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A CURTAIN-CALL FOR PERFORMING ARTS INDUSTRY CLAUSES: WHY NONUNIONIZED STAGE-PERFORMERS ARE "EMPLOYEES" NOT "INDEPENDENT CONTRACTORS"

CHRISTIAN KETTER*

I. SETTING THE STAGE: INDUSTRY PRACTICES

"*The common curse of mankind, folly and ignorance, be thine in great revenue!*"[1]

In the entertainment industry, there exists a class of performers who, while paid, remain nonunionized. It is not uncommon for these performers to rely on nonunionized work to rise through the ranks. It is, in fact, via such fringe stage productions and student films that performers often earn their

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[1] WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 2, sc. 3.

union card.[2] However, this nonunion work forces these performers to face a Hobson's choice: either they must sign away valuable rights and risk sole liability while on the job, or they must altogether forego the opportunity and risk developing their career.[3] These nonunionized performers are typically informed via contract that they are not considered employees, but rather independent contractors.[4] Consequently, companies contractually demand that, as a hired independent contractor, these performers assume liability for any damage they personally cause to sets, props, and themselves while performing for the company.[5] Despite this attempt to contractually waive the employee status of a nonunionized performer, such status clearly exists regardless. Any performer, unionized or otherwise, should not be required to sign away their right to employee treatment when they are in fact being treated in all other relevant respects as an employee.[6] This Article will demonstrate that employee status for performing artists is supported by the fundamentals of employment law, state common-law, federal directives, and various state statutes.

When properly classified, employees benefit from numerous significant statutory protections, such as but not limited

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[2] Alex Ates, *What Nonunion Actors Should Know About Union Strikes*, BACKSTAGE (Jan. 11, 2019), https://www.backstage.com/magazine/article/nonunion-actors-sag-strike-66693/.

[3] *Id.*

[4] *See, e.g.*, *Contract For Grand Theatre Actors/Musicians*, SALT LAKE CMTY. COLL. (Sept. 18, 2018), https://www.slcc.edu/risk-management/docs/grandtheater.pdf; *Independent Contractor Agreement*, MALU PROD., https://static1.squarespace.com/static/550128aae4b0a33931074a11/t/5bf391b2562fa7bd25225da8/1542689207418/INDEPENDENT+CONTRACTOR+AGREEMENT+FORM.pdf (last visited April 20, 2020) (establishing call time, rehearsal, sound check, performance schedule and location, rights and responsibility to direct process of performer).

[5] SALT LAKE CMTY. COLL., *supra* note 4 (stating "Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract.").

[6] *Cf.* W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002) ("Contractual language, such as a provision describing drivers as independent contractors, is not dispositive; instead, the court considers all the facts related to the work situation.") (citation omitted).

to: (1) workers' compensation laws against liability from work-induced injuries; [7] (2) antidiscrimination laws; [8] (3) laws regulating working conditions;[9] (4) laws regulating wages;[10] (5) laws regulating hours worked;[11] (6) laws providing pregnancy and medical leave;[12] (7) Social Security benefits; (8) laws mandating unemployment insurance; [13] and (9) laws against sexual harassment.[14] In contrast, independent contractors do not have these guaranteed statutory protections.[15] Hence, being labeled as an independent contractor comes at a great cost to the performer. By intentionally misclassifying performers as independent contractors, employers attempt to pass labor costs onto both persons they hire and the government. [16] This practice is prohibited by law but it still permeates throughout the performing arts industry. [17] When performers are misclassified by their employers, they are left vulnerable and without the safeguards that both state and federal governments intended for an employees' protection.

Misclassification as an independent contractor subjects nonunionized performers to fewer statutory protections and less

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[7] Anna Deknatel & Lauren Hoff-Downing, *ABC On The Books And In The Courts: An Analysis Of Recent Independent Contractor And Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 54–55 (2015).

[8] *Id.*

[9] Fair Labor Standards Act of 1938, 29 U.S.C. § 201.

[10] Deknatel & Hoff-Downing, *supra* note 7, at 54–55.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

[15] Deknatel & Hoff-Downing, *supra* note 7, at 54–55.

[16] Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP'T L. PROJECT, https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/ (last visited April 20, 2020).

[17] *See* Shelley Attadgie, *Combating the Actor's Sacrifice: How to Amend Federal Labor Law to Influence the Labor Practices of Theaters and Incentivize Actors to Fight for Their Rights*, 40 CARDOZO L. REV. 1045, 1069–70 (2018).

than a living wage.[18] This is because when employers pay performing artists as independent contractors, those employers evade federal and state minimum wage laws.[19] How does one provide for him or herself in an industry where "the price for total and complete artistic freedom is that almost nobody makes a living wage, let alone a living, doing it[?]"[20] While nonunionized workers must fend for themselves in pursuit of such "complete artistic freedom," unionized workers have leverage in stark contrast. For example, The Actors' Equity Association ("AEA"), a union for stage performers and stage managers,[21] prohibits its members from working beyond sixteen performances in a single production without a contract containing very specific terms.[22] In order to perform beyond the limit, AEA members must be paid official Equity contract rates and a $3,000 payment must be paid upfront to AEA.[23] That upfront payment functions as "a bond in case a production is cancelled or postponed, so that actors are guaranteed [at least] a week's pay."[24]

It is well-established that unions support employees and guarantee representational access to statutory protections across all fields of work.[25] Moreover, the strength of performing arts unions is well documented. In 2019, for instance, Chicago Symphony Orchestra ("CSO") members ended a two-month strike after union negotiations took place between their union and the

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[18] Diep Tran, *Off-Off-Broadway: Freedom Isn't Free*, AM. THEATRE (Sept. 24, 2019), https://www.americantheatre.org/2019/09/24/off-off-broadway-freedom-isnt-free/.

[19] U.S. Dep't of Labor, *Consolidated Minimum Wage Table* (July 1, 2019), https://www.dol.gov/Whd/minwage/mw-consolidated.htm.

[20] Tran, *supra* note 18.

[21] Alex Ates, *Equity Continues to Grow Its Power With Announcement of Special Counsel*, BACKSTAGE (Mar. 27, 2019), https://www.backstage.com/magazine/article/equity-special-counsel-lynn-rhinehart-67639/

[22] Tran, *supra* note 18.

[23] *Id.*

[24] *Id.*

[25] Josh Bivens et al., *How today's unions help working people*, ECON. POLICY INST. (Aug. 24, 2017), https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/.

CSO administration.[26] In Hollywood, a noteworthy 2007 writers' union strike had the powerful effect of ending a major blockbuster already in production.[27] The strike successfully derailed a superhero film-adaptation of "Justice League: Mortal," which would have featured actors Armie Hammer as Batman and Adam Brody as the Flash.[28]

However, union strikes are rarely driven by the sole motivation of individual union members.[29] Rather, it is the direction and influence of the union as a whole that "gives an actor status, legitimacy, and protections, [and] the actor is expected to follow union protocols [acting] as a booster of the union's causes, including strikes."[30] If a performing arts union decides collectively to negotiate for an improved position, the union members will strike together.[31]

It is a myth that all performers are insulated from employer abuse and risks of work injury, especially when many performers do not have the protection and "badge of validation" offered by union membership.[32] In fact, it is often routine for performers in this industry to first gain experience in nonunionized work before attaining the ranks of higher-profile unionized work.[33] Such lower-profile localized work, however, suffers from more limited budgets than its Broadway

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[26] Kristen Thometz, *Emanuel: CSO, Union Have Reached an Agreement to End Strike*, WTTW (April 26, 2019), https://news.wttw.com/2019/04/26/emanuel-cso-union-have-reached-agreement-end-strike; *see also*, Howard Reich, *CSO musicians picket in front of Orchestra Hall after announcing strike*, CHI. TRIB. (Mar. 11, 2019), https://www.chicagotribune.com/entertainment/music/howard-reich/ct-ent-cso-musicians-union-0311-story.html.

[27] Brian Davids, *Adam Brody on 'Ready or Not' and His Lost 'Justice League' Movie*, HOLLYWOOD REP. (Aug. 26, 2019), https://www.hollywoodreporter.com/heat-vision/adam-brody-ready-not-his-lost-justice-league-movie-1234550.

[28] *Id.*

[29] Ates, *supra* note 2.

[30] Alex Ates, *What Union Actors Should Know About Union Strikes*, BACKSTAGE (Jan. 10, 2019), https://www.backstage.com/magazine/article/union-actors-sag-strikes-66695/.

[31] *Id.*

[32] *Id.*

[33] Ates, *supra* note 2.

counterparts.[34] For example, many nonunionized performers "appearing in fringe and storefront productions . . . make from $0 . . . to $200 a week" and must work subsequent jobs to pay the bills.[35] Rarely is this because the production company is "stingy . . . The money simply isn't there."[36] As a result, production companies and other performing arts employers "try to save money by classifying their workers as independent contractors rather than employees."[37]

Performing arts contracts typically attempt to dictate performer status as that of an independent contractor or as that of an employee.[38] Higher-profile performing arts work "is covered under collective bargaining agreements, with workers classified as payroll employees."[39] Nonunionized performers, on the other hand, must navigate and grapple with contacts written disadvantageously to their independent contractor status. However, if the industry wants to ensure a sustainable future for all theatre workers, then those with the power have a "legal, ethical, and moral obligation to abide by the law and to educate our colleagues about their responsibilities."[40]

Across the working class of nonunionized stage performers are actors, musical theater performers, ballet dancers,

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[34] Logan Culwell-Block, *How a Low-Budget Theatre Can Still Go High Tech*, PLAYBILL (Sept. 13, 2018), www.playbill.com/article/how-a-low-budget-theatre-can-still-go-high-tech.

[35] Nina Metz, *How Much Do Actors Get Paid?*, CHI. TRIB. (Jan. 28, 2007), https://www.chicagotribune.com/news/ct-xpm-2007-01-28-0701280271-story.html.

[36] *Id.*

[37] Michael Steinberg & Kathryn White, *Classifying Artists and Skilled Technicians as Employees or Independent Contractors under New York Law*, SHEARMAN & STERLING LLP 2 (Aug. 1, 2016), https://www.probonopartner.org/wp-content/uploads/2016/08/Classifying_Artists_as_Employees-Shearman-Sterling-LLP.pdf.

[38] Margot Roosevelt & Ryan Faughnder, *California has a new law for contract workers. But many businesses aren't ready for change*, L.A. TIMES (Sept. 29, 2019), https://www.latimes.com/business/story/2019-09-27/ab5-independent-contractors-how-businesses-are-responding.

[39] *Id.*

[40] Daniel B. Thompson, *Independent Contractors and the American Theatre*, HOWLROUND THEATRE COMMONS (Nov. 10, 2015), https://howlround.com/independent-contractors-and-american-theatre#block-comments.

opera singers, stage acrobats, orchestra players, instrumentalists, exotic dancers, and more.[41] This working class suffers massive misclassification in need of serious reform for the reasons provided herein.[42]

This Article will show that performing artists are employees and bear un-waivable statutory rights of employment. This Article is to serve as notice to performing arts employers who are under the mistaken impression that a performer can work in nonemployment status as an independent contractor. For those employers who willfully hire performers in spite of the law, it is a shot across the bow.

II. ANALYSIS: PULLING BACK THE CURTAIN OF EMPLOYMENT LAW

"*Not fair terms, and a villain's mind*."[43]

A. THE PLOT: LEGAL MISCLASSIFICATION

Misclassification, as it pertains to employment law, is an illegal practice in which an employer improperly declares an employee as an independent contractor.[44] In response to an apparent rise in employee misclassification, the Internal Revenue Service ("IRS") demonstrated a federal-level shift away from employer punishments and toward incentives for compliance.[45] In 2011, the IRS announced the Voluntary Classification Settlement Program that enabled a low-cost means for employers to rectify proper classification under federal tax laws.[46]

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[41] *See* Gary S. Eisenkraft, *Better Safe than Sorry Theater Groups and Independent Contractor Rules*, EISENKRAFT CPA & CONSULTING SERVICES, https://www.art-newyork.org/assets/member-documents/theater-groups-and-ic-rules.pdf (last visited April 20, 2020).

[42] *Id.*

[43] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3.

[44] *Employee Misclassification*, NAT'L CONF. OF ST. LEGISLATURES, www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx (last visited April 20, 2020).

[45] Deknatel & Hoff-Downing, *supra* note 7, at 62.

[46] I.R.S. News Release IR-2011-95 (Sept. 21, 2011).

Notably, proper classification as an employee or as an independent contractor is not determined by contract.[47] Furthermore, misclassification cannot be surmounted by an express agreement between an employer and a worker.[48] A worker cannot waive employee status because employee status is statutory in nature and incapable of waiver.[49] The protections of employee status are structured in favor of the worker to insulate the worker from the treachery of unequal bargaining power that exists in nonunionized employer relationships.[50] Nonunionized performing arts industry's misclassification pervades the performing arts industry across the United States.[51]

It should be noted that misclassification is not unprecedented.[52] For instance, the construction,[53] salon,[54] and film[55] industries have struggled with the misclassification of their employees. Entertainment lawyer Gordon Firemark wrote that "[t]he IRS view[s] . . . that most crew members, actors, and others working on a film production should be classified as employees, not independent contractors," and that statutory rights, therefore, attach and "taxes should thus be withheld."[56] In any case, Firemark expressly cautioned that "merely declaring in a contract

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[47] *See* W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002).

[48] *Id.*

[49] Verdugo v. Alliantgroup, L.P., 187 Cal. Rptr. 3d 613, 616 (Ct. App. 2015); *see also* Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1267–68 (9th Cir. 2017).

[50] Aditi Bagchi, *The Myth Of Equality In The Employment Relation*, 2009 MICH. ST. L. REV. 579, 584–85 (2009) (University of Pennsylvania Law School Assistant Professor Bagchi laments even in general unionized employment contexts there exists a "false image of unions as equal in strength to employers.").

[51] Thompson, *supra* note 40.

[52] Deknatel & Hoff-Downing, *supra* note 7, at 69.

[53] *Id.*

[54] Tina Alberino, *The 20 Factor IRS Test: Independent Contractors in the Salon*, THIS UGLY BEAUTY BUS. (May 10, 2014), https://www.thisuglybeautybusiness.com/2014/05/the-20-factor-irs-test-why-independent.html.

[55] Gordon Firemark, *Do You Hire An Independent Contractor Or Employee (For Your Film)*, FILMMAKING STUFF (Feb. 14, 2017), https://www.filmmakingstuff.com/independent-contractor-or-employee/.

[56] *Id.*

that the parties are independent contractors will do little to persuade the authorities that this is in fact the case."[57] Rather, courts will look to the statutory framework enumerating the criteria for employees and independent contractors to determine the status of work relationships.

In California, legislators signed Assembly Bill 5 into law with an effective date for January 2020.[58] Assembly Bill 5's purpose is to stop misclassification of employees,[59] "which erodes basic worker protections like the minimum wage, paid sick days, and health insurance benefits."[60] In anticipation of California's law, music industry representatives actively lobbied for an independent contracting exemption for musicians.[61] Nevertheless, legislators did not budge.[62] The *Los Angeles Times* reported that the Bill "does not include carve-outs for entertainment industry laborers including musicians and film crew workers."[63]

J. Ross Parelli, a California-based producer and non-profit director, lamented Assembly Bill 5, "[i]f I pay minimum wage, health insurance, paid sick days, overtime … I'm adding 30% to my labor costs."[64] A defense against proper worker classification centered on cost-market analysis unfortunately parallels archaic pro-slavery sentiments that the low labor cost of slavery fixed the production costs and controlled the market.[65] However, the fact that an economic model requires illegal practices to succeed is not an argument to support illegal practices; it is an argument against such an economic model. Parelli, as an employer, believes that she requires independent contractors for marketing, making music videos, and so on to do her job as

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[57] *Id.*

[58] Roosevelt & Faughnder, *supra* note 38.

[59] *Id.*

[60] John Myers, Johana Bhuiyan & Margot Roosevelt, *Newsom signs bill rewriting California employment law, limiting use of independent contractors*, L.A. TIMES (Sept. 18, 2019), https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california.

[61] Roosevelt & Faughnder, *supra* note 38.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] FREDERICK L. OLMSTED, THE COTTON KINGDOM 111 (Sampson Low, Son & Co., 2d ed. 1962).

producer.[66] Parelli, also a 38-year-old award-winning, international touring professional singer and emcee, recognizes that "[o]ur whole millennial generation relies on being independent contractors," [67] but fails to recognize that they do not have to.

The national epidemic of performer misclassification puts artists at risk of injury, discrimination, and financial loss.[68] Misclassification deprives artists of indelible rights. It affects fellow employers who follow the law and properly classify employees in that state.[69] It divests millions from state and local governments in unpaid taxes, absorbed costs, and lost payments to insurance funds and workers compensation funds.[70]

Employment lawyers have noted that companies complying with classification statutes are concerned about the impact these tactics have had on their ability to compete in the marketplace against noncomplying companies.[71] Employers who do pay such taxes suffer unfair competition. [72] Across the proverbial aisle from the performing arts companies who misclassify are performing arts companies that have procured the necessary insurance policies and bear the responsibilities of union employment. Misclassification used as a cost-cutting measure is not only unethical but it leads to a saturated market of eligible performing arts companies all vying for the limited amount of federal grants and donations offered through underwriting.[73] The ramifications of misclassification thus extend beyond the individual worker.

Generally, the scholarship on the subject of misclassification is extensive.[74] The scholarship relating to performing artist misclassification, however, has not addressed

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[66] Roosevelt & Faughnder, *supra* note 38.

[67] *Id.*; *see also*, *Award-Winning Artist J Ross Parrelli Returns in Full-Force After Hiatus, Greatness Now Available*, ULSOUNDS, https://ulsounds.com/j-ross-parelli-greatness/ (last visited April 20, 2020).

[68] Deknatel & Hoff-Downing, *supra* note 7, at 55.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 82.

[72] *Id.* at 55.

[73] *Id.* at 82.

[74] Deknatel & Hoff-Downing, *supra* note 7.

possible solutions to this "gray area" of employment law. [75] In fact, some scholarship tacitly advocates for the legality of performing arts industry misclassification.[76]Alternatively, this Article argues that the performing arts industry is unique in its demands of its workers who deserve their rightful recognition as employees.

B. THE PLOT TWIST: FACTUAL DANGERS FOR MISCLASSIFIED PERFORMERS

Injury is to be expected in the performing arts industry.[77] It is a "part of a dancer's life, as it is for athletes."[78] However, unlike a professional athlete's life, a stage professional may not have guaranteed employment status, whereas "professional athletes are employees of either their team or their league (MLB, NFL, NBA, etc.)."[79] Moreover, an athlete's employment status is guaranteed regardless of endorsements and side ventures.[80] Stakes are similarly high for stage performers with major endorsements such as Under Armour's endorsement of ballet-dancer Misty Copeland, [81] and Rolex's endorsements of conductor Gustavo

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[75] Thompson, *supra* note 40.

[76] Sarah Howes, *Creative Equity: A Practical Approach To The Actor's Copyright*, 42 MITCHELL HAMLINE L. REV. 70, 86 (2016) (stating that "AEA actors enjoy sought-after, although short-lived, employee-status roles, whereas non-union actors operate as independent contractors.").

[77] Sarah L. Kaufman, *When rips, tears and falls kill a dancer's career (or don't)*, WASH. POST (June 29, 2018), https://www.washingtonpost.com/lifestyle/a-ballerina-just-suffered-a-terrible-injury-is-her-career-over/2018/06/29/86cb5740-68ff-11e8-bf8c-f9ed2e672adf_story.html.

[78] *Id.*

[79] Steven Chung, *3 Reasons Why It Is Difficult To Determine Whether A Worker Is An Employee Or An Independent Contractor*, ABOVE THE LAW (Oct. 9, 2019), https://abovethelaw.com/2019/10/3-reasons-why-it-is-difficult-to-determine-whether-a-worker-is-an-employee-or-an-independent-contractor/.

[80] *Id.*

[81] Julie Creswell, *Under Armour's Stock Tanks as Troubles Pile Up*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/business/under-armour-stock-investigation.html.

Dudamel, operatic tenor Plácido Domingo, and operatic soprano and cast-member of PBS' "Downton Abbey," Kiri Te Kanawa.[82]

Workplace injuries in the performing arts are often as severe—indeed, often identical—to those commonly incurred by professional athletes.[83] American Ballet Theatre corps member, Lauren Post, suffered a torn anterior cruciate ligament ("ACL") in her left knee after catching her foot in the hem of her costume while performing on stage at the Metropolitan Opera House.[84] The injury required her to stop dancing and undertake a procedure in which surgeons removed both muscle and tendon from her hamstring in order to repair her ACL.[85]

Other injuries are nationally well-documented. For instance, the Broadway production of "Spider-Man Turn Off the Dark," written by U2's Bono and the Edge, required performers to execute dangerous stunts in a notorious run that ended after multiple injured performers needed emergency hospitalization.[86] Most notably, in December 2010, an actor portraying Spider-Man, Christopher Tierney, fell from the Broadway stage during a performance.[87] Due to the fall, Tierney broke four ribs, his skull, a shoulder, an elbow, three vertebrae and bruised his lung.[88] That same month, an actress in the cast suffered a concussion.[89] Other injuries among various Spider-Man cast members had previously delayed the production's problematic opening-date.[90]

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[82] *Rolex and the Arts*, ROLEX, https://www.rolex.com/world-of-rolex/the-arts.html (last visited April 20, 2020).

[83] Kaufman, *supra* note 77.

[84] *Id.*

[85] Katherine Beard, *Here's How This ABT Dancer Recovered From an Injury that Could Have Ended Her Career*, DANCESPIRIT (Aug. 10, 2017), https://www.dancespirit.com/interview-with-abt-corps-dancer-reveals-how-she-recovered-from-a-career-ending-injury-2471416227.html.

[86] Julia Lull, *Another 'Spider-Man' actor injured on Broadway*, CNN (Aug. 16, 2013), https://www.cnn.com/2013/08/16/showbiz/spiderman-broadway-injury/index.html.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

Curiously, the Spider-Man production had been initially helmed by stage-director Julie Taymor,[91] who adapted Disney's animated blockbuster "The Lion King" into a Broadway production featuring complicated pain and injury-inducing wearable hybrids of costume and puppetry.[92] The costume designer was compelled to change garments to lighter, more durable fabrics in response to cast injury.[93] Such changes included shedding glass and stone beads from certain costumes lighten the load for the actors.[94] Nevertheless, the costume designer ultimately believed that "[b]ack and neck pain are part of the gig because of the headdresses and because some of the [unique] costume movements are not familiar even to dancers."[95] Most significantly, the production became one of the few to have onsite physical therapy.[96]

For stage performers, work-induced injury is not limited to the literal leaps and bounds of ballerinas and stage actors. Likewise, the risk of work injury is not limited to stage work involving sets and moving scenery. Opera singers,[97] violinists,[98]

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[91] Jeff Lunden, *Broadway's 'Spider-Man' Musical Turns Off The Lights At Last*, NPR (Jan. 3, 2014), https://www.npr.org/2014/01/03/256602469/broadways-spider-man-musical-turns-off-the-lights-at-last.

[92] Elysa Gardner, *Julie Taymor On The Lasting Legacy Of The Lion King*, BROADWAY DIRECT (Nov. 6, 2017), broadwaydirect.com/julie-taymor-lasting-legacy-lion-king/.

[93] Ron Dicker, *The Mane Event / It's a jungle in there -- behind the scenes at 'The Lion King'*, SFGATE (Jan. 25, 2004), https://www.sfgate.com/entertainment/article/The-Mane-Event-It-s-a-jungle-in-there-behind-2827511.php.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] American operatic bass and World War II veteran Giorgio Tozzi suffered a career-limiting injury at the Metropolitan Opera when scenery fell striking his head resulting in permanent hearing issues and pitch problems. *See* Giorgio Tozzi, *Backache, Barber and Bing*, JUSSI BJÖRLING SOC'Y (2017), https://www.bjorlingsocietyusa.org/articles/2017/3/10/backache-barber-and-bing; *see also* Margalit Fox, *Giorgio Tozzi, Esteemed Bass at the Met, Is Dead at 88*, N.Y. TIMES (June 2, 2011), https://www.nytimes.com/2011/06/02/arts/music/giorgio-tozzi-esteemed-bass-at-the-met-dies-at-88.html.

[98] Professor Dianna Kenny conducted a study of orchestral injury for the University of Sydney in 2013. Professor Kenny found that

oboists,[99] and even orchestral conductors[100] are susceptible to physical injury while performing, and "like a runner . . . on a sprained ankle . . . can get through [pain] and nobody's going to be the wiser."[101]

Ending misclassification in the performing arts industry can increase accountability of employers and promote procurement of adequate worker's compensation insurance.[102] Most importantly, it can induce cost-saving measures by situating such costs with the employer and not upon the performing arts employee's private insurance or, for uninsured artists, state resources.[103]

C. THE CAST: EMPLOYERS, EMPLOYEES, AND INDEPENDENT CONTRACTORS

An employer's legal status is derived from the master-servant relationship under agency law.[104] Per the Second Restatement of Agency, a master is one "who employs an agent to perform service in his affairs and who *controls* . . . the physical

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"84 percent of professional classical musicians have experienced pain severe enough to interfere with their performance." Dianna Kenny, *Musicians suffering for their art*, UNIV. OF SYDNEY (Oct. 2, 2013), https://www.sydney.edu.au/news/84.html?newsstoryid=12437. Moreover, half of Sydney's sampled 377 orchestral players "reported that they were currently experiencing pain" at the time of the survey. *Id.*

[99] Miami Symphonic Band Oboist, Janice Thomson, fell on the tile floor of the Maurice Gusman Concert Hall, fatally hitting her head "minutes before a season-opening concert." Jackie Salo, *Oboe player Janice Thomson dies in fall at concert hall before performance*, N.Y. POST (Nov. 13, 2019), https://nypost.com/2019/11/13/oboe-player-dies-in-fall-at-concert-hall-before-performance/.

