

# ARIZONA STATE SPORTS AND ENTERTAINMENT LAW JOURNAL

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### FROM BROKE TO BESPOKE: PROVIDING FINANCIAL SECURITY TO STUDENT-ATHLETES WITHIN THE CONFINES OF AMATEURISM

JOEL FEIGENBAUM\*

#### I. INTRODUCTION

In the 2013 documentary, “Schooled: The Price of College Sports,” star running back Arian Foster admitted to accepting money while attending college as a student-athlete. While such an act may seem innocuous in the abstract, Foster admitted to violating one of the oldest and most controversial values of the National Collegiate Athletic Association (“NCAA”): the preservation of “amateurism.” Yet as Foster says, he had no other option: “I really didn’t have any money. I had to either pay the rent or buy some food. I remember the feeling of like, ‘man, be careful.’ But there’s nothing wrong with it. And you’re not going to convince me that there is something wrong with it.”<sup>1</sup>

When describing his financial situation while living on campus, Foster said, “I think my check was like \$87 a month in dorm rooms . . . [a]t the end of the month you don’t have any money, your family can’t send you any money, a lot of those guys—80 percent of the team is made up of kids from the inner city.”<sup>2</sup>

Yet while student-athletes suffer financially in the name of “amateurism,” the NCAA and its member universities profit

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\* J.D. Columbia Law School, 2017; B.A. Yeshiva University, 2014. The author would like to thank the staff and editor of the Arizona State Sports and Entertainment Law Journal for their hard work.

<sup>1</sup> Bobby Valentine, *Schooled: The Price of College Sports*, SPORTS ILLUSTRATED (Sept. 20, 2013), <https://www.si.com/football/2013/09/20/arian-foster-documentary-comments-about-being-paid-tennessee>; see also Tania Ganguli, *Arian Foster Says He Took Benefits* (Sept. 20, 2013), [http://www.espn.com/college-football/story/\\_/id/9698504/arian-foster-says-took-benefits-playing-tennessee-volunteers](http://www.espn.com/college-football/story/_/id/9698504/arian-foster-says-took-benefits-playing-tennessee-volunteers).

<sup>2</sup> Valentine, *supra* note 1.

handsomely, making hundreds of millions of dollars by utilizing the name, image, and likeness (“NIL”) of their athletes through broadcasts, ticket sales, and other revenue streams.<sup>3</sup> Some may view this disparity as inequitable or wince at the concept of a university exploiting its students for millions of dollars. However, judging from the actions of the NCAA and its member colleges, the tremendous revenue generated from perpetuating this disparity has created an overwhelming temptation. In a meeting with famous marketing executive Sonny Vaccaro, a few college deans balked at the prospect of their schools becoming an advertising medium for the sports industry. When questioned on the topic, Vaccaro replied:

You sold your souls, and you’re going to continue selling them. You can be very moral and righteous in asking me that question, sir, but there’s not one of you in this room that’s going to turn down any of our money. You’re going to take it. I can only offer it.<sup>4</sup>

Vaccaro’s response may have been brazen, but he was not wrong. He boasts of “writing checks for millions to everybody in higher education.”<sup>5</sup>

Vaccaro is not the only one writing these checks. The NCAA fosters a multi-billion-dollar ecosystem. The NCAA and its five richest conferences—the Atlantic Coast, Big 12, Big Ten, Pac-12 and Southeastern (“SEC”)—are guaranteed more than \$31 billion in current broadcast contracts.<sup>6</sup> Furthermore, the NCAA earned \$879 million in 2019 just for broadcast rights to the March

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<sup>3</sup> Other revenue streams include alumni contributions, guarantees, and NCAA distributions. *See Revenue*, NCAA, <https://web.archive.org/web/20160328083243/http://www.ncaa.org/abo/ut/resources/finances/revenue> [https://perma.cc/3M79-RM79].

<sup>4</sup> Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

<sup>5</sup> *Id.*

<sup>6</sup> Pamela MacLean & Eben Novy-Williams, *U.S. Athletes Get School Costs Paid but No Cash*, BLOOMBERG (Sept. 30, 2015), <https://www.bloomberg.com/news/articles/2015-09-30/ncaa-fails-to-set-aside-ruling-that-no-pay-cheats-athletes>.

Madness tournament,<sup>7</sup> and for the past fourteen years, ESPN has aired a 24-hour network solely devoted to college sports.<sup>8</sup> Finally, according to an audit conducted in 2012, college athletic programs generate roughly \$6.1 billion annually, largely from ticket sales, radio and television receipts, and royalties.<sup>9</sup> Revenues of this magnitude would be impossible without exceptional student-athletes.

Many schools have doubled down on their “investment” by spending hundreds of millions of dollars on expensive stadium renovations. For example, Texas A&M spent \$483 million<sup>10</sup> and Notre Dame spent an estimated \$400 million<sup>11</sup> on their respective

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<sup>7</sup> National Collegiate Athletic Association and Subsidiaries, *Consolidated Financial Statements as of and for the Years Ended August 31, 2017 and 2016, Supplementary Information for the Year Ended August 31, 2017, and Independent Auditors’ Report*, NCAA, [http://web.archive.org/web/20180618053204/http://www.ncaa.org/sites/default/files/2016-17NCAAFin\\_FinancialStatement\\_20180129.pdf](http://web.archive.org/web/20180618053204/http://www.ncaa.org/sites/default/files/2016-17NCAAFin_FinancialStatement_20180129.pdf) [https://perma.cc/XNH2-FXRA].

<sup>8</sup> *ESPN Fact Sheet*, ESPN MEDIA ZONE, <http://espnmediazone.com/us/espn-inc-fact-sheet/> (last visited Mar. 14, 2019).

<sup>9</sup> Among other revenue streams, including alumni contributions, guarantees, and NCAA distributions, another \$5.3 billion is generated from student fees allocated to athletics, direct and indirect institutional support, and direct government support. *See Revenue*, *supra* note 3.

<sup>10</sup> Kyle Field’s renovation was initially projected to cost \$485 million, but the massive redevelopment was completed under budget with final project costs coming to \$483,888,885. *See* Caitlin Clark, *Kyle Field Renovations Completed on Time And \$1.3M Below Estimated Cost*, THE EAGLE (Jan. 14, 2016), [https://www.theeagle.com/news/local/kyle-field-renovations-completed-on-time-and-m-below-estimated/article\\_073f11ae-0fed-514d-9e31-8938ae0e8002.html](https://www.theeagle.com/news/local/kyle-field-renovations-completed-on-time-and-m-below-estimated/article_073f11ae-0fed-514d-9e31-8938ae0e8002.html). *See also* Tim Newcomb, *Texas A&M’s Redone Kyle Field Is Now Largest in SEC, Full of New Amenities*, SPORTS ILLUSTRATED (Aug. 27, 2015), <https://www.si.com/college-football/2015/08/27/redone-kyle-field-now-largest-sec-full-fresh-amenities>.

<sup>11</sup> *See About the Project, Campus Crossroads*, UNIV. OF NOTRE DAME, <https://crossroads.nd.edu/about-the-project/faqs/#faq-enhancements> (last visited Mar. 14, 2019).

stadiums, with many other schools making similar expenditures.<sup>12</sup> Additionally, many universities have paid coaches millions to mentor “amateurs.” There are currently twenty-four college football coaches slated to make at least \$4 million this year alone, with the highest among them earning \$8.3 million.<sup>13</sup> Yet while these colleges have spent hundreds of millions on their athletic programs, some have asserted that the student-athletes (on which such programs rely) do not deserve *any* compensation, since “[s]cholarship athletes are already paid in the most meaningful way possible: with a free education.”<sup>14</sup>

Yet without financial stability, athletes like Arian Foster often go hungry and are incentivized to forego their education and begin their professional careers earlier. After all, a jump to the professional level brings the promise of not just food, but a hefty paycheck. If the NCAA refers to these players as “*student-athletes*” and preaches that academics come first, one would reasonably expect that the NCAA would encourage them to *continue* their education, rather than effectively chasing them away.

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<sup>12</sup> In addition, David Booth Kansas Memorial Stadium underwent \$350 million in renovations, Tennessee’s Neyland Stadium underwent \$340 million in renovations, Berkeley’s Memorial Stadium underwent \$321 million in renovations, and Colorado State Stadium underwent \$238 million in renovations. *See* KU Places Directory, *David Booth Kansas Memorial Stadium*, UNIV. OF KANSAS, <http://places.ku.edu/buildings/memorialstadium> (last visited Mar. 14, 2019); Rachel Ohm, *Neyland Stadium Set for \$340M in Renovations Starting in Summer 2018*, KNOX NEWS (Nov. 2, 2017), <https://www.knoxnews.com/story/sports/college/university-of-tennessee/2017/11/02/neyland-stadium-set-340-m-renovations-starting-summer-2018/820890001>; Nanette Asimov, *Cal Scrambling to Cover Stadium Bill*, SFGATE (June 16, 2013), <http://www.sfgate.com/collegesports/article/Cal-scrumbling-to-cover-stadium-bill-4604221.php>; Chad Deutschman, *On-Campus Stadium Approaches Completion*, COLLEGIAN (Mar. 22, 2017), <https://collegian.com/2017/03/on-campus-stadium-approaches-completion/>.

<sup>13</sup> *See* Steve Berkowitz, *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/> (last visited Mar. 14, 2019).

<sup>14</sup> *See* Gregory Huckabee & Aaron Fox, *Is it Ethical to Sell a Lower Tier College Sports Team Another Team of Far Greater Competitive Skill?*, 16 U. DENV. SPORTS & ENT. L.J. 89, 125 (2014) (quoting the Knight Commission).

This article accomplishes four objectives. First, it conveys the origins of the NCAA's leverage, which has enabled it to prevent student-athletes from receiving any income from their NIL. Second, it analyzes how a Ninth Circuit decision produced a change in the status quo, and its potential fallout. Third, it explores the current impediments to compensating student-athletes. Finally, it proposes a detailed solution to complete the spirit of the Ninth Circuit's decision, while preserving "amateurism," as defined by the NCAA's published standards.

## II. THE NCAA'S RISE TO POWER, AND THE LEVERAGE OF "AMATEURISM"

The NCAA, originally known as the Intercollegiate Athletic Association, was formed in 1906, and renamed the NCAA in 1910.<sup>15</sup> Its formation was a response to a number of factors, including: (1) the epidemic of universities paying their players (some of whom did not even attend the school), (2) the commercial growth of sports, and (3) the need for safety regulations after several on-field deaths.<sup>16</sup> One of the NCAA's first goals was to reinstate a requirement of complete amateurism, which most schools largely ignored. According to *American College Athletics*, a report published by the Carnegie Foundation in 1929, 81 of the 112 schools surveyed provided monetary inducements to student-athletes.<sup>17</sup>

The NCAA responded by adopting what has become known as the "Sanity Code" in 1948.<sup>18</sup> The Sanity Code capped the amount of financial aid a student-athlete could receive at the cost of tuition and fees, and prohibited schools from awarding such aid (or offering such aid to potential student-athletes) based

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<sup>15</sup> Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

<sup>16</sup> The issues faced at the time were "the extreme pressure to win, which is compounded by the commercialization of sport, and the need for regulations and a regulatory body to ensure fairness and safety." *Id.*

<sup>17</sup> Branch, *supra* note 4.

<sup>18</sup> See Dillon Besser, *The Forgotten Party in O'Bannon v. National Collegiate Athletic Association: How Non-Revenue Sports Operate in a Changing Intercollegiate Marketplace*, 101 IOWA L. REV. 2105, 2112 (2016).

on athletic ability.<sup>19</sup> Yet, the Sanity Code was all bark but no bite. Since the punishment for violating the code was termination of NCAA membership and a complete ban on participation in NCAA sports, colleges refrained from imposing such a severe penalty on each other.<sup>20</sup> Its ineffectiveness caused the NCAA to repeal the Sanity Code three years later.<sup>21</sup>

In 1956, the NCAA pursued a less restrictive approach to financial aid. This approach permitted NCAA members to give student-athletes scholarships based on athletic ability. Still, the NCAA limited the amount schools could award to “grant in aid,” which equaled the total cost of “tuition and fees, room and board, and required course-related books.”<sup>22</sup> Student-athletes could seek additional financial aid *unrelated* to their athletic skills, but if they chose to do so, the total amount of athletic and nonathletic financial aid they received could not exceed the “cost of attendance” at their particular school.<sup>23</sup>

In August 2014, the NCAA allowed their member schools to increase their financial aid to the full cost of attendance and in 2015, the colleges in the five wealthiest conferences voted 79-1 to adopt that approach.<sup>24</sup> However, the NCAA has steadfastly refused to lift the complete prohibition on student-athletes receiving compensation based on their athletic ability, regardless of the source. Boosters, would-be licensors, and companies hoping to utilize the student-athletes’ NIL or pay for an endorsement are still unable to do so.<sup>25</sup>

Furthermore, when it comes to enforcing these prohibitions, no infraction is too small. For example, the NCAA suspended A.J. Green for four games at the start of the 2010 season for selling his game-worn jersey to raise money for a

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<sup>19</sup> See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007).

<sup>20</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054 (9th Cir. 2015). See also Branch, *supra* note 4.

<sup>21</sup> See Smith, *supra* note 15, at 15.

<sup>22</sup> *O’Bannon*, 802 F.3d at 1054.

<sup>23</sup> *Id.*

<sup>24</sup> See Marc Tracy, *Top Conferences to Allow Aid for Athletes’ Full Bills*, N.Y. Times (Jan. 17, 2015), <https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html>.

<sup>25</sup> *O’Bannon*, 802 F.3d at 1055.



spring-break vacation.<sup>26</sup> While he served the suspension, the Georgia Bulldogs team store continued selling replicas of Green's jersey for a hefty profit. More recently, in July 2017, the NCAA revoked the eligibility of University of Central Florida kicker Donald De La Haye after he refused to de-monetize YouTube videos that the NCAA deemed to be "based on his athletics, reputation, prestige or ability."<sup>27</sup> While the NCAA makes such determinations on a case-by-case basis, it is entirely unclear as to what constitutes "reputation" or "prestige."<sup>28</sup>

The NCAA is quick to point to such prohibitions as measures taken to maintain amateurism, but they are undeniably lucrative for the organization. For example, from 1997 to 2014, the NCAA provided EA Sports with a license to create the NCAA Football video game with the image and likeness of all their star players.<sup>29</sup> This license was longstanding mainly because it was so profitable; the video game was an unequivocal success, reportedly selling 2.5 million copies in 2008 alone.<sup>30</sup> Ironically, the NCAA's licensing with EA Sports laid the groundwork for arguably one of the most important lawsuits in the NCAA's history, and created a precedent for student-athlete "compensation" in the near future, much to the dismay of the NCAA.

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<sup>26</sup> Mark Schlabach, *NCAA Upholds A.J. Green's Suspension*, ESPN (Sept. 18, 2010), <http://www.espn.com/college-football/news/story?id=5585220>.

<sup>27</sup> Benjamin A. Tulis, *NCAA's Statement on Student-Athlete Side Hustle Raises Questions*, THE NAT'L L. REV. (Aug. 11, 2017) (italics omitted), <https://www.natlawreview.com/article/ncaa-s-statement-student-athlete-side-hustle-raises-questions>.

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

<sup>29</sup> See *The History of NCAA Football*, EA Sports (Nov. 27, 2013), <https://www.ea.com/news/ncaa-football-history>. The NCAA refrained from renewing its license in 2014, making the NCAA Football 2014 video game the last in the franchise to date. See Press Release, NCAA, NCAA Will Not Renew EA Sports Contract (July 2013), <https://web.archive.org/web/20130922005447/http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/July/NCAA+will+not+renew+EA+Sports+contract> [<https://perma.cc/ZN45-Z53Q>].

<sup>30</sup> See Branch, *supra* note 4.

### III. NCAA TAKES A LOSS: THE *O'BANNON* DECISION

The now-infamous *O'Bannon* case has an interesting backstory. Ed O'Bannon, years after being named an All-American basketball player at UCLA, discovered that he was depicted in a video game produced by EA Sports.<sup>31</sup> The game featured a virtual player on the UCLA team that wore his old jersey number (31), had his same height and build, and even mimicked his left-handed shot.<sup>32</sup> O'Bannon never consented to the use of his likeness in the video game, nor has he ever been compensated for it.<sup>33</sup> Yet, according to the NCAA rules, this was the appropriate, and indeed intended, result.<sup>34</sup> In fact, O'Bannon was still not entitled to any of the profits EA Sports generated by commercially exploiting his NIL, even after he left UCLA.<sup>35</sup>

O'Bannon sued the NCAA in federal district court in 2009, and the Ninth Circuit issued an opinion on appeal six years later.<sup>36</sup> O'Bannon alleged that the NCAA's amateurism rules violated Section 1 of the Sherman Antitrust Act<sup>37</sup> by preventing student-athletes from receiving compensation in exchange for use of their NILs.<sup>38</sup> In order to determine whether the NCAA's amateurism rules violated the Sherman Act, the Ninth Circuit applied the Rule of Reason test, rather than hold the restrictions illegal *per se*.<sup>39</sup> The court explained that even though the NCAA's restrictions were a horizontal restraint on trade, college sports

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<sup>31</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

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

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

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

<sup>35</sup> *See id.* at 1079.

<sup>36</sup> *Id.* at 1055. As the district court's decision was largely affirmed by the Ninth Circuit, the following analysis will be from the Ninth Circuit's perspective but will reference the district court opinion where appropriate. Oscar Robertson, whose NIL the NCAA continues to utilize over 27 years after he left college, also decided to join the suit. Marlen Garcia, *Oscar Robertson Joins Lawsuit vs. NCAA Over Use of Image, Likeness*, USA TODAY (Jan. 27, 2011), [https://usatoday30.usatoday.com/sports/college/2011-01-26-oscar-robertson-ncaa-likeness-lawsuit\\_N.htm](https://usatoday30.usatoday.com/sports/college/2011-01-26-oscar-robertson-ncaa-likeness-lawsuit_N.htm).

<sup>37</sup> *O'Bannon*, 802 F.3d at 1055; *see also* 15 U.S.C. § 1 (2018).

<sup>38</sup> *O'Bannon*, 802 F.3d at 1055.

<sup>39</sup> *Id.* at 1069–70.

could not exist without certain horizontal agreements.<sup>40</sup> One such agreement is the members' decision to enforce amateurism restrictions.<sup>41</sup>

The Rule of Reason test requires a three-step analysis. First, the court must determine whether the NCAA's actions created significant anticompetitive effects within a relevant market. Next, if significant anticompetitive effects exist, the court must determine whether there was a procompetitive justification for the NCAA's anticompetitive measures. Finally, the court must determine whether such procompetitive effects can be achieved through substantially less restrictive alternatives.<sup>42</sup>

#### A. ANTICOMPETITIVE EFFECTS WITHIN A RELEVANT MARKET

To evaluate the anticompetitive effects of the NCAA's agreement, the Ninth Circuit first determined the relevant market. The Ninth Circuit generally agreed with the district court, and found a cognizable "college education market" wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.<sup>43</sup> The court then noted that if the NCAA's compensation rules did not exist, member schools would compete to offer recruits compensation for their NILs.<sup>44</sup> By preventing students from receiving compensation beyond "grant in aid", the NCAA fixes the "price"<sup>45</sup> that schools pay to secure the services of their recruits, and effectively values the NILs of its student-athletes at zero. As the NCAA effectively prevents what would amount to a free market system, the court found substantial support for the

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<sup>40</sup> *Id.* at 1063.

<sup>41</sup> *Id.* at 1069. ("[W]e are persuaded . . . that the appropriate rule is the Rule of Reason . . . Because the 'integrity of the 'product' cannot be preserved except by mutual agreement' [and] 'restraints on competition are essential if the product is to be available at all.'" (quoting *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-04 (1984))).

<sup>42</sup> *Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

<sup>43</sup> *O'Bannon*, 802 F.3d at 1072.

<sup>44</sup> *Id.* at 1070-71.

<sup>45</sup> *Id.* at 1058.

district court's finding that these rules have an anticompetitive effect on the college education market.

#### B. PROCOMPETITIVE JUSTIFICATION

The Ninth Circuit then analyzed whether the NCAA's argument that amateurism, a core principal of the NCAA, provided sufficient procompetitive justification for these anticompetitive effects.<sup>46</sup> The court accepted the NCAA's argument that there is a "concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers."<sup>47</sup> The court found that preserving amateurism "makes [collegiate sports] more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball."<sup>48</sup> Nevertheless, the court noted that "not every rule adopted by the NCAA that restricts the market is necessary to preserving the 'character' of college sports."<sup>49</sup> Therefore, the court turned to the final factor.

#### C. AVAILABILITY OF SUBSTANTIALLY LESS RESTRICTIVE ALTERNATIVES

The Ninth Circuit ultimately disagreed with the district court's analysis of the third factor, but still handed a victory to student-athletes. For a substantially less restrictive measure to be considered a viable alternative, that measure must be "virtually as effective in serving the procompetitive purposes of the NCAA's current rules, . . . without significantly increased cost."<sup>50</sup> The court noted that this is a significantly high burden, as the Supreme Court has instructed courts to generally afford the NCAA "ample latitude" to superintend college athletics.<sup>51</sup> The court then analyzed the two possible alternatives approved by the district court. These included (1) allowing NCAA member schools to award stipends to student-athletes up to the full cost of attendance;

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

<sup>47</sup> *Id.* at 1073.

<sup>48</sup> *Id.* at 1074 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting City. of Tuolumne v. Sonora Cty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).

<sup>51</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120.

and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.<sup>52</sup>

As for allowing NCAA schools to provide student-athletes with the full cost of attendance, the Ninth Circuit affirmed the district court's decision and held that raising the grant-in-aid cap to the cost of attendance "would have virtually no impact on amateurism . . . [since] all the money given to students would be going to cover their 'legitimate costs' to attend school."<sup>53</sup> The court also noted that there is no reason to assume college sports fans would be less interested in those sports if athletes' scholarships covered their full cost of attendance.<sup>54</sup> In fact, by the NCAA's own standards, student-athletes remain amateurs so long as any money paid to them is used for legitimate educational expenses.<sup>55</sup> Therefore, the Ninth Circuit found that providing student-athletes the full cost of attendance was a viable and substantially less restrictive alternative to the NCAA's amateurism rules.<sup>56</sup>

However, the Ninth Circuit reversed the district court's finding that offering student-athletes small amounts of deferred cash compensation for use of their NILs was an equally viable alternative.<sup>57</sup> The court asserted that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."<sup>58</sup> The court decided that being a "poorly-paid college athlete" is much closer to being a minor league baseball player than being an amateur, and would significantly dampen the appeal of NCAA sports.<sup>59</sup> As the court warned, this slippery slope is one the NCAA may not survive:

Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit

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<sup>52</sup> *O'Bannon*, 802 F.3d at 1061.

<sup>53</sup> *Id.* at 1075.

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

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

<sup>56</sup> *Id.* at 1075–76.

<sup>57</sup> *Id.* at 1076.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its ‘particular brand of football’ to minor league status.<sup>60</sup>

The Ninth Circuit accordingly vacated this part of the district court’s opinion. As a result, the NCAA was not required to allow its member schools to pay student-athletes up to \$5,000 per year in deferred compensation.

#### **IV. OVERTIME: THE PROBLEMS THAT LIE AHEAD, AND THE STEPS NEEDED TO COMPLETE THE SPIRIT OF THE O’BANNON DECISION**

The *O’Bannon* decision, allowing schools to award cost of attendance, has had less than ideal repercussions. Some have asserted that schools are now creating incentives for athletes to attend by artificially inflating their cost of attendance in order to provide a larger monetary “cost of attendance stipend.”<sup>61</sup> This is plausible in part because the U.S. Department of Education provides guidelines for the stipend,<sup>62</sup> but financial aid offices at each school have the power to decide the amounts of each type of cost.<sup>63</sup>

It appears that the schools’ newfound freedom is too tempting for some of them to ignore. For example, Mississippi State University, University of Tennessee, and Auburn University are all located in states where cost of living is relatively low. In an economic study analyzing the lowest-cost states, Mississippi came in first, Tennessee came in seventh, and Alabama came in

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<sup>60</sup> *Id.* at 1078–79.

<sup>61</sup> Jake New, *More Money... If You Can Play Ball* (Aug. 12, 2015), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>.

<sup>62</sup> For example, money can be calculated for tuition and fees; room and board; books; supplies; transportation and miscellaneous personal expenses.

<sup>63</sup> Jon Solomon, *2015–16 CBS Sports FBS College Football Cost of Attendance Database*, CBS SPORTS (Aug. 20, 2015), <http://www.cbssports.com/college-football/news/2015-16-cbs-sports-fbs-college-football-cost-of-attendance-database/>.

twelfth.<sup>64</sup> Yet Mississippi State, Tennessee and Auburn reported the highest cost of attendance, providing their student-athletes with a stipend of more than five-thousand dollars per year in extra spending money.<sup>65</sup>

University of Alabama is a particularly interesting case. When asked about the effects of the *O'Bannon* decision, Alabama's head football coach Nick Saban opined, "You can't create a system that can really almost promote fraud."<sup>66</sup> Saban's statement was made at a time when Alabama's cost of attendance stipend was one of the lowest in its conference at \$3,463 per year.<sup>67</sup> Coincidentally, Alabama's cost of attendance stipend rose 39.2% to \$5,386 following the *O'Bannon* decision.<sup>68</sup> This cost now gives high-powered schools a perceived competitive advantage over schools like Boston College, which has a much

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<sup>64</sup> See Missouri Economic Research and Information Center, *Cost of Living Data Series Annual Average 2018*, MISSOURI DEPARTMENT OF ECONOMIC DEVELOPMENT, [https://www.missourieconomy.org/indicators/cost\\_of\\_living/](https://www.missourieconomy.org/indicators/cost_of_living/) [https://perma.cc/X4YW-VYLS] (displaying that, unsurprisingly, California, D.C., and Hawaii were rated the most expensive). This article utilizes the cost of living figures from 2016 for consistency, as the cost of attendance stipends for each school are not readily accessible past the 2015-2016 academic year.

<sup>65</sup> Tennessee (\$5,666), Auburn (\$5,586) and Mississippi (\$5,126). See Natalie Williams, *SEC Coaches React to Wide Cost-of-Attendance Disparity; New League Rules Require Transparency*, AL.COM (June 4, 2015), [http://www.al.com/sports/index.ssf/2015/06/sec\\_coaches\\_cost\\_of\\_attendance.html](http://www.al.com/sports/index.ssf/2015/06/sec_coaches_cost_of_attendance.html).

<sup>66</sup> David Climer, *In the NCAA, There's No Such Thing as a Level Playing Field*, THE TENNESSEAN (June 4, 2015), <http://www.tennessean.com/story/sports/columnist/david-climer/2015/06/04/thing-level-playing-field/28503605/>.

<sup>67</sup> Jason Kendall, *What if Kansas Paid its Basketball Players? It Already Does, Sort Of*, KU SPORTS (July 24, 2016), <http://www2.kusports.com/news/2016/jul/24/what-if-kansas-paid-its-basketball-players-it-alre/>.

<sup>68</sup> Alabama's cost of attendance was \$5,386 for out-of-state players and \$4,172 for in-state players. See Michael Casagrande, *How Alabama's Cost-of-Attendance Scholarship Jumped 39 Percent*, AL.COM (July 28, 2015), [https://www.al.com/alabamafootball/2015/07/how\\_alabamas\\_cost-of-attendanc.html](https://www.al.com/alabamafootball/2015/07/how_alabamas_cost-of-attendanc.html).

lower cost of attendance stipend (\$1,400),<sup>69</sup> despite being located in the state with the fifth most expensive cost of living.<sup>70</sup>

This artificial inflation in a school's cost of attendance is precisely the domino effect the *O'Bannon* court was worried about, as it begins to resemble a bidding war to recruit top student-athletes. Consider a comparison between two schools in the SEC: the University of Tennessee and the University of Kentucky. Tennessee's football team has been a perennial powerhouse, with a winning percentage of 66% over 112 seasons.<sup>71</sup> Kentucky's football program, on the other hand, has been quite the opposite, with a winning percentage of just 45% over 101 seasons.<sup>72</sup> Since Tennessee and Kentucky are located in the seventh and tenth lowest cost of living states, respectively, one would expect that the cost of attendance stipends awarded to student-athletes would be comparable. Yet, Tennessee's stipend was more than *double* that of Kentucky's, with a difference of \$3,382.<sup>73</sup>

<sup>69</sup> James Crepea, *Why is Auburn's Cost of Attendance So Much Higher Than its Tuition, Room & Board?*, MONTGOMERY ADVERTISER (June 17, 2015), <http://www.montgomeryadvertiser.com/story/sports/college/auburn/2015/06/17/auburns-cost-attendance-much-higher-tuition-room-board/28899143/>.

<sup>70</sup> Missouri Economic Research and Information Center, *supra* note 64.

<sup>71</sup> *Tennessee Volunteers School History*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/schools/tennessee/index.html> (last visited Apr. 26, 2019) (winning percentage derived from school record through the 2016 season).

<sup>72</sup> *Kentucky Wildcats School History*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/schools/kentucky/index.html> (last visited Apr. 26, 2019) (winning percentage derived from school record through the 2016 season).

<sup>73</sup> Tennessee has a cost of attendance stipend of \$5,666 while Kentucky has a cost of attendance stipend of \$2,284. *See* Brad Wolverton & Sandhya Kambhampati, *At Least 15 Athletics Programs to Offer More Than \$4,000 in Extra Aid to Athletes*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 9, 2015), <http://www.chronicle.com/article/At-Least-15-Athletics-Programs/229229/>. *See also* Tim Sullivan, *Lexington's Low Prices Could Hurt UK Athletics*, Courier Journal (Apr. 13, 2015), <https://www.courier-journal.com/story/sports/tim-sullivan/2015/04/13/cost-attendance-prove-costly-uk/25748011/>; Williams, *supra* note 65.



What stops these costs from continually escalating, and what differentiates these stipends from a bonus or a paycheck? By artificially inflating their cost of attendance in order to enable them to award higher stipends, these schools are presupposing a distinction that may not exist. The Ninth Circuit vacated the district court's award of \$5,000 per year in deferred compensation because "paying students for their NIL rights will vitiate their amateur status as collegiate athletes."<sup>74</sup> Does labelling the ever-increasing sum a "cost of attendance stipend" and awarding it to students immediately change that logic?

Furthermore, a school's inflation of its cost of attendance also adversely affects students who are not athletes. Since many students who are not on scholarship must take out loans to cover their tuition and living expenses, inflating the cost of attendance would cause them to request more money (and acquire more debt) than necessary. While a few students may immediately re-deposit the excess funds at the end of the semester, far more students may view the excess funds as a result of their frugal spending during the academic period and reward themselves by spending the remainder of the sum on personal activities. While this response is completely understandable, these students may end up paying thousands more in interest (as well as origination fees) for the additional loaned amount. This could have all been avoided had the schools not artificially inflated their cost of attendance.

Nevertheless, while the current cost of attendance stipend is far from perfect, it still has laudable intentions. For one, it provides a way to help struggling student-athletes cover their expenses. Ideally, the stipend should be directed to help students address expenses originating from food and groceries, school supplies, and transportation. Some schools achieve that aim.<sup>75</sup> Yet, many others fail to counsel their student-athletes on how the money should be spent and give them a large stipend with few constraints. For example, Auburn has a cost of attendance stipend of \$5,586, but that stipend is only divided into two categories:

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<sup>74</sup> O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1078 (9th Cir. 2015).

<sup>75</sup> Blair Kerkhoff & Tod Palmer, *They're Not Paychecks, But Major College Athletes Got Extra Scholarship Stipends for First Time this School Year*, KANSAS CITY STAR (June 26, 2016), <http://www.kansascity.com/sports/college/article86062792.html#storylink=cpy>.

\$2,728 for personal expenses and \$2,858 for transportation.<sup>76</sup> This presents two problems. First, a student-athlete may very well spend his or her stipend irresponsibly and have no money remaining to cover more vital expenses. Second, a stipend without specific spending constraints is disturbingly similar to offering a “cash sum[] untethered to educational expenses,”<sup>77</sup> which the Ninth Circuit explicitly rejected, stating that “once that line is crossed, we see no basis for returning to a rule of amateurism.”<sup>78</sup>

While the spirit of the *O'Bannon* decision is certainly well-intentioned, its restriction is: (1) under-inclusive as it does nothing to prevent schools from artificially inflating their cost of attendance and providing students with large stipends to use however they wish, similar to a paycheck, and (2) overbroad as it requires a relatively uniform stipend for all student-athletes at each particular school,<sup>79</sup> and may not provide adequate compensation for the amount of revenue generated by the student-athletes. A more structured and transparent system could resolve many of the current legal and logistical problems indirectly caused by the *O'Bannon* decision.

## V. PROPOSED SOLUTION

To curb the universities' descent into a stipend 'bidding war' for top recruits, student-athletes should be “compensated” for their NILs while remaining amateurs under the NCAA's current definition. A free market solution would benefit soon-to-be-highly-paid professionals, but largely ignore smaller market recruits, or players who outperform schools' initial performance expectations. This article's solution would benefit even this second group of overlooked players, while still preserving the values of amateurism championed by the NCAA.

This solution entails “compensating” players for the great value they add to their respective universities (and the NCAA) in the form of a loss-of-value (“LOV”) insurance policy, with

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<sup>76</sup> *Why is Auburn's Cost of Attendance So Much Higher Than Its Tuition, Room & Board?*, MONTGOMERY ADVERTISER (June 17, 2015), <http://www.montgomeryadvertiser.com/story/sports/college/auburn/2015/06/17/auburns-cost-attendance-much-higher-tuition-room-board/28899143/>.

<sup>77</sup> *O'Bannon*, 802 F.3d at 1078.

<sup>78</sup> *Id.*

<sup>79</sup> Some schools report a different cost of attendance for in-state and out-of-state students, but fail to provide any specific figures for cost of attendance beyond these two large groups.

premiums paid from a fund financed with a percentage of the revenue generated by the players' NIL. This would provide any qualifying player who suffers an injury that derails or significantly impedes his or her career with the ability to collect on a policy that could help either finance the athlete's rehabilitation or jumpstart a transition to a new profession. While student-athletes would never see a penny of this money in an ideal situation, they would have the comfort of knowing that should they ever need it, they could reap a share of the school's (or the NCAA's) profits that they helped generate. This solution also helps the "victims" who need it most. Few pity the NFL or NBA millionaires who lost a few extra dollars at the beginning of their careers. However, college stars who suffer career-altering injuries can take comfort in knowing that their injuries will not preclude their ability to profit from their amateur achievements.

#### A. LOSS-OF-VALUE INSURANCE EXPLAINED

A loss-of-value insurance policy protects a player's future contract value from decreasing below a pre-established threshold due to an injury or illness suffered during the coverage period.<sup>80</sup> Currently, the insurance industry mandates that LOV insurance be purchased in addition to permanent total disability insurance, which covers an athlete who suffers a career-ending injury.<sup>81</sup>

The process for purchasing LOV coverage is fairly straightforward. First, an insurance underwriter determines an athlete's projected draft position and, depending on the player's projected ranking, may offer a coverage limit.<sup>82</sup> Next, the underwriter sets a LOV threshold, which is typically fifty percent of the athlete's projected rookie contract.<sup>83</sup> If the player ultimately receives a contract offer that is lower than the threshold amount solely because of a significant injury or illness, the player may be able to collect up to the coverage limit.<sup>84</sup> However, standard coverage exclusions may prevent the athlete from collecting on the policy, even if the prior factors are met. These vary based on

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<sup>80</sup> *Loss-of-Value White Paper*, NCAA,  
<http://www.ncaa.org/about/resources/insurance/loss-value-white-paper>  
[<https://perma.cc/U39K-BV9N>].

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

provider and individual plans, but typically include pre-existing injuries or illnesses, osteoarthritis or a cumulative injury, a criminal act, intentional self-injury, or a mental disorder or disease.<sup>85</sup> Medical underwriting is usually required to disclose any such pre-existing injuries or illnesses, which are usually excluded from coverage.

**B. LOV INSURANCE PRESENTS A SIGNIFICANT FORM OF COMPENSATION TO STUDENT-ATHLETES**

While players may purchase LOV policies directly through a provider, the NCAA does not provide LOV policies to student-athletes.<sup>86</sup> These policies can become quite expensive because insurers absorb the risk of compensating players for potentially millions in lost wages. As rookie contracts are generally based solely on draft position under the NFL Collective Bargaining Agreement,<sup>87</sup> a player who falls from his or her projected spot in the draft due to injury could end up losing millions of dollars.

Myles Jack is unfortunately an example of such a player. Jack, a linebacker out of UCLA who declared for the 2016 NFL Draft, was considered a consensus top-5 pick,<sup>88</sup> in line to sign a rookie contract worth millions of dollars. However, just seven months before the draft, Jack tore his anterior meniscus during a

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

<sup>86</sup> *Loss-of-Value White Paper: Executive Summary*, NCAA, <http://www.ncaa.org/about/resources/insurance/loss-value-white-paper-executive-summary> [<https://perma.cc/94GU-DYNJ>].

<sup>87</sup> Compensation for rookies pursuant to the Collective Bargaining Agreement is based on the league's salary cap and the rookie compensation pool, with the league-wide pool divided among the member clubs, with each club getting a share proportional to its total number, round and position of the club's draft picks (plus a max of \$75,000 for undrafted rookies). See NFL Players Association, *NFL Collective Bargaining Agreement* 21–32 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/X5UH-AG87>].

<sup>88</sup> Jack was the 3rd ranked player on NFL Network draft analyst Daniel Jeremiah's 2016 rankings, and Jack was projected to go 5th overall by renown draft analyst Todd McShay. See Daniel Jeremiah, *Daniel Jeremiah's Top 50 Prospects for 2016 NFL Draft*, NFL (Mar. 4, 2016), <http://www.nfl.com/news/story/0ap3000000637416/article/daniel-jeremiahs-top-50-prospects-for-2016-nfl-draft>.

routine football practice.<sup>89</sup> With a projected four to six-month recovery period, teams shied away from him on draft day, and Jack fell out of the first round completely.<sup>90</sup> Instead, with the fifth pick in the draft, the Jacksonville Jaguars selected cornerback Jalen Ramsey.<sup>91</sup> Ramsey signed a four-year rookie deal worth \$23.3 million with a \$15 million signing bonus.<sup>92</sup> Jack would not be selected until the 36th pick, also by the Jaguars, where he signed a four-year rookie deal worth only \$6.3 million, with a \$2.8 million signing bonus—a difference of over \$17 million, or almost 73%.<sup>93</sup>

Jack's story ultimately proved to be a happy one, as he has crafted a successful career in the NFL.<sup>94</sup> However, there are several athletes whose injuries prevented them from having a professional career at all. One such example is Stanley Doughty, a former defensive tackle for the University of South Carolina. Doughty was told by his team's training staff to play through a spinal injury that he suffered during a game.<sup>95</sup> As a result, Doughty went undrafted, and while he eventually signed a contract with the Kansas City Chiefs, he never received medical clearance to play in the NFL and was forced to retire early.<sup>96</sup>

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<sup>89</sup> Stefanie Loh, *Here's How Myles Jack, Former Bellevue and UCLA Star, Got Himself Ready for the NFL Draft*, SEATTLE TIMES (Feb. 19, 2016), <https://www.seattletimes.com/sports/seahawks/heres-how-myles-jack-former-bellevue-and-ucla-star-got-himself-ready-for-the-nfl-draft/>.

