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ARTICLES

NOTES

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THE SAFETY ACT, TERRORISM, AND THE NATIONAL FOOTBALL LEAGUE

Karen Bunso Bryant*

"What I find objectionable, however, fatally so, is that the SAFETY Act was never the subject of any hearing, was never considered by a committee in either chamber . . . ."

-Senator John McCain at Senate deliberations on the Homeland Security Act, November 19, 2002[1]

I. INTRODUCTION

The Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) incentivizes companies to make and commercialize anti-terrorist products by offering liability protection.[2] The SAFETY Act was folded into the congressionally passed Homeland Security Act of 2002.[3] Signed

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[1] 107 CONG. REC. 150, 11,430 (2002).

[2] Support Anti-Terrorism by Fostering Effective Technologies Act, 6 U.S.C.A. § 442 (2016).

[3] Homeland Security Act of 2002, Pub. L. No. 107–296, 2002, U.S.C.C.A.N. (116 Stat.) 2135, 2238 (codified at 6 U.S.C.A. § 101 (2002)).

into law by President George W. Bush on November 25, 2002,[4] the Homeland Security Act of 2002 established the Department of Homeland Security (DHS), the Directorate for Information Analysis and Infrastructure Protection, the Critical Infrastructure Information Act of 2002, the Cyber Security Enhancement Act of 2002, and the SAFETY Act.[5]

In 2009, the National Football League (NFL) gained liability protection against lawsuits stemming from a terrorist attack at an NFL stadium through an accreditation offered by the SAFETY Act.[6] The NFL has the highest accreditation level, "Designation and Certification,"[7] while the National Basketball Association (NBA) has "Designation," and Major League Baseball (MLB) has "Development Testing and Evaluation" (DT&E).[8] This accreditation is an important liability protection which "makes it impossible to sue a company after a terrorist attack for standard negligence."[9] If a ticket-holding spectator brings in "an explosive device in a purse that wasn't detected during standard bag inspection by entrance guards" and a terror attack occurs, the league, including the entrance guards, cannot be held liable.[10]

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[4] *President Bush Signs Homeland Security Act*, THE WHITE HOUSE (Nov. 25, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021125-6.html.

[5] Support Anti-Terrorism by Fostering Effective Technologies Act, 6 U.S.C.A. §§ 441–444 (2016).

[6] Thomas Frank, *NFL Exempt from Terrorism Lawsuits*, USA TODAY (Mar. 9, 2009, 9:40 PM), http://usatoday30.usatoday.com/news/nation/2009-03-09-safety-act_N.htm.

[7] The terms "Designation and Certification" have also been stated as "Certification," the terms have been used interchangeably this way in DHS SAFETY Act literature.

[8] David Broughton, *Lambeau Field Latest to Get DHS Designation,* STREET & SMITH'S SPORTS BUS. J. (May 16, 2016), http://www.sportsbusinessdaily.com/Journal/Issues/2016/05/16/Facilities/Lambeau-DHS.aspx.

[9] Bob Sullivan, *Yankees Win Protection Against Terrorism -- But What Did You Lose?*, NBCNEWS.COM (Aug. 21, 2012, 3:43 AM), http://redtape.nbcnews.com/_news/2012/08/21/13381431-yankees-win-protection-against-terrorism-but-what-did-you-lose?lite.

[10] *Id.*

Administered by the Secretary of the DHS, Office of SAFETY Act Implementation (OSAI) within the Directorate of Science and Technology,[11] the SAFETY Act aims to encourage the commercialization of anti-terrorism technology for public use by providing product liability protection to the manufacturer.[12] This protection "ensure[s] that the threat of liability does not deter potential manufacturers or sellers of antiterrorism technologies from developing, deploying, and commercializing technologies that could save lives."[13]

Under the SAFETY Act, the term "technology" is broadly defined to include any product, equipment, device, technology, and services such as design, consulting, engineering, software development as well as "threat assessments, vulnerability studies, and other analyses relevant to homeland security."[14] The SAFETY Act authorizes the DHS Secretary[15] to designate the aforementioned varieties of technologies as anti-terrorism technologies under a risk management system,[16] which provides legal liability protections to manufacturers and sellers of technologies against claims arising out of an Act of Terrorism.[17] Lockheed Martin, Bank of America, IBM, Boeing, Accenture, Raytheon and Unisys are some of the companies with technologies that have received SAFETY Act accreditation.[18]

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[11] 6 C.F.R. § 25.2 (2006).
[12] *See* 6 U.S.C. § 442 (2002).
[13] 6 C.F.R. § 25.
[14] *Safety Act Webinar: What is the SAFETY Act and How Do You Apply?*, DEPT. OF HOMELAND SEC. 6 (Feb. 11, 2015), https://www.safetyact.gov/jsp/refdoc/samsRefDocSearch.do [hereinafter *SAFETY Act Webinar*].
[15] 6 C.F.R. § 25.3 (2006) ("All of the Secretary's responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism for purposes of section 865(2) of the SAFETY Act, may be exercised by the Under Secretary for Science and Technology of the Department of Homeland Security or the Under Secretary's designees.").
[16] Homeland Security Act of 2002, Pub. L. No. 107–296, 2002, U.S.C.C.A.N. (116 Stat.) 2135, 2238 (codified at 6 U.S.C.A. § 101 (2002)).
[17] *SAFETY Act Webinar*, *supra* note 14.
[18] *SAFETY Act 101 Briefing: The Support Anti-terrorism By Fostering*

This paper explores the SAFETY Act and how the NFL qualified for its liability protection. Part II explains the SAFETY Act's background, statutory and regulatory history, regulatory requirements and application process. Part III examines the accreditation of the NFL and other professional sports teams and leagues. Part IV addresses the worst-case scenario, Part V discusses possible implications, and Part VI concludes.

II. THE SAFETY ACT

A. BACKGROUND

When the Homeland Security Act of 2002[19] was first introduced by Congressman Dick Armey in the House of Representatives on June 24, 2002, it did not contain the SAFETY Act.[20] Rather, it appeared in the July 24 version of the Bill without identifying sponsorship.[21] In examining the chronology and proposed legislation, the SAFETY Act had apparently been added to the Bill by the House between June 24 and July 24, 2002.[22]

Effective Technologies (SAFETY) Act of 2002, DEPT. OF HOMELAND SEC., https://www.safetyact.gov/jsp/refdoc/samsRefDocView.do?action=ViewAttachment&refDocGroupName=Reference%20Documents&refDocTitle=SAFETY%20Act%20101%20Briefing&attachmentName=SAFETY%20Act%20101%20Briefing.pdf.

[19] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[20] H.R. REP. NO. 107-5005 (2002).

[21] SELECT COMM. ON HOMELAND SEC., H.R. DOC. NO. 107-5005, at Title VII, Subtitle F (2002).

[22] *See* H.R. REP. NO. 107-609, at 118 (2d Sess. 2002). The SAFETY Act was not in the original June 24th Bill as introduced in the House of Representatives, nor did it appear in the House's July 17th hearings before the Select Committee on Homeland Security. *The Homeland Security Act of 2002, Day 3: Hearing Before the Select Comm. on Homeland Sec.*, 107th Cong. (2002); H.R. REP. NO. 107-5005 (2002). It first appeared in the Select Committee's July 24th version of the Bill. H.R. REP. NO. 107-609, at 174 (2002). The House's report along with the Minority and Dissenting Views also of July 24th included the SAFETY Act and the vote to remove it. H.R. REP. NO. 107-609 (2d Sess. 2002). It went to the Senate July 26, 2002. *H.R. 5005 (107th): Homeland Security Act of 2002*, GOVTRACK, https://www.govtrack.us/congress/votes/107-2002/h367 (last visited Mar. 3, 2017).

The recorded committee votes held on July 19 were in the House's Select Committee on Homeland Security Minority Report of July 24, 2002.[23] A vote was held for an amendment which would have struck the SAFETY Act from the Bill, but it was narrowly rejected 5-4.[24] On July 26, 2002, the House passed the Homeland Security Act with the SAFETY Act included by a vote of 295-132, sending it to the Senate.[25]

The Senate did not begin deliberating the Bill until after August 2002.[26] On November 19, 2002, the Senate held lively discussions about the addition of the SAFETY Act which had not been the subject of any hearings.[27] Senator Patrick Leahy argued, "the bill provides liability protections for companies at the expense of consumers. This unprecedented executive authority to unilaterally immunize corporations from accountability for their products is irresponsible and endangers the consumers and our military service men and women."[28] Senator Kennedy declared, "[t]his provision has nothing to do with bioterrorism preparedness or homeland security—and everything to do with rewarding a large contributor to the Republican Party."[29] Senator Lieberman asserted that it gives the Department "broad authority to designate certain technologies as so-called 'qualified antiterrorism technologies.' [Its] granting of this designation—which appears to be unilateral, and probably not subject to review by anyone . . . ."[30]

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[23] H.R. REP. NO. 107-609, at 68–72 (2d Sess. 2002).
[24] *Id.* at 70–71.
[25] *H.R. 5005 (107th): Homeland Security Act of 2002*, GOVTRACK, https://www.govtrack.us/congress/votes/107-2002/h367 (last visited Mar. 3, 2017).
[26] HAROLD C. RELYEA, CONG. RESEARCH SERV., RL31751, HOMELAND SEC.: DEP'T ORGANIZATION AND MGMT. — IMPLEMENTATION PHASE (2005).
[27] *See* 148 CONG. REC. (daily ed. Nov. 19, 2002).
[28] *Id.* at S11427 (statement of Sen. Leahy).
[29] *Id.* at S11419 (statement of Sen. Kennedy).
[30] *Id.* at S11362 (statement of Sen. Lieberman).

Senators Lieberman and Daschle introduced amendment 4953 to have the SAFETY Act struck from the Bill,[31] but it was closely rejected with a 52-47 vote.[32] The Senate then passed the Homeland Security Act with the SAFETY Act included, with a 90-9 vote.[33]

The legislative history of the SAFETY Act reveals its support was divided; a possible indication that if it was not couched into the Homeland Security Act it may not have passed at all.[34]

While the SAFETY Act was signed into law in 2002, DHS published its first proposed rules for implementation on July 11, 2003.[35] An interim rule governing implementation of the SAFETY Act was promulgated on October 16, 2003, making certain changes to the proposed rules but retaining its interpretation.[36] DHS subsequently published protocols for implementation and activated the program.[37]

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[31] *See id.* at S11358 ("Daschle (for Lieberman) Amendment No. 4911 (to Amendment No. 4901), to provide that certain provisions of the Act shall not take effect. Daschle (for Lieberman) Amendment No. 4953 (to Amendment No. 4911), of a perfecting nature.").
[32] 148 CONG. REC. (daily ed. Nov. 19, 2002), at S11371.
[33] Homeland Security Act of 2002, Pub. L. No. 107–296, 2002, U.S.C.C.A.N. (116 Stat.) 2135, 2238 (codified at 6 U.S.C.A. § 101 (2002)).
[34] SELECT COMM. ON HOMELAND SEC., H.R. DOC. NO. 107-5005, at S11363 (2002). (statement of John Breaux, Senator, Louisiana: "What has happened in the course of this process is interesting but not unusual. The House loaded up the homeland security bill with a whole bunch of things that were concocted in the middle of the night and not the subject of any hearings or not brought through the normal committee process and not voted on by the House and not voted on by any committee in the Senate and not passed by the Senate. But, lo and behold, all of these provisions are now attached to the bill, and the House announced that they are going out of town, and take it or leave it.").
[35] Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 68 Fed. Reg. 41420 (proposed July 11, 2003) (to be codified at 6 C.F.R. pt. 25).
[36] *Id.* 68 Fed. Reg. 59684 (Interim rule published October 16, 2003).
[37] 6 C.F.R. §25 (2006).

The program started slow with just six technologies receiving protections during its first year and a half (October, 2003 to February, 2005), but an additional sixty-eight technologies received protections from March, 2005 to June, 2006. [38] After the first three years, the procedures for administering the program needed improvements and DHS incorporated comments and suggestions in the final rule to do so. [39] On June 8, 2006, the final rule (6 CFR 25) for implementing Subtitle G of Title VIII of the Homeland Security Act of 2002, Public Law 107-296 was issued, effective July 10, 2006.[40]

B. PROCESS

Under the SAFETY Act, an entity with a potential anti-terrorism technology can apply for Designation (the first level which can be attained) or apply simultaneously for the highest level of Designation and Certification.[41] A technology that is untested but promising can apply and receive limited protection during trial tests under Developmental Testing & Evaluation (DT&E) designation.[42] Designation and certification are valid and effective for five to eight years.[43] If an application is denied, the entity may reapply at any time by resubmitting a full application.[44] Once approved, the technology is deemed to be a Qualified Anti-Terrorism Technology (QATT) [45] and the

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[38] 71 Fed. Reg. 33148 (I)(A) (proposed June 8, 2006) (to be codified at 6 C.F.R. pt. 25).
[39] 71 Fed. Reg. 33151 (II); 6 C.F.R. § 25 (2006).
[40] 6 C.F.R. § 25.2 (2006).
[41] *Id.* §§ 25.6, 25.9 (2006).
[42] 6 C.F.R. § 25.4(f) (2016).
[43] 6 C.F.R. §§ 25.6(f), 25.9(f)(2) (2016).
[44] *SAFETY Act Frequently Asked Questions*, DEP'T OF HOMELAND SEC., https://www.safetyact.gov/jsp/faq/samsFAQSearch.do?action=SearchFAQForPublic (follow the "NEXT PAGE" hyperlink until "Q: What if my first application is denied?" is displayed) (last visited Mar. 3, 2017).
[45] 6 C.F.R. § 25.2 (2016). (''Qualified Anti-Terrorism Technology'' or ''QATT'' means any Technology (including information technology) designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a

"seller"[46] receives liability protection against claims filed in United States courts rising out of, relating to, or resulting from an Act of Terrorism when their technologies have been deployed. However, the SAFETY Act protections apply only when an Act of Terrorism has occurred.[47]

Additionally, a SAFETY Act accreditation is not required to sell anti-terrorism technologies, but is a promotional seal of recommendation (red, blue or green[48]) with liability protection, which places the technology on an "Approved Technologies"[49] list, much like a well insured service provider on Angie's List.[50]

One of the earliest technologies to receive SAFETY Act Certification was Northrop Grumman's *Biological Detection System (BDS)* which was "designed to screen mail for the presence of anthrax spores as it is processed on automated mail sorting equipment in mailrooms."[51]

Designation has been issued pursuant to this part.)

[46] *Id.* (Seller: "The term 'Seller' means any person, firm, or other entity that sells or otherwise provides Qualified Anti-Terrorism Technology to any customer(s) and to whom or to which (as appropriate) a Designation and/or Certification has been issued under this Part (unless the context requires otherwise.").

[47] 6 U.S.C. § 442 (2012); 6 C.F.R. §§ 25.7 (2016). Both the statute and the regulations condition the limited liability protections afforded to Sellers to claims "arising out of, relating to, or resulting from an Act of Terrorism." 6 C.F.R. § 25.7 (2016).

[48] *See Approved Technologies*, DEP'T OF HOMELAND SEC., https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (last visited Mar. 3, 2017) (signaling a Certification with a red mark, a Designation with a blue mark, and a DT&E with a green mark).

[49] *Id.*

[50] ANGIE'S LIST, https://www.angieslist.com/how-it-works.htm (last visited Mar. 3, 2017) ("Verified reviews and ratings in hundreds of categories help you find the best companies to help you complete your projects.").

[51] *Approved Technologies, supra* note 48 (using the "SORT ORDER" menu to arrange the approved technologies by "Ascending" and pressing search to find Northrop Grumman's technology). Northrop Grumman's Biological Detection System (BDS) was approved in June 2004. *Id.*

While the term "Secretary" is used frequently throughout the regulations, there is an important distinction between the roles and responsibilities of the Secretary of DHS and the "Secretary" that is the Under Secretary for Science and Technology of DHS.[52] The Under Secretary has, by delegation, all of the DHS Secretary's "responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism."[53]

The term ''Act of Terrorism'' means any act determined to have met the following requirements or such other requirements as defined and specified by the DHS Secretary:[54]

1. Is unlawful;
2. Causes harm, including financial harm, to a person, property, or entity, in the United States . . . ; and
3. Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.[55]

C. QUALIFIED ANTI-TERRORISM TECHNOLOGIES (QATT)

A QATT is any technology (including information technology) which is designed, developed, modified, or procured specifically for preventing, detecting, identifying, or deterring an Act of Terrorism or limiting the harm from such act.[56] Designating a QATT is based on criteria, but can be exercised at

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[52] 6 C.F.R. § 25.3 (2006) ("Delegation. All of the Secretary's responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism for purposes of section 865(2) of the SAFETY Act, may be exercised by the Under Secretary for Science and Technology of the Department of Homeland Security or the Under Secretary's designees.").
[53] *Id.*
[54] *Id.*
[55] *Id.* § 25.2.
[56] *Id.*

the discretion and judgement of the DHS Secretary.[57] Moreover, applicants do not have to meet all of the criteria – the Secretary may consider other factors depending on the technology and its use.[58] The following criteria are utilized in evaluating technology to receive SAFETY Act Designation:

1. Prior United States Government use or demonstrated substantial utility and effectiveness.
2. Availability of the technology for immediate deployment in public and private settings.
3. Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism technology.
4. Substantial likelihood that such anti-terrorism technology will not be deployed unless protections under the system of risk management provided under this subtitle are extended.
5. Magnitude of risk exposure to the public if such anti-terrorism technology is not deployed.
6. Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the Technology to substantially reduce risks of harm.
7. Anti-terrorism technology that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts.
8. A determination made by Federal, State, or local officials that the technology is appropriate for the purpose of preventing, detecting, identifying or deterring acts of

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[57] *Id.* § 25.4.
[58] *Id.*

terrorism or limiting the harm such acts might otherwise cause.

9. Any other factor that the Under Secretary may consider to be relevant to the determination or to the homeland security of the United States.[59]

D. PROTECTIONS

Once DHS confers SAFETY Act Designation, protections include a bar against punitive damages, a bar against interest on claims during pre-judgment, a limitation on non-economic damages, a cap on third-party liability, proportional liability with respect to the responsibility of the seller, restriction of liability claims as only against the seller,[60] and exclusive jurisdiction in federal court.[61] These claim protections also apply to downstream users of the QATT.[62]

Meeting the Designation criteria is the prerequisite for attaining SAFETY Act Certification, the highest level of protection.[63] In addition to the Designation criteria, DHS must also find that the technology "will perform as intended, conforms to the Seller's specifications, and is safe for use as intended."[64] Certification confers all the Designation protections, and allows a seller to assert the government contractor defense for claims arising from Acts of Terrorism.[65] Hence, technology with a SAFETY Act Certification is "entitled to a presumption of dismissal from a cause of action brought against a Seller,"[66] arising from an Act of Terrorism when QATT was deployed. The government contractor defense is a substantial barrier for any claim and can only be overcome by "clear and convincing

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[59] *Id.* § 25.4(b)(1)(ix).
[60] *Id.* § 25.7(a)–(b)(2), (d).
[61] 6 U.S.C. § 442(a)(2) (2012).
[62] *See* 6 C.F.R. § 25.7(d) (2016).
[63] *See id.* § 25.8.
[64] *Id.* § 25.8(a).
[65] *See id.* § 25.8(c).
[66] *Id.*

evidence," showing that the seller acted fraudulently when submitting their SAFETY Act application to DHS.[67]

The Government Contractor Defense

The government contractor defense "is a judicially created affirmative defense"[68] that arose from the U.S. Supreme Court's decision in *Boyle v. United Technologies Corp.*[69] The case involved the death of a Marine helicopter pilot who drowned when his helicopter crashed in the ocean.[70] The deceased Marine's father filed a product liability suit against the government contracted manufacturer of the helicopter for defective design of the escape hatch.[71]

The U.S. Supreme Court determined a defense contractor manufacturing a military product in accordance with precise government specifications may not be held liable for claims resulting from use of the manufactured product.[72] In the 5–4 decision against Boyle, with the majority opinion crafted by Justice Scalia,[73] the Court ruled that a government contractor can claim the government contractor defense under the following three conditions:[74]

1. the United States approved reasonably precise specifications;
2. the equipment conformed to those specifications, and;
3. the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[75]

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[67] *Id.* § 25.8(b).
[68] Alison M. Levin, *The SAFETY Act of 2003: Implications for the Government Contractor Defense,* 34 PUB. CONT. L. J. 175, 184 (2004).
[69] 487 U.S. 500, 512 (1988).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

These three conditions have since been applied to similar cases utilizing the government contractor defense.[76] While originally the government contractor defense related to "contracts entered into directly with the federal government to provide goods that furthered the military's conducting of the national defense,"[77] the SAFETY Act applies it to non-military situations[78] where the "government is not a party at all to any transaction involving the technology."[79]

The SAFETY Act's final rules express DHS's interpretation of how the government contractor defense should be applied.[80] Starting with the analysis,[81] DHS states the SAFETY Act "creates a rebuttable presumption that the government contractor defense applies" to QATT approved by the DHS Secretary and the seller of a QATT cannot be held liable for "design defects or failure to warn claims," unless there is evidence that the seller acted fraudulently during the application process.[82]

DHS further states that while the government contractor defense is a judicially-created doctrine, section 863's explicit terms supersede the requirements in the case law for the application of the defense.[83] In effect, DHS is stating the 2002 SAFETY Act's *Litigation Management* and *Government Contractor Defense*[84] terms, *replaces* the three conditions set

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[76] Edward Richards, *The Government Contractor Defense*, LSU L. CTR. (Apr. 19, 2009), http://biotech.law.lsu.edu/map/TheGovernment ContractorDefense.html

[77] JOE D. WHITLEY & LYNNE K. ZUSMAN, AM. B. ASS'N, HOMELAND SECURITY: LEGAL AND POLICY ISSUES 171 (2009).

[78] *Id.* at 174.

[79] *Id.*

[80] 6 C.F.R. § 25.2 (2006).

[81] *Id.* at § 25.2(1).

[82] *Id.*

[83] *See generally Rules and Regulations*, BPSIGLOBAL.COM, http://www.bpsiglobal.com/SafetyActFinalRule-highlight.pdf (last visited Apr. 11, 2017).

[84] *Compare* 6 U.S.C. § 442(d)(1) (2012), *with* Boyle v. United Techs. Corp., 487 U.S. 5000, 512–13 (1988) (comparing the differing language between Boyle v. United Techs. Corp. and the Act).

forth in *Boyle*. However, in a following paragraph, DHS adopts[85] the government contractor defense from judicial case law from 1988's *Boyle* only through the 2002 enactment of the SAFETY Act,[86] which is based on the three conditions as established in *Boyle*. This is a confusing contradiction to the previous statement, which claimed section 863 replaces the government contractor defense case law.[87] This contradiction was previously pointed out in Levin's[88] 2004 analysis of the government contractor defense and the SAFETY Act:[89]

> [T]his statement that the SAFETY Act intended to incorporate the existing case law may contradict the earlier statement that the Act is supposed to supplant the case law. Taken alone, this statement could cause significant problems for courts and frustrate the purpose of the SAFETY Act entirely.[90]

The application of the government contractor defense could be more detailed in the regulations[91] contained in *Establishing Applicability of the Government Contractor Defense*,[92] however, it contains only three sentences. The first states the Under Secretary is responsible for approving anti-terrorism technology for it to be covered against claims under the government contractor defense if it is deployed during an Act of Terrorism.[93] The second sentence states that the Certification of a technology is the only thing required to have a presumption of dismissal of

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[85] Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147, 33,150 (Jun. 8, 2006).
[86] *See id.*
[87] *See id.*
[88] Levin, *supra* note 68, at 188.
[89] 6 C.F.R. § 25, Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act); Proposed Rules, 68 Fed. Reg., No. 133 (Jul. 11, 2003).
[90] Levin, *supra* note 68, at 188.
[91] 6 C.F.R. § 25.8 (2016).
[92] 6 C.F.R. § 25.8(c) (2006).
[93] *Id.*

legal action against a seller.[94] The third sentence states: "[t]his presumption of dismissal is based upon the statutory government contractor defense conferred by the SAFETY Act."[95]

DHS's interpretation of what the statutory government contractor defense the SAFETY Act provides is confusing. It could be the three conditions judicially established in *Boyle* or it could be those three federal rules. Given the ambiguity, it will likely be left to the courts to decide and "the courts will likely continue to have different interpretations of the scope of SAFETY Act protection afforded to Sellers." [96] With the potentially varying interpretations, "there will likely be no uniform national application of SAFETY Act protections in the event they are tested following a terrorist attack."[97]

In returning to *Boyle's* three conditions for the government contractor defense, how would the *NFL Best Practices for Stadium Security* meet them? Considering the first condition of U.S. approved specifications, the NFL's technology does not have to be designed to government specifications.[98] Subsequently, condition two, conforming to specifications are determined by the seller, the NFL. The third condition involves the seller informing the government of vulnerabilities or dangers of its technology.

E. SELLER OBLIGATIONS

While the SAFETY Act provides extensive liability protections, it stipulates that the seller obtain liability insurance "to satisfy otherwise compensable third-party claims,"[99] in the amount of the specified liability cap certified by the Secretary.[100] Further, DHS may not require any type of insurance that is not available on the world market, or that would unreasonably distort the sales price of the seller's anti-terrorism technology.[101] Should

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[94] *Id.*
[95] *Id.*
[96] Levin, *supra* note 68, at 188.
[97] WHITLEY & ZUSMAN, *supra* note 77, at 173.
[98] 6 C.F.R. §§ 25.6, 25.9 (2006).
[99] *Id.* § 25.5(a).
[100] *Id.* § 25.5(b).
[101] *Id.* § 25.5(b)(2).

the seller fail to provide the required insurance certifications or provide a false certification, DHS may terminate a Designation.[102]

Clearly, the SAFETY Act is a valuable carrot to encourage companies to develop and deploy commercialized technologies to defend against an Act of Terrorism. As of January 2015, a total of 724 technologies received a SAFETY Act Designation or Certification.[103]

III. THE NATIONAL FOOTBALL LEAGUE

DHS was researching the dire potentialities of a terror attack on a sports stadium as early as 2004 when the Homeland Security Council created "Planning Scenarios."[104] One of those scenarios, Scenario 12, was an explosives attack inside a sports arena that hypothetically left 100 fatalities and 450 hospitalizations.[105] This might explain how the SAFETY Act provisions could be useful to sports stadiums and arenas, which totals 112 venues between the NFL, MLS, MLB, NBA, and NHL.[106]

How the NFL qualifies as a "seller" of QATT under the SAFETY Act is explained in the 2014 DHS document expressly designed for stadium and arena operators: *SAFETY Act Webinar: Building SAFETY Act Applications for Event, Arena, and Stadium Security*.[107] In it, DHS states, "[t]he SAFETY Act

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[102] *Id.* § 25.5(h).
[103] *SAFETY Act Webinar*, *supra* note 14.
[104] David Howe, *Planning Scenarios Executive Summaries*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/security/library/report/2004/hsc-planning-scenarios-jul04.htm (last visited Mar. 5, 2017) (The July 2004 planning scenario was "[c]reated for use in National, Federal, State, and Local Homeland Security Preparedness Activities.").
[105] *Id.* at Scenario 12.
[106] Randy Beers, *DHS Hosts Sports Leagues Conference and Table-Top Exercise*, U.S. DEP'T OF HOMELAND SEC. (Apr. 28, 2010, 3:35 PM), https://www.dhs.gov/blog/2010/04/28/dhs-hosts-sports-leagues-conference-and-table-top-exercise.
[107] SAFETY ACT WEBINAR: BUILDING SAFETY ACT APPLICATIONS FOR EVENT, ARENA, AND STADIUM SECURITY, U.S. DEP'T OF HOMELAND SEC., https://www.safetyact.gov/jsp/external/readContent.do?contentPath=sams%5Crefdoc%5C2014_April_24_SA

applies to a broad range of technologies, including a range of security services. Event, arena, and stadium security is a complex, multilayered group of technologies including policies, plans, personnel, and physical defenses."[108]

The NFL was the first sports league to receive DHS SAFETY Act accreditation, receiving the five-year Designation and Certification in December 2008.[109] The league reportedly received the Certification based on their nine-page "set of guidelines for stadium security management designed to deter and defend against terrorist attacks at sports stadiums" titled *NFL Best Practices for Stadium Security.*[110] For the Certification of their technology, *NFL Best Practices for Stadium Security*, the NFL qualifies for the government contractor defense.[111]

The guidelines, "developed shortly after 9/11, include digital security cameras in stadiums, quick searches on entering spectators and barriers that keep cars and trucks 100 feet from a stadium."[112] In a 2009 interview, then NFL security chief. Milt Ahlerich, stated the benefit to the NFL is, "fairly obvious," and, "[a]n attack from a terrorist organization could put us out of business."[113]

A search of the NFL's and DHS's websites revealed no public availability of the NFL's security guidelines, likely because submitted materials are considered confidential and are exempt from Freedom of Information Act (FOIA) requests.[114] However, a search did produce several DHS guides related to the NFL's stadium and security technology: an *Evacuation Planning*

FETY%20Act%20Webinar%20Stadium%20Security.pdf&contentType=application/pdf (last visited Mar. 5, 2017).

[108] *Id.* at 6.

[109] David Broughton, *Comerica Park Earns Safety Act Designation*, STREET & SMITH'S SPORTS BUS. J. (Oct. 5, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/10/05/Facilities/Safety-Act-Comerica.aspx.

[110] *Id.*

[111] *See id.* (noting that Comerica Park earned the relevant Safety Act designation and that the NFL has equal or greater qualifications).

[112] Frank, *supra* note 6.

[113] *Id.*

[114] *See* 6 C.F.R. § 25.10 (2016).

Guide for Stadiums,[115] the *Protective Measures Guide for the U.S. Outdoor Venues Industry*,[116] and a *Sports Venue Bag Search Procedures Guide*,[117] the latter of which listed the NFL's *Best Practices for Stadium Security* as a reference document.[118]

The NFL subsequently renewed their SAFETY Act accreditation in 2013,[119] The NFL's SAFETY Act Designation and Certification describes their technology:

> November 14, 2013 - The National Football League provides National Football League ("NFL") Best Practices for Stadium Security (the "Technology"). The Technology is a set of guidelines for football stadium security management designed to deter and defend against terrorist attacks at sports stadiums. It includes standards for non-game day operations, game day operations, and threat assessments and emergency plans. The Technology also includes the NFL's Stadium Security Evaluation and Compliance Program, the hiring, vetting, qualifications, and training of the personnel used to provide the programs and services. The Technology does not include each NFL club's or stadium owner's or operator's implementation of the Technology. This Designation and Certification will expire on November 30, 2018.[120]

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[115] *Evacuation Planning Guide for Stadiums*, U.S. DEP'T OF HOMELAND SEC. (2008), https://www.hsdl.org/?view&did=30626.
[116] *Protective Measures Guide for the U.S. Outdoor Venues Industry*, U.S. DEP'T OF HOMELAND SEC. (June 2011), https://info.publicintelligence.net/DHS-OutdoorVenues.pdf.
[117] *Sports Venue Bag Search Procedures Guide: Commercial Facilities Sector Specific Agency*, U.S. DEP'T OF HOMELAND SEC. (May 2012), https://www.dhs.gov/sites/default/files/publications/sports-venue-bag-search-guide-508.pdf.
[118] *Id.* at 17.
[119] *See National Football League*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Nov. 14, 2013), https://www.safetyact.gov (follow "Approved Technologies" hyperlink; then "Search NFL" hyperlink).
[120] *Id.*

As previously noted, the NFL received their Designation and Certification on December 18, 2008, renewing it on November 14, 2013; it is due to expire November 30, 2018.[121] The NFL's technology was speculated to be only for Super Bowls, however, HOK, a company that ran Super Bowl XLI in Miami, Florida, [122] had SAFETY Act Designation for the event.

Other sports teams, stadiums, and leagues can be found on the Approved Technology list, however, of the 724 technologies on it, only 15 of them belong to a professional sports league or venue.[123] All of their listings define their "Technology" as a security plan.

NFL teams with accreditations include the New York Giants' and New York Jets' shared stadium, the New Meadowlands Stadium Company, [124] the Arizona Cardinals' University of Phoenix Stadium,[125] the Washington Redskins'

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[121] *Id.*

[122] *DHS Safety Act Approvals*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT 23 (June 23, 2011), http://safetyactconsultants.com/yahoo_site_admin/assets/docs/SAFETY_Act_Approvals_as_of_12-23-2011.356103211.pdf.

[123] *See generally Approved Technologies,* U.S. DEP'T OF HOMELAND SEC. SAFETY ACT, https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (last visited Feb. 25, 2017).

[124] *New Meadowlands Stadium Company, LLC*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Dec. 20, 2013), https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (search keyword field for "meadowlands"). The New York Giants and New York Jets' shared stadium, the New Meadowlands Stadium Company, LLC received their Designation and Certification December 20, 2013, for the MetLife Stadium Security Program (the "Technology"). Their technology also states the technology applies during non-game days as well, and during special events. Their accreditation expires January 31, 2019. *Id.*

[125] *Arizona Sports and Tourism Authority ("AZSTA")*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Dec. 17, 2014), https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (search keyword field for "Arizona"). The Arizona Cardinal's home, run by the Arizona Sports and Tourism Authority (AZSTA) received their Designation and Certification on December 17, 2014, based on the University of Phoenix (UoPS)

FedEx Field (WFI Stadium Inc.),[126] the Green Bay Packers' Lambeau Field,[127] and the San Francisco Forty Niners' Levi's Stadium.[128] Additionally, there are other NFL teams reportedly in the process of applying, including the Buffalo Bills, Cleveland Browns, and the Tennessee Titans.[129]

IV. DISCUSSION

While it has yet to be tested in court,[130] the SAFETY Act incentivized the NFL and others to create a security plan, the "technology." Perhaps DHS has offered liability immunity for a

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Stadium Security Program. It is "performed in accordance with the NFL Best Practices for Stadium Security." *Id.* Their Designation and Certification expires on January 31, 2020. *Id.*

[126] *WFI Stadium, Inc.*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Feb. 18, 2015), https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (search keyword field for "fedex"). The Washington Redskin's FedEx Field (WFI Stadium Inc.) received Designation on February 18, 2015. WFI provides the FedExField Security Program, and it will expire on March 31, 2020. *Id.*

[127] *Id.* The Green Bay Packers' Lambeau Field received Designation and Certification in April 2016 through May 2021. The Green Bay Packers, Inc. provides Lambeau Field Security Program, which is "the Applicant's implementation of the National Football League's Best Practices for Stadium Security . . . ." *Id.*

[128] The San Francisco Forty Niners Stadium Management Company LLC, the Santa Clara Stadium Authority, and the City of Santa Clara provide Levi's® Stadium Security Program (the "Technology"). They received their Designation June 2016 and it expires on June 30, 2021. The Forty Niners Levi's® Stadium Security Program: "The Technology is a comprehensive, integrated security program comprised of security policies and procedures, physical and electronic security equipment, tools, emergency planning processes and procedures, and properly trained personnel. The Technology, a 24-hour/7-days per week security program, is deployed during National Football League (NFL) events and Special Events (concerts, Non-NFL sporting events, functions and entertainment events) and Non-Event Days." *Id.*

[129] Broughton, *supra* note 8.

[130] Steve Ragan, *SAFETY Act Liability Shield Starts Showing Cracks,* CSO ONLINE (May 6, 2015, 3:30 PM), http://www.csoonline.com/article/2919609/advanced-persistent-threats/safety-act-liability-shield-starts-showing-cracks.html.

potential terrorist attack on a stadium, making it nearly impossible for consumer spectators to sue for standard negligence[131] because it is well aware of the potential disaster a terrorist attack in an NFL stadium could cause. In August 2008, DHS funded a study that simulated the impact of a bio-terrorist attack at a sports stadium and estimated the economic loss to $62 to $73 billion.[132] The study called for 7,000 lives lost and 20,000 illnesses, "followed by the reduced demand for sports stadium visits."[133] The study went on to explain the fallout,

> We assume that any professional sports games would be cancelled for one month after the hypothetical biological attack on an NFL stadium, which translates to about an eight percent reduction in annual attendance at professional sports games. We expect that a significant proportion of sports fans would avoid attending sports games even after the professional sports league resumes play.[134]

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[131] Sullivan, *supra* note 9.

[132] Bumsoo Lee et al., *Simulating the Economic Impacts of a Hypothetical Bio-Terrorist Attack: A Sports Stadium Case*, CREATE HOMELAND SEC. CTR. (2008), http://research.create.usc.edu/cgi/viewcontent.cgi?article=1137&context=published_papers.

[133] *Id*. at 5. The analysis was based on the scenario that terrorists release a bio agent in a stadium where an NFL game is playing for an attendance of 75,000 spectators. The analysis states:

> A desktop analysis using Hazard Prediction and Assessment Capability (HPAC) employing notional biological agents, urban density and weather conditions predicted a range of potential consequences. This economic scenario models an attack in which 20,000 illnesses and 7,000 casualties occur among the attendees. In this scenario, the bio agent would contaminate a neighboring area of 5.5 km2 and would cause an additional 11,000 illnesses and 3,600 deaths.

Id.

[134] *Id.* at 9.

With this knowledge, DHS may decide that an incident was an Act of Terrorism whether or not it actually was, in order to protect and possibly save the NFL over the rights of 75,000 spectators.[135]

An anti-terrorism technology such as the *NFL Best Practices for Stadium Security* may do little to save lives or protect spectators from an act of terrorism.[136] Specifically, an incident occurred during a televised Monday Night Football game on November 3, 2015, at the Carolina Panthers' Bank of America Stadium in Charlotte, North Carolina.[137] Two spectators used ropes and climbing gear to lower themselves from upper deck seats to hang a large banner.[138] They were arrested and charged with "trespassing, resisting arrest and dropping an object at a sporting event."[139] The spectators entered with purchased tickets,[140] went through security at the gate, and somehow managed to enter with climbing gear.[141] Security firm ASIS

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[135] *See id.* at 5.

[136] *See* Polly Mosendz, *Protesters Arrested for Rappelling Into Bank of America Stadium During NFL Game*, NEWSWEEK (Nov. 3, 2015, 9:18 AM), http://www.newsweek.com/fracking-protesters-arrested-propelling-bank-america-stadium-during-monday-389990 (describing an incident where spectators were able to smuggle rappelling gear into the stadium despite anti-terrorism technologies).

[137] *Id*.

[138] *Id.*

[139] *Id.*

[140] David Perlmutt, Cleve Wootson Jr. & Mark Washburn, *Carolina Panthers Pouring Over Tapes for Clues to Monday Night Football Protesters Breach,* THE CHARLOTTE OBSERVER (Nov. 5, 2015, 7:15 PM), http://www.charlotteobserver.com/news/local/article43301241.html#storylink=cpy.

[141] *Id.* The four purchased tickets to the game through the NFL Ticket Exchange, one stated the four entered the stadium with other fans and went through security, and was checked with a handheld metal detector. Photographs showed they were dressed in baggy clothes, hoodies, rain ponchos and hats. A spectator observed, "[t]hey had this whole system ready . . . it took them literally 20 seconds to stand up and rappel off the top . . . [i]t happened so fast, they just took everybody by surprise. No one knew what to do." Below in section 339, Danielle Wilson of Charlotte caught something in the corner of her eye and glanced up. Two spectators behind her decided to leave, Wilson said. "I heard them say, 'Maybe this is some kind of terrorist

International wrote that the NFL's "prohibited items list for stadiums" made no mention of rope or climbing gear, but that "most do include that the stadium has the right to prohibit any items they consider a security risk."[142]

Had there been injuries and DHS deemed it an Act of Terrorism, the injured spectators would have no legal recourse[143] against the seller-NFL or stadium, because of their SAFETY Act protections, even if they were negligent.

V. IMPLICATIONS

In order to get anti-terrorism technology to the commercial market quickly and to potentially save lives, the SAFETY Act allows many products to qualify as a technology, [144] and for many companies to have liability protections as a seller. [145] However, based on its poorly articulated interpretation of the government contractor defense,[146] the SAFETY Act remains unclear as to whether it can deliver the substantial liability protections it promotes. The SAFETY Act attempts to remain consistent with *Boyle* and to supplant it. This duplicity "may leave Sellers questioning the certainty of their liability protections under the SAFETY Act" until they are defined in court. [147]

More importantly, it remains to be seen if SAFETY Act approved anti-terrorism technology will work as intended. During a live Monday Night Football broadcast, the NFL's SAFETY Act anti-terrorism technology was proven a spectacular failure.[148] Yet despite its failure, had the incident been an actual Act of Terrorism, the NFL would not be liable to injured spectators.

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situation.' That thought entered my mind once or twice."

