Sports and Entertainment Law Journal
Sandra Day O'Connor College of Law
Arizona State University
P.O. Box 877906
Tempe, Arizona 85287

Sports and Entertainment Law Journal is supported by the Sandra Day O'Connor College of Law at Arizona State University. *Sports and Entertainment Law Journal*'s mailing address is: Sports and Entertainment Law Journal, P.O. Box 877906, 1100 S. McAllister Ave., Tempe, AZ 85287.
Sports and Entertainment Law Journal's email address is: Selj.law.asu@gmail.com.

Citation: Cite as: ARIZ. ST. SPORTS & ENT. L.J.

SPORTS AND ENTERTAINMENT LAW JOURNAL

Sandra Day O'Connor College of Law
Arizona State University
Volume 3 Fall 2013 Issue 1

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When Tweets Get Real: Applying Traditional Contract Law Theories to the World of Social Media

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Back in November 2010, rapper Ryan Leslie announced that his personal laptop had been stolen out of his Mercedes.[2] Leslie "tweeted" what appeared to be an offer of a million dollar reward for the safe return of the MacBook.[3] When one of his Twitter followers, Armin Augstein, found the laptop and attempted to return it to Leslie to collect the million dollar reward, Leslie refused to pay Augstein.[4] As a result, Augstein sued Leslie.[5]

Similarly, in May 2008, Pittsburgh Steelers running back Rashard Mendenhall entered into a three-year Talent

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[1] Kristen Chiger is a 2013 Graduate from Barry University, School of Law. Ms. Chiger wishes to thank her mentor, Professor Marc Edelman, for his assistance in developing the concept of this paper, and for all the other countless ways he contributed to her success and accomplishments throughout her time in law school.

[2] *See Ryan Leslie Offers One Million Dollars for Stolen Laptop Return*, SINGERSROOM (Nov. 8, 2010), http://singersroom.com/content/2010-11-08/Ryan-Leslie-Offers-One-Million-Dollars-For-Stolen-Laptop-Return/ (stating that Ryan Leslie had his laptop stolen out of his Mercedes).

[3] *See* Rob Markman, *Watch The Throne Tracks Lost With Ryan Leslie's Laptop,* MTV.COM (Oct 4, 2012, 1:07 PM), *http*://www.mtv.com/news/articles/1694935/ryan-leslie-watch-the-throne-lost-tracks-laptop.jhtml (explaining that, "desperate to reclaim the work that he'd lost, Leslie offered a million-dollar reward").

[4] *See* Rob Markman, *Ryan Leslie Sued For $1 Million Over Laptop Reward*, MTV.COM (Oct. 26, 2011, 6:01 PM), http://www.mtv.com/news/articles/1673241/ryan-leslie-laptop-lawsuit.jhtml

[5] *See* Markman, *Watch The Throne Tracks Lost With Ryan Leslie's Laptop,* (stating that "the singer is being sued in a trial that is scheduled to start on October 22").

Agreement with Hanesbrands[6] to promote and advertise Hanesbrands' products that were sold under the Champion trademark.[7] The Talent Agreement contained a Morals Clause that provided Hanesbrands the right to terminate the agreement if Mendenhall were to become the subject of a public controversy.[8] On May 2, 2011, just one day after the President announced the capture and death of Osama Bin Laden, Mendenhall put out a series of controversial tweets relating to the matter.[9] Based on these tweets, just a few days later on May 5, 2011, Hanesbrands informed Mendenhall of their intent to terminate their Talent Agreement and Mendenhall filed suit against Hanes for breach of contract.[10]

While the popularity of social networking in today's society continues to sky rocket, so do the inevitable issues surrounding the legality of statements and agreements made using social media sites such as Twitter. This paper will

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[6] *See* Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 719 (M.D.N.C. 2012) (stating that "In May 2008, Mr. Mendenhall and Hanesbrands, a Maryland corporation with its principal place of business located in Winston-Salem, North Carolina, entered into a Talent Agreement").

[7] *See id.* ("Under the terms of the Talent Agreement, Hanesbrands would use the services of Mr. Mendenhall to advertise and promote Hanesbrands' products sold under the Champion trademark.").

[8] *See id.* at 719-20 (citing the agreement that stated, "If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the 'Act') tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then we shall have the right to immediately terminate this Agreement.").

[9] Dan Pompei, *Mendenhall's Tweets Draw Criticism*, CHICAGO TRIBUNE (May 3, 2011), http://articles.chicagotribune.com/2011-05-03/sports/ct-spt-0504-rashard-mendenhall-osama-20110503_1_tweet-rashard-mendenhall-twitter-comments.

[10] *See Mendenhall*, 856 F. Supp. 2d at 721 ("In a letter dated May 5, 2011, and addressed to Rob Lefko, one of Mr. Mendenhall's representatives at Priority Sports and Entertainment, Hanesbrands' Associate General Counsel, L. Lynette Fuller–Andrews, indicated that it was Hanesbrands' intent to terminate the Talent Agreement effective Friday, May 13, 2011.").

address recent cases and controversies involving Twitter, while discussing and applying contract law—both traditional and modern—to such incidents.

Part I of this paper will give a background on Twitter, discussing its role and popularity in today's society. Part II will discuss the legal issues involved with contractual agreements made over Twitter, and whether the reward tweet authored by Ryan Leslie indeed constituted a valid offer. Part III of this paper will address the case of *Mendenhall v. Hanesbrands, Inc.*, and will discuss the issue of whether a tweet made in violation of a Morals Clause is sufficient grounds for termination of a Talent Agreement contract. Part IV will discuss scandals involving public figures that took place as a result of Twitter. Finally, part V will conclude and discuss legal issues that may arise in the future.

I. ABOUT TWITTER

Twitter, a social media site started in 2006[11], is a "real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting."[12] Users are able to create and share "tweets," which are postings that can be up to 140 characters in length.[13]

Unlike lengthy blog posts, Twitter gives users the opportunity to say what's on their mind without having to

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[11] *See* Eric Jackson, *Facebook's MySpace Moment: Why Twitter Is Already Bigger Than Facebook*, FORBES.COM (September 26, 2012, 4:05 PM), http://www.forbes.com/sites/ericjackson/2012/09/26/f acebooks- myspace-moment-why-twitter-is-already-bigger-than-facebook/ (The article states that "Twitter was started when Jack Dorsey sent an SMS message at 9:50pm PT on March 21, 2006.").

[12] *See* TWITTER, https://twitter.com/about.

[13] *See id.* ("At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters long, but don't let the small size fool you—you can discover a lot in a little space. You can see photos, videos and conversations directly in Tweets to get the whole story at a glance, and all in one place.").

take the time or energy to write a full-length posting at regular intervals.[14] Twitter has been called "microblogging" due to the fact that a tweet contains 140 characters or less.[15] Each tweet is made in order to answer the question "what are you doing?" and is then published in the twitter feed of those users who "follow."[16]

Perhaps the most well-known Twitter feature is the hashtag. Hashtags are words or phrases that follow a "#" symbol.[17] They are used as a way for Twitter users to find others who are talking about the same subject.[18] For example, if someone hashtags the word "winning," the likely results following a click of the linked word would yield several others who are discussing things such as great accomplishments, competition results, or Charlie Sheen.[19]

Among the site's millions of users are several

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[14] *See* Anita Hamilton, *Why Everyone's Talking about Twitter*, TIME (March 27, 2007), http://www.time.com/time/business/article/0,8599,1603637,00.html#ixzz2CPC9Xncb (The article states that those who have "ever fancied yourself a blogger" but did not have the time to keep one can "set your inner blogger free" using Twitter.).

[15] *Id.* (stating that while some people refer to Twitter as microblogging or moblogging, the author likes to think of it as "simply blogging for regular people").

[16] *Id.* (explaining that tweets are limited to 140 characters, and are used to answer the question "what are you doing?").

[17] *See* Ashley Parker, *Twitter's Secret Handshake*, N.Y. TIMES (June 10, 2011), http://www.nytimes.com/2011/06/12/fashion/hashtags-a-new-way-for-tweets-cultural-studies.html?_r=1&pagewanted=all (defining hashtags as "words or phrases preceded by the # symbol").

[18] *See id.* (describing hastags as a way for users to "organize and search messages" with words or phrases within real-time updates).

[19] *See id.* (explaining that when Charlie Sheen had his "meltdown" back in 2011, he tweeted the phrase "#winning" and it immediately caught on and highlighted hashtags as "one of the newest ways technology has changed how we communicate").

celebrities and public figures.[20] While Twitter is a great way to instantly exchange information in "real-time," it is no stranger to public scandals[21] and legal issues.

II. TWEETS FOR KEEPS: CONTRACT FORMATION & SOCIAL MEDIA

On March 23, 2011, the United States District Court for the Southern District of Florida held that an instant message exchange effectively modified a written agreement which contained a "no-oral modification clause."[22] In the case of *CX Digital Media v. Smoking Everywhere*, CX Digital Media, Inc., ("CX") filed suit against Smoking Everywhere, Inc. ("Smoking Everywhere") for damages owed based on a modification agreement, which was made entirely through instant messages.[23]

Despite Smoking Everywhere's argument that an online conversation lacks the "specificity and directness" needed to form a valid contract, the court ruled otherwise.[24] Judge Cecilia Altonaga held that the conversation at issue was indeed an "unsigned writing" that contained valid offer and

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[20] *See* Kelly Phillips Erb, *Microblogging: Is Twitter the New Blog?*, 31-AUG PA. LAW 34 (2009) (stating that the "appeal of Twitter has gone beyond celebrities and politicians," including President Barack Obama, who has a Twitter account).

[21] *See* Porcher L. Taylor, III. et. al., *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in A New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 110-11 (2010) (noting that "armed with Twitter, talent are just possibly one tweet away from scandal.").

[22] *See* CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020, 2011 U.S. Dist. LEXIS 29999, at *54-55 (S.D. Fla. Mar. 23, 2011) (holding that an instant messaging conversation could modify a contract).

[23] *See id.* at *7-11 (reviewing a day-long instant messaging conversation between the parties where they discussed a number of topics, one of which was the modification agreement in question).

[24] *See id.* at *30 (S.D. Fla. Mar. 23, 2011) (citing how Smoking Everywhere argued that an online conversation lacks the "specificity and directness" needed in order to modify a contract).

acceptance.[25] Essentially, the ruling made it clear that, where a contract requires a written and signed modification, an online instant message exchange is sufficient to meet that requirement.

The *Cx Digital Media* case tells us that contracts formed over the internet are just as binding and valid as those that are formed in person.[26] "Tweets" are similar to instant messages, and if a dispute involving a sales contract formed over Twitter takes place in the future, the *CX Digital Media* case will likely be persuasive authority. A similar decision was rendered in the case of *Augstein v. Leslie*, which involved a reward offer.

A. Tweeter Beware: Reward Offers Can Be Binding

While touring Germany, rapper Ryan Leslie's laptop was stolen.[27] The laptop's hard drive contained Leslie's intellectual property, including unreleased tracks that were scheduled to be included in his upcoming album.[28] As a result, Leslie posted a video to YouTube offering a million

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[25] *Id.* at *40 (the court reasoned that, because Smoking Everywhere was aware of the changes and did not complain, the "signed-writing" argument did not hold weight); *See* WILLISTON ON CONTRACTS § 29:43 (4th ed. 1999) ("[W]here, following the oral modification, one of the parties materially changes position in reliance on the oral modification, the courts are in general agreement that the other party will be held to have waived or be estopped from asserting the no oral modification clause.").

[26] *CX Digital Media*, 2011 U.S. Dist. LEXIS at 37 (ruling that the "instant-message conversation, as an unsigned writing" was sufficient enough under Delaware law to properly modify the "Insertion Order" in question).

[27] Augstein v. Leslie, 2012 U.S. Dist. LEXIS 2919, at *1 (S.D.N.Y. Jan. 10, 2012) ("Defendant, a New York resident, advertised a $1 million reward for the return of his laptop and other personal property that was stolen in Germany").

[28] *See* Rob Markman, *Ryan Leslie Sued For $1 Million Over Laptop Reward*, MTV.COM (Oct. 26, 2011, 6:01 PM), http://www.mtv.com/news/articles/1673241/ryan-leslie-laptop-lawsuit.jhtml (quoting Leslie stating that, "I lost my computer out here in Germany. I actually had my whole new album on there, which I had been working on in secret, and it got stolen.").

dollar reward for the return of the laptop and later "tweeted" the link to the video.[29] Armin Augstein found the laptop in a park while walking his dog.[30] However, Leslie refused to pay Augstein the promised million dollar reward.[31] As a result, Augstein brought suit against Leslie in the United States District Court for the Southern District of New York.

This first issue to be determined by the court was whether the tweet Leslie made containing the $1 million dollar reward for the return of the laptop constituted an offer, or whether it was simply an invitation to negotiate. Leslie argued that the reward was not an offer, it was simply "an advertisement."[32] According to Leslie, if it was indeed an advertisement, no contract resulted.[33] The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested."[34]

In the classic case of *Lefkowitz v. Great Minneapolis Surplus Store, Inc*. a similar issue arose.[35] In *Lefkowitz,* the defendant, Great Minneapolis Surplus Store ("GMSS"),

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[29] *See* Greg Watkins, *Producer Ryan Leslie Sued For $1 Million Over Failed Laptop Reward Payment*, ALLHIPHOP.COM (Oct. 25, 2011, 9:30 AM), http://allhiphop.com/2011/10/25/producer-ryan-leslie-sued-for-1-million-over-failed-laptop-reward-payment/ (Stating that Ryan Leslie "took to Twitter" to eventually offer a $1 million reward).

[30] *See* Adrian Chen, *If You Offer a $1 Million Bounty for Your Missing Laptop, You Must Pay It*, GAWKER.COM (Oct. 25, 2011, 3:41 PM), http://gawker.com/5853256/if-you-offer-a-1-million-bounty-for-your-missing-laptop-you-must-pay-it (stating that Augstein found the missing laptop "while walking his dog in the park.").

[31] *See* Augstein v. Leslie, No. 11 Civ. 7512(HB), 2012 WL 4928914, at *1 (S.D.N.Y. Oct. 17, 2012) ("After Augstein returned the laptop and hard drive, Leslie refused to pay the reward . . . . ").

[32] *See id.* at *3.

[33] *See id.* ("Advertisements, Leslie argues, are generally considered offeres.").

[34] 1 WILLISTON ON CONTRACTS § 4:10 (4th ed. 1999).

[35] Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689 (1957).

placed an advertisement in a local newspaper stating that a stole worth $139.50 was available for only $1, on a first come first serve basis.[36]

Like Leslie, GMSS contended that it was simply an advertisement and a "unilateral offer" that could be withdrawn without notice.[37] GMSS also argued that an advertisement is not an offer, but rather an invitation for an offer.[38]

The court in *Lefkowitz* ruled for the plaintiff, concluding that the advertisement in question "was a clear, definite, and explicit offer of sale by defendant and left nothing open for negotiation, and plaintiff, who was first to appear at defendant's place of business to be served, was entitled to performance on part of defendant." Based on the *Lefkowitz* ruling, it appears Leslie's statement that "I am offering a reward of $20,000," followed later by a tweet which reaffirmed followers that Leslie was "absolutely continuing my Euro tour + I raised the reward for my intellectual property for $1mm" indeed constituted an offer and left nothing open for negotiation.

Leonard v. Pepsico, Inc. is another similar case which involved the question of whether a statement made was an

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[36] *See id.* at 690 (stating that the defendant published an advertisement that stated "Saturday 9 A.M. Sharp 3 Brand New Fur Coats. Worth to $100.00. First Come First Served $1 Each").

[37] *See id.* (explaining that the defendant contended that "a newspaper advertisement offering items of merchandise for sale at a named price is a 'unilateral offer' which may be withdrawn without notice").

[38] *See id.* at 690-91 (explaining that the defendant contended that "advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them", but rather "an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms").

offer or simply an advertisement.[39] In *Leonard*, a television commercial viewer brought suit against Pepsico, Inc., asking the court to enforce an alleged contractual commitment of Pepsico to provide a fighter jet aircraft in return for "Pepsi points."[40] The "Pepsi points" promotion in question "encouraged consumers to collect 'Pepsi Points' from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo."[41]

In a commercial advertisement some of the "prizes," along with their point values, were displayed and towards the end of the commercial the words "HARRIER FIGHTER 7,000,000 PEPSI POINTS" appeared.[42] Leonard attempted to collect the 7,000,000 Pepsi Points needed, and when Pepsi refused to honor the offer and provide the fighter jet, Leonard brought suit against Pepsi.

The United States District Court for the Southern District of New York ruled in favor of defendant Pepsico. However, their reasoning for doing so was based on the fact that, although the fighter jet was featured on the commercial advertisement, the fighter jet did not appear in the product catalog featuring all of the items.[43] In contrast, the *Augstein* reward offer was *not* followed with a formal writing of any sort.

Unlike the commercial in question in the *Leonard* case, Leslie's conduct:

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[39] *See* Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd,* 210 F.3d 88 (2d Cir. 2000).
[40] *See generally id*.
[41] *Id.* at 118.
[42] *See id.* at 119 (explaining that the commercial ended by a military drumroll sounding, followed by the following words appearing on the screen: "HARRIER FIGHTER 7,000,000 PEPSI POINTS").
[43] *See id.* at 124 (stating that the case is distinguishable from *Lefkowitz* because "First, the commercial cannot be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the Catalog").

> "was meant to induce performance. Leslie was not seeking a promise from an individual who would return belongings, rather he was seeking performance—the actual return of his property. In addition, his videos and other commentary cannot be reasonably understood as an invitation to negotiate because, similarly, Leslie was not soliciting help to find his property, but the actual return itself."[44]

B. Do Tweets Pass the Reasonable Objective Person Test?

The second issue involved in the case of *Augstein v. Leslie* was whether a reasonable person would have understood the offer made via Leslie's tweet to be an offer, rather than an invitation to negotiate.[45] Because there is sparse case law considering whether an offer can be made over Twitter, several factors should be considered. The traditional "reasonable objective person test" must be

[44] *See* Augstein v. Leslie, No. 11 Civ. 7512(HB), 2012 WL 4928914, at *3 (S.D.N.Y. Oct. 17, 2012).

[45] *See id.* (stating that Leslie relied "on the fact that the offer was conveyed over YouTube (a website where many advertisements and promotional videos are shared, along with any number of other types of video) to undermine the legitimacy of the offer.").

applied.[46]

In the classic well-known contracts law case *Lucy v. Zehmer*, the reasonable person standard is put to the test.[47] In this case, two men negotiate the sale of a farm after having some alcoholic drinks.[48] Zehmer wrote a statement on the back of a restaurant check offering the sale of his farm to Lucy for $50,000.[49]

Although Zehmer signed the written offer, Zehmer later claimed he was not serious about the offer and it was done in jest.[50] However, the court ruled that even if Zehmer was not serious about selling his farm to Lucy, the fact that Lucy believed it to be a serious offer—as would any other reasonable person—showed the offer was indeed a valid, binding offer.[51]

In the case of *Augstein v. Leslie*, the court found that "a reasonable person viewing the video would understand that Leslie was seeking the return of his property and that by returning it, the bargain would be concluded."[52] It is clear

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[46] Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) ("An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.") (citing 17 C.J.S. *Contracts* § 32 at 361; 12 Am. Jur. *Contracts* § 19 at 515).

[47] *See generally id.*

[48] *See id.* at 518 (stating that Zehmer and Lucy "had one or two drinks together" the night of the agreement in question).

[49] *See id.* (stating that Zehmer "took a restaurant check and wrote on the back of it, 'I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete.'").

[50] *See id.* at 517-18 (stating that Zehmer believed that the offer was "made in jest").

[51] *See id.* at 521 (stating that, "If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself.").

[52] *See* Augstein v. Leslie, 2012 WL 4928914 (S.D.N.Y. Oct. 17, 2012).

that, unlike in *Lucy*, Leslie's offer was a serious one and was not made in jest. The tweet that conveyed the reward offer was viewable by over 450,000 "followers."[53]

Leslie's reward offer was made several times through various social media outlets, including Twitter.[54] Thus, it is clear that any reasonable person who read the offer contained in the tweet would believe it to be a serious one. Therefore, the offer made by Leslie indeed passes the "reasonable objective person test."

C. Absence of Signature Not a Defense

When it comes to agreements formed online, including Twitter, the affirmative defense of the Statute of Frauds signature requirement would not hold much weight. This is because, at the turn of the millennium, two electronic contracting statutes were put in place: the Electronic Signatures in Global and National Commerce Act ("E-Sign") and the Uniform Electronic Transactions Act ("UETA").

The E-Sign and UETA were passed by congress and signed into law by President Bill Clinton in 2000, and they

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[53] *See Stats & Rankings for Ryan Leslie*, TWITAHOLIC.COM, http://twitaholic.com/ryanleslie/ (last visited Oct. 20, 2013).

[54] *See Augstein* at *2, ("Leslie mentioned the $20,000 reward for the return of his property in a YouTube video on October 24, 2010. In the video, Leslie says, 'I am offering a reward of $20,000.' He also implied that the lost property was worth much more than $20,000. On November 6, 2010, a video was posted increasing the reward to $1,000,000. At the end of the video, a message reads, 'In the interest of retrieving the invaluable intellectual property contained on his laptop & hard drive, Mr. Leslie has increased the reward offer from $20,000 to $1,000,000 USD.' The increase of the reward was publicized on Leslie's Facebook and Twitter accounts, including a post on Twitter which read, 'I'm absolutely continuing my Euro tour + I raised the reward for my intellectual property to $1mm' and included a link to the video on YouTube. News organizations also published reports on Leslie's reward offer, both in print and online. Finally, Leslie was interviewed on MTV on November 11, 2010, and reiterated the $1,000,000 reward, saying 'I got a million dollar reward for anybody that can return all my intellectual property to me.'").

were designed to eliminate barriers to electronic commerce.[55] The purpose of the laws was to establish that electronic signatures and electronic records generally satisfy the legal requirement set forth by the statute of fraud's signature requirement.[56] Thus, if a contract for the sale of a good is formed over Twitter, or any other type of online communication, an electronic signature would suffice.

III. LADY DUFF GORDON MEETS THE TWEETS

The classic contract law case of *Wood v. Lucy*, Lady Duff-Gordon establishes that there is an implied covenant of good faith and fair dealing present in every contract.[57] The recent case of *Hanesbrand v. Mendhenall* shows that this same covenant is present in Talent Agreements being challenged based on a series of controversial tweets.

The day after Osama Bin Laden's death was announced by President Barack Obama, Steelers running back Rashard Mendenhall released a series of controversial tweets regarding the capture and death of Bin Laden.[58] Mendenhall was a spokesman for Hanesbrands' Champion products, and

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[55] See Patricia Brumfield Fry, *Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions*, 37 Idaho L. Rev. 237 (2004), for a general overview and discussion of the Uniform Electronic Transactions Act.

[56] *See* U.C.C. § 2-201 (2012) ("(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.").

[57] Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

[58] *See* Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012) (stating that on May 2, 2011 Plaintiff issued "tweets regarding Osama bin Laden, whose death had been announced by President Obama on May 1, 2011").

as a result of the tweets, Hanesbrands tried to terminate the Talent Agreement, contending that Mendenhall's tweets were in violation of a moral clause found within the agreement.[59]

Mendenhall has a history of using his Twitter partly as a political platform to express his views regarding parenting, relationships, women, Islam, and the ways in which the NFL is similar to a slave trade.[60] Hanesbrands never made any indication that they were not pleased with these tweets.[61] However, on May 2, 2011, Mendenhall issued the following tweets regarding the capture and killing of Osama bin Laden, just one day after President Obama announced bin Laden's death:

> *What kind of person celebrates death? It's amazing how people can HATE a man they never even heard speak. We've only heard one side ...*
> *I believe in God. I believe we're ALL his children. And I believe HE is the ONE and ONLY judge.*
> *Those who judge others, will also be judged themselves.*

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[59] *See id.* at 721 (stating that on May 5, 2011, Hanesbrand's general counsel sent Mendenhall's representatives a letter explaining that Hanesbrands intended to "terminate the Talent Agreement effective Friday, May 13, 2011").

[60] *See id.* at 720 ("Plaintiff used his Twitter account to candidly express his views about Islam, women, parenting and relationships, and made comments in which Plaintiff compared the NFL to the slave trade.").

[61] *See id.* ("Plaintiff alleges that in response to these tweets, 'Hanesbrands at no time suggested that it disagreed with Mr. Mendenhall's comments or that his tweets were in any way inconsistent with the values of the Champion brand or his obligations under the Talent Agreement, or that because of his tweets, Hanesbrands believed Mr. Mendenhall could no longer continue to effectively communicate on behalf of and represent Champion with consumers.'").

> *For those of you who said we want to see Bin Laden burn in hell and piss on his ashes, I ask how would God feel about your heart?*
> *There is not an ignorant bone in my body. I just encourage you to # think*
> *@dkller23 We'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style.*[62]

The public reacted strongly to these tweets, which led Mendenhall to issue an explanation two days later.[63] On May

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[62] *See id.*

[63] *See id.* at 720-21 (stating that in response to some negative reaction to the May 2, 2011 tweets, Mr. Mendenhall issued the following explanation: "I appreciate those of you who have decided to read this letter and attain a greater understanding of my recent twitter posts. I see how they have gotten misconstrued, and wanted to use this outlet as a way to clear up all things that do not truthfully represent myself, what I stand for personally, and any organization that I am a part of. First, I want people to understand that I am not in support of Bin Laden, or against the USA. I understand how devastating 9/11 was to this country and to the people whose families were affected. Not just in the US, but families all over the world who had relatives in the World Trade Centers. My heart goes out to the troops who fight for our freedoms everyday, not being certain if they will have the opportunity to return home, and the families who watch their loved ones bravely go off to war. Last year, I was grateful enough to have the opportunity to travel over seas and participate in a football camp put on for the children of U.S. troops stationed in Germany. It was a special experience. These events have had a significant impact in my life. 'What kind of person celebrates death? It's amazing how people can HATE a man they have never even heard speak. We've only heard one side ...' This controversial statement was something I said in response to the amount of joy I saw in the event of a murder. I don't believe that this is an issue of politics or American pride; but one of religion, morality, and human ethics. In the bible, Ezekiel 33:11 states, 'Say to them, 'As surely as I live, [continued on the next page...]

5, 2011, just a few days after Mendenhall issued his explanation, Mendenhall's agent received a letter from Hanesbrands informing him that Hanesbrands would be terminating the Talent Agreement pursuant to the morals clause in the contract.[64] Hanesbrands also issued a public statement to ESPN that explained their decision to terminate the Talent Agreement.[65]

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declares the Sovereign LORD, I take no pleasure in the death of the wicked, but rather that they turn from their ways and live. Turn! Turn from your evil ways ...' I wasn't questioning Bin Laden's evil acts. I believe that he will have to face God for what he has done. I was reflecting on our own hypocrisy. During 9/11 we watched in horror as parts of the world celebrated death on our soil. Earlier this week, parts of the world watched us in horror celebrating a man's death. Nothing I said was meant to stir up controversy. It was my way to generate conversation. In looking at my timeline in its entirety, everything that I've said is with the intent of expressing a wide array of ideas and generating open and honest discussions, something I believe we as American citizens should be able to do. Most opinions will not be fully agreed upon and are not meant to be. However, I believe every opinion should be respected or at least given some thought. I apologize for the timing as such a sensitive matter, but it was not meant to do harm. I apologize to anyone I unintentionally harmed with anything that I said, or any hurtful interpretation that was made and put in my name. It was only meant to encourage everyone reading it to think.").

[64] *See id.* at 721 ("In a letter dated May 5, 2011, and addressed to Rob Lefko, one of Mr. Mendenhall's representatives at Priority Sports and Entertainment, Hanesbrands' Associate General Counsel, L. Lynette Fuller–Andrews, indicated that it was Hanesbrands' intent to terminate the Talent Agreement effective Friday, May 13, 2011, pursuant to Paragraph 17(a) of the Agreement. (Complaint, Ex. C).").

[65] *See id.* at 721-22 (M.D.N.C. 2012) (stating that on May 6, 2011, Hanesbrands stated the following to ESPN: "Champion is a strong supporter of the government's efforts to fight terrorism and is very appreciative of the dedication and commitment of the U.S. Armed Forces. Earlier this week, Rashard Mendenhall, who endorses Champion products, expressed personal comments and opinions regarding Osama bin Laden and the September 11 terrorist attacks that were inconsistent with the values of the Champion brand and with which we strongly disagreed. In light of these comments, Champion was obligated to conduct a business assessment to determine whether Mr. Mendenhall could continue to effectively communicate on behalf of and represent Champion with

[continued on the next page...]

As a result of Hanesbrands' attempt to cancel the Talent Agreement, Mendenhall filed suit against them on July 18, 2011.[66] Mendenhall alleged that Hanesbrands breached the Talent Agreement contract "[b]y its actions purporting to terminate the Talent Agreement and Extension under Section 17(a), and by its failure and refusal to pay amounts due Mr. Mendenhall."[67] Specifically, Mendenhall alleged that:

> "the unilateral action taken by Hanesbrands is unreasonable, violates the express terms of the Talent Agreement and Extension, is contrary to the course of dealing between the parties with regard to Mr. Mendenhall's use of Twitter to freely express opinions on controversial and non-controversial subjects, violates the covenant of good faith and fair dealing implied in every contract, and constitutes a breach of the Talent Agreement."[68]

Hanesbrands filed a motion for summary judgment.[69] However, Mendenhall defended his claim based on the notion that it was unreasonable for Hanesbrands to cancel the contract based on the tweets in question. Mendenhall argued that, although the Morals Clause allowed termination of the Talent Agreement contract if Mendenhall was involved with a

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consumers. While we respect Mr. Mendenhall's right to express sincere thoughts regarding potentially controversial topics, we no longer believe that Mr. Mendenhall can appropriately represent Champion and we have notified Mr. Mendenhall that we are ending our business relationship. Champion has appreciated its association with Mr. Mendenhall during his early professional football career and found him to be a dedicated and conscientious young athlete. We sincerely wish him all the best.").

[66] *See id.* at 722 (stating that Mendenhall filed action on July 18, 2011).

[67] *Id.* at 722.

[68] *Id.*.

[69] *See id.* ("Defendant, in its Motion for Judgment on the Pleadings, contends that it was within its rights under the express terms of Section 17(a) to terminate the Talent Agreement and Extension with Mr. Mendenhall pursuant to Section 17(a) of the Agreement.").

"public disrepute, contempt, scandal, or ridicule[70]", it does not grant Hanesbrands the right to terminate simply because the company disagreed with Mendenhall's personal tweets.[71]

Under New York law, in every contract there is an implied duty of good faith and fair dealing that prohibits the parties to the agreement from acting arbitrarily or irrationally in exercising their discretion.[72] Therefore, although Section 17(a) of the Talent Agreement contract provides Hanesbrands with discretionary termination rights, the discretion must be exercised under the implied covenant of good faith and fair dealing.[73] Thus, the Court determined that Hanesbrands' attempt to terminate the Talent Agreement contract based on mere disagreement with the statements contained in Mendenhall's tweets may have been unreasonable and denied Hanesbrands' Motion for Summary Judgment.[74]

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[70] *See id.* at 720 (citing Section 17(a) that states that if Mendenhall "commits or is arrested for any crime or becomes involved in any situation or occurrence tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof," Hanesbrands would have the right to terminate the contract.).

[71] *See id.* at 726 (stating that Mendenhall noted that Hanesbrands issued a public statement to ESPN indicating that the company's reasons for terminating the Talent Agreement contract was because Hanesbrands "strongly disagreed with Mr. Mendenhall's comments").

[72] *See* Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389, 663 N.E.2d 289, 291 (1995) (stating that where a contract allows for the exercise of discretion, "this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion").

[73] *See Mendenhall*, 856 F. Supp. 2d at 726 (stating that any discretion granted to Hanesbrands by Section 17(a) "is subject to the implied covenant of good faith and fair dealing").

[74] *See id.* at 728 (ruling that a judgment on the pleadings would not be warranted and denied Hanesbrands' Motion for Judgement on the Pleadings).

IV. TWITTER SCANDALS

As with any social network site, Twitter has seen its fair share of public scandals[75], many of which involve contract law related issues. For example, during a conversation believed to be off-the-record, President Obama voiced his opinion about the Kanye West and Taylor Switft incident at the 2009 MTV Video Music Awards.[76] After President Obama called Kanye West a "jackass" for the stunt, his remark ended up on Twitter.[77]

An ABC News employee by the name of Moran tweeted President Obama's comment just after hearing it.[78] However, little did Moran know, by doing so he breached an explicit agreement—made between the news station conducting the interview and the White House—that all of President Obama's "pre interview chitchat" was to be considered off the record.[79]

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[75] *See e.g.* Frances Romero, *Top 10 Twitter Controversies*, TIME (Jun. 6, 2011), http://www.time.com/time/specials/packages/article/0,28804,2075071_2075082_2075118,00.html.

[76] *See MTV awards: West Disrupts Swift's Speech*, CNN.COM (Sep. 14, 2009), http://articles.cnn.com/2009-09-14/entertainment/mtv.music.video.awards_1_taylor-swift-mtv-video-music-awards-awards-show?_s=PM:SHOWBIZ (stating that Kanye West rushed onstage and grabbed the microphone from Taylor Swift during her acceptance speech, in order to "let loose an outburst" on behalf of Beyonce Knowles, who he believed should have won).

[77] *See* Matea Gold, *Obama, Kanye West and trouble with Twitter*, LOS ANGELES TIMES (Sep. 16, 2009), http://articles.latimes.com/2009/sep/16/entertainment/et-abctwitter16 (explaining that the comment ended up on Twitter because an ABC News employee tweeted about it).

[78] *See id.* (recounting that after hearing President Barack Obama make the comment, ABC News employee Moran tweeted,"Pres. Obama just called Kanye West a 'jackass' for his outburst at VMAs when Taylor Swift won," Moran tweeted. "Now THAT'S presidential.").

[79] *See id.* ("the explicit agreement CNBC made with the White House that Obama's pre-interview chitchat was off the record.").

Within an hour, the tweet was deleted, but the story had already gotten out.[80] As a result, ABC News had to call the White House to apologize for the breach of contract caused by the tweets.[81]

The permanent nature of written tweets has caused great controversy in the past few years. For example, Chris Brown was involved in a Twitter scandal in late 2010.[82] In a series of angry tweets directed at former B2K artist Raz-B, Brown tweeted the "N-word"[83] along with other words associated with homophobia[84] and domestic violence. The day after the "tweet war" between Chris Brown and Raz-B,

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[80] *See id.* (explaining that within an hour, Moran realized the breach caused and deleted the tweet, but the story "was already out").

[81] *See id.* (stating that "ABC News quickly called CNBC and the White House to apologize").

[82] *See* Gil Kaufman, *Chris Brown, Raz-B In Bitter Twitter Feud Over Rihanna*, MTV.COM (Dec. 30, 2010, 9:01 AM), http://www.mtv.com/news/articles/1655091/chris-brown-raz-b-bitter-twitter-feud-over-rihanna.jhtml (stating that Chris Brown was involved in a "tweet war" with artist Raz-B. Brown described the incident as follows: "I was minding my damn business and Peter pan decides to pop off!!! I'm not mad though!!! I'm just not silent nor am i one of these scary R&B cats!!" Brown later tweeted, "I'm not homophobic! He's just disrespectful!!!").

[83] *See id.* (stating that according to reports, Brown got heated when another artist by the name of Raz-B tweeted "I'm just sittin here thinking how can n---as like [Eric Benet] and [Chris Brown] disrespect women as intelligent as Halle Berry, Rihanna." Brown tweeted back, "N---a you want attention! Grow up n---a!!! Di-- in da booty ass lil boy.").

[84] *See id.* (recounting that at one point, Brown tweeted to Raz-B, "Di-- in da boot ass lil boy.").

Brown issued a public apology.[85]

However, perhaps the most well-known Twitter scandal to date—at least in the world of politics—involved former United States Representative Anthony Weiner.[86] On Friday, May 27, Weiner tweeted a waist-down photograph of a man's briefs to a 21-year-old female college student in Seattle.[87] Shortly thereafter, Weiner removed the tweet, claiming that his account was hacked.[88]

However, the photo was eventually identified as being a photo of Weiner. And, a few days later, Weiner admitted that he was indeed the one who tweeted it.[89] This was only after the Twitter follower, to whom Weiner tweeted the photograph, came forward to offer evidence that she had been

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[85] *See* TMZ Staff, *Chris Brown Homophobic? – I Apologize, I'm Not Homophobic*, TMZ.COM (Dec. 30, 2010, 3:45 PM), http://www.tmz.com/2010/12/30/chris-brown-apologize-homophobic-twittter-raz-b-razb/ (reporting that Chris Brown issued the following statement to TMZ: "Yesterday was an unfortunate lack in judgment sparked by public Twitter attacks from Raz B, who was bent on getting attention. Words cannot begin to express how sorry and frustrated I am over what transpired publicly on Twitter. I have learned over the past few years to not condone or represent acts of violence against anyone. Molestation and victims of such acts are not to be taken lightly; and for my comments I apologize -- from the bottom of my heart. I love all of my fans, gay and straight. I have friends from all walks of life and I am committed, with God's help, to continue becoming a better person.").