<sup>90</sup> See *NFL Draft: Results, Analysis for All 253 Picks*, ESPN (May 3, 2016), [http://www.espn.com/nfl/draft2016/story/\\_/id/15440046/nfl-draft-2016-full-results-picks-analysis-order-round-1-7](http://www.espn.com/nfl/draft2016/story/_/id/15440046/nfl-draft-2016-full-results-picks-analysis-order-round-1-7).

<sup>91</sup> *Id.*

<sup>92</sup> *Jalen Ramsey*, SPOTRAC, <https://www.spotrac.com/nfl/jacksonville-jaguars/jalen-ramsey-18953/> (last visited Mar. 24, 2019).

<sup>93</sup> *Myles Jack*, SPOTRAC, <https://www.spotrac.com/nfl/jacksonville-jaguars/myles-jack-18984/> (last visited Mar. 24, 2019).

<sup>94</sup> *Id.*

<sup>95</sup> Meghan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013), <https://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/>.

<sup>96</sup> *Id.*

Moreover, if players in Doughty's position return to school, they may end up losing their scholarship as well. NCAA rules do not prohibit a coach from revoking a player's scholarship the year after the athlete becomes injured.<sup>97</sup> As a result, athletes courted by numerous schools when they had the opportunity to display their athletic abilities are often left to fend for themselves. Without a scholarship, many athletes cannot afford their own health insurance and are wholly dependent on their school's healthcare system.<sup>98</sup> Even if these players are able to afford their own health insurance or are able to utilize their parents' coverage, athletes who lose their scholarship may drop out of college, unable (or unwilling) to pay for tuition.

LOV insurance can provide these tragic stories with a silver lining. For example, Ifo Ekpre-Olomu was initially projected by many as a first round pick,<sup>99</sup> but tore his ACL in the practice before the Rose Bowl.<sup>100</sup> If Ekpre-Olomu had been drafted at the end of the first round as predicted, he could have made \$6 million per year.<sup>101</sup> Yet teams feared how the injury would affect his career and resisted drafting him. As a result, Ekpre-Olomu dropped all the way to the seventh round and signed a four-year contract worth only about a third of his projected

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<sup>97</sup> Ben Strauss, *A Fight to Keep College Athletes From the Pain of Injury Costs*, N.Y. TIMES (Apr. 24, 2014), <https://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html>.

<sup>98</sup> Walsh, *supra* note 95.

<sup>99</sup> For example, NFL draft expert Mel Kiper, Jr. of ESPN rated Ekpre-Olomu as the top senior cornerback available in the 2015 NFL Draft. Mel Kiper, Jr. *Top CB Prospects for 2015*, ESPN (June 12, 2014), [http://insider.espn.com/nfl/draft2015/insider/story/\\_/id/11065987/mel-kiper-early-ranking-top-cornerback-prospects-2015-nfl-draft](http://insider.espn.com/nfl/draft2015/insider/story/_/id/11065987/mel-kiper-early-ranking-top-cornerback-prospects-2015-nfl-draft).

<sup>100</sup> Andy Staples, *Man Coverage: How Loss-of-Value Policies Work and Why They're Becoming More Common; Punt, Pass & Pork*, SPORTS ILLUSTRATED (Jan. 18, 2016), <https://www.si.com/college-football/2016/01/18/why-loss-value-insurance-policies-becoming-more-common>.

<sup>101</sup> See *Malcom Brown*, SPOTRAC, <https://www.spotrac.com/nfl/draft/2015/round-1/> (last visited Mar. 14, 2019) (Malcom Brown was the last of the first-round picks for the 2015 draft and signed a \$7.6 million dollar contract, \$6 million of which was guaranteed, with the New England Patriots).

salary.<sup>102</sup> Fortunately, Ekpre-Olomu had the foresight to purchase LOV coverage. As a result of his fall in draft position, he received \$3 million from his policy and will collect another \$2 million if he never plays.<sup>103</sup> As of the date of this publication, Ekpre-Olomu remains unsigned.<sup>104</sup>

For all its benefits, an extensive LOV plan is not cheap, especially for a premium-caliber player. For example, the parents of Leonard Fournette, a former Louisiana State University tailback and current Jacksonville Jaguar, purchased two insurance policies, each worth \$10 million: one to cover total disability in the event of a career-ending injury and one to cover circumstances leading to a drop in his projected draft spot.<sup>105</sup> The premiums for these policies were approximately \$8,000 per \$1 million of coverage, which forced Fournette's parents to take out a loan.<sup>106</sup> While Fournette is fortunate his parents were in the position to bankroll such a prudent financial decision, players who come from less affluent families do not have that luxury.

#### C. LOV INSURANCE FILLS A NEED UNADDRESSED BY CURRENT ALTERNATIVES

Admittedly, schools can already purchase LOV insurance for their athletes. Therefore, one could argue that if the proposed solution was an effective means to recruit athletes, schools would have already pursued this option. However, there are only a limited number of funds that schools can utilize to pay for these policies. One of the most common LOV payment system is the

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<sup>102</sup> *Ifo Ekpre-Olomu*, SPOTRAC, <https://www.spotrac.com/nfl/miami-dolphins/ifo-ekpre-olomu-16967/> (last visited Mar. 24, 2019).

<sup>103</sup> Darren Rovell, *Ifo Ekpre-Olomu Collects Record \$3M on Loss of Value Policy*, ESPN, (Oct. 19, 2015), [http://www.espn.com/nfl/story/\\_/id/13924955/ifo-ekpre-olomu-cleveland-browns-collects-3-million-draft-policy](http://www.espn.com/nfl/story/_/id/13924955/ifo-ekpre-olomu-cleveland-browns-collects-3-million-draft-policy).

<sup>104</sup> *Ifo Ekpre-Olomu*, *supra* note 102.

<sup>105</sup> See Dennis Dodd, *Leonard Fournette's \$10M Policies and the Unregulated World of Player Protection*, CBS SPORTS (May 12, 2016), <https://www.cbssports.com/college-football/news/leonard-fournettes-10m-policies-and-the-unregulated-world-of-player-protection/>.

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

Student Assistance Fund (“Fund”).<sup>107</sup> Florida State University used this approach for Jameis Winston, Texas A&M used it for Cedric Ogbuehi, and the University of Oregon used it for Marcus Mariota.<sup>108</sup>

Unfortunately, the Fund has its limits, as it is not intended to be used as a recruiting tool. The NCAA website explains that “most of the money [in the Fund] is used for educational purposes, with some also going for needs such as clothing.”<sup>109</sup> Universities have described it as a fund “intended to assist in covering student-athletes’ non-athletics-related costs while attending an institution.”<sup>110</sup> Additionally, the capital included in the Fund is not exceptionally high. For example, the SEC has previously stated that its member schools have been allotted \$350,000 for the Fund.<sup>111</sup> Given the rising cost of LOV insurance premiums, this is simply not enough capital to adequately insure a number of different student-athletes. Moreover, most schools avoid using the Fund for this purpose due to political reasons, since the money is designated to cover unplanned expenses and would detract from

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<sup>107</sup> See Staples, *supra* note 100 (discussing the use of LOV insurance policies by student-athletes and how some schools dip into their NCAA-approved Student Assistance Funds to pay the premiums). This article does not claim to specify every alternative means through which a university can fund the payment of LOV insurance for student-athletes. *Id.*

<sup>108</sup> See Kristi Dosh, *Assistance Funds Pay Tab to Insure Stars*, SPORTS BUSINESS DAILY (Jan. 12, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/01/12/Colleges/Student-Assistance-Fund.aspx> (discussing how Florida State, Texas A&M, and University of Oregon all paid the premiums on the LOV policies for their star players).

<sup>109</sup> See NCAA, *Student-Athlete Benefits*, <http://www.ncaa.org/about/resources/finances/student-athlete-benefits> [<https://perma.cc/GBK4-C8UV>].

<sup>110</sup> See Sun Devil Compliance, *NCAA Student Assistance Fund*, ARIZONA STATE UNIVERSITY, <https://sundevilcompliance.asu.edu/enrolled-student-athletes/ncaa-student-assistance-fund> (last visited Mar. 24, 2019).

<sup>111</sup> See Bruce Feldman, *How Texas A&M Paid Over \$50,000 to Get Cedric Ogbuehi Back for 2014*, FOX SPORTS (July 16, 2014), <https://www.foxsports.com/college-football/story/texas-am-aggies-paid-nearly-60-grand-top-nfl-prospect-cedric-ogbuehi-071614> (stating that the SEC allotted each of its members \$350,000 for their Student Assistance Funds).



the funds available to other athletes.<sup>112</sup> As Bob Bowlsby, the Big 12 commissioner and chairman of the NCAA Football Oversight Committee, has stated, “I’m not comfortable having the Student Assistant Fund used for [insurance] . . . it’s a very large premium, typically, and it takes away from other kids.”<sup>113</sup>

D. LOV COVERAGE WOULD SATISFY THE REQUIREMENTS OF BOTH THE NCAA AND ITS PLAYERS

Every year, the NCAA releases its NCAA Division 1 Manual, which, among other topics, provides the rules and regulations governing amateurism and player eligibility. Currently, there is an explicit carve-out under Section 12.1.2.4.4, entitled “Exception for Insurance Against Disabling Injury or Illness, or Loss of Value.”<sup>114</sup> The provision provides that an individual may borrow against “his or her future earnings from an established, accredited commercial lending institution exclusively for the purpose of purchasing insurance . . . against a disabling injury or illness that would prevent the individual from pursuing a chosen career or for the purpose of purchasing loss-of-value insurance.”<sup>115</sup> The provision also explicitly contemplates a school’s role in purchasing LOV coverage, as the subsection further states, “an institution’s president or chancellor (or his or her designated representative from outside the department of athletics) may designate an institutional staff member (or staff members) (e.g., professional sports counseling panel) to assist a student-athlete with arrangements for securing the loan and insurance.”<sup>116</sup>

Given the language above, the NCAA would be hard-pressed to assert that allowing schools to purchase LOV insurance for qualifying players<sup>117</sup> would vitiate amateurism, as players are

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<sup>112</sup> See Staples, *supra* note 100.

<sup>113</sup> See Dodd, *supra* note 105.

<sup>114</sup> NCAA, DIVISION I MANUAL 69 (2018), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/U9WZ-XYAX>].

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

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

<sup>117</sup> As LOV policies insure against the athlete’s fall in the draft, providers will typically only offer LOV insurance to players who are projected to be drafted (or drafted in a certain round or by a certain pick). See *Loss-of-Value White Paper*, *supra* note 80.

already permitted to do so themselves. Many of these policies, such as the coverage Leonard Fournette's parents purchased, are simply too cost-prohibitive to purchase with funds borrowed against future earnings. Additionally, there are only a select few players each year whose projected future earnings would be high enough to justify purchasing an expansive LOV policy. These financial implications simply have no impact on whether purchasing such policies would fall within the confines of the NCAA's rules.

While the costs for universities that purchase LOV coverage for their student-athletes would undoubtedly be significant, Section I demonstrates that these institutions are in prime position to bear the expense. Additionally, these expenses can be equitably drawn from a fund financed with revenue generated from commercially exploiting the players' NILs, finally "compensating" them for the immense value they bring to their schools. The revenue generated from monetizing players' NILs would enable universities to attract top talent based, in part, on the LOV coverage they would be willing to offer.

Schools could also include significant incentives within the structure of the LOV coverage to better serve their student-athletes. For example, the amount of LOV coverage purchased could be based on the projected performance of the player averaged over a minimum of two years, which would encourage student-athletes to remain in school to pursue an education. Players and NCAA critics alike have wanted a free-market system for years, this solution would provide one while preserving student-athletes' status as amateurs. It would allow the students to exist in an ideal intersection—between 'student' and 'athlete'.

## VI. CONCLUSION

It is time for a change. The NCAA and its member universities should no longer be allowed to improve their bottom-line to the detriment of their student-athletes. We must work to change the perception that a free education is sufficient compensation, especially when the NCAA allows coaches to revoke a player's athletic scholarship—this "free education"—if he or she gets injured.<sup>118</sup> The NCAA touts this arrangement as perpetuating amateurism, but such a "performance-based reward" is the epitome of compensation. When players can no longer compete, they are no longer permitted to utilize a university's resources free of charge. One would be hard-pressed to distinguish

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<sup>118</sup> See Strauss, *supra* note 9797.

this practice from an employee who gets laid off for not showing up to work.

Imagine if schools were required<sup>119</sup> to provide LOV insurance for their student-athletes. Picture the difference this would have made for Stanley Doughty, who was never able to live out his dream in the NFL. Leonard Fournette could have slept easy at night, without having to worry about how his parents will pay for his insurance premiums.

If everyone can agree to “play ball” and accept that student-athletes deserve some form of compensation for the risk they undertake and the value they provide for their universities, we may finally be able to change the inequitable status quo. True, some student-athletes may be disappointed that they will not get the high-cash salary available to professionals. However, LOV coverage will enable them to complete their education free of any financial distress, while not endangering their amateur status. The proposed solution is truly a “win” for everyone, no matter whose team they are on.

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<sup>119</sup> Such a requirement would be due to market forces, similar to the trend among certain schools of raising cost of attendance stipends to attract student-athletes, as previously critiqued in Section IV.

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**THE TRICKY BUSINESS OF  
COMPUTER-GENERATED IMAGERY:  
WHEN COPYRIGHT LAW MEETS MOVIE MAGIC**

SAMMI ELEFANT\*

**ABSTRACT**

What do *Guardians of the Galaxy*, *Avengers: Age of Ultron*, and *Beauty and the Beast* have in common? Each film makes use of performance motion-capture technology known as “MOVA” to create the life-like characters, such as the “Hulk” or the “Beast,” which are imperative to the success of live-action films.

However, because of the use of this technology, these three blockbuster hits have become the center of litigation involving Rearden, LLC, a visual effects firm, and some of Hollywood’s biggest film studios including: Disney, Marvel, 20th Century Fox and Paramount. After the technology was found to be stolen by a former Rearden employee, and subsequently unlawfully licensed to Hollywood’s cinematic giants, Rearden brought patent, trademark, and copyright infringement claims against the Mouse House.

In its complaint, Rearden notes: “Disney used the stolen MOVA Contour systems and methods, made derivative works, and reproduced, distributed, performed, and displayed at least *Guardians of the Galaxy*, *Avengers: Age of Ultron*, and *Beauty and the Beast*, in knowing or willfully blind violation of Rearden Mova LLC’s intellectual property rights.”<sup>1</sup>

This article does not analyze the patent or trademark claims. Instead, it focuses on the bold claims to copyright made by Rearden in the computer-generated characters its MOVA system helps bring to life. It argues that Rearden has no claim to

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<sup>1</sup> Complaint at 3, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

copyright in these computer-generated characters because although the technology's contributions are substantial, it is not enough to establish ownership where the goal of any computer program is to take an input and deliver an output. Rearden ultimately lost on this claim as the court found it implausible that any output created by MOVA was done without considerable contributions from the actors or directors.

Lastly, this article argues that Rearden's new theory of copyright—that MOVA is a literary work of authorship fixed in a tangible medium of expression—is only likely to be upheld on the claim that MOVA retains copyright solely in the programming of the language that enables the software to operate. To extend this type of copyright protection to the computer-generated character outputs would broaden the scope of protection to a point that would ultimately hinder "the progress of Science and the useful Arts."<sup>2</sup>

## I. INTRODUCTION

There have been a lot of great [computer graphics] performances, but [the Beast] was a romantic hero, someone who was at the emotional center of the movie. I always said that we could get everything else in this movie right, but if we didn't get a Beast that people believed in then [the movie] wouldn't work.<sup>3</sup>

-Bill Condon, Director, *Beauty and the Beast*

The history of animation can be traced back to 30,000 B.C., where archeological artifacts evidence that humans have been on a long journey to get to the art form recognized today.<sup>4</sup> From goats leaping on painting pottery bowls to Da Vinci's Vitruvian Man drawing; motion has always been necessarily

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<sup>2</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> Brian Truitt, *Watch the Crazy Way 'Beauty and the Beast' Turned Dan Stevens into a Monster*, KSDK (May 29, 2017), <https://www.ksdk.com/article/news/nation-now/watch-the-crazy-way-beauty-and-the-beast-turned-dan-stevens-into-a-monster/465-714f532a-8fe5-440e-a942-505c28b112cb>.

<sup>4</sup> *The History of Animation*, <https://history-of-animation.webflow.io/> (last visited Apr. 10, 2019).

inherent to human expression.<sup>5</sup> Fast-forward to 1833, Belgian physicist Joseph Plateau and Austrian Professor of Geometry Simon Stampfer, simultaneously invented the phenakistoscope.<sup>6</sup> This spinning cardboard disc is widely considered to be the first form of animation.<sup>7</sup> When observed by the naked eye, the phenakistoscope created the illusion of fluid motion as the hand-drawn images spun.<sup>8</sup> However, animation stagnated until 1906, when the film industry found a need for stop-motion photography to create action.<sup>9</sup> Stop-motion, where a camera repeatedly stops and starts again, allowed figurines and drawings to move when still image captures were placed and played in chronological order.<sup>10</sup> Stop-motion was the dominant form of animation in film for nearly a century, through the “Golden Age” where the rise of Walt Disney’s iconic 2D animated characters forever changed the industry.<sup>11</sup> Then, computer-generated imagery (“CGI”) exploded onto the scene, replacing frame-by-frame hand-drawings with 3D modeling.

Pixar’s 1995 film *Toy Story* was the first feature-length film created entirely by computer.<sup>12</sup> Pixar’s contribution captured the hearts of millions with the story of toys who come to life when nobody’s looking. But perhaps more significant, the film closed a gap that had endured between animation and real-life motion pictures. CGI now allowed filmmakers to envision synchronizing fantasy and reality almost entirely organically across every genre.

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<sup>5</sup> *Id.*

<sup>6</sup> *Phenakistoscopes (1833)*, THE PUBLIC DOMAIN REVIEW, <https://publicdomainreview.org/collections/phenakistoscopes-1833/> (last visited Mar. 20, 2019) (displaying pictorial examples of the phenakistoscope).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *The History of Animation*, *supra* note 4.

<sup>10</sup> *Stop Motion Animation*, TECHOPEDIA, <https://www.techopedia.com/definition/109/stop-motion-animation> (last visited Mar. 20, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> Julia Zorthian, *How ‘Toy Story’ Changed Movie History*, TIME (Nov. 19, 2015), <http://time.com/4118006/20-years-toy-story-pixar/>.

CGI is the application of three-dimensional computer graphics technology to create visual effects.<sup>13</sup> Its use has become mainstream across film, television, video games, and even printed media. Audiences recognize CGI as the technology that allows dinosaurs to appear in *Jurassic Park*, and Mark Ruffalo to transform into the “Hulk” in *The Avengers*. In 2017, the filmmakers behind *Beauty and the Beast* flaunted CGI as the tool allowing them to capture both Dan Stevens’ facial and body expressions to create the “Beast.”<sup>14</sup> However, with CGI’s nearly ubiquitous blurring of fantasy and reality, another haze is cast over what might normally be considered a rather clear distinction: who owns the copyright’s output—the Computer-Generated (“CG”) characters?

The leading CGI technology is MOVA Contour Reality Capture (“MOVA”), an incredibly sophisticated photoreal facial capture and animation system, which has been used in many films and video games.<sup>15</sup> As such, MOVA is highly-guarded intellectual property with clear copyright, trademark, and patent protections. MOVA has been at the center of litigation for the last few years. That litigation has ushered in a new challenge to copyright law’s protection of ownership over CG creative outputs. A personal feud between two former friends and co-workers sparked a lawsuit involving these novel issues. That lawsuit led to another, this time between MOVA’s owner, Rearden, LLC (“Rearden”), and major film studios, including Disney and Paramount. To put the current state of the lawsuit between Rearden and the studios in context, this article must first explore the case’s complex history.

## II. PROCEDURAL HISTORY: A LEGAL STORM FOLLOWS BETRAYAL

### A. REARDEN’S OWNERSHIP OF MOVA

The first Rearden lawsuit set the stage for Rearden’s current copyright battle over who owns the copyright in a

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<sup>13</sup> See *Computer-Generated Imagery*, SCIENCEDAILY, [https://www.sciencedaily.com/terms/computer-generated\\_imagery.htm](https://www.sciencedaily.com/terms/computer-generated_imagery.htm) (last visited Mar. 10, 2019) (defining the practice).

<sup>14</sup> See discussion *infra* Section V.A.1.

<sup>15</sup> *MOVA Contour Facial Capture System Recognized With Academy Award*, MARKET WIRED (Jan. 21, 2019), <http://www.marketwired.com/press-release/movar-contour-facial-capture-system-recognized-with-academy-awardr-1984911.htm>.

technology's output. It is, itself, something out of a Hollywood movie. The story includes tales of friendship, innovation, betrayal, theft, and a Chinese shell company.<sup>16</sup>

As Rearden employees, Greg LaSalle and Ken Pearce oversaw the MOVA system from its inception.<sup>17</sup> Their long-time friend was Steve Perlman, MOVA's inventor and Rearden's CEO.<sup>18</sup> As employees, they were under strict employment and proprietary information/invention agreements to protect the intellectual property rights contained within both the physical equipment and intellectual property of MOVA.<sup>19</sup> After working on motion-capture technology with LaSalle and Pearce for several years, Perlman transferred MOVA to one of Rearden's subsidiaries, OnLive.<sup>20</sup> LaSalle and Pearce moved with the technology.<sup>21</sup> OnLive had several prominent customers, including Disney and Industrial Light and Magic.<sup>22</sup> All was seemingly well for LaSalle, Pearce, and Perlman before Perlman realized—MOVA was not profitable.<sup>23</sup>

Perlman re-structured OnLive and moved MOVA to a new company, OL2, which was run by its lead investor, Gary Lauder.<sup>24</sup> Lauder kept a significant portion of the old OnLive team, but he fired LaSalle and Pearce.<sup>25</sup> Perlman hired them back to work with him at Rearden, and he wanted MOVA back as well.<sup>26</sup> As part of a negotiation-tactic-gone-wrong, Perlman suggested that Lauder sell MOVA to LaSalle and Pearce for one dollar so they could continue working with it.<sup>27</sup> Perlman assumed that this maneuver would convince Lauder that MOVA was not so valuable enough that Perlman would want it back himself.<sup>28</sup> The goal was that after LaSalle and Pearce had recouped MOVA,

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<sup>16</sup> *Shenzhenshi Haitiecheng Sci. & Tech. Co. v. Rearden, LLC*, No. 15-CV-00797-JST, 2017 U.S. Dist. LEXIS 128105 (N.D. Cal. Aug. 11, 2017).

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*10–11.

<sup>20</sup> *Id.* at \*8–9.

<sup>21</sup> *Id.* at \*9.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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

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

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

<sup>27</sup> *Id.* at \*15.

<sup>28</sup> *Id.* at \*13–14.



Perlman would re-assume control, and the three would continue business as normal.<sup>29</sup> Lauder appeared amenable to Perlman's one-dollar deal, but he diligently looked for other buyers.<sup>30</sup> Enter the betrayal; without consulting Perlman, Lauder asked LaSalle and Pearce if they would agree to share 25% of MOVA's sale proceeds if he found a third-party buyer.<sup>31</sup> Without Perlman's knowledge, they agreed.<sup>32</sup>

Somehow, Perlman found out about LaSalle and Pearce's secret deal.<sup>33</sup> He directed his anger at Pearce, whom he assumed to be the mastermind.<sup>34</sup> Perlman fired Pearce on the spot.<sup>35</sup> Lauder could not find a third-party buyer, so he sold MOVA to LaSalle's supposed company, MO2.<sup>36</sup> Perlman, however, created MO2 as a subsidiary of Rearden.<sup>37</sup> Perlman once again owned MOVA.<sup>38</sup>

Once the MOVA assets were safely under MO2, LaSalle began secretly emailing with Ed Ulrich, the CEO of Digital Domain 3.0 ("DD3") about DD3 purchasing MOVA from MO2.<sup>39</sup> DD3 was Rearden's direct competitor in the visual effects ("VFX") business.<sup>40</sup> LaSalle was convinced that he had the authority as MO2's manager to sell its assets.<sup>41</sup> Ulrich told LaSalle that he could move to DD3 from Rearden with MOVA to manage it without Perlman's supervision.<sup>42</sup> When the plans were in place to sell MOVA to DD3, LaSalle told Perlman about the sale.<sup>43</sup>

Perlman told LaSalle that MOVA belonged to Rearden and that LaSalle needed to turn over the management of MO2 to Perlman.<sup>44</sup> Both Perlman and Rearden's human resources department made unsuccessful attempts to reach LaSalle to

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

<sup>30</sup> *Id.* at \*15.

<sup>31</sup> *Id.* at \*16.

<sup>32</sup> *Id.* at \*17.

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

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

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

<sup>36</sup> *Id.* at \*18.

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.* at \*20.

<sup>42</sup> *Id.* at \*19.

<sup>43</sup> *Id.* at \*21.

<sup>44</sup> *Id.* at \*21–22.

remind him of his employment obligations under his employment and proprietary information/invention agreement.<sup>45</sup> The company also repeatedly urged him to return the MOVA assets on his own.<sup>46</sup> Perlman also contacted DD3's General Counsel to put DD3 on notice that LaSalle was not the owner of MOVA.<sup>47</sup> Nevertheless, on May 8, 2013, LaSalle closed the deal with DD3 and transferred the assets to a Chinese technology company, Shenzhenshi ("SHST") to shield DD3 from liability.<sup>48</sup> Following this transfer of the MOVA assets, SHST attempted to sell the assets to Virtue Global Holdings ("VGH") in order to further "frustrate Rearden's rights as a creditor and owner of MOVA."<sup>49</sup> Ultimately, Rearden came out victorious against SHST because it never actually had legal ownership of MOVA.

#### B. REARDEN'S OWNERSHIP OF MOVA'S OUTPUT

With MOVA's dramatic transactional history behind it, Rearden now faces a more complicated lawsuit. On July 17, 2017, Rearden sued Disney, Fox, and Paramount, along with their five major film studios, alleging copyright, patent, and trademark infringement for the unlicensed use of the MOVA technology in a slew of box office hits.<sup>50</sup> The film at the center of the suit is Disney's *Beauty and the Beast*. The Beast character was only possible through MOVA's Contour Reality Capture System, which enabled the filmmakers to capture every human reaction of Dan Stevens' performance with submillimeter precision. Stevens' reactive movements were then placed on the CG Beast mold, transmogrifying Stevens into the character audiences recognize. Stevens best describes what it was like working with MOVA to bring the Beast to life:

The facial capture [for the Beast] was done separately using a technology called "MOVA." So, every ten days, two weeks, I'd go into a booth and spray my face with UV paint and 27 little cameras would capture the facial expressions of all the scenes we had done on previous

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<sup>45</sup> *Id.* at \*23.

<sup>46</sup> *Id.* at \*24.

<sup>47</sup> *Id.* at \*25.

<sup>48</sup> *Id.* at \*26.

<sup>49</sup> *Id.* at \*28.

<sup>50</sup> Complaint, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

days . . . they would take that information and morph it onto the Beast, his face . . . .<sup>51</sup>

With the win against SHST in tow, Rearden pressed on, and pitted itself against the film studios that illegally contracted with DD3 to use MOVA.<sup>52</sup> However, the studios alike were unaware that LaSalle stole the patented and copyright-protected MOVA Contour system that was used to film, most recently, *Beauty and the Beast*.<sup>53</sup>

Rearden's lawsuit against the studios not only attracted headlines, but also threw into question the very landscape of intellectual property law—particularly copyright ownership. The core of Rearden's intellectual property argument was that *it owned* MOVA's output of CG characters as the MOVA programmer—not the film studio.<sup>54</sup> This has launched a call to action for the legal community to think about the future of copyright law as technology becomes increasingly “smarter” and indispensable to the development of creative works.<sup>55</sup> Currently, United States copyright protection extends only to works owing their origins to a human being.<sup>56</sup> Nevertheless, artificial intelligence (“AI”) machines and systems can already create art, music, and literature,

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<sup>51</sup> See Press Conference, *Beauty and the Beast*, YOUTUBE (Feb. 20, 2017), [https://www.youtube.com/watch?v=R9mKV\\_gklgw&feature=youtu.be&t=12m14s](https://www.youtube.com/watch?v=R9mKV_gklgw&feature=youtu.be&t=12m14s) (actors describing MOVA and how it was uniquely utilized in this film).

<sup>52</sup> Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018).

<sup>53</sup> *Shenzhenshi Haitiecheng Sci. & Tech. Co. v. Rearden, LLC*, No. 15-CV-00797-JST, 2017 U.S. Dist. LEXIS 128105, at \*36 (N.D. Cal. Aug. 11, 2017) (the court makes a finding of fact that LaSalle was not the true owner of the MOVA assets and did not have authority to make a sale of the MOVA assets).

<sup>54</sup> Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963, 968 (N.D. Cal. 2018).

<sup>55</sup> Brian Kulp, *Rearden v. Walt Disney Co.: District Court Rejects Puzzling Copyright Allegation but Permits Patent and Trademark Claims to Move Forward*, JOLT Digest (Mar. 6, 2018), <https://jolt.law.harvard.edu/digest/rearden-v-walt-disney-co-district-court-rejects-puzzling-copyright-allegation-but-permits-patent-and-trademark-claims-to-move-forward>.

<sup>56</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.06[A][C] (Matthew Bender, Rev. Ed. 2018).

some of which may even be financially viable.<sup>57</sup> With that viability, courts will inevitably have to consider the application of copyright protection for those non-human created works. Although MOVA is not an entirely non-human output, Rearden's assertions of what the technology is capable of has already challenged the future of copyright law.

### III. THE ROLE OF COPYRIGHT LAW

Rearden claimed that it owned the output of the MOVA technology—the CG characters themselves. For Rearden's claims to succeed, a court would have to find that MOVA is an artificially intelligent program creating the CG character outputs. However, this would mean that copyright law, as it currently exists, would need to be over-hauled to accommodate non-human copyrightable works. Copyright law has an intricate history, but as technology becomes increasingly “smart” and able to function without much input from humans, the malleability and scope of copyright's traditional doctrines and theories will continue to be tested.

#### A. LEGAL ORIGINS

A dominant legal problem over the protection of literary or film characters is that none of the classic copyright doctrines apply perfectly. Copyright protections may exist for a character as part of a story, or in a drawing or painting, or perhaps even by trademark as a symbol of a product, but rights in the character itself, mined from the world in which that character has been placed by its author, are unclear.<sup>58</sup>

Copyright law owes its origins to seventeenth-century England, when Parliament granted a publishing monopoly for books to a group of London merchants.<sup>59</sup> The Statute of Anne,<sup>60</sup> signed into law in 1710, was the first law to ever recognize and

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<sup>57</sup> Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence*, HARVARD BUSINESS REVIEW (July 26, 2017), <https://hbr.org/cover-story/2017/07/the-business-of-artificial-intelligence>.

<sup>58</sup> See Alan J. Hartnick, *The Character Licensing Enigma*, 70 N.Y. ST. B.J. 18 (1998) (relaying an interview between the author and Richard Wincour, author of *The Art of Character Licensing*).

<sup>59</sup> See CRAIG JOYCE ET AL., COPYRIGHT LAW 16 (6th ed. 2003).

<sup>60</sup> 8 Ann., c. 19 (1710).

grant exclusive publishing rights to authors.<sup>61</sup> The purpose of the Statute of Anne was to curb the exploitation of authors, encourage widespread education through literature, and incentivize people to create new works.<sup>62</sup> With this statute, authors were at last recognized for their contributions through the grant of the exclusive right to print or reprint their works.<sup>63</sup> Further, a third party could no longer import, publish, or sell the work without the author's explicit consent.<sup>64</sup>

Copyright law only reached the United States in the eighteenth century. The United States Constitution grants Congress the 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."<sup>65</sup> In 1790, Congress enacted the first Federal Copyright Act, which protected only maps, charts, and books.<sup>66</sup> Similar to the Statute of Anne, authors were granted the exclusive right to print, publish, or sell these types of works.<sup>67</sup> As evidenced by its scope, the intent of the 1790 Copyright Act was to promote education.<sup>68</sup> Nonetheless, throughout the nineteenth century Congress expanded the reach of the 1790 Copyright Act to include different types of works and rights. Most notable was the Supreme Court's expansion in *White-Smith Music Publishing v. Apollo Co.*<sup>69</sup> There the court held that the "author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition retained the exclusive right to print, reprint, publish, complete, copy, and sell the copyrighted work."<sup>70</sup> *White-Smith* preceded the landmark 1909 Copyright Act by one year.

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<sup>61</sup> *Id.* (Typically, any rights in a published work were granted to its publisher, rather than its corresponding author).

<sup>62</sup> See Matthew Brett Freedman, *Machinima and Copyright Law*, 13 J. INTELL. PROP. L. 235 (2005) (providing a detailed history of copyright law).

<sup>63</sup> 8 Ann., c. 19 (1710).

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

<sup>65</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>66</sup> Copyright Act of 1790, 1 Stat. 124 (1790).

<sup>67</sup> *Id.*

<sup>68</sup> Copyright Act of 1790, 1 Stat. 124 (1790) (stating the intent as "[a]n Act for the encouragement of learning . . .").

<sup>69</sup> *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908).

<sup>70</sup> *Id.*

The 1909 Copyright Act revised copyright law to include future-focused language for new media, as technology began to play a more prominent role in the creation of different types of works. This grew out of a plea by former President Theodore Roosevelt, who vehemently fought for a complete revision of copyright law, as opposed to simply amending it. In 1905, he urgently pressed members of Congress to act, stating:

They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public.<sup>71</sup>

However, Congress' most important enactment was the Copyright Act of 1976—the pillar of contemporary copyright law. As amended, the 1976 Act protects: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>72</sup> It grants a copyright holder the exclusive right to reproduce the copyrighted material, create derivative works, distribute the work to the public, and to publicly perform or display the work.<sup>73</sup> The shift in the law accords with Congress' stated purpose "to promote the progress of the 'useful Arts' by rewarding creativity."<sup>74</sup>

## B. FIXATION, ORIGINALITY, AND MINIMAL CREATIVITY

Copyright protects words, images, sounds, and other expressions used by the author to express an idea. The law does not protect the idea itself because an idea alone does not contain some identifiable or tangible apotheosis. Section 102 of the 1976

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<sup>71</sup> H.R. REP. NO. 60-1108, at 1 (1909).

<sup>72</sup> 17 U.S.C. § 106 (2018).

<sup>73</sup> *Id.*

<sup>74</sup> *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 151 (1998).

Copyright Act establishes three requirements for a work to be copyrightable.<sup>75</sup>

1. Fixation

First the 1976 Copyright Act requires that the work be “fixed in a tangible medium of expression” to be eligible for copyright protection.<sup>76</sup> A work is “fixed” upon being “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>77</sup> There are many ways to “fix” a work, and courts have held that it makes no difference in what manner, form, or medium the fixation occurs. For example, a work may be expressed in “words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia,” and the author’s expression may be “fixed in a physical object in written, printed, photographic, sculptural . . . or any other stable form.”<sup>78</sup> This requirement is not particularly difficult to meet, as most works are fixed organically in their creation.<sup>79</sup>

*Williams Electronics, Inc. v. Artic International, Inc.* provides a strong example of when a work is considered “fixed” for the purposes of copyright protection.<sup>80</sup> Williams Electronics, Inc. (“Williams”) created a video game titled “DEFENDER,” which displayed images of spaceships and aliens.<sup>81</sup> As a computer program, the game was hard-wired into a ROM-chip inside the game’s physical container.<sup>82</sup> Artic, a competing video game company, produced a knock-off of Williams’ game that used almost identical images, movements, *and* the program Williams actually created.<sup>83</sup> The court held Williams met the fixation requirement because the audiovisual features of “DEFENDER” repeat themselves over and over again, thus making the game

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<sup>75</sup> 17 U.S.C. § 102(a) (2018).

<sup>76</sup> *Id.*

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

<sup>78</sup> H.R. REP. NO. 94-1476, at 52 (1976).

<sup>79</sup> *E.g.*, an article printed on paper, a song recorded in a digital audio file, or an audiovisual work captured on film.

<sup>80</sup> *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

<sup>81</sup> *Id.* at 872.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 872–73.

“sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>84</sup> The *Williams* court emphasized that “DEFENDER” is permanently embodied in a material object—the memory devices of the ROM-chip—from which it can be perceived with the help of the other elements of the game.<sup>85</sup>

## 2. Originality & Minimal Creativity

The second requirement for copyright protection is that a work must be an “original work of authorship.”<sup>86</sup> Creativity is the definitive prerequisite for protection. Without it, copyists and plagiarists would essentially have the same rights as the author without having supplied any original contribution of their own to the already existing work. This is why originality is considered the “the bedrock principle of copyright.”<sup>87</sup> To be eligible for copyright protection, “a work must be original to the author,” which means that the work must be “independently created by the author” possessing at least “some minimal degree of creativity.”<sup>88</sup> All independent creation means is that the author must create a work without copying another’s work. Though, originality does not require that the work be novel. A work can satisfy the independent creation prong of the originality requirement even though it may closely resemble another work.<sup>89</sup> So long as the authors did not copy the expression from each other, independent creation is satisfied.<sup>90</sup>

As for the creativity prong of originality, what is required is some “minimal degree of creativity” present in the work.<sup>91</sup> The court in *Feist Publishing Inc. v. Rural Telephone Service Co., Inc.*<sup>92</sup> stated: “[t]he requisite level of creativity is extremely low. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or

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<sup>84</sup> *Id.* at 874.

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

<sup>86</sup> 17 U.S.C. § 102(a) (1990).

<sup>87</sup> *Feist Publications Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 347 (1991).

<sup>88</sup> *Id.* at 345.

<sup>89</sup> *Id.*

<sup>90</sup> 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.11[B][1] (Matthew Bender, rev. ed. 2018).

<sup>91</sup> *Feist*, 499 U.S. at 375.