[100] Janelle Gelfand, *Is playing violin as dangerous as football?*, CIN. ENQUIRER (Mar. 17, 2017), https://www.cincinnati.com/story/entertainment/2017/03/13/champion-player-returns-injured-list/98860296/.

[101] An instrumentalist's work injuries can occur from repetitive action, such as the "repetitive strokes of a [violinist's] bow" or a percussionist's mallet. The potential for injury can strike *any* person on stage, even the conductor, as "even a maestro's baton can cause [repetitively induced] injuries such as nerve damage, joint, muscle or tendon problems." *Id.*

[102] Myers, Bhuiyan & Roosevelt, *supra* note 60.

[103] Deknatel and Hoff-Downing, *supra* note 7, at 74.

[104] RESTATEMENT (SECOND) OF AGENCY § 2(1).

conduct of the other in the performance of the service."[105] A servant is employed by a master to perform services for the master when the servant's physical conduct in the performance of the service is controlled or is subject to the right to control by the master.[106]

Under the Fair Labor Standards Act, an "employer" is any person acting directly or indirectly in the interest of an employer in relation to an employee.[107] Principles of employment law establish that "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work."[108] Moreover, a worker is an employee even if the work is performed gratuitously. A lack of payment "[will] not relieve a principal of liability."[109] At its very base, the operative inquiry of employment, as a legal concept, is the level of control exerted over the worker and not the amount or means of payment.[110] Nor is it affected by contractually designating a title.[111]

Returning to the Fair Labor Standards Act, it provides albeit somewhat circularly that an "employee" is "any individual employed by an employer."[112] Similarly, for one to be employed means "to suffer or [be] permit[ted] to work."[113] The Act also tacitly recognizes work in the performing arts as employment in its mandates regarding child labor.[114] Furthermore, the wage "paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are

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[105] *Id.* (emphasis in italics).

[106] RESTATEMENT (SECOND) OF AGENCY § 2(2).

[107] Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d).

[108] RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a).

[109] *Id.*

[110] RESTATEMENT (SECOND) OF AGENCY § 2(2).

[111] *Id.*

[112] Fair Labor Standards Act of 1938, 29 U.S.C. § 203©(1).

[113] *Id.* § 203(g).

[114] Fair Labor Standards Act of 1938, 29 U.S.C. § 213©(3) ("The provisions of section 212 of this title relating to child labor shall not apply to any child *employed as an actor or performer* in motion pictures or theatrical productions, or in radio or television productions.") (emphasis added).

customarily furnished by such employer to his employees."[115] Thus, providing housing and amenities to performing artists does not increase an independent status; rather, it more greatly secures their employee status.[116]

Alternatively, the Second Restatement defines an independent contractor as one "who contracts with another to do something for [that other] but who is not controlled" nor is subject to control by the other.[117] Rather, the independent contractor maintains self-control over "physical conduct in the performance" of the act that is performed for the other.[118] Merely reserving the right to control the servant without ever exercising that right is not sufficient to establish an independent contractor. When any control is established over the means or methods of performance, the independent contractor is no longer independent. Instead, the contractor is an employee.

A general rule to properly identifying independent contractors is that the right to control an independent contractor is limited the right to "control or direct only the *result* of the work."[119] By contrast, an employer renders an independent contractor an employee by controlling "what will be done and how it will be done."[120]

Federal tax forms indicate that if an employer files a payment with a 1099 form, then the worker is presumed to be an independent contractor instead of an employee.[121] The status of employee, as opposed to independent contractor, brings with it "a vast array of legal protections and benefits."[122] The 1099 form, however, is not dispositive as to the question of employment status.[123] Therefore, the issues over semantic titles of independent contractor or employee is not solved simply via a 1099 form. In

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[115] *Id.* §203(m)(1).

[116] *Id.*

[117] RESTATEMENT (SECOND) OF AGENCY § 2(3).

[118] *Id.*

[119] *Independent Contractor Defined*, IRS (Jan. 23, 2020), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined.

[120] *Id.*

[121] Deknatel & Hoff-Downing, *supra* note 7, at 54.

[122] *Id.*

[123] *Id.* at 54–55.

addition to analyzing beyond mere forms, courts generally look beyond the text in an employment contract.[124]

On behalf of the *American Bar Association*, Attorney Robert W. Wood wrote that when one hires "an independent contractor, one is paying [solely] for a product or result" without the means to control how that product or result is accomplished.[125] Wood stated that when one contracts "[w]ith an employee, one is paying for . . . what is asked, whatever that might be," as "[w]ith employees, one controls not only the nature of the work, but the method, manner, and means by which" the employee does such work.[126] Proper employment classification is significant insofar as state statutory rights attach to employees and simply do not for the independent contractor.[127]

The benefits of employee status are not one-sided and most importantly do not solely benefit the employee. For example, in some states, employee status insulates an employer from greater exposure, such as civil tort liability.[128] The employee may be limited by the state itself to a fixed amount of compensable recovery.[129] An employee's case may be limited to review by an administrative body, as opposed to the filing of a civil suit before a trial court.[130]

Therefore, while there is much danger for the misclassified employee, the consequential legal risks for a

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[124] W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002).

[125] Robert W. Wood, *Do's and Don'ts When Using Independent Contractors*, AM. BAR ASS'N. (June 30, 2011), https://www.americanbar.org/groups/business_law/publications/blt/2011/06/03_wood/.

[126] *Id.*

[127] Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case For Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239–40 (1997).

[128] Walton v. Ill. Bell Telephone Co., 818 N.E.2d 1242 (Ill. App. 2004). The Illinois Appellate Court affirmed the sole avenue of recovery for an employee is administered in its worker's compensation commission, and thus injured employees cannot utilize civil tort law in the state's circuit courts. *Id.*

[129] *Id.*

[130] *Id.*

misclassified employee ultimately falls upon the employer who controlled his employee.

D. A PLOT DOTH THICKENED: MISCLASSIFIED PERFORMING ARTISTS

"*This above all: to thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man*."[131]

1. *APPLICATION OF COMMON-LAW TO THE PERFORMING ARTS INDUSTRY*

In order for performing artists to be truly classified under common law as independent contractors, the initial point of inquiry becomes whether the employer truly controls the employer.[132] In order to be properly characterized as an independent contractor, the permissible control over a performer would be limited to only the completion of the performance and not any means leading up to that performance.[133]

The reality for performers is that an employer's control extends beyond the mere direct results.[134] Control is typically exerted via a rehearsal process dictating what the performance itself will be "and how it will be done."[135] Performances are not simply mounted and improvised all in one quick presentation. Rather, the process is one in which performers "spend hours in the practice room, followed by hours of rehearsal before the final performance."[136]

2. *REWRITING THE PLOT: EXOTIC DANCERS MIGHT BE THE KEY TO UNLOCKING EMPLOYMENT RIGHTS OF STATE PERFORMERS*

"*They say the owl was a baker's daughter. Lord, we know what we are, but know not what we may be. God be at your table*."[137]

The ever-growing body of common law relating to employment fails to directly address how it relates to the

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[131] WILLIAM SHAKESPEARE, HAMLET act 1, sc. 3.
[132] RESTATEMENT (SECOND) OF AGENCY § 2(3).
[133] *Id.*
[134] *Independent Contractor Defined*, *supra* note 119.
[135] *Id.*
[136] Gelfand, *supra* note 100.
[137] WILLIAM SHAKESPEARE, HAMLET act 4, sc. 5.

performing arts industry. In close proximity, however, is the existing case-law on exotic dancers, which may be instructive upon, relevant to, and indeed a part of the performing arts industry. Dancers' legal battles for employment rights are applicable across all working forms of stage performance.

Exotic dancers are among the class of paid stage performers who suffer well-documented misclassification.[138] They have made national headlines in their movement demanding labor reform to ensure status as employees.[139] An exotic dancer in Charlotte, North Carolina, sued "Club Onyx" in July 2019, alleging violations of state and federal labor laws for failure to pay overtime and the club's taking of her tips.[140] In New York, an exotic dancer "signed on to one lawsuit" in this wave of reform, but the club "paid out, and nothing changed."[141] While clubs typically do not pay the dancers a salary, they do tend to control the dancers' hours, outfits, performances, and chargeable amounts for private dances.[142]

In *Chaves v. King Arthur's Lounge, Inc.*, the plaintiff, Lucienne Chaves was an exotic dancer at King Arthur's Lounge ("King Arthur's").[143] King Arthur's classified Chaves and its dancers as independent contractors.[144] King Arthur's terminated Chaves after a dispute at work.[145] She subsequently sued to defend her rights under wage and hour laws.[146] The Superior Court of Massachusetts found that Chaves, as an exotic dancer, was indeed a misclassified employee.[147] The court noted, significantly, that it is the employer's right of control that is

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[138] *NC stripper sues exotic dance club over pay*, ASSOCIATED PRESS (July 20, 2019), https://www.cbs17.com/news/north-carolina-news/nc-stripper-sues-exotic-dance-club-over-pay/.

[139] Valeriya Safronova, *Strippers Are Doing It for Themselves*, N.Y. TIMES (July 24, 2019), https://www.nytimes.com/2019/07/24/style/strip-clubs.html.

[140] ASSOCIATED PRESS, *supra* note 138.

[141] Safronova, *supra* note 139, at 1.

[142] *Id.*

[143] Chaves v. King Arthur's Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *1 (July 30, 2009).

[144] *Id.*

[145] *Id.*

[146] *Id.* at *3.

[147] *Id.* at *19–20.

paramount to employment analysis, rather than the exercise of it.[148] That employer's right "is legally determinative," and King Arthur's retained that right as Chaves' employer.[149]

King Arthur's argued that because its usual course of business was selling alcohol and not exotic dancing, King Arthur's was not Chaves' employer and Chaves was not King Arthur's employee.[150] Moreover, King Arthur's argued that its strip dancing services are merely a form of entertainment "akin to the televisions and pool tables in a sports bar."[151] The Superior Court disagreed: "[a] court would need to be blind to human instinct to decide that live nude entertainment was equivalent to the wallpaper of routinely- televised matches, games, tournaments and sports talk in such a place. The dancing is an integral part of King Arthur's business."[152]

The court analyzed the control exerted upon those dancers and the artistic characteristics of such work and held that King Arthur's did exert a measure of control over the dancers.[153] The court noted several forms of control unique to the employment of exotic dancers. For instance, King Arthur's trained its performers as to how they should dance.[154] King Arthur's "hired and fired dancers."[155] Also, the club made its dancers perform according to a set shift schedule that King Arthur's determined.[156] Despite initial appearances of the dancers' artistic autonomy, the *Chaves* court found sufficient employment control exerted over Chaves as an exotic dancer.[157]

The finding that exotic dancers are qualified employees and not independent contractors is affirmed in *Monteiro v. PJD Entertainment of Worcester, Inc.*[158] Here, again, an exotic dancer

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[148] *Id.* at *7 (citing Rainbow Dev., L.L.C. v. Dep't of Indus. Accidents, No. SUCV2005-00435, 2005 Mass. Super. LEXIS 586, at *7 (Nov. 14, 2005)).

[149] *Id.*

[150] *Id.* at *9.

[151] *Id.*

[152] *Id.* at *11.

[153] *Id.* at *7–8.

[154] *Id.* at *8–9.

[155] *Id.*

[156] *Id.*

[157] *Id.* at *7–8.

[158] Monteiro v. PJD Entm't of Worcester, Inc., No. 10-1930, 2011 Mass. Super. LEXIS 296 (Nov. 23, 2011).

brought a misclassification suit against her employer night club, Centerfolds.[159] She alleged that Centerfolds violated state wage laws, including those relating to minimum wage and overtime.[160] The central issue was whether exotic dancing was within the usual course of the club's business, and if so, then the exotic dancer would be deemed an employee.[161] The court determined that "[a]n establishment that serves alcohol and provides a venue for exotic dancers *is* in the business of providing adult entertainment."[162] Thus, as in *Chaves*, the exotic dancer was entitled to the hourly minimum wage as an employee.[163]

In the greater performing arts industry, the control that the *Chaves* and *Monteiro* courts recognized is applicable to performance schedules that are established independently of an individual performer's schedule.[164] A producer will establish a "clearly laid-out rehearsal schedule ahead of time" so that performers can "accommodate the production into their schedules."[165] That performing arts companies reserve the right to fire performers prior to the final performance is a level of control indicating employment.[166] The ultimate example of control among these various indicators of employment is the process of rehearsals that function to shape the artist's performance.[167]

For the reasons that follow, rehearsal processes in the performing arts industry are no different than various forms of employee training and control.[168] Stage performers are often subject to a form of rehearsal called "blocking," in which performers are directed to act from specific locations on the

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[159] *Id.* at *1.

[160] *Id.*

[161] *See id.* at *1, *2, *3.

[162] *Id.* at *6 (emphasis added).

[163] *Id.*

[164] Kerry Hishon, *Creating a Rehearsal Schedule*, THEATREFOLK (Feb. 27, 2017), https://www.theatrefolk.com/blog/creating-rehearsal-schedule/.

[165] *Id.*

[166] Chaves v. King Arthur's Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *8–9 (July 30, 2009).

[167] *Id.*

[168] MALU PROD., *supra* note 4 (establishing call time, rehearsals, sound check, performance schedule, performance locations, rights and responsibility to direct the process of performer).

stage.[169] Blocking also establishes the manner in which the performer should move, stand, sit, lay down, etc. on stage.[170] The performance term, "working," is a process in which performers rehearse the stage movements that occur after a performance has been "blocked."[171] The scene is "worked" by rehearsing it specifically for the purposes of fluidity and memorization.[172] The requirement of memorization is colloquially known as "performing off-book."[173] From there, rehearsal processes include "[r]unning and polishing," once performers are "off-book."[174] This process necessitates running the full performance to achieve the goal of a final, polished and presentable product: the performances.[175]

Next, "[t]ech-rehearsals" are a series of rehearsals specifically purposed to allow for perfecting the technical aspects of a show.[176] This period also allows performers a chance to become familiar with the set itself.[177] These aspects include sound effects, lighting, and the incorporation of equipment such as fog machines.[178] It is often a series of rehearsals commonly known as "tech-week."[179]

For productions involving sung music, there is the "sitzprobe," a German word that means "seated rehearsal."[180] This is a mandatory rehearsal that purposefully does not use the stage, props, or production elements.[181] Instead, the sitzprobe's purpose is to isolate the music and achieve cohesiveness by rehearsing only that element with the entire performing cast and orchestra.[182]

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[169] Tom Vander Well, *Preparing For A Role: Rehearsal Process*, WAYFARER (Feb. 3, 2013), https://tomvanderwell.com/2013/02/03/preparing-for-a-role-rehearsal-process/.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Hishon, *supra* note 164.

[181] *Id.*

[182] *Id.*

Finally, "dress-rehearsals" are rehearsals simulated as full performances for the purpose of running the show as if it is the final product, allowing mistakes to occur without immediate correction.[183] As it were, whatever happens, happens. Performers receive what are known as "notes" from the director after rehearsals.[184] These notes indicate what the performer must change before the next rehearsal.[185] "[C]all-time," is the time at which a performer is required to arrive for the purposes of rehearsal or performance.[186]

For performing arts employers who may believe that some control is permissible over a contractor's work, some states are sensitive to slight exertions of control over a worker.[187] For instance, Illinois recognized that a "claimant was exposed to a greater risk than the general public because she was continually forced to use stairs [in order for her] to seek personal comfort during her workday."[188] Therefore, once again, any exertion of control over a performing artist factors into employment analysis.

Among subtle relevant examples of control includes orchestral duties such as the manner in which two string players share one music stand with one player designated as the "inside player," responsible for turning pages.[189] Other examples in performing arts agreements with purported "independent contractors" include contractual requirements for a performer to use only original music;[190] to perform "in a professional

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[183] Vander Well, *supra* note 169.

[184] *Id.*

[185] *Id.*

[186] *Glossary of Technical Theatre Terms – Beginners*, THEATERCRAFTS.COM http://www.theatrecrafts.com/pages/home/topics/beginners/glossary/ (last visited April 20, 2020).

[187] Ill. Consol. Tel. Co. v. Indus. Comm'n, 314 Ill. App. 3d 347, 350 (App. Ct. 2000).

[188] *Id.*

[189] RICHARD KING, RECORDING ORCHESTRA AND OTHER CLASSICAL MUSIC ENSEMBLES 51 (Routledge, 2017).

[190] *Performance Agreement*, DEEP ELLUM ARTS FESTIVAL, http://deepellumartsfestival.com/wp-content/uploads/2018/04/performance_agreement_2019.pdf (last visited April 20, 2020) (stating that any independent "[c]ontractor shall provide a performance of only original music composed, and whose rights are owned, by the artist contracted. Performance will be conducted in a professional manner.").

manner;"[191] prohibiting performers from "drinking of alcoholic beverages . . . while on the premises of the engagement, or during said hours of the performance(s);"[192] requiring that performers "do not eat, smoke, or drink beverages (other than water) while wearing your costume;"[193] requiring that a performer participate in "striking" a set after the show is complete;[194] reserving strict times for the performer's arrival, known as "call-times," [195] establishing a required procedure to contact a stage manager if the performer will be more than ten minutes late;[196] establishing performer guidelines or warning that a "violation of actor guidelines [could] result in immediate dismissal from the production;"[197] controlling when or where the performer's equipment may be set up;[198] contractual reservations of right to direct the performer's performance;[199] requiring that company "policies . . . should be followed as written," or else "[f]ailure to do so may result in a system of warnings or immediate dismissal from the production."[200] Each and every exertion of control in the performing arts defeats the proposition that the performer is an independent contractor.

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[191] *Id*.

[192] *Allan Hancock College Associated Students Agreement of Service*, ALLAN HANCOCK COLL., https://www.hancockcollege.edu/asbg/documents/Contract%20for%20Service.pdf (last visited April 20, 2020).

[193] *Lakewood Playhouse Actor Contract*, LAKEWOOD PLAYHOUSE, https://www.lakewoodplayhouse.org/uploads/8/1/1/6/81162538/0xx_blank_cast_adult.docx (last visited April 20, 2020).

[194] "Striking" is an industry term that means removal or deconstruction of a set after a production is completed. Ben Pesener, *Strike*, THEATRE DICTIONARY (Mar. 30, 2015), dictionary.tdf.org/strike/; *see, e.g.*, LAKEWOOD PLAYHOUSE, *supra* note 193, at 3 (stating "contractor will be compensated on CLOSING NIGHT of the Production after participating with Strike.").

[195] MALU PROD., *supra* note 4, at 1–2.

[196] LAKEWOOD PLAYHOUSE, *supra* note 193, at 2.

[197] *Id*.

[198] ALLAN HANCOCK COLL., *supra* note 192, at 1.

[199] MALU PROD., *supra* note 4, at 2.

[200] LAKEWOOD PLAYHOUSE, *supra* note 193, at 2.

3. *STICK TO THE SCRIPT: THE INTERNAL REVENUE SERVICE'S EMPLOYMENT DIRECTIVES APPLIED TO PERFORMING ARTS*

Under directives from the IRS,[201] employment status may be established pursuant to IRS Rev. Rul. 87-41, 1987-1 C.B. 296. According to the IRS, there exist twenty factors of employment.[202] The following analysis of ten of the factors supports the proposition that performing artists are indeed employees and not independent contractors.

a) *Instructions*

If the person for whom the services are performed has the right to require compliance with instructions, then that indicates employee status.[203] Performers are hired to perform a specific type of work as instructed by their production company. For instance, actors perform scripts, which are instructions on how to portray a character.[204] Musicians perform musical scores, which are instructions on how to play a composition.[205] Dancers perform notated choreography, which are instructions on how to move.[206] While there may be room for minor deviation and artistic expression, performers are primarily restricted to the style, format, and direction of their producer.

Performing arts contracts themselves contain examples of instructions requiring compliance. For example, a performing arts company in Washington states that even though the performer is hired as an independent contractor, that performer is subject to the

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[201] Federal directives operate both independent of and supreme to state common law tests. *See* IRS Rev. Rul. 87-41 (1987).

[202] *Id*.

[203] *Id*.

[204] GABRIEL A. RADVANSKY, HUMAN MEMORY: SECOND EDITION 144 (Routledge, 2nd ed. 2011).

[205] Satoshi Kawamura & Hitoaki Toshida, *KANSEI (Emotional) Information Classifications of Music Scores Using Self Organizing Map*, *in* TRENDS IN APPLIED KNOWLEDGE-BASED SYSTEMS AND DATA SCIENCE 574, 575 (Hamido Fujita et al., 2016).

[206] Jody Sperling, *How do you write down choreography?*, TIME LAPSE DANCE (Feb. 2, 2010), jodysperling.com/process/how-do-you-write-down-choreography/.

direction of the play house and certain behaviors would result in a reduced stipend.[207]

b) *Training*

Worker training indicates that the person for whom services are performed wants the services performed in a particular manner. [208] Orchestras, singers, soloists, and instrumentalists typically rehearse a work in order to synthesize a conductor's musical ideas. Stage performers are conditioned throughout the rehearsal process to the director's intentions.[209] Similarly, choreography is taught to dancing performers in ballets, stage musicals, and dance ensembles consistent with the choreographer's artistic vision and must remain the same throughout a run of performances.[210] Thus, any form of practice or rehearsal is training.

c) *Integration*

"Integration of the worker's services into the business operations" of the person for whom services are performed is an indication of employee status. [211] Performers whose work becomes a recurring part of artistic administrative choices become integrated. Administrative choices specifically taking the performer's capabilities in mind constitute integration. This is especially true of companies that mount a production as a "star-vehicle" to showcase specific aspects of cast members of a company.[212] Decisions by management to produce certain works that are within the wheelhouse of the performers supports a theory of employment.[213]

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[207] LAKEWOOD PLAYHOUSE, *supra* note 193, at 6.

[208] Rev. Rul. 87-41, 1987-1 C.B. 296.

[209] David Siegel, *Stage managers work long hours for rich rewards*, DC METRO (Nov. 8, 2019), https://dcmetrotheaterarts.com/2019/11/08/stage-managers-work-long-hours-for-rich-rewards/.

[210] *Id.*

[211] Rev. Rul. 87-41, 1987-1 C.B. 296.

[212] Nancy Churnin, *Stage/Nancy Churnin: Nostalgia Plays Well in San Diego*, L.A. TIMES (Sep. 3, 1992), https://www.latimes.com/archives/la-xpm-1992-09-03-ca-7032-story.html.

[213] Brittney Leemon, *Repertoire Programming Decisions Of Major West Coast Opera Companies In Washington, Oregon, And*

d) *Services Rendered Personally (Non-Delegable Services)*

If the services are required to be performed personally, then this indicates that the person for whom services are performed is interested in the methods used to the accomplish the work (which, in turn, indicates employee status).[214] Performing artists are typically hired for their unique capabilities and overall artistic production ideas. Nevertheless, the industry uses "understudies," performers who fill-in for a performer when that performer cannot meet the needs of the performance.[215] Nevertheless, the role of understudy is typically something for which a performer auditions.[216] This negates the ability for the primary performer to delegate her duties to another person, even if that other person is equally capable. When provided by a performing arts company, understudies are analogous to substitute teachers, who are employees trained and subject to rules in order to adequately substitute the primary employee.[217]

e) *Hiring, Supervising, and Paying Assistants*

If the person for whom services are performed hires, supervises, or pays assistants, this generally indicates employee status.[218] The performing arts personnel includes artistic directors, stage directors, assistant directors, conductors, assistant conductors, concertmasters, assistant concertmasters, section leaders, and other personnel throughout the respective

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California, UNIV. OF OR. 31 (June 6, 2017), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/22499/AAD_Leemon_Final Project_2017.pdf?sequence=4&isAllowed=y (stating that a "select few performers" may guide company choices in an industry).

[214] Rev. Rul. 87-41, 1987-1 C.B. 296.

[215] Erin McCarthy, *14 Behind-the-Scenes Secrets of Broadway Understudies*, MENTAL FLOSS (June 9, 2017), https://www.mentalfloss.com/article/501497/14-behind-scenes-secrets-broadway-understudies. ("Covers" is another industry term).

[216] *Id.*

[217] *See Substitute Teacher Training Manual*, GWINNETT CTY. PUB. SCH. 19–20, https://www.nctq.org/dmsView/16-2 (last visited April 20, 2020).

