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FOREWORD

Since our inaugural publication, the *Sports and Entertainment Law Journal (Journal)* has enjoyed significant accolade from both the professional and educational communities. As an opportune time to reflect upon our first two years, I simply offer that we are very grateful for what we have accomplished through our hard work and dedication to quality scholarship. In that effort, the fields of sports and entertainment law have been ever changing. This year was particularly trying. For example, with collective bargaining agreements expiring and the rights of celebrity changing, professionals and scholars have been dealing with a field as variable as ever. This Issue is no exception.

To begin, Mr. Isai Molina addresses the need for uniformity in the world of professional boxing and offers his recommendations for going forward. Following Molina, we are proud to publish the studious work of Mr. Jason Steiner, our first full-length article by a *Journal* editor, which uncovers the complexities of genetic doping and how the Lance Armstrong case will be used in the future. Ms. Joy Butler then delves into the world of sweepstakes and entertainment programming and proffers some brighter lines in an area of law buttressed by chance.

In addition to these reflections on how professional competitions should be regulated, two of our authors confront, in a national and international context, the unavoidable concept of amateurism. Offering her unique perspective, Ms. Elsa Cole, the former General Counsel of the NCAA, chronicles the elaborate path of the NCAA's interpretation of what it means to be an amateur and calls for a continuance of the fundamental and organic bond of the athlete to the student. Subsequently, Mr. Ross Appel exposes the NHL's decades-old reliance on Russian hockey leagues for the development of professional hockey players and justifies the need for an updated transfer agreement process between the NHL and Russia's new super league, the Kontinental Hockey League.

To conclude, Mr. Ryan Byrnes discusses the currently-unanswered state of copyright law as it pertains to the rights of those who create Broadway productions (e.g., stage directors) and how off-Broadway renditions jeopardize those rights. In arguing for a prohibition of rights extending to stage directions, Byrnes underscores the utilitarian aspect of copyright and its overall creative benefit to society.

I can honestly say that my work for the *Journal* has been the highlight of my law school career and yet another reinforcement of my long-held belief that groups of dedicated individuals can achieve great things. Every editor has such an important role in keeping the *Journal* among the leading forums for sports and entertainment law scholarship. I especially want to recognize our graduating 3Ls, many of who edited both publications as well as authored countless articles on the ever popular Sports and Entertainment Law Blog (sportsandentertainmentlawblog.com).

Matthew Hamilton's supererogatory editorial skills far surpassed my high expectations again this year, and I am fatigued by the prospect of this past year without him. Crystal Knysh admirably took over as President this year of the Sports and Entertainment Law Students Association, a position which had previously been filled by two students, and she helped develop yet another near-perfect experience at the Second Annual Conference on Sports and Entertainment Law (Conference) in Tempe this past November. The success of the Conference, which drew in presenters and panelists from all across the country, was also due in large part to the tireless work of Jason Steiner and Casey Johnson. Casey's work as Conference Chair was especially impressive for a 2L, and I am confident that he will make an excellent addition to the *Journal's* Executive Committee in the future.

Always obliging Seth Patek deserves thanks and congratulations for serving in the most tedious and time-consuming job the *Journal* has to offer. In a similar vein, I have always been impressed by the superb work and editorial skills of Emily Wolkowicz and Alexander LaCroix. On the recruitment front, Molly Haas and Lon Johnson were critical in ensuring the quality growth of the *Journal* by screening and

selecting some of the most talented and devoted students that the College of Law has to offer. The *Journal* is in very capable hands, and I look forward to seeing the continued progress for years to come.

I would also like to take the time to thank the many practitioners as well as members of the College of Law's faculty who continue to offer the *Journal* their unwavering support. The entire *Journal* staff dedicates so much time and effort in hopes of providing our readers with the very best product. To that end, I hope we have met this high standard, and that you enjoy this Issue.

Kellen W. Bradley
Editor-in-Chief

SPORTS AND ENTERTAINMENT LAW JOURNAL

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BOXING: ONE LAST CRY FOR NATIONAL UNIFORMITY

Isai Molina *

I. INTRODUCTION

Is boxing dead? A sport that has seen its fair share of highs and lows finds itself in the midst of another decline. For the last decade, American sport journalists have declared boxing as a dying sport.¹ More specifically, American athletes are no longer boxing. Once dominated by Americans, Europeans now largely control the glamorous heavyweight division and many of the championships in the lower weight divisions. Towering brothers Wladimir Klitschko and Vitali Klitschko from the Ukraine are the current heavyweight champions and are relatively unpopular in America.² Yet, the Ukrainian brothers frequently sell out soccer stadiums throughout Germany and other European nations.

* Isai Molina is a third-year law student at the Oklahoma City University School of Law. He received his B.A. in Political Science from the University of Central Oklahoma in 2008. The author would like to thank his father for introducing him to the sport of boxing at an early age, as well as Professor Brendan Maher for his time and guidance on this Article. The author dedicates this work to his newborn child, Sophia, and his lovely wife, Monica Molina, whose love, patience, and support inspire him daily.

1. Greg Doyel, *Boxing's Big Hurrah? More Like Last Gasp Before MMA Seizes the Day*, CBS SPORTS (May 3, 2007), <http://www.cbssports.com/columns/story/10164182>.

2. Reigning Champions, ESPN, <http://sports.espn.go.com/sports/boxing/news/story?page=boxing/champions/index> (last visited Dec. 2, 2011). The Klitschko brothers have dominated the heavyweight division for the last several years, essentially wiping out all contenders in the heavyweight division. Yet, because of their defensive European boxing style, Americans have not embraced the boxing champions.

Nevertheless, while boxing may be in need of resuscitation in America, it has enjoyed some success in the latter half of the decade. More precisely, American fans seem to give boxing overwhelming attention when the stakes are high. For instance in 2007, “Golden Boy” Oscar De La Hoya and Floyd Mayweather Jr. provided the world with the richest fight in the history of boxing.³ Making over 19 million dollars at the gate, over 150 million dollars from sponsors, and over 120 million dollars from Pay-Per-View (PPV) revenue of 2.4 million homes, the event ignited an interest that boxing had not seen in many years.⁴ Although the fight itself was nothing memorable, Mayweather went on to become a mega-star and, in his own words, “a cash-cow.”⁵ His following three fights, measured by the success of PPV numbers, were among the most successful events in boxing: versus Englishman Ricky Hatton, 920,000 PPV buys, 47 million dollars;⁶ versus Mexican Juan Manuel Marquez, 1 million PPV buys, 52 million dollars;⁷ versus American “Sugar” Shane Mosley, 1.4 million PPV buys, 78 million dollars.⁸ These numbers do not take into account the sponsorship, gate, or foreign revenue.

3. Dan Rafael, *De La Hoya ‘Ecstatic’ that the Fight was the Richest Ever*, ESPN (May 9, 2007, 10:31 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=2865349>.

4. *Id.*; Dan Rafael, *Mayweather-Hatton Pay-Per-View a Smashing Success*, ESPN (Dec. 17, 2007, 12:15 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=3158134>.

5. *Fight vs. Marquez Set for July 18*, ESPN (May 2, 2009, 5:50 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=4128066>.

6. Rafael, *supra* note 4; Dan Rafael, *Mayweather Fight Yields 1 Million Buys*, ESPN (Sept. 25, 2009, 6:43 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=4502922>.

7. Dan Rafael, *Mayweather Fight Yields 1 Million Buys*, ESPN (Sept. 25, 2009, 6:43 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=4502922>.

8. Dan Rafael, *Mayweather Win Draws 1.4 Million Buys*, ESPN (May 11, 2010, 5:21 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=5180941>.

Moreover, as PPV numbers have become synonymous with success, another PPV star has further bolstered boxing's recent surge. Filipino Manny Pacquiao has been a huge attraction in his country for a long time and, in the last few years, has transitioned from a regional star to a world star. American fans first showed their interest in Pacquiao when he fought De La Hoya in 2008. The fight generated 1.25 million PPV buys, which equaled over 70 million dollars.⁹ Pacquiao subsequently would continue to have blockbusters: versus Ricky Hatton, 825,000 PPV buys, 50 million dollars;¹⁰ versus Puerto Rican Miguel Cotto, 1.25 million PPV buys, 70 million dollars;¹¹ versus Ghanaian Joshua Clottey, 700,000 PPV buys, 35 million dollars;¹² versus Mexico's Antonio Margarito, 1.15 million PPV buys, 64 million dollars.¹³ Recently, Pacquiao reached his highest PPV-buy mark against Shane Mosley indicating that Pacquiao should continue to be a huge draw throughout the next few years.¹⁴

9. Dan Rafael, *Fight Generates \$70 Million in TV Revenue*, ESPN (Dec. 10, 2008, 8:27 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=3760142>.

10. Dan Rafael, *Pacquiao-Hatton PPV Numbers Something to Celebrate, Even If Arum Refuses*, ESPN (May 14, 2009, 9:04 AM), http://espn.go.com/sports/boxing/blog/_/name/rafael_dan/id/4165901.

11. Dan Rafael, *Pacquiao-Cotto Tops Mayweather in PPV*, ESPN (Nov. 20, 2009, 5:33 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=4674275>.

12. Dan Rafael, *Pacquiao-Clottey Earns Big PPV Bucks*, ESPN (Mar. 23, 2010, 4:27 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=5022192>.

13. Dan Rafael, *Pacquiao Also a PPV Champion*, ESPN (Nov. 23, 2010, 2:04 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=5842507>.

14. Scott Christ, *Early Estimates: PPV Buys Strong for Pacquiao vs Mosley*, BAD LEFT HOOK (May 10, 2011, 11:58 PM), <http://www.badlefthook.com/2011/5/10/2164926/pacquiao-vs-mosley-replay-ppv-buys>. Top Rank Boxing, Pacquiao's promoter, inked a deal with Showtime to produce and distribute the Pacquiao versus Mosley event—HBO had produced and distributed Pacquiao fights for many years. Because CBS is a sister network of Showtime, boxing briefly returned to mainstream by CBS's screening of *Fight Camp 360*, a four-part series to promote the

Because America has been the hub for professional boxing historically, American regulation of the sport has had an influential impact on this global sport. As demonstrated by the numbers, boxing has the ability to be a tremendous economic benefit to boxers, promoters, venues, cities, and state economies. Conversely, because the United States government has withheld or been hesitant to pass uniform and comprehensive regulation, the sport has been and is ripe for manipulation and abuse.

This Article addresses the dire need for Congress to pass the Professional Boxing Amendments Act (PBAA), which, among other things, establishes a federal boxing commission.¹⁵ To understand why boxing is in dire need of comprehensive regulation, Part II discusses the long and colorful history of boxing, which includes numerous examples of scandals and abuse. Part III focuses on the current era of the world governing sanctioning bodies, and how they are inept to be the chief administrators in the sport. Part IV discusses the evolution of modern regulation. Part V addresses the current state system and its race-to-the-bottom concerns. Part VI discusses the intricacies of the PBAA, and Part VII examines why Congress should pass the bill and what results would occur from its passage.

II. HISTORY

Boxing, considered one the oldest sports in the world, dates back likely over six thousand years.¹⁶ Many historians

fight. Dan Rafael, *Pacquiao-Mosley series kicks off April 2*, ESPN (Feb. 10, 2011, 7:35 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=6108286>.

15. The Professional Boxing Amendment Act of 2009, S. 38, 111th Cong. (2009).

16. ROBERT G. RODRIGUEZ, *THE REGULATION OF BOXING: A HISTORY AND COMPARATIVE ANALYSIS OF POLICIES AMONG AMERICAN STATES* 23 (2009).

believe that the ancient Sumerian people of Mesopotamia, in what is now Iraq and Syria, were the oldest known civilization to participate in some form of boxing or fist fighting.¹⁷ The ancient Egyptians portrayed the sport in numerous tombs throughout Egypt.¹⁸ The Greeks introduced the sport into the Ancient Olympics as early as 632 B.C.¹⁹ Ancient Greek illustrations even demonstrate that the Greeks included an umpire or referee in the sport indicating that the sport was organized and regulated.²⁰ On the other hand, the Romans inhumanely brutalized the sport by making it bloodier.²¹ They made their gladiators use metal-studded leather hand coverings and usually required them to fight to the death.²² Finally when Rome realized that the sport was too brutal, it banned the sport completely.²³

After the Romans shelved the sport, boxing resurfaced in the early 1700s in England, “as the aristocratic society . . . determined that self-defense and sport were honorable activities.”²⁴ The English held these bouts in a ring with the pugilists using their bare-knuckles.²⁵ James Figg, known as the “Father of Boxing,” became the first British Heavyweight Champion and a teacher of the sport.²⁶ One of Figg’s students, Jack Broughton, made the first attempt in 1743 to regulate the

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Gary Holland, *Early History Boxing: A Guide to the Early History of Boxing From Ancient Times to the Roman Equivalent*, BBC (Sep. 4, 2008, 11:56 AM), http://www.bbc.co.uk/london/content/articles/2007/11/13/early_boxing_history_feature.shtml.

22. *Id.*

23. *Id.*

24. RODRIGUEZ, *supra* note 16, at 24.

25. JAMES B. ROBERTS & ALEXANDER G. SKUTT, *THE BOXING REGISTER: INTERNATIONAL BOXING HALL OF FAME OFFICIAL RECORD BOOK* 28 (2006).

26. *Id.*

sport after competing in a bout where his opponent had died.²⁷ The Broughton Rules, most notably, provided ways for the boxer or his trainer to discontinue the fight when beaten, a thirty-second count for knockdowns, two referees, and prohibited punches below the waistline.²⁸ Although illegal in the United States, it was during this period that boxing matches began to emerge throughout America.²⁹

In 1838, the London Prize Ring Rules further attempted to regulate the sport.³⁰ The significance of the London Prize Ring Rules was that it established a twenty-four-foot ring for every contest.³¹ Additionally, because regulations had not provided any time limits, the Rules recognized that a referee could consider a fighter who went down from exhaustion as the loser.³²

In 1865, the Marquis of Queensberry Rules called for the use of boxing gloves and three-minute rounds.³³ American boxing legend, John L. Sullivan, rose to stardom during this era.³⁴ Journalists have credited Sullivan for legitimizing the sport under the Marquis of Queensberry Rules, as he refused to fight without gloves during his career.³⁵ The sport flourished throughout America in the late-nineteenth and twentieth

27. John McCain & Ken Nahigian, *A Fighting Chance for Professional Boxing*, 15 STAN. L. & POL'Y REV. 7, 9 (2004).

28. RODRIGUEZ, *supra* note 16, at 25.

29. *Id.*

30. McCain & Nahigian, *supra* note 27.

31. RODRIGUEZ, *supra* note 16, at 26.

32. Dan Cuoco, *London Prize Ring Rules – 1838*, INTERNATIONAL BOXING RESEARCH ORGANIZATION (Apr. 19, 2001), <http://www.ibroresearch.com/?p=333>.

33. Gary Holland, *A London Revival: The Story of How London Re-introduced Boxing in the 17th Century*, BBC (Sep. 4, 2008, 12:00 PM), http://www.bbc.co.uk/london/content/articles/2007/11/13/boxing_london_revival_feature.shtml.

34. THOMAS HAUSER, AN UNFORGIVING SPORT: AN INSIDE LOOK AT ANOTHER YEAR IN BOXING 6 (2009).

35. *Id.*

century despite its continued illegality.³⁶ As a result, several states slowly began to legalize the sport.³⁷ Nevada, California, Louisiana, and New York were among the first states to allow prize fighting.³⁸

Early into the twentieth century, New York's Frawley Law of 1911 was the first attempt to create a state athletic commission.³⁹ The commission was unsuccessful.⁴⁰ Not until 1920 did New York reestablish its commission under the Walker Law.⁴¹ The law in an unprecedented manner empowered state officials to oversee the sport. Because of its success in regulating the sport, other states in the union adopted similar measures.⁴² With popularity of heavyweight champion Jack Dempsey and the inception of high profile and high-profit boxing events, boxing was ascendant.⁴³

The New York State Athletic Commission (NYSAC) arguably became one of the most prominent commissions

36. See ROBERTS & SKUTT, *supra* note 25, at 13-14.

37. McCain & Nahigian, *supra* note 27, at 10.

38. *Id.* New York specifically legalized boxing under the Horton Law in 1896. *Id.* The Horton Law, largely recognized for its flaws, was replaced by the Lewis Law of 1900. See RODRIGUEZ, *supra* note 16, at 32. The Lewis Law allowed boxing to exist through private clubs, and as a result, the next several decades would witness a rise in prominent boxing clubs. *Id.* at 32-35. Similar evolving laws in California and Nevada gave rise to western American boxing clubs, such as the California Athletic Club in San Francisco. *Id.* at 32.

39. The commission took the name of New York State Athletic Commission, a name adopted by the current commission in New York. See RODRIGUEZ, *supra* note 16, at 33.

40. Yet, boxing was very unpopular, largely due to the dominance of the heavyweight division by African-American and boxing legend Jack Johnson. Ron Flatter, *Johnson Boxed, Lived on His Own Terms*, ESPN, <http://espn.go.com/sportscenury/features/00014275.html> (last visited Jan. 20, 2011).

41. See ROBERTS & SKUTT, *supra* note 25, at 753.

42. See RODRIGUEZ, *supra* note 16, at 35.

43. The triumph of popular Jack Dempsey over Jess Willard in Toledo, Ohio marked the beginning of the sport's rise in popularity again. See ROBERTS & SKUTT, *supra* note 25, at 103.

globally only to be rivaled by the emerging fifteen-state-member organization, the National Boxing Association (NBA).⁴⁴ Throughout the following decades, the sport would see several changes. Rounds for a fight were limited to fifteen, and the scoring system was revamped to today's modern ten-point-must system.⁴⁵ Radio and early television would mainstream the sport and lead to one of the most popular eras in boxing. Legends like Joe Louis and Henry Armstrong would become dominant champions and national representatives before and after World War II.⁴⁶ In a time when racism was still rampant throughout certain parts of the United States, two-thirds of American people tuned into the radio to support their representative and boxing hero, African-American Joe Louis, as he knocked out Nazi Germany's Max Schmeling in the first round, an athletic rebuke to the Nazi theory of Aryan supremacy.⁴⁷ During this era of boxing's heightened popularity, Rhode Island Representative, Ambrose Kennedy, made the first attempts to establish a national boxing commission.⁴⁸ The bill, however, became lost as the United States entered World War II.⁴⁹

Events beginning in the 1950s provided the framework for the modern structure of boxing. James D. Norris and Arthur M. Wirtz created the International Boxing Club (IBC) to promote boxing fights.⁵⁰ The company became the most

44. *Id.* at 49.

45. *See* RODRIGUEZ, *supra* note 16, at 36.

46. *See id.* at 37–39.

47. *Id.* at 37.

48. *See id.*

49. *See id.* at 38–39.

50. *See* 1 EDMUND P. EDMONDS, Congress Finally Lands a One-Two Combination: A Legislative of the Professional Safety Boxing Act of 1996 the Muhammad Ali Boxing Reform Act, CONGRESS AND BOXING: A LEGISLATIVE HISTORY, 1960 – 2003 (Edmund P. Edmonds & William H. Hanz eds., William S. Hein & Co., Inc., 2005), available at <http://www.nd.edu/~ndlaw/faculty/edmonds/Congress%20Finally%20Land s%20a%20One-Two%20Combination%20-%20Hein%20Legislat.pdf>.

prominent promotional company in America, albeit with the assistance of organized crime.⁵¹ The IBC, through its criminal connections, gained exclusive control over many of the top venues and top fighters.⁵² As a result, boxing was plagued with bribery, fixing, and illegal activity.⁵³

In 1955, the United States Department of Justice brought an antitrust action against the IBC in *United States v. International Boxing Club*.⁵⁴ The United States Supreme Court held that the business of major boxing fights, although held in one state, derived substantial revenue from interstate activity and, thus, was subject to the Sherman Act.⁵⁵ On remand, the government broke up the defendants' monopoly, therefore, establishing a precedent for the federal government to regulate boxing and its promoters.⁵⁶

Additionally, having boxing nationally televised on a regular basis proved to be a double-edged sword. In 1962, the death of Benny Paret as a result of his fight against Emile Griffith, which was televised nationally, reignited the debate of the legitimacy of boxing as a sport.⁵⁷ Prominent politicians became involved in the fight against boxing, and Gillette Company, a major boxing sponsor, and the National Broadcasting Company (NBC) pulled the plug on an otherwise popular and long-running boxing program.⁵⁸ For the rest of the decade, television networks rarely broadcasted boxing, and its golden era would fade away.⁵⁹

In the early 1960s, Tennessee Senator Carey Estes Kefauver proposed a bill to create a commission under the

51. See ROBERTS & SKUTT, *supra* note 25, at 749.

52. McCain & Nahigian, *supra* note 27, at 11–12.

53. *Id.*

54. *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955).

55. See *id.* The defendants' argument that they were exempt from the anti-trust laws failed. *Id.*

56. See McCain & Nahigian, *supra* note 27, at 12.

57. See ROBERTS & SKUTT, *supra* note 25, at 433.

58. RODRIGUEZ, *supra* note 16, at 39.

59. *Id.*

Department of Justice.⁶⁰ However, the Senator died in 1963, and the bill failed in Congress.⁶¹ Congress' inability to provide strong regulation to the sport provided a breeding ground to today's international sanctioning bodies. Hated by many of the current boxing insiders for their inconsistency and arbitrary nature, the sanctioning governing bodies have controlled the sport for many decades.⁶² The previously mentioned NBA evolved into the modern World Boxing Association (WBA).⁶³ Because fifteen American states started the NBA to create a counter-balance against the NYSAC, the organization enjoyed widespread popularity among the American public during the early years after the WBA's inception in 1962.⁶⁴ The WBA offered more than just overseeing matches, providing safety rules, and regulating fights.⁶⁵ The WBA began naming champions and providing a sound ranking structure that networks and the public could utilize.⁶⁶

The inception of the WBA prompted a global response.⁶⁷ Eleven countries, mostly Latin American, met in Mexico City in 1963 to create the rival sanctioning body, the World Boxing Council (WBC).⁶⁸ The WBC legitimized itself as the British Board of Boxing Control, European Boxing Union, and most notably, the NYSAC supported it—the

60. See McCain & Nahigian, *supra* note 27, at 14.

61. EDMONDS, *supra* note 50, at 9. In response to prior events, however, President Lyndon Johnson signed a law dealing directly with bribery in any sporting contest. 18 U.S.C. § 224 (1964).

62. See Jake Emen, *Sanctioning Bodies: A Guide to the Sanctioning Bodies of Boxing*, PROBOXING-FANS.COM, <http://www.proboxing-fans.com/boxing-101/sanctioning-bodies/> (last visited Jan. 21, 2011).

63. World Boxing Association History, WORLD BOXING ASSOCIATION, <http://www.wbaonline.com/> (last visited Jan. 21, 2011).

64. ROBERTS & SKUTT, *supra* note 25, at 50.

65. McCain & Nahigian, *supra* note 27, at 14.

66. *Id.*

67. ROBERTS & SKUTT, *supra* note 25, at 50.

68. History, WORLD BOXING COUNCIL, <http://wbcbboxing.com/indexEng.php> (last visited Jan. 21, 2011).

leading commissions in the western world.⁶⁹ This evolved into two organizations competing for the control of the sport, which ignited the era of sanctioning bodies.⁷⁰ The WBA would eventually move to Panama City, Panama as two Panamanian directors, Rodrigo Sanchez and Elias Cordova, transferred all power over to Latin American countries.⁷¹

In the meantime, a young and controversial Cassius Clay, later known as Muhammad Ali, shocked the world when he beat Charles “Sonny” Liston for his heavyweight title in 1964.⁷² The rematch in 1965, known for the notorious phantom punch and accusations of corruption, prompted Representative Oren Harris of Arkansas to draft a bill to create a federal boxing commission.⁷³ The boxing community, including the WBA and many former fighters, urged Congress to pass the bill.⁷⁴ The bill, based on the idea that national broadcasts were interstate commerce, passed in the House but failed in the Senate.⁷⁵ Congress would wait several years before addressing the sport again.⁷⁶

Ali, whom authorities stripped of his title and boxing license for refusing to join the service when the military drafted him, defended his title nine times prior to his hiatus.⁷⁷ Boxing greats Joe Frazier and George Foreman emerged during Ali’s hiatus, and boxing historians credit all three with reviving the

69. *Id.*

70. *See* McCain & Nahigian, *supra* note 27, at 14.

71. World Boxing Association History, *supra* note 63.

72. ROBERTS & SKUTT, *supra* note 25, at 269.

73. EDMONDS, *supra* note 50, at 11; H.R. 8635, 89th Cong. (1965).

74. EDMONDS, *supra* note 50, at 11–12.

75. Charles Jay, *No Commission by Omission*, BOXING DIGEST, Dec. 2007, at 43.

76. EDMONDS, *supra* note 50, at 12.

77. Boxer: Muhammad Ali, BOXREC, http://boxrec.com/list_bouts.php?human_id=000180&cat=boxer (last visited Jan. 21, 2011); The Boxer: Exile, THE OFFICIAL SITE OF MUHAMMAD ALI, http://www.ali.com/legend_boxer_exile.php (last visited Jan. 21, 2011).

sport in the 1960s and 1970s.⁷⁸ The popularity of boxing, however, brought boxing's dark matters back to the forefront for the public to see.

The break-up of the IBC would eventually permit a flashy and brazen promoter named Donald King to emerge as boxing's leading promoter. In 1977, Don King Productions (DKP), the promoter's official company, collaborated with the American Broadcasting Company to televise the United States Boxing Championship tournament.⁷⁹ The tournament became the center of scandal as parties involved in the tournament made allegations of false records and bribery against King.⁸⁰ *The Ring Magazine*, a longstanding boxing magazine established in 1922, began fabricating false records for DKP-promoted fighters, making them eligible for fights that otherwise were not warranted.⁸¹ When investigators informed the American Broadcasting Company of the scheme, it refused to continue with the tournament.⁸² Nevertheless, the damage was done, and the public knew about it.

As the media highlighted the scandal, Congress again looked at the idea of creating a national commission.⁸³ The proposed Federal Boxing Board would be a three-member commission that would "register boxers and investigate matches to determine if bribery, racketeering, or other use of influence surrounded a fight."⁸⁴ Added to the bill were clauses indicating safety and health procedures for fighters.⁸⁵ Nonetheless, the bill did not pass.⁸⁶ Throughout the following decade, Representative James Florio, Congressman and former

78. See RODRIGUEZ, *supra* note 16, at 42.

79. *A King-Sized Scandal in the Ring*, TIME (May 2, 1977), <http://www.time.com/time/magazine/article/0,9171,918922,00.html>.

80. *Id.*

81. *See id.*

82. *See id.*

83. EDMONDS, *supra* note 50, at 12.

84. *Id.* at 13; H.R. 2726, 96th Cong. (1979).

85. H.R. 2726.

86. *Id.*

presidential candidate Bill Richardson, and Representative Pat Williams would author a variety of bills calling for the establishment of a federal commission or corporation.⁸⁷ None passed.⁸⁸ As a result, the international governing bodies would gain substantial control over the sport.

III. INTERNATIONAL SANCTIONING BODIES

Although boxing is a global sport, the biggest and most lucrative fights have been and continue to be held in the United States.⁸⁹ Consequently, the lack of American legislation to regulate the sport has allowed the international sanctioning bodies to shape the sport. While the WBA and WBC controlled the sport for almost two decades, in 1983, a split in the WBA, led by Robert Lee of New Jersey, triggered the creation of a third sanctioning body, the International Boxing Federation (IBF).⁹⁰ Lee was the director of the United States Boxing Association, a regional organization within the WBA.⁹¹ Lee and disgruntled members created the IBF, which would soon be legitimized by having heavyweight champion Larry Holmes decline the WBA and WBC titles and accept only the IBF title.⁹²

87. See EDMONDS, *supra* note 50, at 13–14.

88. *Id.*

89. See *supra* notes 2–13.

90. Emen, *supra* note 62.

91. IBF/USBA History, INTERNATIONAL BOXING FEDERATION – UNITED STATES BOXING ASSOCIATION, <http://www.ibf-usba-boxing.com/index.php?pg=2> (last visited Jan. 21, 2011).

92. See RODRIGUEZ, *supra* note 16, at 44. The boxing world recognized Larry Holmes as the top heavyweight fighter at that time. Holmes promoting the IBF legitimized the organization and placed it at the same level as the historical powerhouses, the WBA and the WBC. This action discredited the international sanctioning bodies as it proved that the sanctioning bodies did not create the fighter, but that instead that the fighters made the sanctioning bodies. This single act drew away power not only from the WBA and WBC, but also from all future sanctioning bodies by essentially demonstrating their vulnerability.

Because Lee headquartered the IBF in America, it was able to garner strength rapidly due to its associations with American promoters, networks, and other prominent figures.⁹³ The IBF quickly developed into the third major international sanctioning body due to many important fighters recognizing the IBF belt.⁹⁴

The WBA's future troubles in the late eighties caused yet another break in the organization. In 1988, members from Puerto Rico soon broke out of the WBA, much like the IBF, and created the Puerto Rican-based World Boxing Organization (WBO).⁹⁵ Mirroring the actions of the IBF, the WBO recognized the popular Thomas "The Hitman" Hearns as the super middleweight champion.⁹⁶ More recent WBO titleholders, such as De La Hoya and Pacquiao, would legitimize the WBO as the fourth major sanctioning body.⁹⁷

In the early days of the WBA and WBC, both sanctioning bodies were able to provide legitimate bylaws and regulations for ranking boxers, licensing officials, and providing procedures to secure the safety and health of the participants. However, the creation of new sanctioning bodies produced competing interests between the organizations, which compromised what the sanctioning bodies first set out to do. Instead, the sanctioning bodies arguably became more concerned about promoting their champions and making larger profits. Further evidence of the sanctioning bodies' selfish interests are that the bodies will not recognize the other bodies' champions within their rankings.⁹⁸ Thus, the organizations'

93. See IBF-USBA History, *supra* note 91.

94. See *id.*

95. *Id.*

96. *Id.*

97. *Id.*; Champions, WORLD BOXING ORGANIZATION, <http://www.wbo-int.com/revised/CHAMPS-WBO.asp> (last visited Jan. 21, 2011).

98. By not ranking all boxers, the sanctioning bodies' rankings have essentially created false contenders. This practice avoids fights between the best fighters and, effectively, places inadequate fighters in danger because of the deceiving classifications. Michael J. Jurek, Note, *Janitor or Savior:*

rankings do not provide honest rankings. As a result, allowing the sanctioning bodies to oversee professional boxing has proven to be ineffective.

For example, in 1982, during the highly-touted WBA light-welterweight championship bout between Alexis Arguello and Aaron Pryor, Pryor's trainer, Carlos "Panama" Lewis, was clearly overheard in the corner by television cameras after the thirteenth round informing his assistant to hand him the bottle that he mixed.⁹⁹ Pryor, with renewed vigor, stopped Arguello in the fourteenth round.¹⁰⁰ The boxing commission never conducted a post-fight urinalysis and failed to investigate the incident fully.¹⁰¹ The WBA appeared to contain no authority over the situation and was unable to get involved. Thus, boxing pundits still debate the mystery of the mixed bottle until this day.

More troubles for boxing and the WBA came in 1982. That year, the WBA ranked twenty-three-year-old South Korean Duk Koo Kim as the number one contender for the WBA lightweight championship, which an American, Ray "Boom Boom" Mancini, held the title at the time.¹⁰² Kim had seventeen wins and one loss, but he had not fought in any

The Role of Congress in Professional Boxing Reform, OHIO ST. L.J. 1187, 1215–16 (2006); IBF Ratings Criteria, INTERNATIONAL BOXING FEDERATION – UNITED STATES BOXING ASSOCIATION, <http://assets.ibf-usba-boxing.com/File/IBFRatingsCriteria.pdf> (last visited Jan. 21, 2011).

99. John Louie Ramos, *Of Scandals and Controversies: Pryor, Arguello, and the Black Bottle*, BLEACHER REPORT (Jan. 20, 2009), <http://bleacherreport.com/articles/113231-of-scandals-and-controversies-pryor-arguello-and-the-black-bottle>.

100. *Id.*

101. Ryan Songalia, *Flying High: The Aaron Pryor Story*, EAST SIDE BOXING (May 26, 2006), <http://www.eastsideboxing.com/news.php?p=7068&more=1>.

102. Ron Borges, *Twenty-Five Years is a Long Time to Carry the Memory*, ESPN (Nov. 13, 2007) <http://sports.espn.go.com/sports/boxing/news/story?id=3107079>.

competition at the world level.¹⁰³ His number one ranking was very questionable. Nonetheless, the popular Mancini and Kim went back and forth in a brutal bout.¹⁰⁴ In the fourteenth round, Mancini knocked down Kim, and the referee stopped the fight.¹⁰⁵ Kim would fall into a coma immediately after the bout was over and died five days later.¹⁰⁶ Because the event was nationally broadcast in the United States, questions surrounding the fight began to surface.¹⁰⁷ Most notably, the public wondered why the WBA would allow an unknown and unproven fighter to compete against a world-class fighter and champion.¹⁰⁸

Consequently, after several studies indicated the dangers of the later rounds, rival organization WBC announced that it would reduce its championship bouts from fifteen rounds to twelve rounds.¹⁰⁹ Five years later the WBA and IBF would also reduce its championship fights to twelve rounds.¹¹⁰ Since the WBO emerged in 1988, it has always worked under the twelve-round limit.¹¹¹ Unfortunately, neither the WBA nor any sanctioning body ever changed their ranking system, which is arguably a major factor in mismatches that result in severe injuries or death.¹¹²

103. In addition to the questionable ranking, officials were aware that Kim had tremendous difficulty losing weight in preparation for the fight. Throughout boxing's history, fighters who have been severely injured or killed in boxing contests commonly had difficulty losing weight prior to the fight. *Id.*

104. *See id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. *See* RODRIGUEZ, *supra* note 16, at 47.

110. *Id.* at 47–48.

111. Regulations of World Championship Contests, WORLD BOXING ORGANIZATION, <http://www.wboboxing.com/regulations/> (last visited Jan 21, 2011).

112. *See generally* Antoinette Vacca, *Boxing: Why It Should Be Down for the Count*, 13 SPORTS LAW J. 207 (2006).

Nonetheless, this was not the end of the sanctioning bodies' problems and controversies. The WBC began as a non-profit international organization to rank boxers and award champions.¹¹³ Upon the election of current-president Jose Sulaiman in 1975, the WBC would become a thriving for-profit business, despite its statements that it continues to be a non-profit organization.¹¹⁴ Nonetheless, the WBC gains its profits from sanctioning fees, which are about three percent of a fighter's purse.¹¹⁵ The more number of fights the WBC sanctions, the more profit; the more lucrative the bout, the higher the sanctioning fee. Thus, the WBC and other organizations have an incentive to sanction as many fights as possible.

Sanctioning bodies present many other conflicts of interest. Boxing insiders have pointed to Sulaiman's relationship with controversial promoter Don King as a prime example of illegal collusion.¹¹⁶ The first notable example is when Leon Spinks defeated Ali for the WBC heavyweight title.¹¹⁷ DKP-promoted Ken Norton became the mandatory challenger for the belt.¹¹⁸ When Spinks elected to fight Ali in rematch because of a larger purse, the WBC stripped him of his title and handed it to Norton.¹¹⁹ No organization had ever done that, as boxers could only win the belt by fighting for the

113. Rich Thomas, *The World Boxing Council: The Most Prestigious and Outrageous of Boxing's Sanctioning Bodies*, ASSOCIATED CONTENT (Mar. 18, 2008), http://www.associatedcontent.com/article/656737/the_world_boxing_council_wbc_pg2.html?cat=14.

114. *Id.*

115. Sanctioning bodies require the fighter to pay the fee before sanctioning the fight. Scott Baglio, Note, *The Muhammad Ali Boxing Reform Act: The First Jab at Establishing Credibility in Professional Boxing*, 68 FORDHAM L. REV. 2257, 2263 (2000).

116. Thomas, *supra* note 113.

117. *Id.*

118. *Id.*

119. *Id.*

title.¹²⁰ Norton went on to lose the belt against DKP-promoted Larry Holmes.¹²¹

Boxing insiders routinely criticize the WBC ranking procedures as the WBC has questionably ranked certain fighters extremely high. One such example is Mike Tyson, after his return to the ring following his release from prison. Tyson had not fought in several years yet the WBC ranked him as the number-one contender.¹²² The same occurred recently with current WBC heavyweight champion Vitali Klitschko.¹²³ The WBC awarded Klitschko the number-one contender slot after a two-year hiatus.¹²⁴ At the time of their returns, both Tyson and Klitschko presented boxing promoters very lucrative options.

Another fiasco involved Roy Jones Jr., a former WBC light-heavyweight champion, when he decided to vacate the title during his reign.¹²⁵ The WBC accepted the request and sanctioned a bout between Graciano Rocchigiani and Michael Nunn for the belt.¹²⁶ Rocchigiani won, but the more popular Jones decided he wanted his belt back.¹²⁷ The WBC awarded Jones the championship title and informed Rocchigiani that he had won an interim belt.¹²⁸ The WBC stated that it had committed a “typographical error.”¹²⁹ Rocchigiani sued the WBC in federal court in 2001 and won a judgment of thirty-

120. *Id.*

121. *Id.*

122. *Id.*

123. Boxer: Vitali Klitschko, BOXREC, http://boxrec.com/list_bouts.php?cat=boxer&human_id=7033 (last visited Jan 21, 2011).

124. Thomas, *supra* note 113.

125. Jones was contemplating a move to a higher weight division, and in doing so, he would be unable to defend his light-heavyweight title. *Id.*

126. *Id.*

127. Dan Rafael, *Bankruptcy Could Spell Doom for the WBC*, USA TODAY (June 13, 2004), http://www.usatoday.com/sports/boxing/2004-06-13-wbc_x.htm.

128. *Id.*

129. *Id.*

million dollars.¹³⁰ Unfortunately for the boxing world, the WBC and Rocchigiani settled on a plan that would allow the WBC to continue to exist.¹³¹ Consequently, Sulaiman has publicly mentioned in his speeches the need for the WBC to sanction as many championship fights in order to pay that debt.¹³² As a result, the WBC has created a structure where it could theoretically award up to four titles in each division, confusing the public and the fighters as to who the real champions are.¹³³

Other sanctioning bodies are widely believed to be corrupt, incompetent, or both. For example, in 1997, the Federal Bureau of Investigation (FBI) began investigating IBF President Robert Lee for charges of racketeering and accepting bribes.¹³⁴ The investigation alleged that Lee would take bribes from various promoters to rank their fighters, one being Don King.¹³⁵ Other promoters that testified to paying bribes included Bob Arum, Dino Duva, and Cedric Kushner, all are or

130. See *Rocchigiani v. World Boxing Council, Inc.*, 139 F. Supp. 2d 440 (S.D.N.Y. 2001).

131. Thomas, *supra* note 113.

132. Bob Newman, *Jose Sulaiman Resigns*, FIGHTNEWS.COM (Nov. 3, 2010), <http://www.fightnews.com/Boxing/jose-sulaiman-resigns-65488>.

133. Current Champions, WORLD BOXING COUNCIL, <http://wbcboxing.com/indexEng.php> (last visited Jan. 21, 2011). The WBA, very similar to the WBC, has also had a long reigning president, Gilberto Mendoza. Rich Thomas, *The World Boxing Association: Oldest of the Alphabet Soups*, ASSOCIATED CONTENT (Mar. 6, 2008), http://www.associatedcontent.com/article/635767/the_world_boxing_association.html?cat=14. Not being immune from scandal, promoter Bob Arum admitted bribing WBA officials for favorable treatment. McCain & Nahigian, *supra* note 27, at 15. Recently, the WBA also instituted several world championships per weight division, too. Thomas, *supra* note 133. At any given time, a division could have up to three champions, and all must pay sanctioning fees. Current Champions, WORLD BOXING ASSOCIATION, <http://www.wbaonline.com/> (last visited Jan 21, 2011).

134. Jack Newfield, *The Shame of Boxing*, THE NATION (Oct. 25, 2001), <http://www.thenation.com/article/shame-boxing?page=full>.

135. *Id.*

were well-known promoters.¹³⁶ Although the FBI dropped the racketeering charges against the IBF and Lee, the court still convicted Lee of conspiracy, money laundering, and tax evasion.¹³⁷ Lee is still serving his sentence today.¹³⁸

Further, in 2001, the WBO mistakenly kept one of their ranked fighters, Darren Morris, in their rankings despite the fact that he had died.¹³⁹ To make matters worse, Morris continued to move up in the rankings before the WBO realized their mistake and removed him.¹⁴⁰ The WBO dismissed it as an administrative error.¹⁴¹

Overall, the boxing sanctioning bodies view themselves as innovators and the reason boxing has stayed afloat. They believe their prestige has provided fighters a platform to build their careers and become attractions in the sport. Nonetheless, these organizations are profit-driven, hindering them to make proper decisions in the interest of the boxers' health, safety, and welfare. These organizations have ruled the boxing world for over four decades, but their reign is fading. Fighters, the public, and journalists no longer give them the attention or the prestige that the organizations once had. In fact, HBO boxing analysts, throughout the telecast, frequently avoid recognizing the titles by its sanctioning body. The organizations only have themselves to blame.

Dissatisfaction with the sanctioning bodies has led to some new practices among boxers. Some fighters have elected not to pay the sanctioning fees and refuse the title altogether.¹⁴²

136. *Id.*

137. Ronald Smothers, *Lee Sr. Cleared of Bribery; Convicted on Other Charges*, N.Y. TIMES (Aug. 18, 2000), <http://www.nytimes.com/2000/08/18/sports/boxing-lee-sr-cleared-of-bribery-convicted-on-other-charges.html?ref=robertwleejr>.

138. *United States v. Lee Sr.*, 359 F.3d 194 (3d Cir. 2004).

139. *See Jurek*, *supra* note 98, at 1214.

140. *See id.*

141. *See id.*

142. Franklin McNeil, *Mayweather Not Going for Gold*, ESPN (Apr. 28, 2010), <http://sports.espn.go.com/sports/boxing/news/story?id=5136492>.

The latest and most noteworthy example occurred when the world's number one and most profitable fighter, Floyd "Money" Mayweather Jr., decided prior to his fight with WBA welterweight champion "Sugar" Shane Mosley that he would not pay the required sanctioning fee.¹⁴³ In a fight where Mayweather made a guaranteed 22-million-dollar purse plus additional income from PPV revenue ranging around 10 million dollars, the WBA would have requested almost 1 million dollars in sanctioning fees.¹⁴⁴ Mayweather refused and stated, "At this level, it's not about belts . . . it's about money."¹⁴⁵ His actions reestablished that it is not the belts who make the fighters, but the fighters who make the belts, and ultimately, he reaffirmed that the sanctioning bodies are becoming irrelevant in the sport.

IV. MODERN LEGISLATION

As the boxing public realized that the sanctioning bodies were not the answer to clean up the sport, the 1990s saw various Congressmen reattempt to address the sport's issues and lack of regulation.¹⁴⁶ Delaware Senator William Roth, Jr. introduced a bill to create the Professional Boxing Corporation.¹⁴⁷ Bill Richardson would also introduce a similar

143. *Id.*

144. Lem Satterfield, *Floyd Mayweather to Earn \$22.5 Million Guaranteed; \$7 Million for Mosley*, FANHOUSE (Apr. 29, 2010, 9:11 PM), <http://boxing.fanhouse.com/2010/04/29/floyd-mayweather-to-earn-22-5-million-purse/>.