[142] Nancy Serot & Thomas K. Zink, *Securing the Fan Experience*, ASIS INT'L: SEC. MGMT. (Feb. 9, 2015), https://sm.asisonline.org/Pages/Securing-the-Fan-Experience.aspx.

[143] 6 C.F.R. § 25.7(d) (2017).

[144] Sullivan, *supra* note 9.

[145] *See* 6 C.F.R. § 25.7 (2017).

[146] *See* Levin, *supra* note 68, at 194.

[147] *See* Levin, *supra* note 68, at 188.

[148] Mosendz, *supra* note 138.

The NFL's anti-terrorism technology failure raises the issue of whether or not a security plan should qualify as an anti-terrorism technology and receive liability protection since it is a method, not a service or a product for sale. The common elements in both the SAFETY Act and the judicially established government contractor defense is a seller, a buyer, a product and a sale. The SAFETY Act advocates for the seller, the company making the technology (product), and mentions the buyer and their protections downstream as well.[149] Regarding the sale of a technology, the SAFETY Act states the "presumption of the government contractor defense shall apply regardless of whether the claim against the Seller arises from a *sale* of the product to Federal Government or non-Federal Government customers."[150] Loosely interpreted, the government contractor defense is contingent upon a sale.

This begs the question: is the NFL selling its technology? NFL football spectators are probably not receiving a nine-page security plan with their ticket. With a security plan for a technology, without a sale, it is debatable how the NFL qualifies as a seller under the SAFETY Act, and subsequently, how they would qualify for the government contractor defense.

VI. CONCLUSION

The SAFETY Act is an incentive for companies that make technology by removing the hindrance of product liability in getting it to market for life saving use.[151] But was the intent of the law to also "protect ballparks and give them a get-out-of-jail-free card, as long as they didn't lie . . . during the approval process"?[152]

Given the potential consequences,[153] with 112 combined venues used by the professional sports leagues, it is surprising that so few have applied for the "the mother of all liability waivers,"[154] offered by the SAFETY Act. It may be that in a legal contest its ambiguous language and divided congressional

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[149] *See* 6 C.F.R. § 25.7 (2006).
[150] 6 C.F.R. § 25.8(b) (2006).
[151] Levin, *supra* note 68, at 177.
[152] Sullivan, *supra* note 9.
[153] Lee, *supra* note 134, at 5.
[154] Sullivan, *supra* note 9.

intent may send the courts to consider all relevant case law, making its advertised liability protections tenuous. As for spectators of NFL football games, the SAFETY Act may just be another axiomatic waiver on the back of their ticket they're unaware they were sold.[155]

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[155] *Sullivan*, *supra* note 9.

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GENERAL COUNSELS IN SPORTS: AN ANALYSIS OF THE RESPONSIBILITIES, DEMOGRAPHICS, AND QUALIFICATIONS

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ABSTRACT

This Article is the first ever in-depth analysis of the responsibilities, demographics, and qualifications for general counsels of clubs in the four major North American sports leagues: the National Football League (NFL); Major League Baseball (MLB); the National Basketball Association (NBA); and, the National Hockey League (NHL). As the highest-ranking attorney at each club, general counsels are prominent individuals in both the sports and legal industries. We sought to better understand their roles and experiences.

Our analysis did not reveal any essential characteristic or qualification on the path to becoming a general counsel. Nevertheless, we did find several interesting pieces of information. Specifically:

(1) Prestige matters. Fifty-two general counsels (49.5%) attended a law school currently ranked in the top 25

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and seventy-five of them (66.4%) previously worked at a law firm of at least 101 attorneys.

(2) Prior experience at a league office or at a major sports law firm helps, but is not essential. Only seventeen general counsels (15.0%) previously worked at a law firm with a substantial sports law practice, and only ten (8.8%) previously worked at a league office.

(3) More gender and racial diversity is needed in the roster of general counsels. Only twenty-one (18.6%) general counsels are female and only sixteen (14.1%) are non-white.

The Article includes other information about the backgrounds of general counsels, including their age, the industries in which they previously worked, and the amount of legal experience they obtained before becoming a general counsel. Ultimately, we hope that this Article helps shed light on an important role in the sports industry, and provides guidance for those who seek to aspire to such heights.

INTRODUCTION

Careers in the sports industry are highly sought after and competitive.[2] Similarly, in recent years, careers in the legal industry have become highly competitive as the industry has undergone changes.[3] It thus stands to reason that legal careers in

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[2] GLENN M. WONG, THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS 3 (Shoshanna Goldberg et al. eds., 2d ed. 2013) ("There is a high demand from people who want to work in the sports industry, and there is a limited supply of jobs.").

[3] *See*, *e.g.*, Peter Lattman, *Dewey & LeBoeuf Crisis Mirrors Legal Industry's Woes*, N.Y. TIMES (Apr. 25, 2012, 6:21 PM), http://dealbook.nytimes.com/2012/04/25/dewey-leboeuf-crisis-mirrors-the-legal-industrys-woes [https://perma.cc/4ZV4-ET82] (discussing the outlook and future for the legal industry); Elizabeth Olson, *Burdened With Debt, Law School Graduates Struggle in Job Market*, N.Y. TIMES (Apr. 26, 2015), http://www.nytimes.com/2015/04/27/business/dealbook/burdened-with-debt-law-school-graduates-struggle-in-job-market.html [https://perma.cc/MHL6-3QN7] (discussing the difficulty law school graduates have in securing employment in the legal industry).

the sports industry are extremely competitive. Nevertheless, skilled and intelligent individuals have managed to traverse these competitive challenges to reach the upper echelons of both the sports and legal industries. These individuals are the general counsels of professional sports clubs.

This Article is the first ever in-depth analysis of the responsibilities, demographics, and qualifications for general counsels of clubs in the four major North American sports leagues: the National Football League (NFL); Major League Baseball (MLB); the National Basketball Association (NBA); and, the National Hockey League (NHL). This Article builds on prior work we have done analyzing the responsibilities, characteristics and qualifications of club general managers in the NFL,[4] MLB,[5] and NBA,[6] as well as of athletic directors at National Collegiate Athletic Association (NCAA) Division I institutions.[7]

Before proceeding, it is important to understand who we are talking about when discussing general counsels. Black's Law Dictionary provides the following definitions for a general counsel:

1. A lawyer or law firm that represents a client in all or most of the client's legal matters, but that sometimes refers extraordinary matters – such as litigation and intellectual-property cases – to other lawyers.

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[4] *See* Chris Deubert, Glenn M. Wong & Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications and Characteristics*, 20 VILL. SPORTS & ENT. L. J. 427 (2013).

[5] Glenn M. Wong & Chris Deubert, *Major League Baseball General Managers: An Analysis of Their Responsibilities, Qualifications and Characteristics*, 18 NINE: J. BASEBALL HIST. & CULTURE 74 (2010), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1587675.

[6] Glenn M. Wong & Chris Deubert, *National Basketball Association General Managers: An Analysis of the Responsibilities, Qualifications and Characteristics*, 18 VILL. SPORTS & ENT. L. J. 213 (2011).

[7] Glenn M. Wong, Christopher R. Deubert & Justin Hayek, *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L. J. 1 (2015).

2. The most senior lawyer in a corporation's legal department, usu[ally] also a corporate officer.[8]

We adopt the Black's Law Dictionary definition for our purposes here with one clarification – we are interested only in those attorneys that are employed by the club (or the entity that owns the club) – not attorneys that act in a general counsel capacity but are employed by a law firm. Additionally, titles do not control the individuals included in our analysis. While individuals discussed in this Article often have a variety of titles, usually but not always including general counsel, for purposes of this Article we mean for the term "general counsel" to include any individual that is the highest-ranking attorney at a club, and who on a regular basis provides legal advice to the club. As a result of our definition, and as will be discussed further in Part II, not all clubs have a general counsel; these clubs instead rely primarily on outside counsel, *i.e.* attorneys that are not employed by the club, for legal matters.

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This Article will proceed in four parts: Part I discusses the responsibilities of a club's general counsel; Part II discusses those clubs that do not have a general counsel; Part III examines the demographics of club general counsels, including age, race/ethnicity, and gender; and, Part IV examines the qualifications of club general counsels, including information about their law schools, and prior work experience, including experience in the sports industry. Finally, we conclude with thoughts on the paths to becoming a general counsel for a club.

I. RESPONSIBILITIES OF GENERAL COUNSELS

General counsels, in all industries, "occup[y] multiple roles within the organization."[9] In particular, these roles generally include: (1) providing legal advice to the corporation; (2) serving as a senior member of the executive team; (3) administrating the corporation's internal (or "in-house") legal

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[8] *Counsel*, BLACK'S LAW DICTIONARY (10th ed. 2014); *General Counsel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[9] Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 955 (2005).

department; and, (4) managing external relationships, such as outside counsel.[10] Below, we describe each of these roles as it relates to sports club general counsels.

A. PROVIDING LEGAL ADVICE TO THE CLUB

General counsels are not necessarily experts in any area of law, and are more likely to be experienced or knowledgeable about several areas of law.[11] The Association of Corporate Counsel, a professional association of attorneys working in-house at a variety of corporations and private sector organizations (such as general counsels), has conducted surveys of in-house counsel,[12] that provide useful data on this issue. According to a 2015 survey, the ten primary practice areas for in-house counsel, listed in order of the number of counsel practicing in that area, are: (1) contracts; (2) general commercial/contracts; (3) corporate transactions; (4) compliance/ethics; (5) employment/labor; (6) generalist; (7) corporate governance; (8) intellectual property; (9) litigation; and, (10) law department management.[13] The practices of general counsels for sports clubs are likely similar.

Writing and negotiating agreements for the club is one of the general counsel's most important jobs. Sports clubs enter into a wide variety of agreements, many of which relate to the stadium or arena in which the club plays. The type of agreement may vary depending on whether the club owns the facility, but

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[10] *Id.* at 957–58.

[11] *See* Erik Spanberg, *Teams Find Safety in Numbers When It Comes to Their Legal Staff*, SPORTS BUS. J. (May 11, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/11/In-Depth/Team-counsel.aspx [https://perma.cc/N5M2-FKMV] (discussing the variety of areas in which sports club general counsels practice).

[12] *See* ASS'N OF CORP. COUNSEL, 2015 ACC GLOBAL CENSUS A PROFILE OF IN-HOUSE COUNSEL (2015) [hereinafter 2015 ACC GLOBAL CENSUS], http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1411922&page=/legalresources/surveys/index.cfm&qstring=&title=2015%20ACC%20Global%20Census%20Executive%20Summary&recorded=*1* [https://perma.cc/57X7-MHFD]. The 2015 survey gathered data from 5,012 in-house attorneys, 59% of whom were located in the United States. *Id.* at 33.

[13] *Id.* at 28.

typical contracts that need negotiating are financing arrangements, leases (including those with municipalities), vendor agreements with food service and maintenance companies, luxury box contracts, and agreements with companies looking to advertise in or around the facility.[14]

General counsels' contract-related duties also extend into their employment and labor practice. General counsels will be involved in the drafting and negotiation of contracts for the clubs' most important employees, including the general manager and coaches.[15] Nevertheless, general counsels' role in drafting or negotiating player contracts is generally limited. All the leagues have standard contracts,[16] and complex contract rules.[17] Conformity with these rules and addendums to the standard contracts are generally governed by the leagues' attorneys.[18]

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[14] *See* Spanberg, *supra* note 11 (discussing types of contractual agreements General Counsels enter on behalf of the organization).

[15] *See, e.g.*, *#15 – Jeff Gewirtz – EVP Brooklyn Nets & Barclays Center – Part 2,* LAWINSPORT (Oct. 23, 2013), https://soundcloud.com/lawinsport/jeff-gewirtz-part-2 [https://perma.cc/8S27-GM8L] (discussing Gewirtz's role of aiding General Manager Billie King in drafting head coach, assistant coach, scouts, and assistant general manager contracts).

[16] *See, e.g.*, *2012-2016 Basic Agreement*, MLB.COM 227–294 (Dec. 12, 2011), http://mlb.mlb.com/pa/pdf/cba_english.pdf; *NBA Collective Bargaining Agreement*, SCRIBD (Dec. 8, 2011), https://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011; *NFL Collective Bargaining Agreement*, NFL 256–264 (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf; *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, NHL.COM 310–321 (Feb. 15, 2013), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf.

[17] *See* CHRISTOPHER R. DEUBERT ET AL., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues,* THE FOOTBALL PLAYER'S HEALTH STUDY AT HARV. UNIV. (forthcoming 2017), http://petrieflom.law.harvard.edu/research/fphs (discussing salary cap and compensation rules in the NFL, MLB, NBA, NHL, Canadian Football League and Major League Soccer).

[18] *See, e.g.*, *NHL Rejects Kovalchuk Deal*, ESPN (July 21, 2010), http://www.espn.com/new-york/nhl/news/story?id=5397588 [https://perma.cc/EWX9-Y25X] (highlighting the role leagues play in governing collectively bargained standard player contracts).

Beyond employment contracts, general counsels must ensure the club's compliance with a wide variety of employment-related statutes, regulations and policies, including but not limited to those related to wages, [19] discrimination, [20] benefits, [21] and retirement plans,[22] for both players and other club employees.

The area of intellectual property is one of significant and growing importance to general counsels. Licensing of league and club games for broadcasting on television and radio networks is one of, if not the, highest sources of revenue for leagues and clubs.[23] While the NFL sells the television and radio broadcast

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[19] *See, e.g.*, *Wage and Hour Division (WHD)*, U.S. DEP'T OF LABOR, https://www.dol.gov/whd/flsa/ [https://perma.cc/8NKL-5C2E] (last visited Feb. 22, 2017) (discussing the Fair Labor Standards Act regulating wages and hours of work).

[20] *See, e.g.*, *Laws Enforced By EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/statutes/ [https://perma.cc/G24Q-D7GH] (last visited Feb. 22, 2017) (discussing laws prohibiting various forms of discrimination in the workplace).

[21] *See, e.g.*, 26 U.S.C. § 4980H (2016) (obligating employers who employ an average of at least 50 full-time employees on business days to provide some basic level of health insurance to its employees or pay a financial penalty).

[22] *See, e.g.*, *Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/erisa (last visited Feb. 22, 2017) [https://perma.cc/AYQ3-ZS4T] (describing ERISA as "…a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans").

[23] *See* Kurt Badenhausen, *New York Knicks Head the NBA's Most Valuable Teams at $3 Billion*, FORBES (Jan. 20, 2016, 9:57 AM) http://www.forbes.com/sites/kurtbadenhausen/2016/01/20/new-york-knicks-head-the-nbas-most-valuable-teams-at-3-billion/#79c3325d2d3a [https://perma.cc/H2U8-SEMQ] (discussing impact of media rights on NBA revenues); Maury Brown, *MLB Sees Record Revenues for 2015, Up $500 Million and Approaching $9.5 Billion*, FORBES (Dec. 4, 2015, 4:40 PM), http://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#2e3f48712307 [https://perma.cc/KJ5R-TNL6] (discussing impact of media rights on MLB revenues).

rights to all of its games (except preseason) collectively,[24] in MLB, the NBA and the NHL, the clubs are able to sell all games not included in national television packages to local television and radio stations on an individual basis.[25] These revenue streams are vital to the clubs' operations. For example, in 2016, MLB clubs' local television contracts brought in a mean of approximately $53.48 million.[26] Also in the realm of intellectual property, another important source of revenue for clubs is the licensing of the club name and logos.[27] Clubs enter into agreements with a wide variety of companies that either want to sell items with the club name and logo, or want to be associated with the club, generally as an official sponsor of some kind.[28] General counsels must ensure that these agreements comply with the law, protect the clubs' rights and comply with league policies about such arrangements. For example, the NFL's advertising policy prohibits advertisements containing firearms, ammunition, weapons, contraceptives, tobacco products, gambling, and fireworks.[29]

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[24] *See* Matthew J. Mitten & Aaron Hernandez, *The Sports Broadcasting Act of 1961: A Comparative Analysis of its Effects on Competitive Balance in the NFL and NCAA Division I FBS Football*, 39 OHIO N.U. L. REV. 745, 745–52 (2013) (discussing the collective sale of television rights by professional sports leagues).

[25] Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 886–87 (2009).

[26] Craig Edwards, *Estimated TV Revenues for All 30 MLB Teams*, FANGRAPHS (Apr. 25, 2016), http://www.fangraphs.com/blogs/estimated-tv-revenues-for-all-30-mlb-teams/ [https://perma.cc/949Y-2FJY].

[27] Feldman, *supra* note 24, at 888–89; John A. Fortunato & Shannon E. Martin, *American Needle v. NFL: Legal and Sponsorship Implications*, 9 DENV. U. SPORTS & ENT. L.J. 73, 74–75 (2010).

[28] *Id.*

[29] *See* Julia Ritchey, *VIDEO: Super Bowl Ad Controversy Puts Georgia Gunmaker in Spotlight*, SAVANNAH MORNING NEWS, http://savannahnow.com/exchange/2013-12-06/super-bowl-ad-controversy-puts-georgia-gunmaker-spotlight [https://perma.cc/HEE5-EG7K] (last updated Dec. 7, 2013, 9:54 AM) (discussing the NFL's

There is an important limitation to the advice general counsels provide. General counsels provide legal advice for the entity for which they work (through its employees), but not for the employees of the entity for which they work.[30] This distinction can become problematic if the general counsel believes a fellow employee has committed an act that violates a legal obligation of the entity. In such situations, the general counsel has an obligation to protect the interests of the entity – not the other employee.[31] Non-lawyers are not always aware of this distinction, which has necessitated a practice whereby general counsels advise employees during internal or other legal investigations that the general counsel represents the entity, not the employee.[32]

B. SERVING AS A SENIOR MEMBER OF THE CLUB'S EXECUTIVE TEAM

A general counsel's principal role, as explained above, is to provide the club with legal advice. Nevertheless, given the importance of their role as a trusted legal advisor, general counsels often take on broader responsibilities, including advising on and managing the club's business and other non-legal affairs. A useful example of a general counsel that has taken on an expanded role is New York Yankees Chief Operating Officer and General Counsel Lonn Trost. Trost, who began working as the Yankees' outside counsel in 1975, described his current responsibilities as follows:

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policy that advertisements for "firearms, ammunition, and other weapons are prohibited").

[30] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2016); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 190–94 (2001) (stating that the lawyer's primary professional responsibility is to assist the organization entity to achieve its goals and objectives).

[31] *Id.*

[32] *See* Grace M. Giesel, *Upjohn Warnings, The Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109, 110–12 (2010).

> As general counsel, I provide advice to the Yankees and its affiliates, handling everything from contracts and disputes to radio, TV, Internet, and social media issues…. As COO, I'm responsible for everything from personnel to events in the stadium. One day I may be concerned about a leaky joint in the stadium or how loud the music is being played, and the next day it may be player agreements.[33]

Trost is among the oldest and most experienced general counsels in sports. Thus, it stands to reason that he would ascend to more influential roles within the club.

While Trost's non-legal roles are of a business nature, some general counsels do evolve into roles that more directly affect the on-field/court/ice play of the club. In 2016, the Cleveland Browns promoted then-General Counsel Sashi Brown to Executive Director of Football Operations, providing Brown with control over the club's roster.[34] Brown's direct involvement in player personnel decisions is a rare progression for an attorney, but nevertheless one that might occur on occasion.[35]

There are also potential complications that come with providing non-legal advice. While such advice is permitted by codes of ethics,[36] it can create ethical dilemmas for general

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[33] Julie Edwards, *Rallying Your Team Behind the Cause*, MOD. COUNS., http://modern-counsel.com/2015/new-york-yankees/ [https://perma.cc/J5ZU-JAGE] (last visited Feb. 22, 2017).

[34] Zac Jackson, *Haslam Gives Sashi Brown Roster Control, Denies Marrone Interview Scheduled*, PROFOOTBALLTALK (Jan. 3, 2016, 8:43 PM), http://profootballtalk.nbcsports.com/2016/01/03/haslam-gives-sashi-brown-roster-control-denies-marrone-interview-scheduled [https://perma.cc/CUB7-QJFU].

[35] *See, e.g.*, Mike Tannenbaum, MIAMI DOLPHINS, http://www.miamidolphins.com/team/staff/Tannenbaum Mike/3994258c-8b67-43a8-b178-73bd76764b07 [https://perma.cc/DY4Q-FJ4Y] (last visited Feb. 22, 2017); Howie Roseman, PHILA. EAGLES, http://www.philadelphiaeagles.com/team/staff/howie-roseman/930d39c9-7d61-4bd3-b061-85b8656e793e [https://perma.cc/8RE5-FPXC] (last visited Feb. 22, 2017).

[36] *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

counsel.[37] By helping the corporation make business decisions, the general counsel might find it difficult to provide the independent and effective legal advice that the corporation needs.[38] Additionally, blurring the types of advice provided by the general counsel potentially eliminates the attorney-client privilege for certain communications between the general counsel and the corporation where it might not be clear which type of advice the general counsel is providing.[39] These are important considerations for attorneys that might progress from general counsel to senior executive positions.

C. ADMINISTRATING THE CLUB'S LEGAL STAFF

A general counsel is also responsible for overseeing other lawyers that work for the corporation.[40] While some corporations require tens or even hundreds of lawyers,[41] professional sports clubs are much smaller. Most clubs have two in-house attorneys – a general counsel and associate counsel – supplemented by outside counsel as needed.[42] Indeed, as discussed below in Section IV.B.6, many general counsels previously worked as associate or assistant counsels at the club for which they are now general counsel.

There often are other lawyers working for the clubs that are worth mentioning. All four of the sports leagues employ

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[37] *See* Kim, *supra* note 30, at 226–45 (discussing the potential problems that can arise when representing an organizational entity).
[38] *See id.* at 227–235.
[39] *See id.* at 239–42.
[40] Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 969 (2005).
[41] *See, e.g.*, *id.* at 977 (discussing Enron's 250 lawyers); Peter Robinson, Adam Satariaon & Monte Reel, *Here Are the Legal Generals Behind Apple's Brawl with the FBI,* BLOOMBERG (Mar. 4, 2016, 5:00 AM), http://www.bloomberg.com/news/articles/2016-03-04/apple-defense-pairs-cyberpioneer-with-architect-of-samsung-brawl [https://perma.cc/DGR5-5CHD] (mentioning Apple's 500 lawyers); Kathryn Kranhold, *GE's Key Lawyer Rewired the Game*, WALL ST. J. (Oct. 31, 2005, 12:01 AM), http://www.wsj.com/articles/SB113072236623783871 [https://perma.cc/DQ8E-TQ62] (mentioning General Electric's 1,100 lawyers).
[42] *See* Spanberg, *supra* note 11.

some form of a salary cap and/or luxury tax system that restricts, in varying degrees of flexibility, the amount clubs can spend on player salaries.[43]

Concomitant with these systems are complicated rules governing player contracts, including, but not limited to, minimum and maximum salaries, maximum contract lengths, regulations over the types of bonuses permitted, and how a player's salary counts against the salary cap or luxury tax system.[44] As a result, most clubs employ someone responsible for these tasks; in the NFL, they are generally known as the director of football administration;[45] in MLB, the NBA and NHL, such roles are often filled by assistant general managers,[46] but it's becoming more common that such roles are being combined with individuals handling statistical analysis (analytics) for the club.[47] Some of these individuals have law

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[43] *See* DEUBERT ET AL., *supra* note 17.
[44] *Id.*
[45] *See Front Office*, TAMPA BAY BUCCANEERS, http://www.buccaneers.com/team/staff/mike-greenberg/c2f64209-be37-46de-9db7-f6bf0dc4777c [https://perma.cc/9WRD-ZCU2] (last visited Feb. 22, 2017) [hereinafter Mike Greenberg]; *New York Jets Media Guide*, NEW YORK JETS LLC (Aug. 11, 2016, 7:17 AM), http://prod.static.jets.clubs.nfl.com/assets/docs/New-York-Jets-Media-Guide.pdf [https://perma.cc/2PRT-B8HX] [hereinafter Jacqueline Davidson] (providing the biography of Jacqueline Davidson).
[46] *See, e.g.*, *Executive Staff*, CHARLOTTE HORNETS, http://www.nba.com/hornets/executive-staff [https://perma.cc/4TAJ-Q2UJ] (last visited Feb. 22, 2017); *Front Office Biographies*, ARIZ. DIAMONDBACKS, http://arizona.diamondbacks.mlb.com/ari/team/exec_bios/minniti_bryan.jsp [https://perma.cc/YU2L-2X2N] (last visited Jan. 21, 2017); *Ryan Martin*, DETROIT RED WINGS, http://redwings.nhl.com/club/page.htm?id=43962 [https://perma.cc/2W3C-CYPD] (last visited Feb. 22, 2017).
[47] *See, e.g.*, *Clippers 2015–16 Information Guide*, L.A. CLIPPERS, http://i.cdn.turner.com/nba/nba/.element/media/2.0/teamsites/clippers/2015-16_LA-Clippers_Media-Guide.pdf [https://perma.cc/CLT4-8R7T] (last visited Feb. 22, 2017) (providing the biography of Jud Winton); *Team*, TAMPA BAY LIGHTNING, http://lightning.nhl.com/club/page.htm?id=109144 [https://perma.cc/9KU3-DX5Z] (last visited Feb. 22, 2017).

degrees.[48]

Nevertheless, the general counsel generally does not supervise these salary cap and contract professionals. While the general counsel may occasionally provide advice concerning a contract or the collective bargaining agreement, these professionals generally report to the general manager, who is responsible for the club's roster. Consequently, the attorneys who the general counsel must supervise generally only include one or two associate counsels, and outside counsel, discussed next.

D. MANAGING EXTERNAL RELATIONSHIPS

One of the general counsel's most important duties in any industry is to know when to seek additional legal help. As discussed above, general counsels must handle a wide variety of legal issues. However, if one matter becomes too complicated or time consuming, it is best to hire a law firm to handle the matter. In the 2015 Association of Corporate Counsel survey, in-house counsel were asked for what types of legal matters the corporation frequently consulted outside counsel; the top ten areas were: (1) litigation (consulted 67% of the time); (2) employment/labor (50%); (3) intellectual property (41%); (4) corporate transactions (36%); (5) mergers/acquisitions (34%); (6) antitrust/trade (26%); (7) tax (23%); (8) real estate (19%); (9) securities/governance (18%); and, (10) international (16%). Notably, some of the areas for which outside counsel are most frequently consulted are areas of frequent and particular relevance to the world of sports: litigation; employment/labor; intellectual property; and, antitrust/trade.

Choosing outside counsel is an important and competitive process.[49] Law firms seek to impress general counsels in hopes of securing interesting and lucrative work,[50]

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[48] *See, e.g.*, Jacqueline Davidson, *supra* note 45; Mike Greenberg, *supra* note 44; *Ryan Martin*, *supra* note 46.

[49] *See* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 970–74 (2005).

[50] *See* Melissa Maleske, *How to Woo In-House Counsel in 2016*, LAW360 (Dec. 24, 2015, 8:39 PM),

particularly for professional sports clubs. Not surprisingly, clubs generally work with the biggest and best law firms in the country or their metropolitan area, including many that have long-standing sports law practices. Some of these firms are discussed at length in Section IV.B.4. Firms Practicing Sports Law.

An additional external relationship that general counsels must manage is with the league and the league's attorneys. Each of the sports leagues we discuss in this Article consists of member clubs that are individually owned and operated, with the league serving as a centralized, governing body. The member clubs, collectively and with the guidance of league staff, make decisions about the leagues' policies and practices. The general counsel is sometimes among the club's employees that represent the club at league meetings where potential policy and practice changes are discussed and voted upon.[51] Relatedly, general counsels frequently consult with league employees and attorneys about policies and practices, to better protect both the club's and league's interests.[52]

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With the above understanding of a general counsel's responsibilities, we now move on to discussing those clubs without a general counsel before analyzing the demographics and qualifications of general counsels in Parts III and IV, respectively.

II. CLUBS WITHOUT A GENERAL COUNSEL

Clubs' personnel structure for the handling of legal

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http://www.law360.com/articles/738607/how-to-woo-in-house-counsel-in-2016.

[51] *See, e.g.*, Jim Owczarski, *Bengals' Katie Blackburn Holds Important Place in NFL*, THE CINCINNATI ENQUIRER (Mar. 23, 2016, 7:10 PM), http://www.cincinnati.com/story/sports/nfl/bengals/2016/03/22/cincinnati-bengals-executive-vice-president-katie-blackburn-workplace-diversity/82138824/.

[52] *See, e.g.*, Villanova University, *Moorad Speaker Series: Aileen Dagrosa*, YOUTUBE (Apr. 29, 2016), https://www.youtube.com/watch?v=g-JgwfZVFDs [https://perma.cc/823K-VCDV] (discussing relationship with league office on intellectual property, sponsorship, venue management, security, and player conduct policies and issues).

issues is not uniform. While most clubs have a general counsel as defined in this Article, *i.e.,* handles a wide range of general legal matters for the club, some clubs do not have such a position. Many clubs have attorneys sprinkled throughout other departments who handle tasks that do not necessarily require a law degree, including player personnel,[53] salary cap,[54] and business matters.[55] Nevertheless, these individuals generally lack the broad legal experience and duties of a general counsel and thus are not included in our analysis.

Additionally, there are several attorneys who are employees of, and general counsels to, the entity that owns the club. As a result, these attorneys might handle legal matters beyond those exclusive to the club. For example, Giles Kibbe is General Counsel of Crane Capital Group,[56] an entity principally owned and controlled by Houston Astros owner Jim Crane.[57] Such arrangements are very common in the NBA and NHL, where an entity might own an NBA club and/or an NHL club, and the arena in which one or more clubs play. For example, Peter Miller is General Counsel to Maple Leaf Sports & Entertainment, an entity that owns the NBA's Toronto Raptors, the NHL's Toronto Maple Leafs, and the Air Canada Centre

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[53] *See supra*, note 35; *see also Calgary Flames Executives*, NHL.COM, http://flames.nhl.com/club/page.htm?id=40733 (last visited Feb. 22, 2017) [https://perma.cc/XPG4-SKQG] (including the biography of Brian Burke, President of Hockey Operations for the Flames and a graduate of Harvard Law School).

[54] *See, e.g.*, *Chiefs 2016 Media Guide*, KANSAS CITY CHIEFS 44 (2016), http://prod.static.chiefs.clubs.nfl.com/assets/pdf/2016/2016MediaGuide.pdf [https://perma.cc/29MR-HUJK] (providing background on Trip MacCracken, Director of Football Administration, including J.D. from Duke University School of Law).

[55] *Id.* at 15.

[56] *See Giles Kibbe*, LINKEDIN, https://www.linkedin.com/in/giles-kibbe-132031a8 [https://perma.cc/U8EU-PV6R] (last visited Feb. 22, 2017).

[57] *See Jim Crane Owner and Chairman*, HOUS. ASTROS, http://houston.astros.mlb.com/hou/team/exec_bios/jim_crane.html [https://perma.cc/LQ4H-8ZBR] (last visited Feb. 22, 2017).

where both clubs play.[58] Because these attorneys provide the type of generalized legal services covered in this Article, and because there is a unity of interest between their direct employer and the club, we do include these individuals in our analysis.

Table 1 below provides the number of clubs in each league that lack a general counsel. Instead, these clubs heavily rely on outside counsel for legal work.

Table 1: Teams Without a General Counsel

League	Clubs Without a General Counsel
NFL	2
MLB	3
NBA	1
NHL	3
Total	**9**

The following is a list of those clubs without a general counsel: Kansas City Chiefs;[59] San Diego Chargers;[60] Cincinnati

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[58] Annie Monjar, *Maple Leaf Sports Has Serious Defense*, ADVANTAGE (Mar. 15, 2014), http://advantagemagazine.ca/2014/mlse-2/ [https://perma.cc/8FZR-QTP4].

[59] As discussed in preceding footnotes, the Chiefs have two attorneys on staff, though their roles do not require a law degree. In a recent case that reached the Supreme Court of Missouri, the Chiefs relied on Polsinelli PC, the second largest law firm in Kansas City to represent them. *See* Cox v. Kansas City Chiefs Football Club, Inc., 473 S.W.3d 107 (Mo. 2015); *see also* Andrew McKeegan, *Kansas City's Top Law Firms*, KAN. CITY BUS. J. (Jan. 22, 2016, 5:00 AM), http://www.bizjournals.com/kansascity/subscriber-only/2016/01/22/law-firms.html [https://perma.cc/6HVP-CW8S].

[60] *Mark Fabiani*, SAN DIEGO CHARGERS, http://www.chargers.com/team/staff/roster/mark-fabiani [https://perma.cc/6VVA-W7EB] (last visited Feb. 22, 2017). Although the San Diego Chargers list Mark Fabiani as "Special Counsel" on their website, Fabiani's job description makes clear that his role is limited to "finding a new permanent home for the Chargers." *Id.* Moreover, Fabiani maintains his own consulting firm in addition to his work with the Chargers. *See id.*

Reds;[61] Cleveland Indians;[62] Kansas City Royals;[63] Oklahoma City Thunder;[64] Calgary Flames;[65] Chicago Blackhawks;[66] and, St. Louis Blues.[67] As described in the accompanying footnotes, all of these clubs rely on local law firms for their legal matters.

Finally, it is important to understand how these clubs without general counsels affect our analysis. There are 122 clubs in the NFL, MLB, NBA and NHL combined. We are interested in the universe of clubs that have general counsels. Thus, by subtracting out the nine clubs that do not, the denominator for our analyses is 113 (unless otherwise indicated due to other circumstances).

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[61] The Reds rely on James A. Marx of the law firm Dinsmore & Shohl LLP. *See James A. Marx*, DINSMORE, http://www.dinsmore.com/jim_marx/ [https://perma.cc/Y3E7-U5RA] (last visited Feb. 19, 2017).

[62] The Indians rely on Joseph R. Znidarsic of the law firm Thrasher Dinsmore & Dolan. *See Joseph R. Znidarsic*, THRASHER DINSMORE & DOLAN, http://tddlaw.com/attorneys/joseph-znidarsic-chardon-oh-lawyer/ [https://perma.cc/N6ZZ-C9GS] (last visited Feb. 19, 2017).

[63] The Royals rely on David W. Frantze of the law firm Stinson Leonard Street LLP. *See David W. Frantze*, STINSON LEONARD STREET, https://www.stinson.com/DaveFrantze/ [https://perma.cc/L47S-HJ97] (last visited Feb. 19, 2017).

[64] The Oklahoma City Thunder's legal matters are handled by Frank D. Hill of the law firm of McAfee & Taft. *See Frank D. Hill*, MCAFEE & TAFT, http://www.mcafeetaft.com/frank-d-hill [https://perma.cc/P7L4-59W5] (last visited Feb. 19, 2017).

[65] The Flames rely on Brian Yaworski of the law firm DLA Piper. *See Brian Yaworski, Q.C., ICD.D*, DLA PIPER, https://www.dlapiper.com/en/canada/people/y/yaworski-brian/ [https://perma.cc/2EAH-99JE] (last visited Feb. 19, 2017).

[66] The Blackhawks rely on David Americus of the law firm Godzecki, Del Giudice, Americus, Farkas & Brocato LLP. *See David Americus*, CHI. BLACKHAWKS, http://blackhawks.nhl.com/club/page.htm?id=86122 [https://perma.cc/Y5VL-3JPN] (last visited Feb. 19, 2017).

[67] The Blues rely on Christopher J. Schmidt and Ryan S. Davis of the law firm Bryan Cave. *See Christopher J. Schmidt*, BRYAN CAVE, https://www.bryancave.com/en/people/christopher-j-schmidt.html [https://perma.cc/V635-687Y] (last visited Feb. 19, 2017); *Ryan S. Davis*, BRYAN CAVE, https://www.bryancave.com/en/people/ryan-s-davis.html [https://perma.cc/RPV3-YXR2] (last visited Feb. 19, 2017).

Also of note, included in the 113 statistic are general counsels that serve multiple sports clubs. For example, Brad Shron is General Counsel of both the Philadelphia 76ers and the New Jersey Devils.[68] Because we are interested in the demographics and qualifications of general counsels in each sports league, those working for two clubs are included in the analysis of each league.

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Having identified the few clubs that do not have a general counsel, we can now analyze the demographics of general counsels in Part III, and their qualifications in Part IV.

III. DEMOGRAPHICS OF GENERAL COUNSELS

This Part provides the demographics of general counsels in the areas of age, race/ethnicity, and gender.

Before providing this data, it is important to explain our methodology for its collection. In the summer of 2016, we created a database of all of the general counsels for NFL, MLB, NBA, and NHL clubs. That database was updated in January 2017. The general counsels were determined by visiting each club's website, and sometimes consulting the club's media guide. To gather personal and professional data about each general counsel, we reviewed biographies available from club websites and media guides, as well as the LinkedIn[69] pages personally created by the general counsels. We considered these sources to be eminently reliable in collecting data. For a small minority of general counsels, additional information was gathered from other reliable sources, including reputable news outlets and state bar records.

Additionally, in considering the aggregate data presented, bear in mind that because not all clubs have general counsels, the denominators in our analysis do not match the number of clubs in each league.

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[68] *Brad Shron*, LINKEDIN, https://www.linkedin.com/in/brad-shron-82538358 [https://perma.cc/NH3K-C4UG] (last visited Feb. 19, 2017).

[69] LinkedIn is an online professional networking service where people can post their academic and professional biographies. *See* LINKEDIN, https://www.linkedin.com/static?key=what_is_linkedin (last visited Feb. 19, 2017).

Examination of the data also requires context. In analyzing the demographics (and later the qualifications) of general counsels in sports, it is helpful to compare that data against lawyers generally and, more specifically, in-house counsel. We will again use the 2015 survey from the Association of Corporate Counsel, mentioned earlier.[70] The 2015 survey gathered data from 5,012 in-house attorneys, fifty-nine percent of whom were located in the United States.[71] We will provide corresponding data from this survey where relevant. Nevertheless, to be clear, this survey collected data from all in-house counsel, not just general counsels.

A. AGE

Table 2 below provides the number of general counsels fitting into various age brackets. Table 3 provides the age ranges of general counsels when they first assumed the position of general counsel. In collecting data, if a birth year was not readily available, we assumed that the individual was twenty-two years old the year he or she graduated from college.

Table 2: Age[72]

	NFL	MLB	NBA	NHL	Total
Under 30	0	0	1	1	**2 (1.8%)**
30-39	8	1	8	5	**22 (19.5%)**
40-49	8	12	9	10	**39 (34.5%)**
50-59	7	4	9	8	**28 (24.8%)**
Over 60	7	10	2	3	**22 (19.5%)**
Total	**30**	**27**	**29**	**27**	**113**

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[70] 2015 ACC GLOBAL CENSUS, *supra* note 12, at 26.
[71] *Id.* at 33.
[72] The most recent data on the ages of American attorneys comes from a 2005 report by the American Bar Foundation. That report found the ages of attorneys to be as follows: 29 years or less – 4%; 30-34 – 9%; 35-39 – 13%; 40-44 – 13%; 45-54 – 28%; 55-64 – 21%; and, 65 or older – 13%. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf [https://perma.cc/VNC3-Z2FV] (*citing The Lawyer Statistical Report,* AM. BAR FOUND. (2012)).

Table 3: Age When Hired As General Counsel

	NFL	MLB	NBA	NHL	Total
Under 30	4	1	2	2	**9 (8.0%)**
30-39	14	12	16	13	**55 (49.1%)**
40-49	6	7	10	7	**30 (26.8%)**
50-59	5	5	1	3	**14 (12.5%)**
Over 60	1	2	0	1	**4 (3.6%)**
Total	**30**	**27**	**29**	**26**[73]	**112**

Not surprisingly, there are only two general counsels under the age of thirty and only nine were hired before the age of thirty. Generally speaking, it is difficult to obtain the necessary experience in such a short period of time to obtain the position of general counsel. Nevertheless, the two general counsels believed to be under thirty years of age are Zachary Kleiman of the Memphis Grizzlies[74] and Alana Newhook of the Dallas Stars.[75] Kleiman joined the Grizzlies after briefly working as an attorney with Proskauer Rose LLP,[76] which, as will be discussed in Section IV.B.4, is one of the preeminent law firms practicing in sports. Kleiman had also previously interned with the New York Knicks, Los Angeles Lakers, Oakland Raiders, and Charlotte Bobcats.[77] Newhook worked briefly at the Dallas office of

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[73] Information was not available for one NHL club general counsel.
[74] *See Zachary Z. Kleiman*, LINKEDIN, https://www.linkedin.com/in/zachary-z-kleiman-3064178 [https://perma.cc/L6TG-RHL9] (last visited Feb. 22, 2017) (indicating that Kleiman graduated from college in 2010).
[75] *Alana C. Newhook*, LINKEDIN, https://www.linkedin.com/in/alana-c-newhook-82257839 [https://perma.cc/ZU7E-RGZR] (last visited Feb. 22, 2017) (indicating that Newhook graduated college in 2009 after only three years).
[76] *Zachary Z. Kleiman*, *supra* note 74; *see infra* notes 176–188 and accompanying text.
[77] *Zachary Z. Kleiman*, *supra* note 74.