<sup>92</sup> *Id.*



obvious it might be.”<sup>93</sup> In *Feist*, Rural Telephone Services (“Rural”) published an annual telephone directory that covers a small geographic area.<sup>94</sup> Feist Publications, Inc. (“Feist”) was a competing directory publisher that serviced a much larger area than Rural.<sup>95</sup> Feist requested that Rural license its contacts, and when Rural refused, Feist used its contacts without consent.<sup>96</sup> The court held that because Rural’s directory was a garden-variety compilation of phone numbers and addresses, it was not entitled to copyright protection.<sup>97</sup> In other words, Rural lacked the requisite originality to protect the contents of its directory.<sup>98</sup> Here the “creative spark” was so minimal to render it mechanical or routine, obvious, or “practically inevitable.”<sup>99</sup>

### C. AUTHORSHIP

The third requirement for copyright protection is authorship, which answers the question: who is entitled to claim copyright protection in any given work? The Constitution’s Intellectual Property Clause<sup>100</sup> specifies that copyright is to be granted to “Authors.”<sup>101</sup> Under United States copyright law, an author is either the person who actually creates the copyrightable work, or if the copyrightable work is created while under the regular course of employment, the employer of the person will retain authorship of the work as a work-made-for-hire.<sup>102</sup>

Initially, copyright protection of a work vests in the author.<sup>103</sup> However, the author may assign some or all of her rights to another person. With sole authorship, the single author can claim copyright over the entire work.<sup>104</sup> In a joint work, such as a film, the copyrightable subject matter is generally created by “two or more authors with the intent that their contributions be merged

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 342–43.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 343.

<sup>97</sup> *Id.* at 362.

<sup>98</sup> *Id.* at 363–64.

<sup>99</sup> *Id.* at 363.

<sup>100</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>101</sup> *Id.*

<sup>102</sup> 17 U.S.C. § 101 (2010).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

into inseparable or interdependent parts of the unitary whole.”<sup>105</sup> In the case of joint works, each author would be a co-owner of the copyright; meaning that each individual author retains the right to use, sell, reproduce, or copy the work.<sup>106</sup> In *Aalmuhammed v. Lee* the court held that a joint work is one that both parties *intended* to create as a joint work.<sup>107</sup> Jefri Aalmuhammed worked as a consultant to Spike Lee during the filming of *Malcolm X*.<sup>108</sup> He reviewed the script, rewrote certain scenes, and acted as consultant to Denzel Washington, the actor portraying Malcom X in the film.<sup>109</sup> The court reasoned that Aalmuhammed was correct in claiming that he contributed independent copyrightable subject matter to the film.<sup>110</sup> However, because it was not the intent of the parties to create a joint work, as Aalmuhammed had signed a work-for-hire agreement, he was not entitled to claim copyright in the film.<sup>111</sup>

Generally, parties can avoid confusion as to who can claim authorship through their contracting language.<sup>112</sup> The Second Circuit Court of Appeals in *16 Casa Duse, LLC v. Merkin* required that copyright in a film be owned by one person or entity, specifically identified in the contract as the “dominant author” of the film.<sup>113</sup> Typically, the dominant author is the production company responsible for hiring all of the actors, crew members, directors, as well as any outsourced third-party companies for any special visual effects the film may require.<sup>114</sup>

#### D. ESTABLISHING COPYRIGHT INFRINGEMENT

To win a copyright infringement case, the burden rests on the copyright holder to establish: (1) ownership of the copyright; (2) copyright validity; and (3) that one or more of the exclusive

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<sup>105</sup> *Id.*

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

<sup>107</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

<sup>108</sup> *Id.* at 1229–30.

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

<sup>110</sup> *Id.*

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

<sup>112</sup> *Id.* at 1233–35.

<sup>113</sup> *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 258 (2d Cir. 2015).

<sup>114</sup> *Id.* at 260.

rights in the copyright have been breached by the infringing party.<sup>115</sup>

Establishing the first prong would appear simple enough; however, absent strong contract language, ownership over the copyright can become a battle royale when many people claim to have contributed to the creation of the work.<sup>116</sup> Typically, courts tend to defer to whoever fixed the work in its tangible medium of expression.<sup>117</sup>

As for the second prong, courts presume validity if a certificate of registration is filed with the United States Copyright Office.<sup>118</sup> Nevertheless, even if a certificate of registration has not been filed, copyright validity may still be established by proving the work is fixed in a tangible medium of expression, and that the work is original—being independently created by the author and possessing some minimal degree of creativity.<sup>119</sup>

After a valid copyright has been established by the claimant, the copyright owner must show that someone infringed upon his or her work in some way.<sup>120</sup> The copyright owner has the burden of proving that the infringer exercised one or more of the owner's exclusive rights without the owner's express permission.<sup>121</sup> These exclusive rights include: reproduction, preparation of "derivative works," public distribution of copies of the work, and public performance.<sup>122</sup> Without evidence of direct copying, proving infringement requires a fact-based showing that the infringer had "access" to the original work and that the two works are "substantially similar."<sup>123</sup>

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<sup>115</sup> Freedman, *supra* note 6262, at 243 (delineating the necessary requirements to establish a claim for copyright infringement).

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

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

<sup>118</sup> 17 U.S.C. § 410(c) (1976) (noting in any judicial proceeding, the certificate of registration made before or within five years after first publication of the work is prima facie evidence of the validity of the copyright).

<sup>119</sup> Freedman, *supra* note 62, at 243–244.

<sup>120</sup> Weintraub Firm, *The Complexity of Proving Copyright Infringement*, THE IP LAW BLOG (Feb. 20, 2007), <https://www.theiplawblog.com/2007/02/articles/copyright-law/the-complexity-of-proving-copyright-infringement/>.

<sup>121</sup> Freedman, *supra* note 62, at 245.

<sup>122</sup> 17 U.S.C. § 106 (2002).

<sup>123</sup> See Weintraub Firm, *supra* note 120.

#### IV. DESIGNING COMPUTER-GENERATED CHARACTERS: HOW MOVA WORKS

The MOVA Contour technology system is an exceptional tool for filmmakers using CGI in their movies. Its capabilities are vast, and as Rearden has stated, CG characters would not exist without it.<sup>124</sup> Nevertheless, as described below, MOVA is only as good as its programmers' inputs, as well as its embedded partnership with the work of the actor(s) and director(s) who create a realistic output.

Since its founding in 1999, Rearden's core technological focus has been performance motion capture.<sup>125</sup> Performance motion capture is used to create three-dimensional animated characters in a film or video game that look and move precisely as human actors would.<sup>126</sup> Rearden is credited as the inventor of the technology that can capture, track, and replicate the nuances of human facial reactions in a life-like manner.<sup>127</sup> In fact, Rearden's MOVA Contour can capture reactions expressed by the human face at a submillimeter precision so that there is hardly a distinction between what is real and what is fantasy when viewed on screen.<sup>128</sup>

The MOVA Contour system is entirely portable and can be set up on any light-sealed stage.<sup>129</sup> Once the rig is set up, the actor's skin is covered with an FDA-approved phosphorescent makeup, either alone or mixed with a skin-tone base color.<sup>130</sup> Filmmakers can also treat clothing with this makeup to digitally render it.<sup>131</sup> The stage is then lit with custom fluorescent light fixtures, which flash on and off at a rate of 90-120 frames per second—a speed beyond human perception.<sup>132</sup> This flashing is coordinated with two sets of cameras crucial to the capture: color cameras and geometry cameras.<sup>133</sup> The color cameras capture normally-lit surfaces only when the fluorescent lights are on,

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<sup>124</sup> Complaint at 5, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 7.

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

<sup>129</sup> *Id.* at 12.

<sup>130</sup> *Id.*

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

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

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

providing the reference video.<sup>134</sup> The geometry cameras capture the phosphorescent patterns created by the makeup on the actor only when the lights are off.<sup>135</sup>

MOVA Contour is not just a portable stage. The entire system is controlled by a high-tech proprietary software that operates the system in real time to capture the actor's performance frame-by-frame.<sup>136</sup> It then creates original Contour Program output files based on the performance, again frame-by-frame.<sup>137</sup> This software begins operating prior to the facial capture sessions with the actor in order to prepare the system, and it also operates during the session to process the live facial capture, as well as after the session to create and record the tracked surfaces of the actor's face on the computers.<sup>138</sup>

Once the actor has applied the phosphorescent makeup, he or she will sit or stand in the arc shaped MOVA rig.<sup>139</sup> The actor then provides what is called a "facial performance," and MOVA transfers the output of each of the two types of cameras onto storage devices.<sup>140</sup> This first MOVA-created output is the "Skin Texture," where the first set of cameras captures the actor's skin.<sup>141</sup> The output looks as any viewer would expect—normal skin and facial features of the actor captured from multiple camera angles.<sup>142</sup> The second output creates the "Makeup Pattern," which looks like a random pattern of green or blue, depending on the color of the phosphorescent makeup. On this output file, the actor's skin and facial features cannot be seen. The computer can only see the applied makeup.<sup>143</sup> MOVA also uses the makeup pattern to compute a high-resolution, three-dimensional mesh that tracks the points on the actor's skin as it moves during the performance.<sup>144</sup> This third output is known as "Tracking

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

<sup>135</sup> *Id.*

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

<sup>137</sup> *Id.* at 11.

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

<sup>139</sup> *Id.* at 13.

<sup>140</sup> *Id.*

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

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

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

<sup>144</sup> *Id.* at 14.

Mesh.”<sup>145</sup> Tracking Mesh is crucial to the process because it is the output that follows the actor’s exact movements.<sup>146</sup> For example, if the actor smiles, the Tracking Mesh will mark the precise cheek bulge on the actor’s face, creating an exact replica of the three-dimensional movement a smile creates.<sup>147</sup>

Once these three sets of outputs have been captured, MOVA then calculates a high-resolution, three-dimensional surface that moves in the shape of the actor’s skin.<sup>148</sup> This fourth output file is called the “Captured Surface.”<sup>149</sup> When computers fully render the captured surface, the product looks like a three-dimensional bust of the actor’s skin. All four outputs are used together to “retarget” the actor’s facial performance onto another face model, depending on the needs of the individual film.<sup>150</sup> For example, the retargeting could occur on a real face, as when Ron Weasley turns into Harry Potter in *Harry Potter and the Deathly Hallows*, or it could occur on a fictional face, such as Brad Pitt’s aging process in *The Curious Case of Benjamin Button*.<sup>151</sup>

MOVA is crucial to transforming an actor’s facial performance into a computer-generated image. The software captures an actor’s detailed facial motions and merges them with a three-dimensional computer-generated image, ultimately closing the gap between fantasy and reality. MOVA provides such control and precision to filmmakers that it clearly “promote[s] the progress of Science and the Useful Arts.”<sup>152</sup> Thus the question remains: whether Rearden can claim copyright ownership in any of the characters born through MOVA?

## V. MOVA LITIGATION GAINS TRACTION: RECLAIMING INTELLECTUAL PROPERTY CONTROL

The *Shenzhenshi* case was the first step in what has now become Rearden’s fiery copyright battle against herculean film studios. During *Shenzhenshi*, DD3 released a photograph that shows the stolen MOVA Contour rig operated by the visual effects

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

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

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

<sup>148</sup> *Id.* at 13.

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

<sup>150</sup> *Id.* at 15.

<sup>151</sup> *Id.*

<sup>152</sup> U.S. CONST. art. I, § 8, cl. 8.

company and licensed unlawfully in at least *Guardians of the Galaxy* and *Beauty and the Beast*.<sup>153</sup> The magnified portions of the image showed a Rearden Asset Tag and serial number, both of which match the exact numbers catalogued as stolen by Rearden in 2013.<sup>154</sup> Additional evidence that Rearden owned MOVA was that the technology has no operating manual,<sup>155</sup> the system must be hand-built by Rearden-trained MOVA employees, who are the only people who know how to install and operate it.<sup>156</sup> Further, Rearden subjected its employees and contractors to strict confidentiality obligations.<sup>157</sup>

The *Shenzhenshi* lawsuit was ultimately about regaining ownership over the stolen MOVA system. The evidence established a clear case for Rearden.<sup>158</sup> The court held that LaSalle was still an employee of Rearden during his transactions with DD3 and therefore breached his employment agreement.<sup>159</sup> Judge Tigar reasoned that LaSalle had established MO2, the new Rearden subsidiary, using money Rearden provided.<sup>160</sup> Further, under the terms of the proprietary information/invention agreements and his employment agreement, the MOVA assets LaSalle claimed as his own belonged to Rearden.<sup>161</sup> LaSalle's conduct, the court held, was not only wrongful, but also in explicit violation of his agreement as an employee of Rearden.<sup>162</sup> Additionally, Judge Tigar found that SHST, DD3, and VGH were on notice that they had no rights to use MOVA.<sup>163</sup> All three companies had actual knowledge that LaSalle did not own the MOVA assets, and he did not have actual or apparent authority to

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<sup>153</sup> Order Granting Motion to Intervene, Motion to Augment the Record, and Motion for De Novo Determination, *Shenzhenshi Haitiecheng Sci. & Tech. Co. v. Rearden, LLC*, No. 15-CV-00797-JST, 2017 U.S. Dist. LEXIS 128105 (N.D. Cal. Aug. 11, 2017) (Doc. 305).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

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

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

<sup>158</sup> *Shenzhenshi Haitiecheng Sci. & Tech. Co. v. Rearden, LLC*, No. 15-CV-00797-JST, 2017 U.S. Dist. LEXIS 128105, at \*29–37 (N.D. Cal. Aug. 11, 2017).

<sup>159</sup> *Id.* at \*29–30.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at \*34.

sell them.<sup>164</sup> The court ordered that Rearden was entitled to regain possession and control over MOVA.<sup>165</sup>

This ruling armed Rearden to take on the studios that entered into agreements with DD3 for use of the stolen technology. It also helped Rearden show that the studios were aware of the litigation against SHST and nevertheless proceeded with use of the stolen MOVA assets.<sup>166</sup> Rearden moved from one lawsuit to another, now claiming copyright ownership in the CG characters the studios created with its stolen software.

#### A. REARDEN TAKES ON DISNEY, FOX, AND PARAMOUNT

After winning the case against SHST and DD3, Rearden subsequently sued the film studios, which had contracted with DD3 during the ongoing litigation, to “provide facial performance capture services and output files made with the patented and copyrighted MOVA Contour system and methods.”<sup>167</sup> After alleging copyright, patent, and trademark infringement, Disney, Fox, and Paramount—the named studios—filed a motion to dismiss on all grounds.<sup>168</sup> Judge Tigar granted the motion in part, and denied it in part.<sup>169</sup> Rearden’s major loss came on the heels of its bold argument that the company has ownership over the CGI characters created with its software because MOVA does the “lion’s share of the work.”<sup>170</sup> However, as the litigation is ongoing, Rearden may still find success in its amended complaint under patent and trademark infringement claims. Though it remains unlikely that the VFX firm will win on its new copyright theory, which claims that MOVA is a literary work entitled to copyright protection.

##### 1. *The “Lion’s Share” Doesn’t Make the Cut*

In the motion to dismiss, the film studios argued that Rearden’s copyright claims fail because Rearden “cannot show that the copyright in the software program extends to the output files; [and] Rearden cannot show that the [computer-generated]

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

<sup>165</sup> *Id.* at \*36.

<sup>166</sup> *Id.* at \*29.

<sup>167</sup> *Rearden, LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963, 975 (N.D. Cal. 2018).

<sup>168</sup> *Id.* at 967.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 971.



characters or the movies are derivative works of the film.”<sup>171</sup> Rearden responded to this claim by attempting to show that the MOVA Contour program does “the lion’s share” of the work in creating the output, and that this meets the standard for authorship because the CG characters both incorporate and are derived from MOVA’s outputs.<sup>172</sup> Rearden would only succeed on this argument if MOVA were actually contributing a new original expression to the preexisting work which the film studios created in scripts.

The court looked to the Ninth Circuit, which recently recognized that some authorities do “suggest that the copyright protection afforded a computer program may extend to the program’s output if the program does the lion’s share of the work in creating the output such that the user’s role is so marginal that the output reflects the program’s contents.”<sup>173</sup> The Ninth Circuit never fully ruled on this problem because evidence was not presented to effectively establish that the program does “the lion’s share” of the work, or that the user’s (*i.e.*, the film studio’s) input is “marginal.”<sup>174</sup>

To aid his analysis, Judge Tigar looked to *Torah Soft Ltd. v. Drosnin* (“*Torah Soft*”),<sup>175</sup> where the software at issue created a matrix in response to an end user’s input of a particular item.<sup>176</sup> In *Torah Soft*, the court held that the program’s user was not the author of the copyright, emphasizing the end-user’s role in the actual creation of the matrix.<sup>177</sup> The court stated:

In addition, an end-user’s role in creating a matrix is marginal. Creating a matrix is unlike the creative process used in many computer art programs, which permit an end-user to create an original work of art in an electronic medium. It is fair to say that users of such programs often supply the lion’s share of the creativity to create

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<sup>171</sup> *Id.* at 969.

<sup>172</sup> *Id.* at 970.

<sup>173</sup> *Design Data Corp. v. Unigate Enter., Inc.*, 847 F.3d 1169, 1173 (9th Cir. 2017).

<sup>174</sup> *Id.*

<sup>175</sup> *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276, 283 (S.D.N.Y. 2001).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

the screen display. By contrast, an end-user of the Software merely inputs a word or phrase which the Software searches for in the Database. Thus, the Software does the lion's share of the work. In short Drosin is not the author of the matrixes.<sup>178</sup>

Rearden relied heavily on this standard set out by *Torah Soft* to substantiate its claim that it owns the copyright in MOVA's output.<sup>179</sup>

There is no record of anyone disputing that MOVA's contributions to any given film are substantial. However, MOVA itself is not responsible for the expressive, creative performance that is ultimately viewed on screen. MOVA is an enabling tool that allows filmmakers to fix their ideas in a tangible medium of expression. By itself, the software would not be able to bring, for example, "the Beast" to life. It is only through the contributions of the actors, directors, and film crew that MOVA can create the final output of the CG character.

The output for a film is considerably different than the output in creating a matrix on a computer program. Where Rearden's copyright infringement claim fails is precisely where the studios counter: (1) that another person is directing the performance of the actor to make the various facial motions; and (2) that the actor is contributing certain instincts and reactions contained in the scene, which undeniably determine the output MOVA captures.<sup>180</sup> The studios rightly point out that "the human contribution cannot be deemed 'marginal' in any sense."<sup>181</sup>

Rearden's argument is particularly interesting because it has attempted to narrow the court's focus on only MOVA's generation of output. The output, Rearden claims, is allegedly distinct from (1) the two-dimensional images of the actors' performances captured by MOVA's cameras, which are (2) generated by the program by synthesizing the two-dimensional captures into three-dimensional captured surface and tracking mesh outputs (which occurs after the director's work on the actor's performance), and (3) created entirely by MOVA without any contribution from the actors or directors.<sup>182</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Rearden, LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963, 970 (N.D. Cal. 2018).

<sup>180</sup> *Rearden*, 293 F. Supp. 3d at 970.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

Judge Tigar struggles with this argument in the opinion because no one presumes that the MOVA output is created without any substantial contribution from the actors or directors.<sup>183</sup> To assume this would anoint AI-like status upon MOVA—that is, MOVA itself creates outputs normally requiring human intelligence. MOVA is not capable of directing the actor, nor is it capable of creating a CG character without capturing an actor’s facial performance. Thus, Rearden’s claim must fail because although MOVA is essential to the creation of these CG characters, its ability to turn two-dimensional images into three-dimensional photorealistic movements and surfaces is not enough to establish ownership “since all computer programs take inputs and turn them into outputs.”<sup>184</sup> As such, Rearden would have had to establish that MOVA does the “lion’s share” of the original creative expression in generating the outputs of the system.<sup>185</sup>

Rearden’s burden is incredibly difficult to meet, especially where the actors’ and directors’ contributions can hardly be separated from MOVA. In fact, in its complaint, Rearden continuously acknowledges the actors’ contributions, stating: “[the] film’s romantic hero, the Beast, was a [computer-generated] character played by Dan Stevens, with every human subtlety of his facial performance carried through to the animal like [computer-generated] face of the Beast.”<sup>186</sup> Rearden was in no way successful in establishing that the contributions of the film studios were “marginal” and that MOVA did the “lion’s share of the work.” But Rearden has yet to give up hope: the VFX firm amended the lawsuit to test a new copyright theory—that MOVA is a literary work.<sup>187</sup>

## B. REARDEN’S LAST-DITCH EFFORT: MOVA AS A LITERARY WORK

In copyright law, literary works are defined as “works other than audiovisual works expressed in words, numbers, or

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

<sup>184</sup> *Id.* at 971.

<sup>185</sup> *Id.*

<sup>186</sup> Complaint at 1, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>187</sup> First Amended Complaint for Copyright, Patent, and Trademark Infringement at 60, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

other verbal or numerical symbols or indicia regardless of the nature of the material objects . . . in which they are embodied.”<sup>188</sup> With the 1976 Copyright Act, Congress chose to grant copyright protection to computer programs as a type of literary work.<sup>189</sup>

Rearden’s amended complaint claims that MOVA is an original literary work of authorship by Rearden-employed and trained programmers.<sup>190</sup> The company argues that MOVA was fixed in a tangible medium of expression when it was stored on computer hard drives, CD, CD-R, DVD, or Blu-ray disks from which it may be perceived, reproduced, or otherwise communicated for more than a transitory period.<sup>191</sup> If the court should find these facts to be true, MOVA is entitled to copyright protection.

Questions surrounding a computer program’s copyright ownership are the most analogous to those posed by the Rearden litigation. Courts in copyright infringement cases for computer programs often find themselves balancing a variety of factors, the outcome of which is highly fact-specific to each case. For example, in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, the court granted broad protections to computer programs.<sup>192</sup> The case involved two computer programs that were used to manage a dental lab.<sup>193</sup> Jaslow owned and operated the lab, and hired Whelan, a computer programmer, to write a program for managing all business operations of the lab.<sup>194</sup> The parties agreed that Whelan would own the copyright in the program, while Jaslow would only use it.<sup>195</sup> Two years after Whelan had completed the program, Jaslow began selling a similar program that was designed using a different coding language than Whelan had used.<sup>196</sup>

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<sup>188</sup> 17 U.S.C. § 101 (2018); *see also* 66 OHIO JUR. 3d *Literary and Artistic Property* § 1 (2019).

<sup>189</sup> H.R. REP. NO. 94-1476, at 54 (1976) (stating the term “literary works” includes computer programs).

<sup>190</sup> First Amended Complaint for Copyright, Patent, and Trademark Infringement, *Rearden, LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>191</sup> *Id.*

<sup>192</sup> *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1224 (3d Cir. 1986).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1225.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1226.

The Third Circuit emphasized that “the copyrights of other literary works can be infringed even when there is no substantial similarity between the works’ literal elements.”<sup>197</sup> The court turned back to the idea/expression dichotomy, attempting to deliver a bright-line rule on the scope of literary protection to computer programs.<sup>198</sup> It reasoned that “the line between idea and expression may be drawn with reference to the end sought to be achieved by the work in question.”<sup>199</sup> Under this test, the *Whelan* court concluded that because any number of structures could have been used in coding the program, no one structure was a necessary part of the program’s purpose and idea.<sup>200</sup> Thus, *Whelan*’s expression of the code was particular to her and therefore protectable under copyright law.<sup>201</sup>

*Computer Associates International, Inc. v. Altai, Inc.* attempted to narrow the *Whelan* test. Computer Associates International (“Computer Associates”) designed “CA-Scheduler,” a job scheduling program containing a subprogram called “Adapter.”<sup>202</sup> Adapter was a completely integrated part of CA-Scheduler and could not function independently.<sup>203</sup> Altai began to market and sell its own job-scheduling program named “Zeke.”<sup>204</sup> It poached one of Computer Associates’ employees, who took copies of the source code for Adapter and used them to design Altai’s new component program “Oscar.”<sup>205</sup> Computer Associates sued for copyright infringement.<sup>206</sup>

The Second Circuit articulated its disapproval of Congress’ decision to use copyright law to protect computer programs.<sup>207</sup> The court also expressed distaste with the doctrines other courts have developed in an effort to adhere to Congress’

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<sup>197</sup> *Id.* at 1234.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1235.

<sup>200</sup> *Id.* at 1236.

<sup>201</sup> *Id.* at 1239.

<sup>202</sup> *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 454 (Tex. 1996).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 455.

<sup>207</sup> *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992).

intent.<sup>208</sup> Nevertheless, the Second Circuit is bound by Congress and therefore utilized a new, three-prong test, to determine the scope of copyright protection for computer programs.<sup>209</sup> At the first prong, the court would apply what is known as the abstractions test in order to “dissect the allegedly copied program’s structure and isolate each level of abstraction contained within it.”<sup>210</sup> This process begins with the code and ends with an articulation of the program’s ultimate function.”<sup>211</sup>

Once the court determines the levels of abstraction that contain protectable expression, it then applies the second prong: filtration.<sup>212</sup> Filtration is where the court “sift[s] out all non-protectable material” by applying copyright doctrines such as merger,<sup>213</sup> *scènes à faire*,<sup>214</sup> and public domain.<sup>215</sup> The merger doctrine filters out “those elements of a computer program that are necessarily incidental to its function and are therefore unprotectable.”<sup>216</sup> *Scènes à faire* filters out standard structural elements that “[flow] naturally from considerations external to the authors creativity.”<sup>217</sup> Similarly, imposing a public domain filter sifts out any remaining element that is unprotectable because it is available to the public as a whole.<sup>218</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 707. The merger doctrine is triggered “[w]hen there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression.” *Id.* at 707–08 (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988)).

<sup>214</sup> *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 709 (2d Cir. 1992). *Scènes à faire* are not copyrightable because it may be impossible to write about a historical event or fictional theme without certain stock or standard literary devices. *Id.*

<sup>215</sup> Material in the public domain is not protected by copyright, even when it is used in a copyrightable work. *Id.* at 710.

<sup>216</sup> *Id.* at 705.

<sup>217</sup> *Id.* at 715 (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [F][3] (Matthew Bender, rev. ed. 2018)).

<sup>218</sup> *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992).

After applying filtration, the court is left with what is actually protectable expression in the software.<sup>219</sup> The court may now apply the third prong: comparison.<sup>220</sup> In this prong “the court’s substantial similarity inquiry would focus on whether the defendant copied any aspect of this protected expression, as well as an assessment of any copied portion’s relative importance with respect to the plaintiff’s overall program.”<sup>221</sup>

It is unlikely that a court would find the CG characters as part of MOVA’s unique expression in its computer programming language. The *Whelan* court granted broad protections to computer programs. However, what distinguishes *Whelan* from Rearden’s claims is that Rearden is attempting to extend the copyright of its unique expression in MOVA to the software’s outputs in the unique expression of the CG characters.<sup>222</sup> Under *Whelan*, Rearden will likely only retain its copyright in the programming language enabling MOVA to operate, not in the outputs created as a function of that software.

It is true that Rearden has a copyright registration number for MOVA, though it would seem farfetched that a court would find the copyright protection in the software itself to extend to its CG characters. Were a court to do so, copyright protection would be so broad that Microsoft, for example, could claim ownership in anything written on Microsoft Word. Such a rule would ultimately hinder the “progress of Science and the useful Arts”<sup>223</sup> because there would be no incentive to create original works if ownership were to be granted to the tools that enable conception.

Perhaps Rearden would have been more successful if it had argued that MOVA’s end purpose was the CG character final output, as that is the heart of the *Whelan* test. Still, a court determining the purpose of any literary work is highly problematic. The *Whelan* test, although widely used, is also strongly criticized for its inaccuracy and the manipulation in which it asks the courts to engage.<sup>224</sup> *Whelan* dictates that a

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<sup>219</sup> *Id.* at 707–11.

<sup>220</sup> *Id.* at 710–11.

<sup>221</sup> *Id.* at 710.

<sup>222</sup> Complaint at 60, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>223</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>224</sup> Rick Sanders, *Copyright Protections of APIs After Oracle v. Google: Poppin’ A Whalen*, THE IP BREAKDOWN, (Aug. 20, 2012),

computer program's purpose is found in its idea—uncopyrightable subject matter.<sup>225</sup> However, it asks courts to determine everything in the software that may be “less abstract” than its purported idea, which would be deemed protectable expression.<sup>226</sup>

The *Computer Associates* test would not support Rearden's claims either. Under that test, the Second Circuit focused on whether the elements of a program could be excluded from protection rather than whether the elements themselves were protectable and illegally copied.<sup>227</sup> Rearden argues that MOVA, as a literary work, finds protectable expression in both its software, and the CG characters the software makes possible.<sup>228</sup> The company claims that the MOVA elements are protectable, whereas a court would focus on whether MOVA could be excluded from protection of the CG characters. This is likely why Rearden included both direct and vicarious infringement in its amended complaint.<sup>229</sup>

Rearden's strongest copyright claim derives from the source of the entire controversy—the intellectual property theft. The company claims that each time DD3 operated MOVA, whether for facial performance capture or for processing those captures into output works, the computers made an unauthorized copy of MOVA in their central processing units and random access memory.<sup>230</sup> Rearden correctly argues that each of these copies is a violation of its exclusive right to authorized copies of MOVA.<sup>231</sup> The court will likely rule in favor of Rearden on this claim because to reproduce and distribute copyrighted works is an exclusive right granted to copyright holders under the 1976 Copyright Act. DD3 operated and licensed MOVA unlawfully, consisting of a direct infringement on Rearden's copyright.

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<http://ipbreakdown.com/blog/copyright-protection-of-apis-after-oracle-v-google-poppin-a-whelan/> (explaining the problem with the Whelan test as being overbroad).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Complaint at 60, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>229</sup> First Amended Complaint at 59, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>230</sup> *Id.* at 60.

<sup>231</sup> *Id.*



Nevertheless, this claim does not entitle Rearden to then claim copyright over the CG characters MOVA produces. Such rights would greatly broaden the scope of copyright protection to a point beyond the intent of Congress in protecting computer programs.

Rearden also alleges that Disney, Fox, and Paramount either directly or through entities subject to the film companies' direction and control contracted in bad faith, argues that the film studios are both vicariously and contributorily liable for DD3's infringement.<sup>232</sup> In order to prove vicarious copyright liability, Rearden must prove the studios (1) had the right and ability to supervise the infringing conduct and (2) had a direct financial interest in the infringing activity.<sup>233</sup> Rearden contends that at all times Disney, Fox, and Paramount were in a position to police, supervise, and control DD3's actions.<sup>234</sup> The claim also alleges that the studios had actual knowledge of DD3's specific acts of infringement and by continuing production of the films using MOVA, "induced, caused and materially contributed" to DD3's infringement.<sup>235</sup> The studios answered by filing a motion to dismiss, but the court disagreed finding that the amended complaint sufficiently alleged the studios were in a position to police and monitor DD3's infringing conduct, including the ability to observe and evaluate the services DD3 was providing.<sup>236</sup>

Rearden also attempts to resurrect its previously losing argument to bolster its vicarious and contributory liability claims. Its amended complaint further alleges that for each facial capture session, the film studios supplied a director, acting as the studio's supervising agent, to control and direct DD3's use of MOVA by beginning and ending each capture session, starting and stopping each take, ordering DD3 to provide additional takes, and choosing

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<sup>232</sup> *Id.* at 60–63.

<sup>233</sup> *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 802 (9th Cir. 2007).

<sup>234</sup> First Amended Complaint at 60–63, *Rearden, LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>235</sup> *Id.* at 63.

<sup>236</sup> Kevin M. Littman, *When Can a Company Be Liable for Its Vendor's Copyright or Patent Infringement?: Hollywood Studios' IP Headache*, THE NATIONAL LAW REVIEW, <https://www.natlawreview.com/article/when-can-company-be-liable-its-vendor-s-copyright-or-patent-infringement-hollywood> (Aug. 20, 2018).

“selects” (the good takes) for further MOVA processing to create the Tracking Mesh and Captured Surface.<sup>237</sup> The complaint states:

So extensive is Disney MPG’s directors’ supervision and control over the facial motion capture sessions performed by DD3, that defendants contend that the directors’ contribution “is substantial and performs ‘the lion’s share of the creativity’ in the facial motion capture,” and that consequently the directors are the authors of the results of the facial motion capture.<sup>238</sup>

Although this may prove that Disney, Fox, and Paramount knew of DD3’s infringement and acted in bad faith by contracting with DD3, it still does not provide any evidence that Rearden owns the final output of the CG characters. Rather, by directly linking the studios to infringement, Rearden only highlights its obvious financial interests in recouping lost profits from the unauthorized use of MOVA. However, Rearden will likely fail to establish a plausible and convincing link between MOVA and the CG characters it enables filmmakers to create.

## VI. CONCLUSION

In its attempt to claim complete ownership of CG characters, Rearden has demonstrated predicting the future of copyright law will be difficult. Granting Rearden copyright ownership in MOVA-generated characters would recognize that MOVA has the requisite artificial intelligence to raise questions of so-called “robot-rights.” “Robo-rights” and copyright law will undoubtedly have to find some common ground as technology progresses. Although no law currently grants ownership over software where no human input is present, *Torah Soft* gives rise to the inference that where the end-users input is marginal, the software *itself* may have the stronger copyright.

Rearden does not attempt to argue that MOVA can create and operate an original work of expression without human contribution. Rather, the core of Rearden’s argument is that MOVA’s programmers assign their rights to Rearden as works-for-hire, and therefore Rearden owns the characters. To be sure,

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<sup>237</sup> First Amended Complaint at 61, Rearden, LLC v. Walt Disney Co., 293 F. Supp. 3d 963 (N.D. Cal. 2018) (No. 3:17-cv-04006-JST).

<sup>238</sup> *Id.*

Rearden's programmers allow the software to function—but they are only part of the input. The other measure of input comes from the actors and directors, without whom the software is useless. MOVA is simply a tool that allows for the creation of believable and compelling characters. If Rearden's copyright ownership theory were to hold up in court, copyright law would be so broad that writers who created their novels on Microsoft Word, or artists who built songs in Logic, would not be the owners of their works. Whether Rearden can claim copyright in the characters as a literary work has yet to be decided. Though, seeing as MOVA is not responsible for a movie's script, nor is the technology credited with an actor's facial performance, it is unlikely that any court would extend Rearden's current copyright to MOVA's on-screen CG characters.

Rearden's vicarious and contributory liability claims survived the studios' motion to dismiss, and the case is now proceeding on the remaining copyright and trademark claims. Although not discussed extensively above, the copyright infringement risks when entering into a service agreement with a vendor are important to understand. Specially, it is important to know when a party may be liable for vicarious copyright infringement particularly if it is feasible to stop the infringing conduct and if the party obtains a financial benefit from the infringement. Rearden has footing on both grounds. The court held that the film studios could have observed the infringing conduct and directed DD3 to stop using the software, even without directly interacting with MOVA. Rearden's attempts to find a new frontier in copyright law are noble. Though, fighting for copyright ownership of the movie studios' CG characters appear more vengeful, like the *Beauty and the Beast* character Gaston, rather than Rearden appearing thoughtful like the character Belle.

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## I CAN'T GET NO (LEGAL PROTECTION): THE UNAUTHORIZED USE OF MUSIC IN POLITICAL CAMPAIGNS

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### I. INTRODUCTION

In the latter part of the 20th century, political campaigns increasingly turned to the power of established popular songs to energize potential voters and drive home the candidate's message.<sup>1</sup> In 1984, Ronald Reagan used Bruce Springsteen's "Born in the U.S.A." as his campaign theme song.<sup>2</sup> Springsteen did not approve of or authorize the song's use, which marked the first major controversy about nonpermissive use of a copyrighted song in a presidential campaign.<sup>3</sup> Today, it is common for political campaigns to use popular music—without permission from the artist. In recent years, this practice has seemingly created the most frequent conflicts between Republican politicians and

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<sup>1</sup> See James C. McKinley, *G.O.P. Candidates Are Told, Don't Use the Verses, It's Not Your Song*, N.Y. TIMES (Feb. 3, 2012), <https://www.nytimes.com/2012/02/04/arts/music/romney-and-gingrich-pull-songs-after-complaints.html>.

<sup>2</sup> See Chet Flippo, *The 25 Most Intriguing People of 1984: Bruce Springsteen*, PEOPLE, Dec. 31, 1984, at 28.

<sup>3</sup> *Id.* Reagan praised Springsteen as a "man so many Americans admire" at a campaign rally in New Jersey. *Id.* "Bruce [Springsteen] refused to endorse either candidate; he wasn't coy about where he stood on the issue. In Pittsburgh, two days after the President's comments, he said of Reagan: 'I got to wondering what his favorite album must have been. I don't think he's been listening to this one.' And he launched into *Johnny 99*, a bitter plaint on the fate of a laid-off worker." *Id.*

Democratic-supporting artists who do not support their candidacy.<sup>4</sup>

This Note argues that the nonpermissive use of music in political campaigns is an issue taken for granted in the contemporary political landscape. Part II of this Note highlights the most controversial nonpermissive uses of popular music in recent American history. Parts III and IV identify deficiencies in existing copyright and trademark law that have resulted in weak protection for artists from nonpermissive use by political campaigns. Part V examines potential solutions proposed in prior academic articles, including expansion of the moral rights doctrine, and points out deficiencies in these approaches. Part VI of this Note then proposes two novel strategies for addressing this problem: altering blanket licenses to exempt political use altogether or including a political-use opt-out in musicians' membership agreements.

## II. NONPERMISSIVE USE IN RECENT AMERICAN HISTORY

The issue of nonpermissive use gained widespread public attention during the 2016 presidential election. Leading up to the 2016 Republican National Convention, Republican presidential candidate Donald Trump used Queen's "We Are the Champions" at multiple rallies on the campaign trail.<sup>5</sup> Brian May, Queen's lead

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<sup>4</sup> See James Frazier, *Liberal Musicians Demand Conservative Pols Stop the Music*, WASH. TIMES (Feb. 1, 2012), <http://www.washingtontimes.com/news/2012/feb/1/songwriters-have-history-of-asking-politicians-to-/>; See also Eriq Gardner, *Michele Bachmann in Legal Spat for Using Tom Petty's 'American Girl' at Rally*, HOLLYWOOD REPORTER (June 28, 2011, 11:48 AM), <http://www.hollywoodreporter.com/thr-esq/michele-bachmann-legal-spat-using-206257> (explaining that many complaints are by liberal-learning artists against conservative candidates); Chris Richards, *Campaigns Adopting Songs Is Nothing New, But Squabbles With Musicians Are*, WASH. POST (June 29, 2011), [https://www.washingtonpost.com/lifestyle/style/campaigns-adopting-songs-is-nothing-new-but-squabbles-with-musicians-are/2011/06/29/AGKpKIrH\\_story.html?utm\\_term=.aa4bde4bab37](https://www.washingtonpost.com/lifestyle/style/campaigns-adopting-songs-is-nothing-new-but-squabbles-with-musicians-are/2011/06/29/AGKpKIrH_story.html?utm_term=.aa4bde4bab37) (determining that 80% of donations from individuals in the music industry have been to Democrats).

