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MEDIA MOGULS RISKING IT ALL: CONTRACT CLAUSES IN THE ENTERTAINMENT BUSINESS IN THE AGE OF #METOO

RICK G. MORRIS*

ABSTRACT

This article explores the ability of entertainment companies to respond to the salacious misconduct or bad behavior of their talent and leaders through the perspectives of corporate ownership, impacted employees, business partners, and the victims of the misconduct. The article examines the history of social trouble in the media caused at both the individual and corporate level, and how such social trouble can lead to irreparable reputational and financial damage. This article proposes that entertainment companies should consistently implement and apply morals clauses in talent and leadership contracts as a solution to this post-Weinstein problem. While morals clauses can be wielded as a sword against risky talent, this article identifies three challenges that morals clauses face including pushback from unions, negotiations to soften morals clauses, and the prior status quo that permitted free speech and industry practices to rationalize and ignore misconduct. Finally, this article will urge entertainment companies to be proactive in protecting their reputation, their employees, and their very

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existence amidst the backdrop of the #MeToo movement and recent developments in litigation by employing a modern morals clause in future contracts.

INTRODUCTION

The news media reports that your media company's namesake CEO has been involved in salacious behavior for the last twenty years. The reports are numerous and damming. Multiple women come forth reporting sexual harassment. What do you do?[1]

Or, a news headline announces that the lead star of your company's most popular sitcom has been accused of sexual misconduct. The alleged misconduct is so offensive that it could be fatal to the success of the company. Your executives decide to terminate your company's relationship with that star. However, the star is under contract for additional seasons. What can be done?[2]

Or, your partner, television host, and well-known chef is accused of assault. You own several restaurants with this partner, and his prestige as head chef is crucial to the value of the brand. What happens next?[3]

If these scenarios seem familiar, it is because they were ripped from recent headlines. Companies inherit great risk when their leaders engage in behavioral misconduct. Especially in media companies, when transgressions are made, they are very often high-profile, reported in the news, and subject to public criticism via the Tweet and re-Tweet of social media and entertainment companies[4] have become intertwined with our

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[1] Schuyler Moore, *Morality Clauses in Hollywood: What You Need to Know*, FORBES (Mar. 12, 2018), https://www.forbes.com/sites/schuylermoore/2018/03/12/morality-clauses-in-hollywood/#57019b6e49a5.

[2] *See* discussion *infra* pp. 13–17. See Rosanne Barr and the actions that led her to leave the sitcom *Roseanne*, *infra* pp. 14–15.

[3] *See* Julia Moskin, *Mario Batali Exits His Restaurants*, N.Y. TIMES (Mar. 6, 2019), http://www.nytimes.com/2019/03/06/dining/mario-batali-bastianich-restaurants.html ("A year after reports that the celebrity chef sexually assaulted and harassed women, the Bastianich family and Mr. Batali's other partners have bought out his stake and regrouped.").

[4] For the purpose of this article, media companies include not only the traditional networks such as ABC, CBC, NBC, PBS, Fox, and

everyday lives. Communication is their business, and we engage in communication every day. The reputation of the company, its leadership, and its clientele is often crucial to its success as a business and influences whether people engage with their product. When leaders of these companies engage in misconduct such as sexual harassment or assault, their actions jeopardize the company's reputation, and subsequently, the success and perhaps even viability of that company.[5] While other industries may have addressed questions of leadership misconduct less ostensibly, the media industry stands in a glaring spotlight shines on how poorly it has handled errant leadership. This article examines the history of those issues created by leadership misconduct, identifies the current and real remaining problems facing the media industry, and proposes change in the form and a plenary use of modernized

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CW, but also all cable networks, all streaming companies such as YouTube, Hulu, Netflix, HBOGo, all social media such as Facebook, Twitter, Instagram, and all affiliates of those main companies like their news divisions and entertainment distribution collectives. It would also include any alternative distribution platforms.

[5] *See, e.g.*, *The New York Times Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, N.Y. TIMES, https://www.nytimes.com/editorial-standards/ethical-journalism.html# (last visited Nov. 18, 2019) (This handbook, developed by the staff of the New York Times, sets forth ethical and behavioral standards of conduct for news and editorial departments); ASSOCIATED PRESS, ASSOCIATED PRESS STATEMENT OF NEWS VALUES AND PRINCIPLES (2017), https://www.ap.org/about/news-values-and-principles/downloads/ap-news-values-and-principles.pdf; WALT DISNEY COMPANY, CORPORATE SOCIAL RESPONSIBILITY UPDATE (2018), https://www.thewaltdisneycompany.com/wp-content/uploads/2019/03/2018-CSR-Report.pdf; CBS CORPORATION, 2016 BUSINESS CONDUCT STATEMENT (2016), https://www.cbscorporation.com/wp-content/uploads/2018/03/CBS-2016-BCS.pdf.

morals clauses[6] to help mitigate the effects of misconduct in the era of #MeToo, Time's Up, and common sense.[7]

I. HOW COMPANIES ARE MADE VULNERABLE BY THE BEHAVIORAL MISCONDUCT OF THEIR OWN

Companies need to protect themselves, especially media and entertainment companies. Whether they are part of a mega corporation like a news division or an entertainment brand,

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[6] The term "morals clause" or "morality clause" originated in approximately 1921. *See, e.g.*, *Morality Clause For Films; Universal Will Cancel Engagements of Actors Who Forfeit Respect*, N.Y. TIMES, https://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.html?pageNumber=8 (last visited Nov. 18, 2019). While perhaps appropriate at the time in 1921, this author takes issue with continued use of the term "morals clause." A morals clause functions as a "for cause" clause in a contract in the entertainment industry. The term morals clause is too broad in that "immoral" activity is not necessarily something that a person would be fired for, even if it could be determined what is "immoral." And yet the term it also simultaneously too narrow because a company might want to terminate employment for non-morality issues like mere disagreeable speech. Because of this obsolescence-by-age, this author suggests the term "behavioral clause" as a more accurate and descriptive term. However, the scholarship and practice still refers to this type of clause as a "morals clause;" so for accurate representation congruent with the historical context and academic and case indexing, this author will continue to refer to this type of clause as a morals clause often throughout this article. *See infra* pp. 30–33.

[7] For past scholarship on the state of morals clauses, *see generally* Caroline Epstein, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. OF INTELL. PROP. AND ENT. L. 72 (2015); David E. Fink & Sarah E. Diamond, *Morality Clauses in the Age of #MeToo and Time's Up*, 34 COMM. LAW. 4 (2019); Caysee Kamenetsky, *The Need for Strict Morality Clauses in Endorsement Contracts*, 7 PACE INTELL. PROP., SPORTS & ENT. L. FORUM 289 (2017); Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal, and Practical Guide*, 29 COLUM. J.L. & ARTS 235 (2005); Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares about Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. OF SPORTS AND ENT. L. 347 (2009); Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3 (2017).

company where a portion of their goodwill and intellectual property determines their company's total market value,[8] or whether they own a local operation like a theatre, symphony, or opera company; a company's reputation can be everything. It can directly affect both the value of individual products like a show, a series, or a movie, to even the value of the entire company.[9]

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[8] For example, the market value of Disney as of the close of markets on May 21, 2019 was $241 billion. *See Walt Disney Market Cap*, YAHOO (Sept. 19, 2019), https://ycharts.com/companies/DIS/market_cap. Disney owns a full range of communication entities like ABC Television, ABC News, ESPN, the Disney Channel plus A&E and many other cable networks, movie studios, theme parks, and numerous websites. A problem at any one of their owned entities could cause the value of their company to tumble. This is only to use Disney as one example among many and all; this is the case for any publicly-traded media company. And they must all protect their reputation. *See* Mark Fritz, *Disney's Wild World of Lawyers: The Scrappiest Place on Earth?*, L.A. TIMES (Nov. 3, 1996), https://www.latimes.com/archives/la-xpm-1996-11-03-mn-60757-story.html; *see also* Jay Michaelson, *Mickey Takes Deadmau5 to Court*, DAILY BEAST (Sept. 3, 2014), https://www.thedailybeast.com/mickey-mouse-takes-deadmau5-to-court. Disney highly values its reputation and publishes so on its website. *See, e.g., Disney is No. 1 on Forbes' World's Best Regarded Companies List*, WALT DISNEY COMPANY (Sept. 12, 2018), https://www.thewaltdisneycompany.com/disney-is-no-1-on-forbes-worlds-best-regarded-companies-list/. Similarly, the owners of the Barney trademark are also protective. *See* Brooke A. Masters, *Protecting the Barney's Image from Bogus Beasts*, WASH. POST (Mar. 25, 1998), https://www.washingtonpost.com/archive/local/1998/03/25/protecting-barneys-image-from-bogus-beasts/1e1c5a94-acd7-4de6-ac9b-5f85b50bcd8e/. Similarly, when media companies' reputation starts taking a beating, as Facebook is learning. *See* Don Reisinger, *Tesla and Facebook Corporate Reputation Rankings Plummet*, FORTUNE (Mar. 6, 2019), https://fortune.com/2019/03/06/tesla-facebook-reputation/; *see also* Evan Osnos, *How Much Trust Can Facebook Afford to Lose?*, NEW YORKER (Dec. 19, 2018), https://www.newyorker.com/news/daily-comment/how-much-trust-can-facebook-afford-to-lose.

[9] This includes protection of reputation of all types. In 1989, Disney even sued the Academy of Motion Picture Arts and Sciences (the people who award the Oscars), contending that a musical number that included Snow White was "unflattering." Bruce V. Bigelow, *Disney Sues Over Snow White Portrayal*, ASSOCIATED PRESS (Mar. 31, 1989), https://www.apnews.com/bad7541b13ce3cac192194760359909b.

This is especially true for publicly-traded companies and particularly fragile companies.[10] A publicly-traded company has SEC oversight and is prone to shareholder lawsuits.[11] A shareholder can sue over practically any perceived breach of duty by management or the board of directors. What happens when a stock falls by a huge percentage within the same timeframe of breaking of news involving the misconduct of an employee or manager? Or what happens when a media mogul commits some egregious act while on the job? Shareholders are likely to sue. Why? To protect their investment from the company's tarnished reputation.

A "media mogul," for the purpose of this discussion, means a person in a significant leadership position in an entertainment company. When a media mogul commits a significant breach of behavior, it may *all* be on the line – and that *all* can include up to the *entire value and existence* of the company itself. Behavioral misconduct may cost damages of many millions; it may cost enduring reputational damage; it may cost collateral damage to partner companies in many millions; it may cost collateral damage to innocent individuals part of the same or related production team that may no longer profit from being on that production. The damage can extend up and down the line of production various ways, even causing intellectual property that should have decades of value and *in which many companies and people have invested in* good faith, instantly worthless. The damage can be so extensive that there is no reliable way to estimate it. Once upon a time, the aggrieved party would sue and either a settlement or a judgment would bring the aggrieved some money and the case would be closed[12] Now, the number of aggrieved parties coming forward is increasing, and the variety of

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[10] For possibly "fragile" companies, *see, e.g.*, *infra* note 103 and accompanying text (theatre closed down six days after a story published that contained bad publicity about one of its leaders).

[11] *See* Joe Flint, *Suit Accuses Current, Former CBS Executives of Insider Trading*, WALL ST. J. (Feb. 12, 2019), https://www.wsj.com/articles/suit-accuses-current-former-cbs-executives-of-insider-trading-11550016859.

[12] *See* Christina Pazzapese & Collen Walsh, *The Women's Revolt: Why Now, and Where To*, HARV. GAZETTE (Dec. 21, 2017), https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/.

remedies sought are multiplying, as are the dangers to the companies.[13]

Individuals succumb to bad behavior, even those that live in the limelight. Not always, but perhaps it is even more expected now than ever. Or, perhaps, individual misconduct was simply more tolerated than it is now.[14] But today is a new day and those aggrieved have found their voice.[15] Media companies are especially at-a high profile and high risk area – the media is happy to report on each other for competitive edge. For example, when the Harvey Weinstein story became public, it first appeared in the *New York Times*, circulation 540,000 weekday copies in 2017[16]

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[13] *See, e.g.*, Riley Griffin, Hannah Recht & Jeff Green, *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/.

[14] *See, e.g.*, Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements ("The mogul used money from his brother and elaborate legal agreements to hide allegations of predation for decades."). One person allegedly molested by Harvey Weinstein criticizes the system that protected Weinstein and let him continue in his ways. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html; *see also* Marlow Stern, *'Untouchable' Exposes How the Media Protected Harvey Weinstein for Decades*, DAILY BEAST (Jan. 26, 2019), https://www.thedailybeast.com/untouchable-explores-how-the-media-protected-harvey-weinstein-for-decades. *See also* JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019).

[15] The "MeToo" movement was founded in 2006 by Tarana Burke as a way to help women who survived sexual violence. The phrase was made popular and went viral in 2017 when actress Alyssa Milano suggested the use on Twitter in the wake of the Harvey Weinstein scandal. *See* Aisha Harris, *She Founded MeToo. Now She Wants to Move Past the Trauma.*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html; *see also* Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE (May 29, 2019), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.

[16] *See* Amy Watson, *Average paid and verified weekday circulation* of the New York Times from 2000 to 2018 (in 1,000 copies)*,

and 89 million online hits per month,[17] and in the *New Yorker* with a print/digital circulation in 2017 of 1.1 million and 15.6 million unique hits on its website.[18] Once the story breaks, many other news outlets pick it up and "report on the reports." In addition to the mass media, individuals can broadcast their own station via social media. For example, Ronan Farrow, the journalist who broke the Weinstein story in the *New Yorker*, has a Twitter account of 878,000 followers.[19] In the past, news could be stopped; today it travels fast and far.

Post-2017 and the Harvey Weinstein scandal, support for victims of sexual harassment has dramatically increased, so companies should expect more lawsuits if such allegations continue to be made against them.[20] These lawsuits will take new forms. In the case of Les Moonves, *infra* at 25–27, we see that the victims attempted to take up lawsuits against the board of directors for negligent retention and even securities fraud.[21] What was once

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STATISTA, https://www.statista.com/statistics/273503/average-paid-weekday-circulation-of-the-new-york-times/ (last visited Nov. 18, 2019).

[17] *See* Ross Benes, *How the New York Times Gets People To Spend 5 Minutes Per Visit On Its Site*, DIGIDAY (Dec. 21, 2017), https://digiday.com/media/new-york-times-gets-people-spend-5-minutes-per-visit-site/.

[18] *See* Lucia Moses, *How The New Yorker is Capitalizing on Its Trump Bump*, DIGIDAY (Mar. 10, 2017), https://digiday.com/media/new-yorker-enjoying-trump-bump/.

[19] *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories; *see also* Ronan Farrow (@RonanFarrow), TWITTER, https://twitter.com/RonanFarrow?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Nov. 18, 2019).

[20] Gene Maddaus, *Paz de la Huerta Adds Bob Iger and Michael Eisner to Weinstein Lawsuit*, VARIETY (Aug. 27, 2019), https://variety.com/2019/biz/news/paz-de-la-huerta-eisner-iger-weinstein-lawsuit-1203316154/; Dominic Patten, *Disney To "Vigorously" Fight New $60M Harvey Weinstein Assault Suit From Paz De La Huerta*, DEADLINE (Aug. 27, 2019), https://deadline.com/2019/08/paz-de-la-huerta-sues-disney-harvey-weinstein-rape-claim-miramax-1202705695/.

[21] For securities fraud, *see generally* Karen Bitar & Sarah Fedner, *Recent Developments in Securities Litigation: The "Event Driven" #MeToo Lawsuit*, JD SUPRA (June 12, 2019), https://www.jdsupra.com/legalnews/recent-developments-in-securities-

a personnel matter has now become a public matter and the risks have multiplied ranging from financial to reputational damage.

The speed with which a company acts can minimize its damage, and particularly, its reputational damage. Under the doctrine of *respondeat superior*, a company may be held liable for its employee's conduct. If the board of directors has knowledge that one of its own has engaged in behavioral malfeasance, it needs to take swift and certain action.[22] The faster a company disassociates from a CEO or executive in social trouble, the more likely it is to stop any harassment, contain the damage, to keep it from spreading, and to protect its reputation.[23]

A company failing to quickly address behavioral misconduct from within risks prolonging damage to its reputation and to possible victims. A rapid response can, thus, decrease damage. Engaging in proactive measures, such as the inclusion of morality clauses into media business contracts, may mitigate those damages from the onset.

II. THE HISTORY OF SOCIAL TROUBLE IN THE MEDIA

An executive gets into what this article calls "social trouble" as a broad categorization, by engaging in conduct including sexual harassment, improper supervision, use of language so deficient for the board of directors to remove them, or any other display of "moral turpitude." In this case it does not need to rise to a criminal level, it only needs to be significantly damaging to the reputation of the company.

60318/; Eriq Gardner, *CBS Hit With Shareholder Suit Over Leslie Moonves Sexual Harassment Allegations*, HOLLYWOOD REP. (Aug 27, 2018), https://www.hollywoodreporter.com/thr-esq/cbs-hit-shareholder-suit-les-moonves-sexual-harassment-allegations-1137677 ("The complaint alleges the company should have disclosed that enforcement of its own harassment policies was inadequate.").

[22] *See generally Vicarious Liability/Respondeat Superior*, JUSTIA, https://www.justia.com/injury/negligence-theory/vicarious-liability-respondeat-superior/ (last visited Nov. 18, 2019). Although assuming the CEO, once "caught" would not cause any more problems, it is always possible and then the board might also face claims of Negligent Retention. So far those claims have not been successful, but at some point they might.

[23] *See* discussion *infra* pp. 25–26.

The behavior leading to social trouble can include anything from improper language[24] to other bad behavior including, direct sexual harassment,[25] violating insider trading rules,[26] inappropriately smoking a banned substance when you are a federal contractor, or violating SEC rules.[27] The list is extensive and this article will only discuss examples.

With this bad behavior comes damage to reputation, either to the product's reputation or to the company. Damage to reputation in a non-media company might be manageable. However, in a media company the scrutiny is magnified. The media company often has an audience very willing to pounce, criticize, and publicize missteps. Further, in the era of self-media like Twitter, Facebook, and Instagram, potentially devastating news travels fast around the world. Is reputational damage something that will pass or is it something that should concern the attention of the board of directors? Bad behavior that threatens the company to the extent that the leadership person needs to be removed from their position is something that will rise to the highest levels of the company. The tools provided by a good "morals" or "behavioral clause" include rapid damage control to reputation, the ability to quickly sever the relationship with the bad actor, and the potential ability to limit liability. The arguments herein do not portend to judge, but rather are borne of many years of front-line human resources legal experience. When something goes wrong, what tools are needed? Some might wonder if these same principals might be extensible to other industries. Why of course many industries may consider such strategic tools, but the focus here is on the special attributes and needs of the entertainment industry.

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[24] The "improper language" can have its own range of bad behavior from potentially anti-Semitic language to other offensive and racist language.

[25] *See infra* pp. 20–22 (discussing alleged activity in the Harvey Weinstein case); *infra* pp. 25–27 (the Les Moonves case); *infra* pp. 27–28 (the case of Kevin Tsujihara).

[26] *See infra* note 74 and accompanying text.

[27] *See infra* note 83 and accompanying text.

A. MEDIA: OFTEN BIG BUSINESS GROWN THROUGH INNOVATION

For as big and powerful as "the media" might be, it has a remarkable history that has small business and start-up stories time and time again. Not only is the popular media of today fairly young, most beginning in the 1900s through the early 2000s, but it seems to have had some larger-than-life owners or leadership.

Movie studios, for example, are relatively new to the scene: Universal Studios was founded in 1912,[28] Paramount was founded in 1912,[29] Warner Brothers was founded 1923, Walt Disney studios was founded 1923,[30] and Sony Pictures (Columbia) was founded 1924.[31] Similar to the technology companies and founders with which we are familiar, like Apple to Steve Jobs and Steve Wozniak,[32] and Microsoft to Bill Gates,[33] these media had figures that were key to their success.

Television networks also have a recent history. Of the current full-time television networks, American Broadcasting Company (ABC) was founded in its modern form in 1953,[34] CBS television was founded in 1941,[35] the National Broadcasting

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[28] *Our History*, NBCUNIVERSAL, http://www.nbcuniversal.com/our-history (last visited Nov. 18, 2019).

[29] *The Paramount Story*, PARAMOUNT STUDIOS, http://www.paramountstudios.com/phone/paramount-history.html (last visited Nov. 18, 2019).

[30] *Disney History*, D23, https://d23.com/disney-history/ (last visited Nov. 18, 2019).

[31] *Sony Pictures History*, SONY PICTURES MUSEUM, http://www.sonypicturesmuseum.com/studio/history/sony-pictures (last visited Nov. 18, 2019).

[32] Angelique Richardson & Ellen Terrell, *Apple Computer, Inc.*, LIBRARY OF CONG. BUS. REFERENCE SERVS. https://www.loc.gov/rr/business/businesshistory/April/apple.html (last updated Aug. 12, 2015).

[33] *This Day in History | 1975 April 04 Microsoft founded*, HISTORY.COM (Oct. 9, 2015), https://www.history.com/this-day-in-history/microsoft-founded.

[34] CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, STAY TUNED: THE HISTORY OF AMERICAN BROADCASTING 288 (3d ed. 2002).

[35] GARY R. EDGERTON, THE COLUMBIA HISTORY OF AMERICAN TELEVISION, 66–67 (2007).

Company's television network (NBC) was founded in 1939,[36] and Fox was founded in 1986.[37] They have all had towering figures that made them what they are today. ABC had Leonard Goldenson,[38] CBS had William S. Paley and Frank Stanton,[39] NBC had David Sarnoff, Bob Wright, and Brandon Tartikoff,[40] and Fox had Rupert Murdoch.[41]

Other media includes Pixar, founded by Steve Jobs and former Lucasfilm employees (think *Toy Story* and *The Incredibles*),[42] Cable News Network (CNN) founded in 1980 by Ted Turner,[43] and Facebook, which was founded in 2004 by Mark Zuckerberg, and others.[44]

All of these companies have two things in common; the companies themselves are relatively young in their development, and they are each led by iconic individuals. They are young by necessity, whether film, television, radio, internet, streaming, or any permutation or combination; successful media depends on innovation and the invention and development of technology, so most media is relatively "new" because media, itself, is constantly innovating. Most importantly here, however, is the uniqueness of the leadership. Sometimes, individual leaders are close to indispensable to the company. Much of the media known today was founded in the rental spaces, garages, and dormitories of these individuals. This is the life story of modern media. While none of

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[36] *Our History*, NBCUNIVERSAL, http://www.nbcuniversal.com/our-history (last visited Nov. 18, 2019) ("David Sarnoff launches regular TV service from the 1939 World's Fair in Flushing, Queens").

[37] Sterling & Kitross, *supra* note 34, at 289.

[38] Felicity Barringer, *Leonard Goldenson, Force Behind ABC, Is Dead at 94*, N.Y. TIMES (Dec. 28, 1999), https://www.nytimes.com/1999/12/28/business/leonard-goldenson-force-behind-abc-is-dead-at-94.html.

[39] Sterling & Kitross, *supra* note 34, at 283–84.

[40] Lee Hall, *Always cutting edge: From David Sarnoff to Bob Wright, how NBC grew to become a giant*, BROADCASTING + CABLE (Mar. 10, 2002), https://www.broadcastingcable.com/news/always-cutting-edge-91622.

[41] Sterling & Kitross, *supra* note 34, at 508.

[42] *Our Story*, PIXAR, https://www.pixar.com/our-story-1 (last visited Nov. 18, 2019).

[43] Rachel Doepker, *CNN Launched 6/1/1980*, LIBRARY OF CONG. BUS. REFERENCE SERVS. https://www.loc.gov/rr/business/businesshistory/June/cnn.html (last updated Mar. 3, 2016).

[44] Jose Antonio Vargas, *The Face of Facebook*, NEW YORKER (Sept. 13, 2019), https://www.newyorker.com/magazine/2010/09/20/the-face-of-facebook.

the above referenced leaders are subjects of the stories in this article, we will see that when the leadership of media companies run into moral or social trouble in the media industry, it can impact many lives at many levels.

Moral or social trouble often manifests as a conduct breach. Conduct breaches can affect single projects, a series of projects, or entire companies. The outcomes vary, the amount at-risk varies, the preventative measures vary, and industry practices vary. Therefore, the following sections split up the types of scenarios into those posing risk to a single-project or series-of-projects and those posing risk to the company as a whole.

1. *"KEY PLAYER SYNDROME"*

Suppose the damage is caused by a single star on a single show. If that show is a one-time type of show, for example, an awards show and the proposed host has done something bad, perhaps the problem can be solved by merely changing hosts? If the show is a weekly show, perhaps eliminating a character and going on with the rest of the show might be an option. The highest profile of that problem was with Charlie Sheen on the show *Two-and-a-Half-Men*. He was the star of the show and the show was built around him, but it was owned, written, and produced by Chuck Lorre (and others) so ultimately the answer was merely to kill off the lead character.[45]

The "key player syndrome" can extend to particularly valuable behind-the-camera or off-screen players. For example, Director James Gunn was fired from directing *Guardians of the Galaxy 3* by Disney for social media messages that he posted many years before. This jeopardized not only the production of the movie, but the jobs of the many people expected to work on the movie as well.[46] Disney manifested the key player syndrome

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[45] *See* Kimberly Nordyke, *How Charlie Sheen's Character Dies on 'Two and a Half Men'*, HOLLYWOOD REP. (Sept. 19, 2011), https://www.hollywoodreporter.com/news/how-charlie-sheens-character-dies-237384.

[46] Mr. Gunn's previous two Guardians of the Galaxy movies had grossed $863 million and $773 million. *See* Mike Fleming Jr., *James Gunn Fired From 'Guardians Of The Galaxy' Franchise Over Offensive Tweets*, DEADLINE (July 20, 2018), https://deadline.com/2018/07/james-gunn-fired-guardians-of-the-galaxy-disney-offensive-tweets-

when Disney "rehired" Mr. Gunn to direct the movie some time later, after an apology by Mr. Gunn and after about a year had passed.[47]

The problem becomes more complicated when the person in social trouble also owns all or part of the company's property, as in the case of Rosanne Barr, in which case she also created her own character. Ms. Barr co-owned a portion of the company when she tweeted an allegedly racist tweet.[48] Ms. Barr did try to apologize for the Tweet.[49] At the time of the incident, the show, *Roseanne*, was the highest rated ABC television show in years, had brought in an estimated $45 million in revenue, and was estimated to bring in $60 million the next year.[50]

Disney, which had been a leader in combating racial stereotypes, owns ABC, and Bob Iger, president of Disney, said there was "no place for that type of bigotry."[51]ABC Television quickly canceled Barr's show.[52] After the show was canceled, Barr sent out a Tweet apologizing to the "hundreds of people" who lost their jobs on her show.[53] In addition to losing her show, she was also terminated by ICM Partners, her talent agency.[54] After the show was canceled, all appeared to be lost for the remaining cast and crew; they had all been affected by the actions of a single person, the star of the show, and a co-owner of the property. Fortunately, in this case, the collateral damage did not last long. Within days The Carsey-Werner Company, the producing

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1202430392/. Mr. Gunn claimed that the tweets were meant as sarcastic humor. *Id.*

[47] Julia Alexander, *Disney Rehires James Gunn for Guardians of the Galaxy 3 After Firing Him Over Old Tweets*, THE VERGE (Mar. 15, 2019), https://www.theverge.com/2019/3/15/18267551/james-gunn-direct-guardians-of-the-galaxy-3-disney-marvel.

[48] John Koblin, *After Racist Tweet, Rosanne Barr's Show is Canceled by ABC*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html.

[49] Desiree Murphy & Jennifer Drysdale, *Roseanne Barr Fallout: A Complete Guide to How Her Racist Tweet Led to the Cancellation and 'The Connors'*, ET ONLINE (Oct. 16, 2018), https://www.etonline.com/roseanne-barr-fallout-a-complete-guide-to-how-her-racist-tweet-led-to-cancellation-and-the-conners.

[50] Koblin, *supra* note 48.

[51] *Id.*

[52] *Id.*

[53] Murphy & Drysdale, *supra* note 49.

[54] *Id.*

company, put together a new package, got Barr to agree to a settlement to leave the production,[55] and sold a spinoff titled "*The Connors*" to ABC restoring the rest of the cast's jobs. When ABC brought back *The Connors*, Barr was not to have any financial stake in the show and no creative control.[56]

The *New York Times* reports that cancelling a show is highly unusual, as networks normally rework the show without the offending character, as in *Two and a Half Men*, *House of Cards*, and *Transparent*.[57] However, the fact that the show was cancelled in less than 12 hours suggests that "the intensity and immediacy of the social media age [has] turned corporate crisis management into an exercise where minutes, and sometimes seconds, count."[58]

In the first episode of the new show, *The Connors*, Barr's character was killed off via an opioid overdose.[59] In the end, similarly, the solution was the removal of a character; however, much contractual negotiation needed to occur before the show could continue.[60] *The Connors* fared well enough as a replacement show that it was renewed for a second season by ABC.[61]

The case of Louis C.K. and his movie, *I Love You, Daddy*, demonstrates the damage key player syndrome can do at the cinematic level when an individual's misconduct causes the cancellation of a movie release. A television show might cost three to four million dollars for an hour-long episode, and sometimes up to seven million dollars an episode, and even more in special

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[55] *Id.*

[56] *Id.*

[57] Koblin, *supra* note 48.

[58] Michael M. Grynbaum, *Disney Made Quick Work of 'Roseanne.' It's Not Always So Easy.*, N.Y. TIMES (May 30, 2018), https://www.nytimes.com/2018/05/30/business/media/disney-roseanne-response.html.

[59] Murphy & Drysdale, *supra* note 49.

[60] *Id.*

[61] Alex Welch, "*The Connors" Renewed for a Second Season by ABC*, ZAP2IT (Mar. 22, 2019), https://tvbythenumbers.zap2it.com/more-tv-news/the-conners-renewed-for-second-season-by-abc/. The ratings were well behind the ratings of the former "*Rosanne*" show, but it was the highest rated freshman comedy, meaning its renewal was highly likely. *Id.*

cases.[62] A single-camera half-hour show might cost $1.5 million to three million an episode. A season's order that is between a dozen and two dozen shows, the lost revenue, lost jobs and expenditures add up quickly, not to mention the lost opportunity costs and the lost future royalty streams. Similarly, in the film industry a budget for a single movie can exceed $20 million and can often rise to the level of $100 million to $200 million per movie or even more.[63] Further, there is often a completion bond on a movie, so there could be a contractual hit to an insurance company, assuming no escape clause for these types of actions.[64]

In the case of Louis C.K., his movie, *I Love You, Daddy*, was completed but its release suddenly canceled after the *New York Times* reported on accusations made by five women who claimed to experience unwelcomed sexual behavior by him.[65] The release of his movie was canceled the same day the *New York Times* published its story, and the production crew, having followed the film to completion, never received the full benefit of their work.[66] FX also announced that they were ending their association with Louis C.K.[67] Louis C.K.'s management company subsequently dropped him as a client and HBO dropped him from

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[62] Maureen Ryan & Cynthia Littleton, *TV Series Budgets Hit the Breaking Point as Costs Skyrocket in Peak TV Era*, VARIETY (Sept. 26, 2017), https://variety.com/2017/tv/news/tv-series-budgets-costs-rising-peak-tv-1202570158/.

[63] The website "The Numbers: Where Data and the Movie Business Meet," lists more than 400 movies that have had a budget of $100 million or more. THE NUMBERS, https://www.the-numbers.com/movie/budgets/all/401 (last visited Nov. 18, 2019).

[64] Susan Antilla, *Entire Industries Being Blacklisted By Insurers Over #MeToo Liability*, THE INTERCEPT (Feb. 2, 2019), https://theintercept.com/2019/02/02/workplace-harassment-insurance-metoo/ (seven of thirty-two insurers polled by the publisher of the *Betterley Report* have blacklisted companies in the entertainment industry for employment practices liability insurance).

[65] Yohana Desta, *Louis C.K. Accused of Sexual Misconduct by Five Women*, VANITY FAIR (Nov. 9, 2017); Melena Ryzik, Cara Buckley, & Jodi Kantor, *Louis C.K. is Accused By 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html.

[66] Ryan Reed, *Louis C.K.: 'I Love You, Daddy' Canceled, FX Ends Partnership*, ROLLING STONE (Nov. 10, 2017), https://www.rollingstone.com/movies/movie-news/louis-c-k-i-love-you-daddy-canceled-fx-ends-partnership-124646/.

[67] *Id.*

a comedy benefit.[68] The IMDB page for the movie lists a cast and crew of more than one hundred individuals who worked on the movie.[69]

Over one hundred people worked on the movie; some of them for years. The movie's cancellation caused them to lose any invested interest in that production including the economic value of any back end payments,[70] the very valuable intangibles from credit for working on the movie,[71] awards they might have won for their performances or their technical work,[72] and numerous other benefits from being associated with a movie. The value of the work itself in entertainment cannot be underestimated: "[s]creen credit is probably the single most important factor for artists in the entertainment business. This factor determines who is 'hot' and who is not; it is the basis for determining whether artists are offered subsequent assignments and their increase in compensation for those assignments."[73]

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[68] *Id.*

[69] *I Love You, Daddy (2017) Full Cast & Crew*, IMDB, https://www.imdb.com/title/tt7264080/fullcredits?ref_=tt_cl_sm#cast (last visited Nov. 18, 2019).

[70] *See, e.g.*, Dave McNary, *Hit Microbudget Pics Offer Healthy Backend for Name Actors*, VARIETY (Apr. 11, 2013), https://variety.com/2013/film/news/hit-microbudget-pics-offer-healthy-backend-for-name-actors-1200349263/.

[71] Robert Davenport, *Screen Credit in the Entertainment Industry*, 10 LOY. L.A. ENT. L. REV. 129, 129 (1990).

[72] For a movie, the most obvious award is the Oscar given out by the Academy of Motion Picture Arts and Sciences. However, there are numerous other awards including the Screen Actors Guild Awards, Black Critic's Circle Award, Gay and Lesbian Entertainment Critics Association Awards, the regional awards like the Chicago Film Critics Award, and there are the awards in the individual crafts like costuming, editing, writing. There are also film festival awards such as Sundance, Cannes, the Chicago International Film Festival, the Toronto International Film Festival, the Venice Film Festival, and many, many others. If a movie is not released due to the malfeasance of a leader, each person who worked on that movie will not benefit from whatever acclaim the movie would have earned from respected film organizations.

[73] Davenport, *supra* note 71, at 129.

2. *CONDUCT RESULTING IN CORPORATE FATALITY*

Risk to a single project or series of projects from a lone actor can be contained, insulated, and sometimes even redeemed. However, the stakes rise when entire companies become at risk. When the CEO or another executive officer engage in or are alleged to have engaged in behavioral misconduct, it can threaten many projects, many thousands of jobs, millions of dollars of work, and create third party liabilities and unexpected calls on resources. The devastation can be extensive, unexpected, and swift. The relevant managers need to be ready to act swiftly and to have tools available that can save the company.