[218] Rev. Rul. 87-41, 1987-1 C.B. 296.

industries.[219] All of these roles indicate a chain of command and an element of supervision and control over the employee.

f) *Continuing Relationship*

A continuing relationship between the worker and the person for whom the services are performed indicates employee status.[220] The Literary Managers and Dramaturgs of the Americas contracts with performers "to make best efforts for [the artist] to be hired for revivals, transfers, co-productions, and tours of Theatre's production."[221] This type of recurring work establishes employment for performing arts environments in which the performer is paid for a performing arts season in multiple different productions.[222]

g) *Set Hours of Work*

"The establishment of set hours" for the worker indicates employee status.[223] Rehearsal processes are a "well organized" balance of stage rehearsals, wardrobe fittings, and other performer duties. These are "very carefully structured" schedules that can determine whether a performer works or continues to work in the production.[224] Performing arts "unions [establish] a fixed number [of] hours that can be worked by a performer without overtime."[225] However, simply put, nonunionized performers cannot dictate the time or length of rehearsals, performances,

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[219] *See* Lindsay Alissa King, *Hart Alumnae: Where Are They Now*, THEATERJONES (Nov. 8, 2019), www.theaterjones.com/ntx/features/20191108133357/2019-11-08/Hart-Alumnae-Where-Are-They-Now.

[220] Rev. Rul. 87-41, 1987-1 C.B. 296.

[221] *LMDA Sample Agreement (2018) – Development Dramaturgy Outside of a Festival Setting*, LITERARY MANAGERS AND DRAMATURGS OF THE AMERICAS, https://lmda.org/lmda-employment-guidelines-and-sample-contracts (last visited April 20, 2020).

[222] ROBERT BLUMENFELD, BLUMENFELD'S DICTIONARY OF ACTING AND SHOW BUSINESS 277 (Limelight, 2009) ("seasonal theaters" and "summer festival").

[223] Rev. Rul. 87-41, 1987-1 C.B. 296.

[224] DANIEL BOND, STAGE MANAGEMENT: A GENTLE ART 54 (Routledge, 2nd ed. 1998).

[225] *Id.*

costume fittings, production of promotional materials, the appropriate scheduling of breaks for meals, and rest.[226] Without union representation, those performers are at the performing arts company's sole discretion to determine their hours of work.

h) *Full-Time Required*

"If the worker must devote substantially full time to the business of the person . . . for whom services are performed," then this indicates employee status.[227] Although performing artists typically have full-time or part-time jobs elsewhere in order to supplement income, they spend substantial amounts of time rehearsing for a production.[228] Reportedly, only two percent of actors earn their sole income in that line of work.[229] Moreover, at any moment ninety percent of actors are out of work. [230] Therefore, supplemental income and side work is vital for stage performers. [231] Nevertheless, performers' work is time consuming. *DC Metro* reported that performing arts "stage manager[s] can work 60 to 75 hours per week during rehearsals, tech, and previews."[232] Even for individuals who moonlight in full-time jobs elsewhere, a tech week can mean twelve-hour rehearsal days.[233]

i) *Performing Work on Employer's Premises*

"If the work is performed on the premises of the person . . . for whom the services are performed," then this indicates

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[226] *Id.*

[227] Rev. Rul. 87-41, 1987-1 C.B. 296.

[228] PHILIP H. ENNIS & JOHN BONIN, UNDERSTANDING THE EMPLOYMENT OF ACTORS: A CONDENSATION OF A REPORT 13 (National Endowment for the Arts, 3rd report, 1977).

[229] Nicola Thorp, *Shaming actors for their day jobs is classism disguised as entertainment*, METRO (Oct. 25, 2019), https://metro.co.uk/2019/10/25/shaming-actors-day-jobs-classism-disguised-entertainment-10980997/.

[230] *Id.*

[231] *Id.*

[232] Siegel, *supra* note 209.

[233] Raven Snook, *A pain in the tech*, THEATRE DICTIONARY (June 28, 2016), dictionary.tdf.org/10-out-of-12/.

employee status, "especially if the work could be done elsewhere."[234] Some experts have argued that this is an "innocuous factor" in employment analysis.[235] This is because performing arts companies own property (concert halls, theaters, rehearsal rooms) specifically devoted to the company's production work.[236]

j) *Order or Sequence Test*

"If a worker must perform services in the order or sequence set by the person . . . for whom services are performed, that factor shows that the worker is not free to follow" his or her "own pattern of work," which indicates employee status.[237] For performing artists, the order of performance is often dictated by the script or material for which the performer is hired.[238] A performer cannot "rewrite a show, redirect it, redesign it . . . or otherwise change any other part of the complex puzzle that makes up a show."[239] Thus, a work chosen by an employer, with no room for the performer's deviation, determines the order or sequence. Furthermore, the rehearsal process and its sequence is determined by the performing arts company for reasons aforementioned. For instance, an orchestral conductor designs a schedule for the musicians to follow and that "rehearsal process must have a focus and direction that the conductor plans."[240] Therefore, both the performances and rehearsal process deprive the performer of control over the order or sequence of their work.

k) *Oral or Written Reports*

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[234] Rev. Rul. 87-41, 1987-1 C.B. 296.

[235] Deknatel & Hoff-Downing, *supra* note 7, at 101.

[236] *See* ROBERT COHEN, WORKING TOGETHER IN THEATRE: COLLABORATION AND LEADERSHIP 54 (Palgrave Macmillan, 2011) (stating that a performing arts company's "permanent assets . . . may include . . . a theatre building, scene and costume shops.").

[237] Rev. Rul. 87-41, 1987-1 C.B. 296.

[238] JOE DEER & ROCCO DAL VERA, ACTING IN MUSICAL THEATRE: A COMPREHENSIVE COURSE 224 (Routledge, 2nd ed. 2015).

[239] *Id.*

[240] JOHN F. COLSON, CONDUCTING AND REHEARSING THE INSTRUMENTAL MUSIC ENSEMBLE 135 (Scarecrow Press, 2012).

"A requirement that the worker submit regular or written reports" indicates employee status.[241] Performing artists receive "notes," a term used to describe the director's instructions to the performer for improvement.[242] Similarly, conductors communicate oral directions to performers,[243] and specific written notations are added to musical scores in order to dictate certain artistic preferences. For example, "bowings"[244] for string players and "breaths" for wind instruments[245] will impact the way the individuals in those groups perform.

l) *Payment by the Hour, Week, or Month*

"Payment by the hour, week, or month generally points to" employment status.[246] Employers attempt to sidestep employment classifications by labeling payments as stipends or flat-payments, as opposed to wages.[247] In the performing arts industry, flat-payments are sometimes deemed an honorarium.[248]

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[241] Rev. Rul. 87-41, 1987-1 C.B. 296.

[242] Simi Horwitz, *How Do You Give Notes?*, BACKSTAGE (Feb. 3, 2010), https://www.backstage.com/magazine/article/give-notes-60649/.

[243] COLSON, *supra* note 240.

[244] Bowings are a notated method for orchestras to achieve a tonal effect or articulation among a group of string players. It is accomplished by notating sheet music to reflect the desired effect to be performed by the ensemble. *See* Marvin Rabin & Priscilla Smith, *guide to orchestral bowings through musical styles*, UNIV. OF WIS., naspaa.hostcentric.com/sitebuildercontent/sitebuilderfiles/book.pdf (last visited April 20, 2020).

[245] Wind instruments often require a notated indication as to when the musician should breathe and temporarily pause the constant flow of sound. Breaths are indicated in sheet music in order for uniformity among an ensemble or orchestra. *See* Allison Baker, *Embouchure And Breathing Tips For Beginning Oboists*, BAND DIRECTOR, https://banddirector.com/woodwinds/double-reeds/embouchure-and-breathing-tips-for-beginning-oboists/ (last visited April 20, 2020).

[246] Rev. Rul. 87-41, 1987-1 C.B. 296.

[247]Deknatel & Hoff-Downing, *supra* note 7, at 94.

[248] Myron Silberstein, *Paying the Piper: A New Model for Employment in Storefront Theatre*, SCAPI MAGAZINE (Sept. 16, 2019), https://scapimag.com/2019/09/16/paying-the-piper-a-new-model-for-

The employer's semantic designation does not discharge the role and responsibility of an employer. Courts look to the payment itself, and not merely the employer's chosen terms.[249] In the performing arts industry, nonunionized performers are often paid a stipend for each performance (with no pay for rehearsals).[250] The *Chicago Tribune* reported that "[s]ome companies offer a one-time stipend for the entire run, ranging from $25 to $500."[251] Other companies pay stipends monthly for the performer's work across a larger period of time, such as an entire season or year of performances.[252] "Summer stock theater" is an example of this type of seasonal work.[253] Pay may even vary from theater to theatre company and may be based the union status of the performer.[254]

m) *Payment of Business (and Traveling Expenses)*

The payment of "business and/or traveling expenses" indicates employment status.[255] Some companies will pay for the performer's travel or housing.[256] For instance, some performing

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employment-in-storefront-theatre/?fbclid=IwAR2S_yrl_bqHNvuFq6x KQXYR6CBe61ZTBKq6XYKi8yhn2vyp9HpCAEQMY6E.

[249]Deknatel & Hoff-Downing, *supra* note 7, at 94.

[250] Nina Metz, *How Much Do Actors Get Paid?*, CHI. TRIB. (Jan. 28, 2007), https://www.chicagotribune.com/news/ct-xpm-2007-01-28-0701280271-story.html.

[251] *Id.*

[252] Casey Mink, *Everything Actors Need to Know About Summer Training*, BACKSTAGE (Mar. 11, 2019), https:// www.backstage.com/magazine/article/everything-actors-need-know-summer-training-1924/.

[253] *Id.* ("Summer-stock" theater, according to *Backstage*, "is shorthand for any theater [company] that puts on shows exclusively in the summer, frequently staging multiple shows with the same actors, costumes, sets, and props throughout the season.")

[254] *Id.*

[255] IRS Rev. Rul. 87-41, 1987-1 C.B. 296.

[256] Dan Kempson, *When People are the Product: Why Reliance on Young Artist Programs May Lead to Financial Ruin for Opera*, ART + MARKETING (Jan. 23, 2018), artplusmarketing.com/when-people-are-the-product-why-reliance-on-young-artists-may-lead-to-financial-ruin-for-opera-abbb27317cf9.

arts festivals reportedly include housing as part of the compensation for performers.[257]

n) *Furnishing Tools and Materials*

The provision of "significant tools and materials" to the worker indicates employee status.[258] Performing arts companies provide stage performers with costumes, sets, microphones, makeup, wigs, and props.[259] Additionally, companies provide musicians with music stands, sheet music, and chairs on which to sit.[260] Some companies will even reimburse specific materials needed for the performance when a performer procures such materials.[261]

o) *Significant Investment*

"If the worker invests in facilities used by the worker in performing services and are not typically maintained by employees," then that indicates independent contractor status.[262] Freelance performers almost never have an investment in the venue in which they perform. Performing arts companies often own facilities in which they house performances. It would be extremely rare that a nonunionized performer would own a significant interest of the facility in which they perform.

p) *Realization of Profit or Loss*

"A worker who can realize a profit or suffer a loss as a result of the worker's services . . . is generally an independent contractor . . . ."[263] Nonunionized performers are typically paid a flat fee regardless of the success of the show.[264] This typically insulates them from experiencing losses from a less profitable

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[257] *Id.*
[258] Rev. Rul. 87-41, 1987-1 C.B. 296.
[259] DEER & DAL VERA, *supra* note 238, at 224.
[260] KING, *supra* note 189, at 51.
[261] *Id.*
[262] Rev. Rul. 87-41, 1987-1 C.B. 296.
[263] *Id.*
[264] Silberstein, *supra* note 248.

showing. It is generally up to the production company to provide costumes, props, etc. so performers themselves would not experience any profit loss by investing in such items.

q) *Working for More Than One Firm at a Time*

"If a worker performs more than de minimis services" for multiple firms at the same time, then that generally indicates independent contractor status.[265] Returning to *Chaves*, the court found that the exotic dancer was "'wearing the hat of an employee' of King Arthur's [rather] than 'the hat of [her] own enterprise,' even if she performed exotic dancing for more than one employer."[266] Independent contractors may not be contractually prevented from accepting other work, as that would constitute control.[267] Nevertheless, the conflict of fixed production schedules in a given time could establish a de facto monopolization of the performer's schedule, effectively precluding participation with multiple companies at a given time.

r) *Making Services Available to the General Public*

If "a worker makes his or her services available to the general public on a regular and consistent basis," then that indicates independent contractor status. [268] While stage performers sometimes freelance their services, it is not on a regular and consistent basis. Performers hired by one company are committed to that company for the duration of the show's season. Ultimately, whether performers make their services available to the general public depends on the level of control that the hiring party exercises over the worker's ability to work for other companies.

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[265] Rev. Rul. 87-41, 1987-1 C.B. 296.

[266] Chaves v. King Arthur's Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *18 (July 30, 2009).

[267] A "covenant not to compete," also known as a noncompete clause, "is a term used in contract law under which one party (usually an employee) agrees to not pursue a similar profession or trade in competition against another party (usually the employer). Covenants not to compete are bound by traditional contract requirements, including the consideration doctrine." Jackson Hewitt Inc. v. Childress, No. 06-CV-0909, 2008 U.S. Dist. LEXIS 24460, at *15 (D.N.J. Mar. 21, 2008).

[268] Rev. Rul. 87-41, 1987-1 C.B. 296.

s) *Right to Discharge*

"The right to discharge a worker" indicates "that the worker is an employee and the person possessing the right is an employer."[269] Performing arts companies often reserve the right to replace a performer who is incapable of performing to a company's desired level.[270] This may be done by invoking an understudy in the event that sickness, injury, or termination occurs; however, "the cost and time needed to train understudies" causes many companies go without them.[271] Understudy or not, production companies retain the right to discharge.

t) *Right to Terminate*

If a worker has the right to terminate the "relationship with the person for whom services are performed at any time he or she wishes without incurring liability," then that indicates employee status.[272] Performing arts companies do not typically allow for the risk of a performer terminating the relationship at any time because this may financially impact a company. Rather, the companies typically contractually require that the performer follow through with their duties or risk liability for a premature termination.[273]

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[269] *Id.*

[270] Edith Weiss, *Newsletter: Working with Teen Actors*, PIONEER DRAMA SERVICE (Sept. 17, 2019), https://www.pioneerdrama.com/Newsletter/Articles/The_Contract_That_Could_Save_Your_Sanity3.asp.

[271] Matthew J. Palm, *Most Central Florida theaters forgo understudies — until (like last weekend) they're desperately needed*, ORLANDO SENTINEL (Oct. 24, 2019), https://www.orlandosentinel.com/entertainment/arts-and-theater/os-et-sweeney-todd-deathtrap-understudies-20191024-dthpo7jilngadbj73oyzcfrqne-story.html.

[272] Rev. Rul. 87-41, 1987-1 C.B. 296.

[273] *Chicago Theatre Standards*, #NOTINOURHOUSE 29 (Dec. 2017), https://www.notinourhouse.org/wp-content/uploads/Chicago-Theatre-Standards-12-11-17.pdf (stating that "Actor's failure to comply with the responsibilities herein stated may result in termination of the Actor and removal from the Production at the discretion of the Theatre, without notice or compensation."); *see also* SALT LAKE CMTY. COLL.,

III. APPLICATION: DETERMINING LIABILITY OF PERFORMERS, THEIR EMPLOYERS, AND THIRD-PARTIES

A. EMPLOYER LIABILITY GENERALLY

Employment law varies from state to state based on court precedent and respective legislatures. Nevertheless, generally, "[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."[274] By contrast, "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

Generally, work injuries are overseen at the state level. Each state may extend jurisdiction, for instance, to "[e]very person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State" and "where the contract of hire is made within the State."[275] From there, the state may extend recovery to "persons whose employment results in . . . non-fatal injuries within the State" regardless of if "the contract of hire is made outside of the State."[276] The state may also afford coverage to "persons whose employment is *principally localized* within the

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supra note 4 (stating "TERMINATION: Unless otherwise stated, this contract may be terminated with cause by either party, in advance of the specified termination date, upon written notice being given by the other party. The party in violation will be given ten (10) working days after notification to correct and cease the violation(s), after which this contract may be terminated for cause. This contract may be terminated without cause, in advance of the specified expiration date, by either party, upon sixty (60) days prior written notice being given to the other party. On termination of this contract, all accounts and payments will be processed according to the financial arrangements set forth herein for approved services rendered to date of termination. In no event shall SLCC be liable to the Contractor for compensation for any good neither requested nor accepted by SLCC. In no event shall SLCC's exercise of its right to terminate this contract relieve the Contractor of any liability to SLCC for any damages or claims arising under this contract.").

[274] § 7.07(2) Employee Acting Within Scope of Employment, Restatement of the Law, Agency 3d, (The American Law Institute 2003).

[275] 820 ILCS 305/1(b)(2).

[276] *Id*.

State . . . regardless of the place of the accident or the place where the contract of hire was made."[277]

For employers, risks of employee injury are to be expected.[278] In Illinois, its Workers' Compensation Act provides that in order for a worker "[t]o obtain compensation . . . [that] employee bears the burden of showing, by a preponderance of the evidence," proof that the worker "sustained accidental injuries arising out of and in the course of the employment."[279] From there, the tribunal may assess whether the worker is an employee, if the employer disputes employee status or the scope of employment.[280] Injuries that are covered may either be caused or even aggravated by work.[281] For instance, the Illinois Supreme Court stated that "[w]hen an employee with a preexisting condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability."[282] In Illinois, an administrative tribunal known as the Workers Compensation Commission, decides factual questions under a two-step inquiry.[283] First, "whether there was an accidental injury which arose out of the employment."[284] Second, "whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury."[285]

A state will typically look to the chain of events in order to see if there exists sufficient control and direction over the employee to meet the scope of work injuries "arising out of and in the course of the employment."[286] Such "[a] causal connection between an accident and a claimant's condition may be established by a chain of events.[287] This chain considers the

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[277] *Id*.

[278] *Id.*

[279] 820 ILCS 305/1.

[280] *See generally* Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193 (2003).

[281] Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 215 (2003).

[282] *Id*.

[283] *Id*.

[284] *Id*.

[285] *Id*.

[286] 820 ILL. COMP. STAT. 305 (2012).

[287] Pulliam Masonry v. Indus. Comm'n, 77 Ill. 2d 469 (1979); *see also*, Darling v. Indus. Comm'n of Illinois, 176 Ill. App. 3d 186, 193 (1988).

employee's "ability to perform . . . before an accident," as compared to "a decreased ability to so perform immediately after an accident."[288] States may extend coverage to preexisting discrete injuries aggravated by work.[289] A causal connection may be found to exist between work performance and the injury, when performance contributed to that injury.[290] Once the employee demonstrates "causal connection between the work activity and the injury . . . no 'limitation' or 'exception' to compensation can be imposed to defeat [that employee's] right to recovery."[291]

B. THIRD-PARTY LIABILITY

In the performing arts industry, third-party liability would extend liability beyond the producers to parties, such as, but not limited to, the owner of a performing arts venue and companies who rent performance equipment to the performing arts company. This would include rental companies providing sets, costumes, props, hydraulics, scaffolding, etc. For example, in Illinois, where the work injury creates a legal liability for "*some person other than his employer* to pay damages, then legal proceedings *may be taken against such other person* to recover damages notwithstanding such employer's payment."[292] Under a theory of "subrogation," exposure and liability therefore extend beyond the contracting employer.[293]

If an employer directly or indirectly engages any contractor who lacks proper worker's compensation insurance, then that employer "is liable to pay compensation to the [subsidiary] employees of any . . . contractor or sub-contractor."[294] Without appropriate insurance in place, an injured party may sue up the chain to the party most financially capable of incurring liability. Consequently, any party involved with a performing arts

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[288] *Pulliam Masonry*, 77 Ill. 2d at 471; *see also Darling*, 176 Ill. App. at 193.

[289] Edward Hines Lumber Co. v. Indus. Comm'n, 215 Ill. App. 3d 659, 663 (1990).

[290] Twice Over Clean, Inc. v. Indus. Comm'n, 214 Ill. 2d 403, 413 (2005).

[291] *Id.* at 413.

[292] 820 ILL. COMP. STAT.ILCS 305/5(b) (2019) (emphasis added).

[293] *Id.* (emphasis added).

[294] 820 ILL. COMP. STAT.ILCS 305/1 (2012).

company should ensure the proper employee classification of performing artists and further ascertain whether appropriate workers' compensation is in place.

Those who instruct performing arts companies to contract with employees as an independent contractor will themselves incur a risk of legal liability. For example, a Massachusetts federal court held that "a non-party to an employment relationship can be held liable . . . for aiding and abetting the wrongdoing of a party to an employment relationship."[295] This risk of liability exists "regardless of whether the party to the employment relationship can itself be held liable."[296] Therefore, risks of misclassification extend beyond hiring companies to the parties advising upon the contracts.

C. THE VENUES: STATE-TO-STATE ILLUSTRATIONS OF EMPLOYMENT

States have individualized approaches to determining employment status. While "many work-related injuries and diseases are never compensated within the [respective] workers' compensation systems," states nevertheless have procedures for overseeing the adjudication of work injuries.[297] Like that of other respective states overseeing a vast body of employment law, the Illinois Supreme Court provided the test for which injuries constitute work injuries.[298] Work injuries must arise out of and in the course of employment.[299] More specifically, a work injury occurs in the course of employment if that injury "occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto."[300]

Employment analysis is generally centered on the concept of control. However, the determination of whether performing

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[295] Green v. Parts Distribution Xpress, Inc., Civil Action No. 10-11959-DJC, 2011 U.S. Dist. LEXIS 136616, at *15 (D. Mass. Nov. 29, 2011).

[296] *Id.*

[297] Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS L. REV. 891, 895 (2018).

[298] Saunders v. Indus. Comm'n, 189 Ill. 2d 623, 627–28 (2000).

[299] *Id.*

[300] *Id.*

artists are employees varies depending on state law. This Article is not intended to provide a canon of all tests. Rather, certain notable cases, statutes, and common law tests have been selected to illustrate principles of employment law.

1. *CALIFORNIA: THE EMPLOYER'S RIGHT TO CONTROL TEST*

In *Alexander v. FedEx Ground Package System*, the United States Court of Appeals for the Ninth Circuit reviewed the disputed status of approximately 2,300 of FedEx's full-time delivery drivers under California law.[301] FedEx Ground Package System, Inc. contracted with over two thousand full-time drivers to deliver packages to customers.[302] As per the operating agreement, FedEx required its drivers to wear FedEx uniforms, drive FedEx vehicles, and had company standards of grooming with which drivers had to comport.[303] Furthermore, FedEx directed its drivers what packages to deliver, where to deliver these packages, and the dates and times in which drivers may make such deliveries.[304] Nevertheless, FedEx insisted these drivers were independent because the operating agreement that FedEx had with its drivers designated them as independent contractors.[305] FedEx also recommended to its drivers that they craft ways to "'reduce travel time' and 'minimize expenses and maximize earnings and service.'"[306] The court was not convinced that this was evidence of independent contractor status.[307] The test under which the Ninth Circuit reviewed their status is called the "right-to-control test."[308]

California's right-to-control test requires the weighting of several factors to determine "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[309]

Other factors that California courts must consider include: (a) whether the one performing services is engaged in a distinct

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[301] Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 984 (9th Cir. 2014).

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.* at 985.

[307] *Id.* at 988.

[308] *Id.*

[309] *Id.* (citations omitted).

occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; (h) whether or not the parties believe they are creating the relationship of employer-employee; and (i) the employer's right to terminate the worker at will and without cause.[310]

The Ninth Circuit noted that under California law these factors "generally … cannot be applied mechanically as separate tests."[311] Instead, "they are intertwined and their weight depends often on particular combinations."[312] Notably, the test does not in fact require absolute control.[313]

2. *ILLINOIS' CRACKDOWN ON EMPLOYEE MISCLASSIFICATION*

In 2008, the Illinois Legislature passed the Employee Classification Act ("Act") to address the practice of misclassifying employees as independent contractors.[314] Under the Act, by default, employees are anyone other than an individual who meets the following conditions. First, where the worker is "free from control or direction over the performance of the service for the contractor," with such freedom under both the terms of "contract of service and in fact."[315] Second, where the worker's provided service "is outside the usual course of services performed by the [worker]."[316] Third, where the worker must be either "engaged in an independently established trade, occupation,

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[310] *Id.* at 989.
[311] *Id.*
[312] *Id.*
[313] *Id.* at 990.
[314] 820 ILL. COMP. STAT. 185/3 (West 2008).
[315] *Id.* at 185/10(b)(1).
[316] *Id.* at 185/10(b)(2).

profession or business."[317] Fourth, where the worker "is deemed a legitimate sole proprietor or partnership."[318]

Under the fourth condition, the Act provides that under the test of independence, the person "performing services for a contractor as a subcontractor" may be deemed a sole proprietor if the following twelve conditions are met:

> (1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result; (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor; (3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle; (4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership; (5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis; (6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession; (7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name; (8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name; (9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service; (10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal

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[317] *Id*. at 185/10(b)(3).
[318] *Id*. at 185/10(b)(4).

> Revenue Service; (11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and (12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.[319]

3. *MASSACHUSETTS, NEW MEXICO, OREGON, AND PENNSYLVANIA: THE ABCS OF EMPLOYER CONTROL*

Massachusetts established a notable test that codified its common law "right to control" analysis under a statutory three-prong test.[320] This test is known colloquially as the "ABC test" for employment.[321] (A) requires that "the individual is free from direction and control . . . [both] under his contract for the performance of service and in fact."[322] (B) requires that "the service is performed outside the [employer's] usual course of business."[323] Finally, (C) requires that the worker "is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[324] This ABC test is part of a wave of reform across several states.[325] Some states, such as Pennsylvania, New Mexico, and Oregon, have replaced (B)'s usual course of business with a hybrid test that analyzes whether the work is of a type that is "customarily engaging in an independently established trade."[326]

As applied to performers, the test establishes employment. First, performers are directed and not "free from direction and control." This is true both under contract and when rehearsing and performing.[327] Second, performances are within a

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[319] *Id.* at 185/10(c).
[320] Deknatel & Hoff-Downing, *supra* note 7, at 65.
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.*

performing arts company's "usual course of business."[328] Finally, performers do not act in an established trade that exist independently from the performing arts company.[329] Rather, performers often become an integral part of the company's production.[330] Thus, no prong is met under the ABC test.