[86] *See* Associated Press, *Timeline of Rep. Weiner's Online Sex Scandal*, FOXNEWS.COM (Jun. 11, 2011), http://www.foxnews.com/politics/2011/06/11/timeline-rep-weiners-online-sex-scandal/.

[87] *See id*.

[88] *See id.* (stating that shortly after the photograph was tweeted, Weiner "quickly deleted it and sends out a tweet saying that his Facebook account was hacked").

[89] *See* Chris Cuomo, *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It'*, ABC NEWS (Jun. 6, 2011), http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605#.ULoZzYXQI1w (reporting that Weiner eventually admitted to tweet the photograph, stating "I take full responsibility for my actions. The picture was of me, and I sent it).

in an ongoing "sexting" conversation with the congressman.[90] Weiner ultimately resigned from his position as congressman as a result of the scandal, which came as a disappointment to those who elected him into office—especially since he was a leading candidate for the next mayor of New York.[91]

V. CONCLUSION

When it comes to the contract law issues associated with online agreements, the internet, and social media, it is clear that the law is evolving with the times. This first became evident in 2000, with the passing of acts such as E-Sign and UETA. These acts give validity to those contracts that are created and signed electronically. The evolution of contract law within the digital age continued with the ruling in the recent case of *CX Digital Media v. Smoking Everywhere, Inc*., where the court ruled that contracts formed using social media such as instant messages, and perhaps tweets, will be binding.

The decision in the case of *Augstein v. Leslie* further affirmed this.[92] *Augstein* made it clear that reward offers made over Twitter are also binding.[93] The court in *Augstein* concluded that if a

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[90] *See id.* (reporting that the woman involved in the conversation was Meagan Broussard, a 26-year-old nursing student and mother from Texas. Broussard provided, to the press, "dozens of photos, emails, Facebook messages, and cell phone call logs" to show the extent of the lewd exchanges between herself and Weiner. It was only after Broussard came forward that Weiner confessed to his actions.).

[91] *See* Raymond Hernandez, *Anthony D. Weiner Announces His Resignation*, NYTIMES.COM (Jun. 16, 2011), http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html?pagewanted=all&_r=0 (describing Weiner as a "once-promising politician whose Brooklyn roots and scrappy style made him a leading candidate to be the next mayor of New York" and explains that he made the decision to resign as congressman "after long and emotional discussions with his political advisers and his wife, whom friends described as devastated by the behavior of her husband of 11 months, and worried about the couple's financial future").

[92] *See* Augstein v. Leslie, 2012 WL 4928914, at *1-3 (S.D.N.Y. Oct. 17, 2012).

[93] *Id.*

reasonable objective person would find a tweet to contain an offer to perform in exchange for money, then such offer is valid.[94]

It is likely that litigation involving contract formation and Twitter will continue to increase in the future. In order to avoid excessive litigation, the solution could be for Congress to amend a law currently in place, such as E-Sign or UETA. Simply adding language to validate contracts formed over social media sites, in addition to the validation of those formed and signed electronically, would solve the issue.

While it is normally very difficult for government officials to regulate activities of the internet, in this instance it would take nothing more than an amendment. Doing so would not only prevent future litigation involving social media contracts from clogging up the court systems, but it would also force users of sites such as Twitter to use—or, tweet—with caution.

[94] *Id.*

Speaking in Tweets and Other Social Media: Should Some Written Communication Be Considered Oral Communication?

Ryan Pittman[1]

The increasingly prevalent use of social media raises new questions related to contract formation. In her article Kristen Chiger gives examples of many classic contract cases and principles that the courts may use as precedent to help establish when a contract should be binding if negotiated or offered through social media.[2] One of the author's examples of a contract being formed on social media was in *Augstein v. Leslie,* in which the court used the precedent set by traditional contract law cases to establish that reward offers may be binding when conveyed through Twitter.[3] In the case of *Augstein*, the offer was a million dollar reward for the return of a laptop.[4]

The author also mentions that the courts are evolving contract law to recognize the modern context of social media and the different forms of communication used to form contracts with each other. The case that the author points to,

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[1] Sandra Day O'Connor College of Law, Arizona State University (J.D. Law, 2014 exp.).

[2] See Lefkowitz v. Great Minneapolis Surplus Store, Inc., 251 Minn. 188 (1957) (Holding that a newspaper advertisement that was clear, definite, explicit, and left nothing open for negotiation was entitled to perform their offer); See also, Lucy v. Zehmer, 196 Va. 493 (1954) (Holding that if evidence showed that the contract entered into for the purchase of property was a serious business transaction, the purchasers were entitled to specific performance).

[3] See Augstein v. Leslie, No. 11 Civ. 7512 HB, 2012 WL 4928914, at *2 (S.D.N.Y. Oct. 17, 2012)

[4] See Rob Markman, Ryan Leslie Sued For $1 Million Over Laptop Reward, MTV.com (Oct. 26, 2011, 6:01 PM), http://www.mtv.com/news/articles/1673241/ryan-leslie-laptop-lawsuit.jhtml.

CX Digital Media v. Smoking Everywhere, Inc.,[1] may hold precedential value when looking at how contracts are made or altered through social media and Twitter. In this case, Smoking Everywhere Inc. failed to pay CX Digital Media for sales they brought the company that were not compliant with the original contract.[2] CX Digital Media, however, were able to prevail on their claim for damages because they were able to show that the parties had altered the original contract. What makes this case unique is that all of the alterations to the contract that the court found contractually binding were made entirely through instant messaging conversations between the parties.[3] As more business is done electronically, allowing contract modifications through instant messaging and Twitter has major implications for how businesses can communicate through social media. Allowing contracts to be altered, and perhaps made, through instant messaging could allow for faster transactions and greater flexibility in business contracts made around the world. However, it may also lead to situations in which parties believe they are merely discussing or negotiating a contract when in fact they are being bound by the terms they are stating in an instant messaging conversation. With that in mind, it is important for the courts to continue to clarify how instant messaging will be perceived by the court in contract negotiations.

The conclusion that the court came to in *CX Digital Media* seems to ignore the way that people think of instant messaging and the purpose of its use. Although instant messaging and tweeting are written forms of communication, they are increasingly used as, and function as, a replacement for oral communications. Although the end result of *CX Digital Media* is in line with recognizing instant messaging,

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[1] See generally CX Digital Media v. Smoking Everywhere, Inc., No. 09–62020–Civ., 2011 WL 1102782 (S.D.Fla. Mar. 23, 2011).
[2] Ibid.
[3] Ibid.

and possibly the use of Twitter, as oral communication, the court does so in a way that is less definitive and is less likely to have precedential value.

One of the main issues of contention in *CX Digital Media* was that the contract only allowed changes to be made in writing signed by both of the parties, also known as a "no oral-modification clause" or a signed-writing clause.[4] However, the mere presence of these signed-writing clauses does not necessarily make subsequent agreements void if they are not signed written agreements. "[A] written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement."[5] In order to resolve this issue, the court applied a common law doctrine that allows oral agreements to modify a contract and be binding on the parties.[6] This is complicated, however, by the determination that instant messaging was an unsigned written agreement.[7] Thus, instead of determining that instant messaging acted as an oral conversation, the court expanded the common law principle of oral agreements to unsigned writing as well.[8] Fortunately, this expansion of the common law doctrine for oral agreements does not seem to give a bright line rule for contractual agreements in the future and may not extend past the district court of Florida in which the *CX Digital Media* case was decided.

While instant messaging and tweets are written forms of communication, they seem to act as a replacement for oral communication in ways that other written forms, such as letters, emails, or contracts, do not. This is because instant messaging typically functions in a synchronous way that

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[4] Ibid., *9.
[5] Ibid., *11-12. (citations omitted).
[6] Ibid., *12 ("They may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement.") (citations omitted).
[7] Ibid.
[8] Ibid. ("In this case, the modification was not oral, but appeared in writing in an instant-message conversation. Nevertheless, the same principle applies to this informal, unsigned writing as to an oral modification.").

mimics oral conversations and is treated or portrayed as substitute speech. AOL is famous for showing the message that "You've Got Mail" accompanied by images of letters in one's virtual mailbox or writing a letter when writing an email.[9] Meanwhile, modern forms of text messaging are portrayed with speech bubbles from one person to another.[10] In fact, before changing its name to "Google Hangouts," Google's instant messaging platform was called "Google Talk."[11] Thus, while email is shown as something analogous to writing a letter, instant messaging is portrayed as being analogous to speaking with someone. This shows that the public perceives instant messaging to be more similar to oral communication than written communications. These perceptions effect the different ways that these mediums of communication are designed and used.

Another major difference between instant messaging and email is the notion of presence within a mode of communication.[12] When people are logged into their instant messaging server, they can see when other people in their instant messaging network are also logged in.[13] This allows them to have instant "real-time communication" with those people who are online and communicate in a way that is

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[9] See You've Got Mail email essentials, AOL, http://help.aol.com/help/microsites/microsite.do?cmd=displayKC&docType=kc&externalId=221656 (last visited Oct. 20, 2013).

[10] See Messages, APPLE, http://www.apple.com/ios/messages/ (last visited Oct. 20, 2013); See also Google + Hangouts, http://www.google.com/hangouts/ (last visited Oct. 20, 2013).

[11] See Ryan W. Neal, Google Drops Private Chat: New Hangouts Platform Replaces Talk, Removes Privacy Options, INTERNATIONAL BUSINESS TIMES (May 24, 2013, 3:08 PM), http://www.ibtimes.com/google-drops-private-chat-new-hangouts-platform-replaces-talk-removes-privacy-options-1278859

[12] See Frequently asked questions about Instant Messaging, NATIONAL ARCHIVES, http://www.archives.gov/records-mgmt/initiatives/im-faq.html#differ (last visited Oct. 20, 2013).

[13] Ibid.

much more in line with oral forms of communication. This is contrasted with most written communication forms which are asynchronous. In other words, they are sent to the other party without knowing when they will read it and without the expectation of an instantaneous response as in a telephone or instant message conversation.

The author believes that many of the questions regarding these modern forms of written communication may be answered through making alterations to already existing legislation regarding contract formation over the Internet. As the author mentioned, this would be done through amendments to the Electronic Signatures in Global and National Commerce Act ("E-Sign") and the Uniform Electronic Transactions Act ("UETA"). If this is the case, the legislation should be amended to consider texts and tweets as oral forms of communication. This amendment to the legislation would help courts evolve contract law in a way that conforms more fluidly with the way in which social media is both portrayed and used. More importantly, such an amendment would give parties bright line guidance that is directly in line with the common law rule that oral communications may be sufficient to overrule conditions of a contract that are written, regardless of a signed-writing clause.[14] Such legislative clarification is an effective and necessary way to give parties entering into a contract more confidence in how they may communicate and interact over social media.

[14] CX Digital Media v. Smoking Everywhere, Inc., No. 09–62020–Civ., 2011 WL 1102782, *11-12 (S.D.Fla. Mar. 23, 2011).

The Show-Cause Penalty and the NCAA Scope of Power

Jordan Kobrtiz and Jeffrey Levine

The integrity of the National Collegiate Athletic Association (the "NCAA" or "the Association") is in the media's crosshairs for the NCAA's inability to regulate college athletics. Most recently, questions concerning the NCAA's ability to protect the ivory gates of college athletics stemmed from two major scandals that rocked the nation in 2011: (1) disgraced Ponzi scheme perpetrator Nevin Shapiro's alleged big money involvement with the University of Miami athletics department, and (2) the allegations of child abuse against former Penn State football coach Jerry Sandusky. Both scandals were unique and merited completely different responses from the NCAA. During the year these scandals broke, the NCAA's enforcement staff was encouraged to "be innovative and deliver significant [infractions] cases,"[1] which the Shapiro and Sandusky cases certainly became. However, both cases would become symbols of the NCAA's archaic nature, highlight questionable investigation/enforcement tactics, and create a growing sentiment that the NCAA lacks fundamental fairness.[2]

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[1] Tom Farrey, *Miami seeks unprecedented request*, ESPN.COM (Apr. 4, 2013, 2:05 PM), http://espn.go.com/espn/otl/story/_/id/9131418/miami-writes-ncaa-division-committee-infractions-requests-dismissal-infractions-case.

[2] *See Golfer penalized for washing car*, ESPN.COM (May 30, 2013, 4:04 PM), http://espn.go.com/college-sports/story/_/id/9325352/ncaa-penalizes-golfer-washing-car; *see also* Pat Borzi, *Minnesota Wrestler Loses His Eligibility by Selling a Song*, THE NEW YORK TIMES (Feb. 27, 2013), http://www.nytimes.com/2013/02/28/sports/wrestler-hoping-to-inspire-through-song-loses-eligibility.html?_r=0; *see also* Gregg Clifton, *Despite Missteps in Miami Investigation, NCAA Will Proceed Against School and Others*, COLLEGIATE & PROF. SPORTS L. BLOG, (Feb. 19, 2013).

These complaints have dogged the NCAA, a non-profit membership entity that champions amateurism and was created to safeguard the sanctity of college athletics.[1] However, no prior scandal has been as polarizing as Sandusky. Penn State was unique. It was not so much a sports scandal as a visceral issue that transcended sport, thereby drawing national attention from all the mainstream media outlets. Shortly after the Sandusky scandal broke, NCAA President Mark Emmert promised a swift investigation and guaranteed that appropriate action would be taken against those involved.[2] However one question that would eventually come up is whether the NCAA even possesses the power to deal with a situation as unique as the Sandusky scandal. The debate has centered on the nature of the NCAA's power to impose sanctions and punishment, and on whom.

The NCAA maintains that it uses its power to protect the students of its member institutions, to fulfill its mission of being an integral part of higher education, and to focus on the

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[1] *See History,* NCAA (Aug. 13, 2012) http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+ NCAA/History [herein after *NCAA History*].

[2] *See* Kevin Armstrong, *NCAA President Mark Emmert will launch own investigation into alleged Jerry Sandusky sex-abuse case at Penn State,* THE NEW YORK DAILY NEWS (Nov. 10, 2011), http://www.nydailynews.com/sports/football/ncaa-president-mark-emmert-launch-investigation-alleged-jerry-sandusky-sex-abuse-case-penn-state-article-1.975384; *see also* Genaro C. Armas, *NCAA taking up Penn State scandal*, ASSOCIATED PRESS (Nov. 18, 2011), http://www.boston.com/sports/colleges/football/articles/2011/11/18/ncaa_launching_investigation_of_penn_state/; http://www.usnews.com/news/articles/2011/11/18/ncaa-launches-investigation-over-penn-state-abuse-allegations*see also* Greg Bishop, *Tumultuous Days for N.C.A.A.'s President as the Calls for Reform Grow Louder*, THE NEW YORK TIMES (Feb. 27, 2013), http://www.nytimes.com/2013/02/28/sports/ncaafootball /calls- for-reform-grow-louder-for-ncaa-and-mark-emmert.html?pagewanted=all&_r=0.

development of student-athletes.[3] While a robust debate exists concerning whether the NCAA adheres to its alleged mission statement,[4] the NCAA clearly sees that maintaining the integrity of the sports it administers as paramount to its mission of protecting and developing student-athletes.[5] It is also clear that matters related to recruitment, compliance, boosters, or competitive advantage are within the NCAA's purview to regulate.[6] The question becomes whether the NCAA's regulatory authority extends to the activities that occurred at Penn State.

This note will briefly outline the history of the NCAA, review pertinent sections of Bylaw 19, and explore how key court decisions enable the NCAA to discipline schools that violate its rules. The authors will also examine the scope and range of power the NCAA wields as it relates to rule violators or perceived violators. Finally, this piece will advocate that the NCAA, if it wishes to be perceived as operating more fairly and equitably, must embrace a number of significant reforms including holding member presidents, athletic directors, and other senior university personnel accountable for violations of the principle of institutional control.

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[3]Office of the President, *On the Mark*, NCAA.ORG (Oct. 5, 2010) http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+President/On+the+Mark.

[4] *See* Daniel Uthman, *Paterno family, former Penn State players sue NCAA*, USA TODAY (May 30, 2013) http://www.usatoday.com/story/sports/ncaaf/2013/05/29/paterno-family-to-file-lawsuit-against-ncaa-fir-false-assumptions/2371279/ (Plaintiffs' attorney claimed that the lawsuit "is further proof that the NCAA has lost all sense of its mission); *see also* Reg Henry, *NCAA out of bounds in limiting athletes*, THE PITTSBURGH POST-GAZETTE (June 1, 2011) http://www.post-gazette.com/stories/opinion/reg-henry/ncaa-out-of-bounds-in-limiting-athletes-300167/.

[5] Office of the President, *supra* note 5.

[6] See 2012–2013 NCAA DIVISION I MANUAL (2013) [hereinafter NCAA MANUAL].

History

The NCAA is a voluntary association founded in 1906 for the purpose of organizing and overseeing intercollegiate athletics.[7] It was created at the urging of President Theodore Roosevelt who had invited leaders from college athletics to attend a summit at the White House to discuss college sports reform.[8] Specific issues included major safety concerns within college football[9] and amateurism issues related to all college sports.[10] Football games were so violent and players so unprotected that severe injury or even death was commonplace.[11] The sport was in danger of being abolished by many schools.[12] As a result of this summit, sixty-two schools agreed to form the Intercollegiate Athletic Association of the United Sates (IAAUS).[13] Four years later, the IAAUS changed its name to the NCAA.[14]

The original role of the NCAA was to create a uniform set of rules and to provide a forum for teams to address problems.[15] However, as the complexities of major intercollegiate sport grew, the NCAA's role in college athletics has at times become muddled. Today, the Association's function vacillates between championing amateurism for its members and embracing commercialism, thus belying its original intention. Despite several periods of reform, which resulted in dramatic expansion of its power,[16] the Association has historically been plagued by rule

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[7] NCAA HISTORY, *supra* note 3.
[8] *Id*.
[9] *See id.* (Football was beginning its rise in popularity and was marred by gang tackling, violent collisions and serious injuries, including deaths of players).
[10] *See id. (*Oftentimes, nonstudents were paid to play for college sports teams).
[11] NCAA HISTORY, *supra* note 3.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id*.
[16] *Id*.

violations and other alleged improprieties involving amateurism.[17] In an effort to punish rules violators, and to discourage future rules violations, the NCAA has used, somewhat erratically, what is known as the "show-cause penalty."

NCAA Bylaws

The centerpiece of the NCAA's rulebook and bylaws is the principle of institutional control and responsibility.[18] "It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The *institution's president or chancellor is responsible for the administration of all aspects of the athletics program*…(emphasis added)."[19] According to this rule, the chief executive of the university bears the ultimate responsibility for NCAA compliance in all athletics matters.[20] However, the rule of institutional control applies beyond the president or chancellor's office.

The university is also responsible "for the conduct of its intercollegiate athletics program…[and is] responsib[le] for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution."[21] Thus, under NCAA rules, a university and its senior administrative/athletics personnel are also responsible for the actions of all individuals either employed or affiliated with the university, including boosters. This considerable responsibility is placed on senior university leaders, many of whom are unfamiliar with the gray areas and potential mine

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[17] *See generally Chronology of Enforcement*, NCAA.ORG (Jan. 21, 2013) http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Resources/Chronology+of+Enforcement.
[18] NCAA MANUAL, *supra* note 8, at Rule 2.1.
[19] *Id*. at 2.1.1.
[20] *Id*.
[21] *Id*.

fields within the administration of intercollegiate athletics. Many of these administrators are ill equipped to prevent or effectively confront the violations that inevitably emerge, violations that are thought to be part and parcel of the success within NCAA athletics.

The Association's enforcement program's stated mission is to eliminate NCAA rules violations and impose appropriate penalties.[22] Article 19 of the NCAA bylaws discusses the enforcement program.[23] One of the most important sections of this bylaw is Article 19.01.3.[24] This rule obligates all representatives of member institutions to fully cooperate with the NCAA enforcement staff.[25] The responsibility to cooperate with NCAA enforcement policies is an essential part of the athletics program of each member institution.[26] Moreover, the NCAA requires full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA enforcement staff.[27] This responsibility applies to both the member institution as well as the staff members of such institution.

Bylaw 19.01.4 addresses violations by institutional staff members.[28] "Institutional staff members found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, whether such violations occurred at the certifying institution or during the individual's previous employment at another institution."[29] Thus, it is clear that institutional employees cannot avoid sanctions from the governing body merely by abandoning one institution for another.

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[22] *Id*. at 19.01.01.
[23] *Id*. at 19.
[24] *Id*. at 19.01.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*. at 19.01.04.
[29] *Id*.

NCAA regulators have divided violations into two types: secondary and major violations.[30] (Note: Effective August 1, 2013, the NCAA will implement a four-level violation structure for infractions.[31])

> "A secondary violation is a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit (including but not limited to, an extra benefit, recruiting inducement, preferential treatment or financial aid). Multiple secondary violations by a member institution may collectively be considered as a major violation."[32]

A secondary violation may be penalized through the use of any of the disciplinary measures outlined at Bylaw 19.5.1(a) through Bylaw 19.5.1(i).[33] Potential penalties include: termination of the recruitment of a prospective student-athlete by the institution, forfeit/vacate contests in which ineligible student-athlete participated, prohibition of head coach and/or staff members from recruiting activities for up to one year, the suspension of the head coach or staff members for one or more competitions, and the show-cause penalty.[34]

NCAA Bylaws currently define a major violation as all violations other than secondary violations, specifically

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[30] *Id*. at 19.02.2.
[31] *See* Gary Brown, *Board adopts tougher, more efficient enforcement program*, NCAA.ORG (Oct. 30, 2012) http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/October/Board+adopts+tougher+more+efficient+enforcement+program.
[32] NCAA MANUAL, *supra* note 8, at Rule 19.02.2.1.
[33] *Id*. at 19.01.05.
[34] *Id*. at 19.5.1(a)-19.5.1(i).

including those that provide an extensive recruiting or competitive advantage.[35] This category comes with a list of prescribed disciplinary measures.[36] The Association's bylaws note that "[p]enalties for a major violation shall be significantly more severe than those for a secondary violation[.]"[37] Some of the disciplinary measures for major violations include the "suspension of institutional staff members from their duties for a specified period,"[38] "reduction in the number of financial awards,"[39] limits on recruiting activities, vacation of records in a case in which a student athlete has competed while ineligible, financial penalties, and prohibition against television appearances of the institution in the sport in which the violation occurred.[40] While the range of punishments is substantial, one additional tool is increasingly being used as the remedy of choice.

One of the most important disciplinary measures prescribed by the NCAA Committee on Infractions may be the show cause penalty. This includes a

> [r]equirement that an institution that has been found in violation, or that has an athletics department staff member who has been found in violations of the provisions of NCAA legislation while representing another institution, show cause why a penalty or additional penalty should not be imposed, if, in the opinion of the Committee on Infractions, the institution has not taken appropriate disciplinary or corrective action against athletics department personnel involved in the infractions case or any other

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[35] *Id.* at 19.02.2.2.
[36] *See id.* at 19.5.2.
[37] *Id.* at 19.5.2.
[38] *Id*. at 19.5.2 (o)
[39] *Id*. at 19.5.2 (h)
[40] *Id*. at 19.5.2 (a)-(l).

> institutional employee, if the circumstances warrant, or a representative of the institution's athletic interests.[41]

The NCAA defines the phrase "appropriate disciplinary or corrective action" to include

> severance of relations with any representative of the institutions athletics interest who may be involved; the debarment of the head coach or any assistant coach involved in the infraction from coaching, recruiting, or participation in speaking engagements; and the prohibition of all recruiting in a specified sport for a specified period.[42]

Per the agreement between the participating institution and the NCAA, the NCAA possesses the ability to discipline institutions that do not comply with the governing body's rules.[43] However, the NCAA has no authority to sanction a member institution's employees directly.[44] Realizing this, the NCAA often uses indirect sanctions, like a show-cause penalty, to indirectly force institutions to terminate rules violators. As a result, some university officials facing discipline stemming from the NCAA's show cause order have attempted to avoid punishment by invoking their constitutional rights.[45] In attempting to do this, the employee typically argues that he or she has been deprived of a property interest[46] without due process of the law.[47] Under the case

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[41] *Id*. at 19.5.2(k).
[42] *Id*. at 19.5.2(k)(2).
[43] *Id.* at 2.8.
[44] *See Id*. at 19.02.1.
[45] *See generally* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).
[46] *Id.* Sometimes aggrieved parties may argue that their reputation has been damaged.
[47] *Id.* at 181.

law examined herein, this argument commonly arises when a university terminates, or is forced to terminate, a coach for allegedly violating an NCAA bylaw. The major criticism against the show case penalty is that the NCAA has infrequently used it to discipline coaches and has never used it against upper levels of university administration. Those at the highest levels of administration who are ultimately responsible for rules violations have historically been immune from a show cause order.

Despite a number of legal challenges to the show cause penalty, the NCAA continues to utilize it as a remedy. Properly applied, the show cause order has the potential to be a powerful tool against corruption and rule violations.

Legal Tests of the Show Cause Penalty

The heart of the controversy surrounding the show cause penalty is whether a coach or administrator facing a forced ouster from his or her profession for a period of time holds a constitutionally protected right that cannot be deprived without being afforded due process by the NCAA.[48] The seminal case regarding this issue is *NCAA v. Tarkanian*.[49] In this case, the NCAA found the University of Nevada Las Vegas ("UNLV") to be in violation of 38 bylaws. Ten of those violations were committed by men's head basketball coach Jerry Tarkanian.[50]
As a result of the violations, the NCAA sanctioned the UNLV men's basketball program.[51]

One of the sanctions levied against UNLV was a show cause order to determine why additional sanctions should not

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[48] *See id.* at 181.
[49] *See id.* at 179; *see also* Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019, 1020 (4th Cir. 1984).
[50] *Tarkanian*, 488 U.S. . at 185-186. Tarkanian was one of the most successful Division I basketball coaches in the history of the NCAA.
[51] *Id*. at 186.

be imposed upon the team if the university refused to suspend Coach Tarkanian during UNLV's probationary period.[52] UNLV chose to recognize the NCAA's authority to act as the ultimate decision-maker regarding sanctions and thus suspended Tarkanian during the probationary period.[53] In response, Tarkanian filed suit against UNLV alleging he had been deprived of property and liberty without due process of the law.[54] The trial court accepted this argument and enjoined UNLV from suspending Tarkanian.[55]

After some skirmishing at the trial level, and with the NCAA now joined as a necessary party to the litigation,[56] the case made its way to the Supreme Court.[57] The arguments before the Court centered on whether the NCAA's actions constituted "state action," thus requiring due process.[58] This issue was central to the case because "[a]s a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'"[59] The Court sought to determine if the NCAA, a private actor, was disciplining Tarkanian under the color of state law, or whether the show cause order was a private action.

Tarkanian argued that the NCAA was a state actor because it had misused power that it possessed by virtue of state law.[60] In acquiescing to the NCAA and subsequently suspending him, Tarkanian equated UNLV's conduct to a delegation of its public functions to the NCAA, thus "clothing the Association with authority both to adopt rules governing UNLV's athletic programs and to enforce those rules on

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[52] *Id*.
[53] *Id*. at 187.
[54] *Id*.
[55] *Id*. at 188.
[56] *See id*.
[57] *See generally Tarkanian*, at 182.
[58] *Id*. at 189-99.
[59] *Id*. at 191 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).
[60] *Id*. at 191-92.

behalf of UNLV."[61] However, the Court disagreed with Tarkanian's assertions, opining that his argument fundamentally misconstrued the facts.[62]

To resolve this dispute, the Court looked to precedent to determine whether UNLV was sufficiently involved with the NCAA to treat the decisive conduct as state action.[63] The Court asked "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[64] Although the Court determined that UNLV was acting under the color of state law, the NCAA's status as a potential state actor was less clear.[65] UNLV had delegated no true authority to the NCAA to take specific action against a university employee.[66] In fact, UNLV even retained the authority to withdraw from the NCAA if it so chose.[67] The NCAA's greatest authority was to simply threaten sanctions against UNLV itself through a show-cause penalty or by other measures up to and including expelling UNLV from the Association.[68]

Tarkanian argued that UNLV possessed no practical alternative to complying with NCAA rules, which placed the real decision-making power for personnel decisions in the hands of the Association.[69] In response, the Court posited that the true final question is whether "the conduct allegedly

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[61] *Id*. at 192. Moreover the Nevada Supreme Court had previously held that UNLV had delegated its authority of personnel decisions to the NCAA, thus buttressing Tarkanian's argument (*see id* 191-92).
[62] *Id*.
[63] *Id*.
[64] *Id.* at 192 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (stating "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself")).
[65] *See id*. at 193.
[66] *Id*. at 195-96.
[67] *Id*. at 198.
[68] *See id*.
[69] *Id*. at 198.

cause[d] the deprivation of a federal right [which can] be fairly attributable to the State."[70] In rebutting this argument, the Court stated that it would be "ironic" to find the NCAA's sanctions to be state action since a number of UNLV's supporters were affiliated with the state, including UNLV's general counsel and the Attorney General of Nevada, who strongly opposed the sanctions.[71] On that basis, the Court held that the Association was not a state actor.[72]

The Court in Tarkanian seemed to send a strong, yet befuddling message to those intent on challenging the NCAA's authority. As long as the Association retains only the authority to make threats, it will not act under color of state law regardless of the gravity of such threats. In making this statement, the U.S. Supreme Court has given the NCAA the authority to regulate college athletics, including disciplining institutional employees indirectly, by threatening sanctions against an institution, without the necessity to provide an invaluable procedural safeguard guaranteed by the Constitution. This precedent granted the NCAA new power and confidence in the use of its show cause penalty.

The NCAA's use of the show cause order has also been challenged on other grounds.[73] A former assistant coach of the University of Kentucky's football team, Claude Bassett, filed a complaint against the NCAA, the SEC, and the University of Kentucky Athletic Association (UKAA).[74] In the complaint, Bassett alleged several claims, including one for tortious interference with prospective contractual

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[70] *Id*. at 199 (citing Lugar v. Edmonson Oil Co., 457 U.S. 937 (1982)).
[71] *Id*.
[72] *Id*. (opining it would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law).
[75] *See generally* Bassett v. Nat'l Collegiate Athletic Ass'n, 428 F.Supp.2d 675 (E.D. Ky. 2006), *aff'd* 528 F.3d 426 (6th Cir. 2008).
[74] *Id.*

relations,[75] after he was seemingly forced to resign in the face of allegations of impropriety brought by the NCAA.[76] After Bassett's resignation, the University of Kentucky (UK), along with a representative from the SEC, initiated an investigation of the charges.[77] Individuals from the University as well as representatives of the Southeastern Conference interviewed Bassett as a part of the university's internal investigation of NCAA rules violations.[78] Based on UK's internal investigation, which was submitted to the NCAA, Association enforcement staff issued an official letter of inquiry to Bassett.[79] Bassett, through counsel, refused to be interviewed by the NCAA.[80]

The NCAA released its Infractions Report on January 31, 2002. Bassett's violations of the NCAA rules were deemed so egregious that he was hit with an eight-year show cause order.[81] Thus, between 2002 and 2010, any NCAA member school seeking to hire Bassett would have "to appear before the NCAA infractions committee to consider whether the institution should be subject to the NCAA's show cause procedures."[82] Bassett alleged that this show cause order not only prevented him from seeking employment during the eight year period, but it also rendered him unemployable at any NCAA institution "even beyond the ban."[83]

The crux of Bassett's tortious interference argument was that UK had denied him due process of law during the

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[75] *Id.* Basset had also alleged antitrust violations, fraud, and civil conspiracy.
[76] Basset v. Nat'l Collegiate Athletic Ass'n, No. 5:04-425-JMH, 2006 WL 1312471, at *1 (E.D. Kentucky Feb. 8,
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Bassett,* 428 F.Supp.2d 675, 679 (E.D. Ky. 2006), *aff'd* 528 F.3d 426 (6th Cir. 2008).
[81] *Bassett,* 5:04-425-JMH, 2006 WL 1312471, at *1 (E.D. Ky. May 11, 2006).
[82] *Id*.
[83] *Id*.

institution's investigation, and that the NCAA had relied on the UK investigation when it imposed the eight-year show cause order on him.[84] The court briefly discussed the role of the show cause order.[85]

> Several courts have recognized the NCAA's role in college athletics. The NCAA argues that its issuance of a show cause order was entirely proper because, in order to *uphold the purposes* of its association, it must be allowed to *enforce its rules* by penalizing violators. Both UK and plaintiff had agreed to abide by the NCAA's regulations and to report any possible violations to the NCAA (emphasis added) (citations omitted).[86]

Bassett also used his suit as a forum to question the NCAA's enforcement process. In pleadings, the former coach mocked the NCAA for "structuring its enforcement program to 'encourage schools to push all blame upon [their] employees for rules violations'" and for allowing UK to "railroad the coach through its self-investigation."[87] In failing to perform its own investigation and relying on UK's report, which was allegedly filled with "lies and other deceptions" as a bona fide basis to levy discipline, Bassett lost his right of due process. The court found this argument unavailing, taking testimony that illustrated the importance of self-policing by NCAA member schools, since the Association is a voluntary institution.[88] In fact, the court was advised that no specific NCAA bylaw exists "that requires university officials to be evenhanded and fair in the way they conduct

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[84] *Id*. at 3.
[85] *Id*. at 4.
[86] *Id*.
[87] *Id*. at 5.
[88] *Id*.

investigations."[89] Because the plaintiff was aware of the Association's rules and had admitted to multiple violations,[90] "the NCAA was justified in enforcing those rules through a show cause order" to serve as a deterrent to other individuals who may wish to violate the same rules.[91] Thus, the court was firmly aligned with the NCAA.

Bassett illustrates the support the NCAA enjoys from the legal system, which seems unafraid to uphold the show cause orders, harsh though they may be. Read together, *Tarkanian* sanitized the NCAA as a private actor and *Bassett* authorized the show cause penalty's use stemming from investigations conducted by member institutions without NCAA participation. This staunch support provides the Association with wide latitude to utilize show cause orders; however a question remains as to whether the NCAA is punishing the correct individuals for failing to comply with NCAA bylaws.

A prime example of the NCAA's practice of targeting lower-level personnel in lieu of high-level administrators is *Ridpath v. Board of Governors of Marshall University*.[92] Here, the court was faced with deciding whether a former NCAA compliance officer at Marshall University was deprived of due process before being reassigned as a result of NCAA sanctions.[93] As "corrective action" for an NCAA violation, Marshall reassigned Ridpath from his position as a compliance officer to another position within the University.[94] The university attempted to frame the reassignment as a remedial act, which it designated as

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[89] *Id*.
[90] *Id.* at 6. He violated the NCAA's rules on recruiting inducements, impermissible tryouts, falsification of recruiting records, and unethical conduct.
[91] *Id*.
[92] *Ridpath,* 447 F.3d 292 (4th Cir. 2006).
[93] *See id*. at 307.
[94] *Id*. at 301.

"corrective action."[95] However, Ridpath alleged that the reassignment was performed with little to no procedural safeguards, which allegedly injured Ridpath's reputation and his ability to pursue work elsewhere as an NCAA compliance officer.[96]

Ridpath successfully asserted a due process claim against the University.[97] As a public institution, Marshall University owed Ridpath due process because the University was a state actor.[98] The holding that due process applies is a key distinction between *Ridpath* and *Tarkanian*. Ridpath certainly should have been given notice and been afforded a hearing by Marshall University before the "corrective action" label was placed upon him; however, because the NCAA is not a state actor, it was neither required to give such notice nor was it required to allow an opportunity to be heard. The NCAA was simply imposing a show cause order, which is seemingly endorsed under the Association's enforcement policy. One reason for the contrary decisions in *Ridpath* and *Tarkanian* may rest with the plaintiffs involved. Trakanian was a seminal basketball coach who was almost universally revered for his coaching record. Ridpath, on the other hand, was a relatively anonymous compliance professional who lacked both Tarkanian's power and pedigree.

Current Possible Use of a Show Cause Order

The Supreme Court clothed the NCAA in incredible power through its *Tarkanian* holding. Despite the disagreement in the *Tarkanian* decision, a show cause order operates as a virtual bar of employment for any institutional employee who is forced to wear the NCAA's equivalent of a scarlet letter. Now the focus becomes how the Association wields its enormous power.

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[95] *Id*. at 302.
[96] *Id*. at 308.
[97] *Id*. at 315.
[98] *Id*.

