intentional discrimination,<sup>184</sup> a plaintiff challenging the Operation Gold Grant will be able to plead a short and plain statement and be able to reach discovery in an attempt to uncover more evidence of intentional discrimination. This statement can rely mainly on the wording of the Operation Gold Grant itself.

Other than the Operation Gold Grant, most NCAA bylaws, including those concerning the Olympics, are written in a generic manner, intended to cover all student-athletes as a whole. NCAA bylaw 12.1.2.1.4.3.2 allows Olympic team members to receive all nonmonetary benefits and awards given to other team members of "*that nation's Olympic team*".<sup>185</sup> NCAA bylaw 12.1.2.4.14 allows an individual to receive actual and necessary expenses from the

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<sup>181</sup> See NCAA RESEARCH, *supra* note 6.

<sup>182</sup> See *supra* Part II.A.1.

<sup>183</sup> See *supra* note 38 and accompanying text.

<sup>184</sup> See *supra* Part II.A.2.

<sup>185</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.3.2, *supra* note 5, at 62.

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USOC, as well as any other national governing body or non-professional organization sponsoring an Olympic Exhibition event.<sup>186</sup> While these exceptions allow student-athletes from any country to accept benefits relating to Olympic participation, only the Operation Gold Grant singles out American student-athletes as the only permissible benefit recipients.<sup>187</sup>

The deliberate wording of the exception, differing in form from every other payment exception in its bylaws, must not have been an accident. Surely the NCAA, when it adopted the Operation Gold Grant in April 2001,<sup>188</sup> knew that other countries than the U.S. offered medal bonuses. And even if they did not know, there is no rational reason to single out American student-athletes unless the intent was to provide the American student-athletes with a benefit while simultaneously denying foreign student-athletes the same benefit. In *Pryor*, the plaintiffs were able to overcome the pleading standard for intentional racial discrimination by alleging the NCAA enacted a bylaw to purposely reduce the number of African-Americans who would be eligible to compete. Similarly, the Operation Gold Grant appears to be blatantly intended to treat student-athletes differently solely on account of their national origin, and alleging this should certainly be enough to overcome the pleading standard.

After overcoming this pleading standard, plaintiff will be able to use discovery to unearth more evidence of the true intent behind this bylaw exception. As relevant factors

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<sup>186</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.4.14, *supra* note 5, at 65.

<sup>187</sup> See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5, at 62. See also NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5.1, *supra* note 5, at 62 (specifically allowing funds administered by the U.S. Olympic Committee).

<sup>188</sup> *Id.* (stating the bylaw was adopted in April 2001 and effective as of August 2001).

the court takes into account include the historical background of the decision and any statements made by members of the decisionmaking body,<sup>189</sup> the plaintiffs would be wise to review the minutes of the meetings in which the exception was discussed, as well as conduct depositions with members of the NCAA Executive Committee. One likely reason that the NCAA decided to enact this discriminatory bylaw is the longstanding ties between the NCAA and the USOC.

Many American Olympic athletes compete for the U.S. either during or after their time competing for an NCAA university, and some U.S. National Olympic directors calling the NCAA the USOC's "farm system" or a "sustaining pipeline."<sup>190</sup> Further, the USOC has recently been working closely with the NCAA to try and keep sports that are struggling due to budget concerns, such as gymnastics and wrestling, from disappearing from the NCAA.<sup>191</sup> If these sports continue to disappear, USOC CEO Scott Blackmun noted that it would "have a huge impact on [Team USA's] Olympic performance."<sup>192</sup> Seeing American student-athletes accept bonuses thanks to the Operation Gold Grant that they have to turn down could cause foreign student-athletes to pass up attending an NCAA university altogether, opening up more scholarships for American

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<sup>189</sup> See Pryor, *supra* notes 41-42 and accompanying text.

<sup>190</sup> See Liz Clarke, *Olympic-Style Sports Losing Big at Colleges*, THE NEWS TRIBUNE (July 12, 2012, 12:05 AM), <http://www.thenewstribune.com/2012/07/12/2212099/olympic-style-sports-losing-big.html> (describing how universities eliminating some sports is hurting the USOC).

<sup>191</sup> See David Barron, *U.S. Olympic Committee to Tighten Ties with NCAA*, HOUSTON CHRONICLE (July 17, 2011), <http://www.chron.com/sports/article/U-S-Olympic-Committee-to-tighten-ties-with-NCAA-2078180.php> (explaining the growing NCAA-USOC partnership).

<sup>192</sup> *Id.*



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athletes to sustain the NCAA-USOC pipeline. Every time a foreign student-athlete accepts a scholarship to an NCAA university, that is one less spot that could go to an American athlete who, with proper NCAA and USOC coaching, could potentially be a Team USA Olympic athlete one day.

Of course, no executive from the NCAA or USOC is likely to openly admit that this partnership, or any other reason, caused the NCAA to intentionally discriminate against foreign student-athletes, which is why getting to the discovery process is so important. The meeting minutes for when the bylaw was enacted will be the most telling, as these minutes will show both the sequence of events leading up to its enacting as well as statements made by decisionmakers at the time – two of the more important factors in showing a discriminatory intent.<sup>193</sup>

### **C. REMEDY**

The simple way for the NCAA to remedy this situation is preempt any potential litigation and to amend the Operation Gold Grant to be more in line with the rest of its bylaws, allowing *any* Olympic student-athlete to accept funds administered through a country’s Olympic medal bonus program. This amending would put all similarly-situated NCAA student-athletes in the same position, regardless of national origin. Considering that the NCAA itself claims that it does not discriminate,<sup>194</sup> it should have no problems with amending the bylaw.

If the NCAA does not take this step on its own, it opens itself up to a lawsuit under Title VI, where the plaintiff

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<sup>193</sup> See Pryor, *supra* notes 41-42 and accompanying text.

<sup>194</sup> See 2012-13 Guide for the College-Bound Student-Athlete, *supra* note 24.

would be able to receive both injunctive relief and damages. As the number of foreign student-athletes competing in the NCAA continues to increase, the NCAA's potential liability continues to grow.<sup>195</sup> The injunction would likely see the court enjoin the NCAA from continuing to enforce this discriminatory bylaw provision, and damages could potentially force the NCAA to pay compensatory damages to foreign student-athletes for both bonuses they previously had to decline as well as potentially for any nonpecuniary injuries.<sup>196</sup>

#### IV. CONCLUSION

The Operation Gold Grant, which specifically allows NCAA student-athletes who are members of Team USA to collect Olympic medal bonus money, but not foreign student-athletes, is very likely intentionally discriminatory under Title VI. The courts should find the NCAA to be susceptible to Title VI suits so that the true background of the bylaw can be uncovered through the discovery process. While the Third Circuit has held that the NCAA does not have controlling authority over its member institutions athletic programs, and thus not a federal funding recipient susceptible to a Title VI suit, that holding is contrary to the current nature of the NCAA. The Third Circuit was incorrect on basing the NCAA's lack of controlling authority on *Tarkanian*, as *Tarkanian* actually showed how much power the NCAA has to force a university to do something it does not want to do. Further, the NCAA and college athletics are completely different entity than it was at the time of the

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<sup>195</sup> See Hosick, *supra* note 75.

<sup>196</sup> See U.S. Department of Justice, *supra* note 38, at 103 (listing compensatory damages for Title VI violations as including those for pecuniary and nonpecuniary injuries)

## **OUT OF “CONTROL”: The Operation Gold Exception and the NCAA’s Susceptibility to Lawsuit Under Title VI**

*Tarkanian* and *Cureton* decisions, with skyrocketing revenues and increasing NCAA oversight making it so that leaving the NCAA is simply no longer an option. Through its revenue it provides to universities and its ability to enforce great sanctions, the NCAA does exercise controlling authority over its member institutions and should be susceptible to a Title VI suit.

After showing controlling authority, the NCAA is clearly in violation of Title VI due to the Operation Gold Grant’s apparent intentional discriminatory treatment of foreign student-athletes. It is difficult to think of any purpose for the specific wording of the Operation Gold Grant other than to purposely treat American and foreign student-athletes differently. The NCAA loves to flex its muscles and impose serious sanctions on its member institutions for rule breaking,<sup>197</sup> and has shown a tremendous ability to avoid liability in lawsuits brought against it.<sup>198</sup> In this case, however, the NCAA has gone against what President Kennedy called “simple justice” – the equal treatment of all citizens by institutions receiving federal funding<sup>199</sup> – and needs to be punished accordingly.

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<sup>197</sup> See generally Part II.C.

<sup>198</sup> See Gouveia, *supra* note 60.

<sup>199</sup> See President John F. Kennedy’s address to Congress, *supra* note 26 and accompanying text.

## **The NCAA and Foreign Olympics Competitors: We May Train Our Opponents, but We Don't Have to Reward Them**

**Amanda Newman<sup>1</sup>**

Robert Burns, in his article “Out of ‘Control’: The Operation Gold Exception and the NCAA’s Susceptibility to Lawsuit under Title VI,” paints a vivid picture of alleged discrimination by the NCAA. And, in some respects, his arguments are convincing.

Burns contends that the NCAA should be susceptible to Title VI lawsuits, due to its controlling authority over member institutions. In finding “controlling authority” — a standard referred to, though not specifically adopted, by the Supreme Court in *Nat’l Collegiate Athletic Ass’n v. Smith*<sup>2</sup> — Burns points to the NCAA’s power to impose significant punishments on its institutional members and its effective monopoly over the collegiate athletics market, leaving institutions that wish to maintain their athletics programs with no viable alternative to complying with NCAA bylaws and sanctions. Considering the sheer magnitude of the NCAA’s power over colleges and universities in the United States, from imposing bylaws and wielding sanctions to boasting an impressive \$871.6 million in annual revenue, most of which is distributed to member institutions,<sup>3</sup> it is difficult to argue with Burns’ conclusion that the NCAA has controlling authority over its members and should thus be held liable under Title VI of the Civil Rights Act of 1964.

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<sup>2</sup> 525 U.S. 459, 461 (1999).

<sup>3</sup> See *Revenue*, NCAA,

<http://www.ncaa.org/about/resources/finances/revenue> (last visited March 16, 2014) (breaking down NCAA’s 2011-12 revenue).

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Burns also rightly establishes that Title VI bars intentional discrimination<sup>44</sup> based on “race, color, or national origin”<sup>5</sup> and that the NCAA has specifically maintained that it will not discriminate based on those factors.<sup>6</sup> And, as Burns asserts, the NCAA does in fact distinguish between Olympic athletes competing for the United States and for other countries — American Olympians can keep Operation Gold Grant medal bonuses without affecting their NCAA eligibility, while athletes who competed for other nations may not keep similar bonuses.<sup>7</sup>

Burns’ arguments fall short, however, in one crucial aspect: The Operation Gold Grant exception does not distinguish between athletes based on *national origin* and thus cannot be held to violate Title VI or even the NCAA’s own nondiscrimination statement.

As Burns explains, NCAA Art. 12 provides that athletes lose their amateur status, and thus their NCAA eligibility, if they use their skills for any form of payment.<sup>8</sup> There are two limited exceptions to that rule: the “Expenses/Benefits Related to Olympic Games” exception, providing that athletes may receive all nonmonetary benefits

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<sup>4</sup> The “intentional discrimination” standard was adopted by the Court in *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

<sup>5</sup> 42 U.S.C. § 2000d.

<sup>6</sup> *2012-13 Guide for the College-Bound Student-Athlete*, NCAA ELIGIBILITY CENTER 3 (2012), [http://grfx.cstv.com/photos/schools/afa/genrel/auto\\_pdf/2012-13/misc\\_non\\_event/ncaaguide.pdf](http://grfx.cstv.com/photos/schools/afa/genrel/auto_pdf/2012-13/misc_non_event/ncaaguide.pdf).

<sup>7</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, 2012-13 NCAA DIVISION I MANUAL, § 12.1.2 at 62 (2012) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

<sup>8</sup> *Id.* at § 12 – “Amateurism”.

that automatically come with being part of an Olympic team (such as entertainment, equipment, and clothing),<sup>9</sup> and the “Operation Gold Grant” exception, providing that athletes may accept funds through the U.S. Olympic Committee’s Operation Gold Grant program (which grants bonuses for U.S. medal wins) without losing their eligibility.<sup>10</sup> The former applies to athletes competing for any Olympic team; the latter, clearly, only applies to those competing for Team USA. This, Burns claims, is discrimination based on national origin.

Unfortunately, Burns’s argument conflates “national origin” and “citizenship” — or, perhaps more accurate under the circumstances, “choice of team.”

The Operation Gold Grant exception is not contingent on national origin, as it is available to anyone who wins a medal for Team USA. And, as is evident when scanning the roster and biographies of Olympics competitors for the United States in any recent Games, Team USA draws athletes with a range of national origins, all of who are eligible for those medal bonuses. The 2014 Sochi Games, for example, featured Russia native Simon Shnapir, a pairs skater;<sup>11</sup> Britain native Gus Kenworthy of the freestyle skiing team;<sup>12</sup> and Canada natives Laurene Ross, an alpine skier,<sup>13</sup> Cam Fowler, a hockey defenseman,<sup>14</sup> Paul Stastny,

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<sup>9</sup> *Id.* at § 12.1.2.1.4.3.2 – “Expenses/Benefits Related to Olympic Games”.

<sup>10</sup> *Id.*, § 12.1.2.1.4.1.2 – “Operation Gold Grant”.

<sup>11</sup> *Simon Shnapir*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/simon-shnapir> (last visited March 15, 2014).

<sup>12</sup> *Gus Kenworthy*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/gus-kenworthy> (last visited March 15, 2014).

<sup>13</sup> *Laurene Ross*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/laurene-ross> (last visited March 15, 2014).

<sup>14</sup> *Cam Fowler*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/cam-fowler> (last visited March 15, 2014).

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a hockey forward whose father was the first high-profile hockey player to defect from behind the Iron Curtain,<sup>15</sup> and Debbie McCormick, a curler,<sup>16</sup> to name a few. Two years ago, more than 30 naturalized citizens, many of them immigrants from Latin American countries, wore Team USA uniforms at the London Games.<sup>17</sup> In 2008, at least 33 foreign-born athletes represented the United States at the Beijing Games, including natives of China, Britain, Russia, Kenya, Sudan, and Mexico, among others.<sup>18</sup> The U.S. flag-bearer in Beijing embodied that spirit of cross-nationalization: Lopez Lomong, who won two NCAA championships at Northern Arizona University in 2007 shortly before becoming a U.S. citizen and donning the U.S. Olympics uniform, spent his childhood as one of the “Lost Boys of Sudan.”<sup>19</sup>

The diversity of backgrounds on Team USA comes from the fact that Olympic competitors need not compete for the country where they or their parents were born. Rather, the Olympic Charter requires only that they compete for a

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<sup>15</sup> *Paul Stastny*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/paul-stastny> (last visited March 15, 2014).

<sup>16</sup> *Debbie McCormick*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/debbie-mccormick> (last visited March 15, 2014).

<sup>17</sup> Maria Peña, *U.S. Olympic team shows diversity of immigrant community*, FOX NEWS LATINO (July 31, 2012), <http://latino.foxnews.com/latino/news/2012/07/31/us-olympic-team-shows-diversity-immigrant-community>.

<sup>18</sup> David Crary, *Foreign-born athletes take Olympic stage for US*, THE ASSOCIATED PRESS (July 18, 2008), available at [http://usatoday30.usatoday.com/sports/olympics/beijing/2008-07-18-immigrants\\_N.htm](http://usatoday30.usatoday.com/sports/olympics/beijing/2008-07-18-immigrants_N.htm).

<sup>19</sup> *Olympian Lopez Lomong – Northern Arizona*, NAU LUMBERJACKS, <http://www.nauathletics.com/sports/track/lomong> (last visited March 15, 2014).

country of which they are nationals.<sup>20</sup> Coupled with the fact that dual citizens may select which of their nationalities to compete under,<sup>21</sup> this has, to some extent, led to Olympic team shopping. Athletes often switch teams by pursuing citizenship of different countries to increase their chances of making it to the Olympics.<sup>22</sup> In fact, South Korean speedskating star Ahn Hyun-soo, who became a Russian citizen specifically to compete for Russia at the Sochi Games, admitted to considering naturalization in several countries and searching around for the best deal (the U.S. barely lost out).<sup>23</sup>

For athletes with Olympic promise, changing citizenship is generally not a difficult hurdle. In the United States, EB-1 visas for aliens of extraordinary ability allow such athletes to bypass the waiting line for permanent residency; from there, it is only a five-year wait (three, if they marry a citizen) until they can become citizens.<sup>24</sup> Often, the process is even quicker — Congress has been known to grant expedited citizenship specifically to allow Olympic hopefuls onto Team USA in time for the Games.<sup>25</sup>

This means that, in reality, the NCAA's preferential treatment of Team USA members is hardly even based on citizenship — which, for the record, is not generally a type

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<sup>20</sup> Olympic Charter rule 41, available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf) at 78.

<sup>21</sup> *Id.* at Bye-law to Rule 41.

<sup>22</sup> Duff Wilson & Andrew W. Lehren, *Swapping Passports in Pursuit of Olympic Medals*, THE NEW YORK TIMES (June 15, 2008), [http://www.nytimes.com/2008/06/15/sports/olympics/15citizen.html?page\\_wanted=all&\\_r=0](http://www.nytimes.com/2008/06/15/sports/olympics/15citizen.html?page_wanted=all&_r=0) (last visited March 15, 2014) (listing dozens of examples of athletes who became U.S. citizens to compete for Team USA).

<sup>23</sup> Sam Borden, *Rejecting the U.S. to Skate for Russia*, THE NEW YORK TIMES (Feb. 9, 2014), [http://www.nytimes.com/2014/02/10/sports/olympics/ahn-rejected-us-to-skate-for-russia.html?\\_r=0](http://www.nytimes.com/2014/02/10/sports/olympics/ahn-rejected-us-to-skate-for-russia.html?_r=0) (last visited March 15, 2014).

<sup>24</sup> Wilson & Lehren, *supra* note 21

<sup>25</sup> *Id.*



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of discrimination barred by Title VI.<sup>26</sup> Rather, the NCAA distinction may be more appropriately characterized as a preference based on which country the athletes opt to represent. No reading of Title VI's prohibition of discrimination based on "race, color or national origin" would require the NCAA to treat noncitizens who have chosen to compete for other countries' Olympic teams the same as members of Team USA.

As Burns points out, a large percentage of NCAA Olympians compete for countries other than the United States.<sup>27</sup> However, that fact alone does not indicate that the athletes are being discriminated against by having to choose between a medal bonus and their NCAA eligibility.

For most international students competing in the NCAA, the benefits of retaining eligibility far outweigh an Olympic medal bonus. An American education offers them access to high-quality facilities and coaching that may be instrumental in their progress to the Olympics, and, thanks to scholarships, they often get a free education worth hundreds of thousands of dollars to boot.<sup>28</sup> Forfeiting a one-time bonus is a small price to pay for the opportunity to

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<sup>26</sup> In fact, distinctions based on citizenship are fairly common, including in the realm of secondary education. For example, noncitizens are not always eligible for federal student aid as citizens are. *Non-U.S. Citizens | Federal Student Aid*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/eligibility/non-us-citizens> (last visited March 15, 2014).

<sup>27</sup> See *NCAA Olympic qualifiers by school*, NCAA.COM (July 30, 2012, 11:27AM), <http://www.ncaa.com/news/ncaa/article/2012-07-30/ncaa-olympic-qualifiers-school> (last visited March 15, 2014).

<sup>28</sup> Rachel Bachman, *Schools That Train the Enemy*, THE WALL STREET JOURNAL (June 5, 2012, 7:39 PM), <http://online.wsj.com/news/articles/SB10001424052702303830204577448620436755502> (last visited March 15, 2014).

continue training in the program that helped position them for Olympic success.<sup>29</sup>

Foreign-born athletes choose to compete for American colleges and universities because of the many benefits those institutions and their athletic programs provide. Similarly, those athletes choose whether to compete in the Olympics and, to a significant extent, choose which team to represent. In contrast, athletes cannot choose their race, color, or national heritage — hence the discrimination prohibitions of Title VI.

The opportunities afforded to foreign student-athletes are not without controversy, with some American coaches and Olympians saying that the U.S. should avoid “being a farm club for foreign athletes” and that training so many foreign athletes “hurts our Olympic movement, which we have to think of, first and foremost.”<sup>30</sup>

Despite the dissents, the NCAA has not moved to curtail participation of foreign students in U.S. athletic programs.<sup>31</sup> But at the end of the day, the American organization is still free to encourage Americans to compete

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<sup>29</sup> On the other hand, some international students never even encounter the dilemma, having forfeited their NCAA eligibility before the Games in favor of the benefits that come with going pro. That was the case with Kirani James, who won back-to-back NCAA championships in his first two years of competition, turned pro, and then won the 400-meter sprint for Grenada at the London Games. Don Kausler Jr., *Tide's Kirani James repeats as NCAA champion in the 400-meter dash*, AL.COM (June 10, 2011, 10:31 PM), [http://www.al.com/sports/index.ssf/2011/06/tides\\_kirani\\_james\\_repeats\\_as.html](http://www.al.com/sports/index.ssf/2011/06/tides_kirani_james_repeats_as.html) (last visited March 15, 2014); Tom Fordyce, *Kirani James stuns 400m rivals at London Diamond League*, BBC SPORT (Aug. 5, 2011, 9:13 PM), <http://www.bbc.com/sport/0/athletics/14427554> (last visited March 15, 2014); Christopher Clarey, *Sprinter Gives Grenada Its First Medal*, THE NEW YORK TIMES (Aug. 6, 2012), <http://www.nytimes.com/2012/08/07/sports/olympics/kirani-james-400-meters-track-and-field-roundup.html?pagewanted=all> (last visited March 15, 2014).

<sup>30</sup> Bachman, *supra* note 27.

<sup>31</sup> *Id.*

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for Team USA in the Olympics, through the Operation Gold Grant exception.

No, the NCAA should not discriminate based on race, color, or national origin. Yes, the NCAA should be held accountable under Title VI. But the Operation Gold Grant exception is not discrimination violating Title VI, as the benefit is awarded based on choices and achievements rather than inherent characteristics such as national origin. When American-trained athletes opt to compete against America in the Olympics, the American NCAA need not reward that choice.

## BASEBALL'S ANTITRUST EXEMPTION AND THE RULE OF REASON

Joseph Citelli\*

### I. Introduction

The judicially crafted exemption granted to Major League Baseball ("MLB") is one of the most criticized judicial holdings in the history of the nation. It has been called "[b]aseball's most infamous opinion,"<sup>1</sup> labeled as a "grotesque legal anomaly,"<sup>2</sup> and a "source of embarrassment for scholars of [Justice] Holmes."<sup>3</sup> Some commentators have even gone so far as to suggest the Court only "exempted baseball from the antitrust laws because it was the national pastime."<sup>4</sup> However, despite widespread criticism and condemnation, MLB remains the only professional sports league to have enjoyed such a broad and longstanding exemption from antitrust laws.<sup>5</sup>

The purpose of this Comment is to analyze and discuss franchise relocation restrictions in MLB. Generally, franchise relocation restrictions prohibit individual teams from relocating to a new territory unless they have obtained the prior approval of a specified number of members. Even

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<sup>1</sup> Eldon L. Ham, "Aside the Aside: The True Precedent of Baseball in Law," 13 MARQ. SPORTS L. REV. 213, 215 (2003).

<sup>2</sup> *Id.* at 228.

<sup>3</sup> *Baseball and the American Legal Mind*, 75-76 (Spencer Weber Waller et al. eds., 1995).

<sup>4</sup> Roger I. Abrams, "Blackmun's List," 6 VA. SPORTS & ENT. L. J., 181, 183 (2006-7); see also Roger I. Abrams, *Legal Bases: Baseball and the Law*, 60 (1998).

<sup>5</sup> See Bruce Fein, *Taking the Stand: Baseball's Privileged Antitrust Exemption*, WASHINGTON LAWYER, Oct. 2005, Volume 20 No. 2, available at

[http://www.dcb.org/for\\_lawyers/resources/publications/washington\\_lawyer/october\\_2005/stand.cfm](http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/october_2005/stand.cfm).

though MLB's relocation restrictions are nearly identical to those of other professional sports leagues, the exemption permits MLB to exert greater control over individual franchises than other leagues. Under the 2008 version of MLB's Major League Rule 52,<sup>6</sup> "No franchise shall be granted for an operating territory within the operating territory of a *member without the written consent* of such member." (emphasis added).<sup>7</sup> Furthermore, Article 4.1 of the MLB constitution defines "operating territory" so as to grant franchises "exclusive territorial rights in the city which it is located and within fifty miles of that city's corporate limits."<sup>8</sup> Taken together, these rules create an "absolute barrier...in each geographic submarket by virtue of the absolute veto power granted to each MLB Club to preclude the entry of competition into its exclusive 'operating territory.'"<sup>9</sup>

This Comment first details the historical creation and development of MLB's exemption by identifying several noteworthy cases which will be discussed to demonstrate the prevailing view of the judiciary. Next, the comment will identify and describe the applicable antitrust laws which would be brought to bear in a judicial examination of MLB's franchise relocation restrictions. Recognizing that courts are unlikely to label MLB as single entity unable to conspire in restraint of trade, this section will analyze the restrictions under a Section 1 Rule of Reason analysis.<sup>10</sup> This section

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<sup>6</sup> See Major League Rules ("MLR") available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4452:rare-documents-mlb-constitution-and-by-laws-now-available-online&catid=43:bsn-news&Itemid=114](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4452:rare-documents-mlb-constitution-and-by-laws-now-available-online&catid=43:bsn-news&Itemid=114)

<sup>7</sup> *Id.* MLR 52(d)(1).

<sup>8</sup> See Complaint, *City of San Jose v. Office of the Commissioner of Baseball*, 2013 WL 2996788 (N.D.Cal.).

<sup>9</sup> *Id.*

<sup>10</sup> *Infra* Section III

further notes that vastly different circumstances could arise depending on judicial application and interpretation of the Rule of Reason. This section will conclude by outlining the modern Rule of Reason analysis and its applicability to franchise relocation restrictions in MLB.

Finally, this Comment concludes by identifying and evaluating a recent challenge to MLB's antitrust exemption. In a 2013 lawsuit filed by the City of San Jose (the "City"), at dispute is a proposed relocation of the Oakland Athletics within the operating territory of the San Francisco Giants ("Giants"). This lawsuit seeks to overturn MLB's antitrust exemption and specifically alleged MLB's franchise relocation rules violated the antitrust laws of the United States. It is contended that the competing interests of the parties present unique challenges which make it extremely difficult for the league to settle the lawsuit.<sup>11</sup> This section further discusses the City's likelihood of success, but recognizes the Court's historical unwillingness to deviate from the principles of *stare decisis* when examining the exemption. The potential of congressional action in removing or limiting the exemption is also discussed and dismissed as unlikely.<sup>12</sup> This Comment concludes by questioning whether MLB, and consumers in general, would be better or worse off if the exemption were removed and MLB's franchise relocation restrictions were subject to judicial scrutiny.

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<sup>11</sup> *Infra* Section IV.

<sup>12</sup> *Infra* Section IV C.

## **II. Creation and Survival of the Exemption**

Although MLB did not formally consolidate into a single entity until 2000,<sup>13</sup> the creation of the exemption dates back to the early 1900's when organized baseball was still in its infancy. In 1903, rather than continue to compete with one another, the American League ("AL") and National League ("NL") entered into a "National Agreement" whereby each would operate a separate major league, and the champions would compete against one another in the World Series.<sup>14</sup> In order to protect their fledgling organization from competing leagues, the agreement required that contracts include a "reserve clause," which restricted player movement and permitted the rights to players to be sold or traded.<sup>15</sup> However, in 1914, the Federal League ("FL") was established, and began to compete with the AL and ML for fans and players.<sup>16</sup> Both leagues responded by threatening to blacklist players who defected to the FL, and often brought civil suits against those who

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<sup>13</sup> See Baseball Almanac, *Year in Review: 2000 National League*, BASEBALL ALMANAC (Last visited Feb. 15, 2014) <http://www.baseball-almanac.com/yearly/yr2000n.shtml>.

<sup>14</sup> See Peter Bendix, *The History of the American and National League, Part I*, SB NATION, (Nov. 18, 2008) <http://www.beyondtheboxscore.com/2008/11/18/664028/the-history-of-the-america>

<sup>15</sup> See Baseball Reference, *Reserve Clause*, BASEBALL REFERENCE [http://www.baseball-reference.com/bullpen/reserve\\_clause](http://www.baseball-reference.com/bullpen/reserve_clause) (last visited November 29, 2013).

<sup>16</sup> See ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY* 16 (2003) (The FL owners attempted to lure players away from the MLB with promises of higher salaries and longer contracts, without the restrictions of a reserve clause. While this strategy ultimately failed to attract many players away from MLB, the existence of the FL contributed to a huge increase in average player salaries. "The advent of a rival league put strong upwards pressure on player salaries, which on average doubled between 1914 and 1915.").

did.<sup>17</sup> In response to these restrictive policies, the FL owners filed an antitrust lawsuit against MLB in 1915.<sup>18</sup> Rather than engage in lengthy litigation, the AL and NL saw an opportunity to defeat their competition and elected settle the case.<sup>19</sup> However, because the settlement was unevenly distributed among the FL owners,<sup>20</sup> the Baltimore Terrapins' owners rejected the settlement, and pursued a separate antitrust claim against the two leagues.<sup>21</sup>

In *Federal Baseball Club of Baltimore v. National League*,<sup>22</sup> the Supreme Court ruled against the Baltimore

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*Id.*

<sup>18</sup> The Terrapins' lawsuit alleged that MLB had cornered the market for baseball players. See ZIMBALIST, *supra* note 16.

<sup>19</sup> See Baseball Almanac, *Year in Review: 1915 Federal League*, BASEBALL ALMANAC, (Last visited Nov. 7, 2013), <http://www.baseball-almanac.com/yearly/yr1915f.shtml> ("The Federals agreed to disband after the American and National Leagues both agreed to pay \$600,000 for distribution to owners, absorb two franchises (one American League and one National League) and recognize all former players as eligible picks at a Fed-controlled auction.").

<sup>20</sup> See ZIMBALIST, *supra* note 16 at 16; See Peter Bendix, *The History of Baseball's Antitrust Exemption*, SB NATION, (Dec. 3, 2008) <http://www.beyondtheboxscore.com/2008/12/3/678134/the-history-of-baseball-s> ("The owners of the Baltimore Federal League franchise attempted to purchase a Major League team, and were rebuffed. They tried to buy an International League franchise (the [International League] was the top minor league organization at the top) and were once again denied.").

<sup>21</sup> After the Terrapins' prevailed in the district court, the decision was reversed on appeal. See David Greenberg, *Baseball's Con Game: How did America's Pastime Get an Antitrust Exemption?* SLATE MAGAZINE (July 19, 2002), [http://www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2002/07/baseballs\\_con\\_game.html](http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html).

<sup>22</sup> Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 685 (D.C. Cir. 1920) *aff'd sub nom.* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922).



club and unanimously upheld the appellate court's ruling.<sup>23</sup> In so ruling, the court formed the basis of the modern day MLB's antitrust exemption by holding that professional baseball was not engaged in interstate commerce, and therefore, not subject to federal regulation under the Sherman Act.<sup>24</sup> Specifically, Justice Oliver Wendell Holmes reasoned the business of baseball was "purely state affairs," and that "personal effort, not related to production, is not a subject of commerce."<sup>25</sup>

After nearly a century of litigation surrounding the existence and legality of this exemption, MLB has been extremely successful in retaining the granted protections. This success is a largely a result of MLB's careful management of the exemption's exposure to judicial review. Historically, MLB has dealt with these legal challenges in primarily two ways: (1) settling lawsuits that represent a serious legal challenge to the exemption;<sup>26</sup> or (2) litigating

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<sup>23</sup> See ZIMBALIST, *supra* note 16 at 16; See Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 685 (D.C. Cir. 1920) *aff'd sub nom.* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922) (Holding "The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade.").

<sup>24</sup> See Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 685 (D.C. Cir. 1920) *aff'd sub nom.* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922).

<sup>25</sup> *Id.* at 208-09.

<sup>26</sup> See generally Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993) (A group of investors sought to purchase the San Francisco Giants in an effort to move the team to Tampa Bay, Florida, but MLB rejected the deal. The District Court refused to apply the exemption and held that "The antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system." Faced with the possibility of losing their exemption forever, MLB elected to settle with the investors rather than appeal the decision and risk defeat in the Supreme Court); Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021 (Fla. 1994) (Florida

and defeating less threatening lawsuits in the courtroom, thereby strengthening the validity of the exemption.<sup>27</sup>

Such was the case in *Toolson v. New York Yankees, Inc.*,<sup>28</sup> where Toolson's attorneys attempted to argue that *Federal Baseball* was no longer good law.<sup>29</sup> The Supreme Court disagreed with the appellate court's reasoning proffered by Toolson, and reaffirmed the 1922 *Federal Baseball* decision.<sup>30</sup> In so holding, the Court noted that in the thirty years since the creation of the exemption, Congress had not chosen to enact any legislation to overrule it.<sup>31</sup> In part, the Court reasoned:

Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to

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Supreme Court agreed with the *Piazza* court and held that "[B]aseball's antitrust exemption extends only to the reserve system." The case was never appealed to the Supreme Court because MLB approved the Tampa Bay Devil Rays as an expansion team in 1998.).

<sup>27</sup> See generally *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972);

<sup>28</sup> 346 U.S. 356 (1953) (George Toolson, a minor-league player in the Yankees system, was reassigned but ultimately refused to report to his new team. The Yankees declared him ineligible, which prevented him from playing with any other team and, Toolson sued, claiming the reserve clause in his contract violated antitrust laws.)

<sup>29</sup> See *Gardella v. Chandler*, 172 F.2d 402 at 415 (2d Cir. 1949) (Second Circuit Court of Appeals disagreed with *Federal Baseball* and held "As the playing of the games is essential both to defendants' interstate and intra-state activities, the players' contracts relate to both."). Rather than continue to pursue an appeal to the Supreme Court and risk losing it's antitrust exemption, MLB settled the case and was able to preserve some ambiguity as to whether *Federal Baseball* or *Gardella* was good law; See also ZIMBALIST, *supra* note 16, at 18.

<sup>30</sup> See *Toolson*, 346 U.S. at 357.

<sup>31</sup> *Id.*

develop, on the understanding that it was not subject to existing antitrust legislation [...] We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.<sup>32</sup>

Thus, despite having carved out the exemption nearly thirty years ago, the Court declined to take responsibility to correct itself.<sup>33</sup> Furthermore, by refusing to overrule *Federal Baseball*, the Court greatly strengthened the validity of the exemption as MLB could now point to two separate Supreme Court decisions in support of its continued existence.

However, the *Toolson* ruling did little to discourage litigants and nearly twenty years later, the exemption was again challenged in *Flood v. Kuhn*.<sup>34</sup> At dispute was MLB's "reserve clause," and the case arose when the St. Louis Cardinals traded veteran outfielder Curt Flood to the Philadelphia Phillies in 1969.<sup>35</sup> After he was informed of the trade, Flood refused to report to Philadelphia's training camp, and sat out for the entire 1970 season.<sup>36</sup> Thereafter, Flood filed suit alleging the reserve clause was a violation of the Sherman Act and various civil rights statutes.<sup>37</sup> The case

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 407 U.S. 258 (1972) (Flood filed the lawsuit after being traded to the Philadelphia Phillies seeking injunctive relief from the reserve clause in his contract which prohibited him from negotiating with other teams after his contract expired).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 266.

<sup>37</sup> *Id.* at 265-66.

reached the Supreme Court in 1972, where the court openly acknowledged that both the *Federal Baseball* and *Toolson* decisions were "aberrations," professional baseball was in fact engaged in interstate commerce.<sup>38</sup> Despite this revelation, the Court again refused to overturn the exemption, citing principles of *stare decisis*.<sup>39</sup> Instead, the Court reiterated that it was the responsibility of Congress to remove the exemption by way of legislation.<sup>40</sup> Armed with a second Supreme Court affirmation of its exemption, MLB has been able to confidently operate, largely insulated from the competitive process, as an unregulated, legal monopoly.<sup>41</sup>

### **III. MLB Franchise Relocation Rules and Application of the Rule of Reason**

Debates regarding judicial activism and the proper role of the court aside, the controversy surrounding the *Federal Baseball* decision stems from the role it played in granting MLB an exemption from the antitrust laws of the United States. Because of the exemption, MLB has been able to impose many rules and restrictions free from judicial

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<sup>38</sup> "Professional baseball is a business and it is engaged in interstate commerce... With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Federal Baseball and Toolson have become an aberration confined to baseball." *Id.* at 282.

<sup>39</sup> *Id.* at 284-85.

<sup>40</sup> "The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity... If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." *Id.* at 283-84.

<sup>41</sup> See ZIMBALIST, *supra* note 16.

inquiry or interference. Absent the exemption, the full force and effect of the antitrust laws would apply to the internal operations of MLB. Whether such a removal would be in the best interest of consumers or for professional baseball in general will be discussed later in this Comment.<sup>42</sup> For the moment however, it is important to examine the current state of antitrust law, and to discuss the specific analysis courts use to examine competitive restraints. As will be demonstrated, the removal of the exemption would not necessarily make franchise relocation restrictions illegal per se. Instead, the legality of these restrictions would depend on a myriad of factors including the market definition, and standard used to judge reasonableness.

*A. MLB is a Joint Venture Subject to Section 1 of the Sherman Act.*

In order for a cause of action to be brought against MLB, as a threshold inquiry, courts would need to determine which section of the Sherman Act to apply. As will be discussed, it seems clear that modern jurisprudence would place professional sports leagues squarely within the scope of Section 1 of the Sherman Act. Under Section 1, "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states...is declared to be illegal."<sup>43</sup>

Despite the broad language of the statute, courts have interpreted Section 1 to only prohibit "unreasonable" restraints."<sup>44</sup> Therefore, a prima facie case under Section 1

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<sup>42</sup> *Infra* Part V.

<sup>43</sup> See 15 U.S.C. § 1 (1982).

<sup>44</sup> See *United States v. Joint Traffic Assn.*, 171 U.S. 505 (1898) (Reasoning that Congress could not have intended that courts invalidate every agreement in restraint of trade); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911) (Holding that Section 1 of the Sherman Act

is comprised of three elements: (1) a contract, combination, or conspiracy, (2) an unreasonable restraint on trade, and (3) the restraint must affect interstate commerce.<sup>45</sup> Notably, Section 1 primarily applies to collaborative activity between independent economic actors.<sup>46</sup> Moreover, Section 1 is most often applied to joint ventures, because single entities are incapable of entering into agreements with themselves. Therefore, joint ventures can not satisfy the first element.<sup>47</sup> However, it is important to note that the scope of Section 1 does cover instances whereby separate entities may be engaged in a joint venture.<sup>48</sup>

### *B. Historical Development of the Rule of Reason*

Although the Rule of Reason analysis pre-dates the Sherman Act,<sup>49</sup> it was incorporated for use in antitrust analyses by the Supreme Court<sup>50</sup> "to give the [Sherman] Act both flexibility and definition."<sup>51</sup> Unfortunately, this flexibility has enabled the courts to develop several competing standards for determining the reasonableness of a

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prohibits only unreasonable contracts, combinations or conspiracies in restraint of trade).

<sup>45</sup> See 15 U.S.C. § 1 (1982).

<sup>46</sup> *Id.*

<sup>47</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (Rejecting the concept of intra-enterprise conspiracy and holding that a corporation and its wholly-owned subsidiary are not capable of conspiring with one another for purposes of the Sherman Act).

<sup>48</sup> *Id.*

<sup>49</sup> See *Tallis v. Tallis*, (1853) 118 Eng. Rep. 482, 487 (K.B.) ("A covenant . . . is not void as being in restraint of trade, unless the restraint appears to be greater than the protection of the covenantee can reasonably require."); *Hitchcock v. Coker*, (1837) 112 Eng. Rep. 167, 173 (K.B.) ("[W]here the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law.").

<sup>50</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); and *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

<sup>51</sup> See *Nat'l Soc. of Prof'l Engineers v. U. S.*, 435 U.S. 679, 688 (1978).

restraint.<sup>52</sup> In turn, this has resulted in no small amount of uncertainty for litigants locked in antitrust disputes. Furthermore, with no clarification from the Supreme Court, the lower courts have carried on as best they can, which has led to the establishment and utilization of several different versions of the analysis.

In *United States vs. Addyston Pipe*,<sup>53</sup> the court first attempted to formulate a method for distinguishing restraints that directly affected competition from those which "facilitated" interstate commerce.<sup>54</sup> There, the court examined an agreement among six pipe manufacturing corporations to divide their markets and business into distinct territories.<sup>55</sup> Writing for the majority, Judge Taft employed a means-oriented inquiry and held that "If the restraint exceeds the necessity presented by the main purpose of the contract, it is void."<sup>56</sup> In other words, a restraint is reasonable if it is no more restrictive than necessary, or if less restrictive alternatives are not available (the "least restrictive" approach).<sup>57</sup> Notably, the inquiry did not focus on the restraint's competitive impact, but rather looked to the necessity of the restraint to the underlying agreement or contract.<sup>58</sup>

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<sup>52</sup> See generally Gabriel A. Feldman, *Misuse of the Less Restrictive Alternative inquiry in Rule of Reason Analysis*, 58 AMERICAN UNIVERSITY LAW REVIEW VOLUME 3, ISSUE 2 (2009); See also Renee Grewe, *Antitrust Law and the Less Restrictive Alternatives Doctrine: A Case Study of its Application in the Sports Context*, 9 SPORTS LAW. J. 227,231 (2002) (discussing the rule of reason standards used by different circuits and noting their scholarly support).

<sup>53</sup> 85 F. 271 (6th Cir. 1898).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 85 Fed. At 282-83.

<sup>57</sup> Feldman, *supra* note 52 at 568.

<sup>58</sup> See Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of*

In the years following *Addyston Pipe*, the Supreme Court began to retreat from the least restrictive approach and move towards a more flexible Rule of Reason analysis.<sup>59</sup> The court initiated this ideological shift in the 1911 case of *Standard Oil Co. v. United States*,<sup>60</sup> whereby thirty-seven oil companies under the control of a single holding company were accused of engaging in predatory practices to coerce competitors to join the company, and then to utilize its resulting power to fix prices.<sup>61</sup> In ordering the dissolution of the holding company, Justice White concluded that Section 1 only prohibited unreasonable restraints of trade,<sup>62</sup> and predatory tactics utilized by the holding company, qualified as such. Ultimately, the court held that the proper inquiry when examining a particular restraint for reasonableness should be on the "necessary effect" of that restraint.<sup>63</sup> In a particularly noteworthy aspect of the opinion, the Court reasoned that the mere restriction of competition did not necessarily constitute an illegal restraint of trade.<sup>64</sup> Later that year, Justice White would clarify this sentiment in *United States v. American Tobacco Co.*,<sup>65</sup> by asserting that only agreements "which operated to the prejudice of the public interests by unduly restricting competition or unduly

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*Reason" in Restraint of Trade Analysis*, in 15 RESEARCH IN LAW AND ECONOMICS 1, 62 (Richard O. Zerbe, Jr. & Victor P. Goldberg ed., 1992) (The measure of an agreements legality under the least restrictive approach is whether less restrictive alternatives are possible); Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 908-09 n.73 (1987) (The language in *Addyston Pipe* may "be read to encompass an examination of less restrictive alternatives.").

<sup>59</sup> ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON (1999) [Herein after ABA ANTITRUST SECTION].

<sup>60</sup> 221 U.S. 1 (1911).

<sup>61</sup> *Id.* at 32-40.

<sup>62</sup> *Id.* at 87-88.

<sup>63</sup> *Id.* at 65.

<sup>64</sup> *Id.* at 80.

<sup>65</sup> 221 U.S. 106 (1911).



obstructing the due course of trade...injudiciously restrained trade."<sup>66</sup>

The shift towards a Rule of Reason analysis occurred in the case of *Board of Trade of Chicago v. United States*,<sup>67</sup> where the Supreme Court abandoned the least restrictive alternative approach and adopted a multi-factored balancing test (the "net effects" approach).<sup>68</sup> In *Chicago Board of Trade*, the court examined a "call rule" which required members of the leading organized grain trading market to purchase grain at a specific price.<sup>69</sup> The government relied on the *Addyston Pipe* standard and argued this constituted a violation of Section 1 of the Sherman Act because it was a direct restraint of interstate commerce.<sup>70</sup> The Supreme Court however, disagreed.<sup>71</sup> Writing for the majority, Justice Brandeis stated the appropriate question was "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."<sup>72</sup> Moreover, the inquiry mandates consideration of the "facts peculiar to the industry, the nature of the restraint and its effect to determine whether that restraint promotes or restrains competition."<sup>73</sup> In applying this balancing test, Justice Brandeis determined

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<sup>66</sup> *Id.* at 179.

<sup>67</sup> 246 U.S. 231, 238 (1918).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (The rule required members to fix their bids at the day's closing bid until the opening of the next session).

<sup>70</sup> See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 272 (6th Cir. 1898) *aff'd* as modified, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).

<sup>71</sup> See 246 U.S. at 238.

<sup>72</sup> *Id.* at 238-41.

<sup>73</sup> See *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); See also *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343 (1982) (Holding that the rule of reason requires the trier of fact to consider all the circumstances of the case when determining whether an agreement imposes an unreasonable restraint on competition).

the "call rule" was a reasonable regulation, and was not illegal under the Sherman act.

After *Chicago Board of Trade*, it appeared the Rule of Reason's primary objective was to function as a balancing test to determine what the net competitive effects of the particular restraint were. If a restraint was net procompetitive (i.e. consumers received a benefit from the restraint that would otherwise not be present) it was therefore reasonable, and would not violate the Sherman Act.<sup>74</sup> This opinion would foreshadow modern jurisprudence by suggesting that "in some situations, even price fixing might survive Sherman Act scrutiny if defendants could successfully argue that their arrangement was harmless to consumers."<sup>75</sup>

*i. The "Modern" Rule of Reason Analysis*

Notably, in the current state of affairs, courts must apply both the *Chicago Board of Trade* and *Addyston Pipe* approaches in examining restraints (the "modern" Rule of Reason analysis).<sup>76</sup> Under the modern analysis, a restraint will only be upheld if it results in a net procompetitive effect *and* the benefits of that effect could not have been achieved

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<sup>74</sup> See generally FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2, at 4 (April 2000), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf> ("Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.").

<sup>75</sup> E. GELLHORN & W. KOVACIC, ANTITRUST LAW AND ECONOMICS 174-87 (4th ed. 1994).

<sup>76</sup> See Feldman, *supra* note 52 at 582.

by substantially less restrictive alternatives.<sup>77</sup> Although *Chicago Board of Trade* is still frequently cited, courts "have been decidedly reluctant to engage in the broad inquiry it mandated."<sup>78</sup>

In 1997, the U.S. Court of Appeals for the Second Circuit provided some clarity to modern Rule of Reason, by breaking the analysis down into three distinct stages.<sup>79</sup> As a threshold barrier, the modern Rule of Reason analysis first requires a plaintiff to demonstrate that the restraint's anticompetitive effects.<sup>80</sup> In so doing, courts will initially require plaintiffs to demonstrate that a restraint has caused a substantially adverse effect on competition, or is likely to in the future.<sup>81</sup> Second, after the plaintiff has successfully demonstrated the anticompetitive effects of a particular restraint, the defendant must come forward and offer a procompetitive justification.<sup>82</sup> Third, once the defendant establishes a legitimate procompetitive justification for the restraint, the plaintiff will have a final opportunity to rebut the justification by showing there is an "insufficient nexus between the restraint and procompetitive effect."<sup>83</sup> Finally, after a plaintiff has demonstrated anticompetitive effects,

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<sup>77</sup> *Id.*

<sup>78</sup> ABA ANTITRUST SECTION, *supra* note 59, at 102.