Wilson Elser Moskowitz Edelman & Dicker LLP, a large national law firm,[78] before joining the Stars as Legal Counsel and Director of Contract Management.[79]

Otherwise, the ages of the general counsels are not surprising. The largest age bracket was that of 40-49, representing 34.5% of general counsels. Yet, the age distribution is fairly consistent among the other age brackets: 30-39 (19.5%); 50-59 (24.8%); and, over 60 (19.5%).[80]

Finally, the data suggests that the general counsel position is one in which people remain for an extended period of time. While the 40-49 age bracket makes up the largest percentage today, almost half of general counsels for whom data was available were hired in their thirties. Additionally, while twenty-two general counsels are over sixty, only four were hired at such an age. Thus, the data suggests that many general counsels were likely hired when they were at least one age range younger.

B. RACE/ETHNICITY

Table 4 provides the racial/ethnic demographics of general counsels. In creating this data, we acknowledge there are challenging issues around this topic, particularly trying to categorize increasingly multi-cultural populations into specific categories.[81] It is certainly not within our expertise to wade into any such debate and thus, for our purposes here, we largely tracked the race and ethnicity standards used by the U.S. Census

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[78] *See* WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP http://www.wilsonelser.com/ [https://perma.cc/H9CM-BC5B] (last visited Feb. 22, 2017) (describing firm as having "[n]early 800 attorneys" and "30 strategically located offices in the United States and another in London").

[79] *Alana C. Newhook*, *supra* note 75.

[80] Reliable data on the oldest and youngest General Counsels was not available.

[81] *See* D'Vera Cohn, *Census Considers New Approach to Asking About Race – By Not Using the Term at All*, PEW RES. CTR. (June 18, 2015), http://www.pewresearch.org/fact-tank/2015/06/18/census-considers-new-approach-to-asking-about-race-by-not-using-the-term-at-all/ [https://perma.cc/NN2F-H9F9].

Bureau.[82] Nevertheless, we did supplement the Census Bureau's categories with the category of Hispanic/Latino, a description that research indicates is preferred by a significant portion of Americans.[83]

To obtain the racial/ethnic data, we conducted research into the backgrounds of each general counsel and made certain assumptions based on the information available. We recognize this is not an ideal way to collect such sensitive and personal data and encourage additional research in this area. Nevertheless, we believe this data was important to collect and that there were no other reasonably feasible methods for its collection.

Table 4: Race/Ethnicity

	NFL	**MLB**	**NBA**	**NHL**	**Total**
Asian[84]	1	1	1	1	**4 (3.5%)**
Black/African-American	4	2	4	0	**10 (8.8%)**
Hispanic/Latino	0	1	1	0	**2 (1.8%)**
Native American	0	0	0	0	**0 (0.0%)**
Native Hawaiian/Pacific Islander	0	0	0	0	**0 (0.0%)**
White	25	23	23	26	**97 (85.8%)**
Total	**30**	**27**	**29**	**27**	**113**

It is unfortunate but not surprising to find that the general counsels of professional sports clubs are overwhelmingly white. These statistics also track those of attorneys and in-house counsel generally. For example, by analyzing data from the

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[82] *See Race*, U.S. CENSUS BUREAU, http://www.census.gov/topics/population/race/about.html [https://perma.cc/K5XJ-NGT9] (last visited Jan 21, 2017).

[83] *See* Ana Gonzalez-Barrera, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RES. CTR. (June 15, 2015), http://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/ [https://perma.cc/2K2W-LR2Z].

[84] "Asian" includes the Indian subcontinent. *See* U.S. CENSUS BUREAU, *supra* note 82.

United States Census, the American Bar Association found that in 2010, 88% of attorneys were white, 5% were black, 4% were Hispanic, and 3% were Asian.[85] Similarly, the Association of Corporate Counsel's 2015 census reported that 7% of in-house counsel were Asian, 5% Hispanic, and 4% Black.[86] Simple arithmetic tells us then that 84% of in-house counsel were white.

We think it is important to recognize general counsels that succeeded in this industry despite the racial imbalances and thus identify those general counsels here.

The Asian general counsels are: Meghan Parekh (Jacksonville Jaguars); Ashwin Krishnan (Miami Marlins); Ram Padmanabhan (Chicago Bulls); and, Andrew Koehler (San Jose Sharks).

The Black/African-American general counsels are: Brandon Etheridge (Baltimore Ravens); Myles Pistorius (Miami Dolphins); Kevin Warren (Minnesota Vikings); Ed Goines (Seattle Seahawks); Nona Lee (Arizona Diamondbacks); Damon Jones (Washington Nationals); Joe Pierce (Charlotte Hornets); David Kelly (Golden State Warriors); Rafael Stone (Houston Rockets); and, Nicole Duckett Fricke (Los Angeles Clippers).

Finally, the Hispanic/Latino general counsels are: Sam Fernandez (Los Angeles Dodgers); and, Bobby Perez (San Antonio Spurs).

C. GENDER

Table 5 provides the gender demographics of general counsels.

Table 5: Gender

	NFL	**MLB**	**NBA**	**NHL**	**Total**
Female	6	5	5	5	**21 (18.6%)**
Male	24	22	24	22	**92 (81.4%)**
Total	**30**	**27**	**29**	**27**	**113**

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[85] *See Lawyer Demographics*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf [https://perma.cc/VNC3-Z2FV] (last visited Feb. 21, 2017).

[86] 2015 ACC GLOBAL CENSUS, *supra* note 12, at 26.

It is not surprising that the vast majority of general counsels of men's professional sports clubs are men. Nevertheless, the gender disparity among sports general counsels is greater than that of attorneys generally, and significantly greater when compared to other in-house counsel. According to the American Bar Association, in 2016, 64% of American attorneys were male and 36% were female.[87] Moreover, the Association of Corporate Counsel's 2015 census reported that 50.5% of in-house counsel were male and 49.5% were female.[88] We return to this issue in the Conclusion.

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With the above understanding of the demographics of general counsels, we now turn to their professional qualifications.

IV. QUALIFICATIONS OF GENERAL COUNSELS

In Part III we provided the age, race/ethnicity, and gender demographics of general counsels. Of course, none of these characteristics should be a factor in the hiring of general counsel.[89] What is relevant are the qualifications of the individual being considered for general counsel. This Part examines those qualifications, including information about their law schools and prior work experience, including experience in the sports industry.

It is important to recognize that collecting this data was challenging as there are some general counsels for whom there is little publicly available information. While we have endeavored

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[87] *See Lawyer Demographics*, *supra* note 85.
[88] 2015 ACC GLOBAL CENSUS, *supra* note 12, at 26.
[89] Indeed, federal law prohibits discrimination in employment decisions based on age (if 40 or older), race/ethnicity, and gender. *See About the EEOC: Overview*, U.S. EQUAL EMP. OPP. COMM'N, https://www.eeoc.gov/eeoc/index.cfm [https://perma.cc/EBK7-WFJQ] (last visited Feb. 21, 2017) (discussing role of U.S. Equal Employment Opportunity Commission in "enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.").

to provide the most accurate information that we can, the reader should bear in mind that our data cannot be considered perfectly complete. Indeed, our data should be considered a minimum, as it is possible more general counsels have met the qualifications examined than our research was able to uncover.

A. LAW SCHOOL

Law schools place considerable importance on their rankings, as determined by the U.S. News & World Report,[90] as an indicator of their prestige.[91] As a result, law schools have been accused of "gaming" the rankings by distorting certain information considered in the rankings.[92] In particular, law schools have been accused of not providing accurate information concerning the post-law school employment of its graduates.[93]

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[90] *See Best Law Schools*, U.S. NEWS & WORLD RPT., https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?int=a1d108 [https://perma.cc/K4RK-ZU9Y] (last visited May 5, 2017).

[91] *See* Vivia Chen, *How Law Schools Game the Rankings*, THE CAREERIST (May 5, 2016), http://thecareerist.typepad.com/thecareerist/2016/05/the-brutality-behind-law-schools-rankings-.html [https://perma.cc/9WSM-43U4] (citing WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACAD. RANKINGS, REPUTATION, AND ACCOUNTABILITY 117 (2016)).

[92] *See* Darren Bush & Jessica Peterson, *Jukin' The Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235, 1238 (2013); Paul Campos, *Served,* NEW REPUBLIC (Apr. 25, 2011), https://newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown [https://perma.cc/764Z-MNV2]; Vivia Chen, *How Law Schools Game the Rankings*, THE CAREERIST (May 5, 2016), http://thecareerist.typepad.com/thecareerist/2016/05/the-brutality-behind-law-schools-rankings-.html (citing WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACAD. RANKINGS, REPUTATION, AND ACCOUNTABILITY 130–31 (2016)).

[93] *See* Darren Bush & Jessica Peterson, *Jukin' The Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235, 1253 (2013); Christopher Polchin, *Raising the "Bar" on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201, 205 (2012); Paul Campos, *Served,* NEW REPUBLIC (Apr. 25, 2011), https://newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown.

This information is significant considering that the highest ranked law schools generally have the best employment rates.[94] It also stands to reason that graduates of high-ranking law schools achieve more prestigious employment, including potentially becoming the general counsel of a professional sports club.

Table 6 summarizes the current rankings of law schools from which general counsels obtained their Juris Doctorate. While the ranking of the law school at the time the general counsel attended the law school might be a more accurate indicator of the importance of the law school's ranking, collecting historical data for every year that a general counsel graduated from law school would have been an unreasonably burdensome task. Current law school rankings, while not perfect, provide an interesting perspective into the importance of one's law school education on the path to becoming a general counsel.

Table 6: Current Law School Ranking

	NFL	**MLB**	**NBA**	**NHL**	**Total**
Top 10	11	5	9	4	**29 (27.6%)**
11-25	4	6	5	8	**23 (21.9%)**
26-50	4	6	4	2	**16 (15.2%)**
51-100	8	5	5	3	**21 (20.0%)**
Over 100	3	4	5	4	**16 (15.2%)**
Total	**30**	**26**	**28**	**21**	**105**[95]

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[94] *See* David Lat, *Who Has the Best 'Employed at Graduation' Rate Among the Top 14 Law Schools?*, ABOVE THE L. (Mar. 13, 2013, 10:30 AM), http://abovethelaw.com/2013/03/who-has-the-best-employed-at-graduation-rate-among-the-top-14-law-schools/?rf=1 [https://perma.cc/75JN-VKGB]; Staci Zaretsky, *Which Law Schools Employed the Most Graduates as Real Lawyers Versus Real Baristas?*, ABOVE THE L. (Mar. 27, 2013, 1:09 PM), http://abovethelaw.com/2013/03/which-law-schools-employed-the-most-graduates-as-real-lawyers-versus-real-baristas/?rf=1 [https://perma.cc/U3VJ-69DK].

[95] This data does not include General Counsels who attend Canadian law schools, of which there are eight: Matthew Shuber (Toronto Blue Jays); Peter Miller (Toronto Raptors/Maple Leafs); Keely Brown (Edmonton Oilers); France Margaret Belanger (Montreal Canadiens);

Not surprisingly, law schools ranked in the top 10 are the highest proportion of law schools attended by general counsels. Nevertheless, the distribution between the different tiers of law schools is fairly equal. While fifty-two general counsels attended a law school in the top 25 (49.5%), thirty-seven general counsels attended a law school ranked 51 or lower (35.2%).

The law schools with the most alumni working as general counsels are: Harvard (8);[96] University of Pennsylvania

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Wendy Kelley (Ottawa Senators); Chris Gear (Vancouver Canucks); and, Dan Hursh (Winnipeg Jets). *See France Margaret Belanger*, LINKEDIN, https://www.linkedin.com/in/france-margaret-belanger-833b6b41/ (last visited, Feb. 22, 2017); *Keely Brown*, LINKEDIN, https://www.linkedin.com/in/keely-brown-88590a64/ (last visited, Feb. 22, 2017); *Chris Gear*, LINKEDIN, https://www.linkedin.com/in/chris-gear-bb295a1/ (last visited, Feb. 22, 2017); *Dan Hursh*, LINKEDIN, https://www.linkedin.com/in/dan-hursh-79a48951/ (last visited, Feb. 22, 2017); *Wendy Kelley*, LINKEDIN, https://www.linkedin.com/in/wendyakelley/ (last visited, Feb. 22, 2017); *Peter Miller*, LINKEDIN, https://www.linkedin.com/in/peter-miller-7293892/ (last visited, Feb. 22, 2017); Annie Monjar, *Maple Leaf Sports Has Serious Defense*, ADVANTAGE http://advantagemagazine.ca/2014/mlse-2/ (last visited, Feb. 22, 2017); *Matthew Shuber*, LINKEDIN, https://www.linkedin.com/in/matthew-shuber-4447062/ (last visited, Feb. 22, 2017).

[96] Harvard's General Counsel alumni are: Brandon Etheridge (Baltimore Ravens); Mike Egan (Atlanta Falcons); Megha Parekh (Jacksonville Jaguars); Ashwin Krishnan (Miami Marlins); Damon Jones (Washington Nationals); Michael Zarren (Boston Celtics); and, Brad Shron (Philadelphia 76ers/New Jersey Devils). *See e.g.*, *Ashwin Krishnan*, LINKEDIN, https://www.linkedin.com/in/ashwin-krishnan-936a17103/ (last visited Feb. 22, 2017); *Brad Shron*, LINKEDIN, https://www.linkedin.com/in/brad-shron-82538358/ (last visited Feb. 22, 2017); *Damon Jones*, LINKEDIN, https://www.linkedin.com/in/damon-jones-95218312/ (last visited Feb. 22, 2017); *Michael Zarren*, http://www.nba.com/celtics/contact/michael-zarren.html (last visited Feb. 22, 2017); *Megha Parekh*, LINKEDIN, https://www.linkedin.com/in/meghaparekh/ (last visited Feb. 22, 2017); *Ravens Hire General Counsel Brandon Etheridge*, BALT. RAVENS (Sept.14, 2016), http://www.baltimoreravens.com/news/article-1/Ravens-Hire-General-Counsel-Brandon-Etheridge/0c65958f-889d-49b1-b013-87e007d2cf78; *Staff: Mike Egan*, ATLANTA FALCONS,

(5);[97] Duke (4);[98] Stanford (4);[99] Rutgers (4);[100] Columbia (3);[101]

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http://www.atlantafalcons.com/team/staff/Mike-Egan/58a65414-3b05-4c10-89e3-d00e6578a0aa (last visited Feb. 22, 2017).

[97] The University of Pennsylvania's General Counsel alumni are: William Heller (New York Giants); Ed Weiss (Boston Red Sox); Joe Pierce (Charlotte Hornets); and, Randall Boe (Washington Wizards/Capitals). *See e.g.*, *General Counsel File: William J. Heller, New York Football Giants, Inc.*, PRACTICAL L. (Jan. 15, 2017), http://us.practicallaw.com/3-596-2826?q=&qp=&qo=&qe=;%20Ed%20Weiss; *Ed Weiss*, LINKEDIN, https://www.linkedin.com/in/ed-weiss-62900110a/ (last visited Feb. 22, 2017); *Joe Pierce*, LINKEDIN, https://www.linkedin.com/in/joe-pierce-2333882/ (last visited Feb.22, 2017); *Randall Boe*, LINKEDIN, https://www.linkedin.com/in/randall-boe-4016132/ (last visited Feb. 22, 2017).

[98] Duke's General Counsel alumni are: Rick Strouse (Philadelphia Phillies); John Higgins (Tampa Bay Rays); Scott Wilkinson (Atlanta Hawks); and Zachary Kleiman (Memphis Grizzlies). *See e.g.*, *John Higgins*, LINKEDIN, https://www.linkedin.com/in/john-higgins-a0124650/ (last visited Feb. 22, 2017); *Richard L. Strouse Joins Phillies*, PHILLIES (Dec. 1, 2009, 11:17 AM), http://philadelphia.phillies.mlb.com/news/press_releases/press_release.jsp?ymd=20091201&content_id=7733238&vkey=pr_phi&fext=.jsp&c_id=phi; *Scott Wilkinson*, LINKEDIN, https://www.linkedin.com/in/scott-wilkinson-90001522/ (last visited Feb. 22, 2017); *Zachary Z. Kleiman*, LINKEDIN, https://www.linkedin.com/in/zachary-z-kleiman-3064178/ (last visited Feb. 22, 2017).

[99] Stanford's General Counsel alumni are: Dave Koeninger (Arizona Cardinals); Ed Policy (Green Bay Packers); Hannah Gordon (San Francisco 49ers); and, Rafael Stone (Houston Rockets). *See e.g.*, *David Koeninger*, LINKEDIN, https://www.linkedin.com/in/david-koeninger-ba441938/ (last visited Feb. 22, 2017); *Front Office: Ed Policy*, GREENBAY PACKERS, http://www.packers.com/team/staff/policy-ed/ba047611-d232-4f82-a6e3-6a67732c47fc (last visited Feb. 22, 2017); *Hannah Gordon*, LINKEDIN, https://www.linkedin.com/in/hannahgordon/ (last visited Feb. 22, 2017); *The Business Team*, NBA 67, 69, http://www.nba.com/media/rockets/MediaGuide0809_page67.85.pdf (last visited Feb. 22, 2017).

[100] Rutgers' General Counsel alumni are: Jason Cohen (Dallas Cowboys); Hymie Elhai (New York Jets); Katie Pothier (Texas Rangers); and, Jay Itzkowitz (New York Islanders). *See e.g.*, Daniel Kaplan, *Forty Under 40: Hymie Elhai*, STREET & SMITH'S SPORTS BUS. J. (Apr. 4, 2016), http://www.sportsbusinessdaily.com/

Duquesne (3);[102] Georgetown (3);[103] Marquette (3);[104] University

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Journal/Issues/2016/04/04/Forty-Under-40/Hymie-Elhai.aspx; *Jason Todd Cohen*, ST. B. OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=339078 (click "Find a Lawyer"; then search first name "Jason," last name "Cohen," firm "Cowboys"); Evan Hoopfer, *Rangers Name New Executive Vice President and General Counsel*, DALL. BUS. J., (Sep. 28, 2016), http://www.bizjournals.com/dallas/news/2016/09/28/texas-rangers-katie-pothier-vice-president-counsel.html; *Jay Itzkowitz*, LINKEDIN, https://www.linkedin.com/in/jay-itzkowitz-3841243 (last visited Feb. 22, 2017).

[101] Columbia's General Counsel alumni are: Ted Tywang (Cleveland Browns); Myles Pistorious (Miami Dolphins); and, Richard Haddad (Detroit Pistons). *See Front Office*, CLEVELAND BROWNS, http://www.clevelandbrowns.com/team/front-office.html (last visited Mar. 26, 2017); *see also Staff Directory: Myles Pistorius*, MIAMI DOLPHINS, http://www.miamidolphins.com/team/staff/Pistorius_Myles/8384c068-8126-4d59-97b8-8e16e63d5224 (last visited Mar. 26, 2017); *see also Richard Haddad*, MICH. SPORT BUS. CONF. (Oct. 9, 2013, 11:57 AM), http://umsbc.com/richard-haddadvice-president-general-counsel-palace-sports-entertainment-detroit-pistons.

[102] Duquesne's General Counsel alumni are: Art Rooney II (Pittsburgh Steelers); Travis Williams (Pittsburgh Penguins); and, Greg Kirstein (Columbus Blue Jackets). *See e.g.*, *Arthur J. Rooney* II, BUCHANAN INNGERSOLL & ROONEY PC, http://www.bipc.com/arthur-rooney (last visited Feb. 22, 2017); *Greg Kirstein*, LINKEDIN, https://www.linkedin.com/in/greg-kirstein-82986825/ (last visited Feb. 22, 2017); *Travis Williams*, LINKEDIN, https://www.linkedin.com/in/travis-williams-71883a37 (last visited Feb. 22, 2017).

[103] Georgetown's General Counsel alumni are: Bart Waldman (Seattle Mariners); Matthew Reece (Boston Bruins); and, John Keenan (Los Angeles Kings). *See e.g.*, *Bart Waldman*, LINKEDIN, https://www.linkedin.com/in/bart-waldman-288462a1/ (last visited Feb. 22, 2017); *John Keenan,* LINKEDIN, https://www.linkedin.com/in/john-keenan-8830631/ (last visited Feb. 22, 2017).

[104] Marquette's General Counsel alumni are: Greg Heller (Atlanta Braves); Michael Sneathern (Milwaukee Bucks); and, Nyea Sturman (Orlando Magic). *See e.g.*, *Board of Advisors*, MARQ. UNIV. L. SCH., https://law.marquette.edu/national-sports-law-institute/board-advisors (last visited Feb. 22, 2015).

of Southern California (3);[105] University of Virginia (3);[106] and, Washington University in St. Louis (3).[107]

Also not surprisingly, many of the law schools with multiple general counsels are among the top ranked law schools in the country: Stanford (2nd); Harvard (3rd); University of Pennsylvania (7th); Virginia (tied for 8th); Duke (10th); Georgetown (tied for 15th), Washington University in St. Louis (18th); and, University of Southern California (19th).[108]

The presence of Duquense on the above list can likely be explained by other factors. Duquense is one of only two law schools in the Pittsburgh area (University of Pittsburgh being the other), and thus Duquense alumni are general counsel for two of the Pittsburgh sports clubs (Steelers and Penguins).[109]

Marquette's presence on the list is likely, at least

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[105] USC's General Counsel alumni are: Todd Davis (Los Angeles Rams); Lydia Wahlke (Chicago Cubs); and, Bernard Schneider (Anaheim Ducks). *See e.g.*, Benjamin Gleisser, *A Trojan Makes His Return to L.A. With the Rams*, USC TROJAN FAM., https://tfm.usc.edu/a-trojan-makes-his-return-to-l-a-with-the-rams/ (last visited Mar. 26, 2017).; *Bernard E. Schneider*, LAWYERDB.COM, http://www.lawyerdb.org/Lawyer/Bernard-Schneider/ (last visited Feb. 22, 2017); *Lydia Wahlke*, LINKEDIN, https://www.linkedin.com/in/lydiawahlke (last visited Feb. 22, 2017).

[106] Virginia's General Counsel alumni are: Bryan Stroh (Pittsburgh Pirates); and, Stephen Stieneker (Denver Nuggets/Colorado Avalanche). *See Brian Stroh*, LINKEDIN, https://www.linkedin.com/in/bstroh/ (last visited Mar. 26, 2017); *see also Executive Team*, PEPSI CENTER, https://www.pepsicenter.com/kse/company/executive-team/ (last visited Mar. 26, 2017).

[107] Washington University in St. Louis' General Counsel alumni are: Michael Whittle (St. Louis Cardinals); Neil Kraetsch (Oakland Athletics); and, Steve Weinreich (Minnesota Wild). *See, e.g.*, *Michael Whittle*, LINKEDIN, https://www.linkedin.com/in/michael-whittle-21043511 (last visited Feb. 22, 2017); *Neil Kraetsch*, LINKEDIN, https://www.linkedin.com/in/neil-kraetsch-632a859 (last visited Feb. 22, 2017); *Steve Weinreich*, LINKEDIN, https://www.linkedin.com/in/steve-weinreich-2a23274 (last visited Feb. 22, 2017).

[108] *See Best Law Schools*, *supra* note 90.

[109] *See, e.g.*, *Art Rooney IV*, LINKEDIN, https://www.linkedin.com/in/art-rooney-iv-0654b864 (last visited Jan. 16, 2017); *Travis Williams*, LINKEDIN, https://www.linkedin.com/in/travis-williams-71883a37 (last visited Jan. 16, 2017).

partially, attributed to a different factor. Marquette offers a sports law program considered to be one of the best in the country, including the opportunity to earn a certificate in sports law.[110] It is thus not surprising that some of its alumni have become general counsels of sports clubs. Additionally, Milwaukee Brewers General Counsel, Marti Wronski, actually taught at Marquette University Law School prior to becoming general counsel.[111] Tulane University also offers a well-regarded sports law program[112] that has resulted in alumni throughout the sports world, including two general counsels: Aileen Dagrosa (Philadelphia Eagles);[113] and, Alex Winsberg (Los Angeles Angels).[114] Additionally, Vicky Neumeyer, general counsel for the New Orleans Saints and Pelicans, earned a Master of Laws (L.L.M.) from Tulane's sports law program.[115]

B. PRIOR WORK EXPERIENCE

Of course, one's prior work experience is an important factor in obtaining future positions. For this reason, we are interested in examining the prior work experience that led general counsels to their current positions. In this section, we

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[110] *Sports Law*, MARQ. UNIV. L. SCH., https://law.marquette.edu/programs-degrees/sports-law (last visited Jan. 17, 2017) [https://perma.cc/9YCS-U647].

[111] Marti Wronski, *At Bat for the Brewers*, ST. B. OF WIS., http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=88&Issue=7&ArticleID=24225 (last visited Feb. 21, 2017) [https://perma.cc/BUL6-NVJ4].

[112] *Sports Law*, TULANE UNIV. L. SCH., http://www.law.tulane.edu/tlsAcademicPrograms/sportslaw_index.aspx (last visited Jan. 17, 2017) [https://perma.cc/NSQ8-VY64].

[113] *Aileen Dagrosa Biography*, PHILA. EAGLES, http://media.philadelphiaeagles.com/media/151268/dagrosa-aileen.pdf [https://perma.cc/T27D-D86B] (last visited Jan. 17, 2017).

[114] *Alex Winsberg*, LINKEDIN, https://www.linkedin.com/in/alexwinsberg [https://perma.cc/6YY3-J6FN] (last visited Jan. 17, 2017).

[115] *Vicky Neumeyer Biography*, NEW ORLEANS SAINTS, http://www.neworleanssaints.com/team/staff/vicky-neumeyer/ef944dcf-02d6-4569-94a4-ccc5efa5b458 [https://perma.cc/C4YW-NCCL] (last visited Jan. 17, 2017).

will examine the industries in which general counsels previously worked, the number of years of legal experience before becoming general counsel, the size of the law firms where they previously worked, whether they worked at law firms with sports law practices, whether they spent time working at one of the professional sports leagues' offices, and whether they previously worked as an assistant or associate general counsel.

We again remind the reader of the challenges in gathering position-by-position career data for general counsels, which is not the most public of professions. The data we provide here we believe to be correct (even if not entirely complete) and serves to provide a better understanding of the experiences of general counsels.

1. Industries

It stands to reason that general counsels of professional sports clubs would have considerable experience in the legal and/or sports industries. Table 7 shows the industries in which general counsels previously worked. Also, note that because most of the general counsels worked in more than one industry, the total prior industries in which they worked is well more than the number of general counsels. In addition to the total number of general counsels that worked in a particular industry, we provide the percentage of general counsels that has worked in that industry.

Table 7: Industries Worked in Prior to Becoming General Counsel

	NFL	MLB	NBA	NHL	Total
Academia	0	2	1	1	**4 (3.5%)**[116]
Government	4	10	10	5	**29 (25.7%)**
Private law practice	25	27	24	24	**100 (88.5%)**
Non-profit (legal)	0	1	1	1	**3 (2.7%)**
Sports (legal)	16	11	11	9	**47 (41.6%)**
Sports (non-legal)	3	4	5	5	**17 (15.0%)**
Other (legal)	7	5	11	11	**34 (30.1%)**
Other (non-legal)	3	4	3	5	**15 (13.3%)**
Total	**58**	**64**	**66**	**61**	**249**

Not surprisingly, a strong majority of general counsels (88.5%) previously worked in a private law practice. Working for a private law firm would provide an attorney the training and experience necessary to one day become the general counsel of an organization, including a professional sports club.

Initially, it might appear that many general counsels did not have previous sports-related legal experience. Table 7 shows that of the 113 general counsels in sports, only 47 (41.6%) had prior legal experience in the sports industry. However, when calculating prior legal experience in the sports industry, we did not include the attorney's experience at a law firm. We know that many general counsels did sports-related work at their prior law firms. Nevertheless, the scope of many general counsels'

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[116] These percentages are calculated by dividing the total number of general counsels that worked in this industry by the 113 clubs with general counsels.

prior law firm practice is not readily available information and thus we did not include it in the calculation. Instead, we focused on time spent working for the leagues, clubs and other sports-related entities.

Finally, it is interesting to examine the government experience of the general counsels. At least fourteen general counsels had the experience of either a clerkship or internship with a judge at some point.[117] Additionally, three general

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[117] The General Counsels who had judicial clerkships or internships are: Cliff Stein (Chicago Bears); Vicky Neumeyer (New Orleans Saints/Pelicans); Ed Weiss (Boston Red Sox); Lydia Wahlke (Chicago Cubs); Giles Kibbe (Houston Astros); Erik Greupner (San Diego Padres); Damon Jones (Washington Nationals); Michael Zarren (Boston Celtics); Ram Padmanabhan (Chicago Bulls); Richard Haddad (Detroit Pistons); Ben Lauritsen (Portland Trailblazers); Sam Harkness (Utah Jazz); Robert Carr (Detroit Red Wings); and Wendy Kelley (Ottawa Senators). *See Front Office: Cliff Stein*, CHI. BEARS, http://www.chicagobears.com/team/staff/Cliff-Stein/8dbdd7b5-9ffa-4612-8ddd-902086ec91a3 (last visited Mar. 27, 2017); *see also Vicky Neumeyer*, NEW ORLEANS SAINTS, http://www.neworleanssaints.com/team/staff/vicky-neumeyer/ef944dcf-02d6-4569-94a4-ccc5efa5b458 (last visited Mar. 27, 2017); *see also Ed Weiss*, LINKEDIN, https://www.google.com/search?q=Ed+Weiss+(Boston+Red+Sox)%3B&rlz=1C5CHFA_enUS705US705&oq=Ed+Weiss+(Boston+Red+Sox)%3B&aqs=chrome..69i57j0l2.292j0j4&sourceid=chrome&ie=UTF-8 (last visited Mar. 27, 2017); see also *Lydia Wahlke*, LINKEDIN, https://www.linkedin.com/in/lydiawahlke [https://perma.cc/C4E2-FGD4] (last visited Feb. 20, 2017); *see also Giles Kibbe*, *supra* note 56; *see also Front Office: Eric Greupner*, SAN DIEGO PADRES, http://sandiego.padres.mlb.com/sd/team/exec_bios/greupner.jsp (last visited Mar. 27, 2017); see also *Damon Jones*, *supra* note 96; *see also Michael Zarren – Assistant GM and Team Counsel*, NBA.COM: BOS. CELTICS, http://www.nba.com/celtics/contact/michael-zarren.html [https://perma.cc/4ATE-KCBW] (last visited Feb. 19, 2017); *see also Executive Staff*, CHI. BULLS, http://www.nba.com/bulls/chicago-bulls-staff-directory/ (last visited Mar. 27, 2017); *see also Richard Haddad*, *supra* note 101; *see also Ben Lauritsen - Vice President, General Counsel*, NBA.COM, http://www.nba.com/blazers/staff/ben-lauritsen-vice-president-general-counsel [https://perma.cc/M5X8-LBME] (last visited Feb. 21, 2017); *see also Contact Us*: *Sam Harkness*, UTAH JAZZ, http://www.nba.com/jazz/contact/ (last visited Mar. 27, 2017); *see also Robert Carr*, LINKEDIN, https://www.linkedin.com/in/robert-carr-

counsels are former prosecutors: Richard Slivka of the Denver Broncos, who previously worked for the United States Attorney's Office for the District of Colorado;[118] H. Russell Smouse of the Baltimore Orioles, who was previously an attorney for the United States Department of Justice and an Assistant United States Attorney for the District of Maryland;[119] and, Bobby Perez of the San Antonio Spurs, who was an Assistant District Attorney in Bexar County, Texas.[120] Finally, David Cohen of the New York Mets was previously an Associate Judge for the juvenile court in Fulton County, Georgia.[121]

2. Years of Legal Experience Prior to Becoming General Counsel

As discussed throughout this Article, legal experience is an important prerequisite to becoming a general counsel. But how much legal experience? Table 8 shows the range of general counsels' legal experience prior to becoming general counsel.

44b8b87/ (last visited Mar. 27, 2017); *see also Wendy Kelley*, *supra* note 95.

[118] Adam Mimeles, *Gridiron Guidance,* GW MAG., http://www2.gwu.edu/~magazine/archive/2009_law_winter/dept_alumni_profile1.html [https://perma.cc/KEM7-S3T9] (last visited Jan. 17, 2017).

[119] *H. Russell Smouse Biography*, LAWYERDB.ORG, http://www.lawyerdb.org/Lawyer/Russell-Smouse/ (last visited Mar. 26, 2017).

[120] *Bobby Perez*, LINKEDIN, https://www.linkedin.com/in/bobby-perez-75566740 [https://perma.cc/RKQ5-BRJB] (last visited Feb. 21, 2017).

[121] Roger Adler, *Batter Up! New York Mets GC, David Cohen*, THE NAT'L L. J. (Jan. 16, 2007), http://www.nationallawjournal.com/id=900005553012/Batter-Up?slreturn=20160809023811 [https://perma.cc/7JB3-Z3Q6].

Table 8: Years of Legal Experience Prior to Becoming General Counsel

	NFL	MLB	NBA	NHL	Total
10 or less	14	12	12	12	**50 (44.2%)**
11-20	10	9	12	10	**41 (36.3%)**
21-30	3	4	4	3	**14 (12.4%)**
Over 30	3	2	1	2	**8 (7.1%)**
Total	**30**	**27**	**29**	**27**	**113**

The data shown in Table 8 demonstrates that while general counsels have prior legal experience, they generally are not among the most experienced attorneys – 80.5% of all general counsels had twenty years or less of legal experience prior to becoming general counsel. Moreover, the most common experience range of general counsels is that of ten years or less (44.2%).

There is, of course, also a relation between a general counsel's age and years of legal experience. In Section III.A., Age, we showed that 55.8% of general counsels are less than fifty. When considered alongside the data in Table 8, it appears that there is something of an age/experience sweet spot at which attorneys have benefited from several (but not many) years of experience at a law firm and are then ready to move into an in-house position, including possibly that of general counsel. Some might also move into a position as an assistant or associate counsel, which is discussed in Section IV.B.6.

3. Law Firm Size

The size of the law firm at which an individual works can have a significant impact on an attorney's career. Larger law firms tend to represent larger organizations and be involved in cases that are more substantial (both legally and financially).[122]

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[122] *See* Quintin Johnstone, *An Overview of the Legal Profession in the United States, How that Profession Recently Has Been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 759 (2008).

Attorneys working at large law firms tend to have graduated from more prestigious law schools,[123] make more money than their colleagues at smaller firms,[124] and are generally considered to have more career options once their careers have begun.[125] Undoubtedly, having worked at a major law firm is a significant resume enhancer that can propel attorneys to prominent legal positions, including being general counsel of a professional sports club. Table 9 summarizes the available data about the law firms at which general counsels have worked, divided into four general categories: mega-law firms with 500 or more attorneys; large law firms with between 101 and 499 attorneys; medium size law firms with between 26 and 100 attorneys; and, small law firms with less than 26 attorneys.[126]

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[123] *See* Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 JURIMETRICS J. 413, 430 (2005).

[124] *See* Steven Davidoff Solomon, *Law School a Solid Investment, Despite Pay Discrepancies*, N.Y. TIMES (June 21, 2016), http://www.nytimes.com/2016/06/22/business/dealbook/law-school-a-solid-investment-despite-pay-discrepancies.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=EndOfArticle&pgtype=article [https://perma.cc/T2SG-C5XJ].

[125] *See* Ciolli, *supra* note 123, at 430.

[126] We recognize that the categorization of a law firm as "large" or "small" can vary greatly depending on the metropolitan area in which the firm practices. Nevertheless, sports clubs operate on a national scale and thus we have categorized the firms according to generalized national standards.

Table 9: Prior Law Firm Employment by Size

	NFL	MLB	NBA	NHL	Total
500+ Attorneys	14	11	12	16	**53 (42.7%)**
101-499 Attorneys	7	6	7	9	**29 (23.4%)**
26-100 Attorneys	3	4	2	1	**10 (8.1%)**
Less than 26 Attorneys	3	7	5	3	**18 (14.5%)**
No Law Firm Employment	4	1	6	3	**14 (11.3%)**
Total [127]	**31**	**29**	**32**	**32**	**124**

Above, we described the impact of working at a large law firm generally. The data in Table 9 also shows the importance of working at a large law firm if you wish to be a general counsel of a professional sports club – 42.7% of general counsels (53/124) have experience working at a law firm of at least 500 attorneys (mega-law firms). Similarly, 23.4% of general counsels (29/124) have experience working at a law firm of at least 101-499 attorneys (large law firms). In considering this data, it is important to know our research revealed that seven general counsels worked at both large and mega-law firms, resulting in duplicative data. By removing the double counting, we can calculate that seventy-five general counsels (66.4%)[128] previously worked at a law firm of at least 101 attorneys.

In contrast, only eighteen general counsels (14.5%) ever worked at a small law firm, *i.e.,* one of less than twenty-six

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[127] In considering the totals for the above data, it is important to remember that not all clubs have a General Counsel, and that some General Counsels worked for more than one size law firm and thus are counted twice in Table 7.

[128] The 75 statistic was determined by adding the 53 general counsels that worked at mega-law firms to the 29 general counsels that worked at large law firms, and subtracting 7 for the general counsels that worked at both size law firms. The 66.4% statistic was determined by dividing 75 by the 113 clubs with general counsels.

employees. Thus, it is clear that one's chances of becoming a general counsel are positively correlated with the size of the law firms at which the individual worked. This correlation can, at least partially, be attributed to the fact that it is generally large, prestigious law firms that have sports clubs as clients and do other sports-related work. These law firms are discussed in the next section.

Lastly, those fourteen individuals that never worked at a law firm (12.4% of all general counsels) have varied paths to their current position. Some, like Todd Davis of the Los Angeles Rams[129] and Nyea Sturman of the Orlando Magic[130] were fortunate enough to begin working with the club straight out of school. Moreover, some worked in business, such as Michael Zarren of the Boston Celtics who worked as a management consultant,[131] while others worked in politics, such as Gregory Jackson of the Minnesota Timberwolves, who was staff counsel for the Republicans caucus in the Minnesota State Senate where he worked for then-Senate Minority Leader Glen Taylor, who later purchased the Timberwolves.[132]

4. Firms Practicing Sports Law

Not surprisingly, some of the largest and most prestigious law firms regularly provide legal services to the sports leagues and their clubs. The attorneys at these firms thus become intimately familiar with the legal issues of the leagues and clubs and develop relationships with league and club officials. Thus, it is logical that when looking to hire internal legal counsel, the leagues and clubs often hire attorneys from firms with which they have a working relationship. Below, we briefly discuss these firms (in alphabetical order) and some of

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[129] *See Todd Davis*, LINKEDIN, https://www.linkedin.com/in/todd-davis-75465a5 [https://perma.cc/FKE3-GLV8] (last visited Feb. 22, 2017).
[130] *See Nyea Sturman*, LINKEDIN, https://www.linkedin.com/in/nyea-sturman-b32859 [https://perma.cc/VQ93-ULTG] (last visited Feb. 19, 2017).
[131] *Michael Zarren*, *supra* note 117.
[132] *Gregory W. Jackson*, LINKEDIN, https://www.linkedin.com/in/gregory-w-greg-jackson-74466920 [https://perma.cc/9PGM-ET5P] (last visited Feb. 19, 2017).

the attorneys that have transitioned from external to internal counsel for the leagues or clubs.[133] Notably, this list does not include the law firms of Weil, Gotshal & Manges LLP and Winston Strawn LLP. While both firms have robust sports practices, those practices focus on representing athletes and their players associations[134] – clients whose interests are generally adverse to the clubs and leagues which are the focus of this Article. Finally, Table 10 summarizes the number of club general counsels that worked for at least some time at one of these prominent sports law firms.

a. Akin Gump Strauss Hauer & Feld LLP

Akin Gump Strauss Hauer & Feld LLP (Akin Gump) is an international law firm based in Washington, D.C. with 20 offices[135] and more than 931 attorneys worldwide.[136] Led by attorney Daniel L. Nash, Akin Gump currently serves as the NFL's principal outside counsel on labor matters.[137] Akin Gump is listed as the NFL's counsel in many reported case decisions,

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[133] *See also* GLENN M. WONG, *supra* note 2, at 264 (discussing the top sports law firms).