4. *NEBRASKA: DEFERENCE TO CONTRACTUAL LANGUAGE*

Nebraska emphasizes the provisions of a worker's contract itself and looks to the context in which the worker agreed to perform.[331] However, this practice suffers criticism from some because its focus on contractual language "may provide employers with an opening to contractually designate a worker as an independent contractor, while in reality preserving employee-like control."[332] Contracting with nonunionized performers as independent contractors is a tactical practice in the performing arts industry, although, as this Article explains, it is an illegal practice.[333] Nevertheless, Nebraska's contractual deference is unique among states.

5. *NEW YORK: AN EMPLOYEE FOCUSED APPROACH*

New York, known for its vibrant theatre community both "on and off Broadway," specifically addressed employee

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[328] *Id.*

[329] *Id.*

[330] *Actor Agreement*, #NOTINOURHOUSE 1, https://www.notinourhouse.org/wp-content/uploads/Actor-Agreement.pdf (last visited April 20, 2020) (stating that "[a]ctor's name will appear on [company's] primary publicity tools including but not limited to postcards and bookmarkers, and may appear in posters, lobby displays, and print advertisements. Company agrees that Actor's biography will appear in the program. Actor agrees to provide Company with an electronic headshot and a (FILL IN NUMBER OF WORDS) word or less biography as requested and in compliance with Company standards for such.").

[331] Deknatel & Hoff-Downing, *supra* note 7, at 68.

[332] *Id.* at 69.

[333] *See* Gary S. Eisenkraft, *Better Safe than Sorry Theater Groups and Independent Contractor Rules*, EISENKRAFT CPA & CONSULTING SERVICES, https://www.art-newyork.org/assets/member-documents/theater-groups-and-ic-rules.pdf (last visited April 20, 2020).

classification of performing artists.[334] Joshua Beck, a workers' compensation attorney, stated that "[b]efore 1986 . . . in New York, performers were [generally] considered to be independent contractors and there was a serious legislative push, a lobbying effort that was successful in '86[,] and the New York legislature finally passed an amendment to their workers compensation law."[335]

The New York Department of Labor provides the following criteria as indicators establishing that performers are independent contractors: (1) Performers share in the fee received from the establishment for the performance;[336] (2) The performer provides the venue with the performer's personal equipment for sound, lighting, or stage design;[337] (3) The performer has an investment in such equipment utilized in the performance;[338] (4) The performer operates in the legal form of a corporation or joint venture;[339] (5) The performer retains the right to exercise artistic *control* over the elements of the performance;[340] (6) The performer sets or negotiates the offered rate of pay received from the establishment;[341] (7) The performer retains ultimate authority in establishing the type of music for the performance;[342] (8) The performer dictates to the establishment the conditions of the engagement, for example, the stage layout, security arrangements, transportation requirements, or food and beverage provisions;[343] (9) The featured performer provides services as a single engagement; [344] and (10) The performer establishes when

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[334] Justin Beck & Alan Pierce, *Workers' Compensation for Performing Artists*, LEGAL TALK NETWORK (Sept. 29, 2017), https://legaltalknetwork.com/podcasts/workers-comp-matters/2017/09/workers-compensation-for-performing-artists/.

[335] *Id.*

[336] *Guidelines for Determining Worker Status Performing Artists*, N.Y. DEP'T OF LABOR (Nov. 5, 2017), https://www.labor.ny.gov/formsdocs/ui/IA318.17.pdf.

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Id.*

performance breaks will occur, or establishes the duration of such breaks.[345] If the aforementioned factors are not met, then the relationship between the performer and the performing arts company is an employee relationship.[346]

By contrast, the New York Department of Labor also provided that the following alternative criteria establishes a relationship of employment: (1) The performer is paid at a rate determined solely by the establishment;[347] (2) The establishment makes standard withholding deductions from the performer's fee, e.g. income tax, social security, etc.;[348] (3) The performer is covered under the establishment's Workers' Compensation Policy;[349] (4) A performer is also considered an employee if the establishment provides substitutes or replacements when the performer cannot participate in a scheduled performance.[350]

6. *WASHINGTON: WHY CONTRACTUAL LANGUAGE WON'T SIMPLY SOLVE THE EMPLOYER'S WOES*

The Washington Court of Appeals stated in *Western Ports Transportation, Inc. v. Employment Security Department* that "[c]ontractual language, such as a provision describing [workers] as independent contractors, is not dispositive; instead, the court considers all the facts related to the work situation."[351] As some experts have put it, "courts have chosen to look beyond mere labels."[352] And in *Affordable Cabs, Inc. v. Employment Security*, the Court of Appeals established that another means by which a worker's independent contractor status can be met is if the worker "held himself out to the community as being in a separate business or . . . established himself as a separate business."[353]

The reasoning in *Affordable Cabs* is not a viable framework for solving the issue of performing artists'

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[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *Id.*

[350] *Id.*

[351] W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002).

[352] Deknatel & Hoff-Downing, *supra* note 7, at 98.

[353] Affordable Cabs, Inc. v. Emp't Sec., 101 P.3d 440, 445 (Wash. App. 2004).

employment status. Treating performing artists as a separate business from the performing arts company is nonapplicable to the employment status of performers because performing artists are not an entity that is separate from the performing arts company. Cast-members are often literally defined as "company members."[354] Thus, when performing with a company, however brief, such artists become a temporary inextricable part of the performing arts company.

IV. PROPOSAL: THE PROPER CLASSIFICATION FOR PERFORMING ARTISTS

A. MEANS AND METHOD

As a general premise, insurance spreads risk.[355] In the employment context, workers' compensation insurance serves to limit the financial exposure that an employer faces if and when any of its workforce suffers injury in the course of performance.[356] For instance the "rule of workers' compensation exclusivity" shields an employer who pays "compensation insurance premiums from further liability to its employees."[357]

However, punitive procedures exist for employers who do not procure workers' compensation insurance. States, such as Illinois and Delaware, require business cooperation with several agencies when businesses are suspected of misclassification.[358] Parenthetically, Delaware's employment laws are significant for the reason that many corporations incorporate in the state, due to

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[354] *See* Dan Meyer, *The Lightning Thief Cast Members Join Rob Rokicki's Monstersongs Concert*, PLAYBILL (Oct. 24, 2019), www.playbill.com/article/the-lightning-thief-cast-members-join-rob-rokickis-monstersongs-concert; *see also* Gwendolyn Rice, *The week of the puppet*, ISTHMUS (Oct. 31, 2019), https://isthmus.com/arts/stage/patchwork-puppets-parading-on-mercury/.

[355] *Cf.* Christian Ketter, *A Second Amendment in Jeopardy of Article V Repeal, and "AMFIT," A Legislative Proposal Ensuring the 2nd Amendment Into the 22nd Century: Affordable Mandatory Firearms Insurance and Tax (AMFIT), A Solution to Maintaining the Right to Bear Arms and Promoting the General Welfare*, 64 WAYNE L. REV. 431, 446 (2019).

[356] *Id.*

[357] *Id.*

[358] 820 ILL. COMP. STAT. 185/75 (LexisNexis 2019); *see also*, DEL. CODE ANN. tit. 19 § 3507.

its favorable corporate legal climate.[359] States like Illinois grant standing for misclassification allegations to "[a]ny interested party," who consequently "may file a complaint with the Department against an entity or employer . . . if there is a reasonable belief that the entity or employer" misclassifies employees.[360] Some states afford additional private rights of civil action to workers who have suffered as a result of misclassification.[361]

Many states already have mechanisms in place for regulating employee classification. In the context of performing-arts employers, incentive for compliance can be accomplished by restricting funding of the National Endowment for the Arts, which is a goal of the Trump administration.[362] It can also be accomplished under IRC § 501, by regulating performing arts companies and denying § 501(c)(3) status to charitable companies that do not classify consistently with the aforementioned IRS Rev. Rul. 87-41, 1987-1 C.B. 296.[363] Specifically, IRC § 503 may be

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[359] Alyssa Gregory, *Best States to Incorporate a Business*, BALANCE SMALL BUS. (Mar. 29, 2019), https://www.thebalance smb.com/best-states-to-incorporate-a-business-4178799.

[360] 820 ILL. COMP. STAT. 185/25 (LexisNexis 2019).

[361] Deknatel & Hoff-Downing, *supra* note 7, at 78 (For instance, Delaware, Illinois, Massachusetts, Maryland, New Jersey, and Washington).

[362] Peter Nicholas, *Trump Is MAGA-fying the National Medal of Arts*, THE ATLANTIC (Nov. 11, 2019), https://www.theatlantic.com/ politics/archive/2019/11/trumps-first-medal-arts-winners-include-jon-voight/601672/.

[363] 26 U.S.C. § 501(c)(3) states that the following organizations, unless exemption is denied, shall be exempt from Federal income taxes: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which insures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

amended to include misclassification as grounds for denial, which already denies tax-exempt status for corporate acts resulting in "less than an adequate consideration in money."[364]

B. PURPORTED OBSTACLES

1. *PERFORMING ARTS COMPANIES ARE MERELY IN THE "PRIMARY BUSINESS" OF MARKETING PRODUCTIONS AND THEREFORE PERFORMERS ARE INDEPENDENT CONTRACTORS IN THE SECONDARY BUSINESS OF PERFORMING*.

Some tests, such as California's aforementioned right-to-control test, may look to "a part of the regular business of the principal."[365] In fact, theater companies could be said to have two different lines of day to day work.[366] The first line of work is the marketing and administration of a performing arts company.[367] The second line of work is producing of the performing arts media.[368] The business is dual and therefore it cannot be claimed that somehow one line of business negates the other.

2. *WHEN DIRECT PATRONAGE IS PAID TO PERFORMING ARTISTS IN LIEU OF PAYMENT FROM THE EMPLOYER, THEN THERE CANNOT BE AN EMPLOYEE RELATIONSHIP IF THERE IS NO PAPER TRAIL*.

As a misclassification tactic, employers will instruct customers to pay an employee directly in order to avoid a paper trail.[369] That consequential lack of recorded payment from employer to employee makes it more difficult for a public agency to track. Nevertheless, courts analyze the employer's *control*

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[364] 26 U.S.C. § 503(b)(5).

[365] Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 989 (9th Cir. 2014).

[366] Allison Considine, *Why Wait? The Rise of Undergrad Arts Admin Programs*, AM. THEATRE (Jan. 2, 2019), https://www.americantheatre.org/2019/01/02/why-wait-the-rise-of-undergrad-arts-admin-programs/; *see also MA, Performing Arts Administration*, NYU STEINHARD, https://steinhardt.nyu.edu/degree/ma-performing-arts-administration (last visited April 20, 2020).

[367] Considine, *supra* note 366.

[368] *Id.*

[369] Deknatel & Hoff-Downing, *supra* note 7, at 94.

regardless of the means of remuneration.[370] In the performing arts industry, patrons often directly support a performer on behalf of the charitable performing arts company.[371] However, direct patronage is not a viable solution to employment misclassification for any performing arts company, as *control* is paramount to employee analysis.[372]

3. *ADDITIONAL PERFORMING DUTIES, FROM "DINNER THEATER" TO TOURING MAKE JOB DUTIES TOO PLENTIFUL FOR CHARACTERIZATION AS EMPLOYEES.*

Performers are often tasked with additional duties beyond the performance itself. For instance, a Chicago-based theater company has its performers work additionally as a waitstaff to "serve drinks and food up until a few minutes before the show."[373] The Tracy Jong law firm, a New York firm specializing in liquor license law, cautioned its readership that when a "restaurant/bar environment" classifies workers "as independent contractors, the employer [exposes itself] to more responsibility and liability than it [avoids]."[374] Moreover, misclassification does not "eliminate [the employer's] obligation to pay payroll taxes, unemployment and maintain Worker's Compensation and disability insurance."[375] Stage performance, by itself, is certainly not the work of an independent contractor. Stage performance *with added duties*, such as waiting tables, is surely nothing other than employment.

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[370] *Independent Contractor Defined*, *supra* note 119.

[371] Jennifer Miller, *Suffering for Your Art? Maybe You Need a Patron*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/fashion/what-is-a-patron.html.

[372] *Independent Contractor Defined*, *supra* note 119.

[373] Hedy Weiss, *Theo Ubique Inaugurates New Home With 'The Full Monty'*, WTTW NEWS (Dec. 11, 2018), https://news.wttw.com/2018/12/11/theo-ubique-inaugurates-new-home-full-monty.

[374] *Can My Servers and Bartenders be Independent Contractors?*, TRACY JONG L. FIRM (Mar. 13, 2013), https://www.tracyjonglawfirm.com/blog/can-my-servers-and-bartenders-be-independent-contractors/.

[375] *Id.*

Some performing artists are required to travel in the course of a touring series of performances in multiple locations.[376] Some states recognize that travel as a part of employment expands rather than disrupts the relationship of the employee to the employer.[377] Traveling employees are defined generally as "employees whose duties require them to travel away from their employer's premises."[378] As such, the duties of a worker to travel or tour do not diminish the relationship of employment.

In classical music industry, one of the steppingstones of a career early on is the "Young Artist Program" ("YAP").[379] Dan Kempson, a Grammy-nominated opera singer, has written that "YAPs were created initially as training programs, but increasingly have been relied upon as cheap labor . . . . It doesn't work the same way if you're hiring a marketing associate."[380] Among other duties of performers in YAPs is fundraising work and community outreach.[381] In addition to a general season of stage performances, many YAPs have charity performance concerts to fundraise among benefactors.[382] These duties beyond the stage performances are not paid independently; instead, the performing arts general stipend purports to compensate for all labor.[383]

The Illinois Supreme Court once held that recreational activity during the after-hours of employment could nevertheless

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[376] *See Music, Theatre and Dance News*, OAKLAND U. NEWS (Jul. 30, 2019), https://oakland.edu/oumagazine/news/smtd/music-theatre-and-dance-news-may-2019.

[377] Wright v. Indus. Comm'n, 338 N.E.2d 379, 381 (Ill. 1975).

[378] *Id.*

[379] Kempson, *supra* note 256.

[380] *Id.*

[381] *Young Artist Program, 2020 Program Information*, OPERA SARATOGA, http://www.operasaratoga.org/young-artist-program-application (last visited April 20, 2019) (indicating duties such as performing in festival concerts, public concerts, and community outreach events).

[382] Cara Lippitt, *Learning how to shine out loud, the journey of an opera singer with cochlear implants*, COCHLEAR (Sep. 5, 2019), https://hearandnow.cochlearamericas.com/hearing-solutions/cochlear-implants/opera-singer-with-cochlear-implants/.

[383] Kempson, *supra* note 256.

arise out of and in the course of employment.[384] The Court found that a company baseball team in which the employee participated *after hours*, was a work environment in which the employee suffered an injury was "under the circumstances . . . an incident of his employment."[385] As such, "the injuries [the worker] sustained while playing in the particular game could properly be found to arise out of and in the course of his employment."[386] As a result of that case, Illinois abrogated the case-law in part but maintained scope extension when an employee is ordered or assigned by the employer to do any act.[387] It states that recreational work events generally "do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof," however, that "exclusion *shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program*."[388]

Therefore, if a performer's employment *could* terminate because the performer does not participate in an act, that act is within the performer's scope of employment.

4. *PERFORMING ARTISTS OFTEN HAVE MULTIPLE GIGS, AND THEIR FULL, VARIED SCHEDULES RENDER THEM THE DE FACTO STATUS OF BEING AN INDEPENDENT CONTRACTOR.*

Some performers simultaneously work for multiple performing arts companies at any given time.[389] Nevertheless, employment law accounts for when a claimant is concurrently working for multiple employers but not "in the [literal] employ of both employers at the time of the accident."[390] The employer is liable for loss of all employment, if that employer knows of the performer's concurrent employment.[391] When that "part-time employer [is] aware of the [employee's] main line of work, " then

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[384] Jewel Tea Co. v. Indus. Comm'n, 128 N.E.2d 699, 706 (Ill. 1955).

[385] *Id.*

[386] *Id.*

[387] 820 ILL. COMP. STAT. ANN.§ 305/11 (2019).

[388] *Id.* (emphasis added).

[389] Richard Jordan, *Richard Jordan: It's time to show understudies respect – they might be tomorrow's stars*, THE STAGE (June 21, 2018), https://www.thestage.co.uk/opinion/2018/richard-jordan-its-time-to-show-understudies-respect-they-might-be-tomorrows-stars/.

[390] Flynn v. Indus. Comm'n, 813 N.E.2d 119, 126 (Ill. 2004).

[391] *Id.*

the employee "may be considered" to be "employed 'concurrently' by two or more employers."[392] Liability for *all* employment then attaches.[393]

5. *FOR PERFORMERS, THERE EXISTS SUCH A GREAT AMOUNT OF ROOM FOR IMPROVISATION AND INTERPRETATION THAT ESTABLISHES THE INDEPENDENCE OF WORKERS IN THE PERFORMING ARTS*.

Performing arts employers may claim that a performer's interpretation or improvisation in a given performance somehow generously manifests independence for the performing artist.[394] From this perspective, such performance liberties somehow overcome employer control, and thus defeat employment analysis. However, improvisation and unique artistic expression would be most akin to what is known as "the personal comfort doctrine."[395] Under that doctrine, the scope of employment extends beyond the employer's directives to employee injuries resulting from the unique behavior of an employee.[396] This doctrine covers "an employee, while engaged in the work of his employer," who does any act "necessary to his health and comfort, even though they are personal to himself, and such acts will be considered incidental to

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[392] *Id.*

[393] *Id.*

[394] Here are four examples of improvised performing arts forms: (1) Comedy improv: Natalie Fedor, *Improv comedy teaches openness, risk-taking*, THE EXPONENT (Oct. 28, 2019), https://www.purdueexponent.org/campus/article_bf6f9c06-727a-5600-8b11-6c476ff4a216.html. (2) Freestyle rap: Allison Considine, *Can Freestyle Love Supreme Be Taught?*, AM. THEATRE (Nov. 1, 2019), https://www.americantheatre.org/2019/11/01/can-freestyle-love-supreme-be-taught/. (3) Improvised dance: Amanda Stanger-Read, *What is Improvisation and Why Do We Do It?*, ARTS IN MOTION (May 4, 2019), https://artsinmotion.net/2017/11/04/what-is-improvisation-and-why-do-we-do-it/. (4) Jazz: Georgia State University, *Making It Up as You Go: How Jazz Improvisation Affects the Brain*, NEUROSCIENCE NEWS & RESEARCH (Oct. 26, 2019), https://www.technologynetworks.com/neuroscience/news/making-it-up-as-you-go-how-jazz-improvisation-affects-the-brain-326436.

[395] Hunter Packing Co. v. Indus. Comm'n, 115 N.E.2d 236, 239 (Ill. 1953).

[396] *Id.*

the employment."[397] Therefore, even if a performer improvises or interprets in a manner unique to her, she would still perform within her scope of employment.

6. *EMPLOYERS CAN DISCLAIM EMPLOYEE LIABILITY BY CONTRACTUALLY WARNING THE PERFORMING ARTIST OF RISKS INCIDENTAL TO SUCH WORK*.

It is well-settled that workers' "compensation system[s] cannot be avoided by direct contract, and subterfuges designed to avoid the workers' compensation laws are not countenanced."[398] Performing arts companies expressly cannot disclaim liability via contractually warning an employee of risks and demanding careful work as a term of that contract. [399] Nevertheless, companies demand the performer's assumption of liability.[400] However, when one works within "the reasonable sphere of his employment," there remains for the employer a duty to adequately protect an employee. [401] Some courts affirm that sufficient employee protection cannot be supplanted by contractual agreements to waive liability and workplace rules to promote safety.[402]

The Supreme Court of Illinois stated, "[i]t is true an employee may violate a rule of his employer without necessarily leaving the sphere of his employment."[403] An employee may even very well "be guilty of contributory negligence in violating the rule," but, the employee's negligence "would constitute no bar to a recovery of compensation, for contributory negligence is no defense to a claim for [employee] compensation."[404] However, this common law logic does not dissuade the general counsel of

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[397] *Id.*

[398] Truesdale v. Workers' Comp. App. Bd., 235 Cal. Rptr. 754, 757 (App. 1987).

[399] Lumaghi Coal Co. v. Indus. Comm'n, 149 N.E. 11, 13 (Ill. 1925) (citations omitted).

[400] SALT LAKE CMTY. COLL., *supra* note 5 (stating "Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract.").

[401] *Lumaghi Coal Co.*, 149 N.E. at 13.

[402] *Id.*

[403] *Id.*

[404] *Id.*

performing arts companies from drafting contractual language. For instance, the Salt Lake Community College's Office of the General Counsel & Risk Management declared in its performing arts contract: "Insurance, does not apply to this Contract. Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract."[405]

Under common law principle, acts which are "considered incidental to the employment" are still "considered to be in the course of the employment."[406] The incidental character of an employee's act is terminated under rare circumstances, "only if done [by the employee] in an unusual, unreasonable or unexpected manner."[407] However, "the fact that [a] claimant was not performing her actual job duties at the time of the accident does not foreclose her right to compensation."[408] Thus, the scope of employment broadly favors employees.

CONCLUSION: BRINGING THE CURTAIN TO A CLOSE

"*Uneasy lies the head that wears the crown*."[409]

Performing arts employers are statutorily required to extend employment protections to those working under their control.[410] When these employers misclassify, they illegally shirk those duties.[411]

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[405] SALT LAKE CMTY. COLL., *supra* note 5 (stating "Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract.").

[406] Segler v. Indus. Comm'n, 406 N.E.2d 542, 543 (Ill. 1980).

[407] Union Starch, Div. of Miles Labs., Inc. v. Indus. Comm'n, 307 N.E.2d 118, 121 (Ill. 1974).

[408] Ill. Consol. Tel. Co. v. Indus. Comm'n, 732 N.E.2d 49, 52 (Ill. App. Ct. 2000).

[409] WILLIAM SHAKESPEARE, HENRY IV, PART 2 act 3, sc. 1.

[410] Deknatel & Hoff-Downing, *supra* note 7, at 55.

[411] *Id.*

Within this decade, twenty states pursued stricter regulation for independent contractor status.[412] That mission *must* incorporate regulation and oversight for the performing arts industry. Chicago-based pianist and recording artist Myron Silberstein wrote in *Scapi Magazine* that performing artists should "not be so blinded by the joy of our craft that we forget that our craft, though it is truly a joy, is also a job."[413] Silberstein rallied that performing "[a]rtists should not be asked to provide a sliding scale to theatre companies that do not have the [adequate] budget to pay for artists' services."[414] Dan Kempson warned that "[t]hree well-known [professional] summer festivals currently pay less than $400/week, which equates to less than minimum wage for the state in which [these festivals] reside."[415] Kempson advocated that the performing arts industry needs to follow some corporate models on improving practices by paying its employees more and treating them better.[416]

It is the duty of employers in the performing arts industry to accept the proper role of a performing arts company and, with it, the full gamut of accompanying responsibilities. It is also the duty of performing artists to assert their rights and avail themselves of the protections to which employees are entitled as a matter of law. State legislatures have a duty to understand the work of performing artists. While there is a complicated nature of that work, it is not so different from the greater American workforce so as to remove it from the general realm of employment and its governing laws. Executive agencies must adequately investigate employment sectors, such as the performing arts, in which performers are actively misclassified. And it is the duty of workers' rights organizations to educate themselves on the work of performing artists.

Performing arts work is not an independent practice. Rather, as this Article demonstrates, it is controlled to a great extent by industry employers who are trying to keep their

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[412] *Id.*

[413] Myron Silberstein, *Paying the Piper: A New Model for Employment in Storefront Theatre*, SCAPI MAGAZINE (Sept. 16, 2019), https://scapimag.com/2019/09/16/paying-the-piper-a-new-model-for-employment-in-storefront-theatre/?fbclid=IwAR2S_yrl_bqHNvuFq6xKQXYR6CBe61ZTBKq6XYKi8yhn2vyp9HpCAEQMY6E.

[414] *Id.*

[415] Kempson, *supra* note 256.

[416] *Id.*

production costs low. Recognizing performing artists as employees may indeed cost more for employers, but a cost increase does not justify misclassification. If the show must go on, it cannot be to the detriment of performing artists. Abraham Lincoln allegedly once riddled: "If you call a tail a leg . . . how many legs has a dog? The answer: four, 'because calling a tail a leg doesn't make it a leg.'"[417]

Indeed, calling performing artists "independent contractors" does not change the laws that establish employee status. Nor should it. Performing artists are employees.

[417] William Safire, *Essay; Calling a Tail a Leg*, N.Y. TIMES (Feb. 22, 1993), https://www.nytimes.com/1993/02/22/opinion/essay-calling-a-tail-a-leg.html.

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IN PURSUIT OF COMPETITIVE BALANCE OR PAYROLL RELIEF?