<sup>79</sup> *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) ("First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole on the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same procompetitive effect could be achieved through an alternative means that is less restrictive of competition.").

<sup>80</sup> See e.g. *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972); see also I ABA SECTION OF ANTITRUST LAW DEVELOPMENTS 56 n.292 (4th ed. 1997) [hereinafter ANTITRUST LAW DEVELOPMENTS (FOURTH)].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; see also *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

<sup>83</sup> ABA ANTITRUST SECTION, *supra* note 59, at 121.

and defendant has successfully countered by providing a procompetitive justification, the competing claims will be balanced. If the balance reveals the restraint is substantially anticompetitive in nature, it is illegal; if the effects ambiguous or net procompetitive, the restraint is likely legal.<sup>84</sup>

*C. Franchise Relocation Rules Scrutinized Under the "Modern" Rule of Reason*

As previously noted, the *Federal Baseball* decision armed MLB with a general immunity from antitrust laws, and this immunity has enabled the league to implement restrictions on a variety of league operations, without any judicial inquiry into their potential anticompetitive effects. However, if the exemption were removed or repealed, these restrictions, including those governing franchise relocations, would be subject to scrutiny under the Sherman Act.<sup>85</sup> Along these lines, this section will discuss the viability of the franchise relocation restrictions as examined under a rule of reason analysis.

Notably, although MLB would likely attempt to employ a single entity defense, and claim to be subject to Section 2 of the Sherman Act, it is nearly certain courts would disagree and label the league a joint venture whose actions are subject to scrutiny under Section 1.<sup>86</sup> In any

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<sup>84</sup> See *California Dental Ass'n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997) (Holding that the rule of reason analysis "requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice."), *rev'd*, 119 S. Ct. 1604 (1999); *Clamp-All Corp v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (The rule of reason "forbid[s] only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications.").

<sup>85</sup> *Id.*

<sup>86</sup> See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1401 (9th Cir.), *cert denied*, 496 U.S. 900 (1984); *North American Soccer League v. National Football League*, 670 F.2d

event, because courts have indicated that professional sports leagues consist of separate individual entities operating as a joint venture, MLB would be virtually barred from attempting to argue that it should be treated differently.<sup>87</sup> However, even though MLB would quite clearly be designated as a joint venture, the question of whether a particular league restraint is reasonable or not, involves a much more complicated analysis. For one thing, the majority antitrust scholars recognize that judicial review of competitive restraints would not automatically disqualify league restrictions as per se illegal. Instead, courts would examine the restraints for "reasonableness."<sup>88</sup> In other words, when ancillary restraints are necessary to ensure the product is available at all, the restraint in question must be analyzed under a Rule of Reason analysis.<sup>89</sup>

Several of MLB's most restrictive policies,<sup>90</sup> and therefore, those most susceptible to legal challenge, are the rules controlling the terms and conditions for franchise relocations. As previously mentioned, when construed together, the carefully defined operating territories and the franchise relocations restrictions result in a single team's

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1249 (2d Cir. 1980), *cert denied*, 459 U.S. 1074 (1982); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

<sup>87</sup> *Id.*

<sup>88</sup> *See also Mackey v. Nat'l Football League*, 543 F.2d 606, 619 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978); *Am. Needle, Inc.*, 560 U.S. 183.

<sup>89</sup> *Supra* note 150; *see also Am. Needle, Inc.*, 560 U.S. at 203 (quoting *National Collegiate Athletic Ass'n (NCAA) v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, at 101 (1984)) ("When 'restraints on competition are essential if the product is to be available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.").

<sup>90</sup> MLB is governed by the Professional Baseball Rules Book. Although not all of these documents are released to the public, the consists of four major sections: (1) the Major League Constitution; (2) a Basic Agreement; (3) the Major League Rules; and (4) a Professional Baseball Agreement.

monopolistic control over its designated home territory. It is this combination of rules, that has led to numerous challenges of the exemption, including the most recent lawsuit initiated by the City of San Jose in which the city argued the "sole purpose and effect of Article VIII, Section 8 of the MLB Constitution is to shield Clubs from competition that otherwise would exist absent this veto power."<sup>91</sup>

Without the protection of its exemption, MLB would have a significantly more difficult time controlling the movement of its franchises. For one thing, any attempt to prevent a franchise from relocating, would likely be met with a lawsuit from a bereaved fan or owner.<sup>92</sup> However, due to competing judicial standards there exists no small amount of uncertainty as to how a particular court would determine the necessity of a given restraint. Thus, in an attempt to clarify this issue, the following will examine possible outcomes the courts could reach when applying the modern Rule of Reason analysis to MLB, specifically discussing potential effects on franchise relocation rules. Depending on the standards used by the courts, the current structure of franchise relocation rules could be drastically altered or remain completely unchanged, even absent the antitrust exemption.

### *i. Market Definition*

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<sup>91</sup> See Complaint, *City of San Jose v. Office of the Commissioner of Baseball*, 2013 WL 2996788 (N.D.Cal. 2013).

<sup>92</sup> See, e.g. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984) (The Oakland Raiders successfully challenged NFL restrictions preventing the franchise from moving from Oakland to Los Angeles); and *National Basketball Association v. San Diego Clippers Basketball Club, Inc.*, 815 F.2d 526 (9th Cir. 1987) (San Diego Clippers successfully challenged NBA restrictions on franchise relocations and defended its move from San Diego to Los Angeles).

The first step in any Rule of Reason analysis is to define the relevant market. Because antitrust laws are primarily concerned with market power, the presence or absence of that power can be a critical factor in determining whether a restraint on competition is unreasonably anticompetitive.<sup>93</sup> In defining the market, courts will examine both the relevant geographic and product markets.<sup>94</sup> Moreover, courts can choose to define a particular market broadly or narrowly. Some courts have adopted the following product market definition as described in the 1992 *Horizontal Merger Guidelines*; the relevant product market is one in which “a hypothetical monopolist can profitably impose a “small but significant and nontransitory” price increase, typically of around five to ten percent.”<sup>95</sup> If such an increase in price would not be profitable, the identified group of products is too narrow, and products must be added until a market has been defined where it would be profitable. However, under a different approach, courts may construe product markets by determining the “reasonable interchangeability of use” by consumers of the “cross-elasticity of demand” that exists between the product in question and its reasonable substitutes.<sup>96</sup> These determinations are more often than not, indicative of the outcome of antitrust lawsuits, and the party that wins the market definition battle often prevails when the final verdict is read.

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<sup>93</sup> See *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1392 (“relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue.”).

<sup>94</sup> See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

<sup>95</sup> Dep't of Justice & Federal Trade Comm'n. *Horizontal Merger Guidelines* at § 1.11 (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,572-73 (rev. 1997).

<sup>96</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 592-53; *United States v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 400, 404 (1956).

In the context of professional sports, the relevant product market can theoretically be as broad as all forms of entertainment in the United States, or as narrow as all league teams in a specific geographic area.<sup>97</sup> However, in numerous instances courts have declined to broadly define markets in the context of professional sports. For example, courts have narrowly defined markets such as professional championship boxing,<sup>98</sup> major league professional hockey,<sup>99</sup> and the NBA basketball.<sup>100</sup> Moreover, Justice Stevens concurrence in *NCAA v. Board of Regents*,<sup>101</sup> clearly articulated that the appropriate inquiry is whether there are other products available that can function as reasonable substitutes.<sup>102</sup>

Yet, as any casual sports fan can discern, there are currently no acceptable baseball-related alternatives or substitutes to MLB.<sup>103</sup> Despite the rise in prominence of international Baseball events such as the World Classic Tournament, or the increasing popularity of the Nippon Professional Baseball League in Japan, few consumers of MLB would view these as reasonable replacements. Therefore, in examining MLB's franchise relocation restrictions, it is likely a court would narrowly define the relevant market as professional baseball in the United States. Such a narrow

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<sup>97</sup> See *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1393 (Although the NFL argued for a broad definition of "all entertainment" and the Oakland Raiders sought a narrow definition limiting the relevant market to NFL football in Southern California, the Ninth Circuit determined the market was something "in-between" was more accurate).

<sup>98</sup> See *International Boxing Club v. United States*, 358 U.S. 242, 249-51 (1959).

<sup>99</sup> See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 501-02 (E.D. Pa. 1972).

<sup>100</sup> See *Fishman v. Wirtz*, 1981-2 Trade Cas. (CCH) paragraph 64, 378, at 74, 762-64 (N.D. Ill. 1981).

<sup>101</sup> 104 S. Ct. 2948 (1984).

<sup>102</sup> *Id.* at 2966 (citation omitted).

<sup>103</sup> For example, it is unlikely that many fans would consider international baseball leagues as a viable replacement for MLB.



market definition would make it extremely difficult for MLB to justify its relocation restrictions and would confer significant market power to MLB. Furthermore, under this market definition, overly restrictive franchise relocation rules such as those currently used by MLB could not be said to be reasonably necessary to enable MLB to compete due to the absence of any actual competitors with MLB.

Indeed, there appears to be a judicial consensus that product markets should be construed narrowly when scrutinizing the conduct of professional sports leagues.

However, this definition may be inaccurate. While it is likely true that there are no *baseball-related substitutes* for MLB, there are a myriad of other options available to sports enthusiasts throughout the course of the MLB season. For one thing, MLB broadcasts and schedules games that conflict with collegiate athletics as well as other professional sports leagues. In fact, because an entire MLB season from spring training to the World Series can stretch over nine months, at one point or another, MLB directly competes for ticket sales and viewership with the National Basketball Association ("NBA"), the NFL, and the National Hockey League ("NHL"). If a court were to deviate from the majority market definition and recognize that the proper market may instead be a broader "sports entertainment" market, it would be far easier to conclude that relocation restrictions are reasonably necessary to improve the product and enhance competition against other entertainment offerings.

*ii. Anticompetitive Effects of Franchise Relocations  
Restraints*

After the relevant market has been defined, anticompetitive effects of a given restraint can be properly identified. Although the debate over the proper market

definition is an important factor in the Rule of Reason analysis, plaintiffs must also be able to point to some anticompetitive effect of the restraint in question in order for a lawsuit to proceed. A plaintiff must demonstrate that the conduct or restraint in question has had or is likely to have a substantially adverse effect on competition.<sup>104</sup> Adverse are effects that result from conduct or policies which reduce output or substantially and unreasonably exclude competitors from a properly defined market. Plaintiffs typically demonstrate adverse effects in one of two ways: first, by a showing of proof of an actual effect on competition;<sup>105</sup> or alternatively, by proof that the conduct or restraint will lead to the exercise of market power.<sup>106</sup>

The principle of using evidence of actual anticompetitive effects on competition to support a finding of unreasonableness was laid out by the Supreme Court in *F.T.C. v. Indiana Federation of Dentists*.<sup>107</sup> Additionally, because the Court reasoned that the purpose of determining market power was to examine the potential for adverse effects to occur, the Court held that “proof of actual detrimental effects such as reduction of output” would sufficiently render an elaborate market analysis unnecessary.<sup>108</sup> However, a plaintiff rarely will be able to demonstrate actual anticompetitive effects, in part because of the difficulty courts have in isolating a particular restraint’s effect in the market.

Instead, the majority of Rule of Reason analyses necessarily require a thorough examination into market

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<sup>104</sup> See *Advanced Health-Care Servs., v. Radford Community hosp.*, 910 F.2d 139, 144 (4th Cir. 1990) (requiring plaintiffs to demonstrate that the scrutinized conduct “produced adverse effects within the relevant product and geographic market.”).

<sup>105</sup> See *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972); see also ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 80, at 55-65.

<sup>106</sup> See ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 80, at 55-65.

<sup>107</sup> 476 U.S. 447 (1986).

<sup>108</sup> *Id.* at 460.

power. Market power is commonly defined as the ability to profitably raise prices above and beyond those which would normally be charged in a competitive market.<sup>109</sup> Notably, possession of market power must often be demonstrated before a Rule of Reason analysis will even take place.<sup>110</sup> In addition, although a higher market share increases the likelihood that a defendant has market power, “there is no bright-line test for the level of market share that generally indicates market power.”<sup>111</sup> Moreover, this presumption can be overcome, and courts will also examine other factors such as entry conditions of the relevant market<sup>112</sup> and the relative stability of market shares.<sup>113</sup>

As a starting point, franchise relocation restrictions carry a certain anticompetitive stigma. In *Los Angeles Memorial Coliseum*,<sup>114</sup> the court stated that restrictions of this nature result in “competitive harms [which] are plain.”<sup>115</sup> According to the court, these restrictions merely result in exclusive territories whose purpose and effect is to insulate teams from directly competing with one another, which ultimately facilitates “monopoly prices to the detriment of the consuming public.” Because MLB would

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<sup>109</sup> See e.g. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996).

<sup>110</sup> See *Chicago Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996); *Levine v. Central Florida Med. Affiliates, Inc.*, 72 F.3d 1438, 1552 (11th Cir.), *cert. denied*, 519 U.S. 820 (1996); *Rothgery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986); *but see NCAA v. Board of Regents*, 468 U.S. 85, 101 (1986) (Proof of actual anticompetitive effects eliminated the need to determine whether market power existed or not).

<sup>111</sup> ABA ANTITRUST SECTION, *supra* note 59, at 110.

<sup>112</sup> See *Allen-Myland, Inc. v. IBM* 33 F.3d 194, 209 (3d Cir.), *cert. denied*, 513 U.S. 1066 (1994).

<sup>113</sup> See *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir.), *cert denied*, 516 U.S. 987 (1995).

<sup>114</sup> 726 F.2d 1381 (9th Cir.) *cert. denied*, 105 S.Ct. 397 (1984).

<sup>115</sup> *Id.* at 1395.

possess an extremely high market share in a narrowly defined market, a court examining MLB's relocation restrictions would likely agree with the *Los Angeles Memorial Coliseum* court's analysis. Moreover, with no substitutes available, one could seemingly argue that the restrictions have permitted MLB to establish monopoly prices, and therefore, that consumers have suffered an actual detriment.

Yet, evidence indicates there exists a legitimate question as to whether the franchise relocation rules actually cause adverse effects. This is especially true if the market is defined broadly. For one thing, ticket prices are not related to the presence or absence of a competing team within a defined territory.<sup>116</sup> Instead, ticket prices are much more closely related to the current league standing of the teams playing in a particular game. Furthermore, "teams which have an exclusive market do not charge demonstrably higher for a ticket than those which share their market with another club."<sup>117</sup> Therefore, even in a narrowly defined market, price inelasticity of demand is prevalent throughout MLB regardless of whether teams are competing in the same market or not. Additionally, it is also important to note that in a broadly defined market, MLB prices would be compared with those of other professional sports leagues. In this regard, an average ticket price for a MLB game is the lowest of the four major professional sports leagues (MLB, NBA, NFL, & NHL), and is just slightly higher than Major League Soccer.<sup>118</sup>

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<sup>116</sup> See Frank P. Scibilia, *Baseball Franchise Stability and Consumer Welfare: An Argument for Reaffirming Baseball's Antitrust Exemption With Regard to its Franchise Relocation Rules*, 6 SETON HALL J. SPORTS L. 409, 439 n.175 (1996).

<sup>117</sup> *Id.* at 442.

<sup>118</sup> See Brian Quarstad, *U.S. Pro Sports Attendance, Ticket Prices, Salaries and other Assorted Statistics*, IMSOCCER NEWS (May 11, 2012) <http://www.insidemnsoccer.com/2012/05/11/u-s-pro-sports-attendance-ticket-prices-salaries-and-other-assorted-statistics/>.

Exercise of market power is not the only way to prove anticompetitive effects. It is also necessary to determine whether the restrictions will result decrease in the output of MLBs product. Under the narrow market definition, individual baseball games are likely the output of MLB, whether they be attended in-person or televised. Franchise relocation restrictions certainly do not result in a lower output of professional games in a given season. However, some may argue that the restrictions can decrease output by denying certain cities the opportunity to obtain a MLB franchise. Yet, this argument is fundamentally flawed when discussing franchise relocations because an increase in output for one city would necessarily result in a decrease of output for another. Therefore, franchise relocation restrictions can not be said to decrease output because the net effect of a franchise relocation on output is zero.<sup>119</sup>

*iii. Procompetitive Effects of Franchise Relocation  
Restrictions*

Next, MLB would be given an opportunity to justify the franchise relocation restrictions by identifying their procompetitive effects. As a general principle, the majority of courts have held that only procompetitive *economic justifications* are relevant because the Sherman Act regulates *economic relationships*.<sup>120</sup> This sentiment was most clearly articulated in *National Society of Professional Engineers v.*

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<sup>119</sup> For further discussion on franchise relocation restrictions and their effect on output *see* Scibilia, *supra* note 116, at 443-444.

<sup>120</sup> *See* Chicago Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n, 754 F.Supp. 1336, 1359 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.), *cert denied*, 506 U.S. 954 (1992); *but see* United States v. Brown Univ., 5 F.3d 658, 678 (3d. Cir. 1993) (Holding that the rule of reason should also examine social goals in balancing anticompetitive and procompetitive effects).

*United States*,<sup>121</sup> where the Supreme Court held that only practices which promoted competition would be considered acceptable justifications for restraints. In so holding, the Court reasoned that the "Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services."<sup>122</sup>

There have been a wide array of procompetitive justifications accepted by courts in analyzing Section 1 disputes.<sup>123</sup> For instance, horizontal agreements that result in the creation of a new product,<sup>124</sup> and restraints that ultimately provide for an expansion of output or an improvement<sup>125</sup> have been widely recognized. Furthermore, when examining vertical non-price related restraints, courts have recognized several justifications such as providing incentives to dealers to continue to provide a service to consumers,<sup>126</sup> and to prevent divided loyalties among fellow distributors, as procompetitive in nature.<sup>127</sup>

As some commentators have noted, franchise relocation restrictions are necessary to promote franchise

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<sup>121</sup> 435 U.S. 679, 695 (1978).

<sup>122</sup> *Id.* at 695 ("[The] Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services.").

<sup>123</sup> See *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir.) (Citing ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 80, at 66-67), *cert denied*, 119 S. Ct. 65 (1998) (The Tenth Circuit Court of Appeals listed the following economic justifications: "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice.").

<sup>124</sup> See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful [...] where the agreement on price is necessary to market the product at all."); *NCAA*, 468 U.S. at 101; *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969-70 (10th Cir. 1994), *cert. denied*, 515 U.S. 1152 (1995).

<sup>125</sup> See *Rothgery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 222-23 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1033 (1987).

<sup>126</sup> See *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977); *Sports Ctr., Inc. v. Riddell, Inc.*, 673 F.2d 786, 791 (5th Cir. 1982).

<sup>127</sup> See *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 395 (7th Cir. 1984).

stability.<sup>128</sup> Clearly, at least some territorial restrictions are necessary in order to provide owners with the proper incentives to invest in their respective teams, and the surrounding area. Further strengthening this viewpoint is a Supreme Court decision recognizing that owners have a legitimate interest in protecting the existence of professional leagues and must act collectively to allow the league to function.<sup>129</sup> Indeed, these restrictions seem to reasonably promote franchise stability, as only one MLB team has relocated since 1972.<sup>130</sup> The effect of relocation restrictions on franchise stability is even more apparent in a broadly defined market, and MLB has cultivated the most stability among the major professional sports leagues in the United States.<sup>131</sup>

By extension, franchise relocation restrictions often have trickle down effects to consumers which result in procompetitive justifications. For one thing, the Supreme Court has already recognized that exclusive territories and relocation rules help foster fan loyalty.<sup>132</sup> Furthermore, it has been argued that the restrictions prevent "franchises jumping from town to town to take advantage of the 'honeymoon'

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<sup>128</sup> See generally Allan Selig, MAJOR LEAGUE BASEBALL AND ITS ANTITRUST EXEMPTION, 4 SETON HALL J. SPORT L. 277 (1994).

<sup>129</sup> See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1401 (9<sup>th</sup> Cir.), *cert denied*, 496 U.S. 900 (1984).

<sup>130</sup> See *MLB Franchise Chronology*, MLB.COM (last visited Mar. 27, 2014), [http://mlb.mlb.com/news/article.jsp?ymd=20040929&content\\_id=875187&vkey=news\\_mlb\\_nd&fext=.jsp&c\\_id=null](http://mlb.mlb.com/news/article.jsp?ymd=20040929&content_id=875187&vkey=news_mlb_nd&fext=.jsp&c_id=null) (In 2005, the Montreal Expos relocated to Washington D.C.).

<sup>131</sup> Nathan Grow, "*In Defense of Baseball's Antitrust Exemption*," 49 AM. BUS. L.J. 211, \*230 (Summer, 2012) (Arguing that Congressional threats of revoking the exemption have resulted in valuable, procompetitive concessions from MLB).

<sup>132</sup> *Id.* at 1396.

period that relocated teams enjoy in their first few years."<sup>133</sup> The restraints do far more than prevent hurt feelings, as the loss of a franchise can mean financial devastation for a city with substantial debt on a stadium that can no longer be used to generate expected tax revenues.<sup>134</sup>

Given the numerous procompetitive effects of the franchise relocation rules, a court could very well determine the restrictions are reasonably related to the goal of fostering fan loyalty and promoting stability. Depending on the approach used to determine the reasonableness of the restrictions, on balance, the procompetitive effects could outweigh any identifiable anticompetitive ones. After a defendant has come forward with a reasonable procompetitive justification courts have historically been reluctant to continue with the analysis. Although a justification often results in the end of the analysis and judgment for the defendant, the modern Rule of Reason employs an additional step whereby justifications are balanced against anticompetitive effects.

*iv. Determining the Reasonableness of Franchise Relocation Restrictions*

The final step in a modern Rule of Reason analysis would be for the courts to balance the anticompetitive effects and procompetitive justifications and determine whether MLB's franchise relocation restrictions are reasonable. When conducting a modern Rule of Reason analysis, a critical factor is often the standard used by a court in determining the reasonableness of a particular restraint

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<sup>133</sup> Allan Selig, MAJOR LEAGUE BASEBALL AND ITS ANTITRUST EXEMPTION, 4 Seton Hall J. Sport L. 277, 283 (1994).

<sup>134</sup> Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 105 (1997).



("Least restrictive"<sup>135</sup> vs. "Less restrictive"<sup>136</sup>). Regrettably, it is also the factor most suspect to different interpretations by the judiciary,<sup>137</sup> and the Supreme Court has not yet reconciled the various conflicting interpretations. This uncertainty has left the lower courts to conjecture on the appropriate standard for examining restraints for reasonableness. Depending on the approach used, courts may reach two very different conclusions, and faced with conflicting precedents, the outcome of litigation under the modern Rule of Reason analysis is not always certain.

Some courts will require that the restraint be the least restrictive alternative available to achieve the alleged procompetitive justification (the "least restrictive"

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<sup>135</sup> *Infra* notes 138-146 and accompanying text.

<sup>136</sup> *Infra* notes 150-157 and accompanying text.

<sup>137</sup> The modern test has not been uniformly applied across the federal circuits and courts have greatly varied on just how restrictive a restraint can be without being unreasonable. The D.C. Circuit places the burden on the defendant to demonstrate the least restrictive alternative was utilized, regardless of whether the net effect of the restraint was procompetitive or not. *See Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984). The U.S. Court of Appeals for the Fourth Circuit requires the plaintiff to demonstrate the "same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *See Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); The Eleventh Circuit places the burden on the plaintiff to demonstrate the restraint was not "fairly necessary" to achieve the procompetitive effects. *See Am Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005); The Sixth, Eighth and Ninth Circuits all impose a higher burden on the plaintiff, and require it to demonstrate that legitimate goals of the defendant can be achieved in a "substantially less restrictive manner." *See Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005) (quoting *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); *Flegel v. Christian Hosps. Ne.-Nw.*, 4 F.3d 682, 688 (8th Cir. 1993) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)).

approach.)<sup>138</sup> Under this approach, a restraint is illegal if the alleged procompetitive justification can be achieved by a less restrictive alternative capable of fulfilling the same purpose (i.e. in a way that results in a less anticompetitive effect).<sup>139</sup> Such an approach encourages judicial micro-managing, as courts will be called upon to determine whether a restraint truly is the least restrictive of all other alternatives. Thus, if a court applied this version of the Rule of Reason analysis to MLB, the franchise relocation rules in their current form would almost certainly be struck down.

Such was the case in a relocation dispute involving the National Football League ("NFL") and one of its

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<sup>138</sup> See *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984) (Holding that "it must be shown that the means chosen to achieve that end are the least restrictive available."); *Sullivan v. National Football League*, 34 F.3d 1091, 1103 (1<sup>st</sup> Cir. 1994) (required the least restrictive alternative to achieve the procompetitive effects); *Chicago Prof'l Sports*, 961 F.2d 667, 675 (1992) (Procompetitive justification rejected due to the availability of a less restrictive alternative. The court held that "One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint."); *International Salt Co. v. United States*, 332 U.S. 392, 397-398, 68 S.Ct. 12, 92 L.Ed. 20 (1947) (Availability of less restrictive means than those used resulted in summary judgment for violations of the antitrust laws.).

<sup>139</sup> See *Sullivan v. National Football League*, 34 F.3d 1091, 1103 (1<sup>st</sup> Cir. 1994) (required the least restrictive alternative to achieve the procompetitive effects); *Chicago Prof'l Sports*, 961 F.2d 667, 675 (1992) ("One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint."); see also *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, at 1396 (9<sup>th</sup> Cir.), *cert denied*, 496 U.S. 900 (1984) ("Because there was substantial evidence going to the existence of [reasonable] alternatives, [the court found] that the jury could have reasonably concluded that the NFL should have designed its 'ancillary restraint' in a manner that served its needs but did not so foreclose competition.").

franchises.<sup>140</sup> In the case of *Los Angeles Memorial Coliseum v. National Football League*,<sup>141</sup> the United States Court of Appeals for the Ninth Circuit held that a rule requiring a three-fourths vote by the individual franchises to approve a relocation into another team's home territory was an unreasonable restraint of trade.<sup>142</sup> In its examination of the relocation rule, the court sought to determine "whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public."<sup>143</sup> The court first noted that the rule plainly resulted in competitive harm by providing teams with "Exclusive territories [that] insulate each team from competition...allowing them to set monopoly prices to the detriment of the consuming public."<sup>144</sup> Furthermore, although the court noted the rule did serve some legitimate purpose to the NFL,<sup>145</sup> they concluded there were less restrictive alternatives that could have been employed to accomplish the same result.<sup>146</sup>

As a result, it is unlikely that a restraint structured in the format of MLB's current franchise relocation restrictions would survive judicial scrutiny as the least restrictive alternative for controlling franchise movement. Indeed, the franchise relocation rule struck down in the *Los Angeles Memorial Coliseum* case, was nearly identical to MLB's

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<sup>140</sup> See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1401 (9<sup>th</sup> Cir.), *cert denied*, 496 U.S. 900 (1984).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1392.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1395.

<sup>145</sup> *Id.* at 1396. (The court determined the NFL had a legitimate interest in "preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures." The court further noted that this could result in an erosion of local confidence and a possible "decline in interest.").

<sup>146</sup> *Id.*

current relocation restrictions. Given the opportunity to review MLB's relocation rule, any court employing the least restrictive approach would be hard pressed to reach a different outcome. However, this is not to say that MLB, the NFL, or any other professional sports league could not maintain any restrictions over franchise movement under the least restrictive alternative approach. Instead, such restraints would need to be "more closely tailored to serve the needs inherent in producing the 'product' and competing with other forms of entertainment."<sup>147</sup>

Fortunately, MLB can take some comfort in the fact that "most lower courts have only required that the restraint be "'reasonably necessary' to achieve the desired effects."<sup>148</sup> While this does not prevent a court from following the *least* restrictive alternative approach, the modern view is that this approach is "too narrow and difficult to implement."<sup>149</sup> One possible reason for the movement away from the least restrictive approach may be that it is often difficult to know where to stop; there may always be a less restrictive option available. Moreover, to hold that the existence of a less restrictive alternative makes a restrictive covenant illegal may be too harsh of a penalty. This is especially true in situations where agreements by joint ventures result in substantial efficiencies while only creating minimal anticompetitive effects.

Instead, a majority of courts have routinely articulated much lower standards, and merely held that an

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<sup>147</sup> *Id.* at 1397.

<sup>148</sup> ABA ANTITRUST SECTION, *supra* note 59, at 123.

<sup>149</sup> *Id.* at 165; see also Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1620 (1986) (The least restrictive alternative approach would be "too demanding since it would place joint venture organizers at the hazard that others might come along later and think of some method of achieving similar efficiencies in a manner that is somewhat less restrictive.").

ancillary restraint<sup>150</sup> must be "reasonably necessary" or less restrictive than other alternatives (the "less restrictive" approach.)<sup>151</sup> The reasonably necessary approach does not require restraints of competition to be the least restrictive, rather the question is "whether the restriction ...is actually 'fairly necessary' in the circumstance of the particular case."<sup>152</sup> In other words, while joint venturers may not have to use the least restrictive means for accomplishing a goal, "the venture may be required to show that its choice of

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<sup>150</sup>ABA ANTITRUST SECTION, *supra* note 59, at 123-24 (In analyzing competitive restraints of joint ventures courts often mention the doctrine of ancillary restraints. Ancillary restraints are distinguished from naked restraints in that they are restrictions which are "part of a larger endeavor whose success they promote." Antitrust law acknowledges that some restrictive covenants may be necessary to the success of a joint venture, and "any alleged anticompetitive effects caused by these agreements must be evaluated in light of the procompetitive benefits of the joint venture itself."); *See also* Rothgery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986) (Ancillary restraints are lawful if *reasonably necessary* to achieve the efficiency sought by a legitimate joint venture).

<sup>151</sup>*See* Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1256-57 (S.D. Fla. 1984) *aff'd*, 779 F.2d 592 (11th Cir. 1986) (In examining restraints for adverse effect on competition, "the relevant question is not whether the challenged practice is the most competitive device that can be imagined, or the 'least restrictive,' but simply whether it is reasonable; i.e., not "unduly" restrictive of competition."); *Law v. Nat'l Collegiate Athletic Ass'n*, 902 F. Supp. 1394, 1410 (D. Kan. 1995) *aff'd*, 134 F.3d 1010 (10th Cir. 1998) ("It is unnecessary for plaintiffs to demonstrate that [a particular restraint] is the least restrictive alternative available...or that comparable benefits could be achieved through viable, less restrictive means.").

<sup>152</sup>*See* Fleer Corp. v. Topps Chewing Gum, Inc. 658 F.2d 139, 151 (3d Cir. 1981) (*quoting* Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, at 1248 (3d Cir. 1975)); *Cf.* Consolidated Farmers Mutual Ins. Co. v. Anchor Savings Ass'n, 480 F.Supp. 640, 653 (D.Kan.1979) (lending policies were reasonable and did not need to constitute the least restrictive alternative).

restrictions was reasonable given an array of possible approaches."<sup>153</sup>

Under this lower threshold, restraints need only be "substantially related to the efficiency-enhancing or procompetitive purposes" of the joint venture.<sup>154</sup> These efficiency justifications can often be very powerful arguments, and can sway a court to uphold restrictions that are traditionally condemned as per se illegal. For example, in *Broadcast Music v. Columbia Broadcasting*,<sup>155</sup> the Supreme Court examined a blanket license arrangement and held that "a bulk license of some type [was] a necessary consequence" to achieve certain efficiencies, and "a necessary consequence of an aggregate license is that its price must be established."<sup>156</sup> According to *Broadcast Music*, challenged restraints should be examined to determine if it is designed to "increase economic efficiency and render markets more, rather than less, competitive."<sup>157</sup>

Therefore, MLB stands a far better chance of successfully retaining its franchise relocation restrictions if they are examined under a less restrictive alternative approach. Today, it is clear that at least some competitive restraints are necessary in professional sports because "[c]ompetitive balance is a prerequisite for a successful team sports league in the long run."<sup>158</sup> MLB would likely argue that the relocation restrictions actually promote competition and should therefore be upheld as "reasonable" by the

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<sup>153</sup> See Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 911 (1986)

<sup>154</sup> See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (Holding that a purchasing cooperative was required to "establish and enforce reasonable rules in order to function effectively.").

<sup>155</sup> See *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>156</sup> *Id.* at 21.

<sup>157</sup> *Id.* at 20.

<sup>158</sup> See ZIMBALIST, *supra* note 16 at 151.

courts.<sup>159</sup> However, as was the case in *NCAA v. Board of Regents*,<sup>160</sup> even valid procompetitive justifications may not permit a restraint to escape review merely because they provide an efficiency. There, the court held that even if individual aspects of an agreement are procompetitive, if on balance the restraint is not reasonably necessary to achieve the proffered efficiencies, it can be illegal.

#### **IV. Swinging for the Fences: The City Of San Jose takes on MLB**

Of course, none of the antitrust analysis discussed above currently applies to MLB, as a result of the *Federal Baseball* decision and MLB's exemption from antitrust law. However, the existence of the exemption has done little to prevent potential litigants from pursuing claims against MLB. As a result, MLB has been forced to defend the exemption time and time again; a task which it has effectively and efficiently accomplished.

Despite the leagues impressive judicial record, a recent lawsuit has once again challenged its validity and thrust MLB into the public limelight. On June 18, 2013 the City of San Jose filed a complaint in the Northern District of California, after numerous attempts to relocate the Oakland Athletics ("Athletics") were met with indifference and refusal from MLB.<sup>161</sup> The City's lawsuit claimed antitrust violations and damages resulting from tortious interference

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<sup>159</sup> See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, *supra* note 97 (Reasoning that Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable).

<sup>160</sup> 468 U.S. 85 (1984).

<sup>161</sup> Jill Tucker and John Shea, *San Jose sues MLB over A's Blocked Move*, SF GATE (June 18, 2013), <http://www.sfgate.com/athletics/article/San-Jose-sues-MLB-over-A-s-blocked-move-4607373.php>

of a contract because of perceived actions undertaken by MLB to block the proposed relocation.<sup>162</sup> Although the district court judge agreed that MLB's exemption is "unrealistic, inconsistent or illogical,"<sup>163</sup> he predictably dismissed the city's antitrust claims, citing principles of *stare decisis*.<sup>164</sup> While MLB claimed victory,<sup>165</sup> the City of San Jose appealed the decision to the Ninth Circuit Court of Appeals,<sup>166</sup> and the battle is unlikely to end there. As both sides continue to posture and prepare for the next round of

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<sup>162</sup> See *City of San Jose v. Office of Comm'r of Baseball*, C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) ("Because interference claims are not exclusively premised on the alleged violation of antitrust law, but are also based on MLB's alleged delay in rendering a relocation decision in frustration of the Option Agreement, the court consider[ed] these claims independently of the antitrust claims." The court held that "The alleged tortious interference with contract was an independently unlawful act sufficient to support the City's tortious interference with prospective economic advantage claim, although the claims may be duplicative.").

<sup>163</sup> *Id.* at 10 (*quoting* *Radovich v. National Football League*, 352 U.S. 445, 452 (1957)).

<sup>164</sup> "[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *City of San Jose v. Office of Comm'r of Baseball*, C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) *quoting* *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir.1970); Associated Press, *S. Jose's Claims Against MLB Denied*, ESPN (Oct. 11, 2013) [http://espn.go.com/mlb/story/\\_/id/9809824/judge-rejects-san-jose-antitrust-claims-vs-mlb](http://espn.go.com/mlb/story/_/id/9809824/judge-rejects-san-jose-antitrust-claims-vs-mlb).

<sup>165</sup> MLB Attorney's stated "Major League Baseball is pleased that the Court dismissed the heart of San Jose's action and confirmed that MLB has the legal right to make decisions about the relocation of its member Clubs." See Paul Hagen, *Judge Dismisses Antitrust Claims in San Jose Lawsuit*, MLB.COM, (Oct. 11, 2013), [http://mlb.mlb.com/news/article/mlb/judge-dismisses-antitrust-claims-in-san-jose-lawsuit?ymd=20131011&content\\_id=62837526](http://mlb.mlb.com/news/article/mlb/judge-dismisses-antitrust-claims-in-san-jose-lawsuit?ymd=20131011&content_id=62837526).

<sup>166</sup> Howard Mintz, *San Jose and A's: City appeals antitrust case against MLB*, SAN JOSE MERCURY NEWS (1/23/2014) [http://www.mercurynews.com/crime-courts/ci\\_24978139/san-jose-appeals-antitrust-case-against-mlb](http://www.mercurynews.com/crime-courts/ci_24978139/san-jose-appeals-antitrust-case-against-mlb).



litigation, the question remains; is the City's lawsuit merely another minor annoyance for MLB, or does this case present unique challenges MLB will be forced to overcome?

For reasons that will be discussed,<sup>167</sup> it seems unlikely that MLB will be able to offer an amicable settlement offer to the City of San Jose, and if the case is not settled, the City will be forced to appeal to the Supreme Court. Fortunately for MLB, and as noted below, the City is unlikely to convince the Court to overrule a precedent that has stood, largely untouched, for nearly a century. While this likelihood certainly provides MLB with a major bargaining advantage, it comes with a price. With litigation comes increased attention, not only from activist judges, but from the public and members of the legislature as well.

#### *A. Analyzing MLB's Predicament*

The recent lawsuit brought against MLB by the City of San Jose presents unique challenges for the league. Unlike the franchise relocation disputes of the 1950s<sup>168</sup> and the 1998 expansion which did not involve encroachment into an already occupied territory,<sup>169</sup> San Jose is located squarely within the operating territory of the San Francisco Giants.<sup>170</sup> With the Giants locked into a lease on their new stadium until 2066,<sup>171</sup> the team's owners are not inclined to willingly

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<sup>167</sup> *Infra* Section IV A.

<sup>168</sup> *Supra* note 130 (In 1953 the Boston Braves were relocated to Milwaukee and the Saint Louis Browns moved to Baltimore. In 1954, the Philadelphia Athletics were sold and relocated to Kansas City).

<sup>169</sup> Grow, *supra* note 131 at \*262-64.

<sup>170</sup> Howard Bryant, "Nowhere Men," ESPN (June 17, 2011), <http://sports.espn.go.com/mlb/columns/story?id=6665421> (Ironically, the San Francisco Giants have territorial rights to the city of San Jose as a result of a "loose, gentlemen's agreement between the [San Francisco Giants and Oakland Athletics] 20 years ago allowing the giants rights to the territory for a ballpark that was never built...").

give up their territorial rights, or negotiate the rights away.<sup>172</sup> The team has enjoyed considerable financial success operating in the San Francisco bay area and worst case scenario would be for another team to move into the heart of Silicon Valley, build a new stadium, and actively seek to poach away lucrative corporate ticket sales.

In one scenario, MLB may pressure the owners of the San Francisco Giants owners to permit the relocation, but ultimately the team retains the power to protect its home territory, and only a seventy-five percent vote of all owners could overturn this exercise of territorial rights.<sup>173</sup> While a three-fourths vote would veto the Giants territorial rights, doing so would open a Pandora's Box for owners everywhere. Not only would San Francisco have the ability to sue MLB by arguing they would suffer significant economic loss by losing control of Santa Clara County, but the precedent such a veto would set is nearly as damaging as losing the exemption entirely. Owners feel secure in their investments because they are protected by territorial monopolies. Once a team's territorial rights have been vetoed, the floodgates could open and similar disputes could arise all across the nation. If the owners veto the Giants

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<sup>172</sup> Susan Slusser, "A's Want Stadium Issue on Agenda for May Owners' Meetings," THE DRUMBEAT (April 16, 2012, 12:19 PM), <http://blog.sfgate.com/athletics/2012/04/16/as-to-put-stadium-issue-on-agenda-for-may-owners-meetings/>.

<sup>173</sup> See Major League Constitution, Article VIII, Section 4, available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4452:rare-documents-mlb-constitution-and-by-laws-now-available-online&catid=43:bsn-news&Itemid=114](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4452:rare-documents-mlb-constitution-and-by-laws-now-available-online&catid=43:bsn-news&Itemid=114); see also CBS San Francisco, *San Jose Files New Suit Against MLB Over Proposed A's Move*, CBS San Francisco (last visited Feb. 15, 2014), <http://sanfrancisco.cbslocal.com/2014/01/23/san-jose-files-new-suit-against-mlb-over-proposed-as-move/> ("The MLB constitutional provisions challenged by San Jose are a measure giving the San Francisco Giants territorial rights over Santa Clara County, which would take a vote of three-fourths of the 30 club owners to change, and a measure requiring a three-fourths vote of approval before a club can relocate.").

rights, other cities seeking a professional baseball team are sure to follow San Jose's example.

Of course this issue would be moot should the Athletics find a suitable location for a new stadium other than San Jose.<sup>174</sup> This would represent the best case scenario for MLB, and would also solve the well-documented complaints the Athletics have with their current facility.<sup>175</sup> Unfortunately for MLB, this would do little for the long-term financial security of the Athletics.<sup>176</sup> If baseball is a business, it seems unlikely that the Athletics would want to relocate to a new stadium in the same area it has failed to financially succeed in over a new stadium in an area widely recognized as extremely lucrative. MLB therefore, is currently poised in an impossible situation; the owners can not conceivably vote to force the relocation, and the league can not dispose of the issue by installing an expansion team.

More importantly, the City is acutely aware of the leagues position, and if history is any indication, the longer this showdown continues, the more likely congressional action becomes. Although pressuring MLB's owners into action has worked in the past, the stakes are much higher this time around. If Congress' attempts to pressure MLB to

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<sup>174</sup> See Jana Katsuyama, *Group Works to Keep the A's in Oakland with Waterfront Ballpark*, KTVU.com (last visited Feb. 15, 2014), available at <http://www.ktvu.com/news/news/local/group-works-keep-s-oakland-waterfront-ballpark/ncxQC/>.

<sup>175</sup> Associated Press, "A's, M's Forced Into Same Locker Room," ESPN (June 17, 2013), [http://espn.go.com/mlb/story/\\_/id/9393784/sewage-problem-puts-oakland-seattle-mariners-same-locker-room](http://espn.go.com/mlb/story/_/id/9393784/sewage-problem-puts-oakland-seattle-mariners-same-locker-room)

<sup>176</sup> Christopher M. Clapp & Jahn K. Hakes, *How Long a Honeymoon? The Effect of New Stadiums on Attendance in Major League Baseball*, JOURNAL OF SPORTS ECONOMICS VOL. 6 NO. 3, 237-63 (Aug. 2005) (Study determined that attendance "honeymoon" effect of a new stadium—after separating quality-of-play effects—increases attendance by 32% to 37% the opening year of a new stadium." Attendance remains above normal levels for only six to ten seasons for ballparks built after 1974).

approving the relocation fall on deaf ears, more substantial tactics may be considered. Because MLB has historically acquiesced to the demands of Congress, the two have never been forced into a significant showdown, and Congress could respond by introducing legislation aimed at curbing the exemption. At that point, MLB will be out of options, and forced to decide whether to open Pandora's Box by vetoing the Giant's rights, or risk losing the exemption it has worked so diligently to defend. While some may believe MLB would be forced to use the veto, it is also plausible that the owners may stand up and challenge Congress to act against the interests of some of their biggest campaign contributors.

Viewed under this lens, the recent case of *City of San Jose v. Commissioner of Baseball*,<sup>177</sup> poses unique challenges for MLB. For one thing, it is unlikely the league will be able to persuade the City to drop the lawsuit. First and foremost, MLB's primary goal is to retain immunity from antitrust scrutiny. Historically, MLB has carefully guarded the exemption by dutifully managing its exposure to the Supreme Court.<sup>178</sup> While the league has successfully retained the exemption for over 90 years, undoubtedly it still prefers to prevent legitimate contests from appearing before the Supreme Court. Although MLB has continuously managed to thwart any serious assault on the exemption by settlement or league expansion<sup>179</sup> neither tactic seems to be a feasible option for dealing with the City of San Jose. The City is not interested in a monetary settlement, and for

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<sup>177</sup> C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013).

<sup>178</sup> When franchise relocation conflicts have materialized in the past, MLB has been able to fend off attacks on its exemption via monetary settlements with aggrieved individuals. See *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); additionally, when challenges have been brought by public employees, MLB has settled disputes through league expansion. See *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994).

<sup>179</sup> *Id.*

reasons discussed below, it is unlikely an expansion team would ever be established in San Jose.

Due to the current rules concerning franchise relocation, MLB teams enjoy absolute monopolies over their respective territories.<sup>180</sup> The current dispute arose because of the City's continued attempts to obtain a franchise, despite being located squarely within the defined territory of the San Francisco Giants.<sup>181</sup> The Giants do not want to see a team establish itself in a new stadium and compete for fans, lucrative box suites, and television deals in the lucrative Silicon Valley.<sup>182</sup> As a result, the San Francisco Giant's ownership group (San Francisco Baseball Associated LP) has refused to consent to allow the Athletics to move into their territory, thereby blocking the proposed relocation.<sup>183</sup> It is this wrinkle that will likely prevent MLB from avoiding litigation by expansion. Because the dispute is not really related to the actual distance between stadiums,<sup>184</sup> but

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<sup>180</sup> See *supra* notes 7-10 and accompanying text.

<sup>181</sup> "Late Oakland owner Walter Haas gave the Giants the OK to assume rights to San Jose in a favor of sorts to former San Francisco owner Bob Lurie when his team was considering moving to Florida. The deal basically happened with a handshake -- and "without compensation," the A's wrote -- and then was approved by baseball's owners." See Associated Press, *A's Seek Territorial Rights Resolution*, ESPN, (Mar. 7, 2012), [http://espn.go.com/mlb/story/\\_/id/7658699/oakland-athletics-san-francisco-giants-odds-territorial-rights](http://espn.go.com/mlb/story/_/id/7658699/oakland-athletics-san-francisco-giants-odds-territorial-rights)

<sup>182</sup> *Id.* ("They cherish their hold on technology-rich Silicon Valley, with Santa Clara County making up 43 percent of the club's territory and generating a significant number of fans, corporate sponsors and other supporters.").

<sup>183</sup> *Id.*

<sup>184</sup> "[A]fter the Giants built a shiny new stadium in San Francisco, many wondered why they wouldn't let the A's move to the South Bay, with a proposed stadium location 50 miles from AT&T Park. (For reference, the distance between Camden Yards in Baltimore and Nationals Park in Washington, another similar two-team market, is less than 40 miles.)" See Al Yellon, *Oakland A's Unwrap Christmas Present: A New Stadium In San Jose*, BASEBALL NATION (Dec. 26, 2011),

instead concerns the ability to capture the attention of the Silicon Valley fan base, the Giants are naturally opposed to any infringement upon its territory.

Because of the Giants' steadfast refusal to allow another team to establish itself in San Jose via relocation or expansion, the City of San Jose has been forced to pursue litigation attacking MLB's exemption. As will be discussed, despite the City's high hopes of striking a blow to the exemption and obtaining a MLB franchise, drastic changes are unlikely to be realized.