[134] *See Company Overview of Weil, Gotshal & Manges LLP: James W. Quinn*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/person.asp?personId=33102045&privcapId=1417124&previousCapId=1417124&previousTitle=Weil,%20Gotshal%20&%20Manges%20LLP (last visited Feb. 19, 2017); *Sports*, WINSTON & STRAWN LLP, http://www.winston.com/en/what-we-do/sectors/sports/index.html [https://perma.cc/96BT-3JPX] (last visited Feb. 19, 2017). Quinn, a seminal figure in sports law, recently left Weil, Gotshal & Manges but the practice he created largely remains.

[135] *Locations*, AKIN GUMP, https://www.akingump.com/en/locations/index.html [https://perma.cc/4TMX-W48Z] (last visited Feb. 19, 2017).

[136] *Akin Gump Strauss Hauer & Feld LLP*, VAULT, http://www.vault.com/company-profiles/law/akin-gump-strauss-hauer-feld-llp/company-overview.aspx [https://perma.cc/7GBF-SZ3W] (last visited Feb. 19, 2017) (showing the firm's overview, ranking, diversity/pro bono, reviews, firm information, etc.).

[137] *Daniel L. Nash*, AKIN GUMP, https://www.akingump.com/en/lawyers-advisors/daniel-l-nash.html [https://perma.cc/VUC6-X6CT] (last visited Feb. 19, 2017).

dating back to 1988.[138] Indeed, many of the NFL's in-house counsel practiced first at Akin Gump. Michele Roberts, the Executive Director of the National Basketball Players Association, also previously worked at Akin Gump, but was not involved in sports matters.[139]

Despite Akin Gump's prestigious record, only one current general counsel previously worked at the firm. San Francisco 49ers General Counsel Hannah Gordon was a summer associate at the law firm in 2007.[140] Gordon later worked for the NFL before joining the 49ers in 2011.[141]

b. Covington & Burling LLP

Covington & Burling LLP is an international law firm based in Washington, D.C. with ten offices[142] and 930 attorneys worldwide.[143] Led by attorney Gregg H. Levy, Covington & Burling currently serves as the NFL's principal outside counsel

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[138] *See, e.g.*, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016); Matthews v. Nat'l Football League Mgmt. Council, 688 F.3d 1107 (9th Cir. 2012); Powell v. Nat'l Football League, 690 F. Supp. 812 (D. Minn. 1988).

[139] Jared Dubin, *Who's That Executive Director? Meet the New Head of the NBPA, Michele Roberts*, GRANTLAND (July 29, 2014), http://grantland.com/the-triangle/whos-that-executive-director-meet-the-new-head-of-the-nbpa-michele-roberts/ [https://perma.cc/5QJT-RSPJ].

[140] *Hannah Gordon*, LINKEDIN, https://www.linkedin.com/in/hannahgordon [https://perma.cc/B5A6-W2T6] (last visited Feb. 19, 2017).

[141] *Id.*; *Coaches & Staff: Hannah Gordon*, 49ERS.COM, http://www.49ers.com/team/staff/gordon_hannah/698be8c7-e484-4fe6-8520-93ea6daf5f4b [https://perma.cc/E5FN-6YFY] (last visited Feb. 19, 2017).

[142] *Offices*, COVINGTON & BURLING LLP, https://www.cov.com/en/offices [https://perma.cc/4M75-SABR] (last visited Feb. 22, 2017).

[143] *Covington & Burling LLP at a Glance,* VAULT, http://www.vault.com/company-profiles/law/covington-burling-llp/company-overview.aspx [https://perma.cc/K8WQ-65P7] (last visited Feb. 22, 2017) (showing the firm's overview, ranking, diversity/pro bono, etc.).

on antitrust matters.[144] Covington & Burling has represented the NFL in dozens of reported cases, dating back to 1961.[145] Paul Tagliabue, who served as Commissioner of the NFL from 1989 to 2006, was an attorney at Covington & Burling prior to becoming Commissioner, and returned to the firm upon leaving the NFL.[146]

In addition to Tagliabue, several other prominent sports attorneys spent time working at Covington & Burling, including NFL General Counsel Jeff Pash,[147] and NBA General Counsel Richard Buchanan.[148]

The only current general counsel to have worked at Covington & Burling is Baltimore Ravens' General Counsel Brandon Etheridge. Etheridge worked at the firm from 2011 to 2014, before being hired as counsel at the NFL.[149] Etheridge worked at the NFL for approximately two years before joining the Ravens.[150]

c. Foley & Lardner LLP

Foley & Lardner LLP is an international law firm based

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[144] *Gregg H. Levy*, COVINGTON & BURLING LLP, https://www.cov.com/en/professionals/l/gregg-levy [https://perma.cc/GLX6-XVWP] (last visited Feb. 22, 2017).

[145] *See, e.g.,* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010); Brown v. Pro Football, Inc., 812 F. Supp. 237 (D.C. Cir. 1992); Am. Football League v. Nat'l Football League, 27 F.R.D. 264 (D. Md. 1961).

[146] *Paul J. Tagliabue*, COVINGTON & BURLING LLP, https://www.cov.com/en/professionals/t/paul-tagliabue [https://perma.cc/BD97-AS99] (last visited Feb. 22, 2017).

[147] *Jeffrey Pash*, MIT SLOAN SPORTS ANALYTICS CONF., http://www.sloansportsconference.com/people/jeffrey-pash/ [https://perma.cc/6NVR-PM36] (last visited Feb. 22, 2017).

[148] *Interview with NBA General Counsel Rick Buchanan*, HARV. L. SCH. J. OF SPORTS & ENT. L. (Feb. 26, 2016), http://harvardjsel.com/2016/02/interview-with-nba-general-counsel-rick-buchanan/ [https://perma.cc/7XUD-XR5H].

[149] *Ravens Hire General Counsel Brandon Etheridge*, BALT. RAVENS (Sept. 14, 2016), http://www.baltimoreravens.com/news/article-1/Ravens-Hire-General-Counsel-Brandon-Etheridge/0c65958f-889d-49b1-b013-87e007d2cf78 [https://perma.cc/2J5C-NDWK].

[150] *Id.*

in Milwaukee with 20 offices[151] and more than 839 attorneys worldwide.[152] Led by attorneys Mary K. Braza and Irwin P. Raij, Foley & Lardner has specialized in providing counsel on the purchase and sale of professional sports clubs as well as stadium issues.[153] Foley & Lardner's sports experience began by advising former MLB Commissioner Bud Selig during his time as owner of the Milwaukee Brewers.[154] Selig later hired Foley & Lardner partner Bob DuPuy as MLB's Chief Legal Officer.[155]

Given the historical ties between the Brewers and Foley & Lardner, it is not surprising that the only current general counsel to have worked at the firm is the Brewers' current general counsel, Marti Wronski, who was an associate at the firm from 1997-2001.[156]

d. Kirkland & Ellis LLP

Kirkland & Ellis is an international law firm based in Chicago with 12 offices and approximately 1,700 attorneys

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[151] FOLEY & LARDNER LLP, https://www.foley.com [https://perma.cc/RXD6-ASBE] (last visited Feb. 22, 2017).
[152] *Foley and Lardner LLP*, VAULT, http://www.vault.com/company-profiles/law/foley-lardner-llp/company-overview.aspx [https://perma.cc/QJV6-EN2X] (last visited Feb. 22, 2017) (showing the firm's overview, ranking, diversity/pro bono, etc.).
[153] *See Mary K. Braza*, FOLEY & LARDNER LLP, https://www.foley.com/mary-k-braza/ [https://perma.cc/6SKW-WSSA] (last visited Feb. 22, 2017); *Irwin P. Raij*, FOLEY & LARDNER LLP, https://www.foley.com/irwin-p-raij/ [https://perma.cc/BX9K-9W92] (last visited Feb. 22, 2017).
[154] Rich Kirchen, *Despite Selig's Retirement, Foley & Lardner Hopes to Keep MLB Work*, MILWAUKEE BUS. J. (Oct. 2, 2013, 4:41 PM), http://www.bizjournals.com/milwaukee/blog/2013/10/despite-seligs-retirement-foley.html [https://perma.cc/S3FC-YLYM].
[155] *Id*.
[156] Stephen Schumacher, *General Counsel for the Brewers, Marti Wronski, to Appear on "Conversations from St. Norbert College" Television Show*, SAINT NORBERT COLL. (July 22, 2011), http://www.snc.edu/news/pressrelease/1798/ [https://perma.cc/Z2JR-JQUM].

worldwide.[157] Kirkland & Ellis represents professional sports clubs in a variety of corporate and litigation matters.[158]

Given its prominence in Chicago, it is not surprising that the current general counsels of the Chicago Cubs (Lydia Wahlke) and Chicago Bulls (Ram Padmanabhan) previously worked at the firm. Wahlke was an associate at the firm from 2005-08, and 2009-10 (after completing a federal clerkship),[159] and Padmanabhan was an associate at the firm from approximately 1996-2000.[160] No other general counsels previously practiced at Kirkland & Ellis.

e. Latham & Watkins LLP

Latham & Watkins LLP is an international law firm based in Los Angeles with 31 offices[161] and more than 2,000 attorneys worldwide.[162] Latham & Watkins sports' practice specializes in counseling professional sports leagues and clubs on media deals.[163]

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[157] *Our Firm Offices*, KIRKLAND & ELLIS LLP, https://www.kirkland.com/sitecontent.cfm?contentID=233. (last visited Feb. 20, 2017).

[158] *Law 360 2015 Practice Group of the Year: Sports*, KIRKLAND & ELLIS LLP, https://www.kirkland.com/siteFiles/News/Law360%20(Practice%20Groups%20of%20the%20Year_%20Sports)%202016.pdf [https://perma.cc/JAC7-V62W] (last visited Feb. 20, 2017).

[159] *Lydia Wahlke*, *supra* note 117.

[160] The estimate of Padmanabhan's experience at Kirkland & Ellis is based on his appearances on behalf of the firm in reported case decisions. *See* March Madness Ath. Ass'n LLC v. Netfire,162 F. Supp. 2d 560 (N.D. Tex. 2001) (listing Padmanabhan as a Kirkland & Ellis attorney); Texas v. Am. Tobacco Co. 14 F. Supp. 2d 956 (E.D. Tex. 1997) (relisting Padmanabhan as a Kirkland & Ellis attorney).

[161] *Latham Around the World*, LATHAM & WATKINS LLP, https://www.lw.com/officeSearch.aspx?officeViewMode=ListView [https://perma.cc/28DN-AA6Y] (last visited Feb, 20, 2017) [hereinafter *Latham Around the World*].

[162] *Latham & Watkins LLP*, VAULT, http://www.vault.com/company-profiles/law/latham-watkins-llp/company-overview.aspx [https://perma.cc/G8SF-QJ95] (last visited Feb. 20, 2017) (showing the firm's overview, ranking, diversity/pro bono, etc.).

[163] *See Entertainment, Sports & Media*, LATHAM & WATKINS LLP, https://www.lw.com/industries/entertainment-sports-media [https://perma.cc/6SB8-YX29] (last visited Feb. 20, 2017); *Century*

Given that it has six California offices,[164] it is thus not surprising that three current general counsels working for west coast clubs previously worked at Latham & Watkins: Hannah Gordon of the San Francisco 49ers was an associate at the firm from 2008-09;[165] Sam Fernandez of the Los Angeles Dodgers was an associate at the firm from 1980-84;[166] and, Ben Lauritsen of the Portland Trailblazers was an associate at the firm from 2005-07.[167] Additionally, Ashwin Krishnan of the Miami Marlins was a summer associate at the firm in 2009.[168]

f. Paul, Weiss, Rifkind, Wharton & Garrison LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP (Paul Weiss) is an international law firm with 8 offices[169] and more than 940 attorneys worldwide.[170] In recent years, Paul Weiss' sports law practice has centered around representing the NFL in the class action lawsuit brought by former players concerning concussions,[171] and attorney Ted Wells' handling of sports-

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City Partners Named Among Sports Law "Elite", LATHAM & WATKINS LLP, https://www.lw.com/awards/latham-century-city-partners-named-among-sports-law-elite [https://perma.cc/DMU3-TLYN] (last visited Feb. 20, 2017).

[164] *See Latham Around the World*, *supra* note 161.

[165] *Gordon*, *supra* note 140.

[166] James Bradicich, *Baseball Attorneys Swing Away at USC Event*, USC NEWS (Nov. 16, 2011), https://news.usc.edu/28442/baseball-attorneys-swing-away-at-usc-event/ [https://perma.cc/D8X6-KJF5].

[167] *Ben Lauritsen*, *supra* note 117.

[168] *Ashwin Krishnan*, LINKEDIN, https://www.linkedin.com/in/ashwin-krishnan-936a17103 [https://perma.cc/56V5-FXAN] (last visited Feb. 21, 2017).

[169] PAUL WEISS, https://www.paulweiss.com/ [https://perma.cc/3XNH-ZN2Y] (last visited Feb. 21, 2017).

[170] *Paul, Weiss, Rifkind, Wharton & Garrison LLP*, VAULT, http://www.vault.com/company-profiles/law/paul,-weiss,-rifkind,-wharton-garrison-llp/company-overview.aspx [https://perma.cc/B7FM-YUEY] (last visited Feb. 21, 2017).

[171] *See* In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016); *Brad S. Karp*, PAUL WEISS, https://www.paulweiss.com/professionals/

related investigations, including investigating the conduct of former National Basketball Players Association Executive Director Billy Hunter,[172] the NFL's investigation into workplace misconduct at the Miami Dolphins,[173] and allegations that the New England Patriots intentionally deflated footballs prior to the 2015 AFC Championship Game, known as "Deflategate."[174] Additionally, NBA Executive Vice President and Deputy General Counsel Daniel Rube previously worked at the firm.[175] Nevertheless, the only current general counsel to have worked at Paul Weiss is New York Islanders General Counsel Jay Itzkowitz, who was an associate at the firm from 1987-1991.[176]

g. Proskauer Rose LLP

Proskauer Rose LLP is an international law firm based in New York City with 13 offices[177] and more than 700 attorneys worldwide.[178] Led by attorney Robert Batterman, Proskauer Rose is counsel to all of the major professional sports leagues,

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partners-and-counsel/brad-s-karp.aspx [https://perma.cc/5MUQ-62L9] (last visited Feb. 21, 2017).

[172] Ken Belson, *Inquiry Questions Actions of N.B.A. Union Chief, But Finds No Criminality*, N.Y. TIMES (Jan. 17, 2013), http://www.nytimes.com/2013/01/18/sports/basketball/report-questions-actions-of-nba-union-chief-billy-hunter.html [https://perma.cc/29RU-MURF].

[173] Jacob Gershman, *NFL Taps Attorney Ted Wells to Lead 'Deflategate' Probe*, WALL ST. J. (Jan. 23, 2015, 3:33 PM), http://blogs.wsj.com/law/2015/01/23/nfl-taps-attorney-ted-wells-to-lead-deflategate-probe.

[174] *Id.*

[175] *Daniel Rube*, NBA CAREER OPPORTUNITIES, http://careers.nba.com/leadership/#daniel-rube [https://perma.cc/HLQ9-KL9F] (last visited Feb. 21, 2017).

[176] *Jay Itzkowitz,* LINKEDIN, https://www.linkedin.com/in/jay-itzkowitz-3841243 [https://perma.cc/LX7T-CB9G] (last visited Feb. 21, 2017).

[177] *Offices*, PROSKAUER ROSE LLP, http://www.proskauer.com/offices (last visited Feb. 21, 2017).

[178] *Proskauer Rose LLP*, VAULT, http://www.vault.com/company-profiles/law/proskauer-rose-llp/company-overview.aspx [https://perma.cc/C7EK-AZST] (last visited Feb. 20, 2017) (showing the firm's overview, ranking, diversity/pro bono, etc.).

particularly on labor matters, *e.g.,* collective bargaining.[179] Several prominent sports attorneys began their careers at Proskauer Rose, including former NBA Commissioner David Stern,[180] NHL Commissioner Gary Bettman, NHL General Counsel David Zimmerman,[181] MLB Chief Legal Officer Dan Halem,[182] and NHL Vice President, Special Projects & Corporate Social Responsibility Jessica Berman.[183]

Proskauer Rose has more alumni working as general counsels for sports clubs than any of the other major sports law firms. In the NFL, Megan Parekh of the Jacksonville Jaguars was a Proskauer Rose associate from 2009-2013,[184] and Aileen Dagrosa of the Philadelphia Eagles was an associate at the firm from 2004-2007.[185] In the NBA, Richard Haddad of the Detroit Pistons was a Proskauer Rose associate from 2006-2008 and 2009-2012 (after completing a federal clerkship),[186] Zachary

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[179] *L Robert Batterman*, PROSKAUER ROSE LLP, http://www.proskauer.com/professionals/bob-batterman/ [https://perma.cc/TK3Y-B8KX] (last visited Feb. 20, 2017); *see also* Michael McCann, *Proskauer Rose is the Most Powerful Law Firm in Sports*, SPORTS ILLUSTRATED (Mar. 7, 2013), http://www.si.com/more-sports/2013/03/07/proskauer-rose [https://perma.cc/9SCX-6H32].

[180] McCann, *supra* note 179.

[181] Alex Vorro, *David Zimmerman is a Team Player as GC of the NHL*, INSIDECOUNSEL (Aug. 1, 2011), http://www.insidecounsel.com/2011/08/01/david-zimmerman-is-a-team-player-as-gc-of-the-nhl [https://perma.cc/6QC7-3JQ5].

[182] *MLB Official Info: MLB Executives*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=halem_dan[https://perma.cc/TLQ4-ACYN] (last visited Feb. 20, 2017).

[183] Christopher Botta, *Forty Under 40: Jessica Berman*, SPORTS BUS. J. (Mar. 10, 2014), http://www.sportsbusinessdaily.com/Journal/Issues/2014/03/10/Forty-Under-40/Jessica-Berman.aspx [https://perma.cc/G5QG-GCQL].

[184] *Megha Parekh*, LINKEDIN, https://www.linkedin.com/in/meghaparekh [https://perma.cc/HCA6-R58L] (last visited Feb. 21, 2017).

[185] *Aileen Dagrosa*, LINKEDIN, https://www.linkedin.com/in/aileen-dagrosa-082709b8 (last visited Feb. 21, 2017).

[186] *Richard Haddad*, LINKEDIN, https://www.linkedin.com/in/richard-haddad-9060b368 [https://perma.cc/45YP-9J29] (last visited Feb. 21, 2017).

Kleiman of the Memphis Grizzlies was a Proskauer associate from 2013-2015,[187] and Brad Shron of the Philadelphia 76ers was an associate at the firm from 2005-13.[188] Shron also serves as General Counsel of the NHL's New Jersey Devils, as both the 76ers and Devils are owned by billionaire Josh Harris.[189]

h. Skadden, Arps, Slate, Meagher & Flom LLP

Skadden, Arps, Slate, Meagher & Flom LLP (Skadden Arps) is an international law firm based in New York City with 22 offices[190] and more than 1,650 attorneys worldwide.[191] Led by attorney Jeffrey A. Mishkin, former Chief Legal Officer of the NBA,[192] Skadden Arps provides counsel to all of the major professional sports leagues on a variety of matters, particularly antitrust.[193] Several prominent sports attorneys began their careers at Skadden Arps, including NHL Deputy Commissioner Bill Daly,[194] NHL Deputy General Counsel Julie Grand,[195] and NBA Vice President and Assistant General Counsel David

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[187] *Kleiman*, *supra* note 74.
[188] *Brad Shron*, LINKEDIN, https://www.linkedin.com/in/brad-shron-82538358 [https://perma.cc/NH3K-C4UG] (last visited Feb. 21, 2017).
[189] *Id.*; *#274 Joshua Harris*, FORBES, http://www.forbes.com/profile/joshua-harris/ [https://perma.cc/3ESH-49UR] (last visited Feb. 21, 2017).
[190] *Offices*, SKADDEN, https://www.skadden.com/the-firm/offices [https://perma.cc/57J5-JG7J] (last visited Feb. 22, 2017).
[191] *Skadden*, *Arps, Slate, Meagher & Flom LLP and Affiliates*, VAULT, http://www.vault.com/company-profiles/law/skadden,-arps,-slate,-meagher-flom-llp-and-affiliates/company-overview.aspx [https://perma.cc/2PDT-Y2MA] (last visited Feb. 22, 2017).
[192] *Jeffrey A. Mishkin*, SKADDEN, https://www.skadden.com/professionals/jeffrey-mishkin [https://perma.cc/L4CY-YVER] (last visited Feb. 22, 2017).
[193] *Sports*, SKADDEN, https://www.skadden.com/practice/industry-related/sports [https://perma.cc/66MJ-D72L] (last visited Feb. 22, 2017).
[194] *Bill Daly Bio and Timeline*, SPORTS BUS. J. (Sept. 23, 2013), http://www.sportsbusinessdaily.com/Journal/Issues/2013/09/23/In-Depth/Daly-timeline.aspx [https://perma.cc/P74G-J949].
[195] Peter Lattman, *The WSJ Profiles an NHL Lawyer*, WALL ST. J.: L. BLOG (Sept. 18, 2006, 8:40 AM), http://blogs.wsj.com/law/2006/09/18/the-wsj-profiles-an-nhl-lawyer.

Weiss.[196] As mentioned above, Michele Roberts, the Executive Director of the National Basketball Players Association, also previously worked at Skadden Arps, but was not involved in sports matters.[197] Nevertheless, the only current general counsel to have worked at Skadden Arps is Miami Marlins General Counsel Ashwin Krishnan, who was a summer associate at the firm in 2008.[198]

Table 10: Prior Experience at Firms Practicing Sports Law

	NFL	**MLB**	**NBA**	**NHL**	**Total**
Akin Gump Strauss Hauer & Feld LLP	1	0	0	0	**1**
Covington & Burling LLP	1	0	0	0	**1**
Foley & Lardner LLP	0	1	0	0	**1**
Kirkland & Ellis LLP	0	1	1	0	**2**
Latham & Watkins LLP	1	2	1	0	**4**
Paul, Weiss, Rifkind, Wharton & Garrison LLP	0	0	0	1	**1**
Proskauer Rose LLP	2	0	3	1	**6**
Skadden, Arps, Slate, Meagher & Flom LLP	0	1	0	0	**1**
Total	**5**	**5**	**5**	**2**	**17**

[196] John Lombardo, *Forty Under 40: David Weiss*, SPORTS BUS. J. (Apr. 4, 2016), http://www.sportsbusinessdaily.com/Journal/Issues/2016/04/04/Forty-Under-40/David-Weiss.aspx. [https://perma.cc/WYN4-JMQV].
[197] Dubin, *supra* note 139.
[198] *Krishnan*, *supra* note 168.

In considering the above data, it is helpful to remember that while the firms listed above do have international offices, they are predominantly American law firms. Thus, it would not necessarily be expected that individuals working at these law firms would go on to become the general counsel for one of the nine Canadian sports clubs.[199] Thus, if we remove the nine Canadian clubs from the calculus, we see that 16.3% of the general counsels previously worked at one of the major sports law firms.[200] While this percentage is fairly substantial, the data nonetheless shows that the alumni of these prominent law firms do not control the market for general counsel positions with professional sports clubs. Instead, as discussed in Section IV.B.3, a more telling statistic appears to be the qualification that a general counsel had previously worked at a law firm of at least 101 attorneys, which includes all of the firms practicing sports law discussed above.

5. League Office Experience

It makes sense that part of the work experience for some general counsels would be time having worked in the league's office. There, the future general counsel would have gained familiarity and experience handling many of the legal issues important to the league and clubs.

Similarly, experience in a league office other than the league in which the general counsel currently works can also be helpful. For example, an NBA general counsel might have worked in the NFL league office. This too makes sense. In Section IV.B.4 we discussed the law firms with the leading sports law practices. That discussion also revealed that the sports leagues often rely on the same law firms, in particular Proskauer

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[199] The Canadian sports clubs are: Toronto Blue Jays (MLB); Toronto Raptors (NBA); Calgary Falmes (NHL); Edmonton Oilers (NHL); Montreal Canadiens (NHL); Ottawa Senators (NHL); Toronto Maple Leafs (NHL); Vancouver Canucks (NHL); and, Winnipeg Jets (NHL). *Canada's Major-league Professional Sports Teams*, ROUGH GUIDES, https://www.roughguides.com/destinations/north-america/canada/spectator-sports/canadas-major-league-professional-sports-teams/ (last visited Feb. 22, 2017).

[200] This statistic is calculated by dividing 17 by 104. 104 equals the 113 clubs less the 9 Canadian clubs.

Rose and Skadden Arps. In this respect, there is a community of shared legal interests and perspectives among the leagues and their clubs. Consequently, it is not surprising that some club general counsels previously worked at a league office in a different sport.

Table 11 shows the number of general counsels in each league that have previously worked at one of the offices of either the NFL, MLB, NBA, or NHL.

Table 11: League Office Experience

	NFL General Counsels	**MLB General Counsels**	**NBA General Counsels**	**NHL General Counsels**	**Total**
Experience at NFL	5	0	0	1	**6**
Experience at MLB	0	1	0	0	**1**
Experience at NBA	1	1	0	0	**2**
Experience at NHL	1	0	0	0	**1**
Total	**7**	**2**	**0**	**1**	**10**

The above data shows that only 8.8% (10/113) of general counsels spent at least some time working in a league office. Thus, while it can obviously help, having worked for a professional sports league does not appear to be significantly important in advancing to the role of general counsel. Though, also note that seven out of thirty NFL general counsels (23.3%) did work in a league office.

Four of the general counsels took the interesting path of having worked in the league office in one sport, and then becoming general counsel for a club in another sport. Those individuals are: Myles Pistorius of the Miami Dolphins, who was an executive for the NBA for 15 years before joining the

Dolphins in 2015;[201] Ted Tywang of the Cleveland Browns who was a legal intern at the NHL;[202] Miami Marlins General Counsel Ashwin Krishnan who interned at the NBA while an undergraduate at Harvard;[203] and, Gregg Brandon of the Buffalo Bills and Sabres, who clerked at the NFL while attending law school.[204]

Six general counsels previously worked at the league offices for the sports played by their current employer: Brandon Etheridge of the Baltimore Ravens;[205] Gregg Brandon of the Buffalo Bills;[206] Ted Tywang of the Cleveland Browns; Ed Policy of the Green Bay Packers;[207] Hannah Gordon of the San Francisco 49ers;[208] and, John Westhoff of the Detroit Tigers.[209]

6. Experience as Associate Counsel

In this Section, we have examined some of the possible steps that have led to becoming a general counsel. One logical step would be the position directly underneath a general counsel, that of an associate counsel. These individuals, who can also

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[201] Chris Perkins, *Dolphins Hire Myles Pistorius as New Chief Lawyer*, SUN SENTINEL (June 18, 2015, 3:04 PM), http://www.sun-sentinel.com/sports/miami-dolphins/sfl-dolphins-hire-myles-pistorius-as-senior-vpgeneral-counsel-20150618-story.html [https://perma.cc/U3J6-VSDF].

[202] *Ted Tywang*, LINKEDIN, https://www.linkedin.com/in/ted-tywang-43915414/ (last visited Feb. 28, 2017).

[203] *Krishnan*, *supra* note 168.

[204] *Gregg G. Brandon*, LINKEDIN, https://www.linkedin.com/in/gregg-g-brandon-5563974 [https://perma.cc/4TUA-TF2X] (last visited Jan. 14, 2016).

[205] *Ravens Hire General Counsel Brandon Etheridge*, BALT. RAVENS (Sept. 14, 2016), http://www.baltimoreravens.com/news/article-1/Ravens-Hire-General-Counsel-Brandon-Etheridge/0c65958f-889d-49b1-b013-87e007d2cf78.

[206] *Brandon, supra* note 204.

[207] *Ed Policy*, GREEN BAY PACKERS, http://www.packers.com/team/staff/policy-ed/ba047611-d232-4f82-a6e3-6a67732c47fc [https://perma.cc/86U5-VYMZ] (last visited Jan. 18, 2017).

[208] *Gordon*, *supra* note 140.

[209] *John Westhoff*, DETROIT TIGERS, http://detroit.tigers.mlb.com/det/team/team_frontoffice_bio.jsp?loc=john_westhoff [https://perma.cc/HJT4-ZDDW] (last visited Jan. 18, 2017).

have a variety of titles, perform in-house legal services for the club but would be under the supervision and direction of the general counsel or another club executive. Table 12 shows how many general counsels spent time as associate counsel for a professional sports club before becoming general counsel.

Table 12: Experience as Associate Counsel

	NFL General Counsels	**MLB General Counsels**	**NBA General Counsels**	**NHL General Counsels**	**Total**
For an NFL Club	5	0	1	0	**6**
For a MLB Club	1	5	0	0	**6**
For an NBA Club	0	1	3	0	**4**
For an NHL Club	0	0	0	3	**3**
Total	**6**	**6**	**4**	**3**	**19**

The above data shows that while being an associate counsel is a useful career path to becoming a general counsel, it is far from a prerequisite. The fact that only 16.8% (19/113) of general counsels previously worked as an associate counsel might also be attributed to the fact that the associate counsel position is one of more recent usage. For many years, sports clubs subsisted on one or no in-house counsel, but the increasing complexity of sports clubs' operations has necessitated more in-house attorneys.

Perhaps the most interesting portion of this data are the three individuals that were associate counsel for a club in one sport before becoming general counsel for a club in another sport: David Cohen of the Tampa Bay Buccaneers who was

previously Director, Legal Affairs and Risk Management for the Los Angeles Angels;[210] Nona Lee of the Arizona Diamondbacks who was previously Associate General Counsel for the Phoenix Suns;[211] and, Joe Pierce of the Charlotte Hornets who was previously Associate General Counsel of the Jacksonville Jaguars.[212]

CONCLUSION

One of the principal purposes of this Article was to better understand the career paths that tend to lead to an individual being the general counsel of a professional sports club. An ideal method for collecting this data would be through surveys completed by the general counsels. While we recommend such research be done, we recognize that it would be challenging to obtain that type of access and cooperation. Thus, we believe this Article provides important and previously unknown data. In the Article, we examined a variety of different experiences and qualifications which we hypothesized might match the experiences of general counsels. Generally speaking, our research has not elucidated any one or two clear paths to becoming a general counsel. Nevertheless, we think our analysis has elucidated three themes.

First, prestige matters. This is not a novel conclusion concerning the legal industry but it nonetheless holds true in the sports law industry as well. Ultimately, if you want a highly-respected and highly-paid legal position – which includes being general counsel of a sports club – it helps to have attended a top law school and to then have worked at a top law firm. fifty-two general counsels (49.5%) attended a law school currently ranked in the top 25 and seventy-five of them (66.4%) previously worked at a law firm of at least 101 attorneys. These law schools and law firms tend to attract high quality students and lawyers and it is thus not surprising that sports clubs would gravitate towards individuals with such resumes.

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[210] *David Cohen,* LINKEDIN, https://www.linkedin.com/in/davidcohenesq/ (last visited Feb. 28, 2017).
[211] *Nona Lee*, LINKEDIN, https://www.linkedin.com/in/nona-lee-087114a9 [https://perma.cc/3RJP-AQPR] (last visited Jan. 14, 2017).
[212] *Joe Pierce*, LINKEDIN, https://www.linkedin.com/in/joe-pierce-2333882 [https://perma.cc/7W2G-K8JN] (last visited Jan. 14, 2017).

Second, prior experience at a league office or at a major sports law firm helps, but is not essential. Only seventeen general counsels (15.0%) previously worked at a law firm with a substantial sports law practice (Table 10), and only ten (8.8%) previously worked at a league office (Table 11). Undoubtedly the general counsels who worked in these positions gained important experience and contacts, but there are still many other paths to becoming a general counsel.

Third, more gender and racial diversity is needed in the roster of general counsels. Only twenty-one (18.6%) of general counsels are female and only sixteen (14.1%) are non-white. Sadly, these racial demographics generally match those of lawyers nationwide. The proportion of female general counsels nevertheless is substantially less than the thirty-six percent of all lawyers that are female. While improvement is needed in these areas in the legal industry generally, the sports industry should seek to lead in diversity given the racial diversity of its player populations[213] and its prominent status in many aspects of American culture.

In closing, we hope that this Article sheds light on an important role in the sports and legal industries, and provides

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[213] *See* Richard Lapchick & Angelica Guiao, *The 2015 Racial and Gender Report Card: National Basketball Association*, INST. FOR DIVERSITY & ETHICS SPORT (July 1, 2015), https://nebula.wsimg.com/6e1489cc3560e1e1a2fa88e3030f5149?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1 [https://perma.cc/Y6ER-VDS6] (discussing the racial populations of players in the NBA); Richard Lapchick, *The 2016 Racial and Gender Report Card: Major League Baseball*, INST. FOR DIVERSITY & ETHICS SPORT (Apr. 20, 2016), https://nebula.wsimg.com/811d6cc2d0b42f3ff087ac2cb690ebeb?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1[https://perma.cc/XD6K-KJ25] (discussing racial populations of players in MLB); Richard Lapchick & Leroy Robinson, *The 2015 Racial and Gender Report Card: National Football League*, INST. FOR DIVERSITY & ETHICS SPORT (Sept. 10, 2015), https://nebula.wsimg.com/91f862c7e055dd1842f9ceb52428ae2c?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1[https://perma.cc/95YQ-UDRF] (discussing the racial population of players in the NFL);. To note, no such racial and gender report card has been generated for NHL personnel and players.

guidance for those who seek to aspire to such heights.

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GANGSTERS' PARADISE: PERFORMATIVITY, NARRATIVE, AND PERSPECTIVE IN *THE ACT OF KILLING* AND *THE LOOK OF SILENCE*

Kelly Jo Popkin*

INTRODUCTION

In 1965, Indonesia endured a military.[1] This new military dictatorship labeled any opposing individual a "communist" and a threat to Indonesian democracy.[2] Between 1965 and 1966, over one million "communists" were killed, and many more were beaten, tortured, raped, or detained in concentration camps.[3] Paramilitary forces and Indonesian gangsters largely carried out these exterminations with government authority and financed by the West.[4] The perpetrators of these massive human rights violations have thus

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* J.D. 2017, Harvard Law School.

[1] Helen Fein, *Revolutionary and Antirevolutionary Genocides: A Comparison of State Murders in Democratic Kampuchea, 1975 to 1979, and in Indonesia, 1965 to 1966*, 35 COMP. STUD. IN SOC'Y & HIST. 796, 801 (1993).

[2] *See id.* at 802.

[3] For a more extensive background on Indonesian history through the context of international criminal law, *see* Renée Harrison, *Mass Crimes and Adjudication in Indonesia: Learning From the Cambodian Example*, 11 B.Y.U. INT'L L. & MGMT. REV. 107, 111. (Summer 2015); *see also* Henry Barnes, *Joshua Oppenheimer: 'You Celebrate Mass Killing So You Don't Have to Look Yourself in the Mirror'*, THE GUARDIAN (June 20, 2013, 10:57 AM), https://www.theguardian.com/film/2013/jun/20/joshua-oppenheimer-act-of-killing.

[4] Jonah Weiner, *The Weird Genius of "The Act Of Killing,"* THE NEW YORKER (July 15, 2013), http://www.newyorker.com/culture/culture-desk/the-weird-genius-of-the-act-of-killing.

far eluded punishment and even hold power in many parts of the country.[5] This paper provides both filmic and legal analyses of Joshua Oppenheimer's *The Act of Killing* (2012) and *The Look of Silence* (2014), two documentaries that depict this ongoing conflict.[6] Part One describes the role of participatory spectatorship and Hollywood film in the genesis of the Indonesian gangster. Part Two proffers a theory of redemptive spectatorship, wherein Indonesian gangsters were made to reflect on their crimes through their own performative reenactments. Part Three defines "perspectival shifting" as another form of storytelling that confronts Indonesia's revisionist history and stubborn refusal to acknowledge past harms. Part Four concludes by framing these mass atrocities, and the documentaries that depict them within the context of international criminal law.

I. PARTICIPATORY SPECTATORSHIP AS PERPETRATION

In *The Act of Killing*, Oppenheimer requests that the mass murderers of Indonesian "communists" reenact their heinous actions on film.[7] It is unfathomable as to how these killers can gleefully reenact their cruelty on camera, yet their boyish captivation with American films and narrative storytelling could explain both their impetus to kill and drive to perform it repeatedly. Anwar Congo and his fellow executioners have a long-standing obsession with Americana, fueled by their love of Hollywood cinema.[8] Working as ticket scalpers in the local cinema, they saw mafia gangsters and western outlaws as role models of strength and masculinity.[9] Anwar crafted his entire persona through American films, and admits to the camera that he "imitated them carefully as if [he] played in those movies [him]self."[10] It is through American filmmaking that he was

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[5] *Id.*; *see also* THE ACT OF KILLING (Final Cut for Real 2012).
[6] THE ACT OF KILLING, *supra* note 5; THE LOOK OF SILENCE (Final Cut for Real 2014).
[7] THE ACT OF KILLING, *supra* note 5.
[8] *Id.*
[9] *Id.*
[10] *Id.*

inspired to kill hundreds of victims with wire, his signature act of violence.[11] His existence gives credence to all who critique the depictions of violence in media and fear film's power to both instruct and encourage criminal and deviant behavior.[12]

Through this mimesis, Anwar could live out the narratives he admired on screen.[13] The "Act" of killing takes on a double and conflicted meaning for Anwar, where the "act" is simultaneously a performance and a perpetration.[14] Because the West is the ultimate arbiter of cool, Anwar and his friends look to western culture to define their every action.[15] Their vision is so preoccupied with the surface of the screen that they cannot look beneath the surface of their own reality.[16] Instead, their life imitates the art they ingest. Their spectatorship spills over into reality where they engage in an extended mimetic play of violence and masculinity.[17] It is because of their love for the American gangster that they are capable of perpetrating massive atrocities that would turn the stomachs of most other individuals who comprehend the differences between film and reality. Anwar and his friends, by contrast, commit heinous acts of murder with the extensive distance that is typically afforded to a moviegoer.[18] They commit murder in sunglasses, and it doesn't feel real.[19] Accordingly, the reenactments they perform seem

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[11] *Id.*; *see also* Tim Masters, *Act of Killing Director Says He Can't Go Back to Indonesia*, BBC NEWS (Feb. 18, 2014), http://www.bbc.com/news/entertainment-arts-26122788.
[12] Jessica M. Silbey, *Filmmaking in The Precinct House and the Genre Of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 145 (2005).
[13] *See* THE ACT OF KILLING, *supra* note 5.
[14] *See,* Al Jazeera English, *Empire – Extended Interview: Joshua Oppenheimer – Hollywood: Chronicle of an Empire*, YOUTUBE (Mar. 2, 2014), https://www.youtube.com/watch?v=spkD153ji_A ("Acting was always part of the act of killing for Anwar").
[15] *See Id.*
[16] *See Id.* ("I think that what their love of movies allowed them to do at the time…it allowed Anwar to distance himself from the act of killing while killing.").
[17] THE ACT OF KILLING, *supra* note 5.
[18] *Id.*
[19] *Id.*

equally unreal. They take on the quality of a lurid B-movie, filled with gratuitous violence, dramatic overacting, and bleeding body parts.[20]

The gangsters not only reenact their past, but also their psyche. They become captivated by the bewitching allure of filmic storytelling, driven to reveal their innermost fears and intimate perspectives to the world.[21] Saturated with camp and kitsch, Anwar and his friend Herman Koto (a fellow gangster and paramilitary leader) dramatize one of his horrifying nightmares where his victims take revenge.[22] Their vision is a fauvist's fever dream. Herman plays the devil in a tight-fitted red dress, laughing maniacally as he cuts off a hokey model of Anwar's head.[23] Like a perverse episode of Ru Paul's Drag Race, Herman smears his face with Anwar's blood like rouge and bats his long false eyelashes.[24] He castrates Anwar's body and chews on his liver while force-feeding Anwar his own penis.[25] The image of Anwar's suffering is at once dreamlike, macabre, pornographic, and homoerotic.[26] The gangsters reveal their inner turmoil and their inner desires through this childlike play. Indeed, *The Act of Killing* could be seen as a macabre love story between Herman and Anwar, who massage and flirt with one another throughout the entirety of the film.[27]

Herman also appears in drag in the equally fantastical waterfall scene, which appears as a foil to Anwar's hellish nightmares.[28] Wearing blue, rather than red, Herman dances alongside Anwar as he is awarded a medal of honor from two of his victims, who removed the wires from their throats to thank

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[20] *See id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See* THE ACT OF KILLING, *supra* note 5.
[26] *See* Stanley Cohen, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 178 (2001) (referring to exploitative human rights photography as "an allegory of colonialism" as well as an allegory for pornography).
[27] THE ACT OF KILLING, *supra* note 5.
[28] *See id.*

Anwar for "sending them to heaven."[29] Anwar and Herman raise their hands upwards as the waterfall cascades behind them, and "Born Free" triumphantly enters the soundscape.[30] Just as Anwar uses his film as a platform to reveal his inner guilt, so too does he use the film to convey his innermost desires. Anwar uses this fictional narrative to reframe history using the lens of his own fantasy. Through this scene, we see that Anwar craves a godlike exaltation for his actions. Yet we can also see that Anwar craves redemption without forgiveness, and clemency without any admission of guilt.