In the authors' view, the NCAA should be more concerned with the dubious actions of those officials in charge of member institutions, rather than punishing first-line employees or middle managers. One senior official of an NCAA member institution currently under scrutiny is University of Miami ("UM") President Donna Shalala. UM is in the NCAA's crosshairs after the University and a number of its student-athletes allegedly violated numerous NCAA rules by virtue of their relationship with Nevin Shapiro.[99] Apart from the NCAA's Notice of Allegations,[100] other reports have painted an unflattering picture of Shalala's involvement with Shapiro.[101] She willingly accepted donations from Shapiro while turning a blind eye to his illegal activities, actions that should have caught her attention or the attention of other University administrators.[102] Shapiro was also allowed field access during Miami games and was

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[99] Charles Robinson, *Renegade Miami football booster spells out illicit benefits to players*, YAHOO! SPORTS (Aug. 16, 2011), http://sports.yahoo.com/investigations/news?slug=crenegade_miami_booster_ details_illicit_benefits_081611.

[100] *See* Jorge Milian, *NCAA gives University of Miami notice of allegations; 'lack of institutional control' reportedly among charges*, The Palm Beach Post (Feb. 20, 2013), http://www.palmbeachpost.com/news/sports/college-football/university-of-miami-receives-notice-of-allegations/nWS56/.

[101] *See* Justin Pope, *Scandal threatens Shalala's ambitions at UMiami*, THE SEATTLE TIMES (Aug. 27, 2011, 7:53 AM), http://seattletimes.com/html/sports/2016031451_apusmiamiambitiousshalala.html; *see also* Francisco Alvarado, Donna *Shalala Must Admit Blame In Nevin Shapiro Scandal or Resign*, THE MIAMI NEW TIMES (Aug. 18, 2011, 8:00 AM), http://blogs.miaminewtimes.com/riptide/2011/08/donna_shalala_must_admit_blame.php.

[102] *See* Assoc. Press, *Report: Miami ignored Shapiro Acts*, ESPN.COM (Mar. 29, 2013, 6:04 PM), http://espn.go.com/college-sports/story/_/id/9112146/ncaa-alleges-miami-ignored-nevin-shapiro-acts-report-says. (stating "[t]he NCAA is alleging that some Miami officials essentially looked the other way when presented with evidence of booster Nevin Shapiro's wrongdoing -- the heart of the lack of the 'institutional control' charge…").

frequently honored in the presence of student-athletes for his contributions to the University. In its Notice of Allegations, the NCAA alleged that "[w]hen put on notice of potential issues with Shapiro's involvement…the institution failed to limit Shapiro's access or implement any additional monitoring related to Shapiro.[103] This lack of oversight created an environment in which Shapiro was able to have impermissible contact with student-athletes."[104] Although questions have been raised concerning the tactics used by the NCAA during its investigation,[105] the Shapiro scandal illustrates how complacency of NCAA rules can lead to a toxic culture within an athletic program.

The NCAA must take action to effectuate meaningful cultural change at universities where NCAA infractions have become the norm. That change must begin at the top. The NCAA should utilize the show cause order against senior university administrators who, either by action or acquiescence, create a culture that fosters rampant disregard of Association rules.

Misdirected Punishments

The NCAA has used other forms of punishment besides a show cause order to punish universities that have been rule violators.[106] Previous punishments have included fines, vacating wins, suspensions of post season play, and limits on future scholarships.[107] While these remedies overall

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[103] *Id*.
[104] *Id*.
[105] Terez A. Paylor, *Miami's motion to dismiss Haith case outlines unethical tactics by NCAA*, THE KANSAS CITY STAR (Apr. 4, 2013), http://www.kansascity.com/2013/04/04/4161851/miamis-motion-to-dismiss-haith.html.
[106] *See Chronology of Enforcement, supra* note 9.
[107] *See Penn State sanctions: $60M, bowl ban*, ESPN.COM (JULY 24, 2014), http://espn.go.com/college football/story/_/id/8191027/penn-state-nittany-lions-hit-60-million-fine-4-year-bowl-ban-wins-dating-1998 (discussing the penalties levied against Penn State University by the NCAA); *see also* Fact Sheet on Penn State NCAA Sanctions, available at

have hurt an offending school, the individuals most often affected are typically the student-athletes the NCAA allegedly exists to protect or a first line administrator and/or coach with little to no managerial involvement in the alleged infraction. The individuals who truly bear responsibility for the violation typically have the ability to avoid punishment due to their stature. If properly applied, the show cause penalty would transfer the onus of NCAA sanctions from student-athletes to administrators who are ultimately responsible for the rules violations that occur at their institution.

Conclusion

The NCAA views itself as the protector of college athletics. It has promulgated hundreds of pages of rules [T08] which it attempts to enforce by utilizing various sanctions, including the show cause order. The cases discussed above bear witness to the courts' endorsement of the NCAA's virtually unlimited power and authority to impose the show cause penalty.

The Association should properly utilize its authority to effectuate meaningful change. This change starts at the top. Senior university administrators and athletic department personnel are required by NCAA policy to act vigilantly in enforcing NCAA rules and regulations. Correspondingly, they should also be held responsible for compliance violations. Anything less makes a mockery of the governing body's concept of "institutional control."

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http://progress.psu.edu/assets/content/120803_NCAA_Sanctions_Fact_Sheet_FINAL.pdf (last visited Jun. 1, 2013).

[T08] Brian Bennett, *Panel mulls simplifying NCAA rulebook*, ESPN.COM (Aug. 10, 2011), http ://espn.go.com/college-sports/story/_/id/6850179/ncaa-member-presidents-discuss-simplifying-rulebook-tougher-penalties.

The Current Trend in NCAA Enforcement and How the Show-Cause Order Should be Applied

Cole Peterson[1]

Kobritz and Levine offer a thorough analysis of the significant power the NCAA wields while also acknowledging the NCAA's inadequacy in effectively using this power to protect the integrity of collegiate athletics. Their article appropriately outlines the history of the NCAA and how the Association's great power came to be. This background is helpful to understand where the NCAA enforcement process is at today and where substantial improvements should be made. As the authors adeptly advocate, the only way to eradicate the rampant rules violations throughout collegiate athletics today is to hold the institutional leaders accountable. This could be done through the show-cause order, which has become one of the NCAA's most powerful tools through the decisions in *Tarkanian* and *Bassett*. The application of the show-cause order to senior administrators would likely effectuate significant change, but unfortunately the NCAA's current trend of enforcement suggests this will never occur. The University of Miami sanctions that the authors anticipate were just recently imposed upon the institution. The punishments for UM were all bark and no bite, but that may suggest that the NCAA is trying to create a more equitable system where student-athletes do not take the brunt of the punishment. In order to advance the authors' argument for sanctions against university administrators and to predict the future enforcement landscape, the current trend of the Association needs to be analyzed. NCAA sanctions in recent years have

[1] Sandra Day O'Connor College of Law, Arizona State University (J.D. Law, 2015 exp.)

tended to harm the innocent more than the guilty and often vary too much in degree from one institution to another. The sanctions handed down on USC in 2010 illustrate the far-too-often inequitable distribution of punishments and how future student-athletes are punished for their predecessors' misconduct. USC was given a two-year bowl ban and a reduction of thirty football scholarships for rules violations stemming from Reggie Bush's acceptance of impermissible benefits while a student-athlete at USC.[1] Bush's violations largely contributed to the sanctions, as well as additional violations in the men's basketball and women's tennis programs.[2] The excessive reduction in scholarships and postseason bans continue to plague the USC football program, while Reggie Bush and his former USC head coach Pete Carroll enjoy their uninterrupted NFL careers. In its report, the NCAA ruled the USC athletic department exhibited a lack of institutional control.[3] As Kobritz and Levine assert, this principle of institutional control is at the core of the NCAA's bylaws. At the issuance of these sanctions it was widely thought that USC's punishment lacked fundamental fairness, but it was assumed this stiff punishment would deter misconduct by other institutions. This assumption could not have been more wrong, as the NCAA began a method of softening sanctions against future violators, and thus furthering the notion of inequitable punishments.

A softening approach to the imposition of penalties can be seen in the recent sanctions for the University of Oregon. Just this past summer, the NCAA issued an 18-month show-cause order for former Oregon football head

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[1] Charles Robinson, *USC Hit Hard by NCAA Sanctions*, YAHOO! SPORTS (June 10, 2010), http://sports.yahoo.com/ncaa/football/news?slug=ys-uscpenalties061010.
[2] *Id.*
[3] *Id.*

coach Chip Kelly, and a one-year show-cause order for the former assistant director of football operations.[4] In addition, the institution was placed on a three-year probation, the football program lost three scholarships, and limitations were put on recruiting services.[5] The sanctions were the result of finding major infractions of NCAA legislation with regard to recruiting services and a failure to monitor by the head football coach and the institution.[6] To make matters worse, Oregon was deemed a repeat violator under NCAA bylaws, which is supposed to warrant stiffer penalties.[7] While the sanctions may slightly hinder the athletic department's goals, they hardly serve as a proper determent of misconduct. The show-cause order is inherently powerful but all too easily rendered null, as in the case of Chip Kelly side stepping the effects of his punishment by accepting a head coaching position in the NFL. Perhaps college head coaches will be scared into adherence as a result of Kelly's show-cause penalty, or they may believe that the juice is worth the squeeze if committing violations can lead to career advancement. The most recent NCAA infractions outcome after Oregon will likely continue to foster further unethical conduct in NCAA athletics.

The long awaited sanctions against the University of Miami were handed down this week, further evidencing the NCAA's trend of toothless enforcement. After finding nearly a decade of rampant violations on the part of UM's athletic department, the NCAA decided to give the institution a slap on the wrist instead of using the valuable opportunity to reform and rehabilitate the collegiate athletics landscape.

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[4] *University of Oregon Public Infractions Report*, NCAA 1, 25-26 (June 26, 2013), *available at* http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2013/university+of+oregon+public+infractions+report.

[5] *Id.* at 24-25.

[6] *Id.* at 1-2.

[7] *Id.* at 24.

From 2002 to 2010, the NCAA found UM failed to exercise institutional control when it fostered an environment that allowed booster Nevin Shapiro to commit some of the most egregious infractions in recent NCAA history.[8] Shapiro was found over that time frame to have provided numerous student-athletes and prospects with impermissible gifts of cash, clothing, housing, transportation, dinners, yacht outings, VIP nights out at nightclubs and strip clubs, and many other benefits.[9] In addition to the booster's impermissible benefits, the NCAA found rampant recruiting violations;[10] impermissible supplemental pay to assistant coaches;[11] lack of documenting and monitoring of athletics activities;[12] and lack of proper compliance education.[13] Further violations were also found throughout the football and basketball programs of UM in a case that the chair of the NCAA Committee on Infractions described as "among the most extraordinary in the history of the NCAA."[14] The NCAA took into account UM's self-imposed penalties, such as a two-year bowl ban and recruiting restrictions, when handing down sanctions that include a loss of twelve scholarships between football and basketball, a three-year period of probation, two-year show-cause bans for three former assistant coaches, and a five-game suspension for former Hurricane head basketball coach and current Missouri head basketball coach, Frank

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[8] *See University of Miami Public Infractions Report*, NCAA 1, 56 (Oct. 22, 2013), *available at* http://www.ncaa.org/wps/wcm/connect/public/NCAA/PDFs/2013/COI+REPORT+University+of+Miami+lacked+institutional+control+resulting+in+a+decade+of+violations.

[9] *Id.* at 7-12.

[10] *id.* at 52-56.

[11] *id.* at 48-49.

[12] *id.* at 57-59.

[13] *id.* at 50, 59.

[14] Tim Reynolds, *Miami's NCAA Saga Comes to an End with Sanctions*, ABCNEWS (Oct. 22, 2013), http://abcnews.go.com/Sports/wireStory/ap-source-miami-loses-scholarships-years-20644048.

Haith.[15] As Kobritz and Levine discuss, UM President Donna Shalala willingly accepted donations from Nevin Shapiro while failing to acknowledge the misconduct and to implement a system to prevent such a toxic environment. Although the NCAA was found to have tampered with the investigation, thereby forcing some evidence to be excluded from consideration, the case report reveals plenty of evidence to support the belief that the sanctions were excessively lenient.

In three previous infractions cases between February of 2002 and May of 2003, the committee stated that institutions have a greater obligation to monitor and direct the conduct of an athletics representative with "insider" status.[16] Specifically, in the Alabama infractions case of February 1, 2002, the committee discussed "insider boosters" and an institution's heightened responsibility to monitor these individuals when the committee wrote the following:

> But those athletics representatives provided favored access and "insider" status, frequently in exchange for financial support, are not the typical representative. Their favored access and insider status creates both a greater university obligation to monitor and direct their conduct and a greater university responsibility for any misconduct in which they engage. This case is apt illustration of the unequivocal obligation to monitor closely those athletics representatives whose financial contributions provide a level of visibility, insider status, and a favored access within athletics programs. Their insider status not

[15] *Id.*

[16] *University of Miami Public Infractions* Report, NCAA, *supra* note 8, at 60 (discussing infractions cases of the University of Alabama, the University of Arkansas, and the University of Michigan).

> only gives credence to their claims of authority within a program but also, and however unintended, serves to reward them for the illicit activities in which they engage.[17]

The NCAA's finding of UM's failure to exhibit institutional control coupled with the constructive notice all collegiate institutions received by the Alabama decision creates a significant presumption that UM officials either knew or should have known of the improprieties taking place within their institution. At the time this Alabama decision was rendered, Nevin Shapiro had only recently begun donating to the UM athletics program, yet over the course of the following decade the institution looked the other way when misconduct was afoot. Unfortunately, the NCAA dropped the ball with the UM infractions investigation and the enforcement of penalties at a time when unnoticed conduct may easily escape punishment, as illustrated by the recent Oklahoma State University findings.

The NCAA's four-year statute of limitations did not bar penalties for UM's violations beginning in 2002 because the limitations do not apply when a pattern of willful violations "began before but continued into the four-year limitation."[18] Recently *Sports Illustrated* conducted a ten-month investigation into the allegations of NCAA violations within the Oklahoma State University's football program over the past decade.[19] The investigation discovered widespread misconduct such as improper cash payments to student-athletes, sham jobs, performance bonuses, academic misconduct, tolerated drug use, and a hostess program consisting of females to entice recruits, where some of the

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[17] *Id.* at 60-61 (quoting the *University of Alabama Public Infractions Report*, NCAA, 1, 3 (February 1, 2002)).
[18] NCAA DIV. I MANUAL § 32.6.3 (2012-13)
[19] George Dohrmann & Thayer Evans, *How You Go from Very Bad to Very Good Very Fast*, SPORTS ILLUSTRATED, Sept. 16, 2013, at 31, 31.

hostesses even had sex with the prospects.[20] Even with these findings, much of the conduct discovered in the *Sports Illustrated* investigation falls outside of the NCAA's statute of limitations.[21] This OSU investigation illustrates how widespread NCAA infractions are today and that the NCAA manpower may be lacking to effectively monitor and uncover most improper conduct. Even if manpower is lacking, the NCAA has the power to instill fear to achieve compliance from the institutions across the country through strict enforcement against the university administrators.

This power was signified in *Bassett*, where the court showed its support of the NCAA's use of harsh penalties such as the show-cause order, but the NCAA has yet to use this sanctioned support to its fullest to protect the integrity of collegiate athletics. As Kobritz and Levine alluded to, the NCAA recently reformed its violation structure into four levels to create a more equitable distribution of penalties. Further reform has been implemented such as expanding the size of the Committee on Infractions,[22] but if history is the best predictor of future action, it is hard to see the NCAA actually employing the breadth of its power in future infractions cases.

Based upon the recent decisions of the Committee on Infractions, the primary deterrent of misconduct going forward rests upon the integrity of coaches and administrators. The NCAA lost a great opportunity in the UM infractions case to effectuate change throughout collegiate athletics by administering show-cause orders for university administrators. Instead the Association preferred to scold UM with its greatest tongue lashing, by telling UM it lacks

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[20] *Id.* at 33.
[21] *Id.* at 33.
[22] *See* Emily Potter, *New Reform Efforts Take Hold August 1*, NCAA (Aug. 1, 2013), http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/august/new+reform+efforts+take+hold+august+1.

institutional control. Although it can be easily argued that university officials are unfamiliar with the gray areas in athletics departments and are ill equipped to uncover and confront violations, the time has come where administrators must be scared into policing their respective institutions in order to fully protect student-athletes and the integrity of collegiate athletics. Kobritz and Levine articulate the NCAA's rise in enforcement power thoroughly while advocating a proper solution to reforming the collegiate athletics landscape, but solving the problem requires an understanding of the power used in the most recent NCAA cases. Unfortunately, the power used barely scratches the surface of the Association's enforcement capabilities, leaving little hope for the change that is needed.

Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws

James F. Reid[1]

ABSTRACT

Major League Baseball ("MLB") revised its amateur draft rules in 2012, which had a significant effect on how much of a signing bonus MLB teams could offer their draftees. Accordingly, it is no surprise that signing bonuses for first round draftees decreased by almost $12 million in 2012, as compared to 2011. The new rules, and their subsequent effect on MLB teams, demand that baseball student-athletes, now more than ever, not only be educated in all facets of the MLB Draft before deciding to turn pro or become/remain college student-athletes, but also retain a competent attorney or agent to represent them in the negotiation of a professional contract. The problem is that current National Collegiate Athletic Association ("NCAA") rules make it virtually impossible for baseball student-athletes to receive the education they deserve to make a well-informed decision. Furthermore, NCAA rules completely prohibit

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student-athletes from hiring an attorney and/or agent for representation during negotiations.

MLB revised its rules to address changes in professional baseball; the NCAA must follow suit and amend its outdated bylaws to be in tune with the current state of amateur baseball. This article argues that the NCAA should 1.) Make a "High School Baseball Exception" to its no-agent rule, 2.) Reform its bylaw regarding Professional Sports Counseling Panels, 3.) Revise the no-agent rule as applied to college baseball student-athletes, and 4.) Create a National Professional Sports Counseling Panel.

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INTRODUCTION

Dear National Collegiate Athletic Association,[1]

Major League Baseball revised its First-Year Player Draft rules, which had a significant effect on baseball student-athletes' signing bonus amounts and, thus, on their decision to turn pro or become/remain college student-athletes. Have you considered revising your rules so that student-athletes could be well informed before they make such a life-altering decision?

June 4, 2012, commenced the Major League Baseball ("MLB") First-Year Player Draft ("Draft"). This was a significant day for student-athletes, because it was the first day MLB teams could select and sign them to professional baseball contracts. MLB teams had until July 13, 2012 to sign their selected student-athletes to such contracts. Consequently, between June 4 and July 13, over 1,200 high school and college student-athletes learned the monetary value MLB teams placed on their skills as future professional baseball players.[2] In past Drafts, teams valued and signed players drafted in the first ten rounds for millions of dollars over their recommended signing bonus value (i.e. slot value).[3] However, under the 2012-16 Basic Agreement between Major

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[1] The NCAA is an association of 1,281 institutions, conferences, organizations and individuals that organizes the athletic programs of many colleges and universities in the United States and Canada. *See* Who We Are, NCAA http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are+landing+page (last visited Oct. 18, 2013).

[2] At the conclusion of Round 40 of the 2012 MLB First Year Player Draft, 1,238 student-athletes were drafted. *2012 MLB Draft Tracker,* MLB, http://mlb.mlb.com/mlb/events/draft/y2012/draftcaster.jsp#ft=round&fv=40 (last visited Aug. 3, 2012).

[3] *See, e.g.*, Jim Callis, *Highest Bonuses, Draft History*, BASEBALL AMERICA (Jul. 18, 2012, 8:08 AM), http://www.baseballamerica.com/blog/draft/2012/07/highest-bonuses-draft-history-2/.

League Baseball and the Major League Baseball Players Association ("Basic Agreement"),[4] MLB places a limit on the total amount of money a team can sign all of its players drafted in the first ten rounds. As such, if a team exceeds this imposed limit, it will be taxed accordingly.[5] Not surprisingly, teams thought twice about spending lavishly on their 2012 draftees under the new Basic Agreement.

The new Draft rules may in effect encourage MLB teams to select a lower-valued prospect in earlier rounds so they could sign him for under the recommended slot value, and thus save a significant amount of money. For a high school student-athlete, a team could use the money it saved to offer him an amount greater than his recommended slot value, whereby the student-athlete is more likely to be enticed away from enrolling in college.[6] For a college student-athlete with at least a year of NCAA eligibility remaining, he may have to carefully consider his projected value and leverage in next year's Draft versus the value of completing (or being closer to completing) his degree.

Regardless of whether the student-athlete is in high school or college, the new MLB Draft rules require that student-athletes not only be educated in all facets of the Draft in order to make a well-informed decision, but also retain a competent attorney or agent to represent him in the

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[4] The "Basic Agreement" is the Collective Bargaining Agreement (CBA) between MLB teams and the Major League Baseball Players Association (MLBPA). The MLBPA is the union for MLB players. *MLBPA Info*, MLB, http://mlb.mlb.com/pa/info/cba.jsp.

[5] *See Summary of Major League Baseball Players Association – Major League Baseball Labor Agreement §III(e)(3)(B)*, at 4, *available at* http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf [hereinafter Summary of 2012-16 Basic Agreement].

[6] Jeff Passan, *Landmark CBA's Draft Dollars Cause Consternation*, YAHOO! SPORTS (Nov. 23, 2011) http://sports.yahoo.com/mlb/news?slug=jp-passan_cba_hgh_testing_draft_rules_112211.

negotiation of a professional contract.[7] Herein lies the problem: In an effort to protect a student-athlete's amateur status, the NCAA prohibits the student-athlete from retaining anyone to represent him.[8] The sole exception is that if the student-athlete is in college, the NCAA allows him to be represented by his school's Professional Sports Counseling Panel ("PSCP").[9] However, this exception has problems of its own. First, the NCAA regulates who can be on the panel, which, as will be discussed in this article, prevents the student-athlete from obtaining a high level of expertise.[10] Second, a majority of schools do not have PSCPs, thus limiting the student-athlete's ability to obtain such expertise in the first place.

Part I of this article discusses the MLB Draft rules under the former Basic Agreement, highlights changes to the rules under the new Basic Agreement, and illustrates the new Draft rules' potential impact on high school and college baseball student-athletes. In Part II, this article discusses the challenges current NCAA rules present to baseball student-athletes, and illustrates how such rules are also a problem for parents, NCAA member institutions and their coaches, agents and attorneys, MLB teams, and the NCAA itself. Part II concludes by highlighting the challenges the NCAA and its member institutions have faced trying to regulate this arena.

In Part III, this article contends that the effects of the Basic Agreement on baseball student-athletes confirm the

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[7] Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sports of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?,* 7 VAND. J. ENT.& TECH. L. 215, 222 (2005).

[8] NCAA, 2012-2013 NCAA DIVISION I MANUAL §12.3.1, at 68 (2013), *available at* http://www.ncaapublications.com/productdownloads/D113.pdf [hereinafter NCAA D1 Manual].

[9] *Id.* at §12.3.4.

[10] *Id.* at §§12.3.4.1-12.3.4.2.

immediate need for revision of outdated NCAA rules. Part III concludes by proposing four recommendations for revision.

PART I: THE MLB DRAFT AND ITS EFFECT ON STUDENT-ATHLETES

A. *The MLB Draft and its rules prior to the 2012-2016 Basic Agreement*

The Draft takes place every year during the first full week of June.[11] In general, 30 MLB teams select amateur players, one at a time, in reverse order of their respective win-loss records at the close of the previous regular season.[12] The Major League Rules ("MLRs") govern which players are eligible for selection in the Draft.[13] To be eligible, a player must first be a resident of the United States or Canada.[14] Second, the player must have never signed a MLB or Minor League Baseball contract prior to the Draft.[15] Third, a player must fit within one of three basic categories: (1) graduating high school senior, (2) college player who has completed at least his junior year *or* who is at least 21 years old within 45 days of the Draft, or (3) junior college player.[16] Thus, all Draft-eligible players include student-athletes. Once a

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[11] Major League Rules Rule 4(b) (*available at* http://bizofbaseball.com/docs/MajorLeagueRules-2008.pdf [hereinafter MLR]).

[12] *See* First-Year Player Draft Official Rules, MLB, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited Oct. 18, 2013).

[13] *Id*.

[14] MLR Rule 4(a). "For purposes of this Rule 4, the term "United States" shall mean the 50 states of the United States of America, the District of Columbia, Puerto Rico, and any other Commonwealth, Territory or Possession of the United States of America." Under MLR 3(a)(1)(A), at 15, "a player shall be considered a "resident of the United States" if the player enrolls in a United States high school or college or establishes a legal residence in the United States on the date of the player's contract or within one year prior to that date."

[15] *Id*.

[16] MLR 3(a)(2)-(4) (emphasis added).

student-athlete is selected, a MLB team retains an exclusive right to negotiate a contract with the student-athlete until he enters, or returns to, a four-year college.[17] Under the 2007-2011 Basic Agreement, the deadline for signing a selected student-athlete was August 16th of each year.[18]

If a student-athlete decides to turn pro, he will sign a standard Minor League contract.[19] Under a standard Minor League contract, salary rates for players are fixed by MLB.[20] However, in order to incentivize student-athletes to sign professional contracts, MLB allows its teams to offer them a signing bonus.[21] The amount of the signing bonus is one of the few terms that are negotiable under the standard Minor League contract.[22] Prior to the 2012-16 Basic Agreement, there were no restrictions on the signing bonus amount a MLB team could offer a student-athlete. In light of the absence of such restrictions, and in an effort to curb Draft spending by teams with deep pockets, MLB recommended a specific bonus amount (i.e. slot value) for each selection in the first five rounds of the Draft, and a $150,000 maximum bonus for all players drafted after the 5th round.[23] For

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[17] MLR Rule 4(d)(3). The rules affect *junior college* student-athletes differently. Specifically, under MLR Rule 4(f), if a selected high school senior attends a junior college, or a selected junior college player returns to junior college, then the team that drafted him retains the exclusive right to negotiate with that player up until the seventh day prior to the next Draft.

[18] *Id*.

[19] MLR Rule 3(b)(2). A Minor League contract is a contract between a Minor League Baseball team and a player. Minor League Baseball is an organization that operates under the purview of MLB, and comprised of a tiered system of professional baseball leagues, namely AAA, AA, A-Advanced, A, A-Short Season, and Rookie League. Minor League Baseball serves as a system for developing future MLB players.

[20] MLR Rule 3(c)(2).

[21] MLR Rule 3(c)(4).

[22] *Id*.

[23] *See* Jim Callis, *Bonuses Vs. Slots, 2011*, BASEBALL AMERICA (Jul. 22, 2011, 2:52 PM),

example, in the 2010 Draft, the 28th overall selection (1st round) was assigned a slot value of $1.2 million.[24] Thus, MLB recommended that the team who had the 28th overall selection, the Los Angeles Dodgers, sign its selection to a $1.2 million signing bonus. However, with no penalties for signing its selection above $1.2 million, the Dodgers signed Zach Lee for $5.25 million – over $4 million above MLB's slot value.[25]

B. *Changes to the MLB Draft rules under the 2012-2016 Basic Agreement*

The new Basic Agreement brought sweeping changes to the Draft. First, the signing deadline was moved from mid-August to mid-July.[26] Second, and most significantly, MLB teams are now restricted in offering student-athletes signing bonuses.[27] Under the new Basic Agreement, each MLB team is assigned an aggregate "signing bonus pool" prior to each Draft.[28] Similar to the 2007-11 Basic Agreement, each selection in the first ten rounds of the Draft will be assigned a recommended slot value.[29] Each team's signing bonus pool equals the sum of the values of that team's selections in the first ten rounds of the Draft.[30] Student-athletes selected *after*

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http://www.baseballamerica.com/blog/draft/2011/07/bonuses-vs-slots-2011/.

[24]Steve Henson, *Dodgers Will Make Strong Move To Sign Lee*, YAHOO! SPORTS (Aug. 13, 2010), http://sports.yahoo.com/mlb/news?slug=sh-leedodgers081310.

[25] Tony Jackson, *Dodgers Agree With Zach Lee,* ESPN (Aug. 17, 2010, 11:14 AM), http://sports.espn.go.com/los-angeles/mlb/news/story?id=5469749.

[26]Major League Baseball Players Ass'n, *supra* note 5, §III(e)(1). The signing deadline is now between July 12th and 18th, depending on the date of the MLB All-Star Game.

[27] *Id.* at §III(e)(3)(AI.

[28] *Id*.

[29]*See, e.g.*, *Slots You Can Believe In*, BASEBALL AMERICA (May 16, 2012), http://www.baseballamerica.com/today/ draft/news/2012/2613398.html.

[30] Major League Baseball Players Ass'n, *supra* note 5, §III(e)(3)(A).

the 10th round do not count against a team's signing bonus pool *if they receive bonuses up to $100,000*.[31] Any amounts paid in excess of $100,000 will count against a team's signing bonus pool.[32] To illustrate this new scheme as applied to the 2012 Draft, consider the Houston Astros' 2012 Draft signing bonus pool in the following chart.

Figure 1 - Houston Astros Signing Bonus Pool Under the 2012-16 Basic Agreement[33]

Round #	Selection #	Slot Value
1	1	$7,200,000
Comp. A	41	$1,258,700
2	61	$844,100
3	96	$495,200
4	129	$360,200
5	159	$269,700
6	189	$201,900
7	219	$151,400
8	249	$140,400
9	279	$131,100
10	309	$125,000
Total Signing Bonus Pool:		***$11,177,700***

As the illustration above shows, under the new Basic Agreement, the Houston Astros' signing bonus pool is limited to $11,177,700.

For teams that spend beyond their signing bonus pool, the new Basic Agreement subjects them to penalties, ranging

[31] *Id* (emphasis added).
[32] *Id*.
[33] *Draft 2012: What Your Team Has To Spend,* BASEBALL AMERICA (May 18, 2012), http://www.baseballamerica. com/today/draft/draft-preview/2012/2613426.html.

from a 75% tax on any overage, to a 100% tax on any overage and loss of future Draft selections.[34] Figure 2 below summarizes such penalties.

Figure 2 - Summary of Penalties for Signing Bonus Pool Overage[35]

% Above Pool	Penalty
< 5%	75% tax on overage
5-10%	75% tax on overage and loss of 1st round pick in next year's Draft
10-15%	100% tax on overage and loss of 1st & 2nd round picks in next year's Draft
>15%	100% tax on overage and loss of 1st round picks in next two Drafts

Referring to Figures 1 and 2 above, if the Houston Astros were to spend a total of $11,847,726 on its Draft selections (i.e. 6% above its signing bonus pool), it would have to pay a 75% tax on the $670,626 overage.[36] This amounts to a $502,970 penalty. In addition, the Astros would lose its 1st round selection in the 2013 Draft.[37]

Although not a formal penalty, one other significant restriction is placed on MLB teams under the new Basic Agreement. If a MLB team selects a student-athlete in the Draft, but fails to sign him, the team is not allowed to apply the slot value that corresponded to the draftee to its other selections.[38] In other words, the MLB team loses the slot

[34] Major League Baseball Players Ass'n, *supra* note 5, at §III(e)(3)(B).
[35] *Id*.
[36] *Id.* This number represents the difference between what was spent ($11,847,726) and the aggregate signing bonus pool ($11,177,700).
[37] Major League Baseball Players Ass'n, *supra* note 5, at §III(e)(3)(B).
[38] *See* Kevin Thomas, *Dollars for Draftees: New Rules Limit What a Big-Money Team Can Spend*, PORTLAND PRESS HERALD, Jun. 3, 2012, *available at* http://www.pressherald.com/sports/dollars-for-draftees-new-rules-limit-what-a-big-money-team-can-spend_2012-06-03.html.

value from its overall bonus pool.[39] To illustrate the significant impact this restriction could have on a MLB team, refer once again to the Houston Astros example in Figure 1, *supra*. If the Astros drafted, but failed to sign its 1st round selection, the team's signing bonus pool would decrease from $11,177,700 to $3,977,700.[40]

In contrast to previous Drafts, MLB teams will be required to seriously consider spending lavishly on draftees under the new Basic Agreement. Although teams are allowed to spread their signing bonus pool money among their selections in the first ten rounds in whatever manner they deem necessary, they will have to diligently weigh the risks of offering early Draft selections any amount over their slot value.[41] This may, in turn, lead teams to pass over superior athletes who demand higher bonus amounts.[42] Instead, teams may find it more rational to select under-slot value players in earlier rounds, essentially getting a "bargain." Figure 3 immediately below shows that MLB teams are in fact executing such a strategy.

Figure 3 – Signing Bonus Departure from Slot Comparison (in dollars)[43]

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[39] *Id*.

[40] *Id.* The slot value associated with the Astros' 1st round pick was $7,200,000. The difference between the Astros' initial signing bonus pool ($11,177,700) and the slot value of the non-signed draftee ($7,200,000) equals $3,977,700.

[41] *See*, e.g., Passan, *supra* note 6.

[42] *Id*.

[43] *See* Jim Callis, *Bonuses Vs. Slots*, BASEBALL AMERICA DRAFT BLOG (Jul. 22, 2011, 2:52 PM), http://www.baseballamerica.com/blog/draft/2011/07/bonuses-vs-slots-2011/; 2011 MLB Draft Signings and Bonuses, MyMLBDraft.com, http://www.mymlbdraft.com/2011-mlb-draft-signings-and-bonuses/ (last visited on Oct. 10, 2012); Jim Callis, *Bonuses Vs. Pick Values*, BASEBALL AMERICA DRAFT BLOG (Jul. 18, 2012, 9:15 AM), http://www.baseballamerica.com/blog/draft/category/signings/; *2012 Draft LIVE! Draft Pick Database*, PerfectGame.com,

Selection #	Slot Value	2011 Draft Actual Bonus (+/-) Slot	Year in School*
1	4,000,000	4,000,000	JR
2	3,250,000	5,250,000	JR
3	2,925,000	1,525,000	JR
4	2,700,000	3,550,000	HS
5	2,530,000	4,970,000	HS
6	2,340,000	4,860,000	JR
7	2,178,000	2,822,000	HS
8	2,043,000	857,000	HS
9	1,962,000	663,000	HS
10	1,863,000	0	JUCO
11	1,791,000	734,000	JR
12	1,719,000	806,000	JR
13	1,656,000	444,000	HS
14	1,602,000	398,000	HS
15	1,557,000	443,000	JR
16	1,512,000	77,000	JR
17	1,467,000	0	JR
18	1,422,000	118,000	JR
19	1,386,000	114,000	JR
20	1,359,000	41,000	JR
21	1,332,000	Did Not Sign	HS
22	1,287,000	13,000	JR
23	1,260,000	740,000	JR
24	1,242,000	358,000	HS
25	1,215,000	1,535,000	HS
26	1,197,000	1,303,000	HS
27	1,161,000	839,000	HS
28	1,134,000	0	JR
29	1,116,000	0	JR
30	1,089,000	86,000	JR
31	972,000	143,000	JR
32	954,000	9,000	HS
33	936,000	0	HS

***HS** = High school, **SO** = College Sophomore, **JR** = College Junior, **SR** = College Senior, **JUCO** = Junior College

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http://www.perfectgame.org/draft/Signings.aspx (last visited, Sep. 27, 2013).

2012 Draft

Selection #	Slot Value	Actual Bonus (+/-) Slot	Year in School*
1	7,200,000	-2,400,000	HS
2	6,200,000	-200,000	HS
3	5,200,000	-1,200,000	JR
4	4,200,000	120,000	SO
5	3,500,000	-500,000	JR
6	3,250,000	650,000	HS
7	3,000,000	0	HS
8	2,900,000	Did Not Sign	JR
9	2,800,000	-200,000	JR
10	2,700,000	-100,000	HS
11	2,625,000	0	HS
12	2,550,000	-250,000	HS
13	2,475,000	0	HS
14	2,375,000	-375,000	HS
15	2,250,000	-500,000	JR
16	2,125,000	800,000	HS
17	2,000,000	-250,000	HS
18	1,950,000	400,000	HS
19	1,900,000	0	JR
20	1,850,000	0	JR
21	1,825,000	-200,000	HS
22	1,800,000	0	JR
23	1,775,000	-175,000	SR
24	1,750,000	300,000	JR
25	1,725,000	-12,500	JR
26	1,700,000	0	HS
27	1,675,000	0	HS
28	1,650,000	-125,000	JR
29	1,625,000	0	HS
30	1,600,000	-400,000	HS
31	1,575,000	0	JR
32			
33			

***HS** = High school, **SO** = College Sophomore, **JR** = College Junior, **SR** = College Senior, **JUCO** = Junior College

As Figure 3 illustrates, over 83% of 2012 draftees[44] signed either at or below their slot value, compared to just over 15% in 2011.[45] This statistic further proves that the new Draft rules prevent MLB teams from straying from recommended slot values, thus leaving less negotiating room for draftees. Mark Appel, Stanford University's ace pitcher, experienced this firsthand. As a junior in 2012, Appel was 10-2 with a 2.56 ERA, earned 130 strikeouts in 123 innings, and raised his overall college record to 18-10.[46] These 2012 statistics earned him National College Pitcher of the Year honors. Due to Appel's superior level of talent, he was considered by many to be a consensus number one overall Draft pick in the 2012 Draft. As exhibited by Figure 3 above, the 1st pick in the 2012 Draft came with a recommended slot value of $7.2 million.