*B. The City of San Jose's Lawsuit is Unlikely to Result in an Overruling of the Exemption*

Notwithstanding a recent Supreme Court decision declining to shield a professional sports league from antitrust laws, the fact remains that courts have been reluctant to apply antitrust laws to MLB.<sup>185</sup> Historically, MLB has been extremely successful in fending off attacks against its exemption, and in the process has garnered two Supreme Court affirmations of the exemption's validity. As a result, the legal viability of the exemption is stronger now than ever before. Furthermore, given how successful MLB has been at settling cases which could pose a serious threat to the exemption, removal vis-à-vis judicial review is even more unlikely.

Nevertheless, those who believe judicial removal is likely to occur often point to the historical diminishment of

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<http://www.baseballnation.com/2011/12/26/2661744/oakland-athletics-san-jose-new-stadium-christmas-present>.

<sup>185</sup> Historically, the Supreme Court has upheld MLB's antitrust exemption and asserted that it is the responsibility of Congress to remove the exemption by way of legislation. See *Toolson v. New York Yankees* 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972). But see *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2217 (2010) (The Supreme Court unanimously declined to extend antitrust immunity to collective action by the NFL teams. The Court held the teams could not be considered a "single entity" and their actions were subject to antitrust scrutiny under the rule of reason).

the exemption's scope. Indeed, these arguments have some merit, as over the last twenty years several courts have shown a willingness to divert from a broad application of MLB's exemption. Since 1990, there has been an even split of judicial rulings on the status of MLB's exemption with "One state ruling and one federal ruling [holding] that the exemption applies only to the reserve clause; and one state and one federal ruling held that it applies broadly to the business of baseball."<sup>186</sup> Finally, one recent Supreme Court ruling on antitrust issues in professional sports leagues "effectively broaden[ed], rather than reduce[d], the scope of the Sherman Act."<sup>187</sup>

While the Supreme Court has, to be sure, shown an increased willingness to interfere in the affairs of sports leagues,<sup>188</sup> the possibility of judicial review specifically striking down MLB's exemption is simply unrealistic. In order for such a review to occur: (1) a viable lawsuit capable of reaching the Supreme Court must be brought by a party uninterested in settling; and even more unlikely, (2) the Court must be willing to ignore *stare decisis* and deviate from nearly a century of case law upholding the exemption.

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<sup>186</sup> See ZIMBALIST, *supra* note 16 at 22-23.

<sup>187</sup> Judd Stone & Joshua D. Wright, Antitrust Formalism is Dead! Long Live Antitrust Formalism!: Some Implications of *American Needle v. NFL*, 2009-2010 *Cato Sup. Ct. Rev.* 369, 395 (2010).

<sup>188</sup> See generally *Am. Needle Inc.* 130 S. Ct. 2201 (By refusing to permit the NFL to escape antitrust scrutiny, the Court has signaled its increased willingness to address antitrust issues in the context of professional sports leagues); See also Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball's Antitrust Exemption After American Needle*, 2 *HARV. J. SPORTS & ENT. L.* 265, 290 (2011). ("American Needle...has made the Court's position on antitrust in professional sports more clear than it has been at any time since *Federal Baseball*...In the context of professional baseball, [American Needle] is probably most important as a signal of the Court's willingness to address antitrust issues in professional sports, and to do so with a heavy handedness that has not been seen since *Federal Baseball*.").

Fortunately for MLB, even in the event that the case does reach the Supreme Court, there is a legitimate question regarding the issue of standing that would allow the court to deflect the exemption issue entirely.<sup>189</sup> Moreover, after a casual examination of Supreme Court decisions related to the exemption, it is likely the Court would be eager to utilize the standing issue as a means of sidestepping any decision on the validity of the exemption. This conclusion is evidenced by the Court's retreat on successive occasions to the position that it is the responsibility of Congress to overturn the exemption.<sup>190</sup> While those opposed to the exemption might desire swift and unequivocal action by the Supreme Court, it is far more likely, and perhaps more preferable, that the issue will be tossed aside and left for Congress to address.

Furthermore, as discussed below, the argument for deferral to Congress has ample merit given their increased willingness to become involved in the arena of professional sports.<sup>191</sup> This route is also preferable given that the judicial

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<sup>189</sup> MLB claimed the City lacks standing because the option contract with the Oakland Athletics was never breached and therefore, the City's injuries are too tenuous to be actionable under state and federal antitrust law. *See* Motion to Dismiss at 8-9, *City of San Jose v. Office of the Comm'r of Baseball*, (N.D. Cal. Aug. 7, 2013) (No. 5:13-cv-02787)

<sup>190</sup> *See* *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *see also* *Flood v. Kuhn*, 407 U.S. 258 (1972); This position is puzzling given that as far back as 1951, "The members of Congress did not consider the legislature the best place for defining the legal parameters of the baseball monopoly." The House Sub-Committee on the Study of Monopoly Power concluded the courts "could better determine the legality of [MLB's] operations." *See* CHARLES A. SANTO & GERARD C.S. MILDNER, *SPORT AND PUBLIC POLICY: SOCIAL, POLITICAL, AND ECONOMIC PERSPECTIVES*

<sup>191</sup> *See* Patrick Gavin, *Congress Ponders Football's BCS System*, Politico.com (last visited Feb. 15, 2014), <http://www.politico.com/news/stories/0709/24655.html>; (In 2009, Congress formed a committee to hold hearings regarding the possibility of restructuring the NCAA Men's Football program. The committee was to investigate issues relating to the replacement of the Bowl Championship Series with a different structured playoff format).



system has issued many odd legal outcomes in sports cases, particularly because some judges refuse to view these matters as mere business arrangements.<sup>192</sup> Unsurprisingly, some judges are susceptible to allowing their interest as fans to enter into their reasoning. The exemption itself was created as a result of judicial interpretation, and indeed, a legislative solution may be superior to a simple revocation. If such a revocation were to occur, any number of new and strange rules could be imposed to fill the void.

*C. Can the City's Lawsuit Prompt Congressional Action?*

Given the Supreme Court's trend of deferring to Congress, congressional action is likely the more realistic threat to the continued survival of MLB's antitrust exemption. However, this is not to say congressional action is imminent, or even particularly likely.<sup>193</sup> It is important to note that despite numerous judicial suggestions that Congress is the appropriate entity to remove the exemption should it deem appropriate, the exemption continues to exist.

Yet, Congress has not ignored the effects of the exemption entirely or failed to intervene when necessary. In 1998, Congress stepped up to the plate and passed the

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<sup>192</sup> It has been suggested that the *Federal Baseball* decision was a result of the justices' love for baseball and of their desire to promote and foster the growth of the sport. Indeed, Justice Holmes himself was a "former amateur baseball player. See ZIMBALIST, *supra* note 16 at 16; but see Samuel A. Alito Jr., *The Origin of the Baseball Antitrust Exemption* *Journal of Supreme Court History* 34," no. 2 (July 2009): 183–95.

<sup>193</sup> For one thing, MLB owners are a major source of revenue for political donations. In fact, "MLB organizations pumped in over \$24 million to politicians, PACs and independent expenditure groups throughout the 2012 election cycle." See Louis Serino, "Baseball's (political) heavy hitters," SUNLIGHT FOUNDATION (Mar. 29, 2013), <http://sunlightfoundation.com/blog/2013/03/29/politics-mlb-teams-are-heavy-hitters-republicans/>

Curt-Flood Act<sup>194</sup> which limited the scope of baseball's exemption, and explicitly made antitrust laws applicable to MLB players. Notably, the Curt-Flood Act excluded franchise relocation from the scope of its purview.<sup>195</sup> While this exclusion may indicate Congress's hesitation to do away with the exemption entirely, it does not by itself, prevent antitrust laws from applying to MLB's franchise relocation rules in the future.<sup>196</sup> Furthermore, Congress has demonstrated an increased willingness to exert its influence in the arena of sports league regulation.<sup>197</sup> This trend has proven to be equally true in regards to baseball, where Congress has often used the threat of removing the exemption to pressure MLB into action.<sup>198</sup> Because of this

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<sup>194</sup> 15 U.S.C. § 26b (2013).

<sup>195</sup> 15 U.S.C. § 26b(b)(3) (2013).

<sup>196</sup> See Mozes & Glicksman, *supra* note 128, at 290 n.70 (2011) (The Act states that “[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a) of this section.” Id. at § 26b(b). Senator Orrin Hatch of Utah, a co-sponsor of the bill, noted on the Senate Floor, “With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today.” 145 Cong. Rec. S9621 (daily ed. July 31, 1998) (statement of Sen. Hatch). President Clinton agreed. See Statement on Signing the Curt Flood Act of 1998, 34 Weekly Comp. Pres. Doc. 2150 (Oct. 27, 1998) (“The Act in no way codifies or extends the baseball exemption ....”).

<sup>197</sup> See e.g. H.R. Res. 68, 111th Cong. (2009) (Seeking to alter the landscape of College Football via legislation); Allen Schwarz, *Congress Examines N.F.L. Concussions*, N.Y. TIMES, (Mar. 4, 2010), [http://www.nytimes.com/2010/01/05/sports/football/05concussions.html?\\_r=0](http://www.nytimes.com/2010/01/05/sports/football/05concussions.html?_r=0) (House Judiciary Committee hearing held to investigate the link between professional football and brain injuries.); Brad Wolverton, *Bill in Congress Aims to Give NCAA Athletes Greater Protections*, THE CHRONICLE OF HIGHER EDUCATION, (Aug. 1, 2013), <http://chronicle.com/blogs/players/bill-in-congress-aims-to-give-ncaa-athletes-greater-protections/33327> (Legislation introduced in the U.S. House of Representatives sought to require NCAA colleges to guarantee multi-year scholarships to star players).

<sup>198</sup> JOHN WILSON, PLAYING BY THE RULES: SPORT, SOCIETY, AND THE STATE, 258 (1994) (“The possibility of ‘trading’ [league] expansion for state protection was [a] part of public policy debate as early as the 1950s.”).

power to influence MLB policy decisions, it has been argued that the exemption's continued existence may be far more valuable to Congress than MLB.<sup>199</sup> While this may be true, it also demonstrates Congress' acknowledgment of the exemption's questionable legality. If MLB were ever placed in a situation where it was unable to meet the demands of Congress, repeal of the exemption through legislation may not be such an unlikely scenario.

In fact, Congress has repeatedly leveraged the possibility of removing the exemption into pressuring MLB. In 1951 the U.S. House of Representatives' Subcommittee on the Study of Monopoly Power held several hearings to examine "baseball's operations and allegedly monopolistic aspects," including franchise relocation restrictions.<sup>200</sup> The hearings also addressed concerns regarding the geographic distribution of teams,<sup>201</sup> as there were a mere sixteen teams located in ten cities.<sup>202</sup> Due to increasing pressure resulting from the subcommittee's final report, by 1954 "MLB had acquiesced to congressional threats to revoke its antitrust exemption by relocating each of the three struggling franchises identified in [the report]."<sup>203</sup>

In addition to pressuring MLB to relocate franchises, the legislature has often influenced league expansion as well.

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<sup>199</sup> Grow, *supra* note 131 (Arguing that Congressional threats of revoking the exemption have resulted in valuable, procompetitive concessions from MLB).

<sup>200</sup> See 2 JAMES EDWARD MILLER, *THE BASEBALL BUSINESS: PURSUING PENNANTS AND PROFITS IN BALTIMORE*, 13 (1990) (In the 1950s and 1960s, congress held hearings to pressure "baseball to expand, to improve the situation of the minor leagues or to [permit] increased television or radio coverage.").

<sup>201</sup> *Id.* (Specifically, MLB's failure to relocate or expand franchises in response to the nation's changing demographics).

<sup>202</sup> See *MLB Season History – 1951*, ESPN (last visited Mar. 27, 2014), [http://espn.go.com/mlb/history/season/\\_/year/1951](http://espn.go.com/mlb/history/season/_/year/1951).

<sup>203</sup> Grow, *supra* note 131 at \*263.

Congress has frequently convened hearings to discuss MLB's antitrust exemption for the primary purpose of influencing MLB to expand.<sup>204</sup> One prominent example occurred in 1992 after MLB owners refused to approve the sale and relocation to Tampa Bay of the San Francisco Giants.<sup>205</sup> Faced with proposed legislation aimed at revoking the exemption,<sup>206</sup> MLB announced that it would expand again,<sup>207</sup> and in 1998, baseball franchises arrived in Tampa Bay and Phoenix.<sup>208</sup>

Despite Congress' history of pressuring MLB, the legislature has not yet seen fit enact blanket legislation applying antitrust laws to MLB. Moreover, Congress had the opportunity to limit the exemption when they passed the Curt-Flood Act in 1998, and chose not to address concerns regarding relocation restrictions. It is not as though these restrictions were not part of the public debate at that time either, and the legislation was passed at the same time there was significant concern the San Francisco Giants would be sold and relocated to Tampa Bay, Florida. Furthermore, it is

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<sup>204</sup> *Id.* at 267-68. (Pressure resulting from the 1976 U.S. House of Representatives Select Committee on Professional Sports hearings would eventually result in the 1977 expansion which placed teams in Seattle and Toronto. In 1987, a group of senators and representatives created the Task Force on the Expansion of Major League Baseball and after threatening to introduce legislation attacking the exemption, MLB expanded in 1993 by adding teams to Denver and Miami).

<sup>205</sup> Murray Chass, "BASEBALL; Look What Wind Blew Back: Baseball's Giants," N.Y. TIMES, (Nov. 11, 1992), <http://www.nytimes.com/1992/11/11/sports/baseball-look-what-wind-blew-back-baseball-s-giants.html>

<sup>206</sup> "The bill's proposed mission was "To amend the Clayton Act to make the antitrust laws applicable to the elimination or relocation of major league baseball franchises." See H.R. 3288 107<sup>th</sup> Congress 1<sup>st</sup> Session available at <http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3288> (last visited Feb. 8, 2014),

<sup>207</sup> Chass, *supra* note 205.

<sup>208</sup> See *Expansion of 1998*, BASEBALL REFERENCE (last visited Mar. 27, 2014), [http://www.baseball-reference.com/bullpen/Expansion\\_of\\_1998](http://www.baseball-reference.com/bullpen/Expansion_of_1998) (last visited Feb. 8, 2014).

unlikely that Congress would sufficiently align itself behind the interests of the City of San Jose. Among other things, universal support for unfettered competition between individual franchises over cities and territories does not exist.

Quite clearly, cities who already enjoy the privilege of having a baseball franchise would be opposed to legislation which would make it easier for their beloved team to leave. For example, baseball fans in Oakland, would want the current franchise relocation restrictions to be fully enforced so as to prevent the Athletics from abandoning the city to relocate to a newer stadium. On the opposite end of the spectrum, consumers of baseball in San Jose likely see the restrictions as manifestly unfair. Congressional debates over the subject are likely to mirror this contentious relationship, and it would be no easy task craft substantial antitrust legislation specifically targeting MLBs exemption.

## **V. Conclusion**

To be sure, commentators who vehemently protest the exemption's continued existence,<sup>209</sup> will be closely monitoring City of San Jose's lawsuit. Because of the competing interests of all parties involved, this lawsuit represents a very real threat for MLB, and one it may be unable to prevent from reaching the Supreme Court. Those who would wish to see the exemption overruled however, are likely to walk away disappointed. Despite the novel nature of the City's case, the Court has twice upheld the exemption's validity and is unlikely to reverse course now.

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<sup>209</sup> See Mozes & Glicksman, *supra* note 128, at 292. ("If MLB were brazen enough to raise the exemption as a defense to such a suit in the Supreme Court, the Court would be right to strike it down and should take the opportunity to remove the exemption entirely.").

Despite the similarity of MLBs franchise relocation restrictions to those of the other major professional sports leagues, by virtue of the exemption, MLB is capable of exercising far greater levels of control over its individual franchises. However, despite being subject to the antitrust laws of the United States, other professional leagues have been able to survive, and even thrive. In fact, the NFL is currently far more profitable than MLB, and the NBA has seen a historic increase in value over recent years.<sup>210</sup> Therefore in any discussion related to antitrust laws and MLBs restrictions, ultimately the question that must be asked whether the exemption is even necessary anymore.

The answer may very well depend on which version of the Rule of Reason is eventually adopted by the Supreme Court. In the absence of an exemption, it would be one thing for a court to utilize the less restrictive approach and require MLB to demonstrate that its territorial restrictions were reasonably related to a procompetitive aspect of the league. However, it would be quite another for the courts to apply the least restrictive approach. Under this approach, judicial mistakes would be amplified as courts struggle to determine whether a certain set of restrictions represents the optimal balance between efficiency and competition. The end result could very well be another *Federal Baseball* decision, as courts may be ill-equipped to deal with antitrust issues in professional sports where market definitions are far from apparent and the effects of restraints are highly speculative. Indeed, there are very real concerns over the continued

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<sup>210</sup> See Chad Language, *A Look At Franchise Values Across The NFL, NHL, MLB And NBA*, SPORTING CHARTS (Nov. 28, 2012) (Updated: July 15, 2013), <http://www.sportingcharts.com/articles/off-the-charts/a-look-at-franchise-values-across-the-nfl-nhl-mlb-and-nba.aspx>; see also Kurt Badenhausen, *As Stern Says Goodbye, Knicks, Lakers Set Records As NBA's Most Valuable Teams*, FORBES (Jan. 22, 2014) [http://www.forbes.com/fdc/welcome\\_mjx.shtml](http://www.forbes.com/fdc/welcome_mjx.shtml) ("The average NBA franchise is worth (equity plus debt) \$634 million, up 25% [in 2014 as compared to 2013].").

existence of professional sports leagues if every location dispute was subject to micro-management by the judiciary.

Finally, too often are the negative effects of the exemption amplified and dissected, while the benefits remain undiscussed. Bidding wars between cities and ownership groups seeking to obtain a franchise are bad for the business of baseball and would inevitably place a significant burden on the judicial system. Additionally, although consumers often see franchise relocation restrictions as working against their interests, this view forgets that the restrictions equally confine ownership groups. The City of San Jose's lawsuit very clearly demonstrates this point as the Oakland Athletics have been prohibited from obtaining a new stadium in a profitable territory. However, if the exemption were removed and MLBs franchise restrictions struck down by a court as unreasonable restraints on competition, owners would find it far easier to hold cities hostage for new stadiums and favorable lease deals. The restrictions ultimately function as another hurdle in an owner's attempts to pick up and move to a new territory, and removing that hurdle could have untold consequences, the least of which being widespread and frequent relocations resulting in league-wide instability.

Whatever the outcome of the City of San Jose's lawsuit, the competing concerns discussed in this Comment should be carefully examined and weighed. As the saying goes, "The grass is always greener on the other side." Although the current MLB system is often difficult to navigate and characterized by dealings of wealthy owners carving up a map, who knows what system would inevitably replace it. Consumers therefore, should not be so quick to bemoan the existence of MLBs antitrust exemption. It can not be denied that MLB has enjoyed a significant period of stability, one which has fostered on-field competition and

rivalries. These rivalries and storylines are driving forces behind increased interest in the game, and as long as there is consumer interest, the game of baseball will continue to thrive.



The Olympics, Ambush Marketing and Sochi Media

By

Adam Epstein\*

*I. Introduction*

The purpose of this article is to explore the concept of *ambush marketing* and the legal environment surrounding it. With the advent of the Sochi Olympic Games held in February, 2014, ambush marketing again makes its way to the forefront of national and international attention. Certainly, the discussion of ambush marketing in advertising strategies would be a useful tool at any point in a law course that addresses intellectual property such as trademarks and domain names, and consumer protection issues in general.

While the concept of ambush marketing is nothing new, the biennial Olympic Games once again allows for a discussion of the issues involved when organizations attempt to utilize ambush marketing, also known as *guerilla marketing*, *parasitic marketing*, or simply the *unofficial games*.<sup>1</sup> In sum, ambush marketing is an intentional attempt by an advertiser to associate itself with an event though it did not pay for the right to be associated with it in the first place.<sup>2</sup>

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<sup>1</sup> See ADAM EPSTEIN, SPORTS LAW 397-99 (2013) (discussing ambush marketing generally and noting that while ambush marketing is not, per se, a violation of the Lanham Act, it could be considered unfair competition under §43 of the Act).

<sup>2</sup> *Id.*; see also John Grady & Steve McKelvey, *Ambush Marketing Lessons from the London Olympic Games*, SPORTSBUSINESS J. (Oct. 22, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/10/22/Opinion/Grady-McKelvey.aspx> (offering that ambush marketing is a “controversial practice whereby businesses that are not official sponsors conduct advertising and promotional activities that seek to capitalize on the event’s good will, reputation and popularity.” The authors also observe that rarely,

Thus, the organization is not an *official sponsor* of an event though through advertising a consumer might believe that it is. Examples of ambush marketing events often include the Olympic Games, the Super Bowl, the FIFA World Cup, the Daytona 500, Kentucky Derby, and so on.<sup>3</sup>

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however, do ambush marketers actually infringe on the trademarks of the sport organization or event, though they do associate themselves with the event).

<sup>3</sup> EPSTEIN, *supra* note 1, at 398 (citing similar examples and noting that MasterCard obtained an injunction against Sprint from issuing credit cards with World Cup '94 trademarks in MasterCard Int'l, Inc. v. Sprint Commc'ns Co., 1994 WL 97097 (S.D.N.Y. 1994); *see also* Joe Daly, *Dutch Brewery Sends in Blondes for World Cup Ambush Marketing Stunt*, HUFFINGTON POST (June 17, 2010), [http://www.huffingtonpost.com/2010/06/17/world-cup-ambush-marketing\\_n\\_615872.html](http://www.huffingtonpost.com/2010/06/17/world-cup-ambush-marketing_n_615872.html) (discussing the staged event in which Dutch brewery, Bavaria, at a World Cup match in Johannesburg, South Africa in 2010, intentionally had 36 blonde women wearing orange (the color of the Dutch national team) mini-dresses promoting the beer); *see also* Katherine Levy & Daniel Farey-Jones, *FIFA Cracks Down after World Cup Ambush Marketing Stunt*, MARKETING MAG. (June 18, 2010), <http://www.marketingmagazine.co.uk/article/1010807/fifa-cracks-down-world-cup-ambush-marketing-stunt> (noting that FIFA filed a civil case against Bavaria as well as filing criminal charges against the two Dutch women alleged to have organized the stunt and were charged with contravening the South African Merchandise Marks Act as a result of their actions during the Holland-Denmark game. The authors also note that it is against FIFA regulations to promote any brands other than official sponsors during the World Cup games, and South Africa passed laws ahead of the World Cup to prohibit such activity. Similarly, apparently Bavaria utilized a similar stunt in the 2006 World Cup in Germany when a group of Dutch fans supporting Holland wore orange lederhosen despite that fact that Budweiser was the official beer sponsor of both events); *but see* Dickerson M. Downing, Mary R. Bram, Crowell & Moring & Rodrigo Azevedo & Silveiro Advogados, *Ambush Marketing: Coming Soon to a Stadium Near You*, ASS'N CORP. COUNS. (Jan. 22, 2013), <http://www.acc.com/legalresources/quickcounsel/amcstasny.cfm> (discussing the impact that ambush marketing might have related to Brazil's upcoming 2014 FIFA World Cup Brazil™ and the 2016 Summer Olympic and Paralympic Games in Rio de Janeiro will bring an onslaught [Footnote continues on next page . . .])

ambush marketing attempts that might violate the Brazilian Industrial Property Act, the Copyright Act, the Sports Act and even the Civil Code.

*II. Legal Environment and Ambush Marketing*

*A. Lanham Act: The Federal Trademark Law*

In the United States, the foundation for discussion of the legal environment surrounding ambush marketing likely begins with most relevant federal law, the Lanham Act.<sup>4</sup> This 1946 law, the federal trademark law, prohibits the unauthorized use of a registered trademark in connection with the sale, offering for sale, distribution, or advertising of the ambusher's goods or services, if such use is likely to cause consumer confusion or likely to deceive as to the mark's affiliation, connection, association or origin.<sup>5</sup> The Lanham Act also prohibits the registration of a mark, such as a trademark or service mark, which is determined to be immoral, deceptive or scandalous.<sup>6</sup>

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However, the article also mentions how attempts by South Africa to penalize the Dutch beer company Bavaria actually brought more attention to the brewery and in essence gave it free worldwide publicity).

<sup>4</sup> 15 U.S.C.A. § 1051 et seq. (2013).

<sup>5</sup> 15 U.S.C.A. § 1125(a) et seq. (2013) (False Designations of Origin, False Descriptions, and Dilution Forbidden). Note that Subchapter III of the Lanham Act, codified in section 1125, prohibits the use of a false designation of origin or a false or misleading description or representation of fact thereby avoiding a likelihood of confusion among consumers. However, courts often refer to this simply as §43(a) of the Lanham Act. §43(a) of the Lanham Act prohibits the use of a false designation of origin or a false or misleading description or representation of fact.

<sup>6</sup> *Id.* For example, this is the heart of the issue related to whether or not the name *Washington Redskins* violates federal law and continues to be the subject of lawsuits to enjoin its use. See Ian Botnick, *Honoring Trademarks: The Battle to Preserve Native American Imagery in the National Collegiate Athletic Association*, 7 J. MARSHALL REV. INTELL. PROP. L. 735, 743-44 (mentioning the line of *Harjo* cases in which a group of Native Americans petitioned the U.S. Patent and Trademark Office to cancel six trademarks including the Washington Redskins on the grounds that it was disparaging to Native Americans); See also EPSTEIN, SPORTS LAW at 386-87 (exploring the case *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005) case and other potential "immoral, deceptive, or

An often cited example of trademark infringement includes association with the NCAA *March Madness* basketball tournament held each spring.<sup>7</sup> For example, in 2001, the National Collegiate Athletic Association (NCAA) sued Coors Brewing over trademark infringement because the brewer had Coors Light Tourney Time Sweepstakes in its advertisements and giving away four 2001 Final Four tickets.<sup>8</sup> After a legal battle, Coors paid \$75,000 to the NCAA to settle the case in 2003.<sup>9</sup>

### *B. "Olympic" and United States Olympic Committee*

When exploring ambush marketing, many are unaware that under federal law the United States Olympic Committee (USOC) has the exclusive rights to use the word *Olympic* and *Olympiad* in advertising and promotions, including simulations such as *Olympik*, with few exceptions granted in the U.S.<sup>10</sup> The USOC today governs eligibility, selection and participation in the Olympic Games, the Paralympic Games, and Pan American Games.<sup>11</sup> The

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scandalous" matters involving trademarks and Native American nicknames and connotations) and at 390 (discussing the National Collegiate Athletic Association and ethnic-based mascot issues).

<sup>7</sup> EPSTEIN, *supra* note 1, at 389-90.

<sup>8</sup> *Id.* at 398 (referencing Nat'l Collegiate Athletic Ass'n v. Coors Brewing Co., No. IP01-1768 (S.D. Ind. filed Nov. 27, 2001); *see also* Rick Callahan, *NCAA Sues Coors for Final Four Promotion*, USA TODAY (Nov. 28, 2001), <http://usatoday30.usatoday.com/sports/college/basketball/men/2001-11-28-finalfour-promo.htm>.

<sup>9</sup> *See* Duran Inci, *What is Ambush Marketing?*, OPTIMUM7.COM (Nov. 4, 2011), <http://www.optimum7.com/internet-marketing/sem/what-is-ambush-marketing.html>.

<sup>10</sup> The term simulations refers to alternate or similar spellings of *Olympic*. *See, e.g.*, United States Olympic Comm. v. Tobyhanna Camp Corp., 2010 U.S. Dist. LEXIS 117650 (M.D. Pa. Nov. 4, 2010) (issuing a permanent injunction to stop using *Olympik* and the Olympic rings).

<sup>11</sup> TED STEVENS OLYMPIC AND AMATEUR SPORTS ACT OF 1998 (TSOASA), 36 U.S.C. § 220521 et seq. (2011); *see also* Adam Epstein, *Go for the Gold*

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organization was federally chartered (i.e., established) by the U.S. Congress and remains a private, non-profit organization.<sup>12</sup> Still, the USOC has exclusive rights in accordance with authority granted to it by the Amateur Sports Act (1978) and as amended twenty years later by the Ted Stevens Olympic and Amateur Sports Act (1998).<sup>13</sup> More specifically, under federal law the USOC has the exclusive right to use:

- (1) the name “United States Olympic Committee”;
- (2) the symbol of the International Olympic Committee, consisting of 5 interlocking rings, the symbol of the International Paralympic Committee, consisting of 3 TaiGeuks, or the symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;

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*by Utilizing the Olympics*, 29 J. LEGAL STUD. EDUC. 313 (2012) (offering in the pedagogical piece that both the Winter and Summer Olympics were held during the same year through 1992. Then, beginning in 1994, the Winter and Summer Olympics alternate in even numbered years).

<sup>12</sup> See Epstein, *supra* note 11, at 315 (offering in note 7 that the USOC was established as a federally chartered organization in 1950 though it had survived under different names until becoming the USOC in 1961). Note that the authority of the federal government to create a private corporation to carry out a public purpose emanates from the Necessary and Proper Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 18 (Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”), and the Supreme Court decision in *McCulloch v. Maryland*, 17 U.S. 316, 325-26 (1819).

<sup>13</sup> The AMATEUR SPORTS ACT OF 1978 was codified at 36 U.S.C. §§ 371-396. It has since been re-codified and modified by the TED STEVENS OLYMPIC AND AMATEUR SPORTS ACT OF 1998, 36 U.S.C. § 220521 et seq.; see generally Noelle K. Nish, *How Far have We Come? A Look at the Olympic and Amateur Sports Act of 1998, the United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 SETON HALL J. SPORTS L. 53 (2003).

(3) the emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and

(4) the words “Olympic,” “Olympiad,” “Citius Altius Fortius,” “Paralympic,” “Paralympiad,” “Pan-American,” “America Espirito Sport Fraternite,” or any combination of those words.<sup>14</sup>

However, it is also important to recognize that the use of the word *Olympic* has a “grandfather clause” for those businesses or organizations who used *Olympic* prior to September 21, 1950.<sup>15</sup> There is also an exemption for the use of the word *Olympic* when it refers to the naturally occurring mountains or geographical region of the same name that were named prior to February 6, 1998, as long as such business, goods, or services are operated, sold, and marketed in the State of Washington west of the Cascade Mountain range and operations, sales, and marketing outside of this area are not *substantial*.<sup>16</sup>

### *C. Internet Issues*

As expected, the advent of the Internet has created numerous challenges which have revealed trademark and consumer protection issues generally. As a result, Congress amended the Lanham Act by passing the Anticybersquatting Consumer Protection Act (ACPA) in 1999 to prevent a cybersquatter from registering a web domain name in order to profit from the name or mark in bad faith and to prevent the likelihood of consumer confusion.<sup>17</sup>

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<sup>14</sup> 36 U.S.C. § 220506 (a) (2013).

<sup>15</sup> 36 U.S.C. § 220506 (d) (1) (2013).

<sup>16</sup> 36 U.S.C. § 220506 (d) (3) (B), (C) (2013).

<sup>17</sup> 15 U.S.C. § 1125(d) (2013) Meanwhile, typosquatting is a form of cybersquatting in which an owner speculates that someone will misspell an otherwise legitimate domain name and purchases that variation on

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Issues related to the use of the word *Olympic* have also required that the World Intellectual Property Organization (WIPO), based in Geneva, intervene to resolve Internet domain name disputes including cybersquatting.<sup>18</sup> For example, in *United States Olympic Committee v. MIC*, WIPO ordered a private company that registered the domain name *usolympicstore.com* to be surrendered to the USOC.<sup>19</sup> Similarly, the 2012 London Organising Committee for the Olympic Games (LOCOG) and Paralympic Games Limited brought a complaint seeking the transfer of the domain name *mylondon2012.com*.<sup>20</sup> A WIPO Panel held that the Complainants had rights in the *London 2012* trademark, the registration of the name had been done in bad faith, and utilization without permission constituted a violation.<sup>21</sup>

### *III. Olympic Environment*

#### *A. Infringement Examples: U.S.*

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the name in order to make a profit. For example, registering the domain name Goggle.com (a misspelling of Google.com) with the hope that someone making a typo will be driven to that website; *see also* EPSTEIN, *supra* note 1, at 398.

<sup>18</sup> EPSTEIN, *supra* note 1, at 399.

<sup>19</sup> London Organising Comm. of the Olympic Games & Paralympic Games limited v. H&S Media Ltd, WIPO Case No. D2000-0189, *available at* <http://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-0415.html>.

<sup>20</sup> *Id.* H&S Media Ltd. had registered the domain name *mylondon2012.com* on 6 July 2005, the same date as the International Olympic Committee announced that London's bid to host the Games in 2012 had been successful.

<sup>21</sup> *Id.* When the Complainant learned about the registration, it sent a demand letter to the Respondent, seeking the transfer of the domain name to it on the basis that only the London Organising Committee and entities licensed by it were permitted to use representations likely to suggest an association between traders and their goods and services and the London Olympics, under the *London Olympic Games and Paralympic Games Act 2006*.

The USOC has been quite proactive in protecting its exclusive rights and marks, and the USOC annually protects its intellectual property rights over the exclusive *commercial* use of the word *Olympic* by sending cease and desist letters to alleged violators.<sup>22</sup> In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, the Supreme Court of the United States affirmed an injunction against the use of the word Olympic as part of the Gay Olympic Games.<sup>23</sup> San Francisco Arts & Athletics, Inc., a nonprofit California corporation, had promoted the Gay Olympic Games in 1982 by using Olympics on its letterheads and mailings and on merchandise.<sup>24</sup>

After noncompliance with a cease and desist request, the USOC brought suit in federal district court sought and received a permanent injunction.<sup>25</sup> The U.S. Supreme Court held that Congress granted the USOC exclusive use of the word Olympic, and the USOC's property right in the word

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<sup>22</sup> See Epstein, *supra* note 11, at 330 (referencing in note 75, *United States Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263 (2d Cir. 1984) (affirming a permanent injunction against Intelicense, a Swiss corporation, and its sublicensee, International Sports Marketing, Inc. (ISM), a Vermont corporation, to use, market, and sublicense within the United States the official pictograms of the International Olympic Committee (IOC) without the consent of the USOC); *compare* *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112 (S.D.N.Y. 1980) (holding that plaintiffs who designed and distributed a poster without charge in order to oppose state plans to convert the Olympic Village in Lake Placid into a prison after the winter games did not violate USOC's trademark rights because it was not used for the purpose of trade, or to induce the sale of goods and services); *referencing* Anita M. Moorman & T. Christopher Greenwell, *Consumer Attitudes of Deception and the Legality of Ambush* [Footnote continues on next page . . .]

*Marketing Practices*, 15 J. LEGAL ASPECTS OF SPORT 183, 190 (2005) (noting that the USOC is often an active litigant when protecting its rights)).

<sup>23</sup> *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



and its associated symbols and slogans can be protected.<sup>26</sup> This event is known today as the *Gay Games*.<sup>27</sup>

In recent years, the USOC appears to have turned up its efforts to protect its intellectual property rights and prevent the unauthorized use of its marks but particularly the commercial use of the word *Olympic*. It has been noted that Oregon's *Ferret Olympics* (2005),<sup>28</sup> the rock band *Olympic Hopefuls* (2005),<sup>29</sup> and a comedy club in Chicago called the *ImprovOlympic*<sup>30</sup> were forced to change their name.<sup>31</sup> The city of Seattle no longer has an *Oyster Olympics* (2007)<sup>32</sup> eating contest, nor are there *RobOlympics* in San Francisco (a robotics competition),<sup>33</sup> or the *Redneck Olympics*.<sup>34</sup>

While the USOC battles potential infringers, the International Olympic Committee (IOC) appears to focus its attention more on ambush marketers who attempt to associate themselves with the biennial event related to the host city of the Olympic Games. This might be due to the fact that the IOC could be more concerned with the multi-million dollar investments its sponsors pay for the rights to associate themselves with the Games.<sup>35</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> See Epstein, *supra* note 11, at 331.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 332.

<sup>34</sup> *Id.* Apparently the Redneck Olympics have changed their name to the *Redneck Games*. See SUMMER REDNECK GAMES, <http://summerredneckgames.com/2012-schedule-of-events/> (last visited Nov. 24, 2013) (offering that the events took place in East Dublin, Georgia, and included Watermelon Seed Spitting, Bobbin' for Pig Feet, Mudpit Belly Flop, and Hubcap Hurl, among other things).

<sup>35</sup> See Tripp Mickle, *IOC Ready to Raise Price of joining its TOP Program*, SPORTSBUSINESS J. (Sept. 23, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/09/23/Olympics/IOC-TOP.aspx> (offering that the IOC is considering double the 4-year

*B. International Examples: Ambush Marketing*

The IOC has exclusive rights to the five interlocking rings under the Nairobi Treaty of 1981.<sup>36</sup> This treaty allows the IOC to have exclusive rights to the Olympic symbol, flag, motto, anthem and the games themselves.<sup>37</sup> Associating oneself with The Olympic Partners program (TOP) grants exclusive marketing rights for summer and winter Olympic Games for a hefty fee averaging around \$25 million per year.<sup>38</sup> Today, the IOC requires host countries and cities such as Sochi, Russia, for example, to enact special-event legislation to curtail ambush marketing and illusory association with the Games.<sup>39</sup>

For decades, non-official sponsors of the Olympic Games have found ways to use the Olympic event platform to generate interest in its own product or service. The concept of ambush marketing and the Olympics, however, appears to have emerged from the exposure of the 1984 Los Angeles Olympics.<sup>40</sup> Fuji won the rights to be an official sponsor, but competitor Kodak purchased “extensive advertising” during the broadcast of the Games themselves giving the impression that Kodak was affiliated with the

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(quadrennium) sponsorship fee from \$100M to \$200M but also reducing the number of partners in The Olympic Partnering (TOP) program).

<sup>36</sup> EPSTEIN, *supra* note 1, 391.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also Mickle, *supra* note 35.

<sup>39</sup> See, e.g., Steve McKelvey, *As Games Approach, Time to Reconsider Ambush Marketing*, SPORTSBUSINESS J. (Jan. 18, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/01/20100118/Opinion/As-Games-Approach-Time-To-Reconsider-Ambush-Marketing.aspx> (discussing how the ambush marketing “orgy” that took place in Atlanta’s 1996 Olympic Games led to subsequent Olympic host sites, in this instance the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC), and questioning how extreme and obsessive measures to attempt to prevent ambush marketing might do more harm than good).

<sup>40</sup> See Inci, *supra* note 9.

Games.<sup>41</sup> Additionally, Nike aired television ads during the same Olympic Games with athletes and used the Randy Newman song *I Love L.A.*<sup>42</sup> Subsequent marketing research found more consumers thought Nike was the official sponsor than Converse, the actual sponsor of the Los Angeles Olympic Games.<sup>43</sup>

In 1988, Visa was the paid sponsor of the Seoul, Korea Olympic Games, but American Express used the Olympic stadium in its advertising and Visa subsequently accused American Express of ambush marketing.<sup>44</sup> The 1992 Barcelona, Spain Olympics is noted as the Olympics in which NBA star Michael Jordan had to cover up official sponsor Reebok with an American flag since he had a personal endorsement deal with Nike.<sup>45</sup> In 1996, Reebok

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<sup>41</sup> *Id.*

<sup>42</sup> See Michael Hiestand, *Nike, Famed for Ambush Marketing, Tries New Track*, USA TODAY (July 25, 2012), <http://content.usatoday.com/communities/gameon/post/2012/07/nike-famed-for-olympic-ambush-marketing-tries-new-tack/1#.UpInWcRwq6U>.

<sup>43</sup> *Id.*

<sup>44</sup> See Tripp Mickle, *Visa Goes for Gold: Behind the Company's Acclaimed Program*, SPORTSBUSINESS J. (July 23, 2012), <http://www.sportsbusinessdaily.com/SB-Blogs/Olympics/London-Olympics/2012/07/visaJuly23.aspx>. (offering that the 1988 Olympics (both the Winter Games in Calgary, Alberta and the Summer Games in Seoul, Korea) also paid off nicely for Visa with its advertising campaign, "bring your Visa card, because the Olympics don't take American Express."); see also Rebecca Hobson, *Seven Best Olympic Ambush Marketing Ploys*, LONDON LOVES BUSINESS.COM (July 5, 2012), <http://www.londonlovesbusiness.com/business-news/london-2012-olympics/seven-best-olympic-ambush-marketing-ploys/2884.article> (offering that after American Express (Amex) lost its rights to Visa beginning in 1984, an all-out war began between the two companies that carried over to Barcelona (1992) and Lillehammer, Norway (1994) in which Amex fought back in its advertising by offering that American's did not need visas to travel to Spain and Norway, respectively).

<sup>45</sup> See, e.g., Jared Wade, *How the Dream Team Foreshadowed the Olympics' Sponsorship Controversy*, RISK MGMT. (Aug. 22, 2012), <http://www.rmmagazine.com/2012/08/22/how-the-dream-team-foreshadowed-the-london-olympics-sponsorship-controversy/>; see also

paid \$40M to be the official sponsor of the Atlanta Games, but Nike bought up billboards around Atlanta thereby associating itself with the event at a much cheaper cost and becoming known as the “ambush of all ambushes.”<sup>46</sup>

In 2010, Verizon and Subway television commercials appeared to show legitimate sponsorship of Vancouver Olympic Games, but in fact neither were official USOC sponsors.<sup>47</sup> In the Subway commercial, Michael Phelps swims all the way to an unnamed city in Western Canada which appears to be exactly where Vancouver is located and was characterized as ambush marketing.<sup>48</sup>

### *C. London 2012*

More recently, in 2012, Nike utilized an effective television advertisement campaign *Find Your Greatness* which praised the efforts of anonymous athletes in other towns named London around the world, thereby associating Nike with London towns though Nike had no sponsorship with the London Games themselves.<sup>49</sup> Meanwhile, Nike competitor Adidas had paid millions for its *official* status for

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Peter Hartlaub, *The Top-8 Olympic Marketing Screw-ups*, NBC NEWS.COM (Aug. 6, 2008),

<http://www.nbcnews.com/id/26001006/#.UpJWDMRwq6U>.

<sup>46</sup> See Abram Sauer, *Ambush Marketing: Steals the Show*, BRAND CHANNEL (May 27, 2002),

[http://www.brandchannel.com/features\\_effect.asp?pf\\_id=98](http://www.brandchannel.com/features_effect.asp?pf_id=98).

<sup>47</sup> See, e.g., Stuart Elliott, *Subway Takes Ambush Marketing Complaints in Stride*, N.Y. TIMES (Feb. 11, 2010),

[http://mediadecoder.blogs.nytimes.com/2010/02/11/subway-takes-ambush-marketing-complaints-in-stride/?\\_r=0](http://mediadecoder.blogs.nytimes.com/2010/02/11/subway-takes-ambush-marketing-complaints-in-stride/?_r=0).

<sup>48</sup> *Id.* One wonders if it mattered to consumers that swimming is a summer Olympic event and not a winter sport.

<sup>49</sup> See Mark Sweney, *Olympics 2012: Nike Plots Ambush Campaign*, GUARDIAN (July 25, 2012),

<http://www.theguardian.com/media/2012/jul/25/olympics-2012-nike-ambush-ad>.

the London Games.<sup>50</sup> Nike's ambush marketing advertising campaign proved extremely successful.<sup>51</sup>

However, in order to crack down on ambush marketing, special legislation was enacted by the British government as part of its bid requirement to host the Games entitled *The London Olympic Games and Paralympic Games Act 2006* and contained provisions to attempt to restrict ambush advertising at the 2012 Summer Olympics through the efforts of the London Organising Committee of the Olympic and Paralympic Games (LOCOG).<sup>52</sup> For example, it demanded the removal of advertisements for the betting company Paddy Power which announced that it was "The Official sponsor of the largest athletics event in London this year! There you go, we said it (ahem, London France that is)," referring to an egg-and-spoon race in London, a village in France.<sup>53</sup> LOCOG subsequently relaxed its position.<sup>54</sup> Still, LOCOG "police" did force a real estate agency to remove a window display from simulating Olympic rings, and also a butcher's sausages that were shaped in the form of the Olympic rings had to be removed as well.<sup>55</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; see also Mallory Russell, *Nike Ambushes Adidas on World Stage...Again*, AD AGE (July 21, 2012), <http://adage.com/article/the-viral-video-chart/nike-ambushes-adidas-world-stage/236400/> (demonstrating that the Nike advertisement led the online video views).

<sup>52</sup> See Esther Addley, *Olympics 2012: Branding 'Police' to Protect Sponsors' Exclusive Rights*, GUARDIAN (Apr. 3, 2012), <http://www.theguardian.com/sport/2012/apr/13/olympics-2012-branding-police-sponsors>.

<sup>53</sup> See Grady & McKelvey, *supra* note 2.

<sup>54</sup> See Maisie McCabe, *LOCOG U-turns Over Paddy Power 'London' Ads*, MARKETING MAG.(July 25, 2012), <http://www.marketingmagazine.co.uk/article/1142903/locog-u-turns-paddy-power-london-ads>.

<sup>55</sup> See Grady & McKelvey, *supra* note 2. One wonders if attempts to curtail Olympic-related ambush marketing really only affects those who do not have the financial means to fight in court such as small sausage-business owners.

*D. Rule 40*

One way in which the Olympic Games attempts to curtail ambush marketing is through Rule 40 of the Olympic Charter which actually forbids athletes from taking part in advertising for anyone except sponsors during a Games.<sup>56</sup> Rule 40 of the Olympic Charter reads,

“Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.”<sup>57</sup>

In fact, the discussion of Rule 40 appeared to reach a new high during the London Olympics. With the advent of social media such as Twitter and Facebook, Olympic athletes in London expressed their disappointment and disagreement with the International Olympic Committee (IOC) policy.<sup>58</sup>

The impact of Rule 40 is that Olympic athletes who have sponsorship deals with non-official sponsors are

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<sup>56</sup> OLYMPIC CHARTER, [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf) (in force as from 9 September 2013) (last visited Nov. 24, 2013).

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., Ryan Quinn, *With ‘Rule 40,’ Greedy IOC Shows It Cares More About Its Sponsors Than Olympic Athletes*, SB NATION (Aug. 1, 2012), <http://www.sbnation.com/london-olympics-2012/2012/8/1/3213875/with-rule-40-greedy-ioc-shows-it-cares-more-about-its-sponsors-than>; see also Staff Reports, *Athletes Tweet Demands for Change to IOC Rule*, USA TODAY (July 30, 2012), <http://usatoday30.usatoday.com/sports/olympics/london/story/2012-07-29/olympic-athletes-tweet-demand-for-change/56581574/1> (noting that as a matter of outrage, numerous popular athletes tweeted, “I am honored to be an Olympian, but #WeDemandChange2012.” Including U.S. track runners Sanya Richards-Ross, Nick Symmonds, Lauryn Williams, Marquise Goodwin, Trey Hardee and numerous others).

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prohibited from publicly acknowledging or endorsing their personal sponsors during the time period immediately surrounding the Games.<sup>59</sup> For the London Olympics, Rule 40 was in place from July 18th until three days after Closing Ceremonies, August 15th.<sup>60</sup>

The stated reason for requiring Rule 40 was to “protect against ambush marketing; prevent unauthorized commercialization of the Games; and to protect the integrity of athletes’ performances of the Games.”<sup>61</sup> However, in London 2012, was it realistic in the second decade of the 21<sup>st</sup> century to attempt to prevent the Olympic athletes themselves from being featured in advertisements during the time of the Olympic Games? A penalty for a violation could have been disqualification from the Games themselves.<sup>62</sup> Taking the Rule to a higher level, the most recently updated *IOC Social Media Guidelines* (“Guidelines”) now declare that Olympic athletes cannot promote any brand, product or service within a posting, blog or tweet or otherwise on any social media platforms or on any websites without prior written approval of the IOC or National Olympic Committee (NOC).<sup>63</sup>

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<sup>59</sup> See, e.g., Kelly Whiteside, *After London, Athletes Still Pushing for Rule 40 Change*, USA TODAY (Aug. 23, 2012), <http://usatoday30.usatoday.com/sports/olympics/london/story/2012-08-23/olympics-rule-40-michael-phelpso-lashinda-demus/57225924/1>.