The use of "Born Free" may provide a naïve campy touch to their fantastical fiction film, however it also symbolizes the massive permeation of American "freedom" within Indonesian culture. The film is saturated with small references to the western influences that incited and encouraged this massacre to occur.[31] Herman prepares to run for office by listening to a broadcast of President Barack Obama and gesticulating in the mirror.[32] Paramilitary leaders showcase their posters of Al Pacino, and singing Billy Big Mouth Bass.[33] Anwar and his cronies sing renditions of Creedence Clearwater Revival songs in their local bar.[34] America is just slightly to the west of the frame, however its whispers of influence take center stage in driving the actions and perceptions of gangsters who kill in the name of western democracy. The effort to democratize Indonesia can be seen as a grand performative spectatorship of American "democracy", which is exalted and reenacted using its many cultural signifiers. As spectators, these gangsters killed in the name of both American democracy and Hollywood rebellion.

Throughout the film, we are told that the Indonesian word for "gangster" comes from the English word: "free man."[35] Gangsters are free to do as they please and should be honored for

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[29] *Id.*
[30] *Id.*
[31] *See id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

their thuggish ability to serve the interests of the state beyond the strictures of law and order.[36] These "free men" carry out crimes and craft their personas using Indonesia's two most popular American neocolonial imports—democracy and the movies.[37] Ironically enough, the Indonesian word for gangster ("preman") is actually rooted in the *Dutch* word for "free man."[38] The gangsters, as Indonesia's paradigmatic symbols of freedom, are steeped in colonial roots both etymologically and substantively.

II. PASSIVE SPECTATORSHIP AS REDEMPTION

While shooting the film, Anwar and the others are driven by the desire to portray the "truth," or rather the events as they really happened.[39] Herman emphasizes that their actions should be made public, to preserve their legacy in celluloid for their future generations.[40] Anwar extolls their film as a groundbreaking "new kind of cinema" simply because these sadistic acts are true to life.[41] When he chops off a victim's head on screen, it is all the more violent and "sadistic" because the audience will know that he actually perpetrated the crimes he is reenacting.[42] Anwar states that the film will defy categorization, as it will embody aspects of comedy, hints of romance, and western motifs.[43] Oppenheimer may have included this dialogue as a sort of meta-filmic reference, causing us as spectators to shift uncomfortably in our seats. *The Act of Killing* is truly a "new kind of cinema"—a kind without a completely conscious spectatorship where we may find ourselves unaware that these ostentatious, dreamlike reenactments are representative of something far more harrowing and very much real.

While the gangsters strive to replicate their actions with objectivity and veracity, this drive is contraindicated by their

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[36] *Id.*
[37] *Id.*
[38] Benedict Anderson, VIOLENCE AND THE STATE IN SUHARTO'S INDONESIA 129 (2000).
[39] THE ACT OF KILLING, *supra* note 5.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

realization that the truth depicts them in a more unsavory light than the "truth" that Indonesian society as a whole has accepted.[44] Anwar is haunted by his reality, and this fear only subsides when he numbs himself with alcohol, drugs, or anti-communist propaganda films.[45] His only solace is in the incapacitating role of spectator, where he can be numbed by filmic fantasy.[46] In his attempt to tell his story, however, Anwar is continuously confronted by the terrible truth of his past—if even just to fictionalize it. Anwar struggles most in a reenactment where he plays a communist being tortured and executed.[47] He winces and cries as Herman pretends to hit and strangle him for "trying to ban American films" in Indonesia.[48] This is not the only time where Anwar or other film participants are made almost physically ill from their reenactments.[49] In one scene, where members of the Pancasila Youth paramilitary group pretend to ransack a village, Anwar is rattled to the core.[50] He could barely participate as others pretend to torch huts, grab children, and drag away bodies.[51] Herman's daughter, who played a victim, could not stop crying even after they ended the scene.[52] Frozen in shock, a woman stared blankly and immobile as paramilitary youth attempt to bring her out of shock.[53] It is through this fictional performance where the true horrors are revealed, as the suffering is remediated through a fictional lens. This lens places the unspoken and often-repressed truth within a narrative framework that all participants must engage with and none can ignore.

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[44] *Id.*
[45] *See* Al Jazeera English, *supra* note 14 ("Government propaganda, including movies, helped the killers justify what they've done, even though they know, and say they know, that the propaganda is a lie.").
[46] THE ACT OF KILLING, *supra* note 5.
[47] *Id.*
[48] *Id.*
[49] *Infra* notes 53–56.
[50] THE ACT OF KILLING, *supra* note 5.
[51] *Id.*
[52] *Id.*
[53] *Id.*

Just as spectatorship inspired the genesis of the gangster, it may also be wielded as a powerful tool against him. In performing these reenactments, the killers are occasionally struck by their own cruelty.[54] If their actual crimes are conceived of as semi-conscious filmic "reenactments" of Hollywood violence, then their fictitious reenactments of these "reenactments" provide invaluable re-contextualization and framing. In crafting a revisionist history of their atrocities, they must confront their own historiography and the truth that it obstructs. In narrating their past, they are forced to engage with reality *as* reality, not as some sort of glorified Scorsese remake.

The deepest revelation of the true extent of his crimes comes when Anwar watches the footage of the scenes he found so difficult to shoot.[55] Throughout the film, Oppenheimer plays the takes of their film on a small television screen.[56] Like Hamlet's play-within-a-play, Oppenheimer's film-within-a-film truly catches the conscience of this king.[57] In utter horror and disbelief, Anwar asks Oppenheimer if his victims felt as he did during this torture scene, where he experienced "his dignity destroyed" and "his pride gone" as "the terror begins to possess my body."[58] Oppenheimer replies that they felt much worse because it was real, whereas Anwar understands that it is only a film.[59] Anwar identifies with the victim when he is forced to play that role. Yet upon viewing himself as a victim from the vantage point of a spectator, he was truly able to comprehend the counter-narrative that all victims and their families recognize as their reality.

Oppenheimer employs a two-pronged process of replication and observation, rapidly interchanging spectator with the spectacle as a way to challenge their implicit assumptions of

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *See id.*; Gillian Woods, *Hamlet: The Play Within the Play*, BRIT. LIBR., https://www.bl.uk/shakespeare/articles/hamlet-the-play-within-the-play (last visited Mar. 3, 2017).
[58] THE ACT OF KILLING, *supra* note 5.
[59] *Id.*

authorship and agency.[60] In so doing, he weaves a rich metanarrative to surround the narrative that the killers synthesize and dramatize in their series of graphic reenactments. These gangsters committed many unimaginable acts of violence as if they were in an action movie, in the pursuit of swagger, glory, and wealth without any regard for moral repercussions.[61] Through their fictitious reenactments, however, they were made to confront the grim realities of their actions. In the retelling, the gangsters were forced to re-contextualize their actions through common cultural narratives and modes of storytelling.

III. PERSPECTIVAL TRUTH AND RECONCILIATION

Adi Zulkadry, a fellow executioner culpable for the death of hundreds of communists in 1965, has a more realistic perspective on the truth than the other key players that Oppenheimer follows in *The Act of Killing*.[62] Adi quickly recognizes that admitting the truth on film could convey that "the communists were not more cruel than us" thereby throwing their entire preconceived narrative in jeopardy.[63] To Adi, a successful rendition of reality as it actually happened would "rewrite history" and destroy their "public image."[64] He readily acknowledges the heinousness of murder and confronts his past in a calculated, prescriptive matter.[65] The key, he says, is to find a way to avoid the guilt, thereby avoiding the concomitant insanity it would bring.[66] Adi actively chooses to define reality from his own perspective as a prescriptive solution to the problem of a guilty conscience. Adi privileges his perspective over any others because he believes that the line between right and wrong is drawn by those who are "the winners" of any conflict.[67]

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[60] *See id.*
[61] *See id.*
[62] *See id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

Oppenheimer confronts Adi's moral relativism and perspectival shifting in his subsequent film, *The Look of Silence*, by following another man named Adi, who happens to hold a drastically different comprehension of the military dictatorship.[68] Oppenheimer pursues the victims' interpretation of the communist massacre in a similar style of collaborative filmmaking, as is ethical for an outsider who is distanced from his subject by way of race, culture, level of trauma, and socio-economic background.[69] He follows Adi Rukun, an optometrist whose brother Ramli was brutally murdered by the exterminators.[70] On a similar television screen, Adi watches footage of his brother's tormentors as they happily reenact his castration, torture, and murder by the Snake River.[71] Adi struggles to comprehend why they so gleefully reenact these atrocities, just as we struggle to understand the drive towards reenactment in *The Act of Killing*.[72] We watch as Adi watches the screen, and through his gaze we experience a more painful personal spectatorship, acutely aware of his perspective as he endures the footage of the screen within the screen.[73] As if to answer the lingering question in *The Act of Killing*, Adi watches footage of a man miming a machete sawing at a victim, and postulates: "Maybe he acts this way because he regrets what he

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[68] THE LOOK OF SILENCE (Final Cut for Real 2014).
[69] *See* Wanda Bershen, *A Question of Ethics: The Relationship Between Filmmaker and Subject*, INT'L DOCUMENTARY ASS'N, http://www.documentary.org/feature/question-ethics-relationship-between-filmmaker-and-subject (last visited Mar. 4, 2017) (*quoting* Bill Nichols, *What to Do About Document Distortion? Toward a Code of Ethics*, INT'L DOCUMENTARY ASS'N, http://www.documentary.org/content/what-do-about-documentary-distortion-toward-code-ethics-0 (last visited Mar. 4, 2017) ("These questions boil down to questions of trust--a quality that cannot be legislated, proposed or promised in the abstract so much as demonstrated, earned and granted in negotiated, contingent, concrete relationships in the here and how.")).
[70] THE LOOK OF SILENCE, *supra* note 71.
[71] *Id.*
[72] *Id.*; THE ACT OF KILLING, *supra* note 5.
[73] THE LOOK OF SILENCE, *supra* note 71.

did. He regrets killing people. Because he feels guilty, when he reenacts the killings, he's completely numb."[74]

Adi's profession as the town's optometrist provides a rich metaphor for his mission to disrupt the (re)vision of the perpetrators and refocus the fading image of the past as it blurs in the distance.[75] Just as Anwar was forced to reconcile with his victims' harsh counter-narrative, so too are Adi's customers forced to bear witness with the insidious underbelly to the past they wish to either amend or regret.[76] This perspective-shifting is most readily apparent in one of the culminating scenes where Adi confronts the widow and children of one of his brother's murderers.[77] He uses two storytelling tactics in an attempt to bridge the tremendous gap between survivor and perpetrator.[78] He reads the exterminator's own description of the murder to the widow, and displays the pictures he had drawn of Ramli's torture and execution.[79] When the wife denies all knowledge of her husband's actions, Oppenheimer and Adi play decade-old footage of her listening to her husband as he reads from his book to the camera.[80] Together they subvert the overriding narrative put forth by "the winners" with this *evidence-verité.*[81]

IV. COLLABORATIVE NARRATIVE AS A PURSUIT OF JUSTICE

Though Oppenheimer and Adi have a symbiotic relationship, it is not necessarily the case that they have the same goals in crafting this narrative. Adi seems somewhat satisfied and grateful for the widow's apology and acknowledgment that they "feel the same way."[82] Adi is not confronting the perpetrators for any form of revenge, so much as a simple

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[74] *Id.*; *see* THE ACT OF KILLING, *supra* note 5.
[75] THE LOOK OF SILENCE, *supra* note 71.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Jessica M. Silbey, *Evidence Verité and the Law of Film,* 31 CARDOZO L. REV. 1257, 1271 (2010).
[82] THE LOOK OF SILENCE, *supra* note 71.

acknowledgment of wrongdoing.[83] Oppenheimer reveals another motive when, unsatisfied with the apology, he says, "Just one more clip," to emphasize the widow's direct witnessing and tacit acceptance of her husband's behavior.[84] Once again confronted with the footage, the family preserves their ignorance and blamelessness by averting their eyes.[85] Though they share similar perspectives on the "reality" of the Indonesian extermination, Oppenheimer and Adi may not share the same perspectives on what would constitute "justice" in this particular exchange. According to Oppenheimer, Adi wanted to meet the perpetrators hoping that "they would, in meeting him, acknowledge what they did was wrong, and that he would be able to forgive them so they could start to live together as human beings, instead of as victim and killer divided by fear and mutual suspicion."[86] Perhaps Adi was willing to accept a shallow apology in the hopes that this reconciliation will one day become a lived reality rather than a lofty goal.

Oppenheimer, in contrast, "wanted to do something unprecedented in nonfiction film . . . and more importantly in Indonesia, a fundamental breaking of the silence [in Indonesia]."[87] Linked to the film's website is a petition for a U.S. Senate resolution that "will condemn the 1965-66 atrocities, call on U.S. agencies to declassify documents related to the events, and urge political leaders in Indonesia to establish a commission to address the human rights violations and promote reconciliation across the country."[88] Just as Adi seemed to be more satisfied than Oppenheimer with the apology, so too might a commission-led trial for the perpetrators mass murders look like justice for some and not for others. There is significant deviation among the victims' responses in *The Look of Silence*,

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Berlinale – Berlin International Film Festival, *The Look of Silence Panel Discussion Berlinale* 2015, YOUTUBE (Feb. 9, 2015), https://www.youtube.com/watch?v=5qbJ70lTgcs.
[87] *Id.*
[88] *Participate – The Petition*, THE LOOK OF SILENCE, http://thelookofsilence.com/participate (last visited March 3, 2017).

connoting the arguable notion that a sense of justice is a truly individuated and personal experience—a notion that threatens to destabilize the entirety of criminal law.[89] Adi does not speak for all victims when he denies any desire for revenge or retribution, and he may even be an outlier in this respect. While one survivor at Snake River begs Adi's mother to forget the past, she continues to pray for karma to be dealt upon the children of the perpetrators and their families.[90]

While Adi established his own individualized adjudicatory process in an attempt to move forward towards reconciliation, a nationwide commission or international criminal court could not possibly provide a comparable sense of personal affirmation and recognition. However, a truth commission could be helpful in shifting societal and international perspectives on Indonesian history. As Robert Cover describes in his seminal essay entitled "Nomos and Narrative," law has a unique capacity to "imbue action with significance."[91] As such, law has the capacity to inform narrative, change morality, and alter destiny.[92] International and national recognition upstream may trickle down and initiate intra-communal healing and forgiveness. Aside any trickle down effects, a commission's reconciliatory "forces" are limited.[93] Governmental bodies may *pardon* these perpetrators, however they do not have the "standing" to *forgive*.[94] In high contrast to the documentaries' convoluted interweaving of individual perspectives, criminal trials simplify narratives as they retell

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[89] THE LOOK OF SILENCE, *supra* note 71.
[90] *Id.*
[91] Cover, Robert M., *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983).
[92] *Id.* at 5 ("In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose.").
[93] *See* Martha Minow, *Forgiveness, Law and Justice*, 103 CAL. L. REV. 1615, 1628–29 (2015).
[94] *Id*. at 1629; *see also* Kathryn Abrams, *Seeking Emotional Ends with Legal Means*, 103 CAL. L. REV. 1657 (2015).

them.[95] Whereas a film might more directly convey raw and unmediated emotion, a criminal trial must translate any traumatic and harrowing experiences into cut-and-dry legal language.[96] Provided that a national commission is created or an international trial is held, Oppenheimer's work could arguably be used to supplement other material evidence of paramilitary war crimes in Indonesia.[97] Film has previously been used as evidence in international criminal court proceedings, such as the Lubanga trial at the ICC or the Nuremberg trials.[98] Though highly problematic, it could even be argued that *The Act of Killing* and *The Look of Silence* have obviated the need for an international criminal trial—particularly because Oppenheimer's footage is currently being used by human rights organizations to move forward with their advocacy efforts.[99] *The Act of Killing* has been described as "film 'as justice', where participants illustrate the moral complexities in their various roles of witness, victim and perpetrator and urge mechanisms of international law and human rights to respond in kind."[100] Though Oppenheimer's goal may have been to promote justice, this does not suffice to say that the documentaries he has made provide an unbiased standpoint; nor do they afford the perpetrators the various procedural safeguards that we come to associate with a fair and equitable proceeding. Additionally, video footage is often described as having a more substantial evidentiary weight than other, more "indirect" forms of evidence such as written documents or still photographs.[101] As such, Oppenheimer's

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[95] *See generally* Minow, *supra* note 93.
[96] *Id.*
[97] THE ACT OF KILLING, *supra* note 5.
[98] Daniel Joyce & Gabrielle Simm, *Zero Dark Thirty: International Law, Film and Representation*, 3 LONDON REV. INT'L L. 295, 299 (2015).
[99] *Id.*
[100] *Id.* at 297.
[101] *See* Jessica Silbey, *Evidence Verité and the Law of Film*, 31 CARDOZO L. REV. 1257 (2010); *see also* Jessica Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789 (2006).

extensively edited and highly aestheticized documentaries might nonetheless become exhibited at trial as the unmediated "truth".

International criminal court proceedings are often described as "rituals" where collective stories of suffering are associated with "notions of order, justice, and community."[102] They empower the victims by allowing these stories to be heard in a public forum, however, they "radically transform[] their experiences" by distilling highly individualized and personal trauma into highfalutin legal concepts and notions bearing universal appeal.[103] Less desirable victims may be left out of the fold, and an unsatisfactory ruling could imbue the atrocity with a historicized sense of finality that belies both reality and the perceptions of those who were actually harmed. As opposed to Anwar's reenactments, which diminished the distance between himself and his victim, criminal trials proffer narratives that distance via simplification and condemnation.[104] They may charge some offenders to the exclusion of others, or even implicate those who were not actually involved with the perpetration.[105] *The Look of Silence* could be characterized as a quest for forgiveness, and forgiveness has been known to "jeopardize the appearance, if not the reality, of law's evenhandedness."[106] In fact, forgiveness is definitively a "conscious, deliberate decision to forgo rightful grounds for grievance against those who committed a harm."[107] If reconciliation is the true aim of most survivors, as opposed to retribution, then the law's natural adversarial process might serve as a detriment to the process of communal healing and forgiveness that Adi has initiated.

Although Oppenheimer calls for a commission, he is well aware that our societal understandings of guilt and blame

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[102] Wouter G. Werner, *"We Cannot Allow Ourselves To Imagine What It All Means:" Documentary Practices and the International Criminal Court*, 76 L. & CONTEMP. PROBS. 319, 321 (2014).
[103] *Id.*
[104] *Id.* at 339.
[105] *See, e.g.*, WAR DON DON (Racing Horse Productions 2010).
[106] Martha Minow, *Forgiveness, Law and Justice*, 103 CAL. L. REV. 1615, 1619 (2015).
[107] *Id.* at 1626.

drastically "other" the perpetrator as a way to avoid self-incrimination and implication.[108] Guilt is more slippery and systemic than a prosecutor may presume.[109] Oppenheimer exposes the humanity of Anwar, with all his regret and trauma, as a way to challenge the simplicity of the criminal justice narrative. By emphasizing Anwar's painful spectatorship, he challenges the guilty/innocent dichotomy on which the criminal justice system relies.[110] As we watch Anwar watching, we may implicate our own guilt as fellow spectators whose American way of life was a driving factor that led to these crimes.[111] By denying their humanity, we establish the requisite distance necessary to assuage our fears that such a villain might exist within each of us.[112] "The capacity for human evil," according to Oppenheimer, "depends on our ability to lie to ourselves."[113]

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[108] THE ACT OF KILLING, *supra* note 5.
[109] *Id.*
[110] *Id.*
[111] *See* PRIMO LEVI, THE REAWAKENING 228 (Touchstone, 1965) ("Monsters exist, but they are too few in number to be truly dangerous. More dangerous are the common men, the functionaries ready to believe and to act without asking questions.").
[112] *See generally* Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 COLUM. L. REV. 1157 (2015); *see also* Berlinale - Berlin International Film Festival, *The Look of Silence Panel Discussion Berlinale 2015*, YOUTUBE (Feb. 9, 2015), https://www.youtube.com/watch?v=5qbJ70lTgcs (("I think the capacity for human evil depends on our ability to lie to ourselves.").
[113] *Id.*

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THE WØRD:
SCOPE OF COPYRIGHT PROTECTION FOR LIVE-ACTION CHARACTERS—AN ANALYSIS OF STEPHEN COLBERT'S CHARACTER "STEPHEN COLBERT"

Timothy Lauxman*

Videri quam esse[1]

INTRODUCTION:
STEPHEN COLBERT BECOMES "STEPHEN COLBERT" AS TRUTHINESS BECOMES TRUMPINESS

On July 18, 2016, in the midst of the Republic National Convention, *Late Show* host Stephen Colbert revived his old character from *The Colbert Report*, Stephen Colbert (the "Character"), to explain, as only the Character could, the nomination of Donald Trump as the Republican party's nominee for president. The revival started with Colbert (the person) running off into the wilderness to find Jon Stewart, former host of *The Daily Show*, hidden away in a cabin. And after giving Colbert a spit-take (of what may or may not have been urine) and a few one-liner jokes about Trump—all prompted by Stewart's

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[1] *Stephen Colbert's New Latin Motto*, TALK SHOW NEWS (Jan. 7, 2010), http://talkshownews.interbridge.com/2010/01/stephen-colberts-new-latin-motto.html [hereinafter *Motto*]. This motto hung above the fireplace on the set of *The Colbert Report*; it is latin for: "to seem to be, rather than to be." *Id.* It is a play on "esse quam videri," the state motto of North Carolina. *Id.*

surprise in hearing that Donald Trump was the Republican party's presidential candidate—Stewart then proceeded to summon *The Colbert Report* host Character, who was also hiding in the cabin. The Character, eyebrow cocked, eagle crying, and holding Captain America's shield and Bilbo Baggins's sword Sting, was informed of Trump's nomination. He returned the spit-taking favor to Stewart and charged off into the wilderness towards *The Late Show*'s studio in Manhattan.[2]

The Character returned to *The Late Show* set in grand fashion, wheeled in on a golden chariot pulled by buff, shirtless Uncle Sams while a flute played "Yankee Doodle." The Character began with "Hello Nation" in his old *Colbert Report* opening salutation, quickly redecorated *The Late Show* set to look more like his old *Colbert Report* set while a distorted *Colbert Report* theme song played, and then launched into a signature bit from the *Report*, "The Wørd." That night's "Wørd" centered on "Trumpiness"—an echo of "truthiness," a term coined by Colbert on *The Colbert Report*'s first episode in the same bit—an explanation of how Trump has surpassed the Character's own flexible notion of facts, and how Trump's nomination is suited to and a consequence of many Americans' "legitimate" frustration and anger about the current political climate.[3]

A little over a week later, Colbert announced during *The Late Show* that immediately after the revival of *The Colbert Report*'s Character, "another company" (presumably Viacom, owner of Comedy Central, the network that aired *The Colbert Report*) had contacted CBS's top lawyer and claimed the Character as their intellectual property. Colbert remarked that he

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[2] *The Late Show with Stephen Colbert: Zoe Saldana* (CBS television broadcast July 18, 2016) [hereinafter *Late Show: Zoe Saldana*]; The Late Show with Stephen Colbert, *Only Jon Stewart Can Make Sense of the Trump Candidacy*, YOUTUBE (July 18, 2016), https://www.youtube.com/watch?v=-GFVKMTJUos&list=PLiZxWe0ejyv80dprAb-CPuvR_qPYiSUtt&index=4 [hereinafter *Only Jon Stewart*].

[3] *Late Show: Zoe Saldana*, *supra* note 2; The Late Show with Stephen Colbert, *The Word: Trumpiness*, YOUTUBE (July 18, 2016), https://www.youtube.com/watch?v=NqOTxl3Bsbw&list=PLiZxWe0ejyv80dprAb-CPuvR_qPYiSUtt&index=5 [hereinafter *Trumpiness*].

never considered the Character "much of an intellectual" and sadly admitted that the Character will never be seen again, causing the audience to boo loudly. Colbert quipped: "I understand, but what can I do? The lawyers have spoken. I cannot reasonably argue I own my face or name." Colbert then introduced the Character's identical twin cousin, Stephen Colbert, which is Colbert wearing an American flag short-sleeve shirt.[4]

The entire incident prompts a number of intellectual property questions—a common issue in the world of late night talk-shows[5]—but the most fundamental, and perhaps most novel is this: is the character even copyrightable and capable of being owned?

Colbert describes the Character as "a well-intentioned, poorly informed, high-status idiot."[6] And while most people know the Character from *The Colbert Report*, the Character actually began much earlier, on *The Daily Show*, when Colbert joined the cast in 1997 and began portraying the Character—then merely a correspondent. At first the Character was apolitical but distinctively high-status, inspired by Geraldo Rivera's news reporting, with Colbert stating: "I loved the way Geraldo made reporting a story seem like an act of courage."[7] Over the course of Colbert's time at *The Daily Show*, Stewart pushed him to

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[4] *The Late Show with Stephen Colbert: John Oliver, Jai Courtney, Charlamagne Tha God* (CBS television broadcast July 27, 2016) [hereinafter *Late Show: John Oliver*]; The Late Show with Stephen Colbert, *WERD: The Lesser of Two Evils*, YOUTUBE (July 27, 2016) https://www.youtube.com/watch?v=LvkFkzpVYJ4&feature=youtu.be [hereinafter *The Lesser of Two Evils*].

[5] *See* Eriq Gardner, *Can Viacom Really Stop Stephen Colbert from Playing "Stephen Colbert"?*, THE HOLLYWOOD REPORTER (July 28, 2016, 12:40 PM), http://www.hollywoodreporter.com/thr-esq/can-viacom-stop-stephen-colbert-915340.

[6] Talks at Google, *Stephen Colbert: "America Again: Re-Becoming the Greatness We Never Weren't"*, YOUTUBE (Dec. 14, 2012), https://www.youtube.com/watch?v=-HpBHWUPa8Q&feature=youtu.be.

[7] Charles McGrath, *How Many Stephen Colberts Are There?*, N.Y. TIMES MAG. (Jan. 4, 2012), http://www.nytimes.com/2012/01/08/magazine/stephen-colbert.html?pagewanted=1&_r=3&.

make the Character more political, and finally helped pitch the Character as the host of its own show, *The Colbert Report*, which debuted in 2005.[8] By that point the Character was an amalgamation of pundits Bill O'Rielly, Aaron Brown, Dan Abrams and Joe Scarborough, espousing a right-leaning political stance and an aversion to facts and logic.[9] Nine years and 1,446 half-hour episodes later, the Character signed off as host of *The Colbert Report* as one of the biggest names in late night TV.[10]

In contrast, Stephen Colbert the real person currently hosts *The Late Show*, taking over for David Letterman in 2015.[11] He grew up in Charleston, South Carolina, the youngest of eleven children.[12] Colbert lost his father and two older brothers when they died in a plane crash when he was ten-years-old.[13] By high school he was an avid reader, loved science fiction and Tolkien, and enjoyed playing Dungeons and Dragons.[14] Colbert studied theater at Northwestern and after graduating became a member of the Second City improv group.[15] He worked on numerous TV shows, most notably the *Dana Carvey Show*, *The Daily Show*, and of course *The Colbert Report*.[16] Colbert is a

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[8] *Id.*
[9] *Id.*; Jacques Steinberg, *The News Is Funny, as a Correspondent Gets His Own Show*, N.Y. TIMES (Oct. 12, 2005), http://www.nytimes.com/2005/10/12/arts/television/the-news-is-funny-as-a-correspondent-gets-his-own-show.html.
[10] Mariam Jaffery, *Stephen Colbert Doesn't Own His "Colbert Report" Character*, L. STREET (July 29, 2016), http://lawstreetmedia.com/blogs/ip-copyright/stephen-colbert-own-character-colbert/; David Sims, *Stephen Colbert's Alter Ego Is Back*, THE ATLANTIC (July 19, 2016), http://www.theatlantic.com/entertainment/archive/2016/07/stephen-colbert-returns-to-late-night-just-in-time/491954/; *The Colbert Report: Episode Guide*, COMEDY PARTNERS, http://www.cc.com/shows/the-colbert-report/episode-guide (last visited Apr. 17, 2017).
[11] McGrath, *supra* note 7; James Poniewozik, *Stephen Colbert Introduces Himself as CBS's New Late Show Host*, TIME (May 13, 2015), http://time.com/3857917/stephen-colbert-cbs-late-show/.
[12] McGrath, *supra* note 7.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

married father of three, a practicing Catholic, and even teaches the occasional Sunday-school class.[17]

In order to fully explore whether the Character is copyrightable, this article first briefly explore the basics of copyright. This section focuses on the purpose of copyright law, as stated in the Copyright Clause of the Constitution and the Court's interpretation of the Clause. This section then discusses copyright's requirements, specifically the idea/expression dichotomy that creates the boundary between works protected and unprotected by copyright. Additionally, this section discusses the manner in which a copyrighted work may be infringed, i.e. literal and "nonliteral" copying.

Next, this article explores the specific approaches courts have taken towards copyrighting characters, keeping in mind the policies underlying copyright. This section focuses on Judge Learned Hand's opinion in *Nichols v. Universal Pictures Corp.*,[18] the first case to specifically address the idea of whether characters are copyrightable, distinct from the works in which they appear. Next, the article discusses two separate outgrowths from the *Nichols* opinion, the first representing the "character is the story" standard, as stated in *Warner Bros. Pictures, Inc. v. CBS*,[19] and the second showing the different treatment courts give graphic, versus purely literary, characters. The section concludes with a discussion of the application of those principles to characters portrayed by real persons in costume, i.e. live-action characters.

Then, in light of Colbert's actual use of the Character, this article discusses the fair use doctrine, a defense that allows use of copyrighted material without an author's express consent. This section lays out the policies behind the fair use defense, and explores the factors used in analyzing fair use claims and the Court's unique treatment of parodic uses of copyrighted works.

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[17] *Id.*; Frank Rich, *The Real Stephen Colbert is a Sunday-School Teacher. His Key to Late-Night Success Is Avoiding Piety.*, N.Y. MAG. (Sept. 9, 2015, 1:19 PM), http://nymag.com/daily/intelligencer/2015/09/promise-and-challenge-of-colberts-late-show.html.

[18] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

[19] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

And because of Colbert's unique position as a potential defendant who was also the author of the allegedly infringed work, this article then discusses how the general treatment author-defendants receive from courts in the copyright infringement context.

Last, this article returns to Colbert and the Character and analyzes whether the Character is copyrightable. For sake of argument, the article further analyzes, under the assumption that the Character is copyrightable, the potential success of a fair use claim by Colbert to justify his revival of the Character on *The Late Show*.

The analysis of this article is limited to whether the Character is copyrightable, and whether Colbert's use of the Character was fair. Thus this article will not discuss potential copyright issues beyond the Character, or any other types of federal or state intellectual property law issues potentially arising from the incident. Additionally, this article will not discuss ownership or contractual issues, such as the "work made for hire" doctrine or any similar issue potentially arising from the incident.

I. COPYRIGHT IN GENERAL: ITS HISTORY AND BASIC REQUIREMENTS

A. THE CONSTITUTION AND THE COPYRIGHT ACTS

The United States Constitution states:

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[20]

Congress put this power to use in short order, enacting the United States' first statutory copyright scheme in 1790,[21] and in subsequent acts extended the length of the protection period

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[20] U.S. CONST. art. I, § 8.

[21] Eldred v. Ashcroft, 537 U.S. 186, 194 (citing Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (amended 1831)).

afforded to copyrighted works.[22] Courts have found Congress's extension of a work's copyright protection by a subsequent act constitutional.[23] The current iteration of the Nation's copyright laws was enacted in 1976.[24]

B. THE PURPOSE OF COPYRIGHT

The Supreme Court holds Congress's power to enact copyright laws is based on the underlying purpose—as expressly stated in the Constitution—of "creat[ing] a 'system' that 'promotes the Progress of Science'" and the useful arts.[25] As such, the Copyright Clause both grants and limits Congress's power to create a statutory copyright scheme.[26] Thus protections afforded to an author's work via copyright are merely a means to serve, and are limited by, that end.[27] Elaborating on this, the Court has stated that copyright's limited grant of protection to authors aims "to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[28] As Justice Blackmun put it: "[t]he monopoly created by copyright thus rewards the individual author in order to benefit the public."[29]

This limited grant of monopoly[30] appears to present a conflict between constitutional protections, as the owner of the copyrighted work has the ability to use that monopoly in limiting

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[22] *Id.* (citing Copyright Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (amended 1909); Copyright Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1075, 1080–81(amended 1976)).
[23] *Eldred*, 537 U.S. at 200–05.
[24] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).
[25] *Eldred*, 537 U.S. at 212 (quoting Graham v. John Deere Co., 383 U.S. 1, 6 (1966)).
[26] *Id.*
[27] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).
[28] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
[29] *Id.* at 477 (Blackmun, J., dissenting).
[30] *See* 17 U.S.C. § 106 (2012) (granting certain exclusive rights to a copyright's owner limited only by other statutory provisions).

another's free speech.[31] But the Court has found this to be a non-issue, stating the short temporal space between the adoption of the Copyright Clause and the adoption of the First Amendment shows the Framers believed that copyright's limited monopoly is compatible with free speech principles protected by the First Amendment.[32] Moreover, in light of the express purpose of the Copyright Clause, the Framers likely intended copyright's limited monopoly to be a vehicle for free expression.[33] Copyright achieves this aim by "establishing a marketable right to the use of one's *expression*," thus supplying the economic incentive "to create and disseminate *ideas*."[34]

C. THE IDEA/EXPRESSION DICHOTOMY: WHAT IS PROTECTED BY COPYRIGHT, AND WHAT ARE THE REQUIREMENTS FOR COPYRIGHT PROTECTION?

The boundary between what is copyrightable, and what is not, is the difference between an expression and an idea. It is this dichotomy that "'strikes a definitional balance between the First Amendment and the Copyright Act.'"[35]

The Supreme Court states the difference between an idea and an expression hinges on whether the work is original to the author. [36] This "originality requirement is constitutionally mandated,"[37] and Congress enshrined the originality requirement in section 102(b) of the Copyright Act of 1976.[38] In doing so,

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[31] *Compare id*., *with* U.S. CONST. amend. I.
[32] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).
[33] Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 558 (1985).
[34] *Id*. (emphasis added).
[35] *Id*. at 556 (quoting Harper & Row, Publishers. v. Nation Enters., 723 F.2d 195, 203 (1983)).
[36] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 344–45 (1991) ("[t]he sine qua non of copyright is originality."); Harper & Row, Publishers, 471 U.S. at 556.
[37] Feist, 499 U.S. at 347, 351.
[38] 17 U.S.C. § 102(b) (2012); H.R. REP. NO. 94-1476, at 51 (1976); S. REP. NO. 94-473, at 50 (1975). The other requirement for a work to receive copyright protection is that the work must be "fix[ed] in tangible form." H.R. REP. NO. 94-1476, at 51; S. REP. NO. 94-473, at 50. This requirement was also made explicit in section 102 of Copyright Act of 1976. 17 U.S.C. § 102 (2012).

Congress explicitly mentioned that section 102(b) incorporated "the scope of copyright protection" as it then stood, and section 102(b)'s purpose is merely to "restate . . . that the basic dichotomy between expression and idea remains unchanged."[39]

Originality only requires that the work be new to the author and has a minimal amount of creativity.[40] Thus a work may be original even if it is not completely novel, so long as the similarities between the work and another are not the result of copying.[41] Furthermore, facts themselves are not the original work of an author, but are "merely discovered."[42] But, an author can create a copyrightable expression through arrangement and selection of facts, if done with a minimal amount of creativity.[43] However, copyright protection would only extend to components that are original to the author, i.e. the selection and arrangement.[44]

Just as the line between an idea and its expression is unclear sometimes, the scope of copyright's protections may be ambiguous. While literal copying of a protected work is clearly barred, copyright's protections are not limited to a copyrighted work's exact expression, as this would allow "immaterial variations." [45] Thus copyright protects more than exact duplication of a copyrighted work; it also protects against "nonliteral" copying of a protected work, i.e. paraphrasing.[46] But this presents an issue of when similarities of a new work constitute nonliteral copying of a protected work's expression, as opposed to its mere unprotectable ideas. This issue was best illustrated by Judge Learned Hand in *Nichols v. Universal*

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[39] H.R. REP. NO. 94-1476, at 57; S. REP. NO. 94-473, at 54.
[40] Feist, 499 U.S. at 345.
[41] *Id*.
[42] *Id*. at 347.
[43] *Id*. at 348.
[44] *Id*. at 347–49; Harper & Row, Publishers., 471 U.S. at 547 ("The copyright is limited to those aspects of the work -- termed 'expression' -- that display the stamp of the author's originality.").
[45] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[46] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (rev. ed. 2017).

Pictures Corp.[47] while discussing whether one play violated another play's copyright protection:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.[48]

Thus, courts tend to apply some variant of a substantial similarities test when determining if nonliteral infringement has occurred.[49]

II. THE DISTINCTIONS & APPROACHES TO COPYRIGHT PROTECTION OF CHARACTERS

A. LEARNED HAND'S TAKE ON COPYRIGHTABLE CHARACTERS

Judge Learned Hand's opinion in *Nichols* is not only informative on the general understanding of whether a work as a whole is an expression, but also whether the individual aspects within a work are copyrightable expressions, separate from the copyright for the work as a whole. The dispute in *Nichols* centered on whether one play infringed on the copyright of another when both plays involved families, one Jewish and one Irish Catholic, with fathers at odds with one another while the children fall in love and start a family.[50] The quoted passage above refers to infringement via the copying of a play, but the plaintiff in *Nichols* also argued that the father characters, one a

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[47] 45 F.2d 119 (2d Cir. 1930).
[48] *Id.* at 121.
[49] 2 HOWARD B. ABRAMS, LAW OF COPYRIGHT §14:5 (2016)
[50] *Nichols*, 45 F.2d at 120–21.

Jew and the other an Irish Catholic, were themselves copyrightable and were infringed.[51]

The *Nichols* court held there was no infringement as to the characters, but Judge Hand expressly stated that it was possible that characters could be copyrighted separate from the copyright for the work in which they appeared.[52] Judge Hand considered the characters at issue in *Nichols* to be merely "stock figures,"[53] as they were merely angry fathers belonging to a particular group, and therefore insufficiently delineated to be copyrightable.[54]

But, Judge Hand arguably went even further in setting the bar when he turned to an example from Shakespeare:

> If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast *a riotous knight who kept wassail to the discomfort of the household*, or *a vain and foppish steward who became amorous of his mistress*. These would be no more than Shakespeare's 'ideas' in the play.[55]

Ignoring the color of Judge Hand's language, one should note the various descriptors used in describing these character-ideas. Consider the 'stock character' Sir Toby Belch—he belongs to a particular class/group,[56] with a particular disposition[57] and habits,[58] and has a defined relationship with his surroundings.[59]

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[51] *Id.* at 121–23.
[52] *Id.* at 121.
[53] *Id.* at 122.
[54] *See id.* at 122–23.
[55] *Id.* at 121 (emphasis added).
[56] *See id.* ("knights").
[57] *See id.* ("riotous").
[58] *See id.* ("kept wassail"); *Wassail*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/wassail (last visited Apr. 17, 2017) (likely means "riotous" or "excessive drinking"); *see Twelfth Night: Character Analysis Sir Toby Belch, Sir Andrew Aguecheek, and*

The stock character Malvolio extends this idea to include motives and even changes in character.[60] All of these aspects can occur in a single character, yet the character would remain insufficiently delineated and beyond copyright protection.[61]

B. WHY HOLDEN CAULFIELD IS COPYRIGHTABLE BUT SAM SPADE IS NOT? BECAUSE HOLDEN CAULFIELD *IS* THE PLOT

The *Nichols* standard for whether a character is copyrightable sets the bar quite high, at least for literary characters.[62] This was particularly apparent in *Warner Bros. Pictures, Inc. v. CBS*.[63] In *Warner Bros. Pictures*, the Author of the detective story *The Maltese Falcon* was sued for copyright infringement by Warner Bros.—the story's copyright holder—after the Author had used the characters from *The Maltese Falcon*, including lead-character detective Sam Spade, in later works.[64] In *Warner Bros. Pictures* the court held the character was not copyrightable, and thus could be used by the author in sequels.[65] In doing so, the court echoed the ideas espoused by Judge Learned Hand in *Nichols*, but went even further, stating that "characters of an author's imagination . . . are *always* limited and *always* fall into limited patterns."[66] Furthermore, the *Warner Bros. Pictures* court described characters as mere "vehicles for the story told," and found the idea that ownership of a story's copyright automatically imparting ownership of the story's characters was "unreasonable" and contrary to the Copyright Clause's purpose of "encourag[ing] the production of the arts."[67]

Maria, CLIFFSNOTES, https://www.cliffsnotes.com/literature/t/twelfth-night/character-analysis/sir-toby-belch-sir-andrew-aguecheek-and-maria (last visited Apr. 17, 2017).