145. McNeil, *supra* note 142.

146. *See* EDMONDS, *supra* note 50, at 14–15. Another nationally televised bout, this time between IBF middleweight champion James Toney and Delaware's David Tiberi, revived lawmakers' concerns. *See* RODRIGUEZ, *supra* note 16, at 53. Many viewers believed that Tiberi had won the twelve-round bout; however, it was Toney that was awarded the split decision. *Id.*

147. S. 2852, 102d Cong. (1992).

bill in the House.¹⁴⁸ Both bills failed.¹⁴⁹ Other acts that failed include Congressman Major Owens' Boxing Safety, Retirement, and Restraining Act of 1992 and Richardson's Professional Boxing Corporation Act of 1993.¹⁵⁰ Arizona Senator John McCain joined the crusade and authored the Professional Boxing Safety Act.¹⁵¹ Representative Robert Torricelli would also introduce the bill in the House.¹⁵² These bills would fail, as well.¹⁵³

McCain was the most persistent. In 1996, after conducting joint hearings and hearing testimony from well-known boxing figures, Congress finally passed McCain's Professional Boxing Safety Act (PBSA).¹⁵⁴ The PBSA expressly set to do two things: "(1) to improve and expand the system of safety precautions that protects the welfare of professional boxers; and (2) to assist State boxing commissions to provide proper oversight for the professional boxing industry in the United States."¹⁵⁵

The law provides several requirements for state commissions.¹⁵⁶ The state must provide a boxing commission to regulate a match, and if one is not available, the state must request a neighboring-state commission to oversee the match.¹⁵⁷ Either the commission or the promoter must provide the boxer a pre-fight physical exam, an ambulance or medical personnel with appropriate resuscitation equipment, a ringside physician, health insurance for each boxer, and a boxing

148. H.R. 5407, 102d Cong. (1992).

149. See EDMONDS, *supra* note 50, at 14.

150. *Id.*

151. S. 1991, 103d Cong. (1993).

152. H.R. 4753, 103d Cong. (1993).

153. See EDMONDS, *supra* note 50, at 14.

154. The Professional Boxing Safety Act of 1996, 15 U.S.C. §§ 6301–6313 (2000).

155. *Id.*

156. See *id.*

157. *Id.* § 6303.

license for each boxer.¹⁵⁸ Additionally, the PBSA calls for the commission to evaluate boxing records, honor other state's medical drug and identity-based suspension, and report the results of all matches to a boxer registry.¹⁵⁹ As well, the Act includes a provision that prohibits state commissioners from receiving compensation from any person that sanctions, arranges or promotes professional boxing or has financial interests in participants.¹⁶⁰ Section 10 of the law provides enforcement procedures to seek criminal prosecution or to allow the United States Attorney General to seek injunctive relief for violators.¹⁶¹ Finally, the law addresses fights held on Indian reservations.¹⁶² Reservations, prior to the Act, had autonomy to regulate their own professional prizefighting.¹⁶³ However, this law closed that loophole either by requiring reservations to have as stringent regulations as the state it sits in or by guidelines established by the Association of Boxing Commission (ABC).¹⁶⁴

The ABC is a loosely affiliated organization made up of forty-six state commissions.¹⁶⁵ The PBSA grants specific duties to the ABC, such as providing a medical registry and boxer license registry.¹⁶⁶ Because the ABC has no real enforcement or legal power, it is more akin to the American Law Institute in that it provides model law or endorses particular law for lawmakers to adopt.¹⁶⁷ It has served as a persuasive authority

158. *Id.* § 6304

159. *Id.* § 6305.

160. *Id.* § 6308.

161. *Id.* § 6309.

162. *Id.* § 6312.

163. *See* RODRIGUEZ, *supra* note 16, at 54–55.

164. *Id.*

165. J. Bradley Clair, Note, *Why Federal Preemption is Necessary to Create Uniform Professional Boxer Safety Standards*, 73 BROOK L. REV. 1173, 1182–83 (2008).

166. *See* 15 U.S.C § 6303.

167. Clair, *supra* note 165, at 1183.

for state commissions and aids in the development of boxing regulation.¹⁶⁸

After the successful passage of the PBSA of 1996, McCain went back to work in the next Congress to pass more legislation for boxing.¹⁶⁹ While the PBSA sought to protect boxers in the ring, McCain sought to create legislation that protected boxers from abuse outside the ring. In 1998, the Senate held a committee hearing with prominent boxing figures.¹⁷⁰ Members from the Nevada State Athletic Commission (NAC), New Jersey State Control Board, WBC, and the IBF were present.¹⁷¹ While McCain's bill, the Muhammad Ali Boxing Reform Act (MABRA), would fail in 1998, it passed in 2000.¹⁷² Amending the PBSA, the law's stated goals are:

(1) [T]o protect the rights and welfare of professional boxers on an interstate basis by preventing certain exploitive, oppressive, and unethical business practices; (2) to assist State boxing commission in their efforts to provide more effective public oversight of the sport; and (3) to promote honorable competition in professional boxing and enhance the overall integrity of the industry.¹⁷³

The Act granted more duties to the ABC, which included providing guidelines for avoiding coercive contractual

168. *See id.*

169. *See EDMONDS, supra* note 50, at 15.

170. *See* Muhammad Ali Boxing Reform Act: Hearing on S. 2238 Before the S. Comm. on Commerce, Science, and Transp., 105th Cong. (1998).

171. *Id.*

172. S. 305, 106th Cong. (1998); Muhammad Ali Boxing Reform Act, Pub. L. No. 106-210, 114 Stat. 321, 321-29 (1999) (codified as amended at 15 U.S.C. §§ 6301-6309 (2000)).

173. *See* 114 Stat. 322 at § 3.

procedures and creating minimum contractual standards.¹⁷⁴ Common practice in boxing was for powerful promoters to require free-agent boxers to sign long-term contracts with that promoter to earn the opportunity to fight the promoter's top fighters, who might hold a championship or provide a lucrative fight.¹⁷⁵ If a free-agent fighter did not agree to the promoter's terms, the fighter would rarely have the opportunity to fight for a large purse or against a champion.¹⁷⁶ Thus, this practice limited free-agent boxers' bargaining power, and the boxer would have to wait several years until another opportunity arose unless he agreed to the terms of the one-sided contract.

To counter the practice, the Act requires promoters and the sanctioning bodies to release all contractual and financial information regarding a fight to the state commissions and the boxers.¹⁷⁷ Prior to the MABRA, boxers were rarely aware of how much the promoter or other parties were profiting.¹⁷⁸ Thus, the required transparency gives the state commissions the oversight necessary to regulate the participants. In fights of ten rounds or more, the Act applies a conflict of interest provision between a promoter and a boxer's manager.¹⁷⁹ Essentially, it creates a fiduciary duty for the manager to his boxer in major bouts and separates the potential of promoters and manager colluding against the boxer.

174. 15 U.S.C. § 6307c.

175. In boxing, the promoter usually holds greater bargaining power. As a result, promoters throughout history have created one-sided and coercive contracts that unfairly place boxers in bad situations. See McCain & Nahigian, *supra* note 27, at 20.

176. Boxers can usually ensure their success by beating top fighters in the sport. Thus, boxers will succumb to any terms in order to get the opportunity to fight a top fighter. *Id.*

177. 15 U.S.C. § 6307d.

178. See McCain & Nahigian, *supra* note 27, at 20.

179. 15 U.S.C. § 6308. Promoters and managers usually have long-working relationships that naturally place their boxers as opposing parties when conflicts arise.

Another major part of the Act empowers the ABC to create objective guidelines for commissions or sanctioning bodies to rate boxers.¹⁸⁰ As previously demonstrated in the Kim tragedy, this provision seeks to protect boxers from participating in dangerous mismatches.

V. STATE COMMISSIONS: THE “RACE TO THE BOTTOM”

The Ali Reform Act, although well intentioned, has largely had a minimal effect on boxing due to the lack of enforcement. Both the PBSA and MABRA leave the state commissions to enforce the requirements of the laws.¹⁸¹ For various reasons, state athletic commissions throughout history have been very inefficient and have lacked uniformity when regulating boxing. While prominent state commissions like Nevada, New York, California, Florida, and Illinois lead the commissions in safety and regulation, it is the less active commissions that present the most danger to the fighters.

A great indicator of a commission’s sophistication is the amount of resources that its state allocates to it.¹⁸² For example, Nevada has held many of the most profitable and important matches throughout the last few decades.¹⁸³ Boxing is an important component of the state’s economy, and thus, the state allocates more funds and attention to its commission, the NAC.¹⁸⁴ Consequently, the NAC requires extensive neurological, HIV, and drug testing on every boxer before their fight.¹⁸⁵ In contrast, the West Virginia State Athletic Commission, which is no hotbed for boxing, conducts not one of those tests.¹⁸⁶ Although West Virginia does not hold many

180. *Id.* § 6307c.

181. *See* Jurek, *supra* note 98, at 1202.

182. *See* RODRIGUEZ, *supra* note 16, at 91–92.

183. *See id.* at 108–09.

184. *See id.*

185. *See id.* at 85.

186. *See id.*

fight, the ones that it does hold place the combatants and spectators in great danger.¹⁸⁷

The resulting circumstances have created a race-to-the-bottom phenomenon among the states.¹⁸⁸ The term race to the bottom has been used in various contexts, including corporations law, environmental law, occupational safety, welfare reform, and tort reform. A race to the bottom characterizes circumstances where competition among jurisdictions leads to harmful and undesirable outcomes. In boxing regulation, state commissions, likewise, compete to relax their restrictions in order to entice promoters and matchmakers to choose their state for a fight's venue, effectively minimizing the original purpose of the commission.

In states like Nevada, commissions have to balance the level of stringency that it places on the parties. If Nevada regulates too rigorously, promoters will take their fights elsewhere. For example, Memphis, Tennessee provided a home for the Mike Tyson versus Lennox Lewis match in 2002 when the state of Nevada would not license Tyson after he had several strange incidents in and out of the ring.¹⁸⁹ Tennessee would win the sweepstakes to host the fight and, as a result, benefited financially.¹⁹⁰

In 2010, Nevada and California's tough regulations cost them another profitable bout.¹⁹¹ The California State Athletic Commission (CSAC) suspended Antonio Margarito of Mexico in early 2009 when commissioners found a plaster-like substance in his wraps before his fight with "Sugar" Shane

187. *See id.* at 94–95.

188. The term race-to-the-bottom was first recognized by Justice Louis Brandeis. *See* *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 558–59 (1933) (Brandeis, J., dissenting in part).

189. *See* McCain & Nahigian, *supra* note 27, at 27.

190. *Id.*

191. Dan Rafael, *Antonio Margarito Denied Boxing License*, ESPN (Aug. 19, 2010, 8:56 AM), <http://sports.espn.go.com/sports/boxing/news/story?id=5475019>.

Mosley.¹⁹² The CSAC conducted an investigation and determined that Margarito's camp had tampered with the wraps and had inserted a hard substance.¹⁹³ Subsequently, on March 31, 2009, the CSAC revoked Margarito's license.¹⁹⁴ The CSAC allowed Margarito to reapply for his license after the revocation period of one year.¹⁹⁵

Margarito honored the suspension and did not apply for any licenses in any states.¹⁹⁶ After the revocation period, Margarito's promoter, Bob Arum, offered Margarito a match with Manny Pacquiao.¹⁹⁷ Wanting to hold the fight in Nevada, Arum had Margarito apply for a license in Nevada.¹⁹⁸ However, Nevada did not license him asserting that Margarito needed to go to California first, where his license had been originally revoked.¹⁹⁹ He subsequently reapplied in California, but the commission denied him in a five-to-one decision.²⁰⁰

192. Dan Rafael, *Margarito, Trainer Banned in U.S.*, ESPN (Feb. 11, 2009, 2:45 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=3897765>. The fight, held in Los Angeles, continued despite the findings prior to the fight. *Id.* Mosley won via knockout. *Id.*

193. *Margarito v. State Athletic Comm'n*, 116 Cal. Rptr. 3d 888, 891 (Ct. App. 2010). Margarito argued that he was not aware that his trainer had put the illegal wraps on him. *See id.*

194. *See id.* Although suspicions emerged that he used these wraps in his previous fights, the CSAC did not investigate those allegations. *Margarito Ready to Move Forward*, ESPN (Apr. 5, 2010, 9:15 PM), <http://sports.espn.go.com/los-angeles/news/story?id=5058821>.

195. Rafael, *supra* note 193.

196. Dan Rafael, *Margarito's Plans Stymied by Tabling*, ESPN (Jul. 9, 2010, 6:57 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=5367426>.

197. *See id.*

198. *See id.*

199. *See id.* Margarito had previously appealed the decision in California but lost. *Margarito v. State Athletic Comm'n*, 116 Cal. Rptr. 3d 888, 893 (Ct. App. 2010).

200. Dan Rafael, *Antonio Margarito Denied Boxing License*, ESPN (Aug. 19, 2010, 8:56 AM), <http://sports.espn.go.com/sports/boxing/news/story?id=5475019>.

Once California denied his reinstatement, the forum shopping for a venue began, illustrating the industry's race-to-the-bottom concerns. PBSA requires all states to honor suspensions, but it does not require them to honor revocations.²⁰¹ Thus, Texas and mogul Jerry Jones offered the new Cowboys Stadium in Arlington, Texas to host the fight.²⁰² It was only a matter of days after the California denial before the Texas Department of Licensing and Regulation licensed Margarito, without even holding a hearing and against the wishes of the Association of Boxing Commissioners.²⁰³ The fight, held on November 13, 2010, did very well in Dallas and in PPV statistics.²⁰⁴ Unfortunately for Nevada and California, two states that have not fared well throughout the current recession, they missed one of the most profitable sporting events of 2010.

Although forum shopping is a problem with lucrative bouts such as Pacquiao versus Margarito, it is the lesser-known bouts where the danger lies. Boxers that Nevada or any states with stricter regulations have rendered medically unfit could go to another state with more relaxed regulations and fight. Promoters are familiar with this practice.²⁰⁵

For instance, the NYSAC placed well-known former heavyweight champion Evander Holyfield on medical

201. Tim Lueckenhoff et al., *ABC Statement on Margarito*, FIGHTNEWS.COM (Aug. 19, 2010), <http://www.fightnews.com/Boxing/abc-statement-on-margarito-56935>. This loophole in the current system has allowed many promoters to forum shop when a state has revoked a fighter's license.

202. Rafael, *supra* note 200. Earlier in 2010, Cowboys Stadium held another Pacquiao fight, and Texas benefited substantially from hosting the bout. Rafael, *supra* note 12.

203. Dan Rafael, *Antonio Margarito Licensed in Texas*, ESPN (Sep. 2, 2010, 1:49 PM), <http://sports.espn.go.com/dallas/news/story?id=5501424>. Texas' regulation of boxing is arguably more relaxed than California and Nevada's level of strictness.

204. Rafael, *supra* note 13.

205. *See* McCain & Nahigian, *supra* note 27, at 28–30.

suspension.²⁰⁶ The NYSAC eventually lifted the medical suspension and replaced it with an administrative suspension, yet several states granted Holyfield a license to fight despite the NYSAC actions.²⁰⁷ Fortunately for Holyfield, he has not been severely hurt. However, at the age of forty-eight, Holyfield continues to fight, subjecting himself to the possibility of severe injury or even death.²⁰⁸

Another well-known example of forum shopping is former WBO heavyweight champion Tommy Morrison.²⁰⁹ The NAC diagnosed Morrison with HIV in 1996.²¹⁰ In a campaign to clear his name of the HIV diagnosis, Morrison claimed that he never had HIV.²¹¹ By taking a series of tests in Arizona, he forwarded the results to West Virginia, a state that does not conduct HIV testing.²¹² West Virginia accepted the results and allowed Morrison to fight in 2007.²¹³ After Morrison's win, authorities learned that the results from Arizona were potentially fraudulent.²¹⁴ Unfortunately, the fight put Morrison's opponent, the officials, and the fans in attendance in great danger. Until this day, Morrison has not provided uncontroverted results showing that he is clear of HIV.

206. See Jurek, *supra* note 98, at 1203.

207. Although doctors cleared Holyfield to fight, the NYSAC strongly believed it should not license Holyfield to continue fighting because of his age and history of injuries. Therefore, the NYSAC placed him on administrative leave. *Id.*

208. Holyfield has fought twice in the year 2011 despite nearing the age of 49. Boxer: Evander Holyfield, BOXREC, http://boxrec.com/list_bouts.php?human_id=499&cat=boxer (last visited Jan 22, 2011).

209. Clair, *supra* note 165, at 1192.

210. *Id.*

211. Dan Rafael, *Morrison Medically Cleared to Fight Thursday*, ESPN (Feb. 20, 2007), <http://sports.espn.go.com/sports/boxing/news/story?id=2772386>.

212. Clair, *supra* note 165, at 1192.

213. *Id.*

214. *Id.*

Other variances within the state commissions occur in the area of drug testing.²¹⁵ The recent exposure of athletes using performance-enhancing drugs has heightened everybody's attention in all sports regarding the issue. In boxing, however, only some state commissions conduct drug testing.²¹⁶ Surprisingly, most states do not test for performance-enhancing drugs.²¹⁷ Only the prominent boxing commissions test for performance-enhancing drugs, but vary on how to conduct the test.²¹⁸

In a sport where altering the strength of one fighter could affect the livelihood of his opponent, one would think that commissions would seek to extinguish any fighter's opportunity to use performance-enhancing drugs. However, this is not the case. Authorities have discovered many well-known fighters using performance-enhancing drugs.²¹⁹ For example, after his loss to De La Hoya, former world champion Fernando Vargas tested positive for the performance-enhancing drug Winstrol.²²⁰ Another former world champion, James Toney tested positive for Nandrolone, another type of steroid, in 2005 after his heavyweight title fight with John Ruiz.²²¹ Many former world champions either have tested positive for a banned substance or were linked to performance-enhancing drugs.²²² Furthermore, commissions may never know which

215. See RODRIGUEZ, *supra* note 16, at 94–95.

216. See *id.*

217. Despite drug testing, the commissions do not conduct the more intrusive method of blood testing. Thus, designer performance-enhancing drugs escape the relaxed urine-testing method. See *id.*

218. See *id.* at 80–82.

219. Kieran Mulvaney, *Boxing Does Not Escape the Specter of Steroids*, ESPN (Mar. 1, 2007), <http://sports.espn.go.com/sports/boxing/news/story?id=2782402>.

220. *Id.*

221. The sanctioning body stripped James Toney of his championship after the positive test. *Id.*

222. *Id.* Roy Jones Jr., Francois Botha, and Mariano Carrera, all former world champions, also tested for a banned substance after their fights. *Id.* Other notable champions that have been linked to performance-enhancing

and how many fighters were able to escape drug testing by fighting in states that do not require drug testing or testing of performance-enhancing drugs.

An unlikely source, Floyd Mayweather Jr., began another trend that may affect drug testing in boxing.²²³ For his fight against Shane Mosley, Mayweather required in their fight contract that both he and Mosley be subjected to Olympic-style United State Anti-Doping Agency blood tests.²²⁴ Although Mayweather is the only fighter to request this type of testing, as no state commission requires such extensive testing, fighters may begin following suit. The desirable result is that every commission would require this type of testing. However, the current system does not lend itself to such an overhaul.

Another area where state commissions lack uniformity is in assuring that fighters are involved in competitive matches. Some state commissions have created objective tools for judging whether a fight is competitive.²²⁵ Those commissions may examine the boxer's record, experience, level of competition, recent results, how many times the boxer had been knocked-out, amateur background, age, and other relevant attributes.²²⁶ Yet, in looking through the public registry of fighters' records, like Boxrec, uncompetitive match-ups occur

drugs but never tested positive are Evander Holyfield and Shane Mosley. Dan Rafael, *Mosley Admits He Unknowingly Took BALCO Steroids*, ESPN (Sep. 27, 2007, 5:14 AM), <http://sports.espn.go.com/sports/boxing/news/story?id=3041449>.

223. *Fighters Agree to Olympic-Style Testing*, ESPN (Mar. 18, 2010, 6:46 PM), <http://sports.espn.go.com/sports/boxing/news/story?id=5006342>. The sports world recognizes Floyd Mayweather as probably the most controversial figure in boxing today. Yet, Mayweather has brought many buried issues to the forefront for the media, officials, and other figures to address.

224. *Id.*

225. *See* RODRIGUEZ, *supra* note 16, at 71–72.

226. *See id.*

all the time.²²⁷ In fact, many promoters unofficially designate certain boxers as “journeymen” to indicate that promoters and fans expect them to lose and provide a win for their opponents.²²⁸ This practice affects the safety of fighters throughout the nation.

VI. PROFESSIONAL BOXING AMENDMENT ACT AND THE UNITED STATES BOXING COMMISSION

Current law expects state commissions to enforce regulation or follow through with criminal prosecutions.²²⁹ Prominent boxing states tend to do a much better job enforcing their regulations and conducting investigations. However, most states do not have the funds or manpower to enforce the regulations.²³⁰ Even more, states understandingly fear that promoters and sanctioning bodies will boycott them.²³¹ States, therefore, may pull back on enforcement. Boxing journalist Thomas Hauser clarifies the race-to-the-bottom concerns, “It’s hard for a state attorney general in one state to [take a party to court] . . . let’s say the New York state attorney general does it, the [sanctioning bodies] . . . won’t sanction title fights in New York, but they will in some other state.”²³²

Some lawmakers, specifically John McCain, have been keenly aware of the current model’s inefficiencies.²³³ Since the

227. The Boxrec registry, created as an informational tool for fans, has become the public archive for boxers, their managers and promoters, and officials. BOXREC, <http://boxrec.com/> (last visited Jan 22, 2011).

228. Journeyman, BOXREC, <http://boxrec.com/media/index.php/Journeyman> (last visited Jan 22, 2011). Usually, a journeyman has more losses than wins on his record or has lost a substantial amount of his most recent fights. No one expects the journeyman to win.

229. See Jurek, *supra* note 98, at 1198.

230. See RODRIGUEZ, *supra* note 16, at 91–92.

231. See *id.* at 101–05.

232. See *id.* at 105.

233. See generally McCain & Nahigian, *supra* note 27.

passage of MABRA, McCain has proposed legislation to create a national boxing commission in every congressional session.²³⁴ The bills, titled Professional Boxing Amendments Act (PBAA), would amend the PBSA to create a federal oversight commission.²³⁵ McCain introduced the latest version of the bill in 2009, but Congress last looked at it on March 4, 2010.²³⁶ Co-sponsored by North Dakota Senator, Byron Dorgan, and introduced in the House of Representatives by Peter King of New York, the Congressmen have slightly altered the bill from its prior versions.²³⁷

Although the commission or the Act would not fix all of boxing's problems, it would take a major step by placing boundaries for the parties involved. The PBAA's official purpose is to "protect the health, safety, and welfare of boxers and to ensure fairness in the sport of professional boxing."²³⁸ The PBAA would vest authority to the USBC over all boxing matches in the nation.²³⁹ Specifically, the USBC must grant approval to matches that allegedly violate the MABRA, championship fights with ten rounds or more, or matches where one fighter has "suffered ten consecutive defeats."²⁴⁰ The Act requires state commissions to test all fighters for infectious diseases, requires an ambulance and emergency personnel with proper resuscitation equipment at all fights, and

234. S. 38, 111th Cong. (2009); S. 84, 110th Cong. (2007); S. 148, 109th Cong. (2005); H.R. 1281, 108th Cong. (2003); S. 2550, 107th Cong. (2002).

235. *See id.* The early renderings of the bills contained a commission called the United States Boxing Administration, which would be headed by the Department of Labor. S. 2550. The later and current versions of the bill name the commission the United States Boxing Commission (USBC), which instead is placed under the Department of Commerce. S. 38.

236. S. 38.

237. S. 38 - Professional Boxing Amendments Act of 2009, OPENCONGRESS, <http://www.opencongress.org/bill/111-s38/show> (last visited Jan. 22, 2011).

238. S. 38, 111th Cong. § 201 (2009).

239. *Id.* § 203(b)(3).

240. *Id.* § 4(b)(1).

requires health and safety disclosures to the combatants.²⁴¹ The PBAA gives the USBC authority to develop guidelines for the sanctioning bodies to rank boxers, develop minimal contractual guidelines, modify disclosures for promoters and the sanctioning bodies, approve and license officials, create and maintain a medical registry, and provide conflict-of-interests provision.²⁴² Very importantly, boxers would have an avenue to question their ranking among the sanctioning bodies.²⁴³

The PBAA prohibits the USBC from ranking boxers, awarding championships, and promoting events.²⁴⁴ However, the USBC would essentially centralize all data and procedures for independent agencies to use.

Maybe the most important aspect of the law is that the USBC would have direct authority to investigate violations, power to subpoena, and power to intervene in civil actions.²⁴⁵ Because every state would uphold all suspensions and sanctions, the states would not have the fear of being boycotted by the sanctioning bodies and promoters. Thus, standard medical, health, and safety procedures would be uniform throughout the whole nation. Forum shopping from state to state would cease.

As well, because the USBC is an oversight commission, the USBC and the state commissions could exist simultaneously.²⁴⁶ The USBC's main goal is to ensure that the state commissions are complying with rules and regulations.²⁴⁷ In instances where state regulation is below minimum standards, the USBC would ensure that the commission

241. *Id.* § 6.

242. *Id.* § 9.

243. *Id.* § 11(c).

244. *Id.* § 203(c). Not allowing the USBC to rank fighters avoids the issues that the sanctioning bodies currently contain—having incentives to promote certain fighters to high rankings.

245. *Id.* § 207(b)(2).

246. *See* RODRIGUEZ, *supra* note 16, at 59–60.

247. *See id.*

complies with those standards.²⁴⁸ Overall, the PBAA would directly combat many of the race-to-the-bottom concerns.

VII. WHY THE USBC IS NECESSARY

The USBC has garnered wide support throughout the boxing community.²⁴⁹ However, at a time when the economy is a major concern, Congress is having trouble convincing itself and the public that another regulatory entity paid by American tax dollars is necessary. Although the bill is not on the table in the new congressional session, boxing insiders expect McCain to propose the bill again.²⁵⁰

Nevertheless, skeptics of the PBAA suggest that the USBC would not fix the problems that underlie boxing.²⁵¹ They state that boxing's scandals, inconsistencies, and inability to provide fans the best contests stem from other issues that neither a state nor a national commission could cure.²⁵² Some scholars indicate that until boxing eradicates the sanctioning bodies, boxing will continue to have corruption.²⁵³ Skeptics also argue that the USBC or PBAA would not affect rankings, which in some sense signify a fighter's marketability.²⁵⁴ Therefore, in order to fix boxing completely, a commission would have to fix or eliminate the sanctioning bodies.²⁵⁵

248. *See id.*

249. *See* McCain & Nahigian, *supra* note 27, at 28-32. The Association of Boxing Commissioners, Home Box Office (HBO) Sports, boxers, and promoters have lobbied extensively to convince Congress to pass the bill. *Id.*

250. Joe DeGuardia, *Boxing Promoters Association Reaching Out to U.S. Senator*, EAST SIDE BOXING (Jan. 15, 2011), <http://www.eastsideboxing.com/news.php?p=26439&more=1>.

251. *See* Jurek, *supra* note 98, at 1210-25.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

However, the USBC does provide oversight against the sanctioning bodies and promoters. To begin, the boxer will be able to officially petition any concern about his ranking.²⁵⁶ The ability for a boxer to question his ranking in a particular sanctioning body theoretically will keep the bodies in check. The questionable changes in the rankings that the bodies have conducted in the past would not pass muster under the USBC. Hauser explains this theory as he criticizes the WBO for ranking a deceased fighter, “. . . if the U.S. attorney’s officer [or USBC] went to court and said they want an injunction against the [sanctioning body] collecting sanctioning fees, they’d have to clean up their ratings act.”²⁵⁷ The sanctioning bodies, which depend heavily on the sanctioning fee, would not last long without them. The pressure would be too immense for the sanctioning bodies not to cooperate. Obviously, this tool would apply in many other circumstances.

USBC investigatory and subpoena power would also keep the sanctioning bodies honest. Theoretically, the USBC’s investigatory power would deter illegal collusion between the promoters and the sanctioning bodies. Any allegations of misconduct by the parties would prompt the USBC to fully investigate and prosecute if necessary. Because the USBC would be in charge of licensing all promoters, boxers, and officials, findings of misconduct could potentially cripple any party involved.²⁵⁸

Moreover, the party suspended would not be able to continue to operate in any state, essentially hindering their livelihood.²⁵⁹ Thus, the Antonio Margaritos of the world would have never had the opportunity to go to Texas and fight after California and Nevada denied him. The law would shun any powerful promoters’ influence over the state commissions.

256. S. 38 § 11(c).

257. See RODRIGUEZ, *supra* note 16, at 105.

258. S. 38 § 204.

259. *Id.* § 207.

Other benefits from having the USBC and federal uniformity include appropriate disciplinary actions for conduct outside the ring by fighters, including suspensions for criminal or unethical behavior.²⁶⁰ The current system provides an inadequate mechanism for disciplinary action. Thus, fighters are notorious for conducting controversial behavior and then collecting a purse several weeks later.²⁶¹ The USBC could provide disciplinary actions to apply higher standards for all individuals involved.

Likewise, the USBC could apply these disciplinary actions to enforce a better drug-testing policy. The USBC through its authority could require state commissions to cooperate with a uniform standard for drug testing. Today's trend of employing stricter drug-testing policies in all sports would most likely influence the USBC to adopt a strict and reputable drug-testing policy. Thus, the PBAA would greatly reduce any concern of a fighter using performance-enhancing drugs without the possibility of detection.

Finally, the USBC could eventually serve as the implementer of innovations in boxing. Changes in the sport are rare because neither the commissions nor the sanctioning bodies want to take the first steps in implementing new regulation. Usually, commissions do not take action until a tragedy occurs within their jurisdiction.²⁶² That should not be the indicator for change, yet the realities of the sport say otherwise. The USBC, in the interest of improving the health and safety of boxers, could conduct studies to assure that boxers perform at the utmost level of safety.²⁶³ Instead of

260. *Id.*

261. Dan Rafael, *Floyd Mayweather: I'll Cook that Chump*, ESPN (Sep. 4, 2010, 1:58 AM), <http://sports.espn.go.com/sports/boxing/news/story?id=5527403> (demonstrating how Floyd Mayweather Jr. went on a racist internet-video rant and no state commission subjected him to any disciplinary action).

262. *See* RODRIGUEZ, *supra* note 16, at 86–87.

263. *Id.* at 58.

waiting for one commission to take the lead, the USBC would implement the safety measures across the board to ensure that it provides every boxer the best care possible. The USBC would potentially eliminate the race-to-the-bottom practices.

VIII. CONCLUSION

The solution to boxing's problems will not cease to exist with the creation of the USBC. However, many would agree that this would be a major step in that direction. Even though recent trends have shifted some of the focus of boxing to European nations, the United States remains the ultimate destination for boxers and fans. Thus, the United States implementing such extensive regulation is sure to provide a structure to the whole world of boxing.

Furthermore, providing a centralized system in the United States could lead to other important reforms. Boxing is one of the few sports operating without a union, and consequently, many boxers end up destitute after their careers. Additionally, many boxers operate with inadequate or sometimes no health insurance.²⁶⁴ The ripple effect of creating a national commission could lead boxers to unionize finally. As a result, a union could address the issue of poor benefits. As well, fans can hope that centralizing boxing could finally persuade promoters to centralize themselves and create an oversight body that could handle the day-to-day operations, similar to the National Football League and other major American sport leagues.

Although these wishes all seem farfetched for the common boxing fan, recent concerns of the state of boxing have persuaded promoters to take some action. In 2009, thirty boxing promoters created the Boxing Promoters Association to

264. *Id.* at 74.

“promote the well being of the sport of boxing.”²⁶⁵ This indicates that prominent boxing figures are willing to organize. The boxing world truly desires order and structure. With the passage of the PBAA and creation of the USBC, Congress may have the power to provide that order and structure.

265. History, BOXING PROMOTERS ASSOCIATION, <http://www.boxingpromotersassociation.com/page/boxing-promoters-association> (last visited Jan. 22, 2011).

GENETIC DOPING: THE LANCE ARMSTRONG CASE AS A PREVIEW FOR FUTURE REGULATIONS

Jason Steiner^{*}

INTRODUCTION

Steroids. Human growth hormone. Human chorionic gonadotropin. These are some of the usual suspects affiliated with major doping scandals in sports. Admirers of major sports are familiar with the doping scandal involving seven-time Tour de France champion and the most famous American athlete involved in the sport of cycling, Lance Armstrong. However, fans might not be as knowledgeable with the terms genetic doping, EPO, or VEGF. Over the past few decades the world of sports has seen a dramatic increase in the amount of performance-enhancing drugs that are enabling athletes to run faster, jump higher, and be stronger. What started as caffeine, cocaine, and alcohol led to HGH and anabolic steroids, and has recently and dangerously evolved into genetic doping. Genetic doping is a rapidly evolving tool of gene therapy. While gene

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therapy involves inserting DNA into a person's body for the purpose of restoring a function related to a malfunctioning or missing gene, gene doping is the opposite process of inserting DNA for the purpose of enhancing athletic performance.¹

To the extent that researchers are learning very quickly how to manipulate and repair genes responsible for deadly diseases, they are also seeing the value in modifying human traits such as physical, cognitive, and personality traits.² Among these traits are those that influence athletic ability, including strength, speed, and tolerance to injury and pain. According to researchers, the widespread use of genetic doping is still forthcoming,³ but recent cases and allegations prove the exact opposite.

The scientific world realizes that now is the time to develop social, ethical, and regulatory policies to govern, as well as techniques to detect the use of gene doping in athletes. What may come as a shock to many is that the United States has no laws specifically banning gene doping. This can be attributed to the fact that genes are not controlled substances, unlike cocaine or steroids, and their use as a doping mechanism is currently undetectable.

Most notably, the sport of cycling has fallen prey to gene doping and has become a drug-filled environment. A common belief today is that cycling's main event, the Tour de France, has become a "competition between pills, not skills, and that the sports champions of the future will be chemically

1. Leslie A. Pray, *Sports, Gene Doping, and WADA*, NATURE EDUCATION (2008), <http://www.nature.com/scitable/topicpage/Sports-Gen-Doping-and-WADA-764>.

2. ANGELA J. SCHNEIDER & THEODORE FRIEDMANN, GENE DOPING IN SPORTS: THE SCIENCE AND ETHICS OF GENETICALLY MODIFIED ATHLETES xi (2006).

3. *Genetics Perspectives on Policy Seminar - Gene Doping: Human Genetic Technologies and the Future of Sports*, GENETICS & PUB. POL'Y CENTER (Oct. 11, 2005), http://www.dnapolicy.org/news.past.php?action=detail&past_event_id=17.

created.”⁴ Cycling’s poor reputation has grown more notorious in the past decade because of doping allegations and scandals; even former chairman of the World Anti-Doping Agency (WADA) Richard Pound has expressed that the state of the sport is “in the toilet.”⁵ However, cycling is in the best position to be a foundation for bringing the issue of performance-enhancing drugs, such as genetic doping, into the public arena and facilitating the implementation of new regulations that address the growing problem of gene doping.⁶

Despite unparalleled success as the face of cycling, Lance Armstrong has never been able to shed allegations that he was a user of performance-enhancing drugs. During Armstrong’s tenure as seven-time Tour de France champion, and continuing to this day, rumors and allegations have spread that Armstrong’s career was stimulated by doping. Even though Armstrong has retired from the sport and turned his attention to cancer research, he still is confronted with doping allegations from former teammates, competitors, journalists, and officials. Armstrong has continually denied any use of illegal performance-enhancing drugs and has labeled himself as “the most tested athlete in the world.”⁷ However, new allegations published in *Sports Illustrated* in January of 2011, have diminished Armstrong’s credibility yet again when *Sports Illustrated* reporters Selena Roberts and David Epstein alleged new, disturbing facts. One such allegation is that Armstrong

4. Robyn J. Rosen, *Breaking the Cycle: Balancing the Eradication of Doping From International Sport While Upholding the Rights of the Accused Athlete*, 25 ENT. & SPORTS LAW. 3, 3 (2007).

5. *Cycling’s Image in the Toilet*, BBC (July 2, 2006), http://news.bbc.co.uk/sport2/hi/other_sports/cycling/5138306.stm.

6. Rosen, *supra* note 4, at 3.

7. *Pound Stunned by Attack*, BBC (Mar. 5, 2004), http://news.bbc.co.uk/sport2/hi/other_sports/cycling/3535573.stm.

illegally obtained and took an experimental drug called HemAssist, which was never distributed beyond clinical tests.⁸

Armstrong has never tested positive for any performance-enhancing drug and his scandal has been the best example of how gene doping has made an absolute mess of sports. The undetectable nature and uncertainty surrounding the use and testing of gene doping has been evidenced by the retroactive witch-hunt against Armstrong. Despite never once testing positive for doping, allegations and suspicions of using performance-enhancing drugs, including gene doping, have undermined his credibility and more importantly the integrity of cycling as a sport.

While there are countless critical questions that remain as to whether gene doping can and should be hindered, the anti-doping authorities' focus should be on Armstrong's career and the future of cycling as testing for gene doping is developed and federal investigations emerge. If investigations ultimately do not find any evidence of Armstrong having used any performance enhancers, what are the effects on the future of gene doping, cycling, and proceedings against athletes? If evidence ultimately proves that Armstrong is guilty, the sport and his legacy will clearly suffer, but the future of genetic doping regulations is far less certain. In answering these questions, the sports world regulatory organizations should actively examine cases like the one against Lance Armstrong in order to develop a regulatory policy that effectively acknowledges genetic doping.

To more thoroughly analyze the legal and ethical questions facing the problem of gene doping as it relates to cycling and its athletes, this Article begins with Part I, which contains a detailed history of doping in sports and which specific developments make cycling a prime candidate for implementing gene doping procedures. Part II contains the

8. Selena Roberts & David Epstein, *The Case Against Lance Armstrong*, SPORTS ILLUSTRATED (Jan. 24, 2011), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1180944/index.htm>.

troubling, yet unproven, case against Lance Armstrong and what the outlook is for the current federal investigation into his actions. The background and science of gene doping is described in Part III, including possible uses and current testing methods. Part IV contains an ethical argument for and against gene doping in sports such as cycling, and a preview of future regulations. Finally, recommendations on how to effectively implement a clear regulatory policy and testing regime, manage statute of limitations issues, and the importance of increasing awareness and research funding of gene doping are proposed in Part V.

I. THE MATERIALIZATION OF DOPING IN SPORTS

A. *Comprehensive History of Doping*

Until the early 1900s, the understanding of human physiology in sport was so highly deficient that, for example, the Harvard football team decided to only eat red meat under the belief that it would add to their on-field toughness; what instead resulted were digestive problems for the entire team.⁹ The first recorded case of performance-enhancing drugs in the modern era was during the marathon at the 1904 Olympic games, where the winner, Tom Hicks, was given repeated doses of strychnine-laced eggs and cognac during the race after being denied water.¹⁰ While he did win the race, it was the slowest in Olympic history by almost a half hour.¹¹ However, society's understanding of doping began to grow during the mid-1900s, and athletes started to grasp the idea of gaining advantages through doping.

9. Paul H. Haagen, *The Players Have Lost that Argument: Doping, Drug Testing, And Collective Bargaining*, 40 NEW ENG. L. REV. 831, 834 (2006).

10. GEORGE R. MATTHEWS, *AMERICA'S FIRST OLYMPICS: THE ST. LOUIS GAMES OF 1904* 140 (2005).

11. *Id.*

During the 1930s, amphetamines became increasingly popular among athletes and replaced strychnine as the doping drug of choice.¹² It was about this time that the International Olympic Committee (IOC) focused their efforts in sports on doping regulation. During World War II, doping concerns were temporarily alleviated while new amphetamines were being utilized by the military.¹³ In the subsequent decade, the importance of steroid research became quite prevalent with the development of two anti-inflammatories, Prednisone and Prednisolone, and the marketing of the first anabolic-androgenic steroid, Dianabol.¹⁴

In 1957, after *The New York Times* reported that Olympic swimmers were routinely using “pep pills” before their races,¹⁵ and after the death of an Olympic cyclist who had taken amphetamines,¹⁶ it became clear to the IOC that a large portion of the Olympic athletes were engaging in regular doping. Throughout much of the 1950s, the sports world was filled with rumors that the Soviets and East Germany were heavily experimenting with testosterone as a way to increase athletic performance.¹⁷

In the years to follow, while doping became a large issue in sports, it surprisingly did not receive much political movement. Nevertheless, the problem continued, when in 1967

12. IVAN WADDINGTON, *SPORT, HEALTH, AND DRUGS: A CRITICAL SOCIOLOGICAL PERSPECTIVE* 146 (2000).

13. *Id.* at 115.

14. Karl Huesler & Jaroslav Kalvoda, *Between Basic and Applied Research: Ciba's Involvement in Steroids in the 1950s and 1960s*, 61 *STERIODS* 492, 499 (1996).

15. Keith Wailoo, *Old Story, Updated: Better Living Through Pills*, N.Y. *TIMES*, Nov. 13, 2007, at 20.

16. James B. Jacobs & Bruce Samuels, *The Drug Testing Project in International Sports: Dilemmas in an Expanding Regulatory Regime*, 18 *HASTINGS INT'L & COMP. L. REV.* 557, 562 (1994); see Don. H. Catlin & Thomas H. Murray, *Performance-Enhancing Drugs, Fair Competition, and Olympic Sport*, 276 *JAMA* 231, 232 (1996).

17. WADDINGTON, *supra* note 12, at 144.

British cyclist Tom Simpson died during the Tour de France, and his autopsy report indicated positive tests for both amphetamines and methyl-amphetamines.¹⁸ Simpson's death was extremely emblematic of the widespread use of doping as he had previously described his drug use to the press, comparing amphetamine effects to a couple extra cups of coffee.¹⁹ Additionally, during this time the sports world began to see the rise of anabolic steroids. By 1968, a third of the American track and field team was reported to be using them.²⁰ The response from the IOC was to begin testing athletes for the first time, but anabolic steroids did not have a testing mechanism until 1976, roughly twenty years after their introduction into the market.²¹

Though the IOC publicly condemned doping, its efforts were futile in stopping the practice.²² In 1983, testosterone, diuretics, beta-blockers, and blood doping were added to the IOC's banned drugs list, which originally contained only two categories, stimulants and narcotic analgesics.²³ In addition to the difficulty of keeping up with the methods of doping, the IOC was hampered with the task of keeping track of masking methods such as manipulation of urine samples.²⁴ The IOC also began blood testing athletes and added human chorionic gonadotropin (used to reverse testicular shrinking in steroid users), HGH, and peptide hormones to list of prohibited drugs in 1989.²⁵

18. *Drugs Discovered in Cyclist's Autopsy*, N.Y. TIMES, Aug. 4, 1967, at 26.

19. Maxwell J. Mehlman, Elizabeth Banger & Matthew M. Wright, *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15, 23 (2005).