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INTRODUCTION

The term "competitive balance" may be one of the most commonly used—and emphatically stressed—phrases in sports. Indeed, professional sports league commissioners invoke it with great regularity to underscore the importance they place on its underlying value: that for the health, longevity, and growth of the league, teams must have a realistic chance—season-to-season or over another period of time—to be a winning team and ultimately compete in the playoffs and for a championship.[1] As former Major League Baseball Commissioner Bud Selig stated, "every fan has to have hope and faith. If you remove hope and faith from the mind of a fan, you destroy the fabric of the sport."[2] Perhaps even more important than this, the argument goes, is the necessity for teams to be competitive so that fans stay engaged, the various revenues of the sport remain robust, and the interest in the league deepens and grows.[3] The fear is that large-market teams have substantially higher revenues than small and mid-market franchises that would otherwise allow them to have exponentially higher payrolls that

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[1] Matthew J. Parlow, *Hope and Faith: The Summer of Scott Boras's Discontent*, 10 HARV. J. SPORTS & ENT. 85, 100–04 (2019) (hereinafter "Parlow, *Hope and Faith*").

[2] Gabe Zaldivar, *MLB's Slow Offseason Hints at Larger Problems, Possible Strike*, FORBES (Jan. 29, 2018), https://www.forbes.com/sites/gabezaldivar/2018/01/29/mlbs-slow-offseason-hints-at-larger-problems-possible-strike/#27ef2b661ca0.

[3] Dan Markel, Michael McCann & Howard M. Wasserman, *Catalyzing Fans*, 6 HARV. J. SPORTS & ENT. L. 1, 26 (2015).

would enable them to hoard the best players.[4] In turn, these big-market super teams would then dominate both the regular season and playoffs, leading to almost predetermined outcomes game-to-game and season-to-season.[5] Fans would thus lose interest in these lopsided contests—and thus the leagues—because only a few franchises had the real ability to win most games and, ultimately, the championship.[6]

Part of what makes sports so compelling to so many of us is the uncertainty of the outcome of a particular sporting event and the playoff and championship contests.[7] Consequently, many argue that a professional sports league that has the likelihood of winning being concentrated in a few larger-market teams significantly limits the sports' appeal to fans and the general public.[8] In fact, some commentators have contended that such competitive disparity could actually spell doom for a sports league over time.[9] To avoid either fate, professional sports leagues have placed a great emphasis on competitive balance over the past fifty years. In particular, leagues such as Major League Baseball (MLB), the National Basketball Association (NBA), and the National Football League (NFL)[10], have implemented a variety of reforms—most, though not all, through the process of collective bargaining with their respective players' unions—aimed at achieving greater parity within their leagues. These have come in the form of revenue sharing, salary caps, luxury taxes, changes to the amateur draft, limitations to rookie and veteran contracts, and free agency reforms.[11]

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[4] Richard A. Kaplan, *The NBA Luxury Tax: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1615 n.2 (2004).

[5] *See id.*

[6] Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 MARQ. SPORTS L.J. 323, 362 (1994).

[7] Ian A. McLin, *Going, Going, Public? Taking a United States Professional Sports League Public*, 8 WM. & MARY BUS. L. REV. 545, 561 (2017).

[8] *See* Martens, *supra* note 6, at 362.

[9] *See id.*

[10] While there are other professional sports leagues, this article limits its analysis to the three largest revenue-grossing—and most popular sports leagues—in the United States.

[11] *See* Parlow, *Hope and Faith*, *supra* note 1, at 105–11.

This value of competitive balance in sports has been deemed so important that courts have not only recognized it, they have created special legal protections for professional sports leagues to implement such reforms—in particular, exempting certain actions from antitrust scrutiny.[12] Courts have reasoned that competitive balance was so necessary to the economic health and long-term viability of professional sports leagues that certain parity-seeking reforms—despite otherwise violating antitrust laws—were permissible.[13] In this regard, not only have professional sports leagues identified—and proselytized regarding—the value of competitive balance, but they have received special legal recognition by the courts for pursuing it. Given this long-standing narrative and the judicial validity given to it, an observer could easily conclude that professional sports leagues are animated by the goal of competitive balance among its teams and pursue it doggedly and in earnest.

Yet a deeper look into this topic reveals some questions regarding professional sports leagues' motivations for implementing these competitive balance reforms. Have the results of these competitive balance reforms led to greater parity in the NFL, NBA, and MLB? Are team owners more interested in winning or profit maximization? Are the competitive balance reforms geared more towards winning or limiting team owners' payrolls (and thus costs)?

This article seeks to sort through the competitive balance landscape and analyze these questions through legal, business, and policy lenses. Part I explores the concept of competitive balance, the interest of professional sports leagues (in particular, the team owners) in minimizing their costs through payroll constraints, and how collective bargaining plays an integral role in the law and business of professional sports. Part II details the various competitive balance reforms that the NBA, NFL, and MLB have adopted in the past two decades. Part III will delve into the questions of how competitively balanced professional sports leagues are and analyzes market forces such as tanking and the rise of data analytics and their impact on the pursuit of parity. The conclusion provides some reflections on the tension between winning and profit maximization in light of these various

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[12] Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TUL. L. REV. 859, 873 (2012).

[13] *See, e.g.*, United States v. Nat'l Football League, 116 F.Supp. 319, 323 (E.D. Pa. 1953).

competitive balance reforms and their impact on league parity and players' share of growing league revenues.

I. COMPETITIVE BALANCE, COST MINIMIZATION, AND COLLECTIVE BARGAINING

A. COMPETITIVE BALANCE

While MLB's Blue Ribbon Panel brought competitive balance to the forefront of the professional sports conversation in 2000,[14] the concept dates back to at least the 1920s when the New York Yankees' dominance of MLB caused attendance problems that threatened the sport.[15] Despite its prevalence in sports parlance for nearly one hundred years, the definition of competitive balance is somewhat more elusive. One way to envision competitive balance is a state where there is not a significant talent and performance gap between the top and bottom teams in a professional sports league.[16] In other words, the best teams would not be substantially better than the worst teams in the league.[17] In a league with greater parity, the teams would be sufficiently well-matched to where the outcome of games was unpredictable on any given day or night.[18] This "uncertainty of

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[14] RICHARD C. LEVIN ET AL., THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER'S BLUE RIBBON PANEL ON BASEBALL ECONOMICS 1, 1–5 (2000), *available at* http://mlb.mlb.com/mlb/news/mitchell/index.jsp.

[15] Daniel A. Rascher, *Competitive Balance: On the Field and In the Courts*, SPORTS ADVISORY GROUP, http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/competitive-balance-on-the-field-and-in-the-courts/ (last visited April 21, 2020).

[16] Matt D. Pautler, *The Relationship Between Competitive Balance and Revenue in America's Two Largest Sports Leagues*, CMC SENIOR THESES, PAPER 86 (2010), *available at* http://scholarship.claremont.edu/cmc_theses/86/.

[17] Michael Lopez, *Exploring Consistency in Professional Sports: How the NFL's Parity is Somewhat of a Hoax*, SLOAN SPORTS CONFERENCE, http://www.sloansportsconference.com/mit_news/exploring-consistency-in-professional-sports-how-the-nfls-parity-is-somewhat-of-a-hoax/ (last visited April 21, 2020).

[18] *See* Paulter, *supra* note 16, at 4–5.

outcome" hypothesis[19] rests on the notion that fans' interest will be greater the more uncertain the outcome of the game (or season) is.[20] In short, fans do not want games to be fixed or anything close to it.[21] Moreover, a competitively-balanced league is one where no team or two would dominate the regular season and playoffs year after year.[22] Rather, as NFL Commissioner Roger Goodell noted, competitive balance exists "[w]hen you come into a season, [and] every fan thinks that their football team has a chance to win the Super Bowl."[23]

Indeed, many professional sports league commissioners view parity among teams in their respective leagues as one of their key responsibilities[24] because of the broadly-held perception that the more competitive balance there is in a league, the higher the attendance and the greater the interest will be in the sport.[25] Relatedly, many believe that improved competitive balance also leads to increased revenue and financial success of the sport.[26] It is unsurprising, then, that one scholar urged that "competitive balance should be viewed as a level of competitiveness and uncertainty of outcome sufficient to increase or optimize the fan appeal of a sports league."[27] Indeed, there are several studies that seem to confirm this conventional wisdom: that is, that competitive balance within a league led to an increase in attendance while less parity within a league resulted in lower

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[19] R. Alan Bowman, James Lambrimonos & Thomas Ashman, *Competitive Balance in the Eyes of the Sports Fan: Prospective Measures Using Point Spreads in the NFL and NBA*, 14 J. SPORTS ECON. 498, 517 (2012).

[20] Travis Lee, *Competitive Balance in the National Football League After the 1993 Collective Bargaining Agreement*, 11 J. SPORTS ECON. 77, 78 (2010).

[21] Aaron Gordon, *The Myth of Competitive Balance*, SPORTS ON EARTH (Aug. 8, 2013), http://www.sportsonearth.com/article/56193798.

[22] *See id.*

[23] *See* Lopez, *supra* note 17.

[24] John Urschel, *The Parity Ideal*, THE PLAYERS' TRIBUNE (Jan. 4, 2016), https://www.theplayerstribune.com/en-us/articles/john-urschel-ravens-parity-ideal.

[25] *See* Bowman et al., *supra* note 19, at 499.

[26] *See* Gordon, *supra* note 21.

[27] James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 525 (2011).

attendance.[28] Professional sports leagues thus seek to create greater parity to avoid periods of time like the Boston Celtics in the 1960s—when the team won ten NBA titles from 1959-1969—and the New York Yankees in the 1920s (when the team so dominated MLB that the league experienced serious attendance problems) that disrupted each sport.[29] The more competitively balanced the teams in a league, the greater fan interest, attendance, and revenues should be.[30]

Despite the importance placed on the concept, courts, industry professionals, scholars, and commentators alike all struggle to define competitive balance in order to gauge and assess a league's parity. For example, one court wrote the following definition: "[c]ompetitive balance means in essence that all of the league's teams are of sufficiently compatible playing strength that…fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching games, thus supporting the teams' television and gate revenues."[31] In 2000, the MLB Blue Ribbon Commission similarly focused on the post-season by defining

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[28] *See* Martin B. Schmidt & David J. Berri, *Competitive Balance and Attendance: The Case of Major League Baseball*, 2 J. SPORTS ECON. 145, 146–57 (2001) (noting the correlation between greater competitive balance and higher attendance and less parity and lower attendance); Edwin Woodrow Eckard, *Baseball's Blue Ribbon Economic Report: Solutions in Search of a Problem*, 2 J. SPORTS ECON. 213 (2001) (explaining that while attendance increased as a team approached competing for a championship, attendance actually decreased for each additional year that the team contended for the title); JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 1 (1992) (finding that during the time that the Cleveland Browns consistently won conference championships and titles in the NFL, their attendance decreased due to lack of parity in the league).

[29] *See* Josh Weinstein, *Can the NBA's Competitive Balance Issue Be Fixed?*, LAST WORD ON SPORTS (April 11, 2017), https://lastwordonsports.com/2017/04/11/can-nbas-competitive-balance-issue-fixed/.

[30] P. Dorian Owen & Nicholas King, *Competitive Balance Measures in Sports Leagues: The Effects of Variation in Season Length*, 53 ECON. INQUIRY 731, 731 (2015).

[31] Smith v. Pro-Football, 420 F. Supp. 738, 745 (D.C. Cir. 1976).

competitive balance as a "regularly recurring hope of reaching postseason play."[32] One commentator defined competitive balance as either one team being able to beat another team at any given time or the possibility of any team winning the championship.[33] Another writer described just some of the ways in which one could view competitive balance: specifically, the number of different teams winning a championship; advancing deep in the playoffs; losing perpetually; or sustaining winning records for years.[34]

Economists and other scholars, on the other hand, have attempted to quantify competitive balance through various metrics in order to judge a league's success in achieving it. Many economists focus on the standard deviation of winning percentage for teams as an accurate measure of a league's competitive balance.[35] Economists seem to prefer a regular-season focus because playoffs—particularly in the case of the NFL where it is a one game contest where the losing team is eliminated—are not as statistically reliable.[36] While no single definition prevails, one scholar's description seems to capture the general sentiment: "The 'optimal' level of competitive balance probably does not require that each team be 'competitive' every year—provided that each team has a reasonable probability of winning in the foreseeable future."[37]

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[32] Olugbenga Ajilore & Joshua Hendrickson, The Impact of the Luxury Tax on Competitive Balance in Major League Baseball 1-3 (2011) (unpublished manuscript), *available at* https://works.bepress.com/gajilore/11/.

[33] *How Does Parity Compare Among the Major U.S. Sports Leagues?*, FORBES (Mar. 13, 2012), https://www.forbes.com/sites/quora/2012/03/13/how-does-parity-compare-among-the-major-u-s-sports-nfl-nba-mlb-nhl-college-football-college-basketball/#67800034cedd.

[34] *Competitive Balance in Pro Sports Leagues: how does the NBA look?*, 82 GAMES, http://www.82games.com/balance.htm (last visited April 21, 2020).

[35] *See* Evan S. Totty & Mark F. Owens, *Salary Caps and Competitive Balance in Professional Sports Leagues*, 11 J. FOR ECON. EDUC. 46, 49 (2011); *see also* Andrew Zimbalist, *Competitive Balance in Sports Leagues: An Introduction*, 3 J. SPORTS ECON. 111, 112 (2002).

[36] *See* David Berri, *Major League Baseball Is Less Competitive Than We Think*, TIME USA (Oct. 7, 2014), http://time.com/3479205/major-league-baseball-bud-selig-competitive-balance/.

[37] McKeown, *supra* note 27, at 526.

This push—perhaps even obsession—with competitive balance is rather unique to professional sports.[38] Traditionally, businesses seek to eliminate their competition from the marketplace and create a competitive imbalance so as to reap the rewards of their market dominance.[39] The structure of professional sports are such that individual teams need one another—indeed, need the competition—in order to be profitable and, in all likelihood, to exist.[40] To this end, teams must cooperate with one another—through the centralized league office—to facilitate the on-field product.[41] In this regard, professional sports leagues are joint ventures where teams have a duty to one another and the entire sport to work together to grow and sustain the sport.[42] While some of the collective, centralized work focuses on logistics like scheduling, more normative values such as competitive balance play a key role in the success and operation of a professional sports league.[43] Therefore, though teams compete on the field or court in the games, the business side of the sport necessitates a collaborative approach for its success.[44]

The importance of competitive balance has been recognized by courts in a variety of ways. For example, while rejecting the NFL's argument that it is a single entity, the United States Supreme Court in *American Needle v. National Football League* stated that competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."[45] In *Toolson v. New York Yankees*, the United

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[38] *See* Yong-zhen Cao, *Competitive Balance of Professional Sports Leagues—A Case Study on NBA*, IEEE XPLORE (2010), https://ieeexplore.ieee.org/document/5660323/.

[39] *See* Martin B. Schmidt & David J. Berri, *Competitive Balance and Market Size in Major League Baseball: A Response to Baseball's Blue Ribbon Panel*, 21 REV. INDUS. ORG. 41, 42 (2002).

[40] *See* Henry H. Perritt, Jr., *Competitive Entertainment: Implications of the NFL Lockout Litigation for Sports, Theatre, Music, and Video Entertainment*, 35 HASTINGS COMM. & ENT. L.J. 95, 108 (2012).

[41] *See* Rascher, *supra* note 15.

[42] *See id.*

[43] *See* McKeown, *supra* note 27, at 526–27.

[44] *See* Cao, *supra* note 38, at 1.

[45] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010); *see also* NCAA v. Board of Regents, 468 U.S. 85 (1985)

States Supreme Court upheld baseball's reserve clause, noting the importance of centralized league coordination and decision-making in order to field the sporting events that the public desired.[46] In *National Basketball Association v. Williams*, the court upheld various restraints on trade implemented by the NBA because while such actions may have other violated antitrust laws, the effectiveness of the salary cap in helping create competitive balance outweighed the anticompetitive effects of these restraints.[47] Perhaps it is unsurprising then that some scholars have advocated for an antitrust exemption for professional sports leagues because of their anomalous business model.[48] While courts have been unwilling to recognize such a blanket exemption, there is no doubt that courts have provided preferential treatment to teams working collectively in furtherance of competitive balance.

B. MINIMIZING PAYROLL COSTS

Professional sports teams are all private businesses, with the exception of the NFL's Green Bay Packers.[49] Accordingly, owners run their team businesses with a profit-maximizing motive that one would expect to find with any other business.[50] One side of the profit-maximization equation is increasing and optimizing revenues. Teams do this by fielding a competitive product on the field or court and strategically growing revenue in the various ways in which money flows into their sport, including ticket sales, concessions, merchandise, television and radio deals, and marketing and sponsorship agreements.[51] In addition, like other private businesses, professional sports teams seek to limit their

(justifying various restraints on trade on the basis of the need for competitive balance).

[46] *See* Toolson v. N.Y. Yankees, 346 U.S. 356 (1953).

[47] *See* Nat'l Basketball Ass'n v. Williams, 857 F.Supp. 1069, 1079 (S.D.N.Y. 1994).

[48] *See* Salil K. Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499, 1500 (2016).

[49] *See* Matthew J. Parlow & Anne-Louise Mittal, *Are the Green Bay Packers Socialists?*, 14 VA. SPORTS & ENT. L.J. 143, 144–46 (2015).

[50] *See* McKeown, *supra* note 27, at 521.

[51] *See* Jeremy M. Evans, *We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, 33 SUM ENT. & SPORTS L.J. 12, 14 (2017).

costs to help maximize their profits.[52] Indeed, particularly over the past few decades, businesses generally have sought to cut or cap labor costs to remain competitive in the marketplace and thus generate more robust profits.[53]

For most private-sector employers, there are a variety of tools and approaches that they can implement in order to cut or minimize labor costs. For example, employers can reduce the number of hours an employee works per week, cut employee pay rates, and reduce or eliminate various employee benefits in order to cut labor costs.[54] Moreover, employers can change the relationship with their employees to avoid various government-required costs, such as workers' compensation, social security, and unemployment insurance.[55] Employers effect this approach by hiring workers as independent contractors rather than as employees or by hiring employees as part-time workers to minimize or eliminate some of the regulatory costs that would otherwise apply to full-time employees.[56] In short, employers—whether they be professional sports teams or any other private business—seek to reduce their labor costs in order to help maximize profits.

As detailed below in Part II, professional sports leagues have implemented a variety of reforms—purportedly aimed at competitive balance—that have the effect of minimizing labor costs. These cost-control and competitive balance measures come in the form of revenue sharing, salary caps, luxury taxes, amateur drafts (and the rookie contracts that flow from them), limits and restrictions to player free agency, and other contractual limitations placed on player contracts. However, because the players in the NFL, NBA, and MLB are unionized, these types of policies that impact the employment relationship between the league and teams on one side and the players on the other must be collectively bargained.[57] In this regard, players' unions—like other private-sector unions—have a voice through collective bargaining in labor

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[52] *See* Perritt, Jr., *supra* note 40, at 159.

[53] *See* Stephen Plass, *Wage Compression as a Democratic Ideal*, 25 CORNELL J.L. & PUB. POL'Y 601, 611 (2016).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See* Parlow, *Hope and Faith*, *supra* note 1, at 98.

cost reductions through concession bargaining.[58] Such labor cost reductions are common even when a business has healthy and increasing profits and their position in the marketplace vis-à-vis competitors is relatively secure—as is the case with professional sports leagues and teams—because of the profit-maximizing focus that private businesses pursue.[59]

C. THE ROLE OF COLLECTIVE BARGAINING

Whether for competitive balance or labor cost control purposes (or both), league regulations related to issues like salary caps, free agency, luxury taxes, revenue sharing, and the like must be negotiated between the league and their respective players' union through the collective bargaining process.[60] A collective bargaining agreement ("CBA") provides professional sports leagues with an additional special legal status for running their business and sport. When this special status for these CBAs are combined with the unique legal protections provided by courts, professional sports leagues have an inimitable legal and business space within which to operate, so long as they reach agreement with the players' union on the terms and conditions of employment for players and the related policies governing the sport.

While extremely powerful once implemented,[61] CBAs must be negotiated between management (the commissioner's office working on behalf of the owners) and employees (the players who are represented by their players' union).[62] CBAs cover a variety of operational, employment, and business-related

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[58] *See* Plass, *supra* note 53, at 612–13.

[59] *Id.*

[60] *See* Brad R. Humphreys & Hyunwoong Pyun, *Monopsony in Professional Sport: Evidence from Major League Baseball Position Players, 2000-2011*, 38 MANAGE. DECIS. ECON. 676, 678 (2016).

[61] Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008) (referring to CBAs as "the supreme governing authority" of labor matters between professional sports leagues, teams and their players).

[62] *See* Christopher R. Deubert, I. Glenn Cohen & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 183 (2017).

functions of a professional sports league.[63] These negotiations are done pursuant to the National Labor Relations Act.[64] Required topics for negotiation between the league and players' union are certain terms and conditions of employment, such as wages, salaries, hours, and other related working conditions.[65] In addition, the two sides often also negotiate on broader league economic policies that could impact player salaries: revenue sharing, luxury taxes, and the like.[66] Labor law requires that both sides negotiate these terms and conditions of employment in good faith and through arms-length negotiations.[67] This requirement is based on the underlying theory of the collective bargaining process: that both sides negotiated freely—and not under duress or false pretenses—and that the terms to which both sides agreed are acceptable to both.[68] Given the great judicial deference given to the terms and conditions of a CBA, this labor law requirement for good faith and arms-length negotiations makes even greater sense.[69]

It is hard to overstate the special and impactful legal protection that CBAs receive from the courts: namely an

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[63] *See* Brendan H. Ewing, Comment, *MLS Promotion! Can MLS's Single Entity Protect it from "Pro/Rel"?*, 25 JEFFREY S. MOORAD SPORTS L.J. 359, 381 (2018).

[64] 29 U.S.C. § 151–169. *See also* Am. League of Prof'l Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires, 180 NLRB 190 (1969) (establishing the National Labor Relations Board's jurisdiction over professional sports leagues).

[65] *See* Cody McElroy, *Take a Knee: Speech Considerations in the NFL*, THE CIVILIAN (Oct. 5, 2016), https://sites.law.lsu.edu/civilian/2016/10/take-a-knee-speech-considerations-in-the-nfl/.

[66] *See* Marc J. Coghlan, *Why the NHL's Current Expansion Criteria Will Continue to Deny Canadian Cities NHL Franchises*, 16 VA. SPORTS & ENT. L.J. 267, 284–85 (2017).

[67] *See* Brown v. Prof'l Football, Inc., 518 U.S. 231, 235–36 (1995).

[68] *See* Ryan Probasco, *Revisiting the Service Time Quandary: Does Service Time Manipulation of Minor League Baseball Players Violate MLB's Collective Bargaining Agreement?*, 15 DEPAUL J. SPORTS L. 1, 12 (2019).

[69] *See* Josh Mandel, *Deflategate Pumped Up: Analyzing the Second Circuit's Decision and the NFL Commissioner's Authority*, 72 U. MIAMI L. REV. 827, 866 (2018).

exemption to most antitrust laws.[70] The various competitive balance rules and policies—described further below in Part II—would ordinarily violate antitrust laws as they are unreasonable restraints on trade.[71] In fact, the collective work of the team owners together would alone almost certainly violate antitrust laws without the CBA protection.[72] Yet because these otherwise violative terms and conditions of employment are negotiated and agreed to as part of the collective bargaining process, they are insulated from antitrust laws. Given the special status that labor law provides for CBAs, courts are often vigilant in ensuring that both sides—the league/owners and the players—adhere to the terms to which they agreed. In this regard, the collective bargaining process places a premium on the importance for both sides to know what issues matter most to them, negotiate them into the CBA as best they can, and be willing to live with the results of the CBA for the entire term of the agreement.

II. COMPETITIVE BALANCE REFORMS

Armed with the special legal protections provided by labor law, the NBA, NFL, and MLB have pursued various competitive balance reforms that have been adopted through the collective bargaining process. These include revenue sharing, salary caps, luxury taxes, amateur drafts, rookie contracts, various contract limitations, and restrictions to player free agency. While some of these reforms have shown some modest progress in terms of helping a league achieve greater parity among its teams, most of these policies have failed to achieve the stated goals of competitive balance. However, many of them have succeeded in creating greater revenue streams for team owners, reducing or limiting their payroll costs, and thus fulfilling their profit-maximizing motivation.

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[70] *See* Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 223 (2009).

[71] *See* John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705–06 (1977).

[72] *See* Kurt Badenhausen, *Does Competitive Balance Drive Interest in Sports?*, FORBES (Aug. 25, 2015), https://www.forbes.com/sites/kurtbadenhausen/2015/08/25/does-competitive-balance-drive-interest-in-sports/#4975dc134f25.

A. REVENUE SHARING

Professional sports leagues have adopted revenue sharing policies to help address the competitive imbalance issues that each had historically faced.[73] The intent of revenue sharing is to redistribute some league revenues so there is not such a great gap in resources between larger- and smaller-market teams.[74] By redistributing such revenue, small- to mid-market franchises should, in theory, have more money to spend on payroll and thus field a more competitive team.[75] All three professional sports leagues share revenue by pooling—and then redistributing—money from similar areas of league activity: national broadcasting contracts,[76] intellectual property rights, and league-wide sponsorships.[77] These revenues are generally divided equally among teams, even though larger-market teams bring greater value to each category of these centralized revenue streams.[78] While most local revenue—such as ticket sales, concessions, local

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[73] *See* Nicholas A. Jolly, *Revenue Sharing and Within-Team Payroll Inequality in Major League Baseball*, 22 APPLIED ECON. LETTERS 80, 81 (2015).