When the Commissioner of MLB, Bud Selig, rose to the podium to announce the first selection of the 2012 Draft, Mark Appel's name was not mentioned. In fact, Appel's name was not heard until the Pittsburgh Pirates selected him as the 8th pick.[47] Appel's drop from the 1st pick to the 8th corresponded with a $4.3 million drop in recommended slot value.[48] The baseball community was left wondering why Appel dropped so far down in the Draft. One source says that Appel turned down a $6 million offer from the Houston

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[44] *Id.* In 2012, 25 out of the 30 draftees who signed professional contracts signed either at or below their slot value.
[45] *Id.* In 2011, five out of the 32 draftees who signed professional contracts signed either at or below their slot value.
[46] Associated Press, *Mark Appel Will Stay at Stanford*, ESPN (Jul. 14, 2012, 7:10 AM) http://espn.go.com/ mlb/story/_/id/8164488/mark-appel-spurns-pittsburgh-pirates-stay-stanford.
[47] *2012 MLB Draft Tracker, supra* note 2.
[48] *Slots You Can Believe In*, *supra* note 29 (The 1st pick's recommended slot value is $7.2 million, whereas the 8th pick's is $2.9 million).

Astros.[49] As a result, the Astros instead selected and offered a high school student-athlete $4.8 million, essentially saving the team $1.2 million.[50] What happened from that point on is speculation,[51] but regardless of his drop to the 8th pick, Mark Appel still had a sizeable recommended slot value associated with his spot in the Draft: $2.9 million.[52] The Pirates offered him $3.8 million, $900,000 above the $2.9 million recommended slot value, but, surprisingly, Appel turned it down. The result: the Pirates walked and Appel would return to Stanford for his senior college season. For the Pirates, the new Draft rules prohibited the team from allocating the offered $3.8 million to other Draft selections. However, because the team didn't sign Appel, it will receive an extra first-round pick in next year's Draft (i.e. the 9th overall selection).[53]

Mark Appel's example shows that the limits placed on MLB teams in the way of signing bonus pools, as well as the imposed penalties for exceeding the pool, affect a MLB team's Draft strategy. In regards to Appel's situation, one source said that the Pirates were prepared to go as much as five percent above its signing bonus pool.[54] At that level, the Pirates would incur a 75% tax on the overage, which would amount to around $440,000. However, the Pirates did not want to exceed five percent because doing so would not only

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[49] Matthew Pouliot, *Report: Mark Appel Turned Down $6 Million From Astros*, NBCSPORTS (Jun. 5, 2012, 6:11 PM) http://hardballtalk.nbcsports.com/2012/06/05/report-mark-appel-turned-down-6-million-from-astros/.

[50] Callis, *supra* note 43; *See also*, *Draft 2012*, *supra* note 43.

[51] Associated Press, *supra* note 46. One source said that MLB teams who had the 2nd through 7th picks in the Draft shied away from Appel because of the expected demands of his advisor, Scott Boras.

[52] *Slots You Can Believe In*, *supra* note 29.

[53] Associated Press, *supra* note 46.

[54] *Id*.

result in a higher tax penalty, but also the loss of a 1st round Draft pick in 2013.[55]

C. *Complexities surrounding a baseball student-athlete's decision to turn pro*

Every year, Draft-eligible student-athletes eagerly anticipate the Draft. With over 1,200 student-athletes selected in the Draft each year,[56] student-athletes across the United States and Canada remain hopeful they will be one of those selected. For many student-athletes, it is their dream to play professional baseball and a way to earn a living doing something they enjoy. For superior student-athletes with attractive MLB talent, the anticipation can be huge, and grows as the Draft gets closer. Much of the anticipation is the result of the attention a student-athlete receives by scouts representing MLB teams. As early as two years prior to the Draft, scouts from all 30 MLB teams evaluate student-athletes at their games and practices, at regional and national showcases, and at MLB-sponsored tryouts.[57] One commentator explains the important role scouts play: "As part of the evaluation process, scouts assess a student-athlete's skill, makeup, and character."[58] In many cases, scouts will begin to develop a personal relationship with student-athletes.[59] Moreover, scouts will request that a student-athlete complete questionnaires.[60] MLB teams approach the evaluation process with utmost diligence, because selecting and signing a student-athlete in the Draft is an investment, especially for those selections in the first ten rounds.[61]

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[55] *Id*.
[56] 2012 *MLB Draft Tracker*, *supra* note 2.
[57] Karcher, *supra* note 7, at 220.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Slots You Can Believe In*, *supra* note 29. 2012 Draft slot values in the first ten rounds ranged from $125,000 (last pick in the 10th round) to $7.2 million (first pick in the 1st round).

The MLRs expressly permit MLB team representatives to talk to any Draft-eligible student-athlete prior to the Draft.[62] Therefore, once teams determine what student-athletes they are interested in potentially selecting in the Draft, teams will inquire about each student-athlete's willingness to sign a professional contract and thus forego any remaining college eligibility.[63] This inquiry includes determining the signing bonus amount for which a student-athlete will sign.[64] The obvious method MLB teams use to make this inquiry is through direct discussions with the student-athlete and/or those individuals acting on his behalf.[65] In some cases, MLB teams will negotiate a signing bonus with a baseball student-athlete and his representative prior to the Draft, and ask the student-athlete to verbally commit to the team prior to such team selecting him in the Draft.[66] Although this type of "pre-Draft dealing" is prohibited by the MLRs, MLB teams and student-athletes engage in it because "it brings certainty to both [parties]; thus, a contract can be completed shortly after the [D]raft without the need for prolonged negotiations [between Draft day and the signing deadline]."[67] Considering the decision to turn pro may be less attractive to a student-athlete under the new Draft rules (i.e. the likelihood of not signing for over the recommended slot value is greater), MLB teams are more likely to violate the MLRs and enter into pre-Draft agreements because of their need for some level of certainty in signing a highly valued prospect.

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[62] MLR 3(g)(1).
[63] NCAA DI Manual, *supra* note 8, §12.1.2(c). Once student-athletes sign a professional contract, their remaining eligibility will expire.
[64] Karcher, *supra* note 7, at 220. This is known as "signability" in the baseball industry.
[65] *Id.* at 221.
[66] *Id*.
[67] *Id*. at 56. Since pre-Draft deals are prohibited by the MLRs, verbal agreements between MLB teams and student-athletes are not binding.

Due to the nature of the Draft, signability plays more of a role with high school seniors and college juniors because it is this category of Draft-eligible student-athletes that have the bargaining leverage of entering/returning to college.[68] For the vast majority of student-athletes, this is most likely the first time they have been made the subject of discussions about 1.) signing a contract, and 2.) receiving compensation for upwards of seven figures. The reality is that 17 to 22 year-old student-athletes and their families are involved in sophisticated discussions regarding the Draft and the decision to turn pro – discussions with implications on student-athletes' professional baseball careers and financial futures. In most cases, student-athletes with little or no real-world experience are expected to bargain with MLB teams, MLB team representatives who have years of negotiating experience, and other MLB team staff members that seek to minimize the signing bonus of its draftees.[69] As discussed above, under the new Basic Agreement, MLB teams are limited in what they can offer student-athletes.[70] Thus, team representatives are forced to exercise a certain level of shrewdness during discussions about the Draft and potential signing bonuses. As can be expected, these discussions have an elevated level of intensity with top prospects. The pressure surrounding discussions can also reach high levels

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[68] *Id.* at 220. College seniors have less bargaining leverage in a Draft because their college eligibility will have expired. College seniors have only two choices for professional baseball upon expiration of their college eligibility: 1.) Enter the Draft, or 2.) Compete in an international league or professional league not affiliated with MLB or Minor League Baseball (i.e. Independent League baseball organizations). Considering the latter choice neither pays lucrative signing bonuses, nor has the attraction MLB does, student-athletes prefer to enter the Draft. MLB teams realize this, which in turn leads to college seniors being offered signing bonuses significantly less than their recommended slot value.

[69] Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L. J. 555, 571 (2009).

[70] Summary of 2012-16 Basic Agreement, *supra* note 5, §III(e)(3)(A).

when agents, coaches, family, friends, and/or the media begin to inquire into the top prospects' particular goals and plans.[71]

Furthermore, a student-athlete's decision to turn pro involves a complicated set of MLB and NCAA rules and regulations.[72] Therefore, student-athletes must fully understand the consequences surrounding their choice to turn pro and be aware of ways to reduce their personal risks during the decision-making process.[73] In order to do so, it is common practice for student-athletes and their families to lean on the expertise of agents to assist them during discussions.[74] Such assistance often results in the agent having contact with MLB teams that, unfortunately, is in violation of NCAA Bylaw 12.3: the "no-agent rule" (to be discussed *infra*).[75] Violations of NCAA rules can have severe consequences for student-athletes and, if college student-athletes, the NCAA member institution they attend.[76] Penalties could include forfeiture of student-athlete eligibility, as well as institutional fines, investigations, probations, or even athletic program termination.[77] Regardless of whether the baseball student-athlete is in high school or college, the regulations, technicalities, and legal jargon surrounding the Draft and NCAA eligibility warrant that student-athletes be educated and advised properly. In most cases, this requires the student-athlete to retain an attorney and/or agent. As such, this article will now discuss the importance of retaining

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[71] Glenn M. Wong, Warren Zola, & Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L. J. 553, 557 (2011).
[72] *Id*.
[73] *Id*.
[74] Karcher, *supra* note 7, at 222.
[75] NCAA DI Manual, *supra* note 8, §12.3 (prohibiting a student-athlete from being represented by an agent for the purpose of marketing his or her athletics ability).
[76] Karcher, *supra* note 7, at 222.
[77] *Id*.

an attorney and/or agent and how the process is made complicated due to NCAA overreach and its principle of amateurism embodied in NCAA Bylaw 12.3.

PART II: THE NCAA'S ROLE IN A STUDENT-ATHLETE'S DECISION TO TURN PRO

A. *The NCAA's "amateurism principle"*

Before discussing the details of the no-agent rule and the challenges surrounding it, it is important to highlight the NCAA's claimed purpose behind all of its bylaws. The NCAA's core purpose is to "govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education *so that the educational experience of the student-athlete is paramount*."[78] One of the guiding principles of the NCAA bylaws governing the use of agents is that only *amateur* student-athletes are eligible for participation in intercollegiate athletics.[79] Thus, the NCAA purports that "[NCAA] member institutions' athletic programs are designed to be an integral part of the educational program [and] the student-athlete is considered an integral part of the student body, thus maintaining a *clear line of demarcation* between collegiate and professional sports."[80]

The NCAA's purpose and its guiding principles behind amateurism have been under severe criticism lately, especially considering the $60 billion industry that is college sports.[81] Economic benefits from NCAA-sponsored events such as March Madness,[82] bowl games, promotions, as well as from profits made by using student-athletes' image and

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[78] Wong, *supra* note 71, at 554 (emphasis added).
[79] Karcher, *supra* note 7, at 216 (emphasis added).
[80] NCAA DI Manual, *supra* note 8, §12.1.2 (emphasis added).
[81] Fitt, *supra* note 69, at 567.
[82] Name designated to the men's NCAA Division I Basketball Championship held each spring. Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 18 (2012).

likeness, all have played a role in the $60 billion figure that has led many to argue the NCAA stands for anything but amateurism.[83] For example, the NCAA was paid $711 million for television rights to the 2011 March Madness basketball tournament alone.[84] Student-athletes are not ignorant of such profits; indeed, most of them know that billions of dollars are floating around because of them.[85] Similarly, student-athletes are also aware of the multi-million dollar salaries of NCAA coaches.[86] In fact, part and parcel of living the life of a NCAA student-athlete includes dreaming about earning multi-million dollar salaries of their own, along with signing large bonuses and endorsement deals.[87] For the most talented and highly touted student-athletes, NCAA competitions are theoretically a student-athletes' ideal opportunity to showcase their market value to the world of professional sports – a world where they could earn the multi-million dollar salaries and bonuses similar to those of their current coaches.

B. *Agents, the agent industry, and the NCAA's no-agent rule*

Agents in the context of sports are similar to agents found in principal-agent relationships under agency law. The

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[83] Fitt, *supra* note 69, at 567. *See, e.g.*, Michael McCann, *Players 2, NCAA 0*, SPORTS ILLUSTRATED, Oct. 15, 2012, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1206132/index.htm (Ed O'Bannon, former student-athlete at University of California-Los Angeles, challenging NCAA's licensing of names, images and likenesses of former Division I college athletes for commercial purposes without compensation or consent).or consent).

[84] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Sept. 7, 2011, *available at* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/.

[85] *Id*.

[86] Fitt, *supra* note 69, at 568.

[87] *Id*.

fundamental function of sports agents is to represent, counsel, advise, and assist an athlete in the negotiation, execution, and enforcement of their contract.[88] However, in contrast to the portrayal of agents in the movie *Jerry Maguire,* the most successful agents provide services that extend beyond "showing clients the money" attached to a long-term, multi-million dollar contract.[89] Specifically, such agents offer services such as education to student-athletes and their families regarding the Draft and their transition to the pros, endorsement and marketing advice, and post-athletic career planning.[90] There has also been a growing trend among sports agents to limit their representation activities to one sport, or athletes of a particular playing position. Therefore, many agents are able to provide expert advice to athletes on the rules, regulations, and complexities of a given sport.[91]

The nature of the agent industry can be summed up in one word: cutthroat. Thousands of individuals claim to be agents, however there are only 3,346 active athletes among the three major sports leagues, namely MLB, the National Football League (NFL), and the National Basketball Association (NBA).[92] In MLB, the only way an agent can

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[88] Robert P. Garbarino, *So You Want to be a Sports Lawyer, or is it a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?,* 1 VILL. SPORTS & ENT. L. F. 11, 30 (1994).

[89] *See* Cameron Crowe, Jerry Maguire Movie Script (1996), *available at* http://screenplay.com/downloads/ scripts/Jerry%20Maguire.pdf (last visited on Sep. 29, 2013).

[90] Garbarino, *supra* note 88, at 32. Within the context of baseball, and in consideration of the new Draft rules, agents should consider engaging in such differentiation because providing value by negotiating signing bonuses well above the recommended slot will be difficult to do under the new Draft rules. Refer to Figure 3, *supra*.

[91] *Id.* at 22.

[92] MLB is comprised of 30 teams, with 40 players per team, totaling 1,200 players. *Team-by-Team Information*, MLB.COM, http://mlb.mlb.com/team; Player *Search*, MLB.COM, http://www.mlb.com/mlb/players (last visited Sept. 29, 2013). The NFL is made up of 32 teams, with 53 active players

(Footnote continued on page 81)

become "certified" by the Major League Baseball Player's Association (MLBPA)[93] is by representing a player on the "40-man roster."[94] Therefore, as one can imagine, the competition among agents to acquire a client is fierce. Several agents have gone to great measures, such as wrongfully giving prospective clients cash and loans and buying them cars, alcohol, and equipment, as a means to recruit them while they are student-athletes.[95] Reggie Bush, former University of Southern California (USC) football standout, is a well-publicized example.[96] Bush and his family had received hundreds of thousands of dollars in cash and gifts from advisors who labeled themselves as "sports marketers."[97] After a four-year investigation, the NCAA punished Bush for his receipt of extra benefits, and USC for its lack of institutional control.[98] Specifically, the NCAA

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per team, totaling 1,696 players. *Teams*, NFL, http://www.nfl.com/teams (last visited Sept. 29, 2013). The NBA has 30 teams, with about 15 players per team, totaling about 450 players. *Team Index*, NBA.COM, http://www.nba.com/teams (last visited Sept. 29, 2013).

[93] The MLBPA is the union, and thus the exclusive bargaining representative for MLB players. However, per Article 4 of the Basic Agreement, a MLB player may designate an agent to negotiate a MLB contract on his behalf, provided that such agent is certified to MLB teams by the MLBPA. MLB teams are not allowed to negotiate with any agents except those that are certified by the MLBPA. *See* MLBPA Regulations Governing Player Agents, §1(B), *available at* http://reg.mlbpaagent.org/Documents/AgentForms/Agent%20Regulations.pdf.

[94] The "40-man roster" is composed of all the players on a MLB team who are signed to a MLB contract.

[95] *See generally* United States v. Walters, 913 F.2d 388, 390 (7th Cir. 1990) (agents enticed talented college football players by providing signing bonuses in cash, no-interest loans, sports cars and other incentives).

[96] *Reggie Bush to forfeit Heisman*, ESPN, Sep. 15, 2010, http://sports.espn.go.com/los-angeles/ncf/news/story?id=5572827.

[97] *Id*.

[98] *Id*.

stripped Bush of the 2005 Heisman Trophy;[99] it barred USC from participating in bowl games for two years, took away football scholarships, and stripped the university of its 2004 National Championship.[100]

Due to the nature of the agent industry and its possible negative impact on student-athletes, the NCAA instituted bylaws as a means to regulate the agent industry. The general rule, called the "no-agent rule," is found under NCAA Bylaw 12.3.1. Under Bylaw 12.3.1, "an *individual* [who has ever] agreed (orally or in writing) to be represented by an agent for the purpose of marketing [the athlete's] athletics ability or reputation…" will be ineligible for participation in an intercollegiate sport.[101] The NCAA has defined "individual" as a "person prior to and subsequent to enrollment in a [NCAA] member institution."[102] Therefore, the NCAA has extended its reach beyond collegiate student-athletes; it also includes high school student-athletes or graduates prior to enrollment in a NCAA member institution. Thus, high school student-athletes could essentially be deemed ineligible by the NCAA to participate in collegiate sports before they step foot on a college campus.[103]

Pursuant to Bylaw 12.3.1, the NCAA further restricts high school and collegiate student-athletes from entering into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the student-athlete has exhausted his eligibility.[104] The classic case includes an agent providing advice to a student-athlete about his or her transition to professional sports, and

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[99] *Id.* Annual award given to the most outstanding player in college football.
[100] *Reggie Bush to forfeit Heisman*, *supra* note 96.
[101] NCAA DI Manual, *supra* note 8, §12.3.1 (emphasis added).
[102] NCAA DI Manual, *supra* note 8, §12.1.3.
[103] Karcher, *supra* note 7, at 216.
[104] NCAA DI Manual, *supra* note 8, §12.3.1.1. The NCAA also prohibits a student-athlete and his or her relatives and friends from accepting transportation or other benefits from agents under §12.3.1.2.

the student-athlete verbally agreeing to pay the agent a fee for this advice, as well as retain him or her, after his NCAA eligibility expires. Regardless if the agent has the same fee arrangement for all student-athletes, the student-athlete will be in violation of both Bylaw 12.3.1.1, "Representation for Future Negotiations," and Bylaw 12.3.1.2, "Benefits from Prospective Agents."[105]

The NCAA has carved out a limited exception to its general rule. Under Bylaw 12.3.2, the NCAA allows a student-athlete to secure advice "from a lawyer concerning a proposed professional sports contract."[106] However, the lawyer, like an agent, may neither represent the student-athlete in negotiations for such a contract, nor be present during discussions of a contract offer between the student-athlete and a professional sports team.[107] Additionally, lawyers, like agents, may not have any direct contact (in person, by telephone, or by mail) with a professional sports team on behalf of the student-athlete.[108]

C. *The NCAA's exception to its no-agent rule: Professional Sports Counseling Panels*

As mentioned above, a student-athlete's transition to professional sports can be complex, sparking a need for expert counsel in most situations.[109] Considering the NCAA's mission to protect student-athletes from unethical agents attempting to provide such counsel, the NCAA created Bylaw 12.3.4.[110] Bylaw 12.3.4 allows an NCAA member institution to create a PSCP and outlines seven different

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[105] Karcher, *supra* note 7, at 217.
[106] NCAA DI Manual, *supra* note 8, §12.3.2.
[107] *Id*.
[108] *Id*. §12.3.2.1.
[109] Karcher, *supra* note 7, at 222.
[110] NCAA DI Manual, *supra* note 8, §12.3.4.

functions it can serve.[111] These functions include: advising a student-athlete about a future professional career,[112] advising a student-athlete on agent selection,[113] directly communicating and meeting with representatives of professional teams,[114] and discussing a student-athlete's market value with the student-athlete, agents, and representatives of professional teams.[115] The NCAA mandates that the PSCP consist of at least three persons appointed by the school's president, with not more than one panel member being an athletics department staff member.[116] Sports agents, or any person employed by a sports agent or agency, are not allowed to sit on the PSCP.[117]

PSCPs can be an invaluable resource to student-athletes, especially considering that "many student-athletes are ill prepared for the transition to professional sports due to the lack of guidance, counsel, and expertise throughout it."[118] Proponents of PSCPs argue that if NCAA member institutions prepared their student-athletes better, everyone involved in the professional sports transition process would win.[119] Specifically, the student-athlete and his or her family would have a clearer understanding of the process. Moreover, professional teams and player's unions such as the MLBPA would appreciate a more mature and educated player entering the league, because it may result in a more positive image for the league and a better opportunity to market the player as a league representative.[120] Those representing the athletes win, too. Specifically, if student-athletes have a fundamental

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[111] *Id*.
[112] *Id*. §12.3.4(a)
[113] *Id*. §12.3.4(f)
[114] *Id*. §12.3.4(d) and (e).
[115] *Id*. §12.3.4(f).
[116] *Id*. §12.3.4.1-12.3.4.2.
[117] *Id*.
[118] Wong, *supra* note 71, at 600.
[119] *Id*. at 588.
[120] *Id*.

knowledge of their career potential and financial outlook, it greatly reduces the "babysitting" agents and financial advisors have to do in servicing their clients.[121] Additionally, student-athletes have a better chance to attract and retain the best agents and financial advisors. Such agents and financial advisors prefer smarter, more mature clients who understand the professional sports process.[122] With a clear understanding of the process, student-athletes are more likely to have loyalty toward those representing them.[123]

Despite the potential benefits of PSCPs and the option they provide in light of the NCAA's strict rules regarding the use of agents, many NCAA member institutions have not instituted them. In fact, it is estimated that only 25% of schools have a PSCP.[124] For example, in the ACC,[125] a premier NCAA athletic conference that includes twelve schools, fewer than half have a PSCP.[126] Why is this? One argument is that since the NCAA mandates that the majority of PSCP panelists come from outside a university's athletic department, there are limited, if any, sources of funding.[127] However, this argument is somewhat weakened considering that some schools have expended large sums of money to hire outside consultants to advise their student-athletes, rather than instituting their own PSCP.[128]

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[121] *Id*. at 600.
[122] *Id*.
[123] *Id*.
[124] Jimmy Golen, *At some schools, advisers help navigate going pro*, WASHINGTON TIMES, Oct. 14, 2011, *available at* http://www.washingtontimes.com/news/2011/oct/14/at-some-schools-advisers-help-navigate-going-pro/?page=all.
[125] Athletic Coast Conference, http://www.theacc.com (last visited Oct. 10, 2012).
[126] Golden, *supra* note 124.
[127] *Id*.
[128] *See* CORNERSTONE SPORTS CONSULTING, http://cornerstonesports.com (last visited Oct. 10, 2012). As of October 10, 2012, Cornerstone Sports Consulting has been retained by eight NCAA member institutions: LSU,

Scholars have argued that even if a NCAA member institution creates its own PSCP, NCAA restrictions prevent student-athletes from obtaining the level of expertise they deserve. First, because the NCAA limits the panel members to athletic department employees and faculty members, it is reasonable to conclude that most panel members are not well-versed in the rules and regulations of not only the NCAA, but also the numerous major sports leagues such as MLB, the NFL, NBA, and National Hockey League (NHL). Furthermore, many of these panel members most likely do not have relationships with scouts and team executives.[129] This presents a problem since these are the people who determine the market value of student-athletes and negotiate their signing bonuses. One of the main reasons a student-athlete hires an agent is because of the agent's relationships with scouts and team executives.

Second, the makeup of the PSCP may potentially create a conflict of interest among student-athletes and panel members. Since panel members are full-time employees and representatives of the university, they may be more inclined to sway an elite student-athlete to compete as a student-athlete for another year before turning pro.[130] One scholar explains: "As long as the institution has a vested, financial interest in encouraging the student [-athlete] to stay [in school], full-time employees of the institution may not be wholly neutral."[131] Simply put, the longer an elite student-athlete competes at the school, the more likely such a student-athlete will help the school generate more wins and thus more revenue. If a PSCP member encourages a student-athlete to

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Oklahoma, Kentucky, Washington, Georgia, Arkansas, Auburn, and Alabama. *Id.* Cornerstone Sports Consulting limits its practice to football student-athletes. CORNERSTONE SPORTS CONSULTING, http://cornerstonesports.com/about-us (last visited Oct. 10, 2012).

[129] Karcher, *supra* note 7, at 224.

[130] *Id*.

[131] Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 364 (1997)

sign a professional contract, the school may miss out on such benefits.

Third, PSCP members may not have the time necessary to devote to fulfilling his or her duties as a PSCP member. More likely than not, panel members selected to serve on a school's PSCP are individuals with major responsibilities at the university.[132] Considering there is an extensive amount of time demanded in researching a student-athlete's market value, communicating with the student-athlete and his or her family, agents, scouts, and team executives, and becoming well versed in the NCAA bylaws and a particular sports league's rules and regulations, this also presents a problem for the student-athlete. Chances are that a student-athlete will not receive the necessary attention and counseling he deserves to make an informed decision about whether to turn pro or not.

Finally, it is important to note that since high school student-athletes are not yet student-athletes of a NCAA institution, they are not allowed access to PSCPs.[133] For baseball student-athletes, this is a problem because there are very few outlets, besides agents, to obtain the necessary information to make a well-informed decision about turning pro.[134]

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[132] Karcher, *supra* note 7, at 224.

[133] *Id*.

[134] This situation is unique to high school baseball student-athletes compared, for example, to basketball and football student-athletes. Basketball student-athletes must be out of high school for at least one year before they are draft-eligible in the NBA. *Article X – Player Eligibility and NBA Draft*, 2005 COLLECTIVE BARGAINING AGREEMENT 225 (2005), *available at* http://www.nbpa.org/sites/nbpa.org/files/ARTICLE%20X.pdf. Football student-athletes must be out of high school for at least three years before they are draft-eligible in the NFL. *Article 6 College Draft*, COLLECTIVE BARGAINING AGREEMENT 17 *available at* http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf.

D. *The NCAA's no-agent rule and the challenges surrounding baseball student-athletes*

With the MLB Draft taking place in the beginning of June, Draft-eligible student-athletes obligated to comply with NCAA rules face significant challenges. In the early weeks of June, there is no guarantee a high school or college baseball student-athlete will be finished with his season.[135] As a result, every year, hundreds of baseball student-athletes are forced to finish their season (or state or national championship run) with the distractions and pressures of the Draft looming over them. In addition, MLB teams and executives contact student-athletes during this time, in an effort to determine their signability and willingness to negotiate a signing bonus.[136] Accordingly, this is quite a daunting scenario for most 17 to 22-year olds, let alone student-athletes who are focused on competing for their school at a highly visible level. Because of this reality, it would be wise for most baseball student-athletes to hire an agent or attorney to advise them and speak with MLB teams.[137] As one scholar argues, "without an agent to communicate with a MLB team, the student-athlete is at a disadvantage in the Draft selection and negotiation process."[138] Furthermore, without an agent, a baseball student-athlete may make a career decision that could have a devastating effect on his future.[139] However, student-athletes face limited options regarding the use of agents because of NCAA restrictions. Student-athletes could either challenge NCAA rules in court, or completely disregard them and thus risk the loss of their NCAA eligibility.

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[135] Karcher, *supra* note 7, at 222.
[136] *Id*. at 221.
[137] *Id*. at 224.
[138] Fitt, *supra* note 69, at 571.
[139] Todd Fisher, *Amateurism and Intercollegiate Athletics: The Double Standard of Section 12.2.4.2.1*, 3 SPORTS LAW. J. 1, 13 (1996).

One would think student-athletes have a reasonable option of challenging the validity of NCAA rules in court. However, courts generally have been disfavorable to student-athletes on past challenges to NCAA rules. Courts have reasoned that since the NCAA is a private, voluntary association, it has the right to apply its rules and manage its own internal affairs without interference from the courts.[140] For example, in *Cole v. NCAA*, the court stated that the "NCAA's rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference" and that it "is reluctant to replace the NCAA…as the decision-maker."[141] The student-athlete in *Cole* brought action in state court against the NCAA, seeking a declaration that the association's participation policy violated the Americans with Disabilities Act (ADA) and seeking to enjoin the NCAA from discriminating against student-athletes.[142]

Despite courts' past unfavorable rulings for student-athletes, in 2009, Andy Oliver, then baseball student-athlete at Oklahoma State University, nonetheless decided to challenge the NCAA rules affecting him in Ohio state court.[143] In *Oliver v. NCAA*, one of the arguments presented by Oliver was that the no-agent rule was "arbitrary and capricious because it does not impact a player's amateur status but instead limits the player's ability to effectively negotiate a contract that the player or a player's parent could negotiate."[144] Surprisingly, the Court of Common Pleas of

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[140] *See* NCAA v. Tarkanian, 488 U.S. 179, 202 (1988) (NCAA is not a "state actor" for purposes of the 14th Amendment); Wiley v. NCAA, 612 F.2d 473, 477 (10th Cir. 1976) (unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with NCAA rules do not present substantial federal questions).

[141] Cole v. NCAA, 120 F.Supp.2d 1060, 1071-72 (N.D. Ga. 2000).

[142] *Id*. at 1062.

[143] Oliver v. NCAA, 2009-Ohio-6587, 920 N.E.2d 203, 207 (Com. Pl. 2009).

[144] *Id*. at 208.

Ohio agreed with Oliver's argument and also added that the NCAA's no-agent rule was against public policy.[145] The NCAA appealed this decision, but the case was settled out of court with the NCAA paying Oliver $750,000.[146]

Judge Tone's decision in *Oliver* seemed to be a major victory for baseball student-athletes. However, because the case was settled out of court before any higher courts could rule on appeal, the *Oliver* decision did not set a precedent. The NCAA did nothing to change its rule, but instead added an additional level of enforcement on baseball student-athletes.[147] Specifically, the NCAA mandates that universities administer a survey for drafted undergraduate baseball student-athletes that asks if they 1.) retained an agent prior to enrollment, and 2.) if they retained an agent, did the agent speak to a professional organization on their behalf? This places baseball student-athletes in a no-win situation. If a baseball student-athlete answers the questions in the affirmative, he will be deemed ineligible. If he answers in the negative, but in fact did hire an agent and such agent spoke to MLB teams on his behalf, he has more than likely committed an ethical violation at his university and may face suspension or expulsion if the university is made aware of such a violation.

The other option student-athletes have concerning the NCAA's rules restricting the use of agents is to completely disregard them. For the high school baseball student-athlete, the NCAA unquestionably wants him or his family to strictly adhere to the no-agent rule. This means talking to or negotiating with a MLB team without an agent present, thus facing the consequences of unequal bargaining power. For the college baseball student-athlete, the NCAA wants him to

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[145] *Id*. at 215.
[146] Parties' Settlement Agreement at 1 Oliver v. NCAA, 2009-Ohio-6587, 920 N.E.2d 203 (Com. Pl. 2009) (No. 2008-CV-0762), *available at* http://www.docstoc.com/docs/12908872/Andy-Oliver-Settlement-Terms.
[147] Branch, *supra* note 84.

either strictly adhere to the no-agent rule, or, if his university has a PSCP, use its services. Unfortunately, if a student-athlete or his family is not comfortable in talking to or negotiating with a MLB team, or if a PSCP is not available, or, if a PSCP is available but lacks the expertise the student-athlete demands, his only option is to disregard the no-agent rule and allow his agent to talk to and negotiate with a MLB team on his behalf. In many cases, this is what student-athletes do.

MLB scouting directors, agents, and coaches have publicly stated that nearly every Draft prospect violates the no-agent rule.[148] A well-publicized example took place during the 2001 Draft. Before the signing deadline of the 2001 Draft, high school student-athlete and 20th round pick Jeremy Sowers and his family hired an agent to advise them.[149] Sowers' agent had contact with the Cincinnati Reds – the MLB team that drafted him.[150] When the NCAA caught wind of this while Sowers was enrolled at Vanderbilt University, it suspended Sowers for six games for violating the no-agent rule.[151] A more recent example took place in 2006 when Andy Oliver, then a high school student-athlete at Vermillion High School (Ohio), hired an agent before the 2006 MLB Draft.[152] Oliver was drafted in the 17th round by the Minnesota Twins and, before the signing deadline, met with representatives of the Twins at his home.[153] Oliver's agent, Tim Baratta, was present at the meeting, along with Oliver's father. Because his agent was present, Oliver clearly

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[148] Aaron Fitt, *Headed To Trial: Oliver case may have lasting ramifications,* BASEBALL AMERICA Dec. 22, 2008*, available at* www.baseballamerica.com/today/college/on-campus/2009/267366.html.
[149] Karcher, *supra* note 7, at 222.
[150] *Id*.
[151] *Id*.
[152] *Oliver*, 920 N.E.2d at 206.
[153] *Id*.

violated the no-agent rule.[154] After heeding the advice of his father, Oliver rejected a $390,000 offer from the Twins and instead chose to attend Oklahoma State University as a student-athlete.[155] The NCAA learned of Oliver's violation of the no-agent rule in 2008, after Oliver fired Baratta.[156] In retaliation for both being fired and not collecting fees for the "legal services" he provided Oliver, Baratta sent correspondence to the NCAA, making it aware of Oliver's violation of the no-agent rule.[157] Unlike Jeremy Sowers' case, the NCAA was harsh – it suspended Oliver for his junior season, as well as limited his eligibility to three years as opposed to four.[158]

Baseball student-athletes are not the only ones adversely affected by the NCAA rules regarding the use of agents. Parents, universities and their coaches, agents and attorneys, MLB teams, and the NCAA itself are affected as well. Most parents are not sophisticated when it comes to the rules and regulations of the Draft and NCAA and do not have negotiating experience. Thus, if they are forced to negotiate on their son's behalf, they will most likely not be able to place their son in the best bargaining position.

The no-agent rule also presents universities and their coaches with challenges. Regardless of actual knowledge, universities face possible sanctions when student-athletes violate NCAA rules.[159] In addition, universities may lose out on revenue and wins when their student-athletes are deemed ineligible due to rules violations. This is exactly what happened to USC as a result of Reggie Bush's decision to accept cash payments from "sports marketers" acting as

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[154] *Id*. at 207.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] Karcher, *supra* note 7, at 222.

agents.[160] University coaches are hurt because they may have distracted athletes leading up to and during the Draft. The more time, focus, and energy student-athletes have to devote to talking and bargaining with MLB team representatives, the less the student-athletes have towards helping their team win baseball games.

The no-agent rule complicates matters for agents, attorneys, and MLB teams as well. In order to help their clients during negotiations with MLB teams (while ensuring their clients are abiding by NCAA rules), agents are forced to be a "ghost negotiator." In other words, the agent has to communicate directly to the student-athlete and/or his family and tell him what to say and how to negotiate with a MLB team representative. This presents several problems. The agent's message to the MLB team may be lost in the translation from student-athlete to MLB team representative; the student-athlete may "buckle under the pressure" of negotiation, and agree to an offer against the agent's strategy; the potential for delays in the process become more of a reality because at least three people (i.e. student-athlete, agent, MLB team representative) need to be available when discussions are to commence. This makes for a complex scheduling challenge, especially for MLB team representatives who are balancing the time demands that come with drafting 40 or more student-athletes. As for attorneys who are retained by student-athletes, some argue that letting a 17-22 year old student-athlete negotiate a potential million-dollar contract by himself would be setting the attorney up for a malpractice suit.[161]

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[160] *Reggie Bush to forfeit Heisman, supra* note 96. It is estimated that USC lost millions of dollars in revenue as a result of the university being barred from participating in two years worth of bowl games.

[161] Fitt, *supra* note 69, at 571.

Finally, the NCAA's no-agent rule presents challenges to its own administration's ability to enforce the rule. Currently, the NCAA has 57 full-time employees that are responsible for investigating and enforcing its bylaws.[162] With over 1,200 baseball student-athletes drafted each year, along with thousands of student-athletes in other sports considering the option to turn pro, the NCAA's ability to comprehensively investigate potential violations is questionable at best considering its small enforcement staff.[163]

E. *Regulation and enforcement issues surrounding the athlete-agent relationship*

Continuing efforts have been made by the NCAA and its member institutions to regulate the athlete-agent relationship. However, such efforts have been "largely ineffectual."[164] In regards to the NCAA, the first problem is that its reach of enforcement only extends to student-athletes,

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[162] Employment number is based on the author's email correspondence with Emily Potter, the NCAA's Associate Director of Public and Media Relations, on Feb. 11, 2013.