An eponymous CEO, Martha Stewart, is just one example of how the lone conduct of a company's chief officer can bring on such corporate-wide devastation. Martha Stewart Living Omnimedia was a media company built on Ms. Stewart's personal brand. It had television shows as well as physical goods and brands of housewares and garden ware. Ms. Stewart's name is part of what gave those products value and it was her name that helped to sell the goods. However, the SEC alleged that she committed insider trading[74] and took her to trial where she was convicted[75] and sent to jail. As part of her subsequent civil settlement with the SEC, she had to pay $195,000 in fines and fees, and she could not serve as a director or CEO of a publicly-traded company for five years.[76] Even more devastating was the impact her conviction had on the image of the Martha Stewart brand, which deteriorated as a result. In an attempt to salvage the company, the board of directors enlisted a third-party – the government – to mitigate the damaging outcome.[77] The settlement precluded Ms. Stewart from contributing to the board in certain ways including being CEO.

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[74] Press Release, Sec. Exch. Comm'n., SEC Charges Martha Stewart, Broker Peter Bacanovic with Illegal Insider Trading (June 4, 2003), https://www.sec.gov/news/press/2003-69.htm.

[75] Leslie Eaton, *The Martha Stewart Verdict: The Overview; Stewart Found Guilty of Lying in Sale of Stock*, N.Y. TIMES (Mar. 6, 2004), https://www.nytimes.com/2004/03/06/business/martha-stewart-verdict-overview-stewart-found-guilty-lying-sale-stock.html.

[76] Landon Thomas, *Martha Stewart Settles Civil Insider-Trading Case*, N.Y. TIMES (Aug. 7, 2006), https://www.nytimes.com/2006/08/07/business/07cnd-martha.html.

[77] Eaton, *supra* note 75.

Fortunately, Martha Stewart Living Omnimedia recovered as a company and continues to operate.

In comparison, one may remember the 2010 media atrocity of the appearance of Tony Hayward, the CEO of British Petroleum ("BP") and how his remarks about the Deepwater Horizon oil platform explosion got him fired.[78] Hayward himself had replaced a prior disgraced CEO and promised to focus on safety.[79] Unfortunately, the Deepwater Horizon tragedy he presided over killed several workers and dumped millions of gallons of oil into the Gulf of Mexico. The impact of his remarks was so severe that it caused the BP stock to plummet, which ultimately initiated his removal as CEO.[80] In another corporate case, Elon Musk, CEO of Tesla and SpaceX, was caught smoking what appeared to be marijuana on a video podcast.[81] In combination with the fallout he received from publishing a Tweet that implied he was close to sealing a business deal, an act that potentially violates SEC rules, he was almost removed from his position as CEO as well.[82] Despite being an iconic founder of several well-respected companies, his personal misconduct could have proved to be corporately fatal.[83]

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[78] Bryan Walsh, *Oil Spill: Goodbye, Mr. Hayward*, TIME (July 25, 2010), http://science.time.com/2010/07/25/oil-spill-goodbye-mr-hayward/.

[79] *Id.*

[80] James Quinn & Rowena Mason, *BP Oil Spill: Billions Wiped Off Value BP as Share Price Plummets*, THE TELEGRAPH (June 10, 2010), https://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7816623/BP-oil-spill-Billions-wiped-off-value-BP-as-share-price-plummets.html.

[81] Eric Lutz, *Reefer Madness: Elon Musk's Viral Blunt-Smoking Photo Comes Back to Haunt Him*, VANITY FAIR (Mar. 8, 2019), https://www.vanityfair.com/news/2019/03/reefer-madness-elon-musks-viral-blunt-smoking-photo-comes-back-to-haunt-him (marijuana is legal in California, but not for people with government security clearances).

[82] Benjamin Bain & Gregory Mott, *Can Elon Musk Tweet That? The SEC Is Digging In*, BLOOMBERG (Aug. 7, 2018), https://www.bloomberg.com/news/articles/2018-08-07/can-elon-musk-tweet-that-the-sec-may-have-an-opinion-quicktake.

[83] Alan Ohnsman, *Elon Musk's Tesla Tweet Puts CEO Role at Risk Again*, FORBES (Feb. 25, 2019), https://www.forbes.com/sites/alanohnsman/2019/02/25/elon-musks-tesla-tweet-puts-ceo-role-at-risk-again/#5d66e4576cdb.

BP was fortunate in the corporate world; it still exists and has generally recovered. Martha Stewart Living Omnimedia was also fortunate with its outcome in the media industry. However, if we move further into the media world, we can find an even more serious example of a CEO's behavior taking an entire company down. The executive's actions risked all of the capital invested in the company, all of the current projects, and all of the money loaned to the company, and eventually involved money pledged by the company's insurers.[84] If not for a last-minute "white knight" buyer, numerous third parties would have been collateral damage to his alleged sexual proclivities.

The most visible current example is Harvey Weinstein, the former head of the Weinstein Company. In October of 2017, the *New York Times* ran a story on how Mr. Weinstein, the head of the Weinstein Company, had been paying off sexual harassment accusers for decades.[85] The employees of the Weinstein Company had contracts saying they would not criticize its leaders and the women accepting payouts agreed to confidentiality clauses.[86] Many of his employees knew of the alleged inappropriate conduct and some of the board members were concerned.[87] The allegations went back decades involving both actresses and employees. The board of the Weinstein Company acted quickly, firing co-founder Weinstein from his own company a few days later, on October 8th.[88] Part of the board resigned in protest of Mr. Weinstein's actions while the remaining board members, including his brother, hung on to the company without him.[89]

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[84] Brooks Barnes & Jan Ransom, *Harvey Weinstein Is Said to Reach $44 Million Deal to Settle Lawsuits*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/business/harvey-weinstein-settlement.html ("Insurance policies would cover the $44 million if the current agreement is finalized.").

[85] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[86] *Id.*

[87] *Id.*

[88] Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html.

[89] *Id.*

The Weinstein Company, one of Hollywood's most successful independent producers, went into a death spiral. The company was eventually sold in a bankruptcy auction to the single bidder, Lantern Entertainment, who bought the assets for $310 million.[90] That was 40% less than was being offered for the company a few months before and a fraction of what it was allegedly worth before the sexual misconduct allegations.[91] A year before the scandal broke, Mr. Weinstein claimed the company was worth $700 to $800 million.[92] Although $310 million is substantial, Mr. Weinstein and his brother would not receive anything as a result of the sale, the proceeds, instead, going toward paying off lawyers, creditors and others including the alleged victims.[93] He lost his company and his company's fortune within a year. Virtually all of The Weinstein Company's employees lost their jobs.[94]

In addition to losing his company and his fortune, Mr. Weinstein lost family, friends, and honors. His wife, Georgina Chapman, began divorce proceedings.[95] His friendship with the Clintons and the Obamas deteriorated.[96] The British Academy of

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[90] Chris Isidore, *Remains of the Weinstein Company Sold – to the Only Real Bidder*, CNN BUS. (May 2, 2018), https://money.cnn.com/2018/05/02/media/weinstein-company-bidder/index.html. Another report has the final closing price at $289 million. The deal was an asset-only deal for 270 films and other properties. *See* Dawn C. Chmielewski, *Lantern Entertainment Closes $289 Million Acquisition of the Weinstein Co.'s Assets*, DEADLINE (July 16, 2018), https://deadline.com/2018/07/lantern-entertainment-closes-289-million-acquisition-weinstein-co-s-assets-1202427141/.

[91] Chmielewski, *supra* note 90.

[92] *Id.*

[93] Yohana Desta, *After Months-Long Death Rattles, the Weinstein Company Is Officially Kaput*, VANITY FAIR (July 16, 2018), https://www.vanityfair.com/hollywood/2018/07/the-weinstein-company-lantern-entertainment.

[94] *Id.*

[95] Weinstein and his wife were married in 2007 and have two children. *See* Pat Saperstein, *Harvey Weinstein's Wife Georgina Chapman Divorcing Him*, VARIETY (Oct. 10, 2017), https://variety.com/2017/film/news/harvey-weinstein-wife-georgina-chapman-divorcing-divorce-1202586378/.

[96] Jon Blistein, *Hillary Clinton, Obamas Rebuke Harvey Weinstein After Assault Allegations*, ROLLING STONE (Oct. 11, 2017),

Film and Television Arts ("BAFTA") suspended his membership for "behavior completely unacceptable and incompatible with BAFTA's values."[97] He resigned from the Director's Guild of America ("DGA"),[98] France revoked his Legion of Honor award,[99] and Harvard took away his DuBois Medal.[100] All of these incidents were reported within the first couple of months after the *New York Times* article! Weinstein tried to submit the claims for his defense into insurance companies who argued they were not required to cover him for intentional acts.

Enough cannot be said about the Weinstein case. It generated national news coverage, is influential in the current practices and attitudes towards #MeToo, and it resulted in the complete demise of Mr. Weinstein's company. What happened to Mr. Weinstein is not only reserved for nationally renowned film producers, however. On the far smaller scale of a local theater, the damage can be equally complete.[101] The news magazine *The Chicago Reader*, a long-standing, weekly publication known for running in-depth stories of Chicago interest, ran a feature about alleged physical abuse in a local storefront theater known as the *Profile Theatre*. The artistic director pushed back and said that he

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https://www.rollingstone.com/movies/movie-news/hillary-clinton-obamas-rebuke-harvey-weinstein-after-assault-allegations-118236/.

[97] Seth Kelley, *BAFTA Suspends Harvey Weinstein*, VARIETY (Oct. 11, 2017), https://variety.com/2017/film/news/ harvey-weinstein-bafta-1202586879/.

[98] David Robb, *Facing DGA Expulsion, Harvey Weinstein Resigns His Membership*, DEADLINE (Nov. 27, 2017), https://deadline.com/2017/11/harvey-weinstein-booted-from-the-directors-guild-dga-1202215223/.

[99] Harry Cockburn & Harriet Agerholm, *Macron 'to Revoke Harvey Weinstein's Legion of Honour Award',* INDEPENDENT (Oct. 15, 2017), https://www.independent.co.uk/arts-entertainment/films/news/emmanuel-macron-revoke-harvey-weinstein-legion-of-honour-award-france-a8002176.html.

[100] Graham W. Bishai & Leah S. Yared, *Harvard to Rescind Harvey Weinstein's Du Bois Medal*, HARV. CRIMSON (Oct. 19, 2017), https://www.thecrimson.com/article/2017/10/19/weinstein-dubois-medal-rescinded/.

[101] Aimee Levitt & Christopher Piatt, *At Profiles Theatre the Drama – and Abuse – is Real*, CHICAGO READER (June 8, 2016), https://www.chicagoreader.com/chicago/profiles-theatre-theater-abuse-investigation/Content?oid=22415861("For more than 20 years, actors and crew members stayed silent about mistreatment they suffered at the acclaimed storefront theater.").

believed in the codes of conduct and that no abuse had happened.[102] However, six days after the Chicago Reader article was published, the theater, which had been in business for decades, closed its doors forever.[103] The theatre, despite its longevity and artistic acclaim, had suffered a "death penalty" of its own.

a) *Collateral Damage Caused by Corporate Moral Death*

Corporate fatality does not always strike so immediately. Some damage may show up years later. For example, Bill Cosby was listed as a creator of *The Cosby Show*, and his production company Bill Cosby Enterprises produced the show along with Carsey-Werner Enterprises. The show aired from 1984 to 1992 and won numerous awards.[104] *The Cosby Show* has had enduring residual value airing in re-runs continuously after the end of its network run. Mr. Cosby, however, was arrested many years later in December 2015[105] for a sexual assault that occurred in 2004, and was convicted and sentenced to three to ten years in prison.[106] The show was pulled from TV Land[107] and BET after the

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[102] Jake Malooley, '*Unfortunately, I am the villain': Profiles Theatre Artistic Director Darrell W. Cox Responds to Reader Abuse Investigation*, CHICAGO READER (June 10, 2016), https://www.chicagoreader.com/Bleader/archives/2016/06/10/unfortunately-i-am-the-villain-profiles-theatre-artistic-director-darrell-w-cox-responds-to-reader-abuse-investigation.

[103] American Theatre Editors, *Chicago's Profiles Theatre Closes in Wake of Abuse allegations*, AM. THEATRE (June 15, 2016), https://www.americantheatre.org/2016/06/15/chicagos-profiles-theatre-closes/.

[104] Marcia Johnson, *The Cosby Show (1983-1992)*, BLACKPAST (Apr. 19, 2011), https://www.blackpast.org/african-american-history/cosby-show-1984-1992/.

[105] Eric Levenson & Aaron Cooper, *Bill Cosby sentenced to 3 to 10 years in prison for sexual assault*, CNN (Sept. 28, 2018), https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html.

[106] *Id.*

[107] Cynthia Littleton & Ted Johnson, *Bill Cosby Scandal Boils Over in New Media Climate*, VARIETY (Nov. 25, 2014), https://variety.com/2014/biz/news/bill-cosby-sexual-assault-allegations-public-opinon-1201364071/.

allegations,[108] Thus destroying the residual value of the television program for the foreseeable future.

The collateral damage from Mr. Cosby's conviction was immense. It damaged a major production company, perhaps caused one of the stars on his show to work at Trader Joe's grocery store, and, according to one opinion, created hardship for African American women actors from the show. When the show went into syndication, the life a show has in re-runs after it has shown on the broadcast network, it sold for an unprecedented $4 million an episode.[109] The reruns across two decades generated over $1.5 billion in revenue.[110] Once a show is cancelled from rerun networks, the syndication dollars end.[111] When the show was cancelled, revenue ended not only for Mr. Cosby, but also for Carsey-Werner Television, one of the companies that invested heavily in him.[112] Carsey-Werner also, coincidently, produced the *Roseanne* show, which likewise was canceled for a misconduct by its name star.[113]

One former *Cosby Show* actor, Geoffrey Owens, took a job at Trader Joe's partially due to the loss of residuals from the

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[108] Whitney Friedlander, *Bounce TV Pulls 'Cosby' reruns, BET's Centric Yanks 'The Cosby Show'*, VARIETY (July 7, 2015), https://variety.com/2015/tv/news/cosby-reruns-bounce-tv-1201535254/.

[109] Dana Feldman, *Cosby on Trial: How Sexual Assault Allegations Have Cost Him A Fortune*, FORBES (June 8, 2017), https://www.forbes.com/sites/danafeldman/2017/06/08/a-look-into-how-the-criminal-case-against-bill-cosby-is-costing-him-a-fortune/#45b9bf5141ad.

[110] *Id.*

[111] *See id.* Forbes also notes that Mr. Cosby suffered other personal income loss including the loss of his comedy tour, the loss of media streaming revenue, and the loss of new projects that he was working on. *Id.*

[112] Roger Friedman, *Second Stunning Blow for Producer of "Rosanne" and "Cosby" as Syndication Revenue Vanishes,* SHOWBIZ 411 (May 29, 2018), https://www.showbiz411.com/2018/05/29/second-stunning-blow-for-producer-of-roseanne-and-cosby-as-syndication-revenue-vanishes.

[113] *Id.*; *see also* Daniel Holloway, *'Roseanne' Episodes Pulled From Hulu, Viacom Cable Channels*, VARIETY (May 29, 2018), https://variety.com/2018/tv/uncategorized/roseanne-episodes-viacom-cable-channels-1202824599/.

Cosby Show.[114] One commentator noted that most of the shows actors who left without their residual checks after the show's cancellations were African-American women, the majority gender on set.[115] Residuals are calculated on a sliding scale from the original fee. After the thirteenth time a show airs, a leading actor gets five percent of the original fee for each episode that airs in perpetuity.[116] An estimated seven hundred plus people have been involved in productions starring Mr. Cosby and earn $20 million dollars per year of residuals.[117] This does not include the loss of revenue from the top-line sales or the companies involved in distribution.

This issue can affect the highest levels of companies. Recently, the CBS Board removed Leslie Moonves for inappropriate activities that took place over many years. Once they came to light, the Board acted swiftly and separation from CBS was quickly completed. A story written by Ronan Farrow broke in *The New Yorker* on July 27, 2018.[118] The story said that Mr. Moonves had been one of the most powerful media executives in America and had a knack for picking projects, so much so that the previous year he had earned $70 million.[119] Furthermore, he had become a prominent voice in the #MeToo movement and helped found the Commission on Eliminating Sexual Harassment

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[114] Itay Hod, *Geoffrey Owens Says Lost 'Cosby Show' Residuals a Factor in His Trader Joe's Job,* THE WRAP (Sept. 6, 2018), http://www.thewrap.com/geoffrey-owens-says-lost-cosby-show-residuals-factor-trader-joes-job-exclusive/.

[115] Ariana Romero, *When Networks Pull* The Cosby Show, *Its Women Stars Who Pay For Bill Cosby's Transgressions*, REFINERY29 (Apr. 27, 2018), https://www.refinery29.com/en-us/2018/04/197615/cosby-show-pulled-keshia-knight-pulliam-tempestt-bledsoe (stars such as Keshia Knight Pulliam, Lisa Bonet, and Phylicia Rashad are some of the people affected).

[116] Dom Serafini, *The Cost of Falling Stars: The Bill Cosby Residuals Story*, VIDEOAGE (Jan. 4, 2016), https://www.videoageinternational.net/2016/01/04/watercooler/the-cost-of-falling-stars-the-bill-cosby-residuals-story/.

[117] *Id.*

[118] Ronan Farrow, *Les Moonves And CBS Face Allegations Of Sexual Misconduct*, NEW YORKER (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct.

[119] *Id.*

and Advancing Equality in the Workplace, which was chaired by Anita Hill.[120] Mr. Moonves had also promulgated a "Zero Tolerance" policy at CBS in an email sent to all employees the year before.[121] In the reporting for the article, Ronan said that six women who had professional dealings with Mr. Moonves between the 1980's and the late 2000's had been sexually harassed by Mr. Moonves.[122] The article alleged that CBS had been covering up similar misconduct for many years.[123]

On August 2nd, 2018, CNN reported that the CBS Board had hired two law firms to conduct a full investigation of the allegations against CEO Moonves and "cultural issues at all levels of CBS."[124] By September 9th, 2018, Mr. Moonves stepped down as CEO effective immediately. The reporting surrounding the resignation attributed it to the sexual misconduct allegations and also noted that the "shakeup may position CBS for a sale," and that "the company is also facing some continued reputational risk."[125] CBS began damage control immediately; they made donations to organizations that supported the #MeToo movement and other groups fighting for workplace equality for women.[126] Mr. Moonves denied many of the allegations, some happening before he came to CBS.[127]

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[120] *Id.*

[121] Dawn C. Chmielewski, *Leslie Moonves Promoted CBS' "Zero Tolerance Policy" Towards Harassment*, DEADLINE (July 30, 2018), https://deadline.com/2018/07/cbs-leslie-moonves-email-zero-tolerance-policy-towards-harassment-1202436794/ (the email was sent March 9, 2017 and said that "the company is committed to providing every employee with a professional work environment that's free of discrimination and harassment. . . .").

[122] Farrow, *supra* note 118.

[123] *Id.* ("The company is shielding lots of bad behavior.").

[124] Brian Stelter, *CBS board hires two law firms as fallout over harassment allegations grows*, CNN BUS. (Aug. 2, 2018), https://money.cnn.com/2018/08/02/media/cbs-board-harassment-allegations/index.html.

[125] Brian Stelter, *Les Moonves is out at CBS after harassment allegations, corporate battle*, CNN BUS. (Sept. 9, 2018), https://money.cnn.com/2018/09/09/media/les-moonves-cbs/index.html.

[126] *Id.*

[127] Phil McCausland & Alex Johnson, *Les Moonves leaves CBS, denies new report of sexual misconduct*, NBC NEWS (Sept. 9, 2018), https://www.nbcnews.com/news/us-news/six-more-women-accuse-cbs-ceo-leslie-moonves-sexual-misconduct-n907926.

CBS survived the trauma of the high-profile loss of Mr. Moonves. In the aftermath CBS created the job of "Chief People Officer."[128] And when it came time to pay Mr. Moonves his $120 million in severance, the Board refused on the grounds that he was fired for cause.[129] Mr. Moonves also survived the separation from CBS. In fact, he recently opened his own media company in Hollywood and CBS is paying the rent for his space.[130]

At another mega-media company, the chairman of Warner Brothers, Kevin Tsujihara, stepped down in March of 2019 because of sexual misconduct allegations.[131] The announcement of his resignation came more than a week after Warner Media said it was investigating claims that Tsujihara promised acting roles to a young actress in exchange for sexual favors.[132] The information became public on March 6th in an article in the Hollywood Reporter.[133] The resignation happened mere days later on March 18th. The board acted swiftly. In his announcement, the CEO of the parent corporation, WarnerMedia,

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[128] Joe Pompeo, *"He's Not Acting as If He's a Temp": Despite the Moonves Baggage, CBS Insiders See a Strong Case for Joe Ianniello as C.E.O.*, VANITY FAIR (Oct. 22, 2018), https://www.vanityfair.com/news/2018/10/despite-moonves-cbs-insiders-see-a-strong-case-for-joe-ianiello-as-ceo.

[129] Joy Press, *Les Moonves will not get $120 Million severance from CBS, board says*, VANITY FAIR (Dec. 18, 2018), https://www.vanityfair.com/hollywood/2018/12/les-moonves-will-not-receive-120-million-dollar-severance-from-cbs?verso=true.

[130] David Gelles, Rachel Abrams & Edmund Lee, *Les Moonves, Fired by CBS, Sets Up Shop in Hollywood*, N.Y. TIMES (Feb 8, 2019), https://www.nytimes.com/2019/02/08/business/media/les-moonves-moonrise.html (his new company is called "Moon Rise Unlimited").

[131] Jade Scipioni, *Warner Bros. chairman and CEO Kevin Tsujihara to step down amid sexual misconduct allegations*, FOX BUS. (Mar. 18, 2019), https://www.foxbusiness.com/features/warner-bros-chairman-and-ceo-kevin-tsujihara-to-step-down-amid-sexual-misconduct-allegations.

[132] *Id.*

[133] Tatiana Siegel & Kim Masters, *"I Need to Be Careful": Texts Reveal Warner Bros. CEO Promoted Actress Amid Apparent Sexual Relationship***,** HOLLYWOOD REP. (Mar. 6, 2019), https://www.hollywoodreporter.com/features/i-need-be-careful-texts-reveal-warner-bros-ceo-promoted-actress-apparent-sexual-relationship-1192660.

acknowledged the reach such behavior could have – including on partners and other divisions:

> It is in the best interest of WarnerMedia, Warner Bros., our employees and our partners for Kevin to step down as Chairman and CEO of Warner Bros. Kevin has contributed greatly to the studio's success over the past 25 years and for that we thank him. Kevin acknowledges that his mistakes are inconsistent with the company's leadership expectations and could impact the Company's ability to execute going forward.[134]

A few months later Warner Bros. named Ann Sarnoff as the first woman to run the studio.[135]

These scandals reach all corners of entertainment, including the upright halls of opera. Conductor James Levine was at the Metropolitan Opera in New York for forty years before allegations of sexual misconduct began. Levine was fired after "credible evidence" was found that he had engaged in "sexually abusive or harassing conduct with seven people" over a twenty-five year period.[136] Mr. Levine sued the Met three days later for breach of contract and defamation.[137] The Met then filed a countersuit for $5.86 million for "what it called a breach of loyalty."[138] The Met said that it "has and will continue to incur significant reputational and economic harm as a result of the

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[134] Cynthia Littleton, *Kevin Tsujihara Out as Warner Bros. Chief Amid Sexual Impropriety Scandal*, VARIETY (Mar. 18, 2019), https://variety.com/2019/biz/news/kevin-tsujihara-warner-bros-sexual-impropriety-1203165653/ (quoting WarnerMedia CEO John Stankey).

[135] Brian Stelter, *Ann Sarnoff named chair and CEO of Warner Bros. She is the first woman to run the studio*, CNN BUS. (June 24, 2019), https://www.cnn.com/2019/06/24/media/ann-sarnoff-warner-bros/index.html.

[136] Associated Press, *Metropolitan Opera says it has evidence conductor James Levine abused or harassed 7 people*, USA TODAY (May 19, 2018), https://www.usatoday.com/story/life/people/2018/05/18/metropolitan-opera-says-james-levine-abused-harassed-7-people/625573002/.

[137] *Id.*

[138] *Id.*

publicity associated with Levine's misconduct."[139] The Met has been in difficult financial condition and its bond rating was recently lowered.[140] Eventually, in August 2019, the suit settled. [141] Continuing the trend that no media or art form, including opera, is immune from such claims, the famous opera star, Placido Domingo, has also received accusations of sexual harassment from a number of women and not only did he lose individual engagements, but he also lost his job at the Los Angeles Opera.[142]

In the wake of #MeToo, the number of fired or resigned media leaders for reasons of alleged sexual misconduct has increased exponentially. In another famous example, Roger Ailes, the former CEO of Fox Television, had numerous women accuse him of sexual assault and harassment. Shortly after, he stopped working for Fox.[143] Similarly, Matt Lauer's departure from NBC also happened suddenly. NBC received notice on Monday night and Lauer was fired by Wednesday morning when a notice was

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[139] Michael Cooper, *Met Opera Accuses James Levine of Decades of Sexual Misconduct*, N.Y. TIMES (May 18, 2018), https://www.nytimes.com/2018/05/18/arts/music/james-levine-metropolitan-opera.html.

[140] *Id.*

[141] Michael Cooper, *James Levine and Met Opera Settle Suit Over Sexual Misconduct Firing*, N.Y. TIMES (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/arts/music/james-levine-metropolitan-opera.html.

[142] Michael Cooper, *Plácido Domingo Leaves Los Angeles Opera Amid Sex Harrasment Inquiry*, N.Y. TIMES (Oct 2, 2019), https://www.nytimes.com/2019/10/02/arts/music/placido-domingo-la-opera-sexual-harassment.html; Storm Gifford, *Number of women who claim opera star Placido Domingo sexually harassed them rises to 20*, N.Y. DAILY NEWS (Sept. 5, 2019), https://www.nydailynews.com/news/national/ny-11-more-women-claim-domingo-harassed-them-20190905-d4u6ebqtlzf7fl3cs7fx3imbiu-story.html.

[143] Anita Balakrishnan & Michelle Castillo, *Roger Ailes resigns as CEO of Fox News*, CNBC (July 21, 2016), https://www.cnbc.com/2016/07/21/fox-news-confirms-that-roger-ailes-is-leaving-company.html; Lloyd Grove, *Megyn Kelly: 'Roger Ailes Tried to Grab Me Three Times. I Had to Shove Him Off Me'*, DAILY BEAST (Nov. 29, 2017), https://www.thedailybeast.com/megyn-kelly-roger-ailes-tried-to-grab-me-three-times-i-had-to-shove-him-off-me; Sarah Ellison, *Inside The Final Days Of Roger Ailes' Reign At Fox News*, VANITY FAIR (Sept. 22, 2016), https://www.vanityfair.com/news/2016/09/roger-ailes-fox-news-final-days.

read on-air as the Today Show started.[144] After the Weinstein story was published in 2017, Kevin Spacey, the Oscar, Tony, and Emmy winning performer who brought fame to the streaming service of Netflix through his show *House of Cards*, was accused of sexually assaulting an underage actor years before in 1986.[145] He was subsequently accused by several more men of sexual assault.[146] Mr. Spacey then faced a civil lawsuit by an accuser that was eventually withdrawn, and a related Massachusetts criminal case where prosecutors later dismissed all charges due to unavailable witnesses.[147]

III. MORALS CLAUSES AS A SWORD AGAINST MEDIA MOGUL MISCONDUCT AND BEYOND

CEOs, other executives, talent, directors, and other key employees are likely to be operating under the terms of a contract. Under the general cannons of contract construction, when interpreting a contract, one usually looks only within the four corners of the contract.[148] However, the interpretation of certain terms may not always be clear. Under standard employment contracts, the "for cause" terms by which an employee may be fired, disciplined, or removed from their current position can be vague. The court reporters are full of those disputes. If firing: for cause" is difficult by itself, what about firing for something even more vague, like firing a person for what they say or do in their off time? In a media company, the reputation factor, the value of the public good will, can be much higher than in other companies

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[144] USA Today Editors, *Read the NBC News memo on firing Matt Lauer over 'inappropriate sexual behavior'*, USA TODAY (Nov. 30, 2017, 8:19 AM), https://www.usatoday.com/story/life/entertainthis/2017/11/29/nbcs-statement-firing-matt-lauer-over-inappropriate-sexual-behavior-complaint/904395001/.

[145] Chris Francescani, *The rise and fall of Kevin Spacey: A timeline of Sexual Assault Allegations,* ABC NEWS (June 3, 2019), https://abcnews.go.com/US/rise-fall-kevin-spacey-timeline-sexual-assault-allegations/story?id=63420983.

[146] *Id.*

[147] Laura Bradley, *Kevin Spacey's Criminal Case Has Been Dismissed*, VANITY FAIR (July 17, 2019), https://www.vanityfair.com/hollywood/2019/07/kevin-spacey-criminal-case-dismissed.

[148] *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 209-215 (AM. LAW INST. 1979) (Integrated Agreements and Parol Evidence; the contents of the four corners of a contract controls absent a special circumstance).

and the likelihood of exposure is certainly high. An employee, absent a specific contractual agreement, might have significant statutory or common law protections available depending on their jurisdiction. So, what is a board to do?

Companies have long had "key person" insurance to protect them against the unexpected or untimely loss of the talents of people in key management roles. In the case of individual misconduct that impairs a company's reputation, what is a company to do? Key person insurance usually covers only death or disability. However, companies should consider expanding this key person insurance to cover key talent that descends into social trouble.

The entertainment industry has long employed morals clauses. Again, a morals clause is a provision in the employment contract that enables an employer to terminate any contract "if the talent engages in conduct that results in adverse publicity or notoriety or risks bringing the talent into public disrepute, contempt, scandal or ridicule."[149] Morals clauses first arose in entertainment in1921 when Roscoe "Fatty" Arbuckle was arrested for rape and murder.[150] Although he was eventually acquitted,[151] the reputational harm had taken its toll. Afterwards, several entertainment companies, led by Universal Studios, began to include morals clauses in their contracts to protect themselves from similar harm.[152]

Post-Weinstein and post-Spacey, large film studios, like Fox and Paramount, are moving to reinstate morals clauses in contracts once again.[153] Small scale film distributors are also

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[149] Tatiana Siegel, *#MeToo Hits Movie Deals: Studios Race to Add 'Morality Clauses' to Contracts*, HOLLYWOOD REP. (Feb. 7, 2018), https://www.hollywoodreporter.com/news/metoo-hits-movie-deals-studios-race-add-morality-clauses-contracts-1082563.

[150] Caroline Epstein, *Morals Clauses: Past, Present, and Future*, 5 N.Y.U. INTELL. PROP. & ENT. LAW 72, 76 (2015).

[151] Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN (Nov. 8, 2011), https://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/.

[152] *See Morality Clause for Films*, *supra* note 6, at 8 ("Actors and actresses employed by the Universal Film Company hereafter will be bound by a 'morality clause' in their contracts, permitting the company to discontinue their salaries if they forfeit the respect of the public.").

[153] *See* Siegel, *supra* note 149.

beginning to add morals clauses to protect themselves from liability arising from talent touched by sexual harassment scandals.[154] Even downstream ancillary partners including cable channels are requiring morals clauses.[155] Those ancillaries, frequently distributors, can suffer similar damage if a movie, a television show, or a brand becomes suddenly unmarketable due to someone's misconduct. The broad range of behavior encompassed by morals clauses begs the question as to which misconduct exactly is actionable. For example, a morals clause could limit such behavior to criminal activity. It could read: "If the employee is charged with a crime, whether felony or misdemeanor, the board of directors may take disciplinary action that may include immediate termination, suspension of duties and/or pay, or other penalties deemed appropriate by the board."[156]

However, this language may not cover the full range of behavior a media company sensitive to reputational harm may desire. A broader morals clause might look like this:

> If at any time while Artist is rendering or obligated to render on-camera services for the program hereunder, Artist is involved in any situation or occurrence which subjects Artist to public scandal, disrepute, widespread contempt, public ridicule, [*or which is widely deemed by members of the general public, to embarrass, offend, insult or denigrate individuals or groups,*] or that will tend to shock, insult or offend the community or public morals or decency or prejudice the Producer in general, then Producer shall have the right, in its sole discretion, to take any action it deems appropriate, including but not limited to terminating the production of the program.[157]

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[154] *Id.*

[155] *Id.*

[156] *See* Epstein, *supra* note 150. *See also* Nader v. ABC Television Inc., 330 F. Supp. 2d 345, 347 (S.D.N.Y. 2004) (where the Nader was fired after his second criminal arrest).

[157] Bob Tarantino, *Keep your pants on - the morals clause in performer contracts*, LEXOLOGY (Jan. 18, 2012), https://www.lexology.com/library/detail.aspx?g=7b61d1e8-8dcb-4d37-b1b3-f8a9af8bb8e8.

A morals clause is not designed to *rectify* the behavior of misbehaving talent. It is very difficult to regulate individual behavior anyway. Rather, morals clauses empower companies to protect themselves from the damaging effects of talent engaging in undesirable behavior.

Effective morals clauses provide companies the option to quickly sever its relationship with talent in order to protect its reputation and limit its potential liability. A typical "for cause" clause does not cut it in the entertainment industry. Due to movements like #MeToo, public pressure to oust individuals for any allegation of sexual misconduct supports the comeback of morals clauses.

However, media companies face several challenges in reinstituting these broad morals clauses including (A) direct pushback from unions against moral clauses; (B) negotiations held by the talent's counsel to soften the clause; and (C) a prior status quo of permitting, or ignoring, certain free speech that is now considered harassment.

A. PUSHBACK FROM UNIONS AGAINST MORALS CLAUSES

While morals clauses are routine for actors and on-air journalists, other showbusiness disciplines avoid or even forbid them. Directors and Writers' unions in particular do not favor morals clauses.[158] Some of the most powerful people in media are the directors and the writers because they control the content of production. Yet *every* major movie studio, most minor studios, all major television networks, many local television stations, etc. are signatories to the union agreements with the major directors' union, the Directors Guild of America ("DGA"). But what does the DGA have to say about morals clauses? DGA Contract language provides that: "Employer agrees that it shall not include or enforce any so-called 'Morals Clause,' as the term is commonly understood in the motion picture and television industries, in any contract of employment or deal memo for the services of an Employee."[159]

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[158] *See, e.g.*, *Basic Agreement Article 17-123*, DIRECTORS GUILD OF AMERICA 277 (2017), https://www.dga.org/-/media/447D60B880324B1D99217478D9E8FF1E.pdf; *see also Article 54 - Prohibition of So-Called "Morals Clause"*, WRITERS GUILD OF AMERICA 309 (2017), https://www.wga.org/uploadedfiles/contracts/mba17.pdf.

[159] DIRECTORS GUILD OF AMERICA, *supra* note 158.

Another powerful media union, both to Hollywood movies and to television, is the Writers Guild of America ("WGA"). Most of the major and accomplished writers end up being a member of the Writers' Guild and similar to the DGA, all major studios, all networks, etc. are signatories to agreements with the WGA. So, what does the WGA say about morals clauses? WGA Contract language provides that: "Subject to any contractual obligations to the contrary which may exist on March 1, 1981, Company agrees that it will not include the so-called 'morals clause' in any writer's employment agreement covered by this Basic Agreement."[160]

The Screen Actors Guild ("SAG-AFTRA") is different. It has no formal prohibition against a morals clause, but it appears as if it might be considering morals clauses as unnecessary for its members:

> We are also hearing reports as well of more widespread use of increasingly onerous morality clauses, and that is obviously a significant concern for us. While we do not have contract language directly prohibiting these clauses, we will be taking a close look at this issue to ensure that the union is taking all appropriate measures to protect our members.[161]

Even though SAG-AFTRA may not favor morals clauses for its members, it has taken other steps to regulate potential misconduct. For example, in an attempt to eliminate the "casting couch," SAG-AFTRA prohibits business meetings in private homes and hotel rooms. It has also devised new reporting procedures.[162]

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[160] WRITERS GUILD OF AMERICA, *supra* note 158.