20. WADDINGTON, *supra* note 12, at 145.

21. JOHN HOBERMAN, TESTOSTERONE DREAMS: REJUVENATION, APHRODISIA, DOPING 243 (2005).

22. Mehlman, *supra* note 19, at 24.

23. *Id.*

24. *Id.*

25. *Id.*

As the IOC's expanding list of banned substances continued to grow, their efforts at catching dopers were still largely unsuccessful. At the Olympic Games in 1980, not one athlete tested positive for doping, even though the East Germans were known to have been doping.²⁶ Up until the mid-1990s, no more than twelve athletes tested positive for doping in the Olympics, an unimpressive figure for the IOC, which had increased research and testing methods in a era where doping was becoming more prevalent.²⁷ Frustration over the lack of positive tests and embarrassing doping incidents, notably in the worlds of cycling and sprinting, led the IOC to hold a World Conference on Doping in Sport in Switzerland in 1999.²⁸ During this conference, the IOC created the WADA which, in addition to implementing its own policies, was delegated with tracking the development of international anti-doping policies with two specific goals in mind: to protect the well-being of athletes and to promote fair play.²⁹

Today what the IOC, WADA and other regulatory bodies face is a new, undetectable threat, genetic doping. In what could be considered a unique approach for the regulatory agencies, they have launched a preemptive strike against potential users, by prohibiting the use of genetic enhancement in all athletic competitions.³⁰ However, the threat of gene doping is more present than regulators may fear. In 2006, during a drug investigation of German running coach Thomas Springstein, some of his e-mails detailed references to

26. *Swimming: Olympian Tells of Steroid Use*, N.Y. TIMES, Apr. 21, 1998, at C5.

27. Mehlman, *supra* note 19, at 24.

28. Kristin Jo Custer, Note, *From Mice to Men: Genetic Doping in International Sports*, 30 HASTINGS INT'L & COMP. L. REV. 181, 191 (2007).

29. Joe Fore, Note, *Moving Beyond "Gene Doping": Preparing For Genetic Modification in Sport*, 15 VA. J.L. & TECH. 76, 76 (2010).

30. Ted Friedmann, *Potential for Genetic Enhancements in Sports, Address Before the President's Council on Bioethics*, PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES (July 11, 2002), <http://www.bioethics.gov/transcripts/jul02/session4.html>.

Repoxygen, a substance used in gene therapy for anemic patients.³¹

The actual research on gene doping by the IOC began in 2001.³² The results of the research supported taking precautions to keep gene doping completely out of sports. As the idea of genetic enhancement became more possible, more than a half-dozen major meetings and discussions on the subject were held by organizations including the IOC, the American Association for the Advancement of Science, and the U.S. President's Council on Bioethics.³³ What may be considered the most important result of these meetings was the Banbury Conference in 2002, hosted by WADA, which presented two major recommendations for the fight against gene doping.³⁴ The first recommendation was to fund a research program that would help detect gene doping, and WADA responded to this challenge by awarding twenty-one grants between 2003 and 2007, all to help research the process of detecting gene doping.³⁵ The second recommendation was for WADA and other regulatory agencies to include genetic modification in their respective definitions of "doping" and to list gene transfers alongside other banned drugs in the World Anti-Doping Code.³⁶ The 2009 amended version of the Prohibited List defined gene doping as: "the transfer of cells or genetic elements or the use of cells, genetic elements or pharmacological agents to modulating expression of endogenous genes having the capacity to enhance athletic performance, is prohibited."³⁷

31. Fore, *supra* note 29, at 83.

32. ANDY MIAH, GENETICALLY MODIFIED ATHLETES: BIOMEDICAL ETHICS, GENE DOPING AND SPORT 33 (2004).

33. Fore, *supra* note 29, at 83.

34. *Id.*

35. *Id.*

36. SCHNEIDER & FRIEDMANN, *supra* note 2, at 75.

37. WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE: THE 2009 PROHIBITED LIST 6 (2008), available at <http://www.wada->

Today, most regulatory agencies are in unison on the idea that gene transfer should be prohibited from sports, citing mainly the risk of harm to athletes.³⁸ H. Lee Sweeney, chair and professor of the University of Pennsylvania's Department of Physiology, warns these agencies of the potential problems ahead: "Are we going to be faced with a situation where athletes can modify their athletic performance using gene therapy? That's cheating, but how do you regulate it? Especially if society says this is OK for old-age enhancements, without side effects. Someday, these are going to be real issues for sports."³⁹ Unfortunately, that someday is now.

B. The State of Cycling and the Sport's Doping Policies

The sport of cycling is at the forefront of drug-filled scandals and federal investigations after a tumultuous last decade. Cycling falls under the scope of the IOC and therefore is governed by the testing procedures and policies of WADA.⁴⁰ While doping has been particularly relevant to cycling recently, the sport has experienced constant doping allegations and scandals since its inception; the very first drug scandal of the Tour de France can be traced all the way back to the 1924 race.⁴¹ The next explicit evidence of the growth of doping in cycling was during the 1955 race, when the International Cycling Union (UCI) disqualified a racer for encouraging other team members to use controlled substances.⁴² The 1980s were also filled with heavy steroid usage.⁴³ During the 1990s, fans of the sport saw Bjarne Riis, the 1996 Tour de France champion,

ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf.

38. See MIAH, *supra* note 32, at 178 ("Presently, the emerging perspective in sport is to rid sport of GM before it even enters into competition.").

39. GENETICS & PUB. POL'Y CENTER, *supra* note 3.

40. Rosen, *supra* note 4, at 3.

41. *Id.* at 3-4.

42. *Id.* at 4.

43. *Id.*

admit to doping and consequently become stripped of his title.⁴⁴

The next decade in cycling showed even more widespread doping. Drug tests during the 2000 Tour de France revealed that in forty-five percent of participants' urine there was some evidence of both drugs and supplements.⁴⁵ The failed drug tests continued during 2004 when Olympic Gold Medalist Tyler Hamilton faced a two-year suspension from the sport because he failed two blood doping tests.⁴⁶ In 2006, the doping allegations worsened, when a number of cyclists were banned from participating in the Tour because of failed drug tests.⁴⁷

The first major sightings of gene doping in the sport surfaced in 1998, when the number one ranked Spanish team was expelled from the Tour because large amounts of EPO and growth hormone were discovered in the team's possession; there were more than 400 vials of drugs found in one of the team's cars.⁴⁸ Thereafter, five other Spanish teams quit the race in an ostensible protest against the French police, whom they believed treated the expelled team unfairly.⁴⁹ However, these other teams were also criticized since much of the media suspected their withdrawals were due to fear of being caught.⁵⁰ This latest allegation prompted the creation of the anti-doping Code, which shows the ability of cycling to act as a catalyst for prompting change in doping policies.⁵¹

In 2006, the Agency for Cycling Ethics (ACE) was founded "as an organization of anti-doping specialists that administered independent testing programs in which several

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

men's pro cycling teams participated on a voluntary basis."⁵² ACE's Pure Sport program tried to be proactive against the rise of gene doping by using "longitudinal analysis of blood samples to establish baseline levels of numerous biomarkers (e.g., blood composition and hormone levels)" for each competitive rider.⁵³ The program tracked baseline values and once any minor deviation was triggered, it could be identified and investigated without needing to detect a specific banned substance.⁵⁴ In 2008, the emergence of the 'biological passport' program was embraced by the UCI and WADA; however, it is deemed less thorough than the program offered by ACE.⁵⁵

As part of the ACE program, riders' locations were tracked by wireless communication so their availability for blood and urine testing at least twice a month could be determined around the world.⁵⁶ ACE kept a well-managed and detailed database of these testing results, which were provided to the UCI and cycling team personnel.⁵⁷ Participating teams added contract clauses to the rider contracts in order to ensure compliance with the program.⁵⁸ However, due to the "frequency and thoroughness of the program, its cost was beyond what anti-doping agencies could afford"⁵⁹ ACE did plan to expand their program to other sports that were also suffering with the rise of doping, but a lack of funding forced the program to go out of business in 2008.⁶⁰ Today, cycling

52. Lance Armstrong Doping History, SCRIBD.COM, <http://www.scribd.com/doc/16226502/Lance-Armstrong-Doping-History> (last visited Apr. 1, 2011).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

teams such as Garmin-Chipotle and Columbia participate in a comparable program offered by Anti-Doping Research, Inc.⁶¹

While it may be considered somewhat normal and prevalent today for cyclists to use performance-enhancing drugs, the sport could also be a foundation for change and serve as the model sport for implementing anti-doping policies. “Arguably, the different doping scandals that have afflicted the sport have served as a catalyst for change in the doping policies and procedures throughout all of sport.”⁶²

II. THE CASE AGAINST LANCE ARMSTRONG

Lance Armstrong broke into the world of cycling and pop culture when he won the 1993 World Professional Road Race Championship in Oslo, Norway.⁶³ With cycling star Greg LeMond retiring the following year, Lance’s emergence came at the perfect time.⁶⁴ Lance’s arrogant, cold, and combative attitude brought a unique figure to the world of cycling.⁶⁵ Though only given a twenty percent chance to live, Armstrong prevailed through numerous bouts of surgery and chemotherapy due to testicular cancer.⁶⁶ From there, Armstrong became an instant international sporting sensation on his way to winning an unprecedented seven consecutive Tour de France championships from 1999 to 2005.⁶⁷ Armstrong also displayed his philanthropic nature with the inception of the Lance Armstrong Foundation (aka Livestrong), which provides support and education to cancer patients, including funding for research.⁶⁸

61. *Id.*

62. Rosen, *supra* note 4, at 4.

63. Lance Armstrong Doping History, *supra* note 52.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

Despite consistently asserting denials and despite never having failed a drug test, Lance Armstrong's professional and personal career has been stained by doping allegations, most particularly the alleged use of r-EPO (recombinant erythropoietin) and EPO. However, Armstrong's image began to crack when it was revealed that he had consulted with Michele Ferrari, an Italian physiologist infamous for his drug support, who once compared the inherent risks of using r-EPO to that of drinking orange juice.⁶⁹ Armstrong only decided to disclose his relationship with Ferrari when he learned a story about it would be published, and he claimed that he only consulted Ferrari because he wanted guidance on breaking the World Hour Record.⁷⁰ Armstrong also claimed he never intended to conceal his relationship with Ferrari and that even numerous journalists were aware as well of the relationship, but no one has confirmed this.⁷¹

Greg LeMond, who had been a huge supporter of Armstrong to this point, expressed great disdain towards the allegations against Armstrong, saying that if he had, in fact, cheated, Armstrong's feat would be notorious for something closer to a fraud than a comeback.⁷² The allegations continued in 2004, when Armstrong announced he was immediately pursuing libel actions in London and Paris against the journalists and publishing companies whose articles presented strong suspicions from Armstrong's former teammates about his alleged doping.⁷³

Even with Armstrong's continual denials, he was not paid a large bonus due to him for having won a sixth straight Tour, largely because of the information in the French newspaper.⁷⁴ In the course of suing for the amount, former

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

teammate and friend, Frankie Andreu, along with Andreu's wife, testified that "they heard Armstrong admit in a hospital room in 1996 that he had taken 'testosterone, EPO, human growth hormone, and corticoids.'"⁷⁵ However, Armstrong was able to fight this allegation when a third witness, apparently under enormous pressure from Armstrong and her employer (Oakley, one of Armstrong's sponsors), altered her previous statements that supported Andreu's testimony.⁷⁶ Craig Nichols, M.D., testified that Armstrong never made such an admission, and that it would have been extremely odd for any doctor to ask this type of question given the circumstances.⁷⁷ Nevertheless, the blame game continued when other oncologists disputed Dr. Nichols' claim, and "Armstrong's own attorney admitted doctors had questioned him about his past substance use; he admitted to no more than drinking an occasional beer."⁷⁸

Moreover, Armstrong's story continued to dissolve when, just two days after the Andreu's testimony under oath, the Lance Armstrong Foundation proclaimed a contribution of \$1.5 million to Dr. Nichols' medical department at Indiana University.⁷⁹ Nevertheless, the matter was settled with Armstrong receiving not only the \$5 million bonus, but also \$2.5 million in attorney's fees and interest.⁸⁰ Armstrong used the settlement to declare his innocence, but in fact the arbitration panel never ruled on whether Armstrong had doped or not.⁸¹

In 2005, French sporting newspaper *L'Équipe* published the shocking revelation that Armstrong's frozen urine samples from six separate stages of the 1999 Tour tested

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

positive for EPO.⁸² To refute the claims, Armstrong appeared on CNN's "Larry King Live," and offered his theory that the French National Doping Detection Laboratory (LNDD) had intentionally altered his samples.⁸³ However, this theory was not supported by the fact that, "each of Armstrong's samples was tested along with several others, and lab technicians were unaware of which sample came from whom, furthermore, the pattern of results [did] not indicate that the samples were spiked."⁸⁴ Armstrong's case was considered incredible, in part because he was very reluctant to bring his claims to trial despite being so adamant about his innocence. However, Armstrong did eventually prevail somewhat when the legitimacy of the testing of the urine samples was called into question by the media and anti-regulatory agencies.

Armstrong's quest to distance himself from the genetic doping scandal in cycling became more vocal and frequent. For example, during the 1999 Tour, French competitor Christophe Bassons, who had a reputation for being staunchly against doping, wrote numerous articles for his newspaper detailing the widespread use of r-EPO in the sport.⁸⁵ Armstrong, on behalf of the sport, expressed his disgust about the allegations, stating, "His accusations are not good for the sport, for his team, for me. If he wants to ride professionally, he can't speak like that, because sponsors will walk away from the sport."⁸⁶

Armstrong's next dispute, with Italian rider Fillipo Simeoni, was much more notable, and sent shockwaves throughout the sport. Simeoni admitted to doping, and testified in 2003 that Ferrari had supplied him with certain prescriptions for banned products dating back to 1996.⁸⁷ Armstrong, who had ties to Ferrari, claimed Simeoni was a liar, which prompted

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Simeoni to sue Armstrong for defamation, causing Armstrong to countersue in order to maintain face.⁸⁸ Both parties eventually settled out of court and both actions were dropped.⁸⁹ Ferrari, unsurprisingly, was charged and found guilty of “distributing dangerous substances to cyclists and other athletes,” at which point Armstrong finally cut ties to him.⁹⁰ However, Ferrari’s conviction was eventually overturned.⁹¹

In 2005, Armstrong confirmed a secret six-figure donation he had made to the UCI a few years back, purportedly “to help fight doping.”⁹² What critics found noteworthy was that it had been made “while he was an active athlete and subject to the UCI’s discipline” and, more notably, that the UCI even accepted his gift.⁹³ Armstrong retired from cycling later that year, still amidst doping speculation.⁹⁴ In 2007, retired Danish cyclist Bjarne Riis admitted he had used r-EPO in his 1996 Tour win, prompting Tour officials to demand that he return his yellow jersey.⁹⁵ Armstrong declined to make comment about Riis’ admission, but used the spotlight to redirect frustration at Tour officials, condemning their actions as hypocritical.⁹⁶

Even with Armstrong removed from the competition aspect of the sport, his name surged back into headlines soon after Floyd Landis, an American, won the 2006 Tour with a stunning comeback and an even more stunning and familiar revelation that he had tested positive for increased levels of testosterone.⁹⁷ Landis denied the positive test and insisted it

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Lance Armstrong Retires*, BICYCLING (Feb. 16, 2001), <http://bicycling.com/blogs/dailylance/2011/02/16/lance-armstrong-retires>.

95. *Lance Armstrong Doping History*, *supra* note 52.

96. *Id.*

97. *Id.*

was a result of “a natural overproduction of the hormone,” even though he lacked any supporting documentation.⁹⁸ However, his defense became moot when it was revealed that he had in fact tested positive for synthetic testosterone.⁹⁹

Armstrong made a triumphant return from his retirement shortly after Landis’ fallout in 2008 and declared he would win the 2009 Tour.¹⁰⁰ Expecting critics to latch on to Armstrong’s doping past, he made a proactive and unprecedented move when he announced he would subject himself to a completely unbiased and advanced doping program, where his new team, Astana, would pay for the program and have renowned anti-doping expert Don Catlin, M.D., be its “impartial administrator.”¹⁰¹ Armstrong also wanted to post his testing results online in order to allow for complete transparency in his comeback.¹⁰²

Critics such as LeMond argued that the policy lacked impartiality since it was not being conducted by an independent party like WADA.¹⁰³ LeMond further challenged the program’s effectiveness, stating, “It’s all very well checking blood values, but if you’re a smart doctor, you just always keep your rider’s blood values high. EPO is only detectable within a few days, and that’s why it’s hard to [catch] it.”¹⁰⁴ LeMond more importantly pointed out that “athletes who use either EPO or do (autologous) transfusions of their own blood can still escape being caught.”¹⁰⁵ LeMond passionately proposed collecting actual performance data by utilizing on-bike power meters stating, “The power-output information this yields would then be analyzed in light of physiological data,

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

such as VO2max, that would be collected in the lab along with blood throughout the year.”¹⁰⁶

Nevertheless, Armstrong’s first samples were not drawn until January the following year, and he began to show signs of reluctance in allowing the program’s data to be displayed to the media.¹⁰⁷ Armstrong then abruptly announced in February, two days before the Tour of California commenced, that he had effectively ended his relationship with Dr. Catlin and would thereafter be tested by his team’s own internal anti-doping program.¹⁰⁸ Armstrong expressed that the complicated plans he set forth with Dr. Catlin “were not feasible for administrative, logistical, and financial reasons.”¹⁰⁹ The media used Armstrong’s flip-flopping to claim he manipulated them in order to enhance his image in light of his return,¹¹⁰ which ended up being unremarkable, as he did not win a post-comeback Tour de France.

The new federal investigation against Armstrong, headed by FDA agent Jeff Novitzky, is backed by evidence that suggests Armstrong was involved in an organized doping operation as a member of the team sponsored by the U.S. Postal Service (USPS).¹¹¹ The federal investigation focused mainly on the period from 1999 to 2004, when Armstrong won six of his seven Tour de France championships and the USPS team received more than \$40 million in sponsorship revenue.¹¹² Because government sponsorship is involved in this investigation, if Armstrong is found to have directed illegal activity, he could also be charged with conspiracy, wire fraud,

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Roberts & Epstein, *supra* note 8.

112. *Id.*

money laundering, racketeering, drug trafficking, and defrauding the government.¹¹³

However, doping allegations have become extremely familiar to Armstrong, and to this day he has successfully fought each one, in large part because they have been extremely speculative and borderline hearsay. The report further reveals that two of Armstrong's teammates on the 1990 U.S. junior team filed a suit against USA Cycling in 2000 alleging that coaches administered steroids to them in 1990 with Armstrong, which damaged their immune systems and, therefore, shortened the duration of their careers; however, neither teammate tested positive for steroids and the suit was settled in 2006.¹¹⁴ This again has been labeled as just one of many unsuccessful attempts in proving Armstrong's use of performance-enhancing drugs. During that decade, Armstrong was tested more than two dozen times by the U.S. Olympic anti-doping lab at UCLA.¹¹⁵ This lab also had three of Armstrong's test samples from the 1990s that had tested well above normal levels for testosterone-epitestosterone, but because they could not be confirmed by a second sample, the samples were listed as negative.¹¹⁶

The empty allegations were further brought to the public when Stephen Swart, a previous teammate of Armstrong's, said that Armstrong was the instigator of the team's decision to start taking EPO, though he claims he never saw Armstrong inject EPO or give it to anyone else.¹¹⁷ Swart further claimed that he and his teammates (including Armstrong) regularly tested their hemacrit level and Armstrong's level was once around 54 or 56, which would have resulted in a 15-day ban.¹¹⁸ Again, because of the lack of

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

gene doping testing at the time, Swart's claims were nothing more than an unproven allegation. Additionally, the federal investigation report detailed an arrest of one of Armstrong's former Radio Shack teammates, which uncovered emails and texts that linked Armstrong to Ferrari in 2009, even though Armstrong claimed to sever all ties with Ferrari in 2004.¹¹⁹ Lastly, the report included a detailed allegation from Landis claiming that Armstrong's use of private planes allowed him to easily bypass customs, even when he was carrying large amounts of drugs in his luggage.¹²⁰

While Armstrong still has skeptics despite never failing a drug test, he does have supporters as well. Supporters "cling to the fact that Armstrong never failed a drug test, even though there [were] none for r-EPO" and genetic doping throughout much of his historic career, which took place during what is now known to have been an era of widespread drug use.¹²¹ However, opponents believe the totality of the circumstances against Armstrong are far too suspicious for him to be credible; "There are simply too many 'dots' which, when connected, reveal anything but a heroic figure."¹²²

III. THE SCIENCE OF GENE DOPING

A. Description and Potential Uses

Genetic doping is essentially the use of gene therapy, in which doctors add or modify genes to prevent or treat illness, to instead genetically enhance someone who is healthy. The line is rather gray, but if the cells or body functions being modified are normal to start with, the modification qualifies as genetic doping.¹²³ There are two types of gene doping. In

119. *Id.*

120. *Id.*

121. Lance Armstrong Doping History, *supra* note 52.

122. *Id.*

123. SCHNEIDER & FRIEDMANN, *supra* note 2, at 75.

somatic cell modification, genes are modified in regular cells of the body, and genetic changes are not passed on to children.¹²⁴ Today's version of gene therapy uses somatic cell modification.¹²⁵ However, in germline modification, genes are changed in the father's sperm, the mother's eggs, or an embryo.¹²⁶ These genetic modifications are noteworthy because they are passed down to offspring, creating effects on a family's genetic makeup. Since the U.S. government has not funded any research on human germline modification, and other governments have banned it, somatic cells are the primary type of gene transfer that requires focus for the foreseeable future.¹²⁷

The techniques used for gene doping rely on those already utilized in gene therapy, which at this point are still highly experimental and unproven.¹²⁸ However, the scientific ability required to perform gene doping is not that complicated and could be easily performed by students with the right equipment.¹²⁹ Such a lab would only cost about \$10 million to fund, and the demand for services would likely be great given the history of doping in sports.¹³⁰

After the Human Genome Project, the scientific world saw an increase in the attempted use of gene therapy to treat diseases or malfunctioning gene expression.¹³¹ For example, a

124. Susan L. Nasr, *How Gene Doping Works*, HOW STUFF WORKS (Jan. 1. 2010), <http://science.howstuffworks.com/environmental/life/genetic/gene-doping.htm/printable>.

125. Kathi Hanna, *Germline Gene Transfer*, NAT'L HUMAN GENOME RES. INST. (Mar. 2006), <http://www.genome.gov/10004764>.

126. *Id.*

127. Nasr, *supra* note 124.

128. Fore, *supra* note 29, at 78.

129. Kevin Van Valkenburg, *Gene Doping Looms as Next Sports Edge: Boost at Cellular Level is All but Undetectable*, BALT. SUN, Jan. 16, 2005, at 1A.

130. Custer, *supra* note 28, at 187.

131. Human Genome Project (HGP) Information, *About the Human Genome Project*, GENOMIC SCIENCE PROGRAM,

person with muscular dystrophy might use gene therapy to regain normal muscle function.¹³² After researchers overcame the obstacle of how to introduce the therapeutic gene into the cell by using a carrier, called a vector, the risks and benefits of gene therapy became somewhat clearer.¹³³ Gene therapy could be used for treatment of a genetic abnormality, of a disease such as cancer, or in repairing sports injuries. Nevertheless, there are risks with gene therapy, including possible disease from the use of the viral vector, an immune response to endogenous and gene therapy-produced protein, autoimmune response, or the development of “leukemia-like” symptoms from insertion of the gene into the wrong spot of the genome gene.¹³⁴ But, when the purpose for gene therapy becomes enhancement, it is called gene doping, even though both practices employ essentially the same techniques. Thus, while the purposes behind each method may be different, anti-doping agencies are going to be faced with a difficult task in differentiating between these two techniques that utilize essentially the same methods and produce relatively similar results.

Currently, there are three ways in which foreign genes can be inserted into an athlete’s body: 1) cultured cells can be genetically modified *ex vivo* and then inserted into the body; 2) the foreign DNA can be directly injected into the muscle or bloodstream; or 3) the genes can be engineered into a virus, which would then be used to “infect” the athlete’s cells with the genes.¹³⁵ In regards to the third method, adenoviruses

http://ornl.gov/sci/techresources/Human_Genome/project/about.shtml (last modified Sept. 19, 2011).

132. Blair H. Moses, *Eligibility of Athletes Receiving Necessary Gene Therapy: The Oscar Pistorius Case as Procedural Precedent*, 49 JURIMETRICS J. 343, 347 (2009).

133. *Id.* at 347-48.

134. *Id.* at 351.

135. Fore, *supra* note 29, at 79.

would likely be the virus of choice, because of their ability to carry a significant amount of genetic material.¹³⁶

An obvious advantage to genetic doping in comparison to other performance-enhancing drugs is the permanent stamp it leaves on your genetic makeup. Once the foreign genes are inserted into the athlete's somatic cells, they essentially become part of that athlete's genetic makeup, similar to any other part of their original genetic code. Thus, drug costs would go down enormously for dopers if they used genes as their drug of choice because of the permanence of treatment. However, the real enticement for gene doping is that they are currently undetectable. Current technology is incapable of detecting gene doping because "proteins made by engineered genes look identical to the ones the body makes naturally."¹³⁷ Moreover, some genes that would be used for doping never make their way into the bloodstream, where they would be detected by blood analysis.¹³⁸ Thus, the only current proven and conclusive method for detecting gene doping would be a muscle biopsy at the injection point, an extremely invasive procedure that most athletes will not subject to.¹³⁹

Athletes could be enticed to use genes as a form of doping in numerous ways. An athlete with a recurring injury in a particular part of their body might use gene doping to enhance the muscle's growth and rate of recovery.¹⁴⁰ Others might use the genes in order to enhance the strength of a muscle they consider inadequate.¹⁴¹ Additionally, athletes

136. *Id.*

137. *Id.*

138. Melinda Wenner, *How to Be Popular During the Olympics: Be H. Lee Sweeney, Gene Doping Expert*, SCI. AM. (Aug. 15, 2008), <http://www.sciam.com/article.cfm?id=olympics-gene-doping-expert>.

139. Fore, *supra* note 29, at 80.

140. Thomas H. Murray, *Gene Doping and Olympic Sport*, PLAY TRUE: AN OFFICIAL PUBLICATION OF THE WORLD ANTI-DOPING AGENCY (June 1, 2009), http://www.wada-ama.org/rtecontent/document/Play_True_01_2005_en.pdf.

141. *Id.*

might inject themselves with a gene that produces EPO, causing the body to produce more red blood cells naturally.¹⁴²

Gene therapy studies have included research into a few types of genes that would be enticing for athletes to use. EPO, a prime candidate for gene doping, is a life saving medicinal tool. EPO is a vital hormone used in the process of normal blood production for humans and other mammals.¹⁴³ EPO is triggered in conditions in which a mammal is exposed to lowered amounts of oxygen, and it acts to increase the production of the red blood cells in the bone marrow.¹⁴⁴ EPO is one of the world's most impactful therapeutic drugs because of its benefits to patients with suppressed blood production by diseases such as cancer or kidney disease.¹⁴⁵ Endurance athletes, such as runners or cyclists, have taken note of the benefits of EPO, which could allow them to increase their athletic output without tiring.¹⁴⁶ This was demonstrated in 2003, when researchers at Stanford conducted *ex vivo* gene transfer experiments in which they inserted a normal mouse EPO gene into healthy mice, resulting in increased red blood cell production.¹⁴⁷ However, EPO thickens the blood, increasing the risk of heart disease, stroke, and embolism for short-term and long-term dopers.¹⁴⁸

A second potential target for athletes could be the gene that regulates human vascular endothelial growth factor (VEGF), which stimulates the formation of new blood

142. Custer, *supra* note 28, at 188.

143. SCHNEIDER & FRIEDMANN, *supra* note 2, at 44.

144. *Id.*

145. *Id.*

146. Fore, *supra* note 29, at 79.

147. SCHNEIDER & FRIEDMANN, *supra* note 2, at 44-45.

148. Mark S. Juhn, *Popular Sports Supplements and Ergogenic Aids*, 33 SPORTS MED. 921, 929 (2003) (citing M. Audran et al., *Effects of Erythropoietin Administration in Training Athletes and Possible Indirect Detection in Doping Control*, 31 MED. & SCI. IN SPORTS & EXERCISE 639, 639-45 (1999)).

vessels.¹⁴⁹ Future dopers could utilize this gene to increase the vascularization of muscles, the heart, and other organs.¹⁵⁰ The increased number of blood vessels would promote the increased delivery of oxygen, which would result in a delay of exhaustion for endurance athletes.¹⁵¹

However, when most people think of doping, they think of increased strength. Not surprisingly, there seems to be a gene doping tool for that desired trait as well. In 1998, Professor Lee Sweeney experimented with *in vivo* transfers in mice using the gene for insulin-like growth factor 1 (IGF-1), a protein that stimulates muscle growth.¹⁵² The result was mice whose strength had been increased by thirty-five percent, leading the press to nickname them “Schwarzenegger mice.”¹⁵³ The ability for the user to insert the gene directly into the desired muscle, presents many attractions to athletes that use a particular muscle frequently. A pitcher’s arm, tennis player’s shoulder, or soccer’s player’s leg would be potential targets of such a gene transfer. Additionally, Dr. Sweeney’s research team has worked on inhibiting the protein myostatin, which counteracts IGF-1 and also plays a role in fat deposit in the body.¹⁵⁴ Regulating myostatin would be extremely appealing to any athlete because of its ability to reduce body fat and increase muscle strength.

Lastly, since diet and calorie intake is such a large part of an athlete’s health, the ability to adjust the metabolism of particular muscles presents another enticing aspect to athletes. Research studies of the peroxisome proliferator-activated receptor (PPAR) delta gene in mice have shown that the gene is able to increase the number of “slow-twitch” muscle fibers,

149. H. J. Haisma & O. de Hon, *Gene Doping*, 27 INT’L. J. SPORTS MED. 257, 257 (2006).

150. *Id.*

151. *Id.*

152. Wenner, *supra* note 138.

153. *Id.*

154. *Id.*

which are utilized also in endurance exercises, such as cycling, swimming, and running.¹⁵⁵ These mice showed a significant reduction in body fat, and surprisingly became more efficient energy users during endurance training.¹⁵⁶

B. Testing & Existing Regulatory Policies

As of January 1, 2003, the IOC added gene doping to the list of prohibited substances for international and Olympic competition.¹⁵⁷ In 2004, WADA took over maintaining and updating this list, but the IOC Medical Commission continues to represent the IOC in WADA committees.¹⁵⁸ WADA's ban on gene doping is the first time a regulatory agency has placed a ban on a doping method not even in use.¹⁵⁹ Thereafter, the United States Doping Agency was designated by 21 U.S.C. § 2001 to work with the United States Olympic Committee to make certain that athletes are "prevented from using performance-enhancing drugs, or performance-enhancing genetic modification accomplished through gene doping."¹⁶⁰ Additionally, this statute states that the Agency is to "permanently include" gene doping among any list of prohibited substances.¹⁶¹

The stance on gene doping is the newest branch of anti-doping organizations' general prohibition of performance-enhancing drugs in sports. In countries that use gene therapy, such as China, the uses have been directed at diseases, such as cancer, neurodegenerative diseases, cystic fibrosis, and immunodeficiency states.¹⁶² However, the testing and

155. SCHNEIDER & FRIEDMANN, *supra* note 2, at 46.

156. *Id.*

157. Custer, *supra* note 28, at 189.

158. *Id.* at 191-93.

159. SWITZERLAND FEDERAL OFFICE OF SPORT: GENE DOPING (2007), available at www.antidoping.ch/en/download/2560/en/.

160. 21 U.S.C. § 2001(b)(2) (2006).

161. Custer, *supra* note 28, at 191-93.

162. *Id.* at 200-01.

regulation for gene doping became necessary when the intent for the uses of genes changed from curing diseases to taking normal genes and enhancing them.¹⁶³

As stated earlier, the problem with testing for gene doping lies in its undetectability, which lends itself to many users in sports. What athlete would not want a performance enhancer that is undetectable and has a permanent beneficial effect on their abilities with few side effects? This is exactly why gene doping has become such a major concern for anti-doping agencies, especially WADA. WADA has held three international meetings on the topic since 2002, which have focused on efforts to prevent and detect the practice.¹⁶⁴ Gary Wadler, WADA chairman, believes that the race against preventing the widespread use of gene doping is simply a matter of time: Athletes "read the scientific literature and they know what's cutting-edge—there's no question about it," he says.¹⁶⁵

Recently, the United States government has established a protocol for the approval of gene therapy studies. Scientific researchers who wish to begin research on gene transfer studies on human subjects must get approval from the FDA, NIH, and the Recombinant DNA Advisory Committee.¹⁶⁶ The number of unknown risks and benefits to the athlete at this point in time make it impossible under ethical medical practice to obtain complete informed consent in using gene therapy.¹⁶⁷ Therefore, gene doping attempts by athletes would have to occur outside of the governmental protocol and athletes could soon be headed to the black market or foreign countries to get their

163. *Id.*

164. Wenner, *supra* note 138.

165. *Id.*

166. SCHNEIDER & FRIEDMANN, *supra* note 2, at 61.

167. Andy Miah, *Gene Doping: Sport, Values & Bioethics*, in THE ETHICS OF HUMAN GENETICS: CHALLENGES OF THE (POST) GENOMIC ERA 175, 177 (J. Glasa ed., 2003), available at <http://www.andymiah.net/documents/Miah2002GeneDopingGlasaBk.pdf>.

doping accomplished. The combination of unknown risks and permanent effect to the athlete make it quite appropriate to understand the stance of the doping agencies to prohibit gene doping in sport. But what if the risks and benefits of gene doping become more apparent and measureable in the future? What if the risks are inconsequential? Does this make way for informed consent since the safety of athletes is no longer a sufficient justification for banning gene doping?¹⁶⁸ If this is the case, the only argument left is an ethical one: "Whether genetic modification is still ethically acceptable in conditions where the technology is sufficiently safe."¹⁶⁹

IV. CONCERNS WITH REGULATING GENE DOPING

Many organizations, such as WADA, and individuals would view genetic doping in the manner as any other performance-enhancing drug. But, there are those who are against regulating gene doping because, with the current lack of testing and knowledge, there is nothing wrong about it. Opposing ethical, legal, and moral arguments exist on both sides.¹⁷⁰ While performance-enhancing drugs have a negative stigma in society, outside of sports, performance-enhancing drugs are not forbidden. For example, should an athlete without an arch in his foot be permitted to wear orthotics during the game? Should an athlete be permitted to take a multi-vitamin or protein supplement after a workout to build strength?¹⁷¹ What about drinking coffee before a game?¹⁷² Where do sports draw the line?

168. ANDY MIAH, GENETICALLY MODIFIED ATHLETES: BIOMEDICAL ETHICS, GENE DOPING AND SPORT 33, 138 (2004).

169. *Id.*

170. Custer, *supra* note 28, at 197.

171. Richard A. Posner, *In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping*, 57 DUKE L.J. 1725, 1728 (2008).

172. *Id.*

Whether gene doping should be regulated truly depends on one's view of sports. There are those who fight and yearn for clean, un-biased competition to see who the best at a particular level is. These opponents of doping argue for a romanticized view of sport where practice and natural ability are at the forefront of the success of the players. On the other side of that argument are those who view sport as an entertainment industry that promotes those who shine the brightest with the biggest personalities.

Those who view the sports industry as pure entertainment may accept gene doping as an understandable progression of science and technology. Others might be concerned about the health and mental prognosis of the athletes they view as role models. In comparing these interests, one who views athletes as entertainers might draw a parallel between the inherent rights of an athlete to alter their physical makeup to an actor's decision to have plastic surgery.¹⁷³ If gene doping is just the latest and greatest mechanism that science has created to better ourselves, and if it is available to all, then what is the problem?

However, the more intriguing issues are less ethical, and more legal in nature, as the case against Lance Armstrong has displayed. Procedurally, the only proceedings against Armstrong have been investigations, but other athletes have had different experiences with the regulatory policies of WADA and UCI. Issues revolving around the biological passport program, the strict liability standard, and athlete testing and sanctions have only been complicated by the increase in the use of gene doping. More importantly, the ambiguity surrounding not only the culpability of Armstrong, but also the creation of a reliable detection method, have thrust Armstrong into the forefront of the development of gene doping regulations.

173. Custer, *supra* note 28, at 198.

A. Future of Gene Doping Regulations

While there will be numerous problems in prohibiting gene doping, at the forefront is the difficulty in detection. Currently, the only reliable ways to detect gene doping (e.g., muscle biopsy) are too expensive for researchers and agencies and too intrusive to athletes.¹⁷⁴ However, even if tests are developed to detect gene doping, the problem of distinguishing between enhancement and a naturally higher-performing gene is extremely difficult.¹⁷⁵ Even more problematic for testers is the permanence of the gene once introduced into the body, since there is no way to remove or “turn them off” essentially.¹⁷⁶

If testers for the anti-doping agencies were to make a mistake in sanctioning or accusing an athlete for gene doping, possibly like Lance Armstrong’s situation, the result would be extremely harmful to the athlete. Anti-doping agencies employ a lifetime ban for an athlete in the use of their strict liability standard, while WADA uses a two-year ban for first time dopers.¹⁷⁷ While Armstrong has not faced such a ban, it can easily be said that his reputation, whether he is innocent or not, has taken a large and possibly irreparable hit. Armstrong’s case only provides a warning to future regulators of the problems genetic doping provides. The amount of gray area and inconclusive results attached to the use of gene doping should place a greater sense of urgency on regulators and testers to act preemptively, possibly through the use of biological passports. As evidenced by Armstrong’s allegations, implementing uncertain scientific results creates one of the biggest potential messes in science.

174. Fore, *supra* note 29, at 89.

175. *Id.*

176. *Id.*

177. Custer, *supra* note 28, at 208.

i. Procedural Enforcement

The complex nature of genetic doping requires not only carefully researched scientific data, but also a legal system just as sophisticated in order to ensure the rights of athletes. A doping infraction is a result of private contract law and sometimes criminal laws can be triggered as well (e.g., Barry Bonds, Marion Jones).¹⁷⁸ By entering into a competition, an athlete agrees to be governed by the rules that make up that particular sport, including not using prohibited substances or methods.¹⁷⁹ If the athlete breaches this agreement by doping, he or she has already decided to be bound by the punishments set forth by the sport's governing body.¹⁸⁰ Anti-doping law is the enforcement of these private contractual agreements.¹⁸¹

In order to show that there is a presence of doping in the athlete's biological sample, the burden of proof lies first with the prosecuting sports body bringing forth the accusation.¹⁸² The athlete at this point only has the right to present contradicting evidence to defend against the possible positive test.¹⁸³ Since most doping allegations involve a positive test of an athlete, it is easy to assume that the burden is on that athlete to prove his or her innocence; however, every athlete is entitled to a full presumption of innocence.¹⁸⁴ Armstrong's case has been a unique example, where he has been trying to prove the unreliability of the doping allegations against him and the lack of evidence of a positive test.

178. Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. The Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 174-75 (2006).

179. *Id.*

180. *Id.* at 175.

181. *Id.*

182. *Id.* at 176.

183. *Id.* at 176-77.

184. *Id.* at 177.

Next, as part of the process of showing evidence of a banned substance in the athlete's biological sample, the governing sports body must show that it followed strict procedures for gathering, storing, and processing the samples, something that Armstrong has exploited in defending against the various allegations levied against him.¹⁸⁵ The standard of proof that the sports body is required to meet when proving this sample procedure is the "comfortable satisfaction standard";¹⁸⁶ this benchmark is essentially the equivalent of the "clear and convincing" standard used in U.S. courts. However, when the laboratory conducting the sample analysis is already accredited by WADA, that laboratory is presumed to have performed the analysis correctly under the governing standards.¹⁸⁷

Much like the Armstrong case, if there is a legitimate discrepancy between the standards required for the collection and analyzing of the biological samples, "the discrepancy must be reasonably considered to have affected the results of an otherwise valid test to influence the ultimate finding of a doping offense."¹⁸⁸ For example, a case arising out of the Olympic games in Sydney showed that even though two forms referenced different amounts of the urine used in their sample testing, the irregularity in the record showing the amount of urine used could not "reasonably be considered to have affected the results and therefore had no effect on the finding of a doping offense."¹⁸⁹ At this point, once the governing sports body has established that the athlete's sample is evidence of a prohibited substance, the burden of proof shifts to the athlete to present exculpatory evidence.¹⁹⁰

185. *Id.*

186. *See* N.J.Y.W. v. FINA, CAS 98/208, Award of 22 December 1998 (quoting Korneev and Ghouliev v. IOC, CAS OG 96/003-004.) (" . . . ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made.").

187. Connolly, *supra* note 178, at 177.

188. *Id.*

189. *Id.* at 177-78.

190. *Id.* at 178.

ii. Implications of a Strict Liability Policy

The strict liability standard is considered a major element of anti-doping regulations, affirmed by WADA in its comment to Article 2.1.1.:

For purposes of anti-doping violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), the Code adopts the rule of strict liability which is found in the [Olympic Movement Anti-Doping Code, predecessor to WADA] and the vast majority of existing anti-doping rules. Under the strict liability principle, an anti-doping rule violation occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault.¹⁹¹

There are two different consequences of a doping violation: disqualification from a particular competition and indefinite suspension from future competition.¹⁹² If an athlete is found to have a presence of a banned substance in them during a competition, the disqualification is effective immediately in order to preserve the fairness of the competition.¹⁹³ However, an exception to the two consequences listed above exists if an athlete can prove he was not at fault or there was an extraordinary circumstance, the athlete may be subject to lesser sanctions at the discretion of the governing organization.¹⁹⁴

191. WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE COMMENT TO ARTICLE 2.1.1, 8 (2003), *available at* http://www.wada-amg.org/rtecontent/document/code_v2.pdf.

192. Connolly, *supra* note 175, at 178.

193. *Id.*

194. Bryan J. Schmalzer, *A Vicious Cycle: The Biological Passport Dilemma*, 70 U. PITT. L. REV. 677, 682 (2009).

The problem that the Armstrong case presents is that his doping accusations have come after the competitions have ended and, therefore, his opponents have had no say in the fairness of their competition. If Armstrong were to have had the presence of enhanced amounts of EPO or other types of doping in his system, it makes no difference to his competitors whether Armstrong obtained the competitive advantage intentionally, negligently, or unbeknownst to him;¹⁹⁵ all that matters to competing athletes is that they participated in a fair race where the best athlete prevailed. Additionally, since Armstrong has been found guilty only in the media, the strict liability penalty has not been enforced against Armstrong.

The strict liability standard comes into play when an athlete's biological sample, usually urine or blood, tests positive for the presence of a banned substance.¹⁹⁶ The obvious problem of the undetectability of genetic doping makes this standard somewhat irrelevant. However, if the presence of genetic doping becomes traceable, it will not matter how the banned substance entered the athlete's body because that athlete will be held strictly liable for its presence alone. For example, the vastness and seriousness of WADA's strict liability standard was evidenced in a case where a male athlete whose urine tested positive for a banned substance claimed his positive test was the result of sexual intercourse with a woman who took a medication containing the substance.¹⁹⁷ Even though a WADA laboratory was able to confirm the athlete's story, he was still held to be strictly liable for having the steroid in his system.¹⁹⁸

Obviously this standard creates many problems for the future of competition, but some still argue its necessity in order to maintain a sense of integrity to the sports. Since intent is not an element of a doping offense, no regulatory body cares why

195. Connolly, *supra* note 178, at 178-79.

196. *Id.* at 179.

197. *Id.* at 180.