[163] Prior to 2011, the NCAA's Agents, Gambling, and Amateurism Department was responsible for bylaw investigation and enforcement and included only four employees. In 2011, the NCAA restructured its enforcement staff and streamlined more full-time employees to address potential violations. Although the NCAA's current staff of 57 employees is much bigger than in previous years, it is still rather small compared to the over 450,000 student-athletes participating in the NCAA. *See* Symposium, *Ethics and Sports: Agent Regulation*, FORDHAM INTELL. PROP. MEDIA * ENT. L.J. 747, 756 (2004); NCAA, *NCAA enforcement restructures for greater flexibility*, Jun. 30, 2011, *available at* http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2 011/June/NCAA+ enforcement+restructures+for+greater+flexibility; NCAA, *NCAA student-athlete participation hits 450,000*, Sep. 19, 2012, *available at* http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/September/ NCAA+student-athlete+participation+hits+450000.

[164] R. Alexander Payne, Note, *Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game*, 13 VAND. J. ENT. & TECH. L. 657, 659 (2011).

NCAA member institutions, and coaches.[165] Ethical agents are more likely to follow NCAA rules for fear of placing their clients and the general student-athlete body at risk of ineligibility. However, unethical agents are not deterred by NCAA rules because the NCAA has no jurisdiction over them.

The second problem is that the NCAA does not have enough staff to investigate no-agent rule violations. With limited staff to investigate, the NCAA cannot proactively work to uncover such violations. Thus, in most cases, the NCAA will not become aware of a violation unless a party involved in the violation brings it to the NCAA's attention.[166] If a student-athlete makes a promise to an agent to hire him or her upon turning pro, the student-athlete will not report such an agreement because he or she will lose NCAA eligibility. The agent won't report the violation because, if his or her client is deemed ineligible, he or she may hurt the market value of such client. Additionally, by reporting a violation, the agent may put a state on notice that he or she has violated a state's anti-agent laws.[167]

The third problem is that the scope of the NCAA's regulation of the athlete-agent relationship is inconsistent with state and federal laws. As mentioned above, NCAA Bylaw 12.3.1 prohibits a student-athlete from agreeing to be represented by an agent. Although state and federal legislators have gotten involved in regulating the athlete-agent relationship, they have not prohibited a contractual relationship between such parties. The primary issues state

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[165] Timothy G. Nelson, Comment, *Flag on the Play: The Ineffectiveness of Athlete-Agent Laws and Regulations* – Timothy G. Nelson, Comment, *Flag on the Play: The Ineffectiveness of Athlete-Agent Laws and Regulations – and How North Carolina Can Take Advantage of a Scandal to be a Model for Reform*, 90 N.C. L. REV. 800, 819 (2012).

[166] *See Oliver*, *supra* note 143.

[167] *See* discussion of state and federal agent laws *infra*.

and federal legislators deem worthy of regulation are the registration of agents[168] and the criminal activities committed by agents[169] in the context of the athlete-agent relationship. Since state and federal legislatures are not interfering with the contractual relationship between student-athletes and agents, neither should the NCAA.

NCAA member institutions face similar challenges in regards to enforcing the no-agent rule. Many universities have taken the NCAA's no-agent rule one step further and enacted rules that determine when and under what circumstances their student-athletes can meet with agents. For example, The University of North Carolina recently enacted a rule that limits a student-athlete/agent meeting to one hour and only allows the meeting to take place during a certain time of the semester.[170] At the University of Miami,

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[168] *See* NCAA, *Uniform Athlete Agents Act*, *available at* http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Uniform+Athlete+Agents+Act+Homepage (last visited Oct 10, 2012). The Uniform Athlete Agents Act (UAAA), enacted in 2000 by the National Conference of Commissioners, is a model state law passed in 40 states that provides a means of regulating the conduct of athlete agents. The UAAA requires an agent to register with a state authority, typically the Secretary of State, in order to act as an agent in that state.

[169] *See* Sports Agent Responsibility and Trust Act, Pub. L. No. 108-304, 118 Stat. 1125 (2004)(codified at 15 U.S.C. §§ 7801-7807 (2006)). In 2004, the federal government passed the Sports Agent Responsibility and Trust Act (SPARTA). SPARTA makes it illegal for an agent to provide anything of value (e.g. providing a loan, co-signing a loan, etc.) to a student-athlete (or anyone associated with the student-athlete) before the student-athlete enters into an agency contract. Agent violations of SPARTA are considered unfair and/or deceptive trade practices regulated by the Federal Trade Commission (FTC).

[170] Darren Heitner, *New University of North Carolina Agent Policy is Extremely Limiting*, SPORTS AGENT BLOG, (Jul. 3, 2012), http://www.sportsagentblog.com/2012/07/03/new-university-of-north-carolina-agent-policy-is-extremely-limiting/. The University of North Carolina enacted its rule in response to NCAA allegations that seven university football student-athletes received more than $27,000 in improper benefits in 2009 and 2010, as well as trips paid for by an agent.

student-athletes are prohibited from having any communication with an agent.[171] Despite universities enacting their own rules to protect themselves and their student-athletes, most university Compliance Departments lack the staff and resources to monitor athlete-agent relationships.[172] University Compliance Departments responsible for enforcing both NCAA and their own rules spend most of their time checking eligibility and practice limit issues, as opposed to investigating agents and educating student-athletes on the process of transitioning to the pros.[173]

Aside from the enforcement challenges individual NCAA member institutions face when they enact their own rules restricting the athlete-agent relationship, there is an underlying concern that such rules are enacted to the detriment of the student-athlete. By imposing restrictions such as limiting the athlete/agent meeting to one hour, or prohibiting all contact between a student-athlete and agent, universities are thereby preventing student-athletes from conducting due diligence on agents. By obstructing such due diligence, universities are making it more likely for student-athletes who follow the rules to select an agent that may not be the best fit for the student-athlete. Additionally, such restrictions are in fact encouraging student-athletes to violate the rules to acquire the information they need to make an informed decision.

In high school and college baseball, it is no secret that there is an overwhelming lack of enforcement and compliance with NCAA rules regarding the athlete-agent relationship. Agents are prevalent in amateur baseball, and they, along with the student-athletes they represent, are willing to bend or break rules and laws to effectively address their respective

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[171] *Id*.
[172] Wong, *supra* note 71, at 561.
[173] *Id*. at 560.

interests and needs. As one MLB scouting director said, "…we're playing a charade here if we think these [student-athletes] are representing themselves."[174] With such little enforcement, it is not surprising that both baseball agents and student-athletes are willing to risk being investigated and sanctioned. Considering this culture of non-compliance, it is necessary for the NCAA to revise its rules in order to more effectively monitor and regulate the athlete-agent relationship, especially within the context of baseball.

PART III: THE NEED FOR NCAA BYLAW 12.3 REVISION

As Taylor Branch reminds us, the NCAA has created an implicit presumption that preserving amateurism is necessary for the well-being of student-athletes.[175] However, as Branch argues, "…while amateurism – and the free labor it provides – may be necessary to the preservation of the NCAA, and, perhaps, to the profit margins of various interested corporations and educational institutions, *what if it doesn't benefit the [student-] athletes? What if it hurts them?*"[176]

There is a lot on the line for elite baseball student-athletes, such as their education, college baseball career, professional baseball career, and financial well-being. As such, many such student-athletes work around the seldom enforced no-agent rule because it seems to be the only way to get the advice and information needed to make a well-informed decision. Plus, what student-athlete would feel comfortable negotiating with an experienced MLB executive with all that is on the line? Even if a PSCP at a university is established, PSCPs are off limits for high school baseball student-athletes, and, for college baseball student-athletes, it

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[174] James Halt, *Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball*, 19 J. LEGAL ASPECTS OF SPORT 185, 197 (2009).
[175] Branch, *supra* note 84.
[176] *Id*. (emphasis added).

does not have the credibility to provide student-athletes the expert, unbiased advice they deserve. To a large extent, the NCAA bylaws, particularly the bylaws addressing the use of agents and PSCPs, are not aligned with modern amateurism. Additionally, they are especially detrimental to baseball student-athletes in light of the new Draft rules governing the signing bonuses student-athletes will be offered from MLB teams. Considering such changes to the Draft under the new Basic Agreement, there is no better time than now for the NCAA to revisit its bylaws as they pertain to baseball student-athletes.

A. *Recommendations*

1. Make a "High School Baseball Exception" to the no-agent rule

The NCAA should carve out a "High School Baseball Exception" (hereinafter Exception) to Bylaw 12.3. This Exception has three parts: 1.) Allow a high school baseball student-athlete to enter into a representation contract with an agent, 2.) Allow an agent or attorney to represent the student-athlete in discussions with MLB teams and be present at negotiations for a professional contract, and 3.) If the student-athlete does not sign a professional contract and enrolls as a student-athlete in a NCAA member institution, the athlete-agent contract would terminate at the time of enrollment.

a. *Exception, Part 1*: Allow a high school baseball student-athlete to enter into a representation contract with an agent

From the NCAA's perspective, it is acceptable for a high school baseball student-athlete to obtain advice from his agent before, during, and after the MLB Draft. However, it is not acceptable for such a student-athlete to contract with his agent for the purpose of advocating his market value to MLB teams.[177] As mentioned in Part II, the pre-Draft advice an

[177] NCAA DI Manual, *supra* note 8, §12.3.1.

agent provides a student-athlete is invaluable. Most agents are devoting significant resources (i.e. time, employees, travel costs, etc.) in delivering such advice. Like any professional providing value-added services, an agent prefers something in return for the value he or she provides. Thus, it is reasonable to assume that a contractual relationship would encourage agents to demand up-front payment from their clients. However, the vast majority of student-athletes and their families cannot afford the pecuniary value of an agent's services before the Draft. The best agents are aware of this reality, and are willing to defer their fees until their client is able to pay (which is typically when the client receives a signing bonus subsequent to the Draft). These agents are taking a risk because there is no guarantee a client will be drafted and subsequently sign for a significant amount of money. Therefore, having some guarantee that the student-athlete will not "shop around" other agents for advice, but instead be committed to the agent, is all the agent can ask from his amateur client. A contractual relationship can address this. Although a contract between the agent and athlete may not guarantee the student-athlete's long-term commitment to the agent, it may initially encourage client loyalty, provide an extra layer of accountability between the parties, and/or allow for remedies for breach of contract.

In addition to safeguarding agents, a contractual athlete-agent relationship also safeguards high school student-athletes. First, a contract would clearly establish and define the athlete-agent relationship, and thus allow the student-athlete and his family to set expectations as to the services the agent will provide. Second, a contract would provide the student-athlete assurance that the agent will remain loyal to him in the moments leading up to the Draft, especially if the student-athlete becomes a less-desirable Draft prospect. Third, if an agent does not execute on what was contracted, veers outside the scope of the relationship defined in the contract, and/or demands a different fee, the contract may

provide a way to terminate the relationship and/or provide remedies for breach of contract.

b. *Exception, Part 2*: Allow an agent or attorney to represent the high school baseball student-athlete in discussions with MLB teams and be present at negotiations for a professional contract

Recall the NCAA's purpose behind disallowing an agent or attorney to represent the student-athlete in discussions with professional teams and/or be present at negotiations: to maintain "a clear demarcation between collegiate athletics and professional sports." Viewed in the context of the MLB Draft, to maintain such a "clear demarcation," the NCAA believes that a high school baseball student-athlete and his family are the only people that should communicate, negotiate, and be physically present at discussions with MLB teams. This view is flawed for two principal reasons.

First, as highlighted earlier in this article, student-athletes and their parents lack the level of sophistication needed to negotiate with MLB teams. On the other hand, agents are in the best bargaining position to negotiate a student-athlete's signing bonus, therefore the NCAA should not get in the way of the agent or attorney's duty to represent their clients competently. By allowing an agent or attorney to handle the discussions and negotiations, a high school student-athlete can focus on the responsibilities and commitments he has as a student and athlete. Moreover, parents can direct their efforts in supporting their son during his life-altering decision.

The NCAA may be concerned that by allowing an agent or attorney to have this level of involvement, more high school student-athletes may be convinced to turn pro. The quicker the agent's client is paid, the sooner the agent will be compensated for his or her services. However, the *best* agents

are more concerned with a student-athletes' long-term success, and thus take a comprehensive approach to providing them advice. Specifically, the *most reputable* agents will evaluate the student-athlete's complete picture (e.g. financial need, projected market value, probability of academic success in college, etc.) before providing advice regarding whether to turn pro or enroll in college. In addition, there are benefits for agents to encourage a student-athlete to enroll in college which include: further building (thus solidifying) his or her relationship with the student-athlete and his family while he's in college; establishing a relationship and rapport with the student-athlete's college coaches; gaining a more mature and educated client in anticipation of the student-athlete's next Draft-eligible year, thus garnering a more marketable client.

Second, the NCAA's view is flawed because a student-athlete is not a professional-in-fact simply because he hires an agent or attorney to help him make a career decision. As was the case in *Oliver*, when a high school baseball student-athlete retains competent counsel to represent him in contract discussions, he does nothing more than to retain an expert to advocate on his behalf and help him make a decision to turn pro or go to college.[1] Furthermore, in the context of MLB, a student-athlete does not agree to become a *professional* baseball player until he signs a professional contract with a MLB team. Until that point, he is still considered an amateur baseball player. So why does the NCAA deem a student-athlete to have crossed from amateur to professional before he even agrees to become a professional? In brief, because the NCAA says so.

The NCAA's stance that hiring an agent or attorney to discuss, negotiate, and/or be present at negotiations is a student-athlete's declaration that he or she has turned professional is at odds with its own Bylaw 12.3.4,

[1] Brandon D. Morgan, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, but Remains Safe*, 17 SPORTS LAW. J. 303, 314 (2010).

"Professional Sports Counseling Panel." There is no fundamental difference between an agent or attorney discussing, negotiating, or being present at negotiations than it is for a PSCP member to do so. However, the NCAA says college student-athletes remain amateurs if a PSCP member negotiates on their behalf. What if such a PSCP member is an attorney? Again, there is no fundamental difference between a PSCP attorney and non-PSCP attorney negotiating with a MLB team. Thus, a baseball student-athlete should retain his amateur status regardless if a PSCP or non-PSCP member is representing him, especially a high school baseball student-athlete who has no access to a PSCP in the first place.

c. *Exception, Part 3*: If the high school baseball student-athlete does not sign a professional contract and enrolls as a student-athlete in a NCAA member institution, Bylaw 12.3.1.1 would take affect

If a high school baseball student-athlete does not sign a professional contract after his senior high school season, but instead enrolls as a student-athlete in a four-year NCAA member institution, he will not be eligible for another Draft until his junior year or after he turns 21.[2] Therefore, such a student-athlete will not need to discuss his market value or negotiate a potential professional contract with a MLB team until that time. Consequently, outside of continuing to build a personal relationship with his agent, the majority of unsigned student-athletes will not need pre-Draft services for at least two years.[3] Accordingly, under this article's proposed Exception, once the student-athlete enrolls in college, the

[2] MLR 3(a)(2)-(4).

[3] Two years from the conclusion of his senior high school season would be the conclusion of his sophomore college season – exactly one year before most college student-athletes become Draft-eligible again.

contractual agreement between the student-athlete and agent would terminate and Bylaw 12.3.1.1 would take effect.

In order for this proposed Exception to be effective, the NCAA should revise Bylaw 12.3.1.1 to require that all baseball athlete-agent contracts contain an expiration clause which causes the athlete-agent contractual relationship to terminate prior to the student-athlete's enrollment in a NCAA member institution. Additionally, the NCAA should command that a copy of such contract be held with the member institution's Athletics Compliance Department. If the student-athlete's athlete-agent contract does not expire upon enrollment and/or the student-athlete failed to submit a copy of the contract to his university's Athletics Compliance Department, the NCAA would deem the student-athlete ineligible by way of Bylaw 12.3.1.1.

Requiring contract termination to preserve NCAA eligibility may seem inequitable at first blush; however, it is beneficial for both the student-athlete and the agent. The best agents are not only involved with student-athletes' athletic careers, but also their finances, health, and families. As student-athletes mature through the college years, their perspectives and needs change accordingly. As such, an agent that met all of a student-athlete's needs after high school may not be able to meet them at a later time. Therefore, it is crucial to give a student-athlete time to further build trust in his relationship with his agent before he enters into another contractual agreement with him or her. This was acutely illustrated in *Oliver*.[4] In *Oliver*, Andy Oliver fired the advisor who represented him while he was in high school and retained Scott Boras before he became Draft-eligible again as a college junior.[5] Undoubtedly, Oliver's needs changed between his senior year in high school and his junior year in

[4] *Oliver*, 920 N.E.2d at 207.
[5] *Id*.

college, and thus Oliver viewed Scott Boras as the person better able to meet his needs at that particular time.

The agent benefits from contract termination as well. The student-athlete may not be an ideal client by the time his next Draft-eligible year arrives for several reasons. Specifically, the student-athlete may have a change in personality or values that clash with the agent, may lose the interest of MLB teams due to a decline in performance or to injury, or simply may not value the agent's services anymore. Therefore, by the student-athlete abiding by NCAA Bylaw 12.3.1.1, the agent does not have to be concerned about fulfilling contractual obligations to a client he or she would not otherwise want to represent.

This article suggests one exception to Bylaw 12.3.1.1 taking affect during a college baseball student-athlete's career. This exception will be discussed under Recommendation Three, *infra*.

2. Reform Bylaw 12.3.4 addressing PSCPs

PSCPs should be fixtures at NCAA member institutions. If "[NCAA] member institutions' athletic programs are designed to be an integral part of the educational program [and] the student-athlete is considered an integral part of the student body,"[6] it is a university's duty to provide necessary life skills for its student-athletes.[7] This includes providing education to student-athletes regarding their transition to the pros – an area in which there is an "overall lack of guidance, counsel, and expertise."[8] Many student-athletes are unaware of their needs and thus do not know what resources for which to search throughout their transition to the pros. Unfortunately, "if the transition process is deficient and it has a negative effect on the athlete's career,

[6] NCAA DI Manual, *supra* note 8, §12.1.2.
[7] Wong, *supra* note 71, at 596.
[8] *Id*. at 574.

it will impact the rest of [the student-athlete's] life."[9] In fact, there have been many examples of athletes making poor financial and personal decisions shortly after their time as a college student-athlete. One such example is JaMarcus Russell, former Louisiana State University (LSU) standout and 1st pick of the 2007 NFL Draft. In 2007, Russell signed a contract worth $61 million, $32 million of which was guaranteed.[10] Sources have reported that Russell almost lost his $2.4 million mansion to foreclosure, and, as of 2011, owed nearly $200,000 in back taxes.[11]

NCAA member institutions across the country are in a great position to make a positive impact on their student-athletes' lives through PSCPs, especially considering that the college years are among the most developmental years of an individual's life. Likewise, in consideration of baseball student-athletes who will be affected by MLB's new Draft rules, student-athletes may decide not to use agents, and thus will more likely look to resources such as their university's PSCP for education and advice.[12] Despite the opportunity to

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[9] *Id*. at 580.

[10] Nancy Gay, *Raiders, Russell agree to contract - $32 million guaranteed*, S. F. CHRON., Sept. 11, 2007, *available at* http://www.sfgate.com/sports/article/Raiders-Russell-agree-to-contract-32-million-2522930.php.

[11] Chris Chase, *JaMarcus Russell is on the verge of losing his mansion*, YAHOO! SPORTS (Mar. 3, 2011, 7:08 PM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/JaMarcus-Russell-is-on-the-verge-of-losing-his-m?urn=nfl-329411.

[12] As mentioned previously, the new Draft rules have essentially diminished a MLB team's willingness to offer signing bonuses above the recommended slot value. *Supra* note 5. Thus, there is arguably a lesser need for agents because they will not be able to provide the same value by negotiating a higher signing bonus (as agents were able to do in previous Drafts). If agents are not providing value-added services beyond negotiating a signing bonus (e.g. education on the transition process to the pros) student-athletes are better off seeking advice elsewhere for two primary reasons. First, student-athletes can save upwards of six figures in agent commission fees. Darren Heitner, *No More Commissions*, SPORTS AGENT BLOG (Dec. 29, 2006),

impact and help student-athletes, and the plethora of stories detailing former student-athletes' failures as professional athletes, it is estimated that only around 100 universities have a PSCP.[13] NCAA President, Mark Emmert, said that "little has been done in regards to the pro sports transition" and that the "NCAA needs to have a sharper focus on educating student-athletes through athletics."[14]

One reason for the shortage of PSCPs may be because NCAA member institutions wrongly assume that it is solely the agent's job to help student-athletes transition to the pros. However, another key reason for the shortage is because of the limits the NCAA places on the composition of PSCPs. This article suggests the NCAA revise Bylaws 12.3.4.1 and 12.3.4.2, which limit a school's PSCP to one full-time Athletic Department employee and two full-time faculty members.[15] Specifically, this article suggests a three-part revision that involves: 1.) Allow attorneys, agents, and financial advisors to *advise* a PSCP, 2.) Allow non-agent professionals, former professional athletes, and distinguished alumni to *sit* on a PSCP, and 3.) Expand the PSCP to include three, full-time Athletic Department employees.

a. *Part 1*: Allow attorneys, agents, and financial advisors to advise a PSCP

Some of the key topics that are involved in a student-athlete's potential transition to the pros include, but are not

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http://www.sportsagentblog.com/2006/12/29/no-more-commissions/ (noting that Ray Allen saved $2.8 million agent commission by paying an attorney hourly fees instead). Second, the student-athlete more likely will not place his NCAA eligibility at risk by entering into an athlete-agent relationship that may lead to improprieties. NCAA DI Manual, *supra* note 8, §10.4.

[13] Wong, *supra* note 71, at 581.

[14] Elisia J.P. Gatemen, *Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes*, 10 SEATTLE J. FOR SOC. JUST. 509, 559-60 (2011).

[15] NCAA D1 Manual, *supra* note 8, §12.3.4.

limited to, the following: the decision to remain in school or not, agent selection, weighing insurance options, financial education, responsibilities and pressures as a professional athlete, and market/talent valuation. Considering the vast differences in the rules and regulations between different professional sports leagues, it is virtually impossible for three full-time employees at a school to understand them all. One college baseball coach admits, "administrators don't understand this part of college baseball."[16] Without a clear understanding, PSCP members will not be able to provide their student-athletes with the expertise they need and deserve.

There are two key benefits associated with allowing student-athlete advisors such as attorneys, agents, and financial advisors to advise PSCPs. First, the NCAA creates a win-win for PSCP members and the advisors that are counseling student-athletes. PSCP members win because such advisors could provide much needed help understanding a particular professional league's rules and regulations, as well as the current market for student-athletes in a respective professional sports league. Student-athlete advisors, on the other hand, win because PSCP members could help them better identify their client's needs since such members are more likely to interact with the student-athlete on a more frequent basis. "Most [student-athlete advisors] would welcome the presence of an experienced, independent advisor [who is a PSCP member]…because it's more likely to be a discussion about the things that are meaningful [to the student-athlete's future career as a professional athlete]."[17] Additionally, student-athlete advisors realize that if "student-athletes had better guidance, it is more likely they would be able to…form healthy [professional] relationships."[18]

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[16] Halt, *supra* note 174, at 197.
[17] Golen, *supra* note 124.
[18] Wong, *supra* note 71, at 589.

Second, allowing agents, attorneys, and financial advisors to advise PSCPs provides the NCAA and its member institutions with a diplomatic way to monitor the relationships student-athletes have with them – something they have not been able to do successfully. The NCAA has admitted that addressing the problems that surround student-athletes' relationships with such professionals cannot be handled by a single organization.[19] By partnering with the professionals who are experts in sports, student-athletes would be allowed to build legitimate relationships with such professionals – all while creating an environment for regular oversight by the school. With effective oversight, NCAA member institutions will be able to identify and blacklist unethical and incompetent agents, while rewarding ethical and proficient ones with continued relationships with university administrators and student-athletes. As one scholar writes, "if the [transition] process were better handled, less desirable agents would be obtaining fewer clients, resulting in less regulation violations and disputes."[20]

b. *Part 2*: Allow non-agent professionals, former professional athletes, and distinguished alumni to sit on a PSCP

As mentioned above, there are several questions surrounding the level of expertise and objectivity that university athletic department employees and faculty members can provide various student-athletes in regards to their transition to the pros. Thus, many student-athletes, especially those who have the potential to sign million-dollar signing bonuses, will not view such employees and faculty members as credible. Without credibility, the PSCP more likely will not be consulted, thus preventing their

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[19] Associated Press, *Report: State agent laws unenforced*, ESPN (Aug. 17, 2010, 4:20 PM), http://sports.espn.go.com/ncaa/news/story?id=5470067.
[20] Wong, *supra* note 71, at 589.

effectiveness from the outset. The NCAA should address this by allowing non-agent professionals, former professional athletes, and distinguished alumni to sit on a PSCP. The collaboration of such individuals with PSCP members could provide several benefits.

First, expanding the panel to include non-agent professionals such as attorneys, accountants, and business consultants can offer PSCP members and student-athletes with additional insights and broader perspectives into the business and legal landscape of sports.

Second, former professional athletes can provide PSCP members and student-athletes with a more realistic view of the pressures, complexities, and responsibilities that come with being a professional athlete – a viewpoint that most athletic department employees or faculty members are unable to offer. Moreover, former professional athletes can provide insight into the typical career duration and potential future earnings of professional athletes. This insight is crucial because, as one scholar admits, "[many] of the problem[s] associated with the inability of players to make… informed decision[s] lies in the makeup of pro athletes. While there are exceptions, most players are relatively young, unsophisticated in making business decisions, and have egos."[21] This "makeup" is not limited to pro athletes; it is the makeup of thousands of student-athletes across the country. In addition, "many [student-] athletes have an inflated sense of their future pro prospects."[22] In the context of baseball, considering the "average MLB career…for a position player that makes it to the Big Leagues is 5.6 years," this inflated sense of reality can set an athlete up for failure, especially in

[21] Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 752 (2006).
[22] Wong, *supra* note 71, at 591

the realm of financial management.[23] Therefore, former professional athletes become an invaluable asset to a student-athlete because of their ability to speak, from firsthand experience, to the realities of professional sports. As a result, the PSCP becomes more credible to student-athletes because it can be the conduit to obtaining such an asset.

Third, non-agent professionals, former professional athletes, and distinguished alumni collectively could provide student-athletes with a strong foundation of lifelong relationships and mentorships. Student-athletes need various role models and guidance not only in the context of their transition to professional sports, but also in life. In addition, providing student-athletes with the opportunity to build relationships with successful professionals well before their athletic careers end will provide them with a network of people that can help them transition from their playing careers to their next career. It is well documented that there is a dark side to retirement from professional sports, which can include depression, addiction, and even suicide.[24] Many agents position themselves as an athlete's "go-to" during the athlete's athletic career. However, just as many agents are not around when their clients' athletic careers end.[25] Furthermore, professional sports leagues such as MLB, the NFL and NBA do not provide many resources to athletes transitioning out of professional sports. PSCP members can fill that void, especially if strong relationships were formed during the athlete's college years. Although PSCP members

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[23] Sam Roberts, *Just How Long Does The Average Baseball Career Last?*, NEW YORK TIMES, Jul. 15, 2007, *available at* http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?_r=0.

[24] Robert Laura, *How Star Athletes Deal With Retirement,* FORBES, May 5, 2012, *available at* http://www.forbes.com/sites/robertlaura/2012/05/22/how-star-athletes-deal-with-retirement/.

[25] Karcher, *supra* note 21, at 768.

may not be able to address all of an athlete's issues and needs, just being there for support is much better than the athlete's alternative: no support whatsoever.

Fourth, there is an indirect benefit to the NCAA and NCAA member institutions by allowing non-agent professionals, former professional athletes, and distinguished alumni to sit on a PSCP: deterrence of bad agents. The NCAA has made it clear that it desires to prevent unscrupulous agents from negatively impacting student-athletes.[26] If athletes have the opportunity to be educated and advised by qualified professionals, former professional athletes, and distinguished alumni, student-athletes will more likely select an ethical agent who can provide expertise and best fit the student-athlete's needs. With a team of professionals helping the student-athlete in this area, those agents who have earned the reputation of being knowledgeable, ethical, and professional will more likely overshadow the unethical ones.

c. *Part 3*: Expand the PSCP to include upwards of three, full-time Athletic Department employees

Chances are, the lone athletic department employee designated to sit on a PSCP under current NCAA rules will be a full-time employee with significant responsibilities. As stated earlier, there is an extensive amount of time demanded in researching a student-athlete's market value, communicating with the student-athlete and his or her family, agents, scouts, and team executives, and in becoming well versed in a particular sports league's rules and regulations. With Compliance Department employees already overworked by having to ensure that hundreds of its university's student-athletes are complying with NCAA rules, student-athletes considering the transition to the pros will not receive the necessary attention and counseling they deserve to make an

[26] Karcher, *supra* note 7, at 224.

informed decision. Thus, student-athletes are more likely to search outside their university for answers, or simply may depend on their family, friends, and agents to make the decision for them. This could make for a messy situation, especially if those who the student-athlete relies upon do not have his or her best interests in mind. As one scholar argues, "a sloppy pro transition process only blurs the clear line of demarcation and makes the NCAA's and colleges' job that much difficult."[27]

As argued earlier, it is the duty of university athletic departments across the country to educate its student-athletes on the transition process to the pros. If such athletic departments are to be an "integral part of the educational program" for student-athletes, then more of their full-time employees need to be involved in the student-athlete's transition process to the pros. Thus, the NCAA should allow upwards of three, full-time Athletic Department employees to sit on PSCPs. More Athletic Department employees will not only allow them to "spread the workload" among each other, but will also give them the opportunity to select the best suited employee to serve on the PSCP for a particular student-athlete.

3. Revise the no-agent rule as applied to college baseball student-athletes

Aaron Fitt, Baseball America's national writer for college baseball, mentioned, "if the NCAA is going to get serious about [no-agent rule] enforcement, it needs to start by coming to grips with the simple reality that agents are omnipresent in college baseball in the 21st century."[28] Due to the timing of the Draft, the industry norm in college baseball

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[27] Wong, *supra* note 71, at 587.

[28] *The NCAA's "no agent" Rule Discriminates Against Baseball Players*, SPORTS LAW BLOG, Aug. 27, 2008, http://sports-law.blogspot.com/2008/08/ncaas-no-agent-rule-discriminates.html.

is for student-athletes to ignore the NCAA's no-agent rule and allow their agents to speak with MLB teams to assess their market value and determine which teams are most interested in them. Thus, the NCAA must also revise its no-agent rule as it relates to college baseball student-athletes.[29]

The obvious argument is that if the NCAA makes such a revision, it must do the same for other sports, especially sports with major amateur drafts. However, it is important to recognize that the no-agent rule affects baseball student-athletes much differently than, for example, football student-athletes. These differences are due mostly to the timing and eligibility rules surrounding the Draft, which differ from the NFL draft. Professor Karcher summarizes the difference below:

> Under the National Football League (NFL) rules, amateur football players are not draft-eligible until the completion of their senior year in college unless, upon completion of their junior football season, they ask to be placed on the NFL draft list. Thus, high school senior football players are not eligible for the NFL draft. As a result, [unlike baseball players], they do not face the difficult decision of whether to sign a professional contract or to enroll in college after being drafted. As for college football players, their season ends in the end of November or early December unless their team attends a bowl game, in which case the season would end in the first week of January at the latest. Therefore, college seniors, as well as college juniors who have declared draft eligibility, have three to four months between the end of the season and the NFL draft in April in which to select

[29] *Id*.

> an agent and have their representative contact professional clubs on their behalf in preparation for the draft.
>
> After the completion of the season, draft-eligible football players choose an agent and execute a standard representation agreement with the agent issued by the NFL Players Association. Once the player either completes his senior football season or declares himself draft-eligible after his junior season, he has exhausted his remaining NCAA eligibility in that sport. At that point, the player is not concerned about violating the NCAA's prohibition against entering agreements with agents. In contrast, draft-eligible baseball players are obviously concerned about NCAA compliance because they have remaining NCAA eligibility both before and after the draft."[30]

The differences outlined above by Professor Karcher warrant an exception for baseball student-athletes. Therefore, the NCAA should apply the following revision: if a school has a PSCP in place, it should follow this article's recommendation under Recommendation Two, Part 1, *supra*, and allow a student-athlete's agent to advise the PSCP on issues pertaining to his or her client and be involved contemporaneously with discussions between the PSCP and MLB teams. The benefits of this are numerous, and are highlighted under Recommendation Two, Part 1, *supra*. However, if a school does *not* have a PSCP in place, then the same Exception this article suggests be given to high school baseball student-athletes should apply to college baseball student-athletes. Specifically, Parts 1 and 2 of the "High

[30] Karcher, *supra* note 7, at 222-23.

School Baseball Exception," *supra*, should apply no earlier than one year before the student-athlete at a non-PSCP school becomes Draft-eligible. This "one year" bar is significant because most material discussions between MLB teams and college baseball student-athletes do not commence until one year before the student-athlete becomes Draft-eligible.

By allowing the High School Baseball Exception to apply to college student-athletes that are enrolled in a school that does not have a PSCP, the NCAA would encourage schools to institute and maintain a PSCP. As mentioned above, it is in a school's best interest to form a PSCP, especially in regards to providing its student-athletes with a meaningful education about the professional sports transition process and proactively preventing them from violating NCAA rules. Consequently, the NCAA itself will more likely encourage and support its member institutions in creating a PSCP under such an Exception, since it too has a desire to monitor the athlete-agent relationship and prevent any blurring of the demarcation between amateur and professional sports. However, simply having a way to monitor the athlete-agent relationship is just one of many benefits that creating a PSCP could provide to a NCAA member institution.

Creating a PSCP could serve as a recruiting, retention, and fundraising tool for a NCAA member institution. When a prospective student-athlete at the top of a school's recruiting list is aware that such a school is devoted to playing an active role in helping the student-athlete transition to a professional career in sports, such a student-athlete will more likely be persuaded to choose that school for undergraduate studies. Likewise, the student-athlete's parents are more likely to gravitate towards a school with a PSCP, because it will not only serve as a resource to them, but also bring added comfort knowing the school is providing their son or daughter with invaluable resources and meaningful relationships.

Additionally, by providing student-athletes with such resources and relationships, PSCPs will enhance their college experience and thus be more likely to retain them. "Many pro athletes are disgruntled about the lack of guidance they received during their college career and/or the way they may have been treated by the NCAA, especially while the school and NCAA make millions of dollars."[31] PSCPs can address this negative sentiment, and thus build much needed trust between student-athletes and athletic department administrators. A potential by-product of both enhancing the student-athletes' college experience and building trust with them is fundraising dollars. If student-athletes go on to have successful professional careers, they more likely will be willing (and possibly eager) to give back to the school that prepared them for such success.

Although schools may be concerned about the costs associated with creating a PSCP, the potential costs that accompany NCAA violations far outweigh creating and maintaining a PSCP. A university could lose millions in the way of "bowl appearance fees, sagging attendance, attorney's fees, direct restitution penalties, and a slew of other ancillary costs" if a student-athlete violates a NCAA rule surrounding the professional sports transition process.[32] Once again, the incident surrounding USC's Reggie Bush is a perfect example. Bush cost the school tens of millions of dollars in lost bowl game revenues from his violation alone.[33] If USC had a credible PSCP in place during Bush's enrollment, the

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[31] Wong, *supra* note 71, at 589.

[32] Warren Zola, *Supporting Student-Athletes in Their Transition to the Pros: A Financial Argument*, HUFFINGTON POST, Sep. 26, 2011, http://www.huffingtonpost.com/warren-k-zola/college-sports-scandals_b_980935.html.

[33] Gary Klein, *At USC, assessing the financial damage from Reggie Bush and O.J. Mayo scandals is the multimillion-dollar question*, L. A. TIMES, Jun. 21, 2011, *available at* http://articles.latimes.com/2011/jun/21/sports/la-sp-0622-reggie-bush-usc-20110622.

school more likely would have had a better opportunity to educate Bush, as well as monitor and be involved in Bush's relationship with his advisors. This, in turn, would have helped Bush better understand the implications of receiving improper benefits from agents and perhaps prevented the incident altogether.

4. Create a National Professional Sports Counseling Panel

One scholar explains, "Even though the NCAA generates and distributes a tremendous amount of money to [its] member institutions, only a small group of schools manage to generate a surplus from athletics."[34] With the majority of NCAA member institutions not generating profits, it makes sense that one possible pushback by schools in creating and maintaining PSCPs is that there is a lack of funding and resources. Therefore, the NCAA should create a National Professional Sports Counseling Panel ("NPSCP"). By creating a NPSCP, the NCAA would not only serve as support to schools that do not have adequate funding and resources to maintain a credible PSCP, but would also create a platform for the entire student-athlete community (i.e. high school and college) to receive education and information. Although the NCAA Division I Amateurism Cabinet initially considered creating a NPSCP in 2010 and admitted that it "need[ed] to provide better information to [its] prospects and student-athletes," nothing has been done since.[35] The following discussion provides suggestions as to the scope of the NPSCP.

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[34] J. Winston Busby, Comment, *Playing for Love: Why the NCAA Rules Must Require A Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135, 142 (2011-12).

[35] Libby Sander, *NCAA Considers a National Pro-Sports Counseling Panel*, CHRON. OF HIGHER EDUCATION (Oct. 19, 2010, 3:03 PM), http://chronicle.com/blogs/players/ncaa-mulls-idea-of-a-national-pro-sports-counseling-panel/27598.