[74] *See id.* at 81.

[75] *See* Derek Thompson, *Why American Sports Are Socialist*, THE ATLANTIC (June 20, 2016), https://www.theatlantic.com/business/archive/2016/06/why-american-sports-are-socialist/487640/.

[76] *See* Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTING NEWS (Sept. 5, 2014), http://www.sportingnews.com/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mphu01x3vu875oeaq6. National television deals are often incredibly lucrative for leagues and thus comprise a significant portion of revenue sharing in the NBA, NFL, and MLB. For example, the NBA's nine-year national broadcasting rights agreement with ESPN and Turner Sports is worth $24 billion. Brandon S. Ross, *The NBA's New Media Rights Deal: A Look Into the Multi-Billion Dollar Cause of What May Become the Next NBA Lockout*, 37 HOFSTRA LAB. & EMP. L.J. 291, 291 (2016). MLB's national television contract is worth $4 billion over eight years. *See* Evans, *supra* note 51, at 12.

[77] *See* Scott Bukstein, *Preparing for Another Round of Collective Bargaining in the National Basketball Association*, 22 JEFFREY S. MOORAD SPORTS L.J. 373, 377–78 (2015).

[78] *See* Bloom, *supra* note 76.

television and radio contracts, team sponsorships, and the like—are usually retained by the team,[79] there are distinct differences in each league's revenue sharing system.[80] The NFL, for example, shares approximately 61% of its revenue among its teams.[81] MLB shares hundreds of millions of dollars with its teams through its revenue-sharing policy.[82] The NBA shares enough revenue among its teams that without it, fourteen of the league's thirty teams would have lost money in 2017.[83] While the unshared revenues in each league still create a gap between the "rich" and

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[79] *See id.*

[80] *See* John Urschel, *The Parity Ideal*, THE PLAYERS' TRIBUNE (Jan. 4, 2016), https://www.theplayerstribune.com/en-us/articles/john-urschel-ravens-parity-ideal.

[81] *See* Bloom, *supra* note 76. A decade ago, by contrast, MLB shared 40% of its revenue while the NBA shared 25%. *See* John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34 REV. IND. ORGAN. 5, 7 (2009).

[82] *See* Andy Dolich, *MLB Revenue Sharing a Problem for A's, Raiders*, NBC SPORTS (Feb. 29, 2016), https://www.nbcsports.com/bayarea/athletics/mlb-revenue-sharing-problem-raiders (noting that for the 2015 season, MLB redistributed $34 million in revenue sharing to each of its teams). Some of this money came from national television broadcasting deals and centralized intellectual property licensing, while others came from a percentage of locally-sourced revenue from tickets sales and local television and radio deals. *See* Maury Brown, *Revenue Sharing is Making an Impact*, BASEBALL AMERICA (Mar. 2, 2010), https://www.baseballamerica.com/stories/revenue-sharing-is-making-an-impact/. In addition, MLB teams that spend above the competitive balance tax threshold—another name for a luxury tax—pay additional monies into a fund that is redistributed to lower-revenue teams. *See* Evans, *supra* note 51, at 15. At the same time, MLB does not share any local television contract revenues, which can be extraordinarily lucrative for teams such as the Los Angeles Dodgers and New York Yankees. *See* Evan Zepfel, *Have MLB's Efforts to Preserve Competitive Balance Done Enough?*, HARV. SPORTS ANALYSIS (Feb. 13, 2015), http://harvardsportsanalysis.org/2015/02/have-mlbs-efforts-to-preserve-competitive-balance-done-enough/.

[83] *See* Brian Windhorst and Zach Lowe, *A Confidential Report Shows Nearly Half the NBA Lost Money Last Season. Now What?*, ESPN (Sept. 19, 2017), https://www.espn.com/nba/story/_/id/20747413/a-confidential-report-shows-nearly-half-nba-lost-money-last-season-now-what.

"poor" teams, the revenue sharing systems for the NBA, NFL, and MLB seek to minimize that revenue disparity to some degree.[84]

While the animating theory behind revenue sharing is to enable smaller-market teams to better compete against large-market team payrolls, nothing in the three leagues' respective CBAs requires teams receiving revenue sharing money to use it to increase their payroll. For example, while MLB forbids the use of revenue sharing money to pay for tax obligations or debt service—under threat of fines from the MLB Commissioner—nothing in the league's governing documents requires teams to spend the money on their payroll.[85] Without a requirement to use such funding for payroll and on-field improvement, teams may well prioritize profit maximization over fielding a more competitive team. Indeed, some economists posit that by redistributing revenue, leagues create circumstances where teams will value non-elite players and thus keep more of the money rather than offer more competitive salaries and drive up their labor costs.[86] Put another way, revenue sharing devalues winning which by definition makes players less valuable.[87]

This economic theory may well explain why revenue sharing has not seemed to have spurred more competitive balance in professional sports leagues. This result seems antithetical as one would understandably believe that as more revenue was shared, payroll inequality would lessen and more competitive balance

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[84] *See* Kevin Clark, *The NFL's Parity Myth Has Become a Reality*, THE RINGER (Oct. 17, 2017), https://www.theringer.com/nfl/2017/10/17/16488320/parity-myth-dynasty-roger-goodell-collective-bargaining-agreement.

[85] *MLB players union files grievance against 4 teams for failing to spend revenue-sharing money*, DENVER POST (Feb. 27, 2018), https://www.denverpost.com/2018/02/27/mlb-players-union-grievance-revenue-sharing-money/ [hereinafter "MLB Players Union Grievance"]. The MLB CBA encourages using revenue sharing money for improving its payroll and on-field performance, but there is nevertheless no prescription to do so: "Each Club shall use its revenue-sharing receipts (including any distributions from the Commissioner's Discretionary Fund) in an effort to improve its performance on the field." *See id.* (quoting the 2017-21 MLB CBA).

[86] *See* RODNEY FORT, THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE 216–17 (Kevin G. Quinn, ed. 2012).

[87] *See id.*

would be achieved.[88] Strikingly, the opposite has been true: Since revenue sharing began in MLB, payroll inequality has grown and greater parity among teams in the league has failed.[89] In fact, several studies indicate that revenue sharing does not improve parity in these leagues.[90] In this regard, irrespective of the intended goal of revenue sharing, the results seem to suggest that greater parity has not been achieved in the NBA, NFL, and MLB because team owners have not spent enough of the revenue sharing money on increasing their payroll and improving their rosters.

B. SALARY CAP

The NBA and NFL have pursued a salary cap as another means for achieving competitive balances, while MLB has never had one.[91] The NFL has a "hard" salary cap, meaning that team payrolls may not exceed a certain designated threshold, with very limited exceptions.[92] The NBA, on the other hand, has a "soft" salary cap that allows teams to spend above the identified payroll target but under far more limiting circumstances than if their payroll was below the salary cap amount.[93] The underlying theory

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[88] *See* Zepfel, *supra* note 82, at 2.

[89] *See id.*

[90] *See* Fort, *supra* note 86, at 217; *see* Zimbalist, *supra* note 35, at 111. *See also* Craig Edwards, *The Battle Between Payroll and Parity*, FANGRAPHS (Aug. 23, 2018), https://blogs.fangraphs.com/the-battle-between-payroll-and-parity/ [hereinafter "Edwards, *Battle*"].

[91] *See* Derek Taylor, *Splitting the Uprights: How the Seventh Circuit's American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 143, 148 (2010).

[92] *See* Glenn M. Wong & Chris Deubert, *National Basketball Association General Managers: An Analysis of the Responsibilities, Qualifications and Characteristics*, 18 VILL. SPORTS & ENT. L.J. 213, 219 (2011).

[93] *See* Deubert et al., *supra* note 62, at 158. The NBA's salary cap seeks to ensure that the players collectively receive approximately 50% of the league revenue—referred to as basketball-related income (BRI)—for that season. *See* Bukstein, *supra* note 77, at 383. While there are many exceptions that allow NBA teams to spend above the salary cap—such as the Larry Bird exception—most do not allow the team to offer contracts at robust or market-rate amounts. *See* Larry Coon, *Larry*

of a salary cap in both cases—for parity purposes—is that by precluding or limiting higher-revenue teams from outspending other teams, the league will experience better team competitive balance.[94] In both the NBA and NFL, the parameters of the salary cap are negotiated through collective bargaining with the yearly amount of the cap being determined as a percentage of the league's revenues from the previous year.[95] The types of penalties teams face for not adhering to the salary cap mandates—such as fines, loss of draft picks, and even player contract cancellation—are also negotiated through collective bargaining and well-known in each league.[96] The belief that salary caps will bring about greater parity within professional sports leagues is sufficiently strong that even courts have recognized their importance in holding that they do not violate antitrust laws despite their anticompetitive effect on player salaries and mobility.[97]

The success of salary caps to achieving competitive balance is a little less clear. Some studies have deemed them to

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Coon's NBA Salary Cap FAQ, http://www.cbafaq.com/salarycap.htm#Q2 (last visited April 21, 2020); Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Bias, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1488 n.157 (2006) (explaining the Larry Bird exception).

[94] *See* D'Bria Bradshaw, Comment, *Has the National Basketball Association Lost Its Competitive Touch? Increasing Competitive Balance and Parity and Avoiding Litigation Through the New NBA Collective Bargaining Agreement*, 4 ST. THOMAS J. COMPLEX LITIG. 54, 58 (2017). Interestingly, both the NFL and NBA have instituted salary "floors"—a minimum payroll threshold that all teams must meet—in order to present teams from minimizing their payroll spending and maximizing their profits. *See* Deubert et al., *supra* note 62, at 155.

[95] *See* Michael Schottey, *How the NFL Became the Most Competitive League in All Sports*, BLEACHER REP. (Mar. 20, 2013), https://bleacherreport.com/articles/1574285-how-the-nfl-became-the-most-competitive-league-in-all-of-sports.

[96] Kerry Miller, *How NBA Free Agency, Salary Cap Work*, BLEACHER REP. (Aug. 7, 2018), https://bleacherreport.com/articles/2787871-how-nba-free-agency-salary-cap-work#slide4.

[97] *See* Nat'l Basketball Ass'n v. Williams, 857 F.Supp. 1069, 1079 (S.D.N.Y. 1994). There appears to be good reason for this protected legal status, as some studies suggest that salary caps are effective tools for achieving greater competitive balance.

have achieved the goal of league parity.[98] Others have either found that salary caps had no impact on competitive balance or, even worse, created greater imbalance.[99] While the effects of a salary cap may be up for debate, one clear impact of its usage is its negative impact on player salaries. When an overall maximum payroll amount is imposed, team owners benefit financially through the capping of payroll expenses and the lessening of competition for player talent in the marketplace.[100] By limiting the amount that teams can spend on player salaries, team owners are able to better maximize profits.[101] Moreover, with a payroll cap, players' salaries are artificially depressed because of the decrease in how talent is valued within the salary cap model.[102] This economic reality helps explain one scholar's compelling finding about salary caps: Salary caps in isolation improve parity because they compress team payrolls so that higher-revenue teams do not have a marked advantage.[103] However, salary caps combined with revenue sharing created very different results. The infusion of revenue-sharing monies created a disincentive for teams to pursue winning—as owners more actively sought profit maximization—and thus offset the greater parity that the salary cap would otherwise achieve.[104] Consequently, a professional sports league would experience the same type of competitive imbalance it experienced before the implementation of a salary cap because of the offsetting features that the introduction of revenue sharing created.[105]

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[98] *See, e.g.*, Andrew Larsen, Aju J. Fenn, & Erin Leanne Spenner, *The Impact of Free Agency and the Salary Cap on Competitive Balance in the National Football League*, 7 J. SPORTS ECON. 474, 476 (2006).

[99] *See* Fort, *supra* note 86, at 216; Totty & Owens, *supra* note 35, at 47 (finding no evidence of parity derived from the implementation of salary caps). Totty and Owens worried that their research suggested that salary caps might create great competitive imbalance. *See id.* This concern echoed that of another scholar whose research indicated a greater disparity created among teams when a salary cap was used. *See* Vrooman, *supra* note 81, at 38.

[100] *See* Totty & Owens, *supra* note 35, at 48.

[101] *See id.*

[102] *See* Rascher, *supra* note 15.

[103] Vrooman, *supra* note 81, at 11.

[104] *See id.*

[105] *See id.*

C. LUXURY TAXES

Luxury taxes are similar to salary caps in that they attempt to limit teams' overall payroll expenses so that higher-revenue teams cannot substantially outspend other teams in the league.[106] While the NBA adopts a luxury tax in conjunction with its salary cap, MLB dispenses with the salary cap and solely implements a luxury tax—called the competitive balance tax—to achieve its parity goals.[107] In both cases, a luxury tax system creates a payroll threshold—in the NBA, it is above the salary cap amount—over which teams are fined a financial penalty for exceeding that amount.[108] Each team's payroll is determined by aggregating its players' salaries and signing bonuses—both of which are apportioned based on the player's contract length.[109] The league then assesses the penalty tax at set amounts for a team's payroll amount above the luxury tax threshold.[110] There are also progressive and additional taxes both for different levels above the luxury tax threshold, as well as for teams that exceed that amount for more than one year in a row.[111] In addition to financial penalties, teams that consistently pay the luxury tax can lose other competitive advantages such as a drop in draft pick order in MLB and the ability to use certain exceptions to the salary cap in the NBA.[112] The goal in such progressive tax penalties is to inhibit

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[106] Thompson, *supra* note 75.

[107] Brett Pollard, *Creating Economic Equality Among Major League Baseball Franchises: The Removal of Major League Baseball's Archaic Antitrust Exemption*, 18 TEX. REV. ENT. & SPORTS L. 49, 50–51 (2016).

[108] Kaplan, *supra* note 4, at 1615.

[109] Kristi Dosh, *Can Money Still Buy the Postseason in Major League Baseball?*, DEN. U. SPORTS & ENT. L.J. 1, 20 (2007).

[110] Ajilore & Hendrickson, *supra* note 32, at 3; *see also* Frank Urbina, *How does the NBA's luxury tax work?*, HOOPSHYPE (Oct. 11, 2018), https://hoopshype.com/2018/10/11/nba-luxury-tax/ (explaining the specifics of the NBA's luxury tax); *Competitive Balance Tax*, MLB, http://m.mlb.com/glossary/transactions/competitive-balance-tax (detailing MLB's competitive balance tax) (last visited April 21, 2020).

[111] *See id.*

[112] R.J. Anderson, *MLB Luxury Tax: Breaking down baseball's Competitive Balance Tax and how it affects hot stove season*, CBS SPORTS (Nov. 11, 2019), https://www.cbssports.com/mlb/news/mlb-luxury-tax-breaking-down-baseballs-competitive-balance-tax-and-how-

higher-revenue teams from being able to afford to retain multiple star players or otherwise outspend the rest of the league.[113] Of course, as one commentator pointed out, the salary cap and luxury tax provisions in the NBA did not stop the Golden State Warriors from outspending the rest of the NBA to keep its championship team of stars—including Stephen Curry, Kevin Durant, Klay Thomson, and Draymond Green—together for several years.[114]

While some commentators believe that luxury taxes are helping advance competitive balance by becoming quasi-hard salary caps given their increasing and harsh penalties,[115] some evidence—apart from the anecdotal Golden State Warriors example—suggests the opposite. The theory behind luxury taxes is to create a more compressed payroll bandwidth among teams. Couple that with revenue sharing—and thus, in theory, the ability for smaller-market teams to spend more on their players—and one might expect that league parity would increase. In the case of MLB, the opposite has been true: There is now greater payroll disparity in the league than there was more than thirty years ago.[116] In fact, many of the teams with the highest payrolls are large-market teams, and their higher payrolls have come with consistent

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it-affects-hot-stove-season/; Ross, *supra* note 76 at 308. Teams can reset their luxury tax penalty by dropping below the threshold for a season and thus avoid some of the cumulative penalties that the leagues impose. *See Competitive Balance Tax*, *supra* note 110.

[113] *See* Dan Messeloff, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 563, (2000); Matt Mullarkey, *For the Love of the Game: A Historical Analysis and Defense of Final Offer of Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L.J. 234, 241–42 (2010).

[114] *Fixing the NBA Competitive Balance Problem*, BASKETBALL INSIDERS (July 6, 2017), http://www.basketballinsiders.com/nba-am-fixing-the-nba-competitive-balance-problem/ (pointing out that the soft salary cap and luxury tax still did not deter the Golden State Warriors from spending more money than most of the NBA to retain a championship core of players such as Stephen Curry, Kevin Durant, Klay Thompson, Draymond Green, Andre Iguodala, and Shaun Livingston).

[115] *See* Tom Verducci, *Seven Reasons Why the Free Agent Market Is So Incredibly Slow*, SPORTS ILLUSTRATED (Jan. 11, 2018), https://www.si.com/mlb/2018/01/11/free-agency-hot-stove-slow-pace.

[116] Zepfel, *supra* note 82, at 2.

success with regard to both the regular season and playoffs.[117] As one commentator notes, while those teams that are able to absorb these penalties will, at times, exceed the luxury tax threshold, the combination of the harsh luxury tax penalties and revenue sharing has provided team owners with a powerful incentive to keep their payrolls manageable and maximize their profits.[118]

D. AMATEUR DRAFT AND ROOKIE CONTRACTS

Another way in which professional sports leagues attempt to achieve greater parity among teams is through the amateur player draft and the attendant rookie contracts that players receive through that process. When amateur or international athletes want to enter the NBA, NFL, or MLB, they cannot negotiate directly with any team they want. Instead, they must enter that league's amateur draft.[119] In doing so, the player agrees to be able only to negotiate a contract with—and play for—the team that drafts them.[120] Professional sports leagues attempt to structure their amateur player drafts to increase competitive balance. For example, the NFL and MLB hold reverse-order drafts where the team with the worst record from the previous year drafts first and other teams follow until the last pick is chosen by the team with the best record.[121] Similarly, the NBA holds a draft where teams that did not make the playoffs are entered into a lottery for the top

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[117] *See, e.g.*, Craig Edwards, *In 2019, Team Payroll and Wins are Closely Linked*, FANGRAPHS (Aug. 16, 2019), https://blogs.fangraphs.com/in-2019-team-payroll-and-wins-are-closely-linked/ [hereinafter "Edwards, *Team Payroll*"].

[118] Emma Baccellieri, *The MLBPA is Failing Its Players*, DEADSPIN (Jan. 22, 2018), https://deadspin.com/the-mlbpa-is-failing-its-players-1822305159.

[119] Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS L.J. 205–06 (1996); *see also* Russell Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball's Antitrust Exemption*, 5 HARV. J. SPORTS & ENT. L. 265, 280–83 (2014) (describing MLB's first-year player draft in detail).

[120] Humphreys & Pyun, *supra* note 60, at 677.

[121] Nicholas A. Deming, *Drafting a Solution: Impact of the New Salary System on the New First-Year Major League Baseball Amateur Draft*, 34 HASTINGS COMM. & ENT. L.J. 427, 438 (2012).

thirteen picks of the draft, followed by a reverse-order draft thereafter by record for the playoff teams.[122] With both models, the leagues seek to reallocate talent so that the weakest teams in the league get the best new players entering the sport.[123] In this regard, teams with losing records one year have the opportunity to turn things around quickly if they secure an elite player in the draft.[124]

Relatedly, players entering the NFL, NBA, and MLB through the draft sign rookie contracts with the teams that selected them. These rookie contracts contain player restrictions and conditions that seek to further competitive balance within the league.[125] Players have "reserve clauses" in their rookie contracts that require them to play for the team that owns their contract—whether it be the team that drafted them or the one that acquired them through a trade—for a defined number of years.[126] For example, in the NFL, rookie contracts are designated for four years with a team option for a fifth year.[127] The NBA rookie contracts for first-round draft picks are guaranteed for two years with team options for a third and fourth year.[128] In MLB, players are under rookie contract conditions for the first six years of playing time at the big league level.[129] Given the contractual control and financial benefits to MLB's pre-free agency system,

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[122] Bukstein, *supra* note 77, at 376.

[123] Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and Antitrust Laws*, 1997 U. ILL. L. REV. 519, 574 (1997). MLB also adds "competitive balance draft picks" to smaller-market and lower-revenue teams to enable them to draft and develop additional players—after the first two rounds of the draft—that are on team-friendly rookie contracts. *See Competitive Balance Draft Picks*, MLB, http://m.mlb.com/glossary/transactions/competitive-balance-draft-picks (last visited April 21, 2020).

[124] Schottey, *supra* note 95.

[125] Humphreys & Pyun, *supra* note 60, at 677.

[126] *See id.*

[127] Andrew Brandt, *Teams Have All the Leverage On Rookie Contracts, Another Topic for Future CBA Negotiations*, SPORTS ILLUSTRATED (Aug. 6, 2018), https://sports.yahoo.com/teams-leverage-rookie-contracts-another-174522175.html.

[128] Derek J. Rowe, *It's Time to Retire the NBA's Rookie Salary Scale*, 24 SPORTS LAW. J. 123, 132 (2017).

[129] Connor J. Menneto, *Using the MLB's Final Offer Arbitration System to Revamp the NFL's Franchise Tag*, 17 VA. SPORTS & ENT. L.J. 101, 112 (2017).

many teams will purposefully engage in "service time manipulation"—the process by which a player is sent back and forth between the minor and major leagues or by delaying a player's being called up to the big leagues—in order to stretch such player control to a seventh year.[130] Accordingly, players cannot enter free agency—and thus negotiate for higher salaries—for between four to seven years depending on the league. Finally, the salaries under each league's rookie contracts are intentionally set at far below market value.[131] Rookie salaries are either predetermined based on a sliding scale negotiated as part of the collective bargaining process or have significant restrictions placed on the maximum salary and/or signing bonus that teams can pay their rookie players.[132] Therefore, losing teams the year before can change their fortunes by drafting a talented rookie player—and keep him under contract for years—without needing significant resources.[133]

While reverse-order drafts seem to incentivize losing—a recent phenomenon dubbed "tanking," as discussed further below in Part III—many believe that the amateur drafts (coupled with team-friendly rookie contract salaries and terms) help promote competitive balance.[134] Indeed, a team coming off a losing season can draft the next superstar player in the league to help make them

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[130] Probasco, *supra* note 68, at 5; *see also* Bill Shaikin, *Baseball's compensation system is broken. Owners and players will discuss building a new one this winter*, L.A. TIMES (Sept. 29, 2018), https://www.latimes.com/sports/mlb/la-sp-mlb-column-20180929-story.html (detailing the examples of Ronald Acuna with the Atlanta Braves and Vladimir Guerrero, Jr., with the Toronto Blue Jays as recent example of such service-time manipulation to extend each player for a seventh year).

[131] *See* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players From the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 119–20 (2004).

[132] *See id.* In MLB, players can receive closer to market value in their "arbitration years"—usually years four, five, and six under the aforementioned system. *See* Probasco, *supra* note 68, at 5.

[133] *See* McCann, *supra* note 131, at 119–20. This system has led to superstars, like the NFL's Dallas Cowboys quarterback, Dak Prescott, being paid $630,000 for a season on his rookie contract while comparable quarterbacks in the league made $25 to $30 million that same year. *See* Brandt, *supra* note 127.

[134] Gordon, *supra* note 21.

competitive again. These teams have an even greater likelihood of becoming more competitive because a rookie player will not cost the team that much money for several years because of the under-market salary scale for rookie contracts that each league employs. The amateur draft and rookie contract terms thus seem to help redistribute player talent in a cost-effective manner to teams most in need of a competitive advantage. This structure, in theory, should lead to greater parity within each league. However, some studies have cast doubt on that assumption.[135] One reason for this skepticism is that while drafts reallocate talent, the weaker teams have the choice to sell or trade their draft pick for other players, future draft picks, salary relief, or other considerations that a team owner may desire.[136] In this regard, a team owner motivated by profit maximization could well sell or trade a draft pick to increase profits but not necessarily improve their team.[137]

Moreover, these player and control measures seem geared towards enabling teams to control players during many of their prime playing years at depressed salary levels.[138] For example, in 2010, top draft picks in the NFL were paid upwards of $50 million in guaranteed money, while that figure dropped to approximately $30 million eight years later (without factoring in inflation).[139] So while these competitive balance reforms enable teams to retain talented players at an affordable level, there is also a significant cost savings in these depressed rookie salaries that helps maximize profits for owners.

E. Free Agency and Other Contractual Limitations

If players make it through their rookie contracts, they can become free agents and negotiate to play for any team. However, the NBA, NFL, and MLB all have different policies related to free agency that, they claim, attempt to advance competitive balance. For example, in the NBA, there are two types of free agents: restricted and unrestricted.[140] As the name suggests, a restricted

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[135] Fort, *supra* note 86, at 217; Zimbalist, *supra* note 35, at 111.

[136] Gordon, *supra* note 21.

[137] *See id.*

[138] *See* Baccellieri, *supra* note 118.

[139] *See* Brandt, *supra* note 127.