198. *Id.*

Lance Armstrong or any other athlete decided to ingest the substance. However, the amount of supplements and over-the-counter products today make it rather easy for athletes to negligently ingest something. Still, proponents of the standard maintain the principle that preserving fair competition is supreme.¹⁹⁹

If the strict-liability standard were lessened to a case-by-case basis, the work required for regulatory bodies to prove the intent of the athlete would make the uphill battle against doping even more difficult. For example, since Armstrong's allegations are in the past, it would be almost impossible to prove his intent on a case-by-case basis. As mentioned before, athletes have a contractual duty to ethically compete in their respective sport. In order to maintain the integrity of the game, athletes should respect and abide by the strict liability standard by always being aware of prohibited substances. While some doping allegations produce unfair outcomes, the "sum of these injustices is minor in comparison to the overall inequity that would result from a standard lower than strict liability."²⁰⁰

Effectuating notice upon athletes is also extremely important in order to make sure they are aware of any developments in the list of prohibited substances. However, some anti-doping rules must be kept vague for the purpose of unpredictability, much like the case of genetic doping. For example, the "related substances" clause can be found at the end of the list of banned substances in each category (e.g., stimulants, anabolic agents, etc.).²⁰¹ Mainly, this provision ensures that an athlete cannot ingest a particular substance that has been modified to the point where it is no part of the banned substances list and, therefore, not prohibited.²⁰²

Not one regulatory body disputes the powerful nature of such a permanent and undetectable doping substance like gene

199. *Id.* at 182.

200. *Id.* at 184.

201. *Id.* at 186.

202. *Id.*

doping, but until Mr. Armstrong's case it might have never been more relevant to include it as a banned substance. Much like it took the BALCO scandal to bring to light the prominence of designer steroids, Armstrong's case, while delayed in some respects, has finally displayed the urgency needed in regards to gene doping, as cycling might never recover from the face of their sport being unofficially deemed a cheater. However, if Armstrong is finally deemed innocent, the future of cycling, which has been marred with doping allegations and violations, is far more inconclusive.

iii. Implementing Suspensions

The effect of a potential suspension to an athlete is far more detrimental than a disqualification. "Unlike a disqualification, a suspension from future competition is based on some level of culpability of the accused athlete."²⁰³ While strict liability is the principle for the doping offense, WADA does loosen its standards if exceptional circumstances arise and "the [a]thlete can demonstrate that he or she was not at fault or significant fault."²⁰⁴ In this situation, the athlete can have his or her sanction reduced, but still faces a potential disqualification.²⁰⁵ This obviously leaves the question of what the athlete must show to meet this standard. Following the standards established by WADA, "arbitrators have defined 'no fault or negligence' as occurring when the athlete could not, even with the exercise of the utmost caution, reasonably have suspected, that he had been administered a prohibited substance."²⁰⁶ Given the detailed circumstances surrounding the intent of Armstrong in his alleged doping violations, this seems to be a major hurdle that he probably will not be able to overcome.

203. *Id.* at 188.

204. *Id.*

205. *Id.*

206. *Id.*

For an athlete to show no significant fault or liability, “he or she must establish that his or her negligence, when viewed in the totality of the circumstances, was not significant in relationship to the anti-doping rule violation.”²⁰⁷ If an athlete fulfills this standard, he or she is eligible to have the sanction imposed against them reduced to up to one-half of the minimum period detailed in the rules.²⁰⁸ Regulatory bodies have held that it is not a valid excuse for an athlete to assert that they were given a medication, supplement, or other product by an individual who should have known better than to give the athlete the product.²⁰⁹ Therefore, it is only the athlete’s duty to maintain their body in a natural state and keep it free from any banned substance.²¹⁰

Moreover, arbitrators have found that a separate inquiry should be made to assess whether the punishment is proportional or not.²¹¹ Since Armstrong has not been found guilty of any doping violation, it is pure speculation to guess what punishment he would receive. This is made even more difficult considering his alleged violations are so far in the past that it would be tremendously difficult to determine when he actually received any forms of gene doping. While some might argue that stripping Armstrong of his seven Tour de France titles is appropriate, it might only leave the sport in a further state of uncertainty.

iv. The Effect of Gene Doping on Anti-Doping Authorities

In order to have athletes follow their rules, anti-doping regulatory bodies must first follow their own rules and enforce them with a sense of integrity and clarity. The allegations against Armstrong are a prime example of how the anti-doping

207. *Id.* at 189.

208. *Id.*

209. *Id.* at 192-93.

210. *Id.* at 191.

211. *Id.* at 193.

authorities have exceeded their jurisdiction in order to effectuate a sanction. As aforementioned, after a French sports newspaper obtained research done on Armstrong's urine samples in 1998, the newspaper printed the information that Armstrong had used EPO.²¹² "There was no suggestion that any proper chain-of-custody procedures had been followed, no evidence that proper specimen storage and handling had occurred, no B-sample to permit Armstrong the retesting rights that any accused athlete would normally have and no proof that the information was legitimate."²¹³ While the leak of information and laboratory's breach of anonymity of the research specimen were breaches of WADA standards, Richard Pound did not distance WADA from the scandal.²¹⁴ Pound implied support for the accusations against Armstrong and did not criticize the lack of credibility surrounding the newspaper's tactics.²¹⁵ The UCI condemned WADA for not following its own guidelines more strictly and gave further evidence of the problem that the lack of information in regards to gene doping presents to athletes and regulatory authorities.²¹⁶

Additionally, the Landis trial raised more serious doubts about the testing procedures for gene doping. The trial record showed alarming amounts of bookkeeping abnormalities and errors by the French laboratory, with testing results that were incredibly inconsistent.²¹⁷ Under explicit USADA rules, "testing agencies are only required to produce records pertaining to specific tests performed on an athlete's own sample; they are not required to produce anything regarding the facility's general practices."²¹⁸ What might be the most telling

212. *Id.* at 196.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Schmalzer, *supra* note 194, at 688.

218. *Id.*

is that the laboratory used in Landis' case was the same one used in the Armstrong case.²¹⁹

The case against Spanish rider Iban Mayo is no different. On July 24, during the second rest day of the 2007 Tour, Mayo tested positive for EPO and was suspended by his team until the release of his "B" samples arrived.²²⁰ "Mayo's 'B' sample was tested in a different laboratory than his 'A' sample, which used a slightly different technique"²²¹ The results of the "B" sample in the WADA-accredited laboratory in Belgium were inconclusive, which was effectively deemed a negative result.²²² Consequently, the Spanish national cycling federation would not allow any retesting of Mayo's "B" sample, since it would have subjected him to double jeopardy.²²³ Nevertheless, the UCI decided to retest the sample a third time and a positive result was returned.²²⁴ The UCI refused to clear Mayo at that point and left him without a team and with an uncertain future in cycling.²²⁵ This outcome is extremely representative of a flawed testing procedure and regulatory policy in regards to gene doping. The lack of uniform testing and technological awareness on the topic has left many athletes' careers motionless in the process.

Realizing its immediate imperfections, WADA revised the code in 2007, which would take full effect in 2009.²²⁶ For athletes like Armstrong, Mayo, and Landis, the most important revision is one that reduces penalties for athletes who facilitate investigations against other athletes who are suspected to have used a banned substance, such as gene doping, or use a banned substance with no original intention of improving

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 689.

224. *Id.*

225. *Id.*

226. *Id.*

performance.²²⁷ Additionally, WADA hopes to increase efficiency by eliminating the lag time between testing for “A” samples and “B” samples.²²⁸ Nevertheless, the new Code took a much-needed harsher approach against first-time users that involve “aggravating circumstances.”²²⁹

Athletes, like Armstrong, and anti-regulatory bodies must be able to rely on the credibility of the strict liability policy. Whether or not Armstrong did use gene doping or r-EPO as a form of performance enhancement, he should not be saddled with a regulatory system riddled with ambiguity and inconclusive results. The uniform application of testing and rules on the use of gene doping is extremely necessary to maintain and improve upon the trust of competing athletes, sporting organizations, and fans.

v. Intrusive Monitoring and the Biological Passport Program

As previously mentioned, the only current method for detecting gene doping is by the use of a muscle biopsy at the doping injection point, an extremely expensive and invasive procedure that will probably cause alarm and concern among athletes. However, the biological passport program presents a promising alternative for the detection of gene doping. The program came about in 2006 during the Winter Olympics in Italy when many athletes faced penalties for increased amounts of hemoglobin in their blood.²³⁰ In an urgent response, WADA and the UCI took proactive measures toward implementing a program that would establish baseline blood samples for cyclists.²³¹ WADA’s ultimate goal is to implement the program for all Olympic sports.²³²

227. *Id.*

228. *Id.* at 690.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

The biological passport is an electronic database for an athlete that “consists of a personalized ‘hematological and steroid profile.’”²³³ The program’s purpose is to establish any deviation from baseline blood levels that will hopefully lead to better detection of gene doping. An athlete will be suspended when there are proven and detectable fluctuations in the athlete’s blood sample.²³⁴ The passport program also distinguishes the effects to an athlete for banned substances from the effects of undetected drugs or changes in training regimens.²³⁵ Riders involved in the program, besides testing, “are subject to a strict rider location program developed and administered by the WADA and dubbed the Anti-Doping Administration & Monitoring System (ADAMS).”²³⁶ Summarizing how the program will be effective, a French regulatory official stated, “The blood passport doesn’t follow products, but the athlete.”²³⁷ Hence, the biological passport program is the best-suited testing regime in response to gene doping. Assuming that monitored parameters are relatively stable and do not fluctuate normally, having athletes such as Armstrong and Landis submit their blood samples regularly to WADA and the UCI to be tested against their own baseline sample, could be the most effective weapon in the fight against gene doping.

While the biological passport program provides many intriguing opportunities for anti-doping authorities, the program also presents many policy concerns. An intriguing issue is the statute of limitations argument surrounding blood samples taken from athletes. When should anti-doping authorities remove the samples from their databases? Should doping authorities let bygones be bygones and vindicate those whose samples were wrongfully tested or those who were

233. *Id.*

234. *Id.*

235. *Id.* at 691.

236. *Id.*

237. *Id.*

found to have tested positive for a banned substance? What about the exorbitant costs that will be needed to maintain such doping databases?

Currently, samples are frozen and kept for eight years, during which time they may be retroactively analyzed if a new test is made available.²³⁸ Additionally, the statute of limitations for enforcing doping sanctions on an athlete who has used performance-enhancing drugs is also eight years, according to WADA.²³⁹ WADA's current eight-year safeguard allows them to shelter the integrity of the sport while they furiously try to find a way to effectively test for gene doping. With the eight-year standard, WADA can retroactively test an athlete's old sample in light of any new gene doping test being developed. WADA should expect some athletes to argue that eight years is too lengthy, especially those that are out of the sport by the time their sample is retested. However, I.O.C. president, Jacques Rogge, defended retroactive testing as a cornerstone for international drug testing, saying, "We hope that this will work as a strong deterrent and make athletes think twice before cheating."²⁴⁰

Additionally, the storage and implementation costs needed to maintain and develop such a vast database will bring critics as well. Currently, the cost of gene doping testing and who will pay for it is unknown, although experts say testing for EPO can cost more than \$300 per sample.²⁴¹ If a valid test for gene doping is not developed by the 2012 Olympics, athletes and skeptics will criticize such high storage and maintenance costs in conjunction with a doping mechanism that has no useful test.

238. Juliet Macur, *Olympic Blood Samples to be Retested*, N.Y. TIMES (Oct. 9, 2008), <http://www.nytimes.com/2008/10/09/sports/olympics/09doping.html>.

239. *Id.*

240. *Id.*

241. *Id.*

V. RECOMMENDATIONS

A. *WADA Must Institute a Clear, Broad, and Rigid Policy*

Discrepancies and questionable actions on the part of anti-doping organizations and laboratories have severely undermined the battle against gene doping. While gene doping presents a very uncertain enemy to WADA and other anti-doping organizations, the policies implemented in regulating gene doping cannot be just as ambiguous. The case of Lance Armstrong, while it may be the most renowned at the moment, is not the only proceeding against an athlete that has ended in a mess because of a lack of a credible policy and objective and reliable testing regime with regards to gene doping. The cases involving Mayo and Landis also emphasize crucial problems with the amount of credibility given to laboratories in proceedings against accused athletes. These popular examples are a good representation of the inconsistent outcomes in cases against athletes, due in part to a combination of lack of informed testing with regards to types of doping, including gene doping, and issues with anti-doping testing procedures in general. Besides the revisions in 2007, WADA has not done much to remedy their issues. One lawyer stated, "The rules [of WADA] are designed to make it as easy as possible to convict an athlete."²⁴² However, the ease of obtaining or the amount of convictions should not be the goal in anti-doping efforts.²⁴³

In order for WADA to avoid future "Lance Armstrong" situations involving EPO or another banned substance, WADA needs to be extremely proactive and relentless in improving their testing procedures, laboratories, and Code provisions with regards to gene doping. As seen by the growing number of EPO users and positive tests, gene doping has been in widespread use for some time now. Nevertheless, proper testing and a clear policy against the use of gene doping is

242. Schmalzer, *supra* note 194, at 689.

243. *Id.*

nowhere in sight. While gene doping is on the WADA Prohibited List, an ethical policy for testing procedures and staying ahead of the uses available to athletes is sadly non-existent.

To begin, WADA and other federal regulatory agencies need to make the supply of genes used for doping a criminal action. By halting supply and instituting a behavioral aspect to the act of gene doping, WADA might be more successful in reaching possible dopers. However, some athletes might view the compliance with a criminal law against the use of gene doping as a huge competitive disadvantage, which runs the risk of being left behind while other athletes enhance themselves to be stronger and faster. Nevertheless, by taking a firm policy stance against gene doping, WADA could possibly halt the growth of this popular doping mechanism. Additionally, despite knowledge and awareness of steroids and other performance-enhancing drugs in sports, the majority of the general public is fairly in the dark about gene doping. In educating the public about the potential uses of gene doping and the regulatory stance against the practice, WADA and other agencies can gauge the public's opinion and also possibly deter potential users. By informing the public about the side effects of gene doping and possible criminal sanctions for use of performance-enhancing drugs, WADA could have a realistic opportunity to implement a clear and rigid policy against the use of gene doping.

Furthermore, WADA should amend the Code to allow for unbiased testing by independent laboratories. Considering the work-in-process that is genetic testing, WADA "should afford athletes a higher standard of due process and allow meaningful challenges to laboratory procedures, instead of presuming the athletes are guilty."²⁴⁴ Each gene doping scandal WADA has been engaged in has found the organization bending its own rules in order to effectuate a witch-hunt

244. *Id.* at 696.

against the athlete. This does nothing but undermine anti-doping efforts and the credibility of sports.²⁴⁵ By instituting independent testing in addition to WADA approved laboratories, WADA could restore its integrity in the eyes of fans, athletes, and even the UCI. Moreover, once a reliable test is developed, independent laboratories could be instrumental in preventing a future legal mess similar to Armstrong's.

WADA could also rectify any future "Lance Armstrong" predicaments by offering to reimburse athletes for their legal counsel if they are vindicated because of the uncertainty and unreliability surrounding current gene doping testing.²⁴⁶ To this point, only athletes have borne the economic and personal effects of laboratory mistakes in their pursuit of perfecting genetic testing.²⁴⁷ The UCI could promote a policy effort by endorsing team anti-doping programs, which would allow even more control of athletes.²⁴⁸ However, the UCI should still maintain some control over the teams' testing regimes by possibly requiring teams to provide their results to UCI for an unbiased approval. In order to promote this effort, WADA should encourage UCI to suspend or disqualify teams who do not subject their riders to the UCI monitoring program.

*B. Enhance Gene Doping Research,
Technology, and Funding*

i. Discriminate Gene Therapy from Gene Doping

A potential problem in gene doping cases like Armstrong's is in the use of therapeutic gene therapies, which allow injured athletes to receive treatments with banned substances by obtaining a "Therapeutic Use Exemption" (TUE) authorized by the anti-doping regulatory agency governing the

245. *Id.*

246. *Id.* at 697.

247. *Id.*

248. *Id.*

competition.²⁴⁹ Once the treatment is completed on the injured athlete, he or she is able to resume competition.²⁵⁰ However, an interesting problem exists when a child undergoes gene therapy by the permission of a TUE and then later develops athletic ability.²⁵¹ Should that athlete be banned from entering international athletic competition for the TUE he received as a child?²⁵² Similarly, is it possible that Armstrong could have been banned from competition due to the years of cancer treatment he underwent, including the numerous cycles of therapeutic drugs?

As there is no current test for gene doping, any future tests employed will most likely not be able to distinguish between genetic therapy techniques or genetic enhancement. While gene therapy will most likely in all circumstances enhance the athlete's performance because of the rehabilitated tissue, WADA could potentially ban an athlete even though their intent was permissible under the strict liability standard. This result should make it clear that WADA has to employ a test that accurately distinguishes the intention of the original treatment for the athlete. While anti-doping agencies have expressed the difficulty in distinguishing between both types of treatment, the need for a test distinguishing the athlete's intent is highly advantageous to maintaining the integrity of sport as the technology of gene therapy advances.

ii. Increase Funding for Possible New Testing Breakthrough

The market and demand for gene doping will most likely grow more quickly than the knowledge of WADA and similar anti-doping agencies. While there is no proven available test for detecting gene doping, scientists in Germany recently said they have come up with a blood test that can

249. Custer, *supra* note 28, at 205-06.

250. *Id.*

251. Fore, *supra* note 29, at 90.

252. *Id.*

provide the closest thing to conclusive proof of gene doping, with the ability to go back as far as 56 days from the day that doping took place.²⁵³ Authorities have said that the testing needs to go through more scientific validation and could possibly be available for the 2012 Olympics.²⁵⁴ Possibly is not good enough.

The anti-doping authorities should increase their research funding in light of this possible breakthrough in order to stay a step ahead of potential dopers and have an available testing procedure in place before the 2012 Olympics. While WADA funded \$2 million in research projects in order to devise a reliable gene doping test,²⁵⁵ more funding is desperately needed in order to prove the reliability of the new test. Because athletes and fans expect that anti-doping agencies will employ the most current scientific knowledge in their testing, funding should be made available in order to increase research efforts into the potential uses and detection of gene doping. Since the outcome of any scientific test would be significantly more dependable with new scientific research, the determination of an athlete's eligibility after a doping test requires diligence and funding in obtaining the most current knowledge.²⁵⁶

Regarding the new possible test, WADA director general David Howman said, "It's not through markers, it's through actual detection. There's a significant difference there. Using the marker method is more a probability approach, whereas the method these researchers have come up with is stone cold dead, 100 percent."²⁵⁷ However, detailed studies

253. Stephen Wilson, *WADA Reports Breakthrough in Gene Doping Tests*, USA TODAY (Sept. 3, 2010), http://www.usatoday.com/sports/olympics/2010-09-03-3646293393_x.htm.

254. *Id.*

255. *Id.*

256. Moses, *supra* note 132, at 372.

257. *The Week That Was in Running - August 30 - September 5, 2010*, LETSRUN.COM (Sept. 7, 2010), <http://www.letsrun.com/2010/week-0907.php>.

into highly sensitive detection strategies for gene doping have led scientists to the use of biosensors and biomarkers, and WADA should still keep this approach in its arsenal. This technique involves monitoring specific secondary changes or biomarkers that arise as a result of transgene transfer and expression.²⁵⁸ The underlying theory is that “expression of the transgene as a result of gene doping activates signal transduction pathways ultimately leading to quantifiable changes in expression of other genes, their protein products, and downstream biochemical pathways and their metabolites.”²⁵⁹

Researching these particular effects of gene manipulation and transfer “provide identification of a ‘signature pattern’ following manipulation of gene expression and ultimately may form the basis for designing detection methodologies.”²⁶⁰ While WADA believes its new approach could be conclusive proof of gene doping detection, biosensors and markers have been involved in prior testing and could be a reliable option for future gene doping testing.

iii. Privacy and Statute of Limitation Concerns

Due to the prolific and vast nature of the sports business, athletes already have diminished privacy expectations, and the biological passport program only “necessitates further intrusion into their already compromised private lives.”²⁶¹ However, in order for the biological passport program and other future testing procedures to work, there must be complete access to athletes’ laboratory results and

258. Anna Baotuina, Ian E. Alexander, John E. J. Rasko & Kerry R. Emslie, *Developing Strategies for Detection of Gene Doping*, 10 J. GENE MED. 3, 13 (2007), available at <http://onlinelibrary.wiley.com.ez.proxy1.lib.asu.edu/doi/10.1002/jgm.1114/pdf>.

259. *Id.*

260. *Id.*

261. Schmalzer, *supra* note 194, at 693.

uniformity among the anti-doping authorities. While requiring athletes to participate in the program may bring criticism, it more importantly brings credibility to the testing process and establishes baseline laboratory results that will only help restore a currently imperfect testing system.

Additionally, WADA should increase the current statute of limitations for keeping the thousands of samples tested in laboratories in order to preserve the integrity of international competition. While a reliable method for detecting gene doping might soon be available, the fate of prior world records and championships are far more inconclusive. While incredible competitors like Lance Armstrong established world records and titles, they also might have forever ruined the honor of their sport, no matter how long ago it happened. Armstrong and many other athletes who have been suspected of doping are far removed from their sport at this point and no reliable method to test their samples exists.

Therefore, in order to prevent the statute of limitations clock from stopping, WADA should increase the statutory period in order to protect the possibility that a new testing procedure will allow them to retroactively test questioned champions like Armstrong. Furthermore, in order to preserve its own reliability and image, WADA should also implement a public relations campaign that vindicates wrongfully accused athletes if their samples are ultimately proven to be clean.

VI. CONCLUSION

Much, if not all, of Lance Armstrong's fate has been speculatively and inconclusively decided in the media. This can be attributed to the fact that since no reliable test has implicated Armstrong, information-starved media constituents, fans, journalists, and anti-doping authorities have decided to fill the void. However, international sport is too crucial to society, regulatory authorities, and the athletes to have the fate of athletes and competitions decided by uncertain testing and

conjecture. While many will argue that the book on Armstrong has been closed no matter what future tests reveal, the state of cycling and gene doping detection is anything but decided.

If anyone were to analyze the state of cycling and gene doping in the past decade-long debacle of sanctioned and battered performance-enhancing athletes, it is far from a stretch to wonder if Armstrong was that much more talented or if he was playing on an uneven playing field. Despite the fact that Armstrong has never failed one drug test and consistently disputes any doping claims against him, it is fairly easy to discredit Armstrong since many of his competitors have used performance-enhancing drugs, like gene doping.

Nevertheless, Armstrong still has staunch supporters, like Bob Stapleton, co-owner of the rival HTC-Highroad team, who referred to Armstrong's career, his battle against cancer and his inception of the Livestrong foundation as a legacy wrapped more in good than bad.²⁶² "I think the story is so extraordinary," Stapleton said, "that it is the results on the bike and with cancer that will be remembered 20 years from now. Whatever happens with the grand jury, it may call into question some of the magnitude of his athletic success but as an overall historical figure not much."²⁶³ Stapleton also argues that despite many public battles, Armstrong had respect from his peers, "He was just a beast on the bike, a ferocious competitor and if he proved unstoppable it was because he did the work to improve."²⁶⁴ Stapleton's claims point out a real key in restoring or defining Armstrong's legacy: "doping or no doping, Armstrong won on an even playing field."²⁶⁵

Even if a new reliable testing method for gene doping is implemented soon, Armstrong's feats and controversies are far

262. Diane Pucin, *Lance Armstrong Leaves a Far-Reaching Legacy*, L.A. TIMES (Feb. 16, 2011), <http://articles.latimes.com/2011/feb/16/sports/la-sp-armstrong-cycling-20110217>.

263. *Id.*

264. *Id.*

265. *Id.*

enough in the past that he might never be proven to have used performance-enhancing drugs like r-EPO and EPO. However, if statute of limitations concerns and increased funding towards a new possible test are taken seriously, Armstrong's case could finally be decided appropriately and set a precedent for future proceedings involving an athlete's decision to use gene doping as a way to enhance their athletic ability.

Armstrong's case is much more useful as a warning to anti-doping authorities of the problems they may face in trying to retroactively rectify their records books in light of new gene doping detection methods. More importantly, the ultimate mess of allegations that has resulted from the case against Armstrong might finally show the necessity of anti-doping authorities to desperately move forward with gene doping testing methods and research and preserve the past as it currently stands. However, that might be a question for a grand jury, WADA, or the media to answer, just ask Lance Armstrong.

MIXING CONTESTS AND SWEEPSTAKES WITH ENTERTAINMENT PROGRAMMING

JOY R. BUTLER*

I. INTRODUCTION

Unlike oil and water, popular promotions like contests and sweepstakes mix well with entertainment programming. In fact, program producers have integrated contests and sweepstakes with entertainment programming as early as the radio broadcasts of the Golden Age of Radio.¹ Nevertheless, such mixing sometimes generates lumps that must be smoothed out.

This Article offers an overview of the laws and regulations that govern contests and sweepstakes, discusses

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1. The Golden Age of Radio, NATIONAL ENDOWMENT FOR THE ARTS: THE BIG READ, <http://www.neabigread.org/books/lonelyhunter/teachers/HeartIsALonelyHunterHandout1.pdf> (last visited Dec. 1, 2011). The Golden Age of Radio refers to the period starting in the early 1920s when the first commercial radio stations launched and continuing through the 1950s when television replaced radio as the dominant source of broadcasts accessed in the home.

current trends for mixing contests and sweepstakes into entertainment programming, and analyzes the legal concerns such mixing creates for the program producer and for the contest or sweepstakes promoter.

In this Article, entertainment programming refers to television programs, radio programs, and audio or audiovisual programs streamed over the Internet and over other electronic devices. Specific categories of contests and sweepstakes discussed in this Article are radio and television call-in giveaways, reality television competitions, and video submission competitions

II. LAWS AND RULES APPLICABLE TO CONTESTS AND SWEEPSTAKES

An assortment of federal and state laws govern contests and sweepstakes. This Article focuses on laws that prohibit promotions from being illegal lotteries and laws that prohibit promoters from manipulating the outcome of the promotion.² At the federal level, these laws include Section 509 of the Communications Act,³ FCC Regulation 73.1216,⁴ and Section 1304 of the U.S. Penal Code.⁵ In addition to federal law, each state has its own laws governing contests and sweepstakes.

2. Another federal law specifically targeted to promotions and not extensively treated in this Article includes The Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. §§ 3001, 3005, 3007, 3012, 3017 (2006). There are additional federal laws and regulations not specifically targeted to promotions but which may be applicable in some circumstances. They include the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act of 2003, 15 U.S.C. § 7701 (2006); the Lanham Trademark Act of 1946, 15 U.S.C. § 1051 (2006); and the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2010).

3. 47 U.S.C. § 509 (2006).

4. 47 C.F.R. § 73.1216 (2009).

5. 18 U.S.C. § 1304 (2006).

*A. Prize, Consideration, and Chance
Turn a Promotion into a Lottery*

Many laws relevant to contests and sweepstakes focus on preventing these promotions from being illegal lotteries. A lottery is a game or scheme that combines the elements of a prize, consideration, and chance.⁶ With few exceptions, only governmental agencies may offer lotteries.⁷ Hence, a privately run promotion may not have all three of these elements. It may only have up to two of the three.⁸

B. Elimination of the Prize

A prize is something of value awarded to the winner of a promotion.⁹ People are much more motivated to enter a

6. See, e.g., *Fed. Commc'ns Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 290 (1954); *State v. Crayton*, 344 So.2d 771, 774 (Ala. Civ. App. 1977), *cert. denied*, 344 So.2d 775, 775 (Ala. 1977); *Mobil Oil Corp. v. Attorney Gen.*, 280 N.E.2d 406, 406 (Mass. 1972). The California Penal Code defines lottery as “any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property.” CAL. PENAL CODE § 319 (West 2010).

7. The constitutions of some states prohibit the operation of a lottery by any person or entity other than the state. For example, the state constitution of Washington provides that “[l]otteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.” WASH. CONST. art. II, § 24. Many states make it a criminal offense to promote or conduct a lottery. See, e.g., CAL. PENAL CODE § 320 (West 2010).

8. See, e.g., *People v. Eagle Food Ctrs., Inc.*, 202 N.E.2d 473, 474-75 (Ill. 1964) (characterizing viewpoint: “(1) that there are three elements essential to the existence of a lottery, chance, consideration and a prize; and (2) that there is no lottery if any one of these elements or ingredients is missing” as a universally accepted view.).

9. For example, Iowa defines prize as a “gift, award, cash award, or other merchandise of value that is offered or awarded to a person in a real or

promotion that offers a prize to the winner. Accordingly, promoters typically do not want to omit the prize from promotions and will instead attempt to offer a promotion without the element of consideration or a promotion without the element of chance.

Although there are exceptions, there is rarely disagreement regarding whether a promotion offers the element of a prize.¹⁰ This is distinct from the elements of chance and consideration, the existence or absence of which frequently trigger disagreement.

C. Elimination of Chance

Chance refers to one method of selecting the winner of a promotion. Chance indicates that the promoter selects the winner randomly.¹¹ For example, if the promoter selects the winner by drawing a name from a hat, the promoter has selected the winner by chance. In a chance promotion, the participant has little or no control over whether he wins or loses.¹²

The alternative to selecting the winner based on chance is selecting the winner based on a skill the participants demonstrate or use.¹³ A promotion based on skill allows the participant to have some impact on whether he wins or loses. Winning is based on factors over which the participant has some control such as scope of knowledge, dancing ability, or video production ability.

purported contest, competition, sweepstakes, puzzle, drawing, scheme, plan, or other selection process.” IOWA CODE § 714.B.1(4) (2003).

10. *See infra* Part IV.B.3.

11. *See, e.g.*, 38 Am. Jur. 2d Gambling § 4 (2010) (citing *State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428 (Neb. 1991)).

12. *Id.*

13. *See Op. of the Justices*, 692 So. 2d 107 (Ala. 1997); *Finster v. Keller*, 96 Cal. Rptr. 241 (Ct. App. 1971).

i. A Promotion that Awards a Prize Based
on Chance is a Sweepstakes

A promotion that awards a prize based on chance is a sweepstakes.¹⁴ Since the elements of a prize and chance are present, to avoid classification of the promotion as an illegal lottery, the sweepstakes promoter may not charge any consideration for entering the sweepstakes.

ii. A Promotion that Awards a Prize
Based on Skill is a Contest

A promotion that awards a prize based on skill rather than on chance is a contest.¹⁵ Since the element of chance is not present, adding the element of consideration places only two of the three lottery elements into the promotion. Hence, a contest is not an illegal lottery if the contest promoter charges contestants consideration for the opportunity to participate in the contest. Some contest promoters charge consideration, while others do not.

D. Elimination of Consideration

Consideration is money or an item of value that a person pays for the opportunity to participate in a promotion.¹⁶ While consideration is not limited to money, most states apply the principle that the participant must part with money or something of marketable value in order for the promotion to be

14. For example, Alabama defines sweepstakes as a “legal contest or game where anything of value is distributed by lot or chance.” ALA. CODE § 8-19D-1(4) (2011).

15. See, e.g., *Finster*, 96 Cal. Rptr. at 246 (citing *In re Allen*, 377 P.2d 280 (Cal. 1962)).

16. See, e.g., *Lotteries & Gambling*, Op. Ark. Att’y Gen. 2006-052, *3 (June 28, 2006).

viewed as requiring consideration.¹⁷ A minority of states apply the principle that there is consideration if the promoter receives any benefit as a result of the person's participation.¹⁸

i. Alternative Methods of Entry

The opportunity to participate in a sweepstakes often comes bundled with a product. For example, in the 1980s, the Pepsi-Cola Bottling Company offered the *Pepsi Cola Instant Cash Bottle Cap Game* (Pepsi Bottle Cap Promotion).¹⁹ As part of the promotion, Pepsi marked certain soda bottle caps with the monetary amounts of \$0.25, \$1.00, and \$100. A customer finding a marked bottle cap would receive the amount of money specified on the cap. Pepsi also marked bottle caps with individual letters that together spelled "Pepsi Instant Cash." Any participant who collected bottle caps with all the letters to spell "Pepsi Instant Cash" won \$10,000.

Pepsi Cola designed the promotion to be a sweepstakes meaning that participants could not pay consideration for the opportunity to play the game and win a prize. Of course, the customer paid for the bottle of soda. Payment for a product that includes a sweepstakes-playing opportunity is permissible as

17. See *Cudd v. Aschenbrenner*, 377 P.2d 150, 153 (Or. 1962) (holding that states' anti-lottery laws are directed at schemes requiring participants to contribute something of economic value and that consideration for a lottery requires more than the consideration generally required for the making of a contract); *Cal. Gasoline Retailers v. Regal Petroleum Corp.*, 330 P.2d 778 (Cal. 1958). But see *State v. Bussiere*, 154 A.2d 702, 704 (Me. 1959).

18. For example, Washington takes the view that consideration sufficient to support a contract is sufficient to qualify as the consideration in a lottery or promotion. Such consideration can include an action or forbearance that "vouchsafes a gain or benefit to the promoter of the scheme." *State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 297 (Wash. 1972) (citing *State ex. rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 955 (Wash. 1969)); see also *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 487 (N.J. 1995); *Maughs v. Porter*, 161 S.E. 242, 242-44 (Va. 1931).

19. *Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia*, 534 So. 2d 295, 296 (Ala. 1988).

long as the customer pays to obtain the product and not solely for the opportunity to enter the sweepstakes.²⁰

To eliminate any perception or possibility that participation in the sweepstakes requires payment, promoters often offer a free alternative method of entry (AMOE). For example, if an opportunity to play comes with the purchase of the product, the promoter might distribute free game cards that offer the same winning opportunity. In the Pepsi Bottle Cap Promotion, entrants could play without purchasing a soda by requesting game cards by phone or by mail.²¹ Pepsi also made 25,000 game cards available at retail stores for free.²² Since participants did not have to make a purchase or pay any consideration, the Pepsi Bottle Cap Promotion was not an illegal lottery.²³

ii. Failure of Alternative Methods of Entry

Offering an AMOE does not guarantee elimination of improper consideration.²⁴ If not implemented properly, the free AMOE may be invalid. Actions that invalidate an AMOE include presenting too many barriers to using the free method

20. See generally *id.* at 297; compare with *Face Trading, Inc. v. Dep't of Consumer & Indus. Servs.*, 717 N.W.2d 377, 389 (Mich. Ct. App. 2006) (holding that the product participants purchase to enter the game was incidental to the game itself, and the free alternative method of entry did not legitimize the game).

21. *Pepsi Cola Bottling Co.*, 534 So. 2d at 296.

22. *Id.* at 297.

23. *Id.* (in finding no consideration and a proper AMOE, the court also found persuasive the facts that Pepsi advertised via store displays and radio that no purchase was required and that Pepsi's salesmen monitored the disbursement and availability of free cards at each store).

24. *Gambling, telephone card sweepstakes*, 48 Op. Fla. Att'y Gen. 48 (2007) (availability of a free AMOE will not convert an otherwise unlawful gambling scheme into a lawful sweepstakes).

of entry²⁵ and failing to alert participants to the availability of the free method of entry.²⁶

III. METHODS OF MIXING CONTESTS AND SWEEPSTAKES WITH ENTERTAINMENT PROGRAMMING

There are three methods of mixing promotions with entertainment programming discussed in this Article: radio and television call-in giveaways, reality television competitions, and video submission competitions.

A. Radio and Television Call-In Giveaways

Radio stations often offer listeners an opportunity to win a prize by calling into the station. For example, a radio station might offer a prize to the tenth caller who correctly identifies the song of the day or who gives the correct response to a trivia question. These promotions include the elements of a prize and chance. These are legal sweepstakes as long as there is no consideration charged to participate.²⁷

In the television version of the call-in giveaway, television programs such as *The Apprentice* and *Deal or No*

25. *G.A. Carney, Ltd. v. Brzeczek*, 453 N.E.2d 756, 757-58 (Ill. App. Ct. 1983) (evidence suggested that the offer of free entry forms was illusory where promoter's address did not appear on form indicating that free entry blanks could be obtained at the office of the promoter; the promoter's phone number was not listed in local telephone directory; and interested parties could not obtain the free forms via mail but had to pick them up in person).

26. The New York Attorney General brought enforcement actions against a promotion operated by the makers of Tylenol as well as a promotion operated by CVS. In both promotions, the New York Attorney General accused companies of overemphasizing the purchase-based method of playing the sweepstakes and deemphasizing the free AMOE. For example, in the stores, CVS offered only the purchase-based method of entry. The AMOE was available only on the CVS website. Press Release, N.Y. Att'y Gen. Elliot Spitzer, CVS to Amend Sweepstakes Promotions (July 8, 2004), http://www.oag.state.ny.us/media_center/2004/jul/jul08a_04.html.

27. See *supra* Part II.C.1.

Deal offer a promotional component for the home-based audience. Calling in often takes the form of submitting a response or entry by website or via text messaging, which raises questions about whether these promotions include consideration.²⁸

B. Reality Television Competitions

Reality television shows are programs that focus on the lives of real people. Reality television shows began in the late 1940s and the 1950s with *Candid Camera* and game shows like *Beat the Clock* and *Truth or Consequences*. Today's era of reality television – sometimes known as unscripted drama – began in the early 2000s with programs such as *Big Brother* and *Survivor*.

Reality television programming often places the participants in unique situations such as stranded on a remote island or swapping families. Sometimes the participants work toward a common goal or compete for a prize. When including a competitive element, these reality television shows are contests and should be structured in adherence to applicable contest law. With competitive forms of reality television programs, participants compete in a certain event and face elimination until only one contestant or team of contestants remain. Popular reality television shows with a competitive element include *The Apprentice*, *American Idol*, *So You Think You Can Dance*, *Dancing with the Stars*, *America's Next Top Model*, *The Amazing Race*, *Project Runway*, and *Hell's Kitchen*.

i. Consideration as an Element of Reality Television Competitions

This writer is not aware of any legal proceedings alleging that participants in reality television competitions pay

28. See *infra* Part IV.C.

consideration. Usually, the programs pay participants to compete – albeit not much compared to the pay of union actors.²⁹ However, contestants do go through a rigorous interview and screening process including a background check, take a hiatus from their normal jobs to participate, and agree to comply with the production's rules which may include living in a certain place and not talking to people without the production's approval. The winner sometimes agrees to be bound by a long-term project with the sponsor.

ii. Chance as an Element of Reality Television Competitions

Elimination of contestants may be done by vote of the audience, by the show's own participants, by a panel of judges, or some combination of the three. When the audience vote contributes to the elimination of participants, this introduces an element of chance into the competition.³⁰

C. Video Submission Promotion

For video submission promotions, promoters invite members of the public to create and submit an original video. The rules typically specify that the submitted video must feature a service or product offered by the promoter. For example, in the DORITOS brand/Pepsi MAX Crash the Super Bowl Ad Contest (Doritos/Pepsi Ad Contest), the promoters, which were the companies that manufacture Doritos chips and Pepsi Max products, invited members of the public to create and submit a thirty-second commercial featuring Doritos brand tortilla chips or Pepsi Max.³¹ As another example, in the Star

29. Libby Chase, *How Much Does Reality TV Pay*, YOUNG MONEY (Mar. 8, 2010), <http://www.youngmoney.com/careers/how-much-does-reality-tv-pay>.

30. See *infra* Part IV.B.2

31. See Crash the Super Bowl Ad Contest - Official Rules, http://www.crashthesuperbowl.com/official_rules.html (last visited Mar. 4, 2011) [hereinafter Doritos/Pepsi Ad Contest Rules].

Wars Fan Movie Challenge, members of the public can create and submit original parodies or documentaries of the Star Wars saga.³²

This mixing of promotion and entertainment triggers at least two issues about consideration and chance. If the promoters allow public opinion and voting to influence the selection of the winners, there is a question of whether winning is based on chance or based on skill. The video required for submission might qualify as consideration. If elements of both consideration and chance are present, it can be a challenge for the sponsor to structure the promotion as a legal sweepstakes or legal contest. The chance and consideration components of these contests are discussed later in Part IV.B.

Another legal issue in video submission promotions, discussed only briefly in this Article, is the problem of content and rights clearance. Original material created by entrants may violate copyright, trademark, privacy, publicity, defamation, and other rights clearance laws.³³ Promoters may try to minimize the risk of rights clearance problems by providing pre-cleared materials for entrants. For example, in the Doritos/Pepsi Ad Contest, the promoters reduced the risk of music licensing violations by obtaining necessary licenses in about fifteen music selections in various styles ranging from country to hip-hop to rock and requiring that entrants use only this music in their video submissions.³⁴

32. See Official Rules of the Star Wars Fan Movie Challenge, <http://www.atom.com/about/starwars/> (last visited Mar. 4, 2011).

33. Rights clearance is the process of verifying that your production contains no material that violates the rights of another person or that violates any relevant laws. Material requiring a rights-clearance review includes literary quotes, photographs, footage, images of people, trademarks, and music. See generally JOY BUTLER, *THE PERMISSION SEEKER'S GUIDE THROUGH THE LEGAL JUNGLE: CLEARING COPYRIGHTS, TRADEMARKS AND OTHER RIGHTS FOR ENTERTAINMENT AND MEDIA PRODUCTIONS* (Sashay Communications 2007).

34. Doritos/Pepsi Ad Contest Rules, *supra* note 31, at § 3, Additional Requirements.

IV. LEGAL CONSIDERATIONS FOR MIXING CONTESTS AND SWEEPSTAKES WITH ENTERTAINMENT PROGRAMMING

This part of the Article offers examples of legal concerns that can arise when mixing contests, sweepstakes, and entertainment programming. It begins with an analysis of the communications law violations and lawsuits that may follow a promoter's attempts to manipulate the outcome of promotions incorporated into entertainment programs. It then turns to the challenges of balancing consideration and chance faced by promoters of call-in giveaways and video submission promotions.

A. Straying from Stated Rules and Manipulation of the Outcome

Promoters sometimes do not adhere strictly to stated contest and sweepstakes rules. Failure to apply the rules may be an oversight or may be a deliberate act. When manipulation is a deliberate act in the context of promotions televised or broadcast on radio, the promoters' goals are often to increase ratings. Manipulation includes editing to misrepresent what events actually occurred or how those events unfolded. Manipulation also includes influencing who will remain in the promotion and who will be eliminated. A participant in a promotion might respond to manipulation by filing a complaint under communications laws or filing a lawsuit.

i. Communications Laws and Regulations

Manipulation may violate communications laws if the promotion is broadcast on television or radio or qualifies as a contest under the rules of the Federal Communications Commission (FCC). Pursuing a claim under the communications laws discussed, which include Section 509 of the Communications Act and FCC Regulation 73.1216,

requires filing a complaint with the FCC.³⁵ There is no private action under these communications laws and regulations.³⁶

a. 47 U.S.C. § 509, Prohibited Practices in Contests of Knowledge, Skill, or Chance

Section 509 of the Communications Act of 1934, entitled “Prohibited Practices in Contests of Knowledge, Skill, or Chance,” makes it illegal to influence, prearrange, or pre-determine the outcome of certain types of broadcasted games and contests, or to conspire with others to do so.³⁷

Section 509 developed out of the quiz show scandal of the 1950s. In the 1950s, quiz shows were one of the most popular television programming formats.³⁸ In an effort to increase the “drama” and, thereby, increase their shows’ ratings, 1950s quiz show producers sometimes rigged the outcomes by giving answers to participants.³⁹ Producers also orchestrated who would win and who would lose.⁴⁰ When this deception became publicly known, Congress held hearings to question the shows’ producers and participants.⁴¹ However, none of the perpetrators of the deception faced criminal charges. At that time, there was no law making manipulation of game show contests illegal. Congress enacted Section 509 to

35. *Ibarra v. W.Q.S.U. Radio Broad. Org.*, 218 F. App’x 169 (3d Cir. 2007).