First, similar to the suggestions for and reasons behind the composition of local PSCPs discussed in Recommendation Two, *supra*, the NPSCP should consist of full-time Athletic Department employees from NCAA member institutions, non-agent professionals, former professional athletes, and successful businessmen and women. Furthermore, the NPSCP should certify agents, attorney-agents, and financial advisors to serve as *advisors* to the NPSCP, especially if a particular student-athlete advisee is the agent, attorney-agent, or financial advisor's client. The benefits of having agents, attorney-agents, and financial advisors as advisors are discussed in Recommendation Two, *supra*.

Second, the NPSCP can provide various mediums for education surrounding the pro transition process. Besides serving the traditional functions of a local PSCP,[36] the NPSCP could hold workshops, seminars, and conferences to educate local PSCP members. As one scholar suggests, the NCAA could "create a guide of information on its website" and potentially "[create] a course" via the NPSCP.[37] Furthermore, the NPSCP could host retreats and summits for college student-athletes, not only to provide education about the professional sports transition process, but also about topics such as professionalism, ethics, and personal branding.

Third, since the NPSCP should aim to serve the overall student-athlete community, the NCAA should open the NPSCP to Draft-eligible high school student-athletes. This would allow such high school athletes access to resources and relationships regarding the pro transition process – something that a local PSCP cannot provide due to current NCAA rules. Unquestionably, high school student-athletes need education and support surrounding the pro

[36] *See* NCAA D1 Manual, *supra* note 8, §12.3.4(a)-(g).
[37] Wong, *supra* note 71, at 602-03.

transition process well before they set foot on a college campus.

Fourth, the NPSCP should create strategic alliances within the student-athlete community. Specifically, in the context of baseball, this would include partnering with institutions including, but not limited to, MLB, the MLBPA, USA Baseball, various collegiate summer baseball leagues, and high school baseball showcases. Partnering with such entities has several benefits to the NCAA and student-athletes, some of which include: the NCAA acquiring more pertinent information, resources, and relationships that will aid in supporting local PSCPs and in helping advise student-athletes; student-athletes and their families gaining more access to information surrounding the professional sports transition process; and providing student-athletes with a larger network of professionals that may help them market their abilities and human qualities for careers after their athletic career ends. Additionally, with a large network of strategic alliances, the NCAA has more avenues for possible funding of both the NPSCP and local PSCPs. In fact, the NCAA is already experiencing this possibility considering recent discussions with MLB regarding its involvement in funding scholarships for college baseball.[38]

It would behoove the NCAA to implement a NPSCP that would create a support system and education platform for the student-athlete community. The timing of such discussions and implementation would be ripe, especially since the NCAA has been under fire lately for being more concerned about generating revenue, as opposed to supporting and protecting its member institutions and their student-

[38]Jon Solomon, *Tie-In could increase scholarships: MLB, college may form unique partnership*, THE BIRMINGHAM NEWS, May 26, 2012, *available at http://www.al.com/sports/index.ssf/2012/05/ncaa_and_major_league_baseball.html.*.

athletes.[39] Additionally, with the NCAA losing increasingly more revenue as member institutions strike television deals outside the purview of the NCAA, the NCAA will need to get as many players in the student-athlete community on its side.[40] Giving support to the community by way of a creating a NPSCP would be a great start.

CONCLUSION

The effects of the changes to the 2012 Draft rules serve as a reminder that current NCAA bylaws as applied to baseball student-athletes must be changed. Under the new Basic Agreement, MLB teams face limitations regarding the signing bonuses they can offer Draft-eligible student-athletes. As such, now more than ever, high school and college baseball student-athletes must undertake extensive due diligence and acquire expert advice regarding their market value and decision to sign a professional contract. Without such an undertaking, student-athletes place their future financial independence and personal goals at risk. Unfortunately, current NCAA bylaws regarding the use of agents and the composition of PSCPs present a hindrance to student-athletes seeking to maximize their market value, obtain the information necessary to make a well-informed decision, and protect their NCAA eligibility. Specifically, student-athletes are forced to either enter into an unfair bargaining environment by conducting discussions on their

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[39] Michael McCann, *O'Bannon expands NCAA lawsuit*, SPORTS ILLUSTRATED, Sep. 1, 2012, *available at* http://sportsillustrated.cnn.com/2012/writers/michael_mccann/09/01/obannon-ncaa-lawsuit/index.html (class action lawsuit against NCAA for NCAA's policy of licensing the names, images and likenesses of former Division I football and men's basketball players in various commercial ventures without the players' permission and without providing them compensation).

[40] Branch, *supra* note 84.

own, or disregard NCAA rules and place their NCAA eligibility at risk.

The NCAA can address the issues on baseball student-athletes by changing its no-agent rule as applied to them, as well as relaxing the limits placed on PSCPs. Specifically, the NCAA should carve out an exception for baseball student-athletes, which would allow an agent to represent them in discussions with MLB teams in certain circumstances. Such an exception is especially needed for high school baseball student athletes since they do not have adequate access to information regarding the transition to professional baseball, and do not have the level of sophistication to negotiate with MLB teams. The NCAA must also revise its bylaws regarding PSCPs so that college student-athletes can obtain the expertise they deserve, as well as build important relationships and mentorships. Finally, the NCAA should create a NPSCP, not only to support those member institutions who lack the funding and resources to create their own PSCP, but also to create a platform of education and advice that will benefit the student-athlete community as a whole. These changes will positively impact the decision-making process of baseball student-athletes, while concurrently protecting student-athletes' amateur status and providing a diplomatic way for the NCAA and its member institutions to monitor and regulate the athlete-agent relationship.

The Conflict of Interest Issue with NCAA Student-Athletes and Professional Sports Counseling Panels

Sarah Staudinger[1]

Under NCAA Bylaw 12.3, any student-athlete currently participating or who may be eligible to participate in intercollegiate sports may not agree to be represented by an athlete agent.[2] As was highlighted in *Call to the Bullpen*, this Bylaw greatly disadvantages student-athletes when facing a life-changing contract decision for what is most likely the first time.[3] One of the NCAA's "solutions" to the no-agent rule is to allow NCAA institutions to create Professional Sports Counseling Panels (hereinafter "PSCP").[4] The duties of a PSCP include advising student-athletes about their professional careers, meeting with representatives of professional sports teams, reviewing contracts, and discussing the athlete's market value with both the student and professional sports teams.[5] Although a PSCP could be instrumental in helping student-athletes make the best career choices possible, the PSCP system has many weaknesses that

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[1] J.D. Candidate 2015, Sandra Day O'Connor College of Law at Arizona State University; B.A. 2012, Indiana University.

[2] *Overview of NCAA bylaws governing athlete agents*, NCAA.ORG, (July 29, 2010), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Overview+of+NCAA+bylaws+governing+athlete+agents.

[3] Jim Reid, *Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws*, ARIZ. ST. SPORTS & ENT. L.J. (Nov. 2013).

[4] *Id.*

[5] Glenn M. Wong, Warren Zola & Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 575 (2011).

cannot be ignored.[1] For example, most NCAA institutions do not implement a PSCP, resulting in unequal access to information for student-athletes across the country. Also, many panel members are not well qualified to perform the duties of an agent. Further, a great potential for conflicts of interest exists between the institution's PSCP and the athletes it is supposed to represent.[2]

The members of a PSCP essentially play the role of an agent for the student-athlete. Thus, as an agent, a PSCP should have the best interests of the student-athlete in mind. Unfortunately, since a PSCP is comprised of mostly employees and representatives of the university, its interests often diverge from those of the student-athlete.[3] For example, universities invest a lot of time and scholarship money into securing the top recruits out of high school. Once a student-athlete agrees to play for a university, that university has an interest in keeping a high-profile athlete enrolled for as long as possible.[4] Not only do such athletes help to earn more wins for the school, but they also bring national attention to the university's athletic program and create revenue.[5] For these reasons, full-time university employees whose interests align with those of the school are unable to act in the neutral and unbiased way required by the principal-agent relationship. In fact, the panel members may be more likely to encourage a student-athlete to stay at the university until their eligibility expires, regardless of whether this is in the student's best interest.[6]

One potential solution to the conflict of interest problem inherent in the relationship between student-athletes

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[1] Reid, *supra* note 2.
[2] *Id.*
[3] *E.g.*, Wong, *supra* note 4, at 575.
[4] Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 364 (1997).
[5] *Id.*
[6] Reid, *supra* note 2.

and PSCPs is to allow student-athletes to independently hire an agent.[7] Arguably, an agent hired by the student-athlete is better situated than university employees to give unbiased advice. Ideally, the student-athlete's interest and the agent's interest are one and the same.[8] For example, a high-profile collegiate athlete is typically interested in going pro as soon as he is most prepared, maximizing his chances of success as a professional athlete. Further, a student-athlete will be focused on signing a big contract.[9] Because agent salaries are based upon the income of the athletes they represent, agents will be looking for exactly what their client wants – a big pay day.[10] Also, an agent will do his best to meet all the client's requests aside from money, making the athlete more likely to retain the agent throughout his (ideally) successful career.[11]

However, there are reasons why the student-athlete market has not been opened to independently hired agents.[12] It is well known that the agent industry is extremely competitive and that agents are looking out for their own best interests whether or not they align with those of a potential client.[13] Although NCAA rules explicitly prohibit student-athletes from retaining agents, the number of student-athletes who hire agents has continually increased. This is largely attributable to accessibility through social networking and athletes who are earning higher salaries than ever before.[14] With the increasing number of student-athletes who retain agents, a greater amount of shady dealing occurs. Agents have been known to buy student-athletes pre-paid credit

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[7] Libby Sander, *Angst Over Agents*, CHRONICLE.COM (Sep. 26, 2010, 10:37 PM), http://chronicle.com/blogs/players/angst-over-agents/27203.
[8] Stiglitz, *supra* note 8, at 364.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Sander, *supra* note 11.
[13] Reid, *supra* note 2.
[14] Sander, *supra* note 11.

cards, cars, alcohol, and equipment – going to any means necessary to obtain a star athlete's business.[15]

Knowing an agent is willing to break the rules to secure a high-profile client can lead to the conclusion that the agent is looking out for his own interests at the expense of the collegiate athlete. Agents are not disciplined by the NCAA Bylaws and risk virtually nothing other than being seen as unethical when they violate the rules governing players. Although forty states have enacted laws regulating the interactions of agents and student-athletes, which can result in felony charges for misbehaving agents, the laws are notoriously unenforced and ineffective.[16] A student-athlete, on the other hand, faces the very real risks of forfeiture of eligibility, imposition of fines, and probation for or even termination of the athletic department at his university.[17] Thus, when an agent employs under-the-table bargaining tactics, he demonstrates his willingness to allow a student-athlete to take huge risks for a shot at retaining the student-athlete's business in the future.

A strong argument can also be made that agents are interested in taking advantage of a student-athlete's inexperience in order to unfairly capitalize on the athlete's success.[18] As previously stated, most student-athletes are not well versed in contract law and may not understand their best career options. Although an agent will ideally be there to assist a student-athlete, some agents have their own ulterior motives in mind. As ProFiles Sports, Inc.'s President Pat Dye Jr. has put it, "for every good agent, there are countless more who cut corners and mislead athletes."[19]

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[15] Reid, *supra* note 2; Brad Wolverton, *On Bat Phones, Backstabbing, and Other Grievances*, CHRONICLE.COM (July 23, 2010), http://chronicle.com/blogs/players/on-bat-phones-backstabbingother-grievances/25743.
[16] Sander, *supra* note 11.
[17] Reid, *supra* note 2.
[18] *See* Sander, *supra* note 11; Reid *supra* note 2.
[19] Sander, *supra* note 11.

In sum, a PSCP is most likely unqualified to represent the student-athlete in a decision as big as going pro and will often have interests adverse to the athlete's. However, independently hired agents also pose a significant conflict of interest risk. Therefore, a solution apart from these options may be best for the student-athlete.

As Mike Rogers, a law professor and faculty athletics representative at Baylor University, has said, "We all agree that we need to provide better information to our prospects and student-athletes. The debate is how to best go about that."[20] One option is to create a National Professional Sports Counseling Panel, an idea that has been considered by the Division I Amateurism Cabinet in the past.[21] The idea behind a national panel is similar to that of a PSCP. However, instead of staffing the panel with university employees who "lack the sport-specific expertise needed to be truly helpful to athletes," a national panel would focus on providing athletes with expert advice.[22] Further, a national panel could be staffed with agents, whereas university panels are prohibited from doing so. Having professional agents give advice to student-athletes could eliminate the conflict of interest problem that current university PSCPs face, as long as the agents sitting on the panel do not personally represent any of the athletes seeking its advice.[23] This obviously presents a problem of its own, since many agents will not be willing to sit on a panel requiring them to forfeit independent representation of high-profile athletes. However, if the job paid well and ensured a

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[20] Libby Sander, *NCAA Considers a National Pro-Sports Counseling Panel*, CHRONICLE.COM (Oct. 19, 2010), http://chronicle.com/blogs/players/ncaa-mulls-idea-of-a-national-pro-sports-counseling-panel/27598.
[21] *Id.*
[22] *Id.*
[23] *Id.*

certain level of job security without the cutthroat atmosphere, it would be an appealing position for an agent.

Student-athletes have shown support for a national panel, stating that, "the panel can't just be a bunch of people in the NCAA office. It has to be professionals, someone who has the experience of being both the college and professional athlete."[24] This idea supports placing not only expert agents on the panel, but also former and current professional athletes who have been through the system before.[25] As one student-athlete has said, "[student-athletes] need to know what life is like as a professional compared to what they can get out of extra time in college."[26] Having both agents and professional athletes on the national panel would further mitigate conflict of interest issues by providing student-athletes with views from each side of a contract deal.

Clearly, NCAA student-athletes are in need of more information when making life-changing decisions about when and if to leave university athletics and go professional. A university staffed PSCP not only lacks the sport-specific knowledge required, but also creates conflicts of interest when advising student-athletes. However, opening the market of student-athletes up to the cutthroat world of sports agents is not the best solution and is a great source of conflicts of interest, as well. Therefore, implementing a new process to advise student-athletes is the best option. A National Professional Sports Counseling Panel would provide student-athletes across the country with equal access to advice coming not only from agents and legal experts, but also

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[24] Michelle Brutlag Hosick, *Cabinet discusses agents, pro sports counseling panel*, NCAA.ORG (Oct. 11, 2011), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/October/Cabinet+discusses+agents,+pro+sports+counseling+panel.

[25] *Id.*

[26] *Id.*

professional athletes, thus eliminating most of the conflict of interest problems of a PSCP and independently hired agents.

Recommendations for Studios: Increasing Good Will and Revenue via Fan Conventions

Tiffany Lee

While the TV and film industry have been experiencing less revenue from DVD and box office sales since illegal file sharing came into prominence,[1] one way to recoup these losses is to focus on merchandising, especially in one often overlooked venue: fan conventions. Conventions are not just isolated events that occur sporadically throughout the year. On the contrary, many fan convention organizers have websites where they sell merchandise year-round.[2] However, one reason studios are not fully exploiting fan conventions probably relates to their hesitance to relinquish rights to fans. This paper discusses the diverse attitudes of rights holders toward fan works in the U.S. and Japan (another center for vibrant fan culture), rights holders' legitimate legal concerns, and recommendations to American studios with respect to fans and convention organizers.

Illustrating the problem introduced in this paper, one example that demonstrates wariness about fans usurping rights is the Warner Brothers case against the publisher of a

[1] See, e.g., Dan Sabbagh, Hollywood in Turmoil as DVD Sales Drop and Downloads steal the Show, The Guardian, http://www.guardian.co.uk/business/2011/may/03/film-industry-turmoil-as-dvd-sales-drop; Joel Hruska, New Study Documents Relationship between Ticket Sales, Movie Piracy, Hot Hardware, http://hothardware.com/News/New-Study-Documents-Relationship-Between-Ticket-Sales-Movie-Piracy.

[2] Creation Entertainment Store, EBAY, http://www.ebay.com/sch/creationent/m.html?_nkw=&_armrs=1&_from=&_ipg=25.

Harry Potter lexicon, the online version of which was created by fans.[1] The attributed author was a librarian, Steve Vander Ark, and the site was essentially an encyclopedia of spells, characters, creatures, magical items, and other elements from the franchise.[2] The author of the *Harry Potter* novels, J.K. Rowling, and Warner Brothers, which owns the film rights to the series, alleged copyright infringement and sought an injunction to block its publication because Rowling had intended to publish such an encyclopedia herself.[3] (Rowlings did not object to the lexicon when it was simply an online website; she objected to the publication of it. She did not sue Vander Ark himself, but only the publisher.)

Interestingly, the fan work in this case represented a tremendous opportunity for collaboration. The lexicon was so comprehensive and well-organized, that both Rowlings and representatives from Warner Brothers stated that they visited the lexicon when it was online.[4] Rowlings admitted she used it to check facts while writing, rather than refer to the actual *Harry Potter* books.[5] David Heyman, producer of all the *Harry Potter* films, told Vander Ark that they (Warner Brothers) used the lexicon website almost daily.[6] Moreover, Vander Ark had contacted Rowling's literary agent in the UK and suggested that if Rowling planned to make a physical encyclopedia, he would be a good candidate to work as an editor, given his experience with the lexicon website.[7] However, the literary agency dismissed him, responding that Rowling intended to work alone and did not need a

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[1] *See* Warner Bros. Entertainment, Inc. v. RDR Books, 575 F.Supp.2d 513 (S.D.N.Y. 2008).
[2] Warner Bros., *supra* note 3, at 520.
[3] *Id.* at 513, 519.
[4] *Id.* at 521.
[5] *Id.*
[6] *Id.*
[7] *Id.*

collaborator.[8] This was a missed opportunity to work with a talented, industrious fan rather than maintain a barrier against fans. The former would surely have been the better option for the public image of both Rowlings and Warner Brothers.

Rights holders are understandably protective of all possible ways they might profit from their works, but in some cases, it is ultimately more profitable to relinquish certain rights, as this paper will demonstrate.

The Rise of Participatory Fans

Rights holders' "trouble" starts with the fact that fans are no longer passive consumers of media, as literature on fan culture increasingly demonstrates. Instead, fans are creating artwork, novels, and myriad types of merchandise that re-appropriate copyrighted characters and portray them in ways that may be at odds with how rights holders wish the characters to be portrayed. It is not surprising then that tension developed between studios and fans, especially with the rise of the internet. Fox was notorious early on for taking down fan sites revolving around its shows.[9] Even as late as this year (2013), Fox has proven perhaps too protective of rights that can generate revenue, earning the rancor of many fans. This spring, they've been criticized by fans of *Firefly* (a Joss Whedon sci-fi/western that was canceled after one season) for shutting down shops selling unauthorized hats based on the unlikely orange wool hat worn by the otherwise tough hired gun, Jayne, in the show.[10] More precisely, fan reactions were mixed, as the comments on Whedonesque illustrate. They acknowledged that Fox owns the copyright,

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[8] *Id.*

[9] Fox Seeks to Shut Down Fans Sites on the Net, ROCK OUT CENSORSHIP, http://www.theroc.org/updates/fox.htm.

[10] Fox Bans the Sale of Unlicensed Jayne Hats from Firefly, i09 (April 9, 2013), http://io9.com/fox-bans-the-sale-of-unlicensed-jayne-hats-from-firefly-471820413.

but were disappointed anyway.[11] Fan comments also suggested defenses, such as the generic look of the hat and the fact that Fox waited so long to object.[12] Lurking in the background undoubtedly were persistent, sore feelings about Fox canceling the show after just one season; If the studio did not care about the show enough to give it a second season, it seemed unfair to care about it now and police it so strictly, once fans demonstrated the show's merchandise could be profitable.

The Jayne hat also represented an opportunity for Fox to collaborate with fans. Rather than shutting down the shops, Fox might have demanded and negotiated a royalty. Such a result would allow the studio to profit from the hat creator's work while still ensuring fans could buy the hat. It appears Fox ultimately came to the same realization, since the hats are now for sale online and are advertised as "officially-licensed Firefly merchandise."[13] Perhaps all that was needed was better communication with fans, assuring them the cessation of hat distribution was only temporary and would resume after negotiations (if that had been their plan from the start).

Early in even the pre-internet days of fandom, fans gave rights holders who insisted on maintaining control of their characters reason to worry, not because rights holders were missing out on revenue, but because fan works were changing the characters too much. For example, early *Star Trek* fanzines, circulated by physical mail, included portrayals of Kirk and Spock in a more erotic light than the show ever allowed, and also included portrayals of the two male characters in a romantic relationship with each other.[14] A

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[11] Fox Lawyers Shut Down Etsy Shops Selling Unlicensed Jayne Hats, WHEDONESQUE (April 9, 2013), http://whedonesque.com/comments/30764.
[12] Fox Bans the Sale, *supra* note 12.
[13] Jayne's Hat, THINK GEEK, http://www.thinkgeek.com/product/f108/.
[14] Catherine Salmon and Don Symons, *Slash Fiction and Human Mating Psychology*, JOURNAL OF SEX RESEARCH, 94 (2004), http://www.tandfonline.com/doi/pdf/10.1080/00224490409552217.

leading scholar on fan culture, Henry Jenkins describes this general threat to studios: "Fans appear to be frighteningly out of control, undisciplined and unrepentant, rogue readers. Rejecting aesthetic distance, fans passionately embrace favored texts and attempt to integrate media representations within their own social experience…Like rebellious children, fans refuse to read by the rules imposed upon them by the shoolmasters."[15]

It is true that supporting fan conventions and fan works involves relinquishing some control over the way copyrighted characters are depicted, but more studios in recent years are realizing the value of inviting fans to participate in their franchises.

A Success Story: Creation Entertainment

Creation Entertainment started organizing local comic book conventions in the 1970s, later focusing more on sci-fi and fantasy TV shows and films.[16] In 1991, it became the first convention organizer to secure film still photos through a license with a studio.[17] Paramount Pictures, who owns all *Star Trek* rights, granted Creation permission to design and produce *Star Trek* T-shirts, mugs, hats, autographed collectibles, and photos.[18] Creation worked closely with Paramount and Viacom's Consumer Products division, which supervises merchandise, and also worked with Gene Rodenberry, the creator of the original show.[19]

Creation's *Trek* conventions demonstrated to studios that genre fans could be a valuable market for publicity and merchandise purchases, even after the show had ended, or a

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[15] Henry Jenkins III, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, CRITICAL STUD. MASS COMM., 85, 86 (1988).
[16] Company Info, CREATION ENTERTAINMENT, http://www.creationent.com/company.htm.
[17] *Id.*
[18] *Id*.
[19] *Id*.

film was waiting for a sequel.[20] *Trek* fans, often called Trekkies or Trekkers, are stereotyped as indiscriminate collectors "who will buy anything associated with the program or its cast,"[21] but in general, convention-goers of any show or film are passionate about their fandom and likely to purchase merchandise at the conventions they attend. They've already paid for their ticket to the convention, after all.

Following its success with *Star Trek*, Creation Entertainment developed relationships with other franchises and continued producing "official fan conventions" with licensed souvenirs and authorized fan clubs.[22] They also continued producing their own merchandise with studios. Events and merchandise they have produced involved *Star Wars*, *Terminator*, *The X-Files*, *Xena*, *The Lord of the Rings*, *Dr. Who*, *Supernatural*, and *Twilight*, among many others.[23]

Creation's merchandise is sold at the conventions, on its website, and online through distributors such as eBay. Thanks to its relationships with celebrities that attend its conventions, Creation is able to offer autographed collectibles, allowing some of its merchandise to be sold for high prices on its auction site.[24] Such autograph signings are often included in the contracts made with celebrities when they agree to appear at the conventions.[25]

At the time of this writing, Creation is publicizing its next official convention for the CW's series *The Vampire Diaries*.[26] Creation made the deal with Warner Brothers in April, 2012, and the agreement licensed Creation to produce

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[20] *Id.*
[21] Henry Jenkins, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE, 10 (1992).
[22] Company Info, *supra* note 18.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] The Vampire Diaries Official Convention, CREATION ENTERTAINMENT, http://www.creationent.com/cal/tvd_ orlando.html.

official conventions annually for three years.[27] Though not all terms of the agreement are public, it seems that this offered Warner some security because regardless of what happened to the show, the studio would be able to make revenue from the franchise through these official fan conventions, since fans continue to attend conventions even after a show is off the air.

In addition to selling merchandise at conventions, Creation is also selling merchandise and autographed collectibles for *The Vampire Diaries* on their website, even in between conventions. The offerings include T-shirts, photos, bottles, coffee mugs, shot glasses, hats, purses, and posters.[28]

Although fan-made work is not necessarily legal, and could constitute copyright and/or trademark infringement, studios appear to consent to most fan creations when licensing companies to produce fan conventions. For example, in Warner's press release on the *Vampire Diaries* deal, the convention is presented as a place for attendees "to show off their THE VAMPIRE DIARIES–inspired artwork, costumes, filmmaking and music."[29] Thus, Warner does not have a problem with fans –in this context– creating derivative works such as films, songs, and artwork using their characters.

However, it is unclear whether Warner would object to fan works at conventions being sold for profit. Some limits appear in Creation's rules for vendors. Their website states: "Vendors are not allowed to sell ANY PHOTOGRAPHS or PROMOTIONAL POSTERS or PROMOTIONAL ITEMS

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[27] Rene Thurston, *Warner Bros. Licenses Creation Entertainment for The Vampire Diaries Conventions*, EXAMINER.COM (April 5, 2012), http://www.examiner.com/article/warner-bros-licenses-creation-entertainment-for-the-vampire-diaries-conventions.

[28] The Vampire Diaries: Buy Merchandise, CREATION ENTERTAINMENT, http://www.creationent.com/shop.htm.

[29] Press Release, Warner Bros., Warner Bros. Consumer Products Grants License to Creation Entertainment to Produce "Official The Vampire Diaries Fan Conventions" (Mar. 23, 2012) *available at* http://creationent.com/cal/tvd_wbpr.html.

PRINTED ON ANY PAPER PRODUCT of any Supernatural, Vampire Diaries or Stargate character. That includes promotional photographs or mini-posters of the cast originally taken for PR for the series."[30] It would surely harm public relations ("PR") for Warner to object to the sale of such items, but it could also be dangerous for a studio to not police its rights. Perhaps, however, Warner and other studios may decline to enforce their rights at vendors' tables because they would accept giving up rights to derivative works, in the particular context of conventions, in exchange for the publicity that fan conventions generate.

Confusion: Studio Reactions in the U.S. and Japan

Although Creation Entertainment's collaboration with Paramount is a success story, U.S. studios have not always welcomed participation from fans in this way. As described above in the *Harry Potter* litigation example and Fox's initial attack against selling Jayne hats, studios are not comfortable allowing others to profit from fan-made products involving their characters. While many have no problem with non-commercial fan works, it is curious that studios do not typically contact fans with commercially successful products and collaborate with them right away. In addition to stopping the publisher in the *Harry Potter* example, Rowlings could have acknowledged the commercial success that Mr. Vander Ark's lexicon would have if published, and she could have collaborated with him in publishing the book, rather than suing the publisher. In the *Firefly* example, Fox could have immediately contacted the fans making the Jayne hats and suggested collaborating with them and the shops, which could pay royalties on each sale. Although this outcome seems to have occurred eventually, the studio's initial reaction created

[30]Vendor Table Information, CREATION ENTERTAINMENT, http://creationent.com/dealers.htm.

tumult among the fan community, as it seemed once again that Fox was trying to keep fans from extending the show into their own world. In both cases, initial public reactions were important.

Although rights holders in the U.S. are generally becoming more supportive of fans in recent years, rights holders' reactions have continued to fluctuate. Jenkins points out that most entertainment corporations have tolerated fan fiction, for example, but a few have attempted to suppress such uses of their characters.[31] Despite their deal with Creation Entertainment, Paramount itself had attempted early on to suppress *Star Trek* fan fiction.[32] Even while tolerating many fan activities, Paramount adhered to a policy of aggressive action against strict copying of official images and scripts.[33]

Perhaps most common were early negative reactions to homosexual depictions of characters. Rebecca Tushnet points to a cease and desist letter served on a seller of *Quantum Leap* homoerotic fan fiction.[34] However, unlike most fanfiction, that work was commercial in nature. Similarly, LucasFilms attempted to keep relationships in *Star Wars* fan fiction heterosexual.[35] Jenkins notes that Lucasfilm threatened to prosecute editors publishing works concerning *Star Wars* that violated the "family values" of the films.[36]

Although copyright law provides rights holders with the exclusive rights to reproduce and distribute their works and produce derivative works, it does not offer complete

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[31] Jenkins, *supra* note 23 at 30-31 (discussing Lucasfilms' early endeavors to suppress erotic stories in *Star Wars* fanfiction).
[32] Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 653-54 (1997), (citing E-mail from Lori L. Bloomer to fictalk@chaos.taylored.com (Oct. 28, 1996) (on file with Loyola of Los Angeles Entertainment Law Journal)).
[33] *Id.* at 673.
[34] *Id.* at 653.
[35] *Id.* at 674.
[36] Jenkins, *supra* note 17 at 90.

control of images. Many fan works would be upheld under fair use defenses. Unlike a rights-holder in Europe, a rights-holder in the U.S. has no "moral right" to protect the moral integrity of a work, outside of visual art.[37] Nevertheless, some studios have shown a strong desire to protect and control their characters and relationships in fan communities.

An intriguing contrast appears in Japan, where in the *dōjinshi* (self-published manga), the unauthorized production of derivative products for profit has become a vibrant and visible industry. At *dōjinshi* conventions, fans buy and sell fan-made manga which are based on copyrighted works – most typically, other manga (comics) and anime (animated videos). However, anime and manga owners do not generally object to this large-scale, infringing industry. Some are even pleased when their works inspire the creation of fan products, even though they are sold for profit.[38] The *dōjinshi* market is so accepted in Japan, that it is a legitimate measure of success. According to Professor Matt Thorn in the Manga Department of Kyoto Seika University, a fan-made product that gains popularity helps draw attention to the authorized manga.[39] An example is the editors of Weekly Shonen Jump, who "have some of their artists design their manga specifically to become fodder for dojinshi," though they would deny consciously catering to *dōjinshi* fans.[40] However, not all rights holders in Japan welcome *dōjinshi*; Artists understand that creation of *dōjinshi* involving Pokemon or Doraemon is taboo.[41]

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[37] Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1990).
[38] Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us about the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 137 (2003).
[39] Ian Condry, *Cultures of Music Piracy: An Ethnographical Comparison of the US and Japan*, INTERNATIONAL JOURNAL OF CULTURAL STUDIES, 7:3, 354 (2004).
[40] Correspondence from Matt Thorn (May 22, 2013), on file with author.
[41] *Id.*

According to Thorn, PR is a factor in publishers' current reluctance to object to *dōjinshi*. When *dōjinshi* first came into prominence, "publishers tried to stamp out *dōjinshi* creators, and artists bitterly complained in media interviews. The result was that the publishers looked like bullies, and the artists looked like naive prima donnas."[42] They also used means other than lawsuits (which indicate very public ruptures in relationships), for example, pressuring distributors to refuse to distribute offending publishers' products, or withholding cooperation that was offered in the past.[43]

Although Japan has probably taken the better PR approach by embracing their fans, even anticipating and incorporating fans' ideas, some U.S. creators come closer to the Japanese example. For example, when *Buffy the Vampire Slayer* was still in production, many of the show's writers would appear in the main fan-made chat room to discuss each new episode after it aired, answer fans' questions, and discuss plot points.[44] Joss Whedon, the creator himself, was even known to make frequent appearances.[45] He and the writers were not merely appearing to explain and defend the plots, however. They were listening to the fans, gauging their reactions, and thinking about the show in a new way, based on what they heard from fans. This is apparent from episodes like "Something Blue" and "Doppelgangland," which depict alternate universes based largely on fans' speculative scenarios.[46]

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[42] *Id*.
[43] *Id.*
[44] Sarah N. Gatson & Amanda Zweerink, *www.buffy.com: Cliques, Boundaries, and Hierarchies in an Internet Community*, *in* FIGHTING THE FORCES: WHAT'S AT STAKE IN BUFFY THE VAMPIRE SLAYER, 244 (Rhonda V. Wilcox & David Lavery eds., 2002); Justine Larbalestier, *Buffy's Mary Sue is Jonathan: Buffy Acknowledges the Fans*, *in* FIGHTING THE FORCES: WHAT'S AT STAKE IN BUFFY THE VAMPIRE SLAYER, 227 (Rhonda V. Wilcox & David Lavery eds., 2002).
[45] Gatson & Zweerink, *supra* note 46 at 244.
[46] Larbalestier, *supra* note 42 at 229, 227.

This kind of give and take between fans is not common in the U.S., and it can nourish a strong cult following, which has certainly been the case with many of Mr. Whedon's shows. In today's internet world, it is more difficult to find centralized chat rooms and forums to discuss shows in, but studio websites or Facebook pages for each show would be convenient locations to host such discussions. Writers from the show could appear and converse with the fans. This would at least give fans the sense that they are being heard and appreciated. Additionally, fans may feel they are participating in some way in the creation of episodes to come later, simply by offering their reactions and perspectives. Hosting such forums on studio-run sites would give fans the sense that not just the writers but also the studios support and appreciate the fans as well. Currently, only one half of this give and take typically occurs on shows' Facebook pages; fans write their reactions, thoughts, questions, and criticisms, but it is important for fans to receive feedback and acknowledgment from the creators of the show as well.

Trademark Issues

In addition to copyright claims, studios could also have legitimate legal objections to fan works sold at fan conventions which may represent trademark infringements. Unlike fanfiction, which is largely written for no profit, merchandise at fan conventions (sometimes made by fans) is typically sold for profit. T-shirts, posters, and artwork with fans' favorite characters from shows, for example, may be made by fans and sold without the authorization of the rights holders. This practice persists unchecked at many conventions, especially at anime conventions, where the rights holders in both the U.S. and Japan are especially obliging to fans. But not all rights holders are the same, and some will object to such uses of their characters.

A well-known case in the area of fan works is *Comedy III Productions v. Saderup.*[47] There, the defendant was sued for an artistic but realistic rendering of the Three Stooges on a T-shirt. Comedy III alleged a violation of the right of publicity and related business torts.[48] Because the renderings were not sufficiently transformative, the defendants' artwork was not protected by the First Amendment.[49] However, as *Winter v. DC Comics* affirms, if the artwork or rendering of characters in merchandise is transformative, so that the economic value is not derived solely from the character but also by the artist's expression, the artist may be protected by the First Amendment.[50] Here, a right of publicity claim was brought because the characters on the shirts were actual people. Had they been fictional characters, a similar analysis might have demonstrated that the First Amendment would not defend against a trademark infringement claim where the work was not sufficiently transformative.

As described in the Lanham Act, a trademark is infringed when one uses another's mark, or confusingly similar mark, for one's product in interstate commerce.[51] A mark can be a well-known character if it is a source identifier, thus fan-made products featuring characters or other source identifiers may constitute using another's mark. Second, in the context of fan conventions and organizations, selling products at fan conventions might qualify as use in interstate commerce. As mentioned above, convention organizers often have their own websites where they sell and auction off merchandise to people all over the country and beyond (though they will likely be careful to ensure this type of merchandise is authorized). Vendors may also move with the convention from one state to another, selling their wares in

[47] Comedy III Productions, Inc. v. Saderup, Inc., 21 P.3d 797 (Cal. 2001).
[48] *Id*. at 800.
[49] *Id*. at 810-11.
[50] *See* Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).
[51] The Lanham Act, 15 USC § 1114 (2005).

person to people from all over the U.S. These in-person sales of fan works are less carefully policed.

The last element for trademark infringement is likelihood of confusion as to source, affiliation, or sponsorship. If a vendor is set up at a convention or sold on the organizers' website, people may well be confused as to whether the products sold are affiliated with or sponsored by the rights holders, particularly if the rights holders have given some rights to the convention organizers, or are promoting the convention in some way. Relatedly, claims of dilution and passing off could certainly be brought for fan-written novels, which unlike fanfiction online, are sold for profit. Fans may be able to evade trademark claims by having clear disclaimers on the products, denouncing any affiliation or sponsorship with the rights holders.

Trademark issues have not loomed large in the Japanese scene. As evidenced by the continuing prosperity of *dōjinshi* conventions described above, Japanese studios are not pursuing trademark claims. Although Japan is generally a less litigious society than the U.S.,[52] it seems that the hype generated around original works due to the highly successful amateur market and fear of negative PR, allow the sale of products with presumably trademarked characters to continue and flourish without challenge.

Why Focus on Merchandising

Data suggests that studios earn more on merchandise than the movies. One example is Disney, who received $28.6 billion from merchandise in 2010.[53] Toys and T-shirts were the money makers, rather than films or TV shows. Popular items were Buzz Lightyear dolls and Lightning

[52] Kirkpatrick, *supra* note 40 at 148.