[140] Matthew Epps, Comment, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport*, 16 Vill. Sports & Ent. L.J. 343, 356 (2009).

free agent has more limited options in their choices. After a player's fourth year of their rookie contract, that player may negotiate and agree to a contract with any team in the league within the parameters of the salary cap and other CBA conditions.[141] However, the player's current team can invoke its right of first refusal and match any such contract offer made by another team and thus keep the player on their team at those negotiated terms.[142] Unsurprisingly, restricted free agents are far less likely to command the same—that is, higher—salaries than if they were an unrestricted free agent. A restricted free agent can choose to take their team's one-year qualifying offer for their fifth season and then become an unrestricted free agent after that season.[143] An unrestricted free agent in the NBA is one whose current team can does not have a right of refusal; rather, the player can sign with any team under contractual terms consistent with the salary cap and the CBA.[144] In this regard, an unrestricted free agent has a greater chance of achieving their fair market value. However, with both types of NBA free agency, the NBA CBA places various limitations on player contracts that restrains a free market for player services. These include a cap on the maximum number of years for a contract; a maximum salary per year; and other such limitations.[145] In these regards, players may not get their actual market worth for the number of years they would otherwise be able to negotiate in a true free market.[146]

The NFL has a similar type of unrestricted versus restricted form of free agency that can limit a player's options after their rookie contract.[147] In addition, the NFL has the "franchise tag," which allows a team to designate a player as its "Exclusive

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[141] *Free Agency Explained*, NBA, https://www.nba.com/free-agency-explained#restricted (last visited April 21, 2020).

[142] *See id.*

[143] *See id.*

[144] *See* Epps, *supra* note 140, at 356.

[145] *See Free Agency Explained*, *supra* note 141.

[146] *See* Jared Wade, *Doing the Math on LeBron James' Would Be Worth on the Open Market*, BLEACHER REP. (Feb. 5, 2013), https://bleacherreport.com/articles/1513402-doing-the-math-on-lebron-james-would-be-worth-on-the-open-market.

[147] *See 2019 NFL Free Agency FAQ*, NFL (Mar. 11, 2019), https://operations.nfl.com/updates/football-ops/2019-nfl-free-agency-faq/.

Franchise Player."[148] If the player wants to play in the league that year, they must accept the team's one-year, fully-guaranteed contract, which will be the greater of 120% of the player's previous year's salary; the average of the five highest-paid players at the same position; or a certain percentage of the salary cap as determined by looking at the five highest-paid players at the same position over the previous five years.[149] The franchise tag thus accomplishes two competing goals in line with league parity: It ensures that the player is highly paid while allowing smaller-market teams to keep one of their better players without needing to compete on the free agent market for their services.[150] However, the franchise tag option does not allow for long-term contract protections that many players seek in additional to their annual salary amount.[151]

As described above, MLB players do not reach free agency until after six full years of playing on the major-league level.[152] Oftentimes, due to "service-time" manipulation, players do not reach free agency until after seven years at that level.[153] Even once a player is a free agent, MLB places an additional restriction of player movement within the league by requiring a team that signs an elite free agent to send a comparable high draft pick to the team which lost that player's services.[154] If a team offers one of its free agents a qualifying offer, then a team that signs that player in free agency will lose a high draft pick in the next draft—depending on what classification the free agent had—to compensate the original team for the loss of its player.[155] While the stated purpose of this system to help with league parity—by

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[148] Menneto, *supra* note 129, at 102.

[149] *See id.* at 102–03.

[150] *See id.* at 101.

[151] *See id.*

[152] *See* Probasco, *supra* note 68, at 5.

[153] *See id.*

[154] *See* Noah J. Goodman, *The Evolution and Decline of Free Agency in Major League Baseball: How the 2012-2016 Collective Bargaining Agreement is Restraining Trade*, 23 SPORTS L.J. 19, 46 (2016); *see also* Totty & Owens, *supra* note 35, at 47.

[155] *See Qualifying Offer*, MLB, http://m.mlb.com/glossary/transactions/qualifying-offer (last visited April 21, 2020). The NFL has a similar compensatory draft pick system for teams that lose players in free agency. *See 2019 Compensatory Draft Picks*, NFL (Feb. 22, 2019), https://operations.nfl.com/updates/football-ops/2019-nfl-compensatory-draft-picks/.

compensating a team with a draft pick when they lose a top player to free agency—it also has a chilling effect on player salaries and their ability to garner long-term contracts because of this penalty that the signing team must pay. While the player can accept their current team's one-year qualifying offer and then enter free agency with no compensatory draft pick attached to them, that additional year delays the player entering the free-agent market. This can be risky with regard to how teams have increased their awareness of, and calculations regarding, the player aging curve and projected future performance.[156]

Traditionally, commentators worried that free agency would have a negative effect on league parity because the large-market teams with plentiful resources could better afford and amass rosters with a disproportionate amount of elite talent in the league.[157] However, in 1956, economist Simon Rottenberg theorized through his invariance proposition that free agency would yield the same talent distribution as the reserve system that professional sports leagues had in place at the time (which allowed a team to keep a player under contract as long as it wanted).[158] More recently, several economists have argued that free agency has not had a negative impact on the competitive balance of professional sports leagues, due, in part, to the payroll constraints imposed by each league's CBA.[159] Other economists have found that free agency actually promotes competitive balance.[160] Whether free agency achieves greater league parity or not, it is clear that the systems in the NFL, NBA, and MLB do restrict player movement and salaries. For example, in MLB, in 2018, of the league's seventy best players, only eight of them had ever been

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[156] *See* Probasco, *supra* note 68, at 10–11.

[157] *See* Lee, *supra* note 20, at 78.

[158] *See* Vrooman, *supra* note 81, at 6. Interestingly, the only difference that Rottenberg identified between the two approaches would be the lessening of team control and manipulation of players that would enable players to better achieve the fair market value of their services. *Id*.

[159] *See* Lee, *supra* note 20, at 78.

[160] Michael R. Butler, *Competitive Balance in Major League Baseball*, 39 AMER. ECON. 46, 47–49 (1995).

free agents.[161] This may be due, in part, to the length of time players need to play under the rookie contract system before reaching free agency. It could also be related to players realizing that with the rise of data analytics, the old system and tradition of playing through a long rookie contract and striking it rich with a free agent contract is becoming increasingly rare.[162] The contrast between the evidence that free agency may well lead to more competitive balance and the lengths through which leagues go in order to stifle player movement through free agency—and depress player salaries—raises the question again about whether owners truly seek parity or payroll relief.

III. TRENDS IN PROFESSIONAL SPORTS IMPACTING PARITY: HOW COMPETITIVELY BALANCED ARE THE LEAGUES?

There are two trends in professional sports that have both enhanced and hurt the efforts toward achieving competitive balance: the phenomenon of tanking and the rise of data analytics in sports. "Tanking" is a term used in sports that describes when a team purposely acts in ways—such as trading expensive star players or minimizing payroll—to not be competitive and thus garner benefits like top, cost-effective draft picks to build toward a strong, more competitive future.[163] At the same time, there has been a growth in the use of statistics in professional sports that has helped teams better evaluate and value players, project future performance, and more efficiently structure their rosters for success in the short- and long-term. Whether these trends were fueled by—or merely exacerbated the problems with—the various competitive balance reforms detailed above is hard to say. But they are important topics to analyze in trying to determine whether these various rules and policies aimed at parity have been successful or not.

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[161] Sam Miller, *Why aren't the Dodgers even better?*, ESPN (Sept. 19, 2018), https://www.espn.com/mlb/story/_/id/24710787/why-los-angeles-dodgers-even-better.

[162] *See* Shaikin, *supra* note 130; *see also* Humphreys & Pyun, *supra* note 60, at 686.

[163] Allen T. Paxton, *Trust the Process: How the NBA Can Combat Its "Tanking" Problem in Court*, 104 IOWA L. REV. 1551, 1552 (2019).

A. TANKING

The tanking phenomenon has seemed to rise in prominence the past decade or so. Teams in each league assess whether they will be able to compete for a championship or not. If they can, the teams spend as strategically and aggressively as it can in order to pursue a title. They might give up long-term assets—like draft picks—for short-term infusions of talent: for example, trading for high-priced players or signing an expensive free agent. On the other hand, if teams are not competitive for the championship, then they will oftentimes begin a rebuilding process to reconstruct a title-contending roster in the future.[164] In that circumstance, teams will oftentimes trade away expensive players, forgo the free agent market, and attempt to stockpile as many future draft picks as possible.[165] By stripping its roster down, these non-competitive teams minimize their payroll and ensure profitability because of league revenue sharing. These teams also usually end with one of the worst records in the league, which gives them a higher draft pick (and likely more talented player).[166] As the team wallows during the regular season for a few years, they compile highly-talented players through the draft that are cost-controlled through their rookie contracts.[167] Once the

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[164] *See* Scott Davis, *"I have no idea what the hell is happening:" MLB's bizarre free agency has created a rift in the league and both sides are pointing fingers*, BUS. INSIDER (Mar. 3, 2018), http://www.businessinsider.com/mlb-free-agency-drama-rift-2018-3.

[165] *See* Rachel Schaefer, *What exactly is "tanking?"*, THE DAILY CAMPUS (Feb. 7, 2018), http://dailycampus.com/stories/2018/2/7/mlb-column-what-exactly-is-tanking.

[166] *See* Dave Sheinin, *No longer sports' dirty little secret, tanking is on full display and impossible to contain*, WASH. POST (Mar. 2, 2018), https://www.washingtonpost.com/sports/no-longer-sports-dirty-little-secret-tanking-is-on-full-display-and-impossible-to-contain/2018/03/02/9b436f0a-1d96-11e8-b2d9-08e748f892c0_story.html?noredirect=on&utm_term=.85e9d996a553. That is not to say that teams purposely lose individual games. Rather, teams that are rebuilding construct their rosters in a manner that makes the likelihood of a winning season quite low. *See* Davis, *supra*, note 164; *see also MLB Players Union Grievance*, *supra* note 85 (quoting MLB Commissioner Rob Manfred as saying, "[i]n Baseball, it has always been true that Clubs go through cyclical, multi-year strategies directed at winning").

[167] *See MLB Players Union Grievance*, *supra* note 85.

team sufficiently improves, the financial flexibility of having top-quality talent on rookie contract salaries allows the team to then trade for higher-priced players or sign expensive free agents and then compete effectively for the league championship for a window of time. Once that window closes, the team starts the rebuilding process all over by "tanking" again.

The intricate system of competitive balance reforms seems to almost encourage this all-or-nothing approach to running a professional sports team. If a team can compete for a championship, the structure is in place to do so within a salary- or luxury-capped environment that limits spending on payroll. If a team is not competitive, it has an incentive to minimize payroll—especially with revenue sharing all but ensuring profitability—and wind up with one of the worst records in the league so that they can obtain top players in the next draft at fixed, far-below-market costs. As several commentators have noted, especially in the NBA, being in middle—that is, not competing for a championship but not being one of the worst teams in the league—is fraught with peril.[168] To be middling, teams usually have healthy payrolls, yet they do not get the benefit of being able to draft an elite talent given that they choose in the middle of the draft—creating an untenable yet self-fulfilling situation.[169] Perhaps it is unsurprising then that in a given season, six teams might be competing for an NBA championship while the others are either actively trying to rebuild or stuck in middle-ground purgatory.[170] Given the parity systems in place in these leagues, well-run teams thus try and alternate between the highest levels of winning and the lowest levels of losing—attempting to avoid the middle along the way.[171]

This approach has proven successful in professional sports. For example, the Philadelphia 76ers in the NBA have built a title-contending roster after years of abysmal records.[172] Four of the last five MLB World Series champions all rebuilt their teams

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[168] *See* Verducci, *supra* note 115.

[169] *See id.*

[170] *See* Weinstein, *supra* note 29.

[171] *See* J.P.F., *Continental Divide*, THE ECONOMIST (Dec. 16, 2013), https://www.economist.com/game-theory/2013/12/16/continental-divide.

[172] *See Fixing the NBA Competitive Balance Problem*, *supra* note 114.

in a similar "tanking" fashion.[173] These examples may help explain why fan bases have not revolted against teams that tank and rebuild. Studies validate that fans view winning over a three- to five-year horizon rather than on an every-year basis.[174] If a potential championship looms in the near-term, fans have shown their willingness to be patient through losing seasons.[175] At the same time, this all-or-nothing trend leads to fewer teams spending on their rosters to be competitive and, instead, minimizing costs in the short run to garner greater cost effective rookie talent for the long term. Whether this phenomenon was created by the competitive balance reforms or more starkly accentuates some of its particular features, it has changed the marketplace for players and thus disrupted long-standing assumptions about players' salaries and contracts.[176]

B. DATA ANALYTICS

The rise of data analytics in professional sports over the last decade has similarly intersected with the competitive balance reforms. Almost every team in the NFL, NBA, and MLB have analytics departments that track and analyze data—offensive and defensive statistics—that help inform player usage and roster decision-making.[177] Teams research aging curves, project future

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[173] The Kansas City Royals in 2015; the Chicago Cubs in 2016; the Houston Astros in 2017; and the Boston Red Sox in 2018. *See MLB Players Union Grievance*, *supra* note 85; Sam Miller, *In 2018, What is a Win? A Shift in Philosophy Has Changed MLB Forever*, ESPN (Mar. 23, 2018), http://www.espn.com/mlb/story/_/id/22815820/houston-astros-chicago-cubs-set-path-winning-losing [hereinafter "Miller, *What is a Win?*"]. The latter two championships, of course, are now called into question given the sign-stealing scandal that broke in late 2019 and early 2020. *See* Molly Knight, *How can MLB put an end to illegal sign stealing? Do away with instant replay*, THE ATHLETIC (Jan. 10, 2020), https://theathletic.com/1524044/2020/01/10/knight-how-can-mlb-put-an-end-to-illegal-sign-stealing-do-away-with-instant-replay/.

[174] *See* Gordon, *supra* note 21.

[175] *See* Miller, *supra* note 173.

[176] *See* Parlow, *Hope and Faith*, *supra* note 1, at 113–16.

[177] *See* Jay Jaffe, *The Free Agent Market is Slow Partially Because It's Extremely Flawed*, SPORTS ILLUSTRATED (Jan. 19, 2018), https://www.si.com/mlb/2018/01/19/free-agent-market-jd-martinez-eric-hosmer-jake-arrieta-yu-darvish.

productivity, estimate cost per win, and adjust for salary inflation in preparation for free agent contract negotiations.[178] This use of data has led teams away from past practices of paying players for past performance under the assumption that for at least the early years of a free agent's contract, they will perform similarly.[179] Teams use statistics and data projections to determine how much a player is worth going forward and usually do not stray from this cost efficiency modeling.[180]

This shift towards data analytics runs contrary to the norms that historically ruled free agency: Teams would give expensive, long-term free agent contracts to stars—based on past performance—knowing that they would likely only perform to the value of the contract in the first few years.[181] Teams were thus willing to get less productivity—indeed, below contract value statistically—for the latter years of the star player's contract because of the near-certainty of a strong performance early in the contract.[182] Since many players are reaching free agency well into their 20s—if not early 30s—this change in valuing players creates challenges for free agents seeking to achieve the big payoff of a free agent contract after under-market salaries on their rookie contracts.[183] Given the ages in which players reach free agency, teams are usually unwilling to offer long contracts or higher salaries—at least compared to the past—because of their recognition of aging curves and projected future performance as the players age.[184]

While data analytics started famously with the Oakland A's and Moneyball, large- and small-market teams alike use data

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[178] *Id.*

[179] *See* Wayne G. McDonnell, Jr., *MLB Free Agency is Suffering from Owners' Flawed Strategies and an Imperfect Agreement*, FORBES (Feb. 13, 2018), https://www.forbes.com/sites/waynemcdonnell/2018/02/13/mlb-free-agency-is-suffering-from-owners-flawed-strategies-and-an-imperfect-agreement/#48bed34a792f.

[180] *See* Davis, *supra* note 164.

[181] *See* Baccellieri, *supra* note 118.

[182] *Id.*

[183] *See* Probasco, *supra* note 68, at 10–11.

[184] *See* Neil Weinberg, *The Beginner's Guide to Aging Curves*, FANGRAPHS (Dec. 10, 2015), https://library.fangraphs.com/the-beginners-guide-to-aging-curves/; Sam Miller, *What Happens as Baseball Players Age?*, ESPN (June 27, 2018), https://www.espn.com/mlb/story/_/id/23916211/major-league-baseball-aging-cycle-how-mike-trout-becomes-albert-pujols.

analytics.[185] In this regard, statistics have indisputably impacted nearly every aspect of player compensation.[186] They have changed the length and amounts of free agent contracts.[187] Data analytics have led teams to value less expensive rookie players over veteran players, even if the less-experienced player will lead to fewer wins.[188] Teams may not deem the cost differential worth the additional wins, particularly if they are in a tanking/rebuilding mode.[189] Indeed, the data analytics movement was driven by a desire for teams to be able to better evaluate and value players and pay them accordingly.[190] This goal, however, is not related to benefitting smaller-market or lower-revenue teams to create greater parity in the league. Instead, data analytics has enabled all teams to become more cost efficient in constructing their rosters—with the aid of the various competitive balance reforms detailed above—and thus minimize their payroll costs.[191]

C. HAVE THE COMPETITIVE BALANCE REFORMS CREATED GREATER PARITY?

With all of the effort leagues have put into designing and implementing the various competitive balance reforms, and in light of tanking and data analytics, the question arises as to whether professional sports leagues have achieved greater parity or not. The record is mixed. Some economists argue that competitive balance improved "despite team relocation, expansion, and growing local revenue disparities beginning in the early 1980s."[192] Different data points seem to support this contention to varying degrees.[193] For example, from 2011-2017, there was not a strong correlation between payroll and wins in

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[185] *See* Edwards, *Team Payroll*, *supra* note 117.

[186] *See* Shaikin, *supra* note 130.

[187] *See* Probasco, *supra* note 68, at 10–11.

[188] *See* Jaffe, *supra* note 177.

[189] *See* Davis, *supra* note 164.

[190] *See* Gordon, *supra* note 21.

[191] *Id.*

[192] Rodney Fort & Young Hoon Lee, *Structural Change in MLB Competitive Balance: The Depression, Team Location, and Integration*, 43 ECON. INQ. 158, 167 (2005).

[193] *See* Bowman et al., *supra* note 19, at 512.

MLB for six of the seven seasons during that time period.[194] Moreover, in 2013, the MLB teams above the median payroll experienced no greater success than those below the median.[195] Such relative balance may help explain why from 2010-2019, all but four MLB teams made the playoffs.[196] Indeed, during a fifteen year period from 2000-2015, sixteen different MLB teams competed for the World Series with ten different teams emerging victorious.[197] In the NFL, there has been a pretty consistent turnover in the teams that compete for the conference championships each year—also suggesting greater parity.[198] During that same fifteen-year period—2000-2015—seventeen different NFL teams competed in the Super Bowl with nine different teams winning over that span of time.[199] These various data points seem to suggest that professional sports leagues experienced greater competitive balance after implementing some of the aforementioned reforms aimed at parity within the leagues.

On the other hand, there exists contrary evidence that leagues have remained imbalanced or, worse yet, move further away from parity than before the institution of these reforms. For example, certain NFL teams dominate the number of conference championship appearances: the Denver Broncos, New England Patriots, and Pittsburgh Steelers—with the Patriots winning five of the twenty Super Bowls since 2000.[200] Perhaps most strikingly, only eight of the NFL's thirty-two teams account for almost 70% of Super Bowl victories in league history.[201] In fact, half of all conference championship berths from 2000-2017 were concentrated among five teams.[202] The NBA similarly has a dearth of teams that have made the conference championships in the past

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[194] *See* Edwards, *Battle*, *supra* note 90.

[195] *See* Yavner, *supra* note 119, at 310–11.

[196] *See* Matt Snyder, *The NFL is a league of parity, but so is Major League Baseball*, CBS SPORTS (Jan. 23, 2016), https://www.cbssports.com/mlb/news/the-nfl-is-a-league-of-parity-but-so-is-major-league-baseball/. The four MLB teams that did not make the playoffs during that period of time were the Chicago White Sox, Seattle Mariners, Miami Marlins, and the San Diego Padres. *See id.*

[197] *Id.*

[198] *See* Fort, *supra* note 86, at 211–12.

[199] *See* Snyder, *supra* note 196.

[200] *See* Fort, *supra* note 86, at 213–14.

[201] *See* Badenhausen, *supra* note 72.

[202] *See* Clark, *supra* note 84.

ten years.[203] This phenomenon is due, in part, to a few teams having more NBA superstars on their roster than other teams and thus having greater success in the regular season and the early rounds of the playoffs on their way to the conference championships.[204] In MLB, the size of a team's payroll has been correlated with more success in the regular season.[205] In fact, from 2014-2017, only one of the eight winningest teams during that period did not have a payroll amount among the top eleven teams in the league.[206] In these regards, professional sports leagues do not seem to have improved parity among their teams despite the various competitive balance reforms they implemented over the past couple of decades.

Interestingly, whether leagues are more competitively balanced or not, two things remain true: revenues have been surging for the leagues and the players' share of revenue has declined from historical levels. For example, MLB just surpassed more than $10 billion in annual revenues.[207] Yet the players in these professional sports leagues are receiving a smaller percentage of the league's revenues than in the past. For example, NBA players receive between 49% and 51% of the basketball-related income in the NBA.[208] The NFL also shares approximately 50% of its revenue with its players.[209] While MLB Commissioner Rob Manfred claims that players' share of league revenue is close

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[203] *Competitive Balance in Pro Sports Leagues*, *supra* note 34. However, this trend should not be particularly surprising as the NBA has been historically less competitively balanced than the NFL and MLB. *See* Andrew Puopolo, *Which Sports League Has the Most Parity*, HARV. SPORTS ANALYSIS (Dec. 1, 2016), http://harvardsportsanalysis.org/2016/12/which-sports-league-has-the-most-parity/.

[204] *See* Weinstein, *supra* note 29.

[205] Edwards, *Team Payroll*, *supra* note 117.

[206] *Id.*

[207] Jeff Passan, *Here's why baseball's economic system might be broken*, YAHOO (Jan. 16, 2018), https://sports.yahoo.com/heres-baseballs-economic-system-might-broken-224638354.html. This figure is even more impressive when considering that several MLB teams have been struggling with declining attendance. *See id.*

[208] Baccellieri, *supra* note 118.

[209] Ben Lindbergh, *Baseball's Economics Aren't As Skewed As They Seem*, THE RINGER (Feb. 21, 2018), https://www.theringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred.

to 50%, some estimates have it closer to 40%.[210] However, these figures are lower than historical percentages and may reveal the unspoken goal of many of these competitive balance reforms: minimizing payroll costs.[211]

CONCLUSION

The analysis above leads to the inevitable question: Are team owners more interested in winning or profit maximization? The long-standing argument for the various competitive balance reforms has been to create greater league parity. These reforms were needed, leagues argued, so that teams were competitive, which would keep fans interested—thus increasing revenue for the league.[212] However, this foundational argument does not seem to hold up upon closer scrutiny. For example, several economists have studied competitive balance and attendance and found that there was no statistically-significant relationship between parity and greater fan attendance.[213] In fact, some studies suggested that more competitive balance would actually hurt attendance for professional sports leagues.[214] Rather, attendance increased when a few teams consistently dominated the league over a sustained period of time.[215] In addition, star players have also tended to drive fan interest and attendance.[216] Others have noted that league parity does not always equate to greater interest and respect. For example, the NBA had its greatest parity among teams in the 1970s, but that decade is widely viewed as one of the least interesting and respected in the league's history.[217]

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[210] *Id.*

[211] *Id.* (providing a chart of MLB revenue and the percentage of league revenue allocated to players and noting that MLB players had previously received between 56%-60% of league revenue); Vrooman, *supra* note 81, at 24 (detailing league revenues and the percentage attributable to players for the NFL and MLB).

[212] Gordon, *supra* note 21.

[213] Mehra & Zuercher, *supra* note 48, at 1533–34.

[214] *Id.* at 1535.

[215] Badenhausen, *supra* note 72.

[216] *Id.*

[217] Jerry Brewer, *Cavaliers' and Warriors' complete dominance actually illustrates NBA's competitive balance*, CHI. TRIBUNE (May 30, 2017), https://www.chicagotribune.com/sports/ct-nba-finals-cavaliers-warriors-dominance-20170530-story.html.