36. *Id.*

37. 47 U.S.C. § 509 (2006).

38. Thomas Doherty, *Quiz Show Scandals*, THE MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/eotvsection.php?entrycode=quizshowsca>.

39. *Id.*

40. *Id.*

41. *Id.*

correct that oversight.⁴² Section 509 applies to any contest “of knowledge, skill, or chance” and reads as follows:

It shall be unlawful for any person, with intent to deceive the listening or viewing public—

(1) To supply to any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined.

(2) By means of persuasion, bribery, intimidation, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined.

(3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

(4) To produce or participate in the production for broadcasting of, to broadcast or participate in the broadcasting of, to offer to a licensee for broadcasting, or to sponsor, any radio program, knowing or having reasonable ground for

42. Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs “Illegal Contests” in Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 152-53 (2007).

believing that, in connection with a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance constituting any part of such program, any person has done or is going to do any act or thing referred to in paragraph (1), (2), or (3) of this subsection

(5) To conspire with any other person or persons to do any act or thing prohibited by paragraph (1), (2), (3), or (4) of this subsection, if one or more of such persons do any act to effect the object of such conspiracy.⁴³

b. Applicability of 47 U.S.C. § 509

One commentator opines that Section 509's specific reference to "bona fide contest of intellectual knowledge or intellectual skill" means that the statute does not apply to contests that test non-intellectual skills such as dancing, singing, or beauty.⁴⁴ That means Section 509 would likely apply to reality television programs such as *Survivor*, *Project Runway*, and *The Apprentice*, but not to reality television programs such as *American Idol* and *Dancing with the Stars*. At this time, there are no clear guidelines to indicate which contests fall inside or outside the Section 509 restrictions. The statute does not define "bona fide contest of intellectual knowledge or skill." Furthermore, no case law has addressed which contests Section 509 governs.

There is another puzzling element to Section 509. Taking the plain language of the statute, the prohibition on deception and manipulation seems to apply only to contests conducted via radio and not to contests conducted via television. The statute defines contest and listening audience in a manner that includes only radio stations.

43. 47 U.S.C. § 509 (2006).

44. Podlas, *supra* note 42, at 156.

For the purposes of this section— (1) The term “contest” means any contest broadcast by a radio station in connection with which any money or any other thing of value is offered as a prize or prizes to be paid or presented by the program sponsor or by any other person or persons, as announced in the course of the broadcast. (2) The term “the listening or viewing public” means those members of the public who, with the aid of radio receiving sets, listen to or view programs broadcast by radio stations.⁴⁵

For a number of reasons, this interpretation does not seem to be the intent. Since the statute emanated from the controversy surrounding the televised quiz show contests of the 1950s, it seems illogical for the statute to be restricted to radio. The FCC, the agency charged with enacting regulations under Section 509, apparently holds the opinion that the statute is applicable to both television and radio. FCC regulation 73.1216, a regulation enacted by the FCC to enforce Section 509, explicitly applies to contests broadcast on television or on radio.⁴⁶ Also, in information offered about contest law and regulation on its website, the FCC explicitly includes televised contests as being included under Section 509.⁴⁷

45. 47 U.S.C. § 509(b) (2006).

46. *See infra* Part IV.A.1.c.

47. According to the FCC’s website, for purposes of Section 509, the term “contest” means any contest broadcast by a broadcast station in connection with which any money or any other thing of value is offered as a prize or prizes to be paid or presented by the program sponsor or by any other person or persons, as announced in the course of the broadcast and the term “listening or viewing public” means those members of the public who, with the aid of radio receiving sets, listen to or view programs broadcast by radio or television stations. The language on the FCC’s website does not track exactly the language in the statute. The statutory language does not

c. 47 C.F.R. § 73.1216, Licensee-conducted contests

Regulation 73.1216, a rule enacted by the FCC, requires that broadcast stations conduct contests substantially as announced and disclose all material terms of contests and games.⁴⁸ If a station fails to do so, the FCC may assess a forfeiture against the station.⁴⁹ For example, the FCC has assessed monetary penalties against stations for ending a contest one day earlier than stated in the official rules,⁵⁰ failing to deliver the contest prize within the time frame promised in the rules,⁵¹ and failing to state correctly the prize to be awarded.⁵²

ii. Lawsuits by Participants

Contest and sweepstakes participants who believe the promoters are not playing fairly by the stated rules often file lawsuits claiming breach of contract, fraud, and similar

explicitly refer to television. Broadcast Contests, FED. COMM. COMM'N, <http://www.fcc.gov/eb/broadcast/contests.html> (last visited Nov. 20, 2010).

48. 47 C.F.R. § 73.1216 (2009).

49. 47 U.S.C. § 503(b)(1)(B) provides that any person who is determined by the FCC to have willfully or repeatedly failed to comply with any provision of the Communications Act or any rule, regulation, or order issued by the FCC shall be liable to the United States for a forfeiture penalty. 47 U.S.C. § 503(b)(1)(B) (2010); *see also* 47 C.F.R. § 1.80(a)(1) (2009).

50. *Nassau Broad. III, L.L.C.*, 25 F.C.C.R. 12447 (Aug. 23, 2010) (station fined \$4,000 for ending Father's Day Contest one day earlier than advertised).

51. *Saga Commc'ns of New Eng., L.L.C.*, 25 F.C.C.R. 3289 (Apr. 1, 2010) (FCC fined station because the contest rules required delivery of the prize within thirty days and the station delivered prize in seven months with no justification for the delay).

52. *Clear Channel Broad. Licenses, Inc.*, 15 F.C.C.R. 2734 (Feb. 10, 2000) (FCC fined station \$4,000 for not clarifying that the prize in the "So You Want to Win 10,000," contest was 10,000 in Italian lira (equivalent to \$53 U.S. dollars at the time) and not 10,000 U.S. dollars).

violations. If promoters have manipulated the outcome, these can be valid claims.

a. Allegations of Breach of Contract

For a breach of contract action, there must first be a valid contract. In any promotion, a valid contract exists between a promoter and a participant as soon as the promoter makes an offer by publishing the promotion rules and the participant accepts the offer by performing the requested act.⁵³ The promoter can change the rules (such as the prize to be awarded) if the rules reserve the right to make such changes.⁵⁴ This contractual relationship also exists when the promotion is mixed with entertainment programming.

For radio and television call-in giveaways as well as for video submission promotions, the contract generally consists of posted or published rules that serve as the offer. The participant accepts that offer by performing the act stated in the rules. In reality television competitive programs, the contract between the promoter or producer and the participant tends to be more formal with the promoter and participant executing a more traditional written contract rather than relying on the posting or publication of contest rules.

In a highly publicized lawsuit against the *Survivor* producers, Stacey Stillman, a participant in the first season of *Survivor*, claimed breach of contract and other claims based on producer manipulation.⁵⁵ Stillman alleged that the show's executive producers Mark Burnett and Craig Poligian persuaded other *Survivor* participants to vote Stillman out of

53. See *Englert v. Nutritional Sciences, L.L.C.*, No. 07AP989, 2008 WL 4416597, ¶ 8-9 (Ohio Ct. App. Sept. 30, 2008).

54. *Id.* at ¶ 14 (after reserving in the contest rules "the right to cancel the [contest] at anytime, or to make changes as we see fit," the promoter could legally change the amount of the award prior to a contestant claiming the prize).

55. Complaint, *Stillman v. CBS Corp.*, 2001 WL 34129688 (Cal. Super. Ct. Feb. 5, 2001).

the game rather than Rudy Boesch, another *Survivor* participant.⁵⁶ Stillman also alleged that the producers convinced the other players that Boesch's physical ability would be an asset in the upcoming challenges.⁵⁷ According to Stillman's complaint, the producers wanted to keep Boesch because Boesch, who at seventy-two years old was the last remaining contestant over forty years old, was important to the demographic viewing audience and made good television.⁵⁸ Although the full text of the *Survivor* contract was not made available during the legal proceeding, it is doubtful that it authorized the producers to influence the votes of contestants. After a deposition in which Dirk Been, another participant in the first *Survivor*, corroborated Stillman's version of what occurred, the parties settled.⁵⁹

b. Allegations of Fraud

There is sufficient evidence for a finding of fraud in a promotion when the promoters imply that they will apply the rules fairly and consistently to all entrants, consciously fail to apply them in that manner, and instead apply them in a manner that favors one participant over another.⁶⁰ While there have been lawsuits initiated as a result of alleged fraud in a

56. *Survivor* begins with sixteen contestants inhabiting a tropical island. Each week the contestants cast votes to eliminate other contestants one by one until only one contestant remains. The sole remaining contestant receives one million dollars. *Id.* at ¶ 31.

57. *Id.* at ¶ 30-32.

58. *Id.*

59. Deposition of Dirk Been, SEG, Inc. v. Stillman, 2001 WL 36012817 (Cal. Super. Ct. May 14, 2001), *available at* news.findlaw.com/hdocs/docs/survivor/segstillmanbeendp525.pdf. Been also expressed disappointment that the *Survivor* contest was more about making good television: "[s]o really, instead of battle against other people, myself, Mother Nature, . . . -- my biggest job was to impress Mark as being someone that was going to produce a good TV show for him." *Id.* at 74.

60. *Plough Broad. Co., Inc. v. Dobbs*, 293 S.E.2d 526, 527 (Ga. Ct. App. 1970).

promotion mixed with entertainment programming, this writer is not aware of any case that has yielded a court opinion explicitly addressing the merits of the fraud claim. In the absence of such case law discussion specifically focused on circumstances with mixed promotions and entertainment programming, one can draw parallels with other fraud cases dealing with basic promotions.

In *Plough Broadcasting Co., Inc. v. Dobbs*,⁶¹ Thomas Dobbs entered a contest in which first prize went to the person with the greatest weight in pan fish. According to the contest rules, each contestant could enter up to fifty fish.⁶² The contest officials allowed Bobby Buice to weigh his fish before entering them in the contest.⁶³ When Buice discovered that the weight of his fish was less than that of Dobbs' fish, Buice replaced three fish with fish of higher weights so that the total weight of Buice's fish exceeded the total weight of Dobbs'.⁶⁴ The contest officials had full knowledge of Buice's replacement and allowed him to make the substitution.⁶⁵ Buice won the contest.⁶⁶ Dobbs later filed suit alleging fraud. The court found that the circumstances provided sufficient evidence for a finding of fraud.⁶⁷

*B. Balancing Chance and Consideration
in Video Submission Promotions*

i. Video Submission Promotions
Often Require Consideration

While this writer is unaware of any opinion on point, one can reasonably argue that video submission promotions

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 528.

require consideration. Entrants often put effort and their own money into the making of a commercial to promote the organizer's product. Furthermore, the participant sometimes grants exclusive rights in the video submission to the promoter. For the Doritos/Pepsi Ad Contest, entrants agree to transfer the complete copyright in the video submission to the sponsors if the entrant becomes one of the finalists. The relevant portion of the rules for the Doritos/Pepsi Ad Contest reads as follows:

FINALISTS AGREE TO IRREVOCABLY
ASSIGN AND TRANSFER TO THE
SPONSOR ANY AND ALL RIGHTS, TITLE
AND INTEREST IN SUBMISSION,
INCLUDING, WITHOUT LIMITATION, ALL
COPYRIGHTS AND WAIVE ALL MORAL
RIGHTS IN SUBMISSION.⁶⁸

Many of the video submissions are of professional quality.⁶⁹ The transfer of the video satisfies the majority and minority views of consideration.⁷⁰ The finalist parts with the copyright in the video submission, which is an object of marketable value, and the promoter receives the benefit of the advertising and promotional attention for its products and services.

68. Doritos/Pepsi Ad Contest Rules, *supra* note 31, at § 3, Additional Requirements.

69. Doritos reports that since 2007 the consumer-created ads aired from the Doritos/Pepsi Ad Contest have consistently ranked within the top five spots of the USA Today Ad Meter. The USA Today Ad Meter tracks responses of viewers to Super Bowl commercials and ranks them from best to worst. Press Release, Chris Kuechenmeister, PepsiCo's Doritos and Pepsi MAX Turn Over Unprecedented Six Super Bowl Ads to Consumers With \$5 Million on the Line for Top-Ranking Spots (Sept. 15, 2010), <http://www.pepsico.com/PressRelease/PepsiCos-Doritos-and-Pepsi-MAX-Turn-Over-Unprecedented-Six-Super-Bowl-Ads-to-Con09152010.html>.

70. *See supra* Part II.D.

This element of consideration impacts how the promoter can select the winner. If there is consideration and a prize, the promoter must select the winner based on skill and not chance in order to avoid operating an illegal lottery.

ii. Audience Voting Introduces an Element of Chance

Some promotions invite the general public to participate in the selection of the winner. For example, in the reality television program, *American Idol*, in which participants compete on singing ability, members of the public can call in and vote. Similarly, many promotions which invite submission of original creations of writing, art, or video make the submissions available to the public for viewing, critiquing, and voting.

One can argue that public voting introduces the element of chance. While some voters might objectively evaluate the merit of the entries, all voters are not going to vote based on a uniform set of criteria. Many members of the public will vote for a particular entry because they personally know or want to support that particular participant. In this case, success is fortuitous. It is not – at least not entirely – a skill contest in which the participants' demonstration of specific abilities impacts whether they win or lose.⁷¹ When public voting is used, any impact a participant has over winning or losing is not necessarily the result of the participant's demonstrated skill, ability, or talent in the activity being tested by the promoter. Instead, the participant's impact on his chances to win are his persuasive ability in convincing members of the public (e.g., his friends and acquaintances) to vote for him.

Despite the uncertain effect of allowing public voting, promoters still include audience participation. Public voting gets the public more involved in the promotion and, thus, makes the promotion more successful. If public voting does

71. See *supra* Part II.C.2.

introduce chance, the promoter must eliminate the prize or consideration in order to have a legal promotion. As explained previously in Part V.B.1, video submission contests often involve consideration. That means the promoter must eliminate the prize in order to stay legal. That is not a popular solution as there is less participant enthusiasm in competing in a promotion that offers no prize.

iii. Methods Used by Video Submission Promotions
to Balance Consideration, Chance, and Prize

Submission promotions handle the dilemma of not mixing consideration, chance, and a prize by offering separate tiers of competitions. For the tiers in which participants compete for a prize, qualified judges select winners based on a demonstration of skill and other objective criteria. The tier in which the public votes does not offer a prize. Hence, even though this tier may have consideration as a result of the participant's submission of a video and chance due to the public voting, the absence of a prize prevents this tier from being an illegal lottery.

For example, the Doritos/Pepsi Ad Contest invites entrants to make a commercial for Doritos brand chips or for Pepsi Max. In the first tier of the competition, a panel of judges reviews the submissions and selects ten finalists based on objective criteria.⁷² Each finalist receives a cash award of \$25,000 and a trip to a private Super Bowl party. For the second tier of the competition, the sponsors post the ten finalist videos online for public voting. Based in large part on the results of public voting, the promoters select six grand prize

72. The promoters choose a qualified panel of judges who then select ten finalist videos based on originality and creativity, adherence to creative assignment, and overall appeal. Doritos/Pepsi Ad Contest Rules, *supra* note 31.

winners.⁷³ The videos of the grand prize winners are broadcast during the Super Bowl. However, the rules proclaim that there is no monetary value associated with being a grand prize winner and, indeed, the promoters do not award a prize to the grand prize winners.⁷⁴ The \$25,000 awarded to the ten finalists is the prize, and that prize is awarded based on the judge's application of set criteria. Since there is no prize for the component of the promotion that involves public voting, chance and consideration can co-exist.

C. Eliminating Consideration from Call-In Sweepstakes

Radio and television call-ins award a prize based on chance. Therefore, promoters of these call-in sweepstakes must eliminate consideration.

i. History of Call-Ins and Consideration

In the 1950s, the FCC made great efforts to have radio station call-in giveaways declared illegal. The FCC and stations agreed that the radio station giveaways involved a prize awarded based on chance.⁷⁵ They disagreed on whether or not the giveaways required entrants to pay consideration in

73. The six grand prize winners consist of the four finalists who received the highest number of public votes and the two finalists who received the highest judges score (but did not receive the highest number of public votes). *Id.*

74. Although to this writer's knowledge never challenged, this claim is arguable. If a participant's video is selected for broadcast during the Super Bowl, the participant has additional opportunities to win contest money. If the USA Today Ad Meter rankings rank a participant's video as one of the top three best Super Bowl commercials, the promoters give the participant an additional monetary bonus of between \$400,000 and \$2,000,000. Neither Doritos nor Pepsi is affiliated with or controls the outcome of the USA Today Ad Meter rankings. *Id.*

75. *Fed. Comm'n Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 290-91 (1954). The decision consolidated FCC actions involving ABC, CBS, and NBC.

order to participate.⁷⁶ Entrants did not give the stations money or anything else of value. Nevertheless, the FCC argued that participating in the programs encouraged individuals to listen to the radio station.⁷⁷ Having a larger audience benefited the radio stations and that benefit sufficed as consideration from the entrants.

The FCC used Section 1304 of the United States Criminal Code as the focal point of its efforts to make radio call-ins illegal. Section 1304 makes it a criminal act to broadcast information about a lottery, gift enterprise, or similar scheme.⁷⁸ The FCC used its enforcement power under Section 1304 to issue rules prohibiting any promotions that required interactions between the station and the home-based audience or required any specific activity on the part of the home-based listener.⁷⁹ For example, the rules prohibited a call-in promotion that did any of the following: required someone to listen to a station, asked a question by phone where hints to the answer

76. *Id.*

77. *Id.*

78. At the time of the 1954 Supreme Court ruling in *Federal Communications Commission v. American Broadcasting Co.*, Section 1304 read as follows: "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense." *Fed. Commc'ns Comm'n*, 347 U.S. at 285 n.1. As of this writing, the statute remains substantially the same. The one significant exception is a 1988 amendment which added the words "or television" after radio in the first sentence so that the beginning of 18 U.S.C. § 1304 currently reads as follows: "Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station" 18 U.S.C. § 1304 (2006).

79. The 1952 FCC regulations were codified at 47 C.F.R. §§ 3.192, 3.292, 3.656. *See Fed. Commc'ns Comm'n*, 347 U.S. at 287-88.

were given on the radio, or required the home-based listener to answer the phone in a particular manner.⁸⁰

The FCC rules were valid only if the radio station call-ins were improper under Section 1304. The United States Supreme Court decided that the radio station giveaways were not improper under Section 1304 and enjoined the FCC from enforcing the rules.⁸¹ In making this ruling, the Supreme Court rejected the FCC's argument that there was consideration because the radio stations derived a commercial benefit from the home-based audience's act of listening.⁸² While acknowledging that consideration could take various forms, the Supreme Court concluded that a person listening at home to a radio or television program did not satisfy the consideration requirement.⁸³

ii. *Deal or No Deal* Lawsuits

More than fifty years after the Supreme Court ruling in favor of radio station call-in giveaways in *Federal Communications Commission v. American Broadcasting Co.*, a modernized call-in technique faces another set of questions about consideration. *American Idol*, *Deal or No Deal*, *I vs. 100*, and *The Apprentice* are programs that do or did offer call-in giveaways. During these programs, viewers could respond to a trivia question or guess which contestant would continue in the program. The winner is chosen at random from entrants providing correct answers.

The Supreme Court decision for radio station giveaways in *Federal Communications Commission v. American Broadcasting Co.* applies to the television call-in giveaways. A viewer watching the television program does not

80. *Id.* at 288.

81. *Id.* at 289.

82. *Id.* at 293-94.

83. *Id.*

pay consideration just by virtue of watching the program. However, instead of calling in their answers, television viewers submit their answers via text messaging or a designated website. There is no charge for submission by the website. However, submission by text messaging generates a ninety-nine cent fee plus standard text messaging fees charged by the entrant's wireless carrier.⁸⁴

Individuals who played these call-in giveaways have filed class action lawsuits against the shows producers alleging that the promotions are illegal lotteries.⁸⁵ There is no argument among the parties that the promotions contain the elements of a prize and chance. The parties disagree on whether the ninety-nine cent text-messaging fee qualifies as consideration.

The *Deal or No Deal* litigation illustrates the additional problems a promotion may have as a result of being governed by more than one state's laws. Both Georgia and California have looked at the *Deal or No Deal* lawsuits. The Georgia court dismissed the case, while the California court denied a dismissal motion.⁸⁶ As of this writing, the *Deal or No Deal* lawsuit continues in California with the court having granted preliminary approval of a settlement submitted by the parties.⁸⁷

a. Georgia Supreme Court *Deal or No Deal*
Decision Leads to Dismissal

The Georgia action, *Hardin v. NBC Universal, Inc.*,⁸⁸ focused on the Lucky Case Game, which is part of the NBC

84. The opinions do not indicate whether the text-messaging fee is kept by the promoters or goes to the promoters' service providers.

85. See, e.g., *Hardin v. NBC Universal, Inc.*, 660 S.E.2d 374, 375 (Ga. 2008).

86. See *infra* Part IV.C.2.a and b.

87. Agreement of Settlement, *Herbert v. Endemol USA, Inc.*, No. 07-3537 and 07-3916 (C.D. Cal. Sept. 23, 2011). The Agreement of Settlement is attached as Exhibit 1 to Defendants' Notice of Compliance with 28 U.S.C. § 1715.

88. *Hardin*, 660 S.E.2d at 375.

television program, *Deal or No Deal*.⁸⁹ Georgia residents who played the Lucky Case Game filed a lawsuit against NBC Universal, Inc., Endemol USA, Inc., and VeriSign, Inc. (the organizers and sponsors of the game). The Georgia residents filed their claim under OCGA § 13-8-3(b), which allows the loser of a gambling consideration to maintain a private, civil action to recover damages from the winner.⁹⁰ The Georgia residents hoped to recover the fees for the text messages. While reviewing the case the United States District Court for the Northern District of Georgia certified two questions of Georgia law to the Georgia Supreme Court:

1. Does OCGA § 13-8-3(b) authorize the filing and maintenance of a civil suit to recover money paid out or lost on account of one's participation in an illegal lottery?
2. If OCGA § 13-8-3(b) authorizes a suit to recover money paid out or lost on account of an illegal lottery, may the plaintiff in such a suit recover from the lottery's promoter or organizer?⁹¹

The Georgia Supreme Court responded to the first question in the negative and did not reach the second question. To be successful in their claim under OCGA § 13-8-3, the Georgia plaintiffs needed to prove that a "gambling contract" existed between the parties and that the parties had exchanged

89. The Lucky Case game is similar to other promotions targeted by the lawsuits. As part of the *Deal or No Deal* Program, the announcer invites viewers to guess which one of the six onscreen gold briefcases is the lucky case. Viewers can make their selection via the Internet or by text messaging. There is a \$0.99 fee if viewers use the text messaging method. The lucky case is revealed at the end of the program. Participants who selected the lucky case are entered into a random drawing. The person selected from the random drawing wins a cash prize.

90. *Hardin*, 660 S.E.2d at 375.

91. *Id.*

"gambling consideration."⁹² The Georgia Supreme Court determined that the Lucky Case Game did not involve a gambling consideration or any other bet or wager. In making this decision, the Georgia Supreme Court relied on the definition of gambling contract as "one in which the parties in effect stipulate that they shall gain or lose upon the happening of an . . . event in which they have no interest except that arising from the possibility of such gain or loss."⁹³

The Georgia Supreme Court found that "neither defendants nor any participant was certain to lose"⁹⁴ It also found that the contract's ninety-nine cent text messaging consideration never hangs in the balance.⁹⁵ Since there was no gambling contract and no gambling consideration, the Georgia Supreme Court concluded that OCGA § 13-8-3(b) provided no mechanism of recovery for the plaintiffs.⁹⁶ The Georgia Supreme Court did not directly address whether the Lucky Case Game was an illegal lottery. It held only that the Lucky Case Game was not actionable under the statute cited by the Georgia plaintiffs.⁹⁷

b. *Deal or No Deal* Lawsuit Survives
Dismissal Motion in California

In the California action, there are consolidated cases involving sweepstakes associated with television programs *American Idol*, *Deal or No Deal*, *1 vs. 100*, and *The Apprentice*. In November 2007, the California court refused to dismiss the case finding that the alternative method of entry used by the programs might be defective and, therefore, the

92. *Id.*

93. *Id.* (citing *Martin v. Citizens' Bank of Marshallville*, 171 S.E. 711 (Ga. 1933)).

94. *Id.* at 375-76 (citing *Talley v. Mathis*, 453 S.E.2d 704 (Ga. 1995)).

95. *Hardin*, 660 S.E.2d at 376.

96. *Id.*

97. *Id.* at 376 n.2.

promotions might be illegal lotteries.⁹⁸ The plaintiffs seek relief under California's Unfair Competition Law, which prohibits acts of unfair competition, including "any unlawful, unfair, or fraudulent business practice."⁹⁹ Unlawful practices are any activities that are forbidden by law.¹⁰⁰ According to the plaintiffs, the unlawful practice was running an illegal lottery.¹⁰¹

The promoters argued that while the promotion included a prize and chance, it did not include consideration because there was a free alternative method of entry.¹⁰² The court suggested that even though the promoters offered a free alternative method of entry, the promoters may have implemented it incorrectly.¹⁰³ According to the court, the relevant question is not whether some people could enter for free, but whether anyone did in fact pay for the opportunity to participate.¹⁰⁴ The court stressed that viewers who sent in text messages paid only for the privilege of entering the promotions.¹⁰⁵ The viewers received nothing of equivalent

98. Order Denying Defendants' Motions and Joint Motions to Dismiss, *Couch v. Telescope, Inc.*, No. 07-3916, 07-3537, 07-3643, and 07-3647 (C.D. Cal. Nov. 30, 2007). At the time of the dismissal motion, the case included four consolidated cases: *Couch v. Telescope, Inc.*, *Herbert v. Endemol USA, Inc.*, *Cunningham v. Endemol USA, Inc.*, and *Bentley v. NBC Universal, Inc.* At the time of this writing, three additional cases had been added: *Glass v. NBC Universal, Inc.*, *Snelson v. Endemol USA, Inc.*, and *Miller v. Upper Ground Enterprises, Inc.* The seven cases are consolidated for pre-trial purposes only.

99. CAL. BUS. & PROF. CODE § 17200 (West 2010).

100. *Couch v. Telescope, Inc.*, 611 F.3d 629 (9th Cir. 2010) (citing *Samura v. Kaiser Found. Health Plan, Inc.*, 22 Cal. Rptr. 2d 20, 24 (Ct. App. 1992)).

101. Order Denying Defendants' Motions and Joint Motions to Dismiss, *Couch v. Telescope, Inc.*, No. 07-3916, 07-3537, 07-3643, and 07-3647 (C.D. Cal. Nov. 30, 2007).

102. *Id.* at 7.

103. *Id.* at 9.

104. *Id.*

105. *Id.*

economic value in return.¹⁰⁶ It was irrelevant that some viewers did in fact enter for free. Accordingly, the court ruled that the plaintiffs made a valid claim that defendants conducted illegal lotteries under California law.¹⁰⁷

As of this writing, the parties in the *Deal or No Deal* lawsuit in California have reached a settlement agreement, which has received the court's preliminary approval.¹⁰⁸ If the settlement agreement is approved,¹⁰⁹ the defendants would agree to the entry of an injunction preventing them from participating in any promotions featuring premium text messages for a five-year period.¹¹⁰ Specifically, the injunction would provide that "Endemol USA, Inc., NBC Universal Media LLC, Verisign, Inc., and Don Jagoda Associates will not create, sponsor, or operate any contest or sweepstakes, for which entrants are offered the possibility of winning a prize, in which people who enter via premium text message do not receive something of comparable value to the premium text message charge in addition to the entry."¹¹¹ The defendants would also refund premium text message charges paid by persons who entered the Lucky Case game or American Idol Challenge and did not win a prize.¹¹²

106. *Id.*

107. *Id.*

108. Preliminary Approval Order for Notice and Hearing in Connection with Settlement Proceedings, *Herbert v. Endemol USA, Inc.*, No. 07-3537 (C.D. Cal. Sept. 21, 2011).

109. As of this writing, a fairness hearing is scheduled for December 19, 2011. *Id.* at ¶ 8.

110. Agreement of Settlement, *Herbert v. Endemol USA, Inc.*, No. 07-3537 and 07-3916, ¶ 8 (C.D. Cal. Sept. 23, 2011). The Agreement of Settlement is attached as Exhibit 1 to Defendants' Notice of Compliance with 28 U.S.C. § 1715.

111. *Id.*

112. *Id.* at ¶ 10.

V. CONCLUSION

Mixing contests, sweepstakes, and entertainment programming is not all fun and games. The successful promoter must do a balancing act to make certain that prize, chance, and consideration do not mix in such a way that what might otherwise be a legal promotion becomes an illegal lottery.

AMATEURISM—OUTDATED OR STILL A VITAL CONCEPT?

Elsa Kircher Cole *

Americans have a love-hate relationship with the idea that college students who participate in collegiate sports should do so for “the love of the game,” as amateurs. They enjoy the notion that the intercollegiate student-athlete receives no pay for participation, but instead plays for the enjoyment of the experience. On the other hand, the American public has a healthy fear of being duped and is concerned that what it might feel is a joyous expression of youth and sport is really a subterfuge for under-the-table payouts or a system in which everyone is getting rich except the student-athletes.

This Article will explore how courts have considered society’s view of the value and appropriateness of amateur sports in the legal analysis applied to litigation brought against the National Collegiate Athletic Association (NCAA) over the eligibility of certain students to participate in NCAA contests and the continued vitality of the concept of amateurism in college sports, particularly in Division I of the NCAA.¹

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1. The NCAA is a voluntary membership association that is the leading amateur intercollegiate athletics association in the United States. It recently has begun accepting provisional members in Canada. There are over 1,200 colleges and universities in the association that together provide and administer standardized rules for the conduct of athletic programs. *See Who We Are*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/> (last visited Nov. 7, 2011); *How We Work*, NAT’L COLLEGIATE ATHLETIC ASS’N,

I. A BRIEF HISTORY OF AMATEURISM
IN AMERICAN COLLEGE SPORTS

In the mid-19th century, Americans joined with the British in embracing the idea of sporting contests between teams of university athletes.² In America, colleges became the hosts of these contests, a system that is atypical for most of the world, where clubs are the norm for creating teams and hosting events. The first intercollegiate contest is generally considered to have been a crew race between Harvard and Yale in 1852.³ It is also generally acknowledged that the concept of amateurism was based on a desire of the wealthy elite to prevent the working class from being able to participate and possibly dominate them due to physical prowess and stamina built up through manual labor.⁴

College students arranged their own competitions and chose their competitors in the early years of collegiate sport, and also determined their own standards of eligibility.⁵ The desire to win led to the use of “ringers” in competition. Colleges sought and used good athletes who were not matriculated at the institutions they represented.⁶ While this

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/about+the+ncaa/how+we+work/ncaa+membership+and+the+ncaa+national+office> (last visited Nov. 7, 2011); David Pickle, *Mexican Interests Inquire About Division II Membership*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 12, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/Mexican+interests+inquire+about+Division+II+membersh+ip>.

2. Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateuism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html>.

3. JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA'S FIRST CENTURY* (NCAA ed. 2006), *available at* <http://www.ncaapublications.com/productdownloads/AB06.pdf>.

4. *See* Hawes, *supra* note 2.

5. *See* CROWLEY, *supra* note 3, at 37.

6. *Id.*

was not the reason for the formation of the NCAA,⁷ the practice became a concern of the NCAA when it began hosting competitions itself. The myriad of rules that determine who is eligible to compete in NCAA athletics today is a result of the attempts by the colleges and universities who are members of the NCAA to establish a consistent set of criteria for all competitors in order to assure a level playing field and fair contests.

II. THE NCAA'S DEFINITION OF AMATEURISM

Amateurism was first defined in NCAA bylaws in 1916. According to the NCAA, "An amateur athlete is one who participates in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom."⁸ Later, this definition was revised and made part of the fundamental principles of the NCAA constitution. The revision included the concept that participation in intercollegiate athletics should be motivated primarily by education and that it is an avocation. Additionally, the revision said student-athletes should be protected from exploitation by professional and commercial enterprises.⁹

7. The origin of the NCAA was a meeting of college presidents called by President Theodore Roosevelt in 1905 to address the significant number of serious injuries and deaths occurring in the sport of college football. In response to that a group of colleges and universities faculty members determined self-regulation was preferable to government intervention and abolishment of football. They created a set of rules to reform the sport. This developed into a discussion group originally called the Intercollegiate Athletic Association of the United States (IAAUS), which in 1910 became the NCAA. *Id.* at 43-44.

8. See Hawes, *supra* note 2.

9. NAT'L COLLEGIATE ATHLETIC ASS'N CONST., art. II, § 2.9 (stating that "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived . . . [S]tudent-athletes should be protected from exploitation by professional and commercial enterprises.").

The concept that a primary factor in determining amateurism should be an educational motivation is reinforced by the basic purpose of the NCAA, which is stated as the first fundamental principle of the association. NCAA Constitution, Article 1, Bylaw 1.3.1 states:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.¹⁰

The linkage of amateurism to education came from the Greek model of classical education, that the mind and the body should be entwined.¹¹ Early faculty proponents of college athletics pointed to the important values that were part of the noble amateur ideal: fairness, generosity, courage, character, self-restraint, chivalric bearing, and high ethical standards.¹²

That image of amateurism had to change as access to higher education became radically more available to a larger number of people. The author chosen by the NCAA to chronicle its first hundred years as an organization at its centennial said it well:

For the Greeks as for the British, amateurism was a central component of elite education. In

10. *Id.* art. I, § 1.3.1.

11. See CROWLEY, *supra* note 3, at 8 (As was stated by a faculty member at the third annual IAAUS convention, "In the Palestra, the Gymnasium, . . . the Greek youth was taught to make his body a perfect habitation for his mind . . .").

12. *Id.*

America, the amateur ideal provided an anchor, a tie to the past, perhaps a symbol of continuity. That ideal would need to change and stretch as higher education became a major vehicle of democratization, with college sports playing a key role. The continuing challenge for American colleges and universities . . . was to preserve the fundamental principle and ethical essence of amateurism while applying it in a thriving democratic environment. That too would be the NCAA's constant challenge.¹³

III. CHALLENGES TO THE NCAA'S AMATEURISM DETERMINATIONS

Courts have long held that the protection and fostering of amateurism is a legitimate objective of the NCAA.¹⁴ In 1984, the United States Supreme Court characterized the NCAA as "the guardian of an important American tradition," namely, amateurism in intercollegiate athletics.¹⁵

Courts have also held that "the NCAA unquestionably has an interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics."¹⁶ Indeed, the courts have recognized that the NCAA was created for the stated

13. *Id.* at 9.

14. *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 371 (D. Ariz. 1983) (holding that the NCAA had not engaged in an illegal group boycott when it deemed the plaintiff football players ineligible for both postseason play and television appearance for two years following NCAA rule violations by their school, even though the plaintiffs were not the ones who had broken the rules).

15. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 626 (Colo. Ct. App. 2004) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101, 104 (1984)).

16. *Nat'l Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 85 (Ky. 2001).

purpose of preserving the proper balance between athletics and scholarship in intercollegiate sports.¹⁷

Nevertheless, saying amateurism has historically been an important concept does not make the actions of the NCAA regarding the eligibility of students to compete immune from attack. The following is an examination of those attacks and an explanation of how the NCAA has defended itself successfully in the past and how it must position itself in the future to withstand further assault.

IV. THE DEBATE BETWEEN DUE PROCESS AND FAIR PROCESS

Various student-athletes have taken a run at the questions of whether the NCAA is a state actor and whether participation in college athletics is a constitutionally protected right, rather than a privilege. This is important for both what standard of review is appropriate and what process must be accorded prior to a determination that a student-athlete has lost amateur status and is thus ineligible to compete.¹⁸

For example, courts have rejected requests to review the NCAA's amateurism rules under a strict scrutiny standard, holding that there is not a right to participate in intercollegiate athletics in *Shelton v. National Collegiate Athletic Ass'n*,¹⁹

17. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 85 (Tex. 1999).

18. Some student-athletes have also unsuccessfully tried to assert that they have a 1st Amendment right of association that is implicated when they are declared no longer to be amateurs. In *Karmanos v. Baker*, a student-athlete who had participated on a professional Canadian hockey team while in high school was deemed by the NCAA to be ineligible to compete for the University of Michigan hockey team. *Karmanos v. Baker*, 816 F.2d 258, 260 (6th Cir. 1987). The court determined that because the student-athlete was free to associate with whomever he pleased, but just could not play on the Michigan hockey team, that no right of association had been violated by the NCAA. *Id.*

19. *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1197 (9th Cir. 1976) (the court found no violation of the equal protection clause when the

Parish v. National Collegiate Athletic Ass'n,²⁰ *Jones v. National Collegiate Athletic Ass'n*,²¹ *Justice v. National Collegiate Athletic Ass'n*,²² and *Graham v. National Collegiate Athletic Ass'n*.²³ This has been true both under a property and liberty rights analysis.

For example, in *Colorado Seminary (University of Denver) v. National Collegiate Athletic Ass'n*,²⁴ the Tenth Circuit Court of Appeals examined whether NCAA sanctions against a college hockey team for eligibility violations involved constitutionally protected rights.²⁵ The NCAA had placed the hockey team on a two-year probation with no post-season participation in NCAA events and all of the college's other athletic teams on a one-year probation and post-season ban.²⁶ The court found participation in intercollegiate athletics to be similar to membership in other activities in which students engaged, such as school clubs and social groups, which did not have constitutional protection.²⁷

NCAA ruled ineligible a student-athlete who signed an invalid contract to play the same professional sport that he wished to play in college).

20. *Parish v. Nat'l Collegiate Athletic Ass'n*, 506 F.2d 1028, 1034 (5th Cir. 1975) (a student-athlete who did not meet the minimum GPA requirement to participate in NCAA sports did not cite a violation of 14th Amendment due process).

21. *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975) (rejecting the plaintiff hockey player's claim that NCAA rules deeming him ineligible violated the antitrust laws).

22. *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 366 (D. Ariz. 1983).

23. *Graham v. Nat'l Collegiate Athletic Ass'n*, 804 F.2d 953, 957 (6th Cir. 1986) (holding that NCAA rulemaking was not done under color of state law because the promulgation of rules was not serving a function that traditionally and exclusively was a prerogative of the state).

24. *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978).

25. *Colo. Seminary (Univ. of Denver)*, 570 F.2d at 320.

26. *Colo. Seminary (Univ. of Denver)*, 417 F. Supp. at 892.

27. *Colo. Seminary (Univ. of Denver)*, 570 F.2d at 321.

The court relied on a case involving high school athletics, *Albach v. Olde*, noting that while there were differences between high school and college programs, including the possibility of college athletics scholarship arrangements, it did not find that to be a true distinction between the programs but only a difference in degree.²⁸ It said:

The fundamental positions are the same, the goals are the same, the stakes are pretty much the same. The same relationship also exists between the primary academic functions of the schools in each category and the athletic programs . . . In each, the athletic program is very important, as are the many other diverse functions, programs and activities not within the academic core.²⁹

The court then quoted the following passage from *Albach*:

The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement.³⁰

The Tenth Circuit went on to state that, “The ‘educational process’ is indeed a bundle of diverse situations to which students are subjected by varying degrees of

28. *Id.*

29. *Id.*

30. *Id.*

compulsion, both officially and by their peers.”³¹ Students at a public institution have a constitutionally protected property right in their continued attendance, requiring due process before they can be dismissed or suspended.³² According to the Supreme Court opinion in *Goss v. Lopez*, “if one stick in the bundle is removed, it does not necessarily mean that a constitutionally protected right of a student has thereby been violated.”³³

The most recent case to consider if participation in intercollegiate athletics has constitutional protection as a property or liberty interest is *NCAA v. Yeo*.³⁴ Joscelyn Yeo was a world-class swimmer from Singapore who was an intercollegiate athlete at the University of California Berkeley (Berkeley).³⁵ When her coach left to take a position at the University of Texas at Austin (Texas), Yeo transferred there to be able to continue swimming for that coach.³⁶ Under the NCAA 2001-2002 Division I Manual, as a transfer student-athlete, Yeo could only compete at Texas that year if Berkeley agreed to waive the NCAA rule which prohibited student-athlete transfers from one NCAA four-year school to another from competing for one year in NCAA competition.³⁷ Berkeley declined to agree to the waiver.³⁸

Thereafter, Yeo represented her country in the 2000 Olympics and had such popularity as an athlete that she was selected to carry her country’s flag in the opening procession.³⁹ When Yeo returned to classes at Texas, the school miscalculated when the one year expired and allowed her to

31. *Id.*

32. *Goss v Lopez*, 419 U.S. 565, 575 (1975).

33. *Colo. Seminary (Univ. of Denver)*, 570 F.2d at 321.

34. *Nat’l Collegiate Athletic Ass’n v. Yeo*, 171 S.W.3d 863 (Tex. 2005).

35. *Id.* at 865.

36. *Id.* at 866.

37. 2001-2002 NAT’L COLLEGIATE ATHLETIC ASS’N DIVISION I MANUAL §14.5.5.1 (2001).

38. *Yeo*, 171 S.W.3d at 866.

39. *Id.* at 869.

compete in NCAA swimming events prematurely.⁴⁰ Berkeley noted her presence at one of those events and complained to the NCAA, which ruled that Yeo must sit out four events as a consequence.⁴¹ Texas then incorrectly counted certain events towards the four, which would have allowed Yeo to participate in the NCAA 2002 Division I women's swimming and diving championship.⁴² Berkeley again objected, and the NCAA agreed.⁴³

Yeo was permitted to participate in a telephone appeal to an NCAA committee of the decision that she could not compete in the NCAA championship.⁴⁴ The committee upheld the staff decision.⁴⁵ Yeo then hired an attorney who was able to persuade Berkeley to waive the one-year restriction, but the NCAA did not change its decision.⁴⁶ She then sued Texas in state court two days before the NCAA championship and successfully received a temporary restraining order allowing her to compete based on the court's decision that she had not been given a due process hearing by the school before it declared her ineligible.⁴⁷ Yeo alleged this was required by her property and liberty rights in her special and unique reputation as an Olympic swimmer and the most decorated athlete ever in Singapore, and the negative impact the disqualification would have on the lucrative endorsement deals she would otherwise be able to receive based on that reputation.⁴⁸

The day after the temporary restraining order was issued, the NCAA attempted to intervene in the case, saying that because the integrity of its championship was at stake, it

40. *Id.* at 866.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 867.