<sup>5</sup> See Melinda Newman, *Why Queen Cannot Stop Donald Trump's Use of 'We Are the Champions'*, FORBES (July 19, 2016, 3:38

guitarist, made a public statement saying, “I can confirm that permission to use the track was neither sought nor given. Regardless of our views on Mr. Trump’s platform, it has always been against our policy to allow Queen music to be used as a political campaigning tool.”<sup>6</sup> One month after May’s public statement, Trump walked out on stage to “We Are the Champions” at the Republican National Convention.<sup>7</sup> Trump’s use of the song, written by the late Freddie Mercury, who died of bronchial pneumonia resulting from AIDS, sparked outrage among the LGBTQ community.<sup>8</sup> Hundreds of LGBTQ advocates took to Twitter, arguing that Trump’s campaign should not be authorized to play songs created by LGBTQ artists if he does not recognize LGBTQ rights.<sup>9</sup> Queen responded by tweeting, “An unauthorised use at the Republican Convention against our wishes. -Queen.”<sup>10</sup> Sean Spicer, communications director for the Republican National Committee, disputed Queen’s claim by

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PM), <https://www.forbes.com/sites/melindanewman/2016/07/19/why-queen-cannot-stop-trumps-use-of-we-are-the-champions/#14d8936f6d4b>.

<sup>6</sup> See Debbie Emery, *Trump Defies Brian May by Using ‘We Are the Champions’ as RNC Walkout Song*, THE WRAP (July 18, 2016, 9:09 PM), <https://www.thewrap.com/trump-defies-brian-mays-ban-by-using-we-are-the-champions-as-rnc-walkout-song/>.

<sup>7</sup> See Newman, *supra* note 5.

<sup>8</sup> See *infra* note 9 and accompanying text.

<sup>9</sup> See, e.g., Dan Ramos (@RepDanRamos), TWITTER (July 18, 2016, 7:25 PM), <https://twitter.com/RepDanRamos/status/755227134545780737> (“Hey #RNCinCLE. Don’t play “We Are the Champions” by Queen, or any other song sung by GLBT people, if you don’t recognize GLBT rights.”); Chris Cillizza (@CillizzaCNN), TWITTER (July 18, 2016, 7:23 PM), <https://twitter.com/CillizzaCNN/status/755226642356862977> (“My guess is that Freddie Mercury would not likely have been a Trump supporter”); Igorvolsky (@igorvolsky), TWITTER (July 18, 2016, 7:24 PM), <https://twitter.com/igorvolsky/status/755226755984535552> (“Trump comes out to Freddie Mercury, who the GOP platform would send to ex-gay therapy”); Sara Benincasa (@SaraJBenincasa), TWITTER (July 19, 2016), <https://twitter.com/SaraJBenincasa/status/755226755984535452> (“Donald Trump appeared in a dry ice silhouette while Freddie Mercury played because he loves queer immigrant men oh wait nope”).

<sup>10</sup> Queen (@QueenWillRock), TWITTER (July 19, 2016, 7:18 AM), <https://twitter.com/QueenWillRock/status/755406469269450752>.

tweeting, “Big fan but you are wrong @GOPconvention paid to license the use of song in the arena . . . .”<sup>11</sup>

Brian May is not the only artist who has publicly scolded Donald Trump for using his music. Other artists who have taken similar actions include The Rolling Stones, Adele, Cher and Neil Young.<sup>12</sup> Two of the most recent artists to face these issues were Pharrell Williams and Rihanna.<sup>13</sup> In October 2018, President Trump played Pharrell Williams’ song “Happy” at a political event in Indiana hours after a mass shooting at a Pittsburgh synagogue.<sup>14</sup> Williams’ lawyer sent a cease-and-desist letter to President Trump saying, “Pharrell has not, and will not, grant you permission to publicly perform or otherwise broadcast or disseminate any of his music.”<sup>15</sup> The letter continued, “On the day of the mass murder of 11 human beings at the hands of a deranged ‘nationalist,’ you played his song Happy to a crowd at a political event in Indiana. There was nothing ‘happy’ about the tragedy inflicted upon our country on Saturday and no permission was granted for your use of this song for this purpose.”<sup>16</sup> Even more recently, in November 2018, Donald Trump played Rihanna’s song “Don’t Stop the Music” at a political event at the University of Tennessee.<sup>17</sup> The song was played despite Rihanna’s public denouncement of Donald Trump in 2017, in which she called him

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<sup>11</sup> Sean Spicer (@seanspicer), TWITTER (July 19, 2016, 9:42 AM), <https://twitter.com/seanspicer/status/755442824376676352>.

<sup>12</sup> See Lauren Craddock, *29 Artists Who Have Spoken Out Against Donald Trump (So Far)*, BILLBOARD (July 18, 2016), <https://www.billboard.com/articles/news/7430903/musicians-against-donald-trump>.

<sup>13</sup> See *infra* notes 14–17 and accompanying text.

<sup>14</sup> See Sarah Rulz-Grossman, *Pharrell Sent Trump Cease-And-Desist Letter for Playing ‘Happy’ After Synagogue Shooting*, HUFFINGTON POST (Oct. 29, 2018, 10:05 PM), [https://www.huffingtonpost.com/entry/pharrell-williams-trump-letter-happy\\_us\\_5bd7b36ee4b017e5bfd501ed](https://www.huffingtonpost.com/entry/pharrell-williams-trump-letter-happy_us_5bd7b36ee4b017e5bfd501ed).

<sup>15</sup> *Id.*

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

<sup>17</sup> See Antonia Noori Farzan, *Rihanna Doesn’t Want Trump Playing Her Music at His ‘Tragic Rallies,’ but She May Not Have a Choice*, WASH. POST (Nov. 5, 2018), [https://www.washingtonpost.com/nation/2018/11/05/rihanna-doesnt-want-trump-playing-her-music-his-tragic-rallies-she-may-not-have-choice/?noredirect=on&utm\\_term=.7169c3a2af60](https://www.washingtonpost.com/nation/2018/11/05/rihanna-doesnt-want-trump-playing-her-music-his-tragic-rallies-she-may-not-have-choice/?noredirect=on&utm_term=.7169c3a2af60).

an “immoral pig” after he signed an executive order banning citizens of seven majority-Muslim countries from entering the United States.<sup>18</sup> Upon hearing of the unauthorized use, Rihanna tweeted, “[Don’t Stop the Music will] not [be played] for much longer . . . [neither] me nor my people would ever be at or around one of those tragic rallies . . . .”<sup>19</sup>

President Trump was not the first presidential candidate to come under fire for nonpermissive use of a copyrighted song. In fact, the most notorious transgressor was the 2008 McCain-Palin campaign, which received the most artist objections to song use of any campaign in American history.<sup>20</sup> Following his New Hampshire primary win, Republican presidential hopeful John McCain walked out on stage to the Orleans song “Still the One.”<sup>21</sup> At the time, John Hall, a former Orleans member and the co-writer of “Still the One,” was serving as a Democratic congressman. Hall sent a cease-and-desist letter and publicly condemned the use of his song at a Republican rally.<sup>22</sup> Shortly thereafter, McCain used the Van Halen song “Right Now” during a televised rally.<sup>23</sup> Van Halen issued a statement saying, “Permission was not sought or granted nor would it have been given.”<sup>24</sup> Around the same time, McCain used the John Mellencamp songs “Our Country” and “Pink Houses” at several political events.<sup>25</sup> John Mellencamp, who called himself “as left wing as you can get,” asked the

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<sup>18</sup> *Id.*

<sup>19</sup> Rihanna (@rihanna), TWITTER (Nov. 4, 2018, 4:26 PM), <https://twitter.com/rihanna/status/1059240423091245056>.

<sup>20</sup> See *infra* notes 21–32 and accompanying text.

<sup>21</sup> See Charles Stockdale & John Harrington, *35 Musicians Who Famously Told Politicians: Don’t Use My Song*, USA TODAY (July 16, 2018, 3:10 PM), <https://www.usatoday.com/story/life/music/2018/07/16/35-musicians-who-famously-told-politicians-dont-use-my-song/784121002/>.

<sup>22</sup> *Id.*

<sup>23</sup> See Michael Scherer, *The Most Misused Song in GOP Politics: Van Halen’s “Right Now,”* TIME (Apr. 18, 2011), <http://swampland.time.com/2011/04/18/the-most-misused-song-in-gop-politics-van-halens-right-now/>.

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

<sup>25</sup> See Eveline Chao, *Stop Using My Song: 35 Artists Who Fought Politicians Over Their Music*, ROLLING STONE (July 8, 2015, 12:27 PM), <https://www.rollingstone.com/politics/politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611/heart-vs-sarah-palin-30713/>.



presidential candidate to cease and desist.<sup>26</sup> McCain then used ABBA's song "Take a Chance on Me" at multiple political events, for which the band sent him a cease-and-desist letter.<sup>27</sup> Most notably, McCain used the Foo Fighters song "My Hero" as his campaign theme song during his presidential run.<sup>28</sup> The Foo Fighters made a public statement saying, "It's frustrating and infuriating that someone who claims to speak for the American people would repeatedly show such little respect for creativity and intellectual property." The band went on to say, "To have [My Hero] appropriated without our knowledge and used in a manner that perverts the original sentiment of the lyrics just tarnishes the song."<sup>29</sup>

John McCain's running mate, Sarah Palin, also received backlash from numerous artists over her nonpermissive use of music. At the Republican National Convention, Palin walked out on stage to Heart's song "Barracuda" as a nod to her childhood nickname Barracuda.<sup>30</sup> Heart sent a cease-and-desist letter, and Heart's lead singer Nancy Wilson released a public statement saying, "I feel completely [screwed] over. Sarah Palin's views and values in no way represent us as American women."<sup>31</sup> Shortly thereafter, Palin began using Martina McBride's "Independence Day" to introduce herself at rallies.<sup>32</sup> Gretchen Peters, who wrote

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

<sup>27</sup> Jason Szep, *Would Abba Take a Chance on McCain?*, REUTERS (Feb. 18, 2008, 5:29 PM), <http://www.reuters.com/article/idUSN1820870620080219> (reporting McCain's comments on the difficulties of using music on the campaign trail).

<sup>28</sup> See Chao, *supra* note 25.

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

<sup>30</sup> See Tom Leonard, *Sarah Palin: Don't Use Our Barracuda Song as Your Anthem, Says Rock Band Heart*, THE TELEGRAPH (Sept. 8, 2008, 5:12 PM), <https://www.telegraph.co.uk/news/newsttopics/uselection2008/johnmccain/2706276/Sarah-Palin-Dont-use-our-Barracuda-song-as-your-anthem-says-rock-band-Heart.html>.

<sup>31</sup> See Chao, *supra* note 25.

<sup>32</sup> See Martin Chilton, *Adele, Rolling Stones and Other Musicians Angry at Politicians Using Their Songs*, THE TELEGRAPH (May 5, 2016, 7:05 AM), <https://www.telegraph.co.uk/music/artists/adele-and-other-musicians-angry-at-politicians-using-their-songs/>.

the country hit, released a public statement saying, “The fact that the McCain/Palin campaign is using a song about an abused woman as a rallying cry for their Vice Presidential candidate, a woman who would ban abortion even in cases of rape and incest, is beyond irony.”<sup>33</sup> Around the same time, Sarah Palin was playing Jon Bon Jovi’s song “Who Says You Can’t Go Home” at a handful of rallies. Bon Jovi released a statement condemning the use of his song at a Republican rally, saying, “We were not asked, [and] we do not approve of their use of [the song].”<sup>34</sup>

Despite objections from several artists, John McCain and Sarah Palin continued using the songs.<sup>35</sup> The two politicians released a joint statement saying, “The McCain-Palin campaign respects copyright. Accordingly, this campaign has obtained and paid for licenses from performing rights organizations, giving us permission to play millions of different songs . . . .”<sup>36</sup> This joint statement illustrates the deficiencies of existing law in protecting artists from nonpermissive use by political campaigns. Some of these deficiencies are highlighted in the following Part.

### III. FAILURE OF EXISTING COPYRIGHT LAW

#### A. BLANKET LICENSING

A copyright is a form of property ownership which grants individuals the exclusive right to use and disseminate their creative works for a fixed number of years.<sup>37</sup> The Copyright Act of 1976 (the “Act”) is the primary basis of copyright law in the United States.<sup>38</sup> Section 106 of the Act provides copyright holders with the exclusive right to publicly perform the copyrighted work.<sup>39</sup> This “performing right” helps ensure that a copyrighted

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

<sup>34</sup> *See* Chao, *supra* note 25.

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

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

<sup>37</sup> 17 U.S.C. §§ 101–810 (1976).

<sup>38</sup> *Id.* at § 106.

<sup>39</sup> To “perform” a work “means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show images in any sequence or to make the sounds accompanying it audible.” *Id.* at § 101. To perform or display a work “publicly” means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and

song will not be played in public without the owner's permission.<sup>40</sup> However, there are hundreds of thousands of establishments in the United States where music is publicly performed, including restaurants, hotels, stadiums, radio and television stations, and the like.<sup>41</sup> It is impossible for individuals to monitor these establishments themselves. As a result, virtually all songwriters affiliate with a performing rights organization (a "PRO").<sup>42</sup>

A PRO is an agency that acquires rights to songs from songwriters and publishers and ensures that those songwriters and publishers are paid for the public performance of their songs.<sup>43</sup> To legally play a copyrighted song at an establishment or on a radio or television station, the entity playing the song must first purchase a public performance license from a PRO.<sup>44</sup> PRO representatives regularly visit public establishments, monitor broadcasts, and browse the internet for public performance of their members' copyrighted songs.<sup>45</sup> When they identify unauthorized performances, they send automated take-down notices, cease-and-desist letters, and demands for public performance payments.<sup>46</sup> Once a PRO collects the public performance payments, it distributes the royalties to the songwriters and publishers, minus

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its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. *Id.*

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

<sup>41</sup> Michael R. Cohen, 25B *West's Legal Forms, Intellectual Property*, § 23:22 (2014) ("Since it would be virtually impossible for publishers and songwriters to monitor and control the large number of users of their songs, the enforcement and control of such performance rights usually falls to one of three performing rights organizations...").

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

<sup>43</sup> See Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 385 (1992).

<sup>44</sup> See Cohen, *supra* note 41, at 22.

<sup>45</sup> See generally P. DRANOV, *INSIDE THE MUSIC PUBLISHING INDUSTRY*, 124–26 (1980).

<sup>46</sup> See Besen, *supra* note 43, at 385.

the PRO's administration costs.<sup>47</sup> The three primary PROs are the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Media, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC").<sup>48</sup> Together, ASCAP and BMI represent approximately ninety percent of the musical composition market in the United States.<sup>49</sup> SESAC does not release its market share information, but it is estimated to represent somewhere between five and ten percent of the United States musical composition market.<sup>50</sup> Songwriters are only allowed to join one PRO, so they must register all of their works with one group.<sup>51</sup>

A common practice among PROs is blanket licensing.<sup>52</sup> A blanket license enables the licensee to play all of the music under contract by the particular PRO.<sup>53</sup> For example, if a radio station is issued a blanket license by BMI, then the station has the right to play all music by BMI-represented musicians. Most large venues, stations, and streaming services purchase blanket licenses from all three PROs, allowing them to play virtually any song.<sup>54</sup> The fees for blanket licenses vary depending on how much music the licensee plays and how large of a listener base the licensee has. Large radio stations can pay millions of dollars in blanket licensing fees per year, while small venues and restaurants may

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<sup>47</sup> *Id.*

<sup>48</sup> See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 20 (2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>; see also *About Us*, SESAC, <http://www.sesac.com/About/History.aspx> (last visited Jan. 9, 2019).

<sup>49</sup> See COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 48, at 20.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Stanley Rothenberg, *Copyright and Public Performance of Music*, at 40 (1987); John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy*, SOCIAL FORCES at 77-85; see also *CBS v. ASCAP*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975).

<sup>53</sup> See, e.g., *United States v. Broad. Music, Inc.*, 275 F.3d 168, 172 (2d Cir. 2001); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 831 F. Supp. 137, 166-67 (S.D.N.Y. 1993).

<sup>54</sup> See Rothenberg, *supra* note 52, at 41.

only pay a couple hundred dollars per year.<sup>55</sup> The licensing fees collected from blanket licenses are the main source of public performance payment for songwriters and publishers.<sup>56</sup>

Whenever a political campaign plays a song at a rally, the campaign must have a public performance license that covers that song.<sup>57</sup> If a rally is held at a major public venue like an arena or convention center, the venue's blanket license protects politicians, who may play any song in that PRO's repertoire.<sup>58</sup> Since most venues purchase blanket licenses from multiple PROs, political campaigns may legally play virtually any song.<sup>59</sup> However, politicians are not always campaigning in large venues, so most national political campaigns also purchase their own blanket licenses covering all campaign events, no matter where the event is held.<sup>60</sup> Once a political campaign purchases a blanket license from a PRO, the artists signed with that PRO have no legal ground to object to the use of their music.<sup>61</sup> Accordingly, when politicians are accused of unauthorized use, they typically respond like the McCain-Palin campaign did with a simple statement declaring that the "campaign has obtained and paid for licenses from performing rights organizations. . . ."<sup>62</sup>

During the 2016 presidential election, nonpermissive use gained public attention and ASCAP and BMI were scrutinized for limiting the legal remedies available to artists for nonpermissive use by political campaigns.<sup>63</sup> In response, BMI explained that it

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<sup>55</sup> See Vincent D. Paragano, *Making Money From the Airwaves The Basics of Music Licensing*, 183 N.J. LAW 10, 11-12 (Mar. 1997).

<sup>56</sup> See The ASCAP Payment System, *supra* note 55; see BMI Royalty Information, *supra* note 55; see Everything You Need to Know About Getting Paid, *supra* note 55.

<sup>57</sup> See generally, Cohen, *supra* note 41, at 22.

<sup>58</sup> See Rothenberg, *supra* note 52, at 17.

<sup>59</sup> *Id.* at 41.

<sup>60</sup> See Geoff Boucher, *Songs in the Key of Presidency*, L.A. TIMES, Oct. 11, 2000, at A1; Claire Suddath, *A Brief History of Political Campaign Songs*, TIME, Sept. 12, 2008.

<sup>61</sup> Boucher, *supra* note 60; Suddath, *supra* note 60.

<sup>62</sup> See Chilton, *supra* note 32.

<sup>63</sup> See Travis Andrews, *The Rolling Stones demand Trump stop using its music at rallies, but can the band actually stop him?*, THE WASHINGTON POST, May 5, 2016.

allows artists to opt out of blanket licenses during the initial contracting phase.<sup>64</sup> If an artist opts out of blanket licenses in her contract, her music will be excluded from all licenses purchased by political campaigns.<sup>65</sup> Although this optout option seems promising on paper, it is unrealistic for most artists. If an artist opts out of blanket licenses in her contract, her music will be excluded from licenses purchased not only by political campaigns but also by arenas, convention centers, restaurants, hotels, radio and television stations, and the like.<sup>66</sup> Licensing fees collected from blanket licenses are the main source of public performance royalties for an artist.<sup>67</sup> When an artist opts out, her revenue stream all but disappears.<sup>68</sup> Because of this, artists rarely opt out of blanket licenses.<sup>69</sup> Consequently, their music is available to any politician-licensee and they have no legal recourse under copyright law.

## B. FAIR USE

Even if a political campaign does not purchase a blanket license from a PRO, it may still use a copyrighted song if that use is “fair.”<sup>70</sup> Fair use is an affirmative defense available when, without authorization, a party appropriates a copyrighted work for limited purposes such as “comment,” “news reporting,” and “teaching.”<sup>71</sup> This is a centuries-old doctrine but was first codified

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

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

<sup>66</sup> See Rothenberg, *supra* note 52, at 41.

<sup>67</sup> See Richard Schulenberg, *Legal Aspects of the Music Industry: An Insider's View*, 289 (2005).

<sup>68</sup> *Id.*; see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-23 (1970) (the loss of benefits that would result from non-membership in a PRO effectively makes non-membership an unfeasible option.).

<sup>69</sup> *Id.*

<sup>70</sup> See 17 U.S.C. § 107 (codifying fair use defense).

<sup>71</sup> See 17 U.S.C. § 107 (codifying fair use defense). Section 107 gives examples of favored uses: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” If the use falls into one of these favored categories, it is more likely to be fair use. However, a favored use may not qualify as fair use, and a use outside of these categories may nevertheless be fair.

in the Act.<sup>72</sup> It seeks to balance artists' interests in protecting their creative works against the public's interest in protecting free speech and the free dissemination of ideas.<sup>73</sup> The Act fails to define "fair use," which has required courts to determine whether a use is fair on a case-by-case basis.<sup>74</sup>

Courts must consider four factors set forth by the Act: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect on the potential market.<sup>75</sup> In practice, the first and fourth factors weigh most heavily in the analysis.<sup>76</sup> As with any affirmative defense, the burden is on the defendant to demonstrate fair use.<sup>77</sup>

Two cases have considered fair use in the context of political campaigns. A court first considered the fair use defense in political advertisements in *Mastercard Int'l, Inc. v. Nader 2000 Primary Committee, Inc.*<sup>78</sup> During the 2000 presidential campaign, Mastercard sued independent presidential candidate Ralph Nader for modeling one of his political ads after Mastercard's "Priceless" advertisements.<sup>79</sup> Nader's political advertisement mimicked Mastercard's advertisements by listing items synonymous with dirty politics, the "prices" for each item, and concluding: "Finding out the truth: priceless."<sup>80</sup> On summary

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<sup>72</sup> 17 U.S.C. §§ 101-810 (1976).

<sup>73</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (noting that fair use requires "sensitive balancing of interests"); see also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151-52 (9th Cir. 1986) ("Courts balance these factors to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work." (citing *D.C. Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 27 (2d Cir. 1982))).

<sup>74</sup> See *Campbell*, 510 U.S. at 577 ("the task [of determining fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

<sup>75</sup> See 17 U.S.C. § 107.

<sup>76</sup> See *Campbell*, 510 U.S. 569.

<sup>77</sup> *MasterCard Int'l Inc. v. Nader*, No. 00-6068, 2004 U.S. Dist. LEXIS 3644, at \*35 (S.D.N.Y. Mar. 8, 2004).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*2.

<sup>80</sup> *Id.* at \*2-3.

judgment, the court held that Nader's political advertisement was fair use and, in turn, Nader was not liable for copyright infringement.<sup>81</sup>

The court held that the first fair use factor, the purpose and character of use, heavily favored Nader because his political advertisement was a transformative work.<sup>82</sup> The advertisement was deemed a parody because, although it used a large portion of the original work, it conveyed a different message than Mastercard's original advertisement and provided commentary on materialism and political corruption. Parodies are deemed transformative because they "[add] something new, with a further purpose or different character, altering the first new expression, meaning or message."<sup>83</sup> The creation of transformative works is considered a factor in favor of a finding of fair use.<sup>84</sup>

The court also held that the fourth factor, the effect on the potential market, strongly favored a finding of fair use because the Nader advertisement served a political purpose that was entirely different than the commercial purpose of the Mastercard advertisements.<sup>85</sup> Mastercard argued that Nader's advertisement was commercial in nature because he used the commercial to solicit donations, but the court rejected this argument. The court stated that "all political campaign speech would also be 'commercial speech' since all political candidates collect contributions."<sup>86</sup> This cut against the Act's legislative history, which "clearly indicate[ed] that Congress did not intend for the Act to chill political speech."<sup>87</sup> The court afforded the second and third factors little significance.<sup>88</sup>

A different federal court reached the opposite conclusion in *Henley v. DeVore*.<sup>89</sup> In 2009, Don Henley filed suit against Republican senatorial candidate Charles DeVore for using two of his songs in online political advertisements.<sup>90</sup> DeVore

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<sup>81</sup> *Id.* at \*42–43, 48–49.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at \*42–43.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*49.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at \*23–24.

<sup>88</sup> *Id.* at \*44–48.

<sup>89</sup> *See Henley v. DeVore*, No. 09-0481, 2010 U.S. Dist. LEXIS 67987, at \*9 (C.D. Cal. 2009).

<sup>90</sup> *Id.*



downloaded the karaoke version of Henley's song "Boys of Summer" and altered the lyrics into "The Hope of November," which was aimed at criticizing President Barack Obama. DeVore also downloaded the karaoke version of Henley's song "All She Wants to Do is Dance" and altered the lyrics into "All She Wants to Do is Tax," which was aimed at criticizing Democratic senator Barbra Boxer's cap-and-trade and global warming policies.<sup>91</sup> On summary judgment, the court held that DeVore's political advertisements were not fair use.<sup>92</sup>

In coming to this conclusion, the court held that the first factor, the purpose and character of use, favored Henley because the altered songs were merely "satirical," as they simply "evoked the same themes of the original in order to attack an entirely separate subject."<sup>93</sup> The court reasoned that a satire is not transformative enough to support a finding of fair use.<sup>94</sup> The court held that the fourth factor, the effect on the potential market, favored Henley because the DeVore songs were commercial in nature as DeVore "benefitted or gained an advantage without having to pay customary licensing fees."<sup>95</sup> The court further reasoned that it could not hold, as a matter of law, that "widespread dissemination of similar satirical spins" on Henley's songs would not harm the market for the original works, even though it was not clear that DeVore's songs actually threatened the market for Henley's songs.<sup>96</sup>

The fair use analyses undertaken in *Nader* and *Henley* provide persuasive, conflicting precedent for cases involving the unauthorized use of music in political campaigns. While the *Nader* court held that political advertisements, even those soliciting donations, are noncommercial political speech under the fourth fair use factor,<sup>97</sup> the *Henley* court held that political advertisements could be commercial insofar as the political campaign benefits without paying licensing fees or harms the

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<sup>91</sup> *Id.* at \*24–25.

<sup>92</sup> *Id.* at \*37.

<sup>93</sup> *Id.* at \*33.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at \*38 (citing *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000)).

<sup>96</sup> *Id.* at \*44–49.

<sup>97</sup> See *Nader*, 2004 U.S. Dist. LEXIS 3644, at \*23–24.

future sales of the artist.<sup>98</sup> In addition, while the *Nader* court applied a lenient standard of “parody,” which saw the incorporation of an exact copy of an original work into a second work as “transformative” under the first fair use factor,<sup>99</sup> the *Henley* court applied a strict standard of “parody,” which requires more than using the same “themes and devices to mock a separate subject. . . .”<sup>100</sup> Therefore, future musician-plaintiffs have persuasive precedent under *Henley* to find against fair use, while defendant-politicians have a persuasive precedent under *Nader* to find for fair use.

However, the *Nader* and *Henley* decisions share one common attribute that limits hope for artists—the cases substantially outlasted the campaigns. The *Nader* advertisement was used during the 2000 presidential campaign, but summary judgment was not handed down until 2004.<sup>101</sup> Similarly, DeVore parodied *Henley*’s songs in 2009, but summary judgment was not handed down until 2010, after DeVore had already lost his bid for the United States Senate seat.<sup>102</sup> In addition, both courts denied preliminary injunctions during the defendants’ campaigns.<sup>103</sup> As such, it is unlikely that copyright law can provide timely and effective assistance to artists seeking to prevent, by injunction, impermissible use by political campaigns.

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<sup>98</sup> See *Henley*, 2010 U.S. Dist. LEXIS 67987, at \*38.

<sup>99</sup> See *Nader*, 2004 U.S. Dist. LEXIS 3644, at \*42–43.

<sup>100</sup> See *Henley*, 2010 U.S. Dist. LEXIS 67987, at \*29–33.

<sup>101</sup> See *Nader*, 2004 U.S. Dist. LEXIS 3644, at \*1–4.

<sup>102</sup> See *Henley*, 2010 U.S. Dist. LEXIS 67987, at \*1 (stating date of decision); see also Associated Press, *Fiorina Wins GOP Senate Primary in California*, CBS NEWS (June 9, 2010, 12:20 AM), <http://www.cbsnews.com/stories/2010/06/09/politics/main6563065.shtml> (reporting Carly Fiorina’s victory in California Republican primary held on June 8, 2010).

<sup>103</sup> See *Nader*, 2004 U.S. Dist. LEXIS 3644, at \*4 (stating court denied MasterCard’s motion for preliminary injunction during 2000 presidential campaign); *Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 685 (N.D. Ohio 2002) (denying plaintiff’s motion for preliminary injunction).

#### IV. FAILURE OF EXISTING TRADEMARK LAW

##### A. FALSE ENDORSEMENT

Another potential avenue of protection for artists is trademark law. A trademark is a “word, name, symbol, or device, or any combination thereof” that is used to identify and distinguish one’s goods or services from those of another.<sup>104</sup> Federal trademark rights are governed by the Lanham Act.<sup>105</sup> The Lanham Act’s purpose is to foster fair competition, protect consumers from deceiving business practices, and protect the mark holder’s goodwill in the marketplace.<sup>106</sup> Section 43(a) of the Lanham Act imposes liability for “false endorsement,” where a defendant appropriates a distinctive attribute of a celebrity, giving the impression that the celebrity endorsed the defendant in some manner.<sup>107</sup>

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<sup>104</sup> 15 U.S.C. § 1127 (2010).

<sup>105</sup> 15 U.S.C. §§ 1051–1141 (2012).

<sup>106</sup> See Stephanie D. Zimdahl, Comment, *A Celebrity Balancing Act: An Analysis of Trademark Protection Under the Lanham Act and the First Amendment Artistic Expression Defense*, 99 NW. U.L. REV. 1817, 1823 n.38 (2005) (explaining Supreme Court interpretation and congressional intent of Lanham Act).

<sup>107</sup> Section 43(a) reads:

- (1) Any person who, on or in connection with any good or services, or any container of goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact- which
  - (A) [I]s likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
  - (B) [I]n commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes he or she is or is likely to be damaged by such act.

To succeed on a claim of false endorsement, the celebrity must show: (1) its mark is legally protectable; (2) it owns the mark; (3) the defendant uses the mark in commerce to identify its goods or services; and (4) the use of the mark in commerce is likely to confuse, deceive or mislead consumers into falsely believing that the celebrity approves, sponsors or endorses the goods or services at issue.<sup>108</sup> In false endorsement cases, the “mark” at issue is the celebrity’s identity and it is presumed the celebrity owns his identity.<sup>109</sup> The third and fourth factors are typically the controlling issues.<sup>110</sup> When analyzing the fourth factor—likelihood of confusion—courts examine the “level of recognition that the celebrity enjoys among members of society”<sup>111</sup> and “the reasons for or source of the plaintiff’s fame.”<sup>112</sup>

In *Waits v. Frito-Lay*, after singer Tom Waits refused Frito-Lay’s endorsement offer, Frito-Lay used a sound-alike of him in an advertisement.<sup>113</sup> Waits then sued Frito-Lay for false endorsement.<sup>114</sup> The court determined that Waits’ voice was his “identity” because it had a unique “raspy, gravelly” quality, which was widely recognized and helped him achieve commercial and critical success in his musical career.<sup>115</sup> In turn, the court determined that Frito-Lay misused Waits’ identity by imitating Waits’ voice in a way that would lead consumers to mistakenly

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15 U.S.C. § 1125 (a) (2012); Courts interpret section 43(a) to include false endorsement. *See, e.g.,* *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1399–1401 (9th Cir. 1992); *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 625–30 (S.D.N.Y. 1985); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996) (false endorsement “based on the unauthorized use of a celebrity’s identity” is actionable as trademark infringement).

<sup>108</sup> *See* 15 U.S.C. § 1125(a)(1)(A) (2012).

<sup>109</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106–07 (9th Cir. 1992).

<sup>110</sup> *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 942 (E.D. La. 2017).

<sup>111</sup> *See Zimdahl, supra* note 106, at 1829 (analyzing likelihood of confusion factors in celebrity cases).

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

<sup>113</sup> *See Waits*, 978 F.2d at 1097.

<sup>114</sup> *Id.* at 1106–07.

<sup>115</sup> *Id.* at 1097.

think he was endorsing their product.<sup>116</sup> Therefore, Frito-Lay was liable under a claim of false endorsement.<sup>117</sup>

There is disagreement among federal courts as to whether artists may bring false endorsement claims against political campaigns. To succeed on a claim of false endorsement, the Lanham Act requires that the unauthorized use of the trademark occur *in commerce*.<sup>118</sup> Many courts read the “in commerce” language in conjunction with § 1127’s definition of “use in commerce,” whereby the trademark must be physically placed on goods or services that the defendant sells or transports in commerce, or the trademark must be used in the sale or advertisement of goods or services that are rendered in commerce.<sup>119</sup> This interpretation prevents artists from bringing false endorsement claims against political campaigns because playing music to fire up a crowd and introduce the candidate has no obvious commercial connotation. A political campaign is not a business entity, no product is sold, and no commercial service is rendered.<sup>120</sup>

In contrast, in 2008, the Central District of California held that “the Lanham Act’s reference to ‘use in commerce’ does not require a plaintiff who asserts a claim under section 43(a)(1)(A) to show that the defendant actually used the mark in commerce.”<sup>121</sup> Rather, this reference “actually ‘reflects Congress’s intent to legislate to the limits of its authority under the Commerce Clause’ to regulate interstate commerce.”<sup>122</sup> This requires a party to show that the defendant’s conduct only “affects interstate commerce, such as through diminishing the plaintiff’s ability to control use of the mark, thereby affecting the mark and its relationship to interstate commerce.”<sup>123</sup> Under this definition,

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<sup>116</sup> *Id.* at 1107.

<sup>117</sup> *Id.* at 1106–07.

<sup>118</sup> See Lanham Act, *supra* note 107.

<sup>119</sup> See *Waits*, 978 F.2d at 1108–09.

<sup>120</sup> See, e.g., *Am. Family Life Ins. Co. v. Hagen*, 266 F. Supp. 2d 682, 697 (N.D. Ohio 2002) (candidate’s political website is not commercial speech, but political).

<sup>121</sup> See *Browne v. McCain*, 611 F. Supp. 2d 1073, 1083 (C.D. Cal. 2009) (the only decision issued in *Browne v. McCain* was a ruling on the Browne Defendants’ respective motions to dismiss).

<sup>122</sup> *Id.*

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

nonpermissive use of music by political campaigns could be considered “use in commerce” if the artist can show that the politician’s use of her song diminished her ability to control the song in commerce.

However, whether a mark must be used in commerce or what that phrase means may be irrelevant. To succeed on a claim of false endorsement, the Lanham Act requires “likely consumer confusion,” which means use of the trademark that is likely to confuse *consumers* about affiliations in *commercial matters*.<sup>124</sup> While voters compare political platforms and choose among candidates, voters are not consumers and candidates are not goods that they purchase. A politician has no tangible goods or services to sell. In fact, it is illegal for a politician to monetize the power to vote.<sup>125</sup> So, even if the use of the song mark created some type of confusion as to the artist’s sponsorship or endorsement of the politician, it would not create consumer confusion. As a result, even in jurisdictions that accept the expanded version of “use in commerce,” an artist’s false endorsement claim will likely fail for inability to show consumer confusion.

## B. RIGHT OF PUBLICITY

Trademark law also offers legal protection to artists under rights of publicity. As recognized by common law or statutes in most states, the right of publicity rests on the notion that, through the expenditures of time and effort in honing professional talents and skills, a celebrity develops a potentially valuable property right in her name, likeness, and identity.<sup>126</sup> Based on this right, a celebrity is entitled to legal relief when another party appropriates the celebrity’s name, likeness, or identity to her advantage, which causes the celebrity harm.<sup>127</sup> Unlike a claim of false endorsement, the right of publicity does not require the plaintiff to prove likely

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<sup>124</sup> See *Eastland Music Grp., L.L.C. v. Lionsgate Entm’t, Inc.*, 707 F.3d 869, 872 (7th Cir. 2013) (quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003)); *Ray Commc’ns v. Clear Channel*, 673 F.3d 294, 301 (4th Cir. 2012); *Hormel Foods Corp. v. Jim Henson Prods, Inc.*, 73 F.3d 497, 502 (2d Cir. 1996).

<sup>125</sup> See *generally* *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (outlining legal and ethical restrictions of politicians).

<sup>126</sup> See J. THOMAS MCCARTHY ET AL., *MCCARTHY’S DESK* *ENCYCLOPEDIA OF INTELLECTUAL PROPERTY* 529 (3d ed. 2004).

<sup>127</sup> *Id.* at 528–31.

consumer confusion, which gives artists a better chance of success against defendant-politicians.<sup>128</sup>

Musicians can rely on *Browne v. McCain*<sup>129</sup> when bringing a right of publicity claim against a political campaign for nonpermissive use of music. In this case, Jackson Browne filed a right of publicity claim under California common law<sup>130</sup> against presidential candidate John McCain for nonpermissive use of Browne's song "Running on Empty" in a 2008 political advertisement.<sup>131</sup> The advertisement mocked presidential candidate Barack Obama's energy policies by playing a clip of Obama with "Running on Empty" playing in the background.<sup>132</sup> In ruling on McCain's motion to strike Browne's right of publicity claim, the court noted that in order to succeed on his claim, Browne needed to show that McCain used his name, likeness, or identity without his consent for McCain's "advantage, commercially or otherwise," and that McCain's actions caused injury to Browne.<sup>133</sup> The court determined that Browne's song was his "identity" because Browne presented "evidence that tends to show that his voice is sufficiently distinctive and widely known."<sup>134</sup> The court also determined that, without Browne's consent, McCain "appropriated his identity to [his] advantage" by seeking and perhaps obtaining "increased media attention for Senator McCain's candidacy."<sup>135</sup> Lastly, Browne made a sufficient showing of injury because the video "gave the false impression that he was associated with or endorsed" the McCain campaign, when in reality Browne was "closely associated with liberal causes and Democratic political candidates."<sup>136</sup> Therefore, Browne succeeded on each element of his right of publicity

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<sup>128</sup> *Id.* at 529.

<sup>129</sup> *Browne v. McCain*, 611 F. Supp. 2d 1073, 1075 (C.D. Cal. 2009).

<sup>130</sup> The statutory option would not have worked for Browne because the applicable statute has a political-use exemption which permits uses of a celebrity's voice in a political campaign. *Browne*, 611 F. Supp. 2d at 1069 n.3.

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

<sup>132</sup> *Id.* at 1070.

<sup>133</sup> *Id.* at 1080.

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

<sup>135</sup> *Id.* at 1082.