[161] Natalie Robehmed, *The Morality Clause: How #MeToo Is Changing Hollywood Dealmaking*, FORBES (Mar. 29, 2018), https://www.forbes.com/sites/natalierobehmed/2018/03/29/the-morality-clause-how-metoo-is-changing-hollywood-dealmaking/#353e501f3e4d. SAG is also moving to counter harassment and discrimination through its new policy. *See, e.g.*, Letter from Gabrielle Carteris, President, SAG-AFTRA and David White, Nat'l. Exec. Dir., SAG-AFTRA, to Member, https://www.sagaftra.org/files/call_to_action_final.pdf.

[162] Gabrielle Carteris, *SAG-AFTRA President: Have the Weinstein Revelations Really Changed Anything? (Guest Column)*, HOLLYWOOD REP. (Oct. 4, 2018), https://www.hollywoodreporter.com/

Printed press authors have an opinion too. Morals clauses are becoming more prevalent in author contracts.[163] The Authors Guild opposes morals clauses.[164] They are concerned that the morals clauses are too broad and allow a publisher to terminate "based on individual accusations or the vague notion of 'public condemnation' – which can occur all too easily in these days of viral social media."[165] They are concerned with the "ambiguity and subjectivity" of the clauses.[166] If sexual harassment allegations are determined to be unfounded, for example, but media employers of the accused have already severed ties, the accused's career may be ruined anyway. By taking action too quickly, a company's decision to enforce a morals clause may harm both the actor involved and the company itself. It works both ways. The company's reputation, brand, and livelihood may suffer deeply for ostracizing innocent talent. The board's decision to enforce morals clauses, thus, demands care.

Notably, union members are not immune to the allegations of misconduct either. While they seek to support their members in the face of false or frivolous allegations, they are also sometimes called upon to defend guilty members. And if the allegation is sexual harassment of some sort? The union may end up in the unenviable position of representing both the accuser who is a union member, and the accused who is also a union member. This difficult position is being acted out in the ballet world.[167] The conundrum of unions and morals clauses is problematic – as long as the union's role is clear, to represent its members against

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news/sag-aftra-president-have-weinstein-revelations-changed-anything-guest-column-1149279.

[163] Judith Shulevitz, *Opinion: Must Writers Be Moral? Their Contracts May Require It*, N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/opinion/sunday/metoo-new-yorker-conde-nast.html.

[164] *Why We Oppose Morals Clauses in Book Contracts*, AUTHORS GUILD (Jan. 24, 2019), https://www.authorsguild.org/industry-advocacy/why-we-oppose-morals-clauses-in-book-contracts/.

[165] *Id.*

[166] *Id.*

[167] Michael Cooper, *Caught in the Middle of #MeToo: Unions That Represent Accusers and Accused*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/arts/metoo-unions-ballet-ramasar.html. Unions usually consider that they have a "duty to protect members whose contractual rights may have been violated." *Id.*

charges at almost all cost, unions could carry out their advocacy roles fairly easily with only occasional conflicts. However, in a #MeToo world, one never knows with whom the bad behavior will originate.

The theatre community in Chicago is concerned about sexual harassment in live theatre and they are on the cutting edge of addressing the issue. Some have formed an advocacy group, created a website to inform on the issues, and now have promulgated a policy. The *Not In Our House* Project #NotInOurHouse[168] "was born of artists and administrators at all levels of our community working together toward a cultural paradigm shift away from turning a blind eye to sexual harassment, discrimination, violence, intimidation and bullying in our theatres and towards mentoring, prevention, and accountability."[169]

The organization has promulgated extensive standards that are intended to be used as a model for the industry.[170] Those standards, similar to the SAG statement, help and assist in protecting members and working actors. However, they do not address the question of how to fire misbehaving leadership. Only the employer can take that action and the contract clauses discussed in this article are a tool that helps the employers act quickly, if needed.

One difficulty, perhaps even a danger of morals clauses, is that they can be used as a double-edged sword. The enforcement of a morals clause is inherently a judgment call. While morals clauses can protect a company from people who are behaving like sexual predators and permit the termination of CEOs with bad behavior, there are several other concerns about the lines surrounding a termination for cause based on behavior. For example, morals clauses have been used to terminate Hollywood writers who refused to testify before the House Un-American Activities Committee in the 1950's.[171] There is also significant

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[168] *Chicago Theatre Standards Pilot Project*, #NOTINOURHOUSE, https://www.notinourhouse.org/chicago-theatre-standards-pilot-project/ (last visited Nov. 18, 2019).

[169] *Id.*

[170] *Download the Standards*, #NOTINOURHOUSE, https://www.notinourhouse.org/download-the-standards/ (last visited Nov. 18, 2019).

[171] *See, e.g.*, Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 847–48 (9th Cir. 1954). Lardner was discharged from his employment four days after being cited for Contempt of Congress for

concern that morals clauses may not serve LGBTQ interests. *The Advocate* notes that Hollywood Studios used morality clauses as "a weapon against queer performers."[172] Tracy Gilchrist notes that much "fuzziness" surrounds what is called "moral turpitude."[173] Careers can be in danger for differing viewpoints and life differences, and this is yet to be sorted out.

Other market forces are likely to push back against moral clauses. Counsel serving executives on boards of large media companies, for example, will do their best to limit the "for cause" contract clause to one that is as narrow as possible in favor of their client. For executives, simply not having a morals clause is the most ideal. One alternative to not having one at all could be to negotiate a narrow definition of "cause" for termination.[174] A morals clause, however, is, by its nature, a broad clause with much discretion vested in the employer. Counsel for executives or even client talent might negotiate a tighter standard for dismissal so as to prevent spurious and capricious termination.[175]

Furthermore, no current standard exists that direct the interpretation of morals clauses. This allows boards of

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refusing to answer the question whether he was a member of the Communist Party. *Id.*

[172] Stuart N. Brotman, *Convicting Celebrities: How the Morals Clause Continues to Shape American Culture*, HARV. J. SPORTS & ENT. L. BLOG (Feb. 26, 2019), https://harvardjsel.com/2019/02/convicting-celebrities-how-the-morals-clause-continues-to-shape-american-culture/ (arguing that there may now be an "implied" morals clause); Tracy Gilchrist, *Sexual Abusers Spur Return of "Morality Clauses" That Could Be Bad for LGBT Actors*, THE ADVOCATE (Feb. 8, 2018), https://www.advocate.com/arts-entertainment/2018/2/08/sexual-abusers-spur-return-morality-clauses-could-be-bad-lgbt-actors.

[173] Gilchrist, *supra* note 172.

[174] Mark J. Oberti, *5 things all execs should have in employment contracts*, BUS. JOURNALS (Jan. 25, 2013), https://www.bizjournals.com/bizjournals/how-to/human-resources/2013/01/5-things-all-execs-should-have-in.html.

[175] *See* Eriq Gardner, *Charlie Sheen's Contract: Was There Actually a Morals Clause? (Analysis)*, HOLLYWOOD REP. (Mar. 8, 2011), https://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309; *see also Harvey Weinstein Contract With TWC Allowed For Sexual Harassment*, TMZ (Oct. 12, 2017), https://www.tmz.com/2017/10/12/weinstein-contract-the-weinstein-company-sexual-harassment-firing-illegal/.

entertainment companies to react willy-nilly to allegations of misconduct, which may vary from year-to-year and change over time. The fact that there is no "rubric for assessing to what extent morality clauses are enforceable, fairly imposed, and lawfully interpreted" is, of course, a concern of those who are subject to the clauses.[176] And the potential unfairness is a good reason that counsel for executives and clientele will do their best to limit the morals clause as much as possible and to draw as narrow of a definition of the conduct that constitutes a breach of contract as possible.

B. NEGOTIATIONS TO SOFTEN THE MORALS CLAUSE

Entertainment is a cult of personalities. Relationships often depend on who you know and the individuals with which you will work. Even more invidious in the industry is that who you can bring to the table and who you can convince to work on a project determines your power. Your next success is often based upon your past successes. So, in some ways, it is an industry uniquely set up for #MeToo problems. If the question was about, for example, the CEO of a utility company, or a large real estate company, or a large manufacturer, there are probably a dozen or several dozen qualified CEOs around the country who could step in to replace one errant CEO who has committed a breach. BP, a company in the energy industry, for example, did not have much of a problem replacing their CEO after egregious conduct.[177] In fact, many companies have installed "succession planning" in case something happens to their CEO.[178] But entertainment is different. Often people at the top are considered a "genius." Blair Tindal, author of *Mozart in the Jungle: Sex, Drugs, and Classical*

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[176] Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 9 (2017).

[177] Christina Burack, *Musicians assume harassment is 'just part of life'*, DEUTSCHE WELLE (Dec. 23, 2017), https://www.dw.com/en/musicians-assume-harassment-is-just-part-of-life/a-41913820.

[178] John Welsh, *7 Steps To Successful Succession Planning*, FORBES (Jan. 14, 2019), https://www.forbes.com/sites/johnwelsheurope/2019/01/14/7-steps-to-successful-succession-planning/#2b4867d945fb. The usual "succession planning" is in case of an accident or in case of death or incapacity, or for a natural and expected occurrence such as a planned retirement. But succession planning can also prepare a company for other sudden replacement such as a publicity crisis. *Id.*

Music, says "sexual harassment is widespread in the industry" and the conductor is often seen as "above moral wrong."[179]

However, top management of the media industry often share the attributes of the stars. The actors may, in fact, be easier to replace than the CEOs. Furthermore, in many cases, management and CEOs may have significant ownership stakes, and therefore a large block of shareholder votes. Charlie Sheen did not have a standard morals clause in his contract.[180] Harvey Weinstein did not have a morals clause in his contract.[181] They negotiated it down.

Further, in addition to corporate ownership interests, the person may also be a key owner of the intellectual property of the company.[182] Rosanne Barr was a key co-owner of the intellectual property of her show.[183] Michael Jackson owned extensive

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[179] Burack, *supra* note 177.

[180] Charlie Sheen's clause was very limited. It was for "a felony offense involving moral turpitude under federal, state, or local laws, or is indicted or convicted of any such offense . . . ." Gardner, *supra* note 175. Such a clause, requiring legal action such as an indictment or conviction is very restrictive to the employer. *Charlie Sheen -- Morality Not My Problem*, TMZ, (Feb. 14, 2011), https://www.tmz.com/2011/02/14/charlie-sheen-two-and-half-man-morals-clause-morality-drugs-cocaine-prostitutes/ ("Charlie Sheen cannot be fired from Two and a Half Men for doing drugs, hiring hookers, or any of his other antics…because he doesn't have a 'morals clause' in his contract, TMZ has learned.").

[181] TMZ, *supra* note 180. ("TMZ is privy to Weinstein's 2015 employment contract, which says if he gets sued for sexual harassment or any other 'misconduct' that results in a settlement or judgment against TWC, all Weinstein has to do is pay what the company's out, along with a fine, and he's in the clear."); *see also* Richard Morgan, *Harvey Weinstein's Contract Gave Him Outs for Harassment Claims*, N.Y. POST (June 6, 2018), https://nypost.com/2018/06/06/harvey-weinsteins-contract-gave-him-outs-for-harassment-claims/.

[182] Jem Aswad, *Michael Jackson's Estate and Sony/ATV Extend Mijac Administration Agreement*, VARIETY (July 21, 2017), https://variety.com/2017/music/news/michael-jackson-estate-and-sonyatv-extend-mijac-administration-agree ment-1202502241/. Michael Jackson owned not only his own copyrights, but also the Beatle's music library and others; his catalog was "one of the most significant and valuable in music." *Id.*

[183] Nellie Andreeva, *'Roseanne' Followup Without Roseanne Barr Inches Forward, Hurdles Remain*, DEADLINE (June 1, 2018),

intellectual property rights in his company's products, as did many of the people who were founding artists.

Therefore, in a CEO contract, there may also be a need for a provision for the intellectual property rights to be held in trust for the benefit of the company. This provision is likely to create some resistance at contract negotiation time.

Even old allegations might be enough to cause a company to want to end a relationship. In the case of the deal between Amazon and Woody Allen, the allegations were 25 years old and allegedly involved accusations surrounding his daughter, Dylan Farrow; he has denied the allegations and the State did not charge Allen with any crime.[184] Amazon spent $70 million to end Woody Allen's contract with Amazon Productions.

The Amazon deal, reached in August 2017, was to finance and distribute at least four films, including "*A Rainy Day in New York*," which was complete.[185] Amazon said the deal had become impracticable because of "supervening events, including renewed allegations against Mr. Allen, his own controversial comments, and the increasing refusal of top talent to work with or be associated with him in any way, all of which have frustrated the purpose of the agreement."[186] Another report said that an Amazon lawyer, Attorney Robert Klieger, told U.S. District Judge Denise Cote that the company protected itself after Allen made "public comments that at a minimum were insensitive to the #MeToo movement."[187]

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https://deadline.com/2018/06/roseanne-followup-spinoff-without-roseanne-abc-darlene-pitch-meet ing-problems-1202402239/. While the producing company Carsey-Werner owned the show, Roseanne was a co-creator and co-owner. *Id.*

[184] Sopan Deb, *Woody Allen Sues Amazon Over Canceled $68 Million Deal*, N.Y. TIMES (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/movies/woody-allen-amazon-lawsuit.html.

[185] *Id.*

[186] *Id.*

[187] Larry Neumeister, *Amazon: Woody Allen's #MeToo comments wrecked movie deal*, ASSOCIATED PRESS (Apr. 12, 2019), https://www.apnews.com/59a6dfc685d140e3a7c71a371d419cc6.

C. BREAKING DOWN THE PRIOR STATUS QUO WHERE MEDIA SPEECH AND MEDIA PRACTICES RATIONALIZED MISCONDUCT

While some contenders of morals clauses may argue that their actions are protected by the First Amendment, they are wrong. The First Amendment protects infringement of speech by government, but it does not protect speech between private parties. It is generally permissible for employers to fire an employee for offensive speech.[188] Although this may not have been the trend of the past, it appears to be the trend of the future.

Media, however, is special in this case too. Media is a holder, protector, and exercisor of the First Amendment. Media companies may be segregated organizations doing only one function, as CNN was in its beginning in 1980. More often, however, media is a conglomeration, such as Time Warner, which now owns CNN, Warner Brothers Studio, and HBO, the home of Game of Thrones and many other programs that stretch the First Amendment and program content in one way or another. The media, including Facebook, Twitter, Instagram, and all other modes of disseminating news and views, are protected in the U.S. by the First Amendment and, in the case of internet providers, sometimes other laws such as the Telecommunications Act of 1996.[189] The media are also protective of their rights to artistic expression and their ability to tell stories. Some of these stories will have tales of sex and relationships.[190]

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[188] Debra C. Weiss, *Does Roseanne Barr have a valid legal claim for cancellation of her show?*, A.B.A. J. (May 31, 2018), http://www.abajournal.com/news/article/roseanne_legal_claim_cancellation_show.

[189] Telecommunications Act of 1996, P. L. 104-104, 110 S. 56 (1996).

[190] One of Harvey Weinstein's early successes was distributing the movie *sex, lies, and videotape* which was groundbreaking in its discussion of marital infidelity. Sean Axmaker, *How Steven Soderbergh's 'sex, lies, and videotape' Still Influences Sundance After 25 Years*, INDIEWIRE (Jan. 15, 2014), https://www.indiewire.com/2014/01/how-steven-soderberghs-sex-lies-and-videotape-still-influences-sundance-after-25-years-31300/. Louis C.K.'s movie *I Love You Daddy* was rumored in the press to be perhaps inspired by Woody Allen's life. Tatiana Siegel, *Louis C.K. Opens Up About His Controversial New Film, Woody Allen Influences*, HOLLYWOOD REP. (Sept. 10, 2017),

The job of the leadership in the media is often to take chances on content, whether it is the topics covered by its news division, or whether there should be a same-sex kiss on prime-time television, to whether nudity is appropriate on a show, to questioning why network television cannot show more nudity,[191] to being the arbitrators of how much violence is on television,[192] and whether violence is shown on streaming services such as YouTube[193] and Facebook.[194]

There is no excuse for bad behavior in real life, but in their business world, the executives are deciding on the lines of social behavior every day. In many cases, it is a good decision to have the morals discussion and to move the country forward, but in some cases, one wonders if the lines have become blurred for the individual lives. In any case, the media is an industry that vigorously defends its right to make these decisions. Therefore, there is a need for a clear and enforceable contractual provision *ab initio*. Once the leader becomes "too valuable" or once the pernicious behavior becomes public, it is just #TooLate.

D. COMPARE ENTERTAINMENT WITH SPORTS

The sports industry deserves at least a brief mention because not only have they generally found a way to embrace morals clauses, but they also have league-based contractual

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https://www.hollywoodreporter.com/news/louis-ck-opens-up-his-controversial-film-i-love-you-daddy-tiff-2017-1037371.

[191] Bob Wright, president of NBC, wrote a memo in 2001 wanting to be able to compete with HBO in its violence, language and nudity. *See* Neal Gabler, *Cable vs. broadcast: TV's different mindsets*, L.A. TIMES (Apr. 4, 2010), https://www.latimes.com/archives/la-xpm-2010-apr-04-la-ca-cable-cosmology4-2010apr04-story.html.

[192] *Id.* These questions are not immaterial, they can advance social discussions. For example, showing certain violence can dramatize police brutality or violence against transgender people. So moving the boundaries are an important part of the media executive's business.

[193] Amy X. Wang, *Youtube Removes 30 Music Videos for 'Gestures of Violence'*, ROLLING STONE (May 29, 2018), https://www.rollingstone.com/music/music-news/youtube-removes-30-music-videos-for-gestures-of-violence-621/.

[194] Sherisse Pham, *How Facebook decides what violent and explicit content is allowed*, CNN BUS. (May 22, 2017), https://money.cnn.com/2017/05/22/technology/facebook-leaked-documents-sex-violence-nudity/index.html.

methods of bringing errant executives back into line. In their examination of morals clauses, Taylor, et al. notes that the major leagues of Football,[195] Baseball,[196] and Hockey,[197] all have a form of a morals clause for their players that require sportsmanship-like conduct and general good conduct both on and off the field. Those contracts are signed by the players unions, contain good behavior language, and are quite contrary to the explicit desires of many of the entertainment union contracts that we have examined.[198] In this way, the sports industry is very different than the entertainment industry. Athletes are likely to have a "morals clause" not only in their primary jobs as sports figures, but also in their outside "endorsement lives" where an athlete might be working for a beverage company or a sportswear company.[199]

The sports industry and the entertainment industry have the same problems in leadership ranks. For example, Robert Kraft is the owner of the New England Patriots football team. What happens if a CEO commits a morals violation?[200] Kraft was arrested and charged with soliciting prostitution at a day spa involved with human trafficking. This is a current case and has not yet gone to trial, but what remedies are available to those individuals and institutions associated with Kraft? The interesting thing about sports is that "organized sports," has a labyrinth of contracts that creates special relationships. Contained within these layers of contracts are exactly the types of remedies that do not exist in the entertainment industries. For example, the organization's constitutions, bylaws, or rules often permit some sort of sanctions.

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[195] Porcher L. Taylor III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse Morals Clause: The Unique Way to Save Talent's Reputation and Money in A New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT L.J. 65, 78 (2010).

[196] *Id.*

[197] *Id.*

[198] *See supra* note 158.

[199] Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L., 1, 7–8 (2005).

[200] A.J. Perez, *Patriots owner Robert Kraft pleads not guilty to charges of soliciting prostitution*, USA TODAY (Feb. 28, 2019), https://www.usatoday.com/story/sports/nfl/patriots/2019/02/28/robert-kraft-patriots-owner-pleads-not-guilty-solicitation-prostitution-charges/3016697002/.

In football, the Commissioner of the NFL, Roger Goodell, has the authority to punish owners for "conduct detrimental to the welfare of the League or professional football."[201] This gives the leagues extra-judicial power to reign in an errant participant, often mitigating bad publicity. The *New York Times* reported that Jerry Richardson, former owner of the Carolina Panthers, "was fined $2.75 million after an investigation confirmed claims that for years he sexually harassed employees."[202]

Another possible punishment in the sporting world is to rescind stadium naming rights. In the case of Richardson, the stadium is currently named after his company, Gillette. Changing the name of a stadium is one way to distance a sports team from offending bad behavior. There is a petition to end the naming rights for The Patriots' stadium in response to Richardson's criminal charges.[203] The fact that the sports industry has institutionalized procedures for dealing with bad behavior should be a clear signal to the entertainment industry.

E. REVERSE MORALS CLAUSES – RECIPROCAL PROTECTION?

The use of so-called "reverse morals" clauses is a recent development that this article cannot fail to mention because it strengthens the argument for morals clauses and because it identifies the need for reputational protection.[204] A reverse-morals clause is "a reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from the negative, unethical immoral, and/or criminal behavior of the endorsee-company or purchaser of talent's endorsement."[205] Thus, in scenarios where the *client* desires to terminate its employment with a company because of its association to

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[201] Ken Belson, *What Will the N.F.L. Do About Robert Kraft This Time?*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/sports/nfl-robert-kraft.html.

[202] *Id.*

[203] Alex Betschen, *Gillette Stadium No More? How an Online Petition Could Change Naming Rights Agreements*, UB L. SPORTS & ENT. F. (Mar. 13, 2019), https://ublawsportsforum.com/2019/03/13/gillette-stadium-no-more-how-an-online-petition-could-change-naming-rights-agreements/.

[204] *See The Reverse Morals Clause*, *supra* note 195, at 79.

[205] *Id.* at 66–67.

reputational harm, reverse morals clauses empower these clients to do so.

Such a clause "gives talent the reciprocal right to terminate an endorsement contract based on negative conduct."[206] When extended to ordinary entertainment management contracts, it could give the leadership a method of enacting a golden parachute to exit a company under fire, perhaps when the company is most in need of good management talent. The mere fact that talent would like their own "escape clause" in the form of a reverse morals clause is the *sine qua non* indication of the bilateral and material importance of such contract clauses.

As mentioned, one method of mitigating bad actions or scandals of various sorts in sports is to remove names from public view, and so it also works in the case of reverse morals clauses. This is most often done with stadiums. What happens if the stadium is named for a company that falls into disrepute? For example, "Enron Field" was renamed after the team determined that continuing to play in Enron Field after the scandal and corporate failure did not suit their public image[207] In the case of Enron Field, after the company fell into disrepute, it had to sell the naming rights back to the Houston Astros at a greatly reduced price, and the Astros quickly re-sold the naming rights to Minute Maid.[208] Stadiums need to be renamed due to scandal or bankruptcy with some frequency.[209]

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[206] *Id.* at 67.

[207] Enron paid $100 million to buy the naming rights to Enron Field for 30 years. They had to sell it back to the Houston Astros two years later for just $2.1 million. *See* Gus Lubin & Simone Foxman, *The Enron Field Curse: Why You Should Avoid Companies That Put Their Name On A Stadium*, BUS. INSIDER (Jan. 18, 2012), https://www.businessinsider.com/the-enron-field-curse-why-you-should-steer-clear-of-companies-that-put-their-name-on-stadium-2012-1.

[208] ESPN Baseball, *Name that park: For Astros, it's Minute Maid*, ESPN (June 5, 2002), http://www.espn.com/mlb/news/2002/0605/1391013.html.

[209] Morgan Watkins, *U of L is pulling Papa John's off Cardinal Stadium after N-word scandal*, LOUISVILLE COURIER J. (July 13, 2018), https://www.courier-journal.com/story/sports/college/louisville/2018/07/13/papa-johns-n-word-scandal-u-l-address-cardinal-stadium/783009002/; *see also* Paul Toscano, *The Stadium Curse: Naming Deals Gone Bust*, CNBC (Mar. 17, 2010), https://www.cnbc.com/2010/01/20/The-Stadium-Curse:-Naming-Deals-Gone-Bust.html.

CONCLUSION

With the pervasiveness and invasiveness of current media, the damage that is done to individuals, and the ability to prove the actuality of the misconduct, almost no discipline or person will be able to avoid a "morals clause" or "behavior clause" any longer. It may not be called a "morals clause" but the contents will be similar from industry to industry and the effect will be the same – there will need to be a fairly broad agreement that the employment contract can be terminated under terms of bad behavior or reputational damage, as defined in the clause and as might be limited by the bona-fides of negotiation. The perplexing paradox is that media has been both a leader in effectuating morals clauses, being first to actively consider and to name the problem, while simultaneously resisting their comeback. And while their purpose might now be even more essential, perhaps it is time to rename the "morals clause," to something more reflective of the time. One would like to respect that "morals" are not at the center of the problem, but rather a behavior, harassment, sometimes pernicious speech, and other activities.

Despite the conceptual and even active resistance that exists to this day, inappropriate speech and conduct will continue. It is to the benefit of the entertainment industry to embrace the concept of a morals clause to defend itself from future allegations. Does there need to be protections and due process? No doubt. Fairness must be prioritized for everyone. However, show business is just too valuable and complex to let the collateral damage ripple through the jobs of innocent people who had nothing to do with the misconduct of others. At times, media companies will need to end relationships based on actions of their stars or management. And there is nothing wrong with that.

In a country where employment-at-will is synonymous with fire-at-will, why are morals clauses important? Because contracts are essential for the talent and the leadership of companies. While the leadership is required to show up and use their best efforts to manage the company, the company's obligations are also spelled out, and one of those obligations is the terms for termination. The nature of employment contracts is that they modify the general condition of employment-at-will that governs the employment relationship. Will termination only be for cause? If so, what constitutes cause? If it can be for bad behavior, and what exactly is bad behavior? Is it only being convicted of a crime? Or is it more? What is the balance in this very specific

industry steeped in practices, relationships, and specialized power and ownership structures? The clause will determine, and over time the practice and the interpretation will help establish the practice.

It is important to have a set of rules in place for those who might eventually break the rules, and who are important enough to be able to cause significant damage as they do so. It will put rein in the damage resulting from those who disregard the rules whether purposely or accidentally.

There is a substantial risk to media companies due to the misconduct of their management. The risks can range from a tarnished reputation to the death of a company itself. It is too late to think about a morals clause once the problem has appeared. It needs to be a standing practice and it needs to be in every relevant contract. Without morals clauses, the entertainment industry risks the very thing that makes it profitable: its reputation.

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RESTORING MUTUALITY IN SPORTS CONTRACTS

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ABSTRACT

Contract disputes between professional athletes and sports clubs occur all the time. Historically, when a club accused one of its players of breaching its contract, the player would often use the defense that the contract "lacked mutuality." Over time, however, the mutuality defense fell out of favor and became "all but dead." What caused the demise of the mutuality doctrine? The decline can be explained by considering (1) the rise of the consideration doctrine, (2) the evolution of both unilateral and option contracts, and (3) publications from prominent secondary sources, such as restatements and treatises. Developments in contract law, combined with the movement toward fairer and more equitable dealings between sports clubs and professional athletes, call for the revival of mutuality principles in sports contracts. Such a revival would (1) restore balance in lopsided sports contracts, (2) promote interleague competition, and (3) keep sports contracts up to date with recent developments in workers' rights.

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INTRODUCTION

Contract disputes between professional athletes and sports clubs occur all the time.[1] Historically, when a club accused one of its players of breaching its contract, the player would often use the defense that the contract "lacked mutuality."[2] For example, professional athletes often raised the lack-of-mutuality defense when the club looked to enjoin the player from leaving their agreement and playing for another franchise.[3] By showing the gross imbalance between the contractual obligations of the club and the player, the player could convince a tribunal that his or her contract was "void for a lack of mutuality."[4] Over time, however, the mutuality defense fell out of the court's favor and became "all but dead."[5] The decline of mutuality in sports contracts has received little scholarly attention,[6] although it should. The decline of mutuality in sports contracts raises concerns as to the imbalance of bargaining power between players and teams[7] and as to the restriction of players' individual liberties.[8]

What caused the demise of the mutuality doctrine? What are the ramifications of the doctrine's demise in the context of

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[1] *See* Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 690–91 (1981).

[2] JAMES T. GRAY & MARTIN J. GREENBURG, 1 SPORTS LAW PRACTICE § 2.06[1] (LEXIS 2018).

[3] *Id.* at § 2.06[3].

[4] *Id.*

[5] *Id.*; *see also* Val D. Ricks, *In Defense of Mutuality of Obligation: Why "Both Should be Bound, or Neither"*, 78 NEB. L. REV. 491, 515 (1999).

[6] Professor Arthur Corbin provides a general overview of the fall of the mutuality doctrine. *See* 2 CORBIN ON CONTRACTS § 6.1 (2018). The Restatement (Second) of Contracts briefly explains why the mutuality doctrine is no longer essential to contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 79 (A.L.I. 1981). However, these sources do not cover the decline of the mutuality doctrine in the sports context.

[7] Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 7–8 (1971).

[8] Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 270–71 (2006).

sports? Should the doctrine be restored in light of modern developments?

The next section of this paper will begin to answer these questions by reviewing the history of the mutuality doctrine in sports. Specifically, Part I traces the history of the "mutuality of obligation" and "mutuality of remedy" doctrines, and then reviews how courts applied these doctrines to contract disputes between professional athletes and sports clubs. Part II explains the reasons for the mutuality doctrine's demise, especially how the evolution of contract law—particularly the development of the consideration doctrine, unilateral contract, and option contract—led to the fall of the mutuality doctrine. Part III reviews the fall of the mutuality doctrine in sports dealings. Finally, Part IV proposes that recent developments in contract law, combined with the movement toward fairer and more equitable dealings between sports clubs and professional athletes, call for the restoration of the mutuality doctrine in sports.

I. HISTORY OF THE MUTUALITY DOCTRINE

The mutuality doctrine generally takes two forms: mutuality of obligation and mutuality of remedy. Mutuality of obligation stands for the proposition that "both parties must be bound to a contract, or neither is."[9] A contract is void for lack of mutual obligation if each party to the contract does not have some legally enforceable obligation at the time of contract formation.[10] For example, a mere promise made by a man to a woman to marry her is not legally enforceable under the mutuality of obligation doctrine. In *Harrison v. Cage*,[11] the court rejected a woman's claim that a man's promise to marry her was binding while her promise to marry him was not. Even though the man and the woman both exchanged promises to marry, the woman argued that the exchange only imposed a legally enforceable obligation onto the man. The court denied her claim based on the doctrine of mutual obligation.[12]

In contrast, the mutuality of remedy doctrine requires that a remedy be theoretically available to both parties in a contract or

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[9] Ricks, *supra* note 5, at 493.
[10] *Id.* at 493.
[11] Harrison v. Cage (1703) 87 Eng. Rep. 736, 736 (KB).
[12] *Id.*

else neither party is entitled to a remedy.[13] If a contract is such that only one party could ever obtain a remedy for a breach by the other, then the contract is void for lack of mutual remedy.[14] For example, in *Rust v. Conrad*,[15] the court denied a lessee's request for equitable relief because an equivalent remedy was not available to the lessor. Given that the lessee had the sole power to terminate the lease and the lessor had no power to terminate the lease, the court denied the lessee's request for equitable relief because mutuality of remedy between the parties was lacking.[16]

In sports, the mutuality doctrine may also void contracts that lack either the mutuality of obligation or the mutuality of remedy.[17] For example, in *American League Baseball Club of Chicago v. Chase*,[18] a professional baseball club could not enjoin its star baseball player, Harold Chase, from playing in a rival league after Chase cancelled his contract with the club. The court reasoned that the obligations and remedies set out in the contract between the club and the player were grossly uneven. While the player was bound to play for the baseball club indefinitely, the club had the right to terminate the contract at any time upon ten days' notice.[19] According to the court, if the club were to terminate the contract, Chase would be "remediless" because he could "neither secure specific performance of the contract in an action against the [club] in a court of equity, nor damages in an action at law."[20] Since the contract constituted an "absolute lack of mutuality, both of obligation and of remedy," the court found for the player and denied the club's request for a negative injunction.[21] Courts applied similar reasoning under mutuality principles in other similarly situated sports contract cases.[22]

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[13] Ricks, *supra* note 5, at 498–99.

[14] *Id.*

[15] Rust v. Conrad, 11 N.W. 265, 266–67 (Mich. 1882).

[16] *Id.*

[17] Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 14 (N.Y. Sup. Ct. 1914); *see also* Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630, 630 (1914).

[18] *Chase*, 149 N.Y.S. at 14.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See, e.g.*, *Johnson*, 190 Ill. App. at 630.

II. DECLINE OF THE MUTUALITY DOCTRINE

The mutuality doctrine was considered an essential element to contracts up until the twentieth century.[23] By July 1969, the Third, Sixth, and Seventh Circuit Courts of Appeals found that mutuality of obligation was no longer essential.[24] State courts reached similar conclusions in Alaska, Arkansas, California, Illinois, Iowa, Kentucky, Ohio, Pennsylvania, Texas, Utah, Virginia, and Washington.[25] What caused the decline of the mutuality doctrine in contract law? The decline can be explained by considering (1) the development of the consideration doctrine, (2) the rise of both unilateral and option contracts, and (3) publications from prominent secondary sources, such as the restatements and treatises.

A. REPLACING THE MUTUALITY DOCTRINE WITH THE CONSIDERATION DOCTRINE

One of the main reasons for the mutuality doctrine's decline is that courts increasingly began to replace the mutuality doctrine with the doctrine of consideration.[26] The consideration doctrine generally functions in contract law to make promises legally enforceable.[27] Under the consideration doctrine, a promise by one party becomes enforceable if it was bargained in exchange for a performance or return promise by another party.[28] As long as there is a bargained-for exchange, each party need not have a legally enforceable obligation at the time of contract formation as is required under the mutuality doctrine.[29]

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[23] Ricks, *supra* note 5, at 492.

[24] Consol. Labs., Inc. v. Shandon Sci. Co., 413 F.2d 208, 212 (7th Cir. 1969); Hunt v. Stimson, 23 F.2d 447, 450 (6th Cir. 1928); Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924).

[25] 2 CORBIN ON CONTRACTS § 6.1, at 1 n.3 (2018) (listing state courts that regard "mutuality" as a nonessential component in contracts).

[26] *Id.*

[27] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. a (A.L.I. 1981) ("[T]he phrase 'sufficient consideration' [has been used] to express the legal conclusion that one requirement for an enforceable bargain is met.").

[28] *Id.*

[29] RESTATEMENT (SECOND) OF CONTRACTS § 78 cmt. a (A.L.I. 1981) ("The fact that no legal remedy is available for breach of a promise

For example, in *Hay v. Fortier*,[30] the court found that a contract was valid between a creditor and a debtor, even though the creditor had no legally enforceable obligation when the parties signed their contract. The creditor promised to forbear suit against the debtor, who had already defaulted on her debt, in exchange for the debtor's promise to repay the entire debt balance within three months.[31] The creditor's promise to forbear suit was not a legal obligation because the creditor was already entitled to the debt repayments the debtor again promised to repay.[32] The court nevertheless found that, although the contract was "not originally binding for want of mutuality," the contract was valid because the parties bargained for their exchange of promises and partially performed each promise.[33] *Hay* represents an early example of how courts began to discredit mutuality of obligation in relation to the consideration doctrine.[34]

The mutuality doctrine faced further decline as courts began to accept the consideration doctrine's tenet that the demand for "symmetry" or equivalence in the obligations exchanged "is a species of the forbidden inquiry into the adequacy of consideration."[35] "Adequate consideration" is consideration that is equal or adequate in value to the thing being conveyed.[36] However, the role of the court is not to measure the value of consideration.[37] Under the consideration doctrine, courts do not require adequate consideration at all.[38] Consideration need only be "something which the law regards as of value" in order to be sufficient.[39]

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does not prevent it from being a part of a bargain or remove the bargain from the scope of the general principle that bargains are enforceable.").