48. *Id.* at 868-69.

was a necessary party to the litigation.⁴⁹ Yeo contested the intervention, and the court struck the NCAA as a party.⁵⁰ An attempt the same day by the NCAA to get a writ of mandamus from the Texas Court of Appeals to allow it to intervene failed.⁵¹ Yeo was allowed to compete in the championship.⁵²

Six months later, after a bench trial, Texas was permanently enjoined from declaring Yeo ineligible in the future without affording her due process and from punishing her for her participation in past competitions, including the championship.⁵³ Yeo was also awarded her attorneys' fees.⁵⁴ Texas appealed the judgment, and the NCAA appealed the order striking its intervention.⁵⁵

The Supreme Court of Texas carefully examined Yeo's claims that she was different than the general student-athlete because of her stellar reputation as an athlete. It noted that she had acknowledged that the United States Supreme Court had held that reputation alone is not a protected liberty or property interest deserving of 14th Amendment due process before it is impacted,⁵⁶ and that she had conceded that a student-athlete with a lesser reputation or less certain of her earning potential would not have the same right to participate in intercollegiate athletics.⁵⁷ In other words, Yeo argued that there were traditional amateur athletes and then there were superstar amateur athletes, who have greater earning potential and better chances of becoming professional athletes, and therefore deserve more rights.⁵⁸

49. *Id.* at 867.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 868 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

57. *Id.*

58. *Id.*

The court disagreed with Yeo. It explained that it was the character of the interest, its nature, not the degree or the weight of that interest that is determinative of whether it merits constitutional protection.⁵⁹ Regarding Yeo's alleged reputational interest, the court noted that a stellar reputation for athletic prowess is not categorically different in the eyes of the law from a modest one and that the loss of either to its owner can be substantial.⁶⁰ Regarding Yeo's alleged property interest, the court reasoned that while student-athletes remain amateurs, future expectations are too speculative to be actual legal entitlements.⁶¹

Significant for the NCAA's position on the nature of amateurism, the court declined an effort by Yeo to equate an interest in graduate education, which the court had previously found to implicate a protected liberty interest, with an interest in intercollegiate athletics.⁶² This is consistent with the view held by faculty from the NCAA's earliest days that amateur college athletics are ancillary to and supportive of the educational mission of the institution and not independent of it.⁶³

The fact that the NCAA has strenuously fought against making participation in college athletics a right rather than a privilege does not mean that it can ignore the realities of the public expectations that student-athletes will be treated fairly when the actions of their schools come before the NCAA. The NCAA tries to ensure that the basic elements accorded to a student in a disciplinary hearing on a public institution's

59. *Id.* at 869.

60. *Id.*

61. *Id.* at 870.

62. *Id.*

63. Note that the court chided the lower courts for their intervention in this question of student-athlete eligibility, saying that such judicial intervention "often does more harm than good." *Id.* (quoting *In re Univ. Interscholastic League*, 20 S.W.3d 690, 692 (Tex. 2000)). This admonishment will be discussed further in this Article as one that more courts should take to heart.

campus are also present when a member institution's actions are reviewed to determine if an NCAA rule has been violated. Those key elements of adequate notice of the violation and an opportunity to be heard before an impartial decision-maker are critical to the courts' willingness to continue to defer to NCAA rule interpretations and judgments on amateurism. But just as public institutions are not required to import all the procedural protections that would be present in a criminal proceeding into a campus disciplinary hearing, the NCAA likewise should not be required to include all of those protections into its administrative hearings regarding its own rules about who is an amateur.

V. THE OBLIGATION TO ACT REASONABLY AND
NOT ARBITRARILY OR CAPRICIOUSLY

Courts have traditionally deferred to voluntary associations like the NCAA in the making and enforcing of their own rules and have been reluctant to interfere in their internal affairs, except in the most limited of circumstances.⁶⁴ Indeed, one court said that, "In general, members of such associations should be allowed to 'paddle their own canoe' without unwarranted interference from the courts."⁶⁵ Because student-athletes and others do not like the courts' deference to the administrative decisions of the NCAA, various ways have been attempted to find justification for their intervention. One has been to characterize the NCAA as a state actor or quasi-state actor in states where such entities can have their decisions reversed if entered into arbitrarily or capriciously.⁶⁶

64. *See* Bloom v Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. Ct. App. 2004).

65. Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001).

66. *Id.* at 83 n.9 (citing Ind. High School Athletic Ass'n v. Carlberg by Carlberg, 694 N.E.2d 222, 230-32 (Ind. 1997)).

Such an attempt was made in *National Collegiate Athletic Ass'n v. Lasege*,⁶⁷ in which an ineligible basketball player alleged that the NCAA was like a state high school association and therefore NCAA decisions should be subject to review for arbitrariness and capriciousness. The court appeared to seize that as a reason for judicial intervention and failed to conduct a thorough analysis of the nature of the NCAA. A better analysis of the character of the NCAA was made by the Supreme Court in *National Collegiate Athletic Ass'n v. Tarkanian*,⁶⁸ in which the Court held that the NCAA is not a state actor for purposes of assessing its actions regarding a college basketball coach. The Court's decision in *Tarkanian* has subsequently been applied in situations involving NCAA decisions assessing a student-athlete's amateurism status.⁶⁹

Because a court's ability to apply the arbitrary and capricious standard varies depending on state law, and because the NCAA as an unincorporated entity can be sued in every jurisdiction in which it has a member institution, it is most prudent for the NCAA to have a rational basis for its rule and decision-making. This helps protect the amateurism rules against challenges in both antitrust and tort law—the former because the courts have declined to apply antitrust law to amateurism rules finding that NCAA regulations designed to preserve amateurism and fair competition are reasonable restraints under the rule of reason test and that they lack an anticompetitive purpose.⁷⁰

The courts may not, however, use a decision as to whether an amateurism rule is the best means for achieving a

67. *Id.*

68. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 195-96 (1988).

69. *See* *Matthew v Nat'l Collegiate Athletic Ass'n*, 79 F. Supp. 2d 1199, 1207 (E.D. Wash. 1999).

70. *See* *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 366 (D. Ariz. 1983); *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1153-54 (5th Cir. 1977).

desired goal as a standard of review. As the Ninth Circuit Court of Appeals said, “It is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules.”⁷¹ That court also said that potential hardships created by such rules do not make the rules irrational or unrelated to their goals.⁷² The Oklahoma Supreme Court has said that in the absence of evidence of fraud or collusion or that a voluntary association acted unreasonably, arbitrarily, or capriciously toward one of its members, a voluntary association ought to be able to enforce its rules without interference by the courts.⁷³ The test that is supposed to be used should be whether a rule furthers some legitimate purpose of the organization.⁷⁴

Despite all of these admonitions, trial courts find it almost irresistible to second-guess amateurism decisions by the NCAA. Often the student-athlete plaintiff has an appealing persona and story to tell, and the judge finds it difficult to rule that a “bureaucratic” decision by the NCAA should be entitled to deference. Such was the case involving Muhammed Lasege, who came from Nigeria via Canada to play intercollegiate men’s basketball at the University of Louisville (Louisville).⁷⁵

Louisville disclosed to the NCAA that Lasege had played professional basketball in Russia before coming to the United States, including signing contracts and receiving benefits from a professional team.⁷⁶ However, it requested that Lasege be considered an amateur and eligible to play for the school due to his ignorance of NCAA rules and other mitigating circumstances.⁷⁷ The NCAA reviewed the request,

71. *Shelton v. Nat’l Collegiate Athletic Ass’n*, 539 F.2d 1197, 1198 (9th Cir. 1976).

72. *Id.*

73. *Mahan v Agee*, 652 P.2d 765, 767 (Okla. 1982) (citing *Okla. Secondary Sch. Activities Ass’n v. Midget*, 505 P.2d 175 (Okla. 1972)).

74. *Shelton*, 539 F.2d at 1197.

75. *Nat’l Collegiate Athletic Ass’n v. Lasege*, 53 S.W.3d 77, 80 (Ky. 2001).

76. *Id.* at 81.

77. *Id.* at 80.

found that Lasege had violated NCAA amateurism guidelines, and refused the request.⁷⁸ Lasege then filed suit in Kentucky state court seeking an injunction permitting him to play and preventing any NCAA repercussions against him or the school for doing so.⁷⁹

The trial court found that there were mitigating circumstances that the NCAA should have weighed differently in determining whether Lasege was eligible to play basketball at Louisville, including Lasege's economic hardships in Nigeria and possible deportation from the United States if he was ruled not to be an amateur.⁸⁰ The court issued a temporary injunction allowing him to compete as an amateur as requested by Lasege and Louisville.⁸¹

The Supreme Court of Kentucky, in reviewing and vacating the trial court's decision, which had been upheld by the Kentucky Court of Appeals, chided the trial court for substituting its judgment for that of the NCAA.⁸² The court said that the standard to be applied for a private, voluntary association should be whether the rules are clearly erroneous, meaning unsupported by substantial evidence.⁸³ Further, the court held:

The NCAA's eligibility determinations are entitled to a presumption of correctness—particularly when they stem from conceded violations of NCAA regulations. Although we recognize that Lasege's mitigation evidence is relevant to review of the NCAA's determination, we believe the trial court simply disagreed with the NCAA as to the weight

78. *Id.* at 80-81.

79. *Id.* at 81.

80. *Id.* at 82.

81. *Id.*

82. *Id.* at 84.

83. *Id.*

which should be assigned to this evidence. Accordingly, we believe the trial court abused its discretion when it found that Lasege had a high probability of success on the merits of his claim.⁸⁴

The court also criticized the trial court for considering only the equities of one party in determining Lasege's likelihood of success on the merits of his case, explaining that while the NCAA has no identifiable interest in the arbitrary application of its regulations to the detriment of a student-athlete, it certainly has an interest in the proper application of those regulations to ensure competitive equity.⁸⁵

The court stated:

The trial court could not possibly have weighed the NCAA's interests, because it did not believe the NCAA had any interest for it to consider. Nor does it appear that the trial court gave any consideration to the possible injury to those programs and student-athletes who, because of the temporary injunction, would compete against a U of L Men's Basketball team with Lasege on the roster.⁸⁶

This point by the court is an important one. There are many student-athletes who play by the rules and who forgo professional opportunities so that they can compete in NCAA sports. It is unfair to those who are not present in the courtroom to be forgotten or overlooked when a case like *Lasege* is tried. The NCAA, as the guardian of amateur college athletics, has to be the one looking out for their best interest and that of collegiate sport.

84. *Id.* at 85 (emphasis added).

85. *Id.* at 85-86.

86. *Id.* at 86.

VI. GOOD FAITH AND FAIR DEALING

Student-athletes have a difficult time justifying a court's interference in NCAA amateur matters when they bring litigation against the NCAA in a jurisdiction that does not allow a court to review the actions of a private, voluntary association under the arbitrary and capricious standard.⁸⁷ One mechanism that has been used to achieve the same result is to allege that there is a contract between the NCAA and a member school to deal fairly, and a student-athlete is a third-party beneficiary of that contract. The Colorado Court of Appeals took this approach in *Bloom v. National Collegiate Athletic Ass'n*.⁸⁸

Jeremy Bloom was a world-class, Olympic mogul skier who wanted to play football for the University of Colorado (Colorado).⁸⁹ He had accepted product endorsements and paid entertainment opportunities and contracted to model clothing for a clothing manufacturer.⁹⁰ On his behalf, Colorado requested the NCAA to waive its rule that would have deemed Bloom not to be an amateur due to these commercial activities.⁹¹ The NCAA declined, and Bloom filed suit against the NCAA seeking an injunction declaring the NCAA restrictions inapplicable to him.⁹²

In the suit, Bloom alleged that he was a third-party beneficiary to the contract between the NCAA and Colorado and therefore was entitled to its enforcement.⁹³ Bloom also claimed that the NCAA's restrictions on his commercial activities were arbitrary and capricious.⁹⁴ The trial court denied

87. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 624 (Colo. Ct. App. 2004).

88. *Id.*

89. *Id.* at 622.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

the injunction, and Bloom appealed to the Colorado Court of Appeals.⁹⁵

In its decision, the appellate court discussed the *Lasege* opinion that the NCAA could be considered a quasi-state actor under Kentucky law and its actions could therefore be reviewed by a court in that state as to whether they were arbitrary and capricious.⁹⁶ The appellate court felt, however, that the articulated basis for that analysis by the Kentucky court lacked clarity and therefore declined to use it as a basis for review of the NCAA's actions.⁹⁷

However, the *Bloom* court ended up in the same place. The appellate court determined that Bloom was a third-party beneficiary to a contract between the school and the NCAA.⁹⁸ As such, he had standing to assert a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members.⁹⁹ Under Colorado law, that duty requires a party vested with contractual discretion to exercise that discretion reasonably, not arbitrarily or capriciously.¹⁰⁰ The appellate court was therefore able to use that standard in reviewing the NCAA's actions involving Bloom.

The appellate court supported the trial court's finding that Bloom had provided inadequate evidence that his commercial activities were only related to his skiing and not to his football prowess.¹⁰¹ It also found a rational basis for the NCAA's commercialism rule, which creates a clear line of demarcation between intercollegiate athletics and professional sports.¹⁰²

95. *Id.* at 623.

96. *Id.* at 624.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 627.

102. *Id.* at 626.

The appellate court went on to uphold the trial court's rejection of Bloom's argument that the commercial endorsement prohibition by the NCAA for amateur athletes was inconsistent with the NCAA's position on schools' ability to make commercial deals regarding such things as requiring student-athletes to wear certain logoed clothing and equipment while engaged in intercollegiate competition.¹⁰³ Those endorsement deals, the trial court held, and the appellate court agreed, were distinguishable from Bloom's situation because the receipt of such money by NCAA institutions had a rational basis in economic necessity in that the financial benefits inured not to any single student-athlete but to the schools themselves and thus to all student-athletes including those who participated in sports that generated no revenue.¹⁰⁴

VII. WHAT THESE DECISIONS MEAN FOR THE FUTURE OF AMATEURISM AT THE NCAA

The concept of the collegiate model of amateurism is not fixed in stone, but is organic. Aspects of it will change and evolve as society's values change and evolve. However, it is best described and defended when its core values remain the ones of the faculty who decided long ago that athletics should be part of the higher education model in the United States, keeping true to the concept that the mind and the body both should be developed in an educational system and that important societal values can be learned on the playing field as well as in the classroom.

The *Bloom* court endorsed this when it quoted former University of Michigan President James J. Duderstadt as to the relationship of amateur intercollegiate athletics and the academy as follows:

103. *Id.* at 627.

104. *Id.*

College sports provided an important opportunity for teaching people about character, motivation, endurance, loyalty and the attainment of one's personal best—all qualities of great value in its citizens. In this sense, competitive athletics were viewed as an extracurricular activity, justified by the university as part of its ideal objective of educating the whole person.¹⁰⁵

For the NCAA, this means that it must continue to tie its rules and decision-making to the educational values of its member schools. It must endeavor to articulate clearly how a proposed rule or interpretation of that rule not only advances competitive equity, but also the educational mission of its institutions. This will provide a clear path for courts to follow when sustaining NCAA decisions about where to draw the line between amateur and professional sports.

VIII. WHAT ABOUT PAYING STUDENT-ATHLETES?

Critics of the NCAA model of collegiate amateurism constantly raise the question of paying student-athletes. Everyone else in the system — coaches, athletic directors, conference commissioners, sporting goods manufacturers, and broadcasters — makes big money off of the talent of these young people. Why should the student-athletes not get some of it themselves?

Usually, this argument is made for football players and men's basketball players in major athletic programs, as they are generally the ones who might be financially successful as professional athletes.¹⁰⁶ However, Title IX does not allow

105. *Id.* at 626.

106. Note, however, that only a tiny fraction of collegiate football players (1.7%) and a similarly tiny fraction of collegiate men's basketball players (1.2%) will be drafted to play professionally. Estimated Probability of

schools to only pay male student-athletes and not a corresponding number of female student-athletes, instead obligating schools to treat their male and female student-athletes the same in regard to the amount of financial support that can be given to them.¹⁰⁷

Next, almost all intercollegiate athletic programs lose money.¹⁰⁸ Only a small fraction of Division I programs have greater revenue than expenses.¹⁰⁹ Most are supported by student fees or distributions from the school's budget.¹¹⁰ And those parts of the athletic program that do make money support those sports that do not, although that is a struggle in these difficult economic times.¹¹¹

This is an important aspect of college sports that is not well understood by those outside the academy but is very familiar to those within it, as it is consistent with the university model of financing. Colleges do not allocate money only to the academic departments in which students are most likely to learn a professional skill or which have the courses that appeal to the largest number of students. Instead, revenues are

Competing in Athletics Beyond the High School Interscholastic Level, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting/Probability+of+Going+Pro> (last visited Nov. 7, 2011).

107. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2006); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. § 86 (2010).

108. July 27 - August 1, 2009: Six Part Series: College Sports and Money, KNIGHT COMMISSION, http://knightcommission.org/index.php?option=com_content&view=article&id=316:six-part-series-college-sports-and-money&catid=1:content&Itemid=11 (last visited Oct. 1, 2011).

109. *Id.*; *see also* Gary Brown, *Latest Revenue and Expense Data Reveal Effects of the Slumping Economy*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 17, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/August+latest+news/Latest+revenues+and+expense+data+reveal+effects+of+slumping+economy>.

110. College Sports and Money, *supra* note 108.

111. Brown, *supra* note 109.

distributed in a way that ensures a broad array of liberal and fine arts program offerings that are an essential part of a university. To do otherwise would transform colleges and universities into trade schools.

In the same way, college athletic departments do not only offer those sports that produce revenue but instead see value in having a broad array of sports opportunities to meet the needs of a diverse student body. Just as in the greater academic community some programs with greater enrollment support those with less, the revenue makers in a college athletic program support those sports that do not.

Schools also continue to support athletic programs that do not make money in any sport at all for their educational value and because of the perceived tangible and intangible benefits they bring to the campus environment, such as alumni and booster donations, a sense of camaraderie and pride on the campus, support by the local community for its activities, and name recognition leading to potentially greater admission applications and successful recruitment efforts. There is not a lot of extra money, though, if any, that could be distributed to student-athletes in the vast majority of programs.

Even if these hurdles did not exist or could be overcome, to pay student-athletes would require a fundamental shift in philosophy away from that established in the NCAA's earliest days. Schools would have to decide that college sports should not be played for the educational values that they instill in young people, but instead for money. Intercollegiate athletics would no longer be an integral part of the educational institution, but a separate and independent arm of it. College sports would likely become something like third-rate minor league teams of professional franchises, and they would lose their audience and meaning in academic life.

Given that the money that does come into the athletics department does not go to paying student-athletes, what is the fair and appropriate way to recognize the skills and talents that they are bringing to their sport and contributing to the welfare

of the campus community? The answer must be to support them in their educational endeavors and ensure that they are connected to and integrated into the educational life of the school. To fail to do this is to act inconsistently with the fundamental values of the NCAA and its founders. The NCAA's initial and continuing academic eligibility standards are based on the goals of making sure student-athletes are prepared for the rigors of a college education and ensuring that student-athletes have the aid they might need to continue to progress in their studies, while meeting the demands of their sport. This is one of the most important functions of the NCAA.

In sum, for the collegiate amateur model to be sustained, it must add value to the educational mission of the institution. It must be centered on the student-athlete and invested in their education. To do otherwise would be to abandon a fundamental purpose of the NCAA and leave its position on amateurism vulnerable and subject to court intervention.

LET'S MAKE A DEAL: EXAMINING THE CONTENTIOUS RELATIONSHIP BETWEEN THE NATIONAL HOCKEY LEAGUE AND KONTINENTAL HOCKEY LEAGUE

Ross Appel^{*}

Don't kill the goose that lays the golden eggs. For years, the National Hockey League (NHL) has reaped great benefits by luring Russia's top hockey talent to the United States. When the NHL's transfer agreement with Russia lapsed in 2005,¹ most saw it as a winning proposition for the NHL. The NHL's teams would pay absolutely nothing in exchange for some of the world's best hockey players. With Russian teams suddenly receiving absolutely nothing upon losing their talent, however, their budgets for the future development of talent would logically suffer. In turn, those smaller budgets would lead to less ready-to-contribute talent and thus a smaller talent pool from which the NHL might choose. Quite simply, the golden eggs would be no more.

This Article will discuss the need for an agreement to be reached and honored between the NHL and its Russian counterpart, the Kontinental Hockey League (KHL). While lawsuits and back-and-forth bickering between the two have increased during the last three years, it is the future threats to

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1. Kevin Allen, *Russia Passes on NHL Transfer Deal*, USA TODAY, Aug. 17, 2005, at 3C; see *Europeans Create Transfer Deal With NHL, Minus Russia*, TAIPEI TIMES, Aug. 18, 2005, at 19, available at <http://www.taipeitimes.com/News/sport/archives/2005/08/18/2003268260>.

the viability of the NHL that inspire this Article. Thus, this Article will discuss the history of interleague litigation and explore the best available alternatives to avoid protracted future litigation amid the leagues and their member teams. This Article will also discuss whether the KHL can legitimately market itself as a league that competes directly with the NHL, and if the NHL should truly worry about such competition.

Part I sets the stage for the modern relationship between the leagues by rehashing the histories of hockey in the former Soviet Union and the nearly 100 years of the NHL. Part II proceeds to examine the legal action that has arisen as a result of the contentious relationship between the two leagues. Part III discusses proposed provisions to a potential transfer agreement that may prove agreeable to both sides. It will focus on those provisions that meet the most scrutiny and others that could help alleviate the controversial nature of international transfers. Finally, this Article will analyze the NHL's Collective Bargaining Agreement (CBA) and its role in preventing the KHL from attaining the transfer system it prefers.

I. HOW WE GOT HERE

Since the mid 1990s, NHL teams were free to sign Russian hockey players, including those playing under contract for Russian teams, in exchange for a predetermined transfer fee. The fee was determined in a transfer agreement with the International Ice Hockey Federation (IIHF) and paid as compensation to the team from which the player was taken.² When the KHL replaced the recently disbanded Russian Super League in 2008, things changed. The KHL intends to be much more than a feeder league to the NHL; it plans to, and (according to its statements in the media) expects to, compete directly with the NHL as the world's most powerful hockey

2. *See id.*

league.³ With new goals came new methods. Fed up with losing its best talent to the NHL, Russian officials refused to sign a 2007 transfer agreement that would extend the previously used transfer rules for four more years.⁴ The KHL was ready to compete with the NHL rather than be one of its strongest developmental leagues.

A. Russian Hockey: A Brief History

Ice hockey came to the Soviet Union by way of Canada in the 1930s, and less than two decades later (1946), the USSR's first organized hockey season took place. Shortly thereafter, the USSR was a world hockey power.⁵ The Soviets entered their first World Hockey Championships in 1954, the first international competition they participated in, and promptly upset the Canadians 7-2 to claim their first championship.⁶ Two years later, the Soviets took the gold medal at the Winter Olympics.⁷ Under Anatoly Tarasov, a Soviet coaching legend considered the "Father of Russian

3. Former NHL great Vyacheslav Fetisov, among the first group of Russian players in the NHL, explained that "[i]f we (the KHL) continue this way then within five years we will be able to compete with the National Hockey League." See *KHL to Match NHL in Five Years*, RUSSIAN TIMES (May 15, 2009), <http://rt.com/sport/hockey/khl-to-match-nhl-in-five-years/?fullstory>.

4. *Russia Refuses to Sign Transfer Agreement with NHL*, USA TODAY (May 9, 2007), http://www.usatoday.com/sports/hockey/nhl/2007-05-09-russia-transfer-agreement_N.htm.

5. AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS, VOL. 1 1366 (1997).

6. E.M. Swift, *The Original Miracle on Ice*, SPORTS ILLUSTRATED, Nov. 29, 1999, at 102; Interview with Robert Edelman, *PBS Red Files: Episode 2 Soviet Sports Wars* (PBS television broadcast Oct. 4, 1999) (transcript available at http://www.pbs.org/redfiles/sports/deep/interv/s_int_robert_edelman.htm).

7. Interview with Robert Edelman, *supra* note 6.

hockey,”⁸ the Soviets developed a tactical style – based on crisp passing and skating – which differed greatly from the Canadians’ physical and “primitive” style of play.⁹ Beginning with their gold medal in the 1956 Winter Olympics, the Soviets medaled in ten consecutive Olympic tournaments, a streak that included eight gold medals, including gold in the 1992 Winter Olympics won by the Unified Team of 15 former Soviet republics.¹⁰

Meanwhile, the Soviet League was dominated for nearly 50 years by the Red Army’s CSKA Moscow team; it won the league’s championship 32 times in 46 years.¹¹ After the fall of the Soviet Union, the IHL replaced the Soviet League, however, the Russian Super League (RSL) replaced it after just four seasons.¹² The RSL lasted twelve seasons and collected millions of dollars from NHL teams in transfer payments as it functioned, in essence, as a feeder league for the NHL.¹³

The KHL formed in March 2008, with the purpose of promoting “the successful development of hockey in Russia and other countries in Europe and Asia.”¹⁴ While the league has only completed three seasons, it is already considered

8. Ronald Sullivan, *Anatoly Tarasov*, 76, *Innovative Coach of Hockey in Soviet Union*, N.Y. TIMES, June 24, 1995, §1, at 9.

9. *Id.*; see Jon A. Dolezar, *Q&A with Vladislav Tretiak*, SI.COM (Sept. 27, 2002), http://sportsillustrated.cnn.com/hockey/news/2002/09/27/tretiak_interview/.

10. Jamie Fitzpatrick, *Olympic Hockey Medal Winners: All-Time Results of Men's Olympic Hockey*, ABOUT.COM, http://proicehockey.about.com/od/olympichockey/a/olympic_medals.htm (last visited Jan. 27, 2011).

11. Lisa Crandall, *Russians on Ice: A Brief Overview of Soviet and Russian Hockey*, THE SCH. OF RUSSIAN AND ASIAN STUD. (Dec. 3, 2009), http://www.sras.org/russian_ice_hockey.

12. *Id.*

13. *See id.*

14. About the KHL, KHL.RU, <http://en.khl.ru/official/22007/> (last visited Feb. 4, 2011).

Europe's strongest hockey league.¹⁵ A majority of the league's players hail from the former Soviet Union.¹⁶ The league restricts the amount of foreign players on a team's roster to five and, to encourage the development of Russian goaltenders, restricts the number of games that a foreign goaltender may play.¹⁷ During the KHL's second season, there were 35 former NHL players on the rosters of KHL teams, a sign to some that the KHL intended to compete directly with the NHL for talent.

B. National Hockey League: A Brief History

The NHL formed in 1917, following the demise of the National Hockey Association.¹⁸ Initially a league of five teams, the first NHL season saw only three teams compete for its first championship title after one team lost its arena to a fire and another did not play a game until the league's third season.¹⁹ After struggling to remain afloat for a handful of years, the NHL grew into the world's most powerful and talent-laden hockey league.²⁰

During much of the 1940s, 50s, and 60s, the NHL was comprised solely of six teams now known as the "Original Six."²¹ While the Original Six were not all charter members of the NHL (only Montreal and Toronto were), all six were formed during the league's first ten years and predate the rest

15. *KHL to Match NHL in Five Years*, RUSSIAN TIMES (May 15, 2009), <http://rt.com/sport/hockey/khl-to-match-nhl-in-five-years/?fullstory>.

16. Bill Meltzer, *SKA, Metallurg lead pack in Russia's KHL*, NHL.COM (Dec. 9, 2009, 10:26 AM), <http://www.nhl.com/ice/news.htm?id=509204>.

17. *Id.*

18. BRIAN MCFARLANE, BRIAN MCFARLANE'S HISTORY OF HOCKEY 15 (Susan M. McKinney ed. 1997) [hereinafter MCFARLANE].

19. *Id.* at 16.

20. *See id.* at 15, 25-27

21. The original six consists of the Boston Bruins, Chicago Blackhawks, Detroit Red Wings, Montreal Canadiens, New York Rangers and Toronto Maple Leafs. *See* HERB ADDISON, ET AL., THE NEW YORK TIMES GUIDE TO ESSENTIAL KNOWLEDGE 888 (2d ed. 2007).

of the teams currently in the NHL. The NHL added eight franchises in the late 1960s and then faced legitimate competition from an upstart league known as the World Hockey Association (WHA).²² The WHA lured talent from the NHL and gained credibility by proving that it could compete with the NHL product in terms of talent. The NHL responded quickly by adding four more franchises.²³ The WHA perhaps grew too quickly for its own good in its attempt to compete with the NHL, as it folded in 1979 and four of its teams joined the NHL.²⁴ The WHA left a lasting legacy beyond its four teams, however, by making the acquisition of European talent fashionable.²⁵

Player migration from the Soviet Union began during the late 1980s. Besides Sergei Pryakhin being granted permission by Soviet authorities to bring his trade to the NHL, other Soviet nationals had to defect to avoid the Soviet Union's iron curtain.²⁶ NHL teams began to draft Soviets much more often in the late 1980s and into the 90s as it became apparent that those players would increase the league's talent pool.²⁷ Since 1990, the NHL has expanded to 30 teams and suffered through two work stoppages, the second of which caused the cancellation of an entire season. Despite a market that is not what it was before labor strife, the NHL remains the hockey world's gold standard in terms of talent.

22. See SCOTT SURGENT, *THE COMPLETE HISTORICAL AND STATISTICAL REFERENCE TO THE WORLD HOCKEY ASSOCIATION, 1972-1979* 2 (Xaler Press 2004) (1995) [hereinafter SURGENT].

23. MCFARLANE, *supra* note 18, at 116-17, 119.

24. SURGENT, *supra* note 22, at 16.

25. See *id.* at 8.

26. Randy Harvey, *On Thin Ice: Soviet Star Defects to Play in NHL, But His Status Remains Questionable*, L.A. TIMES, May 8, 1989, at Sports 1.

27. See NHL Entry Draft: Hockey in Europe, NHL.COM, <http://www.nhl.com/futures/europe.html> (last visited Sept. 24, 2011).

C. Can the KHL Compete?

Many people believe that the KHL cannot compete with the NHL simply because the NHL has pedigree and is therefore inimitable. Such a belief hinges on the thought that the KHL is just another start-up league with grand, yet unrealistic and unattainable, plans to compete with the best in the world. The KHL, however, is backed financially by Gazprom, the world's largest natural gas producer, and Norilsk Nickel, the world's top producer of nickel and palladium.²⁸ KHL spokesman Alexander LaPutin went as far as to call it a "state program."²⁹ With such giant sponsors and a government that refuses to allow the league to fail, the KHL has plenty of resources to lure some big names to Russia in its attempt to shift international hockey's balance of power.

Although the KHL's funds are limited, vacillate depending on the energy market, and are vulnerable to the world's economic crisis, money is still the KHL's primary advantage. The KHL and its teams are willing and able to dish out giant contracts to attract big name players that bring credibility to the league. With such former NHL stars as Jaromir Jagr, Sergei Federov, Alexei Yashin, Richard Zednik and Pavol Demitra (among others) playing in Russia, the KHL captured the attention it was seeking. It is notable, though, that while these are marquee players, they were all past their prime playing days when they transitioned to the KHL. Indeed, there are no claims that the presence of these players in Russia proved that it was on par with the NHL; these things take time. The top hockey talent in the world remains in the NHL. Although, as more marquee players head to Russia for one last payday, the talent level rises. More importantly, Russians can watch their childhood heroes play in a league closer to home.

28. Talis Archdeacon, *Russian League Mounts Challenge to NHL*, USA TODAY (Sept. 11, 2008), http://www.usatoday.com/sports/hockey/2008-09-11-1215143669_x.htm.

29. *Id.*

In essence, these players are an advertisement for a league that is hopeful that future stars will shun the NHL in favor of the KHL, following in the footsteps of their childhood heroes.

While it may take large contracts to lure players over initially, the KHL has much to offer. Reports are numerous that Russian teams have offered tax-free contracts to attract players overseas.³⁰ Given the Government's involvement in the league, it is easy to imagine that such an incentive can be offered. Even without tax-free contracts, Russia's income tax rate is a mere 13 percent, less than half of what the players would be taxed in North America.³¹ Furthermore, the KHL offers its homegrown talent something of great value that the NHL cannot: the comfort of home. If the KHL can legitimately compete talent wise with the NHL, the allure of home is very likely to be an enticement that many Russians cannot deny.

Many point to evidence of early KHL struggles to suggest that it cannot sustain success and mount a challenge against the NHL. KHL President Alexander Medvedev admitted that some players were not paid on time in the league's first season.³² Most recently, the KHL's fourth season

30. See Greg Wyshynski, *Why Evgeni Nabokov Turned His Back on the NHL*, YAHOO! SPORTS (July 8, 2010, 12:53 PM), http://sports.yahoo.com/nhl/blog/puck_daddy/post/Why-Evgeni-Nabokov-turned-his-back-on-the-NHL?urn=nhl-254608; James Mirtle, *How KHL Clubs Woo NHL Free Agents: Gerber Signs a Tax-free, Rent-free Contract*, FROM THE RINK (July 22, 2009, 2:34 PM), <http://fromtherink.sbnprivate.com/2009/7/22/958088/how-khl-clubs-woo-nhl-free-agents>; Dan Furey, *The Latest Defection: Jiri Hudler to the KHL*, SPORTS AGENT BLOG (July 10, 2009), <http://www.sportsagentblog.com/2009/07/10/the-latest-defection-jiri-hudler-to-the-khl/>.

31. See NALOGOVYI KODEKS ROSSIISKOI FEDERATSII [NK RF] [Tax Code] art. 224(1) (Russ.); NALOGOVYI KODEKS ROSSIISKOI FEDERATSII [NK RF] [Tax Code] art. 11(2) (Russ.) (explaining that individuals are considered residents if they reside in Russia for at least 183 days of the year.).

32. Pierre LeBrun, *KHL Still Standing; Should NHL Worry?*, ESPN (Oct. 21, 2009), http://sports.espn.go.com/nhl/columns/story?columnist=lebrun_pierre&id=4582318; see also Jim Matheson, *Money Problems Hit*

began with tragedy when an airplane carrying Lokomotiv Yaroslavl, a consistent championship contending team, crashed shortly after taking off on September 7, 2011.³³ The crash took the lives of all 44 players and coaches on board.³⁴ Lokomotiv will not play in the KHL's fourth season, however, plans to rebuild the team and keep hockey alive in the Russian city of Yaroslavl are being put in place by team and league executives.³⁵ The KHL has the resources to overcome the tragedy and continue to build momentum. The NHL survived the 2004-05 lockout (discussed in greater detail later), the destruction of an arena to a fire, and the loss of the Stanley Cup Finals in its first few seasons. The KHL should not be overlooked due to its rocky start.

i. Russian Soccer: A Case Study

Russian soccer's recent past provides an excellent example of what Russian sports and money are capable of. In late 2005, Gazprom, the same energy giant that backs the KHL, purchased FC Zenit Saint Petersburg.³⁶ The team, then known as Zenit Leningrad, joined the Soviet's top league in 1938 and struggled with mediocrity for years. In fact, government intervention was required in 1967 to keep the squad in the top

Some Russian Teams, THE EDMONTON J. (Nov. 11, 2008), <http://www.canada.com/edmontonjournal/news/sports/story.html?id=1c56e53d-354c-4d7d-927b-cd64abe726f9> (discussing the trouble that the KHL endured in 2008).

33. Ellen Barry, *Last Member of Team Dies 5 Days After Crash in Russia*, N.Y. TIMES (Sept. 12, 2011), <http://www.nytimes.com/2011/09/13/world/europe/13russia.html>.

34. *Id.*

35. *The Future of Lokomotiv*, KHL.RU (Sept. 13, 2011), <http://en.khl.ru/news/2011/9/13/24161.html>.

36. Eduard Nisenboim, *Gazprom Fuels Zenit Dream*, UEFA MAGAZINE (Jan. 19, 2007), <http://www.uefa.com/magazine/news/kind=134217728/newsid=497842.html> [hereinafter Nisenboim].

league.³⁷ Nearly two decades later in 1984, Zenit won the Soviet Title but could not sustain success. It was relegated to a lesser league in 1989.³⁸

Zenit's fortunes changed, however, when Gazprom purchased it.³⁹ Gazprom funded a Zenit spending spree, splurging for local and foreign talent alike. It spent \$30 million for Bruno Alves from the Portuguese League, imported Danko Lazovic from the Dutch for \$8 million, acquired Alessandro Rosina from Italy for \$11 million, and broke the Russian transfer fee record when it signed Portuguese midfielder Miguel Danny from Dinamo Moscow for \$41 million.⁴⁰ With these new acquisitions, Zenit won the Russian league title in 2007, the UEFA Cup title in 2008,⁴¹ and both the Russian Cup and the Russian Premier League in 2010.⁴²

As was the case with Russia's best hockey players, Russia's soccer players also left the country for what was perceived to be greener pastures after the fall of the Soviet

37. Domm Norris, *Stand Up Tall, The Rise of Zenit St. Petersburg*, IN BED WITH MARADONA (Nov. 22, 2010), <http://inbedwithmaradona.com/stand-up-tall-the-rise-of-zenit-st-petersburg/> [hereinafter Norris].

38. FC Zenit St. Petersburg: Club Profile, UEFA.COM, <http://www.uefa.com/news/newsid=1517239.html> (last visited Feb. 4, 2011).

39. Sources say the transaction was between \$30 and \$40 million. See Conor Humphries, *Gazprom Buys Zenit*, THE ST. PETERSBURG TIMES (Dec. 23, 2005), http://www.sptimesrussia.com/index.php?action_id=2&story_id=16457.

40. Gabriele Marcotti, *Russia: Soccer's Sleeping Giant*, WALL ST. J. (Nov. 15, 2010), <http://online.wsj.com/article/SB10001424052748704393604575614542248704232.html>; *Zenit Pay Record €30m for Danny*, UEFA.COM (Aug. 25, 2008), <http://www.uefa.com/uefachampionsleague/news/newsid=741811.html>.

41. Norris, *supra* note 37.

42. *Zenit Clinches Russian Premier League Title*, RIA NOVOSTI (Nov. 14, 2010), <http://en.rian.ru/sports/20101114/161335151.html>; Marcus Haydon, *Zenit St. Petersburg Win Russian Cup*, GOAL.COM (May 16, 2010), <http://www.goal.com/en/news/553/russia/2010/05/16/1927949/zenit-st-petersburg-win-russian-cup>.

Union.⁴³ However, with the influx of money into the Russian product, the Russian players returned, foreign players began to come over as well, and consequently the fans returned.⁴⁴ When Gazprom took control of Zenit, it set the goal of making the team one of the best in Europe, a lofty goal that the team is successfully working toward achieving.⁴⁵ Similarities abound with the current state of Russian hockey. After bolting to play hockey across the ocean in the 1990s, enormous budgets have tempted some Russian-developed players to stay home and have lured other foreign players to sign with Russian teams. Gazprom has proven that it can back a successful sports venture and it has similarly demonstrated what it is capable of when setting lofty goals. Accordingly, it would be inane to assume that the energy-giant-backed KHL cannot eventually compete with the NHL.

II. CHILLY RELATIONS

In 1989, Sergei Pryakhin became the first Soviet player granted permission to leave the Soviet Union to play in the NHL.⁴⁶ At that time, Cliff Fletcher, General Manager of the Calgary Flames, did not believe that Pryakhin would start a trend of Soviets playing in the NHL. Fletcher explained that the transfer was merely designed to “test the waters” for players in the future.⁴⁷ Even after only one Soviet player joined the NHL, at least one NHL bigwig was not overlooking the possible ulterior motives involved. Bobby Smith, a former Calder Trophy winner (awarded to the NHL’s rookie of the

43. *Medvedev Congratulates Zenit on UEFA Triumph*, RIA NOVOSTI (May 16, 2008), <http://en.rian.ru/sports/20080516/107548281.html>.

44. *Id.*

45. *See* Nisenboim, *supra* note 36.

46. Brian Friedman, *Soviet Invasion: Spring Thaw for USSR Athletes Looking West*, L.A. TIMES, Apr. 30, 1989, at Sports 1 (note that Pryakhin’s name has seen multiple spellings, primarily Pryakhin and Priakin).

47. *Id.*

year), wondered aloud whether “Pryakhin wasn't allowed to sign just for the money” and further added that “[t]he Soviets may just want to rake in our money.”⁴⁸ Later in 1989, future NHL All Star Alexander Mogilny defected following the Soviet’s World Championship victory in Stockholm, Sweden.⁴⁹ The NHL’s Buffalo Sabres, who owned Mogilny’s rights, claimed no knowledge of his defection.⁵⁰ Viktor Tikhonov, coach of the Soviet national team, however, called Mogilny’s actions “disgusting” and opined that Mogilny was lured by promises of a lucrative NHL career.⁵¹ While the Cold War was over, these transactions simply added fuel to the fire of North American-Soviet hockey relations. Nonetheless, as moving from the Soviet Union to North America became a reality, millions of youngsters adjusted their dreams.⁵²

Beginning in the mid 1990s, the IIHF brokered player transfer agreements in order to regulate “transfers to the NHL from all non-North American IIHF affiliated associations and leagues.”⁵³ With these agreements in place, NHL teams and the IIHF member associations agreed upon a \$200,000 transfer fee, with the NHL often paying about \$11 million per year on

48. Dan Hefner, *NHL Roundup: Soviet Makes Debut in Calgary Win*, L.A. TIMES, Apr. 1, 1989, at Sports 9.

49. *Soviet Hockey's Mogilny Defects*, L.A. TIMES, May 5, 1989, at Sports 4.

50. *Id.*

51. *Id.*

52. Pavel Bure, the NHL leading goal scorer three times, including back-to-back seasons with the Florida Panthers between 1999 and 2001, explained that as Russian players grew older and more players from Russia started to leave for the NHL, players began to dream of playing in the NHL rather than in Russia. Shawn P. Roarke, *Stastnys Remain an Inspiration*, NHL.COM (Oct. 30, 2003), http://www.nhl.com/intheslot/read/impact/april/euro_bros.html.

53. IIHF Press Release, *Player Transfer Agreement Signed* (July 12, 2007) available at [http://www.iihf.com/home-of-hockey/news/news-singleview/article/player-transfer-agreement-signed.html?tx_ttnews\[pS\]=1183240800&tx_ttnews\[pL\]=2678399&tx_ttnews\[arc\]=1&tx_ttnews\[backPid\]=187&cHash=d93edbeb2f](http://www.iihf.com/home-of-hockey/news/news-singleview/article/player-transfer-agreement-signed.html?tx_ttnews[pS]=1183240800&tx_ttnews[pL]=2678399&tx_ttnews[arc]=1&tx_ttnews[backPid]=187&cHash=d93edbeb2f).

European talent.⁵⁴ Certainly, \$200,000 was a better option than losing players by defection, but one would expect that IIHF member associations were nonetheless irritated that they were merely receiving a flat \$200,000 fee for developing some of the world's best hockey talent.

In late 1996, a well-publicized battle over Russian teenager Sergei Samsonov was brewing between perennial Russian favorite CSKA and the Detroit Vipers of the International Hockey League (IHL). The IHL was a professional hockey league in North America with teams in Canada and all across the United States.⁵⁵ Samsonov had been a member of the CSKA organization since 1986, where he developed into arguably one of the world's best players.⁵⁶ Samsonov signed two contracts with CSKA, one when he was fifteen years old and another two years later.⁵⁷ His intention, and seemingly the intention of the second contract, was that he would play in Russia's Super league.⁵⁸ After learning that he would not play in Russia's top league, however, Samsonov decided to leave Russia to seek a better opportunity.⁵⁹ After becoming aware of Samsonov's availability, the Detroit Vipers signed Samsonov to a contract.⁶⁰ Samsonov played his first season amid controversy that he was still under contract with his Russian team and had not been released. He nevertheless led all rookies in scoring.⁶¹ The Vipers contended that they believed Samsonov was released from his obligations with

54. *Transfer Agreement Between NHL and IIHF Expires*, THE CANADIAN PRESS (June 26, 2008), <http://www.tsn.ca/nhl/story/?id=240848>.