<sup>60</sup> See Matt Harvey, *What is Rule 40 and How will it Affect Skiers in 2014?*, FREESKIER.COM (Feb. 13, 2013), <http://freeskier.com/stories/what-is-rule-40-and-how-will-it-affect-skiers-in-2014>.

<sup>61</sup> *Id.*

<sup>62</sup> See Martin Rogers, *American Athletes Lead Revolt Against IOC Ban on Social Media Use to Promote Sponsors*, YAHOO SPORTS (July 30, 2012), <http://sports.yahoo.com/news/olympics--u-s--leads-revolt-against-ioc-ban-against-social-media-use-to-promote-sponsors.html>.

<sup>63</sup> 2013 INFORMATION FOR ATHLETES, THEIR AGENTS AND NGBS, USOC (June, 2013), available at <http://www.teamusa.org/For-Athletes/Athlete-Ombudsman/Games-Information> (last visited Nov. 24, 2013) (hereinafter collectively “Guidelines” in text or GUIDELINES in footnotes and discussed further, *infra*. Under “Frequently Asked Questions,” for example, the

*IV. Sochi 2014**A. Ambush Marketing Concerns Revisited*

The 2014 Winter Olympics start February 7 in Sochi, Russia and are officially known as the XXII Winter Olympics.<sup>64</sup> The Sochi Winter Olympics have ten Worldwide Olympic Partners including Atos, Coca-Cola, Dow Chemical, General Electric (GE), McDonald's, Omega, Panasonic, Procter & Gamble (P&G), Samsung and Visa, and it appears that general concerns over ambush marketing are once again warranted.<sup>65</sup>

For example, in the *Sochi 2014 Ambush Marketing Report* by the Global Language Monitor (GLM), the company found that many non-affiliated brands are among the top rated on GLM's Brand Affiliation Index (BAI) which measures the perceived relationship between the Olympics and the particular brand. In its September 2013, report, GLM

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GUIDELINES state, "Q: Can I post about my sponsors during the Olympic Games? A: NO; Unless they have obtained the prior written approval of the IOC or their NOC, Participants must not, either promote any brand, product or service on their social media pages, blogs or personal websites, or use social media and internet in a manner that creates or implies any association between the Olympic Games or the IOC and a third party, or its products and services. All competitors, coaches, trainers and officials must [Footnote continues on next page . . .]

ensure that their activities on the internet and social media comply with the requirements of Rule 40 of the Olympic Charter and the related instructions issued by the IOC, Sochi 2014 and their respective National Olympic Committees.").

<sup>64</sup> See ORGANIZING COMMITTEE OF THE XXII OLYMPIC WINTER GAMES AND XI PARALYMPIC WINTER GAMES 2014 IN SOCHI, <http://www.sochi2014.com/en/> (last visited Nov. 24, 2013) (noting that the Paralympic Games are March 7-16).

<sup>65</sup> See *The Ambush Marketing Race to the Sochi Olympics is On!*, GLOBAL LANGUAGE MONITOR (Aug. 30, 2013), <http://www.languagemonitor.com/olympics/the-ambush-marketing-race-to-the-sochi-olympics-is-on/>.



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noted that 10 of the top 15 spots were occupied by non-affiliated (i.e., non-official) marketers.<sup>66</sup> The company analyzed how often brand names were linked to the Olympics in global print and electronic media including Twitter.<sup>67</sup>

In October 2013, Pennsylvania-based lighter company Zippo became involved in the ambush marketing discussion after it was revealed that it had to remove an image from its Facebook page in which a picture of a Zippo product was shown being used to reignite the Olympic Flame for Sochi 2014 after it went out in Russia.<sup>68</sup> Zippo was warned by Sochi officials that this violated ambush marketing rules involving Olympic marketing.<sup>69</sup>

### *B. Sochi and Social Media: IOC Guidelines*

As mentioned, as of June, 2013, the IOC published its most recent Guidelines for athletes, all participants and other accredited persons at the Olympic Games.<sup>70</sup> The guidelines apply from the “opening of the Olympic Villages on 30 January 2014, until the closing of the Olympic Villages on 26 February 2014.” Naturally, the Guidelines remind these same individuals that postings, blogs and tweets “should at all times conform to the Olympic spirit and

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<sup>66</sup> *Id.*

<sup>67</sup> See Alan Baldwin, *Sponsors in Branding Battle for Sochi*, GLOBAL POST (Aug. 30, 2013), <http://www.globalpost.com/dispatch/news/thomson-reuters/130830/sponsors-branding-battle-sochi>.

<sup>68</sup> See Duncan Mackay, *Zippo Drop Cheeky Olympic Torch Facebook Campaign after Accused of Ambush Marketing*, INSIDE THE GAMES (Oct. 8, 2013), <http://www.insidethegames.biz/olympics/winter-olympics/2014/1016390-zippo-drop-cheeky-olympic-torch-facebook-campaign-after-accused-of-ambush-marketing>.

<sup>69</sup> *Id.* (noting that Zippo apparently also started #ZippoSavesOlympics on Twitter as well).

<sup>70</sup> GUIDELINES, *supra* note 63.

fundamental principles of Olympism as contained in the Olympic Charter, be dignified and in good taste, and should not be discriminatory, offensive, hateful, defamatory or otherwise illegal and shall not contain vulgar or obscene words or images.”<sup>71</sup>

The Guidelines also, however, also demonstrate that the IOC has concern-and apparently control-over its intellectual property such as the Olympic symbol (the five interlaced rings),<sup>72</sup> the word Olympic and Olympic-related words.<sup>73</sup> Guideline 6 (Accredited Media) and 7 (Olympic Properties) establish that as long as the rings and words related to Olympic are used as a factual reference only, then there is no violation of the Guidelines. However, the word Olympic and other Olympic-related words may not be “associated with any third party or any third party’s products or services.”<sup>74</sup> Clearly, this is an attempt to curtail ambush marketing efforts by sponsors (through athletes) or by athletes (for their sponsors) during the Olympic Games themselves.

Guideline 9 (Domain Names/URLs/Page Naming/Applications) attempts to restrict how internet domain names can be utilized by mandating that the word Olympic or Olympics (and similar words) may not be used with prior approval by the IOC.<sup>75</sup> Meanwhile Guideline 10 (Links) actually encourages participants and other accredited persons to link their own blogs, websites and other social media to the official site of the Olympic Movement ([www.olympic.org](http://www.olympic.org)), the Sochi Olympic Games

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Guideline 7 also states, “Participants and Other Accredited Persons must not use other Olympic Properties such as NOC [National Olympic Committee] and/or Sochi 2014 emblems or mascots on their postings, blogs or tweets on any websites, unless they have obtained the prior written approval of their relevant NOC and/or Sochi 2014.”

<sup>75</sup> *Id.*

([www.sochi2014.com](http://www.sochi2014.com)) and the official site of the relevant NOC such as the United States Olympic Committee ([www.usoc.org](http://www.usoc.org)).<sup>76</sup>

In the event the IOC believes there has been a violation of its social media policies, the possible penalties are found under Guideline 12 (Infringements). In sum, the IOC may withdraw the accreditation of any person accredited at the Olympic Games and without notice.<sup>77</sup> Guideline 12 goes further by stating,

“The IOC reserves all its right to take any other appropriate measures with respect to infringements of these Guidelines, including issuing a Take Down Notice, taking legal action for damages, and imposing other sanctions. Participants and Other Accredited Persons may also be subject to additional guidelines and sanctions in respect of social media, blogging and internet, from their relevant NOC.”<sup>78</sup>

One wonders how Guideline 12 will actually be enforced. For example, would an Olympic medalist have their medal revoked if they post a tweet thanking their non-official, third-party sponsor? Only time will tell.

### *C. USOC Athlete Endorsement Guidelines*

The USOC in its *USOC Athlete Endorsement Guidelines* (“Endorsement Guidelines”) reminds U.S. participants that it “will not tolerate ambush marketing by

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

companies that are not Sponsors.”<sup>79</sup> It states under *Endorsement Contract with Unaffiliated Third Party*,

“In order to ensure that unaffiliated third parties (those who have no official relationship with the USOC or “Non-Sponsors”) do not create the false impression that they are a Sponsor of the Games and/or Team USA, athletes endorsing Non-Sponsors should make certain that advertising, web sites, promotions, etc. focus on the athlete and his/her achievements rather than on the Olympic or Paralympic Games (“Games”). The USOC will not tolerate ambush marketing by companies that are not Sponsors. Non-Sponsors may not use OLYMPIC, PARALYMPIC, SOCHI 2014, RIO 2016 or other Marks in any commercial context without the USOC’s permission before, during or after the Games.”<sup>80</sup>

These Endorsement Guidelines also discuss similar rules related to non-official sponsors for fundraising,<sup>81</sup> web sites,<sup>82</sup> Olympic and Paralympic Footage,<sup>83</sup> and even Philanthropy efforts.<sup>84</sup> The phrase ambush marketing is actually used.<sup>85</sup> Finally, if there are any questions or concerns, the USOC encourages athletes to contact John

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<sup>79</sup> 2013 INFORMATION FOR ATHLETES, THEIR AGENTS AND NGBS, *USOC* (June, 2013), *available at* <http://www.teamusa.org/For-Athletes/Athlete-Ombudsman/Games-Information> (last visited Nov. 24, 2013) (hereinafter collectively as “Endorsement Guidelines”). “The USOC will not tolerate ambush marketing by companies that are not Sponsors.” Note that this information is found in the same pdf file as GUIDELINES discussed *supra* note 63.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Ruger, the Athlete Ombudsman, who is authorized to advise athletes of their rights in accordance with the Ted Stevens Olympic and Amateur Sports Act.<sup>86</sup>

*V. Conclusion*

The purpose of this article was to present the fundamental legal environment surrounding the concept of ambush marketing in the particular context of the Olympics. In the U.S., the Lanham Act is the primary law used in the context of ambush marketing and trademark issues in the real world. The World Intellectual Property Organization (WIPO) has been important in the fight against those who register domain names in bad faith in the virtual world. The United States Olympic Committee (USOC) has been effective in curtailing the use of the word *Olympic* without prior authorization.

The London Olympics of 2012 presented new challenges in attempting to prevent ambush marketing efforts, but when Olympic athletes took their sponsorships and ideas to social media platforms such as Twitter, it became apparent that Rule 40 of the Olympic Charter might be a bit ambitious yet out of step with the real world of quickly changing times and technology. It remains to be seen how effective both the USOC is with regard to potential infringements by its athletes and how the Sochi Olympic Games enforce the IOC's Rule 40 policy against ambush marketing whether it appears print, on television, or on the world wide web of instantaneous commentary in 140 characters or less. One wonders if the price to be paid to enforce the Social Media Guidelines and Athlete Endorsement Guidelines is really worth the price.

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<sup>86</sup> *Id.*

## **The Danger of Ambush Marketing in the Olympic Games, and Balancing the Interests of the Athlete's Sponsors with the Olympics' Official Sponsors**

*Derrick Wright\**

With the recent conclusion to the XXII Olympic Winter Games, the theory of ambush, or guerilla, marketing once again became a topic of discussion among those employing questionable tactics, those seeking to protect their intellectual property rights, and those concerned with protecting their sponsorship interests. In his article, Adam Epstein defines ambush marketing as an intentional attempt by an advertiser to associate itself with an event it did not pay for the right to be associated with, and then addresses these issues in greater detail. Events of the size and magnitude of the Olympic Games (Summer and Winter) and the upcoming annual NCAA Men's Basketball Tournament ("March Madness") provide an opportunity for entities selling products to associate themselves, even absent an agreement, through crafty placement and marketing.

The danger of ambush marketing is to be taken seriously because numerous consumers are susceptible to being amused and consumed with clever television and print advertisements that purport a sponsor's affiliation with the Games when that affiliation may not exist. Epstein cites the Lanham Act, prohibiting the unauthorized use of registered trademarks in association with an ambusher's product, as the most relevant federal law regarding ambush marketing. Epstein also extensively explores the intellectual property rights granted to the United States

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Olympic Committee (USOC) under the Amateur Sports Act (1978) and the Ted Stevens Olympic and Amateur Sports Act (1998). Chief among those rights are the USOC's exclusive right to the use of the familiar International Olympic Committee symbol of five interlocking rings and the use of the words "Olympic," and "Olympiad." It is common to see official sponsors of the Olympic Games stating in their advertisements that they are, in fact, an "official sponsor," to separate themselves from those engaged in ambush marketing. The author also discreetly raises the pertinent issue of cybersquatting with regard to domain names in the continuing technological evolution of the internet. Epstein raises another poignant issue; because the Olympics are generally an international event, there is difficulty in enforcing ambush marketing regulations across numerous jurisdictions.

The USOC actively seeks to protect its intellectual property rights by filing lawsuits against companies under the Lanham Act. Even so, companies have avoided lawsuits by avoiding explicitly infringing on the USOC's protected rights. As stated in the article, Nike exploited the 1996 Olympic Games in Atlanta to the point where their tactics are thought of as one of the most famous ambush strategies of all time.<sup>1</sup> But purchasing billboards in and around Atlanta, detracting from the official sponsor, Reebok, may not have been the "ambush" that is remembered. Nike also ran highly visible and creative commercials, handed out flags with their swoosh logo on them for fans to wave, and built a "Nike

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<sup>1</sup> Terry O'Reilly, *Sochi Olympic on lookout for ambush marketing; IOC up in arms, but fans look at rival's sneaky ads as a spectator sport*, CBC NEWS, <http://www.cbc.ca/news/business/sochi-olympics-on-lookout-for-ambush-marketing-1.2537613>, (last updated Feb. 15, 2014, 5:15 AM ET).

Centre” next to the Olympic Village that provided facilities for the athletes and fans.<sup>2</sup> In fact, the “ambush” that is most remembered from that Olympic Games may have been unintentional. Former Olympic Gold Medalist sprinter Michael Johnson had a memorable Olympic Games in 1996, becoming the first man to win gold medals in both the 200 meters and the 400 meters, setting a world record in the former.<sup>3</sup> People remember the races and that he set a world record, but mostly, what comes to mind, are the gold pair of Nike track spikes he wore. Reebok was the official sponsor of the ’96 Games and paid \$50 million dollars for that title.<sup>4</sup> But “The man with the golden shoes” prompted 22 percent of fans to cite Nike as the official sponsor of the Games when asked, and only 16 percent Reebok.<sup>5</sup> An effective ambush marketing campaign is a part ingenious advertising, a part good timing, a part slight robbery, and two parts “wink, wink.”<sup>6</sup> Nike’s epic ambush prompted the International Olympic Committee, not wanting their official sponsors scared away by ambush marketers, to implement vast anti-ambush regulations.<sup>7</sup>

The author discusses another example of Nike effectively using ambush marketing during the 2012 Summer Olympic Games in London. Nike’s tactful marketing campaign allowed them to skirt liability under regulations that were enacted by the British government specifically to punish ambush marketers and to throw a jab of sorts at the whole process. No host city had drafted broader regulations than the London Organizing Committee of the Olympic and Paralympic Games (LOCOG).<sup>8</sup> With a

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> David Segal, *Brand Police Are on the Prowl for Ambush Marketers at London Games*, *THE NEW YORK TIMES*,



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hint of sarcasm, Nike was praised for standing up to the Olympic branding czars and credited as having “practiced this dark art (of ambush marketing) with more verve and success than” any other player in the field.<sup>9</sup> Nike’s campaign was titled “Find Your Greatness” and was said by Nike to “inspire everyone in their own personal achievements.”<sup>10</sup> A Nike spokesperson was quoted as saying, “[g]reatness doesn’t just happen in the stadiums of London. We’re saying that greatness can be anywhere for anyone and you can achieve it on your own terms.”<sup>11</sup> Yet, the television advertisement depicted athletes from around the world, conveniently, in towns that happen to have the name London and featured a narrator with a British accent.<sup>12</sup> While the regulations drafted by the LOCOG did technically keep Nike from ambushing the Games in a traditional fashion, Nike still gained valuable publicity by detracting attention away from the official sponsors of the Games.<sup>13</sup> Nike did this by basically saying, through a spokesperson, that greatness is not reserved for athletes performing at the Games, but is readily achievable for us all.<sup>14</sup> Although Nike did not infringe on the use of registered trademarks under the Amateur Sports Act and the Ted Stevens Olympic and

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[http://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-brand-police-on-prowl-for-nike-and-other-ambush-marketers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-brand-police-on-prowl-for-nike-and-other-ambush-marketers.html?pagewanted=all&_r=0), (July, 24, 2012).

<sup>9</sup> Mark J. Miller, *London 2012 Watch: Nike Flips the Bird to Olympics Brand Police*, BRAND CHANNEL,

<http://www.brandchannel.com/home/post/2012/07/25/London-2012-Nike-Ambush-Marketing-072512.aspx>, (July 25, 2012, 7:14 PM).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *supra* note 8

<sup>14</sup> *Id.*

Amateur Sports Act, surely, in the end, many consumers associated Nike with the Games through this artful needling of the “Branding Czars.”

Nike has found ways to escape liability with their ambush marketing strategies and should be commended for effectively marketing their product during an event as widely watched and attended as the Olympics. They have complied with the federal and international regulations by refraining from using Olympic marks and terminology. A company, such as Reebok, paying to be recognized as an official sponsor of the Olympics should not prevent competing companies from marketing their goods to consumers in the most creative and effective ways. In reality, Nike’s tactics are the very essence of rigorous competition that, in the end, is healthy for the advertising market and commerce generally.

The author conveys that the IOC has adapted their regulations to the questionable tactics of ambushers by adopting new rules to address evolving concerns. The Olympic Charter now contains Rule 40, which, in tandem with the IOC Social Media Guidelines, prohibits athletes from engaging in advertising for any company other than official sponsors of the Games. The author also mentions the USOC Athlete Endorsement Guidelines, which informs athletes that the USOC will not tolerate ambush marketing by companies that are not sponsors. Companies like Nike, however, will always attempt to find ways to elude prohibitions such as Rule 40. These companies will continue to view Rule 40 as a levied attack on the marketing of their products and will assuredly become even more imaginative in eluding liability.

While ambush marketing is and should be a realistic concern, recently, there has been a discussion on whether enforcement of Rule 40 should be relaxed.<sup>15</sup> Pushback by the

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<sup>15</sup> Tripp Mickle, *A Ringing Endorsement? USOC Considering Relaxing Its Enforcement of Rule 40*, SPORTSBUSINESSDAILY.COM,

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athletes may have prompted this discussion, as the athletes' position is that the sponsors who support them year-round should be able to support them in their most visible, high profiled moments, even if they are not an official sponsor of the Games.<sup>16</sup> With the support of the USOC, the IOC's Director of TV and Marketing Services indicated they intend to evaluate Rule 40 after the Games in Sochi.<sup>17</sup> The USOC's support signifies a drastic shift in the position they have held for the last few decades, but the U.S. athletes' attack of the Rule on Twitter prior to the London Games prompted the IOC and USOC to consider changing Rule 40.<sup>18</sup> USOC CEO Scott Blackmun, acknowledging the challenge of balancing the Rule against sponsors' interests, stated, "[I]f . . . an ad that doesn't use Olympic marks but clearly is Olympic ambush, that's not right and we want to protect our sponsors. . . . But if an athlete has a long term relationship with a company, and they want to continue that . . . that's something we need to have a conversation about."<sup>19</sup> Blackmun's primary concern is the unofficial sponsors refrain from using Olympic marks or terminology and creating consumer confusion,<sup>20</sup> a

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<http://www.sportsbusinessdaily.com/Daily/Issues/2014/02/21/Olympics/Rule-40.aspx> (February, 21, 2014).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

requirement of the Lanham Act.<sup>21</sup> Relaxing enforcement of Rule 40 would benefit all involved. The official sponsors could proceed with their marketing without the fear of ambushers and those same potential ambushers, if allowed more latitude, would not feel the need to antagonize and ridicule the IOC/USOC with sarcastic jabs in their advertising campaigns.

Through its wily tactics, Nike has successfully eluded liability for its ambush marketing. By making sure not to use the protected Olympic marks or terminology, companies at least can argue that they are compliant with the Amateur Sports Act and the Ted Stevens Olympic and Amateur Sports Act. The Lanham Act requires an additional hurdle, that the potential ambusher's marketing campaign does not create confusion among consumers between their products and the official sponsors of the Games. Recently, however, social media has thrown a wrench into enforcement of Rule 40, with companies employing marketing campaigns through regular fans and consumers carrying messages about athletes and their products on Twitter, Instagram, and Facebook.<sup>22</sup> As pointed out by the author, and sources cited in this note, the internet has provided a new forum with new ways to manipulate the regulations. The IOC and USOC would have a difficult time regulating average consumers and fans taking to social media and pushing a particular athlete and that athlete's personal sponsor. Additionally, athletes are now using social media to voice their displeasure with an inability to

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<sup>21</sup> *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (citing *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201, holding that "[U]nder the Lanham Act [§ 43 (a)], the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks . . .").

<sup>22</sup> Jason Blevins, *Olympic athletes adjust to rules forbidding from open sponsorship*, THE DENVER POST, [http://www.denverpost.com/olympics/ci\\_25006310/olympic-athletes-adjust-rules-forbidding-them-from-open](http://www.denverpost.com/olympics/ci_25006310/olympic-athletes-adjust-rules-forbidding-them-from-open), (Jan. 28, 2014, 1:00 AM MST).

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showcase their personal sponsors. It conveys a poor message when Olympic athletes are hash tagging “Rule40” and “wedemandchange”<sup>23</sup> on Twitter.

The IOC and USOC's willingness to consider adapting Rule 40 is a sign that they are evolving to an ever changing environment, in large part due to the internet. If changes to Rule 40 are made, it may lessen Nike's, and others', desire to not only avoid liability for ambush marketing, but also to ridicule the prohibitions in the process. The London Games in 2012, and the growing industry that is social media, have compelled the IOC and USOC to soften their once ardent stance on the use of the Olympic marks and terminology by unofficial sponsors. An adaptation of Rule 40 allowing athletes to display their personal endorsements during the games may curtail many companies' attempts to ambush market. While ambush marketing is very real and palpable, a compromise by the IOC and USOC may go a long way in lessening the intensity and frequency of such marketing. With social media being as accessible as it is today, the less negative publicity for a sponsor, the better. Athletes jumping on Twitter to disparage the IOC or USOC benefits no one, especially given that athletes (and actors, and politicians) are not generally known for exercising a great deal of discretion and judgment when it comes to Twitter. The IOC and USOC should closely examine and consider relaxing Rule 40 and other regulations to better serve all involved, their official Olympic sponsors, as well as the athletes and their personal sponsors.

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<sup>23</sup> *Id.*

***Did Copyright Kill Classical Music?****Copyright's Implications for the Tradition of Borrowing in Classical Music*Dawn Leung <sup>a1</sup>**Table of Contents**

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“Music may be a universal language, but a language is only intelligible if it talks of things we are able to understand. Those who write about music are too fond of treating the art as an end in itself instead of a means to interpret the indefinable something that hides behind all art. Thus, to have its maximum effect, the music of a nation must talk to a nation about itself, because a nation rarely understands anything else.” – *Francis Toye*<sup>1</sup>

Classical music over the last two or three centuries has gone from the popular afternoon entertainment shared with friends, family, and community to a "museum piece" genre making up only 3 percent of music sales and dismissed by ‘pop culture’ as being old, outdated, and only for the ‘elite.’ This view of classical music ignores the practice of many classical composers throughout history to “create music which had current value: music for a specific function, whether that be ceremony, worship, public entertainment, dancing, or amateur music-making.”<sup>2</sup> My question was, “Has copyright been a co-conspirator in that classical recession?” I particularly wanted to look at the tradition of borrowing in classical music.

The modern emphasis on individual originality and authorship largely ignores the fact that borrowing from existing music by other composers has always been a pervasive practice. Borrowing methods have ranged from verbatim quotation of musical phrases to allusion or paraphrase of existing works to a more general influence or “inspiration” from those works. Many composers borrowed extensively from the popular and folk songs and styles of their time. Other composers modeled new works on existing works either as an act of homage to another composer or as a source of compositional study and innovation. Composers

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<sup>1</sup> Francis Toye, *A Case for Music Nationalism*, 4 MUSIC Q. 12, 20-21 (1918).

<sup>2</sup> J. Peter Burkholder, *Museum Pieces: The Historicist Mainstream in Music of the Last Hundred Years*, 2 J. MUSICOLOGY, 115, 119 (1983).



wrote their music with the express purpose of connecting with their colleagues and their culture in a way that their audience could personally recognize and relate to. As one commentator observed, "Such borrowing... did not make these works any less creative. The works simply incorporate motives with which the audience is already familiar. This helps to evoke a certain emotion, place, or era. Borrowing is a way for classical composers to absorb the culture around them and to mark their place in time."<sup>3</sup>

Several composers of the 'classical canon' borrowed extensively from each other. George Frederic Handel (1685-1759), who has become the musicological 'poster boy' of historic borrowing, used other composers' works extensively in his musical compositions as a source of innovation. There is significant debate as to whether Handel should be considered an egregious plagiarist.<sup>4</sup> For example, his oratorio "Israel in Egypt" used musical material from several movements of a "Magnificat" by Dionigi Erba (1692-1729). Johann Sebastian Bach (1685-1750) transcribed and adapted several of Antonio Vivaldi's (1678-1741) concertos for his own keyboard concertos. Wolfgang Amadeus Mozart (1756-1791) borrowed material from Josef Haydn's (1732-1809) Symphony No.13 in D, Hob.I:13, for the Finale of his "Jupiter" Symphony No. 41 in C, K. 551. Ludwig van Beethoven (1770-1827) reworked existing music in at least a third of his own works, and Franz Schubert (1797-1828) and Felix Mendelssohn (1809-1847) borrowed from

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<sup>3</sup> Amanda Scales, *Sola, Perduta, Abbandonata: Are The Copyright Act And Performing Rights Organizations Killing Classical Music?*, 7 VAND. J. ENT. L. & PRAC. 281, 285 (2005).

<sup>4</sup> See generally Ellen T. Harris, *Integrity and Improvisation in the Music of Handel*, 8 J. MUSICOLOGY 301 (1990) (discussing the controversy over Handel's extensive use of borrowing); See also John T. Winemiller, *Recontextualizing Handel's Borrowing*, 15 J. MUSICOLOGY 444, 450 (1997) (discussing Handel's borrowing practices within the context of the culture of the time).

Beethoven. Gustav Mahler's (1860-1911) Symphony No. 3 in D minor borrowed from Johannes Brahms's (1833-1897) Symphony No. 1 in C, Op. 68, in which Brahms had borrowed from Beethoven's "Choral" Symphony No. 9 in D, Op. 125. For these composers and many others, borrowing was a source of creativity, expression, and genius.

The idea of borrowing seems to be at odds with modern notions of proprietary copyright. Modern copyright and definitions of authorship assume that composition is an act of autonomy and that musical ideas or expressions are not original or creative unless they come out of individual, internal genius. By this view, borrowing from another's work is automatically illegitimate, unlawful, and lacking creativity. Composers who borrow from existing works are assumed to be infringing unless they obtain a license. Some have even characterized such borrowing as an act of theft.<sup>5</sup> Such views ignore the inherently social nature of music as an art to be shared. Composers necessarily listen to other music and are influenced by other music.<sup>6</sup> They use the same limited musical 'tools' and 'language' as other composers. Furthermore, music is largely abstract and only has real 'meaning' when the composer, performer, or listener is able to relate the sounds to something extra-musical from their own personal or shared experiences. Therefore, to relate to an audience, music must necessarily use sounds, melodies, and motifs that an audience would be familiar with.

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<sup>5</sup> See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F.Supp. 182, 183 (S.D.N.Y. 1991) (sampling case in which the court's opinion begins with "Thou shalt not steal"); *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004) (sampling of sound recording analogized to a physical taking); See also KEMBREW MCLEOD, *OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW* 89 (2001) (discussing how sampling and borrowing practices have been called "stealing," "theft," "pickpocketing," and "devoid of creativity").

<sup>6</sup> Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 427 (1988).

Modern doctrines of copyright seem to heavily restrict or even preclude many borrowing practices that were historically ubiquitous. The limited judicial definitions of creativity or “originality,” the ambiguity of modern copyright doctrines, and the fear of infringement suits could create a chilling effect on composers who would otherwise wish to creatively use existing materials. Copyright doctrines of substantial similarity and fair use have various tests of infringement (e.g., “idea-expression dichotomy,”<sup>7</sup> the “abstractions test,”<sup>8</sup> or the “total concept and feel”<sup>9</sup> test) and supposedly delineated categories of works (e.g., “derivative work” and “parody”), yet these categories have not always helped to clarify the definition of “originality” or infringing use. It has been hotly debated whether these judicially-created categories realistically reflect the actual practices of composers, musicians, and even the ‘average listener.’

If a modern composer wanted to create a work that purposely reflected or borrowed from current popular musical works or styles in order to connect with the ‘hearts’ of his or her audience or with other contemporary composers, would they be able to do so without the fear of being slapped with an infringement suit?

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<sup>7</sup> See generally *Baker v. Selden*, 101 U.S. 99 (1879) (plaintiff had copyright protection in his expressions but not his ideas in a book keeping system); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9<sup>th</sup> Cir. 1977) (examining the “idea-expression dichotomy” through an “intrinsic-extrinsic” test).

<sup>8</sup> See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“[T]here is a point in [a] series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.”).

<sup>9</sup> See generally *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9<sup>th</sup> Cir. 1970) (finding that the “total concept and feel” of two greeting cards were the same).

## **I. The Traditions and Functions of Borrowing in Classical Music**

Today, the practice of borrowing from existing music is seen as an unusual, anomalous technique. When we think of the great master composers of Western classical music, we have an image of a classical ‘canon’ of unalterable, untouchable works resulting from the purely individual efforts of autonomous composers. However, in reality, composers and musicians have been borrowing from each other for centuries dating back at least to the Renaissance, well before copyright laws existed.<sup>10</sup> Borrowing techniques such as quotation, paraphrase, allusion, transformative imitation, embellishments, and sets of variations on a theme were very popular well into the 19<sup>th</sup> and even 20<sup>th</sup> centuries. Borrowing was “not a sterile or servile act, but in fact a vibrant, creative one.”<sup>11</sup>

### **A. “Peer-to-Peer” Borrowing in Classical Music**

Composers used a variety of borrowing methods for many different purposes throughout history. During the Renaissance (1400-1600), several borrowing techniques used existing music to capture listeners’ attention by using melodies they would presumably recognize. Borrowing during that time was often also an act of emulation or homage to another musician or composer. For example, under the cantus-firmus principles, a composer elaborated on an existing original to create a new arrangement of an old favorite.<sup>12</sup> Composers added one or more lines of harmony

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<sup>10</sup> See generally Hugh Arthur Scott, *Indebtedness in Music*, 13 MUSIC Q. 497 (1927) (discussing various ways that composers are “indebted” to each other by influence or borrowing).

<sup>11</sup> Winemiller, *supra* note 4, at 450.

<sup>12</sup> See generally Howard Mayer Brown, *Emulation, Competition, and Homage: Imitation and Theories of Imitation in the Renaissance*, 35 J. AM. MUSICOLOGICAL SOC’Y 1 (1982) (discussing various Renaissance borrowing methods).

or a secondary melody to a well-known song, or they would use the well-known song as a secondary melody in a larger work. Some composers would take a composition that they saw as thematically or musically related to their own and allude to it by beginning like the existing work but then continuing completely differently. “Parody” or “Imitation” masses, which had nothing to do with humor in the modern sense of ‘parody,’ used melodic portions from an existing piece of music (e.g., a fragment of a popular song) as part of the musical material for a new work. “Quodlibets”<sup>13</sup> combined several different melodies (often popular tunes) in counterpoint with each other in light-hearted, humorous way. Sometimes, a composer or musician would revise existing music to improve it or adapt it for different circumstances. For example, the composer might change the music from a four-line piece to a five-line piece to fit a poem, make a longer passage more condensed or a shorter passage more spacious, add another section, change an ending, or make any number of changes to fit a new situation or need. Several of these practices continued well into the Baroque era (1600-1750).

Through “transformative imitation,” composers used existing works as a compositional starting point or model. They would rework the existing piece, adopt certain elements, or emulate the work’s structural arrangement. For example, J.S. Bach’s Harpsichord Concerto in F minor, BWV 1056, borrowed heavily from the first movement of Georg Philipp Telemann’s (1681-1767) Concerto for solo oboe or flute and strings in G, TWV 51:G2, for solo oboe or flute and strings. Bach made minor changes to the beginning of Telemann’s theme and adopted aspects of Telemann’s scoring, harmony, phrasing, cadential structure, and overall

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<sup>13</sup> “Quodlibet” is Latin for “whatever” or “what pleases.”

dimensions.<sup>14</sup> Handel also borrowed from Telemann's music on occasion. Telemann was well aware of this, and he even encouraged other composers to borrow from his works. In *Ueber die musikalische Composition* (1773), Johann Adolph Scheibe spoke of a conversation with Telemann, and he noted that Telemann understood "the art of making these inventions their own, so that they were transformed in their hands into new and original ideas."<sup>15</sup>

Other composers borrowed a mix of elements from several existing works to create something new. Johannes Brahms borrowed melodic style, embellishments, and chromaticism<sup>16</sup> from W.A. Mozart and Frederic Chopin (1810-1849), orchestration from Robert Schumann (1810-1856), and musical forms from Francois Couperin (1668-1733), Beethoven, and Schubert. Through this mix of existing elements, he developed new ideas on both previous and current musical trends. Musicologist J. Peter Burkholder observed that, as a result, Brahms' music was extremely popular with amateur musicians or "naïve" listeners as well as professional trained musicians. His music is filled with skilled techniques that "excite[ ] the learned connoisseur," yet at the same time, his music was "strikingly beautiful and emotionally appealing" with "enough familiar features to orient the untutored listener."<sup>17</sup>

Several composers often used quotes or smaller popular motifs to evoke a particular theme or subject, pay homage to another composer, or refer to a popular song or idea. Bach, Mozart, Mendelssohn, and several other

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<sup>14</sup> Steven Zohn & Ian Payne, *Bach, Telemann, and the Process of Transformative Imitation in BWV 1056/2 (156/1)*, 17 J. MUSICOLOGY 546 (1999).

<sup>15</sup> *Id.* at 580 (Sheibe further said, "Telemann assured me of this more than once, and in light of other reliable reports I cannot doubt it").

<sup>16</sup> Chromaticism (from Greek *chroma*, "color") is the use of notes that are not in the central diatonic scale upon which a composition is based.

<sup>17</sup> J. Peter Burkholder, *Brahms and Twentieth Century Classical Music*, 8 19TH-CENTURY MUSIC 75, 81 (1984).

composers quoted directly from popular songs and hymns, such as when Mendelssohn quoted from hymns in his “Reformation” Symphony No. 5 in D, Op. 107. Others quoted for humorous or playful purposes. Mozart wrote a set of playful variations on the then popular French song, “Ah! Vous dirai-je, Maman” (“Ah, I would tell you, Mother”),<sup>18</sup> which we know as the melody of “Twinkle, Twinkle, Little Star.” The motif “B flat – A – C – B natural” (the musical ‘spelling’ of “BACH”) was often used in homage to J.S. Bach,<sup>19</sup> and the eight-note sequence of the Gregorian “Dies Irae”<sup>20</sup> chant was used to evoke a theme of death or judgment in the works of several composers.<sup>21</sup>

### **B. Musical Nationalism and Folk Music Borrowing**

Folk music borrowing and the Nationalist movement are especially exemplary of classical music borrowing techniques. Composers used popular music and folk tunes as melodic or stylistic source material. For these composers, this was a way of showcasing, celebrating, connecting with, or saying something about the cultures and traditions that surrounded them. It was also a way for them to connect with their audience by using recognizable popular melodies, motifs, and styles. Musicologist Henry F. Gilbert identified

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<sup>18</sup> Twelve Variations on “Ah! Vous dirai-je, Maman” in C Major, K. 265.

<sup>19</sup> This musical spelling of Bach’s name refers to the fact that B-flat was historically called “B” and B was historically called “H” before modern standardization. Bach first used the motif himself in his “Art of the Fugue,” BWV 1080. Schumann, Brahms, Liszt, Rimsky-Korsakov, Schoenberg, and Poulenc subsequently used the motif as homage.

<sup>20</sup> “Dies Irae” is Latin for “Day of Wrath.” A Dies Irae movement was a standard part of a Requiem Mass.

<sup>21</sup> The “Dies Irae” Gregorian chant melody is comprised of a descending sequence of F-E-F-D-E-C-D-D (or some transposed form thereof). Berlioz famously used it in the “Dream of a Witches’ Sabbath” movement of his “Symphony Fantastique.” Other composers who used the Dies Irae motif included Haydn, Liszt, Mahler, Tchaikovsky, Rachmaninoff, Shostakovich, and Sondheim.

three primary methods of using folk melodies in classical music:

1. verbatim, as a musical germ from which to develop a composition;
2. verbatim, but having no particular relation to the musical structure;
3. as suggestion of folk-like themes expressive of the folk spirit.<sup>22</sup>

For example, Johannes Brahms and Franz Liszt (1811-1886) made liberal use of real folk songs for their thematic material. Edward Grieg (1843-1907) used melodies of his native Norway verbatim as themes in several of his compositions, and Jean Sibelius (1865-1957) did the same for songs of his native Finland. The first fourteen notes of the "Austrian Hymn" attributed to Haydn are actually taken verbatim from a Croatian folk song. Haydn elaborated and extended the fundamental folk style of the melody, and his composition became so beloved that it is now the German national anthem. Peter Illyich Tchaikovsky (1840-1893) used Russian folk melodies either verbatim or as a heavy influence in his melodic, harmonic, or rhythmic styles and patterns. Tchaikovsky's Second Symphony No. 2 in C minor, Op. 17, is called the "Little Russian" Symphony because its main themes are Russian folk songs, and the principal subject of the first movement in Tchaikovsky's Piano Concerto in B-flat minor, Op. 23, is based on a phrase sung by the 'blind beggars' that Tchaikovsky heard in Kamenka, Russia.

Frederic Chopin made both literal and stylistic use of the folk music of his native Poland. Some scholars say that Chopin picked up Poland's folk music style from the countryside villages where he grew up;<sup>23</sup> others say he was

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<sup>22</sup> Henry F. Gilbert, *Folk-Music in Art-Music -- A Discussion and a Theory*, 3 Music Q. 577, 582-83 (1917).

<sup>23</sup> *Id.* at 585.



exposed to folk idioms from the mazurkas and other dances in middle and upper class Warsaw salons and ballrooms where nationalist folk music was the vogue style of the time.<sup>24</sup> Chopin employed many of the melodic, harmonic, and rhythmic elements of this music in his own mazurkas, polonaises, and other Polish-style dance forms as well as in his larger-scale works, including his piano concertos and sonatas. This was Chopin's way of connecting with the culture of his beloved homeland.

Antonin Dvorak's (1841-1904) "Slavonic Dances," symphonies, and other works were largely developed from folk dances, rhythms, melodic phrases, and other characteristics of the Slavonic and Bohemian folk spirit. Additionally, when Dvorak traveled to America and heard ragtime and African-American spirituals, he said he was inspired to capture the spirit of American music in his "New World" Symphony No. 9 in E minor, Op. 95. Several musicologists say that some themes in the "New World" Symphony resemble "Swing Low, Sweet Chariot" (one of Dvorak's favorite spirituals) and "Turkey in the Straw."<sup>25</sup>

Beethoven frequently composed stylized dances and other works with a folk-like character. In his "Pastoral" Symphony No. 6 in F, Op. 68, he borrowed folk music elements from Austrian cultures. Bach, Schumann, and Schubert also were known to borrow folk materials for their compositions. In Italy, the lyrical character of the people's music was reflected in the operas of Rossini and Puccini, and many operatic melodies became the popular songs of the people. Béla Bartok (1881-1945), Zoltán Kodály (1882-1967), Ralph Vaughan Williams (1872-1958), Heitor Villa-Lobos (1887-1959), and Manuel de Falla (1876-1946) were

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<sup>24</sup> See generally Barbara Milewski, *Chopin's Mazurkas and the Myth of the Folk*, 23 19TH-CENTURY MUSIC 113 (1999) (discussing theories of how Chopin was influenced by folk music and the nationalist movement).

<sup>25</sup> Dvorak also borrowed from Beethoven in the Symphony's third movement "Scherzo."

enormously influenced by the folk music of their native countries. These were all efforts by composers to connect with the popular cultures, communities, and people that surrounded them.

### **C. America: The Great Musical Melting Pot**

In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, American music truly started to come into full form, largely *because* of cultural exchanges and borrowing across musical traditions. The influx of immigrants coming to the “Great Melting Pot” nation brought with them the music of their home countries. English minstrel tunes, Jewish folk music, complex European classical music, and African-American spirituals came together to form the American music genres of ragtime, blues, and jazz. Two very notable borrowers in American classical music who were greatly inspired and influenced by the ‘people’s music’ of the time were Charles Ives (1874-1954) and George Gershwin (1898-1937). Both used their borrowing techniques to consciously connect their music with a variety of cultures and a wider audience.

Charles Ives borrowed extensively from hymns, popular songs, ragtime, and marches. He would quote, paraphrase, or borrow harmonic, stylistic, and structural elements from existing works. He was known for a unique “cumulative setting” of music that developed fragmented motives from a melody or presented various countermelodies before the main theme was presented whole at the end.<sup>26</sup> Ives used Renaissance-style quodlibet layering techniques, using the vertical or horizontal combination of two or more recognizable melodies as the basis of a piece. The melodies he layered were often of a similar theme or character, and he would put them together or paraphrase them as a joke or technical “tour de force.” Ives would also

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<sup>26</sup> See generally J. Peter Burkholder, *“Quotation” and Emulation: Charles Ives’s Uses of His Models*, 71 MUSIC Q. 1 (1985) (discussing the various ways Ives borrowed from various sources).

quote familiar music to illustrate a text or fulfill an extra-musical purpose, similar to the way someone might quote Shakespeare in a speech to make a point or develop a character or theme. Commenting on Ives' conscious extra-musical purposes, musicologist J. Peter Burkholder said:

Ives cites his models overtly. He wants us to know what they are, and that they are being quoted... Ives seems to be fulfilling an inner need to explain where his music comes from, why he wrote it, what it meant to him, and what it might evoke in us as we listen, so that we may participate in it as well. The programs he offers... provide a way in, offering an analogy to the music which helps us to experience the music as an analogy to life, an analogy with many possible meanings. They are... a way out of the music, a hook which connects us to his musical traditions and our prior experiences of the music he cites, or music like it... Because he consistently shows us his starting point – whether that be another piece of music, a philosophical idea, a personal experience, a text, an innovative musical procedure, or a combination of these – his music also goes beyond that of his predecessors to become music *about* something.<sup>27</sup>

George Gershwin borrowed from ragtime, blues, and other African-American musical forms, as well as from the musical language of Tin Pan Alley and European art music. He actively sought out opportunities to hear African-American performers in Harlem during the Harlem Renaissance. He made a point of observing the Gullah communities in South Carolina's South Sea Islands to get inspiration for his folk opera, *Porgy and Bess*. Several portions of the opera were noticeably similar to specific African-American spirituals. For example, the now very popular aria, "Summertime" used the same harmonic

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<sup>27</sup> *Id.* at 26.

scheme as the spiritual “Sometimes I Feel Like a Motherless Child.” Gershwin’s other classical works, such as his famous *Rhapsody in Blue*, integrated the classical piano training he had as a youth with the “blue notes” and harmonic relationships associated with jazz.<sup>28</sup> Gershwin’s music also often reflects the Jewish music, scales, and motifs he heard as a young boy growing up in the Jewish community of New York City’s Lower East Side.

Both Ives and Gershwin wrote their music during a time when the social divisions between ‘art’ music and ‘popular’ music were already well entrenched, and many of their techniques of literal or stylistic borrowing were at least initially received with mixed reactions from both sides. Ives’ borrowing techniques are still considered curiosities today, even though many of them, such as the quodlibet technique, find their roots as far back as the Renaissance. Gershwin’s music had the elements of popular styles yet the technical attributes of European classical traditions. His audiences, both on the street and in the concert hall, found it difficult to classify his style within the existing hierarchies. Yet ultimately, Ives and especially Gershwin remain not only respected but extremely popular with audiences across genres and generations precisely because of their borrowing techniques.

## **II. Conceptions of Authorship and Historic Copyright**

Musicians do not usually question the genius of Bach, Beethoven, Brahms, Chopin, and other classical music maestros who borrowed extensively from existing music. Yet these composers and practices do not neatly fit into the “traditional” image of the self-reliant composer or author as

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<sup>28</sup> See JOAN PEYSER, *THE MEMORY OF ALL THAT: THE LIFE OF GEORGE GERSHWIN* 84 (1998) (“[T]he inventive rhythms, the swinging touch that came directly from jazz, brought a quality to the classical-music world that was perceived as genuine freshness.”).

the originator and exclusive owner of the work. In today's copyright framework we tend to think that "to borrow and reuse a portion of another composer's music not only violates the intellectual property rights of the 'loaning' composer, but also sullies the hands of the borrower, who fails to produce something wholly individual or original, and thus valuable."<sup>29</sup> We are uncomfortable with the idea of borrowing because we assume that it lacks any real originality and may even constitute plagiarism.

### A. The Author as "Craftsman"

Before modern copyright, composers had a fundamentally different concept of "authorship" or "ownership" of an artistic work. Renaissance and early 18th century ideas reflected a view of the author as a "craftsman" who manipulated traditional materials and rules in ways that satisfied their audiences.<sup>30</sup> "[O]riginality was not seen as creation on a blank slate, but rather as a process of selection, re-interpretation, and improvement."<sup>31</sup> Musical borrowing during this time was a legitimate, encouraged, and even commendable method of composition. Composers saw the work of their predecessors and contemporaries as a "common fund,"<sup>32</sup> and they treated the original loan material as "capital."<sup>33</sup> "The act of borrowing was then amply justified by returning a substantial 'interest' of [the borrowing composer's] own original ideas derived from it and offered as a creative response to a received stimulus."<sup>34</sup>

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<sup>29</sup> Winemiller, *supra* note 4, at 446.

<sup>30</sup> See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH CENTURY STUDIES 425, 426 (1984).

<sup>31</sup> Keyt, *supra* note 6, at 425-26.

<sup>32</sup> *Id.*

<sup>33</sup> Ian Payne, *Another Händel Borrowing from Telemann?. Capital Gains*, 142 MUSICAL TIMES, 33, 40 (2001).