[30] Hay v. Fortier, 102 A. 294, 295 (Me. 1917).

[31] *Id.* at 294.

[32] *Id.*

[33] *Id.* at 295.

[34] 2 CORBIN ON CONTRACTS § 6.1, at 7 (2018).

[35] Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983); Estrada v. Hanson, 10 N.W.2d 223, 225–26 (Minn. 1943); Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[36] *Farrell*, 101 S.W.2d at 163.

[37] RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (A.L.I. 1981).

[38] *Estrada*, 10 N.W.2d at 225.

[39] *Id.* at 225–26.

For example, in *Pine River State Bank v. Mettille*,[40] the court ruled that there was sufficient consideration to recognize a new employee benefit provision that was added to a previously-made valid employment contract. The employer claimed that the provision was invalid because it was added without "additional, independent consideration" to the employer.[41] The court rejected the employer's argument, however, finding that the employee's continued performance of his services—and election not to withdraw from the contract despite his freedom to do so—constituted a legally valuable consideration.[42] Although the consideration may have appeared inadequate in relation to the new employee benefit provision, the court ruled that there was "no additional requirement of equivalence in the values exchanged . . . or 'mutuality of obligation'" because the requirement of consideration was met by the employer's continued performance.[43] Mere inadequacy of consideration or mutuality was not valid grounds for setting aside the contract.[44]

Moreover, the mutuality doctrine experienced further decline as more courts outright replaced the mutuality doctrine with the doctrine of consideration.[45] In *Meurer Steel Barrel Co. v. Martin*,[46] the Third Circuit preferred the consideration doctrine to the mutuality doctrine in a patent case. Under the terms of a licensing agreement, a patent owner had the sole right to terminate the agreement with his manufacturer.[47] When the manufacturer

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[40] *Mettille*, 333 N.W.2d at 629.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*; *see also Farrell*, 101 S.W.2d at 163.

[45] Consol. Labs., Inc. v. Shandon Sci. Co., 413 F.2d 208, 211 (7th Cir. 1969) ("As a matter of law, mutuality of obligation is not essential to the validity and enforceability of an agreement where it is otherwise supported by valid consideration."); Hunt v. Stimson, 23 F.2d 447, 450 (6th Cir. 1928) ("The general principles applied in courts of equity may develop a lack of mutuality into a bar to relief; but in courts of law that defense rests on the legal rule that a contract must be supported by consideration . . . ."); Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924) ("The terms 'consideration' and 'mutuality of obligation' are sometimes confused. 'Consideration is essential; mutuality of obligation is not unless the want of mutuality would leave one party without a valid or available consideration for his promise.'").

[46] *Meurer Steel Barrel Co.*, 1 F.2d at 688.

[47] *Id.*

defaulted on certain royalty payments the patent owner claimed that the manufacturer had breached their agreement. In response, the manufacturer argued that their agreement was void for lack of mutuality due to the provision that gave the patent owner the sole right to terminate the contract.[48] The Third Circuit Court held that the agreement was valid because the "obligation of each party [was] supported by a consideration moving from the other," that being the licensed right to manufacture the patented product in exchange for royalty payments.[49] The court of appeals reasoned that while consideration was essential to the contract, mutuality of obligation was not.[50] Mutuality of obligation would only be essential where the "want of mutuality would leave one party without a valid or available consideration for his promise."[51] Because the licensing agreement contained a bargained-for exchange in which the manufacturer knowingly agreed to pay royalty fees in exchange for the right to make the patent owner's invention, the Court of Appeals found consideration between the parties and ruled that the licensing agreement was valid.[52] "Harsh" terms or "unequal" obligations within the contract were not dispositive of a lack of consideration.[53]

B. RISE OF UNILATERAL AND OPTION CONTRACTS

By its very nature, the mutuality doctrine cannot be clearly reconciled with unilateral and option contracts.[54] A unilateral contract, which consists of an exchange of a promise for a non-enforceable performance, is void under the mutuality doctrine because each party to the contract does not have—at the

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[48] *Id.*

[49] *Id.* at 688–89.

[50] *Id.* at 688.

[51] *Id.*

[52] *Id.* at 689.

[53] *Id.* at 688.

[54] *See* 2 CORBIN ON CONTRACTS § 6.1, at 1 (2018) ("If mutuality of obligation were a requirement for contract formation, unilateral contracts and option contracts would be 'void for lack of mutuality of obligation.'").

time of contract formation—a legally enforceable obligation.[55] For example, in a unilateral contract in which A promises to pay B ten dollars if B mows A's lawn, A is bound to an enforceable promise whereas B has the option to perform and get paid, or to not perform and not get paid.[56] Such a unilateral contract would be void under the mutuality doctrine because B is not legally obliged to perform.[57]

Yet courts have not doubted the existence of unilateral and option contracts, and have held that such contracts, regardless of mutuality, are valid if they are supported by consideration.[58] Unlike parties in a bilateral contract, parties in a unilateral contract do not both have a legally enforceable obligation until consideration is conveyed by the promisee through performance or partial performance.[59] Whether the consideration exchanged is of symmetrical or equal value in accordance with the mutuality doctrine is irrelevant in unilateral contracts.[60] "It is enough that the duty unconditionally undertaken by each party [to the unilateral contract] be regarded by the law as a sufficient consideration."[61]

Courts have similarly ruled that the mutuality doctrine does not apply to option contracts which, like unilateral contracts, lack a legally enforceable obligation by each party at the time of contract formation.[62] Under a typical option contract, the option giver promises to act if the option holder exercises the option.[63] The option holder has no legal obligation to exercise the option,

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[55] *Id.* at 2; *see also* Crawford v. Gen. Contract Corp., 174 F. Supp. 283, 297 (W.D. Ark. 1959) (stating that there is no "mutuality" of obligation in a unilateral contract).

[56] Ricks, *supra* note 5, at 493.

[57] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018).

[58] *Id.*; *see also Crawford*, 174 F. Supp. at 297; King v. Indus. Bank of Wash., 474 A.2d 151, 156 (D.C. 1984); Weather-Gard Indus. v. Fairfield Sav. & Loan Ass'n, 248 N.E.2d 794, 799 (Ill. App. Ct. 1969).

[59] *Weather-Gard Indus.*, 248 N.E.2d at 799.

[60] *Crawford*, 174 F. Supp. at 297.

[61] *Id.*

[62] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018); *see also* Kowal v. Day, 98 Cal. Rptr. 118, 121 (Ct. App. 1971); Colligan v. Smith, 366 S.W.2d 816, 819 (Tex. App. 1963).

[63] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018). *See also* Michael J. Cozzillio, *The Option Contract: Irrevocable Not Irrejectable*, 39 CATH. U. L. REV. 491, 503–05 (1990) (explaining the meaning and significance of a typical option contract).

but can do so in order to enforce the option giver's promise.[64] For example, in an option contract in which A promises to sell a parcel of land to B if B exercises his option to be the first purchaser of the property, A is bound to an enforceable promise whereas B has the choice to either exercise the option and buy the land or forgo the option.[65] Under the mutuality doctrine, this option contract would be void because B is "under no legal duty, while at the same time [A] is bound."[66]

Despite the lack of mutuality in option contracts, courts have recognized the validity of "thousands of 'option contracts' that are annually made and performed."[67] For example, in *Kowal v. Day*,[68] the court rejected the option giver's contention that his contract was void on grounds that it lacked mutuality with the option holder. Whether the contract was valid depended not on mutuality but on whether the contract was supported by sufficient consideration.[69] Because the option holder conveyed sufficient consideration by incurring costs and delivering benefits to the option giver in anticipation of exercising his option, the court ruled that the option contract was valid.[70] The validity of option contracts thus depends on "consideration for the contract."[71]

Taken together, numerous courts in unilateral and option contract cases demonstrated throughout the twentieth century that mutuality is not "an essential element in every valid contract."[72] Both unilateral and option contracts lack mutuality of obligation, yet courts have not doubted their validity.[73] Ultimately, the mutuality doctrine lost force in the courtroom as more courts accepted unilateral and option contracts.[74]

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[64] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018).

[65] *Id.* at 2–3.

[66] *Id.* at 2.

[67] *Id.*

[68] Kowal v. Day, 98 Cal. Rptr. 118, 120 (Ct. App. 1971).

[69] *Id.* at 122.

[70] *Id.*

[71] *Id.*; *see also* Colligan v. Smith, 366 S.W.2d 816, 820 (Tex. Ct. App. 1963).

[72] 2 CORBIN ON CONTRACTS § 6.1, at 2 n.3 (2018). (citing Armstrong Paint & Varnish Works v. Cont'l Can Co., 133 N.E. 711, 714 (Ill. 1921)).

[73] *Id.*

[74] *Id.* at 1–3.

C. SECONDARY SOURCES ESTABLISH THE CONSIDERATION DOCTRINE OVER MUTUALITY

In addition to court decisions, the publication of distinguished secondary sources contributed to the decline of the mutuality doctrine.[75] In 1981, the Restatement (Second) of Contracts was published, and it dispensed with the contractual requirement of mutuality of obligation where consideration was met.[76] Section 79 of the Restatement (Second) of Contracts provides that "mutuality of obligation" is not "essential to a contract,"[77] and that "the word 'mutuality' . . . has no definite meaning."[78] Because there are plenty of valid contracts based on consideration rather than mutuality, section 79 explicitly asserts that "[i]f the requirement of consideration is met, there is no additional requirement of . . . mutuality of obligation."[79] Furthermore, section 363 of the Restatement (Second) of Contracts states that "the law does not require that the parties have [mutuality of remedy]."[80] The fact that a specific type of remedy, such as specific performance or an injunction, is not available to one party is "not a sufficient reason for refusing it to the other party."[81] Following the publication of the Restatement (Second) of Contracts, more than one hundred courts have cited either section 79 or 363 for the proposition that where there is consideration, mutuality is no longer required for a contract to be valid.[82]

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[75] Ricks, *supra* note 5, at 491–92 (listing several secondary sources of authority claiming that the mutuality doctrine is obsolete).

[76] RESTATEMENT (SECOND) OF CONTRACTS § 79 (A.L.I. 1981).

[77] *Id.* at cmt. a.

[78] *Id.* at cmt. f.

[79] *Id.*

[80] RESTATEMENT (SECOND) OF CONTRACTS § 363 cmt. c (A.L.I. 1981).

[81] *Id.*

[82] A Lexis Shepard's cite of sections 79 and 363 resulted in approximately 116 cases that cite either section 79 or 363 for said proposition. For example, the First Circuit case United States v. Vizcarrondo-Casanova, 763 F.3d 89, 103 (1st Cir. 2014) cites section 79 for the proposition that "lack of mutuality of obligation does not prevent contract formation where there is consideration."

Professor Arthur Corbin's treatise, CORBIN ON CONTRACTS, has also been instrumental to discrediting the mutuality doctrine.[83] Specifically, over 125 courts have cited Corbin to support the proposition that mutuality is not a necessary element of a contract.[84] Just like the Restatement (Second) of Contracts, Corbin writes, "it is consideration that is necessary [to a contract], not mutuality of obligation."[85] Corbin further claims that "the [mutuality] doctrine should simply be abandoned,"[86] on the ground that the doctrine creates "confusion of thought and potential for error."[87] Subsequent publications by contract law professors have reaffirmed, and further contributed to, the decline of the mutuality doctrine.[88]

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The reasons for the mutuality doctrine's decline include the development of the consideration doctrine, the rise of unilateral and option contracts, and publications from prominent secondary sources. First, the mutuality doctrine's tenet that both parties need a legally enforceable obligation at the time of contract formation began to give way as more courts adopted the position that consideration, rather than mutuality, is essential to a contract.[89] Courts also increasingly viewed the mutuality doctrine's demand for symmetry or equivalence in the obligations exchanged as a forbidden inquiry into the adequacy of

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[83] 2 CORBIN ON CONTRACTS § 6.1, LexisNexis (database updated 2018); Ricks, *supra* note 5, at 491–92.

[84] A Lexis search ("corbin" /s "mutuality" and "consideration") resulted in approximately 125 cases that cite Professor Corbin's work for said proposition. For example, the Seventh Circuit case Consol. Lab., Inc. v. Shandon Sci. Co., 413 F.2d 208, 212 (7th Cir. 1969) cites 2 CORBIN ON CONTRACTS § 6.1 for the proposition that "it is consideration that is necessary, not mutuality of obligation." *Consol. Labs., Inc.*, 413 F.2d at 212.

[85] 1–3 JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 66 (5th ed. 2011).

[86] *Id.*

[87] *Id.*

[88] *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 4.12, at 201 (4th ed. 1998) ("The concept of 'mutuality of obligation' has been thoroughly discredited."); MURRAY, *supra* note 85 at § 66 (claiming that the mutuality doctrine is "devoid of any substance" and "meaningless and confusing.").

[89] 2 CORBIN ON CONTRACTS § 6.1, at 1 (2018).

consideration.[90] Second, the mutuality doctrine began losing force in courtrooms as courts began to recognize the validity of unilateral and option contracts.[91] Rather than striking them down for want of mutuality, courts accepted unilateral and option contracts that were supported by consideration.[92] Finally, proposals from distinguished secondary sources, such as the Restatement (Second) of Contracts, to dispense with the mutuality doctrine influenced numerous courts to discredit the need for mutuality of obligation and mutuality of remedy.[93] By the late twentieth century, the mutuality "doctrine [was] all but dead."[94]

III. DECLINE OF THE MUTUALITY DOCTRINE IN SPORTS

In sports, the mutuality doctrine similarly began to lose force in the early twentieth century as courts increasingly replaced the mutuality doctrine with the consideration doctrine.[95] Many courts began viewing "mutuality of obligation" and "mutuality of remedy" as nonessential to sports contracts.[96] The landmark case *Philadelphia Ball Club, Ltd. v. Lajoie* established that as long as contracts between sports clubs and professional athletes contained

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[90] Pine River St. Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983); Estrada v. Hanson, 10 N.W.2d 223, 225–26 (Minn. 1943); Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[91] 2 CORBIN ON CONTRACTS § 6.1, at 2 (2018). *See also* Crawford v. Gen. Cont. Corp., 174 F. Supp. 283, 297 (W.D. Ark. 1959); King v. Indus. Bank of Washington, 474 A.2d 151, 156 (D.C. Cir. 1984); Weather-Gard Indus. v. Fairfield Sav. & Loan Ass'n, 248 N.E.2d 794, 799 (Ill. App. Ct. 1969).

[92] *See, e.g.*, Kowal v. Day, 98 Cal. Rptr. 118, 122 (Ct. App. 1971) (stating that whether a contract was valid depended not on mutuality, but on whether the contract was supported by a sufficient consideration).

[93] *See, e.g.*, United States v. Vizcarrondo-Casanova, 763 F.3d 89, 103 (1st Cir. 2014) (citing section 79 for the proposition that "lack of mutuality of obligation does not prevent contract formation where there is consideration."); RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. f (A.L.I. 1981).

[94] JAMES T. GRAY, 1 SPORTS LAW PRACTICE § 2.06(3) (Matthew Bender, 3d ed. 2018).

[95] Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 244 (App. Ct. 1969); Cent. N.Y. Basketball v. Barnett, 181 N.E.2d 506, 512 (C.P. Cuyahoga Cty. 1961); Philadelphia Ball Club, Ltd. v. Lajoie, 51 A. 973, 975–76 (Pa. 1902).

[96] *Lajoie*, 51 A. at 974.

valid consideration, those contracts were not void for lack of mutuality.[97]

In *Lajoie*, a professional baseball player, Napoleon Lajoie, attempted to void his contract with the Philadelphia Ball Club ("Philadelphia") for lack of mutuality.[98] Philadelphia had sole power to terminate Lajoie's contract upon ten days' notice and to extend Lajoie's contract for up to six months during the contract's final year.[99] Lajoie claimed that such a contractual arrangement lacked mutuality, but the court found the contract to be valid anyway.[100] Specifically, the court held that the contract was valid because it contained valid consideration by evidence of (1) the terms of the contract which explicitly stated that Lajoie's wages constituted consideration;[101] (2) Lajoie's "deliberat[e] accept[ance]" of the contract containing this explicit language;[102] and (3) the good faith partial performance by both Lajoie and Philadelphia under the terms of the agreement.[103] Although the remedies available to each party favored Philadelphia, the big sports club, over Lajoie, the individual athlete, the court ruled that mutuality of remedy need not require each party to have "precisely the same remedy, either in form, effect, or extent" for the contract to be valid.[104]

After *Lajoie*, other courts also began to uphold the validity of sports contracts, despite claims that they lacked mutuality.[105] In *Central N.Y. Basketball v. Barnett*,[106] the court denied a professional basketball player's claim that his sports contract, which empowered the club to unilaterally renew their

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[97] *See Barnett*, 181 N.E.2d at 512; *see also Barry*, 80 Cal. Rptr. at 244.

[98] *See Lajoie*, 51 A. at 975.

[99] *Id.* at 973–74.

[100] *Id.* at 975.

[101] *Id.* at 974.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 975.

[105] *See, e.g.*, Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 245 (App. Ct. 1969); Cent. N.Y. Basketball v. Barnett, 181 N.E.2d 506, 512 (Ohio Ct. Com. Pl. 1961); C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 S.M.U. L. REV. 325, 345 (2002) (stating that the holdings of the *Lajoie* court "has left a more lasting legacy with respect to contract law").

[106] *Barnett*, 181 N.E.2d at 512.

contract for one year during the contract's final year, lacked mutuality. Citing *Lajoie*, the *Barnett* court found that the club provided "sufficient consideration" by paying the player's wage in exchange for the player's "obligations and duties" under their contract, including the renewal provisions.[107] The court further observed, in accordance with *Lajoie*, that the player need not have precisely the same remedies as the club because it was sufficient that the player had the "possibility of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask."[108] "Owing to the peculiar nature and circumstances of the [sports] business," the club's sole right to unilaterally renew the player's contract did not "make the entire contract inequitable."[109] Mutuality of obligation and mutuality of remedy were unnecessary because the player's contract was supported by a valid consideration from the club.[110]

Several other courts ruling in sports cases demonstrate reserve about measuring the degree of mutuality and the adequacy of the things exchanged between players and clubs.[111] Like the court in *Farrell v. Third Nat'l Bank*,[112] some courts believed, in accordance with the consideration doctrine, that it was not their duty to measure value and safeguard players against imprudent or improvident contracts.[113] For example, in *Nassau Sports v. Peters*,[114] the court placed a heavy burden on the player to prove that his NHL contract was inequitable and voidable for lack of mutuality. Despite the player's filing of an affidavit, the court claimed that the mutuality issue was "not seriously . . . pressed" and remarked in a single sentence that "the contract on its face affirmatively indicate[d] grounds for finding such mutuality."[115] The court's unwillingness to delve deeper beyond what appeared

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[107] *Id.*

[108] *Id.* at 513.

[109] *Id.* at 512.

[110] *Id.*

[111] Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972); Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972).

[112] Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[113] *Nassau Sports*, 352 F. Supp. at 876.

[114] *Id.*

[115] *Id.*

on the contract's face exemplified the court's reluctance to measure the adequacy of the things exchanged.[116]

Moreover, the mutuality doctrine experienced further decline in the sports context as more courts recognized the validity of unilateral and option contracts.[117] Although unilateral and option contracts are by definition void under the mutuality doctrine, courts in sports contract cases recognized the validity of such contracts if supported by consideration.[118] For example, in *Lewis v. Rahman*, Boxer Hasim Rahman attempted to void his option contract with opponent boxer Lennox Lewis on the grounds that the contract's rematch option clause lacked mutuality.[119] Rahman specifically argued that the court should not enjoin him from fighting boxers other than Lewis, the sole rematch option holder, because the option was available only to Lewis and not to himself.[120] The court dismissed Rahman's argument, finding that the contract's text expressed that the rematch option clause was supported by consideration,[121] and that Lewis further conveyed consideration by "binding [himself] to fight the rematch on the terms described in the [contract] and to negotiate in good faith for a purse that exceeds the stipulated minimum."[122] The court's decision demonstrated the decline of mutuality as an essential element of a sports contract.[123]

Just as the mutuality doctrine experienced decline in the general realm of contract law, mutuality principles also declined in twentieth century sports contract cases. Like the court in *Meurer Steel Barrel Co.*,[124] the court in *Lajoie*[125] reasoned that even though a sports contract lacked mutuality, it was still valid because it contained sufficient consideration between the parties.

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[116] *See* 2 CORBIN ON CONTRACTS § 6.1, at 6 (2018) (stating that the demand for mutuality is "simply a species of the forbidden inquiry into the adequacy of consideration").

[117] *See, e.g.*, Lewis v. Rahman, 147 F. Supp. 2d 225, 237 (S.D.N.Y. 2001).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* at 229.

[122] *Id.* at 237.

[123] *Id.*

[124] Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924).

[125] Phila. Ball Club, Ltd. v. Lajoie, 51 A. 973, 975 (Pa. 1902).

The court in *Nassau Sports*,[126] like the court in *Farrell*,[127] also demonstrated reserve about measuring the degree of mutuality and adequacy of the things exchanged in sports contracts. Furthermore, like the courts in *Kowal*[128] and *Colligan*,[129] the court in *Rahman*[130] held that a sports option contract, which lacked mutuality, was valid on grounds that it was supported by consideration. Taken together, the developments in sports contract cases indicate that the mutuality doctrine lost force in the courtroom in both the sports world and the general world of contract law.

IV. THE NEED TO REVIVE THE MUTUALITY DOCTRINE IN THE CONTEXT OF SPORTS

Although the mutuality doctrine fell out of favor among courts during the twentieth century, recent developments in contract law, equity, and sports culture call for a restoration of the mutuality doctrine in the sports context. Specifically, (1) concerns about the power imbalance of sports contracts, (2) the benefits of interleague competition, and (3) recent developments in workers' rights warrant the revival of the mutuality doctrine.

A. POWER IMBALANCE OF SPORTS CONTRACTS

Concerns about the power imbalance of professional sports contracts necessitate a restoration of the mutuality doctrine. In order to promote fairer and more equitable contracts, courts must not be so quick to uphold the validity of agreements that are heavily tilted in sports clubs' favor.[131] Courts should recognize that the obligations and available remedies between players and

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[126] Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972).

[127] Farrell v. Third Nat'l Bank, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936).

[128] Kowal v. Day, 98 Cal. Rptr. 118, 122 (Ct. App. 1971).

[129] Colligan v. Smith, 366 S.W.2d 816, 820 (Tex. Civ. App. 1963).

[130] Lewis v. Rahman, 147 F. Supp. 2d 225, 237 (S.D.N.Y. 2001).

[131] *See* Eliot Axelrod, *The Efficacy of the Negative Injunction in Breach of Entertainment Contracts*, 46 J. MARSHALL L. REV. 409, 414 (2013).

clubs are often grossly uneven.[132] This is especially true in the NFL. For example, the standard NFL contract not only gives football clubs the power to terminate player contracts on short notice, but they also enjoin players from leaving the contract on their own to sign with other teams or leagues.[133] These provisions generally extend to players in the last year of their contract and those who have been franchise tagged.[134] The power assumed by football clubs to impose such negative injunctions on professional athletes without any recourse is far from fair or equitable.[135] This

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[132] Dom Cosentino, *Why Only the NFL Doesn't Guarantee Contracts*, DEADSPIN (Aug. 1, 2017), https://deadspin.com/why-only-the-nfl-doesnt-guarantee-contracts-1797020799; Frank Therber, *The Anatomy of an NFL Player Contract*, FORBES (Mar. 8, 2016), www.forbes.com/sites/franktherber/2016/03/08/the-anatomy-of-an-nfl-player-contract/#1ff063183faa.

[133] Therber, *supra* note 132 (stating contracts are team friendly, and the teams do not guarantee portions of the contract); *see also NFL Player Contract*, SEC. AND EXCH. COMM'N (2012), https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm ("Without prior written consent of the Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.").

[134] *NFL Player Contract*, *supra* note 133.

[135] *See* Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 14 (N.Y. Sup. Ct. 1914) (stating that a sports contract lacked mutuality of remedy because only the club could use a negative injunction on the player); *NFL Player Contract*, *supra* note 133 (containing a negative injunction clause available only to the club). Negative injunctions have also been used by entertainment producers on artists and singers. *See* Sarah Swan, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in* Lumley v. Gye, 35 HARV. J. L. & GENDER 167, 168 n.3 (2012) (explaining the Lumley rule, "which holds that a negative injunction may be awarded against artists and performers in circumstances where specific performance cannot be granted").

lack of mutuality of remedy is the same reason the court cited in *Chase* to void the player's contract with the baseball club.[136] This concept should be applied to NFL contracts. Currently, when a player leaves an NFL contract, the lack of mutuality of remedy unfairly allows the football club to impose negative injunctions that prohibit the player from playing anywhere else.[137] The players are left remediless and with no recourse. They cannot compel a club to rehire them. They cannot prohibit a club from hiring replacement players. They even have no guaranty that they will be compensated through salary or otherwise.[138] The mutuality doctrine would not permit such imbalance in these players' contracts.

To be sure, negative injunctions are often the only realistic way to prevent players from committing egregious contract breaches and to deter players from "contract-jumping."[139] One commentator has even called for affirmative injunctions to be used to ensure players specifically perform their contracts.[140] That being said, sports clubs are not unconditionally entitled to negative injunctions.[141] When enforcing negative injunctions, sports clubs are required to show that they are acting in good faith, that they would suffer irreparable harm if not for the negative injunction, and that they would suffer more harm than the player without the negative injunction.[142] If sports clubs can make a successful showing of these requirements, many courts will rule in their favor.[143]

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[136] *Chase*, 149 N.Y.S. at 14.

[137] *See* Therber, *supra* note 132 (describing how, when some NFL players get cut, they do not get any money remaining on their contract).

[138] *Id.*

[139] *See* Axelrod, *supra* note 131, at 427.

[140] *See* Rapp, *supra* note 8, at 263 (arguing that affirmative injunctions against professional athletes are warranted because the common arguments against the use of affirmative injunctions have considerably less force in the sports context).

[141] *See* Bos. Celtics Ltd. P'ship v. Shaw, 908 F.2d 1041, 1048 (1st Cir. 1990) (stating the requirements that clubs must meet when looking for a negative injunction against their players).

[142] *Id.* at 1048–49.

[143] *Id.* at 1049 (holding that a sports club met the requirements to obtain a negative injunction); *see, e.g.*, Erving v. Va. Squires Basketball Club, 468 F.2d 1064, 1066–67 (2d Cir. 1972); Lewis v.

But this is not the case when sports clubs act with "unclean hands" resulting in a balance of harms tilting toward the player.[144] Sports clubs may use negative injunctions to artificially suppress player wages and to restrict market competition by obstructing the development of rival leagues.[145] Negative injunctions have also been used to prevent professional athletes from testing the market and preparing adequately for their next contracts.[146] Moreover, the use of negative injunctions may cause players severe irreparable harm.[147] Given that the average career of an NFL player lasts only three years,[148] negative injunctions stretching for a year or more substantially deprives players of their ability to earn a living. Although mutuality principles should not

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Rahman, 147 F. Supp. 2d 225, 237 (S.D.N.Y. 2001); Nassau Sports v. Peters, 352 F. Supp. 870, 882 (E.D.N.Y. 1972).

[144] *See* Bruce Arthur, *NFL's New Anthem Policy Shows League Has Capitulated to Bad Faith*, THE STAR (May 23, 2018), https://www.thestar.com/sports/football/2018/05/23/nfls-new-anthem-policy-shows-league-has-capitulated-to-bad-faith.html (suggesting that NFL club owners have colluded to cut and not sign certain players); Scott Stossel, *The NFL is Evil—and Unstoppable*, THE ATLANTIC (July 2015), https://www.theatlantic.com/magazine/archive/2015/07/nfl-evil-unstoppable/395306/ (listing several bad faith acts of the NFL authorities); Mike Tanier, *NFL Teams Need to Open the Book and Show Players (and Taxpayers) the Money*, BLEACHER REPORT (July 19, 2018), https://bleacherreport.com/articles/2786655-nfl-teams-need-to-open-the-books-and-show-players-and-taxpayers-the-money (claiming that NFL club owners are not giving players their fair share in collective bargaining); *see also* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 147 (S.D. Ohio 1974) (stating that the balance of harms in its negative injunction case favored the player).

[145] John Charles Bradbury, *Monopsony and Competition: The Impact of Rival Leagues on Player Salaries During the Early Days of Baseball*, 65 EXPLORATIONS IN ECON. HIST. 55, 59 (2017) (discussing the economics of rival league entry and deterrence).

[146] *See Bergey*, 453 F. Supp. at 133–34 (discussing a sports club's attempt to prevent its player from contracting with another club for his future services).

[147] *Id.* at 138 (stating that players would suffer substantial harm if enjoined).

[148] John Keim, *With Average NFL Career 3.3 Years, Players Motivated to Complete MBA Program*, ESPN (July 29, 2016), http://www.espn.com/blog/nflnation/post/_/id/207780/current-and-former-nfl-players-in-the-drivers-seat-after-completing-mba-program.

be used to deny the use of all negative injunctions, they should be used to hold clubs accountable for acting in bad faith. Now that professional football players have more opportunities to earn a living by playing in one of several professional football leagues, such as the NFL or XFL, courts should restore the mutuality doctrine in order to prevent clubs of one league from restricting their players from playing in another.

B. INTERLEAGUE COMPETITION

Reviving the mutuality doctrine to prevent clubs from using negative injunctions against their players in bad faith would promote interleague competition in the U.S., create a better sports product, and serve the public interest.[149] Negative injunctions harm rival leagues when the athletes they wish to recruit are bound up in contracts with clubs for which the athletes no longer play.[150] As a result, rival leagues cannot compete as rigorously for the services of valuable players.[151] Yet the emergence of rival leagues should be encouraged because they offer many benefits to the general economy of the sport.[152] Interleague competition creates more opportunities for players to earn optimal wages and health and security benefits.[153] Competition between leagues also expands public access to sports franchises in their cities.[154] Under the single-league system of the NFL, for example, club owners may take advantage of cities that depend on the NFL franchise for

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[149] *See, e.g.*, *Bergey*, 453 F. Supp. at 138 (stating that the public interest would be served by denying a sports club's request for a negative injunction and promoting interleague competition).

[150] *Id.*

[151] *Id.*

[152] Bradbury, *supra* note 145, at 66 (describing the positive salary effects induced by rival league entry); XiaoGang Che & Brad R. Humphreys, *Competition Between Sports Leagues: Theory and Evidence on Rival League Formation in North America*, 46 REV. INDUS. ORG. 127, 140–41 (2015) (reviewing the benefits of interleague competition on media revenues, player compensation, player supply, and cities).

[153] *See* Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 632 (2002) (stating that interleague competition would give clubs greater incentive to improve the quality of their product).

[154] Che & Humphreys, *supra* note 152, at 141 (stating that interleague competition incentivizes expansion of teams into new cities that are without teams).

revenue.[155] Cities without an NFL franchise may only get an NFL franchise by paying millions of public tax dollars to fund construction of a new stadium.[156] Existing NFL clubs have also threatened to pick up and leave if their current home cities do not pay millions in public tax dollars to renovate old stadiums or build new stadiums.[157] NFL clubs are able to exercise this type of power because they control the professional football market.[158] With the emergence of a rival league, however, NFL clubs would be less able to exploit the public's hard-earned tax dollars, and more cities could enjoy their own professional football teams.[159] Reviving the mutuality doctrine to prevent clubs from using negative injunctions in bad faith would open the door to these rival leagues, thereby improving public access to football and bringing professional football to new cities.[160]

Denying negative injunctions in order to promote interleague competition would also be consistent with the business of professional competitive sports.[161] For example, in *Cincinnati Bengals, Inc. v. Bergey*, NFL player William Bergey of the

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[155] Daniel McClurg, Comment, *Leveling the Playing Field: Publicly Financed Professional Sports Facilities*, 53 WAKE FOREST L. REV. 233, 241 (2018) (describing the power professional sports teams wield over state and local governments in the negotiation process for sports franchises).

[156] *Id.*; *see also* Jason Notte, *Your Tax Dollars at Play: How Stadium Tax Scams Pick Fans' Pockets*, FORBES (Aug. 17, 2018, 7:00 AM), https://www.forbes.com/sites/jasonnotte/2018/08/17/your-tax-dollars-at-play-how-stadium-tax-scams-pick-fans-pockets/#142340266fb9 (describing how much public tax dollars are being spent on sports stadiums to allure sports franchises); *see also* James Philips, Caroline Rider & David Schein, *American Cities Held Hostage: Public Stadiums and Pro Sports Franchises*, 20 RICH. PUB. INT. L. REV. 63, 95–101 (2017) (providing charts on recent public expenditures for stadiums).

[157] McClurg, *supra* note 155, at 241.

[158] Ross & Szymanski, *supra* note 153, at 645–56 (describing how the monopoly status of the NFL enables it to pressure cities into subsidizing costs for stadiums).

[159] *Id.* at 634.

[160] *See* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 137–38 (S.D. Ohio 1974) (deciding not to grant a negative injunction to promote the benefits of interleague competition).

[161] *See, e.g.*, *id.* at 138–39.

Cincinnati Bengals signed a contract with NFL rival World Football League ("WFL") while under his contract with the Bengals.[162] At issue was whether the Bengals club was entitled to a negative injunction against Bergey. According to the WFL contract, Bergey would play for the Virginia Ambassadors once his contract with the Bengals expired. Bergey signed the WFL contract with two years remaining on his NFL contract.[163] The Ambassadors offered the player $125,000 per year, while the Bengals paid him $38,750 per year.[164] Bergey's WFL contract did not expressly violate any of his NFL contractual provisions, but the Bengals claimed that a negative injunction was warranted because the WFL "raid[ed] the ranks of the Bengals unfairly by signing players under existing Bengal contracts to contracts for future services."[165] The court ultimately denied the Bengals' request for a negative injunction because (1) enjoining Bergey from playing for the WFL would be a disfavored "restraint[] on competition";[166] (2) the higher salaries the Bengals would have to pay to keep the player did not constitute irreparable harm;[167] and (3) the Bengals' higher costs to compete with the WFL were "attributable to competition and not unfair competition."[168] The court also observed that the emergence of the rival league enhanced the marketability, mobility, and welfare of players in general.[169]

In order to promote interleague competition, create a better sports product, and serve the public interest, the mutuality doctrine should be revived to prevent sports clubs from using negative injunctions in bad faith. Restoring the mutuality doctrine would incentivize clubs to provide better services, take better care of their players, and give more public access to professional sports franchises.

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[162] *Id.* at 131.
[163] *Id.*
[164] *Id.* at 133.
[165] *Id.* at 131.
[166] *Id.* at 147.
[167] *Id.* at 148.
[168] *Id.*
[169] *Id.* at 134.

C. MODERN SHIFT IN WORKERS' RIGHTS ARE CONSISTENT WITH THE VALUES OF THE MUTUALITY DOCTRINE

The mutuality doctrine shares similar values with the recent movement in worker's rights toward fairness and equity. Restoring the mutuality doctrine in sports contracts would reinforce these core values of fairness and equity. The shift toward these values can be seen in the development of the legal doctrines surrounding restrictive covenants not to compete, "garden leave," and arbitration clauses.