[53] Daniel Frankel, *Report: Disney Raked in $28.6B from Licensed Merchandise in 2010*, THE WRAP (May 18, 2011, 12:42 PM), http://www.thewrap.com/media/article/report-disney-made-286b-2010-licensed-merchandise-27526.

McQueen toy race cars.[54] In contrast, as of May 2011, the Motion Picture Association of America valued the entire 2010 global box office at $31.8 billion.[55] At the height of DVD sales, in 2004, studios managed to generate just $21.8 billion from domestic sales.[56]

Revenue from merchandise can also fund the production of a film. An example is the *Lord of the Rings* franchise. Ten percent of the production budget for the three *Lord of the Rings* films was raised by selling rights to video game, toy, and merchandise companies.[57] The merchandise also helps to promote films before they are released. Typically, 40 percent of movie merchandise is sold before the release of the film.[58]

For studios, there is little risk involved in emphasizing merchandise. Studios rarely manufacture film-related products, instead selling the rights to licensees, who typically incur the manufacturing and distribution expenses.[59] The studio usually receives an advance payment for the products and royalty payments between 5 and 10 percent of the revenues, while the manufacturer is responsible for the loss if the product does not sell.[60]

Emphasizing merchandise is becoming more important for studios in the wake of falling DVD sales and box office revenues. While movies can be easily copied and pirated, the same cannot be said of video games and high quality toys. On the other hand, T-shirts and artwork based on

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[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Merchandising*, FILM REFERENCE, http://www.filmreference.com/encyclopedia/Independent-Film-Road-Movies/Merchandising-THE-MERCHANDISING-PROCESS.html (last visited Oct. 11, 2013).
[58] *Id*.
[59] *Id*.
[60] *Id*.

films can easily be created by fans without securing the rights to make such derivative works.

While some types merchandise are difficult to pirate and thus are a good bet for studios, selling merchandise through fan conventions specifically is a way to educate fans about legal issues. When studios license rights to fan convention organizers, and place restrictions on dealers at the conventions (i.e., no fan art or fan-made T-shirts), the public has a clearer opportunity to see that there are legal implications to fan works. It is apparent to any convention-goer that there are legal and illegal ways to sell merchandise based on films and TV shows.

Merchandise for sale is a staple at fan conventions. Comic Con, for example, has drawn toy and collectibles designers who sell exclusive products, including LEGO, Hasbro, Mattel, National Entertainment Collectibles Association, and Sideshow Collectibles.[61] Many of the exclusives are based on characters from movies and comic books, which studios own rights to and license to the toy creators.[62] Since the studios have already licensed the rights to make such toys, the deals are then between the licensee toy makers and convention organizers. However, as studios will make revenues from the merchandise sold at conventions, studios should promote conventions as a way to maximize their own returns.

Data suggests merchandise may be the real bread and butter for studios in the case of Japan as well. Even small studios are aware of the value of merchandise, to the point where they have merchandise in mind even when developing

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[61] Jay Cochran, *TNI's 2007 San Diego Comic Con Exclusives Checklist*, TOY NEWS INTERNATIONAL (June 1, 2007), http://toynewsi.com/news.php?catid=20&itemid=11349.

[62] *See id.*; *2012 San Diego Comic Con News*, TOY NEWS INTERNATIONAL, http://toynewsi.com/index.php? catid= 316&blogid=1; *San Diego Comic-con 2012 Exclusives*, AWESOME TOY BLOG, http://awesometoyblog.com/san-diego-comic-con-2012-exclusives/.

the characters and scripts of a movie or TV series.[63] Japanese culture expert and MIT Professor Ian Condry has studied the inner workings of anime studios, and discovered that anime creators focus on a character rather than the story when developing a TV series because the character allows them to create a long-term, valuable franchise through character-based merchandising (such as figurines, book bags, lunch boxes, bedspreads, clothing, etc.).[64] These products make more money than the actual anime does.[65] In contrast to the U.S. perhaps, the story is part of the character in Japanese studios, and character is paramount.

Japanese society is far more character-centric than the U.S. in general. In the industry, young artists aspire to be "character designers," and there is a "Character Business Center" at Shogakukan, a major publisher.[66] Condry summarizes that "from a business perspective, the market for licensed merchandise based on fictional characters is ten times that of anime itself."[67] In contrast to the U.S., some of the more lucrative licensing deals in Japan are for pachinko games, which is an enormous industry there.[68]

Conclusion

Studios can profit by collaborating with fans and participating in fan discussions and events. Identifying skillful, industrious fans that have created profitable products and teaming up with them to sell those products is one way to do this. Another is to have writers, other creators of a show, or PR representatives from studios, chat with fans in a forum, whether on Facebook or elsewhere.

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[63] *See* Ian Condry, *Anime Creativity: Characters and Premises in the Quest for Cool Japan*, THEORY, CULTURE & SOCIETY 26:139 (2009), http://tcs.sagepub.com/content/26/2-3/139.
[64] *Id*.
[65] *Id.* at 155.
[66] *Id.*
[67] *Id*.
[68] *Id*. at 143.

Finally, the main argument of the paper is that it can be a good strategy to relinquish some rights in order to produce stellar fan conventions and then sell merchandise through the convention organizers. We can see in the case of Japan how profitable this can be for rights holders whose works are being infringed. More hype around the product leads to more demand in merchandise, and that is where anime and manga creators profit most. While the U.S. is different in terms of the products (live action movies versus anime as the main exports), studio size (American studios are generally larger and have larger budgets), and specific merchandise markets (the pachinko industry is virtually non-existent in the U.S.), in both countries, merchandise constitutes a tremendous portion of revenue, and for some studios, the data suggests it is the primary source of revenue. Emphasizing merchandise sales through conventions and relinquishing certain rights for the production of those conventions is one way to increase revenue while simultaneously showing support and appreciation to fans.

The Lanham Act and Why Studios Are Right in Being Cautious

Devan Orr*

In her article, *Recommendations for Studios: Increasing Good will and Revenue via Fan Conventions*, Tiffany Lee argues that American movie studios should follow the Japanese method of merchandising and be more lax in pursuing copyright and trademark infringement claims. This idea, however, may not work in the United States. The studios have a duty to the artists because the studios distribute and finance the artists' creativity. Copyright and trademark infringement suits are the legal avenue to fulfill this duty and studios are completely within their rights according to the Lanham Act, §15 U.S.C 1114. Even though Ms. Lee argues that the fans would be more cooperative with a lax enforcement of copyright and trademark, the potential for a major influx of unlicensed memorabilia and other copyrighted materials is too great.

Congress enacted The Lanham Act, beginning at 15 U.S.C. §1051 in 1946.[1] Congress wanted to make sure that within the greater power of the Commerce Clause a statutory power existed that allowed for a national system of trademarking and made sure that possessing a trademark or copyright included infringement remedies.[2] Section 1114 specifically deals with those remedies, and lays out the ground rules of what is trademark infringement in a very general way. The Act codified what was common law, and

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[1] *Lanham Act*, LEGAL INFORMATION INSTITUTE (August 19, 2010), http://www.law.cornell.edu/wex/lanham_act.

[2] *Id.*

Congress has updated it several times.[1] Additionally, the Act still leaves states the freedom to implement their own law for the areas that are not codified.[2] By putting everything in a centralized location that Congress can revise as necessary, the United States created a system to pursue trademark claims. Arguably, this means that the United States would prefer businesses pursue trademarks rather than allow infringement that creates a substantial risk of confusion. So, despite the importance of the First Amendment and free expression, the country has acknowledged through its code and the Lanham Act that protecting intellectual property is crucial for the development of commerce. What Ms. Lee and the public fail to realize is that the entertainment industry protects the artist through copyrights and trademarks. Intellectual property is real property that is being stolen through the creation of every unlicensed product. Joss Whedon is the creative mind behind *Firefly*, and Fox undertook the obligation to protect his intellectual property when they agreed to air the television show. Adequately protecting the property includes filing suit against those who infringe and steal from Joss Whedon regardless of intent or scale.

The construction of the statute is grounded in the scope of the Commerce Clause. While not as lauded as the First Amendment rights, the Commerce Clause is an integral part of this nation's history and protecting businesses and people. When the Lanham Act was introduced, the court was in a time of restriction regarding businesses, particularly after the war with most of the Roosevelt court still in place. The Lanham Act was a way for businesses to protect property in the form of ideas and symbols. The first part of the introduction of §1114 of the Lanham Act makes very clear

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[1] *The Lanham Act*, USLEGAL, INC., http://trademarks.uslegal.com/trademark-law/the-lanham-act/.
[2] *Id.*

that this statute applies across the board to "any person."[3] The definition of persons includes individuals as well as companies, corporations, and other entities. No one denies that studios are allowed to pursue trademark suits against other companies as well as the individual sellers at conventions and on the Internet. The second part of the introduction states that whatever action occurs "shall [be taken] without the consent of the registrant."[4] Ms. Lee says the movie studios are going after small-batch producers who do not impact the marketplace.[5] She notes that the convention organizers have personal websites to sell merchandise made by both the studios and other companies operating without permission.[6] With all of the potential for trampling on trademarks, the studios should not let this go unchecked, particularly when the digital age led to more pirating and infringement. Even though Japan has learned to prosper through the amateur market, Japan is a different society; smaller, more homogenized. What works for them in a society founded on different values will not necessarily work for the much larger entertainment industry in the United States. The United States entertainment industry is a global. Studios care just as much if not more about the international box office than the domestic one. Studios cannot allow trademark infringement domestically and still try to enforce copyright and trademarks internationally.

The first part of the statute does not take into account intent. The lack of intent language allows the movie studios to sue whomever as long as the action was done without permission. This means that, despite the potential public

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[3] 15 U.S.C. §1411 (2005).
[4] *Id.*
[5] Tiffany Lee, Recommendations for Studios: Increasing Good Will and revenue via Fan Conventions 1-20 (2013) (unpublished manuscript) (on file with the Arizona State University Sports and Entertainment Law Journal).
[6] *Id.*

relations problem, the studios have the ability to act against everyone, and they should. Tiffany Lee argues that it would be better for public perception if studios either ignored the trademark infringement, or made more of an effort to work with the infringers. Studios, however, have a duty towards the artist to protect that property and make sure the artist receives the profits from his or her creations. Without strict enforcement of copyrights and trademarks, studios cannot relate the profits back to the artist, potentially chilling artistic expression. Ms. Lee argues that "hype generated around original works due to the highly successful amateur market" outweigh any other negatives.[7] However, the negatives such as brand dilution, decreased profits, etc., already make the movie studios cautious in allowing any licensing. This is an especially important concept in today's Pinterest and Etsy age. Those marketplaces are teeming with people who, although claiming First Amendment protection, are just taking something from a television show for their own profit without paying any royalties to the owners or creators of the original intellectual property.

Reasonably, there would be no reason for the studios to put in an injunction before someone was making a substantial profit off of the item. Before widespread use of Internet marketplaces, like EBay or others, the entertainment studios would have no idea who was selling what on any scale unless the news got back to them through slower, more traditional routes. Studios can now be more diligent in pursuing claims, because advanced technology means people turn profits with less effort. What seems a harmless enterprise to an Etsy user could end up being a business with adverse interests to those who own the copyrighted material. So, because it is easier for the everyday crafter to sell her goods, it is also easier for the studios to track those goods being sold. Nothing is anonymous on the Internet, and entertainment

[7] *Id.*

studios can now stop trademark infringement simply by using a quick Google search.

The Internet aside, Ms. Lee wants to promote the fan-held conventions as a place for cooperation and additional revenue for the studios. While the royalty agreements and other formal contracts could further a fan connection, even she admits that it comes at the risk of studios losing profits. The article stated that studios are already losing a sizable profit margin on DVDs and movie tickets, partially due to piracy. The article, however, is arguing that merchandising and other secondary profits should not be considered because of the positive effect. While a nice idea, it cannot work in this depressed economy due to the hit studios are already taking in regards to lower ticket sales. If studios are already losing profits on DVDs and movie tickets, they should be *more* cautious with merchandising. Just as fashion houses must pursue counterfeiters to profit from their merchandise, an entertainment industry already damaged by a decrease in other sources of revenue must guard its trademarks to continue their creative efforts.

Allowing dilution is bad for not only the studios, but also the fans. Take, for example, the Jayne hat from Joss Whedon's *Firefly*. What looks like just a woven hat to anyone else, is a specific design choice that Mr. Whedon or another executive on the show made to convey a specific statement about that character; probably to juxtapose Jayne's rugged and obvious masculine demeanor with his comfort in a fuzzy awkward hat. The fans know this, and that is why they want the hat so badly. The more they create knock-off versions of the hat, the more diluted the marketplace becomes with items that do not fit the aesthetic of the original piece. Fans should be allowed to have or create the real hat, but must act within the scope of the Lantham Act in order to preserve profits and keep the studios functioning and creating the program they love.

The final part of the Section 1114(1) uses the phrase "*shall* be liable in a civil action by the registrant for the remedies hereinafter provided."[8] This final clause sums up the entirety of the argument in favor of enforcement. Despite the potential public relations issues that Ms. Lee pointed out, entertainment studios have the right to protect their profit, especially in difficult times. In order to keep fans happy, the show must exist. Studio executives are often fans themselves, but they know that in order to keep the networks and production companies in business, the trademarks on their items must be enforced. Then studios can make the profits they need in order to make the television shows everyone knows and loves. The unlicensed hat may be cool, but the ability to watch the show itself it was spurs the action. Because of that, entertainment studios ultimately should pursue trademark infringement claims within the scope of the Lantham Act to preserve profits for the artists, and to maintain quality programming for the fans.

[8] *Supra* note 5 at (1).

Potential Civil Liability of "Gatorade Baths"

Josh Winneker[1]

It is a strange sports tradition: if a team is victorious in a particularly important game, the winning players will inevitably dump a cooler filled with Gatorade (or water) over the head of their coach. It does not matter what the temperature is either outside or inside the cooler, the Gatorade gets poured so that the coach is completely drenched when all is said and done. The origin of this weird but fun-to-watch ritual dates back first to the Chicago Bears in the 1984-85 season[2] and then to the New York Giants dousing their coach Bill Parcells during their Super Bowl Winning Season in 1985-86.[3] Following the Super Bowl victory, this "Gatorade bath", as it has come to be known, gained national attention and now nearly 27 years later, it has become almost customary.

Beyond the New York Giants' Super Bowl-winning Gatorade bath, there are definitely some Gatorade baths that are more memorable than others; more memorable because of their potential for legal consequences. For example, there was the very violent Gatorade bath that occurred when the University of Alabama football team won the 2010 National Championship. The Alabama players nearly knocked over their coach Nick Saban with a hard hit that far exceeded

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[2] *See* DARREN ROVELL, FIRST IN THIRST: HOW GATORADE TURNED THE SCIENCE OF SWEAT INTO A CULTURAL PHENOMENON 90 (2006), *available at* http://sports.espn.go.com/espn/page2/story?page=rovell/051014 (last visited Mar. 9 2013).

[3] *Id.* at 79-82. Although Gatorade was not aware of the initial "baths", once they found out, they not only condoned the baths but they also tried to capitalize on its immediate popularity by including a "How to Dunk" poster with the sale of their Gatorade coolers. *Id.* at 82.

normal expectations.[1] Saban's anger was visible, not only to his players, but to millions of television viewers.[2] **This unwanted action prompted the question of whether there could be civil liability if a coach did choose to pursue a claim against his players for dumping Gatorade on him?**

At first glance, it seems like this may be an odd question to ask given that most coaches would never even consider bringing a lawsuit for something that is simply a way for their players to celebrate a victory. But, take for example, the Gatorade bath of 72 year-old football coach George Allen, the former Washington Redskins and Long Beach State University coach.[3] While at Long Beach State, after a victory against the University of Nevada, Las Vegas, Coach Allen's players dumped a cooler of ice water on him (not Gatorade specifically, but the same concept) and he passed away six weeks later.[4] Shortly before his death, he had mentioned that his health had been compromised after some of his players had dumped a bucket of ice water on him.[5] Coach Allen's family, however, never filed a lawsuit or pursued any legal action against the players or anyone else.

Coach Allen's death, along with injuries to several other coaches from Gatorade baths, demonstrate that the

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[1] Anthony P., *Coach Nick Saban Cracked in Face by Gatorade Cooler*, TOTALPROSPORTS.COM (Jan. 8, 2010), http://www.totalprosports.com/2010/01/08/coach-nick-saban-cracked-in-face-by-gatorade-cooler-video.

[2] *Id.*

[3] *See* George Allen, *Coach*, *Dead at 72; Led Redskins to Superbowl VII*, N.Y. TIMES (Jan. 1, 1991), http://www.nytimes.com/1991/01/01/obituaries/george-allen-coach-dead-at-72-led-redskins-to-super-bowl-vii.html.

[4] *See* Brian Cronin, *Did a Gatorade Shower Kill George Allen*?, L.A. TIMES (May 17, 2012), http://articles.latimes.com/2012/may/17/sports/la-sp-sn-gatorade-george-allen-20120517.

[5] *See* N.Y. TIMES, *supra* note 5 (noting that shortly prior to his death, George Allen stated that he had not been healthy since his players drenched him with ice water in celebration of Long Beach State University's win over University of Nevada, Las Vegas).

possibility of civil liability from a Gatorade bath clearly exists, and this article will explore those potential legal ramifications. Part I of this article will discuss the origin, history, and development of the Gatorade bath. Part II will detail the more violent, unwanted and injury-plagued Gatorade baths. Part III will discuss the circumstances and death of Coach Allen. Part IV will outline the liability for injuries to participants and non-participants in sporting events and Part V will explain how Gatorade baths can potentially result in civil liability.

I. History of Gatorade Baths

For young people today watching sports, it may seem like the celebratory Gatorade bath has been around forever. But, this dousing is actually a relatively new feature to sports, which can be traced back to professional football in the 1980s. The origin, however, is actually under dispute.[6] It had long been thought that the 1985-86 Super Bowl winning Giants were the "inventors" of the Gatorade bath; however, in the recent past, it came to light that the first documented evidence of a Gatorade bath occurred a season prior when Dan Hampton, a defensive lineman for the Chicago Bears claimed to have dumped Gatorade on his head coach, Mike Ditka.[7] Hampton's statement was subsequently confirmed from game film - - so the true inventors of the bath were actually the Chicago Bears.[8] There is no disputing though that the Giants gave the Gatorade bath national attention the following season when Jim Burt and Harry Carson began dumping Gatorade on Coach Bill Parcells after each big victory on the way to winning the Super Bowl.[9]

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[6] Rovell, *supra* note 1, at 90.
[7] *Id.*
[8] *Id.*
[9] *See* Chuck Culpepper, *Soaking it up*, SPORTS ON EARTH (Jan. 9, 2013), http://www.sportsonearth.com/article/40897684

Since that year, the Gatorade bath exploded in popularity and was showing up in almost all big or important games. Originally it was relegated to just football games, but then expanded to all types of sports, including even race car driving.[10] It certainly seemed that Gatorade baths would at least be confined to outdoor sports, but Gatorade baths have shown up in indoor sports like baseball as well.[11] And, as what typically occurs when society watches professional sports, lower level sports began to mimic what the

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[10] *See* Kyle Busch, *Victory Lane*: *Race Winner Matt Kenseth, Roush Fenway Racing Ford Celebrates with a Gatorade Shower*, MOTORSPORT.COM, http://www.motorsport.com/nascar-cup/photo/main-gallery/victory-lane-race-winner-matt-kenseth-roush-fenway-racing-ford-celebrates-with-a-gatorade (last visited Mar. 9, 2013) (depicting Nascar Cup winner, Matt Kenseth after he received a Gatorade bath); *see also* Dan Devine, *Miami Heat Coach Erik Spoelstra Gets Gatorade Bath from Udonis Haslem After Winning NBA Title*, YAHOO! SPORTS (June 22, 2012, 3:00 AM), http://sports.yahoo.com/blogs/nba-ball-dont-lie/miami-heat-coach-erik-spoelstra-gets-gatorade-bath-070738452--nba.html (highlighting a Gatorade bath in the NBA); *see also* 'Duk, *Jo-Jo Reyes Gets Gatorade Bath After Halting Winless Streak at 28*, YAHOO! SPORTS (May 30, 2009, 11:30 PM EDT), http://sports.yahoo.com/mlb/blog/big_league_stew/post/jo-jo-reyes-gets-gatorade-bath-after-halting-winless-streak-at-28?urn=mlb,wp8185 (noting a Gatorade bath in Major League Baseball, after Toronto Blue Jays pitcher, Jo-Jo Reyes, pitched 28 straight wins); *see also* Cody Stanley, *Weekly Preview*: *Big Ten Soccer Begins*, BIG TEN NETWORK (Sept. 20, 2012, 11:24 AM), http://btn.com/2012/09/20/weekly-preview-big-ten-soccer-begins (contemplating which Big Ten Men's Soccer Team would be giving their coach a Gatorade bath at the end of the season).

[11] *See* Troy Machir, *Billy Donovan Gets 400th Win and Celebratory Gatorade Bath* (*Video*), NBC SPORTS COLLEGEBASKETBALLTALK (Jan. 19, 2013, 7:12 PM EDT), http://collegebasketballtalk.nbcsports.com/2013/01/19 /billy-donovan-gets-400th-win-and-celebratory-gatorade-bath-video (highlighting Florida Gators men's basketball coach, Billy Donovan, Gatorade bath after winning his 400th game); *see also* Devine, *supra* note 12; *see also* Darren Everson, *The Gatorade-Dunking Hall of Shame*, WALL ST. J., http://online.wsj.com/article/SB10001424052748704081704574652821057756260.html (last updated Jan. 12, 2010, 12:01 AM ET) (noting NBA's head coach, Doc Rivers, receiving a Gatorade shower after a Boston Celtics win in 2008).

professionals were doing so saw Gatorade baths showing up in colleges,[12] high schools,[13] and even levels below them.[14] It is safe to say at this point in sports in America, the Gatorade bath can creep up in any sport, in any location, and at any level of play.

II Not all Gatorade Baths are Welcomed or Wanted by the Coaches

Just because something may have become customary in sports, it does not necessarily make it a part of the rules or even a part of the game. There are several coaches out there who would likely agree that Gatorade baths would fall under that category. Five coaches come to mind immediately: Nick Saban of University of Alabama, Gary Patterson of Texas

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[12] *See Nick Saban's Gatorade Bath*: *The Alabama Coach May be Warming up to Getting Soaked*, HUFFINGTON POST (Jan. 9, 2013, 11:47 AM EST), http://www.huffingtonpost.com/2013/01/09/nick-saban-gatorade-evolu_n_2433837.html (highlighting University of Alabama head football coach, Nick Saban's, history with Gatorade baths); *see also* Chris Greenberg, *Erin Andrews Gatorade Shower: ESPN Reporter*, *Baylor SID Get Soaked with Robert Griffin III*, HUFFINGTON POST (Nov. 22, 2011, 4:48 PM EST), http://www.huffingtonpost.com/2011/11/22/erin-andrews-gatorade-baylor-robert-griffin-oklahoma_n_1108538.html (discussing Baylor college quarterback, Robert Griffin III's Gatorade bath after Baylor upset Oklahoma, and the inadvertent dousing of ESPN commentator, Erin Andrews).

[13] *See Gatorade Shower*: *The Ice-Cold Chill Thrill of Victory*, A PHOTO SENSITIVE PERSP. (Jan. 11, 2013), http://cmac2u.wordpress.com/2013/01/11/gatorade-shower-the-ice-cold-chill-thrill-of-victory (depicting Granite Bay head varsity high school football coach, Ernie Cooper, getting drenched by a Gatorade shower in 2012); *see also* John Haley, *NJ Softball*: *Middlesex County*: *Bishop Ahr Simply the Best*, NJ.COM, http://www.nj.com/hssports/blog/softball/index.ssf/2010/06/nj_softball_middlesex_county_bishop_ahr_simply_the_best_a_look_at_the_move_to_43_feet.html (last updated June 1, 2010, 1:49 PM) (depicting high school softball coach, Missy Magyar, getting a Gatorade shower after a winning game).

[14] *See Coach Gets Gatorade Bath*!, REDDING.COM (June 16, 2011), http://infocus.redding.com/Media/View/1344003 (depicting a little league baseball coach receiving a Gatorade bath at the end of the last regular season game).

Christian University, Richard Thurin of North Platte Community College, Bill Curry of Georgia State University, and George Allen of Long Beach State University.

Nick Saban is the highly successful but equally serious coach of the University of Alabama's football team, a college football powerhouse. He is known for not smiling very much and not really celebrating his victories. After his team won the 2010 National Championship, the cameras were ready and waiting when Saban's players were coming to get him with the Gatorade Bath. Saban did not see it coming and he was blindsided with the Gatorade and even a part of the cooler. [15] Indeed, the "bath" was actually pretty vicious. Saban was visibly upset; even more so than he usually looks and millions of Americans got to witness it.[16] This particular bath was clearly unwelcomed but did not appear to result in any physical harm to Saban.[17]

Although we do not know if Saban told his players beforehand not to douse him, we do know that Gary Patterson, the head football coach of Texas Christian University (TCU) actually did.[18] TCU was playing in the 2010 Rose Bowl and Patterson had told his players prior to the game specifically not to dump Gatorade on him if they

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[15] *Nick Saban*: *It was the Intensity of the Gatorade Bath That was the Problem*, AL.COM (Jan. 8, 2010, 4:27 PM), http://blog.al.com/live/2010/01/nick_saban_it_was_the_intensit.html (last accessed Mar. 9, 2013). At a press conference after the 2010 BCS National Championship Game where Nick Saban received a violent Gatorade bath, Nick Saban stated, "You know, it was a little chilly out, plus I don't know if you noticed, but our defensive players did a pretty good job of hitting, but they're not supposed to hit you in the head with the bucket either . . . I mean that – it was a surprise . . . I knew it was coming, but I wasn't thinking about it . . . so the intensity of the dump was the problem." *Id.*

[16] *See* Everson, *supra* note 13.

[17] *See* Saban, *Gatorade Bath*, *supra* note 14.

[18] Graham Watson, *TCU Players Fake Gary Patterson into a Gatorade Shower*, YARDBARKER (Dec. 3, 2011), http://www.yardbarker.com/all_sports/articles/tcu_players_fake_gary_patterson_into_a_gatorade_shower/8493478.

won.[19] TCU was victorious and his players ignored his command and dumped the Gatorade on him anyway by using deception to lure Patterson into the bath.[20] Patterson was not happy and although he too came away physically unscathed, the Gatorade bath was clearly an unwanted action against someone who did not buy into the "custom".

Unfortunately, not all coaches have been as lucky as Saban and Patterson - - Saban and Patterson may not have wanted the Gatorade baths but at least they did not appear to be harmed. Recently, Coach Richard Thurin of the North Platte Community College Lady Knights Women's basketball team suffered one of the scariest Gatorade baths during the tradition's tenure. After he led the Lady Knights to the NJCAA Division II District F title game in March 2013, his players celebrated with the traditional Gatorade bath.[21] Unfortunately, after Thurin was doused with Gatorade, he slipped on the liquid and fell face-first onto the court.[22] This Gatorade bath highlighted the potential highs and lows of the activity. The crowd was in jubilation after the victory and cheered for the bath, but after Thurin's hard fall forward, the entire crowd collectively gasped and feared for the health of their coach.[23] Additionally, a concerned fan who tried to assist Thurin slipped and fell hard on the basketball court as

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[19] *Id.* During the Gatorade bath's inaugural season, Bill Parcells also told his players not to engage in the Gatorade bath if they won the NFC Championship because it was too cold outside, but the players ignored his request and did it anyway. *See* Rovell, *supra* note 1, at 81

[20] Watson, *supra* note 20.

[21] *Basketball Coach Slips After Getting Gatorade Shower*, UPI (Mar. 12, 2013, 3:44 PM) http://www.upi.com/blog/2013/03/12/VIDEO-Basketball-coach-slips-after-getting-Gatorade-shower/8551363117447 (Coach falls on stomach from Gatorade Bath).

[22] *Id.*

[23] *Id.*

well.[24] Fortunately, Thurin and the fan were able to walk away from the falls relatively unharmed.[25]

The same cannot be said for Georgia State University football coach Bill Curry. Curry suffered one of the worst hits from a Gatorade bath to date. Curry and his Georgia State football team were celebrating the team's first ever victory when his players gave him a Gatorade bath.[26] The bath actually knocked Curry unconscious for at least fifteen seconds and he laid motionless on the ground while his players stood around in disbelief.[27] It appears that just before the Gatorade drenching, the top of the cooler came off and hit Curry in the head and knocked him unconscious.[28] Curry was able to recover from the hit, one of the more dangerous results from a Gatorade Bath, but it is another great example of the potential of legal consequences stemming from this celebratory custom.

Some coaches have been visibly upset about the unwanted Gatorade baths, others have warned their players not to do it, another suffered a harsh fall and still another has been knocked unconscious. There are certainly a number of incidents that have at least raised the question of civil liability

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[24] *Id.*

[25] *See Id.*; *see also Gatorade Bath Goes Awry for North Platte Community College Girls*, NORTH PLATTE BULLETIN (Mar. 12, 2013) http://www.northplattebulletin.com/index.asp?show=news&action=readStory&storyID= 25033&pageID=3 (noting that the concerned fan was uninjured).

[26] Brooks, *GSU's Curry Collapsed After Gatorade Bath*, YARDBARKER (Sep. 3, 2010, 5:32 PM), http://www.sportsbybrooks.com/video-ga-st-coach-collapses-after-gatorade-bath-28934.

[27] *Id.*

[28] *Id.*

from an injury caused by a Gatorade Bath.[29] However, the culmination of the Gatorade bath violence famously occurred with Coach George Allen of Long Beach State University. Following his Gatorade bath, Coach Allen actually passed away.

III. Did a Gatorade Bath actually kill a coach?

George Allen was the former coach of the Washington Redskins and eventually ended his career as the coach of Long Beach State University, where he tried to revitalize a struggling program.[30] Following the victory against the University of Nevada that capped the first winning season the program had seen in years, the players dumped a cooler of ice water on Coach Allen's head while he was giving a media conference.[31]

Following the bath of ice water, Coach Allen noted that he was not feeling well.[32] Six weeks later, he died.[33] Apparently, Coach Allen died from a heart spasm caused by

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[29]Outside of the coaching realm, others have been injured by the Gatorade Bath. For example, former professional baseball player, Deion Sanders, gave a Gatorade Bath to baseball announcer Tim McCarver because of critical comments that McCarver made about Sanders, which left McCarver (by his own admission) injured Larry Stewart, *McCarver All Wet – Thanks to Sanders*, L.A. TIMES (Oct. 16, 1992), http://articles.latimes.com/1992-10-16/sports/sp-111_1_deion-sanders ("McCarver said the first time Sanders doused him, he was so shocked that he pulled a muscle in the right side of his back.").

[30] Brian Cronin, *Did a Gatorade Shower Kill George Allen*?, L.A. TIMES (May 17, 2012), http://articles.latimes.com /2012/ may/17/sports/la-sp-sn-gatorade-george-allen-20120517.

[31] *Id.*

[32] *See* George Allen, *Coach*, *Dead at 72*; *Led Redskins to Superbowl VII*, N.Y. TIMES (Jan. 1, 1991), http://www.nytimes.com/1991/01/01/obituaries/george-allen-coach-dead-at-72-led-redskins-to-super-bowl-vii.html (noting that shortly prior to his death, George Allen stated that he had not been healthy since his players drenched him with ice water in celebration of Long Beach State University's win over University of Nevada, Las Vegas)

[33]Cronin, *supra* note 32.

arrhythmia.[34] His remarks that the Gatorade bath caused him to not feel well afterwards is what sparked wide-spread speculation and theories that the Gatorade bath actually caused his death.[35] Whatever the actual cause was, Coach Allen's estate or family members never filed a lawsuit against the players or the school.

Although there were no legal consequences stemming from this unfortunate incident, there were popular culture references that emerged afterwards that once again alluded to the possibility of legal consequences for a Gatorade bath. In particular, in an episode of the popular television sitcom, "Seinfeld", the lead character, Jerry, recalls a time when his neighbor, Kramer, told another character, Ritchie, to pour Gatorade on 67 year-old club owner Marty Benson's head after a softball game victory. Ritchie did so, and Benson died soon after. The episode was meant as a joke, but it had real-life legal implications similar to the Allen situation.[36]

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[34] John Woolard, *Heart, Not Ice Water Dousing*, *is What led to Allen's Death*, THE BALT. SUN (Jan. 3, 1991) http://articles.baltimoresun.com/1991-01-03/sports/1991003178_1_allen-arrhythmia-capozzola.

[35] Cronin, *supra* note 32 (stating that the "story is most often told as George Allen died of pneumonia that he caught from being doused with cold water and continuing to give interviews for a long time after the game."); *But see* Sam Borden, *A Splashy Tradition*, *Gatorade-Style*, N.Y. TIMES, Jan 20, 2012, http://www.nytimes.com/2012/01/21/sports/football/a-splashy-football-tradition-gatorade-style.html (noting that George Allen's son disputes that Allen died from the Gatorade bath, stating: "He got a cold from it, but that was not the cause of his death . . . he had a heart arrhythmia . . . [his death] had nothing to do with the Gatorade Shower.").

[36] *See* Larry David, *The Pez Dispenser*, SEINFELD SCRIPTS (Jan. 15, 1992) http://www.seinfeldscripts.com/ThePezDispenser.htm (last visited Mar. 29, 2013) ("What happened? The guy was like 67 years old, it was freezing out, he caught a cold, got pneumonia, and a month later he was dead."); Joshua D. Winneker, *Can a "Gatorade Bath" Result in you Taking a Bath in Court*?, 17 COLLEGE SPORTS BUSINESS NEWS 27 (2011), http://collegesportsbusinessnews.com/issue/june-2011/article/can-a-gatorade-bath-result-in-you-taking-a-bath-in-court

While there is some dispute as to the severity of harm caused by Gatorade baths, there is little argument that Gatorade baths can cause harm, harm that could potentially lead to civil liability for the recipient of the "bath". Especially for a coach that has made it known that the Gatorade bath was unwelcomed and then was hit with a part of the cooler or slipped and fell from the Gatorade spill - - civil liability is a real possibility.

IV. Liability at Sporting Events

The body of law that would apply to a potential lawsuit stemming from a Gatorade bath would fall generally under tort liability at sporting events.[37] Plenty of injuries occur during a sporting event but liability for those injuries is also a debated topic with strong proponents believing that the civil court system should simply stay out of the sporting arena.[38] While there are those that do not want sports to be affected by lawsuits, the unfortunate reality is that lawsuits exist for a reason. They serve to provide the injured party with an ability to recover for the damages that they have suffered. Not surprisingly, the court system had to react to the practical effect that lawsuits could have on playing sports and sports in general and what has resulted has been a compromise for both sides. Namely, negligence lawsuits have generally been rejected in favor of protecting sports and limiting what could amount to a floodgate of litigation.[39] Liability at sporting events breaks down to participant

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[37] The body of law known as "tort" law consists of injuries caused by unintentional acts (negligence) and those consisting of reckless and intentional acts. Restatement (Second) of Torts § 281, §§ 1-12, §§ 500-03. In tort law, the injured party is typically seeking financial remuneration for his/her injuries. Restatement (Second) of Torts § 12(A).

[38] Wyatt M. Hicks, *Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus League Self-Regulation*, 11 J. LEGAL ASPECTS SPORT, 209, 212 (2001) (highlighting the disadvantages of a civil court system regulating professional sports

[39] *Id.*

liability in contact and non-contact sports and then liability for non-participants at all types of sporting events.

A. Participant Liability in Contact Sports

Participant liability is very simply liability that results from actually playing (participating) in a sporting event.[40] When it comes to contact sports, courts have generally rejected a theory of negligence.[41] Negligence simply does not suffice in contact sports such as football, hockey, basketball and soccer because unintentional contact, the basis for a negligence lawsuit, is simply a part of the game.[42] If courts were to allow negligence lawsuits in contact sports there could be a lawsuit after almost every game.[43] This would create a "chill" on playing those sports and would completely re-shape and change the sports entirely.[44] It would likely result in no one wanting to play those sports anymore and those sports would eventually fade away.[45] In a society such as ours, where football is the most popular sport, and most

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[40] *See e.g.*, Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975) (holding the defendant not liable for injuries arising during a soccer game where one participant injured a co-participant in a participant liability suit).

[41] *See, e.g.* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979) (holding that recklessness is the minimum standard for liability to a co-participant in professional football); *Nabozny*, 334 N.E.2d at 261 (rejecting negligence as the appropriate standard and holding that a player is liable for injury to a co-participant only when his conduct is deliberate, willful or reckless); Knight v. Jewett, 834 P.2d 696 (Cal. 1992) (holding that there is no liability against a co-participant for ordinary, careless or negligent conduct).

[42] *See Knight*, 834 P.2d at 708.

[43] *See e.g., Nabozny*, 334 N.E.2d at 260 (stating that a negligence standard for participant liability cases in sport would result in "unwarranted judicial intervention" that would "inhibit the games vigor."), *Knight* v. Jewell, 834 P.2d at 710 (stating that a participant's normal energetic behavior often may be accidently careless and holding a participant liable for such behavior may well alter the fundamental nature of a sport).