<sup>34</sup> *Id.*

“It was only when a writer's use of the fund was uninventive or superficial that he would be taken to task.”<sup>35</sup> The focus was on the quality of the creative work as a whole, not on the source of the individual components.<sup>36</sup>

Classical music during this pre-copyright era was a vibrant, relevant, and extremely popular style of musical entertainment. Instead of today's conception of the ‘stuffy’ atmosphere of concert halls where classical music is treated like old museum pieces being fed to a passive audience, the world of classical music was a much more participatory culture where the average person – performer or listener – was just as involved in the music-making and exchange of musical ideas as the composer. Friends would get together and play duets, chamber music, or on-the-spot improvisations based on music by Mozart, Haydn, Schubert and other famous classical composers.<sup>37</sup> Composers purposely left sections in concertos called “cadenzas” where the individual performer could show off their own compositional or improvisational skills. Sheet music of Beethoven sonatas and Rossini opera arrangements were just as popular as sheet music of folk songs and popular songs from ‘non-classical’ composers. Some of the music that we now consider classical or ‘art’ music was actually the ‘music of the street’ or of the people when it was first written. This music was played at parties, dances, festivals, or even literally at street corners and coffee shops.<sup>38</sup> Concerts of

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<sup>35</sup> Keyt, *supra* note 6, at 426.

<sup>36</sup> *Id.* at 425 (noting that musical practice of the time, “emphasizing productivity and professional skill over originality of material, permitted borrowing *so long as* the composer used the material to good effect.”) (citing PAUL HENRY LANG, *GEORGE FRIDERIC HANDEL* 564-65 (1966)).

<sup>37</sup> Composer and pianist Franz Schubert was famous for his regular musical gatherings with friends, known as “Schubertiades.” Some of his compositions were probably inspired by the music and ideas that he and his friends came up with together at these gatherings.

<sup>38</sup> In 18th century Leipzig, Germany, Gottfried Zimmerman owned a coffee shop where he would host weekly music concerts. J.S. Bach and George Philipp Telemann were regular attendees and participants. Musicians from

classical music were ‘the place to be’ for social circles from all walks of life. This social, collaborative, and participatory attitude toward music helps explain why borrowing practices were so historically pervasive in classical music and why so many composers felt so free to borrow from each other’s works.

### **B. Privileges and Early Copyright**

Besides the inherent philosophical differences that were prevalent during the time of Handel and other borrowing composers, the role and structures of legal protection and copyright were also vastly different from today. Before modern copyright law, legal protection of a musical work came in the form of a printing privilege granted by a royal authority.<sup>39</sup> Unlike today, the focus of the protection was not on the author’s right to the individual elements within the works but rather on the publisher’s exclusive right to print or publish a work or a set of works.<sup>40</sup> The publisher with a privilege received the exclusive right to publish the work within the geographic domain of the granting government. Privileges were granted on an ad hoc basis and could vary widely in subject matter, scope, duration, and enforcement.

Composers were initially less interested in taking advantage of the legal protection of privileges. This may have been partly because most composers still received most of their income from working as performers or church

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all walks of life would come, from experienced virtuosos to amateur itinerant musicians. J.S. Bach also wrote an entire musical work dedicated to coffee, known as the “Coffee Cantata” (BWV 211).

<sup>39</sup> See Michael W. Carroll, *Whose Music is it Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1409 (2004) (discussing the history of pre-copyright structures).

<sup>40</sup> See generally F.M. SCHERER, *QUARTER NOTES AND BANK NOTES* 166-80 (2004) (discussing how pre-copyright and early copyright regimes affected the economic structures in which classical composers earned their living).

musicians or in servant-like roles under the patronage system. Patrons and employers often had exclusive rights to the works of composers under them, and such works could not be published or disseminated without the patron's permission.<sup>41</sup> Additionally, composers often created their works for use in a particular (sometimes one-time-only) royal concert, recital, dance, religious service, or other specific event or purpose. As one scholar observed, "Bach, Mozart, Haydn, Beethoven, and their counterparts never had to contemplate such contemporary conditions as going to the marketplace to recoup their investments in their compositions."<sup>42</sup>

The first copyright law – England's Statute of Anne – came in 1709 as a result of negotiations between Parliament and a group of London book publishing guilds called the Stationers' Company. The Statute of Anne applied to "books," gave fourteen years of protection over publication rights in England, and required the author to deposit nine copies of the book in Stationers' Hall. The Statute was first applied to music in 1777 in *Bach v. Longman*.<sup>43</sup> In that case, Johann Christian Bach (son of the more famous Johann Sebastian Bach) sought injunctive relief for unauthorized editions of two of his compositions and argued that music composers had the same right to copyright protection as literary authors. Over the following decades, other countries and regions began enacting similar laws, but even as copyright law regimes started appearing, a

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<sup>41</sup> See *id.*; See also William F. Patry, Patry on Copyright § 1:14 (2012) (discussing copyright's early history, including the patronage system and privileges).

<sup>42</sup> Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 758 (2007).

<sup>43</sup> (1777) 98 Eng. Rep. 1274 (K.B.); See generally Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005) (discussing pre-copyright and early copyright structures and surveying various early music publication cases involving composers).



composer's advantages and incentives for using these copyright protections were still relatively low. Composers usually received a flat fee for both the music manuscript and the right to print and distribute it.<sup>44</sup>

One of the biggest issues with both privileges and early copyright was that the control over publication of one's work often ended at the border of one's country or even one's local region. Publishers often pirated manuscripts from publishers outside their local territories. It was almost an encouraged practice.<sup>45</sup> In 1810, Gottfried Hartel (of the publisher Breitkopf & Hartel) told Beethoven that "under present conditions, avoiding piracy of revised editions in France, England, and Germany is impossible."<sup>46</sup> This limited, questionable protection and return may explain why privileges were still granted until at least 1828.<sup>47</sup> Wider internationalization of copyright did not come until at least the late 19<sup>th</sup> century through treaties and agreements such as the Berne Convention of 1887.

These open pre-copyright and limited copyright frameworks created an atmosphere where borrowing practices could flourish. Even as copyright laws spread and grew in scope, much of the music that composers borrowed – folk music, African American music, hymns, and jazz – was considered 'public domain' material that was free for the borrower to explore. This freedom to borrow and build on these existing trends and traditions gave composers a direct connection with the people's popular culture and with each other in an open exchange of ideas. However, around the time that copyright laws spread, the concept of

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<sup>44</sup> Patry, *supra*, § 1:14.

<sup>45</sup> *Id.*; *Id.* at § 1:4 (noting the encouragement of "piracy" as an important local industry in various German states before German unification in 1871).

<sup>46</sup> SCHERER, *supra* note 40, at 176.

<sup>47</sup> Patry, *supra*, § 1:14 (privilege was granted in 1828 to composer Johann Hummel).

authorship or author's rights gradually changed, and the popularity of classical music began to wane. As composers gained more rights under copyright laws, their works were increasingly viewed as a unique commodity in an increasingly capitalist economy. The composer's individual ideas came to be viewed as untouchable and unalterable, and classical music turned into something separate from the collaborative, participatory music that it once was.

### **C. Changing Perceptions of Authorship: The "Romantic Author"**

Over time, copyright focused more and more on the protection of author's rights rather than the publisher's rights. As a publisher's right, copyright was literally a right to copy and distribute written texts. As an author's right, the focus of copyright gradually shifted onto the individual ideas of the autonomous author.

Today's concept of "originality" is largely based on the image of the "Romantic author," which started appearing in the mid to late 18th century and came from the Enlightenment thinkers who stressed natural rights and

possessive individualism.<sup>48</sup> Unlike the concept of the author as a "craftsman" creatively building on the ideas of predecessors and contemporaries, "Romantic authorship" assumes that that creativity comes from autonomous acts of an individual genius creating completely new ideas. Under this view, the act of creation was embedded with ownership, and the internally "inspired" work became the property of the writer alone. This belief that an author is solely responsible for the production of a unique work is now so

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<sup>48</sup> See generally Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (discussing philosophies of authorship); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991) (discussing historic philosophies of authorship).

taken for granted that it has become central to modern copyright doctrine.<sup>49</sup>

In the 19<sup>th</sup> century, around the same time that the ideas of “Romantic authorship” gained greater prominence, the gap between popular music and ‘art’ music began to grow.<sup>50</sup> The work of the ‘art’ music composer was seen as a sacred text that should not be tampered with. The practices of borrowing from such composers started to be viewed as a ‘sin,’ and the traditions of borrowing from popular or folk music began to be seen as unoriginal and anomalous.<sup>51</sup>

Such autonomous, idealized views of authorship often fail to account for the inherently collaborative and social nature of knowledge, material, creation, and composition, particularly in the context of music. As one commentator observed:

“Composers necessarily listen to other people’s music. Composition does not occur in a vacuum. It occurs instead within an artistic culture that includes well-defined techniques and styles, as well as recurrent technical problems. Thus, it is natural that composers take ideas and inspiration from their colleagues. In addition, any new piece of music, if it

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<sup>49</sup> See generally Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) (discussing the implications of copyright’s focus on autonomous authorship).

<sup>50</sup> See generally Burkholder, *supra* note 2 (discussing some of the causes and effects of the gap between “popular” and “art” music).

<sup>51</sup> Arewa, *supra* note 49, at 598-591 (citing LAWRENCE LEVINE, *HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 30-32 (1988)) (referring to this “deification” of the classical masters and masterworks as “sacralization”); See also, Burkholder, *supra* note 26, at 1-2 (noting that 20th-century composer Charles Ives’ borrowing practice is often considered “exceptional,” “unlike the procedures of any previous composers”, and “an extraordinary and deliberate violation of the customary integrity of compositions in the cultivated tradition, which are normally individual, self-contained, and derived from unique, newly invented musical ideas”).

is to be comprehensible to most listeners, must bear at least *some* similarity to works that have gone before.”<sup>52</sup>

Another scholar said:

“Only those who do not understand the process of musical composition, who cannot see and feel the subtlety of transfiguration that can be created by a changed melody, even a single note, rhythm, or accent, have made a moral issue of something that is a purely esthetic matter.”<sup>53</sup>

“Romantic authorship” assumptions have led to a restrictive view of an intellectual property right that allows a copyright owner to prevent others from borrowing even a small portion from the owner's creation.<sup>54</sup> “By focusing upon a dichotomy between originality and borrowing, such views of musical authorship fail to recognize that the use of existing works for new creations can be an important source of innovation.”<sup>55</sup>

The pervasive belief or assumption that borrowing indicates a lack of originality ignores the reality of musical practices throughout history and even today. Ironically, several heirs of famous historic musicians have been among those lobbying for stronger copyright. For example, even though Gershwin borrowed extensively from popular and folk styles of his time, his heirs have been among those fighting most aggressively for more extensive copyright duration and protection. Marc Gershwini, George

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<sup>52</sup> Keyt, *supra* note 6, at 427-428.

<sup>53</sup> PAUL HENRY LANG, *GEORGE FRIDERIC HANDEL* 560 (1966).

<sup>54</sup> See also, MCLEOD, *supra* note 5, at 42 (observing that this emphasis on individualistic, proprietary ownership “essentially ‘freezes’ the development of particular [music or musical elements], placing them in the hands of a single ‘original’ copyright owner”).

<sup>55</sup> Arewa, *supra* note 49, at 585.

Gershwin's nephew, lamented, "Someone could turn *Porgy and Bess* into rap music!"<sup>56</sup> He ignored the irony that an important part of his uncle's legacy is based on the fact that he turned jazz and spirituals into classical music (or vice versa, depending on your perspective). Such a view of copyright and creation could prevent current and future composers from emulating Gershwin's way of bridging the gap between classical music and contemporary genres, audiences, and cultures.

Today, classical music is heavily associated with old music that has been in the public domain for a decades or centuries. This view certainly has not helped improve the stereotypical image of classical music as the 'old' or 'irrelevant' museum-piece genre that has no relation to contemporary popular culture. Very little recent music is currently available in the public domain except obscure folk music from mostly non-Western civilizations, and using this music would not necessarily help a composer relate to a contemporary audience. The diminishing popularity of classical music has also reduced the financial resources of classical composers and musicians so as to often make it impractical for them to pay for licensing of current music.<sup>57</sup>

Because of modern ideas of authorship and copyright's extensive hold on current or recent music, composers today may have lost much of their freedom to use current musical language and material that wider contemporary audiences would relate to. There is no longer the open atmosphere or framework for the free exchange of

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<sup>56</sup> Steve Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. TIMES, April 25, 1998, at A15.

<sup>57</sup> See also, MCLEOD, *supra* note 5, at 91-92 (quoting several music executives and artists who complain about the costs and impracticalities of paying for music licensing, including Chris Lighty, a hip-hop management company executive who said, "It's very hard to find these [copyright owners] and very expensive legally. You can spend between \$5,000 and \$10,000 just trying to obtain a license and still come up dry").

creative musical ideas that had been historically the norm. Composers today also fear being labeled as uncreative or lazy if they try to use existing music, and there is little (if any) incentive for composers to creatively ‘play around’ with existing music in new, inventive ways that would connect them with their surrounding communities.

Leading up to today, there has been a great deal of litigation and legislation that has increased copyright's hold on existing music, ranging from the increased term of copyright duration to the Sixth Circuit's 2004 decision in *Bridgeport Music v. Dimension Films*, holding a two-second sound recording sample infringing.<sup>58</sup> The scope of modern copyright might limit the creativity of composers who want to explore, borrow, and expand on existing or popular music as Bach, Brahms, Chopin, or Gershwin did in their day.

### **III. Modern Copyright and Borrowing Practices**

Modern American copyright frameworks along with the now widely accepted ideas of autonomous authorship seem to heavily restrict borrowing practices. Some modern copyright principles could preclude the basic ideas of traditional borrowing. For example, the substantial similarity<sup>59</sup> and derivative work<sup>60</sup> doctrines may prevent a

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<sup>58</sup> 383 F.3d at 398-402 (holding that a two-second sample of a sound recording without a license is a copyright infringement).

<sup>59</sup> See generally, *Arnstein v. Porter*, 154 F.2d 464 (S.D.N.Y. 1946) (to recover damages for copyright infringement, a plaintiff must prove that defendant copied from plaintiff's copyrighted work and that copying constituted improper appropriation); *Country Kids 'n City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) (two works at issue must be “sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value”).

<sup>60</sup> 17 U.S.C. §101 (West, Westlaw through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13) (“A ‘derivative work’ is a work based upon one or more preexisting works.”); 17 U.S.C. §103 (West,

composer from quoting or basing their work on an existing popular work. There is also a good deal of ambiguity and confusion because copyright has few bright line rules, and applications of copyright law often vary from one circuit to another. No single clear standard of substantial similarity or fair use has prevailed. It is difficult for a composer with no legal experience or counsel to know if or how they are allowed to experiment with existing musical ideas. The restrictive and ambiguous aspects of copyright doctrines along with the fear of infringement suits could at least create a chilling effect among composers who would otherwise wish to creatively use existing materials.<sup>61</sup> One ‘wrong step’ could cost more than the borrowing effort was worth.

If a composer today wanted to create a work that purposely borrowed from popular music or other existing music in order to connect with his or her audience, would they be able to do so without the fear of being liable for copyright infringement? How would the methods of borrowing that classical composers traditionally used fit into modern copyright doctrines? How closely can a composer reflect a particular work or style without risking infringement?

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Westlaw through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); 17 U.S.C. §106 (West, Westlaw through P.L. 113-57 (excluding P.L. 113-54 and 113-56) approved 12-9-13) (“[T]he owner of copyright... has the exclusive rights to do and to authorize... derivative works based upon the copyrighted work.”).

<sup>61</sup> See, Keyt, *supra* note 6, at 424 (“Because of the danger of infringement suits, many record companies and popular musicians have made it a policy never to listen to or look at unsolicited musical material”).

### **A. Copyright Infringement: Substantial Similarity**

If a plaintiff wants to prove infringement of his or her pre-existing work, he or she would start by presenting either direct or circumstantial evidence that the defendant had access to the pre-existing copyrighted work.<sup>62</sup> Then the plaintiff must prove that his work and the defendant's work are substantially similar and that those similarities resulted from illicit copying of the original, copyright-protectable elements of the plaintiff's work.<sup>63</sup>

For most composers using historic borrowing techniques, access would often be relatively easy to prove. As mentioned earlier, several historic composers even sought out opportunities to access the works and styles they hoped to emulate. Additionally, many composers borrowed from styles and works that were popular at the time, some of which were intimately familiar to them (e.g., Chopin and Polish folk dances).

Substantial similarity can be found in either "fragmented literal similarity" or "comprehensive non-

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<sup>62</sup> See, *Arnstein*, 154 F.2d at 468 ("[T]he evidence [of access and copying] may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence – usually evidence of access – from which the trier of the facts may reasonably infer copying.").

<sup>63</sup> See, *Country Kids 'n City Slicks, Inc.*, 77 F.3d 1280, 1288 (10th Cir. 1996) (court said the test is "whether the accused work is sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value"); *Arnstein*, 154 F.2d at 468 (to recover damages for copyright infringement, a plaintiff must prove that defendant copied from plaintiff's copyrighted work and that copying constituted improper appropriation; in cases where access to the existing work is proven, a more general substantial similarity analysis is employed; where access is not proven, courts will use a more detailed analysis of "striking" similarity to infer access and determine whether the similarities are "so striking as to preclude the possibility that the plaintiff and defendant independently arrived at the same result").



literal similarity.”<sup>64</sup> Fragmented literal similarity involves verbatim reproduction of protected portions of the pre-existing copyrighted work but does not necessarily involve copying the work's overall essence or scheme. “Comprehensive nonliteral similarity” is where the “fundamental essence or structure of one work is duplicated in another,” even if the infringer did not quote verbatim from the particular work.<sup>65</sup> Both approaches ask for a quantitative and qualitative analysis of what was allegedly ‘taken’ from the plaintiff’s work, and both hold potential problems for borrowing composers.

Under “fragmented literal similarity,” if a composer wanted to directly quote from part of a popular song in the same way as Ives or Tchaikovsky, they would probably be liable for infringement unless they could pay for licensing. Ives’ work exemplifies the idea that quoting or paraphrasing from popular recognizable songs is an especially effective way of getting your audience to react and relate on a deeper level. However, for a composer who wanted to quote an existing song today, the potential cost or risk of liability might not be worth the effort.

A composer using a compositional method similar to Bach or Handel’s style of transformative imitation – using an existing work as a model for a new work – may run into some problems under a “comprehensive non-literal similarity” analysis. The same might be true for a nationalist-style composer who wanted to use a melody, harmony, or rhythm similar to a popular style to evoke the “spirit” of the style or a particular work. If a composer today borrowed from a recent existing work the way Bach borrowed several structural and harmonic elements from Telemann's work, he or she would potentially be pulled into

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<sup>64</sup> 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03 [A] (2012).

<sup>65</sup> *Id.*

litigation. Similarly, if Gershwin were sued for copying the overall harmonic scheme and structure of African-American spirituals and works of the Gullah community to write his opera "Porgy and Bess," a good deal of his work would be challenged.

**i. How Much Similarity is Too Much?**

The question then becomes "how much borrowing or similarity is too much?" This has been a difficult question for legal scholars to answer, and a composer with little or no legal experience would be even more confused. Most of the confusion over substantial similarity doctrines comes from the fact that there is no bright line rule as to how much similarity constitutes "substantial similarity" or how much "copying" constitutes illicit copying or unlawful appropriation. In their efforts to come up with some guidelines, most courts have focused on the artistic and commercial "value" of the borrowed material. They have also used some form of the "idea-expression dichotomy," which focuses on which aspects of the plaintiff's work are copyrightable expressions and which are non-copyrightable ideas. However, courts have been inconsistent and often vague in their applications of these principles, and such principles do not always help a borrowing composer to know what they are or are not legally allowed to do in their efforts to creatively borrow musical elements from existing works.

**a. The "Value" of the Borrowed Material**

The more 'valuable' the material was to the plaintiff's work, the more likely that the borrowing will be found to be 'too much.' The court will ask whether the defendant borrowed "that portion of [the plaintiff's work] upon which its popular appeal, and, hence, its commercial success, depends."<sup>66</sup> Was it the "catchy part,"<sup>67</sup> the "heart of

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<sup>66</sup> *Robertson v. Batten, Barton, Durstine, & Osborn, Inc.*, 146 F. Supp. 795, 798 (S.D. Cal. 1956).

<sup>67</sup> Keyt, *supra* note 6, at 439-40 (discussing the implications of the judicial focus on the "value" of musical material).

the composition,”<sup>68</sup> or the “essential musical kernel”<sup>69</sup>? The court in *Arnstein v. Porter*, a seminal substantial similarity case, said the question is “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners... that defendant wrongfully appropriated something which belongs to the plaintiff.”<sup>70</sup> Additionally, the *Arnstein* court said, “The plaintiff’s legally protected interest is not... his reputation as a musician but his interest in the potential financial returns from his compositions.”<sup>71</sup> The concern is that if the borrower takes the more valuable part of the plaintiff’s work, then the subsequent work will be seen as a market substitute for the original.<sup>72</sup>

The judicial assumption that borrowing the “valuable” part of a work is an illicit or unlawful act of misappropriation is in direct conflict with many traditional methods of composition. A composer would often quote or paraphrase part of a known song precisely *because* it was presumably recognizable or “catchy.” This was a way of making cultural or extra-musical references and getting the listeners involved in the music-making. By precluding this kind of quotation or allusion, this judicial view of borrowing could prevent composers from making valuable, direct connections with their audiences.

Additionally, this view of illicit copying focuses almost exclusively on the damage to the plaintiff’s work. Courts have little to say about the value of the borrowed

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<sup>68</sup> *Elsmere Music, Inc. v. Nat’l Broad. Co., Inc.*, 482 F.Supp. 741, 744 (S.D.N.Y. 1980).

<sup>69</sup> *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177, 178 n.6 (S.D.N.Y. 1976).

<sup>70</sup> *Arnstein*, 154 F.2d at 473.

<sup>71</sup> *Id.*

<sup>72</sup> *See*, Keyt, *supra* note 6, at 440 (noting that the *Arnstein* case presumes that “appropriation of the catchy part is likely to result in appropriation of the plaintiff’s customers as well... [and such use] will often be sufficient, for the audience of consumers to treat the defendant’s work as a market substitute for the plaintiff’s”).

material to the defendant's work or the potential damage to the defendant's work if the borrowed portion were prohibited. One commentator speculated that this "prevents a defendant from appropriating a [plaintiff's] five-minute song for use in a four-hour opera, but would seem, conversely, to allow the defendant to market as his own a five-minute aria out of a plaintiff's four-hour opera."<sup>73</sup> Musical material can sound and 'feel' drastically different, depending on its treatment and larger context. This view of copying might not consider the effect of the context, changes, or additions that a defendant may have made to a plaintiff's material or the ways that a defendant's use of the borrowed material may be artistically and creatively beneficial to society.<sup>74</sup>

### **b. The "Idea-Expression" Dichotomy**

The main idea behind the "idea-expression dichotomy" doctrine is that mere copying does not automatically equal illicit copying.<sup>75</sup> Rather copyright infringement only occurs when a defendant has copied the copyright-protected expression of a plaintiff's ideas, not just the ideas themselves.<sup>76</sup> The ideas are the commonplace elements or public domain 'facts' in the work. For example, the basic idea of a "boy meets girl" story is not copyrightable because it is so commonly used that it is essentially public domain. Facts are not copyrightable because they are

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<sup>73</sup> Keyt, *supra* note 6, at 439 (examining the implications of the focus on the "value" of musical material as expressed in *Arnstein v. Porter*).

<sup>74</sup> See, Keyt, *supra* note 6, at 439-41 (discussing the focus on the value of the plaintiff's work and noting that there may be liability even where the defendant transformed the borrowed material so "it no longer sounded so catchy").

<sup>75</sup> See, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. ... [C]opyright protection may extend only to those components of a work that are original to the author.").

<sup>76</sup> 4 Nimmer, *supra* note 64, at §13.03.

discovered, not original to the author.<sup>77</sup> Merely copying such facts and trite concepts would not be infringing. The expression of the ideas is the particular way that the ideas are used in the work to make the work “original” and thus copyrightable.<sup>78</sup> For example, the film “When Harry Met Sally”<sup>79</sup> has a different expression of a “boy meets girl” story than “You’ve Got Mail.”<sup>80</sup> Judge Learned Hand discussed a similar idea in his so-called “abstractions test” in *Nichols v. Universal Pictures Co.*,<sup>81</sup> which involved two allegedly similar plays:

Upon any work, ...a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about...; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.<sup>82</sup>

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<sup>77</sup> *Feist*, 499 U.S. at 344-45 (“[F]acts are not copyrightable.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (“No author may copyright his ideas or the facts he narrates.”).

<sup>78</sup> 4 Nimmer, *supra* note 64, at §13.03.

<sup>79</sup> *When Harry Met Sally* (Castle Rock Entertainment 1989) (two characters are friends for over ten years; they are afraid of taking the relationship any further because it might ruin their friendship; at the end, they both acknowledge that they love each other).

<sup>80</sup> *You’ve Got Mail* (Warner Bros. Pictures 1998) (two characters meet under pseudonyms in an online chat room; in their internet lives, they secretly think they are the perfect match for each other; in their outside “real lives,” they are business rivals and cannot stand each other; the guy finds out the truth about their double lives and falls in love with the girl in real life but still keeps his internet identity a secret; the girl starts secretly falling in love with the guy in real life; in the end, the guy reveals his internet identity; they acknowledge that they love each other).

<sup>81</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>82</sup> *Id.*

The Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* used a two-prong test to determine substantial similarity under the idea-expression dichotomy doctrine.<sup>83</sup> First, an “extrinsic test” uses expert witnesses and analytic, somewhat objective dissection to determine whether the “ideas” are “substantially similar.”<sup>84</sup> In cases involving music, the extrinsic test often involves musically experienced experts. Second, an “intrinsic test” relies on the subjective responses of “lay listeners”<sup>85</sup> (i.e., the jury) to evaluate whether the “expressions” and “total concept and feel”<sup>86</sup> of the two works are “substantially similar.”<sup>87</sup> Both prongs of the Krofft test must be satisfied in order to prove infringement.<sup>88</sup> While some courts view the two prongs as separate, one prong can affect the perceptions and conclusions of the other. As one commentator acknowledged, “it is doubtful that jurors can selectively ignore the expert testimony upon which they likely will have based their determination of the issue of copying.”<sup>89</sup>

If the musical “idea” is common or in the public domain, an infringement charge can be rebutted. For example, if two works at issue share a motif of several notes or a chord progression, a defendant can show how that same

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<sup>83</sup> 562 F.2d at 1164-67.

<sup>84</sup> *Id.*

<sup>85</sup> *Arnstein*, 154 F.2d at 473.

<sup>86</sup> *Roth*, 429 F.2d at 1110 (finding that the “total concept and feel” of two greeting cards were the same).

<sup>87</sup> *Krofft*, 562 F.2d at 1164-67.

<sup>88</sup> *Id.*

<sup>89</sup> Christine Lepera and Michael Manuelian, *Music Plagiarism: A Framework for Litigation*, 15-SUM ENT. & SPORTS LAW. 3, 22 (1997); *See also*, *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232-33 (3d Cir. 1986) (noting that the distinction between expert testimony and lay opinion “may be of doubtful value when the finder of fact is the same person for each step: that person has been exposed to expert evidence in the first step, yet she or he is supposed to ignore or ‘forget’ that evidence in analyzing the problem under the second step”).

sequence of notes or chords appears in literal or similar form in other music.<sup>90</sup> This may bode well for a borrowing composer who wants to develop a work based on the “spirit” of a popular style like a nationalist composer creating a folk-style work. Some common elements, such as certain chord progressions, can be very evocative of certain styles. A classical composer might be able to find the “common” elements of popular musical styles that still made those styles distinct and show that the similarities at issue are “common devices frequently used and dictated by the music’s form or style.”<sup>91</sup> For example, a defendant could show that their use of a chord progression or rhythm from the Motown songs of the 1960’s resulted from incorporating a well-established musical style, not from copying a plaintiff’s particular song. This type of borrowing could allow a composer some flexibility to participate in a cultural exchange of ideas in a way that theoretically does not have as much risk of liability.

However, one major point of confusion in applying the idea-expression dichotomy principles to music is that they were created for more factual subject matter, such as literature, where the line between the basic “ideas” and the unique “expression” is much easier to see. In music, that

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<sup>90</sup> See *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720-21 (9th Cir. 1976) (the plaintiff’s song was not a completely unique composition because it contained a four-note sequence common in the music field).

<sup>91</sup> *Lepera*, *supra* note 89, at 5; See e.g., *Intersong-USA v. CBS, Inc.*, 757 F.Supp. 274, 280 (S.D.N.Y. 1991) (noting that a descending scale step motive is a commonly used compositional device.); *Repp v. Webber*, 947 F.Supp. 105, 113-16 (S.D.N.Y. 1996) (noting that certain devices such as the use of rising arpeggios and tetrachords are among the most common devices in music, particularly religious music); *Landry v. Atlantic Recording Corp.*, No. 04-2794, 2007 WL 4302074, at \*6 (E.D. La Dec. 4, 2007) (noting that three songs at issue contained motives, phrases, chords, a pentatonic (5 note) blues scale, and other techniques common to all rock music).

distinction is much more difficult, if not near impossible, to make.<sup>92</sup> Notes, harmonies, and rhythms by themselves are in the public domain and cannot be copyrighted. The musical ideas underlying any two compositions are essentially the same.<sup>93</sup> Many courts have noted the “limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions.”<sup>94</sup> Cultural and musical convention allows for only so many combinations that are “pleasing to the ear.”<sup>95</sup> Additionally, music is largely an abstract art form that only has meaning through the extra-musical experiences, associations, and reference points that the listeners themselves attach to the abstract sounds. It is difficult to ascertain how much one can or should reduce music to its basic “abstractions” to find the “ideas” or where the arrangement of musical “ideas” becomes a protectable “expression.”

Courts sometimes vary in their judgment of where the public domain idea ends and the original expression begins. Some courts make it seem as if the originality threshold was not very high. In *Wihtol v. Wells*, the plaintiff’s composition was very similar to an old Latvian, Italian or Russian folksong that had been in the public

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<sup>92</sup> See *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004) (“The extrinsic test provides an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of idea and expression.”).

<sup>93</sup> In Western music, there are twelve basic tones repeated over several octaves. Within that, a typical Western diatonic scale (pattern of sequential notes around which a piece of music is centered) is made of only seven basic tones.

<sup>94</sup> *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988).

<sup>95</sup> See *Darrell v. Joe Morris Music Co.*, 113 F.2d 80 (2d Cir. 1940) (“[W]hile there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear.”).



domain for years prior to the plaintiff's use of it.<sup>96</sup> Even so, the Seventh Circuit found that the additions the plaintiff made to the old folk tune were sufficient to meet the originality requirements of copyright law. The court noted that when an author adds something recognizable as a "distinguishable variation" to public domain music, it is enough for it to be "his own."<sup>97</sup> However, the court in *Norden v. Oliver Ditson, Co.* seemed to potentially set the bar quite a bit higher when it said that a copyrightable composition "must have sufficient originality to make it a new work rather than a copy of the old, with minor changes which any skilled musician might make."<sup>98</sup> The lack of a consistent bright line standard of "originality" makes it difficult for a borrowing composer to know when he or she can copy an existing "idea" or how much he or she would need to change the borrowed material in order to be considered "original" and not "illicitly copied."

Furthermore, the tests are largely based on the subjective view of the lay listener.<sup>99</sup> Substantial similarity between two works is based on the question of whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."<sup>100</sup> Moreover, "a jury may find a combination of unprotectable elements to be protectable... because the over-all impact and effect indicate substantial

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<sup>96</sup> *Wihtol v. Wells*, 231 F.2d 550, 551-52 (7th Cir. 1956) (plaintiff admitted that he got his idea from a tune he had heard an organ-grinder play that was similar to the tune of his composition).

<sup>97</sup> *Id.* at 553-54.

<sup>98</sup> 13 F.Supp. 415, 418 (D. Mass. 1936).

<sup>99</sup> See *Arnstein*, 154 F.2d at 473 (noting that "lay listeners" are those "who comprise the audience for whom such... music is composed"); *Hogan v. DC Comics*, 48 F.Supp.2d 298, 310 (S.D.N.Y. 1999) ("Substantial similarity is generally a question of fact for a jury.").

<sup>100</sup> *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

appropriation.”<sup>101</sup> Thus, if a composer stylistically modeled their work off of an existing work (or style), a jury could still potentially find infringement even if the composer only borrowed the “common” elements found elsewhere. The composer might not intend to infringe a particular song, yet the limitations of possible musical ideas may cause the two works to sound more similar than they actually are or were intended to be.<sup>102</sup> For example, a composer who wanted to stylistically model a work (or part of a work) off of Michael Jackson’s music could be labeled as an infringer if the jury thought the work sounded a little too much like “Thriller.”

Because there are only so many notes available to a composer, a borrowing composer in a sympathetic or musically knowledgeable court may have more flexibility in their use of musical “ideas.” However, it is difficult for a composer to predict with any real confidence what a court or a jury will consider a “common musical idea” and what would be considered a copyrightable “expression,” and it is problematic for composers to try to borrow only the “ideas” or common elements in order to ‘tip toe’ around a potential lawsuit. In any case, depending on how closely the composer reflected the borrowed style, how much he changed from the borrowed works, or what specific musical elements he borrowed, his work could still be found substantially similar by a jury of “lay listeners.”

## **ii. Elements of Music in the Eyes of a Court**

For a composer who wants to borrow from or reflect an existing work in a non-infringing way, he or she may try to rework or alter the music by changing some of the notes or harmonies, varying the rhythm, setting it in a different key or mode (Major or minor), putting it at an unexpected place in the musical structure, or layering the borrowed portions

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<sup>101</sup> *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (internal quotations omitted).

<sup>102</sup> Stylistic imitations have been mistaken for the real thing, even during the height of the nationalist movement.

with other melodies and musical elements. A composer might only borrow one particular aspect of the existing work that he or she found attractive or useful in creating his or her own work, or a composer might borrow a mix of elements from various sources. The question then becomes: what aspects of the music does a composer have more freedom to directly borrow? How (or how much) would he or she have to alter the existing music in order for it to be non-infringing?

Courts have looked at a variety of elements to influence their decision of substantial similarity in music including melody, harmony, rhythm, pitch, tempo, phrasing, timbre, tone, spatial organization, consonance, dissonance, accents, bass lines, new technological sounds, and overall structure.<sup>103</sup> Even with this long list of possible considerations, most judicial discussions of music copyright tend to focus most of their discussion on three basic elements - melody, harmony, and rhythm.<sup>104</sup> It is generally thought, or at least implied, that the originality of a piece of music is to be found in one of these elements. This simplistic analysis of originality and musical textures probably results from the fact that most copyright litigation has been centered around popular music, which usually has a relatively simple melodic, harmonic, and rhythmic texture.<sup>105</sup>

Some courts have implied that there may be a difference between analyzing popular music and analyzing

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<sup>103</sup> See *Swirsky*, 376 F.3d at 849 (noting the various musical elements courts have considered).

<sup>104</sup> See Keyt, *supra* note 6, at 429-33 (surveying the judicially recognized elements of music and noting the tendency to focus on melody, harmony, and rhythm); John R. Autry, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTEL. PROP. L. 113, 122-24 (2002) (surveying the judicially recognized elements of music, focusing on melody, harmony, rhythm, and structure).

<sup>105</sup> See Keyt, *supra* note 6, at 429-33, (criticizing various courts' simplistic or misinformed analysis of the elements of music).

more complex music.<sup>106</sup> Compared with popular music, classical music is often much more complex with multiple melodies, intricate rhythms and harmonies, embellishments, special performance techniques, and other more complicated, layered elements. From a musical perspective, much of a composer's originality can come from the way these complexities are layered and combined or varied, even where some of the material is borrowed. Judiciously, this complexity could work for or against a borrowing classical composer. A more favorable court could see the additions and other more complex elements and layers as original expressions that make the piece substantially different from the pre-existing work. On the other hand, a less favorable court might stick with the "fundamentals" and dismiss the borrower's additions to the existing work. Copyright can seem quite restrictive if a court only allows for a limited definition of "originality" with the elements of music.

#### **a. Melody**

Some have argued that the melody is the part of the music most probative for an inquiry of "originality."<sup>107</sup> As a result, it is likely that, out of the choices of musical elements, a composer has the least amount of freedom to borrow from an existing melody. A court may look more generally at the similarity of thematic material, the melodic contour, or the overall shape of the musical phrase. Other courts employ a more detailed, exacting analysis of the individual notes and intervallic<sup>108</sup> relationships, looking note

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<sup>106</sup> See *Selle v. Gibb*, 741 F.2d 896, 899 (7th Cir. 1984) (noting that the expert was highly experienced as a classical musicologist but had never analytically compared two popular musical works).

<sup>107</sup> See *Northern Music Corp. v. King Record Distrib. Co.*, 105 F.Supp. 393, 400 (S.D.N.Y. 1952) ("It is in the melody of the composition- or the arrangement of notes or tones that originality must be found. It is the arrangement or succession of musical notes, which are the finger prints of the composition, and establish its identity.").

<sup>108</sup> Intervals are measures of relational distance from one note to another (e.g., the distance from A up to F is relationally the same as the distance from B up to G).

by note or interval by interval. The more notes or intervals the two works have in common, the more similar they are seen to be.<sup>109</sup> A borrowing composer could try to change or add enough notes to an existing melody to not be found infringing, but there is no bright line rule as to how many similar notes are too many. It is a question of both qualitative and quantitative value.

Many melodies will sound the same to some extent because of the limited amount of notes available. This is compounded by the fact that the two works at issue in a case are often treated as if they were alone in their own little universe with less consideration of the larger musical world.<sup>110</sup> The court in *Repp v. Webber* noted that both melodies at issue began with an “identical interval of a sixth.”<sup>111</sup> That similarity was not ultimately dispositive in *Repp*, but if one were to consider this a more probative fact, one would find many musical works in the wider repertory to be infringing.

A composer can show musical creativity or originality by the way he treats or adds to the melody. Some composers start out like an existing melody and continue with something completely new.<sup>112</sup> They might use embellishments, ornaments, chromaticism, variations, and many other tools and techniques; and the resulting expression may be original. However, courts have been

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<sup>109</sup> See Autry, *supra* note 104, at 122-24 (analyzing how different courts have analyzed the elements of music).

<sup>110</sup> See Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 484-85 (2007) (“The universe within which courts evaluate the similarity of works is often a circumscribed one that may even be limited to consideration of the two works.”)

<sup>111</sup> *Repp*, 947 F.Supp. at 112.

<sup>112</sup> See e.g., *Stratchborneo v. Arc Music Corp.*, 357 F.Supp. 1393, 1405 (S.D.N.Y. 1973) (“Aside from some similarities in the opening passages, the works sound, to the non-professional customer’s ear, quite different from plaintiff’s work.”).

inconsistent in their treatment of melodic embellishments. In *Allen v. Walt Disney Productions*, the plaintiff alleged that the two songs at issue only had two minor differences,<sup>113</sup> but the defendant argued that the Disney song's "decorative and embellishing notes" made it sufficiently original.<sup>114</sup> The court concluded that there might not be any "identity" or similarity in the passages at issue because the decorative notes made the compositions dissimilar.<sup>115</sup> By contrast, other courts, such as in *Repp v. Webber* focused more on the fundamental melodic notes because the surrounding notes were "merely ornamental and decorative, and discounting them in ascertaining the fundamental melodic pitches is consistent with common musicological analytical practice."<sup>116</sup> At the same time, it is possible to oversimplify the music until one is only left with "fundamental" similarities. As the dissent in *Arnstein* recognized, a less favorable court could see similarities where none really exist.<sup>117</sup>

If a composer wanted to allude to a popular melody in the same way as a nationalist composer like Dvorak or Tchaikovsky, using a popular melody as a "germ" from which to develop a larger piece, they might embellish the melody or make it more complex. Chopin added quite a bit of ornamentation and technical complexity to his melodies while still distinctly evoking a particular song or style. Under the *Allen* case's standard, a composer may be able use similar techniques and show a sufficient amount of "originality" in the added material. However, under an analysis that focuses more on the "fundamental" pitches in

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<sup>113</sup> *Allen v. Walt Disney Prods. Ltd.*, 41 F.Supp. 134, 137 (S.D.N.Y. 1941) (comparing the Disney song "Some Day My Prince Will Come" to the song "Old Eli" from a collection of college music published by Yale University).

<sup>114</sup> *Id.* at 139-140.

<sup>115</sup> *Id.*

<sup>116</sup> *Repp*, 947 F.Supp. at 112 note 2.

<sup>117</sup> *Arnstein*, 154 F.2d at 476-77.

the melody, such techniques may not be viewed as favorably, depending on how much or how prominently notes were added or changed. It is not always easy to predict which view a court might take.

A composer's choice of key (e.g., A Major as opposed to D minor) might be a consideration, but most courts give it little weight and imply that the choice of key is an idea that is impossible to separate from the expression.<sup>118</sup> A composer could have chosen his key for a specific aesthetic reason or simply because the instrument or instrumentalist involved is most physically comfortable or deft at playing in that key.<sup>119</sup> Courts have similarly not often considered the "mode" – Major or minor – of a work because there are only two choices that are commonly used in western popular music.<sup>120</sup> By contrast, some classical composers have used other more unusual modes, such as Ionian, Dorian, Lydian, Phrygian, and Mixolydian.<sup>121</sup> Other classical music is set in an ambiguous key or with no central

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<sup>118</sup> See Autry, *supra* note 104, at 135-36 (surveying judicially recognized musical elements, including key and mode); *Tisi v. Patrick*, 97 F.Supp.2d 539, 543 (S.D.N.Y. 2000) (noting that both songs at issue were in A Major but many other songs are also in that key).

<sup>119</sup> Historically, each key was believed to have large emotional, aesthetic, and sometimes even philosophical implications. For example, the key of C Major was believed to be especially happy; the key of D Major was seen as evoking feelings of royalty, victory or glory; and the key of E-flat Major (because of its use of three flats) was seen as representing God in the Trinity.

<sup>120</sup> *Contra Repp*, 947 F.Supp. at 113 (noting the different modes between the two songs and how this affected the different mood or purpose of the two songs at issue).

<sup>121</sup> Modes like Ionian, Dorian, Phrygian, Lydian, Mixolydian, Aeolian, and Locrian were relatively common in Medieval and Renaissance music; they have come back into some use in classical music of the last hundred years. Stravinsky used the Phrygian mode in his "Symphony of Psalms" (1930); he used medieval and Russian modes in many of his other works as well. Debussy used several medieval modes in his works, including his "Suite pour le Piano" (1901). The Beatles used Dorian mode in their song "Eleanor Rigby."

key at all. If a modern composer re-set a popular melody in one of these unusual modes, it is theoretically possible that a court may be willing to take that originality into account. Though, if the melody was recognizably borrowed, such originality is unlikely to be given very much weight.

For a composer who wants to creatively use an existing melody in an otherwise very original work, a judicial melody-centered view and the lack of standard as to how much melodic “originality” is required can be a serious disadvantage. The melody is often viewed as the “catchy” part, and as said before, more similarity is often found where the “catchy” part of an existing work has been borrowed. Such a restrictive view of music ignores the fact that music is made up of many more elements than just melody, and it denies the reality that the meaning of a melody can change drastically depending on its larger musical context. A melody-centric court or jury might not be as willing to give sufficient weight to the creative things a composer can do with harmony, rhythm, structure, layering, and other compositional elements and techniques.<sup>122</sup>

Classical music often has a much more complex view of the use of a melody. Many composers, dating back to the Renaissance and including more recent composers like Ives, layered popular melodies as lower secondary voices in the harmony of an otherwise completely new work.<sup>123</sup> Some composers would borrow a recognizable or unique melody

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<sup>122</sup> *Contra Swirsky v. Carey*, 376 F.3d 841, 848 n.13 (9th Cir. 2004)

(acknowledging that the same pitch sequence played with different key, harmony, rhythm, and tempo could sound substantially different).

<sup>123</sup> In Ives’ *West London*, he quoted a hymn as a secondary melody in his larger work. In doing so, he extended the rhythmic values of some of the notes (e.g., he turned some of the quarter notes into half notes, some of the eighth notes into quarter notes, etc.) and changed the surrounding harmonies. If played by itself, the melody would sound similar to the source material, even if it looked different on the page. However, in the larger texture of the work, it may sound quite different, particularly if played at a slower speed in the midst of the other musical elements of the work.



but change or extend the melody's rhythm, start on unexpected beats, use different harmonies, and alter other surrounding musical elements. This changed the context and meaning of the melody and even added new extra-musical meaning. Such techniques would catch an audience's attention and allow composers to appeal to both untrained listeners and connoisseur musicians.

Today, if a composer made an existing melody into part of a harmony underneath a new original melody, the judicial focus might still be on the borrowed melody even if the rest of the work was much more original and creative. Likewise, if a composer borrowed several melodies from different sources and layered them in a quodlibet style work, they would probably be found infringing on several songs even though the work as a whole would never be mistaken as a market substitute for the original pre-existing works. Courts that have mostly dealt with relatively simple 'pop' music have not had much chance to consider this kind of complexity. They might not recognize the musical creativity or "originality" involved in these techniques, which had historically been very prevalent. In a less favorable court, this complexity might not influence a court's decision very much, if at all, and any "substantially similar" quote or paraphrase of a melody, no matter how layered or embellished, could be considered infringing. As a result, melody is probably also the element that composers are most reticent to experiment with for borrowing purposes.

#### **b. Harmony**

Harmony involves the composer's choices of how different pitches vertically relate to each other, and harmonic chord progressions are the relationships from one chord (i.e., vertical set of pitches) to the next. As mentioned before, harmony is often very suggestive of certain styles. The harmonies used by a Motown band are noticeably different than those used by a punk rock band. Even so, many similar chords and harmonic progressions will be found in a great

number of pieces.<sup>124</sup> If one were to judge Beethoven's works purely based on basic patterns of chord progressions, many passages in his works could be reduced to two very common chords. Much of copyright litigation has been centered around popular music, where customary harmonic progressions have been especially limited.

Because there are often limited harmonic choices available, courts generally do not give harmonic similarities as much weight as melodic similarities.<sup>125</sup> A plaintiff who wants to prove infringement would probably need to show that a large number of chords have been borrowed. He or she must also be able to show that those chords are not trite or common to music in general or to the particular styles or genres in question.<sup>126</sup> Since this analysis gives harmonic similarities less weight, a composer might have some level of freedom to borrow from an existing harmonic progression, particularly where other surrounding elements in the new composition are original.<sup>127</sup>

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<sup>124</sup> See Rob Paravonian, *Pachelbel Rant*, YOUTUBE (Nov. 21, 2006), <http://www.youtube.com/watch?v=JdxkVQy7QLM> (using Pachelbel's Canon in D, T. 337, to illustrate how multiple songs use similar chord progressions and melodic elements); see also The Axis of Awesome, *The Axis of Awesome: 4 Chords Official Music Video*, YOUTUBE (Jul 20, 2011), <http://www.youtube.com/watch?v=oOlDewpCfZQ> (showing many popular songs that sound similar because they use the same for chords).

<sup>125</sup> See generally *Tisi v. Patrick*, 97 F.Supp.2d 539, 543-44 (S.D.N.Y. 2000) (thoroughly analyzing the similarities and differences in the chord structures works and discounting the similarities in a chord progression that was particularly common).

<sup>126</sup> See *id.* (chord progressions in both works at issue were commonly "found in songs in all genres"); *McRae v. Smith*, 968 F.Supp. 559, 566 (D. Colo. 1997) (noting that chord progressions found in both works at issue were "the most common chord progressions in all of the music of Western civilization").

<sup>127</sup> *Contra MCA, Inc. v. Wilson*, 425 F.Supp. 443, 448-49 (S.D.N.Y. 1976) (defendant borrowed a particular chord progression along with other elements from a particular song that may have been common to a genre but admitted there were at least seven others available to him that were also common to the genre; the court ultimately found the defendant had infringed on the plaintiff's work).