[59] *See Nichols*, 45 F.2d at 121 ("to the discomfort of the household").

[60] *See id.* ("who became amorous of his mistress").

[61] *See, e.g.*, *id.* at 121.

[62] *See infra* notes 69–87 and accompanying text for information on characters with visual images.

[63] Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

[64] *Id.* at 946–49.

[65] *Id.* at 950.

[66] *Id.*

[67] *Id.*

This statement by the *Warner Bros. Pictures* court appears to imply that it believed no character could be copyrighted. But the court proceeded to step back from such a position when it stated that, when "[i]t is conceivable that the character really constitutes the story being told," as opposed to being merely "the chessman in the game of telling the story," the character would be sufficiently delineated and copyrightable.[68] This would allow the copyright holder to bar subsequent use of the character.[69]

Salinger v. Colting[70] was the one case that did satisfy the standard set in *Warner Bros. Pictures*. In *Salinger*, Colting had written a new novel, *60 Years Later: Coming through the Rye*, which Colting held out as a sequel to J. D. Salinger's *Catcher in the Rye*, and used Salinger's Holden Caulfield character, this time reappearing as a 76-year-old man.[71] Salinger's estate sued Colting claiming copyright infringement, specifically that Caulfield was a copyrighted character and that Colting had impermissibly used the character.[72]

The court found Holden Caulfield worthy of copyright protection,[73] stating: "Holden Caulfield is quite delineated by word. [*Catcher in the Rye*] is a portrait by words . . . . It is difficult, in fact, to separate Holden Caulfield from the book."[74] This language appears wholly in line with the standard set forth in *Warner Bros. Pictures*, as this "portrait by words" and

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[68] *Id.* at 950.
[69] *See id.*
[70] Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010).
[71] *See id.* at 71–72.
[72] *Id.* at 70–72. Such defense of *Catcher in the Rye* and Holden Caulfield from being used in any way is typical of Salinger's wishes; neither *Catcher in the Rye* nor Holden Caulfield has ever been licensed.
[73] *Id.* at 73 (citing Salinger v. Colting, 641 F. Supp. 2d 250, 254 (S.D.N.Y 2009), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010)).
[74] *Id.* at 73 (quoting Salinger v. Colting, 641 F. Supp. 2d 250, 254 (S.D.N.Y 2009) (Special App. 8 (Hr'g Tr. 24), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010)).

difficulty separating Caulfield from *Catcher in the Rye*[75] shows that Holden Caulfield "really constitutes the story being told."[76]

C. WHEN A PORTRAIT OF WORDS BECOMES A PORTRAIT BY SHAPES, COLORS, & REAL PEOPLE: COPYRIGHT PROTECTION FOR VISUAL CHARACTERS

1. Foundation

In *Nichols*, a case from 1930, the court speculated that a character could be sufficiently delineated and worthy of copyright protection separate from the work itself, but had never come across such a case.[77] The trial court's protection of Holden Caulfield in *Salinger* was decided in 2009.[78] But, it did not take seventy-nine years for the first character to receive copyright protection separate from the work in which it appeared.

In fact, a separate line of cases analyzing the potential of characters having independent copyright protection had already begun with *Hill v. Whalen & Martell*[79]—a case from 1914.[80] In *Hill*, the creator of two cartoon characters brought suit after two actors appeared in costume and performed as the characters, thus borrowing their language and appearance.[81] While the court did not explicitly state that the characters were copyrightable, the court held that the creator's copyright had been infringed and the court's analysis focused entirely on the characters.[82]

In contrast to *Hill*, *Detective Comics, Inc. v. Bruns Publ'ns, Inc*.[83] explicitly held that a comic, with its pictorial and literary form and unique arrangement of events related to characters, could be copyrighted, but the character itself could

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[75] *Salinger*, 607 F.3d at 73.
[76] Warner Bros. Pictures, Inc. v. CBS, 216 F.2d 945, 950 (9th Cir. 1954).
[77] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[78] Salinger v. Colting, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009).
[79] Hill v. Whalen & Martell, Inc., 220 F. 359, 359 (S.D.N.Y. 1914).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 359–60.
[83] Detective Comics, Inc. v. Bruns Publ'ns, Inc., 111 F.2d 432 (2d Cir. 1940).

not.[84] Thus the character's pictorial representation was an element of the author's copyrightable expression in the work as a whole, but did not sufficiently delineate the character itself.[85]

Three things should be noted about *Detective Comics, Inc.*: (1) two of the judges deciding *Detective Comics, Inc.* sat on the *Nichols* court, including Judge Learned Hand;[86] (2) when comparing the two works and deciding that the new work infringed, the court's analysis exclusively focused on the appearance and specific acts of the characters;[87] and (3) despite finding that the character was not protected on its own, the court's amendment to the trial court's order still barred the portrayal of "any of the feats of strength or powers performed by [the character] or closely imitating his costume or appearance *in any feat whatever*."[88] These points, taken together with the prior analysis of Judge Learned Hand's statement in *Nichols*'s regarding Sir Toby Belch and Malvolio, would appear to show that *general character traits*, even in conjunction, do not warrant

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[84] *Id.* at 433 ("So far as the pictorial representations and verbal descriptions of 'Superman' are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are proper subjects of copyright . . . .").
[85] *See id.*
[86] *Id.*; Nichols v. Universal Pictures Corp., 45 F.2d 119, 120 (2d Cir. 1930).
[87] *See Detective Comics, Inc.*, 111 F.2d at 433 ("The attributes and antics of 'Superman' and 'Wonderman' are closely similar. Each at times conceals his strength beneath ordinary clothing but . . . stand[s] revealed in . . . a skintight acrobatic costume. . . . Each is shown running toward a full moon . . . and each is shown crushing a gun in his powerful hands. 'Superman' is pictured as stopping a bullet with his person and 'Wonderman' as arresting and throwing back shells. Each is depicted as shot at by three men, yet as wholly impervious to the missiles that strike him. 'Superman' is shown as leaping over a twenty story building, and 'Wonderman' as leaping from building to building. 'Superman' and 'Wonderman' are each endowed with sufficient strength to rip open a steel door. Each is described as being the strongest man in the world and each as battling against 'evil and injustice.'').
[88] *Id.* at 434 (emphasis added).

protections, but the *specific acts* resulting from those traits are entitled to protection, as seen in the amended order in *Detective Comics, Inc.*[89]

This makes sense considering the idea/expression dichotomy and its relation to a work's potential copyright protections. General character traits are only ideas, whereas the specific acts are the author's original means of expressing the general traits (ideas).[90] And, based on the language from *Detective Comics, Inc.*, the court believed the visual appearance of the character fell into the specific 'expression' category despite finding that the character itself was not worthy of copyright protection.[91]

2. The Happiest (and Most Copyrightable) Place on Earth: Explicit Protection of Visual Characters

The determination that a character's visual appearance is significant in delineating the character was finally made explicit in *Walt Disney Prods. v. Air Pirates*.[92] In *Air Pirates*, Disney sued a group of individuals and magazine publishers who had used a number of "well-known Disney cartoon characters" and placed them in a "free thinking, promiscuous, drug ingesting counterculture" setting.[93] The *Air Pirates* court distinguished cartoon characters from literary characters and found that merely "copying a comic book character's graphic image constitute[d] copying" sufficient to find infringement.[94] In doing so the court noted that, unlike literary characters, graphic characters have both "physical as well as conceptual qualities" and thus "[are] more likely to contain some unique elements of expression."[95]

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[89] *Compare id.*, *with supra* notes 46–52 and accompanying text.
[90] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345–48 (1991).
[91] *See Detective Comics, Inc.*, 111 F.2d at 434 (ordering the bar of portrayals of "any of the feats of strength or powers performed by 'Superman' or closely imitating his costume or appearance in any feat whatever.").
[92] Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).
[93] Kevin W. Wheelwright, *Parody, Copyright, and the First Amendment*, 10 U.S.F. L. Rev. 564, 582 (1976).
[94] *Air Pirates*, 581 F.2d at 755–56.
[95] *Id.*

This duality mitigates the difficulty of delineating a character enough for its own copyright separate from the work in which it appears.[96] This sufficient, though not *per se*, ground for character delineation accords with the general concept of Judge Learned Hand's standard laid out in *Nichols*,[97] as it allows pictorial stock characters to be deemed insufficiently delineated.[98]

But since the *Air Pirates* decision, what constitutes a copyrightable visual character and a copyrightable literary character has diverged even further based on the physical qualities of visual characters. For example, in *DC Comics v. Towle* the court found the Batmobile a copyrightable visual character.[99] Three aspects of the *Towle* decision are noteworthy. First, the court noted the relevant inquiry was "whether the character conveys a set of distinct characteristics," regardless of whether the character in question was merely an object.[100] This would appear to afford protection to visual characters in circumstances beyond potential protection of literary characters, as delineation of objects in a literary work almost undoubtedly fails either the *Nichols* or *Warner Bros. Pictures-Salinger* tests.[101] Second, the court found the Batmobile's image aided its delineation, despite the Batmobile's image changing over time to reflect the latest technology and automotive design styles.[102] Thus the physical qualities aiding a visual character's delineation need not be a consistent expression, but need only cohere to a similar theme.[103] Last, the Batmobile was also found

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[96] *Id.* at 755.

[97] *Compare id.*, *with* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (requiring in either situation that, "the less developed the characters, the less they can be copyrighted . . . ."). In essence, even if the character has a visual image, if the character is not sufficiently developed, it is not worthy of copyright protection. *See* Air Pirates, 581 F.2d at 755.

[98] *E.g.*, Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003).

[99] DC Comics v. Towle, 989 F. Supp. 2d 948, 966–70 (C.D. Cal. 2013), *aff'd*, 802 F.3d 1012 (9th Cir. 2015).

[100] *Id.* at 966–67.

[101] *See* Warner Bros. Pictures, Inc., 216 F.2d at 950; *Nichols*, 45 F.2d at 120–123; *see* ABRAMS, *supra* note 49, at §14:5.

[102] *Towle*, 989 F. Supp. 2d at 966–67.

[103] *See id.* at 967.

copyrightable as a pictorial work, as defined by section 102 of the Copyright Act of 1976, further grounding the Batmobile's protection on its image.[104] Aside from the Batmobile's image, the court also found the Batmobile's character was delineated based on its "swift, cunning, strong, and elusive" nature, and its strong ties with Batman.[105] None of these aspects appear sufficient to pass Learned Hand's test set forth in *Nichols*, nor the *Warner Bros. Pictures-Salinger* test.[106]

The key beneficiaries of this distinction are the authors and copyright holders of cartoon characters, with Disney and its corporate family being particularly litigious in protecting its copyrighted characters.[107] Moreover, courts have been able accomplices in helping Disney protect these copyrights, with courts recognizing the "strong market for counterfeit Disney products" as the sole basis for granting injunctive relief—even if the infringement was a solitary incident and unintentional;[108] and finding infringement of Disney characters prior to the allegedly infringing work even being published.[109] Thus it appears the courts have recognized a truly different level and scope of protection, and willingness to enforce that protection, for visual characters.

Judge Posner's clever quotation and statement from *Gaiman v. McFarlane*[110] may best illustrate (if that's the proper word) the difference in protection in literary and visual characters:

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[104] *Id.* at 968–70.
[105] *Id.* at 967.
[106] *See* Warner Bros. Pictures, Inc. v. CBS, 216 F.2d 945, 950 (9th Cir. 1954); *Nichols*, 45 F.2d at 120–123; *see also* ABRAMS, *supra* note 49, at §14:5.
[107] *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Disney Enters., Inc. v. Away Disc., No. 07-1493, 2010 U.S. Dist. LEXIS 86119 (D. P.R. Aug. 20, 2010); Disney Enters, Inc. v. Law, No. 6:07-cv-1153-Orl-18UAM153, 2008 U.S. Dist. LEXIS 6431 (M.D. Fla. Jan. 3, 2008); Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990); Walt Disney Co. v. Best, No. 88 CIV. 1595, 1990 U.S. Dist. LEXIS 12604 (S.D.N.Y. Sept. 26, 1990); Walt Disney Prods. v. Filmation Assocs., 628 F. Supp. 871 (C.D. Cal. 1986).
[108] *Best*, 1990 U.S. Dist. LEXIS 12604, at *8–10.
[109] *Filmation Assocs.*, 628 F. Supp. at 877.
[110] Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004).

> The description of a character in prose leaves much to the imagination, even when the description is detailed--as in Dashiel Hammett's description of Sam Spade's physical appearance in the first paragraph of *The Maltese Falcon*: "Samuel Spade's jaw was long and bony, his chin a jutting v under the more flexible v of his mouth. His nostrils curved back to make another, smaller, v. His yellowgrey eyes were horizontal. The v *motif* was picked up again by thickish brows rising outward from the twin creases above a hooked nose, and his pale brown hair grew down--from high flat temples--in a point on his forehead. He looked rather pleasantly like a blond satan." Even after all this, one hardly knows what Sam Spade looked like. But everyone knows what Humphrey Bogart looked like.[111]

3. The Idea/Expression Dichotomy in Visual Characters

The protection of graphic characters is not limited to cartoon or artistic renderings of characters, but can be applied to characters portrayed by real persons,[112] i.e. live-action characters.[113] This appears contrary to the fact that a person's face or likeness is deemed a fact, and thus cannot be

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[111] *Id.* at 660–61. Humphrey Bogart played "Sam Spade" in the movie adaptation of the *The Maltese Falcon*. MALTESE FALCON (Warner Brothers 1941).

[112] *E.g.*, Anderson v. Stallone, No. 87-0592, 1989 U.S. Dist. LEXIS 11109 at *1, 20–23 (C.D. Cal. Apr. 25, 1989) (affording copyright protection to live-action character 'Rocky Balboa,' played by Sylvester Stallone).

[113] *Live-action*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/live-action (last visited Apr. 16, 2017) ("[O]f, relating to, or featuring cinematography that is not produced by animation.").

copyrighted.[114] Additionally, the protections afforded to a copyrightable work only cover those aspects that qualify as copyrightable expressions of the author—thus facts or ideas are not protectable.[115] In a related vein, "[h]uman clothing is considered utilitarian and unprotectable."[116]

Such concepts illustrate the differing results in how the courts might look at a character's visual appearance, based on whether the character is animated (i.e. a cartoon), or a real person in costume (i.e. live-action). For example, in *Detective Comics, Inc.* the court protected the animated Superman from new works with characters "closely imitating [Superman's] costume or appearance."[117] But if the original Superman character was created and portrayed first in live-action, the costume—even if it matched the animated version—would be unprotectable because it would serve the utilitarian purpose of being human clothing.[118] The same would also apply to the various bodily aspects of the character.[119] This contradiction leads to the determination that the visual appearance of a live-action character is a factor in sufficiently delineating the character, but is not a fully protectable aspect of the character.[120]

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[114] *E.g.*, Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000) (also noting that names and personas were not copyrightable); Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (noting that voices are also beyond copyright protection).

[115] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350–51 (1991).

[116] Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 916 n.12 (9th Cir. 2010) (contrasting doll clothing and human clothing). The *Mattel* court reasoned that because dolls have no concerns about modesty or temperature, their clothing has no utilitarian function and as such is copyrightable. In contrast, human clothing is a "useful article" based on its "intrinsic utilitarian function" and thus is not protected by copyright. *Id.* (citing 17 U.S.C. §§ 101, 102(a)(5) (2006)).

[117] Detective Comics v. Bruns Publ'ns, 111 F.2d 432 (2d Cir. 1940).

[118] *See Mattel, Inc.*, 616 F.3d at 916 n. 12.

[119] *See* Towle, 989 F. Supp. 2d 948, 966–67 (C.D. Cal. 2013).

[120] *Compare Feist*, 499 U.S. at 350–51, *and* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978), *with* Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000), *and Mattel, Inc.*, 616 F.3d at 916, n. 12 (acknowledging that while a person's image and clothes are always

As such, it is plausible that a court would afford less or no significance to a character's visual appearance if the character was portrayed in live-action versus animation, potentially resulting in the character being insufficiently delineated and unprotectable.[121] Thus the relaxed standard for delineating animated characters because of their visual qualities may not readily apply to live-action characters.

III. THE FAIR USE DOCTRINE

A. A SHIELD AGAINST A SHIELD: THE HISTORY AND PURPOSE OF FAIR USE

Returning to the constitutional balancing issues stated above, the First Amendment and the Copyright Clause itself—based on its purpose—allow for the limited monopoly granted by copyright to be violated in certain circumstances.[122] As Justice Story put it:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.[123]

Courts have found that authors impliedly consent to reasonable, or fair, use of their copyrighted works, based on the Copyright Clause's explicit purpose "[t]o promote the Progress of Science and the useful Arts."[124] Such uses are permissible because they allow subsequent authors to "improv[e] upon prior works," and

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unprotectable ideas, these ideas can still be arranged into a protectable expression that constitutes a character's visual image).

[121] *See Feist*, 499 U.S. at 349–51; *Air Pirates*, 581 F.2d at 755.

[122] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

[123] Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

[124] U.S. CONST. art. I, § 8; *Harper & Row Publishers Inc.*, 471 U.S. at 549.

any bar on those uses would "frustrate the very ends sought to be attained" by the Copyright Clause.[125] This is the basic premise behind the fair use doctrine.[126]

The fair use doctrine was only a common law doctrine until 1976, despite the existence of the Copyright Clause in the Constitution and the enactment of many statutory copyright schemes prior to that point.[127] The Copyright Act of 1976 finally codified the fair use doctrine in section 107 of the Act,[128] with Congress adopting the courts' common law fair use doctrine.[129]

B. THE FOUR FACTORS OF FAIR USE

Section 107 of the Copyright Act of 1976 lists four factors to be used in determining whether a new work's use of the original copyrighted work is a "fair use:"

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[130]

These factors are essentially the same factors as those listed and used in an 1841 opinion written by Justice Story.[131] But even though these statutorily enumerated factors have been long used and are often important in a fair use analysis, they are not

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[125] *Harper & Row*, 471 U.S. at 549 (citing HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).
[126] *See id.*
[127] *See id.* (discussing section 107's codification of the fair use doctrine); *see also* Folsom v. Marsh, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (No. 4,901).
[128] 17 U.S.C. § 107 (2012).
[129] *See* H.R. REP. NO. 94-1476, at 66 (1976); *see also* S. REP. NO. 94-473, at 62 (1976).
[130] 17 U.S.C. § 107 (1992).
[131] *See Folsom*, 9 F. Cas. at 348.

exclusive.[132] The fair use doctrine is "an equitable rule of reason" requiring each case to "be decided on its own facts."[133] In a similar vein, the Court has held that the factors are not considered in isolation, with all factors "to be explored, and the results weighed together, in light of the purposes of copyright."[134]

1. Purpose of the Use

The central question at issue in this factor is whether the new work adds some "new expression, meaning, or message," or merely supersedes, the original work.[135] Essentially, this factor asks "to what extent the new work is transformative?"[136] Transformative value—achieved through expressing a new meaning or message—tends to show the new work is in furtherance of the purpose of copyright as a whole.[137]

Thus the more the new work incorporates some new expression, meaning, or message, and thus is more transformative, the more this factor weighs in favor of fair use.[138] This is true even if the new work is a commercial work, an aspect of a new work's purpose that typically weighs against fair use.[139] In contrast, if the new work's purpose in using the original was merely "to get attention or to avoid the drudgery in working up something fresh," the transformative value is lessened or nonexistent, and this factor would weigh against a fair use finding.[140]

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[132] *Harper & Row*, 471 U.S. at 560.
[133] H.R. REP. NO. 94-1476, at 65.
[134] Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 578 (1994).
[135] *Id.* at 579 (citing *Folsom*, 9 F. Cas. at 348).
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Campbell*, 510 U.S. at 579.
[140] *See id.* at 580. While the *Campbell* Court was specifically discussing parody's use being transformative or not based on its purpose, the principle seems to apply more generally, as any use of an original to avoid coming up with something new or to gain attention would have to potential to harm the value of the copyright, thus undermining the scheme of copyrights being economic incentive to promote useful new works. *Compare id. with* Sony Corp. of Am. v. Universal City Studios,

In general, the for-profit versus nonprofit nature of the new work is only one aspect to be considered when analyzing this factor.[141] The Court has noted that the nonexclusive list, explicitly stated in section 107, of potential new works that might fairly use an original are generally commercial works.[142] Moreover, while new work's commercial purpose tends to weigh against fair use or its nonprofit purpose tends to weigh in favor of fair use, categorization as either does not trigger a *per se* finding in any way.[143] Furthermore, the tendency towards either fair or impermissible use, based on the new work's commercial or nonprofit purpose, "will vary with the context."[144]

2. Nature of the Copyrighted Work

"[S]ome works are closer to the core of intended copyright protection than others," making fair use of their material by a new work more difficult.[145] Generally unpublished works are granted greater protection, as their nature as unpublished works implicates the author's First Amendment right to remain silent, and right to first publication.[146] Works of fact generally have less protection, based on the society's interest in the dissemination of facts—although the extent of such mitigation of protection can be dependent on a work's nature and purpose.[147]

3. Amount & Substantiality of the Portion Used

This factor asks whether the quantity and quality of the original used by the new work is "reasonable in relation to the purpose of the copying" and the "character of the use."[148]

Inc., 464 U.S. 417, 429 (1984) (showing that when parody uses the borrowed material to imbue it with new ideas the parody conforms with copyright's purpose of disseminating ideas).

[141] *Campbell*, 510 U.S. at 584.

[142] *Id.*; S. REP. NO. 94-473, at 61(1976).

[143] *Campbell*, 510 U.S. at 584.

[144] *Id.* at 585.

[145] *Id.* at 586.

[146] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559–60, 564 (1985).

[147] *Id.* at 564.

[148] *Id.* at 586–87.

Regarding quantity, even if a new work only uses a small amount of the original, it may still be an unreasonable amount.[149] Moreover, substantial use of the original's material—as well as verbatim copying compared to looser translations of the original—may be informative of the qualitative value of the material used.[150] Additionally, under certain circumstances a new work may fairly use the qualitative "heart" of the original work, but such use without the new work adding or changing aspects of the borrowed material favors finding that the new work's purpose is merely to supersede the original.[151] As such, the analysis of this factor aids the analysis of the first factor (purpose of the use) and fourth factor (effect on original's market).[152]

Most importantly, this analysis only applies to the aspects of the original work worthy of copyright protection.[153] As such, it will only focus on the copyrightable expression of the original work, and not facts or ideas that are beyond the scope of copyright protection.[154]

4. The Effect of the Use Upon the Original's Market Value & Market for Derivatives

The fourth factor of the fair use analysis focuses on how the new work's use affects the market value of the original work, and market for derivatives of the original work.[155] There is no presumption of market harm when a new work uses an original, unless the new work amounts to mere duplication.[156] The only harm to the original that should be considered is harm stemming from the new work's usurpation of the market's demand for the original; "[b]iting criticism [that merely] suppresses demand" for the original is not cognizable harm to the original.[157]

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[149] *Id.* at 585.
[150] *See id.*
[151] Campbell v. Acuff-Rose Music, 510 U.S. 569, 587–89 (1994).
[152] *Id.* at 586–87.
[153] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 347–51 (1991).
[154] *Id.*
[155] *Campbell*, 510 U.S. at 590.
[156] *Id.* at 591.
[157] *Id.* at 592 (citing Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986)).

Additionally, the only harm to the original's market for derivatives should focus on those potential derivative uses that the original's author "would in general develop or license others to develop."[158] Thus, like the concern with market usurpation, the only harm cognizable to derivatives is market substitution.[159]

C. PARODIC USES

How a court should consider the fair use factors obviously is dependent on the nature of the use. But the Supreme Court specifically addressed the calculus of fair use claims in the context of a parodic use in *Campbell v. Acuff-Rose Music*,[160] as parodies further the purpose of copyright.[161] The *Campbell* Court also defined when parody occurs in the fair use context: when the new work uses "some elements of" another author's work "to create a new one that, at least in part, comments on that author's work."[162] Finding that the new work is a parody is not dependent on the effectiveness of the new work's commentary; instead "the threshold question . . . is whether a parodic character may reasonably be perceived."[163]

In the context of the first factor (purpose of the new work's use), the *Campbell* Court recognized that parodies have "an obvious claim to transformative value" as they necessarily "mimic an original to make [their] point."[164] As such, parodies have some right to fair use of the original, but only to the extent that use relates to the parody's comment on the original work.[165]

The *Campbell* Court also manipulated the value of the second factor (nature of the copyrighted work) when an existing work is used by a parody, noting that "since parodies almost invariably copy publicly known, expressive works," an existing work fitting into that category adds little weight against fair

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[158] *Id.* at 592 (citing *Fisher*, 794 F.2d at 438).
[159] *Id.* at 593.
[160] *Campbell*, 510 U.S. at 569.
[161] *See id.* at 579.
[162] *Id.* at 580.
[163] *Id.* at 582.
[164] *Id.* at 579–81.
[165] *Id.*

use.[166] The *Campbell* Court did not address parodies of lesser-known works.

In the context of the third factor, the *Campbell* Court's consideration of a parodic use centered on the distinction between qualitative and quantitative use.[167] Parody is an example of when this use of the original work's "heart" is more likely to be permissible, if the parodist has justification for the use.[168] One common justification for the parodist's use may be to "conjure up" the original work in the audience's mind, a necessary context for the parody's commentary on the original.[169] But any use beyond what is needed to conjure up the original must serve the parody's commentary, i.e. have justification specific to the idea(s) expressed by the parody.[170]

Last, the *Campbell* Court stated parodies will likely "not affect the market for the original . . . because the parody and the original usually serve different market functions." [171] By definition parodies comment on the original work, thus are more likely to provide biting criticism of the original, a non-cognizable harm. [172] Moreover, parodies usually fall in the derivative market for criticism of the original, which is generally not licensed by the original work's copyright holder and thus is not protected.[173]

IV. AUTHORS AS DEFENDANTS

In reference to the lack of protection afforded to Sam Spade in *Warner Bros. Pictures*, Judge Posner wrote:

> That decision is wrong, though perhaps understandable on the "legal realist" ground that [the Author] was not claiming copyright in Sam

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[166] *Id.* at 586.
[167] *See id.* at 586–90.
[168] *Id.*
[169] *Id.* at 588–89.
[170] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271 (11th Cir. 2001) (citing *Campbell*, 510 U.S. at 588).
[171] *Campbell*, 510 U.S. at 591 .
[172] *Id.* at 580, 591.
[173] *Id.* at 592–93.

> Spade--on the contrary, he wanted to reuse his own character but to be able to do so he had to overcome [the Copyright Holder]'s claim to own the copyright.[174]

Regardless of the accuracy of Judge Posner's assertion, the fact remains that unique issues arise when a work's copyright is owned by someone other than the author and is enforced against the author. The Copyright Clause's stated purpose is "[t]o promote the Progress of Science and useful Arts."[175] The limited monopoly granted to protect the work is intended as an economic incentive to encourage the dissemination of ideas through the creation of new works.[176] But when the copyright holder is no longer the author, and suppresses the author's further development on the copyrighted work, one can understandably ask: has copyright law frustrated its constitutional purpose?

Few cases have directly addressed the issue, and never has the infringement issue squarely reached the Supreme Court; however, courts appear sympathetic to the defendant-author. Similar to *Warner Bros. Pictures*, defendant-authors have received favorable decisions when creating new works in a similar style as the protected work, even when the copyright for the prior work is held by another party.[177] The basis for such protection stems from the idea that an author may and should be allowed to create variations on a subject matter theme or style, so long as there are sufficient differences to create a unique expression in each work.[178] This adheres to the idea/expression dichotomy because the variation's differences create something

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[174] Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2004).
[175] U.S. CONST. art. I, § 8, cl. 8.
[176] *See supra* notes 27–28, 109–112 and accompanying text.
[177] *See* Fantasy, Inc. v. Fogerty, 94 F.3d 553, 555–58 (9th Cir. 1996) (affirming the trial court's award of attorney's fees premised on finding that author's successful copyright defense allowed for himself and others to create new works in a similar style); Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc. 575 F.2d 62, 65–67 (3d Cir. 1978) ("The similarities here are of a nature not calculated to discourage an artist in the development of a specialty yet sufficiently distinguishable to protect his creativity in that sphere.").
[178] *Franklin Mint*, 575 F.2d at 66–67.

that is not a copy of the original, and the theme or style constitutes only an unprotectable idea.[179] The author's protection from infringement liability is heightened when the original work's protectable expression and the unprotectable idea converge, i.e. is primarily based on fact or closely resembles the idea being expressed.[180]

V. BACK TO YOU STEPHEN: IS THE COLBERT REPORT CHARACTER COPYRIGHTABLE?

A. MAN, MYTH, OR SUFFICIENTLY DELINEATED CHARACTER CAPABLE OF COPYRIGHT PROTECTION?

1. Stephen Colbert is Merely Stephen Colbert

His name is Stephen Tyrone Colbert (pronounced "col-bear"), he grew up in Charleston, South Carolina, he is a Catholic.[181] And the same is true for the host of *The Late Show*, Stephen Colbert.[182] Coincidentally, they also look alike and even have the same fashion-sense.[183]

In light of those facts, is it possible that there is no "character" at all and the host of *The Colbert Report* was actually just Colbert, being himself and making his own jokes based on his own sense of humor and his own observations (while looking like himself and wearing his own clothes)?

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[179] *Id.* at 66.
[180] *See id.* at 65.
[181] Avery Gordon, *Stephen's Bio*, COLBERT NATION, http://www.colbertnation.com/cn/stephens-bio.php [https://web.archive.org/web/20080325224351/http://www.colbertnation.com/cn/stephens-bio.php] (last visited Apr. 17, 2017) [hereinafter *Character's Biography*]; *How Stephen Colbert Endured Tragedy and Became One of the Greatest Political Satirists of Our Time*, BUS. INSIDER (Sep. 16, 2015, 1:55 PM), http://www.businessinsider.com/stephen-colbert-bio-2015-9/#stephen-colbert-was-born-on-may-13-1964-in-washington-dc-he-is-the-youngest-of-11-children-1.
[182] ArchieLeach, *Stephen Colbert Biography*, IMDB, http://www.imdb.com/name/nm0170306/bio?ref_=nm_ov_bio_sm (last visited Oct. 22, 2016) [hereinafter *Stephen Colbert's Biography*].
[183] *See, e.g.*, Jaffery, *supra* note 10.

Returning to the Character's *Late Show* appearance, he arrives wielding a sword and shield.[184] The sword appears to be Bilbo Baggins's Sting,[185] while the shield belongs to Captain America.[186] The shield was given to Colbert—not the Character—and Colbert brought it to *The Colbert Report* as a representation of the Character's ego.[187] The sword, however, is representative of another shared attribute between Colbert and the Character—their fascination with the works of J. R. R. Tolkien.[188] Thus while the Character had both the sword and shield on display in *The Colbert Report*, they also illustrate how the minutiae of Colbert's personal life, his personal interests, and interactions with others, were brought into the Character.[189]

Other examples of this are plentiful. When Colbert broke his wrist during taping of *The Colbert Report*, suddenly the Character, obviously wearing the cast, became an advocate for stopping "wrist violence."[190] The Character's long running and frequently referenced fear and hatred of bears is based on

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[184] *Trumpiness, supra* note 3.
[185] *Compare id.*, *with Sting The Sword of Bilbo Baggins*, THINKGEEK, http://www.thinkgeek.com/product/f2bc/ (last visited Oct. 22, 2016).
[186] *Compare Trumpiness supra* note 3, *with* Marc Storm, *The History of Captain America's Shield*, MARVEL (Aug. 18, 2010), http://marvel.com/news/comics/13640/the_history_of_captain_americas_shield.
[187] Greg Gilman, *Stephen Colbert Explains Origins of That 'Captain America' Shield on 'Colbert Report' Set*, THE WRAP (Sept. 3, 2014, 7:38 AM), http://www.thewrap.com/stephen-colbert-explains-origins-of-that-captain-america-shield-on-colbert-report-set-video/; *see* Jason Hughes, *Marvel Reveals New, Black Captain America on 'The Colbert Report'*, THE WRAP (July 17, 2014, 12:40 AM), http://www.thewrap.com/marvel-reveals-new-captain-america-on-the-colbert-report/ ("[The Character]'s been ready to defend freedom and punch Hitler in the face for years.").
[188] Talks at Google, *supra* note 6.
[189] Gilman, *supra* note 187; Sarah Moran, *Stephen Colbert and Frodo Baggins Geek Out*, NERDBASTARDS.COM (Nov. 16, 2011), http://nerdbastards.com/2011/11/16/stephen-colbert-and-frodo-baggins-geek-out.
[190] Brian Stelter, *2 Out of 3 Anchors Join Colbert in Wrist Stunt*, N.Y. TIMES (Aug. 27, 2007), http://www.nytimes.com/2007/08/27/business/media/27colbert.html.

Colbert's own fear of bears.[191] And when Colbert was listed as the second-most influential person in *TIME* magazine's 100 Most Influential People, the Character started a feud with Rain, the Korean pop-star who beat Colbert to the top spot.[192]

But even more than bringing these elements of Colbert's real life into the Character's life and show, it was Colbert's talents, skills, and opinions that created the Character. Colbert designed the Character to be an amalgamation of Bill O'Rielly, Geraldo Rivera, Aaron Brown, Dan Abrams and Joe Scarborough, borrowing different aspects of each to create the Character's beliefs, and speech and behavioral patterns.[193] But this does little to define the Character's real-time actions and reactions, and this is where Colbert's own abilities and opinions come to the fore. As Colbert's long-time comedic partner Jon Stewart described Colbert's portrayal of the Character: "Stephen

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[191] Megh Wright, *Stephen Colbert Finally Ends His Nine Year Grudge Against Bears*, SPLITSIDER (Nov. 18, 2014), http://splitsider.com/2014/11/stephen-colbert-finally-ends-his-nine-year-grudge-against-bears/; *see* Ellen Gray, *The 'Real' Stephen Colbert? Still Scared of Bears*, PHILLY.COM (Aug. 11, 2015, 6:48 AM), http://www.philly.com/philly/entertainment/television/Colbert-Still-scared-of-bears-.html.

[192] EW Staff, *25 Best 'Stephen Colbert' Moments: 21. Colbert and K-pop Star Rain's Dance-off*, ENT. WKLY. (Dec. 15, 2014, 8:00 PM), http://www.ew.com/gallery/25-best-stephen-colbert-moments/754730_21-colbert-and-k-pop-star-rains-dance.

[193] Maureen Dowd, *America's Anchors*, ROLLING STONE (Oct. 31, 2006, 9:54 AM), http://www.rollingstone.com/news/coverstory/jon_stewart_stephen_colbert_americas_anchors [https://web.archive.org/web/20070818095819/http://www.rollingstone.com/news/coverstory/jon_stewart_stephen_colbert_americas_anchors] (quoting Colbert: "'When [O'Reilly] had Geraldo on, talking about Mel Gibson, they talked about Gibson for maybe thirty seconds. And then they go, "If you're rich and you're famous, everybody guns for you." And Geraldo's like, "Guys like us." And O'Reilly's like, "Exactly." And the next five minutes was just about them. I saw O'Reilly do an interview with President Bush, and he said, "Guys like us," and I said, "Shit, the most powerful man in the world and a guy with 2 million people a night watching his show." I keep that equation in the forefront of my character.'"); Steinberg, *supra* note 9 (focusing on O'Rielly's use of "'talking points,'" Brown's "'folksiness,'" and Scarborough's "'common-sense answers'") (internal quotations omitted).

is rendering a character in real time. Typically, he's improvising with people who don't know they're in an improv scene."[194] In another interview Stewart noted how Colbert's humanity shines through the Character, which allows the jokes made by the Character to be funny rather than off-putting.[195] As an example of how the funny-versus-off-putting result of these jokes can shift, consider this description of an interview Colbert did on *The Late Show* when Colbert was just being himself and not portraying the Character:

> There was a moment in September when Colbert was interviewing Jesse Eisenberg about Eisenberg's new book. After Eisenberg made a remark about the book, Colbert replied that he hadn't read the book. It was weird because the voice Colbert used was the same kind of voice he'd use on his old show, which would have gotten a laugh because *of course* "the character" hasn't read Jesse Eisenberg's book. But here, in this setting, it just sounded rude . . . even though I know Colbert didn't intend it that way.[196]

As Stewart eluded, Colbert's brilliance and the Character's appeal is due to Colbert's improvisation, a product of his wit and training.[197] Thus much of the Character's ideological statements and personality are really the result of Colbert's masterful improv comedy skills.[198] But even beyond that, the supposed distinction between Colbert and the Character—the Character's political beliefs—is not the vast divide one might assume it to be.[199] As Colbert himself stated: "I meant a lot of it. I even

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[194] *Id.*
[195] *See* McGrath, *supra* note 7.
[196] Mike Ryan, *Stephen Colbert is Caught Between Himself and 'Stephen Colbert'*, UPROXX (Feb. 4, 2016), http://uproxx.com/tv/late-show-with-stephen-colbert-review.
[197] *Id.*; Dowd, *supra* note 193; McGrath, *supra* note 7.
[198] Dowd, *supra* note 193; Ryan, *supra* note 196.
[199] *See* Gray, *supra* note 191.

agreed with my character sometimes, wearing the [Character] 'like a cap,' sometimes more lightly than others."[200]

Last, and most telling, Colbert incorporated the Character into himself (or perhaps it was always an aspect of him).[201] While the Character is outwardly bold, Colbert states that the Character is inherent and internally weaker, with a "thin-skinned quality."[202] Colbert enjoys that aspect the most about the Character because it is that weakness that Colbert finds familiar and believes they have that in common.[203] Colbert even admits that "I'm not as, um, well defined as he is, and I enjoy copping to that in my own behavior."[204]

Thus I would argue the Character became incorporated into, or was always a part of, Colbert's own personality, behavioral patterns and skills.[205] This would explain the ease and fluidity by which Colbert steps into and out of the Character—sometimes accidentally—and even why Colbert had difficulty keeping separate his own interests from those of his character.[206] The Character's nature as a "well-intentioned, poorly informed, high-status idiot" is merely a means for Colbert to achieve his ultimate aim: to make people laugh.[207]

With that said, assuming the Character is actually a character and not just Colbert's own personality . . .

2. Is the Character a Stock Character or Sufficiently Delineated & Copyrightable?

The Character is best described as a self-absorbed right-wing TV pundit who is "well-intentioned, poorly informed," and a "high-status idiot."[208] Based on this description, is the Character sufficiently delineated when compared to Judge

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[200] *Id.*
[201] Talks at Google, *supra* note 6.
[202] *Id.*
[203] *See id.*
[204] *Id.*
[205] *Id.*
[206] Ryan, *supra* note 196; Talks at Google *supra* note 6.
[207] Dowd, *supra* note 193; Talks at Google *supra* note 6; *see* Ryan *supra* note 196.
[208] Talks at Google, *supra* note 6; *see* Steinberg, *supra* note 9.

Learned Hand's description of Sir Toby Belch or Malvolio in *Nichols*?[209] Judge Hand found that a combination of class/group membership, a particular disposition, habits, motives, and relationship to his surroundings, and even changes in some of those aspects during the course of the work, would not constitute a sufficiently delineated literary character.[210] Many of the Character's previously mentioned descriptors—self-absorbed, well-intentioned, poorly informed, and high-status idiot—merely set out the Character's particular disposition, and likely do not create a more nuanced disposition than either Sir Toby Belch's or Malvolio's disposition as described by Judge Hand.[211] Furthermore, the Character's employment as a right-wing TV pundit is likely no more than a class membership and particular relationship to his surroundings, similar to Sir Toby Belch's role as a riotous knight discomforting the household or Malvolio's role as a steward enamored with his mistress.[212] Additionally, the minutiae of the Character are generally part of Colbert's personal history, opinions, wit or psyche,[213] and thus are merely discovered facts and add little to the Character's delineation.[214] Thus it is likely that the Character's nonvisual nature alone is insufficient to delineate the Character and make him worthy of copyright protection.

Moreover, the Character's visual aspect is likely worthy of minimal or no protection, and thus adds little to the Character's delineation. The Character's physical appearance is not worthy of copyright protection, as those features are Colbert's own physical features and thus are only facts.[215] And the combination of those features is also solely attributable to

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[209] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[210] *See supra* notes 48–54 and accompanying text.
[211] *Nichols*, 45 F.2d at 121.
[212] *Id.*
[213] *See supra* notes 179–87, 189, 192–99 and accompanying text.
[214] *See supra* notes 109–11 and accompanying text (illustrating that aspects of a person, including one's "persona," Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000), is not copyrightable).
[215] *See supra* notes 105–06 and accompanying text.