<sup>136</sup> *Id.* at 1083.

claim.<sup>137</sup> However, the parties settled the dispute, so there was no final ruling on the merits.<sup>138</sup>

Although rights of publicity appear to be the most promising avenue for artists, there are various reasons why courts may not reach the same conclusion as the court in *Browne*. The *Browne* court's treatment of the right of publicity claim came in the context of a ruling on the defendant's motion to strike, so Browne merely needed to demonstrate a probability of success on his right of publicity claim to fend off the strike, which means the court was applying a lower standard.<sup>139</sup> The court may have ruled differently had it been applying the preponderance of the evidence standard required to succeed on the claim.<sup>140</sup>

In addition, there is a dramatic lack of uniformity concerning the scope and substance of the rights of publicity recognized by different states. At one extreme, Indiana's right of publicity extends to one's "personality," which is defined by statute to encompass virtually every attribute, including a person's signature, voice, gestures, appearance, and mannerisms.<sup>141</sup> Indiana's right of publicity extends 100 years past the celebrity's death, and plaintiffs are given a wide range of remedies, such as statutory and punitive damages, attorney fees, and injunctive relief, including confiscation and destruction of infringing goods.<sup>142</sup> At the other end of the spectrum, New York has no common law right of publicity and recognizes a very narrow statutory right of publicity limited to a person's "name, portrait, picture or voice."<sup>143</sup> New York's right of publicity ends when the

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<sup>137</sup> *Id.*

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

<sup>139</sup> McCain based his motion to strike Browne's right of publicity claim on California's anti-SLAPP statute, which provides a mechanism for early-stage dismissal of unmeritorious claims that arise from a defendant's exercise of free speech rights in regard to a matter of public interest. *Id.* at 1067–68; *see also* CAL. CIV. PROC. CODE § 425.16 (West 2015).

<sup>140</sup> *See* McCarthy, *supra* note 114.

<sup>141</sup> *See* IND. CODE ANN. § 32-36-1-7 (2002).

<sup>142</sup> *See* IND. CODE ANN. § 32-36-1-18 (2002).

<sup>143</sup> *See* Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (New York Court of Appeals rejects the common-law right of privacy); *see also* N.Y. CIV. RIGHTS § 50 (1999) (provides civil and criminal sanctions for the use of a living person's



celebrity dies.<sup>144</sup> In between Indiana and New York, there are dozens of states with different scopes of protection, scienter requirements, post-mortem rights, common law tests, and damages caps.<sup>145</sup> Some states, like California, even have political-use exemptions written into the statute, permitting use of a celebrity's voice in political campaigns.<sup>146</sup> With such varied treatment of the right of publicity, the success of the plaintiff-musician largely depends on where the lawsuit is filed, and plaintiff-musicians in states like New York will not be afforded adequate protection of their work. This lack of uniform legal protection under both copyright and trademark law is concerning, so many legal articles have proposed a solution under the moral rights doctrine, which is explored below.

## V. MORAL RIGHTS DOCTRINE AND ITS SHORTCOMINGS

A commonly-proposed solution to the nonpermissive use of music is to grant artists moral rights in their work.<sup>147</sup> Many countries, especially in Europe, see copyright as a type of natural right.<sup>148</sup> Because an author creates a work, the work is an expression of the author's personality, and she should be able to control what happens to it.<sup>149</sup> Similarly, the author's reputation is tied to the work, so if someone injures the work, they injure the author.<sup>150</sup> Based on this philosophical approach to copyright, many countries have codified the moral rights of artists.<sup>151</sup> These laws transcend economic considerations and give artists the right

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name, portrait, picture, or voice for purposes of advertising or trade without his or her written consent).

<sup>144</sup> See N.Y. CIV. RIGHTS, *supra* note 143.

<sup>145</sup> RIGHT OF PUBLICITY ROADMAP, <https://www.rightofpublicityroadmap.com> (last visited Feb. 24, 2019).

<sup>146</sup> See *Browne*, *supra* note 129.

<sup>147</sup> See JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, LAW ETHICS, AND THE VISUAL ARTS, at 251–52 (4th ed. 2002).

<sup>148</sup> See JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, LAW ETHICS, AND THE VISUAL ARTS, at 251–52 (4th ed. 2002).

<sup>149</sup> RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS, at 944, 950–59 (2d ed. 1998).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

to claim authorship and to object to any distortion, mutilation, or other modification of a work which would be prejudicial to her honor or reputation.<sup>152</sup> In contrast, the United States sees copyright law as a matter of economics rather than philosophy.<sup>153</sup> As such, the Act provided economic incentives for authors to create works but did not give any recognition to moral rights.<sup>154</sup>

In 1989, the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”).<sup>155</sup> The Berne Convention requires its members to grant moral rights, stating:

Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>156</sup>

Congress sought to limit the effects of the Berne Convention as much as possible by passing the Berne Convention Implementation Act of 1988, which stated that the United States would adhere to the Berne Convention in the “most limited sense,” and federal and state statutes would not be “expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention.”<sup>157</sup> Two years later, in response to growing domestic and international criticism over the United States’ treatment of moral rights, Congress enacted the Visual Artists Rights Act of 1990 (“VARA”), which is codified in Section 106 of the

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<sup>152</sup> *Id.*

<sup>153</sup> *Copyright Valuation*, APPRAISAL ECONOMICS, <https://www.appraisaleconomics.com/copyright-valuation/> (last visited Apr. 4, 2019).

<sup>154</sup> See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101).

<sup>155</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971).

<sup>156</sup> *Id.* at 1333.

<sup>157</sup> Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

Copyright Act.<sup>158</sup> VARA gives the author of a “work of visual art” the right to, among other things, prevent any intentional “distortion, mutilation, or other modification of the work that which would be prejudicial to his or her honor or reputation.”<sup>159</sup> VARA only applies to works falling within the definition of “visual art,” so musical works are not protected under this act.<sup>160</sup>

In existing academic articles discussing nonpermissive use of music by political campaigns, the proposed solution is often to expand VARA to include musical works.<sup>161</sup> Under this adaptation of VARA, an artist could prevent use of her music that is prejudicial to her honor or reputation.<sup>162</sup> One scholar uses Bruce Springsteen’s song “Born in the U.S.A.” to illustrate the application of an expanded VARA to the nonpermissive use of music.<sup>163</sup> He explains that “Born in the U.S.A.” is meant to be critical of the United States government in telling the story of a “disillusioned Vietnam War Veteran,” but Ronald Reagan used

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<sup>158</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.); *see also*, e.g., *Moral Rights in Our Copyright Laws: Hearing on S. 1198 and S. 1253 Before the Senate Subcomm. On Patents, Copyrights and Trademarks of the Senate Comm. On the Judiciary*, 101st Cong. 85 (1990). During the hearings on VARA, Senator DeConcini addressed scholar Edward Damich’s concerns about Berne compliance in the area of moral rights: “Then you’re saying that in your opinion we are not part of the Berne Convention? We have not adopted the legislation necessary to be in compliance? What we did last year really doesn’t put us in any better position than if we passed nothing?” *Id.* Edward Damich replied, “That’s correct.” *Id.*

<sup>159</sup> *See* H.R. 2690, 101st Cong. § 106A(a)(3) Cong. Rec. 12,597 (1989).

<sup>160</sup> *Id.* § 101, 135 (defining “work of visual art”).

<sup>161</sup> *See*, e.g., Aurele Danoff, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181 (2007); Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1 (2001); Erik Gunderson, *Every Little Thing I Do (Incurs Legal Liability): Unauthorized use of Popular Music in Presidential Campaigns*, 14 LOY. L.A. ENT. L. REV. 137 (1993).

<sup>162</sup> *See generally* Desai, *supra* note 161.

<sup>163</sup> *Id.*

the song at political rallies to incite feelings of patriotism.<sup>164</sup> Under an expanded moral rights doctrine, “[i]f Springsteen could show that his song has been used outside the context of his artistic vision for it, and the use has offended his integrity[,]” he could get an injunction to prevent Ronald Reagan from using his song.<sup>165</sup>

Although the strategy of expanding VARA sounds promising on paper, it is problematic for three main reasons. First, protecting artists’ moral rights is strongly disfavored in the United States. As previously discussed, United States copyright law is a matter of economics rather than philosophy.<sup>166</sup> The United States resisted joining the Berne Convention for 102 years and had instead joined the competing Universal Copyright Convention (the “UCC”), largely because the UCC did not require the United States to protect moral rights.<sup>167</sup> It only agreed to join the Berne Convention after American artists experienced financial harm under the UCC.<sup>168</sup> One scholar notes:

The major impetus for United States accession to the Berne Convention was not a new found desire to bring its copyright laws into harmony with those of the Berne Union, but instead resulted from a stronger, more traditional American impulse: pure economic self-interest. American copyright-based industries whose products were being pirated in international markets, with which the United States did not have copyright relations, wanted greater protection.<sup>169</sup>

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<sup>164</sup> *Id.* at 22.

<sup>165</sup> *Id.* at 22–23.

<sup>166</sup> See *Copyright Valuation*, *supra* 153.

<sup>167</sup> See Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZA L. REV. 373, 399–400 (1995).

<sup>168</sup> Cambra E. Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 857 (2004) (“By the mid-1980s, losses to U.S. copyright proprietors from piracy abroad had mounted into the billions of dollars. At that point, U.S. participation in the UCC seemed inadequate.” (citing David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROBS. 211, 215 (1992))).

<sup>169</sup> *Id.*

Even after the United States joined the Berne Convention, Congress passed the aforementioned Berne Convention Implementation Act, employing the “neither expand nor reduce” language to eliminate the chance that moral rights might creep into the United States Code through Berne Convention adherence.<sup>170</sup> The only time moral rights were treated positively in the United States was through the enactment of VARA.<sup>171</sup> However, VARA simply rode on the coattails of an unrelated key bill. It was tacked onto the Judicial Improvements Act of 1990 at the last minute “without so much as a word of debate or discussion.”<sup>172</sup> The last-minute enactment was immediately criticized by many congressional leaders for being too significant of a departure from copyright and private property laws.<sup>173</sup> United States courts have chipped away at the power of VARA since its enactment in 1990.<sup>174</sup> Because of this tumultuous relationship between United States copyright law and the moral rights doctrine, it is unlikely that Congress will ever expand the scope of VARA.

Second, even if Congress were willing to expand the moral rights protection to include music, problems arise in its real-

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<sup>170</sup> See Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1219 (2002).

<sup>171</sup> See Visual Artists Rights Act, *supra* note 158.

<sup>172</sup> John Henry Merryman & Albert E. Elsen, *Law, Ethics, and The Visual Arts* 283-84 (3d ed. 1998).

<sup>173</sup> The last-minute enactment of VARA was criticized by George C. Smith, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law. “Without so much as a word of debate or discussion, the Artists Act (sic) became law. The lack of debate is unfortunate because the new statute constitutes one of the most extraordinary realignments of private property rights ever adopted by Congress.” *Id.*; see also 136 Cong. Rec. 12,610 (1990) (Representative Fish commented, “This legislation should not be viewed as precedent for the extension of so-called moral rights into other areas. This legislation addresses a very special situation in a very careful and deliberate way.”).

<sup>174</sup> See, e.g., 17 U.S.C. § 106A(a)(3)(B) (VARA will only protect “a work of recognized statute.”); 17 U.S.C. § 106(A)(c)(2) (VARA does not protect against deterioration resulting from public presentation, including damage caused by lighting or placement.); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (VARA does not protect works for hire or “applied art.”).

world application. Recall the “Born in the U.S.A.” example, where Springsteen could obtain an injunction by showing that his “song has been used outside the context of his artistic vision for it.”<sup>175</sup> Although this solution is promising on paper, it fails to clarify how a court would determine whether there has been a violation of the artist’s vision for her work.<sup>176</sup> This was the fundamental issue in *Shostakovich v. Twentieth Century-Fox Film Corp.*<sup>177</sup> There, four Soviet Russian composers sought to enjoin the use of their music in the movie “The Iron Curtain,” which had an anti-Soviet theme.<sup>178</sup> The composers argued, among other things, that the themes of the film went against the artistic vision of their music.<sup>179</sup> The court’s fundamental point was that there was no way to determine the violation of a musician’s vision.<sup>180</sup> The court asked whether the standard should be “good taste, artistic worth, political beliefs, moral concepts” or some other standard.<sup>181</sup> The court dismissed the case, and the issue still stands.<sup>182</sup>

Third, VARA allows artists to waive their moral rights via contract. According to Section 106(e) of VARA, the creator may waive her moral rights by “consenting in a written and signed instrument specifically identifying the artwork and the uses of that work.”<sup>183</sup> In response to this provision, most visual art contracts now contain moral rights waivers, which artists are required to sign during the initial contracting phase.<sup>184</sup> This eliminates the legal recourse promised to visual artists under VARA. The application of VARA to the music industry would be detrimental because of this waiver. It is virtually impossible for an artist to

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<sup>175</sup> See Desai, *supra* note 161, at 22–23.

<sup>176</sup> *Id.* at 21–23.

<sup>177</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 579 (Sup. Ct. 1948); *aff’d*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949).

<sup>178</sup> *Id.* at 576.

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

<sup>180</sup> *Id.* at 579.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See Visual Artists Rights Act, *supra* note 158.

<sup>184</sup> See, e.g., 1B NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 24:19 (Nov. 2018) (drafting checklist that includes waiver of artist’s moral rights); 5B AM. JUR. 2D *Legal Forms* § 72:67 (Nov. 2018) (example of standard moral rights waiver).

operate without a PRO.<sup>185</sup> Because there are only three PROs, artists have very little negotiating power.<sup>186</sup> If VARA is extended to cover music, artists will likely be required to sign moral rights waivers in exchange for memberships and public performance royalties. This eliminates any cause of action an artist may have against a licensee, negating any protection the moral rights doctrine attempts to create. Because of these shortcomings, alternative solutions are explored below.

## VI. PROPOSED SOLUTIONS

The solution to nonpermissive use by political campaigns lies in the hands of PROs. History has demonstrated the immense importance of PROs in furthering the interests of their musicians, and their ability to adapt to new developments in the music industry in order to do so. From radio to television to the internet, new technologies have threatened licensing revenues, and PROs have changed business strategies to better market their artists and secure public performance royalties from the newest channels for music distribution.<sup>187</sup> Recognizing their versatility in the face of new problems, we should look at PROs, and not Congress, to make the necessary changes to protect artists from nonpermissive use.

There are two advantages of using PROs over Congress—lower transaction costs and greater flexibility.<sup>188</sup> PROs already have valuation, monitoring, and enforcement mechanisms in place, which drastically lower the costs of administering new rights.<sup>189</sup> In contrast, amending the Act or Lanham Act would be a tedious process with high transaction costs.<sup>190</sup> Proponents of an

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<sup>185</sup> See generally notes 39–49 and accompanying text.

<sup>186</sup> See COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 48.

<sup>187</sup> See, e.g., Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1338 (1996).

<sup>188</sup> *Id.* at 1296.

<sup>189</sup> *Id.* at 1320.

<sup>190</sup> *Id.* at 1312–13 n.52 (“it is a well-accepted precept in the intellectual property field that ‘U.S. intellectual property law is extremely difficult to change . . . In Washington, it is much easier to stop a bill than to move one through the legislative maze, and any party that feels short-changed can exercise virtual veto-power.’” (quoting

amendment have to win a sequence of victories in subcommittee, in committee, in Rules Committee, in conference, on the floors of both chambers, and in the White House.<sup>191</sup> During this process, large sums of money are spent educating and lobbying Congress.<sup>192</sup> Even if successful, Congress is ill-suited to respond to needs for further change.<sup>193</sup> In contrast, PROs are made up of people knowledgeable about the music industry and thus in tune with its needs. Their structure allows for ongoing adjustment to meet those needs.<sup>194</sup> Given these advantages, we must turn to PROs to solve the problem of nonpermissive use.

It is in PROs' best interest to make the necessary changes to protect their members from nonpermissive use. With the 2020 presidential election on the horizon, the animosity between Democratic-supporting artists and Republican politicians is growing, and artists are becoming increasingly frustrated with their lack of legal protection.<sup>195</sup> A PRO like BMI could use this frustration to poach members from ASCAP and SESAC. If BMI takes a hard stance against nonpermissive use in the political sphere and implements new protections for its members, ASCAP and SESAC artists may transfer their musical catalogs to BMI to better protect themselves. Because nonpermissive use injures the most popular musicians, BMI could secure memberships from top-tier artists like Rihanna, Pharrell, and Queen, increasing its performance royalties by millions of dollars per year.<sup>196</sup> On the opposite side of the same coin, it is in the best interest of all three PROs to take affirmative steps to protect their members so they do not lose them. Two potential changes are explored below.

#### A. EXEMPT POLITICAL USES FROM BLANKET LICENSES

PROs can end the feud between politicians and artists by modifying their standard operating agreements in one of two

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Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT SOC'Y U.S.A. 18, 21 n.8 (1994)).

<sup>191</sup> Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT SOC'Y U.S.A. 18, 32 (1994).

<sup>192</sup> Merges, *supra* note 187, at 1299.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1300 ("Society and the industry will be better off if Congress exercises restraint, creating an environment in which private organizations can flourish.").

<sup>195</sup> See generally *supra* text accompanying notes 5–32.

<sup>196</sup> See Besen, *supra* note 43, at 384.



ways. First, PROs can exempt political uses from their blanket licenses, thus requiring politicians to receive direct permission from the artist. Direct permission is not a new concept; it is required for use of music in dramatic works like operas or Broadway plays.<sup>197</sup> The reason for this distinction is that dramatic uses are much easier for the individual copyright holder to license and police.<sup>198</sup> Unlike the hundreds of thousands of establishments in the United States that are playing popular music right now, Broadway plays are relatively infrequent, take months of preparation, and receive a lot of publicity.<sup>199</sup> Consequently, it is reasonable for musical directors to contact artists directly to receive permission before using their songs. Recognizing this, PROs exclude dramatic works from their blanket licenses.<sup>200</sup> Their justification for declining to license dramatic works also applies to political uses. Political events, like operas or Broadway plays, involve lengthy preparation and publicity.<sup>201</sup> They are also relatively infrequent, as presidential elections only occur once every four years, and Senate and House elections every two years.<sup>202</sup> Because of these similarities, it would be reasonable for campaign directors to contact artists directly to receive permission before using their songs at political events.

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<sup>197</sup> “A dramatic performance usually involves using the work to tell a story or as party of a story or plot.” *Common Licensing Terms Defined*, ASCAP, <https://www.ascap.com/help/ascap-licensing/licensing-terms-defined> (last visited Apr. 30, 2019). The term “dramatico-musical work” includes, but is not limited to, a musical comedy, opera, play with music, revue or ballet. *Id.* Such performances involve dramatic rights, also referred to as “grand rights,” while PROs only have the right to license non-dramatic public performances. *Id.*

<sup>198</sup> See Davis, *infra* note 199.

<sup>199</sup> *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50, 52 (2d Cir. 1972); *Rice v. Am. Program Bureau*, 446 F.2d 685, 689 (2d Cir. 1971); Brent Giles Davis, *Identity Theft: Tribute Bands, Grand Rights, and Dramatico-Musical Performances*, 24 CARDOZO ARTS & ENT. L.J. 845, 868 (2006).

<sup>200</sup> *Id.*

<sup>201</sup> See S.J. GUZZETTA, *THE CAMPAIGN MANUAL: A DEFINITIVE STUDY OF THE MODERN POLITICAL CAMPAIGN PROCESS* (7th ed. 2006).

<sup>202</sup> While local elections may occur more often than federal elections, the issue of artists objecting to PRO-licensed performances at political events has yet to come up in a local election.

Exempting political uses from blanket licenses would be an easy update that can mirror the provisions created to exclude dramatic works. ASCAP excludes dramatic works from its blanket licenses in two ways. First, its blanket licensing agreement begins by saying: “[ASCAP] grants and LICENSEE accepts a license to perform or cause to be performed publicly . . . *non-dramatic* renditions of the separate musical compositions . . . in the repertory of [ASCAP].”<sup>203</sup> PROs can use the same disclaimer for political uses, updating their blanket licensing agreements to cover “*non-political, non-dramatic* renditions of separate musical compositions.” Second, ASCAP’s licensing agreement contains the following limitation: “This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this agreement, a dramatic performance shall include, but not be limited to, the following . . . .”<sup>204</sup> PROs can

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<sup>203</sup> In its entirety, it reads:

(a) SOCIETY grants and LICENSEE accepts a license to perform or cause to be performed publicly at "LICENSEE'S business locations" and at "LICENSEE'S event locations" (each as defined below), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, of which SOCIETY shall have the right to license such performing rights. *Music in Business, Blanket License Agreement*, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, <https://www.ascap.com/~media/files/pdf/licensing/classes/musicbsblank.pdf> (last visited Feb. 24, 2019).

<sup>204</sup> In its entirety, it reads:

(2)(f) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as defined below) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as defined below) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

draft a parallel limitation for political uses: "This license is limited to non-political performances, and does not authorize any political use. For purposes of this agreement, a political use shall include, but not be limited to, the following: political rallies, campaign fundraisers, political speeches, political conventions, political commercials on television, radio, and internet." These two minor updates will effectively disallow any political entity from obtaining a blanket license for political events.

No solution is airtight, and the central issue with this solution is that it does not address the fair use doctrine. Recall that even if a political campaign does not purchase a license from a PRO, the politician may be able to use a copyrighted song if that use is "fair" under the precedent set by *Nader*.<sup>205</sup> However, the *Nader* precedent is only applicable in a minute number of cases, where the politician transforms the song into a parody that evokes different themes than the original.<sup>206</sup> In all of the cases presented in Part II of this Note, the politician used a song in its original form, eliminating any chance of a fair use defense.<sup>207</sup> Therefore, the issue of fair use will only arise in a small number of cases where the politician does not use the actual song. It is impossible to contract or legislate around fair use, so it is the courts' job to determine whether the use is fair on a case-by-case basis.<sup>208</sup>

## B. CREATE POLITICAL-USE OPT-OUT IN MUSICIANS' MEMBERSHIP AGREEMENTS

In the alternative, if PROs are reluctant to completely eliminate political uses from blanket licenses, they can create a political-use opt-out in musicians' membership agreements. This

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(iv) performance of a concert version of a "dramatico-musical work" (as defined below).

The term "dramatico-musical work" as used in this Agreement, shall include, but not be limited to, a musical comedy, opera, play with music, revue, or ballet. *Id.*

<sup>205</sup> See *MasterCard Int'l Inc. v. Nader*, No. 00-6068, 2004 U.S. Dist. LEXIS 3644, at \*42–43 (S.D.N.Y. Mar. 8, 2004).

<sup>206</sup> *Id.*

<sup>207</sup> See generally *supra* text accompanying notes 5–32.

<sup>208</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ("[T]he task [of determining fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

can be as simple as a box that musicians can check or initial if they wish to exclude their musical catalog from blanket licenses sold to political campaigns. If the musician checks this box, her music cannot be sold for political use and, in turn, she will not receive royalties from any blanket licenses sold to political campaigns. Given the technological advancements embraced by PROs,<sup>209</sup> they could easily set up a system that tracks the musicians who opt-out, compiles a master list of songs political campaigns are not permitted to use under their licenses, and monitors whether those campaigns adhere to their licenses. If a campaign plays a song that is not covered under the campaign's blanket license, that artist can sue the campaign for copyright infringement or breach of contract. Checking the opt-out box does not prohibit artists from licensing their music to political campaigns, it simply defaults to a direct permission system in which politicians must ask musicians directly for permission to use their music.<sup>210</sup>

This solution contains one potential loophole in that it does not consider blanket licenses sold to large venues. Recall that if a political rally is held at a major public venue like an arena or convention center, politicians are protected by the venue's blanket license and may play any song licensed to the venue.<sup>211</sup> Since most venues purchase blanket licenses from multiple PROs, political campaigns may legally play virtually any song within the confines of the venue.<sup>212</sup> This means that, even if the musician opts to exclude her musical catalog from blanket licenses sold to political organizations, the political organization can still use her music at events held in arenas or convention centers. However, PROs can remove this loophole by altering their blanket licenses to include a special limitation for venues. This limitation can say: "All VENUE LICENSEES who license their business location to political organizations must prohibit the political organizations from playing songs excluded from political use, attached as Exhibit A." Exhibit A will be the master list of songs political

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<sup>209</sup> For a discussion of the ways in which PROs have harnessed new technology to improve their transactional infrastructure, see Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 20–21 (UC Berkeley Public Law Research Paper No. 1266890), <http://ssrn.com/abstract=1266870>.

<sup>210</sup> This is analogous to direct permission required for dramatic works.

<sup>211</sup> See Rothenberg, *supra* note 52, at 17.

<sup>212</sup> *Id.* at 41.

campaigns are not permitted to use. Under this new limitation, if a campaign plays a song exempted from political use, the PRO can sue to enforce the contract, and the artist can sue the venue for indirect copyright infringement<sup>213</sup> or breach of contract. This minor update will effectively disallow any political entity from sidestepping the limitations placed on political licenses.

## VII. CONCLUSION

The practice of playing popular songs at political rallies has grown to be a common feature of contemporary political campaigns. In a time where every detail of a political campaign is scrutinized by the public and press, artists fear negative association with politicians appropriate their work. Copyright law fails to remedy nonpermissive use because, by purchasing a blanket license from a PRO, political campaigns can legally play any song under contract by the PRO without infringing on an artist's copyright. Even if a political campaign does not purchase a blanket license, defendant-politicians have persuasive precedent under *Nader* to raise a fair use defense, which might protect their nonpermissive use through the life of their campaign. Federal trademark law fails as an effective remedy because false endorsement requires consumer confusion, a standard that plaintiff-musicians cannot meet because voters are not consumers and candidates are not goods that they purchase. State trademark law fails as an effective remedy because of the dramatic lack of uniformity concerning the scope and substance of the rights of publicity recognized by different states. Prior academic articles have proposed a solution under a modified moral rights doctrine, but the moral rights doctrine is strongly disfavored in the United States, violations of such rights are not clearly defined, and VARA

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<sup>213</sup> A defendant is guilty of indirect copyright infringement when he induces, controls, or contributes toward another's act of direct infringement. There are two types of indirect infringement: contributory infringement and vicarious liability. Contributory infringement requires the defendant: (1) have the right and ability to supervise or control the direct infringer; and (2) receive a direct financial benefit. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 919 (2005). Vicarious liability requires the defendant: (1) have knowledge of the infringement; and (2) induce or materially contribute to the infringement. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001).

allows artists to waive their moral rights via contract, which negates any protection the doctrine attempts to create.

One possible solution is for PROs to alter their blanket licenses to exempt political use, requiring political campaigns to receive direct permission from the artist before using her song. Another possible solution is for PROs to include a political-use opt-out in musicians' membership agreements whereby musicians may exclude their musical catalog from blanket licenses sold to political campaigns. No matter what solution is ultimately chosen to combat the issue of nonpermissive use, it should be implemented soon. With the 2020 presidential election on the horizon, the animosity between musicians and politicians is growing. Now is the time to clearly define the legal rights of musicians in the political arena.

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## KNOW WHEN TO FOLD 'EM: THE INTERNATIONAL EFFECTS OF *MURPHY V. NCAA* AND WHY ANTIGUA HOLDS THE CARDS

KATIE BERRY\*

### INTRODUCTION

The Gambler's Fallacy: the misconception that a certain random event is less likely or more likely, given a previous event or a series of events.<sup>1</sup> Often termed the "Monte Carlo fallacy," the Gambler's Fallacy has functioned to the benefit of a few, but to the detriment of many more.<sup>2</sup> Based purely on the maturity of chances, such logic seems rational, making the Gambler's Fallacy an easy trap for decision-makers across many contexts. Indeed, the misperception has been shown to negatively influence refugee asylum judges, loan officers, and baseball umpires.<sup>3</sup> Nonetheless, while the erroneous rationale is generally spoken of in unfavorable

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<sup>1</sup> Rachel Croson & James Sundali, *The Gambler's Fallacy and the Hot Hand: Empirical Data from Casinos*, 30 J. RISK UNCERTAINTY 195 (2005).

<sup>2</sup> See Esther Inglis-Arkell, *The Night the Gambler's Fallacy Lost People Millions*, GIZMODO (Jan. 8, 2014, 12:00PM), <https://io9.gizmodo.com/the-night-the-gamblers-fallacy-lost-people-millions-1496890660> (revisiting a 1913 roulette game that took place in the Monte Carlo Casino Hotel where the ball landed on black 26 times) ("The thought process was that the ball had fallen on black so many times that it had to fall on red sometime soon. Eventually, it did fall on red, but not until after 26 spins of the wheel, each of which saw a greater number of people pushing their chips over to red. The people who put money down on red for the 27th spin won money, of course, but even they lost much of their winnings because they believed that a long streak of black had to be followed by a long streak of red.").

<sup>3</sup> Daniel Chen & Tobias Moskowitz, *Decision-Making Under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires*, 131(3) Q. J. OF ECON. 1181, 1181–1241 (2016).

terms, is there a time that the fallacy could prove cogent? This article argues that the United States could benefit from the logic that an event is more likely to occur based on its lack of transpiration over time.

Indubitably, “Americans have never been one mind about gambling.”<sup>4</sup> However, the country’s past demonstrates a long history of discomfort with the concept of betting, especially within the domain of sports. Accordingly, the United States has integrated such concerns into the country’s legal scheme, both nationally and at the state level. Recently, however, the gambling landscape within the United States has evolved. With the advancement of gambling platforms, popularity of sports, ascension of fantasy leagues, and a recent ruling by the Supreme Court, sports gambling has largely become integrated within the country’s recreational culture. However, the effects of such a cultural lifestyle innovation are much broader in scope.

The much-discussed case of *Murphy v. NCAA* has obvious implications for domestic providers of sports gambling within states that legalize the activity. However, the international consequences of the decision have largely been ignored. In a 2003 World Trade Organization dispute, various international sovereigns complained that the lack of access to the United States’ gambling market constituted a stark violation of world trade obligations. The United States claimed morality as a defense and argued that the country’s general sentiment for gambling constituted a legitimate excuse for limiting market access. The United States won this battle, but lost the war on other grounds and has been subject to an annual judgment in favor of the claimants—an obligation with which the United States has refused to comply. Notwithstanding this aftermath, a changing of the tide within the country on the issue of gambling produces an important consideration. While a defense of public morality was a compelling argument at the time it was invoked, does this contention have any legitimacy in the United States of today?

This article argues that the United States should acknowledge its internal cultural evolution and accept its own transformation. On an international scale, this means taking action to prevent trade disputes from re-emerging. The country must look to its past and employ the Gambler’s Fallacy. Nearly two decades have passed since the United States has justified its international policy on gambling by pointing to public morality. Yet, this span

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<sup>4</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1468 (2018).



of time without international intervention should be scrutinized by the United States with the “maturity of chances” to become wary that tranquility is near its end. Accordingly, the article takes a proactive approach to international relations and politics in the trading of gambling services.

This article begins by reflecting on the United States’ journey to recognizing states’ rights to control betting legislation within their own borders. In Section II, the article provides a brief overview of trade in services on an international level by discussing the General Agreement on the Trade in Services and some of its key features such as the Most Favored Nation concept, general exceptions to trade obligations, and in particular, the “public morals” defense. The article discusses specific commitments within Member Schedules and turns to the most significant dispute dealing with commitments: U.S. – Gambling Services. Section III ties Sections I and II together by considering what effect the legalization of sports gambling has on the international marketplace and whether we will see the re-emergence of the arguments cast at the United States pertaining to certain federal provisions such as the Wire Act. This article concludes by arguing that *Murphy v. NCAA* invalidates the latitude afforded to the United States to violate trade obligations under the General Agreement on the Trade in Services because the nation no longer shares the view that sports gambling stands in utter contrast to the ideals of its people.

## I. SPORTS GAMBLING

### A. HISTORY OF SPORTS BETTING

The first horse-racing track in America was established in 1665 in Long Island, New York.<sup>5</sup> Prior to the Revolutionary War, colonists continued to exercise cultural staples from the homeland, and one of the most prominent was that of horse racing.<sup>6</sup> By 1868, the American Stud Book—a catalogue of

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<sup>5</sup> *There Used to Be a New York Racetrack There: But Where Was It?*, ALB. L. 1 (last visited Apr. 20, 2019), [https://www.albanylaw.edu/media/user/glc/racing\\_gaming/there\\_used\\_to\\_be\\_a\\_racetrack\\_but\\_where11.pdf](https://www.albanylaw.edu/media/user/glc/racing_gaming/there_used_to_be_a_racetrack_but_where11.pdf).

<sup>6</sup> John Eisenberg, *Off to the Races*, SMITHSONIAN MAGAZINE (Aug. 2004), <https://www.smithsonianmag.com/history/off-to-the-races-2266179/#ci2c3vEcUrBSkpbJ.99> (“In wealthy Annapolis, [Maryland], whose inhabitants, it was said, were more British than the

American thoroughbreds—was published, which led to the development of horse racing into a much more “organized enterprise” in the United States.<sup>7</sup> But by the early 1900s, gambling was largely outlawed throughout the country.<sup>8</sup> While many point to the financial climate in the early 1900s as the primary reason for the increasing social distaste<sup>9</sup> of sports betting, the economy was the very cause of its resurrection years later.<sup>10</sup> The country turned to stakes and odds to increase the nation’s revenue—an act

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British, the highlight of the social season was a week of parties and plays organized around a racing meeting.”).

<sup>7</sup> Richard Johnson, *The Centuries-Old History of How Sports Betting Became Illegal in the United States in the First Place*, SB NATION (May 18, 2018), <https://www.sbnation.com/2018/5/18/17353994/sports-betting-illegal-united-states-why>.

<sup>8</sup> NAT’L GAMBLING IMPACT STUDY COMM’N, NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT 2-1 (1999); STEVE DURHAM & KATHRYN HASHIMOTO, *THE HISTORY OF GAMBLING IN AMERICA* 34–35 (2010); *The History of Sports Betting Legislation in the USA (Part 1)*, SPORTS BETTING DIME (last updated Aug. 3, 2018), <https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-i/> (“The sudden change in attitude towards gambling was also related to the broader economic climate in the United States, directly related to the Panic of 1910-1911 (which resulted in an economic downturn). During this era of populism, many developed a strong distaste for activities associated with the super-rich, including horse racing.”).

<sup>9</sup> During the 1919 World Series, eight members of the White Sox were charged with intentionally losing the series to the Cincinnati Reds. *The History of Sports Betting Legislation in the USA (Part 1)*, *supra* note 8. They were incentivized to do so by noted mobster Arnold Rothstein’s sports betting syndicate. *Id.* The significance of this event soured Major League Baseball on anything to do with sports betting and established a precedent that betting on professional sports compromised the integrity of the sports themselves. *Id.*

<sup>10</sup> In 1941, Nevada legalized sports betting in hopes of increasing its tourism industry. *Gambling in America—An Overview-Historical Review*, LIB. INDEX, <https://www.libraryindex.com/pages/1560/Gambling-in-America-An-Overview-HISTORICAL-REVIEW.html> (last visited Apr. 20, 2019). Notably, “Nevada’s divorce laws were also changed in the early 1930s to allow the granting of a divorce after only six weeks of residency. People from other states temporarily moved into small motels and inns in Nevada to satisfy the residency requirement.” *Id.*

of desperation that commenced one of the most profitable, yet controversial industries in American history.<sup>11</sup>

In 1931, in hopes of boosting its economy, Nevada passed the Wide Opening Gambling Bill and issued the first set of gambling licenses.<sup>12</sup> However, when Prohibition ended in 1933, organized crime families became heavily involved in the legal gambling industry.<sup>13</sup> In 1949, Nevada legalized sports betting, attracting slews of people and businesses, including infamous mobster Bugsy Siegel, who helped finance the Las Vegas Strip.<sup>14</sup> Foul play continued to dominate the industry into the ‘60s, when United States Attorney General Robert F. Kennedy saw a need for change. Kennedy acted as a catalyst for a collection of laws still effective today. The congressional attempt to rein in organized crime’s involvement in illegal gambling produced what is today known as the Federal Wire Act (1961), the Travel Act of 1961, the Interstate Transportation of Paraphernalia Act of 1961, the Sports Bribery Act of 1964, and the Illegal Gambling Business Act of 1970.<sup>15</sup>

Despite the legislature’s attempt to suppress gambling’s rapid expansion within the United States, the consensus on betting was hardly uniform. Indeed, many held the view shared by the Commission on the Review of the National Policy Toward Gambling:<sup>16</sup> “Gambling is inevitable. No matter what is said or

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<sup>11</sup> The American Gaming Association (“AGA”) estimates at least \$150 billion a year is gambled on sports in the U.S. and 97% of that amount was bet illegally. A.J. Perez, *What It Means: Supreme Court Strikes Down PASPA Law that Limited Sports Betting*, USA TODAY (May 14, 2018, 10:34 AM), <https://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/>.

<sup>12</sup> See *Gambling in America—An Overview-Historical Review*, *supra* note 10 (noting the state’s sparse population and lack of natural resources).

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

<sup>14</sup> Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTS HANDLE (Nov. 13, 2017), <https://sportshandle.com/gambling-laws-legislation-united-states-history/>.

<sup>15</sup> *Id.*

<sup>16</sup> The Commission on the Review of the National Policy Toward Gambling was created by Congress in the Organized Crime Control Act of 1970 (P.L. 91-452). UNITED STATES COMMISSION ON

done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.”<sup>17</sup> The Commission specifically addressed sports betting by calling into question the fears expressed by professional sporting leagues, considering the substantial flow of revenue already generated from illegal wagering.<sup>18</sup> However, 1989 set the scene for governmental interference when Pete Rose, “one of the most prominent players in Major League Baseball, was banned from the sport for wagering on baseball games that he participated in.”<sup>19</sup>

In response to a series of betting scandals, Congress looked “to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime.”<sup>20</sup> In 1992, the

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THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING X (1976). Its mission was to study gambling as it exists in America and to develop recommendations for the States to follow in formulating their own gambling policies. *Id.* In its 3 years of operation, the Commission staff collected, reviewed, and summarized all available material on gambling. *Id.*

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 178.

<sup>19</sup> Justin Willis McKithen, *Playing Favorites: Congress's Denial of Equal Sovereignty to the States in the Professional and Amateur Sports Protection Act*, 49 GA. L. REV. 539, 565 (2015). Other events included a “scheme to shave points by Boston College basketball players [where] Henry Hill informed federal prosecutors that he worked with several players to shave points in nine games during the 1978–79 season. A few years later, in 1985, three Tulane University basketball players were indicted in a point-shaving case. A prominent 1986 Sports Illustrated article exemplified the growing feelings of those who saw gambling as a plague on sports: ‘[N]othing has done more to despoil the games Americans play and watch than widespread gambling on them. As fans cheer their bets rather than their favorite teams, dark clouds of cynicism and suspicion hang over games, and the possibility of fixes is always in the air.’” Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 29 (2016) (quoting John Underwood, *The Biggest Game in Town*, SPORTS ILLUSTRATED (Mar. 10, 1986), <https://www.si.com/vault/1986/03/10/638301/the-biggest-game-in-town>).

<sup>20</sup> S. REP. NO. 102-248, at 4 (1991).

legislature enacted the Professional Amateur Sports Protection Act (“PASPA”) which made prohibited individuals and states to “sponsor, operate, advertise, promote, license, or authorize . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games.”<sup>21</sup> PASPA also granted professional and amateur organizations the authority to sue to ensure PASPA’s enforcement.<sup>22</sup> The primary motivations for passing the bill were to protect the integrity and character of sports, shield the country’s youth from an addictive and dangerous activity, and restrict the growth of state authorized sports betting.<sup>23</sup> An effort that, while noble, can now be chalked up as done in vain.<sup>24</sup>

PASPA saw few legal challenges until two decades later, when some began to challenge its constitutionality.<sup>25</sup> Arguments that the law violated the Commerce Clause, the Tenth Amendment’s anti-commandeering principle, and the equal sovereignty principle, all fell on deaf ears.<sup>26</sup> Nonetheless, New Jersey, relentless in its attempt to circumvent PASPA’s scope, boost its economy, and “stanch the sports-wagering black market flourishing within [its] borders,” passed a series of laws that would soon alter the legal landscape of the country and destroy the eroding barricade to sports gambling in America.<sup>27</sup>

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<sup>21</sup> 28 U.S.C. § 3702 (1992).