Some courts have been willing to find a lack of similarity where the harmonic differences noticeably change the complexity and character of the work. For example, in *Repp v. Webber*, the court noted that, even where the melodies were similar, the harmonic progression in Repp's song was "very simple," but the harmonies in Webber's song were "complex and extremely sophisticated."<sup>128</sup> This made the overall character of the pieces creatively very different from each other.<sup>129</sup> Thus, if a composer is creative with their harmonic choices, they may have some extra room to borrow other portions or elements of an existing work.

On the other hand, copying a more complex chord progression can lean a court toward a finding of infringement. In *Gaste v. Kaiserman*, the plaintiff's expert pointed out that the harmony copied from the plaintiff's work "evaded resolution" in a very creative way that "he had never seen... in any other compositions."<sup>130</sup> The court found this to be probative, and they ultimately sided with the plaintiff.<sup>131</sup>

### c. Rhythm

Rhythm is the temporal relationship between the notes – i.e., the durational value of the individual notes and how those durations allow the notes to relate to one another. The range of rhythmic values or durations is thought to be fairly limited.<sup>132</sup> Thus, courts tend to find rhythmic similarity less persuasive unless the rhythmic similarities between the two works at issue are symmetrically layered with other similarities.<sup>133</sup> On the other hand, courts might be

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<sup>128</sup> *Repp v. Webber*, 947 F.Supp. 105, 113 (S.D.N.Y. 1996).

<sup>129</sup> *Id.*

<sup>130</sup> *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988).

<sup>131</sup> *Id.*

<sup>132</sup> Rhythmic values include whole notes, half notes, eighth notes, sixteenth notes, and a few others.

<sup>133</sup> See *McRae v. Smith*, 968 F.Supp. 559, 566 (D. Colo. 1997) (striking similarity was not established where certain individual notes of each

willing to consider rhythmic differences or complexities. In *Repp*, the court noted the “rhythmic character” of the second phrase of both songs were similar.<sup>134</sup> Yet the court also noted several other differences in the rhythm and meter of the two works, saying, “These differences in timing qualitatively alter the core personality and character of the two songs.”<sup>135</sup>

Courts have sometimes misunderstood or ‘disagreed’ over what the term “rhythm” encompasses. One common point of confusion, even among lay musicians, is to mix up the definitions of rhythm and beat. The “beat” is the basic pulse underlying the music to keep it going at a steady speed. Some courts have defined rhythm as tempo when actually tempo is simply the speed at which you play a piece of music.<sup>136</sup> Tempo is largely irrelevant to similarity, especially considering that it can even vary from one performer to another. Other courts and scholars have considered meter<sup>137</sup> – the number of pulses or beats within

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composition did not share “significant amounts of . . . rhythm.”); See Autry, *supra* note 104, at 136-38 (surveying how courts have analyzed rhythm in copyright litigation).

<sup>134</sup> *Repp*, 947 F.Supp. at 113 (stating that the two works were rhythmically similar in that “(1) the basic pulse of both phrases is the quarter note; (2) the relationships between the time values of certain consecutive pitches is similar; and (3) the time values of the first three identical melodic pitches, B, E and G, are identical.”).

<sup>135</sup> *Id.* at 116; See also *Allen v. Walt Disney Prods. Ltd.*, 41 F.Supp. 134, 140 (S.D.N.Y. 1941) (the court did not give the rhythmic similarities much weight; the court also noted that one song was written as a waltz and the other as a march).

<sup>136</sup> *Northern Music Corp. v. King Record Distrib. Co.*, 105 F.Supp. 393, 400 (S.D.N.Y. 1952) (“Rhythm is simply the tempo in which the composition is written . . . [O]riginality of rhythm is a rarity, if not an impossibility.”).

<sup>137</sup> See *Repp*, 947 F.Supp. at 113 (one of the songs was in cut time, i.e., four primary beats per measure, while the other was in 3/4 meter, i.e., three beats per measure).

each bar or measure of music<sup>138</sup> - to be part of or the same as rhythm.

As with harmony, the fact that rhythmic similarities are less persuasive to a court gives a borrowing composer some freedom to borrow existing rhythms more directly. A composer could use rhythmic elements that are common to a style to evoke sounds that an audience would recognize yet still remain sufficiently “original” in the eyes of a court. If the borrowing composer’s work is rhythmically different or more complex, a court may also allow for some similarities in other musical elements. However, the lack of consensus as to the definition of rhythm could also work against a borrowing composer in a court less willing to see the importance of their original contributions. Furthermore, if the particular rhythm were especially catchy or famous, composers might be prevented from using it at all.

#### **d. Combination of Musical Elements**

Several courts have noted that isolated analysis of the separate musical elements is somewhat irrelevant without consideration of the overall effect of the combination of musical elements. In *Swirsky v. Carey*, the court said, “To pull these elements out of a song individually, without also looking at them in combination, is to perform an incomplete and distorted musicological analysis.”<sup>139</sup> The Ninth Circuit in *Krofft* said that substantial similarity is not solely dependent on isolated similarities between two works; it is based on the works’ “total concept and feel” as seen by reasonable laypersons.<sup>140</sup> The court in *Swirsky* also noted:

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<sup>138</sup> While most music, particularly popular music, has generally stayed with simple meters of 3 or 4 (or 6 or 8) beats per bar, recent musical trends have opened up more possibilities, particularly in more “classical” genres of music, and have chosen more complex meters such as 5 or 7 beats per bar.

<sup>139</sup> *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004).

<sup>140</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165–67, 1169 n.12 (9th Cir. 1977) (stating that the trial court’s jury instruction was correct in saying that “you must not simply focus on

[C]oncentration solely on pitch sequence may break music down beyond recognition. If a musician were provided with a group of notes identified only by numerical pitch sequences, he or she could play that music a number of different ways, none of them being substantially similar to each other. In order to perform a song exactly, the musician would need information about key, harmony, rhythm, and tempo.<sup>141</sup>

By this reasoning, a composer using principles of transformative imitation could theoretically borrow certain elements, such as harmony or rhythm, and alter or layer them with new elements in unusual ways. Or they could borrow a mix of elements from different sources and layer them together to create a new “total concept and feel.” If the borrowed material was not the uniquely “catchy” part of the existing work and this new “total concept and feel” did not resemble the particular existing work in the ears of a jury or the eyes of a court, the borrowing composer would be less likely to be called an infringer. For example, in *Repp*, the court noted that seven notes in the melodies of the two works were fundamentally the same.<sup>142</sup> However, the harmonies were much more complex, the meter was different, the rhythms were changed, the mode was different, and the

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isolated elements of each work to the exclusion of the other elements, combination of elements, and expressions therein.” Also stating that “it is the *combination* of many different elements which may command copyright protection because of its particular subjective quality”).

<sup>141</sup> *Swirsky*, 376 F.3d at 848 n.13, 849 (“There is no one magical combination of these factors that will automatically substantiate a musical infringement suit; each allegation of infringement will be unique. So long as the plaintiff can demonstrate, through expert testimony that addresses some or all of these elements and supports its employment of them, that the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted work, the extrinsic test is satisfied.”).

<sup>142</sup> *Repp*, 947 F.Supp. at 112-13.

overall character of the two works was different. Thus, the two works were found not to be substantially similar.<sup>143</sup>

Similarly, the symmetrical location or positioning of certain identical or similar notes or intervals in the two works may be relevant. In *Selle v. Gibb*, the plaintiff's musical expert testified that several notes in the two songs at issue shared identical pitches and rhythmic symmetry.<sup>144</sup> In *Repp*, the court noted that a rising arpeggio<sup>145</sup> in one of the songs at issue began on the weak beat, but the rising arpeggio in the other song began on the strong beat.<sup>146</sup>

As mentioned before, composers such as Brahms would often borrow from a number of different sources and end up with a product that was distinctly their own. Yet this method of composition still allowed Brahms to use musical language that his audiences found familiar. Some nationalistic composers such as Bartok were similarly careful not to borrow too directly from any one source. They would borrow a mix of stylistically suggestive harmonies, rhythms, and intervals to create their new works. By the judicial standards of *Repp* and *Swirsky*, such a composer today may be able to create an "original" work while still using some musical language an audience would relate to.

However, for a composer who wished to borrow a greater amount of musical elements to more directly connect with a composer, style, or culture, even though they might alter or expand on the melody or harmony or rhythm, they might not so substantially alter the "total concept and feel" of a work as the composer in *Repp*. Historically, many composers would purposefully borrow elements of folk and popular music that maintained the musical "concept and

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<sup>143</sup> *Id.* at 116-17.

<sup>144</sup> *Selle v. Gibb*, 741 F.2d 896, 899 (7th Cir. 1984).

<sup>145</sup> Arpeggios are notes of a chord- like figure played in sequence one at a time.

<sup>146</sup> *Repp*, 947 F.Supp. at 114.

feel” of the existing work or style, yet they took it to another level by being creative in other ways.

Modern copyright principles purport to encourage creativity and new ideas, but the limited, simplistic judicial view of what constitutes “originality” in the elements of music could actually restrict creativity by restricting the exchange of musical ideas that used to be the norm. Musically, no one would question the musical ingenuity of the ‘great classical masters,’ but this modern judicial view of “originality” could work against composers using some of their compositional techniques today. Furthermore, any of the above methods of borrowing could fail to pass scrutiny by a “lay listener” jury if the composer directly borrowed the more recognizable “catchy” or “valuable” parts of the melody or other musical elements. Even where the composer borrowed the “non-protectable” elements from an existing work, the subjective nature of the similarity analysis could restrict a composer even where he did not intend infringement. The ambiguity of how much similarity is too much and the restrictive judicial definitions of creativity or “originality” in the elements of music might make the costs and potential legal risks not worth the effort of creatively borrowing or experimenting with existing music.

### **B. Derivative Works**

Another modern copyright doctrine that is at odds with borrowing practices is the doctrine of derivative works. A derivative work is defined in the Copyright Act as “a work based upon one or more preexisting works” including any form “in which a work may be recast, transformed, or adapted.”<sup>147</sup> The statute goes on to say, “A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work

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<sup>147</sup> 17 U.S.C. §101 (derivative works may include a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, or condensation).



of authorship, is a ‘derivative work.’”<sup>148</sup> The doctrine does not refer to all works that borrow anything from pre-existing works, but the broad language suggests that any work that is substantially based on pre-existing works may be considered a derivative work.<sup>149</sup>

A copyright owner has the exclusive right to make or authorize derivative works.<sup>150</sup> For any work that uses pre-existing material, copyright protection is withheld from “any part of the work in which such material has been used unlawfully.”<sup>151</sup> Thus, if a borrowing composer’s work were deemed an unauthorized derivative work, it may limit his or her ability to use the existing material or receive copyright protection. For example, in *Negron v. Rivera*, the defendant’s work had the same melody, structure, and key as the plaintiff’s copyrighted work.<sup>152</sup> The court concluded that the defendant’s work was a derivative work of the pre-existing (or “underlying”) composition and could not be copyright protected if he did not obtain a license to use the pre-existing work.<sup>153</sup> Copyright’s vague standard of “sufficient originality” creates a good deal of uncertainty as to whether a borrowing composer’s work is an unauthorized derivative work.

Many historic borrowing practices involved what would now be considered derivative works. For example, Bach’s keyboard arrangements of Vivaldi’s violin concertos or Handel’s transformative imitation of Erba’s music

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<sup>148</sup> *Id.*

<sup>149</sup> See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §3.01 (2012).

<sup>150</sup> 17 U.S.C. § 106 (2012).

<sup>151</sup> 17 U.S.C. § 103 (2012).

<sup>152</sup> *Negron v. Rivera*, 433 F.Supp. 2d 204, 208 (D.P.R. 2006).

<sup>153</sup> *Id.* at 217; See also *Palladium Music, Inc. v. Eatsleepmusic, Inc.*, 398 F.3d 1193, 1197-1200 (10th Cir. 2005) (holding that independently created “karaoke music” sound recordings were derivative of underlying musical compositions, and thus were not entitled to copyright protection without licenses in the underlying compositions).

borrowed several elements of the pre-existing work, much like in the *Negron* case. Similarly, nationalist composers often used a popular folk melody as the musical “germ” from which to develop a larger composition. Far from diminishing the original work’s value, these subsequent works celebrated the original material, shed new light and perspective on the existing music, and brought knowledge of the cultures and traditions to a whole new audience. Such transformative imitations and re-settings were considered in the music world to be sufficiently original. No one playing these composers’ ‘versions’ of the pre-existing works would deny their “original” artistic contributions to them. However, a composer using these methods today with an existing work or a popular song would easily have their work labeled as a derivative work that, without a license, is grossly infringing and unlawful. The current derivative work doctrines discourage and often preclude such “vital reinterpretations” of existing material.<sup>154</sup>

### **C. De Minimis Copying**

There are circumstances where the court could still find that a work did not unlawfully infringe, even where there is substantial similarity. One type of non-infringing borrowing is “de minimis” copying, where the copying is so trivial as to “fall below the quantitative threshold of substantial similarity.”<sup>155</sup> If the composer borrowed a small, insignificant enough portion of the existing work, then it is not actionable. There is not a bright line standard for exactly how little borrowing is considered de minimis. Like many

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<sup>154</sup> Note, *Jazz Has Got Copyright Law and That Ain’t Good*, 118 HARV. L. REV. 1940, 1941 (2005) (noting that copyright law provides little protection for jazz improvisations, and stating that “the contributions and compositions created by jazz artists are not considered original because, technically, they occur within the parameters of an underlying work and are therefore considered ‘derivative’”).

<sup>155</sup> *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

other aspects of copyright, it is decided case-by-case and based on quantitative and qualitative value.

Today, *de minimis* disputes often come up in cases involving hip-hop sampling. Sampling, like some classical borrowing practices, involves taking small portions of an existing work and incorporating them into a new work.<sup>156</sup> When sampling artists are pulled into court, they often try to argue that the portion they borrowed was *de minimis* or not sufficiently original (i.e., too common or lacking sufficient expression) to be copyrightable. For example, in *Newton v. Diamond*, the Beastie Boys had sampled a simple, common three-note sequence (C to D-flat to C) from an existing work to create a looping or repeating pattern.<sup>157</sup> The court said that the sample from the underlying composition was so trivial and *de minimis* that it did not break the quantitative threshold of substantial similarity.<sup>158</sup>

Courts in a *de minimis* case will examine the amount of use and the “value” or centrality of the copied portion to the pre-existing work.<sup>159</sup> If a composer borrowed a small portion of another’s song that was not central or important to the original source, the court may find it ultimately non-infringing. For example, in *Williams v. Broadus*, the court said that a reasonable fact-finder could conclude that the two measures sampled from the song “Hard to Handle” were not

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<sup>156</sup> See generally Arewa, *supra* note 49 (discussing how the practices of borrowing in hip hop music fit in copyright and generally comparing classical borrowing with sampling).

<sup>157</sup> *Newton v. Diamond* 388 F.3d 1189, 1191-92, 1195-97 (9th Cir. 2003).

<sup>158</sup> *Id.* at 1195-97; See also *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976) (plaintiff’s song was not a completely unique composition because it contained a four-note sequence common in the music field).

<sup>159</sup> See *Stretchborneo v. Arc Music Corp.*, 357 F.Supp. 1393, 1404 (S.D.N.Y. 1973) (noting that no “substantial similarity [will] be found if only a small, common phrase appears in both the accused and complaining songs; unless the reappearing phrase is especially unique or qualitatively important . . . .”)

“a substantial portion of the [pre-existing] work.”<sup>160</sup> In such a case, a composer might have more freedom to use the borrowed portion.

On the other hand, if the borrowed portion was central to the existing work or if the audience would recognize the borrowed portion, a court is more likely to find more than a de minimis taking.<sup>161</sup> In *Elsmere v. National Broadcasting Corporation*, Saturday Night Live borrowed only four notes from the song “I Love New York,” but those four notes formed the central catch phrase of the plaintiff’s song.<sup>162</sup> Thus, they were found to have more than a de minimis taking.<sup>163</sup>

This may create problems for borrowing composers who wish to borrow a small portion of the “catchy” part of a popular song. Composers traditionally quoted or copied short recognizable phrases in order to pay homage to the source, to make a direct cultural reference their audience would recognize, to refer to an extra-musical idea, or simply to make a musical joke. It was the musical equivalent of quoting Shakespeare, Abraham Lincoln, or Bob Hope in the middle of a speech. Ives was particularly known for this method of quotation. Most classical composers who used

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<sup>160</sup> *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at \*4 (S.D.N.Y. Aug 27, 2001) (the two measures only appeared at the beginning of the pre-existing work); *See also Santrayall v. Burrell*, 993 F.Supp. 173 (S.D.N.Y. 1998) (M.C. Hammer sampled from a song by The Legend, which had sampled from two other artists’ work without permission; Hammer alleged that The Legend’s song was thus not worthy of copyright protection, but the court concluded that the portion sampled by The Legend played such a minor role in The Legend’s song that unauthorized use could not lead to actionable infringement).

<sup>161</sup> *See Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (looking at a six-note sequence, the court noted that “[e]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity”).

<sup>162</sup> *Elsmere Music, Inc. v. National Broad. Co., Inc.*, 482 F.Supp. 741, 744 (S.D.N.Y. 1980).

<sup>163</sup> *Id.* at 746 (ultimately finding this particular borrowing to constitute fair use as a parody).

this borrowing method had no intention of “infringing” on the original’s copyright. They expected the audience to know where the borrowed phrase originally came from. De minimis doctrines seem to discount the idea that secondary use of such small familiar passages can be creative and artistically or societally beneficial. Principles such as this show how far copyright has come since the days when the focus was on the right to publish full manuscripts of a composer’s work.

#### **D. Fair Use**

Copyright attempts to give defendants some defense or flexibility in their use of existing materials through the fair use doctrine. Under 17 U.S.C. §107, four factors are used to determine whether there is fair use of existing materials:

- (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 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.<sup>164</sup>

The fair use doctrine is an “equitable rule of reason”<sup>165</sup> meant to “prevent authors from exercising absolute control over their creations and to leave some breathing room”<sup>166</sup> for the use of works without consent in

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<sup>164</sup> 17 U.S.C. § 107 (2012)

<sup>165</sup> H.R. REP. NO. 94-1476, pt.1, at 65 (1976).

<sup>166</sup> Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1, 1-2 (2002).

a way that would be socially beneficial.<sup>167</sup> The doctrine allows subsequent authors to make productive uses of existing works in a way that advances the “progress of Science and useful Arts,”<sup>168</sup> and it “permits [courts] to avoid rigid application of the copyright statute when... it would stifle the very creativity which that law is designed to foster.”<sup>169</sup> Examples of fair use include criticism, comment, teaching, scholarship, and research.<sup>170</sup> Authors might use copyrighted materials “to engage in social, political, or cultural commentary, to illustrate an argument or prove a point, [or] to provide historical context . . . .”<sup>171</sup> Yet, as the House Report noted, “[a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.”<sup>172</sup>

#### **i. Purpose and Character of Use**

Under the first factor of fair use – the purpose and character of use – courts will often ask whether the use has been “transformative.” Some see this factor as the center or “soul” of the fair use doctrine.<sup>173</sup> The Supreme Court said that a “transformative” use adds something new to the borrowed work by altering it with new purpose, character,

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<sup>167</sup> See e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477-78 (1984) (Blackmun, J., dissenting) (“[If] the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work . . . produces external benefits from which everyone profits.”).

<sup>168</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>169</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

<sup>170</sup> 17 U.S.C. § 107 (2012).

<sup>171</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2570 (2009).

<sup>172</sup> H.R. REP. NO. 94-1476, pt.1, at 65 (1976).

<sup>173</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 *HARV. L. REV.* 1105, 1116 (1990).

meaning, or message. The new use does not “merely ‘supersede[ ] the objects’ of the original creation.”<sup>174</sup>

*Campbell v. Acuff-Rose Music, Inc.*, where the Supreme Court considered 2 Live Crew’s parody of Roy Orbison’s “Pretty Woman,” is often cited as the seminal “transformative use” case. The band had borrowed the famous guitar opening, main melody, and first line from the original song, but they significantly changed the lyrics to be much more bizarre and humorous.<sup>175</sup> The Court found a valid fair use defense because the 2 Live Crew song was a parody that commented on and criticized the original.<sup>176</sup> The Court observed that parody “has an obvious claim to transformative value” because “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”<sup>177</sup> Conversely, if the parody simply uses the original to “get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish) . . .”<sup>178</sup>

Secondary uses of pre-existing material have generally fallen into one of three groups:

- (1) works that add no original expression;
- (2) works that add original expression, but not in the form of criticism, commentary, or scholarship; and
- (3) works that add original expression that is clearly criticism, commentary, or scholarship.<sup>179</sup>

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<sup>174</sup> *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841)).

<sup>175</sup> *Id.* at 572-74.

<sup>176</sup> *Id.* at 578-94.

<sup>177</sup> *Id.* at 579.

<sup>178</sup> *Id.* at 580.

<sup>179</sup> Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 583 (2000).

The prevalence of “transformative use” as the dispositive fair use test has essentially precluded the fair use defense for all secondary uses in the first two groups. Only works in the third group pass the transformative use test.<sup>180</sup> If a composer borrowed or added to an existing work without a provable reason of criticism, commentary, or parody, his or her work would be less likely to pass fair use scrutiny.

Traditionally, borrowing was a source of creativity, whether or not it was “transformative” in the modern judicial sense. “The notion that transformative fair use is more acceptable because it involves more creativity than other types of borrowings is based on assumptions about the nature of borrowing and creativity that are not sustainable... in light of... the European classical tradition.”<sup>181</sup> Bach or Handel’s borrowings, for example, were considered creative even if their use of the existing work was not criticism, commentary or some other “productive use.” In the thinking of Handel’s time, a composer’s use of existing works was still considered to advance the progress of the arts as long as the existing material was used to good effect and not out of laziness or superficial, uninventive re-use.<sup>182</sup> For a modern composer, this central piece of the fair use doctrine means that they have little incentive to experiment with existing musical material unless they have something to overtly ‘say’ or comment on the existing work in a “transformative” way.

## **ii. Nature of the Copyrighted Work**

The second statutory factor in fair use – the nature of the copyrighted work – possibly comes from Justice Story’s articulation of the “value of the materials used” from the copyrighted work.<sup>183</sup> Justice Story suggested that “some protected matter is more ‘valued’ under copyright law than others,” and this should prompt judges to “consider whether

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<sup>180</sup> *Id.*

<sup>181</sup> Arewa, *supra* note 49, at 578.

<sup>182</sup> Keyt, *supra* note 6, at 425.

<sup>183</sup> *Folsom v. Marsh*, 9 F.Cas. 342, 344, 348 (C.C. D.Mass. 1841).



the protected [work] is of the creative or instructive type that the copyright laws value and seek to foster” (e.g., a novel versus a shopping list).<sup>184</sup>

### iii. Amount and Substantiality of the Portion Used

The third statutory factor in 17 U.S.C. §107 examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>185</sup> “[T]he larger the volume (or the greater the importance) of what is taken, ...the less likely that a taking will qualify as a fair use.”<sup>186</sup> The Supreme Court suggested that a court’s analysis should focus on how much more was borrowed than was necessary to achieve recognizability in the purpose of the work.<sup>187</sup> Thus, this factor also involves both quantitative and qualitative analysis, and it is again dependent on the transformative use. In *Campbell*, for example, the Court noted that 2 Live Crew directly borrowed a significant amount of quantity and quality from the pre-existing song, and, in some cases, such substantial copying “may reveal a dearth of transformative character or purpose.”<sup>188</sup> However, the Court acknowledged that a parody must take quite a bit of the original pre-existing material in order to evoke the original in the mind of the listener. “Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted

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<sup>184</sup> Leval, *supra* note 173, at 1117.

<sup>185</sup> 17 U.S.C. § 107 (West 1992).

<sup>186</sup> Leval, *supra* note 173, at 1122.

<sup>187</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587-89 (1994); *See, e.g., Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (finding excessive use of entertainment video footage in a documentary); *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008) (finding excessive quoting and paraphrasing in a reference work); *Byrne v. British Broadcasting Corp.*, 132 F.Supp.2d 229 (S.D.N.Y. 2001) (finding fifty-second use of a song in an unrelated news story).

<sup>188</sup> *Campbell*, 510 U.S. at 587-89.

imitation.”<sup>189</sup> Thus, at least within the context of a musical parody, a composer may have more freedom to borrow a larger amount from the original work. However, if the composer borrowed more than was necessary for the particular qualifying transformative use, the borrowed use would not be considered “fair use.”

#### **iv. The Effect of the Use Upon the Potential Market**

The fourth factor – the effect of the use upon the potential market for the copyrighted work – is sometimes considered just as important as the “transformative use” factor.<sup>190</sup> Copyright emphasizes promises of rewards to encourage creativity, so the commercial and market considerations are often seen as central to its doctrines. A secondary use that substantially interferes with the market or value of the earlier work is less likely to be seen as a fair use.<sup>191</sup> Courts sometimes consider the proximity of the borrowing author’s market to the markets that the earlier author “is exploiting or is likely to exploit.”<sup>192</sup> They may also consider “the potential for harm caused by others following in the alleged infringer’s footsteps, as well as any harm to the market for derivative works.”<sup>193</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *See id.* at 574 (noting the fourth factor has been called “the most important element of fair use”).

<sup>191</sup> *See id.* at 590 (citing *Nimmer on Copyright* § 13.05[A] [4]) (noting that courts should consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market” for the original”).

<sup>192</sup> Samuelson, *supra* note 171, at 2579; *See e.g., Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (holding that collector’s guide was in different market than beanie babies); *Calkins v. Playboy Enters. Int’l, Inc.*, 561 F.Supp. 2d 1136 (E.D. Cal 2008) (holding that school photographer did not anticipate Playboy’s subsequent use of photo).

<sup>193</sup> *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 277 (6th Cir. 2009) (two works were found to occupy the same market, and a fair use defense was rejected; also noting that “[w]orks that purport to be an homage to the copyrighted work may nevertheless weaken the market for licensed derivative works”).

Several have commented on the interdependence of the first and fourth statutory factors. Transformative uses are less likely to hurt or usurp the market or value of the pre-existing work.<sup>194</sup> For example, in *Campbell*, the audience would not view the parody as a substitute for the original.<sup>195</sup> In *Blanch v. Koons*, Blanch admitted she had not suffered harm from Koons' use of her photo in his collage painting.<sup>196</sup> Similarly, in *Suntrust Bank v. Houghton Mifflin Co.*, the court found that the two books at issue were aimed at different audiences.<sup>197</sup> Thus, if a borrowing composer could prove that their work qualifies as a transformative use, they might be able to show that their work is not interfering with the existing work's market or value. A borrowing composer could argue that their classical orchestral use of a work by a pop artist (e.g., a song by Jay-Z) was aimed at a different audience, but if the composer was purposely trying to reach a wider audience, including those familiar with the original work, this may be problematic.

**v.      Lost      in      Translation:      “Fair”      or  
“Transformative” Uses in Music**

Unfortunately, even though courts have recognized a large number of transformative fair use functions and

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<sup>194</sup> See, Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 22-3 (1994) (“[T]he more the appropriator is using the material for new transformed purposes, the less likely it is that appropriative use will be a substitute for the original.”).

<sup>195</sup> *Campbell*, 510 U.S. at 591-92 (“[T]he parody and the original usually serve different market functions.”).

<sup>196</sup> *Blanch v. Koons*, 467 F.3d 244, 249, 258 (2d Cir. 2006); See also *Stratchborneo*, 357 F.Supp. at 1405-1406 (finding that the defendant had not entered unfair competition by “passing off” their work as that of the plaintiff, the public had not confused the titles or concepts of the two works, the defendants had not tainted the plaintiff's public popularity or good will, and no other party had confused the ownership of the two works).

<sup>197</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (plaintiff had failed to show that such secondary work would significantly harm the market for authorized derivatives).

situations in literary and visual arts,<sup>198</sup> courts have yet to recognize many purely musical transformative uses outside of parody, and most of those cases turned on the content of the lyrics. For example, in *Bourne Co. v. Twentieth Century Fox Film Corp.*, the court found fair use where the offensive lyrics of the defendant's song "I Need a Jew" parodied the wholesome worldview expressed in the song "When You Wish Upon a Star."<sup>199</sup>

Humor, commentary, criticism and other similar functions come out in completely different ways in music (particularly instrumental music) than they do in other more literary or visual arts. Composers such as Dvorak, Gershwin, or Ives were no less commenting on the cultures and traditions they borrowed from than the artist in *Blanch*,<sup>200</sup> the writer in *Suntrust*,<sup>201</sup> or a critic in the newspaper. However, they did so through the medium of abstract sounds and the use of extra-musical connections.

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<sup>198</sup> See e.g., *Blanch*, 467 F.3d at 253-54 (Koons' use of Blanch's photo in a collage painting was fair because the photo was "fodder for his commentary on the social and aesthetic consequences of mass media," and "the public exhibition of art is widely and... properly considered to 'have value that benefits the broader public interest'").

<sup>199</sup> *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009); See also *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (finding parody of plaintiff's song "When Sunny Gets Blue" in defendant's "When Sunny Sniffs Glue"); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F.Supp.2d 84 (S.D.N.Y. 2003) (finding parody where the defendant's rap song "The Forest" sarcastically used the first three lines of "What a Wonderful World" to contrast the different worldviews of the two songs); *Lennon v. Premise Media Corp., L.P.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (portion of John Lennon's song "Imagine" with the lyrics "Nothing to kill or die for / And no religion too" used in a film comparing intelligent design with Darwinian evolution. Court noted that the song "had been used as fodder for social commentary in criticizing [the] views of songwriter").

<sup>200</sup> *Blanch*, 467 F.3d at 253-54.

<sup>201</sup> *Suntrust*, 268 F.3d at 1270 (the defendant's novel, *The Wind Done Gone* was highly transformative of *Gone with the Wind* in recasting numerous scenes and characters and retelling the story from a radically different perspective).

Music is inherently more abstract than literary works, and it necessarily borrows direct elements in order to make the desired comments and connections. For example, Ives quoted the well-known hymn “There is a Fountain” as a secondary melody in his work “West London,” which had been originally dedicated to British religious poet Matthew Arnold (1822-1888).<sup>202</sup> Ives used the well-known hymn to connect and comment on the religious themes in Arnold’s poetry.<sup>203</sup> Similarly, Dvorak, in his New World Symphony, borrowed from American spirituals and folk idioms to praise and celebrate the vibrancy and diversity of American culture and to show how the American culture looked to a foreigner, such as himself, visiting for the first time. Gershwin arguably used African-American music in his “Porgy and Bess” to comment on the cultures he saw, even apart from his use of any lyrics. Composers dating back to the Renaissance borrowed existing melodies they saw as thematically linked to their work. Other composers throughout history quoted from popular tunes in unexpected or humorous-sounding ways as a sort of ‘wink’ to the audience. When the existing work is well-known, actual lyrics are not necessary to garner a smile or other reaction from a listener. A quote of a famous song in an unusual musical or thematic context, with or without lyrics, could potentially be quite funny or thought provoking.

Today, if a composer were to compose a very dissonant sounding anti-war themed classical work and integrate the melody of a well-known anti-war themed popular song into one section, would a court be willing to see how the composer meant to use the song to comment? Or would they be too focused on the fact that the composer

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<sup>202</sup> Ives’ “West London” is actually adapted from his unfinished “Matthew Arnold Overture.”

<sup>203</sup> See Burkholder, *supra* note 26, at 20-5 (discussing the various ways Ives borrowed from various sources).

“stole” a well-known sequence of notes (sans lyrics) to see the composer’s extra-musical purpose or “comment”? Additionally, in such a case, one might also question whether a larger-scale work that briefly quotes the melody but not the lyrics of an existing song, at least for purposes of “commenting,” is truly a market replacement for the original short four-minute song with lyrics.

Courts thus far have yet to recognize this kind of more “abstract” musical humor or comment even if it would in many ways be artistically and societally beneficial to the progress of the arts and the encouragement of creativity. It is rather ironic that the art form with the most limited language that needs to borrow noticeably more in order to “comment” is the art form that has the least amount of freedom or options to borrow under judicial fair use doctrines. Until courts recognize this ability to “comment” more abstractly, fair use is a very limited protection for a borrowing classical composer and may even be non-existent outside of a parody with lyrics. This limited view of musical “fair use” takes away much of a composer’s incentive or ability to interact with surrounding musical dialogues or to experiment with different ways of expressing their points of view through inventive use of existing material.

#### **IV. Hypothetical: “Variations on a Theme by Lady Gaga” (or alternatively, “Variations on a Theme *in the Style of Lady Gaga*”)**

One very popular borrowing method is the “theme and variations” form in which a composer writes a set of variations based on a popular melody and its underlying chord progression. It was a fun way to play around with a melody or motif that the audience would presumably recognize. Bach, Haydn, Mozart, Beethoven, Schubert, Chopin, Liszt, Brahms, Rachmaninoff, Stravinsky, and many others wrote variation sets on popular melodies or

themes by other classical ‘masters.’<sup>204</sup> Variation sets are still composed today, except they are now usually based on completely original themes or themes that are in the public domain.

Typically, a theme and variations set would start with an initial statement of a theme, followed by several variations on that theme. For example, Rachmaninoff’s “Rhapsody on a Theme of Paganini,” Op. 43, for piano and orchestra, has 24 variations on a borrowed theme from Paganini’s *Caprice*, Op. 1, No. 24 for violin. Usually, the melody, harmony, and rhythm of a theme are relatively clear and recognizable in the first theme statement. Then each subsequent variation is noticeably different than the one before, and the melody or the harmony or the rhythm (or all three) is increasingly manipulated from one variation to the next. In the later variations, some elements may seem virtually unrecognizable. For example, the very popular Variation No.18 of Rachmaninoff’s *Rhapsody* (famously used as a theme in the film “*Somewhere in Time*”<sup>205</sup>) does not seem at first glance to have any relationship to the original Paganini theme. The composer of a variation set also often puts quite a bit of their own ‘mark’ or style on the work. The “total concept and feel” of Rachmaninoff’s *Rhapsody* is arguably very different than the original Paganini *Caprice* from which the theme was borrowed.

What if a composer today wanted to write a set of variations on a current popular melody? If a composer were to write “*Variations on a Theme by Lady Gaga*,” for example, this would be a fun way of connecting with a wider audience. If even the initial direct quote in the theme was

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<sup>204</sup> Mozart wrote several sets of variations on popular themes and was famous for being able to improvise brilliant variation sets on the spot. Chopin and other composers wrote variation sets on themes by Mozart; Brahms and Rachmaninoff both wrote their own variation sets on a theme by Paganini.

<sup>205</sup> *Somewhere in Time* (Universal City Studios, Inc. 1980).

considered infringing, the entire work would be precluded because the whole point of writing a variation set would be taken away. Some initial themes could be as short as just a couple phrases long, so a composer could try not to borrow too much of the original theme. However, if the composer borrowed the more “valuable” or catchy part of Lady Gaga’s song, he would very likely be considered infringing, even under the “de minimis” doctrine.<sup>206</sup> He could borrow a less catchy part of her work or try to prove that the particular pitch, rhythm, or harmony sequence was particularly common, and then he might be more likely to get away with it under the idea-expression dichotomy.<sup>207</sup> It is also a question of whether he could try to embellish the melody enough to be considered sufficiently original even in the initial theme statement or whether the court would look primarily to the “fundamental” pitches, especially if he already admitted that he borrowed the theme from Lady Gaga.<sup>208</sup> Alternatively, he could take the ‘less risky’ route of trying to borrow more stylistically without actually

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<sup>206</sup> See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (noting that de minimis copying is where the copying is so trivial as to “fall below the quantitative threshold of substantial similarity”); *Elsmere Music, Inc. v. Nat’l Broad. Co., Inc.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (finding more than a de minimis taking where the borrowed 4 notes from the plaintiff’s song were the central catch phrase of the song).

<sup>207</sup> See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected ... [C]opyright protection may extend only to those components of a work that are original to the author.”); 4 Nimmer, *supra* note 64, at §13.03 (noting that copyright infringement only occurs when a defendant has copied the copyright-protected expression of a plaintiff’s ideas, not just the ideas themselves).

<sup>208</sup> See e.g., *Allen v. Walt Disney Prods.*, 41 F. Supp. 134, 139-40 (S.D.N.Y. 1941) (finding that the decorative notes in the defendant’s work made the two works dissimilar); *Repp v. Webber*, 947 F. Supp. 105, 112 n.2 (S.D.N.Y. 1996) (focusing analysis on the melody’s fundamental pitches because the court believed that “ascertaining the fundamental melodic pitches is consistent with common musicological analytical practice”).



quoting from a specific Lady Gaga song, assuming the “total concept and feel” of the melody and other elements did not too closely resemble any particular song.<sup>209</sup> What if the initial statement of the theme was actually an upside down version of the original and the fact that it was borrowed from a popular Lady Gaga melody was simply an ‘inside joke’ with the audience? It is unlikely that Lady Gaga could base a suit on the fact that they refer to her work in the title, and it is very unlikely that such a work would be a market replacement for her original song. However, a borrowing composer using this work to connect with a wider audience would be in an artistic conundrum because he would naturally want to borrow as catchy and recognizable a portion as he could.

Each subsequent variation might refer at least a little to the original theme in the minds or ears of the listener, but the actual notes, rhythms, or other elements and embellishments may be significantly departed from the original. A couple of the individual variations may have some of the original song’s “total concept and feel,” in which case the composer would risk infringement under the Krofft “intrinsic test.”<sup>210</sup> Other variations can add a great deal of complexity to the melody, harmony, rhythm, instrumentation, mood, and character, to make it “feel” completely different. Rachmaninoff’s famous aforementioned Variation No.18 took Paganini’s basic

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<sup>209</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165-67 n.12 (9th Cir. 1977) (noting that substantial similarity is not solely dependent on isolated similarities between two works; rather, it is based on the works’ “total concept and feel” as seen by reasonable laypersons).

<sup>210</sup> *Id.* at 1164-67 (an “extrinsic test” uses objective analysis by experts to determine whether the “ideas” are “substantially similar; then an “intrinsic test” uses subjective responses of “lay listeners” to evaluate whether the “expressions” and “total concept and feel” of the two works is substantially similar).

theme, turned the melody upside-down, altered and slowed the rhythm and meter, and changed the minor mode to Major mode.

In some variations, a version of the original melody might show up briefly again as either a primary or secondary voice, but in others, only a few notes from the original melody might appear sporadically. In other variations, there could be a completely new melody over some version of the original harmony. Under the case law as mentioned before, harmonic progressions are less protectable unless the defendant borrowed a large amount from the original.<sup>211</sup> Thus, a composer might have more freedom to borrow Lady Gaga's harmony, especially if other elements were altered. Rhythm is also less protectable as long as the borrowed portion was not too catchy or too much.<sup>212</sup> Some variations might keep the original rhythm and change everything else around it, while others could change the rhythm or meter rather significantly but keep other elements the same. Remember, in *Repp v. Webber*, portions of the two melodies at issue were similar but the rhythm, harmony, and overall character of the works were different enough that the subsequent work was found not to be infringing.<sup>213</sup>

However, even if the "total concept and feel" of the work were actually different, Lady Gaga's expert witness could show the jury where the similarities are in the "fundamentals" of the work and convince their ears to hear Lady Gaga's original work hidden inside the new work.<sup>214</sup>

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<sup>211</sup> See e.g., *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543-44 (S.D.N.Y. 2000) (thoroughly analyzing the similarities and differences in the chord structures of two works and discounting the similarities in a chord progression that was particularly common).

<sup>212</sup> See *McRae v. Smith*, 968 F. Supp. 559, 566 (D. Colo. 1997) (finding that similarity was not established where certain individual notes of each composition did not share "significant amounts of . . . rhythm").

<sup>213</sup> *Repp v. Webber*, 947 F. Supp. 105, 113 (S.D.N.Y. 1996).

<sup>214</sup> See *Krofft*, 562 F.2d at 1164-67 (intrinsic and extrinsic test); See also *Whelan Associates, Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232-33 (3d Cir. 1986) (noting that the distinction between expert testimony and

Furthermore, the entire work as a whole is a derivative work or “recasting” of the original theme, even if most of the work is significantly departed from the original.<sup>215</sup> If the composer did not get a license, their work could be labeled an unauthorized derivative work, regardless of the actual amount of creativity involved in creating a variation set. The borrowing composer could try to argue fair use, saying that his elaborate variations were a fair use “parody” or “comment” on the ridiculous, over-the-top nature of celebrity culture.<sup>216</sup> He could try adding the sound of car horns and camera flashes and other unusual incidental noises throughout the piece to support this argument. The success of this argument would depend on whether the court was willing to recognize abstract musical parody or comment. Again, one could question how likely it is that such a work would be considered a market replacement of the original since it arguably serves a different market function and shows the music from a radically different perspective.<sup>217</sup> Such a work may even have the opposite effect of making the original more popular for listeners who want to know more about the original song on which the new work was based. However, if the court chose to stay with musical infringement case law the way it stands today, it is unlikely

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lay opinion “may be of doubtful value when the finder of fact is the same person for each step: that person has been exposed to expert evidence in the first step, yet she or he is supposed to ignore or ‘forget’ that evidence in analyzing the problem under the second step”).

<sup>215</sup> 17 U.S.C. § 101 (West 2010) (a derivative work is “a work based upon one or more preexisting works” including any form “in which a work may be recast, transformed, or adapted”).

<sup>216</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-94 (1994) (finding fair use where the defendant’s work was a parody that commented and criticized the plaintiff’s original song).

<sup>217</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (finding that the defendant’s novel, *The Wind Done Gone*, was highly transformative of *Gone with the Wind* in recasting numerous scenes and characters and retelling the story from a radically different perspective).

that such a work, abstract parody or otherwise, would be found free of infringement liability.

One would hope that Lady Gaga has a sense of humor about these things. But this hypothetical shows that a borrowing composer who wants to relate to a wider audience or connect with a current artist or work can face a great deal of legal uncertainty. They would also be discouraged or prevented from using some very valuable creative outlets and methods of composition. In the world of music, the amount of creativity and “originality” you can show within a basic framework or based on a basic pattern is often celebrated, even where the “fundamentals” are kept intact. But judicially, the theme and variations method of borrowing and others like it may come into serious question or be precluded entirely.

## **V. Summary and Conclusion**

Historically, classical music was the music of the culture and of the people. Composers drew from the latest trends, used musical language that everyday listeners could recognize and relate to, and celebrated and expanded on the musical traditions of the people. This allowed classical music and classical composers to have a direct connection with a wide audience, not only with the ‘elite.’ Bach premiered works at the local coffee shop and churches. Beethoven’s German Dances were played by the kid next door. Chopin’s Polish mazurkas were the talk of the town. Dvorak’s Slavonic Dances expanded and perpetuated international interest in Slavonic and Bohemian folk cultures, and his American-inspired works shined fresh perspective on the early developing American musical landscape. Gershwin’s music connected audiences from ‘both sides of the tracks’ and will always be popular because of that fact. The music of Ives was filled with avant-garde complexity yet could make the small town homebody laugh

with its quotes of recognizable tunes. All of these connections were made possible by the freedom that these composers had to borrow from existing music and surrounding cultures.

Many of the admired geniuses of music history used borrowing methods to develop their own style and to participate in a cultural and social exchange of ideas with their audiences and fellow composers. Sometimes they quoted verbatim to make direct cultural or extra-musical connections with their listeners, and at other times, they wrote to reflect the overall essence, style, or spirit of the music they hoped to celebrate or emulate. Borrowing methods such as quotation, paraphrase, allusion, transformative imitation, embellishments, and variations on a theme were very popular forms of composition dating as far back as the Renaissance and even going into the 20<sup>th</sup> Century.

In the pre-copyright and early copyright eras when Handel, Mozart, Chopin and others were creating their masterpieces, borrowing was a legitimate, encouraged source of creativity. Composers recognized a much wider range of possibilities in the definitions of creativity and originality than courts and copyright laws do today; they found genuine creativity and innovation even where some of the elements were borrowed. They viewed the author or composer of a work as a “craftsman” who manipulated and built on the traditions and ideas of their fellow composers and musicians in ways that satisfied their audiences.<sup>218</sup> Their focus was on the quality of the creative work as a whole, not on the source of the individual components.<sup>219</sup> Their exploration of existing music produced brilliant creative work that appealed to a diverse range of people from all tastes and walks of life and that has endured for centuries as

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<sup>218</sup> Woodmansee, *supra* note 30.

<sup>219</sup> Keyt, *supra* note 6, at 425-26.

a result. If composers had always viewed originality, authorship, and ownership the way courts do today, we arguably would never have seen some of the genius works of composers such as Bach, Brahms, Dvorak, or Gershwin.

The modern copyright framework along with Romantic assumptions of autonomous authorship have entrenched today's musical community with the taken-for-granted belief that true creativity or originality can and should only come from independent acts of individual genius.<sup>220</sup> Under this belief, any product that comes out of this purely individual process is the property of the author alone. Thus, working with pre-existing material by other composers is assumed to be a lazy, uncreative way of composing. Composers today (whether they realize it or not) have put on virtual blinders because they think that exploring, experimenting with, or borrowing from the work of their predecessors and contemporaries is no longer a legitimate option. Composers who would wish to experiment with existing materials or borrowing techniques fear that they might run into legal troubles because of the potentially unfavorable way a court or even a fellow composer or musician would view what they are trying to do.

Modern copyright does not completely preclude all methods of borrowing. Composers may still have some freedom to borrow "common" elements to reflect the "spirit"

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<sup>220</sup> See generally, Cohen, *supra* note 48 (discussing philosophies of authorship); Jaszi, *supra* note 48 (discussing historic philosophies of authorship); Arewa, *supra* note 49 (discussing the implications of copyright's focus on autonomous authorship).

of an overall style or genre.<sup>221</sup> Some common elements, such as chord progressions, can still be very evocative of certain styles. Composers might also have some freedom to use a form of transformative imitation to borrow the less unique harmonies and other elements or to borrow from a mix of different sources as long as the resulting work's "total concept and feel"<sup>222</sup> did not resemble any one existing work too much.

Even so, judicial formulations of substantial similarity<sup>223</sup> and other copyright doctrines impede many other methods of borrowing existing musical material. The heavy focus on the value of even a small number of notes to a plaintiff's work,<sup>224</sup> regardless of its context in a defendant's work, ignores the contributions and changes the defendant might have made to the material and discounts the idea that secondary use of recognizable or "catchy" material

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<sup>221</sup> See e.g., *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976) (finding that the plaintiff's song was not a completely unique composition because it contained a four-note sequence common in the music field); *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 280 (S.D.N.Y. 1991) (noting that a descending scale step motive is a commonly used compositional device.); *Landry v. Atlantic Recording Corp.*, No. 04-2794, 2007 WL 4302074, at \*6 (E.D. La Dec. 4, 2007) (finding that three songs at issue contained elements and techniques common to all rock music).

<sup>222</sup> *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (finding that the "total concept and feel" of two greeting cards were the same).

<sup>223</sup> See generally, *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (noting that to recover damages for copyright infringement, a plaintiff must prove that defendant copied from plaintiff's copyrighted work and that copying constituted improper appropriation); *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) (noting that two works at issue must be "sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value").