Colbert, so even their arrangement is not original.[216] Last, the Character's clothes are only protectable to the extent of their arrangement, as human clothing is utilitarian and not protectable, and that arrangement is of minimal creativity and thus warrants little protection.[217]

On the other hand, and as Colbert himself said, the Character is unlike other anchors who act as a conduit to convey the news and instead the Character actually "is the news;"[218] thus one could argue the Character "constitutes the story being told." [219] *The Colbert Report* centered on the Character, regardless of the material being covered;[220] and even when introducing a guest the Character acted to impliedly suggest he, and not the guest, was the one receiving applause.[221] Moreover the "WristStrong" movement,[222] Tolkien obsession,[223] fear of

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[216] 17 U.S.C. § 102(b) (2012); H.R. Rep. No. 94-1476, at 51 (1976); S. Rep. No. 94-473, at 50 (1975). The other requirement for a work to receive copyright protection is that the work must be "fix[ed] in tangible form." H.R. Rep. No. 94-1476, at 51; S. Rep. No. 94-473, at 50. This requirement was also made explicit in section 102 of the Copyright Act of 1976. 17 U.S.C. § 102 (2012); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344–45 (1991); Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 556–58 (1985).

[217] *See* Gray, *supra* note 191; *see, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990); Disney Enters., Inc. v. Away Disc., No. 07-1493, 2010 U.S. Dist. LEXIS 86119 (D. P.R. Aug. 20, 2010); Disney Enters, Inc. v. Law, No. 6:07-cv-1153-Orl-18UAM153, 2008 U.S. Dist. LEXIS 6431 (M.D. Fla. Jan. 3, 2008); Walt Disney Co. v. Best, No. 88 CIV. 1595, 1990 U.S. Dist. LEXIS 12604 (S.D.N.Y. Sept. 26, 1990); Walt Disney Prods. v. Filmation Assocs., 628 F. Supp. 871 (C.D. Cal. 1986).

[218] Talks at Google, *supra* note 6.

[219] Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).

[220] *E.g.* Moran, *supra* note 189; Talks at Google, *supra* note 6.

[221] *See* Ben Lindbergh, *A Statistical Analysis of Stephen Colbert's First 100 Episodes of 'The Late Show'*, FIVETHIRTYEIGHT (Feb. 26, 2016, 1:07 PM), http://fivethirtyeight.com/features/a-statistical-analysis-of-stephen-colberts-first-100-episodes-of-the-late-show/.

[222] Stelter, *supra* note 190.

[223] Talks at Google, *supra* note 6.

bears,[224] and numerous other recurring bits like "Tip of the Hat, Wag of the Finger" from *The Colbert Report* centered on the Character, and were a means for expressing his views or highlighting events related to the Character itself, rather than presenting truly newsworthy events.[225] Just as with Holden Caulfield in *Catcher in the Rye*, where "it is difficult, in fact, to separate Holden Caulfield from the book," it is difficult to separate the Character from *The Colbert Report*, and as such one could argue the Character is sufficiently delineated and thus copyrightable.[226] Last, the Character has a physical appearance, which strengthens the claim that the Character is copyrightable,[227] even if no single aspect of the Character's appearance would be protected by copyright.[228]

A rebuttal to the Character "constitut[ing] the story being told" would argue that the Character is merely a "conduit" or lens for expressing the news, and that in fact the story being told is a joke, combing the Character and the news.[229] The fact that *The Colbert Report* often centered on less newsworthy events or events relating to the Character does not negate the Character's primary function as a satirical foil in the presentation of information about events in the world to an audience, i.e. the news. As such, it is likely one can distinguish the Character from the story being told, whether it is a joke, an event of international concern, or Colbert breaking his wrist while preparing for that

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[224] EW Staff, *supra* note 192.
[225] Tim Grierson, *30 Best 'Colbert Report' Bits: 2. Tip of the Hat, Wag of the Finger*, ROLLING STONE (Dec. 15, 2014), http://www.rollingstone.com/tv/lists/30-best-colbert-report-bits-20141215/tip-of-the-hat-wag-of-the-finger-20141215.
[226] Salinger v. Colting, 607 F.3d 68, 73 (2d Cir. 2010) (citing Salinger v. Colting, 641 F. Supp. 2d 250, 254 (S.D.N.Y 2009) (Special App. 8 (Hr'g Tr. 24), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010)).
[227] *See* Anderson v. Stallone, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at *21 (C.D. Cal. Apr. 25, 1989).
[228] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350–51 (1991); Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 916 n. 12 (9th Cir. 2010); Brown v. Ames, 201 F.3d 654, 658 (5th Cir. 2000); Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).
[229] Warner Bros. Pictures, Inc. v. CBS, 216 F.2d 945, 950 (9th Cir. 1954); Talks at Google, *supra* note 6.

night's show.[230] This is unlike the difficulty separating Holden Caulfield from *Catcher in the Rye*, which was a "portrait by words" of Caulfield.[231] Moreover, the combination of the Character with the news creates the ultimate aim, or story, of *The Colbert Report*: a satirical joke about modern events. Thus the Character is merely a single part of a duality necessary to create the joke, and thus does not "constitute the story being told."[232]

3. Summary: Is the Character is Copyrightable?

The Character likely is not copyrightable. The significant overlap between the Character and Colbert's own life make it virtually impossible to separate the two, thus any ability to delineate the Character is merely a result of Colbert himself being a unique person with unique opinions and talents.[233] And because much of the Character is unprotectable facts or ideas, combined with its function as a means to tell jokes about recent events in the world, it is likely that the even if the Character is a "character," it is insufficiently delineated to fall within the scope of a copyrightable subject matter.[234]

B. IS IT FAIR FOR STEPHEN COLBERT TO USE HIS OWN NAME & FACE? THE FAIR USE DOCTRINE APPLIED

Even if the Character is copyrightable, it is likely Colbert could successfully assert the fair use defense, as his use of the Character furthered the purpose of copyright by disseminating ideas, was parodic, and, particularly in light of Colbert's line of work and comedic style, provided a public benefit. The following analysis assumes the Character is copyrightable.

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[230] Stelter, *supra* note 190.
[231] *Salinger*, 607 F.3d at 73 (citing Salinger v. Colting, 641 F. Supp. 2d 250, 254 (S.D.N.Y 2009) (Special App. 8 (Hr'g Tr. 24), *rev'd on other grounds*, 607 F.3d 68 (2d Cir. 2010)).
[232] *Warner Bros. Pictures*, 216 F.2d at 950.
[233] *See Feist*, 499 U.S. at 350–51; *Mattel, Inc.*, 616 F.3d at 916, n.12; *Brown*, 201 F.3d at 658.
[234] *See id. But see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978); Anderson v. Stallone, No. 87-0592, 1989 U.S. Dist. LEXIS 11109 at *21 (C.D. Cal. 1989).

1. The Purpose of the Use

This factor likely weighs in favor of fair use, based on the parodic nature of Colbert's use of the Character.[235] While the primary purpose of Colbert's reintroduction of the Character on *The Late Show* was to comment on Donald Trump's presidential campaign,[236] the Character's use as a foil for that commentary involved parodic commentary on the Character itself.[237]

Colbert's use of the Character was a means to contrast the political climate that spawned the Character and *The Colbert Report*, embodied in the concept of truthiness, with the politics of today and Trump's nomination success, embodied in the term "trumpiness."[238] Truthiness, coined by Colbert in 2005, embodies the idea that politicians' statements felt true, but weren't necessarily focused on or even based in fact or logic.[239] Thus Colbert's Character—an advocate for and the embodiment of "truthiness"[240]—had no concern for fact.[241] In the Character's monologue on "trumpiness," the 2016 version of truthiness, the Character first explains the idea of truthiness and how he coined the word; then the Character compares himself to Trump,

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[235] *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 580 (1994); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997).
[236] Sims, *supra* note 10.
[237] *See* Jaffery, *supra* note 10; Sims, *supra* note 10.
[238] *Trumpiness*, *supra* note 3.
[239] Amée Latour, *Stephen Colbert's New Word "Trumpiness" Is the 2016 Evolution of "Truthiness"*, BUSTLE (July 19, 2016), https://www.bustle.com/articles/173568-stephen-colberts-new-word-trumpiness-is-the-2016-evolution-of-truthiness.
[240] *Trumpiness*, *supra* note 3; *see* Dowd, *supra* note 193; EW Staff, *supra* note 192; Steinberg, *supra* note 9. "Truthiness" is defined as "the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the like." *Truthiness*, DICTIONARY.COM, http://www.dictionary.com/browse/truthiness (last visited Apr. 11, 2016). The word was first coined by Colbert/the Character on the first episode of *The Colbert Report*, and used to describe the state of politics and political commentary in 2005. *See* Latour, *supra* note 239.
[241] *See* Dowd, *supra* note 193; EW Staff, *supra* note 192; Steinberg, *supra* note 9.

showing their similarities.[242] But then the Character admits Trump has surpassed him because truthiness requires statements to "feel true, but Trumpiness, doesn't even have to do that," it just "need[s] a leader to feel things that feel *feels*:" voters now only care that a politician's statements merely seem to voice the electorate's emotions.[243] Essentially, Colbert's use of the Character while explaining "trumpiness" is a parodic comment on the Character, showing the Character is out of date, as the political situation has devolved to the point that voters are no longer concerned that politicians' statements even *feel* true. Instead, voters just want a candidate to be an "emotional megaphone" for their anger at the government, and Trump satiates that desire.[244] Thus the Character and his truthiness is contrasted with Trump to illustrate the Character's inadequacy in explaining the change in political climate and voters' motives, and the rise of Trump and his "trumpiness."

A rebuttal to this comparison would argue Colbert's use of the Character did not transform the Character, or did so only minimally, and primarily used the Character for commentary on Trump.[245] Consequently the purpose of using the Character was merely to "avoid the drudgery in working up something fresh."[246] However, this argument likely fails as courts do not require substantial commentary on the original work; they only require that the new work's parodic purpose "may reasonably be perceived."[247] The statements that contrast the Character and Trump, and the explanations of truthiness and "trumpiness" are likely sufficient for parodic commentary, under the *Campbell*

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[242] *Trumpiness*, *supra* note 3.
[243] *Id.*
[244] Rebecca Kaplan, *Colbert: Trump is "My Old Character with $10 Billion"*, CBS NEWS (Dec. 27, 2015, 12:12 PM), http://www.cbsnews.com/news/stephen-colbert-donald-trump-is-my-old-character-with-10-billion/; Latour, *supra* note 239; *Trumpiness*, *supra* note 3.
[245] *See* Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (finding that a new work's use of the original to comment on a separate topic was not a transformative use).
[246] Campbell v. Acuff-Rose Music, 510 U.S. 569, 580 (1994).
[247] *Id.* at 582.

Court's construction of parody.[248] Moreover Colbert's use of the Character in discussing in the change in political climate form 2005 to 2016 is transformative and beneficial commentary on its own.

Last, Colbert's commercial benefit from using the Character does not bar this factor favoring fair use. The Character was used on *The Late Show*, Colbert's current job, thus used for a commercial purpose, which cuts against fair use.[249] But this is relatively insignificant, as a use's commercial nature is only part of this factor and is not determinative of how the factor weighs, and the purpose of Colbert's use to provide parodic and critical commentary mitigates the weight given to the commercial nature of the use.[250]

Thus this factor would likely weigh in favor of fair use, based on Colbert's parodic and social commentary.

2. Nature of the Copyrighted Work

While the Character is a creative work, it is still mostly composed of unprotectable materials—particularly its appearance and political perspective.[251] Moreover, because Colbert's parodic use of the Character, the Character's notoriety is largely irrelevant.[252] Thus this factor would likely weigh against fair use, but only minimally.

3. Amount & Substantiality of the Portion Used

Related to the statements made in the preceding section, the Character's name, voice, and appearance are "facts," while his clothing serves a utilitarian function, and thus are not protected.[253] The Character's general viewpoints are ideas, thus are not worthy of copyright protection and also excluded.[254] Only

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[248] *Compare id.* at 583*, with Trumpiness*, *supra* note 3.
[249] *Campbell*, 510 U.S. at 584–85.
[250] *See id.* at 584–85.
[251] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).
[252] *See Campbell*, 510 U.S. at 586.
[253] *See* Gaiman v. McFarlane, 360 F.3d 644, 658–62 (7th Cir. 2004).
[254] Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350–51 (1991); Harper & Row, Publ'rs. v. Nation Enters., 471 U.S. 539, 556, 559–60 (1985).

specific aspects associated with the Character are potentially worthy of protection.[255] Thus this factor favors fair use due to these limitations on which aspects of the Character are copyrightable and the parodic nature of Colbert's use.

While there are numerous aspects of the Character that could be protected, only a few were used and present few issues. The sword and shield held by the Character during his entrance are items featured on *The Colbert Report*, but both items are associated with Colbert's own interests and belongings, and impart minimal originality to the Character; thus they likely only have weak, if any, copyright protection.[256] Moreover, this is a quantitatively minimal use of the Character, if it is at all, and likely a qualitatively minimal use as well considering other, used unprotectable aspects of the Character.[257] The one aspect that is solely attributable to the Character is the catchphrase "Hello Nation," with the phrase and word "Nation" likely referencing fans of *The Colbert Report*, which the Character referred to as "Colbert Nation."[258] Again, this use is likely both quantitatively and qualitatively minimal, based on the context.[259]

Moreover, Colbert's use of the borrowed aspects was likely permissible based on the parodic nature of the use. Parodies may permissibly use those aspects necessary to "conjure up" the original work.[260] This concept creates a unique issue in the context of Colbert's use of the Character, as Colbert inherently and unintentionally uses many unprotectable aspects of the Character without actually conjuring up the Character, i.e

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[255] *See Walt Disney Prods. v. Air Pirates*, 581 F.2d 755 (9th Cir. 1978).
[256] *See generally Feist*, 499 U.S. at 348–49; 1World, *Peter Jackson Gives Stephen Colbert a Lord of the Rings Sword*, TG DAILY (Nov. 13, 2014), http://www.tgdaily.com/happyplace/film/129466-peter-jackson-gives-stephen-colbert-a-lord-of-the-rings-sword; Moran, *supra* note 189; Talks at Google, *supra* note 6.
[257] *See Feist*, 499 U.S. 340, 361–64.
[258] *See Character's Biography*, *supra* note 181 (noting the official fan website for *The Colbert Report* titled "Colbert Nation").
[259] *See generally Character's Biography*, *supra* note 181.
[260] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271 (11th Cir. 2001) (citing Campbell v. Acuff-Rose Music, 510 U.S. 569, 588 (1994)).

the Character's name, voice, and appearance. Therefore, Colbert must necessarily use other aspects unique to the Character to truly conjure up the Character and differentiate the Character from himself. Thus Colbert's use of the Character's unique aspects—the sword, shield, and catchphrase—is likely permissible based on the parodic purpose of Colbert's use and the necessity to conjure up the Character.[261] As such, it is likely Colbert's relatively minimal use of the Character's protectable aspects, particularly in light of the use's parodic nature, would weigh in favor of fair use.

4. The Effect of the Use Upon the Original's Market Value & Market for Derivatives

The final conventional factor would likely weigh against fair use, but only minimally. While Colbert's use of the Character is more akin to cognizable market substitution versus biting criticism of the Character, that fact is mitigated by (1) the transformative and parodic nature of Colbert's use and (2) Viacom's inability to use the Character—aside from the Character's past performances—substantially diminishing the economic value of and harm on Viacom's copyright.[262] Concerns of substitution are limited by the new subject matter surrounding Colbert's use of the Character, i.e. the comparison with and criticism of the Trump's presidential nomination and explanation of the modern electorate's behavior. Moreover Viacom's lack of control over the Character limits Viacom's ability to further develop the Character, and license and develop their own derivative works.[263] Furthermore, Colbert used or performed as

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[261] *See Campbell* 510 U.S. at 588.

[262] *See The Colbert Report: Episode Guide*, *supra* note 10. No new episodes have been created since Colbert left. *See id.*; Sims *supra* note 10.

[263] *See The Colbert Report: Episode Guide*, *supra* note 10. It appears Viacom has no stake in the books Colbert has written as the character either. *Compare* Stephen Colbert, *America Again: Re-becoming the Greatness We Never Weren't*, AMAZON.COM, https://www.amazon.com/dp/0446583995?_encoding=UTF8&isInIframe=0&n=283155&ref_=dp_proddesc_0&s=books&showDetailProductDesc=1#product-description_feature_div (last visited Apr. 10, 2017) (publishing by Grand Central Publishing) *and* Stephen Colbert ET AL.,

the Character multiple times outside *The Colbert Report*, throughout the *Report*'s time on air.[264] Thus Viacom failed to enforce their copyright against Colbert, weakening any claim of economic harm from Colbert's use on *The Late Show* by not previously requiring Colbert to acquire a license.[265] Thus this factor will weigh against fair use because of the general similarity between the Character's use on *The Late Show* and its function on *The Colbert Report*, but only minimally, due to the parodic nature of Colbert's use and limits on Viacom's ability to use the Character.

5. Further Considerations

While not an express factor for determining fair use, the unique issues presented by Colbert's use of the Character warrants discussion of their inseparability, Colbert's ability to work, and potential limits on Colbert's comedic talents and freedom of expression generally. Moreover, consideration of these issues are permissible,[266] and the courts have generally favored author-defendants facing infringement suits, thus it

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Stephen Colbert's Tek Jansen, AMAZON.COM, [hereinafter *Tek Jansen*] https://www.amazon.com/Stephen-Colberts-Jansen-John-Layman/dp/1934964166/ref=sr_1_1?s=books&ie=UTF8&qid=1475686348&sr=1-1&keywords=tek+jansen (last visited Apr. 10 2017) (publishing by Oni Press) *and* GRAND CENTRAL PUBLISHING, http://www.grandcentralpublishing.com (last visited Oct. 23, 2016), *with Viacom Brands*, VIACOM, http://www.viacom.com/brands/pages/default.aspx (last visited Oct. 23, 2016) (noting that Viacom has no ownership of the publishers that Colbert has used to publish books that use, at least in part, the Character).

[264] *See* McGrath, *supra* note 7 (appearing as the Character while testifying before Congress in 2010; while running for president in 2008; while performing at the 2006 White House Correspondents' Dinner).

[265] *Cf. Campbell*, 510 U.S. at 592 (protecting only derivative uses "that creators of original works would in general develop or license others to develop").

[266] *See id.* at 577–78.

appears that the flexibility afforded by fair use would consider these unique issues.[267]

As discussed above, Colbert and the Character share numerous characteristics, both physically, biographically, and behaviorally. Moreover, like the Character, Colbert hosts a television talk show that discusses the news and involves him interviewing guests.[268] Thus there is already substantial potential for infringement, and if Colbert makes a satirical and egotistical joke while on air, he's arguably slipped back into portraying the Character, even if unintentionally.[269] And the potential for unintentionally slipping back into the Character is further compounded by Colbert's reliance on his improvisational comedy skills.[270] Thus barring Colbert's use of the Character presents a significant limit to Colbert's ability to work as comedian or talk show host generally, and on *The Late Show* in particular based on the similarity format between *The Late Show* and *The Colbert Report*.

Moreover, since becoming host of *The Late Show*, Colbert has partially shifted away from the typical late night guests—actors, athletes, and musicians—to guests more associated with "serious" news topics like politics and business.[271] An analysis of Colbert's first hundred *Late Show* episodes reveals that political figures make up 11.4% of his guests—more than double the amount of his two main competitors; and Colbert's *Late Show* is the only one of the three shows to feature a business figure as a guest.[272] For example, in his first week hosting *The Late Show*, Colbert brought on Jeb Bush, Joe Biden, Elon Musk, and Justice Stephen Breyer; and subsequently hosted Donald Trump.[273] Thus, barring Colbert's use of the Character could substantially limit his ability to host *The Late Show* in its current style, as the chance for an

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[267] *E.g. Campbell*, 510 U.S. 569; Franklin Mint Corp. v. Nat'l Wildlife Art Exch., 575 F.2d 62 (3d Cir. 1978).
[268] *E.g.* Sims, *supra* note 10.
[269] *E.g.* Ryan, *supra* note 196.
[270] *See* Dowd, *supra* note 193 (quoting Jon Stewart: "Stephen is rendering a character in real time.").
[271] Lindbergh, *supra* note 221.
[272] *Id.*
[273] *Id.*

inadvertent slip into the Character is not de minimis based on Colbert's comedic style and the subject matter he presents.[274]

Such a restriction on a person's ability to express himself and his opinions is undoubtedly contrary to the purpose of copyright, which is to facilitate the dissemination of ideas.[275] And based on the differences between Colbert and his competitors, it would appear that dissemination of different ideas is at least an implicit aim of Colbert on *The Late Show*. Moreover, Viacom's inability to continue to use the character to disseminate ideas, seen in light of its restrictions on Colbert's ability to express himself, would also weigh in favor of fair use.[276] These considerations, based on their closeness to the purpose of both copyright and the fair use doctrine, would substantially favor Colbert's use of the Character.[277]

CONCLUSION

Esse quam videri, "to be, rather than to seem."[278] Stephen Colbert (the person) is Stephen Colbert (the Character). He is not pretending to be some character, presenting some carefully crafted fiction of "well-intentioned, poorly informed, high-status idiot" who fears bears, loves Bill O'Rielly, and has no concern for facts or logic. Colbert is simply being himself, improvising in his comfort zone on topics that he loves engaging in. Any appearance of a "character" is purely the result of Colbert's own wit and improvisation skill, his sense of humor, and his political views. Thus, the Character is not a character at all but in fact is merely—or perhaps utterly—Stephen Colbert the person. And even if the Character is a character, he is not copyrightable. His image is a collection of discovered facts with only a modicum of, if any, originality in their arrangement. The

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[274] *See id.*; Dowd, *supra* note 193; Gray, *supra* note 191 (quoting Colbert in part: "'I meant a lot of it. I even agreed with my character sometimes,' wearing the persona 'like a cap,' sometimes more lightly than others.").
[275] *See* Harper & Row, Publ'rs v. Nation Enters., 471 U.S. 539, 558 (1985).
[276] *See generally id.*
[277] *Id.* at 558.
[278] *Motto*, *supra* note 1.

Character still only constitutes an uncopyrightable stock character due to its nature as a self-absorbed, well-intentioned, poorly informed high-status idiot working as a right-wing TV pundit. Even considering *The Colbert Report*'s focus on the Character's personal views and interests, the Character remains uncopyrightable because he functions as a conduit to inform the audience of events and present their humorous aspects. Last, if Character is copyrightable, when Colbert revived the Character on *The Late Show* he made fair use of the Character and should not be liable for infringement. His use of the Character commented on what Colbert saw as a changing political climate, and importantly commented on the Character itself, creating a parody under *Campbell*. As such, if the Character is protected under copyright, Colbert's parodic use of the Character on *The Late Show* is protected as a fair use.

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SMART STADIUMS: AN ILLUSTRATION OF HOW THE "INTERNET OF THINGS" IS REVOLUTIONIZING THE WORLD

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"*To invent, you need a good imagination and a pile of junk.*"
Thomas Edison

"*There are no great limits to growth because there are no limits of human intelligence, imagination, and wonder.*"
Ronald Reagan

I. INTRODUCTION

Imagine walking into your favorite sports team's stadium. You have a sense of anticipation because you heard that the stadium has recently become "Smart" and you are not quite sure what to expect. As you near the gates, you attempt to pull your ticket from your pocket, but there's no need because a camera uses facial-recognition technology to spot you and opens the gate to allow entrance. As you walk in, a screen emerges from the wall to your right, greets you by your name, and shows you the shortest route to your seat. Your watch vibrates on your arm, and you notice that the stadium has offered you a discount for your favorite beverage, an ice-cold Coors Light. You click the purchase button and your watch navigates you to a concession line that is conveniently located near your seat. The wait for the beverage is non-existent because your watch alerted

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the stand to prepare your drink before you even arrived. With an excited grin, you grab your drink, which was automatically paid for by your electronic debit card, and head to your seat just in time for the coin toss.

Throughout the game you are invited by the announcer to use your phone to view live statistics, fun facts, compete in interactive games and polls against other fans in the stadium, and receive individualized coupons and promotions based on your past game consumptions. Don't worry about leaving your seat for a refill or a hotdog because you can click a button on your smartphone app and a vendor brings what you want directly to you. And when you have to go to the restroom after consuming your pick of beverages, an app on your phone alerts you to the closest restrooms, and the one with the shortest line. This scenario is just a prelude of the many amazing opportunities that the Internet of Things will bring to Smart Stadiums.

The "Internet of Things" ("IoT") is a concept that has fueled many modern innovations, and is set to drastically change the way the modern world operates.[1] But, what exactly is the "Internet of Things"?[2] IoT is a broad array of interconnected devices that use sensors to gather data, share that data between devices, and store or evaluate that data.[3] This machine-to-

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[1] *See* Kim Walker, *The Legal Considerations of the Internet of Things*, COMPUTERWEEKLY.COM (July 2014), http://www.computerweekly.com/opinion/The-legal-considerations-of-the-internet-of-things.

[2] *See, e.g.*, Kevin Maney, *Meet Kevin Ashton, Father of the Internet of Things*, NEWSWEEK (Feb. 23, 2015, 12:10 PM), http://www.newsweek.com/2015/03/06/meet-kevin-ashton-father-internet-things-308763.html. Kevin Ashton, a former brand manager for Proctor & Gamble and cofounder of MIT's Auto-ID Center, used the phrase "Internet of Things" as a title of a presentation in 1999 that described an innovative process used to track inventory of product in stores using electronic microchips. *See also* Kevin Ashton, *That 'Internet of Things' Thing*, RFID J. (June 22, 2009), http://www.rfidjournal.com/articles/view?4986 (providing insight into the world of IoT and the future implications of the technology).

[3] Jacob Morgan, *A Simple Explanation of 'The Internet of Things'*, FORBES (May 13, 2014, 12:05 AM), http://www.forbes.com/sites/

machine (M2M) communication, in combination with the sensors, allows for devices that traditionally had no use for the Internet (e.g., such as coffee makers, alarm clocks, and refrigerators) to become "smart."[4] Moreover, "the real value that the Internet of Things creates is at the intersection of gathering data and leveraging it."[5] Cloud computing allows for these devices to analyze and transmit data between the devices to maximize convenience and efficiency in our everyday lives.[6] However, on a more troubling note, the IoT allows companies and governments to gather more information about people than ever before.[7]

As a direct result of the increasing accessibility of the Internet, decreased cost of manufacturing electronics, and smartphone ownership, the market for IoT is booming.[8] In a progressively fast-paced world, both the consumer and businesses are always searching for ways to save time and money.[9] "[The] reality is that the IoT allows for virtually endless opportunities and connections to take place, many of which we can't even think of or fully understand the impact of today."[10]

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jacobmorgan/2014/05/13/simple-explanation-internet-things-that-anyone-can-understand/#314554c66828.

[4] *See* Daniel Burrus, *The Internet of Things is Far Bigger Than Anyone Realizes*, WIRED, https://www.wired.com/insights/2014/11/the-internet-of-things-bigger/ (last visited Apr. 9, 2016).

[5] *Id.*

[6] *Id.*; *see also* Eric Griffith, *What is Cloud Computing?*, PCMAG.COM (May 3, 2016), http://www.pcmag.com/article2/0,2817,2372163,00.asp (noting that cloud computing allows for storage and access to data from any location with Internet connectivity).

[7] *See* Morgan, *supra* note 3.

[8] *See id.*; *see also* Jacob Poushter, *Smartphone Ownership and Internet Usage Continues to Climb in Emerging Economies*, PEW RES. CTR. (Feb. 22, 2016), http://www.pewglobal.org/2016/02/22/smartphone-ownership-and-internet-usage-continues-to-climb-in-emerging-economies/ (finding that 72% of adults in the United States own a smartphone and 89% of adults use the internet at least occasionally).

[9] *See* Morgan, *supra* note 3 (noting that the IoT allows a business or consumer to leverage the technology to make daily lives more efficient and convenient).

[10] *See id.*

Thus, many businesses have already taken steps to implement IoT into their technology, and it is likely many more will follow.[11] While there are legal problems with the implementation of any emerging technology, IoT's enormous impact upon society warrants special consideration into the pertinent legal and policy issues.[12]

This note will underline the application of IoT to sports stadiums, effectively creating "Smart Stadiums."[13] First, it will briefly discuss the vast benefits and effects of IoT from both the business and consumer perspective, with an emphasis on Smart Stadiums. Next, it will discuss the legal issues presented by the implementation of IoT, as an emerging technology, into society. Finally, it will apply these issues directly to Smart Stadiums, and recommend the stance the government should take to create an effective and thriving IoT infrastructure.

II. THE BENEFITS AND IMPLICATIONS OF IOT

The IoT is poised to be a major contributor in the global economy.[14] One study forecasts that there will be over twenty billion devices connected to the Internet by 2020.[15] Additionally, IoT is projected to contribute as much as $11.1 trillion per year

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[11] *See* Dean Takahashi, *IBM to Pour $200 Million into Watson Internet of Things A.I. Business in Munich*, VENTURE BEAT (Oct. 3, 2016, 6:39 PM), *http://venturebeat.com/2016/10/03/ibm-to-pour-200-million-into-watson-internet-of-things-a-i-business-in-munich/* (stating that IBM, a global leader in technological advances, is set to invest $200 million into their IoT technology).

[12] *See infra* notes 15–19 and accompanying text.

[13] *See infra* note 30 and accompanying text.

[14] James Manyika et al., *The Internet of Things: Mapping the Value Beyond the Hype*, MCKINSEY GLOBAL INST. (June 2015), http://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/The%20Internet%20of%20Things%20The%20value%20of%20digitizing%20the%20physical%20world/Unlocking_the_potential_of_the_Internet_of_Things_Executive_summary.ashx.

[15] *Gartner Says 6.4 Billion Connected "Things" Will Be in Use in 2016, up 30 Percent from 2015*, GARTNER (Nov. 10, 2015), http://www.gartner.com/newsroom/id/3165317.

to the global economy by 2025.[16] If these projections become reality, the IoT will impact almost eleven percent of the global GDP.[17] Of course, this is a highly speculative measurement and is dependent upon a large number of factors such as interoperability between devices and applications, privacy, technology prices, security, organization, and public policy, all of which will be discussed in this note.[18] The IoT has the potential to dramatically change lives, and the technology and its uses are only going to continue to grow.[19] Thus, a brief look at the business outlook and consumer benefit outlines the impact that the IoT will have on society.

A. BUSINESS OUTLOOK

IoT offers a unique method for businesses to maximize profit margins both internally through their operations and externally by enhancing customer experience with their products and services.[20] Although most publications and conversations point to the obvious consumer advantage, business-to-business ("B2B") applications will account for nearly seventy percent of the estimated value that IoT will contribute to the global economy.[21] Implementing IoT into B2B allows for increased

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[16] Manyika et al., *supra* note 14, at 4. A study by the McKinsey Global Institute analyzed over 150 IoT cases throughout the world and concluded that, including the total value captured throughout the entire chain of business, the total economic impact could range between $3.9 trillion to $11.1 trillion per year by 2025. The study identified nine settings where IoT could make the largest impact: human, home, retail environments, offices, factories, worksites, vehicles, cities, and outside.

[17] Manyika et al., *supra* note 14, at 2 (contribution based on World Bank projection of $99.5 trillion per year in global GDP in 2025).

[18] Manyika et al., *supra* note 14, at 2.

[19] *See* Manyika et al., *supra* note 14, at 2.

[20] *See* Jacques Bughin et al., *An Executive's Guide to the Internet of Things*, MCKINSEY QUARTERLY (Aug. 2015), http://www.mckinsey.com/business-functions/business-technology/our-insights/an-executives-guide-to-the-internet-of-things.

[21] *Id.*; *see also* Katherine Arline, *What is B2B?*, BUS. NEWS DAILY (Jan. 2, 2015, 10:09 AM), http://www.businessnewsdaily.com/5000-what-is-

productivity in supply chain and manufacturing processes.[22] Additionally, IoT allows for businesses to optimize their operations by using the data gathered by the sensors to make informed and data-driven strategic decisions.[23] IoT technology enables businesses to expand to new markets and to offer new products to the consumer.[24] It will give businesses an effective tool to decrease operating costs, increase productivity, and allow new business opportunities; all of which increases profit margins and permit the business to sell products and services to the consumer at a lower price.[25]

B. CONSUMER BENEFIT

While businesses stand to benefit greatly from the economic impact of IoT, consumers are also poised to benefit in numerous ways.[26] As IoT allows businesses to become more efficient and produce products at a lower price, the consumer will purchase more "smart" products to use with the IoT.[27] These devices, in their abundance, will make the average consumer's life more convenient by allowing them to use the data gathered by their connected devices to maximize their efficiency and time.[28] IoT's data analysis will lead to reduced expenses, improved health, and optimal living conditions.[29] For example, the IoT can help calculate the most efficient route during a commute, customize and tailor advertisements to your personal interests, and adjust your home settings to maximize your comfort and minimize costs.

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b2b.html (stating that B2B focuses on marketing and selling products between other companies, as opposed to the consumer).

[22] Bughin et al., *supra* note 20.

[23] *Id.*

[24] John Greenough, *How the 'Internet of Things' Will Impact Consumers, Businesses, and Governments in 2016 and Beyond*, BUS. INSIDER (July 18, 2016, 10:24 AM), http://www.businessinsider.com/how-the-internet-of-things-market-will-grow-2014-10.

[25] *Id.*; *see also* Bughin et al., *supra* note 20.

[26] Manyika et al., *supra* note 14, at 4–6.

[27] *See id.*

[28] *Id.*

[29] *Id.*

C. SMART STADIUMS—WHAT ARE THEY, AND WHY DO WE CARE?

Smart Stadiums will take the IoT business model to the next level by utilizing sensors, WiFi capabilities, cameras, and other internet-connected devices to improve the fan experience at the game and further improve profits for sports franchises.[30] Thus, Smart Stadiums appear to be the perfect testing ground for massive-scale IoT technologies, such as "Smart Cities."[31]

Due to the prominence of the "At-Home Experience," which has resulted from the availability of instant streaming services, high-definition video and audio, increased WiFi speeds, and other technological improvements, stadium owners are left with an alarming issue—how do we get fans off of the couch and into the stands?[32] Just as sports franchises have a right to be concerned with this phenomenon, the issue is also concerning to the cities in which the stadium is located.[33] Stadiums have an enormous economic impact on their surrounding communities, which have an interest in economic sustainability and growth.[34] For many franchises and cities, perhaps Smart Stadiums can be the answer.

Smart Stadiums will increase the value of attending a sporting event by creating an enhanced fan experience.[35] To make it worthwhile for the consumer to spend the money on tickets, merchandise, and other expenses involved in attending a

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[30] *See Smart Stadiums Take the Lead in Profitability, Fan Experience, and Security*, INTEL 1, http://www.intel.com/content/dam/www/public/us/en/documents/solution-briefs/iot-smart-stadiums-brief.pdf (last visited Apr. 4, 2017) [hereinafter INTEL].

[31] *See* O'BROLCHAIN & GORDIJN, THE ETHICS OF SMART STADIA – A WHITE PAPER 1 (2015). Smart Stadiums, while an exciting opportunity for sports franchises, opens an even greater opportunity of "Smart Cities." It is impossible to fathom the benefits and possibilities that the IoT concept will bring to an increasingly technological, urban society.

[32] INTEL, *supra* note 30, at 1.

[33] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 5.

[34] *See id.* For example, Arizona State University's stadium hosts over 180 events each year for an annual economic impact of $209.4 million.

[35] *See* INTEL, *supra* note 30, at 1.

sporting event, the fan must have fun. Smart stadiums will revolutionize the fan experience with convenience, targeted messages, and access to the Internet.[36] Through the use of smartphones, fans will be able to order merchandise and refreshments with the touch of a button, obtain access to deals, and connect to WiFi to view live statistics and interact with other fans.[37] Like other IoT applications, a Smart Stadium will maximize convenience and reduce expenses for the consumer.[38]

Sports Stadiums will lead to further profits for sports-affiliated businesses. Because the fan experience will be taken to a new level, more people will attend sporting events.[39] More merchandise will be sold in the stadium with the use of personalized marketing and convenient applications, which encourage the fan to consume at a greater rate.[40] Not only will profits from consumers increase, but also the efficiency within the infrastructure will reduce operating costs.[41] Precise data will allow for supply chain efficiency. Automated systems will shrink energy costs.[42] Maintenance costs will decline as staff is automatically alerted to address issues before they occur, and if an issue does arise, it will be resolved quickly.[43]

An additional benefit of IoT application into Smart Stadiums, which is important to both the consumer and the stadium operators, is security and safety of the guests. With tens of thousands of adrenaline-filled fans in a tightly enclosed space, security can become a real issue. Because the IoT utilizes an extensive system of cameras, they can be used to monitor large crowds or other security threats.[44] Sensors can be utilized to detect any unusual activity in the stadium.[45] Both the sensors and

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[36] *Id.*
[37] *Id.* at 2–3.
[38] Manyika et al., *supra* note 14, at 4–6.
[39] *See* INTEL, *supra* note 30, at 2–4.
[40] *See id.*
[41] *Id.* at 2.
[42] *Id.* at 2–4.
[43] *Id.*
[44] O'BROLCHAIN & GORDIJN, *supra* note 31, at 6–7.
[45] *Id.* at 7.

cameras can facilitate anti-terrorist efforts, quickly break-up fights in the crowd, and prevent other criminal activity.[46] Face-capturing technology can limit access to restricted areas.[47] If an issue arises, law enforcement, security or medical personnel can rapidly respond to the precise location of the incident.[48] These examples, among others, demonstrate how IoT enhances stadium security.

Smart Stadiums are becoming a reality. To stay competitive, fun, and safe in the modern technological era, all stadiums should embrace the IoT model.[49]

III. INTEGRATING IOT INTO SPORTS STADIUMS — THE LEGAL CONSIDERATIONS

While Smart Stadiums have the ability to create numerous benefits to consumers and businesses, there are multiple issues of law that should be considered. The chief issues include: security, privacy, data management, and the need for standards and protocols.

A. SECURITY

The widespread use of IoT technology and massive data collection by the affiliated devices requires an acute emphasis on security.[50] In 2013, the Federal Trade Commission ("FTC") first recognized the need for companies to secure their IoT devices.[51] However, because there were not any standards specifically regulating the use of IoT technologies, the FTC settled the

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[46] *Id.*

[47] INTEL, *supra* note 30, at 3.

[48] O'BROLCHAIN & GORDIJN, *supra* note 31, at 7.

[49] *See id.* at 1. An increase in competition will likely drive new innovations and applications of IoT to the arenas, and would further benefit society.

[50] *See supra* notes 14–16; *see also supra* text accompanying note 16.

[51] *See* Julie Brill, Fed. Trade Comm'r, Fed. Trade Comm., Keynote Address Before the Center for Strategic and International Studies, "Stepping into the Fray: The Role of Independent Agencies in Cybersecurity" (Sep. 17, 2014). TRENDnet, Inc., a company that sells baby monitors, failed to provide secure software to protect the baby monitor's live feed from being accessed from outside sources.

claims against TRENDnet under Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[52] After settling the charges against TRENDnet, the FTC declared that a need to "establish a comprehensive information security program designed to address security risks that could result in unauthorized access to or use of the company's devices, and to protect the security, confidentiality, and integrity of information that is stored, captured, accessed, or transmitted by its devices."[53]

In a 2015 staff report, the FTC echoed its comments made against TRENDnet by repeatedly stressing the growing importance of securing IoT technologies, but it declined to recommend to Congress to enact IoT-specific legislation.[54] In that same report, the FTC declared that although the privacy and security risks are real, IoT-specific legislation would be "premature" because IoT is an emerging technology in which all of the potential uses are currently unknown.[55] Instead, the FTC recommended to Congress that they should enact "general data security legislation" which would apply to the application of IoT technologies.[56] Additionally, the FTC concluded that they would encourage self-regulation, educate businesses and consumers, and enforce through their existing powers.[57]

In 2016, the FTC used their existing powers to sanction ASUSTeK for failing to secure a router, which is a very common

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[52] 15 U.S.C. § 45 (2012). Section 5 was enacted in 1914 to give the FCC the power to regulate and secure data in the business context.

[53] *FTC Approves Final Order Settling Charges Against TRENDnet, Inc.*, FED. TRADE COMMISSION (Feb. 7, 2014), https://www.ftc.gov/news-events/press-releases/2014/02/ftc-approves-final-order-settling-charges-against-trendnet-inc.