[44] *Id.*

[45] *See Nabozny*, 334 N.E.2d at 260 (stating that a negligence standard would place "unreasonable burdens on the free and vigorous participation" in sports).

lucrative, the court system would never allow for the sport to be subjected to that many lawsuits.

The problem though is that disallowing tort suits in participant contact sports entirely would leave many injured players without a remedy. The courts reached a compromise. Instead of banning all lawsuits in contact sporting events, the courts decided to allow participants to maintain lawsuits in certain situations: when the participant can allege that he/she was injured because of reckless; intentional conduct on the part of another participant; or, the participant acted outside the realm of the sport.[46]

For example, in *Hackbart v. Cincinnati Bengals*,[47] in a National Football League game between the Denver Broncos and the Cincinnati Bengals, Broncos' defensive back, Dale Hackbart, was intentionally struck in the back of the head by the Bengals' Charles "Booby" Clark, who was frustrated because the Bengals were losing the game.[48] Hackbart sued Clark and the Tenth Circuit Court of Appeals ruled that the roughness of a sport is not a justification for courts to condone tortious conduct, especially when the conduct is not allowed by the rules of the game.[49] In rejecting a negligence standard of care, the court instead held that reckless conduct is the minimum standard needed for tort liability by a co-participant.[50] The court also provided a discussion into what constitutes reckless conduct, which is different than negligent

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[46] *See, e.g.*, *Hackbart*, 601 F.2d at 524 (holding that recklessness is the minimum standard for liability to a co-participant in professional football); Karas v. Strevell, 884 NE 2d 122 (2008) (holding that in full contact sports such as football and hockey the standard for participant liability should be intentional or conduct outside the realm of the sport).

[47] *Id.* at 516.

[48] *Id.* at 518.

[49] *Id.* at 520-521 (holding that Clark's intentional blow was expressly prohibited by NFL rules that "all players are prohibited from striking the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands").

[50] *Id.* at 524.

and intentional conduct.[51] The court stated that recklessness involves making a "choice or adoption of a course of action either with knowledge of the danger or with knowledge of facts which would disclose this danger to a reasonable man,"[52] while negligence consists of "mere inadvertence [or] lack of skillfulness or failure to take precautions. . . ."[53] The *Hackbart* court then rejected Clark's argument that his impulsive strike against Hackbart in the heat of the moment was really a negligent act because Clark actually admitted to intending to strike Hackbart.[54] Hackbart then was able to recover monetary damages for his injuries.

Although the *Hackbart* court found that Clark intended to strike Hackbart, the court did not hold that Clark's conduct intentional, but was instead reckless.[55] The court noted that under a recklessness standard, the tortfeasor must intend to commit the misconduct, but does not intend to cause the harm that results from their misconduct.[56] In contrast, the court stated that intentional misconduct will be found when a tortfeasor intends both to commit the act and produce the resulting injury.[57] Therefore, the court believed that while Clark admitted to intentionally striking Hackbart, his conduct was because of frustration and committed in the heat of anger, so Clark actually did not "intend" to injure Hackbart.[58] However, because Clark did intend to strike Hackbart, the court found that Clark acted with reckless disregard to Hackbart's safety.[59] A victim of intentional misconduct resulting in injury can also choose to bring a civil action for

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 524-25.
[56] *Id.* at 524.
[57] *See id.* at 525.
[58] *Id.* at 524-525 (holding that Clark intended to commit the act, but did not intend to cause the particular harm).
[59] *Id.* at 525.

monetary damages, but they can additionally file criminal charges for assault and battery.[60]

This recklessness/intentional conduct compromise protects the integrity of contact sports but at the same time allows for injured parties to recover for the injuries they sustained at the hands of someone who was acting beyond what was expected in the sport.[61] When playing a contact sport or any sport for that matter, the participants assume the risks that are inherent in that sport.[62] Risks like being tackled, checked, boxed out or bumped are well-known and understood aspects of playing contact sports. As a result, negligence claims simply cannot suffice. Participants, however, do not assume the risks of reckless, intentional or conduct outside the realm of the sport.[63] No one plays a sport assuming that they could be intentionally harmed or be the victim of reckless behavior. Those risks are simply not understood.

B. Participant Liability in Non-contact sports

Having a higher standard of liability in contact sports certainly makes good judicial and practical sense given the level of unintentional contact in a contact sporting event and

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[60] *Id.* In *Averill v. Luttrell*, the defendant was a catcher in a professional baseball game when he intentionally struck the*Id.* In *Averill v. Luttrell*, the defendant was a catcher in a professional baseball game when he intentionally struck the opposing teams' batter in the head, and knocked him unconscious. 311 S.W.2d 812, **814. The defendant was found liable for civil assault and battery because his actions were intentional and carried the intent to cause injury. *Id.* Although this paper focuses on civil actions only, criminal actions can also result from intentional misconduct. *See infra* note 95.

[61] *Id.*

[62] *See, e.g.*, Richmond v. Employers' Fire Ins. Co., 298 So.2d 118, 122 (1st Cir. 1974) (holding that being struck by a bat released by a co-participant is a foreseeable risk during a baseball practice).

[63] *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 524 (10th Cir. 1979) (holding that the assumption of the risk defense applies to negligence and the recklessness standard overcomes the assumption of the risk defense).

the corresponding amount of lawsuits that could result with a lower standard. But what about participant liability in a non-contact sport? A participant in tennis or golf for example is not expecting to be touched by another participant when playing their sport. But, there are plenty of injuries that occur in non-contact sports, which do result in lawsuits. In these situations, the courts were left with another dilemma: will non-contact sports be severely affected by allowing negligence lawsuits as well? The courts are generally split on the issue. The negligence standard is recognized as the standard for liability in non-contact sports in some jurisdictions,[64] while in others, a recklessness standard applies much like in the contact sports cases.[65]

For jurisdictions that reject the negligence standard and apply the recklessness standard, the reasoning behind it also goes back to assumption of risk.[66] When playing a sport, whether contact or non-contact, the participants assume the risks that are inherent in playing that sport. If a court were to allow negligence claims in tennis for example, that would mean that every time a player hits a ball that hits another player during the game then that hurt player could maintain a

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[64] *See e.g.*, Duke's G.M.C., Inc. v. Erskine, 447 N.E.2d 1118, 1123 (Ind. Ct. App. 1983) (holding that a golfer who was stuck in the eye by a wayward golf ball did not assume the risk of the defendant's negligence); Novak v. Virene, 586 N.E.2d 578, 580 (Ill. App. Ct. 1991) (applying a negligence standard to a case where a skier collided with another skier and was subsequently injured).

[65] *See e.g.*, Thompson v. McNeill, 559 N.E.2d 705 (Ohio 1990) (holding that there is no liability for injuries caused by negligent contact in sporting events in a case where injuries were sustained by a golfer); Hathaway v. Tascosa Country Club, Inc., 846 S.W.2d 614 (Tx. App. 1993) (holding that a sport participant cannot sue for another's negligence); Gray v. Giroux, 730 N.E.2d 338 (Mass. App. 2000) (applying a recklessness standard to golf); Schick v. Ferolito, 767 A.2d 962 (N.J. 2001) (rejecting the negligence standard for golf torts).

[66] Brian P. Harlan, *The California Supreme Court Should Take a Mulligan*: *How the Court Shanked by Applying the Primary Assumption of the Risk Doctrine to Golf*, 29 LOY. ENT. L. R. 91, 93 (2008-2009).

lawsuit against the other player.[67] Tennis players constantly get hit with tennis balls during the game and tennis would cease to exist if lawsuits were allowed for every unintentional hit.

The same is true for golf. For example in Shin v. Ahn, a group of golfers were teeing off when one of them hit a ball that hit another player.[68] The injured player filed a lawsuit and claimed negligence as his cause of action.[69] The court rejected that claim and stated that golfers assume a certain risk when playing the sport, which includes potentially getting hit by a golf ball.[70] Additionally, the court stated "we hold that golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is "so reckless as to be totally outside the range of the ordinary activity involved in the sport."[71]

C. Liability for Non-Participant Injuries

Non-participants are those not playing the game, namely the spectators, cameramen, sideline reporters, and even coaches.[72] Spectators are often injured at all types of sporting events. Baseballs and bats fly into the stands, hockey pucks ricochet into the stands, golf balls are hit into galleries and debris flies off at race tracks.[73] Spectators for years have been suing participants and stadium owners and anyone else they can think of to try to recover for their

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[67] Thompson v. McNeill, 559 N.E.2d 705, 707 (Ohio 1990) (holding that shanking, slicing, hooking, or pulling of a golf ball is not uncommon and foreseeable or "built in" the game of golf).
[68] Shin v. Ahn, 42 Cal. 4th 482 (Cal Ct. of App. 2007).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See generally* Ray Rossi, *Sports Injuries*: *High Liability Standard for Nonparticipants*, 98 ILL. BAR J. 200, 202 (April 2010) (stating that sports leagues, referees and coaches are non-participants).
[73] *E.g.*, Greg Botelho, ET AL., *Injuries as debris flies into Daytona stands during fiery NASCAR crash* (Feb. 23, 2013, 11:07 PM), http://www.cnn.com/2013/02/23/us/florida-daytona-crash.

injuries.[74] Plenty of theories have developed over the years, like baseball's limited duty rule that protects stadium owners from liability once they have filled their limited duty for providing protected seating in their stadiums.[75] The prevailing judicial response though was that spectators' assume the risk of attending sporting events and most of these types of lawsuits based on negligence are not successful.[76]

However, similar to the participant liability jurisprudence, non-participants can maintain lawsuits for reckless and intentional actions.[77] For example, Kobe Bryant of the National Basketball Association's Los Angeles Lakers, faced a civil lawsuit after he fell into a fan on the sideline during a game.[78] Bryant fell into the fan and then used his

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[74] *See Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700 (N.J. 2005) (highlighting a spectator that was injured by a foul ball during a professional baseball game); *Moulas v. PBC Productions, Inc.*, 570 N.W. 2d 739 (Wisc. Ct. App. 1997) (involving a spectator whose injuries resulted from a hockey puck that flew into the stands); *Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874 (Minn. 1987) (highlighting a spectator that was struck in the eye by a golf ball).

[75] *See* Turner v. Mandalay Sports Entertainment, LLC., 180 P.3d 1172 (Nev. 2008) (establishing a duty owed by baseball stadium owners to protect spectators from foul balls). The limited duty rule though has not been adopted in every court and recently one court, the Idaho Supreme Court, had ruled that a spectator injured by a foul ball at a baseball game could pursue his negligence claim and they would not adopt the limited duty rule in their state. Rountree v. Boise Baseball, LLC, 296 P.3d 373 (Idaho 2013). The injured patron actually lost his eye. *Id.*

[76] *See e.g.*, Gentry v. Craycraft, 802 N.E.2d 1116 (Ohio 2004) (describing assumption of the risk in the realm of sports); Shin v. Ahn, 165 P.3d 581 (Cal. 2007); Roberts v. Boys and Girls Republic, Inc., 51 A.D.3d 246 (N.Y. App. Div. 2008).

[77] *Harlan*, *supra* note 66, at 106.

[78] Geeslin v. Bryant, 453 Fed.Appx. 637 (6th Cir. 2011).

forearm to push off the fan and get back into the game.[79] Bryant was sued after the man suffered an injured lung.[80] The trial court dismissed the fan's lawsuit because the fan assumed the risk of players falling into him when he sat courtside during an NBA game.[81] The fan appealed though to the Sixth Circuit Court of Appeals and the court reversed in part allowing the fan's claim to go forward.[82] Specifically, the Sixth Circuit stated that the fan did not assume the risk of intentional conduct on the part of a player.[83] The court did believe that he assumed the risk of incidental contact sitting courtside but he did not assume the risk of being forearmed in the chest by Bryant.[84] Bryant eventually settled the lawsuit but it certainly affirms that non-participants assume the risk of negligence but not of conduct that rises above that during a game.

The law then generally holds that in sporting events whether contact or non-contact and whether a participant or non-participant, negligence typically does not suffice as a valid cause of action because sports simply has certain risks assumed by both the players and the non-participants. But no one, not the players or non-participants, assumes the risks of reckless or intentional conduct or conduct outside the realm of the sport, and in those situations, a valid civil lawsuit can still arise.

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[79] *Id. See also Notorious Kick Costs Dennis $200 Grand in a Settlement*, DESERETNEWS.COM (Jan. 21, 1997 12:00 AM MST), http://www.deseretnews.com/article/538654/NOTORIOUS-KICK-COSTS-DENNIS-200-GRAND-IN-A-SETTLEMENT.html?pg=all (last accessed Mar. 13, 2013) (highlighting NBA veteran Dennis Rodman's settlement for $200,000 after kicking a cameraman in the groin during a game).

[80] *Geeslin* at 637.

[81] In re Estate of Geeslin v. Bryant, 2010 WL 2365329 (W.D. Tenn. 2010).

[82] *Geeslin,* 453 Fed.Appx. 637 (6th Cir. 2011).

[83] *Id.* at 639.

[84] *Id.*

V. Potential Civil Liability for Gatorade Baths

As detailed above, Gatorade baths have been established as being the potential source of injury to coaches and eventually the severity of one of them will result in the need for a civil lawsuit.[85] Coaches are generally considered non-participants when lawsuits are filed for injuries that occur during the game.[86] Coaches in that way are like spectators.[87] Therefore, injuries to a coach by a participant in the sport would have to be caused by more than mere negligence; rather the actions must have been done recklessly or intentionally.[88] However, a Gatorade bath presents a unique situation where the participants are actually including the coach in a game custom, which would likely make the

[85] It may be argued that a coach would not want to sue his/her players. But, if a coach is seriously injured or dies from a Gatorade bath, the coach or the coach's family may not have a choice in order to fully recover for the extent of the damages. Moreover, workers compensation (if applicable) would likely not be a bar for a coach to file a civil lawsuit against the players, whether the players are considered co-employees or third-parties because reckless or intentional conduct by a co-employee causing an injury at work is typically outside the range of workers compensation coverage, along with injuries caused by third-parties. *See generally* Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 818-19 (2011) (expressly preserving all claims against third parties); Trivette v. Yount, 735 S.E. 2d 303(N.C. 2012) (allowing claim against co-employee for reckless action).

[86] Trujillo v. Yeager, 642 F. Supp. 2d 86, 90 (D.Conn. 2009) (holding that a coach, as non-participant, is liable for injuries caused by players if the coach also acted recklessly or intentionally).

[87] *See* Ray Rossi, *Sports Injuries*: *High Liability Standard for Nonparticipants*, 98 ILL. BAR J. 200, 202 (2010) (stating that coaches are non-participants to a sporting event).

[88] *See Geeslin*, 453 Fed.Appx. at 637 (2011) (holding that mere negligence will not suffice; rather, intentional or recklessness are the acceptable standards giving rise to liability).

coaches "participants" instead.[89] In that case, the legal result would be the same - - in order to maintain a cause of action against another participant, the action would have to have been reckless or intentional.[90]

A. Likely Cause of Action

Given the options expressed above, where does a cause of action from an injury from a Gatorade bath fall? Generally, negligence is likely not an option, and it really would not apply in this situation anyway.[91] A Gatorade bath is likely not an intentional tort but instead would probably be considered a recklessness situation.

As noted above, an "intentional tort" requires the intent to injure another on the part of the tortfeasor, the one who committed the wrong. Intent has been defined as "the desire to bring about certain results."[92] Regarding Gatorade baths, it does not seem like they would be considered intentional torts because the players do not have the intent to injure their coach; rather the intended result is actually the complete opposite: to celebrate a victory with their coach. Intentionally throwing Gatorade on someone during a game can, however, have criminal consequences. For example, in 1991, former NBA player and Hall of Famer Charles Barkley

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[89] Coaches have engaged in Gatorade Baths on their players as well. Larry Brown, *Rex Ryan Dumps Gatorade on Jason Taylor*, LARRY BROWN SPORTS (Sept. 26, 2010), http://larrybrownsports.com/football/rex-ryan-dumps-gatorade-on-jason-taylor/31688 (last accessed Mar. 13, 2013) (discussing NFL coach, Rex Ryan, dumping Gatorade on one of his players after winning a game). Yet, further evidence that coaches are likely participants in this situation.

[90] *See Nabozny*, 334 N.E.2d 258 (1975) (rejecting negligence as the appropriate standard and holding that a player is liable for injury to a co-participant only when his conduct is deliberate, willful or reckless).

[91] As noted above, negligence typically occurs in an accident or simply from an unintentional action. With Gatorade baths, negligence would likely not be the proper legal cause of action because it is not an accident or an unintentional act that the players are throwing Gatorade on their coach.

[92] Restatement (3rd) of Torts §8A (1998).

was cited by City Prosecutors for disorderly conduct for throwing cups of Gatorade and water on a group of fans during a playoff game against the Milwaukee Bucks.[93] In contrast to a celebratory Gatorade bath, Barkley's intent was obviously very different than the many players that douse their coaches.[94]

The final theory, recklessness, as noted above, is a theory that falls between an intentional tort and negligence.[95] It is oftentimes described as a tort that occurs when one has the intent to commit an act, but no intent to cause harm.[96] It appears that of the three potential torts discussed above, recklessness would likely be the most viable possible cause of action by a coach (or the coach's family members) in the event of an injury or death caused by a Gatorade Bath. The players obviously have the intent to throw the Gatorade onto their coach, but they lack the requisite intent to cause any harm. Recklessness, however, would still require proof of causation that the Gatorade bath was the cause of the injury or death,[97] which could be the greatest challenge for this type of

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[93] *76ers' Barkley Arrested for Battery in Milwaukee*, THE BALTIMORE SUN (Dec. 23, 1991), http://articles.baltimoresun.com/1991-12-23/sports/1991357077_1_barkley-milwaukee-police-winter-olympics (last accessed Mar. 14, 2013); *See also* Eric Goldschein, *LeBron Gets Mini-Gatorade Bath From a Displeased Celtics Fan After a Transcendent Game 6*, SPORTSGRID.COM (June 7th, 2012, 11:35 PM), http://www.sportsgrid.com/nba/ lebron-gets-mini-gatorade-bath/ (last accessed Mar. 14, 2013) (highlighting Celtics' fans throwing Gatorade on LeBron James after a Celtics win).

[94] The same cannot be said for the Deion Sanders/Tim McCarver situation noted above, *supra* note 29. In that situation, Sanders' intent certainly seemed to be to get back at McCarver for critical comments that McCarver made about Sanders. Additionally, the apparent motivation behind the Giants' Jim Burt's initial Gatorade Bath of Bill Parcells was also to get back at Parcells for comments that Parcells made to Burt. *See infra* note 99. Thus, it might be possible to prove intentional conduct on the part of the players in certain situations.

[95] Restatement (2nd) of Torts § 500.

[96] *Id.*

[97] *Id.* at §501.

lawsuit like in the George Allen situation, but would not be too hard to prove in the Bull Curry of Georgia State or Richard Thurin of North Platte situations. At the outset, however, it would appear that a potential plaintiff would likely be able to plead this type of tort in their complaint and also survive any initial attack on their pleadings.

A. Who does the coach (or coach's family) sue?

Having established that a potential cause of action for civil liability exists for a coach injured by a Gatorade bath, the next step is determining who the coach sues. For a coach of a professional team, the answer is easy: sue the players. The players make a lot of money and in some cases, a lot more than the coaches.[98] The players are "deep pockets" and would be viable defendants. Plus, there is not always a lot of love lost among professional coaches and their players.[99] A coach injured in this situation would likely be able to receive a monetary judgment from a financially able defendant.

Coaches at the high school level present a slightly different situation. The injured coaches can sue the players but also can sue the players' parents if the players are

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[98] *See* Mason Levinson, *Girardi Agrees to Three-Year, $9 Million Contract with Yankees, ESPN Says*, BLOOMBERG.COM (Oct. 28, 2010, 11:18 AM PT), http://www.bloomberg.com/news/2010-10-28/girardi-agrees-to-three-year-9-million-contract-with-yankees-espn-says.html (last accessed Mar. 14, 2013) (discussing head coach of the New York Yankees, Joe Girardi, $3 million/year salary); *Contra* Ronald Blum, *A-Rod's Salary Nearly Equals Royals' Payroll*, NEW YORK POST (April 1, 2011, 1:35 PM), http://www.nypost.com/p/sports/yankees/rod_salary_nearly_equals_kc_payroll_AxxMP5E0ddBV57d1Q2Q4NM (last accessed Mar. 14, 2013) (New York Yankee Alexander Rodriguez made $32 million in 2010).

[99] *See* Chuck Culpepper, *Soaking it Up,* SPORTS ON EARTH, (Jan. 9, 2013). http://www.sportsonearth.com/article/ 40897684/.

minors.[100] This leaves the coaches with at least the possibility of recovering a monetary judgment for their injuries caused by a reckless Gatorade bath.

The biggest problem would likely be faced by the college coaches who have athletes playing for them that are over eighteen and no longer under the supervision of their parents but they are not financially viable defendants as unemployed college students. The coaches can, however, still recover a judgment against the players.[101] Given this particular situation though, a coach would have to suffer a serious injury or be left with no other choice except to pursue a legal action.

B. Causation/Damages

As mentioned above, recklessness still requires causation and damages.[102] In some situations like Coach Allen's, causation has been seriously disputed.[103] This does not mean that a complaint cannot be filed and causation

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[100] *See e.g.*, WIS. STAT. § 895.035 (2011) (stating that in the State of Wisconsin parents may be held liable for the negligent, reckless, or intentional acts of their minor child); CAL. CIV. CODE §1714.1 (West 2008) (stating that in California, parents will be held liable for the intentional misconduct of a minor child, including criminal acts, destruction of public or private property).

[101] *See e.g.*, Livingston v. Naylor, 920 A.2d 34 (Md. Ct. Spec. App. 2007) (ordering a writ of garnishment).

[102] Restatement (2nd) of Torts §876 cmt. d (1979).

[103] Sam Borden, *A Splashy Tradition*, *Gatorade-Style*, NYTIMES.COM (Jan 20, 2012), http://www.nytimes.com/2012/01/21/sports/football/a-splashy-football-tradition-gatorade-style.html (last accessed Mar. 10, 2013) (noting that George Allen's son disputes that Allen died from the Gatorade bath, stating: "He got a cold from it, but that was not the cause of his death . . . he had a heart arrhythmia . . . [his death] had nothing to do with the Gatorade Shower.").

cannot be argued, it still can.[104] The situations at Georgia State and North Platte would be far easier to prove causation as there is no dispute that the Gatorade baths in question there clearly knocked one coach unconscious and another (and a fan) fell hard onto to the court because of the Gatorade spilled on the floor. In each of those situations, as well as in other similar situations, the damages would be obvious as they would be the medical bills and other issues associated with the injuries caused to the coaches (and fan).

C. Assumption of Risk

It is well settled that an injured party at a sporting event cannot assume the risk of reckless or intentional conduct; rather they assume the risk of negligent conduct.[105] Here, the Gatorade bath is likely reckless conduct and therefore assumption of risk should not be a viable defense.

However, it may be argued that because Gatorade baths have become so popular and customary in sporting events that coaches assume the risk of them. But, Gatorade baths are not part of the game in that they do not occur at every game or almost every game; rather they are reserved for certain very important games and even then they do not occur every time. Moreover, coaches do not assume the risk when they specifically tell their players not to partake in the Gatorade Bath like TCU's Gary Patterson and they also do not assume the risk that they will be hit with the cooler itself or the top of the cooler when a Gatorade bath is known to just be the liquid inside. Finally, Coaches like Coach Thurin of North Platte clearly did not assume the risk of "wiping out"

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[104] *See e.g.*, Sindell v. Abbott Lab., 607 P.2d 924 (Cal. 1980) (holding the defendant liable even though the plaintiff was unable to determine the actual tortfeasor that caused the plaintiff's injuries); Summers v. Tice, 199 P.2d 1 (Cal. 1948) (holding the defendant liable even though the plaintiff could not prove which defendant caused their harm).

[105] *See Hackbart,* 601 F.2d at 524 (1979) (holding that the assumption of the risk defense applies to negligence and the recklessness standard overcomes the assumption of the risk defense).

and falling face-first hard onto the court after slipping on the spilled Gatorade.

CONCLUSION

Granted, it is unfortunate that even a form of celebration and jubilation could result in a potential lawsuit or liability, but, just as storming the court after a basketball game victory can result in harm to players or others,[106] a Gatorade bath could also cause serious injury to a coach. Maybe instead of an ice-cold cooler of liquid awaiting a coach, schools and professional teams can provide an alternative substance to dump, such as confetti or rice? Either way, the next time you are contemplating the type of celebration you want to engage in following a victory, be mindful of the potential legal consequences of picking up that Gatorade cooler and drenching your coach.

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[106] *See generally* Ron Morris, Morris: *Time to end fines for fans storming the court,* THESTATE.COM (Jan. 31, 2010), http://www.thestate.com/2010/01/31/1135648/morris-time-to-end-fines-for-fans.html (discussing the SEC's decision to fine The University of South Carolina 25,000 dollars for storming the court, a violation of SEC rules); Nicole Auerbach,*The forecast for college basketball: Storming the court, USATODAY.COM (Feb. 7, 2013, 10:33 AM),* http://www.usatoday.com/story/sports/ncaab/2013/02/05/storming-rushing-the-court-college-basketball/1890851/ (noting how the SEC is still fining schools $5,000 for the first offense, $25,000 for the second and $50,000 for anything after that); Cesar Tordesillas, *ACC may implement court storming fines after Krzyzewski incident,* GANTDAILY.COM (Mar. 1, 2013, 4:39 PM), http://gantdaily.com/2013/03/01/acc-may-implement-court-storming-fines-after-krzyzewski-incident/ (Discussing how the Atlantic Coast Conference (ACC) encourages fans not to storm the court. Once that announcement is made any fan who runs onto the court takes responsibility for their actions. The ACC currently has no ban on rushing the court and might have to add one after eight have occurred so far this season.

Risk of Liability Threatens Nearly 30-Year-Old Tradition

Trevor R. Orme[*] and Evan Schlack[∂]

Upon reading Joshua Winneker's article, sports fans and those reminiscent of times past may well exclaim, "What next?!" - "Does this mean no more NASCAR or locker-room champagne celebrations because the cork may injure someone when popped off of a shaken, pressurized bottle?" "What about lifting a coach onto players' shoulders where he risks tumbling to the ground?" "Does 'the wave' pose too much risk of injury to fans?" "What does this mean for baseball dog piles upon winning a game?" "And, what about cutting the net off of the basketball hoop? They're using sharp scissors while balancing on a ladder after all!" Even Winneker's suggestion that schools and professional teams provide, in place of an ice-cold cooler of liquid, something like confetti or rice prompts an equally imaginable question: "What if the coach chokes after inhaling bits of confetti or falls after slipping on the rice?"

The reality is, like most industries, sports are intricately woven with and have necessarily evolved due to legal issues. That's why it is not hard to contemplate a scenario where even the "kiss-cam" may come under siege in the wake of controversial acceptance of nontraditional relationships and the changing definitions of marriage.[1] After reading Winneker's article, one may well argue that while

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[1] Chris Strauss, *Gay Jaguars fan objects to 'Kiss Cam' jokes*, USA TODAY, http://www.usatoday.com/story/gameon/2013/03/20/gay-jacksonville-jaguars-fan-asks-to-end-cam/2003543.

traditions do bring people closer together and bridge the past with the present, they shouldn't come at the expense of the individuals who they harm.

This note will take an alternative approach to the topic of the potential liability of Gatorade baths. It will demonstrate that, while Winneker's conclusions are ultimately supported, his analysis overlooks the possibility that Gatorade baths may be found not to be an inherent part of the sport, which would give rise to redressable claims by non-participants under a theory of negligence.

Winneker writes that civil liability at sporting events can arise in three separate instances within two categories: 1) liability for participants in contact and non-contact sports, 2) and liability for non-participant injuries. His examination of participant liability concludes that in order to have a redressable claim, the event's participants, whether in contact or non-contact sports, are often forced to demonstrate that the act was reckless or intentional. There is a twofold purpose supporting the theory: the first, a policy preference of the courts not to have a "chill[ing]" effect on sports, and second, the view that the players have "assumed the risk" of potential liability as an inherent part of the game.

The rest of Winneker's article focuses on liability for "non-participants." For the purposes of this argument, "non-participants" include the event's spectators, as well as the coaches.[1] His focus is directed to baseball's "limited-duty rule," a policy that forces injured non-participants to prove more than mere negligence to have a valid claim.

Baseball's limited-duty rule and the comparable rules for other professional sports are generally sufficient to force the plaintiff to prove more than negligence because, much like the risks that the athletes assume, some sports events

[1] *Trujillo v. Yeager*, 642 F. Supp. 2d 86, 88 (2009) (a coach, as non-participant, is liable for injuries caused by players if they also acted recklessly or intentionally).

have "common, frequent, and expected" risks.[2] This is the underlying basis for the limited and no duty rules: because the incidents are prevalent, non-participants are aware of the risks, and they have "assumed the risk" by attending the sporting events. Courts, however, have applied a simple negligence standard when it comes to the less "common, frequent, and expected" risks.[3]

Primary examples of limited-duty and no-duty rules can be seen in professional baseball and professional hockey, and, when one examines the statistics, the policy supporting the distinction appears valid. For instance, in Major League Baseball, ("MLB"), there are an estimated 4,000 foul ball injury-related incidents involving non-participants each year.[4] With 30[5] teams playing 162 games[6], (a total 4,860 games), the statistics indicate an 82 percent chance that a fan will be struck by a foul ball in every MLB game. Similarly, in the National Hockey League, ("NHL"), one study found that 122 spectators were hit by flying pucks during a span of 127 games.[7] Using this as a sample, the data would indicate that a spectator will be injured by a flying puck in 96% of hockey games.[8] Due to the frequency of these injuries, courts throughout the country have concluded that spectators

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[2] *Jones v. Three Rivers Management Corp*., 394 A.2d 546, 551 (Pa. 1978).
[3] *Id.*
[4] Michelle Kaminsky, *Spectator Injuries as Sporting Events*, Legal Zoom, http://www.legalzoom.com/lawsuits-settlements/personal-injury/spectator-injuries-sporting-events (last visited Oct. 11, 2013); Avery Holton, *Into the Stands: How Safe is Pro Baseball?*, http://reportingtexas.com/into-the-stands-how-safe-is-professional-baseball/ (last visited Oct. 11, 2013).
[5] *Team-by-Team Information*, Major League Baseball, http://mlb.mlb.com/team/ (last visited Oct. 11, 2013).
[6] *Major League Baseball*, Wikipedia, http://en.wikipedia.org/wiki/Major_League_Baseball#Season_structure, (last visited Oct. 11, 2013).
[7] Leigh Augustine, *Who is responsible When Spectators are Injured While Attending Professional Sporting Events?*, 5 UNIV. OF DEN. SPORTS AND ENTERTAINMENT L. J. 39 (2008).
[8] *Id.*

"assume the risk" of these injuries.[9] Specifically, courts have found that various factors, like foul balls being a "common, frequent, and expected" risk in baseball,[10] "flying pucks [being] an integral and unavoidable part of [hockey],"[11] and broken bats being "an object inherent to the game,"[12] support the assumption of risk.

There are, however, non-participant injuries at sporting events that are not deemed "integral and unavoidable" parts of the game. Thus, they do not necessitate a showing of anything more than mere negligence. Non-participants have been able to recover in situations where they have tripped over support beams before falling down a staircase,[13] fallen into a hole while at a concession stand,[14] been struck with an iron gate,[15] and attacked by surrounding

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[9] *Pestalozzi v. Philadelphia Flyers Ltd.*, 576 A.2d 72, 74 (Pa. Super Ct. 1990) (holding that the "risk of a spectator being struck by an errant puck, even for an individual sitting behind plexiglass, is common and reasonably foreseeable."); *see also Pentrongola v. Comcast-Spectator, L.P.*, 789 A.2d 204 (Pa. Super. Ct. 2001) (spectator assumed the risk of being struck by errant puck); *Baker v. Mid Maine Medical Center,* 499 A.2d 464, 467 (Me. 1985) ("[t]he game of golf presents a known hazard, balls, hit by golfers, that do not always travel in the intended direction, and which are capable of causing serious personal injury."); *Colclough, M.D. v. Orleans Parish School Bd.*, 166 So.2d 647, 648-49 (La. Ct. App. 1964) (plaintiff assumed risk of injury standing on the sidelines of a football game).

[10] *Jones v. Three Rivers Management Corp*., 394 A.2d 546, 551 (Pa. 1978) (citing *Brown v. San Francisco Baseball Club*, 222 P.2d 19, 20 (Cal. Dist. Ct. App. 1950) that "[Non-participant] … subjects himself to certain risks necessarily and usually incident to and inherent in the game").

[11] *Nemarnik v. Los Angeles Kings Hockey Club*, 103 Cal. App. 4th 631, 640 (Cal. Dist. Ct. App. 2002).

[12] *Rees v. Cleveland Indians Baseball Co., Inc.*, No. 84183, 2004 WL 2610531 (Ohio Ct. App. Nov. 18, 2004).

[13] *Martin v. Angel City Baseball Ass'n*, 40 P.2d 287, 287 (Cal.App.2d 1935).

[14] *Louisville Baseball Club v. Butler*, 160 S.W.2d 141 (Ky. 1942).

[15] *Murray v. Pittsburgh Athletic Co.*, 188 A. 190, 191 (Pa. 1936).

fans for a souvenir football.[16] These cases show that the infrequent and uncommon nature of an injury will increase a plaintiff's likelihood of recovering for his or her injuries.[17]

How courts categorize Gatorade-bath claims will determine whether a non-participant, either the spectator or coach, will be able to bring a claim under the negligence standard. How courts view this matter of first impression could lay the foundation for a new approach in dealing with lower likelihood injuries or blur the connection between high risk and assumption of risk. For example, take the recent and notable case of *Roundtree v. Boise Baseball, LLC*.[18] In *Roundtree*, the Idaho Supreme Court first encountered a non-participant's (spectator) injury that resulted from being struck with a foul ball.[19] While recognizing that the "majority of jurisdictions" have "adopt[ed] some variation of the Baseball Rule[,]" the court declined to submit to the trend.[20] Rather, the Idaho Supreme Court held the rarity of similar incidents led to the finding that such events are not an inherent part of the sport.[21] Furthermore, the court felt that there was not a "compelling public policy" that existed within the Baseball Rule's rationale.[22] Consequently, the court held that the spectator who had been injured from a flying foul ball could bring a claim under a theory of negligence.[23]

The success of non-participant civil liability claims in the future, whether originating from a coach[24] or a spectator,

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[16] *Telega v. Security Bureau, Inc.*, 719 A.2d 2, 372, 377 (Pa. Super. Ct. 1998) (stating that "matter would compel a different result had Mr. Telega been injured by the areal football itself rather than the displaced fans intent on obtaining it.").
[17] *Ratcliff v. San Diego Baseball Club*, 27 Cal.App.2d 733, 738 (Cal. Ct. Dist. App. 1938).
[18] 296 P.3d 373, 377-78 (Idaho 2013).
[19] *Id.* at 377.
[20] *Id.*
[21] *Id.* at 379.
[22] *Id.*
[23] *Id.*
[24] *Trujillo*, *supra* note 2, at 88.

will depend on the route of interpretation taken by the courts.. If future courts view the Gatorade baths in a traditional light, as a "frequent, common, and expected[,]" or as an "integral and unavoidable" part of the sport, it is unlikely that non-participants could establish a claim under a negligence standard. However, if the court viewing the claim does not believe that the Gatorade baths meet that standard or believe that public policy should not bar non-participants from injury claims, it may conclude that non-participants have not "assumed the risk" and that they may bring a claim under a negligence theory.

If future courts decide the assumption of risk issue based on the frequency of the occurrence, perhaps the infrequency of the Gatorade baths could be directly related to having a "bad" team: a team that historically loses important games. The quality of a state's team may affect how the state's courts view the risk associated with Gatorade baths and the assumption of risk. For example, the Arizona Cardinals have arguably the worst record over the history of their franchise.[25] If they play the Green Bay Packers (arguably the most winning team of all time[26]) on Arizona turf, lose, and a Packer's player drenches the Packer's coach, a lawsuit brought in Arizona may find that player liable. On the other hand, if the case were brought in Wisconsin, then the coach might not recover because of the recognized risk.

Presently, no lawsuits have been filed claiming injury by Gatorade bath, but that doesn't mean lawsuits won't soon come. The unfortunate result may be the end or severe reduction in an almost 30-year-old tradition. Any avid sports fan who holds this tradition dear should begin his superstitious rituals, voodoo, and mojo and channel his

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[25] Kerry Burne, *A CHFF epic: all-time franchise rankings*, COLD HARD FOOTBALL FACTS, Jun. 24, 2008, http://www.coldhardfootballfacts.com/content/chff-epic-all-time-franchise-rankings/6520/.

[26] *Id.*

positive vibes for the underdog because the law is coming to sack Gatorade baths.