55. *Cent. Sports Army Club v. Arena Assocs.*, 952 F. Supp. 181, 185 (S.D.N.Y. 1997).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 186.

61. *Id.*

CSKA and that even if a contract did exist, it was voidable as Samsonov was a minor at the time of its signing.⁶²

After Samsonov impressed the hockey world with his play for the Vipers, CSKA filed a lawsuit claiming that the Vipers tortiously interfered with Samsonov's contract.⁶³ For numerous reasons, the New York court denied CSKA's motion for preliminary relief. Foremost, whether Russian, New York, or Michigan law applied, Samsonov's contract was voidable because he signed as a minor.⁶⁴ Additionally, CSKA's claim of tortious interference with its contract also failed.

In order to prove tortious interference, "a party must establish (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional inducement of the third party to breach that contract, and (4) damages."⁶⁵ The court stated three reasons that CSKA was unable to support its claim. First, CSKA was unable to establish that the Detroit Vipers induced Samsonov to cut ties with its hockey club.⁶⁶ Samsonov did not come into contact with the Vipers until after he decided to leave Russia, and thus he could not have been persuaded by the Vipers to break his contract with CSKA.⁶⁷ Second, CSKA failed to show that the Vipers had any knowledge that Samsonov was under contract in Russia.⁶⁸ Rather, evidence suggested that the Vipers were under the impression that Samsonov had been released to play hockey abroad and that any existing agreement had been breached by keeping Samsonov out of the country's premier league.⁶⁹ Third, CSKA lacked any evidence that the Vipers acted with an improper

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 191.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

motive to injure the Russian organization.⁷⁰ Under the impression that Samsonov was free to contract with the team of his choice, the Vipers acted quickly to sign him to promote their own legitimate business interests and not with a malicious intent to harm CSKA.⁷¹ While the Russian team failed in its claim, the contentious relationship continued between organizations of the two countries and the stage was set for future tortious interference claims.

A. NHL Season Put on Ice

The NHL's work stoppage in 2004 played a major role in eventually intensifying the hostility between the Russian and North American leagues. While the NHL experienced enormous growth through the 1990s, nearly two-thirds of its franchises were claiming an operating loss in the new millennium.⁷² The losses were caused primarily due to the extraordinarily rapid growth of player salaries, which occurred because of the league's lack of a salary cap.⁷³ An internal league report showed that salaries tripled in the decade leading up to the 2004-2005 season and that 76 percent of the league's revenues were being spent on player salaries.⁷⁴ While the players association claimed that those numbers were the result of creative accounting, which was supported by a *Forbes*

70. *Id.* at 192.

71. *Id.*

72. Jeffrey F. Levine & Bram A. Maravent, *Sports Law Forum - Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419, 1451 (2010) (citing to Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 491-92 (2006)) (nineteen out of the NHL's thirty teams claimed an operating loss).

73. Paul D. Stoudohar, *The Hockey Lockout of 2004-05*, MONTHLY LAB. REV., Dec. 2005, at 24, available at www.bls.gov/opub/mlr/2005/12/art3full.pdf [hereinafter Stoudohar].

74. *Id.* at 24-25

Magazine report that showed that teams actually lost less than half of what the NHL claimed and that salaries actually only consumed 66 percent of revenue, it was still apparent that the NHL was losing money.⁷⁵

When the NHL and its owners refused to concede the need for a salary cap and officially cancelled the season in 2005, it was the first time that a Stanley Cup Champion was not crowned since 1919, when the finals were cancelled due to a deadly influenza epidemic.⁷⁶ NHL teams lost an estimated \$2 billion as a result of the lockout, and the players lost approximately \$1 billion.⁷⁷ Almost 390 players departed to Europe to supplement their lost income, 78 of whom went to Russia.⁷⁸ Two of those players who went to play in Russia were Russian natives Alexander Semin and Alexander Ovechkin.

Semin, a former first-round draft pick of the NHL's Washington Capitals, played his rookie season in the NHL in 2003-2004. When the following season was cancelled due to the lockout, however, Semin returned to Russia and played for Lada Togliatti.⁷⁹ Since he was still under contract and refused his assignment to the Capitals' minor league affiliate team, he was suspended and fined \$1,000 per day for failure to report.⁸⁰ Semin planned to return to continue to play in the Capitals' system to avoid further fines, but he was forced to report for duty in the Russian military, a duty that he was allowed to perform by continuing to play for Lada Togliatta.⁸¹ The Capitals believed the arrangement to be a sham.

75. *Id.*

76. *Lockout Over Salary Cap Shuts Down NHL*, ESPN (Feb. 16, 2005), <http://sports.espn.go.com/nhl/news/story?id=1992793>.

77. Stoudohar, *supra* note 73, at 26.

78. See Anders Etgen Reitz, *The NHL Lockout: The Trickle-Down Effect on European Hockey*, 13 SPORTS LAW. J. 179, 180 (2006).

79. *Lincoln Hockey, LLC v. Semin*, 2005 U.S. Dist. LEXIS 34047, at *2-3 (D.D.C. 2005).

80. *Id.*

81. *Id.*

As the Capitals' training camp was set to begin in September 2005, another series of unusual events prevented Semin from making his return. After his agent indicated that a deal had been worked out for Semin to end his military service early and return to the NHL, Semin changed agents, alerted the Capitals that his military duty kept him from making his return, and continued to play in Russia.⁸² The Capitals responded by seeking injunctive relief and claimed tortious interference with Semin's contract.⁸³ A preliminary injunction may be issued when a "movant demonstrates: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction."⁸⁴ The court, citing the arbitration provision agreed upon in the collective bargaining agreement between the NHL and its players association, decided that arbitration was the necessary forum for the dispute and, as such, the Capitals were less likely to succeed on the merits.⁸⁵ As a result, the motion for a preliminary injunction was denied.⁸⁶

Less than one year later, the Moscow Dynamo sued Alexander Ovechkin, a former first overall draft pick of the Washington Capitals, claiming that Ovechkin was contractually obligated to play in Russia the season following the lockout.⁸⁷ After playing out his one-year contract for the Dynamo, Ovechkin signed a one-year deal with RSL member Avangard Omsk for the following season, but included a provision that would make the contract null and void if Ovechkin signed to play with the Capitals in the event that the

82. *Id.* at *4.

83. *Id.*

84. *Id.* at *5-6.

85. *Id.* at *7-8.

86. *Id.* at *11.

87. *Dynamo v. Ovechkin*, 412 F. Supp. 2d 24, 24-25 (D.D.C. 2006).

NHL's work stoppage was resolved.⁸⁸ After the Capitals announced that Ovechkin was to return for the upcoming season, the Dynamo claimed that it sent Ovechkin a qualifying offer following his season with them and thus retained "matching rights," meaning that it reserved the right sign Ovechkin to a binding contract by matching the financial aspects of his newest contract.⁸⁹ An arbitration committee of the Russian Ice Hockey Federation held a hearing and found that Ovechkin had a valid contract to play with the Dynamo as his "matching rights" were valid and the Dynamo had agreed to match the financial aspects of his contract with Avangard.⁹⁰

The Dynamo filed a petition to confirm the arbitration award, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁹¹ The Convention held that there was no subject matter jurisdiction without an agreement in writing to arbitrate signed by the parties or contained in an exchange of letters.⁹² The court dismissed the action with prejudice for lack of subject matter jurisdiction because no written exchange of correspondence ever existed.⁹³ Ovechkin had no communication whatsoever with the Dynamo following the expiration of his contract. The Dynamo relied only on Ovechkin's agreement with Avangard, which quite simply could not be considered correspondence between the player and the Dynamo.⁹⁴ NHL Deputy Commissioner Bill Daly fueled the fire when he said, "Both Mr. Ovechkin and the Washington Capitals organization are to be congratulated for refusing to be intimidated or extorted by the Dynamo club, and

88. *Id.* at 25.

89. *Id.* at 25-26.

90. *Id.* at 26.

91. *Id.* at 24-25.

92. *Id.* at 27.

93. *Id.* at 28.

94. *Id.* at 28-29.

for taking all steps necessary to defend their legal and contractual rights."⁹⁵

B. Expiration of IIHF Transfer Agreement

In late 2005, as Russian resentment grew due to what they perceived to be player poaching, the time to sign a new player-transfer agreement came and went, and Russia was the only European federation to reject the deal. For Russian teams, receiving a flat \$200,000 fee was far below market value for a number of these players going from Russia to the United States and did not make up for the investment made by the Russian clubs to develop these players. The proposed deal was slightly different from previous transfer agreements, in an apparent attempt to gratify the Russians. The agreement would pay \$900,000 for the first overall NHL Draft choice with the following 30 picks decreasing by \$20,000 each, with no pick paying less than \$150,000.⁹⁶ Citing primarily the same reasons as they did two years earlier, the Russians again refused to be a party to the player-transfer agreement signed in 2007.⁹⁷ Russian Ice Hockey Federation (RIHF) President and Hall of Fame goaltender Vladislav Tretiak commented that money was not the chief barrier to a deal, but he did assert that a \$200,000 fee for developing some of the world's best talent was simply a "handout" that was far below the actual market value of the players.⁹⁸ In an interview, IIHF President Rene Fasel affirmed that "[m]any clubs feel that the sum in many cases didn't reflect the true value of a player" and that the Russian

95. *Dynamo Loses Lawsuit to Force Ovechkin Back*, WINNIPEG SUN, Jan. 19, 2006, at 55.

96. *Hockey: Russia Rejects NHL Deal on Transfer of Players*, N.Y. TIMES (Aug. 3, 2005), <http://www.nytimes.com/2005/08/02/sports/02iht-base.html>.

97. See Steve Keating, *Defiant Russia Rejects Player Transfer Agreement*, REUTERS (May 9, 2007), <http://www.reuters.com/article/idUSL0917906620070509>.

98. *Id.*

organizations “didn’t like the fact that they constantly were losing players who were under contract.”⁹⁹ He also stated that “the decreasing rate of the dollar devalued the transfer sum.”¹⁰⁰

One such player whose value could not be matched by a \$200,000 transfer free was Evgeni Malkin. Malkin was the second overall selection in the 2004 NHL Draft by the Pittsburgh Penguins.¹⁰¹ After being drafted, Malkin played for his hometown team, the Metallurg Magnitogorsk, but Malkin publicly stated his desire to play for the Penguins.¹⁰² As a result, it came as a surprise for many when Malkin signed a one-year contract with Magnitogorsk for the 2006-2007 season.¹⁰³ Allegations of duress followed from Malkin’s camp.¹⁰⁴ Shortly thereafter, Malkin left the team, in essence defecting when the team was in Helsinki for a preseason tournament, and made his way to the United States four days later.¹⁰⁵ Pursuant to Article 80 of the Russian Labor Code,¹⁰⁶ Malkin faxed to Magnitogorsk a letter of resignation.¹⁰⁷ The provision allowed for an employee to terminate a labor contract by simply giving two-weeks notice of the decision to

99. *Life Without a Transfer Deal*, IIHF NEWS (June 16, 2008), <http://www.iihf.com/home-of-hockey/news/news-singleview/article/life-without-a-transfer-deal.html>.

100. *Id.*

101. Shelly Anderson, *Russian Franchise Might Sue Penguins Over Malkin Deal*, PITTSBURGH POST-GAZETTE (May 2, 2006), <http://www.post-gazette.com/pg/06122/686658-61.stm>.

102. Chris Miller, *Hockey’s Cold War – Russia’s Defiance of the IIHF and the Evgeny Malkin Saga*, 17 SETON HALL J. SPORTS & ENT. L. 163, 169-70 (2007) [hereinafter Miller].

103. See Shelly Anderson, *Malkin: Russian Team Takes Case to Court*, PITTSBURGH POST-GAZETTE (Nov. 14, 2006), <http://www.post-gazette.com/pg/06318/738214-61.stm>.

104. Miller, *supra* note 102, at 171.

105. *Id.* at 171-72.

106. TRUDOVOI KODEKS ROSSIJSKOI FEDERATSII [TK RF][Labor Code] art. 80 (Russ.), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm#chap13>.

107. Miller, *supra* note 102, at 172.

terminate.¹⁰⁸ Once again, harsh words were exchanged when Magnitogorsk's General Director claimed that it was shameful to steal Russian players and that it was "sports terrorism."¹⁰⁹ He proclaimed that the team would not sit idly by and allow the Penguins to get away with it.¹¹⁰

Mangnitogorsk and its KHL counterpart, Lokomotiv Yaroslavl, later sued the NHL and Pittsburgh Penguins in the United States District Court in the Southern District of New York seeking to enforce an arbitration ruling from the Russian Hockey Federation declaring that Malkin and prospects Alexei Mikhnov (who had signed with the NHL's Edmonton Oilers) and Andrei Taratukhin (who had signed with the NHL's Calgary Flames) must play the 2006-07 season in Russia.¹¹¹ Once again, the claim was that the NHL had tortiously interfered with the player's contract. Lokomotiv and Metallurg, each represented by attorney Alexander Berkovich, demanded an injunction and damages.¹¹² Once again, the Russians' claims were defeated in court. The case was dismissed, never reaching the merits. The judge stated that the Russian club could not prove irreparable harm because the Russian clubs seemed far more concerned with prying larger sums of money from the NHL rather than worrying about losing a unique talent.¹¹³ Bill Daly hoped that this would put an end to the Russians' strategy of litigation in response to losing players.¹¹⁴

108. *Id.*

109. *Thief in the Night - Russian Team Accuses Pens of Stealing Malkin*, SI.COM (Aug. 14, 2006), <http://sportsillustrated.cnn.com/2006/hockey/nhl/08/14/malkin.reaction/index.html>.

110. *Id.*

111. Miller, *supra* note 102, at 173-74.

112. *Id.* at 174; Anderson, *supra* note 103.

113. *Russian Team's Request for Malkin Injunction Denied*, ESPN (Nov. 16, 2006), <http://sports.espn.go.com/nhl/news/story?id=2663537>.

114. *Id.*

C. The More Things Change, the More They Stay the Same?

Alas, it was not to be. Russia's response was to change its laws and invariably make it more difficult for KHL players to terminate a labor contract, thus beefing up its ability to claim tortious interference with future contracts. Article 80 of the Russian Federation's Labor Code read that an employee had the right to terminate a labor agreement and could do so by warning the "employer about termination of the agreement in written form at least two weeks prior to termination."¹¹⁵ Legislation was enacted to ensure it would not be so simple. The legislation required any player wishing to leave to buy himself out of his contract by repaying two-thirds of his salary under his contract.¹¹⁶ As predicted by Tom Reed, a sports writer for the NHL's Columbus Blue Jackets, the introduction of the KHL and reforms to the labor laws have discouraged NHL teams from using high draft picks on Russian players as they had done in the past.¹¹⁷ In the 2009 NHL Entry Draft, only seven Russians were selected, nearly one-sixth of the amount selected just ten years earlier.¹¹⁸

In 2008, the NHL and KHL were able to reach a "gentleman's agreement" to respect all legally valid contracts that players had with the other league.¹¹⁹ One day later, Alexander Radulov, a Russian player with the NHL's

115. TRUDOVOI KODEKS ROSSIISKOI FEDERATSII [TK RF][Labor Code] art. 80 (Russ.), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm#chap13>.

116. Tom Reed, *Cold Reality: Fewer Russian Players Will be Coming Here*, THE COLUMBUS DISPATCH, July 21, 2008, at 6C.

117. *Id.*

118. Elliotte Friedman, *Best For NHL, KHL to Make a Deal*, CBC (Apr. 3, 2010), <http://www.cbc.ca/sports/blogs/elliottfriedman/2010/04/best-for-nhl-khl-to-make-a-deal.html> [hereinafter Friedman].

119. *Court May Decide on Radulov*, INT'L ICE HOCKEY FED'N (Sept. 6, 2008), [http://www.iihf.com/home-of-hockey/news/news-singleview/browse/3/article/court-may-decide-on-radulov.html?tx_ttnews\[backPid\]=181&cHash=27a7480dd4](http://www.iihf.com/home-of-hockey/news/news-singleview/browse/3/article/court-may-decide-on-radulov.html?tx_ttnews[backPid]=181&cHash=27a7480dd4).

Nashville Predators, announced that he had signed a contract to play with the Russian team SalavatYalaev Ufa, even though Radulov had a year remaining on his contract with the Predators.¹²⁰ KHL President Alexander Medvedev gave somewhat conflicting rationale when asked about the transaction, in one instance he explained that Radulov had decided to leave the Predators before an agreement was reached and in another instance he stated that the agreement “[was] not backed by documents.”¹²¹ In essence, it certainly seems that claiming an agreement is not backed by documents as justification for a seemingly illegitimate transaction is akin to saying that no agreement of value exists.

With Radulov's circumstances, the North Americans and Russians clashed yet again. Litigation and arbitration were considered to resolve the situation, but Radulov's case was never subjected to more than an investigation by the IIHF.¹²² In October 2008, the IIHF announced that the international lawyers called upon to investigate the situation found that Radulov breached a binding and valid contract when he left the Predators for Salavat.¹²³ The IIHF further revealed, however, that due to the lack of a valid agreement between the IIHF and

120. See Jeff Z. Klein, *Medvedev: N.H.L.-K.H.L. Agreement 'Does Not Apply' to Radulov*, N.Y. TIMES (July 12, 2008), <http://slapshot.blogs.nytimes.com/2008/07/12/medvedev-nhl-khl-agreement-does-not-apply-to-radulov/> [hereinafter Klein]. Radulov had a successful second NHL season with the Nashville Predators, finishing third on the team in goals and points. 2007-08 Nashville Predators Roster and Statistics, HOCKEY-REFERENCE.COM, <http://www.hockey-reference.com/teams/NSH/2008.html> (last visited Feb. 12, 2011).

121. Klein, *supra* note 120.

122. See Ken Campbell, *KHL Makes Concessions, But NHL Not Impressed*, HOCKEY NEWS (Sept. 6, 2008), <http://www.thehockeynews.com/articles/17776-KHL-makes-concessions-but-NHL-not-impressed.html>.

123. *Global Agreement Coming Closer*, IIHF NEWS (Oct. 10, 2008), [http://www.iihf.com/home-of-hockey/news/news-singleview/article/global-agreement-coming-closer.html?tx_ttnews\[backPid\]=181&cHash=1fa15a6cc4](http://www.iihf.com/home-of-hockey/news/news-singleview/article/global-agreement-coming-closer.html?tx_ttnews[backPid]=181&cHash=1fa15a6cc4).

the NHL, it had no power to sanction Radulov.¹²⁴ One cannot help but wonder why the IIHF would hire a group of international lawyers and publicly investigate the Radulov situation if it knew all along that it had no jurisdiction to take action. In the end, this may be the move that illustrates that the IIHF is a paper tiger that is no longer in control of the international hockey world.

Over the last two years, both sides have continued to cry foul over the signings of players. In May 2010, however, the KHL reported relations were improving when the NHL and KHL signed a “memorandum of mutual understanding.”¹²⁵ The memorandum apparently contained provisions that stated that the “NHL will recognize the standard contracts of KHL players” and allowed “for the mutual exchange of information regarding the contracts of players in both leagues and the status of free agents.”¹²⁶ Given the bare-bones nature of the agreement, the need for a legitimate agreement regarding player transfers remains a top priority.

*D. Malkin Case: Then and Now – Assessing
Russia’s Legislative Amendment*

While the case was ultimately dismissed, as previously discussed, an analysis of how the same case might be decided today as opposed to five years ago is a valuable undertaking to determine if the Russian legislation to amend its labor law will have the desired effect. Today, a claimant must establish four elements to recover for tortious interference with a contract: “(1) that a valid contract exists; (2) that a ‘third party’ had

124. *Id.*; see *Predators’ Radulov Signs With KHL Team, Violating Leagues’ Truce*, SPORTS BUS. DAILY (July 14, 2008), <http://www.sportsbusinessdaily.com/Daily/Issues/2008/07/Issue-204/Leagues-Governing-Bodies/Predators-Radulov-Signs-With-KHL-Team-Violating-Leagues-Truce.aspx>.

125. *Another Step Forward*, KHL.RU (May 21, 2010), <http://en.khl.ru/news/2010/5/21/23862.html>.

126. *Id.*

knowledge of the contract; (3) that the third party intentionally and improperly procured the breach of the contract; and (4) that the breach resulted in damage to the plaintiff.”¹²⁷ Proving all four elements was far easier to accomplish before the legislative amendment.

The first two elements of a tortious interference claim would be rather unproblematic for the Russian teams to prove. First, the Russian teams would not likely have much trouble proving that a valid contract existed. Malkin was signed through 2008 under his first contract with Metallurg and even signed another contract days before leaving Russia.¹²⁸ Second, Metallurg would most likely be able to prove that the Penguins were aware of Malkin's Russian contract. Malkin was considered by most to be the best player in the world not yet in the NHL and, as such, was a prized possession of the Pittsburgh Penguins.¹²⁹ Additionally, Pittsburgh media outlets updated Malkin's status consistently as Penguins fans awaited the arrival of the future All-Star.¹³⁰ Given the attention afforded Malkin and that his contract status had basically become public knowledge in Pittsburgh, it is impossible to conceive of a situation in which the Penguins were unaware of his Russian contract.

The third element, procuring the breach intentionally and by improper means, presents a more difficult issue. The intentional prong seems evident. The Penguins intended to bring Malkin to Pittsburgh and even received correspondence

127. *Albert v. Loksen*, 239 F.3d 256, 274 (2d Cir. 2001).

128. *Still-hidden Malkin Files Resignation Letter with Russian Team*, USA TODAY (Aug. 17, 2006), http://www.usatoday.com/sports/hockey/nhl/penguins/2006-08-16-malkin-update_x.htm.

129. See Scott Burnside, *Malkin's Problem? Trying Too Hard to Please Too Many*, ESPN (Aug. 24, 2006), http://sports.espn.go.com/nhl/columns/story?columnist=burnside_scott&id=2552862.

130. See Shelly Anderson, *Malkin's Future With Penguins Still Clouded*, PITTSBURGH POST-GAZETTE, Aug. 1, 2006, at D3; see Chuck Finder, *Where is Evgeni Malkin?; Parents: Penguins Prospect Pressured*, PITTSBURGH POST-GAZETTE, Aug. 15, 2006, at D1.

from Russia concerning potential litigation or arbitration if the team allowed Malkin to play in Pittsburgh.¹³¹ Malkin did not end up in Pittsburgh by chance. Proving improper motive, however, would not be so simple. In the Samsonov case discussed earlier, the court looked to “evidence showing that these defendants sought to destroy [Samsonov’s Russian team] or acted with malicious or even indecorous intent” and found that there was none.¹³² This seems to represent a rather narrow use of the term “improper means.” In *Avtec Industries, Inc. v. Sony Corp. of America*, the Superior Court of New Jersey similarly held that finding an improper means or motive depended on intent to injure the other party.¹³³ Additionally, both courts held that the party being sued was merely seeking to promote its own business interests by hiring a profitable and competent employee.¹³⁴

On the other hand, Section 767 of the Restatement of Torts calls for consideration to be given to a number of factors upon determining if intentional interference was improper, those include: the nature of the actor’s conduct, his motive, the interests he seeks to advance, and the interests of the other with which his conduct interferes.¹³⁵ In the situation at hand, while the Penguins indeed intended to employ one of the world’s best hockey players for its own advantage and gain, the NHL’s contentious relationship with the Russian league could very well play a role in a judge’s decision. Here, in the aftermath of Russia refusing a transfer agreement, the actions of the Penguins may very well be taken as a show of force towards its

131. See Jason Cato & Karen Price, *Arbitration Committee Rules Against Malkin*, TRIB.-REV. (Sept. 16, 2006), http://www.pittsburghlive.com/x/pittsburghtrib/s_470833.html.

132. *Cent. Sports Army Club v. Arena Assocs.*, 952 F. Supp. 181, 192 (S.D.N.Y. 1997).

133. *Avtec Indus. v. Sony Corp. of Am.*, 500 A.2d 712, 716 (N.J. Super. Ct. App. Div. 1985).

134. *Id.*; *Cent. Sports Army Club*, 952 F. Supp. at 192.

135. RESTATEMENT (SECOND) OF TORTS § 767 (1979).

competitor across the ocean. Thus, it is feasible that this element of the decision could have gone either way.

In any event, for the sake of this analysis, it is best to envision either that a judge would find improper means or that a case similar to the Malkin case may arise but with stronger evidence of intentional and improper means. All previous elements of the analysis remain the same following the amendment to Russia's labor law. The fourth element, damage to the claimant, however, would likely be far simpler to prove after the amendment. In *Washington Capitols Basketball Club, Inc. v. Barry*, the court held that irreparable harm "exists when an athletic team is denied the services of an irreplaceable athlete" and that "the mere signing of a player to a professional [athletic] contract is substantial evidence of his outstanding qualities."¹³⁶ Additionally, the loss of a team's star player would logically lead to a decrease in fan morale which in turn would lead to less fan support and less revenue. Prior to the closing of the labor law loophole, however, one could simply claim that such harm or damage could not be illustrated. For example, many Russian players grow up dreaming of playing in the NHL and leaving Russia for greener pastures. It was inevitable that talented players would pursue that dream if it could be done at any time by providing two-weeks notice to the employer. If damages were to be calculated based on a harm that took place over a mere two weeks, damages due to the claimant would be highly restricted. Closing the loophole, however, would make such a calculation impossible. The new law would require substantial compensation paid to the team if an athlete terminates a contract without good cause.¹³⁷ This compensation would be a common sense starting point for damages owed to a successful claimant, but one could also imagine damages ranging higher when considering lost

136. *Wash. Capitols Basketball Club, Inc. v. Barry*, 304 F. Supp. 1193, 1197 (N.D. Cal. 1969).

137. Alexey Kozin, *New Regulations for Athletes*, INTERFAX (Feb. 29, 2008), <http://www.interfax.ru/sport/txt.asp?id=2408>.

revenue. Thus, Russia's amendment of its labor code will play an integral role in ensuring that NHL teams think twice before recruiting a Russian player under contract.

Also, the Russian teams claimed that Article 80 of the Labor Code did not even apply to the situation in the first place.¹³⁸ They claimed that Section 26 of the Sports Law should control, which specifies "that professional athletes' contracts remain in effect until expiration of their term, and transfer of professional athletes to other clubs, in Russia or abroad, prior to expiration of the contract's term requires consent of both clubs."¹³⁹ In this situation, however, the tool of hindsight proves valuable. Shortly after the Malkin case, Russia began working furiously to close this loophole. One would imagine that if the loophole did not in fact allow players to terminate their contract by providing their employer with two-weeks notice, the legislative amendment that followed would be superfluous.

III. NEED FOR A LAWFUL AGREEMENT

Previous scholarship has predominantly suggested using the flawed transfer systems already in place in other sports. There is no reason that analysis of this situation should be limited in this way. The NHL and KHL, as well as international leagues in Sweden, Finland, and the Czech Republic, should focus on creating a more practical transfer system based on the needs and concerns of all involved.

The position that teams in Russia have taken is certainly an understandable one. A talent-rich country has watched its product (homegrown players) migrate to the NHL with little or no compensation in return. While Russian teams were previously receiving \$200,000 per player under earlier

138. Plaintiffs' Reply, *Non-Commercial Partnership Hockey Club Lokomotiv Yaroslavl v. National Hockey League*, 2006 WL 3884545, at *11 (S.D.N.Y. Nov. 12, 2006).

139. *Id.*

transfer agreements, those teams were spending upwards of ten times those amounts developing players.¹⁴⁰ Developing young talent includes expenses incurred for coaching, lodging, travel, and food. For example, the Moscow Dynamo claimed to have spent approximately \$2 million to develop Alexander Ovechkin before he left for a starring role in the NHL.¹⁴¹

A. Russia's Preference

The KHL and its member teams have clearly expressed their preference for individually negotiated transfer prices.¹⁴² Such a system would require NHL teams interested in a KHL player to work out a transfer price directly with the player's KHL team. It would ensure that KHL teams receive market value for their players rather than a flat fee. One KHL executive opined that, under such a system, Alexander Ovechkin would require a fee similar to that of David Beckham; Real Madrid paid \$41,000,000 to receive Beckham from Manchester United.¹⁴³ NHL teams would be unable and unwilling to consider paying such massive amounts for one player who has never played an NHL game.¹⁴⁴ In fact, any NHL team that enters into such negotiations would face reprimand from the league.

In its case against the Pittsburgh Penguins, Metallurg pointed to an NHL memorandum which exclaimed that

140. See Miller, *supra* note 102, at 165, 175.

141. *Id.* at 175.

142. *Elite Russian Clubs Want Direct Negotiations*, ESPN (Mar. 24, 2004, 8:26 PM), <http://sports.espn.go.com/nhl/news/story?id=1767568>; Shelly Anderson, *Malkin: Russian Team Takes Case to Court*, PITTSBURGH POST-GAZETTE, Nov. 14, 2006, at D1.

143. Friedman, *supra* note 118.

144. The NHL salary cap, set at \$59.4 million for the 2010-11 Season, would make it impossible for a team to spend such massive amounts on only one player and still put a competitive team on the ice. See *NHL Salary Cap Set at \$59.4 Million for 2010-11 Season*, TSN.CA (June 23, 2010), <http://www.tsn.ca/nhl/story/?id=325481>.

“[c]lubs who negotiate, agree . . . or pay individual release fees to Russian teams . . . will be deemed to have engaged in an act of circumvention of Section 26.3(e) of the CBA, and will be subject to the mandatory penalties described in Section 26.13 of the CBA.”¹⁴⁵ This would appear to be a typographical error, either in the filed complaint or in the NHL’s alleged memorandum, as a read through of the CBA makes clear that Section 26.3(a) is the section that would pertain to such a situation. Section 26.3(a) explains that:

No [c]lub or [c]lub [a]ctor, directly or indirectly, may: (i) enter into any agreements . . . or understandings of any kind . . . or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or [c]ircumventing the provisions of this Agreement or the intention of the parties as reflected by the provisions of this Agreement, including without limitation, provisions with respect to the financial and other reporting obligations of the Clubs and the League, Team Payroll Range, Player Compensation Cost Redistribution System, the Entry Level System and/or Free Agency.¹⁴⁶

Section 26.13(c) calls for fines of up to \$5 million and forfeiture of draft picks for circumvention of the CBA.¹⁴⁷ Allowing the individual negotiations that the Russians desire would cause a major overhaul to how things are currently done. Instead of being eligible for the NHL draft, overseas players

145. Plaintiffs’ Reply, *Non-Commercial Partnership Hockey Club Lokomotiv Yaroslavl v. National Hockey League*, 2006 WL 3884545, at *11 (S.D.N.Y. Nov. 12, 2006).

146. *National Hockey League Collective Bargaining Agreement* art. 26.3(a), July 22, 2005.

147. *Id.* art. 26.13(c).

would be available to all teams. Bidding wars would ensue, which would further drive up the price for these often-unproven players. Based on the above provisions and the NHL's preference for its current system of player movement, it is clear that NHL would not entertain the idea of allowing its teams to negotiate individual transfer fees with their international counterparts. Thus, it is necessary for the NHL and KHL to work out a mutually accommodating transfer agreement to set the standards for future transfers.

B. Proposed Transfer Agreement

Both the NHL and KHL would be in a stronger situation if NHL teams were more selective in choosing overseas talent. First, without any terms forcing selectivity, NHL teams stand to overspend on foreign talent with hopes of landing a future star. In reality, however, the majority will end up as marginal players and others may not even prove ready for the NHL.¹⁴⁸ Second, given that hundreds of players in the last decade have proven to either not be ready to contribute in the NHL or are simply not talented enough, it is hard to debate that those players would not be better off remaining in Russia.¹⁴⁹ One would expect that players would be better off in an environment in which they are comfortable (home in Russia) where millions of dollars are spent on their development rather than either suffering deep on an NHL bench or playing for a North American minor league hockey team.

Multiple provisions may be negotiated in a transfer agreement to force a solution to the selectivity problem, thus providing a benefit to both sides. An assessment of fines upon teams that fail to have a newly acquired Russian player (a

148. See Szymon Szemberg, *IIHF Study on Europeans Going to North America*, INT'L ICE HOCKEY FED'N (Oct. 9, 2006), http://www.iihf.com/fileadmin/user_upload/PDF/IIHF_Study.pdf [hereinafter Szemberg].

149. See *id.*

player in his first season with an NHL team) on its active roster for two-thirds of the season would help ensure selectivity. The fines would be payable to the Russian team that lost the player to North America. NHL teams will have to take measures to ensure, to the greatest extent possible, that certain players are ready to contribute in the NHL and weigh that likelihood against the potential costs of drafting and holding those players. Additionally, an approach similar to Major League Baseball's Rule V Draft, in which a player must be offered back to his former team if he does not remain on a Major League roster for the entire season, could further ensure the goal of increased selectivity.¹⁵⁰ Such a provision would need to be tailored to the hockey scenario. Thus, a provision should provide that, if a newly-acquired Russian player does not remain on the NHL team's active roster for at least one-half of the season, he must be offered back to his previous team at a predetermined price. Such a provision would provide further assurance that an NHL team would choose Russian players more carefully, and, in certain cases in which the player cannot stick on the NHL roster, the player could return home to an environment more conducive to his development.

Additionally, a transfer agreement should borrow from the National Collegiate Athletics Association's (NCAA) Bylaws. For example, NCAA Bylaw 14.5.5.1 requires that a student transferring from a four-year institution must sit out for one year prior to being eligible to play for his new institution.¹⁵¹ This rule should be modified to read that a

150. See Jonathan Mayo, *Clubs Seek Diamond in Rough in Rule 5 Draft*, MLB.COM (Dec. 8, 2010), http://mlb.mlb.com/news/article.jsp?ymd=20101208&content_id=16286566&vkey=news_mlb&c_id=mlb.

151. The rule states that "[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution. Further, a transfer student-athlete admitted after the 12th class day may not use that semester or quarter for the purpose of establishing residency."

player, other than an unrestricted free agent, must sit out one year of competition in his new league. Both leagues would be less likely to take players already under contract in the other country and players would be able to continue their development in their home country. For this to be a viable option, however, the KHL would have to alter its current contractual system. In the KHL, players remain restricted free agents of their team until reaching the age of 28. This allows teams to resign players by simply matching what any another team offers financially. Generally, athletic talent is most coveted at younger ages, so a rule change would have to be made to make these players potentially available to NHL teams.

On the other hand, should the previously considered provision not prove to be a feasible option, a system should be implemented in which the “taking” organization pays an extra fee that is dependent on how many years remain on a player’s contract at the time of the signing. It is inevitable for numerous reasons that players will want to leave the NHL or KHL while still under contract. Whether players are simply homesick and wish to play closer to home, feel that they are a more valued commodity in one country compared to the other, or feel that they can develop more efficiently in one country as opposed to another, there will always be reasons for players to want to break such contracts. Thus, a method to compensate a team for losing a player should reflect the time a player had remaining on his contract. The proposed compensation should increase with each year remaining on the contract. Such a provision may convince teams not to pursue players already under contract. Also, the team losing the player would at least be compensated beyond the agreed-upon transfer price.

Much of the contention from the Russian side comes from the fact that a flat fee does not compensate its clubs

sufficiently for its investment in player development and does not reflect a player's market value. Quite simply, paying the same flat fee for Alexander Ovechkin and Stanislav Chistov (a former first-round draft pick who only played parts of three seasons in the NHL) seems as logical as paying the same flat fee for a share of Microsoft stock and a share of Enron stock. Again, while the NHL would prefer its teams not to pay astronomical fees for players based on their perceived potential, a system based more on market value can appease both sides. It would force teams to be more selective as to which players they are willing to bring over while it would allow Russian teams to get a seemingly more favorable monetary return. Therefore, it is completely necessary for a transfer agreement to move away from a flat fee arrangement and more toward a scheme that includes at least a component based on market value.

It is rather doubtful that the NHL would be willing to involve itself in a system based exclusively on a player's market value, as it would lead to bidding wars among the league's wealthiest teams. Thus, a system with both a fixed component and a variable component would likely work best. Both sides should begin by negotiating a fixed rate, payable immediately upon a player's transfer, with the fact in mind that the expense for that player may increase in the future. The variable cost portion of the agreement should depend on predetermined performance standards. While goals scored, assists, and total points seem like a logical starting point, minutes played, games played, and other statistics must also be considered as one cannot properly analyze a player's worth based only on scoring. Post-season awards further reflect a player's value within his new league and should also account for potential variable costs.

Still, the variable costs must be capped at a negotiated maximum because the former team should not be able to reap a benefit from its departed player for an unforeseen amount of time. If a player becomes a star in his new league, his new

team should not be put in a situation in which it has to finance the operations of the former team simply because it signed a player that wanted out of his previous league. Allowing fees to rise exponentially while a player improves could cause a new team to overcompensate the former team for work that the former team cannot legitimately take credit for and cause the new team to lose the ability to make a winning deal for itself.

The positives of such a part-fixed and part-variable system are manifold. First, the NHL's teams will avoid paying exorbitant fees based on perceived future value. While the Russian league has complained for quite some time that it has not been compensated for the fair market value of some of its best players, the fact that such a high percentage of Russian players have failed to "pan out" in North America suggests that NHL teams often overpay for players.¹⁵² Second, while teams would avoid excessive fees, the system would be more costly than past agreements, and thus it would encourage increased selectivity. Teams are more likely to be careful and avoid signing more international talent than they can potentially afford. The prospect of owing elevated fees for just one or two players may foreclose the idea of signing other players who are less likely to succeed immediately in the league. Third, a player's former team will receive an up-front payment but also have the ability to collect fees based on a player's performance in his new league. This should help to satisfy the Russian clubs upset over the fact that players who did not possess equal skill previously possessed the same monetary value on the international market. Fourth, increased player transfer revenue can be reinvested into the development of Russian players and facilitate the continued growth of hockey in Russia. Both sides of the deal should be satisfied with this result; Russian teams will continue to have the necessary revenue to develop some of the world's best hockey players, and the NHL would have the

152. See Szemberg, *supra* note 148, at 1.

continuous flow of that talent into North America, albeit at a slightly smaller rate perhaps.

Of course, a totally new system would have its difficulties. The NHL would have to restructure its CBA to account for situations in which unanticipated variable costs associated with international talent causes a team to go over the league's salary cap. Perhaps the NHL and its players association could consent to a scenario where those variable costs that put a team over the cap are taxed at an agreeable rate. Additionally, such a system would create slightly more work as some front office employees would need to focus on whether these players reach given performance goals. These minor hindrances, however, should not be reasons to turn down such a system.

C. Arbitration Provision

While the signing of a transfer agreement would go a long way in creating some much-needed goodwill, teams will never be pleased with losing talent abroad. Consequently, an agreement would not foreclose the litigious nature of the relationship between the NHL and KHL. It is easy to envision, even with an agreement in place, that there will be claims of tortious interference with contract and claims that contracts were signed under duress. At this point, it is clear that the NHL does not intend to submit itself to the jurisdiction of the IIHF and prefers its autonomy. Thus, the leagues must include in any transfer agreement a provision calling for disagreements to be arbitrated in front of a neutral panel. It is understandable that the NHL would want no part of IIHF regulations due to fear of bias as more than 25% of the IIHF Council consists of Eastern European members.¹⁵³

153. The Council consists of Ernest Aljancic of Slovenia, Juraj Siroky of Slovakia, Alexander Medvedev of Russia (also the President of the KHL), and Miroslav Subrt of the Czech Republic. The IIHF's Executive Body

A 2008 PricewaterhouseCoopers survey demonstrated that international arbitration is effective in practice and that it is companies' "preferred dispute resolution mechanism for cross-border disputes."¹⁵⁴ Arbitration offers a plethora of benefits that make it the favored choice when international disputes arise. Specifically, arbitration is valued because it tends to offer an effective process, which leads to a fair result at lower monetary costs than litigation, and a final decision.¹⁵⁵ International arbitration may also offer the best option for neutrality. It allows parties in a dispute to select tribunals of neutral nationalities which are detached from the parties and the parties' interests and isolated in a setting in which bias is avoided.¹⁵⁶ Further, arbitration offers a less adversarial setting that should be preferred for two parties such as those that must have an ongoing relationship in the future.¹⁵⁷ These factors clearly show that arbitration agreements provide an excellent solution to international dispute resolution, particularly in light of the high cost of litigation in foreign courts where the laws may either be unfamiliar or simply unforgiving to foreign parties.

The provision dealing with the appointment of arbitrators should follow the method set out in the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is recognized as the core legal body of the United Nations system in the field of international

2008-2012, IIHF.COM, <http://www.iihf.com/iihf-home/the-iihf/council> (last visited Feb. 8, 2011).

154. GERRY LAGERBERG & LOUKAS MISTELLS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2008 2 (2008), available at http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf.

155. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 27 (4th ed. 2004).

156. Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 461 (2007).

157. *See id.* at 462.

trade law.¹⁵⁸ Its business is the modernization and harmonization of rules on international business.¹⁵⁹ Article Seven of UNCITRAL illustrates a preference for a tribunal of three arbitrators.¹⁶⁰ Article Nine adds that “[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator [and] [t]he two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.”¹⁶¹ Such a method should prove satisfactory to both parties and provide each with a feeling of confidence in the workings and neutrality of the system.

Additionally, both parties must agree on the choice of law to apply to their disputes. One possibility might be to apply the laws of a country considered neutral by both parties. With a safeguard for neutrality in place, the leagues may even consider arbitrating under the law of the country in which a given transaction takes place. Whatever the case, the parties must ensure that the agreement spells out, in detail, the choice of law so that there are no surprises when disputes arise.

IV. CONCLUSION

Given the important role of Russian players in the NHL over the last two decades, it is imperative that the NHL and KHL work out a mechanism to allow for player transfers. Such a system is in the best interests of both leagues. The KHL has

158. The UNCITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law, THE UNITED NATIONS COMMISSION ON INT’L TRADE LAW, *available at* http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf (last visited Feb. 12, 2011).

159. *Id.*

160. The United Nations Commission on Int’l Trade Law Arbitration Rules art. 7 (2011), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (providing that three arbitrators shall be appointed if the parties to the dispute do not agree that there should be only one arbitrator).

161. *Id.* art. 9.

explicitly stated that the fees provided by the previous transfer agreements did not sufficiently compensate its teams for their losses. After Russia refused to sign the latest versions of the transfer agreement, Russian lawmakers amended the loophole in its labor code that allowed employees to terminate a labor contract by simply giving two-weeks notice. That was clearly a money-driven decision. With no transfer agreement to ensure a steady flow of incoming fees for outgoing players, the amended law provided for an alternate means of generating revenue for the loss of players.¹⁶²

On the other hand, the NHL needs Russian talent. If Russia's ability to develop talent suffers due to the loss of millions of dollars in transfer fees each year, the NHL will similarly suffer as it will have less talent to acquire in the future. Thus, it is in the NHL's best interest to support and promote Russia's developmental system. With no transfer agreement in place, the NHL and its member clubs have likely spent millions of dollars to litigate with the KHL. A mutually beneficial transfer agreement would quell the need for protracted litigation and instead allow for that money to be better utilized. As IIHF President Rene Fasel said, "[w]ith the current state of affairs, Europe will soon no longer be able to develop as many . . . Ovechkins and Malkins as before."¹⁶³ He added that "there will be no golden eggs."¹⁶⁴ Don't kill the goose.