1. *Restrictive Covenants Not to Compete*

First, the mutuality doctrine should be restored in sports contracts to curtail the use of restrictive covenants not to compete.[170] Like negative injunctions, covenants not to compete enjoin employees from working for rival companies of the employer for a certain amount of time.[171] The purpose of the restrictive covenant is to preserve worker loyalty, to protect company trade secrets, and to encourage companies to invest their resources into the development of their employees.[172] Covenants not to compete have increasingly been criticized for suppressing labor costs, unfairly benefiting employers, and obstructing the ability of workers to make a living.[173]

Several states and federal courts have limited or ended the use of restrictive covenants not to compete on the grounds that they lack mutuality of obligation.[174] For example, California,

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[170] *See* Arakelian v. Omnicare, Inc., 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (declaring that enforcing some noncompete agreements would be unconscionable because it would "destroy the mutuality of obligation on which a covenant not to compete is based"); *see also* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 138 (2008) ("[T]he permissible scope of noncompete agreements has been substantially curtailed in recent opinions.").

[171] Garrison & Wendt, *supra* note 170, at 113–16.

[172] *Id.* at 174.

[173] *Id.* at 175–76.

[174] *Arakelian*, 735 F. Supp. 2d at 41; *see also* OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS:

Oklahoma, and North Dakota have made such restrictive covenants generally unenforceable;[175] New Mexico and Hawaii in 2016 outright banned the use of covenants not to compete in certain industries;[176] Arkansas, Iowa, Kentucky, Maine, Mississippi, New York, Pennsylvania, South Dakota, Tennessee, and the District of Columbia have ended the use of restrictive covenants against employees whose employment was terminated for reasons other than their performance or conduct;[177] Oregon and Utah recently prohibited the use of non-compete covenants lasting longer than eighteen months and twelve months, respectively;[178] and New Jersey, Maryland, Washington, Idaho, Massachusetts, and Michigan have recently introduced legislation to prohibit or limit the use of covenants not to compete in their states.[179] The growing state consensus to decrease the use of restrictive covenants not to compete demonstrates that the mutuality doctrine can and should also be restored in the context of sports.

2. *"Garden Leave" Provisions*

The increasing use of "garden leave" provisions in the U.S. within the past two decades provides further grounds to revive the mutuality doctrine in sports contracts.[180] The garden

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ECONOMIC EFFECTS AND POLICY IMPLICATIONS 16 (2016) [hereinafter *Non-Compete Contracts*], www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

[175] *Non-Compete Contracts*, *supra* note 174, at 16.

[176] *Id.* at 16–17.

[177] Non-Compete and Trade Secrets Blog, Fisher Phillips, *Did Your Non-Compete Agreement Just Get Laid Off?*, FISHER PHILLIPS (Apr. 5, 2018), https://www.fisherphillips.com/Non-Compete-and-Trade-Secrets/did-your-non-compete-just-get-laid-off.

[178] UTAH CODE ANN. § 34-51-201 (LexisNexis 2016); *Non-Compete Contracts*, *supra* note 174, at 16.

[179] S.B. 1287, 64th Leg., 2nd Reg. Sess. (Idaho 2018); *Non-Compete Contracts*, *supra* note 174, at 17.

[180] *See* Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 182 (S.D.N.Y. 2006) (holding that a garden leave clause was valid because the employee receive continual payment of his salary); Natsource LLC v. Paribello, 151 F. Supp. 2d 465, 472 (S.D.N.Y. 2001) (holding that a garden leave period was reasonable because the employer continued to pay the employee's full salary during the period); *see also* Thomas B. Lewis & Mark F. Kowal, *Garden Leave Provisions: A Growing Trend in Employment Agreements*, 204 N.J. L.J. 1, 1–3 (Apr. 18, 2011),

leave provision requires employers to keep terminated employees on the payroll for a set period of time.[181] In exchange, the terminated employee is prohibited from working for a rival company during the garden leave period.[182]

The garden leave practice was imported from the United Kingdom, and has found increasing acceptance among U.S. state and federal courts.[183] The increasing use of garden leave provisions is in part a response to criticisms about the one-sidedness of restrictive covenants not to compete.[184] Courts have been more receptive to garden leave provisions than to noncompete clauses because employees experience a lower burden while placed on garden leave.[185] Although employees on garden leave are still enjoined from working for a rival company, they experience a greater mutuality of remedy because they still get fully compensated through salary, whereas in restrictive covenants not to compete, they do not.[186] The growing trend of the

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https://newjerseylawblogboutique.lexblogplatformtwo.com/files/2014/08/TBL-MFK-NJLJ-4_18_11.pdf (describing the increasing use of garden leave provisions in New Jersey and New York); Charles A. Sullivan, *Tending the Garden: Restricting Competition via "Garden Leave"*, 37 BERKELEY J. EMP. & LAB. L. 293, 294–95 (2016) (describing the increasing acceptance of garden leave provisions in the U.S.).

[181] Sullivan, *supra* note 180, at 297–301.

[182] *Id.*

[183] *Id.* at 294; *see, e.g.*, *Estee Lauder Cos.*, 430 F. Supp. 2d at 182.

[184] *See* Peter A. Steinmeyer et al., *Garden Leave Provisions in Employment Agreements*, PRACTICAL L. 1 (May 2017), https://www.ebglaw.com/content/uploads/2017/05/Thomson-Reuters-Rasnick-Steinmeyer-May-2017.pdf (describing the increasing use of garden leave provisions as covenants not to compete experienced increasing judicial scrutiny); Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2291 (2002) (arguing that garden leave provisions should be used in lieu of covenants not to compete because garden leave provisions "provide appropriate safeguards to insure that employers do not overreach" when terminating an employee).

[185] *See Natsource*, 151 F. Supp. 2d at 472 (holding that a garden leave period was reasonable because the employer continued to pay the employee's full salary during the period); *see also* Steinmeyer, *supra* note 184, at 3 ("[C]ourts may be more receptive to garden leave clauses because they have a lower burden on the employee.").

[186] Steinmeyer, *supra* note 184, at 3.

garden leave practice shows that mutuality principles are becoming more relevant in business contracts.

3. *Arbitration Clauses*

Finally, restoring the mutuality doctrine in sports would be consistent with a recent trend among courts that are striking down arbitration clauses in employment contracts for want of mutuality.[187] Courts have held that arbitration clauses are unconscionable under the mutuality doctrine when arbitration is the sole recourse for the weaker bargaining party[188] and when the arbitrator is inherently biased.[189] In light of these developments, applying the mutuality doctrine in sports contracts is particularly warranted, given that the arbitration process for many sports contract disputes is conducted by league commissioners who are hired and paid by club owners.[190]

For example, NFL Commissioner Roger Goodell ("Commissioner Goodell") has vast powers to resolve disputes with "full, complete, and final jurisdiction to arbitrate any dispute between any player, coach, and/or other employee of any member

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[187] *See* Arthur Kaufman & Ross Babbitt, *The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Road*, 22 FRANCHISE L.J. 101, 104–05 (2002) (analyzing the use of mutuality in unconscionability analysis of arbitration clauses).

[188] *Id.* at 104 (stating that the supreme courts of at least California and Montana have applied mutuality in unconscionability analysis to strike down arbitration provisions).

[189] *See* Alphagraphics Franchising v. Whaler Graphics, 840 F. Supp. 708, 711 (D. Ariz. 1993) (reviewing claims that an arbitration provision is unconscionable on grounds that it is biased and lacking in mutuality); *see also* State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798, 803 (Mo. 2015) (holding that an arbitration provision is unconscionable on grounds of arbitrator bias).

[190] *See* Theresa Mullineaux, *The NFL's Arbitration Bias: A Powerful Commissioner Makes Impartiality Questionable, and a Process Flawed*, 36 ALTERNATIVES 35, 35 (Mar. 2018) ("[Roger] Goodell, in his capacity as the [NFL] commissioner and arbitrator, has direct, definite, and demonstrable bias. His salary comes directly from the teams and thus creates a bias, as he would be more likely to find in favor of those who pay him."); Bob Wallace, Jr., *Neutral Arbitrators in Sports: What Makes it Fair?*, THOMPSON COBURN LLP (Aug. 10, 2015), https://www.thompsoncoburn.com/insights/publications/item/2015-08-10/neutral-arbitrators-in-sports-what-makes-it-fair.

of the League (or any combination thereof) and any member club or clubs."[191] Commissioner Goodell acts as the lead investigator and reviews all appeals of arbitration decisions.[192] Given that the standard NFL contract requires players to submit all their contract disputes to arbitration,[193] critics have accused the NFL arbitration process under Commissioner Goodell of being biased and impartial.[194] One court even struck down an arbitration provision in an NFL employee's contract on grounds that it was biased and unconscionable.[195] Thus, restoring the mutuality doctrine in sports contracts is needed to ensure that players receive a fair and equal arbitration process.

CONCLUSION

Taken together, concerns about the power imbalance of sports contracts, the benefits of interleague competition, and recent developments in workers' rights warrant the revival of the mutuality doctrine in sports contracts. In order to promote fairer and more equitable contracts, courts must not be so quick to uphold the validity of agreements that are heavily tilted in the club's favor. Courts should recognize that the obligations and

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[191] Theresa Mullineaux, *The Latest NFL Fumble: Using Its Commissioner as the Sole Arbitrator*, 36 ALTERNATIVES 24, 24 (Feb. 2018).

[192] Mullineaux, *supra* note 190, at 36 ("The [NFL] commissioner acts not only as the judge, jury, and executioner, but also as lead investigator, prosecutor, and the court of appeals.").

[193] *See NFL Player Contract*, *supra* note 133, at 3 ("During the term of any collective bargaining agreement, any dispute between Player and Club involving the interpretation or application of any provision of this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs.").

[194] Mullineaux, *supra* note 191, at 35–36 ("Because the NFL and NFL team owners issue the commissioner's salary, establish the rules under which he operates, and hold the power over his contract renewal or termination, it is highly unlikely that the commissioner will exercise his powers impartially.").

[195] *See Hewitt*, 461 S.W.3d at 815 (holding that an arbitration provision in an NFL employee's contract was unconscionable because of arbitrator bias).

available remedies between players and clubs have been grossly uneven.[196] Restoring the mutuality doctrine would restrict clubs from using negative injunctions on players in bad faith.

Restricting the use of negative injunctions based on the mutuality doctrine would also promote interleague competition, create a better sports product, and serve the public interest.[197] Courts should apply mutuality principles in sports contracts to incentivize clubs to provide better services, take better care of their players, and give new cities more access to professional sports franchises.

Furthermore, recent developments in workers' rights demonstrate that the mutuality doctrine should be applied in sports contracts. Employment law in general is moving away from the use of restrictive covenants not to compete.[198] In alignment with this shift in employment law, courts should restore the mutuality doctrine in sports contracts to limit clubs from using negative injunctions on players in bad faith. The mutuality doctrine should also be revived in sports in light of the "garden leave" provisions in the U.S.[199] Without greater mutuality between players and their sports clubs, club authorities will continue to cut their players without compensation or obstruct them in bad faith from playing for other clubs.

Furthermore, the mutuality doctrine should be applied in sports contracts to ensure that players receive fair and equal rights to arbitrate their contract disputes. Restoring the mutuality doctrine in this context would be consistent with an increasing trend among courts that have struck down arbitration clauses in employment contracts for want of mutuality.[200] Recent developments in contract law combined with the movement

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[196] *Cosentino*, *supra* note 132; *Therber*, *supra* note 132.

[197] *See, e.g.*, *Bergey*, 453 F. Supp. at 138 (stating that the public interest would be served by denying a sports club's request for a negative injunction and promoting interleague competition).

[198] *See* Arakelian v. Omnicare, Inc., 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) (declaring that enforcing some noncompete agreements would be unconscionable because it would "destroy the mutuality of obligation on which a covenant not to compete is based."); *see also* Garrison & Wendt, *supra* note 170, at 138 ("[T]he permissible scope of noncompete agreements has been substantially curtailed in recent opinions.").

[199] Sullivan, *supra* note 180, at 294–95 (describing the increasing acceptance of garden leave provisions in the U.S.).

[200] Kaufman & Babbitt, *supra* note 187, at 104–05 (analyzing the growing use of mutuality in unconscionability analysis).

toward fairer and more equitable dealings between sports clubs and professional athletes, warrant the revival of the mutuality doctrine in sports.

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OVERSIGHT IN COLLEGIATE ESPORTS: IS THE NCAA THE ANSWER?

ZACHARY BEALS*

ABSTRACT

Over the last decade, eSports has become increasingly popular as sports teams and private investors rush to capitalize on the expanding industry. Nearly 50 colleges nationwide already offer scholarships for eSport athletes. In the United States, the commercial dominance of traditional college sports stems from decades of regulatory support from the National Collegiate Athletic Association ("NCAA"). Consequently, collegiate eSports may also find regulatory support from the NCAA. However, many aspects of eSports inherently conflict with NCAA regulations such as the nature of eSport athletes themselves. Many eSport athletes having existing sources of income through streaming sites, such as Twitch, YouTube, and, more recently, Facebook which conflicts with the NCAA's rule against profiting from play. Additionally, eSports athletes are faced with the challenge of a model that does not conform to the traditional athletics model. This note will explore why the existing NCAA regulations fail to address these issues and will suggest regulatory solutions to address the unique nature of the eSports industry.

INTRODUCTION

On October 13, 2018, 67,452 people anxiously logged onto their computers to witness one of the most anticipated

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eSports games of the year.[1] G2 Esports was scheduled to face off against Cloud9—two of the top teams in North America in the popular rocket-powered car soccer game, *Rocket League*.[2]

Rocket League's audience was vast, and the broadcast pulled viewers spanning from the United States, Europe Union, and Australia.[3] Over 65,000 viewers gathered, albeit remotely, to watch the *Rocket League* Championship Series that airs annually and spans from fall to spring.[4] The winner of this highly anticipated game moved on in the bracket for the chance to win over $200,000 in the finals,[5] which would take place in Las Vegas early November of 2018.[6] The venue would entail a large stage with six monitors, a casting table, and multiple colossal screens to broadcast the game with a live audience watching.[7]

This note will discuss the emerging and fast-growing industry of eSports and how the National Collegiate Athletic Association ("NCAA") is poised to regulate it collegiately, however the NCAA's rules conflict with the current eSports model. In Part I, this note will introduce eSports and how it became a rapidly growing industry. Part II will discuss the current regulatory models of both eSports and traditional collegiate sports. Part III will identify the inherent differences between

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[1] Brett Molina, *Why watch other people play video games? What you need to know about esports*, MEDIUM (Jan. 3, 2017), https://www.usatoday.com/story/tech/news/2018/01/12/more-people-watch-esports-than-x-dont-get-here-basics/1017054001/.

[2] *Rocket League Top Teams*, E-SPORTS EARNINGS https://www.esportsearnings.com/games/409-rocket-league/top-teams (last visited Nov. 18, 2019).

[3] *Twitch.tv Traffic Statistics*, ALEXA, https://www.alexa.com/siteinfo/twitch.tv (last visited Nov. 18, 2019).

[4] *RLCS Season 5 World Championship Schedule*, ROCKET LEAGUE ESPORTS, https://www.rocketleagueesports.com/schedule/ (last visited Nov. 18, 2019).

[5] *Rocket League Championship Series*, E-SPORTS EARNINGS, https://www.esportsearnings.com/leagues/429-rocket-league-championship-series (last visited Nov. 18, 2019).

[6] *Id.*

[7] Cory Lanier, *The RLCS World Championship Returns To Europe!*, ROCKET LEAGUE (Apr. 26, 2018), https://www.rocketleagueesports.com/news/the-rlcs-world-championship-returns-to-europe-/; *Copperbox Arena*, WIKIPEDIA, https://en.wikipedia.org/wiki/Copper_Box_Arena (last visited Nov. 18, 2019).

traditional collegiate sports and eSports serving as obstacles to uniform regulation under the NCAA. Part IV will explain the limitations of the NCAA to regulate the rights of eSports athletes. Finally, Part V will propose alternatives to NCAA regulation of collegiate eSports while also suggesting ways to change existing NCAA rules to more appropriately address eSports.

I. eSPORTS AND ITS RAPID GROWTH

Generally speaking, eSports is competitive gaming that pits players against one another in a tournament setting and allows those who are unable or unwilling to play traditional sports to compete in virtual ones.[8] As a result of its growing popularity in 2017, the eSports industry brought in roughly 700 million dollars, with almost 385 million viewers that year.[9] eSports has become a popular alternative to traditional sports and has captured large numbers in younger audiences.[10] The average age of an eSports viewer is thirty-one, while the average age of a traditional sports viewer ranges from 40 to 64.[11] Similar to the NBA and NFL, most eSport events involve two teams competing against each other.[12]

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[8] Bountie Gaming, *The History and Evolution of Esports*, MEDIUM (Jan. 3, 2018), https://medium.com/@BountieGaming/the-history-and-evolution-of-esports-8ab6c1cf3257.

[9] Kevin Faber, *How the World of Esports is Taking Over Streaming Services*, INNOVATION MGMT., http://www.innovationmanagement.se/2018/02/22/how-the-world-of-esports-is-taking-over-streaming-services/ (last visited Nov. 18, 2019).

[10] John Lynch, *As NFL ratings drop, a new internet study says young men like watching eSports more than traditional sports*, BUS. INSIDER (Sept. 14, 2017), https://www.businessinsider.com/nfl-ratings-drop-study-young-men-watch-esports-more-than-traditional-sports-2017-9.

[11] John Lombardo & David Broughton, *Going gray: Sports TV viewers skew older*, SPORTS BUS. DAILY (June 5, 2017), https://www.sportsbusinessdaily.com/Journal/Issues/2017/06/05/Research-and-Ratings/Viewership-trends.aspx; Eoin Bathurst, *The Average Age of Esports Viewers is Higher than You May Think, says GameScape from Interpret, LLC*, ESPORTS OBSERVER (Feb. 24, 2017), https://esportsobserver.com/average-age-esports-viewers-gamescape/.

[12] *See Rocket League Championship Series Season 5 – North America*, LIQUIPEDIA: ROCKET LEAGUE, https://liquipedia.net/rocketleague/Rocket_League_Championship_Series/Season_5/North_America (last visited Nov. 18, 2019).

For example, the largest *Rocket League* tournament consist of 3v3 tournaments, which pit teams against each other to score the most points in a five-minute game.

Similar to traditional sports, eSports is a product of entertainment built on athletic competition, a devoted fan-base, an audience, and a unique culture. Audiences watch the games, and often large tournaments will occupy live events where they host meet and greets and interview pro players. Interviews with players include assessments of decisions made in the game, which gives viewers a guide on improvements. Often, analysts discuss the tournament with eSports casters to explain decisions made by players to the audience.

Streaming gameplay on internet streaming platforms, such as Twitch, YouTube, Facebook, and Mixer is one of the largest and fastest growing aspects of eSports. The introduction of streaming platforms has opened up an avenue for video game enthusiasts that, prior to streaming platforms, did not exist.[13] Additionally, this new avenue has allowed players to make a living by playing a game they love and streaming it for any viewers that wish to tune in. Last year, eSports has seen immense growth in streaming with games like *Fortnite* boasting a total player count of 45 million.[14] *Fortnite* averaged the following daily statistics in September 2018: 153,285 average viewers; 9,469 average channels (each channel typically equaling one player); a maximum of 581,942 viewers; a maximum of 21,152 channels; and 110 million total hours watched.[15] The economic potential of eSports did not go unnoticed, even in its beginning. In 2014, Amazon paid $970 million to acquire Twitch, one of the primary streaming platforms for eSports tournaments, as well as casual gameplay.[16]

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[13] Faber, *supra* note 9.

[14] Matt Brian, *The rise and rise (and rise) of 'Fortnite'*, ENGADGET (Mar. 17, 2018), https://www.engadget.com/2018/03/17/fortnite-battle-royale-record-breaker/.

[15] *Fortnite: Statistics by Month*, TWITCHTRACKER, https://twitchtracker.com/games/33214 (last visited Nov. 18, 2019).

[16] Eugene Kim, *Amazon Buys Twitch For $970 Million In Cash*, BUS. INSIDER (Aug. 25, 2014), https://www.businessinsider.com/amazon-buys-twitch-2014-8.

A. A BRIEF HISTORY OF ESPORTS

Prior to the first tournament, there were various eSports events held with some of the first video games created, such as *Spacewar*.[17] In 1980, the first eSports tournament debuted: The Space Invaders Championship. The Space Invaders Championship boasted an attendance of 10,000 participants.[18] However, the first to capitalize on these types of events was Red Annihilation, a tournament featuring the first-person shooter ("FPS") game *Quake*.[19] Red Annihilation is widely considered to have been the first official eSports tournament.[20] The first place prize was a Ferrari previously owned by the lead developer of *Quake*.[21] With the invention of the internet, alongside the increased power and accessibility of personal computers in the 1990s, competitive video games and eSports saw a huge surge in popularity.[22] As eSports continued to grow, the formation of organizations devoted to creating and promoting eSports tournaments began.[23]

Some, but not all, eSports athletes have careers as content creators in addition to an eSports professionals. Popular platforms for content creation include streaming sites, such as Twitch, and video uploading sites, such as YouTube. Both types of platforms allow for monetization of their videos.[24] YouTube provides revenue to its content creators in two ways: channel memberships and advertising.[25] A YouTube channel owner must have at least 100,000 subscribers before charging $4.99 for a monthly membership.[26] YouTube's current guidelines state that YouTube

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[17] Bountie Gaming, *supra* note 8.

[18] *Id.*

[19] *Id.*

[20] Tyler F.M. Edwards, *ESPORTS: A BRIEF HISTORY*, ADANAI (Apr. 30, 2013), http://adanai.com/esports/.

[21] *Id.*

[22] *See* Logan Rivenes, *The History of Online Gaming*, DATAPATH.IO (Jan. 17, 2017), https://datapath.io/resources/blog/the-history-of-online-gaming/.

[23] *Id.*

[24] Julia Alexander, *Monetization: How Twitch, YouTube and Patreon work for creators revenue*, POLYGON (June 25, 2018), https://www.polygon.com/2018/6/25/17502380/monteization-youtube-channel-memberships-patreon-twitch-affiliate-partner.

[25] *Id.*

[26] *Id.*

only takes 30% of that $4.99 and the other 70% goes to the content creator.[27] Twitch, on the other hand, operates on a roughly 50/50 cut with its content creators using the usual $4.99 monthly subscription fee.[28] Similar to YouTube, Twitch requires that streamers become an "affiliate" and implement a subscription membership for the streamer's channel.[29]

Twitch, the largest streaming platform for eSports athletes, emerged in 2018 as the 31st largest internet traffic producer in the United States.[30] In 2017 alone, Twitch had 15 million unique viewers a month who viewed a combined 355 billion minutes of gameplay.[31] YouTube, which is currently the second highest trafficked site on the internet, has two of the top five channels with the most gaming-related subscribers worldwide.[32]

B. eSPORTS IN COLLEGIATE SPORTS

Although eSports was marginally prevalent a decade ago, the rapid growth in the eSports industry and its viewership has been immense.[33] This rapid evolution has spread to collegiate sports as universities have launched eSports teams to represent them in competitions.[34]

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *The top 500 sites on the web*, ALEXA, https://www.alexa.com/topsites (last visited Nov. 18, 2019).

[31] David Carr, *Amazon Bets on Content in Deal for Twitch*, N.Y. TIMES (Aug. 31, 2014), https://www.nytimes.com/2014/09/01/business/media/amazons-bet-on-content-in-a-hub-for-gamers.html.

[32] *Data from: 4 reasons people watch gaming content on YouTube*, THINK WITH GOOGLE, https://www.thinkwithgoogle.com/data-collections/gamer-demographics-gaming-statistics/ (last visited Nov. 18, 2019).

[33] Alex Gray, *The Explosive Growth of eSports*, WORLD ECON. GROWTH (July 3, 2017), https://www.weforum.org/agenda/2018/07/the-explosive-growth-of-esports/.

[34] Neal Robison, *Esports Is The New College Football*, FORBES (Jan. 30, 2018), https://www.forbes.com/sites/moorinsights/2018/01/30/esports-is-the-new-college-football/#7ca84e8e1855.

The first varsity eSports program began at Robert Morris University.[35] In 2014, Robert Morris University in Chicago received 3,000 inquiries and 2,000 applications following its announcement of an eSports team, which included 35 scholarships for its players.[36] As of March 2018, there are more than 80 eSports university programs spanning the United States, most falling under the governing body known as the National Association of Collegiate Esports ("NACE").[37] While many universities are members of NACE, the organization fails to actually operate as a governing body; rather, NACE functions more as an administrator that organizes competitions between universities.[38]

The increasing number of universities offering similar eSports programs has undoubtedly grabbed the attention of the NCAA—currently at the helm of regulating traditional collegiate sports—due to the lack of a current regulatory body overseeing collegiate eSports.[39] However, expansive growth in the field questions whether the NCAA should be involved.

II. EXISTING NCAA REGULATORY MODELS IN TRADITIONAL SPORTS AND ESPORTS

Collegiate eSports is without a true governing body, which has left game developers and universities free to create tournaments and leagues along with NACE.[40] For example, Riot (the developer of the popular multiplayer online battle arena game *League of Legends*) created the "College League of Legends" with the goal of having schools treat the game the same way they treat

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[35] Sean Morrison, *List of varsity esports programs spans North America*, ESPN (Mar. 15, 2018), http://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america.

[36] Steve Dittmore, *Are We Witnessing The Dawn Of Competitive Intercollegiate eSports?*, ATHLETIC DIRECTOR U, https://athleticdirectoru.com/articles/esports-college-gaming-possibility/ (last visited Nov. 18, 2019).

[37] Morrison, *supra* note 35.

[38] *NACE eSports Constitution Bylaws*, NACE ESPORTS, http://nacesports.org/wp-content/uploads/2017/02/NAC-eSports-Constitution-Bylaws-9-29-2016-1-1.pdf (last visited Nov. 18, 2019).

[39] See Mitch Reames, *The Role of College Programs in Pro Esports*, SPORT TECHIE (May 7, 2018), https://www.sporttechie.com/role-of-college-esports-ncaa-league-of-legends-overwatch/.

[40] *Id.*

traditional college sports.[41] In 2014, Blizzard (the developer of *Heroes of the Storm*) announced a partnership with the eSports organization TESPA to create a collegiate eSports tournament aptly named "Heroes of the Dorm," which offered tuition scholarships to the winning team.[42]

In 2017, TESPA partnered with Psyonix to create Collegiate Rocket League ("CRL").[43] CRL is an open bracket league that allows free entry to any college student in the United States or Canada.[44] Players opt-in to weekly matches against opponents to place in the top two and qualify for regional conferences with other bracket-winning teams.[45] Regional conferences decide the four qualifying teams for the 2018 conference and totals six teams per conference.[46]

Players wishing to go through the collegiate route to pro eSports will likely face obstacles from the NCAA, if it should choose to step in. Involvement in these growing eSports associations and tournaments will likely bring with it issues over amateurism, compliance with Title IX, and revenue sharing—issues that are further discussed in this note. The NCAA requires student-athletes to adhere to strict amateurism requirements to stay eligible in the field, such as prohibiting students from receiving revenue as a result of using their likeness.[47] As a result, student athletes are faced with the difficult choice of pursuing their athletic goals over other personal goals, such as YouTube or Twitch streaming.

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[41] *Id.*

[42] Sean Morrison, *As Heroes of the Dorm 'graduates,' former players and admins reflect on success*, ESPN (May 10, 2018), http://www.espn.com/esports/story/_/id/23466339/as-heroes-dorm-graduates-former-players-admins-reflect-success.

[43] Cory Lanier, *Collegiate Rocket League Returns This Fall*, ROCKET LEAGUE (Aug. 16, 2017), https://www.rocketleague.com/news/collegiate-rocket-league-returns-this-fall/.

[44] *Collegiate Rocket League Open*, TESPA, https://compete.tespa.org/tournament/121 (last visited Nov. 18, 2019).

[45] *Id.*

[46] *Id.*

[47] California is the exception having passed legislation in September 2019 permitting student-athletes to receive revenue as a result of using their name, image, and likeness. S.B. 206, 2019–20 Legis. Sess. (Cal. 2019).

Unlike NACE, existing NCAA regulations heavily restrict the sports a collegiate student-athlete can play, who they play against, and any income made related to the sport in which they compete.[48] In fact, the eSports industry would have to undergo substantial reform just to meet these NCAA standards because its current model is seriously out of compliance with NCAA bylaw requirements. Student-athletes are required to adhere to strict amateurism rules that prohibit the following: contracts with professional teams; salaries for participating in athletics; prize money above actual and necessary expenses; playing with professionals; tryouts, practice, or competition with a professional team; benefits from an agent or prospective agent; agreements to be represented by an agent; and delayed initial full-time collegiate enrollment to participate in organized sports competition. For these reasons, many prospective eSports student-athletes may find themselves struggling to be in compliance or already non-compliant.[49]

Although there are technically no NCAA age restrictions, the NCAA does require that athletes enroll in a university one calendar year following their high-school graduation and complete a four-year degree within five years.[50] Typically, entering freshman are roughly 17 or 18 years old.[51] As a result, younger traditional sports players can find themselves matched up against older and more physically apt competition. For example, rookies of the Rochester Institute of Technology lacrosse team found themselves on the opposite side of the pitch of a 26-year-old—8 years older than them.[52]

In comparison, eSports players rely on things like dexterity and fast decision-making rather than brute physical size. For example, in the spring of 2018, 15-year-old Justin "JSTN" Morales aided NRG Esports to an undefeated regular season and a second-place finish in the North American Rocket League

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[48] NCAA, SUMMARY OF NCAA REGULATIONS – NCAA DIVISION I (2011), http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf.

[49] *Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism (last visited Nov. 18, 2019).

[50] Danielle Allentuck, *NCAA age rules hurts younger college athletes*, THE ITHACAN (Apr. 17, 2018), https://theithacan.org/columns/ncaa-age-rule-hurts-younger-college-athletes/.

[51] *Id.*

[52] *Id.*

Championship Series.[53] Despite the young talent, many tournament organizations enforce age restrictions on competitors, such as the Rocket League's Championship Series, which has a strict rule prohibiting players under 15 to enter and compete.[54]

As a result, many eSports organizations sponsor young players like Justin Morales before they go to college.[55] These newly sponsored players—usually teenagers—face the hurdle of being an eSports athlete and being a full-time student. Often, these players are expected to put in 12 to 15 hours of training a day to remain competitive in the eSports arena, which is far more than the 20-hour a week restriction the NCAA implements for traditional athletes.[56]

NCAA athletes are the beneficiaries of scholarships from the school they agree to play for during their undergraduate studies.[57] Student-athletes sign an agreement, typically a letter of intent, which is a binding agreement between the school and player.[58] The agreement stipulates that certain school-related expenses will be covered by the university, such as tuition, books, and housing.[59] Finally, the contract strictly forbids the player from receiving any kind of income from their competing.[60] Similarly, players are required to sign contracts with the organization that

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[53] Reames, *supra* note 39, at ¶ 11.

[54] *Championship Series FAQ - RLCS*, ROCKET LEAGUE, https://www.rocketleague.com/esports/faq/ (last visited Nov. 18, 2019).

[55] *jstn*, LIQUIPEDIA: ROCKET LEAGUE, https://liquipedia.net/rocketleague/Jstn (last visited Nov. 18, 2019).

[56] Graham Ashton, *What is the Optimum Training Time for Esports Players?*, ESPORTS OBSERVER (Dec. 28, 2017), https://esportsobserver.com/optimum-player-training-time/; Harrison Jacobs, *Here's the insane training schedule of a 20-something professional gamer*, BUS. INSIDER (May 11, 2015), https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5; Patrick F. McDevitt, *The NCAA's Amatuerism Rules Are Indeed Madness*, HUFFINGTON POST (Mar. 2, 2018), https://www.huffingtonpost.com/entry/opinion-mcdevitt-ncaaamateurism_us_5a987314e4b0479c0250a58d.

[57] *NCAA Sports Contracts and Amateurism*, US LEGAL, https://sportslaw.uslegal.com/sports-agents-and-contracts/ncaa-sports-contracts-and-amateurism/ (last visited Nov. 18, 2019).

[58] *Id.*

[59] *Id.*

[60] *Id.*

sponsors them, which can spawn a slew of issues that players are often ill-equipped to address, such as lower bargaining power and lack of knowledge of appropriate contract terms.[61] Younger players that gain a sponsor prior to going to college with the intent to join a collegiate team may face significant hurdles in joining the collegiate team under existing NCAA regulations.

In the eSports industry, the game developers control the intellectual property rights of the games they create.[62] As a result, developers, such as Psyonix, have the power to ban and/or fine players that violate their intellectual property rights of game through behaviors such as hacking or "modding."[63] Additionally, the developers have discretion to ban and fine players inside and outside their leagues for violating developer created codes of conduct of the game.[64] The NCAA similarly has sole discretion to ban or fine its players but also offers an appeal process.[65]

This discrepancy between traditional sports and eSports calls for a solution that facilitates an official governing body, such as NACE, to regulate the industry, leaves regulating to individual conferences, or extensively modifies existing NCAA regulation to carve out exceptions. The need is derived from the inherent differences that the NCAA model fails to take into account. eSports players rely on streaming, potential scrimmaging with professional players, or prior sponsorships to become relevant in the eSports circuit, all of which would be prohibited under the existing NCAA model.

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[61] *See* Lydia Mitrevski, *Esports contracts: The Good, The Bad, and The Ugly*, ESPORTS INSIDER (May 30, 2017), https://esportsinsider.com/2017/05/esports-contracts-good-bad-ugly/.

[62] Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. Pa. L. REV. 1535, 1538 (2013).

[63] *Code of Conduct And Banning Policy*, ROCKET LEAGUE (Sep. 16, 2018), https://www.rocketleague.com/news/code-of-conduct-and-banning-policy/.

[64] *See, e.g.*, Richard Lewis, *No Appeals Process for LCS Fines-TSM's Reginald Must Pay*, DAILY DOT (Aug. 20, 2014), http://www.dailydot.com/esports/tsm-reginald-fine-riot-games/ (describing an instance where a professional player was fined $2,000 for breaking a rule).

[65] *Enforcement Process: Penalties*, NCAA, http://www.ncaa.org/enforcement/enforcement-process-penalties (last visited Nov. 18, 2019).

III. NCAA GUIDELINES CONFLICT WITH THE ESPORTS MODEL

NCAA athletes are expected to follow strict guidelines to retain their amateurism eligibility in collegiate sports.[66] One of the more controversial restrictions is the prohibition on a player from earning compensation above the actual cost of attending college including tuition and other related school expenses.[67] This regulation could cause a rift in the eSports paradigm if the NCAA were to step in to the eSports realm entirely. In particular, this could completely hinder an eSports athlete's ability to stream the player's gameplay.

Unfortunately, current NCAA regulations restrict a student-athlete from receiving compensation beyond cost of attendance, and typically this compensation comes from the school in the form of scholarships for tuition, books, housing, and other related expenses.[68] If a student-athlete is found to be using their own likeness to receive any kind of compensation, their amateur status becomes jeopardized.[69] Often times, this leads to student-athletes being forced to choose between their hobbies that are bringing in revenue or their athletic career.[70] This becomes especially problematic when eSports athletes gain distinction prior to college and have already begun generating revenue as a result. When these young players enter the college arena, they have already become skilled in the game, have climbed the ranks and are established online generating revenue through Twitch or

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[66] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[67] Joseph M. Hanna, *NCAA Antitrust Bench Trial Set to Begin*, SPORTS L. INSIDER (Sept. 7, 2018), https://sportslawinsider.com/ncaa-antitrust-bench-trial-set-to-begin/.