<sup>22</sup> 28 U.S.C. § 3703 (1992).

<sup>23</sup> See Fielkow, *supra* note 19, at 30 (citing S. REP. NO. 102-248, at 5).

<sup>24</sup> “Despite PASPA’s existence, the American Gaming Association (AGA) estimates at least \$150 billion a year is gambled on sports in the U.S. and 97% of that amount was bet illegally.” Perez, *supra* note 11.

<sup>25</sup> See e.g., *OFC Comm Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009); *Interactive Media Entm’t & Gaming Ass’n, Inc. v. Holder*, No. CIV.A. 09-1301 GEB, 2011 WL 802106, at \*1 (D.N.J. Mar. 7, 2011).

<sup>26</sup> *But see Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 241–45 (3d Cir. 2013) (Vanaskie, J., dissenting in part) (disagreeing with the majority and finding a violation of the anti-commandeering principle).

<sup>27</sup> *Id.* at 217 (quoting Brief for Appellants Christopher J. Christie, David L. Rebutck & Frank Zanzuccki at 13, *Christie I*, 730 F.3d 208 (No. 13-1715), 2013 WL 1873966, at \*13).

## B. MURPHY v. NCAA

On the heels of the increasing demand and infatuation with betting, particularly in the arena of competitive sports, the United States attempted both a reactive and proactive approach with the enactment of PASPA.<sup>28</sup> The Act prohibited state sanctioned sports gambling, with various exceptions delineated for state-sponsored sports wagering already functioning to be grandfathered in.<sup>29</sup> The provision also specifically allowed any sports leagues involved in sports betting, at present or in the future, to bring suit to enjoin such activity.<sup>30</sup> The law largely stifled the national trend towards gambling liberalization and throughout its infancy was invoked sparingly.<sup>31</sup>

In 2011, the New Jersey Legislature held a non-binding referendum asking voters whether sports gambling should be permitted, and 64% voted in favor of legalizing it. In response, the New Jersey legislature expeditiously amended its constitution and developed the Sports Wagering Act (“2012 Act”).<sup>32</sup> The 2012 Act authorized certain regulated sports wagering at New Jersey casinos and racetracks and enacted an extensive regulatory scheme for licensing casinos and sporting events.<sup>33</sup> In 2014, former New Jersey Governor, Chris Christie, signed the bill into law.<sup>34</sup> Not surprisingly, all five major professional sports leagues<sup>35</sup> immediately sued to enjoin the commencement of New

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<sup>28</sup> 28 U.S.C. §§ 3701–3704 (1992).

<sup>29</sup> 28 U.S.C. § 3704 (1992).

<sup>30</sup> 28 U.S.C. § 3703 (1992).

<sup>31</sup> See *In re Petition of Casino Licensees*, 633 A.2d 1050 (N.J. Super. Ct. App. Div. 1993); *Flager v. U.S. Att’y for Dist. of N.J.*, No. CIV.A. 06-3699JAG, 2007 WL 2814657, at \*1 (D.N.J. Sept. 25, 2007).

<sup>32</sup> N.J. CONST. art. IV, § 7, ¶ 2 (D), (F) (2012).

<sup>33</sup> N.J. ADMIN. CODE §§ 13:69–1.1 (2012).

<sup>34</sup> SI WIRE, *N.J. Gov. Chris Christie Signs Law Allowing Sports Betting in New Jersey*, SPORTS ILLUSTRATED, (Oct. 17, 2014), <https://www.si.com/more-sports/2014/10/17/sports-betting-law-new-jersey-chris-christie>.

<sup>35</sup> The sports leagues were the National Collegiate Athletic Association (“NCAA”), National Football League (“NFL”), National Basketball Association (“NBA”), National Hockey League (“NHL”), and the Office of the Commissioner of Baseball, doing business as Major League Baseball (“MLB”, collectively, the “Leagues”). *Nat’l Collegiate Athletic Ass’n v. Christie*, No. CIV.A. 12-4947 MAS, 2012 WL 6698684 (D.N.J. Dec. 21, 2012), *aff’d sub nom.* *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013).

Jersey’s sports betting industry.<sup>36</sup> The result sent the New Jersey lawmakers back to the drawing board. They soon passed similar bill that stopped short of legalization and instead repealed casino regulations.<sup>37</sup> Much to the disappointment of the New Jersey revisionists, the result was the same, and the Third Circuit yet again shot down the state’s attempt at circumventing PASPA’s grip on the sports betting industry, holding that the new law (no less than the old law) violated PASPA by “authorizing sports gambling.”<sup>38</sup> However, New Jersey lawmakers were given a last chance when the Supreme Court granted certiorari to review the case in 2017.<sup>39</sup>

New Jersey reasserted the position it had taken all along—that PASPA violated the Tenth Amendment’s anti-commandeering principle.<sup>40</sup> In effect, the state argued that its lawmaking authority was compromised by PASPA’s prohibition on modifying or repealing laws prohibiting sports gambling.<sup>41</sup> Thus, New Jersey’s stance was that the provision was incompatible with the system of dual sovereignty embodied in the United States Constitution.<sup>42</sup> Alternatively, the NCAA, and the other major leagues (“Respondents”) distinguished the case from the Court’s previous anti-commandeering cases by arguing that “without an affirmative federal command to *do* something, . . . there can be no claim of commandeering.”<sup>43</sup>

As the case reached the Supreme Court, the contest turned on the interpretation of the term “authorization.”<sup>44</sup> PASPA

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

<sup>37</sup> N.J. STAT. ANN. §5:12A-7 (2014) (The bill effectually provided for tacit authorization of sports gambling).

<sup>38</sup> Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 832 F.3d 389 (3d Cir. 2016), *cert. granted sub nom.* N.J. Thoroughbred Horsemen’s Ass’n, Inc. v. Nat’l Collegiate Athletic Ass’n, 198 L.Ed.2d 754 (2017).

<sup>39</sup> *Cert. granted sub nom.* Christie v. Nat’l Collegiate Athletic Ass’n, 198 L.Ed.2d 754 (2017).

<sup>40</sup> See New York v. United States, 505 U. S. 144, 154 (1992).

<sup>41</sup> See Nat’l Collegiate Athletic Assn. v. Christie, 926 F. Supp. 2d 551, 561–62 (N.J. 2013).

<sup>42</sup> Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461 (2018).

<sup>43</sup> *Id.* at 1471 (quoting Nat’l Collegiate Athletic Ass’n. v. Christie, 926 F. Supp. 2d 551, 561–62 (N.J. 2013)).

<sup>44</sup> *Id.*

provided that no state could “authorize” betting or gambling on games involving amateur or professional athletes.<sup>45</sup> New Jersey argued that the anti-authorization provision required states to maintain their existing laws against sports gambling without alteration.<sup>46</sup> The state pointed out that one of the accepted meanings of the term ‘authorize’ is ‘permit.’<sup>47</sup> Therefore, New Jersey argued that “any state law that has the effect of permitting sports gambling, including a law totally or partially *repealing* a prior prohibition, amounts to an authorization.”<sup>48</sup> Accordingly, the 2014 Act that repealed certain laws prohibiting sports gambling effectually authorized sports gambling, resulting in a clear violation of PASPA.<sup>49</sup>

In contrast, Respondents, as well as the United States appearing as an *amicus*, argued that to “authorize” requires some sort of affirmative action, or “[t]o empower; to give a right or authority to act; to endow with authority.”<sup>50</sup> They argued that was what the 2014 Act did: “It empower[ed] a defined group of entities, and it endow[ed] them with the authority to conduct sports gambling operations.”<sup>51</sup> However, Respondents contended that PASPA does not outlaw a total repeal of gambling prohibitions.<sup>52</sup> Because the 2014 Act operated to repeal only certain sports gambling prohibitions, and not all, the Act *authorized* sports gambling in the areas where the regulations were removed.<sup>53</sup> “One would not ordinarily say that private conduct is ‘authorized by law’ simply because the government has not prohibited it.”<sup>54</sup> Thus, because a total repeal would pass muster under PASPA, the system of dual sovereignty stood intact.<sup>55</sup>

In a 7-2<sup>56</sup> decision, the Supreme Court issued an opinion that will forever change the sports gambling landscape in

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<sup>45</sup> 28 U.S.C. § 3702 (1992).

<sup>46</sup> *Murphy*, 138 S. Ct. at 1473.

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1474.

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

<sup>56</sup> Six justices signed onto the majority opinion, and Justice Breyer partially concurred in the judgment. *See id.* at 1488.



America. The Court refused to find a distinction between a full or partial repeal, and held that in either case, any repeal of law “authorizes” those schemes.<sup>57</sup> Thus, the 2014 Act “authorized” sports betting in violation of PASPA.<sup>58</sup> The Court also refused to adhere to the proposition that there was a difference between directing a state legislature to enact a new law and prohibiting a state legislature from such.<sup>59</sup> Accordingly, PASPA’s anti-authorization provision violated the anti-commandeering principle because it specifically mandated what a state could and could not do.

In closing, the Court expressly discussed the parties’ initial concerns and shaped the current American gambling landscape:

The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA “regulate [s] state governments’ regulation” of their citizens, *New York*, 505 U.S., at 166, 112 S. Ct. 2408, 120 L. Ed. 2d 120. The Constitution gives Congress no such power.<sup>60</sup>

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<sup>57</sup> *Id.* at 1475.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1478.

<sup>60</sup> *Id.* at 1484–85.

## II. INTERNATIONAL TRADE: THE GENERAL AGREEMENT ON TRADE IN SERVICES

### A. THE GATS AND TRADE IN SERVICES GENERALLY

The General Agreement on Trade and Services (“GATS”) governs trade in services among World Trade Organization (“WTO”) members and supplies principles that regulate specific commitments entered into by member countries.<sup>61</sup> Specifically, the GATS consists of the framework agreement—the Articles of the Agreement—and its Annexes.<sup>62</sup> Importantly, the GATS schedules of specific commitments and the lists of exemptions from most favored nation (“MFN”) treatment submitted by member governments are also included.<sup>63</sup>

Part I of the GATS explains the scope of the Agreement and states that the GATS applies to measures “affecting trade in services.”<sup>64</sup> Notably, there is some ambiguity in where the boundaries lie, as nearly all goods have a service component. However, Article I:3 expressly limits the scope of “services” to “any service in any sector except services supplied in the exercise of government authority.”<sup>65</sup> Nonetheless, a close look at this limitation also produces certainty as to what falls within the scope of the Agreement. Consequently, the full scope of “services” under the GATS remains unclear.

GATS Article I:2 explains “four modes of supply” for trade in services, which proves useful by distinguishing itself from trade in goods under the General Agreement on Tariffs and Trade (“GATT”):

- (a) ‘from the territory of one Member into the territory of another Member’ (cross-border supply);

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<sup>61</sup> *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Apr. 2, 2019).

<sup>62</sup> *Id.*

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

<sup>64</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

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

- (b) 'in the territory of one Member to the service consumer of any other Member' (consumption abroad);
- (c) 'by a service supplier of one Member, through the commercial presence in the territory of any other Member';
- (d) 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member' (presence of natural persons).<sup>66</sup>

As explained below, these modes of supply are of stark importance to member's commitments within their schedules.

While GATS pertains exclusively to services, it may operate in conjunction with the GATT when measures "involve a service relating to a particular good or a service supplied in conjunction with a particular good."<sup>67</sup> The Appellate Body has explained that the question of whether to apply the GATS or the GATT is to be determined on a case by case basis.<sup>68</sup> Yet, the interplay between the two Agreements does not end there; the GATT can be used as a tool of interpretation for provisions within the GATS that are similar or identical to those found within the GATT.<sup>69</sup> While these Agreements are not mutually exclusive, the GATS operates under the acknowledgement that services are conceptually more difficult to understand than goods.<sup>70</sup> Thus, the

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

<sup>67</sup> *Id.*

<sup>68</sup> Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 221, WTO Doc. WT/DS27 /AB/R (adopted Sept. 9, 1997); *see also* Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, ¶ 19, WTO Doc. WT/DS31/AB/R (adopted June 30, 1997).

<sup>69</sup> *See* Appellate Body Report, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) (noting that previous decisions under Article XX of the GATT were relevant for the analysis of the nearly identical provision located within in Article XIV of the GATS).

<sup>70</sup> *See* SIMON LESTER, BRYAN MERCURIO, ARWEL DAVIES & KARA LEITNER, *WORLD TRADE LAW WTO: TEXT, MATERIALS AND COMMENTARY* 691 (1st ed. 2008).

GATS utilizes the UN Central Product Classification system (“CPC”), which categorizes goods and services within groups and subgroups to describe all the goods and services that may be offered.<sup>71</sup> The list is exhaustive and the categories are mutually exclusive. Further, the CPC plays a crucial part in interpreting member schedules, their obligations, and the exception to such obligations within.<sup>72</sup>

## B. GENERAL OBLIGATIONS AND DISCIPLINES

### 1. Most Favored Nation and National Treatment

Part II of the GATS is entitled “General Obligations and Disciplines” and discusses important rules pertaining to the duties of member countries engaging in the trade for services.<sup>73</sup> Generally, under the WTO agreements, countries cannot treat their trading partners differently, resulting in any type of discrimination.<sup>74</sup> Accordingly, if a member country lowers customs duty rates for another member’s product,<sup>75</sup> the same has to be done for all other WTO members.<sup>76</sup> In international economic relations and politics, this concept is referred to as MFN status or treatment.<sup>77</sup> However, exceptions to this general rule are often exercised—for example, in free trade agreements.<sup>78</sup> Alternatively, developing countries<sup>79</sup> may receive favorable

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> GATS, *supra* note 64, at 286.

<sup>74</sup> *Principles of the Trading System*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Apr. 3, 2019).

<sup>75</sup> “Product” covers goods under the GATT. *Id.*

<sup>76</sup> *Id.*

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

<sup>78</sup> See Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services*, 19 HOUS. J. INT’L L. 95 (1996).

<sup>79</sup> See LESTER, *supra* note 70, at 878 (noting that the WTO has declared that a country’s status as a developing country be self-proclaimed but other Members can challenge this status). But see Barker, *supra* note 78 (explaining that “least developed countries” are distinct from developing countries and are confined to a UN list so there is no controversy regarding who meets such a qualification). The term “developing country” is frequently used to refer to both statuses.

treatment in order to grow and expand their own domestic economy.<sup>80</sup> Members also exercise exceptions for purposes such as regional integration.<sup>81</sup> For example, the United States may mainstream securities reporting requirements for Canadian small businesses, but not small businesses from other countries. Further, member countries may choose to provide favorable treatment due to “Friendship, Commerce and Navigation or investment treaties.”<sup>82</sup>

Along the same vein is the WTO concept that foreign providers of a product must all be subject to the same treatment as domestic providers of the same product. This WTO principle is called “National Treatment.”<sup>83</sup> In contrast to MFN, this concept only applies once the foreign products have entered the market of the importing member. Accordingly, charging a customs duty on the same import that may result in higher costs to the exporting member is not a violation of National Treatment. National Treatment is a general obligation of the GATT and the Agreement of Trade-Related Aspects of Intellectual Property Rights (“TRIPS”),<sup>84</sup> while the GATS only applies National Treatment rules when a commitment has been made.<sup>85</sup>

## 2. *General Exceptions: Article XIV*

Part II of the GATS contains exceptions to its default rules and “permits Members in specified circumstances to introduce or maintain measures in contravention of their obligations under the Agreement, including the MFN requirement or specific commitments.”<sup>86</sup> Among such exceptions are Article V (Economic Integration), Article XII (Restrictions to Safeguard the Balance of Payments), Article XIV (General Exceptions), and Article XIV *bis* (Security Exceptions).<sup>87</sup>

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<sup>80</sup> *Principles of the Trading System*, *supra* note 74.

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The Agreement on Trade Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

<sup>85</sup> See LESTER, *supra* note 70, at 706.

<sup>86</sup> *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, *supra* note 61.

<sup>87</sup> GATS, *supra* note 64, at 228, 293, 294–95.

Perhaps the most powerful exception provision to the GATS is Article XIV. The general exceptions enumerated within Article XIV safeguard measures implemented by member nations that preserve ideals the member nations may deem important. Specifically, a portion of the Article states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health; . . .
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - (iii) safety;<sup>88</sup>

As noted in Section II.A., the GATT and GATS contain similar and sometimes identical provisions that allow the dispute settlement body of the WTO to utilize decisions founded under one when formulating decisions under the other. Accordingly, the Appellate Body has done just this by analogizing Article XIV to

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<sup>88</sup> *Id.* at 294; *see also* General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 194 (containing nearly identical language and applying such language to the trade in goods).

previous decisions under Article XX.<sup>89</sup> After a member state shows *prima facie* that a trade obligation has been violated, the exceptions clauses in the GATT and GATS are invoked as a defense by the respondent member state.<sup>90</sup> The WTO has provided a two-tiered approach that must be satisfied in order for an Article XIV exception to be invoked by a member acting inconsistently with its obligations under the GATS.<sup>91</sup> First, a panel should look at the challenged measure and determine whether it falls within the scope of one of the particular interests identified in the Article and if there is a sufficient linkage between the challenged measure and the interest.<sup>92</sup> The required connection between the measure and the interest is determined by the language in the Article. Specifically, the measure must be “relating to” or “necessary” to the preservation of the member’s identified interest.<sup>93</sup> Second, if the first tier is satisfied, a panel must assess whether the chapeau<sup>94</sup> of the Article has been met.<sup>95</sup> The chapeau requires a panel look at the application of a “measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the

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<sup>89</sup> Appellate Body Report, *supra* note 69, at ¶ 292; *see, e.g.*, General Agreement on Tariffs and Trade art. XX ¶ (a), (b), (d) Oct. 30, 1947, 55 U.N.T.S. 194:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

<sup>90</sup> Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802, 808 (2006).

<sup>91</sup> Appellate Body Report, *supra* note 69, ¶ 292.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> A term often used in reference to the “introductory clause” of a provision. Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 7.586, WTO Doc. WT/DSS453/R (Sept. 30, 2015) (adopted as modified May 9, 2016).

<sup>95</sup> *Id.*

paragraphs of Article XIV.”<sup>96</sup> “[W]hether a measure is *applied* in a particular manner can most often be discerned from the design, the architecture, and the revealing structure of a measure.”<sup>97</sup>

To illustrate, in *EC-Seals*, both the panel and the Appellate Body found the European Union’s prohibition on the importation and marketing of seal products to be “necessary to protect public morals.”<sup>98</sup> However, the Appellate Body deemed an exception from the general ban for products of traditional indigenous hunting to be a violation of the chapeau. Specifically, the Appellate Body pointed to the “inconsistency in the measure, and that “Europe could have done more to facilitate access of Canadian Inuit to the exception.”<sup>99</sup> In sum, the Appellate Body “focus[ed] on the cause of the discrimination,” or the rationale put forward to explain its existence and determined that the EU failed to “sufficiently explain[] how the manner in which the EU Seal Regime treats IC hunts as compared to ‘commercial’ hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.”<sup>100</sup>

Undoubtedly, the general exceptions found within Article XIV of the GATS and Article XX of the GATT supply members significant flexibility to regulate domestic matters that may go against core WTO mandates. The drafters of the GATT felt that each member’s national policies were important and were not to be considered subservient to international trade management.<sup>101</sup> Indeed, *EC-Seals* illustrates a panel and an Appellate Body

<sup>96</sup> Appellate Body Report, *supra* note 69, ¶ 339.

<sup>97</sup> Panel Report, *supra* note 94 ¶ 7.748 (quoting Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.302, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (adopted June 18, 2014) [hereinafter Appellate Body Report, *EC—Seal Products*]).

<sup>98</sup> *Id.* Such a general exception to WTO obligations functions under both the GATT and the GATS. Appellate Body Report, *US—Gambling*, *supra* note 69.

<sup>99</sup> Rob Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO’s Appellate Body Report in EC—Seal Products*, 18 AM. SOC’Y INT. L. (June 4, 2014), [https://edisciplinas.usp.br/pluginfile.php/1127881/mod\\_resource/content/1/EC%20Seal%204.pdf](https://edisciplinas.usp.br/pluginfile.php/1127881/mod_resource/content/1/EC%20Seal%204.pdf) (summarizing Appellate Body Report, *EC—Seal Products*).

<sup>100</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 97, ¶ 5.320.

<sup>101</sup> See LESTER, *supra* note 70, at 373.



respectfully acknowledging the EU's seal protectionist policies. While such a recognition by the drafters is admittedly noble, this acknowledgement has resulted in an exception based in so much subjectivity, many question whether the provision is a "way to disguise . . . intent so as to hide protectionist policies" in measures superficially intended to fall within one of the enumerated exceptions in the Articles.<sup>102</sup>

### 3. *Public Morals in Depth*

A glaring consequence of Article XIV is that the provision "could be used as a catch-all justification for all sorts of protectionist measures, given that WTO Members have (as *EC Seal Products* confirms) fairly wide latitude to define and apply for themselves the concept of public morals according to their own systems and scales of values."<sup>103</sup> Furthermore, the public morals exception enumerated in sub-paragraph (a) of Article XIV effectually operates as a catch all provision for general exceptions, as any of the subsequent listed policy goals could arguably be classified as "necessary to protect public morals."<sup>104</sup> For example, with technological development, the distinction between health, environment, and morality has become unclear.<sup>105</sup> In *EC-Hormones*, the EU banned the importation of hormone-treated beef in part as an attempt to preserve traditional European farming and food production methods, a policy akin to public morality.<sup>106</sup> Similarly, in a separate dispute, the EU adopted intense regulatory measures to control the marking of agricultural biotechnology due to concerns about health and environmental risks as well as religious and ethical considerations.<sup>107</sup>

Not only are the classifications within Article XIV hard to distinguish, the employment of GATS Article XIV(a) and GATT Article XX(a) themselves often seems to be a rigid

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<sup>102</sup> *Id.* at 374.

<sup>103</sup> See Howse, *supra* note 99 at 3.

<sup>104</sup> See LESTER, *supra* note 70, at 386.

<sup>105</sup> Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 2, 158, WTO Doc. WT/DS26/AB/R-WT/DS48/AB/R (Jan. 16, 1998) (finding European prohibition on import of beef treated with growth hormones to violate SPS Agreement).

<sup>106</sup> Marwell, *supra* note 90.

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

observance of formality. “Conceivably, any law passed by a representative government prohibiting any behaviour could be considered a social judgement of what is right or wrong conduct and therefore framed as a public moral issue.”<sup>108</sup> Notably, the public morals exception has been a part of the multilateral trading system since 1947, but the provision has only been invoked in three WTO disputes.<sup>109</sup> Some commentators believe this to be the result of members’ hesitancy to “override objective trade rules with something as subjective as ‘public morals.’”<sup>110</sup> Regardless of the reason the exception has so infrequently been invoked, the aforementioned rationale carries weight. The cases of *U.S.-Gambling Services*, *EC-Seal Products*, and *China-Audiovisuals* demonstrate what great latitude members are afforded in their assessment of public concern.<sup>111</sup> In all three cases, the panels or appellate bodies seem to operate under the conviction that “the content of [public morals] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”<sup>112</sup> Accordingly, the regulation of gambling services, seal products, and certain publications and audiovisual entertainment products constituted matters of public concern in the eyes of the dispute settlement bodies.

Amid 168 WTO member countries, “public morals” could have vastly different meanings and could apply to “anything from religious views on drinking alcohol or eating certain foods to cultural attitudes toward pornography, free expression, human rights, labor norms, women’s rights, or general cultural judgments

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<sup>108</sup> Ming Du, *Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization*, 50 J. OF WORLD TRADE 675, 694 (2016) (referencing Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INTL. L. 689, 731 (1998)).

<sup>109</sup> See Brendan McGivern, Commentary, *The WTO Seal Products Panel—The “Public Morals” Defense*, 9 GLOB. TRADE & CUSTOMS J. 70 (2014).

<sup>110</sup> THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 441 (Kern Alexander & Mads Andreas eds., 2008).

<sup>111</sup> See generally McGivern, *supra* note 109.

<sup>112</sup> Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 66.461, WT/D238/R (Nov. 10, 2004).

about education or social welfare.”<sup>113</sup> Indeed, many states impose trade restrictions on the basis of public morality despite a lack of consensus amongst the international trading community at large.<sup>114</sup> Accordingly, the preservation of national autonomy and the WTO’s approach to what constitutes “public morals” proves problematic in nature, especially when a morality argument bleeds into trade commitments.

### C. SPECIFIC COMMITMENTS AND MARKET ACCESS

Part III of the GATS deals with the specific commitments made among and between member countries. Three types of commitments are made under this section of the GATS: market access commitments, National Treatment, and additional commitments.<sup>115</sup> A commitment is discretionary under the GATS and is the result of negotiations between member countries. As noted in Section II.A, specific commitments are listed in members’ schedules and are either made horizontally or for exclusively distinct sectors. In either case, a schedule will contain “which commitments have been made for each mode of supply”<sup>116</sup> in relation to market access, national treatment, and any additional [categories of] commitments.”<sup>117</sup>

Specifically, the schedule works as follows. The four modes of supply are numbered one to four, listed at the top of a schedule, and are then inserted in the columns for the three commitments: market access, national treatment, and additional commitments.<sup>118</sup> This indicates the commitment for each mode of supply. Generally, three types of entries are found in member schedules: none, unbound, and partial commitments. “None” denotes a full commitment, or said another way, no limitations on treatment or access. “Unbound” means no commitment exists, and thus, no member duties with respect to that mode of supply and

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<sup>113</sup> Marwell, *supra* note 90, at 815.

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

<sup>115</sup> GATS, *supra* note 64, art. XX.

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

<sup>117</sup> See LESTER, *supra* note 70, at 706.

<sup>118</sup> See *Guide to Reading the GATS Schedule of Specific Commitments and the List of Article II (MFN) Exemptions*, WORLD TRADE ORG.,

[https://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm) (last visited Mar. 24, 2019).

particular type of commitment for that sector. A partial commitment is specifically explained in the schedule.

To illustrate with market access commitments, if a schedule denotes “None” for “Cross-Border Supply” of a particular sector, that member state has made a full commitment to this mode and must not implement any Article XVI:2<sup>119</sup> measures relating to cross-border modes of supply. While such an example may seem relatively straightforward, “market access” is used in many contexts, with different meanings within the GATS. Similarly, defining “National Treatment” is difficult, as its scope

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<sup>119</sup> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

GATS, *supra* note 64, art. XVI.

under the GATS is complex.<sup>120</sup> National Treatment commitments pertain to foreign services and service providers in comparison to domestic services and service providers. Again, taking the example of cross border supply, listing “None” in the schedule means that the member will not treat foreign services or service suppliers utilizing the mode of cross border supply less favorably than ‘like’ domestic services or service providers.<sup>121</sup>

Article XVI gives “market access” some substance but provides no general definition. Similarly, “National Treatment” under Article XVII has been subject to inconsistent and unclear explanations in case law. Accordingly, interpretation of specific terms within Article XVI can be complicated. For example, does “in the form of numerical quotas” found in Article XVI:2(c)<sup>122</sup> encapsulate a complete ban on a certain method of service supply even though technically, no numerical value is specified? Such was the question in one of the most well-known world trade disputes to date.<sup>123</sup> The answer—as this article will illustrate—has present day and far-reaching implications.

#### D. U.S. - GAMBLING SERVICES

##### 1. The Facts

In 1998, the increasing consumer demand for sports, gambling, and the interplay between the two, along with the rapid growth of technological platforms and access, spurred the United States to take action against foreign-based internet betting parlors.<sup>124</sup> Federal prosecutors charged twenty-one U.S. citizens with violations of the Wire Act, including Jay Cohen, an American citizen who had been operating the Antigua-based

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<sup>120</sup> See LESTER, *supra* note 70, at 708.

<sup>121</sup> *Id.*

<sup>122</sup> Appellate Body Report, *supra* note 69, ¶ 216.

<sup>123</sup> See Samantha Beckett, *Antigua Rallies Non-aligned Countries in Online Gambling Battle with America*, CASINO.ORG (Sept. 21, 2016), <https://www.casino.org/news/antigua-rallies-against-online-gambling-america> (noting that the case, *U.S.—Gambling*, is now famous in the annals of international trade law and about which scholarly books have been written).

<sup>124</sup> See Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, 2 J. INT. COMM. & ECON. 128, 129 (2009).

World Sports Exchange.<sup>125</sup> “Twenty of the indicted persons entered guilty pleas, had their cases dropped, or remained outside the United States as fugitives, but Cohen returned to the United States to contest his case in court.”<sup>126</sup>

On March 27, 2003, Antigua and Barbuda requested formal consultations with the United States and the WTO calling into question the United States’ cross-border gambling ban.<sup>127</sup> Notably, the request to consult was presented at a time in which an Antiguan industry that once employed 4,000 people, and generated around \$3.4 billion annually in revenues, had dwindled to a mere 300 to 400 jobs.<sup>128</sup> Antigua asserted that the country’s economic crisis was, in part, directly related to the decision of the United States Court of Appeals for the Second Circuit against former Antiguan resident and bookmaker Jay Cohen.<sup>129</sup> Ultimately, Antigua argued that both state and federal provisions that outlawed cross-border gambling and betting services violated the GATS.<sup>130</sup>

## 2. Specific Commitments and Quantitative Restrictions

The WTO’s Dispute Settlement Body established a panel at its meeting on July 21, 2003.<sup>131</sup> Subsequently, Canada, the EC,

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (Attorney Mark Mendel of El Paso, Texas informed Antigua of what he believed to be the United States in violation of the GATS. Antigua subsequently hired Mendel to initiate resolution of the dispute at the World Trade Organization).

<sup>127</sup> Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1, S/L/110, (Mar. 27, 2003).

<sup>128</sup> Ann M. Simmons, *Why Hurricane-Ravaged Barbuda Desperately Wants to Resolve a Dispute Over U.S. Online Gambling*, L.A. TIMES (Oct. 9, 2017), <http://www.latimes.com/world/la-fg-global-antigua-us-trade-2017-story.html>.

<sup>129</sup> See *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001).

<sup>130</sup> Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/1 (Mar. 13, 2003).

<sup>131</sup> Constitution of the Panel Established at the Request of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/3, (Aug. 26, 2003).

Mexico, Chinese Taipei, and Japan reserved third-party rights.<sup>132</sup> Collectively, the parties claimed:

[I]n maintaining measures that prohibit cross-border supply of gambling and betting services, the United States [was] maintaining quantitative limitations that [fell] within the scope of subparagraphs (a) and (c) of Article XVI and that [were] therefore, inconsistent with the market access commitment undertaken in subsection 10.D (titled ‘Other Recreational Services (except sporting)’ of the United States’ Schedule.<sup>133</sup>

Ultimately, the United States had undertaken to provide full market access for “Other Recreational Services” by entering “None” for mode 1 supply in the market access column.<sup>134</sup> However, United States law largely prohibited the ability of companies to provide “remote” gambling and betting services to citizens within its borders.<sup>135</sup>

The panel decided that the ban<sup>136</sup> on the supply of gambling and betting services “effectually ‘limit[ed] to zero’ the number of service suppliers and the number of service operations relating to that service.”<sup>137</sup> Thus, such an effect operated as a

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

<sup>133</sup> Appellate Body Report, *supra* note 69, ¶ 216.

<sup>134</sup> *Id.* ¶ 138.

<sup>135</sup> *Id.* ¶ 259.

<sup>136</sup> The Panel found that the following measures violated Article XVI of the GATS:

- (i) Federal Laws
  - a. The Wire Act
  - b. The Travel Act (when read with state laws)
  - c. The Illegal Gambling Business Act
- (ii) State laws:
  - a. Louisiana: Section 14:90.3 of the Louisiana Revised Statutes
  - b. Massachusetts: Section 17A of chapter 271 of the Annotated Law of Massachusetts.
  - c. South Dakota: Section 22-25A-8 of the South Dakota Codified Laws; and
  - d. Utah: Section 76-10-1102(b) of the Utah Code.

Appellate Body Report, *supra* note 69, ¶ 217.

<sup>137</sup> *Id.* ¶ 216.

“zero quota” and a “limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a),” as well as a “limitation on the total number of service operation or on the total quantity of service output . . . in the form of quotas within the meaning of Article XVI:2(c).”<sup>138</sup>

### 3. *The United States Asserts Art. XIV as a Defense*

In response to the general claim before the panel that the prohibition on cross-border internet betting, among other remote forms of gambling, violated several GATS provisions, the United States invoked Article XIV(a) and (c) of the GATS in defense.<sup>139</sup> The United States argued:

[the] public order and public morals concerns should lead a panel to conclude that remote supply of gambling poses a grave threat to the maintenance of public order and the protection of public morals in the United States—certainly enough so to justify the maintenance and enforcement of origin-neutral restrictions on gambling such as those found in §§ 1084, 1952, and 1955.<sup>140</sup>

Ultimately, the United States explained that §§ 1084, 1952, and 1955 aided in the enforcement of state gambling laws and protected fundamentally important state policies relating to public health, safety, welfare, and the preservation of good order.<sup>141</sup> The United States claimed that “society’s interest in remaining free from crime, and organized crime in particular” was paramount.<sup>142</sup>

Generally, the panel and the Appellate Body reports established the following to determine whether the United States gambling measure fit the bill under an Article XIV(a) exception:

First, determine whether the issue, as a general category, falls within the scope of ‘public morality’ as defined textually and by reference to international state practice. Second, if the issue in general is considered a question of public

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<sup>138</sup> Panel Report, *supra* note 112.

<sup>139</sup> *Id.* ¶ 295.

<sup>140</sup> *Id.* ¶ 295.

<sup>141</sup> *Id.* ¶ 282.

<sup>142</sup> *Id.* ¶ 288.



morality, examine the specific measure in question to ensure that it is legitimately directed at that moral interest. Third, if the particular measure does address a matter of public morals, ensure that the measure is not more trade restrictive than necessary, weighing the morality interest of the regulating state against the interest of other WTO Member States in trade liberalization. Finally, ensure that the measure is not applied in a nondiscriminatory fashion.<sup>143</sup>

The panel utilized three small paragraphs and just as many footnotes to explain that a look at various international practices established that gambling could fall under the definition of “public morals” within Article XVI(a).<sup>144</sup> The panel then looked at the particular challenged United States measures in relation to “public morals,” and determined that that they were adequately designed to preserve these concerns.<sup>145</sup> Next, the panel utilized Appellate Body’s “weighing and balancing” test in order to determine whether the measures implemented by the United States were “necessary” to protect public morals.<sup>146</sup> The panel examined the importance of interests or values that the challenged measure was intended to protect, the extent to which the challenged measure contributed to the realization of the end pursued by that measure, and the trade impact of the challenged measure.<sup>147</sup> The panel then noted that the Appellate Body had suggested “if the value or interest pursued is considered important, it is more likely that the measure is “necessary.”<sup>148</sup>

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<sup>143</sup> Marwell, *supra* note 90, at 814.

<sup>144</sup> Panel Report, *supra* note 112 (noting that restrictions in Israel and the Philippines limited foreign ownership of gambling operations under a heading containing the word “morals”); *see also id.* at n. 914 (noting that the Economic Committee of the League of Nations and the European Court of Justice (ECJ) recognize gambling as a morality concern); *id.* (explaining that some jurisdictions have special legal frameworks for traditional as well as internet gambling).

<sup>145</sup> *See* Panel Report, *supra* note 112.

<sup>146</sup> *Id.* at 6.476.

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

<sup>148</sup> *Id.* at 6.477.

The panel put great emphasis on the historical backdrop of the federal provisions challenged by Antigua in order to determine whether the laws were “necessary” to preserve what the United States identified as concerns associated with remote gambling.<sup>149</sup> The panel pointed to the “Congressional statements identified . . . in paragraphs 6.482-6.485. . . that indicate[d] that these Acts [were] intended to protect society against the threat of money laundering, organized crime, fraud and risks to children (*i.e.*, underage gambling) and to health (*i.e.*, pathological gambling).”<sup>150</sup> Specifically, the report quotes Robert F. Kennedy stating that his program (which included the Wire Act and Travel Act) allowed the federal government to “take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety.”<sup>151</sup>

The panel conceded that the values protected by the United States laws served “very important societal interests” and

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<sup>149</sup> *Id.* at 6.478–6.521 (quoting a 1961 House of Representatives report on the Wire Act issued shortly before its entry into force stating that: “[t]he purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.”); *id.* (quoting *Hearing Before the S. Judiciary Comm. on the Attorney General’s Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess., 3 (1961) (statement of Robert Kennedy, Att’y Gen. of the United States) (“These [hoodlums and racketeers who have become so rich and so powerful] use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size. Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime, all throughout the country.”)).

<sup>150</sup> Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 6.489 WTO. Doc. WT/DS285/R (Nov. 10, 2004).

<sup>151</sup> *Hearing Before the S. Judiciary Comm. on the Attorney General’s Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess., 3 (1961) (statement of Robert Kennedy, Att’y Gen. of the United States).

even characterized such interests as “vital and important to the highest degree.”<sup>152</sup> However, the panel also cautiously noted that “these interests—to protect society against the threat of money laundering, organized crime, fraud and risks to children (*i.e.*, underage gambling) and health (*i.e.*, pathological gambling)—also exist in the context of the non-remote supply of gambling and betting services.”<sup>153</sup> Thus, the panel had to decide whether the measures were justified, “particularly in light of the tolerant attitude displayed in some parts of the United States to the non-remote supply of such services.”<sup>154</sup>

Antigua asserted that money laundering, fraud, and health are at least as grave a concern in relation to the supply of non-remote gambling and betting services as in the case of the remote supply of such services.<sup>155</sup> Nevertheless, the panel asserted that even though these concerns “may exist in the context of the non-remote supply of gambling and betting services,” this did not prohibit the United States from addressing “differently the aspects . . . that are specific to the remote supply of gambling and betting services.”<sup>156</sup>

The United States supported its money laundering concerns associated with remote gambling by asserting that “the remote supply of gambling and betting services is particularly well-suited to concealing and disguising the true nature, source and ownership of the ill-gotten gains of crime.”<sup>157</sup> Similarly, the United States argued fraud as a concern because “the barriers to establishing an online gambling operation are low so that unscrupulous operators can appear and disappear within minute.”<sup>158</sup> Moreover, “[h]ealth concerns in relation to the remote supply of gambling and betting services relate to the isolated environment in which gamblers may operate, which protects them from social stigma and enables them to gamble without interruption for extended periods of time.”<sup>159</sup> Further, the United

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<sup>152</sup> Panel Report, *supra* note 112, at 6.492.