<sup>224</sup> See *Robertson v. Batten, Barton, Durstine & Osborn, Inc.*, 146 F. Supp. 795, 798 (S.D. Cal. 1956) (analyzing whether the defendant borrowed "that portion of [the plaintiff's work] upon which its popular appeal, and, hence, its commercial success, depends").

can be artistically and societally beneficial.<sup>225</sup> Additionally, doctrines like the idea-expression dichotomy<sup>226</sup> do not fit well with music because it is nearly impossible to figure out where the musical “idea” ends and the unique “expression” begins.<sup>227</sup> There are only so many notes for a composer to choose from, and musical elements and figures often reappear in literal or similar form in several works, whether or not they were intentionally copied.<sup>228</sup> Composers are unsure of what they can borrow or how much they need to change existing material in order to be considered “original” because there are no bright line rules about how much borrowing or similarity is too much. The ultimate determination is largely based on the subjective view of the jury,<sup>229</sup> and opinions often differ from one court to another. At the same time, judicial copyright doctrines often only

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<sup>225</sup> See, Keyt, *supra* note 6, at 439-41 (discussing the focus on the value of the plaintiff’s work and noting that there may be liability even where the defendant transformed the borrowed material so “it no longer sounded so catchy”).

<sup>226</sup> See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. . . . [C]opyright protection may extend only to those components of a work that are original to the author.”); see also 4 Nimmer, *supra* note 64, at §13.03 (noting that copyright infringement only occurs when a defendant has copied the copyright-protected expression of a plaintiff’s ideas, not just the ideas themselves).

<sup>227</sup> See *Swirsky v. Carey*, 376 F.3d 841, 848 (9th Cir. 2004) (noting that idea-expression dichotomy tests are “an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of idea and expression”).

<sup>228</sup> *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) (noting the “limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions”).

<sup>229</sup> See *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 310 (S.D.N.Y. 1999) (“Substantial similarity is generally a question of fact for a jury.”); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164-67 (9th Cir. 1977) (in the court’s “extrinsic-intrinsic” test under the idea-expression dichotomy, the “intrinsic” test involved the subjective responses of the jury).



allow for limited, simplistic definitions of “originality” and creativity in even the basic elements of music – melody, harmony, and rhythm.<sup>230</sup> A composer might want to add embellishments or layer or combine the elements in new or unexpected ways, but these creative methods are not necessarily given as much weight or attention if a court sees that some pre-existing element (especially a melody) has been borrowed. Many courts seem to have forgotten (or ignored) the fact that there are a myriad of ways to be genuinely creative with music even where the “fundamentals” are borrowed.

Furthermore, the vague, limited concepts of derivative works<sup>231</sup> and “transformative” fair use<sup>232</sup> in music close the door on many vital traditional methods of developing on existing music and cultural ideas. Any work that is substantially based on pre-existing works may be considered a derivative work, and a copyright owner has the exclusive right to authorize such works.<sup>233</sup> Composers do not want their work to be restricted because it might be labeled an unauthorized derivative work. Thus, valuable reinterpretations of existing music are discouraged. Fair use

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<sup>230</sup> See Keyt, *supra* note 6, at 429-33, (surveying the judicially recognized elements of music and noting the tendency to focus on melody, harmony, and rhythm).

<sup>231</sup> 17 U.S.C. § 101 (West 2010) (“A ‘derivative work’ is a work based upon one or more preexisting works.”); 17 U.S.C. § 103 (West 1976) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

<sup>232</sup> 17 U.S.C. § 107 (1992) (fair use); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that a “transformative” use adds something new to the borrowed work by altering it with new purpose, character, meaning, or message).

<sup>233</sup> 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works.”); 17 U.S.C. § 106 (West 2002) (“the owner of copyright... has the exclusive rights to do and to authorize... derivative works based upon the copyrighted work”); *See also* 1 Nimmer, *supra* note 149.

doctrines and the centrality of the “transformative use” test<sup>234</sup> preclude many secondary uses of music where a composer does not have something to overtly “say” or comment on the existing work in a “transformative” way. Contrary to traditional practices, this view assumes that “non-transformative” secondary uses are less acceptable or less creative than “transformative” uses.<sup>235</sup> Also, fair use doctrines as they relate to music have thus far only allowed parodies to pass the “transformative use” test, and most of those cases have turned on the content of the lyrics.<sup>236</sup> Courts have yet to clearly say whether they would allow for the abstract and sometimes extra-musical “comments” that are possible in purely instrumental music. This takes away much of a composer’s ability to interact with surrounding musical dialogues, musically express their points of view, or shed new light on existing social and cultural events and ideas.

These modern copyright doctrines heavily limit and sometimes preclude many of the borrowing practices that used to be predominant and popular ways of connecting with fellow composers and contemporary audiences. They ignore the inherently abstract and social nature of music and compositional practices. Music is an art form that is meant to be shared, and composers inevitably listen to and are influenced by the music around them. Music only has real ‘meaning’ when the composer or listener is able to relate the

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<sup>234</sup> See generally, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that a “transformative” use adds something new to the borrowed work by altering it with a new purpose, meaning, or message; the new use does not “merely ‘supersede[ ] the objects’ of the original creation”).

<sup>235</sup> See Kudon, *supra* note 179, at 583 (noting that only secondary uses that clearly show some form of criticism, commentary, or scholarship tend to pass the transformative fair use test).

<sup>236</sup> See e.g., *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009) (finding fair use where the offensive lyrics of the defendant’s song “I Need a Jew” parodied the wholesome worldview of the song “When You Wish Upon a Star”).

abstract sounds to their personal or shared cultural or extra-musical experiences. In order to make these desired connections with their audiences, composers must necessarily use or borrow from musical language that their contemporary listeners would recognize and relate to. However, the confusions and limitations of current copyright doctrines could work to stifle the creativity of composers who would wish to make those connections. In this way, such doctrines may even restrict the very creativity they were constitutionally intended to encourage.<sup>237</sup> Additionally, composers who lack financial resources or legal training or counsel are unsure of what they are or are not allowed to do with existing music. This all could create a chilling effect and make composers ask whether the potential cost of liability would be worth the effort of trying to creatively work with existing music. Thus, classical composers have lost vital and valuable incentives and avenues for connecting with the people, music, and cultures around them.

Modern applications of copyright law and perceptions of original authorship as they stand today may not have completely “killed” classical music borrowing practices, but they have put heavy restrictions on what is legally possible. They have given classical music a strong fear and reluctance to look around and participate in a cultural exchange of creative ideas with its wider audiences and musical communities. When viewed in the context of the history of classical music and of music in general, that unwillingness in itself is a tragedy.

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<sup>237</sup> U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts”).

**Not Dead Yet:*****How Copyright Protects Composers of Classical Music***

Cassandra Toth and Lauren Hill\*

**I. INTRODUCTION**

The composer and musical humorist, Peter Schickele, invented a lost son of J.S. Bach. Schickele's creation, P.D.Q. Bach, was supposedly the youngest and least talented of the Bach sons. Schickele, in the guise of P.D.Q. Bach composes pieces that parody classical music conventions. In the introduction to a piece he conducted at Carnegie Hall, Schickele said:

“Working around P.D.Q. Bach's music as long I have there's one trait of his that has rubbed off on me more than any other: that is plagiarism. This *quodlibet* was a piece which had not a single original theme in it. It was all quotes from other pieces . . . . And the piece was so successful; everyone went out whistling the tunes.”<sup>1</sup>

The piece referenced in the quote above, “The Unbegun Symphony,”<sup>2</sup> plays on the classical convention of borrowing other composers' melodies to make a reference (like a literary allusion).<sup>3</sup> For example, Schickele juxtaposes the famous brass theme from Pyotr Il'yich Tchaikovsky's *1812*

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<sup>1</sup> PETER SCHICKELE, *The Unbegun Symphony, on AN HYSTERIC RETURN: PDQ BACH AT CARNEGIE HALL* (Vanguard Records 1966).

<sup>2</sup> The title, “The Unbegun Symphony,” is itself a reference to an “Unfinished Symphony,” of which there are many. One of the most famous is Franz Schubert's Symphony No. 8, left incomplete at his death in 1822.

<sup>3</sup> See Dawn Leung, *Did Copyright Kill Classical Music? Copyright's Implications for the Tradition of Borrowing in Classical Music*, ARIZ. ST. SPORTS & ENT. L.J. 1, 4. (“[T]o relate to an audience, music must necessarily use sounds, melodies and motifs that an audience would be familiar with.”).

*Overture*<sup>4</sup> with the upper strings and winds playing “You Are My Sunshine.” Other “popular” tunes included in the piece are Stephen Foster’s “Beautiful Dreamer” and “Anchors Aweigh.” Clearly, part of the point was to use tunes so familiar to the audience that they seemed wildly out of place in a classical composition. Even so, Schickele avoided using contemporary popular music in what was clearly a parody;<sup>5</sup> all the popular melodies were in the public domain in 1966.<sup>6</sup>

In Dawn Leung’s article, “Did Copyright Kill Classical Music? Copyright’s Implications for the Tradition of Borrowing in Classical Music,” she posits that strong copyright laws and frequent lawsuits have had a chilling effect on borrowing for contemporary composers<sup>7</sup> and consequently, that copyright has enforced a borrowing ban, which is a major factor in stunting classical music as a genre. However, classical music is still heard today in varied media, including commercials, Disney movies and live performances. Far from being a dying breed, classical music is a survivor.

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<sup>4</sup> Tchaikovsky’s *Festival Overture in Eb major, Op. 49 (1812)* itself quotes *La Marseillaise* and *God Save the Tsar!* to reference the French army’s attempt to invade Russia during the Napoleonic Wars. ROLAND JOHN WILEY, TCHAIKOVSKY 240-41 (Oxford Univ. Press 2009).

<sup>5</sup> When courts consider whether a work constitutes fair use, they consider the purpose and character of the work. 17 U.S.C.A. § 107(1); Parody can be one such type of fair use. “A ‘parody’ which is a form of criticism, good-natured or otherwise, is not intended as a substitute for the work parodied, but it must quote enough of that work to make the parody recognizable as such, and that amount of quotation is deemed fair use.” Ty, Inc. v. Publications Intern. Ltd., 292 F.3d 512, 518 (7<sup>th</sup> Cir. 2002).

<sup>6</sup> Stephen Foster, *Beautiful Dreamer* (Published 1864); Oliver Hood, *You Are My Sunshine* (1933); Charles A. Zimmerman, *Anchors Aweigh*, (1906). Works published before 1923 are, by default, public domain. For a work published between 1922 and 1978, its initial copyright duration was 28 years. Patry on Copyright, sec. 7:10 In General.

<sup>7</sup> Leung, *supra* note 3.

## II. BACKGROUND

In order to understand the importance copyright plays in our music industry we must look to the history of music and the introduction of copyright laws. In the 9th century, European churches popularized music through use in their religious services and ceremonies;<sup>8</sup> unsurprisingly, from the 9<sup>th</sup> to the 14<sup>th</sup> century, monks produced almost all of the “classical” music of the time for the church,<sup>9</sup> so the musical composers were unknown.<sup>10</sup> Following this period of primarily church music, the Renaissance period<sup>11</sup> triggered the rise of aristocratic benefactors who played a major role in transitioning classical music from religious to secular entertainment.<sup>12</sup> These changes fundamentally altered the production and composition of music.

As Lueng’s article says, borrowing played a primary role in classical music composition throughout history.<sup>13</sup> The practice of borrowing may have helped create the greatest pieces of all time, but it only worked because of many other contributing factors, including the minimal interest composers actually had in creating their own work and their primary role as performers.<sup>14</sup> Notably, the culture of musical creation was much different. Composers spent their careers working for royal patrons, giving music lessons

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<sup>8</sup>Jim Paterson, *Classical Music Periods*, MUSIC FILES LTD., <http://www.mfiles.co.uk/classical-periods.htm>. (last visited Mar. 23, 2014); *See also History of Classical Music*, NAXOS DIGITAL SERVICES LTD., [http://www.naxos.com/education/brief\\_history.asp](http://www.naxos.com/education/brief_history.asp) (last modified Apr. 8, 2014).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Michael W. Carroll, *Whose Music is it Anyway? :How We Came to View Expression as a Form of Property*, 72 U. Cin. L. Rev. 1405, 1408-09 (2004).

<sup>14</sup> *See* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 920 (2005).

and writing compositions for both current and prospective patrons.<sup>15</sup> Even though artists had increased flexibility because of the demand for music outside of the church, they still had to find a sponsor to finance their efforts. Often these composers were financially dependent on noble patronage to achieve their musical goals.<sup>16</sup> Some patrons even kept composers as servants.<sup>17</sup> The composers of the 17th and 18th century saw the ideology of copyright being created, but instead of the composers, it benefitted patrons who generally owned all of the rights to the musical works.<sup>18</sup> For example, Niccolo Jimmelli was denied access to copies of his own music when he left Duke Carl Eugen's service.<sup>19</sup> Under patronage system artists were not legally entitled to their own music, therefore, they would not have any motivation to protect their works.<sup>20</sup>

Although most composers were laboring under the noble patronage, George Friederick Handel was a rare exception, a freelance composer who made a profit on his own compositions.<sup>21</sup> As the first major freelance composer of his time, Handel was an important figure in expanding the classical music market outside of the patronage system; he

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<sup>15</sup> 1 William F. Patry, *Patry on Copyright* § 1:14 (2012) (discussion of the history of composers and the patronage system).

<sup>16</sup> See also Ronald B. Standler, *Music Copyright Law in the U.S.* (Jul. 21, 2013), <http://www.rbs2.com/copym.pdf>

<sup>17</sup> Patry, *supra* note 15, at § 1:14; See also Standler, *supra* note 16 (noting that this practice of the publisher or sponsor being paid for the original extended well into the 1800's).

<sup>18</sup> Patry, *supra* note 15; See also Standler, *supra* note 16.

<sup>19</sup> Patry, *supra* note 15.

<sup>20</sup> See Generally Patry, *supra* note 15 (discussion of the flat fee paid to authors and composers for absolute rights to their music and copyright's protection of publishers); See Generally Carroll, *supra* note 14, at 920 (discussing pre-copyright and early copyright structures and surveying various early music publication cases involving composers).

<sup>21</sup> Carroll, *supra* note 14, at 928 (discussing Handel as a transitional figure for the introduction of copyright protection for composers).

did this through his ability to be a performer, composer<sup>22</sup> and businessman.<sup>23</sup> The 18<sup>th</sup> century also led to the introduction of concertos, creating an increased demand for performers.<sup>24</sup> This change from exclusively service to independent work and the increased demand for performers paved the way for the commercialization of the music business, giving composers the ability to control their performances and own their work.<sup>25</sup> Additionally, at the tail end of the 18th century, the practice of royalty payments instead of lump sums became more prominent in the industry, helping advance the acceptance of composers' independence.<sup>26</sup>

Once the musical industry changed from a purely social mechanism to a commercial mechanism, it came under the scrutiny of the legal system. The classical period brought about the start of music as a valuable commercial commodity. Notably, composers began seeking protection for their published works through printing privileges from the English crown in the beginning of the 18<sup>th</sup> century.<sup>27</sup> This suggests that the demand for protection of musical works occurred before copyright laws covered musical compositions. The epicenter of copyright's beginnings, London, England was one of the largest and wealthiest cities in Europe during the 18<sup>th</sup> century.<sup>28</sup> The monarch licensed a group of publishers called the Stationer's Company<sup>29</sup> to copy literary works and musical compositions.<sup>30</sup> The Stationer's Company helped cultivate classical music's popularity

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<sup>22</sup> See Generally, *Id.*

<sup>23</sup> See Generally, *Id.*

<sup>24</sup> *Id.* at 927 (discussing pre-copyright and early copyright structures and surveying various early music publication cases involving composers).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Patry, *supra* note 15.

<sup>27</sup> Carroll, *supra* note 14, at 921.

<sup>28</sup> *Id.* at 920.

<sup>29</sup> See Generally Carroll, *supra* note 14 at 922 (discussing the creation of the Stationer's Company).

<sup>30</sup> See Patry, *supra* note 15.



through printing compositions, which became a means for patrons and publishers to profit.<sup>31</sup> These printers often abused this privilege by repeatedly selling copies of manuscripts to other unlicensed printers.<sup>32</sup> Ultimately, this abuse led to the creation of the Statute of Anne, which protected licensed printers from copyright infringement by punishing unauthorized printing of literary works.<sup>33</sup> While Parliament's passage of the Statute of Anne initiated the protection in musical works, the courts did not extend the Statute of Anne to protect compositions until the end of the 18<sup>th</sup> century.<sup>34</sup>

Our laws are simply a reflection of our society's history and viewpoints. To be sure, the law gradually recognizes issues that have become prominent in our culture for extended periods of time; copyright infringement of musical works is no exception. To illustrate, it took over four hundred years for music to transition from an oral tradition

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<sup>31</sup> See *Generally* Michael W. Carroll, *supra* note 14 (surveying various early music publication cases involving composers); See also *The Concept and History of Copyright and Sources of Law*, NATIONAL PARALEGAL COLLEGE,

[http://nationalparalegal.edu/public\\_documents/courseware\\_asp\\_files/patents/Copyrights1/Concept.asp](http://nationalparalegal.edu/public_documents/courseware_asp_files/patents/Copyrights1/Concept.asp) (last visited Mar. 23, 2014) (noting the events leading up to the creation of the Statute of Anne, precipitated through the creation of the Stationary Company and the inability to contain printing rights amongst the original group of printers).

<sup>32</sup> See Patry, *supra* note ("A stationer was generally unencumbered by agreements favouring authors and sold the right to print a book to another stationer without reference to the author..."); See *Generally* Carroll, *supra* note 14.

<sup>33</sup> See Patry, *supra* note 15. ("A stationer was generally unencumbered by agreements favouring authors and sold the right to print a book to another stationer without reference to the author...").

<sup>34</sup> Carroll, *supra* note 14, at 929-30; See also Patry *supra* note 15; See also Carroll, *supra* note 13, at 1450 (noting that claims for proprietary ownership, although not common existed as early as the late Middle Ages to the beginning of the Renaissance).

to a written tradition.<sup>35</sup> The invention of the printing press in the 1400's began the battle for proprietary claims of printed literary and musical works,<sup>36</sup> and long before our modern day copyright laws existed, musical compositions were seen as the property of publishers and patrons.<sup>37</sup>

Classical music, like all popular things, has naturally declined in popularity with the passage of time. Even so, classical music thrived after the creation of copyright laws. For example, here in the United States classical music remained popular in some form well into the 1900's when copyright laws were passed in the 1800's.<sup>38</sup> Essentially, the ability to create a market stems from the uniqueness of the piece, and copyright laws protect a composer's right to control the use of her works. The music industry is a business; artists make money through producing pieces the public will be interested in purchasing. Furthermore, our society values originality and has for many centuries.<sup>39</sup> However stringent the current copyright laws are, they still leave room for the creation of new works. Far from damaging contemporary composers by disallowing borrowing, modern copyright laws may actually *protect* them from shameless appropriation of their works by pop artists.

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<sup>35</sup> Carroll, *supra* note 13, at 1439.

<sup>36</sup> *Id.*

<sup>37</sup> See Generally Carroll, *supra* note 13, at 1452; See Generally Patry, *supra* note 15.

<sup>38</sup> See Generally *The Concept and History of Copyright and Sources of Law*, NATIONAL PARALEGAL COLLEGE, [http://nationalparalegal.edu/public\\_documents/courseware\\_asp\\_files/patent s/Copyrights1/Concept.asp](http://nationalparalegal.edu/public_documents/courseware_asp_files/patent%20s/Copyrights1/Concept.asp) (last visited Mar. 23, 2014); *History of Classical Music*, NAXOS DIGITAL SERVICES LTD., [http://www.naxos.com/education/brief\\_history.asp](http://www.naxos.com/education/brief_history.asp) (last modified Apr. 8, 2014).

<sup>39</sup> Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006) (discussing the implications of copyright's focus on autonomous authorship).

### III. COPYRIGHT'S EFFECT ON COMPOSERS

While a composer of classical music has not been sued yet for appropriating popular music, hardly a decade has gone by in the 20<sup>th</sup> century without some pop musician standing on the shoulder of the classical giants to “create” a copyrighted work from which she or he profits.<sup>40</sup> Leung’s article makes it clear that she believes that modern copyright protections hamstring composers by disallowing borrowing in their music;<sup>41</sup> however, modern copyright standards have also *protected* modern composers from having their compositions used by others in ways they did not intend to turn a profit. A composer who holds copyright over her works is able to control the use of her creation and, to some extent, her own legacy as a composer. As an example of the differing impact of composing with and without copyright protection, consider Pyotr Il’yich Tchaikovsky and Aaron Copland. Tchaikovsky composed prior to most copyright protections and Copland after.

#### A. Tchaikovsky’s *The Sleeping Beauty*

The famous Russian composer, Pyotr Il’yich Tchaikovsky, composed the music for the ballet, *The Sleeping Beauty*, completing the score in August 1889.<sup>42</sup> The composer considered this score one of his best works,<sup>43</sup> saying that it was a topic “*not of this world*.”<sup>44</sup> One of

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<sup>40</sup> See e.g. “Our Love,” a 1939 Big Band arrangement of Tchaikovsky’s main theme from the *Romeo and Juliet Overture*; “Once Upon a Dream,” the 1959 Disney adaptation of Tchaikovsky’s *The Sleeping Beauty* “Valse”; Eric Carmen’s “All by Myself,” (1975), an adaptation of the Adagio from Rachmaninoff’s Second Piano Concerto.

<sup>41</sup> See Leung, *supra* note 3 at 66-67.

<sup>42</sup> WILEY, *supra* note 4, at 342.

<sup>43</sup> David Brown, *Tchaikovsky, Pyotr Il’yich*, THE NEW GROVE DICTIONARY OF MUSIC & MUSICIANS, 606, 624 (Stanley Sadie ed., 1980).

<sup>44</sup> WILEY, *supra* note 4, at 311 (quoting a letter to his brother, Modest) (emphasis original).

Tchaikovsky's talents as a composer, according to his biographer Roland John Wiley, was "his genius for what [Tchaikovsky] called the 'lyrical idea.'"<sup>45</sup> Wiley continues, "the beautiful self-contained melod[ies] gave his music a permanent appeal."<sup>46</sup>

Given the ballet score's lyrical nature, it is not too surprising that the 1959 Disney movie *Sleeping Beauty* uses music from Tchaikovsky's *The Sleeping Beauty*. The man credited with music for the movie is George Bruns, though.<sup>47</sup> Bruns did compose additional music for the score as well as adapting parts of Tchaikovsky's music to suit the animation, and the lyrics were written for the film, but the memorable melody lines were all from the Russian composer.<sup>48</sup> At times, the soundtrack sounds like a symphonic recording of the ballet score with a vocal track slapped on top of it. Irritatingly, Bruns<sup>49</sup> was nominated for an Oscar for Best Scoring of a Musical Picture in 1959.<sup>50</sup> One wonders what Tchaikovsky would have thought about his music being stolen to turn a profit for a giant media company.<sup>51</sup>

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<sup>45</sup> Brown, *supra* note 12, p. 607.

<sup>46</sup> *Id.*

<sup>47</sup> *Sleeping Beauty Full Cast and Crew*, IMDB.COM, [http://www.imdb.com/title/tt0053285/fullcredits?ref\\_=tt\\_ov\\_st\\_sm](http://www.imdb.com/title/tt0053285/fullcredits?ref_=tt_ov_st_sm) (last visited Mar. 15, 2014).

<sup>48</sup> *Id.*

<sup>49</sup> Lest anyone conclude that George Bruns is a shameless plagiarist and nothing more, he was a composer and teacher for many years and composed many completely original pieces, including co-writing "The Ballad of Davy Crockett" and composing the score for *The Jungle Book*. *George Bruns Filmography*, IMDB.COM, <http://www.imdb.com/name/nm0005980/> (last visited Mar. 15, 2014).

<sup>50</sup> *The Official Academy Awards Database*, OSCARS.ORG, <https://www.oscars.org/awards/academyawards/legacy/ceremony/32nd-winners.html> (last visited Mar. 17, 2014).

<sup>51</sup> The situation is especially ironic given Disney's aggressive prosecution of any use of its copyrighted or trademarked properties. *See generally* Walt Disney Productions v. Air Pirates, 581 F.3d 751 (9th Cir. 1978) (suing over "adult" parody of Mickey Mouse); Walt Disney Productions v. Filmmation Association, 628 F.Supp. 871 (C.D. Cal. 1986) (suing on 11 counts of copyright infringement related to *Pinocchio*). Most recently, Disney

Imagine if we shifted Tchaikovsky's timeline and granted him copyright over *The Sleeping Beauty*. He would have exclusive rights over derivative works,<sup>52</sup> and the use in 1959 in Disney's *Sleeping Beauty* would have been a clear infringement on his rights. Proving infringement requires evidence of access to the original work and proof of substantial similarity as the result of illicit copying of copyright-protected elements for the work.<sup>53</sup> As Leung says, "For most composers using historic borrowing techniques, access would often be easy to prove."<sup>54</sup> Given the acknowledgement in the film's original trailer that "you will literally be surrounded with [the film's] delightful songs and glorious music of Tchaikovsky,"<sup>55</sup> proving access would not be an issue.

As far as whether Bruns' adaptation used too much of Tchaikovsky's source material, by almost any standard, the answer is "yes." A good example of the extent of Bruns' borrowing is the song "Once Upon a Dream" from the *Sleeping Beauty* movie. The song's tune is from Tchaikovsky's "Valse" in the ballet score. It is not just similar; it is identical. The melody, harmony and rhythm are completely unchanged. While Bruns did not "borrow" the

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brought a trademark infringement suit related to its animated film, *Frozen*, mere weeks after its release. Eriq Gardner, *Disney Files Trademark Lawsuit over "Frozen Land" Film*, HOLLYWOOD REPORTER (Dec. 24, 2013, 11:25 AM) <http://www.hollywoodreporter.com/thr-esq/disney-files-trademark-lawsuit-frozen-667617>.

<sup>52</sup> 17 U.S.C. § 103. "A 'derivative work' is a work based upon one or more preexisting works, such as . . . musical arrangement . . . abridgement."

17 U.S.C. § 101.

<sup>53</sup> See Leung, *supra* note 4, at 22-26. (discussing "How Much Similarity is too Much?").

<sup>54</sup> Leung, *supra* note 4, at 23.

<sup>55</sup> *Sleeping Beauty* – 1959 Theatrical Trailer, DISNEYPLATINUMDVDSTV YOUTUBE CHANNEL, (May 10, 2010) <http://www.youtube.com/watch?v=W0-JjakcOQk>

entire score, he certainly borrowed one of the best-known melodies. Bruns' adaptation undoubtedly used "that portion of [the work] upon which its popular appeal, and, hence, its commercial success, depends."<sup>56</sup> It was the "catchy part"<sup>57</sup> and the "heart of the composition."<sup>58</sup>

The Disney score's similarity to the composer's original music could affect the potential market since a consumer would be able to purchase the best melodies of Tchaikovsky's *The Sleeping Beauty* with the added bonus of charming lyrics. More than just Tchaikovsky's commercial interests would be damaged, though. His reputation might suffer, either because he receives none of the credit for his compositions or because his association with a cartoon denigrates his status as a serious artist. This would not be an idle fear. Many of Tchaikovsky's most successful themes have been appropriated so often that they are now used as short-hand musical jokes. The love theme from *Romeo & Juliet*<sup>59</sup> is the music that swells in the background in cartoons when the long-separated lovers race across the field at one

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<sup>56</sup> *Robertson v. Batten, Barton, Durstine & Osborn, Inc.*, 146 F.Supp. 795, 798 (S.D. Cal. 1956).

<sup>57</sup> Aaron Keyt, comment, *An Improved Framework for Music Plagiarism Litigation*, 76 Calif. L. Rev. 421, 425 (1988).

<sup>58</sup> *Elsmere Music, Inc. v. Nat'l Broad. Co., Inc.*, 482 F.Supp. 741, 744 (S.D.N.Y. 1980).

<sup>59</sup> Betsy Schwarm, *Romeo and Juliet*, ENCYCLOPAEDIA BRITANNICA, (Jul. 25, 2013) available at <http://www.britannica.com/EBchecked/topic/1833143/Romeo-and-Juliet>.

another<sup>60</sup> or a character sees the object of his affection for the first time.<sup>61</sup>

### **B. Copland's "Hoedown" From *Rodeo***

Aaron Copland, an American composer, was born about sixty years after Tchaikovsky and lived his entire life in the 20<sup>th</sup> Century.<sup>62</sup> He also borrowed generously from American folk music, creating a very American style.<sup>63</sup> Copland wrote his most popular compositions in the 1940s<sup>64</sup> after the development of modern copyright laws. Because Copland held the copyright on his compositions, he had control over the use of them and, consequently, his reputation as a composer.

No known pop song has "borrowed" a Copland motif. The progressive rock band, Emerson, Lake & Palmer did record arrangements of "Hoedown" and "Fanfare for the Common Man," but they credited Copland as the composer

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<sup>60</sup> Amanda Angel, *Top Five Romantic Cliches in Classical Music*, WQXR (Feb. 14, 2012) <http://www.wqxr.org#!/story/187002-top-five-romantic-cliches-classical-music/> (remarking that the piece often accompanies "two passionate parties running, arms extending, toward each other through a field of flowers"); Another good example of a good classical theme devolving into a joke is Frederic Chopin's Sonata No. 2 in B-flat Minor; the third movement, the "Marche Funèbre," is often used in film to indicate someone's death, especially in cartoons. Elizabeth Blair, *Chopin's Iconic Funeral March*, (Mar. 1, 2010, 10:19 AM) <http://www.npr.org/templates/story/story.php?storyId=124039949>.

<sup>61</sup> See, e.g. *Animaniacs: Jockey for Position* (Warner Brothers television broadcast Oct. 25, 1993) (The love theme plays when Pinky the mouse sees Pharfignewton the horse for the first time, and they immediately fall in love.).

<sup>62</sup> William Austin, *Copland, Aaron*, in NEW GROVE DICTIONARY OF AMERICAN MUSIC 496, 496 (H. Wiley Hitchcock & Stanley Sadie, eds., 1980).

<sup>63</sup> *Id.* at 510. (describing A Lincoln Portrait as "a hint of *Yankee Doodle*, link[ing] the lyrical *Springfield Mountain* and the boisterous *Camptown Races*.").

<sup>64</sup> *Id.* at 496. *A Lincoln Portrait* (1942), *Appalachian Spring* (1943-44), *Fanfare for the Common Man* (1942), and *Rodeo* (1942).

in both instances. Copland was still living at the time, and in a BBC Radio Interview, Copland said, “naturally since I have a copyright on such material, they're not able to take it without my permission; so that in each case, where I have given my permission, there was something that attracted me about the version that they perform, which made me think I'd like to allow them to release it.”<sup>65</sup>

Even now after Copland's death, if an advertising executive or symphony conductor wants to use a Copland piece, he or she has to obtain permission for the use from Boosey & Hawkes, the publishing company.<sup>66</sup> Somewhat ironically, Copland's best known piece of music is from a commercial use. “Hoedown” from *Rodeo* is the music that plays in the National Cattlemen's Beef Association advertisements.<sup>67</sup> Had Copland been adamantly opposed to commercial use of his music during his life, he could still enforce it posthumously through a stipulation in his estate or with the publishers.<sup>68</sup> The strong modern copyright laws have allowed Copland to retain control over his music both during his lifetime and after his death.<sup>69</sup>

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<sup>65</sup> EMERSON, LAKE & PALMER, *FROM THE BEGINNING*, (Castle Music UK 2007).

<sup>66</sup> Hardly anyone can hear Copland's “Hoedown” without immediately also hearing the words “Beef, it's what's for dinner” in Sam Elliot or Robert Mitchum's voice. Whether Copland would appreciate that kind of musical immortality is uncertain.

<sup>67</sup> *Beef, it's what's for Dinner – Circa 1993*, YOUTUBE.COM, (Sept. 3, 2010) [http://www.youtube.com/watch?v=tvivAIS9c\\_U](http://www.youtube.com/watch?v=tvivAIS9c_U)

<sup>68</sup> See generally, *Beastie Boys Settle Copyright Dispute with Toy Company Goldieblox*, GUARDIAN MUSIC, <http://www.theguardian.com/music/2014/mar/18/beastie-boys-settle-copyright-dispute-goldieblox-toy-advert> (Mar. 18, 2014, 2:16 PM) (explaining that the Beastie Boy's late frontman Adam Yauch's will had an explicit prohibition against using the group's songs in advertisements).

<sup>69</sup> *Aaron Copland Snapshot*, BOOSEY & HAWKES, [http://www.boosey.com/pages/cr/composer/composer\\_main.asp?composerid=2748](http://www.boosey.com/pages/cr/composer/composer_main.asp?composerid=2748) (last accessed Mar. 17, 2014, 11:41 PM) (directing purchasers how to obtain licenses to both scores and recordings of Copland's music).



#### IV. CONCLUSION

Copyright might be the disaster for classical music that Leung alleges, but it might not. She admits that courts have not examined complex Ivesian compositions that layer popular melodies; most cases have dealt with simple pop songs where the use of another's melody is straightforward<sup>70</sup> or sampled pop songs in hip-hop music.<sup>71</sup> Given the lack of cases on this topic, we cannot conclude that copyright has killed the classical stars. While it is probably true enough that multi-million dollar infringement suits have a chilling effect on contemporary composers' use of borrowing, it is entirely possible that a composer would not meet the same fate as a producer using unlicensed samples.

If the key inquiry is the commercial effect of the use on the original copyrighted work, then borrowing a pop melody for a composition should be in the clear. The financial impact on a melodic quote in a symphony is likely negligible. It is unlikely that a classical composition quoting a melody from Kanye West would cause the buying public to forsake the pop singer in favor of the symphony. The overlap in the Venn diagram for people who consume classical music *and* top forty contemporary urban hits is practically nonexistent. Conversely, the borrowing might even be helpful. Looking to Copland's example, his inclusion of the Shaker hymn "Simple Gifts" brought about a renewed popularity of the song.<sup>72</sup>

We need a few brave souls to write "Variations on a Theme by Justin Timberlake" or the "1990s Pop Song Suite"

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<sup>70</sup> Leung, *supra* note 4, at 37.

<sup>71</sup> See e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6<sup>th</sup> Cir. 2005); *Saregama India, Ltd. v. Mosley*, 687 F.Supp. 2d 1325 (S.D. Fla. 2009).

<sup>72</sup> Austin, *supra* note 29, at 501. (noting that "*Simple Gifts*, after Copland made it famous was adopted into the repertoires of schools, churches, and the popular 'folksingers' of the 1960s").

featuring melodies from Britney Spears, Christina Aguilera and Mandy Moore<sup>73</sup> and see what happens. The courts might be willing to accept a fair use defense for a composition that could transform any of those artists' songs into something grander.

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<sup>73</sup> Titles inspired by Ralph Vaughn William's "Variations on a Theme by Thomas Tallis," borrowing from a Tudor-era composer and Vaughn William's "Folk Song Suite," borrowing English folk songs.

*Creating an Equitable Playing Field:  
Vital Protections for Male Athletes in Revenue-Generating  
Sports who are predominantly African-American*

Jonathan Stahler\*

### **Introduction**

Cardale Jones recently declared on the online social networking service, Twitter, “Why should we have to go to class if we came here to play FOOTBALL, we ain’t come to play SCHOOL classes are POINTLESS.”<sup>1</sup> In that statement, Cardale Jones, a freshman at Ohio State University, who is also the third-string quarterback for the Buckeyes football team, and was rated the 33rd-best quarterback of his 2011 class by ESPN, made his feelings about attending classes publicly clear.<sup>2</sup> Shortly after “tweeting” his feelings, both the tweet and his entire account were deleted by Jones per Ohio State’s demand, not before the media was able to view what Jones had said. Ironically, in the same article about Jones’ tweet, Ohio State University was credited in both 2011 and 2012 for its multiyear Academic Progress Rate scores. The school was in the top 10 percent of all Division I football teams, which is between 120 and 123 institutions.

The Cardale Jones scenario is a prime example of a glaring problem in collegiate athletics that needs to be properly addressed. The problem identified is the following: student-athletes participating in revenue-generating sports, who are predominantly male African Americans, are exploited and treated unfairly on campus during both their collegiate careers and after college. Moreover, they are not

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<sup>1</sup> *Cardale Jones: Classes Pointless*, ESPN.COM, (Oct. 6, 2012, 12:27 AM), [http://espn.go.com/college-football/story/\\_/id/8466428/ohio-state-buckeyes-cardale-jones-tweets-classes-pointless](http://espn.go.com/college-football/story/_/id/8466428/ohio-state-buckeyes-cardale-jones-tweets-classes-pointless).

<sup>2</sup> *Id.*

informed on the importance of life skills, finance, and education overall for their futures, despite the few that do graduate. Male African-Americans who participate in football and men's basketball have helped fund the National Collegiate Athletic Association (NCAA), individual institutions, and many less-publicized sports, while being treated essentially as indentured servants.<sup>3</sup>

A brief history of the identified problem will be presented, followed by how the problem has been tackled today through various practices and proposals at the federal and association levels. Lastly, my proposal for solving the identified problem is then outlined.

## **I. History of the Problem Identified**

Cardale Jones provides us with an illustration of the serious problem, with a longstanding history of the problem dating back to the 1920s. In the past, segregation was the primary problem, inhibiting minorities, predominantly African-Americans, from even getting the opportunity to participate in athletics on all levels. Professor Kenneth L. Shropshire states two reasons why segregation was so prominent and mainstream in sports: "The most obvious [reason] was simply the desire of whites not to associate with African-Americans. . . . Associated with this desire for separation was . . . the other broad explanation: a view that African-Americans were inferior."<sup>4</sup> Sadly, the view finds its roots in slavery.

Informal Jim Crow laws existed throughout the United States in the late nineteenth and early twentieth centuries. These laws prohibited African-Americans from

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<sup>3</sup> Doug Bandow, *End College Sports Indentured Servitude: Pay "Student Athletes"*, FORBES, (Feb. 21, 2012, 2:33 PM), <http://www.forbes.com/sites/dougbandow/2012/02/21/end-college-sports-indentured-servitude-pay-student-athletes/>.

<sup>4</sup> Kenneth L. Shropshire, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 31 (1996).

playing sports for the schools that admitted them.<sup>5</sup> The University of Kansas had its own informal rules of discrimination, which essentially denied African-American students the right to participate in any of the school's mainstream social and extracurricular activities, including athletics. The situation at the University of Kansas highlights the lack of opportunity for African-American students, which set many colleges' attitudes and policies towards African-American students.<sup>6</sup>

Today, a popular argument for why many controversial racial decisions are made in athletics is because "it's all about the money."<sup>7</sup> Apparently, that same argument was relevant in 1916 at Rutgers University. Paul Robeson, a member of Rutgers University's football team and All-American, was prohibited from play when Washington and Lee College threatened not to play in the game if Roberson was allowed to participate. Safety was not a concern because there were no threats of violence likely occurring if Roberson played.<sup>8</sup> It can be inferred that money was a major factor taken into consideration in Rutgers' decision not to play Roberson because if Washington and Lee College did not play the game, Rutgers would inevitably lose potential revenue from playing one less game. While these ugly situations occurred at Kansas and Rutgers between 1916 and the 1930s, there is still an element of discrimination and racial inequity today.

Because many former college athletes, who are African-American males, are not provided with the proper

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<sup>5</sup> MATTHEW MITTEL ET AL., *SPORTS LAW & REGULATION: COLLEGE EDITION* 738 (Aspen College, 2005).

<sup>6</sup> Smith, *Racial Equity Issues in Athletics* at 3.

<sup>7</sup> Matt Hayes, *Student-athletes' Best Interests? It's all About the (TV) Money*, SPORTING NEWS, (Sept. 20, 2011, 10:12 AM), <http://www.sportingnews.com/ncaa-football/feed/2011-08/1stand10/story/student-athletes-best-interests-its-all-about-the-tv-money>

<sup>8</sup> MATTHEW MITTEL ET AL., *supra* note 6, at 739.

benefits of life skills and financial advisement, they are often overlooked for coaching and administrative positions in the very sports that they participated in and excelled at. Opportunities for leadership roles allow people to grow, learn, and guide others. Unfortunately, there has been a common trend for male minorities to not have those opportunities for coaching and administrative roles in athletics.<sup>9</sup> There have been indications of improvement, however. For example, in 2009, Oregon became the first state to enact “Rooney Rule-like legislation, requiring its seven public institutions “to interview minority candidates before hiring a head coach or athletic director.”<sup>10</sup> The Rooney Rule is named after Pittsburgh Steelers owner Dan Rooney, who instilled the provision that at least one person of color should be interviewed as a candidate for consideration for all head coaching vacancies, with proof.

Nevertheless, the racial demographics still highlight a severe disparity within head coaching positions in all Division I men’s athletics. In the 2008-09 season, just four years ago, the demographics of head coaching positions were as follows: 89.3 percent whites; 6.6 percent African-Americans; 1.8 percent Latinos, 0.7 percent Asian Americans; and 0.3 percent Native Americans. Furthermore, in the same year, the percentages for minorities serving as Division I Directors of Athletics, Associate Director of Athletics, and Assistant Director Athletics, were the following: 11.1 percent, 11.5 percent, and 11.6 percent, respectively.<sup>11</sup> A reason why African-Americans have not

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<sup>9</sup> *Lack of minority coaches reflects leadership*, ESPN.COM, (Nov. 18, 2004, 1:29 AM), <http://sports.espn.go.com/nfl/news/story?id=1924981>.

<sup>10</sup> Jack Carey, *New Oregon law to require minority interviews for coaching positions*, USA TODAY, (July 24, 2009, 2:11 AM), [http://usatoday30.usatoday.com/sports/college/football/2009-07-23-collegiate-rooney-rule\\_N.htm](http://usatoday30.usatoday.com/sports/college/football/2009-07-23-collegiate-rooney-rule_N.htm).

<sup>11</sup> *Id.* Richard Lapchick et al., *The 2010 Racial and Gender Report Card: College Sport*, THE INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT, (Mar.

been able to break into leadership roles in coaching and administration is the “good old boy” system of hiring, which is heavily influenced by the boosters.<sup>12</sup> While numbers have increased over roughly the last 15 years, the numbers are still despicably low compared to the number of male minorities who participate in sports.

## **II. The Problem Identified Today: Changes and Best Practices for Solutions**

### **A. At the Federal Level**

In 1972, 20 U.S.C.S. § 1681, which is more commonly known as Title IX, was passed to ensure equal opportunities for women. It provides as follows: Prohibition against discrimination; No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>13</sup> While Title IX has helped solve gender inequity through increased participation and opportunities for females, it has also resulted in increasing racial inequity. For example, in 2008, the median NCAA Division I football and men’s basketball programs accounted for \$19.6 million in revenue, compared to \$490,000 from women’s basketball programs.<sup>14</sup> Nevertheless, there were 492 more women’s programs than men’s in Division I, many of which are funded by the revenue generated from football

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3, 2011), at 42-43, *available at*

[http://www.tidesport.org/rgrc/2010/2010\\_college\\_rgrc\\_final.pdf](http://www.tidesport.org/rgrc/2010/2010_college_rgrc_final.pdf)

<sup>12</sup> Dr. Fitzgerald Hill with Mark Purdy, *Crackback! How College Football Blindsides the Hopes of Black Coaches*, THEPOSTGAME, (June 25, 2012, 10:00 PM), <http://www.thepostgame.com/commentary/201206/fitz-hill-crackback-how-college-football-blindsides-black-coaches>.

<sup>13</sup> 20 U.S.C. § 1681 (1986).

<sup>14</sup> Graham Watson, *Title IX puts schools in conundrum*, ESPN.COM, (July 14, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4326021>

and men's basketball.<sup>15</sup> Reasons why institutions violate Title IX are due to roster mismanagement; disproportionality to enrollment; a lack of participation, opportunities, history, and continuing practice; and a lack of recognition from the NCAA due to deference.

In reality, while one should appreciate the increased participation opportunities and proportionality to enrollment for female students at the collegiate level, it is equally discouraging to realize that male students have lost participation opportunities and had athletic teams and scholarships cut, as a result. The fact that the number of opportunities and teams have decreased for male students, at a time when the number of men going to college has also decreased, is simply unacceptable. Congress should, but has yet to, provide some sort of protection for men's basketball and football from any "adverse racial implications with gender equity efforts" when dealing with Title IX issues.<sup>16</sup>

### **Proposal One – Litigation Seeking Compensation for IP Infringement**

Several former athletes have sought to achieve two goals by bringing a class action in federal court against the NCAA: (1) seek compensation for the use of their names, images, and likeness, and (2) change the way the current collegiate athletes are compensated so that they are protected.<sup>17</sup> These former collegiate athletes are filing this class action because many feel violated for not being advised about the revenue derived from television, video games, and other merchandise. Likewise, many are simply in financial

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<sup>15</sup> *Id.*

<sup>16</sup> Rodney K. Smith, *When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 Mo. L. Rev. 329, 370 (1996), available at <http://scholarship.law.missouri.edu/mlr/vol61/iss2/2/>

<sup>17</sup> Tom Farrey, *Change in compensation sought*, ESPN.COM, (Sept. 2, 2012, 8:36 AM) [http://espn.go.com/college-sports/story/\\_/id/8324732/new-motion-lawsuit-ncaa-change-how-athletes-compensated](http://espn.go.com/college-sports/story/_/id/8324732/new-motion-lawsuit-ncaa-change-how-athletes-compensated).



constraints. Frankly, “Many athletes are sucked into bad decisions after years of living the high life.”<sup>18</sup>

Sources close to the lawsuit indicate that the current student-athletes could be paid anywhere from “tens of thousands” to “hundreds of thousands” of dollars each year to Division I football players and basketball players, respectively, all coming from the use of their images. Also, the monies could be temporarily held in trust until graduation to maintain the notions of amateur sports.<sup>19</sup> Despite this lofty estimate, the NCAA feels confident that the case will be dismissed. NCAA Executive Vice President and General Counsel Donald Remy stated the following: . . . “Plaintiffs want the court to believe that student athletes are the same as professional athletes and unionized employees which is pure fiction. We are confident that plaintiffs will find no more success in this case than they have in past cases.”<sup>20</sup>

The NCAA’s strong stance does not bode well for the former athletes, who seek significant financial relief for alleged intellectual property infringement, largely due to current financial problems. Recently, ESPN aired a short film titled “Broke” in its “30 for 30” series, which highlighted many former professional athletes who are facing serious financial troubles. Herman Edwards, current ESPN NFL analyst and former NFL player and coach for over 10 seasons, talks about how rookies become the “breadwinner” for family members and friends who they feel they have an obligation to. Edwards states, “Many times half way through the season these guys tap out because they’ve over-extended themselves and it ends up affecting how they play. Typically after their third year, guys start to figure it

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<sup>18</sup> Shannon Cross, *Athletes on being broke*, ESPN.COM, (Oct. 2, 2012, 6:10 PM), [http://espn.go.com/espn/story/\\_/id/8436355/athletes-being-broke](http://espn.go.com/espn/story/_/id/8436355/athletes-being-broke).

<sup>19</sup> Farrey, *supra* note 17.

<sup>20</sup> *Id.*

all out.”<sup>21</sup> But what if they do not figure out how to manage their money by their third season as a professional, especially since the average career is about three years?<sup>22</sup> And why should it take them three years, after college?

Brad Daugherty, current ESPN NASCAR analyst and former 5-time NBA All-Star, states that “it’s a cultural thing” when many of the young athletes that end up broke are minorities. Daugherty advocates for the fact that young African-American men do not have the proper education or upbringing to make more savvy financial decisions, and that sometimes people who they should trust (agents or managers) end up taking advantage of them.<sup>23</sup> With both proper financial and life skills advisement through required courses during their four years in college, athletes will already have it figured out as they enter their rookie season, and they will not “tap out” half way through as a result.