[68] Steve Berkowitz, *Judge rules NCAA must defend limits on compensation to college athletes in new trial*, USA TODAY (Mar. 28, 2018), https://www.usatoday.com/story/sports/college/2018/03/28/ncaa-must-defend-limits-compensation-college-athletes/467495002/.

[69] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[70] Marc Lancaster, *UCF kicker Donald De La Haye gives up football for YouTube stardom*, SPORTING NEWS (July 31, 2017), http://www.sportingnews.com/us/ncaa-football/news/deestroying-youtube-donald-de-la-haye-ucf-ncaa-ineligible/9bde3upvnbvf1sl3o62pz4hjq.

YouTube. As a result, they are now, and forever, barred from being an amateur under the existing NCAA regulations.

One example of this complication in traditional collegiate sports is Donald De La Haye. Donald De La Haye played on the University of Central Florida ("UCF") Football team, but he is most known for his YouTube channel "Destroying."[71] His YouTube channel primarily features videos of De La Haye himself performing different football skills ranging from long-range kicks to ridiculous one-handed catches mimicking the legendary Odell Beckham Jr. His channel has millions of views.[72] When De La Haye is not performing amazing feats of football prowess, he is making comedic skits about the life of a football player.[73] Upon finding his YouTube channel, UCF gave him an ultimatum: Shut down his YouTube channel because he was earning revenue in violation of the NCAA amateurism eligibility requirements,[74] or quit the college team.[75] De La Haye chose to continue his YouTube career and, unfortunately, was no longer eligible to play on the University's team.[76] In fact, UCF actually rescinded his football scholarship.[77] In response, De La Haye filed a federal lawsuit against the administration, arguing that his First Amendment right to free speech and his Fourteenth Amendment right to due process were violated by removing his football scholarship following UCF's discovery of his YouTube channel. UCF investigated and subsequently deemed La Haye's YouTube channel a violation of NCAA eligibility rules.[78]

The NCAA actually offered to waive the amateurism requirements for De La Haye. This would allow him to continue

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[71] Steven Ruiz, *A college football player has a hit YouTube channel. He might have to give it up to remain eligible.*, USA TODAY (June 12, 2017), https://ftw.usatoday.com/2017/06/donald-de-la-haye-youtube-channel-central-florida-ucf-ncaa.

[72] Donald De La Haye (@Deestroying), YOUTUBE, https://www.youtube.com/channel/UC4mLlRa_dezwvytudo9s1sw/videos?view=0&sort=p&flow=grid (last visited Nov. 18, 2019).

[73] *Id.*

[74] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[75] Ruiz, *supra* note 71.

[76] Iliana Limon Romero, *Former UCF YouTube kicker Donald De La Haye files lawsuit against Knights*, ORLANDO SENTINEL (Feb. 1, 2018), https://www.orlandosentinel.com/sports/ucf-knights/os-sp-ucf-kicker-lawsuit-20180202-story.html.

[77] *Id.*

[78] *Id.*

running ads on his videos without it affecting his eligibility, so long as the ads did not draw on football material.[79] However, the waiver did not halt the revocation of De La Haye's scholarship. In order to keep his scholarship, he was required by UCF to halt monetization of all of his videos, even the videos unrelated to his football career.[80] Ultimately, De La Haye decided not to honor the waiver or stipulations to maintain his scholarship and was dropped from the UCF football team.[81]

Comparable issues would likely arise with similarly situated eSports athletes under the existing NCAA amateurism guidelines.[82] As noted above, many eSports players stream their gameplay online, and typically generate income from the ad revenue on their videos and streams.[83] As a result, collegiate eSports players that stream will likely find themselves unable to conform, putting their eligibility and potentially their associated scholarships in jeopardy.

This issue does not only arise in the context of a current eSports player, it can also arise with a player wanting to be on a collegiate team in the future. For example, England's Kyle Jackson is considered the youngest *Fortnite* player to become a professional gamer at the age of 13.[84] Now, suppose that Jackson wished to come to the United States for his college education and was offered a scholarship in exchange for playing on a university's team. Jackson would likely be ineligible for failing to meet the amateurism requirements if his streamed gameplay was monetized through advertisements.[85]

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[79] Alex Kirshner, *He lost a scholarship because of YouTube ads, so he's taking NCAA rules to court*, SB NATION (July 14, 2018), https://www.sbnation.com/college-football/2018/7/13/17565672/donald-de-la-haye-youtube-ncaa-deestroying.

[80] *Id.*

[81] *Id.*

[82] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[83] Adriyan King, *Get Rich with Twitch: Tips on How to Make Money Streaming*, MEDIUM (Jan. 21, 2018), https://medium.com/@andrae.king1991/get-rich-with-twitch-tips-on-how-to-make-money-streaming-e18a0e2397cd.

[84] Kevin Breuninger, *This 13-year-old is the youngest professional 'Fortnite' Gamer*, CNBC TECH (May 8, 2018), https://www.cnbc.com/2018/05/08/this-13-year-old-is-the-youngest-professional-fortnite-gamer.html.

[85] *Id.*

eSports is vastly different from traditional sports in regards to the physical attributes necessary to be a top-level athlete, and the NCAA has failed to address the fact that eSports athletes can find success at a young age. Like Kyle Jackson or Justin Morales, many young players find themselves performing at the top level many years prior to going to college and gain a following on streaming platforms.[86] Under NCAA regulations, for athletes to be eligible as an amateur they cannot have earned an income at any point in the past or present.[87] As a result, these young entrepreneurial eSports athletes would be forever barred from playing in collegiate eSports under the current NCAA governing body of eSports before they even reached college age.

These regulations not only affect the ability of an eSports player to stream gameplay, but also it affects their ability to make themselves relevant in the industry and become a professional following graduation. One of the most important things an aspiring eSports athlete can do is gain a following and become well known in the community in which they play. This allows eSports organizations to become familiar with the players and their skill and hopefully lead to a sponsorship. Applying NCAA regulations to collegiate eSports would drastically reduce a player's ability to build a brand and following prior to playing on a college team.

IV. NCAA GUIDELINE CONFLICTS WITH VIDEO GAME MODELS

Generally, competitive video games have two dominant playlists: casual and ranked. Casual consists of an unranked playlist that is predominantly players that play the game for fun and on a very casual level, hence the name. On the other hand, ranked is a place for competing in an effort to climb the ranked leaderboards and achieve the highest rank possible. Winning in either of these playlists results in an increase in a player's matchmaking ranking ("MMR").[88] Increases in MMR are not dictated by how well a player plays, rather they are solely based

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[86] *Id.*

[87] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[88] Grand Champion, *How MMR and the Ranking System Works*, REDDIT, https://www.reddit.com/r/RocketLeague/comments/8qvbwf/how_mmr_and_the_ranking_system_works/ (last visited Nov. 18, 2019).

on whether the player's team won or lost the match.[89] Developers implement MMR's as a way of matching players of similar rank with each other, allowing for an even progression of skill and avoiding unfair matchups between players and teams.[90] MMR in video games functions similarly to varying divisions in college and professional sports.[91]

Naturally, as a player's MMR increases the player competes against better players, and if they get to the top few percent of the players in the game, they have the possibility of playing against a professional player. For example, the top rank in Rocket League is "Grand Champ," and if you are an aspiring eSports athlete this is the rank that is essentially a prerequisite to being noticed in the competitive circuit. As discussed above, age is generally immaterial to that player's ability to perform well and achieve the highest rank, or MMR, in a particular game.[92] As a result, there are many players in a particular game that have played against professional eSports athletes and by no choosing their own. Rather, it is merely a product of the competitive system in many games hoping to break into the eSports circuit.

This system leaves aspiring players out of compliance with NCAA guidelines.[93] NCAA amateurism eligibility requirements prevent student-athletes from becoming eligible if they have played with a professional athlete prior to or during their time at college.[94] One of the biggest problem with this requirement is that, in the case of video games, it is out of the control of the player who the player is matched against. When players enter a queue for a match, they do not get a choice of who to play, rather, it is randomly decided by the matchmaking system

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[89] *Id.*

[90] *How Does the MMR Work?*, LEAGUE OF LEGENDS, http://forums.euw.leagueoflegends.com/board/showthread.php?t=1231895 (last visited Nov. 18, 2019).

[91] Justin Berkman, *What Are NCAA Divisions? Division I vs 2 vs 3*, PREP SCHOLAR (Aug. 22, 2015), https://blog.prepscholar.com/what-are-ncaa-divisions-1-vs-2-vs-3.

[92] *See NRG's jstn about proving his critics wrong*, ROCKETEERS (June 9, 2018), https://rocketeers.gg/interview-nrg-jstn-rlcs-world-championship/.

[93] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[94] *Id.*

designed by the game developer.[95] By contrast, players competing in traditional collegiate sports are matched to others in a given league that can be identified prior to competing.[96]

Similar to the income revenue requirement hindering an eSports player's ability to stream or post their gameplay, restrictions on who a player can play with will have detrimental effects on their ability to grow and become relevant. Because the competitive video game model is not in step with the model of traditional sports, the same NCAA guidelines cannot possibly be the answer to the absence of true regulation in collegiate eSports. NCAA eligibility requirements are ill-equipped to address the complex nature of different video game designs of the twenty-first century because they are based off of requirements made in the early 1900s.[97] As a result, the NCAA's amateurism guidelines would force eSports athletes to choose between retaining their eligibility going forward or to earn money through the sport.

Immunizing eSports athletes from the prohibition on competing against professionals is a necessity if eSports is to be regulated at the collegiate level by the NCAA or similar governing body. Restricting eSports players from professional competition would require extensive and likely expensive changes to video game designs. Players at a young age aspiring to play on a collegiate team and get a scholarship would have to be extremely diligent in avoiding playing with any professional player, which is often out of the control of the player. This is where the game developers come in. Restricting play with professionals must come from the side of the developers and would call for special game modes that exclude professionals, which would require a system to be in place that recognizes professionals and puts them into their own playlist. This is unrealistic, however, because this would be costly and unduly burdensome on the players and game developers.

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[95] *See* Rexxar, *Video Game Matchmaking: A Data-Driven Take from Blizzard*, DIGITAL INITIATIVE (Apr. 9, 2018), https://digit.hbs.org/submission/video-game-matchmaking-a-data-driven-take-from-blizzard/.

[96] *See* Michael Felder, *How Is a College Football Schedule Made?*, BLEACHER REP. (Sept. 27, 2012), https://bleacherreport.com/articles/1350023-how-is-a-college-football-schedule-made.

[97] *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/National-Collegiate-Athletic-Association (last visited Nov. 18, 2019).

V. ADDRESSING NCAA REGULATION CONFLICTS IN COLLEGIATE ESPORTS

One of the biggest barriers to regulating eSports is public unwillingness to accept eSports as a legitimate industry with career opportunities, which in turn obstructs the regulation of eSports.[98] Rapid growth in the eSports industry suggests that it is no longer merely a hobby; rather, eSports can lead to a successful career that merits widespread respect like traditional sports careers. Serious growth in the eSports industry and the spread to collegiate sports programs means that this industry can no longer be ignored and requires accommodating regulation.

Additionally, eSports' consumers represent key advertising demographics that generates substantial advertising revenue.[99] Access to this diverse and key demographic has encouraged large advertisers to start sponsoring major events. State Farm recently partnered with Psyonix to sponsor season five of the Rocket League Championship Series with viewership in the tens of thousands.[100] Other large name companies have also stepped into the market of eSports including Brisk, Mobil 1, 7 Eleven, and Old Spice.[101] Computer hardware companies, like

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[98] For an example of public unwillingness to accept eSports as a legitimate industry, *see* Vlad Savov & Sam Byford, *Can Video Games Be Sports?*, THE VERGE (July 11, 2014), http://www.theverge.com/2014/7/11/5890907/can-videogames-be-sports.

[99] In the United States, 60% of eSports viewers are between 21 and 35 (43% male and 17% female). NEWZOO, GLOBAL 2018 ESPORTS MARKET REPORT (2018), https://newzoo.com/solutions/standard/market-forecasts/global-esports-market-report.pdf. In addition, 52% of eSports viewers are married, and eSports viewers are more likely to be employed full-time than the general population. *Id.* at 4–5, 7.

[100] *State Farm® Joins The RLCS For Season 5*, ROCKET LEAGUE, https://www.rocketleagueesports.com/news/state-farms-joins-the-rlcs-for-season-5-/ (last visited Nov. 18, 2019).

[101] John Gaudiosi, *Brand Sponsors Take Notice As 'Rocket League' Sets New Esports Standard*, A.LIST (May 30, 2017), https://www.alistdaily.com/strategy/brand-sponsors-take-notice-rocket-league-sets-new-esports-standard/.

Intel, have tapped into the success of eSports too, having sponsored the Electronic Sports League since 2006.[102]

The problem is that eSports is an industry that exists tangentially to and because of the existence and continued growth of the Internet, which the government has struggled to keep up with and create proficient and adaptive regulations for.[103] However, many problems that players face are not inherently tied to the Internet or even to the video games themselves, but rather, they are tied to the structures of the collegiate eSports leagues. Ideally, either the eSports structure would change to more similarly reflect the American sports league system, or the NCAA would adapt its regulations to meet the unique differences inherent in collegiate eSports leagues.

One of the biggest hurdles with any regulatory system, but especially with the Internet, is enforcement.[104] In particular, it would be challenging to impose regulations on collegiate eSports leagues and not affect other non-collegiate leagues. Developers would likely be placed in a situation where they have to alter their game to conform to NCAA regulations because, as stated earlier, the models do not align. Specifically, the NCAA would have to target its regulations at collegiate leagues and programs with new regulations drawing a line that properly accounts for the inherent differences between traditional sports and eSports.

This note proposes three possible solutions that would allow the eSports industry to be properly regulated without impeding growth or requiring new bylaws every time a new game enters the eSports circuit: (1) creating a new collegiate regulatory body solely dedicated to eSports (similar to, if not, the NACE); (2) leaving the regulations to the individual universities; or (3) carving out specific exceptions to the current NCAA regulations.

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[102] Andrew Meola, *The biggest companies sponsoring eSports teams and tournaments*, BUS. INSIDER (Jan. 12, 2018), https://www.businessinsider.com/top-esports-sponsors-gaming-sponsorships-2018-1.

[103] *See, e.g.*, Patrick Ryan & Max Senges, *Internet Governance Is Our Shared Responsibility*, 10 J.L. & POL'Y FOR INFO. SOC'Y 1, 4 (2014).

[104] *See* Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 453 (2000).

A. CREATING A NEW COLLEGIATE REGULATORY BODY

The vacancy left by the NCAA in collegiate eSports regulation has been filled by non-regulatory bodies such as NACE, Collegiate Starleague ("CSL"), American Collegiate ESports League ("ACEL"), and TESPA.[105] Each requires certain eligibility requirements to be met in order to compete. For example, TESPA requires a valid school email address in order to sign up and play in any TESPA sponsored tournament.[106] However, a potential pitfall is the fact that school accounts are not valid representations of student status because school faculty, professors, other staff, and prior students may hold school email addresses as well. TESPA states in its bylaws that it requires "certified proof" of enrollment for players that become finalists in its tournaments but fails to state what exactly qualifies as "certified proof."[107]

CSL has also set out standards that student-athletes are required to meet prior to becoming eligible for tournament play. Student-athletes must be enrolled full-time in a university and be in good standing.[108] Unlike TESPA, CSL gives faculty the ability to request transcripts from players to authenticate their status as a student enrolled at a legitimate collegiate institution.[109] Additionally, sanctions can be imposed if a student-athlete fails to provide transcripts when requested.[110]

Alternatively, students can create their own organizations, such as ACEL. ACEL is a non-profit organization wholly run by

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[105] TESPA is the leader in collegiate eSports on campus and on the competitive stage. *See* TESPA, https://tespa.org/ (last visited Nov. 18, 2019); *Championing Collegiate Esports Nationwide*, NACE ESPORTS, https://nacesports.org/ (last visited Nov. 18, 2019); *HAPPENING NOW*, COLLEGIATE STAR LEAGUE, https://www.cstarleague.com/ (last visited Nov. 18, 2019).

[106] *Eligibility from Tespa Tournaments-Rules*, TESPA, https://compete.tespa.org/tournament (last visited Nov. 18, 2019).

[107] *Id.*

[108] *Season Guide to CSL Fall 2019 - Spring 2020, League of Legends*, CSTAR, https://cstarleague.com/lol/rules (last visited Nov. 18, 2019).

[109] *Id.*

[110] *Id.*

students.[111] ACEL has created a conference system that allows students to face off against other students that are near them geographically.[112] A quick look at the eligibility requirements make clear that the ACEL has minimal requirements for students to join and subsequently compete. For example, for a student to compete in a League of Legends tournament in the ACEL league, they must be at least 17 years of age, be enrolled at a school and be in good standing, have an eligible League of Legends account, play on their main accounts[113], and have at least five players and one coach. While the ACEL does require students be in good standing, it fails to provide protections or rights to the players within the league and are still at the mercy of the game developers, rather than the league.[114]

Finally, NACE is likely the most restrictive and most regulatory-like organization currently in collegiate eSports. In addition to requiring a student-email as proof of a status as an enrolled student and for the student to be in good standing, NACE also requires minimum standardized test scores in order to qualify.[115] Particularly, NACE requires a minimum ACT score of 18 or SAT score of 860.[116] Grade point averages must be greater than a 2.0 on a standard 4.0 grading scale.[117] Lastly, NACE limits a player's time in the league to a total of 5 seasons, which comes to 10 semesters at a university.[118]

As convenient as these organizations may be, they fail to truly provide students with uniform protections and regulatory oversight. One possible solution is the creation of a totally new organization that properly distinguishes from traditional sports

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[111] *What is ACEL?*, AM. COLLEGIATE ESPORTS LEAGUE, https://www.acelesports.org/about/ (last visited Nov. 18, 2019).

[112] *Id.*

[113] Often times players attempt to "smurf" by playing on accounts that display a rank that is lower than their true rank. *See* Anna Ward, *What does 'smurfing' mean?*, DAILY DOT (Sept. 1, 2019), https://www.dailydot.com/parsec/what-is-smurfing-gaming/.

[114] ACEL, OFFICIAL LEAGUE OF LEGENDS HANDBOOK, Art. 1 § 1.2 (2018), https://docs.google.com/document/d/1AZqCJ7tk-ag7hqkcJfIvesmo1hqGRbjdQMMZOlPqtCw/edit (last visited Nov. 18, 2019).

[115] NACE, ESPORTS OFFICIAL POLICY HANDBOOK, Art. 2 (2016), http://nacesports.org/wp-content/uploads/2017/02/NAC-eSports-Constitution-Bylaws-9-29-2016-1-1.pdf.

[116] *Id.* at § B(2)(a).

[117] *Id.* at § B(2)(b).

[118] *Id.* at § C(1).

and eSports, while providing for a forum that creates uniformity. A unique obstacle in eSports—due to its very nature being tied to the Internet—is the intangibility of the sport and the fact that players are able to communicate and play with players all over the globe. The United Kingdom has NUEL with approximately 3,000 students and prospective growth moving forward.[119] Oceania has UniGames with approximately 26 teams and 150 students, and Malaysia Campus League with approximately 771 teams and 6,000 students.[120]

Understandably, collegiate eSports is international and calls for an organization able to interact with the organizations of other countries. This type of oversight would likely need the intervention of the government to some capacity; and because of this, the collegiate organizations are not capable of proper regulation as non-governmental entities. An organization separate from game developers and players would allow for uniformity and address the present difficulties if the NCAA were to step in and regulate under its current model. Therefore, the new organization, to some degree, would require government oversight.

B. INDIVIDUAL UNIVERSITY OR CONFERENCE REGULATION

The second potential solution is for the NCAA to relinquish all control and let each university oversee regulation of their eSports programs. Essentially, the suggested model would give full discretion to each university to decide their rules in isolation from the NCAA or other collegiate sports entities. Ideally, this keeps players from being completely barred, even if a particular university has guidelines similar to the NCAA, there will be other universities without those requirements where the student athlete's entry will not be barred.

This idea has been suggested in the form of leaving regulations to conferences of schools, rather than individual schools, but the same idea would apply: each conference/ institution would have full discretion in implementing the rules

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[119] Manny Anekal, *Asia Ahead Of The US in Collegiate Sports*, BUS. INSIDER (Jan. 12, 2018), https://medium.com/tnlmedia/asia-ahead-of-the-us-in-collegiate-esports-9b762166e52c.

[120] *Id.*

and regulations that they deemed necessary.[121] For example, Ohio State University, one of the country's largest and most sports driven universities, has pushed into the eSports arena and the NCAA has yet to step into the picture.[122] Ohio State has announced it will be building a dedicated arena, integrated curriculum involving five colleges and research initiatives aimed to bolster gaming performance.[123] The new program will not be housed under the school's athletics department and as a result, it would be out of the reach of the NCAA should they decide to step in and regulate.[124] Ohio State recognizes the inherent differences with eSports and traditional sports, because eSports athletes are faced with the reality that they gain prominence in their teens and occupy a space between competitors and entertainers.[125] Other universities have followed suit by stationing their eSports programs in their academic departments, rather than their sports departments, including, Miami University, the University of Utah, and the University of California, Irvine.[126]

The Pac-12 created an eSports conference called the Pacific Alliance of Collegiate Gamers (PACG), which is a collective organization of universities devoted to planning and hosting eSports events for big titles, including—League of Legends, Hearthstone, and Overwatch.[127] PACG includes student led organizations at the University of Arizona, Arizona State University, the University of California, University of Oregon, Stanford University, Oregon State University, University of California, Los Angeles, University of Southern California, and

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[121] *See* Bill Connelly, *College football regulation! Here's how conferences would change for 2016*, SB NATION (May 5, 2016), https://www.sbnation.com/college-football/2015/2/24/8052475/college-football-relegation-promotion-conferences-LIKE-SOCCER.

[122] Noah Smith, *Ohio State is latest power conference school to embrace esports while NCAA sits idle*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/sports/2018/10/11/ohio-state-is-latest-power-conference-school-embrace-esports-while-ncaa-sits-idle/?utm_term=.efa3c2f72daa.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Jacob Wolf, *Pac-12 student groups form independent esports league*, ESPN (Jan. 31, 2018), http://www.espn.com/esports/story/_/id/22273704/pac-12-student-groups-form-independent-esports-league.

Washington State University.[128] The hope behind the creation of PACG was to provide a student-driven, competitive eSports league to further legitimize collegiate eSports and elevate the schools involved.[129] Some of the schools offer scholarships to eSports student-athletes in exchange for playing on their team and representing the school in league tournaments or other similar events.[130]

Riot Games, the creator of the most popular video game in the world, *League of Legends*, stated that it supports the PACG, and it wants current high school freshman to know they can play the game and be officially supported by their school of choice in four years.[131] A big push behind the conferences' moves is to challenge the stereotype that gamers are unmotivated individuals; to counter this, they give scholarships to the student applicants that excel in their particular video game field that the school currently hosts.[132]

While this is merely a start and only encompasses less than a dozen schools, it is a hopeful start to what could be the solution to the absence of regulation in eSports. Ideally, conferences will create their own regulations that colleges under their oversight would be mandated to comply with. Naturally, the universities would be more in touch with the student population, as opposed to the NCAA, and therefore be more representative of the needs of the students, rather than hiding behind the idea that amateurism requirements are a bedrock principle to the success of collegiate sports. This would give students a realistic expectation of the rights and protections they would have at a university in an eSports setting, which would be more apt to handling the unique obstacles that can arise in eSports and the internet.

Obvious benefits of this include school freedom to implement or amend rules to most benefit their students. Additionally, the programs, similar to Ohio State's model, would be made specifically for eSports, as opposed to being in the

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[128] *Id.*

[129] Rylee Kahan, *PACG: The Future of College ESports*, DAILY EMERALD (Feb. 25, 2018), https://www.dailyemerald.com/news/pacg-the-future-of-college-esports/article_c989848f-3e93-5b01-bf68-17933401635b.html.

[130] *Id.*

[131] *Id.*

[132] *Id.*

athletics department. Not only does this avoid any potential NCAA regulation, but more importantly, it is overseen by a program that is devoted to eSports alone. As a result, the university would be more likely to take into consideration the current problems with NCAA guidelines being imposed on eSports. University of Utah even used Twitch during one of the tournaments to stream the gameplay, so surely universities would be understanding of individual players desire to stream their own content as well.[133]

The downside, of course, would be the lack of uniform regulation and standards across the nation. Likely, this would lead to some universities lowering their standards to attract students and inevitably lead to schools poaching students or other similar anticompetitive behavior. Activity such as this would be frowned upon as failing to preserve the important and revered concept that student-athletes are students first and athletes second. While addressing the unique hurdles of eSports is important, the primary reason schools exists is to educate their students. This idea should be preserved and remain untarnished by the opportunities that are indeed available through various sports programs, which is the argument that the NCAA has historically used to block compensation for collegiate athletes. Of most importance is for the schools to maintain strong academics while still providing for appropriate regulation of eSports.

C. CARVING OUT NCAA BYLAW EXCEPTIONS FOR ESPORTS ATHLETES

A final solution involving the NCAA is also possible. In large part, the issue with the NCAA stepping in as the primary regulatory body for eSports is not the NCAA's ability to implement, but rather the language of certain bylaws themselves. As previously mentioned, the primary issue here is the bylaws' unalignment with the eSports model. Specifically, the amateurism eligibility requirements that do not allow previous sponsorship, playing with professionals, or making revenue from sports. Generating revenue through streaming or video uploading sites

[133] University of Utah Esports (@UniversityofUtahEsports), TWITCH, https://www.twitch.tv/universityofutahesports (last visited Nov. 18, 2019).

like Twitch and YouTube, specifically, is of the upmost concern when protecting players' rights.[134]

Collegiate sports are predicated on the idea that the athlete is working towards being drafted and "going pro."[135] However, the typical route of going pro in eSports is through sponsorships by individual eSports organizations, rather than a large organization, that facilitates a means of drafting student athletes, such as the NFL.[136] As a result, eSports players aspiring to be professionals require exposure to the community to become known by the eSports organizations that have teams in that particular gaming community.[137]

Implementing NCAA guidelines that strictly prohibit the means by which eSports players become known and potentially sponsored are not realistic. Exceptions must be made in order to account for the lack of a systematic way of drafting talented eSports student-athletes. Allowing for specific types of activity that are essential to the success of eSports athletes would allow an even playing field for student athletes and non-student athletes that are all competing for the limited spots on eSports organizations.

In fact, sponsorships by eSports organizations are much more common with younger players, relative to traditional sports. Accordingly, the NCAA guidelines have to be accommodating to this difference. Sponsorships are one of the biggest ways for players to gain exposure in a community and it cannot be understated how critical exposure is to be a professional player in the eSports circuit. Likewise, the guidelines would merely need to exempt eSports players from this particular eligibility requirement.

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[134] SUMMARY OF NCAA REGULATIONS, *supra* note 48.

[135] *National Football League Draft*, WIKIPEDIA, https://en.wikipedia.org/wiki/National_Football_League_Draft (last visited Nov. 18, 2019).

[136] *The Rise of the Sponsored Professional Gamer*, SPORT TECHIE (Jan. 30, 2018), https://www.sporttechie.com/rise-of-the-sponsored-professional-competitive-gamer/.

[137] *See* Ben Fischer, *Esports players have less endorsement freedom*, STREETS AND SMITH'S SPORTS BUS. J. (May 28, 2018), https://www.sportsbusinessdaily.com/Journal/Issues/2018/05/28/In-Depth/Endorsement.aspx.

Arguably the most controversial requirement of amateurism is the complete bar on being paid for the player's likeness or image related to the sport they participate in.[138] Because a player's online presence is an essential component of a player's exposure in eSports, it is necessary to carve out an exception for streaming or posting one's gameplay on sites like Twitch and YouTube.[139] Respecting the sport and a student-athlete's position as a student first and foremost is understandable and therefore the solution offered is in an effort to preserve this idea. The rules would allow for eSports student-athletes to stream and earn revenue; however, any revenue must be placed in an escrow account or similar alternative account that is not available until post-graduation.[140] Similarly, the rules could allow for revenue earning that must go towards school expenses and would reduce the amount of scholarships given for the total compensation capped at the cost of attendance, with any additional revenue going into an escrow or similar account that is not available until after graduation. Thus, preserving the revered idea that student-athletes are students first, requiring that academics come first, while also allowing for student-athletes to grow their online presence and increase their chances of being sponsored by an eSports organization.

From an economic standpoint, this would be a relatively cost-free option that would properly address the major pitfalls in the NCAA regulations currently being implemented in collegiate eSports. If successful, this could be implemented across every category of sports under the NCAA umbrella. Additionally, the NCAA would have the means necessary to institute uniform and national regulations on all colleges that institute eSports programs.[141] Simultaneously, this would keep individuals desiring to go the educational route to professional play on even footing with players that opt to forego school and stream or upload videos full-time.

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[138] NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-20 NCAA DIVISION 1 MANUAL, Art. 12.01 (2019), http://www.ncaapublications.com/productdownloads/D120.pdf [hereinafter NCAA BYLAWS].

[139] *See* Zac Dudzik, *THE ULTIMATE GUIDE TO GAMING SPONSORSHIPS*, ROGUE ENERGY (Sept. 15, 2018), https://therogueenergy.com/blogs/news/the-ultimate-guide-to-gaming-sponsorships.

[140] *See, e.g.*, CAL. FAM. CODE §§ 6750–53 (West 2018).

[141] NCAA BYLAWS, *supra* note 138.

CONCLUSION

Still in its emerging stages, eSports is poised to surpass many traditional sports in viewership via marketing and revenue. Although game developer-owned leagues have helped to pioneer this success, they have created an environment where players are without true regulation, and as a result are without protections and rights. Even NACE, which has forged a start in the regulation and oversight of the collegiate eSports, does not truly oversee the collegiate eSports. Rather, it is one of the few organizations that has the power to oversee the leagues they create and their members but has no authority outside of those leagues. At the same time, it is unrealistic to task game developers, such as Psyonix, with the responsibility of giving players favorable terms for playing their games. The problem with the eSports industry is not that the collegiate eSports leagues or developers themselves are corrupt; the problem is that the players have no significant way to advance their own interests or rights, and those would be hindered if the NCAA, as is, takes over regulations.

Notwithstanding the lingering disbelief over eSports as a legitimate for-profit business, the increasing interest by companies like Amazon suggest that it is becoming a major source of entertainment and one that demands proper regulation. Any of the three proposed solutions discussed in this note—to create a new collegiate regulatory body, carve out NCAA bylaw exceptions for eSports athletes, or individual university or conference regulation—would create a better and more reliable working environment for eSports players and safeguard a position for eSports as an established industry. As discussed, perhaps the most viable option requires the NCAA to carve out exceptions to the current bylaws for eSports players because the NCAA has the power and authority to implement strong and uniform regulation across the nation.

At the end of the day, the game developers and what conferences do exist are the ones that provide the backdrop of competitive collegiate eSports. Regulation, to some degree, is necessary to ensure the success of the eSports industry within college sports. However, the restrictions placed on eSports and the players must be limited in scope and measures to maintain the integrity of video game models and freedom from infringing upon the developers' freedom and ability to design the game they desire. Game developers are driving the eSports scenes and

without popular competitive games, there would be no collegiate eSports or eSports at all. With that in mind, oversight ensures the rights of the players are protected in an environment where their power is limited.

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CELEBRITY EXECUTIVES AND SOCIAL MEDIA: ARE HIGH FOLLOWER COUNTS SUFFICIENT TO SATISFY SEC DISCLOSURE OBLIGATIONS?

STETSON BIGGS*

INTRODUCTION

Celebrities have long dominated the social media scene. Traditionally, the users with the most engagement have been musicians, film stars, and athletes.[1] However, with the developing and evolving uses of social media, corporations and their executives have achieved follower counts that compare to or outnumber those celebrities that have traditionally held the top spots. For example, YouTube now has over 70 million Twitter followers, making it the site's ninth most followed account.[2] Additionally, corporate executives, such as Bill Gates and Elon Musk, collectively have over 65 million Twitter followers.[3]

These high-profile corporate executives have achieved celebrity status, amassing millions of followers on social media. Similar to Steve Jobs, who served as the innovative face of Apple, they have become an integral and indispensable part of their respective companies' public appearance.[4] The public views these executives as visionaries and oracles as they regularly engage with customers and shareholders through social media. As a result, these executives often garner widespread attention for their

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[1] FRIEND OR FOLLOW, https://friendorfollow.com/twitter/most-followers/ (last visited Nov. 18, 2019).

[2] *Id.*

[3] *Id.*

[4] *See When the CEO is the Brand, But Falls from Grace, What's Next?*, KNOWLEDGE@WHARTON (Apr. 7, 2004), http://knowledge.wharton.upenn.edu/article/when-the-ceo-is-the-brand-but-falls-from-grace-whats-next/.

actions.[5] Since the beginning of industry, these iconic individuals have impressed their knowledge and leadership upon customers, investors, and markets.[6] Some of the first iconic executives in American history include Henry Ford and John D. Rockefeller while modern examples include Warren Buffet, Steve Jobs, and Elon Musk. However, while several corporate executives have become household names, many have not. For example, McDonalds' CEO, Steve Easterbrook, has a mere 12,000 followers on Twitter while Walmart's CEO, Doug McMillon, does not even have an account.[7] As opposed to iconic executives whose profiles are indistinguishable from their companies, the public views these ordinary executives as faceless and temporary administrators with little bearing on investment decisions.[8]

This distinction between celebrity and ordinary executives raises questions about what duties, responsibilities, and privileges celebrity executives might have as compared to ordinary executives when it comes to federal disclosure requirements on social media. With social media becoming increasingly popular and interactive, it has become an obvious forum to share information for broad and rapid dissemination. Once executives establish a significant social media presence and gain large public followings, it makes sense for them to share information about their companies through social media while personally engaging with investors.

Furthermore, granting greater freedom to certain executives to share information on their personal accounts will benefit investors as the accounts attain wide recognition as a source of important investment information. In the social media era, individuals, celebrities, and corporate executives often post on a whim, publishing their thoughts in real time.[9] While executives attempt to open an honest and unimpeded dialogue

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[5] *See* Tom Taulli, *What Investors Look for in a CEO*, FORBES (Mar. 17, 2018, 10:34 AM), https://www.forbes.com/sites/tomtaulli/2018/03/17/what-investors-look-for-in-a-ceo/#254077b5d4de.

[6] *See* KNOWLEDGE@WHARTON, *supra* note 4.

[7] *See* FRIEND OR FOLLOW, *supra* note 1.

[8] *See* Rachel Gillett, *21 of the most and least loved top CEOs*, BUS. INSIDER (Nov. 3, 2017, 7:29 AM), https://www.businessinsider.com/famous-ceos-most-and-least-popular-2017-10.

[9] *See* Liz Moyer, *Securities lawyers shocked by Elon Musk's tweet, point to potential legal minefield*, CNBC (Aug. 7, 2018, 4:02 PM), https://www.cnbc.com/2018/08/07/elon-musk-tweet-shows-the-hazards-of-being-an-interesting-ceo.html.

with investors and followers, their actions can become dangerous, causing investors to act on an executive's late-night thoughts. Despite these dangers, the modern investor expects this type of behavior from leaders that it views as brilliant, but eccentric.[10] Like never before, investors have personal insight into an executive's immediate thoughts and feelings. Because some executives have obtained such substantial followings, their thoughts as published on social media should satisfy fair disclosure regulations without express prior notice to investors from their companies.