<sup>153</sup> *Id.* at 6.493.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 6.505.

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

<sup>157</sup> *Id.* at 6.499.

<sup>158</sup> *Id.* at 3.17.

<sup>159</sup> *Id.* at 6.510.

States supported the argument by pointing to the fact that online gambling is always available to gamblers.<sup>160</sup> Finally, the United States explained that online gambling was a particular risk for children as “[i]nternet gambling businesses have no reliable way of confirming that gamblers on their website are not minors who have gained access to a credit card.”<sup>161</sup>

Notably, as the panel concluded its analysis, it declared that the United States’ concern of organized crime was insufficient as it pertained to remote gambling services because non-remote supply of gambling and betting services *was* permitted in much of the United States, even though it too gave rise to concerns with respect to organized crime.<sup>162</sup> Thus, the United States had identified certain concerns specific to the supply of remote gambling that could therefore not be compared to non-remote gambling. However, organized crime was not one of them.

In the end, the panel acknowledged the United States’ interests to be extremely important and substantially related to the preservation of public morality,<sup>163</sup> but ultimately that they also had a “significant restrictive trade impact.”<sup>164</sup> To the panel, this factor defeated the possibility that the United States’ provisions in dispute were necessary under Article XIV and consistent with the chapeau.<sup>165</sup>

#### 4. *The Appellate Body’s Findings and Orders*

On appeal, the Appellate Body agreed with the findings of the panel that certain United States federal statutes operated to violate Article XVI:2(a) and (c).<sup>166</sup> Further, the Appellate Body upheld the panel’s finding that the United States’ measures were designed “to protect public morals or to maintain public order” within the meaning of Article XIV(a).<sup>167</sup> However, it reversed the panel’s finding that the United States had not shown that its measures were “necessary” to do so because the panel had erred

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<sup>160</sup> *Id.* at 6.511.

<sup>161</sup> *Id.* at 6.516.

<sup>162</sup> *Id.* at 6.520 (emphasis added).

<sup>163</sup> *Id.* at 6.535.

<sup>164</sup> *Id.* at 6.495.

<sup>165</sup> *Id.* at 6.535 (emphasizing the United States’ failure to engage in negotiations with Antigua about less trade-restrictive alternatives to a total prohibition).

<sup>166</sup> Appellate Body Report, *supra* note 69, ¶ 265.

<sup>167</sup> *Id.* at 299.

in considering consultations with Antigua to constitute a “reasonably available” alternative measure.<sup>168</sup> Ultimately, the Appellate Body found that the measures were “necessary” because the United States had made a *prima facie* case showing of “necessity” and Antigua had failed to identify any other alternative measures that might be “reasonably available.”<sup>169</sup>

The Appellate Body reversed the panel’s finding that the measures did not meet the requirements of the chapeau because the United States had discriminated in the enforcement of those measures.<sup>170</sup> However, the Appellate Body upheld the second ground upon which the panel based its finding:

[N]amely that in the light of the Interstate Horseracing Act (which appeared to authorize domestic operators to engage in the remote supply of certain betting services), the United States had not demonstrated that its prohibitions on remote gambling applied to both foreign and domestic service suppliers, i.e. in a manner that did not constitute ‘arbitrary and unjustifiable discrimination’ within the meaning of the chapeau.<sup>171</sup>

The parties commenced consultations to decide what would constitute a reasonable for the United States to bring its measures into compliance, but resorted to arbitration after they were unable to agree.<sup>172</sup> In arbitration, “the Arbitrator determined that the ‘reasonable period of time’ for the United States to implement the recommendations and rulings of the DSB (“Dispute Settlement Body”) was 11 months and 2 weeks from 20 April 2005, which was the date on which the DSB adopted the

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<sup>168</sup> *Id.* at 321.

<sup>169</sup> *Id.* at 325–26.

<sup>170</sup> WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES, 118–19 (2017 ed.)  
[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds285sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285sum_e.pdf).

<sup>171</sup> *Id.*

<sup>172</sup> Article 21.3(c) Arbitration Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 2, WTO Doc. WT/DS285/13 (Aug. 19, 2005).

Panel and Appellate Body Reports.”<sup>173</sup> After the United States failed to meet such a deadline, Antigua requested an authorization to suspend the application to the United States of “concessions and related obligations” of Antigua under the GATS and the TRIPS Agreement, in an amount of an “annual value of US\$3.443 billion”, which it considered to “match the level of nullification or impairment of benefits accruing to Antigua and Barbuda.”<sup>174</sup> The arbitration panel reduced the award to \$21 million annually.<sup>175</sup> Notably, this sum was procured by looking at the United States horse gambling market and estimating the possible revenue Antigua could have attained through unrestricted market access.<sup>176</sup>

Despite the WTO’s ruling, the United States has refused to comply with the award.<sup>177</sup> Subsequently, the WTO authorized Antigua to lift payments on United States intellectual property, a circumvention to the standard copyright fees that would otherwise be owed.<sup>178</sup> Antigua never resorted to this recourse in hopes that the United States would eventually comply with the DSB orders.<sup>179</sup> In November 2016, the amount owed to Antigua was valued at over \$200 million.<sup>180</sup> In 2017, Antigua was devastated by Hurricane Irma and again asserted their right to recourse in hopes of funding the process or reparation to its people and infrastructure.<sup>181</sup> Finally, in June 2018, Antigua Ambassador Ronald Sanders remarked to the DSB that he was “losing all hope”

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<sup>173</sup> *Id.* at 68.

<sup>174</sup> Recourse to Article 22.6 Arbitration Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 2.3, WTO Doc. WT/DS285/ARB (Dec. 21, 2007).

<sup>175</sup> *Id.* at 6.1.

<sup>176</sup> *Id.* at 3.186. The Arbitrator noted that this number was likely influenced by the U.S. measures in question, so the figure was determined by looking to the “pari-mutuel net receipts in the non-remote gambling market from the Bureau of Economic Analysis statistics on consumption expenditures.” *Id.* at 3.187.

<sup>177</sup> Aaron Gray, *The Internet Age: Legislation in the Era of Online Sportsbooks (Part III)*, SBD (last updated Mar. 19, 2019), <https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-iii/>.

<sup>178</sup> *Id.*

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

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

that the United States would comply and that “Antigua and Barbuda is now contemplating, once again, approaching the (WTO) Director-General . . . to join in seeking a mediated solution that would bring much needed relief after these arduous 15 years of damage to our economy.”<sup>182</sup> Nevertheless, the United States may have inadvertently expedited such a settlement after *Murphy*.

### III. *MURPHY V. NCAA* AND THE INTERNATIONAL TRADE IMPLICATIONS

#### A. THE WIRE ACT STILL OPERATES TO MINIMIZE THE REALISTIC EFFECTS OF *MURPHY* BOTH WITHIN THE UNITED STATES AND ABROAD

##### 1. *Domestic Effects*

While PASPA was at issue in *Murphy*, the Court hinted at the possible reinterpretation of another crucial gambling prohibition, 18 U.S.C. § 1084 or the Wire Act. Indeed, in explaining the federal government’s general approach to gambling regulations, the Court referenced several federal laws, including the Illegal Gambling Business Act, the Interstate Transportation of Gambling Paraphernalia Act, and the Travel.<sup>183</sup> It cited these laws to juxtapose PASPA, which federally criminalized sports betting despite the underlying state law.<sup>184</sup> In contrast, the Court explained that the other provisions “implement a coherent federal policy” by requiring a predicate state offense.<sup>185</sup> This approach acts to “respect the policy choices of the people of each State on the controversial issue of gambling.”<sup>186</sup>

Despite the Court’s discussion of the American scheme, the Wire Act’s plain language offers a different interpretation. The pertinent portion of the provides:

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<sup>182</sup> Tom Miles, *Antigua “Losing All Hope” of U.S. Payout in Gambling Dispute*, REUTERS (June 22, 2018, 1:33 AM), <https://www.reuters.com/article/uk-usa-trade-antigua/antigua-losing-all-hope-of-u-s-payout-in-gambling-dispute-idUSKBN1JI0VZ>.

<sup>183</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1465–82 (2018).

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *Id.*

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility<sup>187</sup> for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>188</sup>

Subsection a of the Wire Act does not contain language clarifying its interrelation with a state prohibition operating in conjunction with it.<sup>189</sup> However, the Illegal Gambling Business Act,<sup>190</sup> the Interstate Transportation of Gambling Paraphernalia Act,<sup>191</sup> and the Travel Act<sup>192</sup> expressly require a predicate state offense for a violation to occur. Basic statutory interpretation has resulted in all federal courts have found that the Wire Act functions independently from state law, lacking the need for a predicate violation.<sup>193</sup> Thus, although *Murphy* allows for the legalization of sports betting within a state's own boundaries, the plain language of the Wire Act effectively still prevents cross-border wire communication related to gambling.

Subsection b of the Wire Act offers a safe harbor for information related to a bet or wager transmitted across state borders, so long as the jurisdictions in which the information was

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<sup>187</sup> Jeffrey Rodefer, *Federal Wire Wager Act*, GAMBLING LAW U.S., <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> (last visited Mar. 23, 2019).

<sup>188</sup> 18 U.S.C. § 1084(a).

<sup>189</sup> *Id.*

<sup>190</sup> 18 U.S.C. § 1955.

<sup>191</sup> 18 U.S.C. § 1953.

<sup>192</sup> 18 U.S.C. § 1952(a)(3) & (b)(1).

<sup>193</sup> See *United States v. McDonough*, 835 F.2d 1103, 1104 (5th Cir. 1988); *United States v. Corrar*, 512 F. Supp. 2d 1280, 1289 (N.D. Ga. 2007); *United States v. Kaczowski*, 114 F. Supp. 2d 143, 155 (W.D.N.Y. 2000) ("Conviction for violating 18 U.S.C. § 1084 does not depend on commission of a predicate state offense.").



both sent and received legalizes the underlying form of gambling.<sup>194</sup>

Noticeably, the language in § 1084(b) differs from that in § 1084(a) by only honing in on the transmission of *information*, leaving § 1084(a)’s prohibited activities, despite the underlying jurisdiction’s policies. Some commentators believe the safe harbor provision in § 1084(b) to be what the Court was addressing in its discussion of the Wire Act in *Murphy*.<sup>195</sup> Nonetheless, § 1084(a) remains, and its plain reading has resulted in one court conclusively deciding the very issue posed post-*Murphy*: when two states have legalized sports betting within their borders, the Wire Act still operates to criminalize such activity.<sup>196</sup>

Opponents of this view may cite the statute’s legislative history to assert the idea that the Wire Act’s purpose was, in fact, to reinforce various states’ anti-gambling stance.<sup>197</sup> Indeed, as the

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<sup>194</sup> “Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.” 18 U.S.C. § 1084(b).

<sup>195</sup> See Daniel Wallach, *Did the Supreme Court Reinterpret The Wire Act to Allow Cross-Border Internet Sports Betting?*, FORBES (July 8, 2018, 10:05 PM), <https://www.forbes.com/sites/danielwallach/2018/07/08/did-the-supreme-court-reinterpret-the-wire-act-to-allow-cross-border-internet-sports-betting/#3bcf902846c5> (quoting Gaming lawyer Mark Hichar, a fellow member of the International Masters of Gaming Law and a partner of the Hinckley Allen law firm).

<sup>196</sup> *United States v. Corrar*, 512 F. Supp. 2d 1280, 1289 (N.D. Ga. 2007) (“[E]ven if internet gambling were permissible under state law, using interstate wire communication facilities to promote it would not be. This is why the Wire Act, unlike the Travel Act and 18 U.S.C. § 1955, does not require an underlying violation of state law.”).

<sup>197</sup> See H.R.REP. NO. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631 (“The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.”).

Fifth Circuit explained, “[t]he legislative history [of the Wire Act] sets forth a dual purpose—to assist the various states in enforcing their gambling laws and to aid in the suppression of organized gambling activities . . . .”<sup>198</sup> However, the Fifth Circuit made clear that the legislature said what it meant in § 1084(b) and that § 1084(a) was to be construed differently: “Nothing in the exemption, however, will permit the transmission of bets and wagers . . . from or to any State *whether betting is legal in that State or not.*”<sup>199</sup>

In the end, the public has viewed *Murphy* as a huge win for the gambling sector within the United States, with each state now being at liberty to determine its own rules within its borders. However, little discussion has transpired regarding remaining limitations on sports betting. The Wire Act operates as a huge obstacle for the betting marketplace by prohibiting cross-border gambling among states. Perhaps more significant is the effect the Wire Act still has on the international gambling marketplace.

## 2. International Effects

It is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”<sup>200</sup> However, statutes may be given extraterritorial effect if the law itself allows, and Congress intends it.<sup>201</sup> The Wire Act (as well as the Travel Act and the Wagering Paraphernalia Act) expressly refers to foreign commerce, which is likely indicative of the congressional intent to extend the reach of these provisions beyond the United States’ borders.<sup>202</sup> Not surprisingly, some

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<sup>198</sup> *United States v. McDonough*, 835 F.2d 1103, 1104-05 (5th Cir. 1988) (quoting H.R.REP. NO. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631).

<sup>199</sup> *Id.* (quoting H.R. REP. NO. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631).

<sup>200</sup> *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

<sup>201</sup> *United States v. Noriega*, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990).

<sup>202</sup> Lawrence Walters, *The Long Arm of the Law—Can the UIGEA Be Applied to Candian Gaming Operations?*, WESTON, GARROU, WALTERS, AND MOONEY,

courts have held as much.<sup>203</sup> A First Circuit case, brought under the Wire Act with the question of whether the statute applies abroad, is on point.<sup>204</sup> The court explained that the Wire Act “explicitly applies to transmissions between the United States and a foreign country,” which evinces the congressional intent of extraterritoriality.<sup>205</sup> Thus, if communications giving rise to a Wire Act violation have “at least one participant inside the United States [the acts] fall within the statute’s scope.”<sup>206</sup>

Yet again, *Murphy*’s effective legalization of sports gambling creates the possibility of confusion, primarily among foreign enterprises wishing to legally take part in an extremely lucrative market within the United States. Specifically, because the Wire Act remains intact, and because the law operates abroad, foreign gambling enterprises remain precluded from accessing a booming market within the United States. The international trade implications of such a result are discussed *supra* Section III.C.

Further, the Wire Act’s safe harbor provision will not act as an escape device to foreign defendants despite the fact that sports betting is or will be legal in many states. Recall that the safe harbor section of the Wire Act (subsection b) precludes a violation of the Act (subsection a) from occurring if the transmission of information for the assistance of placing a sports bet travels both to and from a jurisdiction that permits the underlying form of gambling.<sup>207</sup> As the First Circuit illustrated, “if New York allows betting on horses at race tracks in New York, and if Nevada allows betting in Nevada on the results of New York horse races, then information may be wired from New York to Nevada to assist in

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<http://apps.americanbar.org/buslaw/committees/CL430000pub/newsletter/200905/chair-longarm.pdf> (last visited Apr. 23, 2019).

<sup>203</sup> *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001); *New York v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).

<sup>204</sup> *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014).

<sup>205</sup> *Id.* (citing *Pasquantino v. United States*, 544 U.S. 349, 371–72 (2005) (stating that “the wire fraud statute punishes frauds executed in ‘interstate or foreign commerce,’” and therefore can be applied extraterritorially because Congress did not have “only ‘domestic concerns in mind.’”)).

<sup>206</sup> *Id.*

<sup>207</sup> 18 U.S.C. § 1084(b).

the betting in Nevada without violating the statute.<sup>208</sup> As discussed *supra* Section III.A.i., and most notably, the safe harbor provision only applies to the transmission of *information* assisting in the placing of bets and does not exempt from liability the interstate transmission of *bets themselves*.<sup>209</sup>

Furthermore, the Wire Act is effectually more powerful as applied to foreign enterprises or businesses; the Act's legislative history indicates its scope to be narrow enough to encapsulate only those engaged in the business of wagering.<sup>210</sup> The Act's primary advocate, Attorney General Robert Kennedy, "took pains to emphasize that his bill would not target people who gambled for fun, but only those who illicitly profited from the business of gambling."<sup>211</sup> Thus, foreign enterprises engaging in organized gambling fall precisely within the crosshairs of the Act, and therefore are more likely subject to liability than an individual placing casual bets over the phone inside his or her own home.

*Murphy* could easily function as a trap for unwary foreign enterprises, or just as easily, domestic businesses operating offshore. While the legalization of sports gambling creates opportunity for many domestic businesses, organized foreign gambling enterprises remain stuck in the past and subject to the

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<sup>208</sup> *United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014).

<sup>209</sup> *Id.* (citing *United States v. McDonough*, 835 F.2d 1103, 1104–05 (5th Cir. 1988)).

<sup>210</sup> "Law enforcement is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances. That is not the purpose of this legislation. However, it would not make sense for Congress to pass this bill and permit the professional gambler to frustrate any prosecution by saying, as one of the largest layoff bettors in the country has said, 'I just like to bet. I just make social wagers.' This man, incidentally, makes a profit in excess of a half million dollars a year from layoff betting. Therefore, there is a broad prohibition in the bill against the use of wire communications for gambling purposes." *Hearings on S.1653, S.1654, S.1655, S.1656, S.1657, S.1658, S.1665 Before the S. Comm. on the Judiciary*, 87th Cong., 1st Sess. at 12–13 (1961).

<sup>211</sup> David G. Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14 GAMING L. REV. AND ECON., 533, 535 (2010).

same prohibitive measures foreign providers have opposed for years.<sup>212</sup>

B. INTERNATIONAL ACCESS IS IMPERATIVE: A PANEL’S FIRST OPPORTUNITY TO STRICTLY SCRUTINIZE ARTICLE XIV(A)’S ‘PUBLIC MORALS’ STANDARD

1. *The Exception’s Inequities*

The panel in *US-Gambling* declared that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>213</sup> Further, the panel explained that these concepts for members can vary in time and space, depending upon a range of factors, including prevailing “social, cultural, ethical, and religious values.”<sup>214</sup> Consequently, members “should be given some scope to define and apply for themselves the concept of ‘public morals’ . . . according to their own systems and scales of values.”<sup>215</sup>

The DSB’s analysis of what constitutes “public morals” under both the GATT and the GATS has been limited, and the term remains ill-defined. However, one aspect is certain—the WTO refuses to conduct a thorough examination of a member’s self-determined public morality defense.<sup>216</sup> In each dispute involving the public morality exception, almost complete deference is afforded to members to unilaterally assert an ideal as a heightened focal point within its society. Obviously, such a subjective framing of defenses in dispute resolution creates issues for other members who may indeed have brought a worthy claim

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<sup>212</sup> See Appellate Body Report, *supra* note 69 (not only Antigua and Barbuda, but China, Mexico, Canada, and the EC challenge the state of U.S. federal gambling prohibitions).

<sup>213</sup> Panel Report, *supra* note 112.

<sup>214</sup> *Id.*

<sup>215</sup> See Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, WT/DS363/R, at ¶ 7.759 (Jan. 10, 2010) (adopting same methodology).

<sup>216</sup> See Julia Möllenhoff, *Framing The ‘Public Morals’ Exception After EC—Seal Products with Insights From the ECTHR and the GATT National Security Exception*, THE GRADUATE INST. OF INT’L AND DEV. STUDIES, (2015) (“[T]he analysis of public morals . . . comes extremely close to a mere subjective review, i.e. leaving almost limitless discretion to the Member provided that it is itself convinced of the necessity of a measure.”).

to the DSB and should rightfully be awarded recompense. Moreover, perhaps a larger problem lies with members who are being wronged by another member under a trade agreement, but may not choose to pursue their deserved remedies because of the possibility that the violation may fall within the scope of Article XIV(a)'s vague requirements.

Finally, the most regrettable group harmed by the current state of "public morals" jurisprudence is certainly the members who have lost the battle to GATS Article XIV or GATT Article XX. They continue to be impaired under the exception's unremitting governance, even though the member who invoked the defense clearly no longer recognizes the issue as one of "public concern." Such a member likely acknowledges the defense's inequity when it is employed, but when the defense no longer applies, that nation likely feels a sense of injustice. Antigua may be such a member.

## 2. *Geopolitical Implications: Call for Change*

The United States must respond to WTO orders and comply with the award for various reasons. First, the United States relies on the WTO to counter trade practices that it feels are wrong and cause harm to the nation's international trade network. As of 2018, the United States had been a complainant in 123 trade disputes, a respondent in 151 cases, and a third party in 144.<sup>217</sup> These numbers represent a large disparity in dispute involvement between the United States and other members.<sup>218</sup> Since 2009, the United States has filed almost 30 complaints with the WTO—five occurring under the administration of President Donald Trump.<sup>219</sup> Despite numerous members recently taking issue with the United States' Section 232 tariffs on steel, the United States has itself been a victim of non-compliance.<sup>220</sup> For example, in 2011 the EU

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<sup>217</sup> *United States of America and the WTO*, WTO, [https://www.wto.org/english/thewto\\_e/countries\\_e/usa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/usa_e.htm) (last visited Mar. 19, 2019).

<sup>218</sup> *Id.* (documenting China, EU, and various other members' utilization of the dispute resolution system).

<sup>219</sup> Andrew Lumsden, *Hurricane Irma Sends Decades-Old US-Antigua Dispute Back into the Spotlight*, CARIBBEAN 360 (Aug. 21, 2018), <http://www.caribbean360.com/opinion/hurricane-irma-sends-decade-old-us-antigua-dispute-back-into-the-spotlight>.

<sup>220</sup> *What You Need to Know About Section 232 Investigations and Tariffs*, U.S. DEP'T COM. (Mar. 8, 2018),

had coffered more than \$18 million in subsidies to the aircraft manufacturing company, Airbus, and continued to do so despite a ruling by the WTO in a suit brought by the United States.<sup>221</sup> “Furthermore, just this past January, the Trump Administration issued a scathing report detailing several cases of China flouting unfavorable WTO rulings, and, declaring Beijing’s noncompliance as a cause for unilateral imposition of tariffs against Beijing, the first of which took effect in July 2018.”<sup>222</sup> Accordingly, the United States’ own non-compliance with the WTO dispute resolution system provides a perfect justification for other members to follow suit and effectually undermine the entire international trade network.

Relationships are the critical bedrock of the international trading system.<sup>223</sup> Presently, disputes, disagreements, and non-compliance are at their peak among members of the WTO.<sup>224</sup> Thus, it is of grave importance to mend or retain relationships with member countries in an effort to preserve the allegiance of any allies the United States may have. In 2017, the State Department and the U.S. Agency for International Development Budget received a total budget of \$50.1 billion, which amounted to slightly more than 1% of the total federal budget.<sup>225</sup> A great percentage of this amount was proffered to counties with which

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<https://www.commerce.gov/news/blog/2018/03/what-you-need-know-about-section-232-investigations-and-tariffs>.

<sup>221</sup> Press Release, U.S. Trade Rep., United States Prevails in Showing EU Subsidies to Airbus Continue to Break WTO Rules (May 15, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/united-states-prevails-showing-eu#>.

<sup>222</sup> Lumsden, *supra* note 219.

<sup>223</sup> Ryan Monarch & Tim Schmidt-Eisenlohr, *Learning and the Value of Relationships in International Trade*, 1218 INT’L FIN. DISCUSSION PAPERS BD. OF GOVERNORS OF THE FED. RESERVE SYS., 1 (2017).

<sup>224</sup> Lawrence Herman, *Global trade order suffers under chaos and stress wrought by Trump*, THE GLOBE AND MAIL (Mar. 5, 2018), <https://www.theglobeandmail.com/opinion/global-order-suffers-under-the-chaos-and-stress-wrought-by-donald-trump/article38201615/>.

<sup>225</sup> Adam Edelman, *Trump Announces Plan to Slash Federal Costs to Make Way for Boost in Military Spending*, N.Y. DAILY NEWS (Feb. 28, 2017), <http://www.nydailynews.com/news/politics/trump-slash-federal-costs-boost-military-spending-article-1.2985016>.

the United States is at odds, such as China.<sup>226</sup> Conversely, “China has . . . for years been quietly expanding its presence in the Caribbean; providing loans, donations or investment to build roads, port facilities, government buildings and even stadiums.”<sup>227</sup> In June 2018, Antigua and Barbuda agreed to become part of China’s “Belt and Road Initiative,” evidencing the intent to “encroach on a region traditionally viewed as the United States’ backyard.”<sup>228</sup>

Accordingly, as President Trump plans to implement massive budget cuts, aid to these counties is likely to shrink, despite the United States already being dubbed as “neglectful.”<sup>229</sup> At a WTO DSB meeting on June 22, 2018, Barbados, Cuba, Jamaica, Venezuela, and Dominica (for the Organization of Eastern Caribbean States) made statements in support of Antigua and Barbuda, as Antigua once more asserted its right to recompense from the United States.<sup>230</sup> Thus, it is imperative that the United States take some variation of action to evidence its desire to improve ties with nations completely susceptible to external sovereign geopolitical, economic, and military influence.<sup>231</sup>

### 3. *Domestic Culture Invalidates the United States’ Justifications for Its Market Access Prohibition in the Gambling Industry*

In September 2018, District of Columbia (“D.C.”) Councilmember Jack Evans introduced The Sports Wagering

<sup>226</sup> *US Foreign Aid By Country: China (P.R.C.)*, U.S. AID, <https://explorer.usaid.gov/cd/CHN> (last visited Apr. 19, 2019).

<sup>227</sup> Harriet Alexander, *China Steps in to Help Rebuild Barbuda as the West Accused of Benign Neglect*, THE TELEGRAPH (Sept. 23, 2018), <https://www.telegraph.co.uk/news/2018/09/23/china-steps-help-rebuild-barbuda-west-accused-benign-neglect/>.

<sup>228</sup> *Id.*; *China Seeks to Fill Void Left by Western ‘Neglect’ in Antigua and Barbuda in Wake of Hurricane Irma*, S. CHINA MORNING POST (July 15, 2018), <https://www.scmp.com/news/china/diplomacy-defence/article/2155319/china-seeks-fill-void-left-western-neglect-antigua-and>.

<sup>229</sup> Alexander, *supra* note 227.

<sup>230</sup> *WTO Members Review Requests for Panels on Canadian Wine Sale Measures, US Fish Duties*, WTO (June 22, 2018), [https://www.wto.org/english/news\\_e/news18\\_e/dsb\\_22jun18\\_e.htm](https://www.wto.org/english/news_e/news18_e/dsb_22jun18_e.htm).

<sup>231</sup> Lumsden, *supra* note 219.



Lottery Amendment Act of 2018.<sup>232</sup> The bill would operate to “legalize sports betting in the District of Columbia, while also creating strong regulatory structures that ensure consumer confidence.”<sup>233</sup> The Act would legalize “both *online* and in-person wagering, with the District Lottery in charge of regulatory oversight.”<sup>234</sup> However, D.C. is just one of many in the race to legalize intrastate sports betting. As of October 2018, six states had taken advantage of PASPA’s demise, with newly active sports betting industries, while many more states were in the works to establish their own framework.<sup>235</sup> Notably, all but one of the six states that took action to liberalize sports gambling, also legalized online sports betting.<sup>236</sup> Such a movement carries remarkable significance, as remote betting has been the very cause of trepidation in the United States’ historical discomfort with sports gambling.<sup>237</sup> The states’ shift muddies the United States’ apparent stance on remote gambling operations and frame its posture within the WTO as artificial.

Despite the WTO and the United States’ interdependency upon one another for the effective exchange of goods and services across borders, relations have increasingly soured as the United States continues to hamper the DSB’s judicial appointments.<sup>238</sup> Taking place “[a]t a time when the United States’ protectionist policies have sparked a wave of trade wars, the institution best placed to help settle international trade differences and avoid further escalation” is facing the potential inability resolve disputes.<sup>239</sup> This dilemma speaks to much broader issues. Possible

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<sup>232</sup> Dustin Gouker, *New Bill in District of Columbia Would Legalize Sports Betting Via Lottery*, LEGAL SPORTS REPORT (Sep. 18, 2018), <https://www.legalsportsreport.com/24200/new-bill-dc-sports-betting/>.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* § II.3.D.

<sup>238</sup> Gary Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, PETERSON INST. FOR INT’L ECON. (June 13, 2011), <https://piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system>.

<sup>239</sup> *US Refusal of WTO Trade Judge Could Cripple Arbitration System*, THE NATIONAL (Aug. 28, 2018),

consequences of the DSB's ability to properly function and resolve disputes—many likely to include the United States as a party—are troublesome.

The United States has, for better or worse, alienated itself from some of its largest trading partners, its smaller supporters, the DSB, and the global trading network as a whole. Consequently, such disagreement could culminate at a point in the future where the United States has something it stands to lose. The United States can and should be prudent to control what it is can, while still standing by its foreign policy goals and principles. *Murphy* offers the country an opportunity to mend relations, maintain allies, show worldwide rectitude, and submit to compliance. By settling the longstanding gambling dispute with Antigua, the United States circumvents the quintessential opportunity for the DSB to retaliate against it. The WTO's public policy exception has been invoked sparingly but criticized greatly. Thus, reemergence of the *US-Gambling* dispute would supply the DSB with motives to improve upon what many see as a limitless exception. Some might argue that the United States has much larger issues to resolve in the area of geopolitical relations than its dispute with Antigua. However, given the economic stakes, the dispute could have enormous consequences.

#### IV. CONCLUSION

The perception of sports gambling in the United States has ebbed and flowed over time. However, *Murphy* functions to solidify the country's sentiment on an activity historically associated with immoral activity. Sports gambling is no longer prohibited within each state, and with the liberalization of a new domestic market, international parties are certain to take note. If these members remain subject to remote gambling prohibitions, *U.S.-Gambling* has established the framework for members of the WTO to pursue a claim against the United States, and after *Murphy*, the United States is much more vulnerable to claims. Public morality is no longer a defense and the United States must recognize the changing of the tide within its borders. Its outstanding judgement to Antigua has afforded the United States nearly a decade to procrastinate. However, now is the time to settle the Antiguan dispute in order to prevent other parties from coming to Antigua's aid in the midst of hostile international relations. Further, the United States must be mindful of the difficulties it has

caused the WTO in its failure to comply, as well as its blocking of WTO judicial appointments. Such actions could prove harmful in future disputes involving the United States. In sum, the current state of international and domestic affairs demonstrate that the United States must act with haste in reaching an agreement with Antigua, and as opposed to the last decade, the stakes are now high.

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## THE GROWING PLAGUE: TITLE IX, UNIVERSITIES, AND SEXUAL ASSAULT

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### ABSTRACT

*Sexual assault on college campuses is a deeply troubling problem. Title IX of the Education Amendments Act of 1972 requires universities to offer all students the ability to report any form of sexual assault, including off-campus incidents involving non-students.<sup>1</sup> Title IX also requires all universities receiving federal funding to employ at least one person to ensure Title IX compliance.<sup>2</sup> Recently, the media exposed multiple universities for their non-compliance with Title IX, including several whose athletic department directly contributed to the failure to comply.<sup>3</sup> Because the number of university sexual assault scandals continues to increase, universities should no longer oversee sexual assault claims on their own. This note urges the government to require universities to outsource Title IX investigations to third-parties. Students could file complaints with those third-parties, which would investigate claims without university interference.*

### INTRODUCTION

Sexual assault on college campuses is pervasive. College-age women are three-times more likely to be sexually assaulted

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<sup>1</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011) [hereinafter DEAR COLLEAGUE LETTER], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

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

<sup>3</sup> See David Haugh, *Will College Athletics Be Next for the #MeToo Movement?*, CHICAGO TRIBUNE (Jan. 29, 2018, 7:30 AM), <https://www.chicagotribune.com/sports/college/ct-spt-haugh-michigan-state-sexual-assault-scandals-20180129-story.html>.

than women in general.<sup>4</sup> With respect to undergraduate students, an estimated 23.1% of females and 5.4% of males experience rape or sexual assault.<sup>5</sup> The actual sexual assault statistics are difficult to measure for a number of reasons,<sup>6</sup> but mostly because sexual assaults consistently go unreported every year.<sup>7</sup> They are not confined to any particular type of school; sexual assaults occur at private, public, and religious schools across the country.<sup>8</sup>

The media has recently exposed several schools for failing to report and remedy campus sexual assaults. These schools include Baylor University, Michigan State University, University of Minnesota, and Florida State University. These examples so clearly demonstrate schools' failure to oversee Title IX's sexual assault claims process.

First, this note will give a brief history of Title IX and its institutional requirements. Second, the note will analyze Baylor University's institutional failure to process sexual assault claims, and its athletic department's complicity. Third, the note briefly discusses other institutions' inability to comply with Title IX. Fourth, this note will propose a solution to take Title IX sexual assault oversight from universities and give it to third-party investigators.

## I. TITLE IX

On June 23, 1972, Congress passed Title IX of the Education Amendments to the Civil Rights Act.<sup>9</sup> Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or

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<sup>4</sup> *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Apr. 16, 2018).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Kevin Miller, *Schools Are Still Underreporting Sexual Harassment and Assault*, AAUW (Nov. 2, 2018), <https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/>.

<sup>9</sup> *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last visited Apr. 16, 2015).

activity receiving Federal financial assistance.”<sup>10</sup> The U.S. Department of Education’s Office for Civil Rights enforces Title IX by overseeing programs who receive federal assistance and ensuring that they comply with its requirements.<sup>11</sup> Title IX applies to any institution receiving federal financial assistance.<sup>12</sup> It covers most university conduct, but the law specifically directs schools to comply through their “recruitment, admissions, financial assistance, athletics, employment, and discipline” processes.<sup>13</sup> The Office for Civil Rights evaluates, investigates, and resolves complaints brought by individuals against a university when the university engages in sex discrimination.<sup>14</sup>

Sexual harassment and sexual assault are forms of discrimination under Title IX.<sup>15</sup> Title IX applies broadly with regard to these forms of discrimination; it covers any incident involving a student, occurring on- or off-campus.<sup>16</sup> Institutions “must proactively prevent and respond to claims of sexual harassment, sexual violence, and other forms of gender-based violence retaliation, discrimination and must have an impartial and prompt process for investigating and adjudicating reported cases.”<sup>17</sup> Schools must not only investigate claims but must provide survivors with certain accommodations<sup>18</sup> and with the right to report the incident to the police.<sup>19</sup>

Title IX prohibits any form of sex discrimination involving school athletics.<sup>20</sup> Before Title IX, female athletes had few opportunities because the National Collegiate Athletic Association (NCAA), which became the ruling body for college athletics, did not offer scholarships to women and had no championships for women’s teams.<sup>21</sup> Congress created Title IX to

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

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

<sup>14</sup> *Id.*

<sup>15</sup> *Your Title IX Rights, END RAPE ON CAMPUS*, <http://endrapeoncampus.org/title-ix/> (last visited Apr. 11, 2018).

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

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

<sup>18</sup> For example, living or academic accommodations.

<sup>19</sup> *Id.*

<sup>20</sup> *Title IX Enacted, HISTORY* (Nov. 16, 2009), <https://www.history.com/this-day-in-history/title-ix-enacted>.

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

remedy the that imbalance. Although universities do not have to spend the same amount of money on women's athletics programs as they do on men's, Title IX prohibits schools from maintaining more programs for one sex than the other.<sup>22</sup> Since 1972, the number of women athletes has grown from 295,000 in 1972 to more than 2.6 million in 2009.<sup>23</sup>

Title IX has been largely successful in combating programmatic sex discrimination; however, the sheer number of institutions receiving funds and the pervasiveness of sexual assault has shown the Act's deficiencies. In 2015, the Office for Civil Rights reported that approximately "16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums" receive funding.<sup>24</sup> Given the huge number of institutions it has to oversee, in 2011 the Department of Education released a "Dear Colleague Letter" to remind institutions of their duties to protect against sexual violence.<sup>25</sup> The letter stated that each university must:

- (a) disseminate a notice of nondiscrimination;
- (B) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;
- and (C) adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.<sup>26</sup>

The Dear Colleague Letter also reminded the institutions to hire a Title IX coordinator to oversee complaints and identify "any patterns or systemic problems that arise during review of such complaints."<sup>27</sup>

Universities' current Title IX compliance systems are generally ineffective. Title IX coordinators should work with

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> OFFICE FOR CIVIL RIGHTS, *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (Apr. 2015).

<sup>25</sup> DEAR COLLEAGUE LETTER, *supra* note 1.

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

<sup>27</sup> *Id.*

school or local law enforcement when necessary to carry out investigations.<sup>28</sup> Institutions should train administrators, teachers, and students on how to identify sexual assault and the remedial measures offered by the school.<sup>29</sup> Title IX coordinators should ensure institutions are following Title IX to help battle the subject of sex discrimination at schools.<sup>30</sup>

## II. ATHLETICS ABOVE ALL ELSE: BAYLOR UNIVERSITY

In 2015, Baylor University came under fire for failing to investigate and manage its students' sexual assault claims. Since 2015, Baylor has fired its president, Ken Starr, and head football coach, Art Briles.<sup>31</sup> It also placed on probation its athletic director, Ian McCaw, who eventually resigned.<sup>32</sup> The incident at Baylor exemplifies how universities continuously create systems that fail to protect the students. Baylor is not unique in having numerous campus sexual assault claims, but two things about its scandal were unique: (1) the duration of its systemic failure to investigate the claims, and (2) the involvement of its athletics department.

It is difficult to know the exact number of sexual assaults that Baylor attempted to cover-up; however, a lawsuit claims that thirty-one football players committed fifty-two rapes between 2011 and 2014.<sup>33</sup> Along with the numbers alleged in the civil lawsuit, Pepper Hamilton, a civil litigation firm, conducted its own investigation and found that at least seventeen women reported sexual assault by nineteen players, some of which involved gang rape.<sup>34</sup> For at least three years, if not more, football

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

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

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

<sup>31</sup> Jay Croft, *A Timeline of Baylor University Sex Assault Accusations*, CNN (May 17, 2017, 8:44 PM), <https://www.cnn.com/2017/05/17/us/baylor-sex-assault-cases-timeline/index.html>.

<sup>32</sup> Shawn Nottingham, *Baylor University: Ken Starr Bumped from Presidency*, CNN (May 27, 2016, 5:34 PM), <https://www-m.cnn.com/2016/05/26/us/baylor-kenneth-starr-art-briles/>.

<sup>33</sup> *Timeline: Baylor Football Sexual Assault Scandal*, WFAA (Mar. 14, 2018, 8:35 AM), <https://www.wfaa.com/article/sports/ncaa/timeline-baylor-football-sexual-assault-scandal/287-528654814>.

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



players continued to sexually assault women on campus without any consequences. The lack of consequences can be attributed to the university's administration, athletic department, and its football program's ascendance.