### **Proposal Two – Litigation Seeking Compensation and Equal Protection for Racial Discrimination**

It has been quite difficult for plaintiffs (African-American males) to convince courts that their racial discrimination or racial exploitation claims merit compensation and equal protection. In order to disprove discrimination on racial grounds, defendants (the government/the association/the individual institution) must pass the strict scrutiny test. The policy must further a “compelling” purpose, with means that are “narrowly tailored” to that purpose. Both *Pryor v. NCAA* and *Jackson v. University of New Haven* highlight this point, with opposing holdings from the court. In *Pryor*, one plaintiff was an African-American male student, Warren Spivey.

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<sup>21</sup> Cross, *supra*, note 18.

<sup>22</sup> Russ Wiles, *Pro Athletes Fumble the Financial Ball*, USA TODAY, (Apr. 22, 2012, 2:12 AM), <http://usatoday30.usatoday.com/sports/story/2012-04-22/Pro-athletes-and-financial-trouble/54465664/1>

<sup>23</sup> *Id.*

Spivey signed a National Letter of Intent (NLI) to play football at the University of Connecticut, and received an athletic scholarship.<sup>24</sup> However, Spivey did not meet the NCAA's newly adopted Proposition 16, which raised the academic eligibility criteria, did not receive athletically related financial aid, did not participate in football during his freshman year, and incurred "substantial debt" in order to pay for his own college tuition.<sup>25</sup> Spivey, along with another plaintiff, alleged that the NCAA intentionally discriminated against him with Proposition 16 because of his race, violating Title VI of the Civil Rights Act and 42 U.S.C. § 1981.<sup>26</sup>

Spivey proved "purposeful discrimination" against the NCAA under Title VI by showing that the relevant decision maker (the NCAA) adopted the debated policy (Proposition 16) "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>27</sup> Spivey also proved a right to relief under § 1981 by establishing the following against the NCAA: he belongs to a racial minority; the NCAA has an intent to discriminate on the basis of his race (the same standard under Title VI); and discrimination concerning one or more of the activities under § 1981 existed, including the right to make and enforce contracts.<sup>28</sup> On the whole, Spivey was successful by proving that he was initially denied an athletic scholarship, and almost the opportunity to receive an education and college degree, all because of his race. The Court reversed the

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<sup>24</sup> Pryor v. NCAA, 288 F.3d 548, 555 (3d Cir. 2002).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 562 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>28</sup> *Id.* at 569 (citing *Brown v. Philip Morris Inc.*, 250 F.3d 789, 797 (3d Cir. 2001)).

District Court's dismissal of Spivey's Title IV and §1982 claims.<sup>29</sup>

James C. Jackson, a minor league football hall of fame coach and African-American, also alleged racial discrimination under 42 U.S.C. § 1982, Title VI, and Title VII against the University of New Haven and Athletic Director Deborah Chin.<sup>30</sup> Jackson brought suit when he was not considered for the head football coach vacant position at the University of New Haven.<sup>31</sup> Jackson alleged both "disparate treatment" and "disparate impact," but he failed to meet either burden, resulting in the court granting summary judgment for the University of New Haven.<sup>32</sup>

Jackson failed to show "disparate treatment," despite meeting nearly all of the following requirements: he was a member of a protected class; he was qualified for the employment; there was an adverse employment decision made; and circumstances existed to give rise to an inference of discrimination.<sup>33</sup> Even though Jackson was recognized as a minor league football hall of fame coach, he failed to meet the qualification requirement because, according to the University of New Haven, he did not have prior NCAA coaching experience.<sup>34</sup> Jackson also failed to show "disparate impact." Again, Jackson nearly met the following requirements: he must identify a policy, demonstrate that a disparity exists, and establish a causal relationship between the two.<sup>35</sup> Jackson provided statistical proof to support his

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<sup>29</sup> *Id.* at 570.

<sup>30</sup> *Jackson v. University of New Haven*, 228 F. Supp. 2d 156, 157 (D. Conn. 2002).

<sup>31</sup> *Id.* at 158-59.

<sup>32</sup> *Id.* at 159.

<sup>33</sup> *Id.* at 160 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

<sup>34</sup> *Id.* at 161-62.

<sup>35</sup> *Id.* at 164 (quoting *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 159-160 (2d Cir. 2001)).

claim, but the court held that the sample size was “too small to yield a statistically significant result.”<sup>36</sup>

Both *Pryor* and *Jackson* simply highlight a domino effect of problems, with contrasting holdings. African-American students, because of their race, are not afforded the opportunity to participate in athletics, receive athletic scholarships, or educations. Those students then accumulate debt from student loans because they largely come from impoverished backgrounds, or are forced to drop out of college. Those same students become adults without receiving the proper, full education, life skills, or financial knowledge to be considered for leadership roles, particularly in athletics. It appears as if African-American males have extremely high burdens of proof to establish a prima facie case of racial discrimination before the burdens can even begin to shift to the defendant in order to offer a legitimate, nondiscriminatory rationale for his or her actions. As *Pryor* and *Jackson* indicate, courts make their findings on a case-by-case basis, which makes the plan inconsistent, costly, and sometimes unfavorable.

#### **B. At the Association Level**

Today, in collegiate athletics, there is simply more money generated by both the NCAA and the individual institutions. In fact, in the 2010-11 season, the NCAA's revenue equaled roughly \$845.9 million, with the largest sources coming from a media rights agreement with Turner/CBS Sports for coverage of the Division I men's Basketball Championship, and ticket and merchandising sales from championships.<sup>37</sup> Also, according to a study done by the NCAA research staff, college athletic programs generate about \$6.1 billion from media rights agreements, ticket sales, alumni contributions, guarantees, and royalties.

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<sup>36</sup> *Id.* at 165.

<sup>37</sup> Revenue, NCAA, (updated Feb. 13, 2013), <http://www.ncaa.org/about/resources/finances/revenue>

An additional \$5.3 billion comes from student fees allocated to athletics, direct and indirect institutional support, and direct government support.<sup>38</sup> Simply put, there is a lot of money that is generated by collegiate athletics, specifically by men's basketball and football.

### **Proposal Three – The “cost-of-attendance” Stipend**

One proposal offered to solve the problem by providing student-athletes with compensation was adding a \$2,000 cost-of-attendance stipend to scholarships, which NCAA President Mark Emmert initially supported.<sup>39</sup> However, the proposal has been halted because of the probability of creating an unequal playing field in Division I for athletic budgets.<sup>40</sup> In an interview with SportsBusiness Daily, recently elected NCAA Division I Board of Directors Chair Nathan Hatch stated that there is no broad support for the stipend.<sup>41</sup> Hatch states that an enormous range from “\$10 million to \$150 million” for athletic budgets exists, and increased competition would increase not only between the schools within a given athletic conference, but also between schools in the major conferences and schools in the “mid-major” conferences.<sup>42</sup> In other words, Wake Forest, where Hatch was previously President, and similar, smaller private schools would be limited in their funds, likely resulting in only certain athletes being able to receive stipends.

However, economist Jim Peach refutes the argument that competitive balance would be negatively affected.

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<sup>38</sup> *Id.*

<sup>39</sup> *NCAA D-I BOD Chair Talks College Athletics, Stipend Pay for Student-Athletes*, STREET & SMITH'S SPORTSBUSINESSDAILY, (Sept. 11, 2012), <http://www.sportsbusinessdaily.com/Daily/Issues/2012/09/11/Colleges/Hatch-Q-and-A.aspx>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

From 1950 to 2005 in college football, 50 percent of top eight finishes in the AP final poll were claimed by just 12 different schools, and the same holds true in basketball, baseball, and women's softball.<sup>43</sup> Peach states, "In other words, the NCAA currently doesn't have much competitive balance. And paying players is not going to change this reality."<sup>44</sup>

Moreover, the NCAA states that 96 percent of its annual revenue (roughly \$845 million revenue in 2010-11 coming largely from men's basketball) is returned to its member institutions, and the other four percent (nearly \$31 million) is spent on its budget in the form of administrative expenses and staff salaries.<sup>45</sup> Money that is returned to the NCAA member institutions, it is distributed through the following allocations: academic enhancement (\$22.4 million for academic-support programs); basketball fund (\$180.5 million to the conferences of each institution participating in each game of the Division I men's basketball tournament); conference grants (\$8 million for officiating programs, compliance and enforcement, diversity, and drug and gambling education); grants-in-aid (\$111 million, or \$256,304 to each institution that awarded 164.89 scholarships, based on the number of scholarships awarded by an institution the prior year); sports scholarships (\$55 million, or \$30,091 per each sport beginning with the fourteenth sport, based on the number of varsity sports each institution sponsored); and student assistance fund (\$40

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<sup>43</sup> David Berri, *What Sports Illustrated Didn't Tell You About Paying College Athletes*, HUFF POST SPORTS, (Nov. 11, 2011, 8:05 PM), [http://www.huffingtonpost.com/david-berri/paying-college-athletes\\_b\\_1089102.html](http://www.huffingtonpost.com/david-berri/paying-college-athletes_b_1089102.html) (quoting Jim Peach, *College Athletics, Universities, and the NCAA*, 44 Soc. Sci. J. 11 (2007).

<sup>44</sup> *Id.*

<sup>45</sup> Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN.COM, (July 12, 2011), [http://espn.go.com/college-sports/story/\\_/id/6756472/following-ncaa-money](http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money).

million for special assistance and student-athlete opportunity funds when student-athletes exhaust their NCAA eligibility or unable to participate in sports because of medical reasons).<sup>46</sup> It is noted that academic enhancement, conference grants, and the student assistance fund, the three allocation categories that put a focus on assistance and/or education offered to the student-athletes, all receive far less than the other categories.

As far as the basketball fund, the NCAA has awarded all of its Final Four events to domed football stadiums through 2016 in order to sell more tickets.<sup>47</sup> While NCAA Executive Vice President Mark Lewis has casually addressed the issue of players playing in a non-traditional basketball arena, it appears that the decision is likely “all about the money.” The author suggests, “If Lewis really wants to make the game better for the players, the NCAA could use some of the Final Four ticket revenue from those 70,000-seat stadiums to help fund the \$2,000 stipends that once were promised to Division I athletes, then rescinded, or to bring the family members of Final Four participants to the event.”<sup>48</sup>

What is interesting is that the NCAA study points to a portion of the \$5.3 billion coming from student fees that are allocated to athletics. This finding would likely lead the average person to assume that the money is being properly invested to benefit the student-athletes. However, that is simply not the case. Coaches’ salaries and benefits continue to increase, and schools’ marketing budgets continue to rise as well to fund raise, market, and promote athletics. Figure 1A and 1B indicate the top 10 institutions’ revenues in 2008:

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<sup>46</sup> *Id.*

<sup>47</sup> Mike DeCourcy, *NCAA Out-of-bounds in Perhaps Moving Final Fours out of Domes*, SPORTING NEWS NCAAB, (Sept. 7, 2012, 1:08 PM), <http://aol.sportingnews.com/ncaa-basketball/story/2012-09-07/ncaa-tournament-final-four-future-sites-move-to-arenas-domes>.

<sup>48</sup> *Id.*



**Figure 1A**

**2008 Top 10 Institutions' Revenues → 1st – 10th; Notre Dame (14th); Duke (25th)**

Institution	Ticket Sales	Students Fees	Away Games	Donations
Alabama	\$28,410,419	\$0	\$5,500	\$29,860,400
Texas	44,691,119	1,832,229	318,000	35,057,421
Ohio State	38,608,138	0	3,750,189	27,556,385
Florida	21,122,966	2,578,306	283,376	42,630,821
Tennessee	29,403,335	1,000,000	250,000	26,405,309
Michigan	40,258,325	0	245,178	15,138,000
Oklahoma State	17,528,662	1,934,812	755,765	54,923,758
Wisconsin	26,936,910	0	330,000	18,777,294
Texas A&M	30,144,815	0	305,500	28,341,873
Penn State	--	--	--	--
Notre Dame	--	--	--	--
Duke	--	--	--	--

**Figure 1B<sup>49</sup>**

Institution	University Subsidy	Media Rights	Branding	Total
Alabama	\$4,101,515	\$8,825,964	\$4,506,056	\$123,769,841

<sup>49</sup> *College Athletics Revenues and Expenses – 2008*, ESPN: COLLEGE SPORTS, (2011), <http://espn.go.com/ncaa/revenue>.

<b>Texas</b>	0	191,690	16,639,171	120,288,370
<b>Ohio State</b>	0	15,799,713	5,015,349	115,737,022
<b>Florida</b>	0	3,907,635	10,184,021	106,607,895
<b>Tennessee</b>	0	6,650,000	4,154,643	101,806,196
<b>Michigan</b>	58,817	2,025,000	11,087,101	99,027,105
<b>Oklahoma State</b>	2,109,205	2,300,000	1,718,005	98,874,092
<b>Wisconsin</b>	3,356,669	5,660,555	2,705,018	95,118,124
<b>Texas A&amp;M</b>	3,264,000	0	9,224,632	92,476,146
<b>Penn State</b>	--	--	--	\$91,570,233
<b>Notre Dame</b>	--	--	--	\$83,352,439
<b>Duke</b>	--	--	--	\$67,820,335

The numbers are publicly accessible from institutions' athletic departments' financials. To clarify, the "Away Games" category equals the money generated from playing at other institutions, the "Media Rights" category equals the money generated from television, radio and Internet broadcast deals, and the "Branding" category equals the money generated from sales of branded novelties, other merchandise items, sponsorships, and advertisements.<sup>50</sup>

Figure 2A and 2B indicate the top 10 institutions' expenses in 2008:

#### **Figure 2A**

**2008 Top 10 Institutions' Expenses→1st–10th; Penn State (11th); Duke (21st); Notre Dame (33rd)**

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<sup>50</sup> *Id.*

<b>Institution</b>	<b>Students' Tuition</b>	<b>Visitors</b>	<b>Coaches' Pay</b>	<b>Recruiting</b>
<b>Alabama</b>	\$8,824,492	\$2,193,500	\$13,118,559	\$1,029,523
<b>Ohio State</b>	13,184,957	6,248,917	14,108,419	1,137,016
<b>Texas</b>	6,993,766	2,599,256	17,810,365	1,291,852
<b>Tennessee</b>	9,780,350	2,250,000	16,655,628	1,789,301
<b>Florida</b>	6,482,515	2,803,232	13,574,263	1,468,044
<b>Wisconsin</b>	8,788,071	2,554,562	12,805,872	754,972
<b>Oklahoma State</b>	6,609,989	938,631	9,167,517	733,802
<b>Michigan</b>	13,584,477	1,905,538	13,561,605	1,333,040
<b>Michigan State</b>	8,901,044	5,669,052	10,527,226	1,067,088
<b>LSU</b>	7,779,905	1,843,292	12,810,268	1,078,187
<b>Penn State</b>	10,596,768	--	--	935,014
<b>Duke</b>	13,043,010	--	--	1,560,829
<b>Notre Dame</b>	14,527,119	--	--	2,287,619

**Figure 2B**

<b>Institution</b>	<b>Team Travel</b>	<b>Games</b>	<b>Marketing</b>	<b>Total</b>
<b>Alabama</b>	\$3,580,868	\$1,345,797	\$3,460,518	\$123,370,004
<b>Ohio State</b>	5,225,694	10,364,206	2,602,886	114,264,848
<b>Texas</b>	6,991,985	16,230,167	6,687,642	110,996,365
<b>Tennessee</b>	5,611,586	2,126,101	5,632,325	100,507,146
<b>Florida</b>	6,162,438	4,801,014	5,941,289	98,775,583
<b>Wisconsin</b>	8,189,121	6,960,819	2,569,796	93,008,125
<b>Oklahoma State</b>	4,208,548	1,788,463	1,438,376	89,801,118
<b>Michigan</b>	6,914,132	2,524,741	2,174,835	85,496,004
<b>Michigan State</b>	4,478,011	3,617,147	1,110,438	83,444,368
<b>LSU</b>	4,142,660	4,039,261	846,694	81,150,829
<b>Penn State</b>	--	--	--	79,275,354
<b>Duke</b>	--	--	--	\$67,820,334
<b>Notre Dame</b>	--	--	--	60,117,476

Again, the numbers are publicly accessible from institutions' athletic departments' financials. To clarify, the "Tuition" category refers to only the student-athletes' tuition and fees, including textbooks and food. The "Visitors" category refers to money paid to visiting teams. The "Coaches' Pay" category refers to both the coaches' salaries and benefits. The "Marketing"

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<sup>51</sup> *College Athletics Revenues and Expenses – 2008*, ESPN: COLLEGE SPORTS, (2008), [http://espn.go.com/ncaa/revenue/\\_/type/expenses](http://espn.go.com/ncaa/revenue/_/type/expenses).

category refers to the costs to fund raise, market, and promote athletics.<sup>52</sup>

Alabama, Florida, Michigan, Ohio State, Oklahoma State, Tennessee, Texas, and Wisconsin are eight schools in the top 10 for largest revenues and largest expenses in 2008. None of these schools in either Figure 1 or Figure 2, all of which have great influence among the NCAA Division I institutions, have expressly objected to Emmert's initial stipend proposal.<sup>53</sup> What is clear from Figure 1 is that ticket sales, donations, media rights, and branding are the largest sources of revenue, by far. The male student-athletes in football and men's basketball directly impact all four money categories because their participation in their respective sports create such large revenue categories. Likewise, what is evident from Figure 2 is that coaches' pay, tuition, and marketing are the largest expenses for institutions. As was previously stated, coaches' salaries and benefits continue to be a growing expense for institutions, and institutions' marketing budgets also continue to rise for fundraising, marketing, and promoting the athletic programs. Because tuition is also one of the largest expenses for institutions, enabling the cost-of-attendance stipend is a step forward in protecting the student-athletes.

### **Proposal Four – Status Quo**

Many experts, writers, and economists argue that the NCAA's current governance is the best solution, so paying student-athletes would not work.<sup>54</sup> Those who argue for a

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<sup>52</sup> *Id.*

<sup>53</sup> Associated Press, *Multiple Schools Oppose NCAA Scholarship Proposal*, THE WORLD, (Dec. 28, 2011, 11:00 AM) [http://theworldlink.com/sports/multiple-schools-oppose-ncaa-scholarship-proposal/article\\_5c452630-0be4-51ab-8abf-5cdac2ced391.html](http://theworldlink.com/sports/multiple-schools-oppose-ncaa-scholarship-proposal/article_5c452630-0be4-51ab-8abf-5cdac2ced391.html).

<sup>54</sup> Seth Davis, *Should College Athletes be Paid? Why They Already Are*, SI.COM, (updated Sept. 21, 2011, 1:23 PM)

status quo advocate the importance of amateurism in collegiate athletics. However, those same people cannot be naïve to think that pure amateurism in collegiate athletics still exists today, as it did when collegiate athletics first began nearly a hundred years ago. According to sports management professor Dr. Ellen Staurowsky, “What college sports did was take that amateur concept, which was so class-based, and broaden and democratize it. But they ultimately still made it favorable to the power-elite people who are running colleges and universities. It's created an exploitative system.”<sup>55</sup> Staurowsky further states, “The rules have been set up in such a way to avoid a public understanding that athletes are already paid. It's just a matter of whether they are paid their value.”<sup>56</sup>

As far as the large expense of student-athletes' tuition, it is often argued that covering their tuition and fees is enough. Sports Illustrated writer and men's college basketball analyst Seth Davis claims, “. . . [F]ree tuition over the course of four years can exceed \$200,000. They are also provided with housing, textbooks, food, and academic tutoring. When they travel to road games, they are given per diems for meals. They also get coaching, training, and game experience and media exposure they ‘earn’ in their respective crafts.”<sup>57</sup> That all is very true, but, as Ms. Staurowsky stated, are the athletes “paid their value”? Ramogi Huma, a former University of California, Los Angeles linebacker who currently heads the National College Players Association, was forced to take toilet paper

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[http://sportsillustrated.cnn.com/2011/writers/seth\\_davis/09/21/Branch.rebuttal/index.html](http://sportsillustrated.cnn.com/2011/writers/seth_davis/09/21/Branch.rebuttal/index.html).

<sup>55</sup> Mechelle Voepel, *College Athletes Are Already Getting Paid*, ESPN: COLLEGE SPORTS, (July 18, 2011), [http://sports.espn.go.com/ncaa/columns/story?columnist=voepel\\_mechelle&id=6739971](http://sports.espn.go.com/ncaa/columns/story?columnist=voepel_mechelle&id=6739971).

<sup>56</sup> *Id.*

<sup>57</sup> Davis, *supra* note 54.

and soap from hotels, accumulated excessive debt on a credit card during and after graduation, and did not eat the recommended five or six meals a day based on the calories he burned playing football.<sup>58</sup> Not paying the student-athletes a salary, but having their full scholarships equaling the cost of attendance would likely prevent many existing problems.

Although it is argued that student-athletes current scholarships are adequate and fair compensation, coaches' salaries continue to rise. The following five reasons are why coaches' salaries do not reflect free market forces: (1) no monetary compensation is paid to the workforce, the student-athletes; (2) intercollegiate sports benefit from substantial tax exemptions or benefits; (3) there are no shareholders demanding dividend distributions or boards demanding higher profits; (4) athletic departments are backed by university and state financial support; and (5) coaches' salaries are negotiated by athletic directors, whose own salaries increase with the salaries of their employees, the coaches.<sup>59</sup> The most obvious reason why college coaches are paid far more than the reasonable expectation of the revenue they generate is reason (1), "no monetary compensation is paid to the workforce, the student-athletes."<sup>60</sup> According to the Sports Illustrated article, "College football and basketball coaches earn, on average, almost the same amount as their NFL and NBA peers, although college programs generate a fraction of the revenue of professional teams."<sup>61</sup>

The amateurism argument is that student-athletes play for the willingness to perform, hone their craft, and

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<sup>58</sup> Associated Press, *Report Makes Case for Paying Players*, ESPN: COLLEGE SPORTS, (updated Sept. 12, 2011, 4:41 PM), [http://espn.go.com/college-sports/story/\\_/id/6962151/advocacy-group-says-top-college-athletes-worth-six-figures](http://espn.go.com/college-sports/story/_/id/6962151/advocacy-group-says-top-college-athletes-worth-six-figures).

<sup>59</sup> Berri, *supra* note 43.

<sup>60</sup> Berri, *supra* note 43..

<sup>61</sup> Berri, *supra* note 43..

prepare for an opportunity to play their respective sport professionally, so they should not be treated like professionals and receive similar financial compensation. The same argument can be made for college coaches. While they obviously need to be financially compensated for their work as employees of their individual institutions, they are also honing their craft and tending to prepare for an opportunity to coach their respective sport professionally as well. While there is a market for top-tier college coaches, there is no reason for college football and basketball coaches to earn, on average, nearly the same amount of salary as their professional peers. Nonetheless, their salaries, and benefits continue to rise, while nothing has changed to adequately aid and protect the “workforce,” or student-athletes. These necessary protections include being able to eat properly and healthily, have assurance of a guaranteed scholarship, and receive vital education on finance and professional development.

### **Proposal Five – Student-Athlete/Agent Education**

Collegiate Sports Advisors (CSA) is the only proposal examined that offers no financial compensation, and is solely based on education and academic advising for student-athletes’ professional careers. NCAA Bylaw 12.3 governs the lack of any relationship between athletes and agents, who are defined as actual agents, runners, and financial advisors.<sup>62</sup> Under 12.3, a student-athlete may not accept transportation or other benefits from an athlete agent. . . . appl[ying] to the student-athlete and his or her relatives or friends.<sup>63</sup> 12.3 also states, it is not a violation of NCAA

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<sup>62</sup> Overview of NCAA Bylaws Governing Athlete Agents, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Overview+of+NCAA+bylaws+governing+athlete+agents>. THIS LINK DOES NOT WORK.

<sup>63</sup> *Id.*



rules if a student-athlete merely talks to an agent (as long as an agreement for agent representation is not established) or socializes with an agent.<sup>64</sup>

CSA was established to provide compliance workshops and an agent day on campuses of individual institutions willing to pay for its services.<sup>65</sup> It is ultimately in place to benefit not only the student-athletes, but also the institutions, to be properly educated about compliance and the agent process.<sup>66</sup> The University of Memphis embraced CSA by having Dontari Poe, the 11th overall in the 2012 NFL Draft by the Kansas City Chiefs, Will Barton, the 40th overall in the 2012 NBA Draft by the Portland Trail Blazers, and 11 other student-athletes attend the agent day.<sup>67</sup> According to co-founders Darren Heitner and Jason Belzer, who carefully examined all agents present, “The attending agents chose with whom they wished to meet, and the individual student-athletes retained final veto power over all meeting proposals.”<sup>68</sup> The agent day at the University of Memphis resulted in an increase of 10 percent for Tennessee’s agent registration, and more than \$10,000 of generated revenue to the state as well.<sup>69</sup>

On the other hand, the University of Miami prohibits all communication, including via telephone and via e-mail, between agents and student-athletes, regardless of the student-athletes’ class.<sup>70</sup> Heitner states that the University

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<sup>64</sup> *Id.*

<sup>65</sup> Paul Steinbach, *Memphis Outsourcing Student-Athlete Agent Education*, ATHLETIC BUSINESS (Aug. 2012), <http://www.athleticbusiness.com/memphis-outsourcing-student-athlete-agent-education.html>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

of Miami's overprotective approach is counter-productive. "[I]t effectively inhibits the player from getting any good information. So, if the player follows the rule, that player will go through three or four years at the school and then be thrown into this sea of swarming agents and not really have enough time to effectively vet them and figure out which one is the best fit."<sup>71</sup>

Overall, while CSA is a progressive plan that helps educate student-athletes and institutions on the issues involving relationships between agents and student-athletes, and encourages proper conduct for all players involved, it does not help those student-athletes who will not play their sport professionally. Likewise, as was previously mentioned, CSA does not help address the concern for compensating the student-athletes with a cost-of-attendance stipend.

### **Proposal Six – California Senate Bill 1525**

California's recent approved Senate Bill 1525 (SB 1525), known as the "Student-Athlete Bill of Rights," requires California universities that generate an average of more than \$10 million in media revenues a year to provide specific protections for student-athletes.<sup>72</sup> State Senator Alex Padilla, who authored the bill, included the following protections: (1) equivalent academic scholarships to student-athletes who get injured and lose their athletic scholarships; (2) coverage of health-care premiums and deductibles, specifically for low-income student-athletes, those who have exhausted their NCAA eligibility but have not received their degree, or those who sustain injuries

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<sup>71</sup> *Id.*

<sup>72</sup> Neotrope National News Desk, California State Assembly Approves Padilla's 'Student-Athlete Bill of Rights' – Senate Bill 1525, CALIFORNIA NEWswire, (Aug. 20, 2012), [californianewswire.com/2012/08/20/CNW12266\\_173748.php/california-state-assembly-approves-padillas-student-athlete-bill-of-rights/](http://californianewswire.com/2012/08/20/CNW12266_173748.php/california-state-assembly-approves-padillas-student-athlete-bill-of-rights/).

related to their athletic participation; (3) financial and life skills workshops for all first and third year student-athletes; (4) the same disciplinary due process for all students; and (5) adoption and implementation of exercise and supervision, and health and injury guidelines focusing on sports related concussions, dehydration, and potentially life-threatening health conditions.<sup>73</sup>

The bill will apply to the University of Southern California, Stanford University, the University of California, Los Angeles, and the University of California, Berkeley, regardless of public or private status because they are all chartered in California and offer students both state and federal scholarships.<sup>74</sup> Although it is not explicitly clear, the bill is likely aimed at student-athletes who participate in football and men's basketball, those of which are predominantly African-American. Padilla's reasoning for implementing the bill is based on increasing medical costs for injured student-athletes, and decreasing graduation rates at California institutions as a result: "Athletes on scholarship who suffer season or career ending injuries are often saddled with medical bills and are at risk of losing their scholarship. . . . This lack of support contributes to low graduation rates among student-athletes."<sup>75</sup>

For example, the University of California, Berkeley men's basketball graduation rate is an embarrassing 33 percent; the University of California, Los Angeles football's graduation rate is 40 percent; and, the University of Southern California men's basketball graduation rate is 38 percent.<sup>76</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> Don Thompson, *Student Athlete Bill Approved By CA Legislature: SB 1525 Would Compel Universities To Cover Injured Students*, HUFF POST: LOS ANGELES, (Aug. 22, 2012, 7:20 PM), [http://www.huffingtonpost.com/2012/08/22/student-athlete-bill-ca\\_n\\_1823420.html](http://www.huffingtonpost.com/2012/08/22/student-athlete-bill-ca_n_1823420.html).

<sup>75</sup> Neotrope National News Desk, *supra* note 72.

<sup>76</sup> Neotrope National News Desk, *supra* note 72

Senator Alex Padilla stated his reasons for SB 1525: “Neither personal injury nor poverty should dim the dreams of a student-athlete pursuing a college degree, particularly when their performance has enriched their college.”<sup>77</sup> Senator Padilla clearly has the right intentions and proposes a legitimate, sound plan with some of the necessary protections for student-athletes. Nonetheless, SB 1525 is limited in its application because media revenue is the only source of funding for the bill, and it only applies to four of the 23 Division I institutions in California as a result.

### **III. Efficient Plan for Solving the Problem Identified**

#### **A. Overview**

Similar to California Senate Bill 1525, I recommend an efficient plan for protecting and compensating male student-athletes, who are primarily African-American, participating in revenue-generating sports. They should be provided with the following benefits: (1) fair compensation in the form of a guaranteed annual “cost-of-attendance” stipend, with the option to keep money in a secure bank account, that can be accessed during school; (2) a guaranteed athletic/financial aid scholarship, ensuring student-athletes the ability to stay in school and receive an education; and (3) financial and life skills training through required courses during their collegiate careers in order to prepare them for their post-collegiate careers in any profession, particularly professional sports.

Additionally, in order to provide benefits to remaining student-athletes in sports other than football and basketball, the NCAA institutions should provide adequate compensation in the form of “cost-of-attendance” stipends as well. The stipends must be distributed equally to the remaining men’s and women’s student-athletes to avoid any

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<sup>77</sup> Thompson, *supra* note 74.

Title IX or Equal Protection legal claims.<sup>78</sup>

Amending the applicable NCAA Bylaw, 15.02.5: Full Grant-in-Aid, would institute uniformity for its institutions, but the individual institutions must take necessary action as well. By amending 15.02.5, the “Full Grant-in Aid” offered to student-athletes will equal the full “cost-of-attendance,” which includes the stipend. The NCPA report found that the cost of attendance not covered ranges from \$952 to \$6,127. Currently, NCAA Bylaw 15.02.5 reads, “A full grant-in-aid is financial aid that consists of tuition and fees, room and board, and required course-related books.”<sup>79</sup> I propose that it should read, “A full grant-in-aid is financial aid that consists of tuition and fees, room, and board, required course-related books, and a stipend of at least \$950.00 to meet the full cost of attendance.” Because scholarships would also be guaranteed, institutions cannot revoke it for any reason, including athletic performance. However, according to the Associated Press article, “[s]cholarships could still be pulled for reasons such as poor grades, academic misconduct or other forms of improper behavior.”<sup>80</sup>

## **B. Funding and Planning**

According to NCPA report by Ramogi Huma and Drexel University professor Ellen J. Staurowsky, the cost of attendance not covered by the current scholarship ranges from \$952 to \$6,127, depending on the institution.<sup>81</sup> The

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<sup>78</sup> Associated Press, *NCAA Panel Approves Major Changes*, ESPN: COLLEGE SPORTS, (updated Oct. 27, 2011, 11:03 PM), [http://espn.go.com/college-sports/story/\\_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes](http://espn.go.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes).

<sup>79</sup> 2011-2012 NCAA Division I Manual, NCAA PUBLI’NS, (Aug. 1, 2009) available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>80</sup> Associated Press, *supra* note 78.

<sup>81</sup> Associated Press, *supra* note 58.

National College Players Association (NCPA), which serves as a national independent voice for college athletes, conducted a report that found Football Bowl Series institutions offer the average full scholarship, minus over \$3,200 in educational expenses, which include parking fees, utilities charges, clothing, emergency trips home, etc.<sup>82</sup> The NCPA stated that adding this amount to make a true, full scholarship for players would likely “reduce their vulnerability to breaking NCAA rules.”<sup>83</sup> As far as granting the student-athletes access to their secure bank accounts, student-athletes will be rewarded for not violating NCAA rules by granting them access “in their pursuit of or upon achieving their degree,” while those who violate rules lose their money. Huma feels that graduation rates will increase, while violations will decrease.<sup>84</sup> Figure 1 highlights, *supra*, how ticket sales, donations, media rights, and marketing are the largest sources of revenue at NCAA member institutions, and Figure 2 emphasizes how coaches’ pay, tuition, and marketing are the largest expenses. Ohio State University, an NCAA institution that has been highlighted in this paper, has recently used \$1.1 million from boosters and donations to fund a stricter compliance and financial plan.<sup>85</sup> The university is ensuring that its compliance heads are

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<sup>82</sup> Ben Cohen, *The Case for Paying College Athletes*, THE WALL STREET JOURNAL: LIFE & CULTURE, (Sept. 16, 2011), <http://online.wsj.com/article/SB10001424053111904060604576572752351110850.html>.

<sup>83</sup> *Id.*

<sup>84</sup> Ramogi Huma, “*How to Pay College Athletes: A Three-Part Plan*,” THE ATLANTIC, (Sept. 21, 2011, 8:00 AM), <http://www.theatlantic.com/entertainment/archive/2011/09/how-to-pay-college-athletes-a-three-part-plan/245387/>; accord Associated Press, *supra* note 58.

<sup>85</sup> Brad Wolverton, *Can \$1-Million Keep Ohio State’s Sports Program Clean?*, THE CHRONICLE, (Dec. 11, 2012, 11:47 AM), <http://chronicle.com/blogs/players/can-1-million-keep-ohio-states-sports-program-clean/32125>.

educating the student-athletes, primarily in football and basketball, about gambling, alcohol and drugs, and life after football.<sup>86</sup> Additionally, the coaches are being held accountable for their players, with additional duties to go along with their increasing salaries. The article states, "Starting this season, each assistant football coach is responsible for ensuring that every player has a checking account and a personal budget (players can't suit up otherwise). The coaches are required to monitor players' spending habits to make sure they don't get in financial trouble."<sup>87</sup> The precedent set at Ohio State University sets forth the need for a coalition to be formed by the NCAA institutions' leaders, including the coaches, athletic directors, and compliance directors. Together, they can better allocate these major revenues and expenses, taking into account the minimum stipend amount with a secure bank account, and the athletic/financial aid scholarship. While both the stipend and scholarship will be guaranteed, both can be accounted for and allocated on an annual basis because institutions' financial statements are subject to change from year to year.

With regard to the financial and life skills education, institutions should revise their curricula for all student-athletes, specifically those who participate in football and men's basketball. Required courses during their collegiate careers should include, but are not limited to, the following individual courses: accounting; finance; financial planning; money and banking; investments; presentational speaking; public advocacy; and interviewing. Likewise, tutors provide an additional educational aid for the football and men's basketball student-athletes on campus and during travel. Tutors like those at the Center for Academic & Tutorial Services at the University of Kentucky can provide added

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

assistance, specifically in the courses above.<sup>88</sup>

### **C. Conclusion**

In the aforementioned ESPN short film titled “Broke,” the director notes two staggering statistics: 78 percent of retired NFL players are bankrupt within two years; and 60 percent of retired NBA players are broke within five years.<sup>89</sup> The NBA and NFL both enforce educational rookie programs. However, the fundamental elements of finance and life skills are presumed to already have been learned by the athletes in college. There needs to be a high level of accountability set at the individual institutions that derive the benefits from these former student-athletes. By setting their student-athletes up to succeed, as opposed to fail, an equitable playing field is created.

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<sup>88</sup> Audrey Smith, CATS Offers Tutoring to UK Student-athletes, KENTUCKY KERNEL, (Nov. 16, 2010), <http://kykernel.com/2010/11/16/cats-offers-tutoring-to-uk-student-athletes/>.

<sup>89</sup> Cross, *supra* note 18.



**Dealing with the Compensation Problem in Collegiate  
Athletics: Up a Certain Creek, Trying to Find a Paddle.**

Jason Lewis\*

Jonathan Stahler's Article *Creating an Equitable Playing Field: Vital Protections for Male Athletes in Revenue-Generating Sports who are predominantly African-American* addresses the popular and controversial topic of compensating Division I NCAA student-athletes in revenue generating sports like Men's Football and Men's Basketball. While the article does a good job of pointing out the main problems inherent in the current NCAA model and attempts to postulate a feasible solution, it only offers a narrow proposal with little information relating to how the system can be changed.

The current NCAA model was born of a troubled past. The article begins by pointing out some of the race and gender hurdles that plagued college athletics in its early days. While the gender inequality problem was addressed by the congressional enactment of Title IX, the article seeks to help the reader understand that certain racial inequities, while largely reduced since the Jim Crow era, still have a devastating effect on minority student-athletes. Even though the author does not explicitly state that Title IX has proven to adversely impact male minority student-athletes in revenue generating sports, they do imply that Title IX's influence has decreased participation opportunities for male students in general. The author is careful not to go beyond this inference, perhaps in deference to the widely held view that Title IX has been a positive force in collegiate athletics

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and in the fight for gender equality. Beyond this recognition, the article does not make any suggestion that Title IX should be repealed or amended, most likely because that type of action would be highly improbable and hugely unpopular.

The article goes on to highlight some of the current proposals being discussed to address the disproportionate compensation problem in collegiate athletics between student-athletes, member institutions, and the NCAA. Two of these proposals deal with current and past litigation. The first regards ongoing litigation over intellectual property infringement and more directly addresses the compensation component of the problem. The second addresses past actions brought on equal protection grounds. The author correctly points out that any case brought on equal protection grounds is going to be determined on a case-by-case basis, and accordingly explain that the discussion concerning such cases is merely illustrative of the underlying problem. While the author briefly summarizes the impetus behind litigation over intellectual property infringement, they give the topic little treatment and almost predict that the plaintiffs will be ultimately unsuccessful. This conclusion might be diminished by recent progress in the *Keller v. Electronic Arts* case.<sup>1</sup> In *Keller*, a class of current and former Division I NCAA football and basketball players challenged the video game maker's use of their likenesses without permission. The 9th Circuit affirmed the lower court's holding that Electronic Arts did not enjoy First Amendment protection in their portrayal of players in their video games.<sup>2</sup> The author is primarily referring to Ed O'Bannon's current suit against the NCAA, which is an antitrust action brought against the

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<sup>1</sup> In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

<sup>2</sup> *Id.* at 1284.

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NCAA by several current and former collegiate athletes<sup>3</sup> The author's skepticism concerning the litigation route may be warranted since similar actions against the NCAA have been unsuccessful in the past, but as more players seem willing to join class actions, it may be harder for the courts to side with the NCAA.

The remaining proposals discussed by the author deals with possible changes at the association level as opposed to instigating change through legislation or litigation. The author devotes some time to the popular proposal that student-athletes be awarded a cost-of-attendance stipend in addition to the scholarships they are already receiving. The author explains that there was some popular momentum behind this proposal, but that it has lost support because implementing it would create a competition disparity between large schools with ample budgets and smaller schools operating on much less. Arguing in favor of this proposal, the author points out that current budget distributions indicate a great disparity in funds being allocated to coaching salaries and marketing. In the author's view, even schools with a comparatively small operating budget should be able to realign fund distribution in order to accommodate a cost-of-attendance stipend. While the author intimates a workable solution, it seems unlikely that any university would implement such a radical change without enormous outside pressure. Although not suggested by the author, it is possible that the resolution of the O'Bannon lawsuit may provide this type of pressure. If that were the case, institutions might be forced to drastically reorganize

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<sup>3</sup> Stewart Mandel, *Judge allows Ed O'Bannon v. NCAA to proceed to trial*, SI, (Feb. 20, 2014), <http://sportsillustrated.cnn.com/college-football/news/20140220/ed-obannon-lawsuit-proceeds-to-trial/>.

their budgets to accommodate the additional stipend, an action that could result in some undesirable side effects.

Another proposal suggested at the association level argues that institutions should maintain the status quo. This proposal is predicated on the notion that the NCAA, in its current form, represents the best compromise between the foundations of amateurism on which the NCAA was founded and the modern realities of obtaining a higher education. The status quo proposal points out that there really is no amateur component to the NCAA since student-athletes are effectively paid in tuition, room and board, books, and academic services. The author's opposition to this proposal closely relates to the author's marginal support of a cost-of-attendance stipend, since it has become clear that the current model undercompensates student-athletes. Proponents of the current system argue that student-athletes are receiving far more than just an education; they are receiving an opportunity to hone their craft in hopes of practicing on a professional level. The author argues that if this opportunity is reflected in the compensation for student-athletes, then it should be reflected in the compensation for coaches as well. As it stands in the current system, coach's salaries increase every year with no similar benefit being experienced by student-athletes. Therefore, the author reasons that a system viewed as a training platform for some professional endeavor should treat all actors equally and reflect that treatment in commensurate compensation. This counter argument assumes that all collegiate coaches have devices on moving to the professional ranks, but perhaps the assumption is warranted since the initial argument assumes that all student-athletes have the same aspirations.<sup>4</sup> The

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<sup>4</sup> See *Probability of Competing Beyond High School*, NCAA.ORG, (last updated Sep. 2013), <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (highlighting that less than 2% of college football players become professional football players).

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author's most poignant criticism of the status quo approach points out that the rise in benefits to coaches has happened at the same time that student-athletes have struggled to maintain healthy lifestyles due to financial limitations.

The author goes on to highlight a proposal to allow for more student-athlete education regarding professional sporting careers while they are still in school. NCAA bylaw 12.3 mandates that student-athletes and their families may not receive any type of compensation from professional sports agents or their representatives.<sup>5</sup> The bylaw does not prohibit contact between student-athletes and agents, but some universities impose stricter standards than the bylaw<sup>6</sup>. The author explains how an organization called Collegiate Sports Advisors wants to start an institution based outreach program that can facilitate and structure communications between student-athletes and agents. The author is amicable to this approach, but points out that it does not address the compensation problem and does not assist student-athletes who will not play professional sports. Collegiate Sports Advisors appears to offer student-athletes an environment in which they can select future representation free of duress or coercion. There is approximately one agent to every two and one half players in the NFL,<sup>7</sup> a ratio that suggests that at least some agents will attempt to take advantage of future players in order to gain a piece of the market. By facilitating meetings between student-athletes and agents, institutions might be able to mitigate many of the abuses regularly perpetuated against uneducated and vulnerable athletes.

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<sup>5</sup>Nat'l Collegiate Athletic Ass'n, 2009-10 NCAA Division I Manual, 69 (2009), <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> Andrew Brant, *An agent's life isn't all glamour*, ESPN.COM, (Nov. 27, 2012), [http://espn.go.com/nfl/story/\\_/id/8681968/nfl-agent-life-all-glamour](http://espn.go.com/nfl/story/_/id/8681968/nfl-agent-life-all-glamour).

Additionally, the approach called for by College Sports Advisors should serve to increase the quality of agent representatives, since institutions would have some control over which agents have access to their student-athletes. While this does not solve all of the problems student-athletes face during their collegiate careers, it does alleviate a piece of the identified financial education problem by giving student-athletes financial counseling sooner.

The final proposal examined by the author deals with state legislation in California. The legislation was designed in order to protect student-athletes from losing their scholarships when they become injured, to pay for their medical insurance expenses when they become injured or exhaust their athletic eligibility before they graduate, to provide financial and life-skills education to all student-athletes, to standardize disciplinary procedures for all students, and to improve protocols related to serious sports related injuries and ailments. While the author admires this approach, they point out that it fails to address the financial burdens student-athletes find themselves under. Furthermore, the author laments the scope of the legislation since it only applies to 23 institutions in California (since the criteria is based on an institution's marketing revenue). This may be unfair criticism of the legislation. Its passage bodes well for future student-athletes by creating a precedent for similar legislation in other states. The author appears to be searching for a complete solution to the problem, and the bill in question certainly does not offer a complete solution. Regardless of their criticism, the author clearly sees this type of legislation as a component of any future program addressing the problem and incorporate its ideas into their ideal solution.

Absent from the author's discussion, mainly because the development is so recent, is a treatment of the attempts being made by scholarship football players at Northwestern University to unionize. In late January of 2014, the players

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petitioned the National Labor Relations Board (NLRB) to unionize under the College Athletes Players Association (CAPA).<sup>8</sup> In their petition, the players are primarily seeking greater bargaining power in regards to health and safety issues. The players claim that they will not seek to change the current compensation model in the NCAA, but that they would want the ability to bargain for better financial support and increased scholarship protection. The NCAA's position has not changed on this matter since revising their classifications in the wake of *Denver v. Nemeth*: student-athletes are not employees.<sup>9</sup> This classification has long kept student-athletes from collecting any type of worker's compensation, and, if the NLRB sides with the NCAA, it will keep student-athletes from gaining any type of substantial bargaining power with member institutions. As of this moment, the NLRB has decided that Northwestern football players may vote on whether or not unionize.<sup>10</sup> This decision is on appeal, so it remains to be seen whether or not the players will unionize and what type of effects that organization would have on collegiate athletics.

After examining many of the current proposals designed to alleviate the unfair compensation and disparate treatment of predominantly African-American student-athletes in revenue generating Division 1 NCAA sports, the author outlines what he sees as a more efficient and effective plan. The author recommends that student-athletes be given fair compensation in the form of a cost-of-attendance

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<sup>8</sup> See e.g. *Northwestern University*, NLRB.GOV, (last visited Mar. 28, 2014), <http://www.nlr.gov/case/13-RC-121359>

<sup>9</sup> *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

<sup>10</sup> See *NLRB Director for Region 13 issues Decision in Northwestern University Athletes Case*, NLRB.GOV, (Mar. 26, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-director-region-13-issues-decision-northwestern-university-athletes>.

stipend, a guaranteed scholarship, and financial/life skills training administered as a part of their course work. These recommendations seem to be a hybrid of the California legislation and the proposal to create a cost-of-attendance stipend. In making these recommendations, the author has chosen to remain on the pragmatic side of the argument, especially by avoiding any mention of compensation commensurate with services rendered. Implementing these recommendations may solve the problem presented for the time being, but there needs to be mechanisms put into place that can ensure a continuing solution. Nothing substantial would need to change in regards to the education component, especially since universities should be able to maintain some control over the curriculum and course content. Student-athletes currently receive a stipend for living expenses, but that stipend is not regularly adjusted and is uniform across all member institutions. The cost-of-attendance stipend should be designed in a way that allows for adjustments due to inflation. Furthermore, the cost-of-attendance stipend would need some sort of protection from abuse, since institutions with greater economic power may be tempted to distribute more funds to their student-athletes than would be necessary to meet their cost-of-attendance needs. Granted, the author is not intimating that his proposal is by any means comprehensive or complete, and any approach is going to have its own host of nuances that must be addressed before anything can be implemented.

The reality of the situation is that the NCAA should be listening to common sense approaches like those outlined by the author. By maintaining a strong position, the NCAA has forced compensation proponents to take drastic action. If and when student-athletes have unionized and have favorable case law on their side, the NCAA will have little choice but to dramatically alter their compensation model. The NCAA has long avoided fairly compensating student-athletes on the pretenses of preserving amateurism, but that



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reluctance to bargain in the past will surely lead to ruin in the future.