This article will address the Securities and Exchanges Commission ("SEC") disclosure requirements found in Regulation Fair Disclosure ("Regulation FD") as applied to celebrity executives. Part I will define the parameters of Regulation FD. It will then examine those rules as they apply to social media. Part II will address the adequate notice requirement and determine whether Regulation FD requires express prior notice. Part III will consider how a high-profile executive's personal social media account might become a recognized channel of distribution that is designed to provide broad dissemination. Part IV will explain the consequences a celebrity executive may face in making unauthorized disclosures on social media. Finally, Part V will present an argument that the SEC should issue clearer guidance on Regulation FD and social media by clarifying that express prior direction is not required for executives that satisfy certain criteria.

I. REGULATION FAIR DISCLOSURE

The SEC has established several guidelines for the dissemination of information.[11] One such guideline is Regulation FD which the SEC released in 2000.[12] Regulation FD prohibits public companies from disclosing non-public, material information unless the information is distributed to the public first or simultaneously.[13] With Regulation FD's implementation,

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[10] *See infra* pp. 122–24.

[11] *See Compliance and Disclosure Interpretations*, SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/cfguidance.shtml (last visited Nov. 18, 2019).

[12] Regulation FD, 17 C.F.R. § 243.100 (2000).

[13] *Id.*

drafters intended to limit selective disclosure.[14] Selective disclosure occurs when individuals within a public company furnish market-moving information to a select number of investors, allowing these investors to act on the information and gain an unfair advantage over other investors who do not have access to the same information.[15]

Two major considerations implicate Regulation FD: (1) whether the disclosed information is public and (2) whether the information is material.[16] A key factor in determining if information is public is whether the company disseminates the information in a manner that makes the information available to investors at large.[17] For instance, information in an 8-K is public even though many casual investors may not regularly follow a company's releases or SEC filings.[18] But, because the 8-K is publicly available and accessible, it is "public" and satisfies Regulation FD. Although securities laws leave autonomy and ultimate decision-making authority to investors, federal securities laws require access to information to balance investor and corporate responsibility.[19]

Materiality is a more controversial question because the SEC does not formally define the term.[20] In *TSC Industries, Inc. v. Northway, Inc.*, TSC Industries issued a joint proxy statement to its shareholders recommending approval for a proposal to exchange all TSC common and preferred stock for a purchasing company's Series B stock and warrants.[21] Shareholders brought action claiming that the proxy statement contained material omissions.[22] Justice Marshall stated in the majority opinion that a fact is material if there is a "substantial likelihood that a

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[14] *Fair Disclosure, Regulation FD*, SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answers-regfdhtm.html (last visited Nov. 18, 2019).

[15] 17 C.F.R. § 243.100.

[16] *Id.*

[17] *See* Sec. & Exch. Comm'n v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968).

[18] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862, 45,868 (2008) (to be codified at 17 C.F.R. pt. 241 and 271).

[19] *What We Do*, SEC. & EXCH. COMM'N, https://www.sec.gov/Article/whatwedo.html (last visited Nov. 18, 2019).

[20] 17 C.F.R. § 243.100 (2000).

[21] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[22] *Id.*

reasonable shareholder would consider it important" in making an investment decision.[23] In other words, if the facts "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," then those facts are material.[24] Additionally, Regulation FD's initial release included some examples of events that may constitute material information. These events include: earnings, mergers, acquisitions, tender offers, joint ventures, new products, new discoveries, developments regarding customers or suppliers, changes in management control, defaults on senior securities, stock splits, dividends, redemptions or repurchases of securities, sales of securities, and bankruptcy.[25] While there is no clear test for determining materiality, the specific examples help guide the analysis.

Although Regulation FD seeks to limit selective disclosure, it does not absolutely prohibit company officers from communicating with shareholders or other individuals.[26] Some limited exceptions permit the company to disclose information to select individuals.[27] For instance, a company may communicate with a person who owes the company a duty of confidence, including legal counsel and financial advisors.[28] Companies may also make agreements with people who agree to maintain the information in confidentiality.[29] While a promise not to trade on the information is not required, insider trading laws may still apply.[30] Additionally, companies may make communications in connection with an offering of registered securities.[31] Companies must note that this exemption only applies to registered

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[23] *Id.* at 449.

[24] *Id.*

[25] *Final Ruling: Selective Disclosure and Insider Trading*, SEC. & EXCH. COMM'N, https://www.sec.gov/rules/final/33-7881.htm (last visited Nov. 18, 2019).

[26] 17 C.F.R. § 243.100 (2000).

[27] *Id.*

[28] *Regulation FD*, SEC. & EXCH. COMM'N (June 4, 2010), https://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm.

[29] *Id.*

[30] Anna T. Pinedo & Brian D. Hirshberg, *FREQUENTLY ASKED QUESTIONS ABOUT REGULATION FD*, Morrison & Foerster (2017), https://media2.mofo.com/documents/faqs-regulation-fd.pdf.

[31] *Id.*

securities.[32] There is no exception for communications regarding unregistered securities.[33]

Securities laws have long sought to provide fairness for investors by limiting informational asymmetry.[34] Informational asymmetry exists when companies release information to a select few or retain the information for insiders.[35] Disclosure rules allow investors to be sufficiently informed before making an investment.[36] If investors have fair access to material information, they will each have a fair opportunity to trade on the information.[37]

A. DOES REGULATION FAIR DISCLOSURE APPLY TO SOCIAL MEDIA?

In 2008, the SEC took its first significant step towards applying Regulation FD to social media when it released guidance on Regulation FD as applied to company websites (2008 Release).[38] This was a much needed clarification to the rules, as society had become increasingly reliant on the internet for information. The SEC recognized that company websites are an efficient and inexpensive way to disseminate information to investors.[39] In the release, the SEC began by providing guidance on if and when information is "public," therefore making Regulation FD applicable.[40] According to the text of Regulation FD, "[i]n order to make information public, it must be disseminated in a manner calculated to reach the securities market place in general through recognized channels of distribution, and public investors must be afforded a reasonable waiting period to react."[41] This means that companies must consider if (1) the company website is a recognized channel of distribution, (2) the company website disseminates the information in a manner that

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[32] 17 C.F.R. § 243.100 (2000).

[33] *Id.*

[34] *See* SEC. & EXCH. COMM'N, *supra* note 19.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45,862 (Aug. 7, 2008) (to be codified at 17 C.F.R. pt. 241 and 271).

[39] *Id.* at 45,863.

[40] *Id.*

[41] *Id.* at 45,867.

makes it available to the securities marketplace in general, and (3) a reasonable waiting period has passed for the market and investors to react to the information.[42]

Whether a company's website is a recognized channel of distribution depends on the steps the company takes to alert the market that information will come from its website, the company's disclosure practices, and the extent of investors' and the market's use of the company's website.[43] Here, the concept of "dissemination" focuses on the manner in which the company posts the information on its website and the information's ready and timely accessibility to investors and the markets.[44] Factors to consider in determining whether information has been "disseminated" include the following: whether the company lets investors and markets know that it will disclose information from such a channel; how it lets investors and markets know this; whether the company has a pattern of posting such information through the channel; the extent to which the information posted is regularly picked up by the market and reported in the media; whether the channel is kept current and accurate; whether the company uses other methods to disseminate information; and the nature of the information.[45]

Additionally, the SEC's 2008 Release described how to make information public in satisfaction of Regulation FD if a selective disclosure occurs.[46] Prior to this release, the law required companies to furnish an 8-K or use some other broad form of communication promptly after an unintentional selective disclosure or simultaneously in the case of an intentional disclosure.[47] With the 2008 Release, companies could now use their company websites to make disclosures without using an 8-K if their website has a large enough following.[48] Company websites with large followings might not implicate Regulation FD and might satisfy the public requirements since the information's

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 45,868.

[47] 17 C.F.R. § 243.100 (2000).

[48] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

release might not constitute a selective disclosure.[49] To determine if an informational release that a company makes via its website satisfies the public requirement, companies must consider the factors found in the 2008 Release.[50] Companies should use these factors to determine if the website is a recognized channel of distribution and if the information is "posted and accessible" and therefore "disseminated."[51] Additionally, companies should consider the website's ability to meet the simultaneous or prompt timing requirements once a selective disclosure occurs.[52] Though these analyses can be complex, companies have the responsibility both to evaluate the law and its own website to determine if a website posting satisfies these requirements.[53]

In 2013, the SEC provided specific guidance on whether Regulation FD applied to social media (2013 Release).[54] In 2012, Reed Hastings, the CEO of Netflix, revealed to his 200,000 followers on his personal Facebook account that Netflix had achieved one billion hours of content viewing.[55] Hastings had never used his personal Facebook account to disclose material information for Netflix nor had Netflix ever directed investors to his personal account for investment information.[56] This disclosure was substantial enough to warrant an SEC investigation into whether Hastings had violated Regulation FD by revealing market-moving information.[57] In 2013, the SEC issued an opinion stating that he had violated Regulation FD, but that it would not take action against him or Netflix.[58] Instead, the SEC recognized that Regulation FD's application to social media was unclear and took the opportunity to clarify Regulation FD and its application to social media.[59]

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] SEC. & EXCH. COMM'N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934: NETFLIX, INC. AND REED HASTINGS (2013), https://www.sec.gov/litigation/investreport/34-69279.pdf.

[55] *Id.* at 1.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

The SEC relied on its 2008 Release regarding Regulation FD and company websites to conclude that social media can be a proper channel of distribution under certain circumstances.[60] The social media account must be a recognized channel of distribution, disseminate the information in a manner that makes it available to the securities marketplace in general, and allow a reasonable waiting period for the market and investors to react to the information.[61] Like they do for company websites, companies must intensively examine the factors found in the 2008 Release to determine if a social media account is a recognized channel of distribution that is designed to facilitate broad dissemination.[62]

B. DO TWEETS REALLY MOVE MARKETS?

While executives with small social media followings are unlikely to see stock prices increase or decrease with a single post, at least initially, executives with large followings often create immediate changes in stock price when they share material information.[63] Elon Musk, who has 23 million Twitter followers, regularly caused sharp increases and decreases to Tesla's stock price with his tweets.[64] For example, on April 1, 2018, Musk tweeted that Tesla had gone bankrupt.[65] Although this was an April Fool's Day joke, Tesla's stock immediately dropped 5 percent.[66] On June 12, 2018, Musk announced a reorganization on his Twitter account that would result in a firing of 9 percent of Tesla's workforce.[67] Stock prices quickly increased from $332 per

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[60] *Id.* at 2.

[61] *Id.* at 3.

[62] *Id.* at 5.

[63] Alex Davies, *A Brief History of Elon Musk's Market-Moving Tweets*, WIRED (Aug. 29, 2018, 5:31 PM), https://www.wired.com/story/elon-musk-twitter-stock-tweets-libel-suit/.

[64] *Id.*

[65] Elon Musk (@elonmusk), TWITTER (Apr. 1, 2018, 3:02 PM), https://twitter.com/elonmusk/status/980566101124722688?lang=en.

[66] Jena McGregor, *Elon Musk's April Fools' tweets were 'not a joking matter,' experts say*, WASH. POST (Apr. 3, 2018, 10:55 AM), https://www.washingtonpost.com/news/on-leadership/wp/2018/04/03/elon-musks-april-fools-tweets-were-not-a-joking-matter-experts-say/?utm_term=.3e5e48565cae.

[67] Elon Musk (@elonmusk), TWITTER (June 12, 2018), https://twitter.com/elonmusk/status/1006597562156003328.

share to $342 per share.[68] This market fluctuation indicates that investors closely follow executive social media accounts and also react to their updates. Because investors react to the information that executives and companies share, executives and companies must take caution in sharing information. The SEC is surely aware and is ready to enforce disclosure rules against any violations.[69]

II. THE PRIOR NOTICE FACTOR

Generally, in order to be a recognized channel of distribution, a company must direct investors to the channel beforehand.[70] Although a social media account can be a suitable medium for communicating with investors, it is not suitable "if the access is restricted or if investors don't know that's where they need to turn to get the latest news."[71] For instance, the fact that Netflix had never directed investors to Hastings's page was a major reason for his violation of Regulation FD.[72] This is a factor to which the SEC usually gives substantial weight.[73]

Before directing investors to a social media account, a company must determine what mediums are proper for providing such direction. The 2008 Release proposed that a company might include the disclosure of a social media account in its periodic reports, such as the company's Form 10-Ks.[74] A company may also use press releases, particularly if it plans to share specific information with investors.[75] If a company directs investors to a social media account using one of these mediums, it will likely

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[68] Claudia Assis, *Tesla to layoff 9% of its workforce, Elon Musk says*, MARKET WATCH (June 12, 2018, 5:16 PM), https://www.marketwatch.com/story/tesla-to-layoff-9-of-its-workforce-elon-musk-says-2018-06-12.

[69] The SEC brought action against Elon Musk just over one month after he tweeted that he had funding secured to take Tesla private. *See* Sec. & Exch. Comm'n v. Elon Musk, No. 1:18-cv-08865, at *1 (S.D.N.Y Sept. 27, 2018).

[70] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 7.

[71] *SEC Says Social Media OK for Company Announcements if Investors Are Alerted*, SEC. & EXCH. COMM'N (April 2, 2013), https://www.sec.gov/news/press-release/2013-2013-51htm.

[72] *Id.*

[73] *Id.*

[74] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[75] *Id.* at 45,868.

satisfy Regulation FD's requirements.[76] A company may also direct investors to an executive's social media account using a social media account or the company website if that medium is a recognized channel of distribution.[77] So long as the account has a substantial following, it should give investors sufficient opportunity to gain access to the account by registering, subscribing, or following. Companies often play it safe by releasing a press release and an 8-K directing investors.[78] Although this is the safest approach, it is not always necessary.[79]

However, the SEC has provided little guidance on the extent of the direction. While the SEC has brought relatively few Regulation FD enforcement actions, the best way to determine whether the extent of the notice is sufficient is to examine a company's direction for investors and examine the SEC's response.[80] Tesla directed investors to its CEO's personal social media account in a 2013 8-K section labeled, "Interested in keeping up with Tesla?"[81] This section provided that product and company information are available at Teslamotors.com and that press releases and investor information have their own designated webpages.[82] It then identifies Musk's and Tesla's Twitter accounts as sources of "additional information."[83] This is a potentially problematic way of directing investors to Musk's personal Twitter account since the 8-K merely uses the vague term "additional information." Investors may not be aware that Musk might share pertinent market and investment information on his

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[76] *Id.*

[77] *Id.* at 45,867.

[78] *See* Richard J. Sandler, Davis Polk, & Wardwell LLP, *How to Use Social Media for Regulation FD Compliance*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Apr. 16, 2013), https://corpgov.law.harvard.edu/2013/04/16/how-to-use-social-media-for-regulation-fd-compliance/.

[79] *See infra* p. 118.

[80] Stuart Steinberg & Michael Doluisio, *A Refresher on Regulation FD and the SEC's Policing of Selective Disclosures*, DECHERT LLP (Apr. 2, 2018), https://www.dechert.com/knowledge/publication/2018/4/a-refresher-on-regulation-fd-and-the-sec-s-policing-of-selective.html.

[81] Tesla Motors, Inc., Current Report (Form 8-K) (Nov. 5, 2013).

[82] *Id.*

[83] *Id.*

Twitter account. As investors, they may believe that all pertinent information will be available on the designated investor page. While they have notice to monitor Musk's Twitter account, the direction minimizes its importance in comparison with other sources.

Furthermore, the 2008 Release suggested that companies that include website addresses in their reports should also make investors aware that they routinely post important information at that address.[84] By merely stating that Musk's personal account provides "additional information," there is no suggestion that important information will routinely appear on his account. This is problematic because even if investors are aware that pertinent investment information might come from Musk's personal account, they may not be aware that they should regularly follow his account to receive routine updates and information. Because this direction does not make all investors aware that they should subscribe to Musk's account for regular updates, other investors who happen to follow him will receive an advantage.

In contrast, Facebook directs investors to CEO Mark Zuckerberg's personal Facebook account in a much clearer and unambiguous fashion.[85] A Facebook 8-K from April 27, 2016, states, "Facebook uses the investor.fb.com and newsroom.fb.com websites as well as Mark Zuckerberg's Facebook Page (https://www.facebook.com/zuck) as means of disclosing material non-public information and for complying with its disclosure obligations under Regulation FD."[86] This form of direction is more likely to comply with Regulation FD because it does not distinguish between the different types of information that each source shares. The direction ensures that investors know that they should be equally aware of each source in following Facebook's informational disclosures.

While Tesla's direction seems to be problematic, the SEC has not accused Musk or Tesla of violating Regulation FD.[87] In a recent settlement for fraud, the SEC accused Tesla of not properly

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[84] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867.

[85] Facebook, Inc., Current Report (Form 8-K) (Apr. 27, 2016).

[86] *Id.*

[87] *See infra* p. 133–34.

monitoring and filtering Musk's tweets.[88] However, the SEC recognized that Tesla had directed investors to Musk's account in a 2013 8-K.[89] It also acknowledged that, since that time, Musk had regularly disseminated material information through his Twitter account to investors and followers.[90] The SEC did not indicate that it had any problem with the manner in which Tesla directed investors to Musk's account, nor did it indicate that Musk had violated Regulation FD during the period in question.[91] This indicates that either Tesla's direction in its 8-K was sufficient, or that Musk's regular tweeting habits and large following satisfied Regulation FD.

Ultimately, providing direction to investors is a sure way to establish a recognized channel of distribution. Notifying investors directly is more likely to satisfy the SEC when making disclosures. While it may not be necessary, it is certainly helpful.

A. IS EXPRESS PRIOR NOTICE REQUIRED?

The SEC stated in its 2013 Release that without prior direction, an executive's personal social media is "unlikely to qualify as a method 'reasonably designed to provide broad, non-exclusionary distribution of the information to the public' within the meaning of Regulation FD."[92] This is even true of executives with large social media followings.[93] However, by merely expressing that qualification was unlikely, the SEC left open the possibility that a company executive with a large enough social media following may satisfy the rule without providing prior direction to the account.[94] The key is whether investors know where to go to receive the latest news.[95]

In its 2008 Release, the SEC indicated that companies with large enough followings may satisfy the element of making

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[88] *Elon Musk Settles SEC Charges; Tesla Charged With and Resolves Securities Law Charge*, SEC. & EXCH. COMM'N (Sept. 29, 2018), https://www.sec.gov/news/press-release/2018-226.

[89] *Id.*

[90] *Id.*

[91] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 7.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 3.

the information public.[96] This same logic should apply to social media accounts. Because the SEC provides other factors such as whether an account has a pattern of posting such information[97] and the frequency with which the market and media pick up on the information,[98] the SEC seems to have endorsed a functional equivalence standard. Actual access to an account as well as reasonable foreseeability that the account will continue to share information serve as the equivalent of providing prior notice. So long as investors have access to the account and are aware that the account will share investment information, the account should satisfy the factor that investors receive prior notice.

Additionally, interpretive releases are not positive law, meaning that they do not create new requirements for Regulation FD.[99] Neither do such administrative releases increase liability under federal securities laws.[100] Rather, they create safe harbors and reveal strategies that the SEC might use in enforcing regulations.[101] To impose additional requirements, there must be a formal amendment to Regulation FD.[102] As such, the factors that the 2008 Release presents are not requirements. This includes whether a company has expressly notified investors that a particular account will share pertinent investment and market information. Therefore, for a post to implicate and satisfy Regulation FD, it must simply be material and disseminate the information in a broad and non-exclusionary manner to the public.[103]

Also, social media in 2019 is vastly different than social media in 2013. The SEC made clear that Regulation FD should evolve alongside technology and recognized that changing technology continues to facilitate the dissemination of information.[104] Social media continues to grow among celebrities,

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[96] *See* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,867.

[97] *Id.*

[98] *Id.*

[99] *Researching the Federal Securities Laws Through the SEC Website*, SEC. & EXCH. COMM'N (Dec. 4, 2012), https://www.sec.gov/reportspubs/investor-publications/investorpubssecuritieslawshtm.html.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] 17 C.F.R. § 243.100.

[104] *See* Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

average users, and corporate executives.[105] In 2012, when Reed Hastings announced that Netflix viewers had achieved one billion viewing hours a month, the most followed Twitter celebrity was Lady Gaga with roughly 20 million followers.[106] In 2019, Katy Perry is the most followed person on Twitter with roughly 107 million followers, more than five times the amount of followers that Lady Gaga had in 2012.[107] Between 2012 and 2018, YouTube's Twitter following increased from nine million to 71 million followers.[108] Similarly, Tesla's Musk has a follower count increased from 225,000 followers to 23.4 million followers during the same period.[109] In 2012, to reach one million followers was a significant feat; now, users gain millions of followers each year.

Furthermore, not only have high-profile executives gained more followers, more people now use social media.[110] In 2012, roughly 57 percent of the U.S. population had a social media account.[111] In 2018, that percentage increased to 77 percent.[112] While the general population continues to increase its social media adoption, investors are doing so also.[113] A 2014 study revealed that three-fourths of millionaire investors use social media.[114] This increase in social media adoption is a technological evolution that further facilitates the dissemination of information. Like never

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[105] *See infra* notes 114–119.

[106] Ramona Emerson, *Celebrities On Twitter: The 19 Most Popular Stars*, HUFFINGTON POST (Mar. 15, 2012, 10:15 AM), https://www.huffingtonpost.com/2012/03/14/celebrities-on-twitter-most-popular-users_n_1345188.html.

[107] FRIEND OR FOLLOW, *supra* note 1.

[108] *Id.*

[109] *Id.*

[110] *See* J. Clement, *Share of U.S. population with a social media profile 2008-2019*, STATISTA (Aug. 9, 2019), https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/.

[111] *Id.*

[112] *Id.*

[113] *See* Bryan Borzykowski, *How investors are using social media to make money*, CNBC (June 9, 2016, 10:15 AM), https://www.cnbc.com/2016/06/09/how-investors-are-using-social-media-to-make-money.html.

[114] *See Social Media Use Among Affluent Investors*, SPECTREM GROUP (Feb. 26, 2018), https://spectrem.com/Content/social-media-usage-affluent-investors.aspx.

before, both executives and investors are equipped to engage in market and investment related communications via social media because they are increasingly familiar with and reliant on its technology for information. Because these groups now maintain a significant presence on social media, Regulation FD has naturally evolved to the point where express prior notice is not always necessary.

Beyond incredible growth in recent years, social media companies like Twitter and Instagram have increasingly focused efforts on establishing a platform for high-profile individuals to share important information with their followers.[115] They advertise their follower counts, provide ad-free experiences, and supply coveted blue checkmarks that represent verified status.[116] Algorithms also ensure that average users view important content that popular celebrities share, even if those users do not subscribe to that particular celebrity's feed.[117] Public companies are aware of these perks and most have joined social media in some form.[118] Currently, at least 88 percent of public companies have some kind of social media account.[119] As social media platforms continue to cater to high-profile individuals and entities, social media becomes an increasingly valuable tool to companies.

With increasing follower counts and access to high-profile users, informational asymmetry is a diminishing concern.[120] Corporate executives with large followings are able to reach broad audiences instantaneously. As evidenced by increased investor participation in social media, more users and investors

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[115] Felix Salmon, *Elon Musk and the Unnerving Influence of Twitter's Power Users*, WIRED (June 5, 2018, 11:05 AM), https://www.wired.com/story/elon-musk-and-the-unnerving-influence-of-twitters-power-users/.

[116] *About verified accounts*, TWITTER, https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts (last visited Nov. 18, 2019).

[117] *About your Twitter timeline*, TWITTER, https://help.twitter.com/en/using-twitter/twitter-timeline (last visited Nov. 18, 2019).

[118] *How Social Media On Tomorrow's Mobile Network Will Be Game-Changing For Business*, FORBES (June 21, 2018), https://www.forbes.com/sites/tmobile/2019/06/21/how-social-media-on-tomorrows-mobile-network-will-be-game-changing-for-business/#7eb5968358ad.

[119] *Id.*

[120] *Id.*

view social media as way to obtain investment information.[121] Investors seek and expect to find relevant investment information on social media.[122] The fact that corporate executives like Elon Musk and Tim Cook have significantly more followers than their respective companies shows that investors are aware of who represents the companies in which they invest and expect those individuals to furnish relevant investment information through social media.[123] Although executives may simply have more entertaining accounts that draw more followers, executives often share the same information as their official corporate accounts.[124] Other companies have verified corporate accounts that do not share regular updates, leaving executives to maintain the company's social media presence.[125] Regardless, investors appreciate the ability to converse with executives in a more personal and responsive way. Evidence shows that companies generally reply only to users who have product or policy questions.[126] Conversely, executives regularly engage in direct, personal conversations with followers and are willing to give investment information that customer service centers are unequipped to provide.[127] As a result, investors now have straightforward and immediate access to the inner workings of companies through their executives.

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[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *See, e.g.*, Elon Musk (@elonmusk), TWITTER (Feb. 7, 2019, 11:20 AM), https://twitter.com/CNNBusiness/status/1093590238184816646; *see also* Tesla (@Tesla), TWITTER (Feb. 7, 2019, 3:53 PM), https://twitter.com/Tesla/status/1093659031091044354.

[125] *Compare* Apple (@Apple), TWITTER, https://twitter.com/apple?lang=en (last visited Nov. 18, 2019), *with* Tim Cook (@tim_cook), TWITTER, https://twitter.com/tim_cook?ref_src=twsrcpercent5Egooglepercent7Ctwcamppercent5Eserppercent7Ctwgrpercent5Eauthor (last visited Nov. 18, 2019).

[126] Katy Steinmetz, *Does Tweeting at Companies Really Work?*, TIME (Aug. 14, 2017), http://time.com/4894182/twitter-company-complaints/.

[127] *See* Renée Ruggeri, *Tweet Trust: Why Having CEOs on Twitter Aids Investor Participation*, PUBLIC RELATIONS STRATEGIST (Oct. 13, 2015), https://apps.prsa.org/Intelligence/TheStrategist/Articles/view/11247/1117/Tweet_Trust_Why_Having_CEOs_on_Twitter_Aids_Invest#.XcHe4HdFxPZ.

Other evidence that the SEC does not require express prior notice includes its inaction against Reed Hastings and Netflix. Although Netflix had not previously directed investors to Hastings's account nor had Hastings ever used his personal Facebook account to share investment information, he had over 200,000 followers and the media reported on the story shortly after Hastings published the information.[128] In fact, Hastings's followers included reporters from the *New York Times*, *The Wall Street Journal*, and *Forbes*.[129] Hastings violated Regulation FD, but the harm he caused to investors was minimal because he and the media disseminated the information relatively quickly and efficiently.[130] Nevertheless, the SEC likely would have brought action against him had investors sustained greater harm because vigorous enforcement is integral to its efforts to protect investors and market integrity.[131] Accordingly, investor protection and compensation likely would have outweighed sympathy for Hastings's situation had investors and market integrity been at risk. Though lack of clarity was the SEC's principal reason for inaction, its decision also indicates that there was not a significant enough threat to investors or market integrity even though investors received no prior notice.

Investors need advance notice of where to expect investment and market information so that they know where to go for investment and market information. However, with advances in technology and increased social media participation, many investors have constructive notice that information will come from a particular account. This constructive notice is sufficient to satisfy the SEC's requirements in its interpretive releases that investors receive adequate notice of informational disclosures. While not all personal social media accounts have sufficient followings to bypass the express prior notice factor, there are a select few that are able to avoid it.

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[128] SEC. & EXCH. COMM'N, *supra* note 54, at 5.

[129] Joseph A. Grundfest, *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?* 3–4 (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 131, 2013).

[130] SEC. & EXCH. COMM'N, *supra* note 54, at 5.

[131] *See* Mary Jo White, SEC Chair, Testimony on Oversight of the SEC, Address Before the U.S. House of Representatives Committee on Financial Services (May 16, 2013) https://www.sec.gov/news/testimony/2013-ts051613mjwhtm; *see also* Christopher Ippoliti, *Governing the Corporate Insiders: Improving Regulation Fair Disclosure with More Robust Guidance and Stronger Penalties for Individual Executives*, 8 J. BUS. ENTREPRENEURSHIP & L. 13, 47 (2014).

III. HOW CAN A HIGH-PROFILE EXECUTIVE'S PERSONAL SOCIAL MEDIA ACCOUNT BECOME A RECOGNIZED CHANNEL OF DISTRIBUTION WITHOUT PRIOR NOTICE TO INVESTORS?

Since 2013, the SEC has not provided any new guidance on Regulation FD and social media. While express prior notice is not necessarily required, when an executive's personal social media account would satisfy Regulation FD without it remains unclear. Without express prior guidance or direction, investors must attempt to keep track of ever expanding and changing disclosure channels. This has traditionally been an impossible task, but with the growth and development of social media and the large followings that some high-profile executives maintain, there may be a select number of individuals who do not need to provide express prior direction to their account. Executives should consider the other factors found in the SEC's 2008 Release and determine if their accounts satisfy Regulation FD in becoming a recognized channel of distribution that is designed to provide broad dissemination of information. These factors include whether the executive has a pattern of posting important investment information on its personal social media account; whether the company or the executive uses other mediums to share information; and the extent to which the market and media regularly pick up the information that the executive shares on its personal social media account.[132] Because prior notice is such an important aspect of Regulation FD, substantial satisfaction of the above factors is essential to creating a recognized channel of distribution.

A. PATTERN OF POSTING

The first consideration in determining if an executive's social media account is a recognized channel of distribution is whether the executive has a pattern of posting on its social media account.[133] Although the SEC's 2013 Release provided that an executive's personal social media account is unlikely to satisfy

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[132] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[133] *Id.*

Regulation FD without express prior notice that the account will serve as a channel of distribution, the pattern of posting on the account may be a major component of satisfying the requirements.[134] Again referring to Reed Hastings, he had no prior history or pattern of posting market moving information on his Facebook page.[135] For this reason, his post caught the public and investors off guard. No prior activity from his personal account had indicated that such an announcement might occur. A pattern of posting material information creates a channel on which investors can rely for information.[136]

In comparison, other executives have more regular posting habits. To illustrate, Elon Musk regularly posts updates regarding Tesla on Twitter to his 23 million followers.[137] Although his seemingly impulsive tweets have landed Tesla and himself in trouble with the SEC and other regulatory agencies on several occasions, the SEC has not questioned his compliance with Regulation FD.[138] Above all, Tesla has ensured that its investors are aware that Musk's personal Twitter account may disseminate official company information by directing investors towards his account.[139] However, Musk has also developed a pattern of regularly sharing official company information on his personal Twitter account.[140] A quick scroll through Musk's Twitter account will reveal that he posts almost daily about Tesla and its related ventures.[141] Furthermore, he has expressed that he regularly works 120 hours a week, depriving himself of a personal life and time with his family.[142] His Twitter feed demonstrates that he eats, sleeps, and breathes Tesla. He has tweeted about allowing

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[134] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 7.

[135] *Id.* at 4.

[136] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[137] *See* SEC. & EXCH. COMM'N, *supra* note 88.

[138] *See* Davies, *supra* note 63, at 1.

[139] Tesla Motors, Inc., Current Report (Form 8-K) (Nov. 5, 2013).

[140] Davies, *supra* note 63, at 1.

[141] *See* Elon Musk (@elonmusk), TWITTER, https://twitter.com/elonmusk. (last visited Nov. 18, 2019).

[142] Catherine Clifford, *Elon Musk: 'You're gonna go a little bonkers if you work 120 hours a week'*, CNBC (Nov. 5, 2018, 12:35 PM), https://www.cnbc.com/2018/11/05/elon-musk-on-working-120-hours-a-week-youll-go-bonkers.html.

employees to unionize,[143] pursuing new Tesla related ventures,[144] and about taking Tesla private.[145] Although many of his posts provoke legal concerns, all further cement his ability to disclose material information on his personal Twitter account because he has a recognizable habit of sharing important company information on his personal account. A recognizable habit of sharing ensures that investors are aware of where to go to obtain relevant investment information.

In developing a pattern, company executives should be consistent both in the information they share and where they share it.[146] This is relevant to the second consideration of whether the company or executives use other mediums to disclose information.[147] Executives must view each social media account as a distinct channel. For example, a pattern of sharing information on Twitter will not permit an executive to suddenly share information on Facebook or Instagram. The executive must develop a pattern for each channel in order to satisfy this factor.[148] Consistency in medium allows investors to reasonably infer where information will come from. Companies should also ensure that there is consistency among officers. If information comes from varying officers' accounts, then the executive's account is less likely to establish a pattern of sharing information.[149] If a company uses multiple sources, investors will have a hard time following each of them and knowing which sources to watch.

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[143] *See* Elon Musk (@elonmusk), TWITTER (May 20, 2018, 11:44 PM), https://twitter.com/elonmusk/status/998454539941367808?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E998454539941367808&ref_url=https%3A%2F%2Fwww.vox.com%2Fidentities%2F2019%2F9%2F30%2F20891314%2Felon-musk-tesla-labor-violation-nlrb.

[144] Elon Musk (@elonmusk), TWITTER (Oct. 12, 2018, 9:39 AM), https://twitter.com/elonmusk/status/1050788043907448834?lang=en.

[145] Elon Musk (@elonmusk), TWITTER (Aug. 7, 2018, 9:48 AM), https://twitter.com/elonmusk/status/1026872652290379776?lang=en.

[146] Alyssa Wanser, *The Facebook Status That Sparked an SEC Investigation*, 30 Touro L. Rev. 723, 753 (2014).

[147] *Id.*

[148] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[149] Sandler, *supra* note 78.

Narrowing the sources for disclosure provide consistency and reliability in disclosures.

As an added security measure, some companies furnish an 8-K with every social media disclosure to ensure that they comply with Regulation FD.[150] While a disclosure via 8-K is sure to satisfy Regulation FD,[151] if the company continues to double down on disclosures, the social media accounts that share the information will not become recognized channels of distribution. Investors will learn to rely on the 8-K as a crutch. If a company does eventually share information on a social media account without filing an 8-K, investors will be caught off guard.

In order to preserve a recognized channel of distribution, an executive must actually use the account or else the account will lose its status as a recognized channel of distribution.[152] This means that an executive must not leave large lapses in time between disclosures.[153] Sporadic or inconsistent use is unlikely to develop the market following necessary to satisfy Regulation FD. While this does not mean that an executive must make frequent disclosures, it must make disclosures consistently and regularly.[154] That is, executives need not adhere to any definite time period between postings to preserve a recognized channel of distribution. Rather, the executive should create a pattern of sharing information when appropriate so that investors know to regularly refer to the account for information.[155] Irregular use of an account might lead investors and markets to disregard the account as a source of information. Investors are not on notice if they disregard the account due to inactivity. If investors are unaware of where to seek information, then the channel does not satisfy Regulation FD.