Baylor had not had a winning football season since 1995, but before the 2008 season, the university hired Art Briles as its head football coach.<sup>35</sup> With Coach Briles, everything began to change.<sup>36</sup> Briles led his team to a winning season within three years, which led to money pouring in from boosters.<sup>37</sup> Baylor's President, Ken Starr, applauded the football program's success—success in athletics generally means success for the university as a whole.<sup>38</sup> That success, however, caused the school to value winning and recruiting talent above all else, especially its morals and duties under Title IX.<sup>39</sup> Recruits were transferring to Baylor without proper background checks, and some of those recruits sexually assaulted women on Baylor's campus.<sup>40</sup>

Under Briles, Baylor's football program implemented a “show-em a good time” policy and used sex, along with Baylor recruitment programs, to ensure top recruits would attend Baylor.<sup>41</sup> Football staff and athletic administrators continuously protected the football players by underreporting and intervening in sexual assault claims.<sup>42</sup> The program also established a “see no-

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<sup>35</sup> Marc Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html>.

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

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Chip Patterson, *Docs: Art Briles, Baylor Officials Actively Involved in Covering up Player Incidents*, CBS SPORTS (Feb. 3, 2017, 3:14 PM), <https://www.cbssports.com/college-football/news/docs-reveal-art-briles-baylor-coaches-actively-involved-in-covering-up-player-incidents/>.

<sup>41</sup> Sarah Mervosh, *New Baylor Lawsuit*, DALLAS NEWS (Jan. 2017, 7:28 PM), <https://www.dallasnews.com/news/baylor/2017/01/27/new-baylor-lawsuit-describes-show-em-good-time-culture-cites-52-rapes-football-players-4-years>.

<sup>42</sup> Patterson, *supra* note 40.

evil, report no-evil” policy and ensured the football players would evade consequences any other student would have faced.<sup>43</sup>

Regardless of the evidence showing that the football program promulgated these policies, the university administration clearly failed to oversee Title IX.<sup>44</sup> It instead used the football program as a scapegoat.<sup>45</sup> This had dire consequences. In 2011, the Obama administration issued its “Dear Colleague Letter” mandating that all universities designate at least one individual to be a Title IX coordinator.<sup>46</sup> A year passed, and Baylor had yet to hire and appoint a Title IX coordinator.<sup>47</sup> During this time, one of the first sexual assault accusations against a football player came to light.<sup>48</sup>

Jasmine Hernandez came forward in 2012, alleging that Baylor University football player Tevin Elliot raped her.<sup>49</sup> The State of Texas charged Elliot with rape, and he was eventually convicted of two counts of sexual assault and sentenced to twenty years in prison.<sup>50</sup> The Texas Court of Appeals affirmed his conviction.<sup>51</sup> Around the time of Elliot’s trial and conviction, another woman at Baylor came forward alleging that a Baylor football player, Sam Ukwuachu, sexually assaulted her.<sup>52</sup> Ukwuachu was sentenced to six months in jail and ten years of probation.<sup>53</sup>

Three years after receiving a federal directive to hire a Title IX coordinator, and after two football players were criminally charged with sexual assault, Baylor finally hired Patty

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<sup>43</sup> *Id.*

<sup>44</sup> See BAYLOR U. BOARD OF REGENTS, BAYLOR UNIVERSITY BOARD OF REGENTS FINDINGS OF FACT 4–5, <https://www.baylor.edu/thefacts/doc.php/266596.pdf>.

<sup>45</sup> See Sarah Brown, *Baylor ‘Set the Football Program on Fire’*, THE CHRONICLE OF HIGHER EDUC. (July 22, 2018), <https://www.chronicle.com/article/Baylor-Set-the-Football/243983>.

<sup>46</sup> WFAA, *supra* note 33.

<sup>47</sup> *Id.*

<sup>48</sup> Croft, *supra* note 31.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Crawford.<sup>54</sup> Crawford was entrusted with overseeing Title IX claims made by students and investigating all claims to the fullest extent.<sup>55</sup> Crawford soon realized that her role on paper was drastically different from the role the administration actually gave her.

Baylor's administration implemented rules and policies that effectively prevented Crawford from investigating Title IX claims.<sup>56</sup> Crawford resigned from her position as Title IX coordinator in 2016 and filed a complaint with the U.S. Department of Education's Office for Civil Rights, alleging that Baylor actively shirked its responsibility to process Title IX complaints.<sup>57</sup> Throughout the duration of her job, Crawford felt that the harder she worked, the more resistance she experienced from the school's leadership, causing her to doubt the school's willingness to pursue sexual assault complaints.<sup>58</sup> Baylor made it difficult for Crawford to access to police reports, it placed administrative roadblocks in front of her when she tried to schedule interviews with athletes, and administrators consistently told her to do one thing, while acting like they wanted her to do another.<sup>59</sup> At one point, Baylor's athletic director asked Crawford to give any currently-enrolled athletes immunity from investigations.<sup>60</sup> Crawford claimed that the university was more interested in protecting its athletic department than its students.<sup>61</sup> This insulation allowed its then-mediocre football program to rise to prominence.<sup>62</sup>

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<sup>54</sup> Zac Ellis, *A Timeline of the Baylor Sexual Assault Scandal*, SPORTS ILLUSTRATED (May 26, 2016), <https://www.si.com/college-football/2016/05/26/baylor-art-briles-sexual-assault-ken-starr>.

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

<sup>56</sup> Paula Lavigne & Mark Schlabach, *Former Baylor Title IX Coordinator*, ESPN (Oct. 5, 2016), [http://www.espn.com/college-football/story/\\_/id/17720930/former-baylor-title-ix-coordinator-patty-crawford-says-school-hindered-ability-do-job](http://www.espn.com/college-football/story/_/id/17720930/former-baylor-title-ix-coordinator-patty-crawford-says-school-hindered-ability-do-job).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Baylor Outside the Lines* (ESPN television broadcast Nov. 2, 2016).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

In 2015, Baylor's Board of Regents hired Pepper Hamilton to conduct an external review of its method of investigating claims of sexual assault.<sup>63</sup> Pepper Hamilton released its report to the Board of Regents, discussing the numerous shortcomings and mishandling of reports in what should have been a "supportive, responsive, and caring environment for students."<sup>64</sup> The Pepper Hamilton report supported Crawford's claims of roadblocks and lack of administrative support, and found evidence that the football program protected and prioritized football players over victims.<sup>65</sup>

Baylor's previous systematic lack of interest in pursuing Title IX claims soon became clear.<sup>66</sup> Baylor failed to educate students and faculty, provide clear information on resources, provide adequate investigations, and prevent potential hostile situations.<sup>67</sup> The report outlined the administration's failure to oversee and investigate Title IX claims, as well as the football team's own policies contributing to an environment in which sexual assault was ignored, if not sometimes encouraged.<sup>68</sup> Although the Pepper Hamilton report also included a list of policies Baylor should implement, Crawford alleged that the university failed to make them.<sup>69</sup> The changes fell short, Crawford says, because Baylor was quick to place all the blame on the football program.

Although Baylor fired most coaches and administrators on the football team and athletic department, the school's real problems reached the school administration itself.<sup>70</sup> Ian McCaw, Baylor's athletic director during the timeframe in question, claims the university used the football team and athletic programs as scapegoats for the university's inability to manage Title IX.<sup>71</sup> McCaw believes the university failed to adequately train anyone

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<sup>63</sup> Ellis, *supra* note 54.

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

<sup>65</sup> Nicole Auerbach, *Dissecting Pepper Hamilton's Report on Baylor's Failings*, USA TODAY (May 26, 2016, 2:48 PM), <https://www.usatoday.com/story/sports/ncaaf/2016/05/26/pepper-hamilton-report-baylor-sexual-assault-art-briles-fired/84985048/>.

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

<sup>67</sup> BAYLOR U. BOARD OF REGENTS, *supra* note 44.

<sup>68</sup> Auerbach, *supra* note 6565.

<sup>69</sup> Lavigne & Schlabach, *supra* note 56.

<sup>70</sup> *Id.*

<sup>71</sup> Brown, *supra* note 45.

in the athletic department on Title IX, and firing the football coaches and athletic department administrators was merely a public demonstration to show that Baylor could take quick, decisive actions.<sup>72</sup>

Crawford and McCaw's allegations that Baylor used the football program and athletic department as scapegoats do not stand alone; Baylor students substantiate their claims.<sup>73</sup> Jasmine Hernandez, the Baylor student who first reported a football player for sexual assault, spoke out against the school's lack of resources and overall indifference to her sexual assault claim.<sup>74</sup> After the incident, Hernandez visited Baylor's health services center, but was told the counseling center was overbooked and unable to make an appointment.<sup>75</sup> Hernandez went back to medical services several times, who consistently told her that they did not have any openings.<sup>76</sup> Hernandez's mother personally reached out to Briles when academic services were unaccommodating, only to discover that the university did not take any action to investigate the claims.<sup>77</sup> Hernandez's grades declined, she lost her academic scholarship, and she dropped out of Baylor within a year of her rape. Meanwhile, Baylor's football team experienced tremendous success.<sup>78</sup>

Baylor has settled seven lawsuits, all involving its mishandling of Title IX sexual assault claims under Title IX.<sup>79</sup> Ten anonymous students are currently still involved in litigation stemming from the school's failures.<sup>80</sup> Baylor's current head football coach, Matt Rhule, announced early in 2018, the

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<sup>72</sup> *Id.*

<sup>73</sup> Tracy & Barry, *supra* note 35

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

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

<sup>78</sup> *Id.*

<sup>79</sup> Jordan Ray, *Baylor Settles with Ex-Volleyball Player Who Accused Football Players of Gang Rape*, STAR-TELEGRAM (July 13, 2018, 4:30 PM), <https://www.star-telegram.com/sports/college/big-12/baylor-bears/article214863715.html>.

<sup>80</sup> Mac Engel, *Think Baylor's Problems Are Over? Not So Fast, Thanks to These Jane Does*, STAR-TELEGRAM (July 26, 2018, 1:19 PM), <https://www.star-telegram.com/sports/spt-columns-blogs/mac-engel/article215485530.html>.

suspension of three football players amid current sexual assault allegations.<sup>81</sup> After the story about Baylor became public, the NCAA decided to investigate the allegations.<sup>82</sup> The NCAA released its report in October 2018, and cited Baylor for a “lack of institutional control.”<sup>83</sup> The NCAA finding a “lack of institutional control” is one of the most severe findings it can make about a school, and it may prompt the NCAA’s “death penalty.”<sup>84</sup> The death penalty shuts down a school’s football program outright.<sup>85</sup> However, this punishment has only been utilized once in NCAA history.<sup>86</sup>

### III. OTHER UNIVERSITIES’ COMPLIANCE WITH TITLE IX

The situation at Baylor is unique. No other university has been so exposed as having similar institutional failures.<sup>87</sup> However, other universities have experienced sexual assault incidents and failed to comply with Title IX.<sup>88</sup> The evidence of other universities’ inability to manage sexual assault allegations furthers the proposition that universities should no longer manage and oversee Title IX compliance.

#### A. UNIVERSITY OF MINNESOTA

Former athletes from the University of Minnesota are suing the university for wrongful expulsion or suspension after the university investigated the sexual assault of a female student by University of Minnesota football players.<sup>89</sup> The female student

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<sup>81</sup> WFAA, *supra* note 33.

<sup>82</sup> Meredith Cash, *NCAA Completes Investigation Into Baylor’s Sexual Assault Scandal and Cites School for ‘Lack of Institutional Control’*, BUS. INSIDER (Oct. 3, 2018, 12:40 PM), <https://www.businessinsider.com/ncaa-completes-investigation-baylor-2018-10>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

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

<sup>86</sup> *Id.*

<sup>87</sup> BAYLOR U. BOARD OF REGENTS, *supra* note 44, at 4.

<sup>88</sup> See Haugh, *supra* note 3.

<sup>89</sup> Sarah Horner, *UMN Report Details Woman’s Sexual Assault Allegations, Gophers Football Players’ Defense*, TWIN CITIES PIONEER PRESS (Jan. 4, 2017, 1:51 PM),

filed a complaint with the university claiming twelve Minnesota football players and one recruit sexually assaulted her.<sup>90</sup> After the student filed her complaint, Minnesota suspended ten football players once its Office of Equal Opportunity and Affirmative Action completed their investigation into the claim.<sup>91</sup> The athletes suing the university are asking for \$45 million, as they claim the university violated their Due Process rights and discriminated against them based on their race and gender.<sup>92</sup>

The University of Minnesota, so far, has shown their ability to take the proper steps and follow protocol in investigating Title IX complaints.<sup>93</sup> Although the university appears qualified to successfully manage Title IX claims, it is still being sued for its investigation. A third-party investigatory organization would take the entire Title IX process out of university control, which would likely insulate the schools from Title IX lawsuits.

#### B. MICHIGAN STATE UNIVERSITY

Few systematic Title IX violations are as shocking as the recent one at Michigan State University. Michigan State recently reached a \$500 million settlement with the women and girls Larry Nassar sexually assaulted as the gymnastics team doctor.<sup>94</sup> Nassar—alone—was accused of sexually assaulting around 332 individuals during his time at Michigan State University and as a doctor of the United States Women’s Gymnastics team.<sup>95</sup>

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<https://www.twincities.com/2016/12/17/university-report-details-womans-sexual-assault-allegation-football-players-defense/>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Nick Martin, *Minnesota Football Players Involved in Sexual Assault Investigation Sue School For \$45 Million*, DEADSPIN (June 8, 2018, 4:47 PM), <https://deadspin.com/minnesota-football-players-involved-in-sexual-assault-i-1826681512>.

<sup>93</sup> *Id.*

<sup>94</sup> Katherine Lam, *Michigan State Reaches \$500M Settlement with Larry Nassar Sexual Assault Victims*, FOX NEWS (May 16, 2018), <https://www.foxnews.com/us/michigan-state-reaches-500m-settlement-with-larry-nassar-sexual-assault-victims>.

<sup>95</sup> *Id.*

Nassar began working at Michigan State and with USA Gymnastics in 1988.<sup>96</sup> The first reports of sexual assault committed by Nassar were in 1992.<sup>97</sup> Nassar continued to work at Michigan State, along with other gymnastic facilities, and in 1997, an athlete at Michigan State reported Nassar for sexual assault to then Michigan State gymnastics coach Kathie Klages.<sup>98</sup> Klages told the young woman that she was mistaken and misunderstood, and when other athletes reported the same incidents over the next few years, all were told that Nassar was a respected Olympic doctor and knew what he was doing.<sup>99</sup> Other athletic staff were informed of Nassar's actions, but school administrators told the athletes "they were fortunate to receive the best medical care possible from a world-renowned doctor."<sup>100</sup> In 2014, twenty-two years after the first report of sexual assault by Nassar, a Michigan State graduate reported Nassar to the Michigan State Sports Medicine Clinic, filed a Title IX complaint, and filed a police report.<sup>101</sup>

The 2014 report publicly exposed Nassar, but he continued working at Michigan State for another two years, until another student filed a police report.<sup>102</sup> Only then did the university relieve Nassar of clinical duties.<sup>103</sup> The State charged Nassar with first-degree criminal sexual abuse and possession of child pornography.<sup>104</sup> Klages was suspended in 2017, after records surfaced showing she discouraged athletes from filing complaints against Nassar.<sup>105</sup> Nassar was sentenced to 40 to 175 years in prison for the sexual abuse, which is set to begin after his 60-year sentence on the child pornography charges.<sup>106</sup> After Nassar received his sentence, Michigan State's president and

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<sup>96</sup> James Dator, *A Comprehensive Timeline of the Larry Nassar Case*, SBNATION (Jan. 16, 2019, 11:36 AM), <https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state>.

<sup>97</sup> *Id.*

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

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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



athletic director resigned.<sup>107</sup> The women and girls who stood in front of Nassar at his sentencing hearing and read their victim impact statements will never be made whole again, but their current settlement with Michigan State provides some compensation.<sup>108</sup>

Nassar sexually assaulted girls and young women for over twenty years as a “respected” Olympic and university doctor.<sup>109</sup> Student athletes are not the only university actors who commit sexual assault; universities protect staff and athletes alike. If a third-party organization investigated claims of Title IX violations, these women could have gone to the organization, and the university could do nothing to stop them. There is no way to know if the university could have prevented the sexual assaults by Nassar with an investigation of the first incident in 1992, but third-party organizations could prevent these incidents in the future.

### C. FLORIDA STATE UNIVERSITY

Florida State University (“FSU”) came under fire when media reports revealed the university’s cover-up of two sexual assault allegations against then-quarterback Jameis Winston.<sup>110</sup> In 2012, Erica Kinsman reported Winston raped her and sexually assaulted another unidentified woman.<sup>111</sup> One year later, the school investigated both reports while Winston continued playing football.<sup>112</sup> During both investigations, Florida State’s Police Chief called the Dean of Students in charge of Title IX investigations and asked if the university had a policy of telling victims about their potential attacker’s involvement in other allegations.<sup>113</sup> After the conversation, the dean shut down both investigations of Winston.<sup>114</sup> Only after Winston won the Heisman Trophy and the national championship did the investigation

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

<sup>108</sup> Lam, *supra* note 94.

<sup>109</sup> See Dator, *supra* note 96.

<sup>110</sup> Kirby Dick & Amy Ziering, *How Florida State Covered up Two Rape Reports Against Jameis Winston*, THE HUFFINGTON POST (Mar. 12, 2017), [https://www.huffingtonpost.com/kirby-dick/how-florida-state-covered\\_b\\_9421824.html](https://www.huffingtonpost.com/kirby-dick/how-florida-state-covered_b_9421824.html).

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

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

<sup>113</sup> *Id.*

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

continue.<sup>115</sup> When Winston was called to testify, he refused to answer any questions, and the university terminated the investigation.<sup>116</sup> Winston did not receive any punishment for the sexual assault allegations.<sup>117</sup>

Winston was not the only assailant on FSU's football team.<sup>118</sup> The director of Florida State's victim advocate program told lawyers that most of the twenty victims who claimed that football players sexually assaulted them declined to press student code of conduct charges out of fear.<sup>119</sup> Not only were charges rarely brought against the football players, but players received preferential treatment, including access to an athletic department official who helped the players connect with outside lawyers.<sup>120</sup> After the investigation of Winston was dropped, Kinsman filed a Title IX lawsuit against the university, which has been settled for \$950,000.<sup>121</sup> The settlement also requires that FSU implement "sexual assault awareness programs and greater transparency."<sup>122</sup>

Florida State University failed to investigate claims of sexual assault against a single athlete because he was the school's "golden goose." Students, along with the public, threatened Kinsman and hurled derogatory insults at her after she came forward, claiming that she was merely seeking attention.<sup>123</sup> Kinsman eventually left the university.<sup>124</sup>

Florida State's failure to investigate invalidated Kinsman's claim and once again demonstrates a university's perverse incentives to cover-up its athletes' sexual assault. If Kinsman could have reported her claim to a third-party

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

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

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

<sup>118</sup> See *FSU Official: Players Get Special Treatment, 20 Rape Claims in 9 Years*, FOX SPORTS (Nov. 20, 2015, 9:28 PM), <https://www.foxsports.com/college-football/story/florida-state-official-says-20-rape-allegations-against-football-players-in-9-years-112515>.

<sup>119</sup> *Id.*

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

<sup>121</sup> Laura Wagner, *FSU Pays \$950,000 to Woman Who Accused Jameis Winston of Sexual Assault*, NPR (Jan. 25, 2016, 4:42 PM), <https://www.npr.org/sections/thetwo-way/2016/01/25/464332250/fsu-pays-950-000-to-woman-who-accused-jameis-winston-of-sexual-assault>.

<sup>122</sup> *Id.*

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

<sup>124</sup> *Id.*; THE HUNTING GROUND (CNN, Feb. 27, 2015).

organization, the investigation would have been conducted differently and may have produced different outcome. The claims had little lasting effect, as Jameis Winston went on to be the first pick in the 2015 NFL Draft and currently plays for the Tampa Bay Buccaneers.<sup>125126</sup>

#### IV. SOLUTION

Sexual assault remains a severe problem at the four schools discussed in this note, and across the country. Investigations conducted by various authorities have cleared some universities,<sup>127</sup> but other schools, like Baylor, systematically fail to investigate Title IX claims. In response, some universities have created new procedures or updated their policies.<sup>128</sup> However, universities like Baylor made these changes only after victims came forward to put the world on notice that their universities failed them.

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<sup>125</sup> Draft Tracker, *Draft 2015*, NFL, <http://www.nfl.com/draft/2015/tracker#dt-tabs:dt-by-round> (last visited Apr. 23, 2019). Winston served a three-game suspension in the 2018 season after the NFL discovered Winston violated its code of conduct after allegations of sexual assault from an Uber driver from 2016 came to light. Jeanna Thomas, *NFL Suspends Jameis Winston 3 Games for Groping an Uber Driver*, SBNATION (June 29, 2018, 5:49 PM), <https://www.sbnation.com/2018/6/21/16696968/jameis-winston-tampa-bay-buccaneers-suspension-uber>.

<sup>126</sup> Athletes and athletic departments are not the only origin for Title IX violation scandals. *See, e.g.*, Ana Cabera and Sara Weisfeldt, *Punished After Reporting Rape at Brigham Young University*, CNN (Apr. 29, 2016, 4:09 PM), <https://www.cnn.com/2016/04/29/health/brigham-young-university-rape/index.html>. At Brigham Young University students and alumni started speaking out in 2016 over the university's policy of opening honor code violation investigations after a student reported sexual assault.

<sup>127</sup> *See* Martin, *supra* note 92.

<sup>128</sup> *See e.g.*, *Michigan State University Agrees to Change Its Response to Complaints of Sexual Harassment, Sexual Violence*, U.S. DEP'T OF EDUC. (Sept. 1, 2015), <https://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence>.

Some schools have used outside investigators to investigate allegations or conduct disciplinary hearings.<sup>129</sup> Using outside investigators is “generally intended to eliminate any potential conflicts of interest and ensure professionals conduct the type of work that some institutions have sometime struggled to understand.”<sup>130</sup> However, this method of conducting investigations can subvert Title IX’s purpose when an investigation turns into a pure criminal proceeding.<sup>131</sup> Instead of taking purely remedial measures, universities should create prophylactic systems for students to file sexual assault and Title IX complaints. Specifically, schools should consult with third-parties to conduct Title IX—not criminal—investigations of their students. This section will discuss potential third-party investigators, and the benefits and drawbacks of using each.

#### A. POLICE DEPARTMENTS

Three federal laws require campus employees, faculty, and personnel to report certain misconduct—Title IX, The Clery Act, and Title VII.<sup>132</sup> Relevant here, Title IX requires a “responsible employee” to report sexual assault to his or her university.<sup>133</sup> A responsible employee includes “any employee who has the authority to take action to redress the harassment, who has the duty to report sexual harassment to appropriate school officials, or an individual who a student could reasonably believe has this authority or responsibility.”<sup>134</sup> Once reported, the university will conduct an investigation pursuant to its own policies.<sup>135</sup>

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<sup>129</sup> Jeremy Bauer-Wolf, *Outsourcing Rape Investigations*, INSIDE HIGHER EDUC. (Oct. 9, 2017), <https://www.insidehighered.com/news/2017/10/09/some-colleges-opt-outsource-title-ix-investigations-hearings>.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> Brett A. Sokolow, *Who is a Mandated Reporter, of What?—Getting Some Clarity*, ASS’N OF TITLE IX ADMIN. 1, [https://cdn.atixa.org/website-media/o\\_atixa/wp-content/uploads/2012/01/18123011/WHO-IS-A-MANDATED-REPORTER-OF-WHAT-GETTING-SOME-CLARITY.pdf](https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18123011/WHO-IS-A-MANDATED-REPORTER-OF-WHAT-GETTING-SOME-CLARITY.pdf).

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

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

<sup>135</sup> *Id.*

Congress could expand Title IX to require responsible employees to report sexual assaults to their Title IX coordinator, who then must report all incidents to the local police department. Law enforcement departments already train their personnel to conduct sexual assault investigations.<sup>136</sup> Departments train officers “not to label a false report based on an initial interview, a victim’s response to the trauma, a statement that was taken back or recanted, or refusal to press charges.”<sup>137</sup> Officers understand a victim’s trauma and conduct their investigations accordingly.<sup>138</sup> Moreover, police departments train officers to anticipate a suspect’s potential defenses to allegations and collect evidence to counter these defenses.<sup>139</sup> Victims can expect privacy during the investigation and the ability to contact higher authorities within the department if they feel the department has not taken the allegations seriously.<sup>140</sup> Law enforcement personnel often have better access to evidence and can operate separately, allowing unbiased third-party review. Additionally, universities will not bear the costs of the investigations.

This solution has two downsides. First, victims of sexual assault often do not report to police; about two-thirds of sexual assaults go unreported.<sup>141</sup> There are several reasons victims choose to not report sexual assault to the police, including: fear of retaliation, a belief the police would not help, a belief that the assault should remain personal, or a belief the police could not find adequate evidence.<sup>142</sup> Moreover, police generally only investigate claims if there is a minimal threshold of evidence,

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<sup>136</sup> *Communicating with Law Enforcement*, RAINN, <https://www.rainn.org/articles/communicating-law-enforcement> (last visited Apr. 11, 2019).

<sup>137</sup> *Id.*

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

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

<sup>140</sup> *Id.*

<sup>141</sup> *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Apr. 11, 2019).

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

which may not exist when the victims feel afraid to disclose their assault.<sup>143</sup>

Second, criminal cases require an extremely high standard of proof. If the district attorney brings charges, the state must prove them beyond a reasonable doubt.<sup>144</sup> This high standard of proof requires that the state carry its burden to the point of near certainty.<sup>145</sup> However, the Dear Colleague Letter in 2011 required a “preponderance of the evidence” standard.<sup>146</sup> Preponderance of the evidence requires that the person alleging the action prove her case by just “more than 50%” certainty.<sup>147</sup> Even under the most recent Dear Colleague Letter, universities can use a preponderance of the evidence standard or a clear and convincing<sup>148</sup> standard when investigating and punishing students.<sup>149</sup> Regardless of the standard employed, if the state does not think that it could prove its case beyond a reasonable doubt, it may choose not to prosecute. On the other hand, a non-criminal proceeding at a university could still proceed because it would use a lower standard of proof.

Whether or not a police department could move forward with criminal charges, the university could always use the police report to conduct its own hearing. The university’s hearing would establish whether the suspect in question is responsible by its preferred standard and determine a suitable punishment. Outsourcing sexual assault investigations to local police departments could ensure impartiality and professionalism but may be too burdensome to effectively punish students—which may ultimately deter victims from coming forward.

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<sup>143</sup> *What to Expect from the Criminal Justice System*, RAINN, <https://www.rainn.org/articles/what-expect-criminal-justice-system> (last visited Apr. 11, 2019).

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

<sup>145</sup> *Reasonable Doubt*, NOLO, <https://www.nolo.com/dictionary/reasonable-doubt-term.html> (last visited Apr. 11, 2019).

<sup>146</sup> See DEAR COLLEAGUE LETTER, *supra* note 1.

<sup>147</sup> See generally 2 MCCORMICK ON EVIDENCE 484 (Kenneth S. Broun ed., 6th ed. 2006) (nothing the most accepted meaning of “preponderance of evidence” is proof leading a fact-finder to determine that a fact’s existence is more probable than not).

<sup>148</sup> Bauer-Wolf, *supra* note 129.

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

## B. PRIVATE THIRD-PARTY ORGANIZATIONS

Since the 2011 and 2017 Dear Colleague Letters, some universities have started hiring outside professionals, including law firms, to manage and investigate Title IX complaints.<sup>150</sup> Universities have expressed an interest in avoiding trials on campus because of potential bias and distractions.<sup>151</sup> The advantage of using an outside source is that the school could make sure that the investigation is unbiased and those involved do not have a connection with the students.<sup>152</sup>

In 2017, the Department of Education promulgated new guidelines in response to the 2011 Dear Colleague Letter and a belief that some the standards set forth in the 2011 Letter “created an incentive for overzealous administrators to completely disregard the rights of the accused while conceiving ample protections for the accuser, and ultimately perpetuating an unfair system.”<sup>153</sup> Because both victims and perpetrators have sued schools alleging that the schools discriminated against them during the investigations, it is no wonder some universities are opting to hire outside investigators.<sup>154</sup> And because Title IX requires universities to provide victims with a “prompt, adequate, and impartial investigation,” it is of great importance that the investigative process remain unbiased.<sup>155</sup> Thus, a private third-party organization is a potential solution to universities’ Title IX issue.

A Title IX investigation is a sensitive and delicate matter. Those investigating sexual assault allegations must understand

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<sup>150</sup> *Id.*; see also Joseph Lento, *Why Some Colleges are Outsourcing Sexual Assault Investigations*, STUDENT DISCIPLINE DEF. (June 14, 2018), <https://www.studentdisciplinedefense.com/outsourcing-college-sexual-misconduct-cases>.

<sup>151</sup> Bauer-Wolf, *supra* note 129.

<sup>152</sup> *Id.*

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

<sup>154</sup> *Id.*

<sup>155</sup> *The Importance of Outsourcing Your Title IX Investigation*, CAPINVAD INVESTIGATING (Apr. 1, 2018), <https://www.capinvad.com/the-importance-of-outsourcing-your-title-ix-investigation/>.

how to investigate them and Title IX's legal requirements.<sup>156</sup> While hiring outside parties to conduct the investigation is a step in the right direction, not all universities use this alternative method. Instead, when universities find themselves involved in a scandal, they then begin to hire outside sources to investigate the university's compliance.<sup>157</sup> The University of Virginia found out how costly these remedial measures were when they paid \$500,000 to a Washington, D.C. law firm to investigate the university's management of a sexual assault case, and then paid Pepper Hamilton \$660 and \$550 an hour to help revise university policies.<sup>158</sup> Other campus measures are costly as well, including hiring consultants to review requests from the Office of Civil Rights, or providing training sessions to faculty.<sup>159</sup> While training and other workshops may be invaluable to the students, it appears universities are using them as remedial measures *after* someone exposes the university's failures.<sup>160</sup> Instead of universities hiring third parties to investigate the university's own compliance, a third-party organization should exist to oversee and manage all Title IX claims at universities.

The benefit of having any type of third-party organization oversee Title IX complaints is an assurance of an unbiased and properly facilitated investigation. As discussed above,<sup>161</sup> universities can have conflicts of interests preventing adequate—or even minimal—investigations. A third-party organization could investigate without any university interference. Third party investigators also have fewer built-in biases than school administrators, as they have no direct connection to the students, coaches, or other administrators involved in the investigation.

This note discusses potential third-party organizations to oversee Title IX investigations. Any third-party organization used to oversee sexual assault allegations would cooperate with local

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

<sup>157</sup> Sarah Brown, *An Uncertain Future for Title-IX Compliance Consultants*, THE CHRONICLE OF HIGHER EDUC. (Jan. 24, 2017), <https://www.chronicle.com/article/An-Uncertain-Future-for-Title/238950>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (some of these training sessions can cost up to \$1,000 each).

<sup>160</sup> *Id.* (universities are beginning to hire consultants to ensure compliance with Title IX).

<sup>161</sup> See Bauer-Wolf, *supra* note 129.



police departments when necessary, including when the victim decides, on her own, to report the incident to the police. The third-party organization is a preferred alternative to local police investigations because of the various reasons victims choose to not report to the police.<sup>162</sup> This note now explores whether the government, a private organization, or a public organization should create the third-party Title IX investigator.

### 1. Government

Congress could create an additional branch within the Department of Education to investigate claims of sexual assault and ensure case-by-case Title IX compliance. The Department of Education already has oversight of university Title IX compliance, but a new branch would take away the schools' responsibility to investigate claims on their own.<sup>163</sup> The Office of Civil Rights pursue all Title IX complaints to ensure the university's involvement in the investigation is minimal. Giving the Office of Civil Rights complete oversight would ensure an unbiased investigation with little-to-no university obstruction.

The problem with having the federal government manage all Title IX complaints is clear—it would be prohibitively expensive and time-consuming given the government's lack of manpower. The government would potentially have to create an office in each state, with smaller offices in major cities to ensure opportunity and access. The creation of these offices would require a significant amount of money and many people to operate. Because federal spending can fluctuate so much each year, the federal government may not be able or willing to create an adequately-sized Title IX office.

Instead of a federal office, state and local governments could provide their own compliance offices. To be sure, state and local governments would likely have to appropriate more money to their education systems, but significantly less than the federal government. Moreover, local offices would ensure greater efficiency, and each state could experiment with different types of investigatory methods and funding mechanisms.

A government-run Title IX office would solve several of the concerns discussed above. The government office would be free from university interference. If an investigator needed to

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<sup>162</sup> See RAINN, *supra* note 141141 (explaining several reasons why victims choose not to report sexual assault to the police).

<sup>163</sup> See RAINN, *supra* note 4.

interview a student, the government office would be free to schedule the interview. A government office could resolve the concerns of bias; however, it could produce slow investigations and present some of the same law-enforcement deterrence issues discussed above. Because this solution presents several logistical issues and problems of funding, it is less desirable than those discussed below.

## 2. *For-Profit Corporations*

A private company could oversee Title IX claims in much the same way as law firms currently investigate university compliance with Title IX—only now by investigating an individual’s claim. This, however, may not easily be profitable. The company would need to consider funding, particularly at the beginning of forming, and how to create profit thereafter. If the company required students to pay fees to file complaints, the amount of people reporting Title IX complaints would very likely decrease.<sup>164</sup>

Accordingly, universities would likely have to contribute to the private company an amount of money proportionate to their student population. The issue here is the lack of oversight for private companies. Since private companies do not have to comply with the same disclosure standards as public companies, the potential for complications or corruption is higher.<sup>165</sup> To remedy this problem, the government would likely have to impose significant regulations on the companies’ relationships with the schools and their investigatory methods. This solution creates a new problem—the private firm may become a virtual extension of the government, which leads to the problems discussed in the previous subsection. This relationship would be unlikely to result in profits to shareholders *and* cheap enforcement mechanisms for victims and universities.

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<sup>164</sup> Jerilyn Klein Bier, *Most College Students Go Broke At Least One Semester*, FIN. ADVISOR (Nov. 3, 2018), <https://www.fa-mag.com/news/most-college-students-go-broke-at-least-one-semester-25838.html> (“Nearly two-thirds of undergraduate students . . . reported that they had run out of money before the end of a semester at some point during their college career.”).

<sup>165</sup> See *Engaging the Private Sector in the Fight Against Corruption*, TRANSPARENCY INTERNATIONAL, [https://www.transparency.org/whatwedo/activity/engaging\\_the\\_private\\_sector\\_in\\_the\\_fight\\_against\\_corruption](https://www.transparency.org/whatwedo/activity/engaging_the_private_sector_in_the_fight_against_corruption) (last visited May 10, 2019).

### 3. Non-Profit Organization

Non-profit organizations provide the same benefits as a for-profit business working with the government, without the duty to shareholders. A non-profit must consider funding, whether from the government or private donations. A non-profit is a legal entity whose organizational mission is placed above the personal interests of its members.<sup>166</sup> Individuals associated with non-profits are not liable for the non-profit's debts, and creditors and courts are limited in their reach to the non-profit's assets.<sup>167</sup>

Because a non-profit organization places its mission and goals over the personal interests of employees, it is uniquely-suited to pursue Title IX investigations for universities. However, one of the biggest issues a non-profit would face is employing individuals to conduct the investigations.<sup>168</sup> Non-profits sometimes rely on volunteer staff, whereas for-profit corporations mostly use paid employees to pursue their work.<sup>169</sup> A non-profit established to conduct Title IX investigations needs to be reliable and stable. Individuals need be sure that when they go to an organization, company, or government office, employees will manage their complaint in a timely, efficient, professional, and unbiased manner. If non-profits need government funding—either directly or indirectly—to operate effectively, they may, like for-profit corporations, become arms of the government.

### 4. Proposal: Market Solution

Each solution presented above presents its own set of potential problems. Police departments have the potential to scare victims from reporting, as some do not want to involve the police in their claim. The federal government is already a slow-moving entity and establishing an office in every state could be an unrealistic cost. Private and public companies must consider

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<sup>166</sup> *Funding Sources for Charities and Non Profit Organizations*, KNOWHOWNONPROFIT, <https://web.archive.org/web/20180312201516/https://knowhownonprofit.org/governance/board-responsibilities/raisingmoney#> [<https://perma.cc/2URD-ZDKA>].

<sup>167</sup> *Id.*

<sup>168</sup> See Sheela Nimishakavi, *In a Tight Job Market, Nonprofits May Suffer Unless They Use What They've Got*, NPQ, Sept. 5 2017, <https://nonprofitquarterly.org/2017/09/05/tight-job-market-nonprofits-may-suffer-unless-use-theyve-got/>.

<sup>169</sup> *Id.*

funding and costs, including where such funding comes from. Instead of requiring universities to outsource their Title IX investigations to one third-party organization, universities should be required to outsource their investigating and allow them to choose which third-party organization.

If Congress requires universities to outsource their Title IX claims while allowing them to choose which third-party to use, the market can to resolve the issue of which third-party should conduct the investigations. Universities already utilize law firms or other companies to investigate their own Title IX compliance. A prophylactic requirement will ensure that schools pursue Title IX claims when they are filed—ensuring compliance with Title IX. Companies or non-profits will be developed and continue to be funded by the universities. Universities will be required to budget and monitor the costs of outsourcing Title IX claims.

This solution allows the market to develop based on need, helping to resolve several issues. Investigators could compete with each other in a lucrative business; schools will always require good investigators to remain in compliance. The market solution is also cheaper for the federal government. It can maintain its oversight role without creating new offices or appropriating more funds.

The third-party organizations should still be required to cooperate and work with police departments when necessary, but they should *not* be required to report the claims to the police when the claimant does not give her consent to do so. Victims filing Title IX claims could feel safer reporting their claims and feel like their university will not have perverse motives to undermine the investigations.

One of the main concerns with universities managing Title IX claims is the potential bias from university staff, administrators, athletic departments, or coaches. The market solution ensures that the most effective neutral third-parties handle victims' claims, while keeping the schools in compliance with Title IX. The third-party would then give their report to the university with a suggested plan of action and universities would implement those actions. The investigations would be conducted in an efficient and timely manner and third-parties can give students peace of mind that their investigations are being done properly. Of course, if students are unhappy with the progress or method of the third-party's investigation, they can report the third-party's conduct to the Office for Civil Rights under the Department of Education.

## **V. CONCLUSION**

The media placed a spotlight on college sexual assault when it exposed Baylor, Michigan State, the University of Minnesota, and Florida State, but schools of all kinds have failed to adequately prevent and punish sexual assault—particularly when an athletic department is involved. Schools fail to respond to Title IX claims for a variety of reasons. Accordingly, the federal government should require universities to contract with third-party organizations to investigate all Title IX sexual assault claims. Universities are already required to comply with Title IX and operate in a non-discriminatory manner. Mandatory third-party investigators would ensure their compliance with Title IX by forcing them to set aside some of their superficial interests—especially the protection of their athletic programs—and protect victims of sexual assault.