[54] *Internet of Things: Privacy & Security in a Connected World*, FTC STAFF REP. 48–49 (Jan. 2015), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf.

[55] *Id.* at 49.

[56] *Id.* at 49–50.

[57] *Id.* at 53 (using the FTC Act, among others, the FTC encourages businesses to implement appropriate security measures into their devices and software).

IoT device, and for failing to inform consumers of the security flaws inherent in the routers.[58] Hackers were able to access over 12,900 consumers' routers remotely and gain access to all of the data on the network.[59] While TRENDnet and ASUSTeK involve relatively small breaches of security, they portray the very real risk of massive security breaches within IoT systems if appropriate security measures are not taken.

In October 2016 hackers were able to exploit numerous unsecure IoT devices to facilitate a massive distributed denial of service ("DDoS")[60] attack on popular Internet sites, such as Twitter, Netflix, and Spotify.[61] This DDoS attack was coordinated by what is called a "Mirai botnet" which uses IoT devices to flood a server, and because the IoT connects traditionally unrelated devices together, the DDoS attack was able to reach strengths never achieved before.[62] In November 2016 the same Mirai botnet was used to take down the internet infrastructure of the entire country of Liberia, a population of around 4.5 million people.[63] While anonymous hackers launched these attacks, "[i]magine what a well-resourced state actor could

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[58] ASUSTeK Computer, Inc., No. C-4587, 2016 WL 4128217, at *1–5 (F.T.C. July, 2016).

[59] *Id.* at *7–8.

[60] Nicky Woolf, *DDoS Attack That Disrupted Internet Was Largest of Kind in History, Experts Say*, THE GUARDIAN (Oct. 26, 2016 4:42 PM), https://www.theguardian.com/technology/2016/oct/26/ddos-attack-dyn-mirai-botnet (stating a DDoS attack occurs when a "network of computers infected with special malware, known as a 'botnet', are coordinated into bombarding a server with traffic until it collapses under the strain").

[61] Sam Thielman & Chris Johnston, *Major Cyber Attack Disrupts Internet Service Across Europe and US*, THE GUARDIAN (Oct. 21, 2016, 12:06 PM), https://www.theguardian.com/technology/2016/oct/21/ddos-attack-dyn-internet-denial-service.

[62] Woolf, *supra* note 60.

[63] Lee Matthews, *Someone Just Used the Mirai Botnet to Knock an Entire Country Offline*, FORBES (Nov. 3, 2016, 4:00 PM), http://www.forbes.com/sites/leemathews/2016/11/03/someone-just-used-the-mirai-botnet-to-knock-an-entire-country-offline/#3233144d51f0.

do with insecure [IoT] devices."[64] The potential for this Mirai botnet to be used as a weapon should alert lawmakers of the security implications associated with IoT technology and speed up Legislative action.

1. Physical Security Within Stadiums

Smart Stadiums must protect the physical safety of the guests entering the stadium. In light of the recent security breaches that were facilitated by IoT technology, it's not difficult to imagine the various scenarios that could emerge.[65] If even one device connected to the IoT is susceptible to a breach, the entire system could be vulnerable to hackers.[66] Additionally, there is a possibility that terrorists could use IoT to plan, survey, and carry out an attack upon a venue filled with thousands of people.[67] Cameras could be hacked to give terrorists access to real-time video feed of the stadium, exits could be locked remotely leaving guests trapped inside, and the stadium's own security systems could be used against it.[68] While a deliberate attack may sound like fiction, one can imagine the situations that could arise if adequate security measures are not implemented.

On the other side of the spectrum, there is always the risk of an accident. While the IoT is intended to prevent and alleviate loss in an accident,[69] there is always the risk the technology could malfunction and cause greater devastation.[70] If security and medical personnel become reliant upon these systems that are designed to prevent and reduce human harm in the event of an accident, and they fail, a catastrophic event could

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[64] Woolf, *supra* note 60.
[65] *See id.*
[66] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 14; Bernard Marr, *5 Simple Steps to Protect Yourself from IoT Security Threats*, FORBES (May 3, 2016, 3:19 AM), https://www.forbes.com/sites/bernardmarr/2016/05/03/5-simple-steps-to-protect-yourself-from-iot-security-threats/#2ec241532b22.
[67] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 14.
[68] *See id.* at 14.
[69] *See id.* at 7, 14 ("Sensors will also be able to detect structural problems in the stadium before any damage can be done.").
[70] *Id.* at 14.

occur.[71] For example, if a sensor fails to notify the IoT there is a fire and no backup security measures are in place, it could engulf an entire area in flames before first responders are able to detect and then extinguish it. Smart Stadium owners and the cities in which they are located have a significant interest in preventing the loss of life, harm to its' guests, and property damage. Consequently, a Smart Stadium owner should be concerned with creating best practices and internal policies to address the issue of physical security within the stadium.

2. Security and Protection of Data

Smart Stadiums have a significant interest in the security and protection of the private data of their guests and businesses operating within the location. While this may not be as important as the physical safety within the stadium, it is certainly a more pertinent and realistic concern to protect against. If fans embrace the Smart Stadium model, and given that occupant capacities in the largest stadiums can reach an excess of seventy thousand people with millions of annual visitors, the data from vast amounts of people will be exposed to the stadium's network.[72]

Many of the functionalities of the Smart Stadium require a guest to connect their smartphone to the IoT network.[73] When a fan connects their device to an unsecure network an extraordinary amount of their personal data is at risk.[74] An average smart phone contains a wide variety of sensitive information, including bank accounts, emails, social media

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[71] *See id.*

[72] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 2; *see also Sustainable Stadiums & Arenas*, WASTE MGMT. 1, https://www.wm.com/sustainability-services/documents/insights/Stadiums%20and%20Arenas%20Insight.pdf (last visited Apr. 6, 2017) ("Each year the top 200 stadiums in the U.S. draw nearly 181 million visitors, placing the industry in a unique position to integrate sustainability into U.S. culture.").

[73] *Supra* note 30 and accompanying text.

[74] *See* Donna Tapellini, *Smart Phone Theft Rose to 3.1 Million in 2013*, CONSUMER REPORTS (May 28, 2014, 4:00 PM), http://www.consumerreports.org/cro/news/2014/04/smart-phone-thefts-rose-to-3-1-million-last-year/index.htm.

accounts, photos, contacts, and other private information.[75] If a hacker infiltrated the Smart Stadium network all of this data would be susceptible to a breach. When one's phone holds the key to the intricacies of their life, including financial and other private information, a security breach could lead to frightening effects. If the guests do not feel that a Smart Stadium IoT network is secure, they would likely refrain from connecting and utilizing the benefits that a Smart Stadium has to offer, which would undermine the core purpose of creating a Smart Stadium in the first place.[76]

Overall, the guests, stadium businesses, and municipalities stand to benefit from the security benefits of IoT technology in Smart Stadiums.[77] There have always been inherent risks of security in stadiums that IoT is poised to help combat; however, there are new issues, as discussed above, created by IoT.[78] Additionally, with new security technology and surveillance methods, other rights and benefits we value as a society could be infringed upon.[79]

B. PRIVACY

With the sheer amounts of data collected by IoT and shared through the network, there are serious privacy concerns. Privacy is a fundamental right held by an individual, and is the chief legal implication of the IoT.[80] While security has other purposes, the measures taken, as discussed above, also protect privacy rights. Thus, the two considerations are closely related and an understanding of security is insightful when discussing privacy. The first and most obvious privacy concern, which is addressed in the Security section, is that the consumers' private

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[75] *Id.*
[76] *See* INTEL, *supra* note 30, at 1, 4.
[77] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 6–7.
[78] *See supra* notes 65–71 and accompanying text.
[79] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 9–18 (explaining users of IoT are likely to notice a loss of privacy, infringement of autonomy, and increased surveillance activities).
[80] *See* Washington v. Glucksberg, 521 U.S. 702, 770–71 (1997).

information can be hacked by an outside party.[81] Second is the threat that a business would collect data and use it for unauthorized purposes such as selling it or using it beyond the scope of the consumer's expectation.[82] Finally, there is a threat that, because of the vast multitude of cameras and sensors, one's personal data, pictures, or other information will be readily available or accidentally disclosed to the public just by way of being present in the stadium.[83]

1. Privacy Principles: The Foundation

Because IoT is such a disruptive and innovative technology, and society continues to see rapid advancement in the computing space, United States law will likely resort to fundamental privacy principles that have been developed over time.[84] These "Fair Information Practice Principles" originated in the 1970s, but since have been adopted by the FTC.[85] The Fair Information Practice Principles originally focused on five core needs: notice, consent, access, security, and enforcement.[86] Subsequently, in 2012, the FTC consolidated and incorporated

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[81] GARY MARCHANT, SMART STADIUMS AND PRIVACY 2 (2015) (on file with author).
[82] *Id.*
[83] *See id.* at 3.
[84] *See id.* at 7; *see also After Moore's Law*, THE ECONOMIST: TECHNOLOGY QUARTERLY, http://www.economist.com/technology-quarterly/2016-03-12/after-moores-law (last visited Apr. 1, 2017) (computing power has roughly doubled every two years since Gordon Moore's famous 1965 paper). While there are generally no privacy laws that apply, there may be an exception in the case of a government-operated stadium, such as a public university. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 333–337 (1985). In the case of public institution, Fourth Amendment issues may be triggered. *Id.*
[85] ROBERT GELLMAN, FAIR INFORMATION PRACTICES: A BASIC HISTORY (2.17 ed. 2016), http://bobgellman.com/rg-docs/rg-FIPShistory.pdf.
[86] *Id.* There are an additional two principles, data minimization and accuracy, which may not apply to the IoT setting.

the original five into three modern principles: "Privacy by Design," "Simplified Consumer Choice," and "Transparency."[87]

Privacy by Design comprises data security, reasonable collection limits, sound retention practices, and data accuracy.[88] Accordingly, Privacy by Design incorporates the original security and access principles into its formula. Furthermore, the FTC recommends that businesses should create their own internal standards and protocols.[89]

Simplified Consumer Choice requires that businesses, at the time of data collection, provide the consumer with the opportunity to make an educated decision of whether or not they want their data to be collected.[90] However, if the data is collected and used in the context of their continuing relationship, a commonly accepted process, and in the manner in which the consumer would expect it to, the business does not need to provide choice in the form of notice and consent.[91]

Transparency requires that clear, concise, and comprehendible privacy notices be given to the consumer.[92] Additionally, consumers should be given reasonable access to the data that the business has collected, and at a minimum these businesses should offer consumer access to "the types of information the companies maintain about them" and "the sources of such information."[93]

These three privacy principles offer a consolidated approach to the original five. Privacy by Design incorporates security and access into its formula, while Simplified Consumer Choice contains notice and consent. Transparency uses access, notice, and consent. When enforcing IoT under Section 5, the FTC will likely take these principles into account.[94] Moreover,

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[87] FEDERAL TRADE COMMISSION, FTC REPORT, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012).
[88] *Id.* at 23–30.
[89] *Id.* at 30–32.
[90] *Id.* at 48.
[91] *Id.* at 36–48.
[92] *Id.* at 61–4.
[93] *Id.* at 67.
[94] *See* 15 U.S.C.A. § 45 (2012).

with these privacy principles in mind, privacy issues in Smart Stadiums should be addressed by the topics of informed consent, surveillance, autonomy, and data ownership.[95]

2. Informed Consent

Informed consent is a legal concept that comes into play at the onset of data collection.[96] Traditionally, if a business gains informed consent to collect one's personal data, the business is free to do so as long as it is reasonable in light of that consent.[97] Accordingly, informed consent embodies the principles of notice, consent, and Simplified Consumer Choice.[98] However, in the context of IoT and Smart Stadiums, informed consent becomes attenuated.[99] A Smart Stadium, which has thousands of sensors and cameras utilizing IoT technology, creates problems of obtaining informed consent.[100] For example, "many people attending will be unaware that they are producing data—that they themselves are data nodes."[101]

Framed narrowly, the issue is how a fan can give informed consent to all the different data they ceaselessly transmit through the vast multitude of sensors and cameras. One answer is that informed consent, along with the privacy principles that embody it, is simply not applicable in the Smart Stadium setting. However, this note advocates that there is an effective way to apply the FTC privacy principles. A Smart

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[95] *But see* FEDERAL TRADE COMMISSION, *supra* note 54, at 19 ("While some participants continued to support the application of all of the [Fair Information Practice Principles], others argued that data minimization, notice, and choice are less suitable for protecting consumer privacy in the IoT.").

[96] O'BROLCHAIN & GORDIJN, *supra* note 31, at 13 ("Consent is considered fully informed when a competent person, who fully understands the nature of the data being gathered about and fully understands what they are disclosing voluntarily consents to treatment or participation on this basis.").

[97] O'BROLCHAIN & GORDIJN, *supra* note 31, at 13.

[98] *See* GELLMAN, *supra* note 85, at 14.

[99] *Id.* at 13–14.

[100] *Id.*

[101] *Id.* at 13.

Stadium should strive to provide notice that is transparent, clear, and concise so that a reasonable person will understand what information will be collected and how it will be used.[102] This notice can come in many forms: a waiver on the ticket, push notifications to a guest's phone throughout the event, terms and conditions before connecting to WiFi, or signs physically posted at the stadium.[103] Whatever the method that is used to gain informed consent, it must articulate to an ordinary person the extent that their real-time data will be collected, their consumption habits analyzed, and used by the Smart Stadium to further their business objectives.

3. Surveillance

With additional safeguards, security measures, and technological advances comes the potential for the infringement of privacy.[104] Improved surveillance methods, with the IoT, can result in a loss of privacy.[105] All of the devices, sensors, and cameras could be used to accumulate massive amounts of data about an individual without the use of traditional surveillance methods.[106] In the context of Smart Stadiums, where thousands of IoT devices are available to collect data on thousands of individuals throughout the stadium, the infringement of autonomy and privacy becomes a concern. There are two main surveillance concerns in a Smart Stadium: 1) the government will acquire and routinely use IoT data in mass surveillance programs; and 2) data will be unknowingly collected or used for

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[102] MARCHANT, *supra* note 81. For example, if the data will be sold or given to a third party, this information should be highlighted or there should be additional safeguards to prevent unauthorized use of personal information.

[103] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 13.

[104] *See supra* notes 80–83 and accompanying text.

[105] *See* Spencer Ackerman & Sam Thielman, *US Intelligence Chief: We Might Use the Internet of Things to Spy on You*, THEGUARDIAN (Feb. 9, 2016, 4:51 PM), *https*://www.theguardian.com/technology/2016/feb/09/internet-of-things-smart-home-devices-government-surveillance-james-clapper.

[106] *Id.*

unauthorized purposes by the business. Thus, sound policy must be created to address these concerns.

Surveillance is broadly defined as the "[o]bservation and collection of data to provide evidence for a purpose."[107] However, modern surveillance techniques have made it increasingly easy to collect massive amounts of data, and with powerful tools, comes the high potential for abuse.[108] For example, surveillance was brought to the national spotlight in June 2013 when Edward Snowden, a Central Intelligence Agency (CIA) contractor, leaked details of the National Security Agency's (NSA) information gathering techniques.[109] If left unchecked the government could utilize the IoT, along with its current surveillance methods, to collect unprecedented amounts of data on the public.[110]

IoT surveillance allows a business access to significantly more information than traditional data-collection methods. This access to information could be used detrimentally against an individual's privacy rights.[111] For example, Samsung is already using its "SmartTVs" voice recognition function to capture private conversations in your home.[112] The data is then

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[107]Surveillance, THE LAW DICTIONARY, http://thelawdictionary.org/surveillance/ (last visited Apr. 9, 2017).

[108] *NSA Surveillance*, AM. C.L.UNION (last visited Apr. 9, 2017), https://www.aclu.org/issues/national-security/privacy-and-surveillance/nsa-surveillance.

[109] *Edward Snowden: Leaks That Exposed US Spy Programme*, BBC NEWS (Jan.17, 2014), http://www.bbc.com/news/world-us-canada-23123964 (stating that the NSA, with a secret court order, was accessing and collecting millions of American's phone records)..

[110] Ackerman & Thielman, *supra* note 105 (stating that according to James Clapper, the United States Intelligence Chief, that the government plans to use IoT devices as part of their surveillance techniques).

[111] *See* MARCHANT, *supra* note 81, at 14–15.

[112] David Goldman, *Your Samsung TV is Eavesdropping on Your Private Conversations*, CNN (Feb. 10, 2015, 6:38 AM), http://money.cnn.com/2015/02/09/technology/security/samsung-smart-tv-privacy.

transmitted to third parties with the IoT.[113] Although Samsung has a disclaimer in their privacy policy, this is clearly concerning.[114]

A Smart Stadium creates a haven for mass surveillance methods. With a camera seemingly pointed in every nook and cranny of the stadium and sensors recording your every step, there is no escaping the reach of the IoT. Of course, the legitimate need of security of the guest is furthered by surveillance, but the privacy interest will need to be weighed against that need.[115] Thus, the issue is not how to limit the *collection* of data, which is seemingly impossible due to the nature of the IoT. Instead, the solution is to limit the *use* of the data collected. If the government is able to use IoT in their surveillance methods there is an important need for transparency of what data will be collected, how it will be used, and the extent that the government can compel a private entity to hand over the data.[116] Additionally, the Smart Stadium will need to inform the guest that the IoT will be used to collect data, clearly state what the guest's data will be used for, and create an understanding of the implications of the technology.[117] The survival of informed consent in a world filled with IoT technology is dependent upon proper regulation and notice given to the consumer.

4. Autonomy

Autonomy is a value that the Founders of our Constitution treasured, and one that citizens of our free nation

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[113] *Id.*
[114] *Id.*
[115] *Compare* O'BROLCHAIN & GORDIJN, *supra* at 7 *with* O'BROLCHAIN & GORDIJN, *supra* at 14, in footnotes 69–70.
[116] *See Super Bowl Snooping*, N.Y. TIMES (Feb. 4, 2001), http://www.nytimes.com/2001/02/04/opinion/super-bowl-snooping.html. Indeed, surveillance methods such as these have already occurred without the help of the IoT. *Id.* In 2002, Tampa Bay police used facial recognition technology to scan all guests attending Super Bowl XXXV. *Id.* These facial scans were then compared with images of criminals and potential suspects to help ensure the safety of those attending the event. *Id.*
[117] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 13.

still cherish today.[118] Autonomy is an individual's ability to make their own decisions and to pursue the life they want.[119] Personal autonomy is at risk when a person is controlled by an outside source.[120] Thus, the IoT may infringe on autonomy because a business could use the data collected, in combination with targeted advertising and nudging, to influence and potentially control the consumer.[121] The IoT enables advertisers to use the massive amounts of data collected to use marketing methods that are extremely targeted and sophisticated, which may not allow a person to make their own decisions.[122]

There is a relatively low risk of these advertising strategies having a detrimental effect upon autonomy when a fan attends a game in a Smart Stadium because the fan is only in the stadium for a short period of time.[123] However, the long-term effects are more concerning, as the data could be used to influence the guests once they leave the stadium.[124] For example, if personal data is sold or given to a third party, and that third party uses that information in combination with other data collected, it could lead to pervasive nudging and an overall negative effect upon autonomy.[125] While a relatively small concern when compared to the other issues discussed above, Smart Stadiums and the legislature should take autonomy into account as each attempts to regulate the IoT.

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[118] *See generally* U.S. CONST. amend. I, IV, XIV (illustrating through specific and targeted provisions, the Constitution does not explicitly state the term autonomy but it is implicit in many areas such as the First, Fourth, and Fourteenth Amendments).
[119] O'BROLCHAIN & GORDIJN, *supra* note 31, at 16.
[120] *Id.*
[121] *Id.* at 17. Nudging is a subtle advertising technique that is "pervasive, invisible, and constant" which may encourage or influence people to act in a certain way. *Id.*
[122] *Id.* at 18.
[123] *Id.*
[124] *Id.*
[125] MARCHANT, *supra* note 81, at 2.

5. Data Ownership

The theme of this note is clear—the IoT will permit businesses to accumulate massive amounts of data that can be utilized for many different purposes. But, who owns the data is another issue. Data ownership can establish different rights, such as the right to access, use, transfer, and control.[126] Likewise, defining data ownership and the affiliated rights may help resolve some of the other privacy issues, such as surveillance and informed consent.[127]

For the IoT to be effective, the data collected must be analyzed and leveraged effectively.[128] Many businesses often rely on third party services to store, analyze, and maintain this data.[129] In addition to the consumer or guest from which the data is collected, the "data has value, not only to the company generating it, but to the technology companies that provide data-crunching services."[130] An issue arises when a third party uses the data for purposes outside the initial reason it was collected.[131] Therefore, it is important to determine who owns the data and what rights are attached to that ownership.

Data ownership collected from the guests in a Smart Stadium can become particularly tricky. The guest plays an integral part in producing the data, yet they do not own the data obtained from the different sensors and cameras.[132] However, the guest may still expect a certain level of privacy. Once the data is analyzed it could reveal highly personalized and accurate information ranging from consumption habits to economic

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[126] *See* O'BROLCHAIN & GORDIJN, *supra* note 31, at 12.
[127] *Id.* For example, if an individual does not own any data recorded by sensors in a Smart Stadium, then there is no reason to obtain consent. *Id.*
[128] Burrus, *supra* note 4.
[129] Barb Darrow, *The Question of Who Owns the Data is About to Get a Lot Trickier*, FORTUNE (Apr. 6, 2016, 10:00 PM), http://fortune.com/2016/04/06/who-owns-the-data/.
[130] *Id.*
[131] O'BROLCHAIN & GORDIJN, *supra* note 31, at 12.
[132] *Id.*

status.[133] If a third-party data management company is able to transfer or sell the personalized information to an advertising company, a guest may feel their privacy has been infringed upon.[134]

Applying the principles of privacy and informed consent could help mitigate the data ownership dilemma. If a Smart Stadium incorporates Privacy by Design, Simplified Consumer Choice, and Transparency into their data collection policies, it could help reduce a guest's private information from being used in undesirable ways. [135] A guest would be safeguarded with reasonable collection limits, a knowledge of how their information is to be used, and have reasonable access to the information that has been collected.[136]

Further measures could be taken to ensure data ownership stays in the hands of Smart Stadiums. The Smart Stadium could use licensing agreements or other contracts that explicitly retain ownership of the data, and prohibit the use of data by the third party for any other purposes. Data could be collected anonymously, which would not allow third parties to have knowledge about an individual.[137] Lastly, legislation could be put into place controlling how businesses use the IoT data they collect and transfer to third parties.

C. DATA MANAGEMENT

Once consumer data is lawfully collected, businesses are faced with the challenge of data storage and management. The IoT collects unprecedented amounts of data. At this point, data management directly intersects with both the security and privacy considerations. Data management must be efficient, cost effective, secure, and maintain the integrity of private information.

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[133] *Id.*
[134] MARCHANT, *supra* note 81, at 2.
[135] FEDERAL TRADE COMMISSION, *supra* note 87.
[136] *Id.*
[137] O'BROLCHAIN & GORDIJN, *supra* note 31, at 12.

Today, cloud computing has taken the lead in data management.[138] Cloud computing offers many competitive advantages.[139] The cloud permits a business to access data over the Internet from any location, does not require the purchase and maintenance of physical hardware, and is remarkably efficient.[140]Most pertinent to the IoT, the cloud enables the data collected by individual devices to be synced and analyzed with other independent devices.[141] Additionally, cloud computing is highly cost effective.[142]

While it is clear that the IoT could not survive without cloud computing, there are two drawbacks. First, most of a businesses' data is in the hands of a third party company.[143] The business collecting data and utilizing a third party to manage that data must ensure that it is not used for any unauthorized purposes and appropriate security measures are taken to prevent unauthorized access.[144] The business collecting the data must retain a cloud computing service provider that is "capable of maintaining reasonable security, and provide reasonable oversight to ensure that those service providers do so."[145] Luckily, it is relatively easy to find a reliable cloud computing service due to the competition in the market.[146]

Second, because IoT data accumulates exponentially over time, it could eventually become burdensome to manage the data. However, this concern is marginalized by the decreasing

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[138] Griffith, *supra* note 6. The cloud computing industry is estimated to be valued at over $500 billion by 2020. *Id.*
[139] *Id.*
[140] *Id.*
[141] *See id.*
[142] Julie Bort, *Something Called 'The Race to Zero' Is Scaring A Lot Of Tech Companies*, BUS. INSIDER (Nov. 9, 2014, 9:03 AM), http://www.businessinsider.com/cloud-storage-race-to-zero-2014-11. In what's being called "the race to zero", competition in the market for cloud computing has dropped prices incredibly low while increasing storage limits.
[143] Darrow, *supra* note 129.
[144] *Supra* notes 80–83 and accompanying text.
[145] FEDERAL TRADE COMMISSION, *supra* note 54, at 30.
[146] Bort, *supra* note 142.

costs and availability of cloud computing services.[147] Additionally, a business may choose to set limits or delete certain types of data after a specified period of time.

A Smart Stadium presents unique challenges for data management. With thousands of people attending events and flooding the IoT with information, it will be important to have a reliable data management system that can handle the incoming traffic demands. Moreover, the internal procedures of collecting the data must have adequate safeguards to prevent unauthorized access to the network. Once the data is collected, it must be transmitted to a reliable cloud computing service that is used solely for storage and analytics. While it is fairly simple to create an effective data management system, internal business procedures and official legislation would help ensure the privacy of the fan's information, while helping create a best practice in the IoT industry.

D. THE NEED FOR STANDARDS AND PROTOCOLS

After the discussion of the legal considerations involving security, privacy, and data management, it is clear that there is a need for uniform standards and protocols for IoT. The legislature, administrative agencies, and the IoT industry have all recognized the need, and are taking steps to address the considerations.[148] Thus, the challenge is balancing innovation with regulation, while allowing those innovations to flourish.

1. A Step in the Right Direction—The Developing Innovation and Growing the Internet of Things Act

Despite the FTC's hands-off approach, use of alternative methods to regulate IoT, and recommendations that Congress enact "general security legislation," the Senate passed a Resolution in March 2015 expressing the need for a "national

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[147] *Id.*

[148] *See generally, supra* notes 51–59 and accompanying text; *infra* notes 149–155 and accompanying text; *infra* notes 171–184 and accompanying text.

strategy" on the development of the IoT.[149] Acting quickly, in April 2016, the Senate's Commerce, Science, and Transportation Committee pushed a bill.[150] The Developing Innovation and Growing the Internet of Things (DIGIT) Act, if passed by Congress, requires a working group led by the Commerce Department to study IoT and make recommendations to "appropriately plan for and encourage the proliferation of the Internet of Things in the United States."[151] The crux of the DIGIT Act requires:

> The working group must: (1) identify federal laws and regulations, grant practices, budgetary or jurisdictional challenges, and other sector-specific policies that inhibit IoT development; (2) consider policies or programs that encourage and improve coordination among federal agencies with IoT jurisdiction; (3) implement recommendations from the steering committee; (4) examine how federal agencies can benefit from, use, and prepare for the IoT; and (5) consult with nongovernmental stakeholders.[152]

The DIGIT Act would require the working group to report these findings and recommendations to the appropriate federal agencies within eighteen months "to implement recommendations."[153] Additionally, the act requires the FTC to seek public comment on "IoT's spectrum needs, regulatory

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[149] *Senate Passes "The Internet of Things" Resolution*, DEB FISCHER, U.S. SENATOR FOR NEB. (Mar. 24, 2015), http://www.fischer.senate.gov/public/index.cfm/2015/3/senate-passes-the-internet-of-things-resolution; FEDERAL TRADE COMMISSION, *supra* note 54.

[150] Paul Merrion, *Senate Bill Lays Groundwork for Federal Oversight of Internet of Things*, CQ ROLL CALL (Apr. 28, 2016), 2016 WL 1694637. This bill is sponsored by Senator Deb Fisher, and has bipartisan support. *Id.*

[151] *Id.*

[152] DIGIT Act, S. 2607, 114th Cong. (2016) (as amended by S. Comm. on Commerce, Science, and Transportation Sep. 27, 2016).

[153] *Id.*

barriers, and growth" and submit these comments to Congress.[154] However, the FTC has already undertaken the task of researching and reporting on IoT to the Legislature.[155] Furthermore, because the 114th Congress did not ultimately adopt the DIGIT Act, it will have to be introduced at the next session. While admittedly a step in the right direction of regulating IoT, the DIGIT Act appears to be burdened by the snail-like speed of the bureaucratic process.

2. Administrative Agencies and Their Role

As the DIGIT Act entails, Congress generally delegates individual enforcement powers to an administrative agency.[156] Since the introduction of IoT, the FTC is the administrative agency that has been the most concerned with the technology.[157] The FTC has already laid the groundwork by researching and reporting the effects of IoT.[158] Additionally, the FTC has used their broad powers under section 5 of the Federal Trade Commission Act to enforce misrepresentation claims against companies utilizing IoT technologies.[159] However, because the IoT is so dynamic, another administrative agency may also have a claim to regulate the technology.

After the October 2016 Mirai Botnet attacks,[160] which used the IoT to shut down popular websites throughout the United States, Senator Mark Warner sent a letter to the Federal Communications Commission (FCC) Chairman, Tom Wheeler, asking how the FCC could assist the Legislature in combating the IoT security issue.[161] Generally stated, the FCC "regulates

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[154] *Id.*
[155] FEDERAL TRADE COMMISSION, *supra* note 54.
[156] DIGIT Act, S. 2607, 114th Cong. (2016) (as amended by S. Comm. on Commerce, Sci., and Transp., Sep. 27, 2016).
[157] *See* 15 U.S.C. §45 (2012).
[158] *Id.*
[159] *Id.*
[160] Woolf, *supra* note 60.
[161] Brendan Bordelon, *FCC Holds Off on Security Mandates for Internet of Things*, MORNING CONSULT (Oct. 31, 2016), https://morningconsult.com/2016/10/31/fcc-will-hold-off-security-mandates-internet-things.

interstate and international communications by radio, television, wire, satellite, and cable."[162] The FCC has not been directly vested with the power to deal with Internet security issues; however, "the FCC retains broad flexibility in determining whether security actions undertaken by telecommunication providers are reasonable."[163]

In November 2016, just over a week later, the FCC released a final report and order of the FCC's broadband privacy rule.[164] In that report, the FCC included the words "functional equivalents" to expand the definition of technologies that are subject to regulation by the FCC.[165] Additionally, the FCC made sure to specify that their reach included devices and sensors connected to the web, which are core requirements of IoT technologies.[166]

Given the present void in existing law, any mention of regulation of the IoT industry would be a step in the right direction, but the FCC's recent moves are somewhat concerning. Recognizing that the FTC may be the more appropriate agency to regulate the technology, FCC Commissioner Michael O'Reilly stated in his dissenting opinion that this order "makes this sweeping power grab without explaining how it has authority to do so."[167] Due to the FTC's activity within the IoT arena, Commissioner O'Reilly acknowledged that the FCC is behind the curve by stating, "[t]he Commission is intentionally setting itself on a collision course with the FTC[]."[168] More concerning, this privacy rule only requires the advance consent for "web browsing history, application usage history, and the *functional equivalents* of web browsing history or application usage

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[162] *What We Do*, FED. COMMUNICATIONS COMM., https://www.fcc.gov/about-fcc/what-we-do (last visited Apr. 3, 2017).
[163] Bordelon, *supra* note 161.
[164] Paul Merrion, *FCC Privacy Rule Stakes Out Jurisdiction Over Internet of Things*, CQ ROLL CALL (Nov. 7, 2016), 2016 WL 6572693. This rule requires advanced consent for Internet providers to sell or share private consumer information.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*

history."[169] Therefore, the FCC's language does not call for the regulation of websites or social media sites themselves and leaves a gap in the FCC's enforcement power.[170]

The IoT and its implications have caught the attention of the FCC, FTC, and the Congress. However, there appears to be a lack of consensus on what agency should take the lead in regulation of the IoT. In the meantime, IoT technology continues to evolve and become more prevalent in our society. Congress should explicitly decide which agency is in control of IoT regulation, consolidate both studies and research, and timely pursue IoT-specific regulation.

3. Creation of an Industry Standard

As an emerging technology integrates with society, multiple standards and platforms for the technology will be created.[171] As time progresses, the market will adopt the most efficient standard to facilitate growth of the technology.[172] Thus, the creation of an industry standard in emerging technologies within a capitalistic free market is a complex and dynamic process.[173] In the United States, standards are generally market-led and driven by competition in the private sector.[174] However, "the Federal Government may play an important role . . . where there are significant regulatory challenges."[175] Thus, the United States takes the position that the market should develop a standard on its own, but the government may actively participate in helping adopt and form the standards if necessary.[176]

The National Telecommunications & Information Administration ("NTIA"), acting under the authority of the

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[169] *Id.* (emphasis added).
[170] *Id.*
[171] *See* Eoin O'Sullivan & Laure Brévignon-Dodin, *Role of Standardisation in Support of Emerging Technologies* (June 2012), http://www.ifm.eng.cam.ac.uk/uploads/Resources/Reports/OSullivan_Dodin_Role_of_Standardisation_June_2012__2_.pdf.
[172] *Id.*
[173] *Id.* at 3.
[174] *Id.* at 15.
[175] *Id.*
[176] *Id.* at 18.

Department of Commerce, published a green paper that addresses the role the government will take and the "possibility of a national IoT strategy."[177] The NTIA maintains the position that "[e]ncouraging private sector leadership in technology and standards development, and using a multistakeholder approach to policy making" is the best route to develop a uniform standard.[178] Consistent with that position, the NTIA will "advocate for and defend a globally connected, open, and interoperable IoT environment built upon *industry-driven*, *consensus-based standards*."[179] Moreover, because the NTIA's sole focus is advocating Internet policy issues and has a goal of "ensuring that the Internet remains an engine for continued innovation and economic growth," this is an appropriate agency to address the IoT.[180]

The National Institute of Standards and Technology ("NIST"), another agency under Department of Commerce control, has also issued a publication on IoT security.[181] The NIST is the government agency responsible for information security standards and guidelines.[182] In a July 2016 guidance, the NIST defined the IoT, presented universal terminology that can be used by all, and provided examples of how the different components (e.g., sensors, cameras, and phones) could be used together to create an effective business platform.[183] NIST's guideline facilitates growth by setting a clear foundation for businesses in the industry and those looking to enter to base their strategic decisions upon.[184]

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[177] *Fostering the Advancement of the Internet of Things*, NTIA.DOC.GOV (Jan. 2017), https://www.ntia.doc.gov/files/ntia/publications/iot_green_paper_01122017.pdf.
[178] *Id*. at 2.
[179] *Id*. at 2. (emphasis added).
[180] NAT'L TELECOMM. & INFO. ADMIN., https://www.ntia.doc.gov/home (last visited Apr. 3, 2017).
[181] Jeffrey Voas, *Network of 'Things'*, NAT'L INST. OF STANDARDS AND TECH. (July 2016), http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-183.pdf.
[182] *Id*.
[183] *Id*. at 22.
[184] *Id*.

Consequently, the Department of Commerce, supported by the NTIA and NIST, demonstrates that the government is ready to take an active role in fostering the creation of uniform IoT standards.[185] However, there is still not a uniform business standard for IoT communication or security protocols.[186] Communication between devices is central to the IoT concept.[187] Therefore, in order to create a massive and efficient IoT, a uniform standard must be adopted so that all devices can communicate effectively, regardless of the manufacturer or type of device.[188] This problem is exacerbated by the choice between open-source or proprietary platforms.[189] For example, the very nature of a proprietary platform, such as Apple Homekit, discourages uniformity because of confidentiality and copyright laws.[190] However, the most recent protocol, Open Connectivity Foundation (OCF), has pulled together some of the earlier protocols and is pushing for an open-source platform that allows interoperability between devices.[191] OCF protocol could be an indication that the industry is moving towards a uniform standard.

Uniform security protocols for all devices would be a huge measure taken to protect the security of IoT networks.[192] If effective security protocols are implemented into all devices, it

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[185] *See generally id*.; *Fostering the Advancement of the Internet of Things*, *supra* note 177.
[186] Susan D. Rector, *'Internet of Things' Protocols: Past and Future Trends*, LAW360 (Oct. 12, 2016), https://www.law360.com/articles/850593/internet-of-things-protocols-past-and-future-trends.
[187] *Id*.
[188] *Id.*
[189] *Id.* at 1–2. There are currently seven major protocols, some that incorporate open-source and others rely on proprietary standards: (1) Alljoyn & AllSeen Alliance; (2) Thread Group; (3) Open Interconnect Consortium (OIC); (4) Institute of Electrical and Electronics Engineers (IEEE); (5) ITU-T SG20; (6) Apple Homekit; and (7) Open Connectivity Foundation (OCF).
[190] *Id.* at 2.
[191] *Id.* OCF would incorporate major software platforms such as Android, IoS, and Windows.
[192] *Id.*

will vastly reduce the chance that an individual device can be used to gain unauthorized access to the entire IoT network.[193] Security protocols should include controls such as "role-based access control, secure data storage, cryptography, key management, authentication, integrity, and confidentiality of all data received and transmitted."[194]

Smart Stadiums stand to benefit greatly from industry standards of IoT communication and security protocols. Uniform communication protocols would ensure that every device, regardless of the manufacturer, would be able to exchange and transmit data effectively. When a sensor or IoT device breaks, it can be easily replaced without worry that it will disrupt the interoperability of the IoT. Additionally, if uniform security protocols were built into every device it would enhance both the security and privacy of the stadium by ensuring that single devices are not subject to unauthorized access.

All of the essential pieces are in place to create a uniform standard for the IoT industry. The government has stated their desire to facilitate the creation of a uniform standard, and should continue doing so.[195] In due course, our nation's capitalistic market will inevitably adopt an industry standard. However, in order to accomplish this in a rapid manner, it is important that all parties work together. The appropriate administrative agencies, such as NIST and NTIA, should continue to work with these groups to research, educate, and develop the best possible standard for the market. Additionally, the government should eliminate barriers to entry into the marketplace. Once the industry has reached consensus on a standard, Congress should hastily act to require these communication and security protocols as a minimum standard protection.

IV. RECOMMENDATIONS

After years of waiting to see the how IoT technologies would evolve, it is time for action. IoT specific legislation, such

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[193] *Id.*
[194] *Id.* at 3.
[195] O'Sullivan & Brévignon-Dodin, *supra* note 171, at 18.

as the DIGIT Act, should be pushed through Congress. However, unlike the DIGIT Act, the legislation should unambiguously charge the appropriate administrative agencies with the power to enforce and take the lead in IoT regulation.[196] In doing so, Congress would consolidate agency control and accelerate IoT research.[197]

The IoT must protect the security and privacy of individuals, and standardization will help tackle both considerations. While the IoT industry may not have conceded to a standard protocol, the government should continue to take an active role in the standardization of the industry. Once there is an apparent standard, the government should recommend and educate the industry on the standard.

In the meantime, Smart Stadiums need to create their own standards in which they can minimize consumer risk. Aligned with the privacy principles and FTC recommendations, a Smart Stadium should implement built-in security features to protect the security and privacy of consumer data.[198] In doing so, the Smart Stadium ensures their customers are educated and understand the risks of IoT. Finally, a Smart Stadium should continue to compete with other businesses and innovate new uses for IoT technology while working together to benefit society through advancement.

V. CONCLUSION

The emergence of IoT technology is shaping our world into one previously thought unimaginable. The IoT will benefit our society by increasing efficiency, safety, and convenience for both businesses and consumers alike. However, with any emerging technology, the IoT implicates key legal issues such as security, privacy, data management, and the need for standards

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[196] The FTC, due to their experience in IoT and regulatory powers, appears to be the appropriate agency to assign this role to.

[197] DIGIT Act, S. 88, 115th Cong. (2017). For example, the DIGIT Act, gives the research committee 1.5 years to complete its research and report its findings.

[198] These protections should include effective warnings, disclaimers, and terms of service.

and protocols. If left unchecked, the IoT could have negative effects. However, if dealt with effectively, the IoT will thrive while protecting the fundamental rights of individuals.

While this note focuses on IoT application to Smart Stadiums, these insights can be applied to any IoT application. Additionally, the Smart Stadium context is an example of the large-scale use of IoT technologies and could be an excellent case study for Congress or any administrative agency looking to expedite the research process.

Ultimately, Smart Stadiums are illustrative of what could be the next big thing for the IoT, "Smart Cities," and could demonstrate how to balance living with the freedoms the Constitution has granted to the citizens of the United States, such as privacy, autonomy, and freedom, against a world increasingly reliant upon these invasive technologies.

This is our nation's chance to become a leader in a technology that will shape the future. If the IoTs legal considerations are dealt with appropriately, it could foster the creativity and innovative spirit that sets the United States apart from the rest of the world, while creating a platform for IoT technologies to prosper.

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