B. MEDIA AND MARKET ATTENTION

The next factor executives should consider is the regularity that news outlets and markets pick up the information that executives share on their social media accounts.[156] In cases

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[150] *Id.*

[151] *Id.*

[152] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

where news and media outlets are likely to pick up on the shared information, companies and executives may partially or wholly rely on the news outlets for public dissemination.[157] Since this factor manifests the SEC's acceptance of the functional equivalence concept, actual use by the market and investors can substitute for investor notification.[158]

Executives with large social media followings are more likely to receive media attention and may not need to take any affirmative steps beyond posting the information for media outlets to begin to disseminate the information.[159] Regular media attention and market responsiveness are generally only available to those executives with large social media followings or those who have achieved celebrity status.[160] Executives of large companies with substantial followings can reasonably anticipate that the press will report on the information they share. Past practices and regularity of sharing information with media attention are useful in determining whether the media will report on a particular disclosure.[161] If the media has reported on past social media posts, it is an indication that it will continue to report on similar information in the future. In contrast, executives with smaller followings may need to take more affirmative steps like manually contacting media outlets or calling press conferences for the media to pick up on the information.

However, while taking affirmative steps facilitates broad dissemination and helps executives avoid disclosure rules violations, it does not immediately establish the social media account as a recognized channel of distribution unless accompanying press releases expressly direct investors to the account for future disclosures.[162] Over time, consistent media attention may direct investors and the market to the executive's account, causing an increase in followers.[163] If substantial enough, this increase in followers might cause the media to begin reporting on shared information without any affirmative direction from the company. In these cases, an executive may receive regular media

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[157] *Id.*

[158] *Id.*

[159] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 7.

[160] *Id.*

[161] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[162] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 7.

[163] *Id.*

and market attention and become a recognized channel of distribution. But, even if they lead large, public companies, executives with limited followings are unlikely to receive regular media attention. This is the case for the majority of executives.

Nevertheless, it is comprehensible that an executive of a large company might share material information on a personal social media account with a limited number of followers but still receive widespread media attention due to the information's significance or materiality. Even if the information were to receive widespread media attention, the disclosure would still likely result in a Regulation FD violation.[164] An isolated event of media publicity is unlikely to satisfy the requirement that the media regularly report on the shared information because investors would have been unaware that they should watch the social media account.[165] The fact that the post reached the masses through luck or fortuitous circumstances is unlikely to convince the SEC that the account is a recognized channel of distribution.[166] Without a prior history of sharing information on the account and regular media attention, the executive would not have known that the media would pick up on and broadly report the information. Such an executive is unlikely to have the same latitude that the SEC afforded to Hastings when he made a similar disclosure because it has since clarified Regulation FD's relation to social media. However, if the company or the executive takes affirmative steps to alert the media that the account will share or has shared information, the account is more likely to be a recognized channel of distribution because markets and investors will be aware that such information has or will come from the account.[167]

Moreover, the speed at which the information circulates will contribute to the executive's satisfaction of Regulation FD. When Hastings published his Facebook post, the information's publication was short of instantaneous.[168] The first media outlet to report on the information was a technology blog that picked up the post about an hour after its publication.[169] The blog then shared the information on its Twitter account with its 2.5 million

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[164] *Id.*

[165] *Id.* at 7–8.

[166] *Id.*

[167] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[168] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 5.

[169] *Id.*

followers, leading to a handful of other outlets to report on the story within two hours of Hastings's initial posting.[170] Though Netflix also released the story to several media outlets, it did not release the information to its normal mailing list of news outlets which further delayed the story's dissemination.[171] While an hour or two is not necessarily slow news reporting, it would still provide plenty of time for one of Hastings's Facebook followers to trade on the information, gaining an advantage over the rest of the market.

In comparison, when Elon Musk tweeted that he was considering taking Tesla private in August 2018, the mainstream media almost simultaneously picked up on the story.[172] With no warning or facts to support his announcement, Musk tweeted, "Considering taking Tesla private at $420. Funding secured."[173] Musk published his tweet at 9:48 AM PST and journalists and online news outlets began sharing the information by 10:08 am PST.[174] In just over an hour, Tesla's stock surged 7 percent.[175] His renegade tweeting habits coupled with his innovative ideas for society make him a prime target for media attention. His celebrity persona has granted him an incredible 23 million twitter followers. Though the SEC did not accuse Musk of violating Regulation FD,[176] he would have a strong argument that the information he shares is available to everyone. With Musk's 23 million followers and regular media attention, the information he shares is not only widely accessible, it is difficult to miss.

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[170] *Id.*

[171] *Id.*

[172] Steve Goldstein, *Did Elon Musk break any laws with his going-private tweet today?*, MARKETWATCH (Aug. 7, 2018), https://www.marketwatch.com/story/did-elon-musk-break-any-laws-with-his-going-private-tweet-today-2018-08-07.

[173] Musk, *supra* note 145.

[174] *See, e.g.*, Rex Crum, *Elon Musk tweets that he's considering taking Tesla private; Tesla shares soar*, MERCURY NEWS (Aug. 7, 2018, 10:49 AM), https://www.mercurynews.com/2018/08/07/elon-musk-tweets-that-hes-considering-taking-tesla-private/.

[175] Jacob Sonenshine, *Tesla Private: A Visual Timeline of Elon Musk's Crazy Day on Twitter*, THE STREET (Aug. 7, 2018), https://www.thestreet.com/markets/tesla-private-a-visual-timeline-of-elon-musk-crazy-day-on-twitter-14676727.

[176] Moyer, *supra* note 9.

While an executive's celebrity status may provide enough protection and insulation from violating Regulation FD, the lines remain unclear and each case remains fact intensive.[177] There is no definite number as to how many followers an executive must have. Reed Hastings had just over 200,000 which was insufficient.[178] But, Elon Musk had 23 million and that seemed to be adequate to avoid a Regulation FD violation.[179] So, somewhere between 200,000 and 23 million is the number of followers that an executive's account should have to establish itself as a recognized channel of distribution without providing express prior notice.

The regularity of the posting is also unclear. Again, a single post is insufficient while frequent use of an account that only posts about the company is likely to be sufficient.[180] Executives should remain consistent and regular in sharing information as long lapses in time between disclosures delay pattern establishment.[181] Also, the speed at which the media must report on the information is unclear. The internet and social media allow information to circulate quicker than ever. This means that social media participants might have a greater opportunity to trade on information than those who obtain the information from traditional news outlets. Even an hour can provide a significant advantage to investors who follow an executive's social media account. A pattern of posting, the amount of followers, the frequency of disclosures, and the regularity of media attention are all factors in determining whether the media's response was quick enough to satisfy the dissemination requirements.[182]

IV. LIABILITY FOR VIOLATION OF REGULATION FAIR DISCLOSURE

Regulation FD is a disclosure rule, which means that a Regulation FD violation does not automatically imply a violation

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[177] *See* SEC. & EXCH. COMM'N, *supra* note 54, at 5.

[178] *Id.*

[179] *See* Sec. & Exch. Comm'n v. Elon Musk, No. 1:18-cv-08865, at *1 (S.D.N.Y Sept. 27, 2018).

[180] SEC. & EXCH. COMM'N, *supra* note 54, at 5.

[181] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[182] *Id.*

of anti-fraud provisions.[183] Offenders are subject to SEC enforcement actions, but they are not subject to civil liability.[184] Additionally, although executives act as agents of their corporate entities, Regulation FD applies to the issuer and to "any person acting on its behalf."[185] This means that both the company and an executive that makes non-public, material disclosures on its personal social media account are subject to enforcement action. [186] Though the SEC has brought few enforcement actions, [187] they generally consist of fines or injunctions.[188] Regarding the policy for imposing penalties, the SEC has offered the justification that penalty provisions are appropriate both to deter and to penalize offenders.[189]

While there are no formal causes of action that arise from a violation of Regulation FD,[190] and few cases of enforcement actions exist in the social media or internet context, tangential charges give insight into what the SEC might do when an executive violates Regulation FD. Although Regulation FD violations do not imply a violation of anti-fraud rules,[191] charges of fraud and failure to establish sufficient social media guidelines for executives frequently accompany Regulation FD violations.[192] Though the SEC ultimately determined that there was no Regulation FD violation, after tweeting about taking Tesla private, the SEC brought allegations against Tesla of failing to have

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[183] 17 C.F.R. § 243.102 (2000).

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] As of 2011, the SEC had brought about a dozen Regulation FD enforcement actions. Vanessa Schoenthaler, *Regulation FD: learn from prior SEC cases*, IR WEB REPORT (April 11, 2011), http://irwebreport.com/20110411/regulation-fd-learn-from-prior-sec-cases/.

[188] *Id.*

[189] *See* Memorandum of the Securities and Exchange Commission in Support of the Securities Law Enforcement Remedies Act of 1989, *reprinted in* H.R. No. 975, 101st Cong., at 7 (1989).

[190] Schoenthaler, *supra* note 187.

[191] 17 C.F.R. § 243.102 (2000).

[192] *See* SEC v. Tesla, Inc., No. 1:18-cv-8947, at *1 (S.D.N.Y Sept. 29, 2018); *see also* SEC. & EXCH. COMM'N, *supra* note 88.

disclosure controls for Musk's tweets.[193] The SEC also brought allegations of fraud against Musk himself.[194] Tesla and Musk settled their respective charges with the SEC, but with some substantial contingencies.[195] The SEC required Musk to step down as chairman for three years.[196] It also required that Musk pay a $20 million fine, which it then distributed to harmed investors.[197] Although pure Regulation FD violations usually result in personal fines that are significantly less than $20 million,[198] this is an indication of the importance of social media responsibility that the SEC places on popular executives.

For failing to establish required disclosure controls for Musk's tweets, the SEC mandated that Tesla implement additional controls and procedures to monitor and filter Musk's social media communications.[199] This included appointing a new committee of independent directors to oversee the communications.[200] While companies commonly filter executives' tweets, if not write them completely,[201] Tesla has never had any control over Musk's tweets.[202] In fact, after Musk tweeted about taking Tesla private, officers and executives quickly circulated text messages and phone calls inquiring if the tweets were real, fake, or a joke.[203] Immediately after agreeing to

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[193] *See* Complaint at 1, SEC v. Tesla, Inc., No. 1:18-cv-8947 (S.D.N.Y Sept. 29, 2018).

[194] SEC. & EXCH. COMM'N, *supra* note 88.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *See* 15 U.S.C.A. § 78u (West 2015).

[199] SEC. & EXCH. COMM'N, *supra* note 88.

[200] *Id.*

[201] *See* Andrea Fryrear, *How to Use Your CEO's Twitter Account to Build Brand Loyalty*, CONVINCE & CONVERT, https://www.convinceandconvert.com/social-media-strategy/ceo-twitter-account/ (last visited Nov. 18, 2019).

[202] Alexandria Sage & Ismail Shakil, *Elon Musk never sought approval for a single Tesla Tweet, U.S. SEC tells judge*, REUTERS (Mar. 18, 2019, 5:25 PM), https://www.reuters.com/article/us-tesla-musk-sec/elon-musk-tweet-about-tesla-violates-settlement-agreement-u-s-regulator-tells-court-idUSKCN1R001J.

[203] Lucinda Shen, *'The Most Shorted Stock in the History of the Stock Market.' Read Elon Musk's Letter to Employees About Taking Tesla Private*, FORTUNE (Aug. 7, 2018), http://fortune.com/2018/08/07/tesla-elon-musk-letter-to-employees-tesla-stock-tsla/.

the settlement, Musk continued to tweet, criticizing the SEC and the settlement agreement.[204] A judge approved the settlement without taking subsequent tweets that Musk had published into account.[205] In these tweets, Musk referenced the SEC as the "Short Seller Enrichment Commission" and also stated that the $20 million fine was "worth it."[206]

While judges might overlook some bad behavior on social media, there is no guarantee that a judge will not take subsequent tweets into consideration when approving settlements. Martin Shkreli was another iconic, though controversial, executive who obtained celebrity status, in part due to his antics on social media.[207] During his trial for securities fraud, Shkreli was not as lucky as Musk when he posted on Facebook that he would pay $5,000 to anyone who would steal a lock of former presidential candidate Hillary Clinton's hair during her book tour.[208] Unfortunately for Shkreli, the judge saw this post and subsequently revoked his bail.[209] The judge reasoned that the post signaled that Shkreli was a "real danger."[210] Interestingly, Shkreli was not on trial for any violent crimes. Nevertheless, Shkreli suffered severe consequences for publishing his thoughts in real time. While this decision specifically regarded his bail,[211] it serves

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[204] *See* Elon Musk (@elonmusk), TWITTER (Oct. 4, 2018, 1:16 PM), https://twitter.com/elonmusk/status/1047943670350020608?lang=en.

[205] *See* Sage & Shakil, *supra* note 202.

[206] *See* Elon Musk (@elonmusk), TWITTER (Oct. 26, 2018, 7:38 PM), https://twitter.com/elonmusk/status/1056012218897059841?lang=en.

[207] *See* Jacob Frenkel, *Shkreli Provides Social Media Behavior and Governance Lessons for Millennials*, FORBES (Nov. 24, 2017, 11:14 AM), https://www.forbes.com/sites/jacobfrenkel/2017/11/24/shkreli-provides-social-media-behavior-and-governance-lessons-for-millennials/#64f58fd1619a.

[208] *Id.*; *see also* Press Release, Dep't of Justice, Martin Shkreli Sentenced to Seven Years' Imprisonment for Multi-Million Dollar Fraud Scheme (Mar. 9, 2018) https://www.justice.gov/usao-edny/pr/martin-shkreli-sentenced-seven-years-imprisonment-multi-million-dollar-fraud-scheme.

[209] Dep't of Justice, *supra* note 208.

[210] *See* United States v. Shkreli, 15 CR 637 (KAM) 1, 12 (E.D.N.Y. Mar. 6, 2018).

[211] *Id.*

as evidence that judges are aware of social media and assess social media activity in making decisions. In application, not only will judges consider the posts that violate Regulation FD, but they might also consider subsequent posts that the executive publishes after committing the violation. This might result in increased fines and more severe consequences for high-profile executives who misuse social media.

The lack of clarity in consequences demonstrates that the SEC retains broad discretion in issuing penalties for Regulation FD violations. In a 2013 settlement of a Regulation FD enforcement action with Lawrence Polizzotto, Vice President of First Solar, the SEC determined that it would not penalize Polizzotto because of his and the company's cooperation with its investigation.[212] The SEC acknowledged that First Solar cultivated a culture of compliance within the company, self-reported the selective disclosure, and took remedial measures after the disclosure occurred.[213] Although this may be comforting news for some companies that already have compliance measures in place, it may be troubling for others that have renegade executives with substantial control over the company. Executives that unapologetically post on social media may shift the SEC's discretion towards larger fines and harsher penalties as they tweet without remorse.

Conversely, some argue that the social media sites themselves should be accountable for the violations that high-profile executives commit.[214] Social media sites recognize that many high-profile executives use their platforms as evidenced by the significant perks that platforms provide to these users free of monetary payments.[215] Additionally, social media sites already employ technology that they could extend to monitor for potentially material or market-moving information.[216]

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[212] Press Release, Sec. & Exch. Comm'n, SEC Charges Former Vice President of Investor Relations With Violating Fair Disclosure Rules (Sept. 6, 2013) https://www.sec.gov/news/press-release/2013-174.

[213] *Id.*

[214] Charles Radclyffe, *The SEC Ought to Take on Twitter Not Musk*, FORBES (Sept. 28, 2018, 10:38 AM), https://www.forbes.com/sites/charlesradclyffe/2018/09/28/the-sec-ought-to-take-on-twitter-not-musk/#536ce7c6bb87.

[215] Salmon, *supra* note 115.

[216] Radclyffe, *supra* note 214.

Consequently, social media platforms could initiate protocols that ask high-profile users "are you sure?" before publishing such a post.[217] In fact, some social media platforms have already implemented similar mechanisms.[218] For example, Facebook temporarily banned all ads related to Initial Coin Offerings because they were generally fraudulent and extremely risky for inexperienced investors.[219] Also, all major social media sites currently monitor for violent and sexual conduct and remove material that violates their terms of use or the law.[220] Nonetheless, while social media companies surely have the ability to monitor and provide safeguards for high-profile executives, placing liability on social media might not fit the spirit of SEC disclosure rules.

Disclosure rules place responsibility and accountability on companies and their officers.[221] Transferring that responsibility to third parties would be to assume that executives have no self-restraint or sense of accountability in publishing information. Already, high-profile individuals, like Elon Musk and President Donald Trump, frequently fail to exhibit impulse control on social media.[222] But, unlike average users who can impulsively post with limited consequences, careless postings by high-profile executives can have extensive repercussions. An executive's ability to move markets with a single post can affect the monetary interests of employees, investors, and competitors. While

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[217] *Id.*

[218] *Prohibited Financial Products and Services*, FACEBOOK, https://www.facebook.com/policies/ads/prohibited_content/prohibited_financial_products_and_services (last visited Nov. 18, 2019).

[219] *Id.*

[220] *What Types of Behavior Does Facebook Identify as Abusive?*, FACEBOOK, https://www.facebook.com/help/1735443093393986?helpref=hc_global_nav (last visited Nov. 18, 2019).

[221] *See* Richard Walker, Dir. of Enforcement, Sec. & Exch. Comm'n, Speech by SEC Staff: RFD – An Enforcement Perspective (Nov. 1, 2000) (transcript available at http://www.sec.gov/news/speech/spch415.htm).

[222] *See* Elon Musk (@elonmusk), TWITTER, https://twitter.com/elonmusk?ref_src=twsrcpercent5Egooglepercent7Ctwcamppercent5Eserp percent7Ctwgr percent5Eauthor (last visited Nov. 18, 2019); Donald Trump (@realDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump?ref_src=twsrcpercent5Egooglepercent7Ctwcamppercent5Eserp percent7Ctwgrpercent5Eauthor (last visited Nov. 18, 2019).

corporate executives are ultimately human, they should adhere to higher disclosure standards because they maintain important information that widely affects investors.

At length, Regulation FD enforcement actions rarely exist on their own. They are often overshadowed by more significant charges such as fraud or insider trading. Still, the SEC's broad discretion in enforcing the rule permits it to impose greater fines and other meaningful penalties. Indeed, the SEC is increasingly vigilant in enforcing its regulations, especially against high-profile executives.[223]

V. THE SEC SHOULD ISSUE FURTHER GUIDANCE ON SOCIAL MEDIA AND REGULATION FAIR DISCLOSURE

Several high-profile executives maintain regular engagement with millions of people via their social media accounts.[224] Not only do they have static followers, but they also have followers that ask questions, make comments, and otherwise participate in discussions.[225] This regular engagement is ideal for securities laws because corporate officers are more transparent than ever as they provide real-time updates to investors. Social media is also an ideal medium to share such information because it is free, intuitive, and easily accessible to the public. Accordingly, the SEC should clarify that express prior notice is not always necessary and should embrace clear consequences for Regulation FD violations.

A. THE SEC SHOULD CLARIFY THAT EXPRESS PRIOR NOTICE IS NOT ALWAYS NECESSARY

With social media's transparency and accessibility, the SEC should clarify that high-profile executives that have substantial social media followings and engagement should not have to expressly direct investors to their account prior to sharing information. A pattern of posting, along with regular media engagement, should be sufficient to protect investors from informational asymmetry. Fully embracing the benefits of the

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[223] *See* SEC. & EXCH. COMM'N, *supra* note 71.

[224] *See* Mark Zuckerberg, (Mark Zuckerberg), FACEBOOK, https://www.facebook.com/zuck (last visited Nov. 18, 2019); *see also* Cook, *supra* note 125.

[225] *Id.*

digital age will provide increased access to information while removing impediments and fear from corporate executives.

While prior direction is not the most burdensome of requirements, determining whether prior direction is sufficiently specific or whether its location satisfies Regulation FD's requirements can be difficult and impose additional stress on companies. This is especially true of companies with high-profile executives who are actively engaged in social media. Iconic executives that investors view as business gurus or technological visionaries are often difficult to reign in.[226] While these executives should comprehend corporate governance models and adhere to corporate formalities, they often understand the company, its future, and the market better than anyone else. Investors are aware of this as they struggle to differentiate between the company and the executive. In conjunction with the pedestal upon which these executives stand, fully embracing social media allows investors to obtain honest and thorough investment information directly from authoritative company officers. This clarification would allow executives to engage in more open and current dialogue with investors. Both investors and companies would benefit as information flows freely without regulatory impediments. Investors would have the ability to present questions directly to executives who will then be able to provide public and instantaneous responses without complications or delay.

Additionally, modern investors are much more aware, informed, and internet savvy than were those in past generations.[227] In a digital information age, investors actively seek information from those who actively provide it.[228] Investors now use social media to obtain news, seek advice, and share opinions.[229] This illustrates that they are increasingly reliant on social media for all types of information. Increased reliance on social media signifies that more investment and market information should be available to them through social media channels. Permitting companies and executives to join the

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[226] Elizabeth Lopatto, *After the SEC settlement, who will review Elon Musk's tweets?*, THE VERGE (Oct. 5, 2018, 7:00 AM), https://www.theverge.com/2018/10/5/17937768/elon-musk-sec-settlement-twitter-tesla-shareholder-lawsuit.

[227] Borzykowski, *supra* note 113.

[228] *Id.*

[229] *Id.*

conversations that are already taking place among investors without debilitating fear of regulatory violations will provide investors with greater access to information that they are prepared to receive.

Moreover, social media is a more efficient medium for disseminating information that protects a broader range of investors. A company that announces material information in a widely circulated newspaper like *The Wall Street Journal* or in an 8-K is likely to satisfy the requirement of broad dissemination.[230] Antithetically, the suggestion that newspapers provide broad dissemination fails to account for the fact that most news outlets require a subscription to obtain access to their content. Retail investors often have no need to subscribe to corporate-based news mediums and are therefore more likely to miss important investment information.[231] Furthermore, investors with little investment experience may not even know to access an 8-K or to monitor other regulatory filings. While experienced investors are more likely to have certain news subscriptions and familiarity with regulatory filings, the SEC is less concerned with protecting sophisticated investors.[232] In contrast, social media provides free access to all internet users.[233] It is intuitive and easy to use for even the most novice of investors. Even those who do not subscribe to a particular executive's account can access the account through simple web searches.[234] Ideally, all investors would know to regularly follow news media and 8-K releases; but, the reality is that many do not.[235] Even so, there is no minimal investor

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[230] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[231] Mary Co White, Chair, Sec. & Exch. Comm'n, Address Before the Consumer Federation of America: Protecting the Retail Investor (Mar. 21, 2014) (transcript available at https://www.sec.gov/news/speech/mjw-speech-032114-protecting-retail-investor).

[232] *Fast Answers: Accredited Investors*, SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answers-accredhtm.html (last visited Nov. 18, 2019).

[233] *Does it Cost Money to Use Facebook?*, FACEBOOK, https://www.facebook.com/help/186556401394793?helpref=uf_permalink (last visited Nov. 18, 2019).

[234] *About Public and Protected Tweets*, TWITTER, https://help.twitter.com/en/safety-and-security/public-and-protected-tweets (last visited Nov. 18, 2019).

[235] Azi Ben-Rephael et al., *Who Pays Attention to SEC Form 8-K?* 3–4 (Kelley Sch. of Bus. Research Paper No. 17-24, 2017).

qualification standard that prevents competent individuals from investing in public companies. As a result, inexperienced and casual investors instinctively resort to social media as an obvious source of investment information.[236]

Although social media is generally more accessible than newspapers or journals, some high-profile executives have developed a habit of blocking followers that criticize them or disagree with their ideas.[237] For instance, Musk has blocked at least three dozen people from viewing his Twitter feed.[238] These people include investors, journalists, and critics of himself and Tesla.[239] Most social media platforms allow users to limit who can see the information that they share.[240] Though this feature preserves privacy and security, it presents hazards for an executive that is intolerant of criticism. For a high-profile executive, sharing material information after excluding followers may constitute selective disclosure. By excluding individuals from their social media feed, the executive shields parts of the public from the information, meaning that the account may not be public for Regulation FD purposes. Ultimately, blocking certain investors grants unblocked investors an advantage over blocked investors. However, even if an executive blocks users from viewing its content, users have the ability to view the executive's account by performing Google searches and by creating new social media accounts that the executive has not blocked.[241] Although an executive might attempt to block users, so long as the account is set to "public," anyone with an internet connection has immediate access to the account.[242]

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[236] Borzykowski, *supra* note 113.

[237] Jan Wieczner, *How Elon Musk's Twitter Blocking Could Land Him in SEC Trouble*, FORTUNE (Aug. 10, 2018), http://fortune.com/2018/08/09/tesla-elon-musk-twitter-sec-blocked/.

[238] *Id.*

[239] *Id.*

[240] *How to Block Accounts on Twitter*, TWITTER, https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts (last visited Nov. 18, 2019).

[241] *About Public and Protected Tweets*, TWITTER, https://help.twitter.com/en/safety-and-security/public-and-protected-tweets (last visited Nov. 18, 2019).

[242] *Id.*

B. THE SEC SHOULD MANDATE SOCIAL MEDIA RESTRICTIONS FOR REGULATION FAIR DISCLOSURE VIOLATIONS

In addition to clarifying Regulation FD disclosure requirements, the SEC should institute clearer consequences for Regulation FD violations. Due to the SEC's broad discretion, Regulation FD enforcement has been inconsistent and unpredictable, thus, failing to adequately deter future offenses.[243] Because consequences are unpredictable and because there are few precedential Regulation FD violations to serve as examples, rogue executives often take no prior thought before posting on social media.[244]

Deterrence is more likely if there is a strong possibility that Regulation FD violations may likely result in meaningful, individual penalties. Clear and predictable consequences would serve as a warning to executives when they are tempted to press "send" on a potentially material social media post. They will also allow companies and executives to better prepare themselves against enforcement actions with efficient social media compliance programs. While certain executives should have greater freedom in sharing information, they should still be accountable and take responsibility for their actions as irresponsible social media usage harms investors. In sum, clear consequences will not only protect executives, they will also protect investors from irresponsible disclosures.

Though fines have traditionally been the most common penalty for Regulation FD violations,[245] fines alone do not sufficiently deter executives from violating Regulation FD on social media. The majority of high-profile celebrity executives have an extremely high net worth.[246] Because of their wealth, even substantial fines are unlikely to deter their actions because they can be easily paid.[247] Musk himself stated that a personal $20 million fine was "worth it" after he arguably committed fraud with

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[243] Shannon M. Mudd, *The Missing Piece of the Mosaic*, 80 WASH. U. L.Q. 971, 994 (2002).

[244] Moyer, *supra* note 9.

[245] 17 C.F.R. § 243.100 (2000).

[246] *Top 50 CEOs*, CELEBRITY NET WORTH, https://www.celebritynetworth.com/list/top-50-ceos/ (last visited Nov. 18, 2019).

[247] *See* Ippoliti, *supra* note 131.

a Twitter post.[248] While board removal is probably an excessive consequence for a Regulation FD violation, increased social media oversight is a clear and proportional consequence that is likely to deter high-wealth executives who misuse their social media accounts. For executives that view themselves as essential oracles and leaders of their companies, any hindrance of their ability to candidly share information will likely diminish the control they feel that they have over their companies. A decreased perception of their ability to publicly lead their company may be a meaningful deterrent to these sometimes narcissistic executives.

Currently, the Securities Exchange Act of 1934 ("Exchange Act") requires certain issuers to maintain disclosure controls for its officers.[249] Issuers that fall under this section must ensure the company's management reviews certain information prior to sharing to make timely decisions regarding required disclosure.[250] As a result of Tesla's violation of this provision, the SEC vaguely mandated that Tesla implement "controls and procedures to oversee Musk's communications."[251] The extent of the control, including whether Tesla must also review Musk's personal communications, is unclear. Because the SEC has given no specific guidance, companies have discretion in creating controls. While Tesla has not revealed what it has done to manage Musk's tweets, a system for managing social media disclosures might include appointment of an independent committee that reviews and analyzes each post before publication. Although there are numerous other models that companies can develop to manage an executive's social media usage, restrictions must be reasonable to preserve the account as a recognized channel of distribution because overly restrictive controls may cause the account to become inactive. For example, a complete social media ban would be far too restrictive. Both companies and investors would be deprived of the benefits that social media provides while severely limiting executives' ability to publicly lead their companies. Although the SEC does not provide or endorse any specific disclosure control system for companies, the Exchange Act and the SEC's action against Tesla create a framework upon which the

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[248] *See* Elon Musk (@elonmusk), Twitter (Oct. 26, 2018, 7:38 PM), https://twitter.com/elonmusk/status/1056012218897059841?lang=en.

[249] 15 U.S.C.A. § 78u (West, 2015).

[250] *Id.*

[251] *See* SEC. & EXCH. COMM'N, *supra* note 88.

SEC might rely on to enforce similar requirements against Regulation FD offenders.

In outfitting these requirements to Regulation FD offenders, the SEC should reserve discretion to companies. This will allow companies to self-regulate and develop healthy disclosure controls that best suit their executives. However, the SEC should specifically establish the duration of such controls in each situation. Depending on the extent of the violation, the SEC could require that the controls last for a specified time period or indefinitely. While indefinite controls may serve as a greater deterrent, the SEC should use them sparingly because they could limit informational freedom and chill dissemination. Additionally, consistent enforcement is key in creating a meaningful deterrent. Without consistency, executives remain emboldened to take unnecessary risks in sharing information. Clear examples are more likely to cause executives to pause before posting on social media. This consistency will allow executives to retain freedom in social media usage while maintaining a sense of responsibility. In sum, the SEC should leave discretion to companies in establishing controls, but it should impose the penalty consistently to create a precedent that serves as an example to loose-lipped executives.

However, whether companies are able to control a renegade executive's social media activity is unclear. In considering Musk and Tesla, had Tesla been able to implement such controls after the SEC mandated that it filter Musk's tweets, it likely would have prevented Musk from immediately criticizing the SEC on Twitter.[252] Notwithstanding these considerations, Musk has since indicated that these social media restrictions have adversely affected his self-esteem and leadership style.[253] In a recent television interview, Musk tearfully spoke about how placing restrictions on his ability to post on social media infringe upon his First Amendment rights and how the restrictions will create additional problems for him and for Tesla.[254] While this is certainly odd evidence, the fact that Musk literally shed tears while speaking about his social media restrictions indicates the importance of social media communications to these high-profile

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[252] *See* United States v. Shkreli, 15 CR 637 (KAM) 1, 12 (E.D.N.Y. Mar. 6, 2018).

[253] *60 Minutes: Tesla CEO Elon Musk* (CBS television broadcast Dec. 9, 2018), https://www.cbsnews.com/news/tesla-ceo-elon-musk-the-2018-60-minutes-interview/.

[254] *Id.*

executives.[255] Due to the importance of social media to the modern, high-profile executive, the SEC should impose restrictions on a Regulation FD offender's social media usage.

Though the SEC should implement more effective penalties for violations, penalties such as board removal may be too harsh. Musk was, in fact, removed from Tesla's board for tweeting about taking Tesla private; however, it was due to anti-fraud violations, not Regulation FD violations.[256] There is no precedent indicating that the SEC might require board removal for a mere Regulation FD violation.[257] Although Regulation FD protects investors and although disclosure is central to federal securities laws,[258] a Regulation FD violation does not generally harm investors to the extent that the law should relieve the offender from its position within the company. Securities laws seek to limit informational asymmetry, but they do not eliminate it completely.[259] Otherwise, little trading would occur. For most executives, board removal is the most severe penalty that can occur. Especially for commonly egotistical celebrity executives, losing control of their companies relieves them of their high societal position and drastically alters their lifestyle. Apple founder, Steve Jobs, became depressed and possibly suicidal when Apple's board forced him out, stating that his removal was "awful-tasting medicine."[260] Other actions, such as more predictable fines and social media oversight programs, are more appropriate penalties that would provide adequate deterrence and would fit the wrongful actions.

Furthermore, board removal and excessive fines may chill the dissemination of information. In an effort to avoid the costs and burdens that accompany such penalties, corporations may be

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[255] *Id.*

[256] Complaint at 21, SEC v. Tesla, Inc., No. 1:18-cv-8947 (S.D.N.Y Sept. 29, 2018).

[257] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[258] *Structured Disclosure at the SEC: History and Rulemaking*, SEC. & EXCH. COMM'N, https://www.sec.gov/page/osdhistoryandrule making (last visited Nov. 18, 2019).

[259] *Id.*

[260] Mark Sullivan, *Steve Jobs wandered depressed in Europe after being exiled by Apple*, VENTURE BEAT (Mar. 24, 2015, 11:59 AM), https://venturebeat.com/2015/03/24/steve-jobs-wandered-depressed-in-europe-after-being-exiled-by-apple/.

too cautious in regulating their executives' social media usage. Instead, they will likely resort to safer methods such as 8-Ks and press releases. While these methods disseminate information in accordance with Regulation FD, they are inferior to the scope and rapidity of social media.[261] There is a balance that the SEC must strike between freedom to share and effective deterrence against irresponsible disclosures. This balance lies in social media controls for executives who fail to exhibit appropriate esteem for the information they maintain.

Ultimately, even though lack of clarity has been a consistent criticism of Regulation FD since its inception,[262] the SEC has been reluctant to clarify the rule.[263] In addressing criticisms surrounding the vague term "materiality," the SEC asserted that flexibility is essential to Regulation FD's enforcement.[264] It reasoned that each case is different and that flexibility allows it to meet the circumstances of each case.[265] In this same statement, the SEC maintained that it would not issue a bright-line test for materiality nor would it release a comprehensive list of material items that might implicate Regulation FD.[266] However, the SEC compromised by providing a non-comprehensive list of items that might constitute material information and trigger Regulation FD.[267] It also recognized in the same document, which it reiterated in the 2008 Release,[268] that it was willing to adapt Regulation FD to changing technologies.[269] This indicates that the SEC is willing to clarify Regulation FD's requirements if needed. With the way high-profile executives now share information on social media, the SEC should adhere to its statement that Regulation FD should evolve with technology and clarify Regulation FD's requirements along with the penalties that executives may sustain for its violations.

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[261] *See* Ippoliti, *supra* note 131, at 34.

[262] Mudd, *supra* note 243, at 994.

[263] Ippoliti, *supra* note 131, at 40.

[264] *Id.*

[265] *Id.*

[266] *Id.* at 18.

[267] *Id.* at 20.

[268] Commission Guidance on the Use of Company Websites, 73 Fed. Reg. at 45,862.

[269] *Id.*

CONCLUSION

In comparison to music, television, and film, the internet is not a traditional place to find fame. Nevertheless, social media continues to catapult more people to fame for non-traditional reasons. Corporate executives are no exception. As executives become more accessible through social media, more of them will achieve celebrity status. Consequently, more executives are likely to post material that violates Regulation FD. Though social media slips may simply be an inevitable consequence of social media use,[270] executives must remember their investors before their fans. As individuals with increased responsibility, they cannot adopt the same impulsive tendencies as celebrity personalities because investors, companies, and markets depend on their leadership.

But, if executives are willing to be responsible for their actions on social media, the SEC may be more welcoming of their celebrity personas in the modern marketplace. Investors appreciate their transparency, realness, and accessibility. All of these attributes, along with social media's growth and development, further permit investors to obtain information through a familiar and user-friendly medium. As such, Regulation FD and federal securities laws must continue to evolve to meet the needs and abilities of investors, issuers, and executives. In continuing to evolve and grant greater autonomy to both executives and investors, federal securities laws should recognize that celebrity executives are in a unique position that permits them to avoid selective disclosure on their personal social media accounts. Such recognition will afford greater freedom to executives and increase investors' access to information. But, with this recognition, the SEC should also impose social media restrictions as a consequence of pure Regulation FD violations. As more executives become aware of the non-monetary consequences that they are likely to suffer for irresponsible disclosures, they will become more thoughtful in their social media usage, thus, protecting investors and markets.

[270] Lopatto, *supra* note 226.

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