162. *Vladislav Tretiak: No One Will Leave For the NHL*, NEWSRU.COM (Feb. 15, 2008), <http://www.newsru.com/sport/15feb2008/tre.html> (explaining that a premature contract termination between an athlete and his employer at the initiative of an athlete without a valid reason will require the athlete to pay the employer substantial compensation).

163. Pavel Strizhevskii, *Rene Fasel: We Have No Reason to Not Allow Radulov to Play For Salavat*, SPORT-EXPRESS (Sept. 10, 2008), <http://www.sport-express.ru/art.shtml?165988>.

164. *Id.*

GIVE MY REGARDS TO THE UNITED STATES COPYRIGHT OFFICE? A DETERMINATION OF WHETHER COPYRIGHT PROTECTION SHOULD BE EXTENDED TO STAGE DIRECTIONS

Ryan Byrnes^{*}

I. INTRODUCTION TO THE ISSUE

New York City's Broadway Theatre District remains the artistic and financial epicenter of the theater industry in the United States.¹ The iconic district attracts the most creative talents and most skilled actors, resulting in productions that, if successful, may produce millions of dollars in profit over the course of a number of years.² Broadway shows attract audience members and tourists from across the country and the world.³ However, it is not the only source for stage productions, as regional theater companies have developed across the country.⁴ It is not uncommon for these companies to produce versions of shows that originated on Broadway, accommodating to those in other areas and enabling them to enjoy these shows without

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1. Margit Livingston, *Inspiration or Imitation: Copyright Protection For Stage Directors*, 50 B.C. L. REV. 427, 427 (2009) [hereinafter Livingston].

2. *Id.* at 428.

3. *Id.* at 427.

4. *Id.*

having to travel to New York to see them. While audience members have likely appreciated this access, it has also given rise to new legal issues regarding the degree to which that access should be allowed.

In November of 2006, the director of the Broadway production of a play titled "Urinetown" threatened to take legal action against Chicago's Mercury Theatre if it did not share royalties and credit for its version of the show with the creative efforts of the director, choreographers, and designers of the original Broadway production.⁵ Letters from the attorney acting on behalf of the director asserted that, while the Chicago show had license to use the script and music of the Broadway production, such permission did not extend to reproducing the creative input of the Broadway director, in addition to the choreographers and designers.⁶ Similar claims were made against a production of the same show in Akron, Ohio.⁷ The defendants in each case responded by seeking declaratory judgments, claiming that their actions failed to infringe on anyone's rights.⁸ The Broadway artists disagreed, proposing that their work was protected by copyright and could recover on such grounds.⁹ Both cases were settled out of court, leaving the following legal issue largely unanswered¹⁰: Do the original Broadway artists have copyright protection over their creative

5. Chris Jones, *'Urinetown' Battle Roils the World of Musicals*, CHI. TRIB., Nov. 19, 2006, § 7, at 1 (discussing the legal battle over a regional theatre company's staging of a Broadway play).

6. Campbell Robertson, *Creative Team of 'Urinetown' Complains of Midwest Shows*, N.Y. TIMES, Nov. 15, 2006, § 5, at 3.

7. *Id.*

8. *Mullen v. Soc'y of Stage Dirs. & Choreographers*, No. 06 C 6818, 2007 WL 2892654 (N.D. Ill. Sept. 30, 2007); *Carousel Dinner Theatre, LLC v. Carrafa*, No. 5:06 CV 02825 (N.D. Ohio Jul. 6, 2007).

9. Complaint at 12, *Mullen*, 2007 WL 2892654 (No. 06 C 6818); Amended Complaint at 7, *Carousel Dinner Theatre* (No. 5:06 CV 02825).

10. Campbell Robertson, *A 'Urinetown' Suit Is Settled*, N.Y. TIMES, Dec. 1, 2007, § B, at 8.

contributions to their plays, or were the regional companies correct in claiming they did not infringe on anyone's rights?

This Article pontificates on one aspect of that issue, focusing on the rights that are or should be afforded to the directors of Broadway plays and plays in general. For a typical production, the playwright contributes a script, which serves as the centerpiece of the play. Dramatic works are enumerated in the United States Copyright Act (Copyright Act), and scripts have traditionally been afforded the protection that accompanies being categorized as a copyrightable work.¹¹ But while the script provides the foundation of a show, it is the particular stage directions contributed by the director that bring the script to life. These usually consist of both the director's overall concept for staging a dramatic work and individual instructions to the actors about their movements and behaviors on stage.¹² In certain cases, the directions may extend into aspects of stage design or choreography. These directions are generally noted in actors' scripts and in prompt books kept by the stage directors themselves.¹³ Despite their value to each stage production, these directions have not been protected as copyrighted works.¹⁴ This question, left largely unanswered to this point, will become more legally significant should directors continue to seek credit and royalties like the "Urinetown" directors did and attempt to use copyright protection as grounds on which to recover.

The Copyright Act grants exclusive rights to those who create original works of authorship that are fixed in any

11. 17 U.S.C. § 102(a)(3) (2011) (The United States Copyright Act lists "dramatic works" as a specific example of a work of authorship.).

12. Livingston, *supra* note 1, at 427.

13. Jeannette Gunderson, *An Unaccountable Familiarity: A Dual Solution to the Problem of Theft in Theatrical Productions*, 31 SEATTLE U.L. REV. 667, 688 (2008).

14. Livingston, *supra* note 1, at 431.

tangible medium of expression.¹⁵ The policy underlying the statute is that the incentive of receiving exclusive rights in the form of copyright protection over their works will provide sufficient motivation to artists to create more works. However, because the costs of exclusive rights come most directly in the form of the denial of access to the public, there is a delicate balancing of private rights against public rights that determines whether copyright protection is justified. While the immediate effect of copyright law is to secure a fair return for the author's creative labor, the ultimate aim is to stimulate artistic creativity so as to benefit the general public good.¹⁶ In this particular example, the balance would be between the benefits of allowing stage directors to have protection over their works against the benefits of allowing free access to the directions for whoever may want to use them. This presents a two-fold issue: Are these stage directions able to be copyrighted under the requirements of the statute, and – perhaps more importantly – should these directions be protected by copyright?

This Article applies different legal and economic theories to attempt to answer those questions. Section II examines the statutory requirements for copyright protection and whether stage directions meet those requirements. Section III describes the general idea behind four means of answering the thesis question: the utilitarian theory, the economic theory of externalities, the idea of internal and external incentives, and the significance of industry-specific characteristics. Section IV applies the four aforementioned factors to the fact pattern of stage directions, and Section V draws on these applications in order to reach a conclusion.

15. 17 U.S.C. § 102(a) (2011) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .").

16. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

II. THE LEGAL ISSUE

Before determining whether stage directions should receive copyright protection, it is necessary to first examine whether they are eligible for such protection under the language of the Copyright Act. This question is discussed in Margit Livingston's article, *Inspiration or Imitation: Copyright Protection For Stage Directors*.¹⁷ Under the Copyright Act, copyright protection subsists in original works of authorship fixed in any tangible medium of expression.¹⁸ Each part of this requirement analysis warrants a short discussion, though stage directions will typically meet each step of this process.

The originality required by the statute is a relatively low standard to meet. As the Supreme Court determined in *Feist Publications, Inc. v. Rural Telephone Service Co.*, a work need only be an independent creation consisting of minimal creativity in order to be copyrightable.¹⁹ Most works will meet this standard, as even slight creativity on the part of the author will suffice.²⁰ Directors can usually meet this low barrier by contributing their creative thoughts, including the organization of the actors, the actors' movement and interaction, and their incorporation of the play's overall theme.²¹ Much like a painter or writer would in their form of art, directors use building blocks of staging in a creative fashion that enables them to bring about their artistic concept.²² Because the Supreme Court

17. Livingston, *supra* note 1, at 427.

18. 17 U.S.C. § 102(a) (2011).

19. *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.").

20. *Id.* ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.").

21. Livingston, *supra* note 1, at 444.

22. *Id.* at 445.

has held that most works will meet the statute's low requirement of originality, it is reasonable to think that stage directions will be found to possess sufficient creativity.

Next, stage directions must be able to be classified as some type of work of authorship. There are several categories that stage directions could fall into in order to be classified as a work of authorship under the plain language of the statute.²³ One would be as a dramatic work, defined as "any work in which performed actions, speech, or incident – or all three – convey theme, thoughts, or character to an audience."²⁴ The key element that is necessary for a work to qualify as dramatic is the intent to be performed (as opposed to a literal work, which is intended to be read).²⁵ The list of dramatic works included by the Copyright Office includes choreography, pantomimes, plays, and scripts prepared for cinema.²⁶ Stage directions are created with the intent for them to be performed; when combined with a script, they serve as the basis of theatrical performances, instructing how the actors and actresses will navigate the stage. This characteristic suggests that they would be considered copyrightable material as a dramatic work.

There has been some disagreement as to whether a director's work itself is creative enough to be a dramatic work.²⁷ This argument rests on the idea that the directions themselves – standing apart from the playwright's script – are

23. 17 U.S.C. § 102(a)(3)-(4) (2011) ("Works of authorship include the following categories: . . . (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works;").

24. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.9.1 (3d ed. 2005).

25. According to the U.S. Copyright Office, a dramatic work is "one that portrays a story by means of dialog[ue] or acting and is intended to be performed." See U.S. COPYRIGHT OFFICE, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 450.01 (1984).

26. *Id.* at n. 98, § 430.

27. David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683, 699 (1996).

not sufficiently developed to justify being protected by any exclusive right.²⁸ However, such a classification should not preclude protection because the works could still be classified as derivative works, which are also included as a copyrightable subject matter under the statute.²⁹ A derivative work is a work based on or derived from one or more preexisting works.³⁰ To be copyrightable, a derivative work need only differ from the original work enough to constitute more than a trivial variation of the preexisting creation.³¹ Among the examples of derivative works included in the Copyright Act are translations, musical arrangements, and dramatizations based on one or more preexisting works.³² Though minor changes or additions to a prior work will not qualify a new work for protection, stage directions tend to go beyond minor additions if they are original enough to meet the originality requirement of copyright law. Most directors' works will provide a work that is built on an underlying script but contains enough new and original creative input to be considered more than mere trivial variation, and thus most would qualify as derivative works eligible for protection.

Even if stage directions are determined to be original works of authorship, they must also satisfy the fixation requirement in order to be copyrightable. A work is fixed in a tangible medium of expression when its embodiment in a copy is permanent or stable enough to permit it to be perceived,

28. *Id.* (discussing that theatrical stage directions, standing alone, do not "tell a connected story or a series of events").

29. 17 U.S.C. § 103(a) (2011).

30. 17 U.S.C. § 101 (2011) (A derivative work is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction . . . or any other form in which a work may be recast, transformed, or adopted.").

31. *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) ("[A] derivative work must be substantially different from the underling work to be copyrightable.").

32. 17 U.S.C. § 101 (2011).

reproduced, or otherwise communicated for a period of more than transitory duration.³³ Specifically, a work consisting of both sounds and images – such as the performance of stage directions – is fixed for the purposes of the Copyright Act if a fixation of the work is being made simultaneously with its transmission. Because protection attaches at fixation, directors must be sure to take steps to record their work in order to meet this requirement.³⁴ One tangible medium commonly used by stage directors is the prompt book, a record that serves as the master plan for theater productions for a director and his actors.³⁵ Another means of fixating the direction would be to set up video cameras or some sort of device that would enable the director to record his work as it is being performed. The fixation requirement, like the originality requirement, is not particularly difficult to meet. However, it will typically require directors to make some conscious effort toward recording their finished stage directions in order to have documented evidence of a copyrightable work.

The ownership of a copyright is traditionally vested in the hands of the author of a work.³⁶ If a director is able to produce directions that are sufficiently original and in a fixed form, ownership of any copyright thereof should rest in the hands of that director. The ownership question would become

33. 17 U.S.C. §102 (2011); *see* H.R. REP. NO. 94-1476, at 52 (1976) (“As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a ‘tangible medium of expression,’ and adds that this medium may be one ‘now known or later developed,’ and that the fixation is sufficient if the work ‘can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”).

34. 17 U.S.C. § 101 (2011) (The term for protection for works created after 1977 begins on the date of creation. A work is said to have been created “when it is fixed in a copy . . . for the first time.”).

35. Gunderson, *supra* note 13, at 688.

36. 17 U.S.C. § 201(a) (2011) (“Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”).

more complicated if the particular scenario included stage directions resulting from a certain employment status, such as a work-for-hire or joint work. However, ownership of copyright protection over stage directions would lie in the hands of the director, allowing him to obtain subsequent exclusive rights to permit and deny the use of his work.

The language of the Copyright Act suggests that most stage directions would be eligible for copyright protection because the works generally meet the simple standard in the statute's language. The modicum of originality will generally be met by a director's contribution of his creative thoughts and interpretations of the script as communicated through his directions. The inclusion of dramatic works, choreography, pantomime, and derivative work in the statute's non-exhaustive list of works of authorship provides ample categories for stage directions to fit into. Most directors can meet the fixation requirement by recording their works in a prompt book, on a video recording, or through some similar medium.

Consequently, it would seem that stage directions are copyrightable subject matter that afford directors protection under the Copyright Act. However, such works have not traditionally been protected by copyright law, despite their apparent compliance with the necessary statutory terms. The larger question – not whether stage directions could receive copyright protection, but rather whether they should receive it – is the more pertinent inquiry to be discussed.

III. FACTORS TO CONSIDER WHEN DETERMINING WHETHER STAGE DIRECTIONS DESERVE COPYRIGHT PROTECTION

In order to properly approach the question of whether stage directions should be granted copyright protection, it is important to understand the means that will be used to answer the question. This Article focuses on four concepts, though this group of factors is not exhaustive and not all factors included

are independent of each other. Part A discusses the influence of the utilitarian theory on copyright law and the basic public policy premises that underlie the balancing of private and public interests. Part B considers the impact of externalities and how both positive and negative externalities influence copyright law. Part C studies the importance of incentives and how both financial and less-tangible motivations factor into the actions of creators. Finally, Part D explores an analogous case study of the fashion industry as an example of how crucial it is to consider each industry and its characteristics independently from each other.

*A. The Utilitarian Perspective: Balancing
Private and Public Interests*

The general purpose underlying intellectual property law is to bring forth the work of creative people. The idea is the law will grant artists the exclusive right to their original expressions and give them a financial incentive to create works and, in turn, the public will benefit from the enrichment it receives through accessing these works.³⁷ To accomplish this goal, the law is designed to encourage private individuals to produce their creative and artistic works through the promise of statutorily-protected exclusive rights. In exchange for these rights, the public will be granted access to the works. The intended effect is that creativity that would otherwise remain private with the individual artist is brought into the public domain to be enjoyed by the masses. This idea of motivating private persons to allow their works to be accessed by the public follows the theory of utilitarianism.

In its basic form, utilitarianism calls for the maximization of the most good for the most people. Copyright law is heavily rooted in utilitarianism and is designed in a

37. *Satava v. Lowry*, 323 F.3d 805, 807 (9th Cir. 2003).

manner that favors the public over the individual.³⁸ The United States Constitution describes the goal of the copyright system as promoting the progress of science and the useful arts.³⁹ The Supreme Court has held that creative work is to be rewarded, but broad public availability to literature, music, and other art must be the ultimate goal.⁴⁰ Private motivation is merely a means to that end; the interests of the individual are not the primary purpose of copyright law.⁴¹ Through the incentive of exclusive rights and the ability to receive copyright protection, artists are assumed to be sufficiently motivated to continue to be creative. This limited grant in the form of exclusive rights is a means by which to achieve what the Supreme Court has determined to be an important public purpose: allowing the public access to creative works.⁴² It also rewards creators by preventing copiers from free riding on creators' investments in

38. Jeffrey Harrison, *A Positive Externalities Approach To Copyright Law: Theory and Application*, 13 J. INTELL PROP. L. 1, 5 (2005).

39. U.S. CONST. art. I, § 8 (The Copyright Clause empowers Congress to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

40. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

41. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.").

42. *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

creativity.⁴³ Copyright law is partially designed to ensure that authors will not have to share their profits with free riders.⁴⁴

Through the rewards promised to individuals in the form of exclusive rights, copyright law provides a system where a greater purpose is served and the public enjoys the fruits of these individual labors.⁴⁵ From a utilitarian perspective, the goal is not merely which option produces the greatest benefit, but which option produces the greatest net benefit. This requires closely looking at the benefits and costs for private individuals as well as the public and finding an appropriate middle ground that produces the most benefit for all sides.⁴⁶ Ideally, the system will work to adequately serve the interests of both the private creator and the public audience. The creator is rewarded by receiving a monopoly over his work for a certain time period, and the public is rewarded by receiving both the benefit of access to that work and the eventual ownership of the work upon expiration of the statutory monopoly.

43. *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1021 (N.D. Cal. 1992) (“Copyright affords an incentive to authors, the guarantee that free-riders will not be able to appropriate the revenues needed to recoup the author’s investment in creativity.”).

44. *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharmaceuticals, Inc.*, 211 F.3d 21, 29 (2d Cir. 2000).

45. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

46. H.R. REP. NO. 60-2222, at 7 (1909) (According to the report of the Judiciary Committee of the House of Representatives accompanying revisions to copyright law in 1909, this balancing act is an integral role for Congress to consider: “In enacting a copyright law Congress must consider...two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public. The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.”).

B. An Economic Perspective: Accounting For Externalities

The question of whether stage directions should receive copyright protection can also be analyzed from an economic perspective. Professor Jeffery Harrison discussed the practicality of copyright law from an economic perspective in his 2005 article *A Positive Externalities Approach To Copyright Law: Theory and Application*.⁴⁷ Harrison notes that the economic view of this area of law is not controlling; neither intellectual property nor copyright law is interpreted simply to advance economic ends.⁴⁸ There are other factors at play, including moral ones.⁴⁹ But the ultimate aim of copyright law is to stimulate creativity in order for the public to benefit.⁵⁰ This approach seems to mirror the economic idea that social gains and losses should be a central concern when determining when copyright protection should and should not be granted.⁵¹

In order to make an adequate economic analysis of intellectual property law, one must not only account for the direct benefits and costs of a decision, but also for the externalities that follow as a consequence of any given act.⁵² Externalities, which can be either positive or negative, are the benefits or harms that others incur as the result of another's action.⁵³ For copyright law, positive externalities are particularly crucial. There are strong economic reasons to allow those who create positive externalities – benefits enjoyed by others based on the work on another – to be compensated for their creativity. The internalization of these benefits is a principal focus of intellectual property law.⁵⁴ In order to fulfill

47. See Harrison, *supra* note 38.

48. *Id.* at 7.

49. *Id.* at 7, n.19.

50. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

51. See Harrison, *supra* note 38, at 4.

52. *Id.* at 7.

53. *Id.* at 5.

54. *Id.* at 6.

the policy of bringing forth the production of creative people to the extent desired by society, externalities must be accounted for. Positive externalities result in too little creativity being produced because the artist is not fully awarded for his productive effort.⁵⁵ For example, too many free riders taking advantage of the positive externality of open access to an artist's work could diminish the likelihood of that author continuing to create, therefore resulting in less works of art being produced than is desired. On the other hand, negative externalities may result in too much creativity being produced because the costs that are internalized are lower than total costs.⁵⁶ In order to reach what economists term allocative efficiency, both types of externalities must be treated.⁵⁷

Copyright law is carefully designed to encourage efficient allocation of positive externalities while minimizing the social costs of those benefits.⁵⁸ While the goal is to maximize social gains, one must also be conscious of the costs that are incurred at all levels.⁵⁹ This includes the administrative costs of maintaining a copyright system, the transaction costs incurred by private individuals negotiating for the right to use protected works, and the costs of exclusivity – the benefits that are lost when the public is no longer granted free access to an original expression.⁶⁰ For analytical purposes, Harrison suggests assuming that each work is produced at the lowest possible cost, and then when comparing gains and losses, comparing the total benefits and total costs based on this assumption of lowest-cost production.⁶¹

55. *Id.* at 10.

56. *Id.*

57. *Id.*

58. *Id.* at 13.

59. *Id.* at 13-14 ("First, in the context of copyright, the objective is not to maximize total gains resulting from creativity. Protection of these gains results in costs. The objective is to maximize net social gains. If the net social gains are negative, the effort should not be protected.").

60. *Id.* at 14.

61. *Id.* at 10.

There are two operative rules that Harrison suggests the law must comply with in order for copyright law to financially incentivize creative people in a way that still maximizes societal benefits.⁶² First, copyright law should protect works only when doing so creates more social benefits than social costs.⁶³ A given work may produce external benefits, but if the costs of internalization exceed these benefits, they should not be incurred and, as a result, the work should not be protected.⁶⁴ Second, copyright law should incur no greater social cost than necessary to provide incentives to the creator.⁶⁵ Under this rule, any protection beyond the minimum necessary does not increase the social benefit of the work and is thus burdensome in terms of the administrative, transaction, and exclusivity costs mentioned previously. For the purposes of analysis, let's assume works are being produced at the lowest cost and attempt to align the ultimate answer with Harrison's two operative rules.

C. The Importance of Incentives: An Industry-Specific Determination

General economic theory relies on the idea that human beings will respond to incentives and that having certain rewards in place will cause people to adjust their behavior accordingly. Copyright law relies heavily on this idea, as the foundation of the copyright system is the belief that the reward of exclusive rights will serve as the incentive that brings about continued creativity.⁶⁶ This limited grant of a monopoly bestowed upon creators of art is allowed as a special reward

62. *Id.* at 14.

63. *Id.* at 6, 14.

64. *Id.* at 14.

65. *Id.* ("Put differently, as long as the creative effort is put forward, there is no need to incur costs to protect benefits beyond this minimum.").

66. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

intended to initiate creative activity.⁶⁷ The amount of incentives that are necessary to bring about sufficient creativity is less clear to legislators than the general understanding of the need to have them. Balancing the amount of legislation that is necessary to stimulate artists and also benefit the public is one of the main questions Congress must consider when determining the scope of copyright protection.⁶⁸ The balancing of incentives against free public access has long been a feature of intellectual property law and, in order to do so, the amount of incentive necessary must be determined.

The determination of proper incentives requires accounting for what a creator will view as enough motivation to invest his time and labor toward producing an artistic work. This motivation can be either internal or external. Internal benefits are those generally taken into account by individuals when deciding whether or not to create a work, while external benefits are those outside of the individual's decision-making process. Certain benefits – financial ones, for example – are typically easier to quantify and will generally be treated as an internal incentive because they presumably motivate the artist to some degree. An author may be promised a lump sum payment for finishing their book, followed by a payment that is contingent upon the number of books that are sold. This monetary benefit is generally easier to measure and understand. Copyright protection can similarly serve as an internal benefit. The promise of exclusive rights over one's work will, in theory, allow them to reap the full value of the work, including recouping investment and potentially making a profit. An artist can estimate what he or she believes the value and consequent reward might be for their creativity and then factor that estimation into their decision over whether to invest the effort necessary to produce it. Therefore, the reward of copyright protection should be attainable enough to cause artists to be

67. *Id.*

68. *See* H.R. REP. NO. 60-2222, *supra* note 46, at 7.

creative and also to avoid the risk of offering an insufficient amount of incentive.

However, it is crucial to realize that while a failure to provide proper incentives for creative activity is a potential problem, it is not necessarily an automatic one. This is partly because certain internal incentives that factor into a creator's decision-making process are more difficult to measure. It is possible, for example, that a poet may write poetry merely for his own satisfaction or just to the point of recouping investment with less motivation emanating from potential profit.⁶⁹ While an internal motive of a given creator is more difficult to quantify than a financial benefit given its inherently personal nature, any analysis involving internal benefits must account for both because they are presumed to be internal to an individual's calculus when deciding whether to create.⁷⁰

External benefits, on the other hand, are derived by those who do not have to compensate a creator in return for using their work.⁷¹ Because the actions of free riders do not result in a return on investment, this external benefit they enjoy does not factor into an individual's decision-making process when deciding whether to create.⁷² This intangible element complicates the determination of market demand since the use of works without compensating creators results in a market that cannot appropriately respond to consumer demands.⁷³ However, when considering the incentives necessary to motivate creators, the focus is primarily on the internal benefits that factor into their decisions rather than on the benefits to others, which are more difficult – and perhaps, less important –

69. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, U. CHI. L. REV. 263, 306-11 (2002).

70. David W. Barnes, *Trademark Externalities*, 10 YALE J.L. & TECH. 1, 7 (2007).

71. *Id.* at 6.

72. *Id.* at 7-8.

73. *Id.* at 8.

to ascertain. The determination of whether the amount of incentive available to artists in a particular industry is optimal requires analyzing and accounting for the characteristics of that specific industry. Therefore, the proper amount of incentive that is necessary to motivate stage directors to produce a sufficient amount of stage directions will require accounting for internal factors that are both easy and more difficult to measure.

*D. Importance of Industry Characteristics:
The "Piracy Paradox"*

When analyzing the incentives and protections that are necessary for a given art form, one should be sure to account for characteristics and tendencies that are specific to that particular type of work. Measures that are necessary in one industry may not be necessary in another. Additionally, an issue that is perceived to be a problem in one industry may be an asset in another. For example, the practice of copying (or "piracy") is sometimes viewed as an enemy of creativity, yet at other times may be a stimulant of it. In the article *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design* by Kal Raustiala and Christopher Sprigman, the authors discuss this phenomenon as it applies to the fashion industry.⁷⁴ In doing so, they provide a comparable example of how industry characteristics are crucial to any discussion regarding the need for copyright protection within a given industry.⁷⁵

Intellectual property law generally holds that piracy is a problem.⁷⁶ Because intellectual property law is built around the concept of promising protection as a form of incentive to engage in creative labor, several industries have feared that a

74. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688 (2006).

75. *Id.* at 1689.

76. *Id.* at 1717.

lack of protection would result in fewer individuals being willing to invest their creative efforts.⁷⁷ For example, piracy has been a principal concern for content owners in the music and film industries.⁷⁸ Groups such as the Recording Industry of America and the Motion Picture Association of America have staged highly publicized oppositions to enablers of piracy, such as online file-trading systems like Grokster.⁷⁹ The movements of groups representing these interests resulted in recent legislation including the Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension Act.⁸⁰ Permitting piracy may also permit pirates to profit from the sale of works they did not create – a scenario in direct opposition to the aims of copyright law.⁸¹

However, unlike the music and film industries, fashion designers and their lobbyist groups have not made similar pushes for greater protection over their works.⁸² Since the fall of fashion guilds more than 60 years ago, there has been no substantial anti-piracy initiative, as designers within the American industry have had a relative absence of concern about intellectual property protections for their works.⁸³ Instead of being preoccupied with receiving protection over designs, those within the fashion industry have embraced a “low-IP equilibrium,” and Raustiala and Sprigman argue that designers do not have a strong incentive to do anything to change it.⁸⁴ As part of a phenomenon the authors term the “piracy paradox,” they propose that an atmosphere of low intellectual property protection may not only be minimally

77. *Id.*

78. *Id.* at 1715.

79. *Id.*

80. *Id.* at 1717.

81. *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1021 (N.D. Cal. 1992).

82. Raustiala & Sprigman, *supra* note 74, at 1717.

83. *Id.* at 1715.

84. *Id.* at 1695.

harmful to designers, but may actually serve its interests better than higher protection would.⁸⁵

The generally low level of protection afforded to fashion designers has not prevented the business from being largely profitable. The fashion industry sells more than \$750 billion in apparel each year.⁸⁶ However, design copying has been a widespread practice in fashion generally and in United States fashion specifically.⁸⁷ This freedom to copy, the authors propose, is largely taken for granted at all levels of the fashion world and plays a crucial role in the fashion marketplace.⁸⁸ Many copies are actually new versions of a design recast as derivative works, only creatively inspired by the original designs.⁸⁹ The allowance of free appropriation contributes to rapid production of substantially new designs, which in turn leads to more copying, only further introducing another design shift.⁹⁰ Instead of stalling the fashion cycle, piracy propels it.⁹¹ The authors propose that more goods are consumed in low-IP equilibrium than in a highly regulated system because copying rapidly reduces the status premium conveyed by new designs.⁹²

While the low-IP system does not necessarily cause the success of the fashion industry, it is similarly less clear whether an increase in protection would necessarily be a benefit. European law generally protects fashion designers from copying, but there is little indication that designer firms have altered their behavior because of it.⁹³ Copying remains widespread, suggesting that the industry's practice with respect to copying is not sensitive to changes in the legal landscape.⁹⁴

85. *Id.* at 1699.

86. *Id.* at 1693.

87. *Id.* at 1695.

88. *Id.* at 1716.

89. *Id.* at 1724.

90. *Id.* at 1726.

91. *Id.*

92. *Id.* at 1733.

93. *Id.* at 1735.

94. *Id.* at 1735, 1737.

Despite the availability of legal protection over designs, there has been very little litigation.⁹⁵ Additionally, while piracy does not always harm creators, even those who happen to suffer some harm may be reluctant to push for greater protection.⁹⁶ The nature of the industry creates an atmosphere where there is no clear line between originator and copier, as designers are often some degree of both.⁹⁷ One who sets a trend one year may be following the trend the next, and the new leader is often difficult to predict.⁹⁸ After centuries of design, original ideas are few and the trendy nature of fashion means that designers either copy or create derivatives of someone else's idea.⁹⁹

It is quite possible that the atmosphere of free appropriation and the perpetual cycle of piracy allow the industry to remain successful and creative despite the low availability of protection. It is also not clear whether bolstering the legal structure would be beneficial to, or even welcomed by, designers. This provides a strong example of the importance of industry-specific characteristics in the analysis of the necessity of intellectual property protection, as measures sought in one market may be unnecessary and possibly burdensome in another.

IV. APPLICATION OF FACTORS TO STAGE DIRECTIONS ISSUE

A. The Utilitarian Theory: A Cost-Benefit Analysis of the Theater Industry

The goal of any copyright protection available to stage directors should be to bring forth their creativity while still

95. *Id.* at 1737.

96. *Id.* at 1727.

97. *Id.*

98. *Id.*

99. *Id.*

benefiting the public. In order to determine the optimal scope of copyright protection that should be available to stage directions, the focus must be on the two goals of encouraging directors' creativity and also permitting public access. This method of using the motivation of personal gain to ultimately serve a public interest is the basis of copyright law and requires a balancing of these competing interests. In the context of the theater industry, this utilitarian analysis consists of weighing the costs and benefits of granting copyright protection against the costs and benefits of not granting such protection with the optimal choice being whichever results in the greater net benefit for society.

The benefits of allowing directors to obtain copyright protection over their stage directions come most noticeably in the form of the external benefit that exclusive rights would provide. Copyright law relies on the idea that the promise of a limited monopoly over a given work is sufficient incentive to make artists produce artistic works.¹⁰⁰ By extending such protection to stage directions, directors would theoretically have greater incentive to create. However, the utilitarian focus is on the benefit to society and not the individual. Moreover, the benefit to the individual is only significant with respect to how it ultimately benefits the public. The greater incentive available to the individual may bring about a social benefit of more stage directions being produced, but it also carries with it significant social costs. The public will not only suffer the cost of limited access to the works, but they will also have to account for the administrative and legal costs of protecting the exclusive rights. While public access is not likely to be completely cut off (the stage directions will still be used by the original director as well as those who pay the fee to use the original works), the loss suffered through denial of access to those who cannot enjoy the works, if access is not free, is likely to be substantial. This weighs largely against the key utilitarian

100. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

policy of allowing access to the most people despite whatever individual incentives may exist to artists.

The option of not extending protection to stage directions creates a market that more closely parallels the utilitarian goal copyright law seeks to achieve. By not allowing directors to have exclusive rights to their works, the public enjoys relatively free access to stage directions. Without the financial costs of copyright protection hampering the theater industry, directors can more easily share ideas and adopt works, resulting in a greater amount of plays and performances available to a greater amount of audiences. More significantly, this public benefit does not come with a particularly high cost to the private creator. If the utilitarian goal is to bring forth the creation of stage directions while still allowing access to the greatest extent possible, then the theater industry has met this objective quite well without the involvement of copyright protection. The popularity and profitability of today's theater industry indicates that directors have been sufficiently motivated by the current system of internal and external incentives. The public has been the main beneficiary of the existing incentives because they have encouraged directors to turn private ideas into public goods. While it is possible the incentive of copyright protection would lead to a greater creative output by directors, the costs that will necessarily attach significantly diminish any net benefit. The success of the Broadway theater industry under the current system of copyright-free stage directions is a better option to further the utilitarian objective because it brings about sufficient private creativity while the public ultimately benefits most in the form of free access.

*B. Externalities and The Harrison Rules
Applied To Theater Industry*

Before considering the specific incentives that factor into any artist's decision-making process, externalities must be

accounted for. Again, the goal of copyright protection under the utilitarian theory is not to maximize the total gains resulting from creativity, but instead to maximize the net total gains that are produced.¹⁰¹ This includes the benefits and costs that may initially go unnoticed, but that exist in the form of positive and negative externalities. Once all externalities are accounted for, Harrison's two operational rules can be applied; to protect works only when doing so creates more social benefits than social costs and to incur no greater social cost than necessary to provide incentives to the creator.

The application of these rules assists in answering the question of whether copyright protection should be extended to stage directions. Allowing protection for the works would produce a private benefit that presumably would eventually become a social benefit. By making stage directions copyrightable, directors would theoretically have a greater incentive to produce these works because of the limited monopoly they would be able to obtain over them. This increase in incentive could lead to greater production of stage directions, and thus the greater social benefit of having more plays to enjoy.

However, these social benefits must be weighed against the social costs that would accompany protection. The granting of limited rights to directors would curtail the access to the works currently enjoyed by the public. In addition to the initial administrative expense of formally recognizing the copyright, social costs would result when a copyright holder decides to grant access as well as when he or she decides not to. If the director decides to grant a potential licensee permission to use his stage directions, there will be resulting negotiating costs. On the other hand, if a director decides not to grant permission to a licensee or demands a fee that is too high for a potential user, the social cost of limited access is even more prevalent. This situation presents the possible negative externality of

101. See Harrison, *supra* note 38, at 13.

deadweight loss.¹⁰² By requiring a certain agreement or fee in exchange for access, a director is likely to create a barrier that will simply be too high for some users to meet. Therefore, a regional director and his potential audience might be precluded from enjoying the original director's work such that society as a whole suffers. If one determines the administrative costs of copyright protection and the risk of potential deadweight loss are greater than the societal benefits such protection allows, then granting exclusive rights to directors for their stage directions would likely violate Harrison's first operative rule.

The option of continuing to not extend copyright protection to stage directions carries with it its own set of social benefits and costs. On one hand, the public would continue to benefit from free access to stage directions. The lack of administrative hurdles and negotiation barriers permits open sharing of ideas among directors and the potential for regional directors to adapt the works of Broadway artists to their shows in different areas. Additionally, the lack of protection does not necessarily mean a dip in creativity. Stage directors have remained creative for centuries without the incentive of copyright law driving their productions.

The social costs that result from a lack of protection are more speculative than those that would likely result from making stage directions copyrightable, though they are still significant. The lack of copyright protection over stage directions leaves directors with little to no grounds on which to prevent free riders from using their creative works without providing them compensation. This may seem to be a private cost, as the inability to profit off the license and to recover off the ownership of these works is felt most directly by the

102. Deadweight loss is the cost to society that is created by market inefficiency. It can be applied to any deficiency caused by an inefficient allocation of resources. Deadweight loss occurs when supply and demand are not at equilibrium. Dead Weight, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/d/deadweightloss.asp#axzz1dkSBbUy2> (last visited Nov. 16, 2011).

director. However, the inability to obtain exclusive rights to their works may deter certain directors from investing their creative energies in the projects. Ultimately, this would become a social cost because the theater industry, and the public that would make up theater audiences, would suffer from a loss of creativity. Directors may choose to focus their creative talents in a different manner or choose not to be creative at all. This view also accounts for the externalities associated with free riders. While there may be a positive externality conferred upon those who use the original director's work without paying due compensation, this free riding prevents the original creator from maximizing his return on investment or realizing the true demand for his work. It is more difficult to quantify the social costs resulting from a lack of protection because it largely depends on the extent to which directors are deterred from wanting to produce. However, the current standard of not granting copyright protection seems to comply with Harrison's operative rules because the social benefits of free access and healthy creativity are apparent while the social costs do not seem too burdensome.

C. Incentives: A Theater Industry-Specific Consideration

The economic theory underlying copyright law indicates that creators will adjust and respond to incentives that are offered to them. In the copyright context, the idea is that the promise of exclusive rights to and a limited monopoly over their work will properly motivate artists to want to produce works. As discussed earlier, the constant need to determine appropriate incentives requires the consideration of internal and, to a lesser extent, external incentives that are specific to a given industry. The question of whether copyright protection should be available to stage directions, consequently, requires accounting for both more tangible benefits (e.g., financial payment, potential legal protection) as well as less obvious benefits (e.g., non-financial, more self-satisfactory) that are

enjoyed by stage directors and that factor into their decision to produce stage directions.

On one hand, there is the argument that society needs to provide the incentive of copyright protection as a sort of benefit that motivates directors to want to produce a sufficient amount of stage directions. Advocates of this position will likely place more importance on tangible benefits and less importance on the possibility of internal incentive. In most cases, directors will already have a financial benefit in the form of compensation. The types and degrees of compensation are likely to vary depending on the location, size, and success of a particular production. For example, the highest-paid directors who work on Broadway may earn \$50,000 per show and may additionally receive payment in the form of royalties from box office receipts.¹⁰³ The longer a show remains on Broadway, the greater compensation will be. While the means and manner of compensation likely varies on a play-to-play basis, there will generally be some sort of payment serving as an incentive for directors.

However, not all may view this initial compensation to be a sufficient incentive. The access to stage directions may allow free riders from other theaters to use the original director's work without providing compensation. The argument could be made that some directors will be less likely to invest the time and effort necessary to produce stage directions without being able to obtain a limited monopoly over their work. This incentive would be available in the form of the exclusive rights available through copyright protection. The promise of exclusive right would provide a means of both monetary and legal recourse, as directors who receive protection would be able to license out and collect fees from those they allow to use their directions and also have grounds

103. Salary, Wages, Pay: Actors, Producers, and Directors, JOB BANK USA,

http://www.jobbankusa.com/career_employment/actors_producers_director/s/salary_wages_pay.html (last visited Nov. 16, 2011).

on which to preclude or demand compensation from those they choose to deny use to. If this means of protection is not available, it could be argued that society is losing out because some directors will not be motivated to produce stage directions without it.

While some may argue that copyright protection is a necessary incentive for directors in the theater industry, others could argue that the market produces a sufficient amount of stage directions without it. Broadway itself has been in existence for centuries, remaining a profitable industry for artists and theater employees as well as a popular destination for tourists. The Broadway League released statistics earlier this year indicating that Broadway plays grossed more than \$1 billion during the 2010 calendar year, with a total attendance of more than 12 million theatre attendees.¹⁰⁴ The sustainability and current financial success of the center of the theater industry suggests that the art form is performing quite well without the incentive of copyright protection being offered to directors. Despite the lack of protection over their directions, the artists have continued to produce works that are creative enough to draw millions of fans and make billions of dollars on an annual basis. This suggests that the combination of existing financial benefits (in the form of compensation, whether lump sum, royalties, or some mixture thereof) and the internal motive has been sufficient to this point to make Broadway an extremely successful industry.

Additionally, this success has been built without society having to incur the costs of copyright protection. The profitability stemming from Broadway stage directions is even more impressive when one considers they have continued to be sufficient without the administrative or negotiating costs that would attach to any grant of exclusive rights. If one considers there to be sufficient production of stage direction under the

104. Broadway Season Statistics, THE BROADWAY LEAGUE, http://www.broadwayleague.com/index.php?url_identifier=season-by-season-stats-1 (last visited Nov. 16, 2011).

current system, then introducing the costs that would accompany copyright protection would violate Harrison's second operative rule – to incur no greater than necessary to provide incentives to the creator.¹⁰⁵ Even if copyright protection did produce more stage directions, it is not clear whether the benefit of these additional works would be enough to outweigh the costs that would inevitably attach to the change. Harrison discusses the idea that copyright law, with its utilitarian roots, focuses on the net social gains that protection would bring about, and the degree of incentive necessary factors directly into the amount of creativity that is produced.¹⁰⁶ If one views the current level of creativity within the Broadway stage direction industry to be sufficient, then it is likely that the combination of existing financial benefits and the artistic motivation within the directors themselves is the proper level of incentive necessary. Thus, this argument supports the idea that copyright protection for stage directions is unnecessary and also inefficient.

*D. Piracy Paradox – The Benefits of Piracy
Within the Theater Industry*

As the authors displayed in their discussion of the piracy issue within the fashion world, it is crucial to consider the contextual details of a given industry for one to appropriately analyze the necessity of intellectual property protection. Though there are significant differences between fashion and theater, the general acceptance of sharing of creativity as well as the relative success within the respective industries despite low intellectual property protection sheds some light on the question that is considered in this Article.

As in the fashion industry, the general difficulty in distinguishing an original idea from its derivative work may make granting copyright protection over stage directions

105. *See* Harrison, *supra* note 38, at 6.

106. *Id.* at 13.

similarly impractical. This may account for why there has been relatively little advocacy for an increase in protection; directors themselves may not be sure of when they are being copied and when they are copying. Introducing copyright protection to this realm, in addition to concerns over its practicability, could also impair the sharing of creativity that the industry relies on. Much like the way designers borrow and build upon the prior works of others, directors incorporate the elements of others into their works. The possibility of infringing on a stage direction element that might be the copyright material of another could stifle creativity. If a director worries about the possibility of being sued because part of their stage direction was actually a prior direction utilized in another's play, they are less likely to reach their creative potential and more likely to act conservatively avoid risk. This limited creativity eventually would trickle down to a cost for the audience, who would receive fewer plays. Given the litigious nature of the United States, this potential chilling effect of introducing legislation to this creative sphere cannot be ignored.

Additionally, the relative satisfaction with the current system should make legislators hesitant to make any drastic alterations to intellectual property within the theater industry. As discussed in the introduction, there have been examples recently of Broadway stage directors looking to collect royalties and control the use of their works through attempted copyright protection. However, there generally has not been a significant push on behalf of stage directors for legislation. Unlike the RIAA or MPAA, Broadway directors have not yet used their labor organizations such as the Stage Directors and Choreographers Society¹⁰⁷ to seek stronger intellectual property protection. If the supposed beneficiaries of such protection have not made a demonstrated effort to alter the law in their favor, it seems detrimentally aggressive to impose

107. STAGE DIRECTORS AND CHOREOGRAPHERS SOCIETY, <http://www.sdcweb.org/> (last visited Nov. 16, 2011).

different legislation on an industry that may not necessarily desire it.

V. CONCLUSION

The application of the above economic and policy considerations suggests that the goals of intellectual property and copyright law are likely best served by not granting protection to stage directions. From a utilitarian perspective, free access and a lack of exclusive rights produces a greater net benefit to society than the alternative option of protected stage directions. Even after accounting for externalities, the benefits of access outweigh the costs. This option would best align copyright law with Harrison's operative rules of incurring no more social cost than necessary in order to provide incentives. Additionally, the need for more incentive in order to receive adequate production of stage directions is unclear. Directors seem properly motivated by the existing combination of financial benefit and internal non-financial satisfaction. Finally, like fashion designers, stage directions may best operate in an environment of low protection, enabling them to build off of each other's works without fear of litigation. Until and unless the creative output of stage directors dwindles and suffers from a lack of protection, the vibrant history of the theater industry suggests that the art form can sustain itself without the assistance of copyright protection.