One might think that with the competitive imbalance prevalent in professional sports leagues—despite the adoption of competitive balance reforms—the business of these sports should be struggling. But nothing could be further from the truth.[218] As detailed above, the NFL, NBA, and MLB are highly successful—oftentimes reaching record revenue marks in recent years. The incredibly-lucrative broadcasting deals for each league also demonstrate that significant and growing fan interest in these sports, despite the lack of parity in the leagues. Competitive imbalance, then, does not seem to have a negative impact on fan interest, attendance, or league revenue. This phenomenon seems to suggest that as long as a game is not fixed—and thus either team has a chance to win, even if they are unevenly matched—fans will maintain interest in the sport.[219] Moreover, some studies have shown that fans view team competitiveness over a three- to five-year period.[220] This finding helps explain why fans have tolerated—indeed, embraced—the tanking trend in sports. Fans seem to be willing to embrace several losing seasons if they believe the chance of a championship will follow thereafter.[221] In this regard, fans do not look at the year-to-year competitiveness of their teams but rather take a longer-term view of success with the hopes that several down years lead to the euphoria of a title.[222]

Another prominent narrative that may also be suspect is that with the rise of data analytics in professional sports, teams are being "smarter."[223] The "Moneyball" revolution in MLB was heralded as a way in which smaller-market—and lower-revenue—teams could compete with larger-market, higher-revenue teams.[224] However, all teams now fully embrace data. All teams seek to use data to no longer overpay for players: to use data to predict player value and pay accordingly.[225] This analysis, of course, renders the size of a team's market and the amount of team revenue largely irrelevant.[226] At its core, then, the data analytic

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[218] Badenhausen, *supra* note 72.
[219] Gordon, *supra* note 21.
[220] *Id.*
[221] Verducci, *supra* note 115.
[222] Miller, *What is a Win?*, *supra* note 173.
[223] Baccellieri, *supra* note 118.
[224] Gordon, *supra* note 21.
[225] *Id.*
[226] *Id.*

movement in professional sports served simply to find a way for all teams to win more cost efficiently—achieving the same competitive goals while spending less.[227]

If leagues were striving for competitive balance, they would require teams receiving revenue-sharing monies to use it on their payroll rather than keep it as profits. MLB would have a salary floor—a minimum payroll amount for each team. Leagues would embrace a far more free-market free agency, which has been shown by economists to be the most effective method for achieving competitive balance.[228] If leagues chose to continue revenue sharing, they would cease with a salary cap or luxury taxes, as economists have found that the latter two competitive balance reforms have offset the parity gains that revenue sharing alone would accomplish.[229] But leagues have not chosen to do so. Instead, they have adopted a variety of reforms aimed at competitive balance that have largely failed in their goals. Leagues have implemented salary caps and luxury taxes, which—when combined with revenue sharing—create artificially-depressed markets that drive down player salaries and do not lead to improved competitive balance.[230] They continue to redistribute league revenue, despite findings that revenue sharing hurt competitive balance because it makes winning less valuable.[231] Revenue sharing does, however, reduce the amount team owners pay for talent—one MLB study suggested a 22% average reduction in value[232]—while increasing the exploitation of players.[233]

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[227] Baccellieri, *supra* note 118.

[228] *See supra* text accompanying notes 158–160.

[229] *See* Vrooman, *supra* note 81, at 11; *see also* Rascher, *supra* note 15.

[230] *See* Vrooman, *supra* note 81, at 11; *see also* Totty & Owens, *supra* note 35, at 48–49.

[231] Gordon, *supra* note 21; *see also* Zimbalist, *supra* note 35, at 111. As one commentator noted: "There has never been a time in baseball history when a team—a team's owner—got more money just for existing than it does today." Jaffe, *supra* note 177 (quoting Joe Sheehan). Revenue sharing has thus exacerbated competitive balance—rather than achieving greater parity—because it all but guarantees profitability for owners, thus reducing the incentive to win. Gordon, *supra* note 21.

[232] Gordon, *supra* note 21.

[233] Vrooman, *supra* note 81, at 13.

As one scholar noted, professional sports leagues are either terrible at figuring out ways to achieve parity among their teams or they are not really trying to achieve competitive balance.[234] Indeed, the various competitive balance reforms have been unsuccessful at achieving league parity. However, they have been successful at minimizing team payrolls and increasing league and owner profitability.[235] While the popular narratives in the industry and among fans are those regarding competitive balance, the analysis above tells a different story of player exploitation in creating restrained labor markets that depress player salaries and keep team payrolls lower than they would be in a free(er) market. Accordingly, as the NFL, NBA, and MLB inch closer to their next round of collective bargaining negotiations with their respective players' unions, the issue of player pay may become even more prominent than it has in past CBAs.

[234] Fort, *supra* note 86, at 218.
[235] Gordon, *supra* note 21.

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THE CURRENT ANTITRUST DISPUTE BETWEEN THE WRITERS GUILD OF AMERICA AND HOLLYWOOD TALENT AGENCIES: A MODERN RETELLING OF A FAVORITE HOLLYWOOD CLASSIC

BRANDON DREA*

INTRODUCTION

If entertainment executives decided to make a motion picture about the history of American antitrust law, Hollywood itself would play a leading role.

Currently, a large conflict grounded in contract negotiations and entertainment-industry minutiae rages throughout Hollywood. This conflict affects every person who writes and creates television shows and movies that the world watches and consumes.

Since April 2019, the labor union representing writers, the Writers Guild of America (the "Writers Guild"), and the institutions charged with procuring writers their jobs and negotiating their compensation, the agencies that comprise the Association of Talent Agencies ("ATA"), have been in a standoff surrounding the renewal of a decades-old contract between the Writers Guild and the ATA.[1] The Artists' Manager Basic Agreement of 1976 ("AMBA") was a franchise agreement between the ATA and the Writers Guild that governed the working relationship between writers and their agents. The AMBA recently expired in April 2019.[2]

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[1] *See* Jordan Crucchiola, *The Hollywood Fight That's Tearing Apart Writers and Agents, Explained*, VULTURE, https://www.vulture.com/article/wga-hollywood-agents-packaging-explained.html (last updated April 21, 2019).

[2] The Artists' Manager Basic Agreement gives agencies the authority to negotiate over Writers Guild of America's scale (the minimum a writer can be compensated for the writer's work) on a

The AMBA contained a "Code of Conduct" ("Code") that talent agencies were required to follow. The Code regulated the way agencies represented film and television writers, and it became ubiquitous as the Writers Guild and the ATA contractually authorized franchised agencies to include writers in packages through agreements entered into between the Writers Guild and the ATA.

The ATA refused to sign the Writers Guild's new Code of Conduct. The new Code requires agencies to absolutely, categorically, and without exception cease and withdraw from (i) the decades-long practice of "packaging" arrangements, and (ii) any affiliation with or investment in any entity that produces or distributes content (agency-affiliated production).[3]

Since the expiration of the AMBA, of the roughly one hundred talent agencies that comprise the ATA, approximately forty smaller talent agencies have agreed to the Writers Guild's Code of Conduct.[4] However, the Writers Guild is specifically targeting the major talent agencies: Creative Artists Agency ("CAA"), William Morris Endeavor ("WME"), and the United Talent Agency ("UTA").

In April 2019, the dispute between the Writers Guild and the major talent agencies took the spotlight in the Superior Court of California in Los Angeles. There, the Writers Guild filed a lawsuit against the major talent agencies, alleging violations of state and federal law with respect to anticompetitive practices associated with packaging content. The Writers Guild moved into

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writers' behalf. Under federal labor law, the Writers Guild of America is the only organization that is allowed to negotiate compensation for its members, however the union can franchise that right to other entities, such as talent agencies. *See generally* 29 U.S.C. §§ 151–169. *Cf.* Jonathan Handel, *Can the Writers Guild Turn a Manager Into an Agent? Probably Not*, HOLLYWOOD REP. (Mar. 27, 2019).

[3] David Robb, *CAA Files Antitrust Lawsuit Against WGA, Becoming Latest Agency To Sue*, DEADLINE (July 1, 2019), https://deadline.com/2019/07/caa-sues-writers-guild-group-boycott-hollywood-wga-agencies-1202640486/; *see also* Todd S. Purdum, *Why Hollywood Writers are Firing the Agents They Love*, THE ATLANTIC (April 21, 2019), https://www.theatlantic.com/entertainment/archive/2019/04/story-behind-hollywood-writers-vs-their-agents/587650/.

[4] *See* Hoai-Tran Bui, *The WGA vs. ATA Standoff Explained: What is Happening in Hollywood Between Writers and Their Agents?*, /FILM (APRIL 22, 2019), https://www.slashfilm.com/wga-ata-explainer/.

"uncharted waters" when it demanded thousands of Hollywood writers to fire their agents who refused to sign the Code of Conduct.[5] The conflict quickly shifted, graduating to a larger, brighter federal stage in June 2019 when the following sequence of events occurred:

> **June 2019**: UTA and WME filed individual complaints against the Writers Guild for violation of Section 1 of the Sherman Antitrust Act in the United States District Court in the Central District of California, Western Division.[6]
>
> **July 2019**: CAA filed a complaint against the Writers Guild for violation of Section 1 of the Sherman Antitrust Act in the United States District Court in the Central District of California, Western Division.[7]
>
> **August 2019**: The Writers Guild dismissed its suit in state court and consolidated its claims against CAA, WME, and UTA in the United States District Court for the Central District of California, Western Division ("District Court") adding antitrust violations and allegations of racketeering.[8]

The trailer for this story may facially appear to be a new, exciting summer blockbuster. However, it is best likened to a

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[5] Sasha Ingber, *'Uncharted Waters': Union Tells Hollywood Writers to Fire Their Agents*, NPR (April 13, 2019), https://www.npr.org/2019/04/13/713030206/uncharted-waters-union-tells-hollywood-writers-to-fire-their-agents.

[6] David NG, *CAA becomes third agency to take Writers Guild to court*, LA TIMES (July 1, 2019), https://www.latimes.com/business/hollywood/la-fi-ct-caa-antitrust-suit-wga-20190701-story.html.

[7] *Id.*

[8] Jonathan Handel, *Writers Guild Moves Agency Lawsuit to Federal Court, Adds Racketeering and Antitrust Claims*, HOLLYWOOD REP. (Aug. 19, 2019), https://www.hollywoodreporter.com/thr-esq/writers-guild-moves-agency-lawsuit-federal-court-adds-racketeering-antitrust-claims-1233123.

digital remake of an original motion picture filmed in the 1940s or, better yet, the 1960s.

This Note will examine the Writers Guild's conflict with CAA, WME, and UTA. It will address the merits of the claims through an analysis of Hollywood's monopolistic practices that have emerged, subsided, and reemerged throughout the last century.

This Note begins with a historical overview of the monopolistic practices that existed in early twentieth century Hollywood that resulted in the separation of major motion picture producers and exhibitors from distribution and production companies. This occurred as a result of the 1948 Supreme Court decision *United States v. Paramount Pictures, Inc.*[9] Next, the focus will shift to the anticompetitive practices that forced, via legal action, a major Hollywood talent agency and production company in the 1960s to dissolve its agency business on the grounds that being both a buyer and seller of talent posed an inherent conflict of interest.[10]

At risk of playing "spoiler" to this blockbuster Hollywood sequel, several items should be noted:

(i) The District Court should enjoin the Writers Guild from restricting film and television writers from being represented by the agency of their choosing because doing so does have an anticompetitive effect on a particular market—the agents, producers, directors, and viewers;

(ii) The District Court should hold that the industry-standard practice of "packaging" does not violate the Sherman Antitrust Act because it, in fact, promotes pro-competitive practices between agencies, writers, studios, and production companies; and

(iii) The District Court should determine that agency-affiliated production companies are pro-competitive and outweigh any anticompetitive conflicts of interests. However, the District Court

[9] 334 U.S. 131 (1948).
[10] Purdam, *supra* note 3.

> should reserve the right to require CAA, UTA, and WME to provide evidence that agency-affiliated production companies seek to employ competitor-agency's clients.

Now, let the show begin!

I. HISTORY OF ANTITRUST ISSUES IN HOLLYWOOD

An analysis of government antitrust action in the entertainment industry must begin with a description of the industry's product and the demand for it.[11] The product is never identical, rather each product is uniquely different than the last. The market is constantly evolving, and uncertainty is higher in this industry than most others.[12]

To combat this uncertainty, and have some semblance of security, production companies, studios, theaters and talent agencies have used various tactics to control their respective product from "top to the bottom" to ensure that the sale of their product would remain stable.[13] This approach is known as "vertical integration."[14]

A. THE BEGINNING OF THE MOTION PICTURE INDUSTRY

The history of Hollywood and the entertainment industry is one of continuous innovation and a succession of strategies to

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[11] *See* MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 1 (1960).

[12] *Id.*

[13] In the 1930s and 1940s, major producers in the twentieth century purchased leading theaters. *Id.* Through this strategy, the production company could ensure that its product would be exhibited to paying customers. *Id.* This was an attempt to bring some calm in the midst of a knowingly tempestuous market. *Id.* At the same time, large theater chains acquired production companies to ensure that there would be a steady supply of films. *Id.* Through vertically integrated combinations, it was a small step to nationwide horizontal combinations that could exclude the pictures of independent producers from large theaters, and, by withholding their own pictures from independent exhibitors, force them to sell out to major theater circuits. *Id.*

[14] Erwin A. Blackstone & Gary W. Bowman, *Vertical Integration in Motion Pictures*, 49 J. OF COMM. 123, 124 (1999).

control markets.[15] The first innovations occurred in cameras and projectors, film and screens, distribution organization, theater structure, and in techniques throughout the industry.[16] These approaches were based on control of patents, actors, distribution facilities, and theaters.[17]

In the early twentieth century, there were attempts at setting up monopolies by acquiring patents on equipment and technology needed to produce and exhibit motion pictures.[18] As technology became more sophisticated, the power that patents provided decreased.[19] In an attempt to maintain control, however, industry leaders of the time, led by Thomas Edison, merged their companies and formed a coalition: the Motion Picture Patents Company (the "MPPC").[20] With the combination of the licenses and patents held by individual members of the MPPC, the group gained substantial power in the entertainment industry. The MPPC required distributors and exhibitors to use its members' film technology exclusively.[21] While this standardized the manner by which films were distributed and exhibited, it also allowed the MPPC to monopolize this segment of filmmaking.[22]

As technology advanced, so did the rise in independent producers and production companies that refused to join the MPPC. Between 1909 and 1914, Edison's group engaged in continuous litigation against independent producers and

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[15] CONANT, *supra* note 11, at 16–17.

[16] *Id.*

[17] *Id.*

[18] *See id.* Patents were held for the raw film and cameras needed to make motion pictures and for the projectors that were needed to exhibit them. As technology in the motion picture business was still in a pre-industrialized stage, ownership of these patents gave Edison and his contemporaries an opportunity to control the entire business. These individuals vigorously defended their power by bringing a myriad of lawsuits against anyone who infringed on any of their patent rights. *See, e.g.*, Edison v. Am. Mutoscope & Biograph Co., 151 Fed. 767 (2d Cir. 1907).

[19] CONANT, *supra* note 11, at 16–17.

[20] *Id.* at 18 ("The [MPPC] was organized in 1908 and the next year began to control production and marketing in the entire industry").

[21] *Id.* at 19.

[22] *Id.*

production companies that refused to join the MPPC's pool.[23] However, in 1912, the United States filed an antitrust action against MPPC.[24] The United States District Court for the Eastern District of Pennsylvania found that the contracts between the MPPC, its members, and licensees were a "conspiracy in restraint of trade or commerce . . . and were and are illegal, and that [MPPC] had attempted to monopolize, and have monopolized . . . a part of the trade or commerce . . . in the motion picture business . . . ."[25] By 1915, the MPPC had rapidly lost control of the industry, and the rise in production companies that became national distributors, namely Fox, Mutual, Universal, and Famous Players-Laskey, arrived on the scene.[26]

B. THE CREATION OF PARAMOUNT AND THE HOLLYWOOD STUDIO

A majority of the attempts to monopolize in the motion picture industry before 1917 were by the creators of equipment or producer-distributors.[27] Between 1917 and 1927, the industry shifted to stronger theater circuits[28] and their affiliation with the leading producer-distributors.[29] While the court's decision ended the MPPC in 1915, it was not successful in rolling back the control Hollywood producers and distributors had now acquired. The

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[23] The MPPC filed more than 40 patent infringement suits. *See, e.g.*, Motion Picture Patent Co. v. Yankee Film Co., 183 F. 989 (S.D.N.Y. 1911); Motion Picture Patents Co. v. Champion Film Co., 183 F. 986 (S.D.N.Y. 1910); Motion Pictures Patents Co. v. Ullman, 186 F. 174 (S.D.N.Y. 1910); Motion Pictures Patents Co. v. Laemmle, 178 F. 104 (S.D.N.Y. 1910); Motion Picture Patents Co. v. Ceniaur Film Co., 217 F. 247 (D.N.J. 1914); Motion Pictures Patent Co. v. Éclair Film Co., 208 F. 416 (D.N.J. 1913).

[24] United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa. 1915).

[25] *Id.* at 811.

[26] CONANT, *supra* note 11, at 21.

[27] *Id.* at 23–27.

[28] A "circuit" is a number of theatres, cinemas, et cetera, under one management or in which the same film is shown. *Circuit*, COLLINS ENGLISH DICTIONARY–COMPLETE AND UNABRIDGED (12th ed. 2014).

[29] CONANT, *supra* note 11, at 27–29.

demise of the MPPC paved the way for a studio system that soon became synonymous with Hollywood.[30]

National distribution became the focus of producer-distributors, which eventually led to the first fully integrated studio, Paramount Pictures Corporation ("Paramount").[31] In the 1930s, Paramount had contracts with popular motion picture stars with substantial box office appeal.[32] Paramount combined this appeal with its national distribution capabilities, and in doing so, created a new tactic of control: block booking.[33] Although Paramount was the principal leader in the industry, other production-distribution companies followed in Paramount's footsteps.[34]

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[30] *See id.*; *see also* DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM 23 (1986).

[31] Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relationship in the Motion Picture and Television Industry*, 47 INDUS. AND LABOR RELATIONS REV. 666, 680 (July 1994). At the time Paramount was established, film distribution was accomplished by either (i) individual producers selling a motion picture to different theaters throughout the United States, or (ii) by exchanges that distributed motion pictures in separate markets throughout the United States. Kraig G. Fox, Note, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 508 n.22 (1992). W.W. Hodskin initially formed Paramount with the intent for Paramount to become a national distributor. *Id.*; JOHN IZOD, HOLLYWOOD AND THE BOX OFFICE, 1895-1986 45 (1988). Later, in 1916, Paramount merged with Adolph Zukor's Famous Players forming the first Hollywood studio involved in producing and distributing. *See* CONANT, *supra* note 11, at 83.

[32] For example, Mary Pickford, Fatty Arbuckle, Gloria Swanson, Clara Bow, and Rudolph Valentino. Later, in the 1920s and 1930s, Paramount added Claudette Colbert, Carole Lombard, Marlene Dietrich, Mae West, Gary Cooper, W.C Fields, and Bing Crosby. Paramount also added directors Ernst Lubitsch, Josef von Sternberg, and Rouben Mamoulian. *See* DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM: A HISTORY 23 (2005).

[33] Block booking "is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by distributor during a given period." *See* United States v. Paramount Pictures, 334 U.S. 131, 156 (1948).

[34] This included Fox Film Corporation, Warner Bros. Pictures, Inc., Loew's Incorporated, Radio-Keith-Orpheum Corporation, and

Producer-distributors began a block-booking system of distribution based on runs,[35] zones,[36] and clearances.[37] The effects rippled throughout the United States as exhibitors started to suffer the financial consequences of the run-zone-clearance system. To counter this practice, and to gain bargaining power in the industry, exhibitors banded together to form chains and circuits.[38] In 1917, exhibitors throughout the United States formed the National Exhibitors Circuit,[39] the first national merger of high quality, first run theaters.[40] The practice of "circuit booking" became the exhibitors' defense against powerful producer-distributors and studios.[41]

By the 1920s, circuit booking resulted in substantial market domination.[42] Studios took notice. If a particular studio had the means to control the theaters within various circuits, then that studio could conceivably control the entire industry from production to exhibition.[43] Moreover, if that same studio could

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Universal Theaters Corporation. HOWARD T. LEWIS, MOTION PICTURE INDUSTRY 345 (1933).

[35] "Runs" are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management. United States v. Paramount Pictures, Inc., 334 U.S. 131, 145 n.6 (1948).

[36] "Zones" are geographic boundaries. IZOD, *supra* note 31. A distributor would only release a particular motion picture to one theater for exhibition. *Id.* Releasing motion pictures in zones would maximize the number of audience members while preventing other theaters in close proximity from competing for the same customers. *Id.*

[37] A "clearance" is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres. *Id.*

[38] *See id.* at 64; *see also* CONANT, *supra* note 11, at 56.

[39] Later, in 1924, the First National Exhibitors Circuit expanded into a production company under the name First National Pictures, Inc. *See* CLIVE HIRSCHHORN, THE WARNER BROS. STORY 54 (1987). Eventually, First National Pictures was purchased by Warner Bros. *Id.*

[40] *Id.*

[41] MAE D. HUETTIG, ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY 27 (1944).

[42] In the 1950s, several circuits were charged with violating the Sherman Antitrust Act. *See* CONANT, *supra* note 11, at 117.

[43] *See* IZOD, *supra* note 31, at 40–42.

control prices and ensure access to theaters for the exhibition of their own motion pictures, the studio could inevitably prevent competition from other producer-distributors; specifically, the smaller, independent producers.[44] As such, the studios with the ability to do so would have control over the entire industry.[45]

Studios began purchasing exhibitors to make domination of the market a reality. As they did so, studios started to engage in practices that gave exhibition preferences to their own pictures. Additionally, studios would give preference to other major studio's pictures by using extended clearances, creating overbroad zones for affiliated exhibitors, and refusing to exhibit pictures produced by independent producers.[46] As preferential practices and policies started to become the status quo in the industry and the studio-owned circuits dominated the exhibition market, the government took notice.[47]

The government reacted by filing numerous lawsuits against both the circuits and the distributors.[48] These suits charged the circuits and distributors with illegally restraining trade in the motion picture industry by adopting various anticompetitive practices including the use of clearances, zoning methods, and block booking.[49] The government succeeded in these suits by

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[44] *Id.*

[45] *Id.* at 43; *see also* HUETTIG, *supra* note 41, at 53.

[46] J. Pen, *A General Theory of Bargaining*, 42 AM. ECON. REV. 24, 24–34 (1952).

[47] CONANT, *supra* note 11, at 42-59.

[48] *See* SIMON N. WHITNEY, ANTITRUST POLICIES, AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 163-65 (1958); *see, e.g.*, United States v. Griffith Amusement Co., 68 F.Supp. 180 (W.D. Okla. 1946), *rev'd*, 334 U.S. 100 (1948); United States v. Schine Chain Theaters, Inc., 63 F.Supp. 229 (W.D.N.Y. 1945), *aff'd in part and rev'd in part*, 334 U.S. 110 (1948); United States v. Crescent Amusement Co., 31 F.Supp. 730 (M.D. Tenn. 1940), *aff'd in part and rev'd in part*, 323 U.S. 173 (1944); United States v. Interstate Circuit, Inc., 20 F.Supp. 868 (N.D. Tex. 1937), *remanded*, 304 U.S. 55 (1938), *aff'd*, 306 U.S. 208 (1939); United States v. First Nat'l Pictures, Inc., 34 F.2d 815 (S.D.N.Y. 1929), *rev'd*, 282 U.S. 44 (1930); *see also* CONANT, *supra* note 11, at 84–101.

[49] Two notable suits were the government's antitrust charges brought against distributors and exhibitors in Chicago, Illinois and Los Angeles, California. The suits were United States v. Fox West Coast Theaters, 1932-1939 Trade Cas. (CCH) ¶ 55,018 (S.D. Cal. 1932) and United States v. Balaban & Katz Corp., 1932-1939 Trade Cas. (CCH) ¶

forcing the circuits and distributors to sign consent decrees restricting their conduct.[50] However, these consent decrees had a minimal effect on limiting the increasingly expansive anti-competitive mindset that had permeated and dominated the motion picture industry.[51] By the end of the 1930s, major studios had purchased the most powerful circuits.[52]

The government responded to the studios' undeniably anticompetitive activity by filing more lawsuits to eliminate the monopolistic activities of the circuits.[53] Finally, the Department of Justice took a monumental step in attempting to end these activities. In 1938, the government brought a case against Paramount Pictures Co.[54] However, the studios settled the case with the government before it went to trial and agreed to sign a consent decree.[55]

55,001 (N.D. Ill. 1932) respectively. *See also* Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 341, 350 (2004).

[50] *See* Orbach, *supra* note 49, at 342 ("The decree (i) limited the Majors' expansion of their exhibition businesses, (ii) permitted reasonable run-clearance-zone systems, (iii) prohibited discrimination among theaters, and (iv) prohibited block-booking of more than five features").

[51] *See* CONANT, *supra* note 11, at 87.

[52] *Id.* at 82.

[53] *See, e.g.*, Schine Chain Theaters v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); *Interstate Circuit Inc.*, 20 F.Supp. at 868.

[54] The antitrust suit was brought under 29 Stat. 209 (1890), which is now codified in 15 U.S.C. §§ 1–7 (1982). Paramount was one of seven defendants in the suit. However, Paramount was the most dominant defendant. The defendants were divided into groups. The "major" defendants were Paramount, Loew's Inc., Radio-Keith-Orpheum Corp. ("RKO"), Twentieth Century-Fox Film Corp., and Warner Bros. Pictures, Inc. All studios in the "major" grouping produced, distributed, and exhibited motion pictures. The "minor" defendants were Columbia Pictures Corp. and Universal Corp., both distributed and produced pictures, and United Artists Corp., who only distributed motion pictures.

[55] United States v. Paramount Pictures, Inc., 1940-1943 Trade Cas. (CCH) ¶ 56,072 (S.D.N.Y. 1940).

This consent decree lasted three years.[56] while the government relied on the strength of the consent decree and the good faith of the studios to eliminate their anticompetitive behavior.[57] Among other remedies, the decree (i) limited the major studios' expansion of their exhibition businesses,[58] (ii) permitted reasonable run-clearance-zone systems,[59] (iii) prohibited discrimination among theaters,[60] (iv) prohibited blind bidding,[61] and (v) prohibited block-booking of more than five features.[62] In addition, the decree set up an arbitration system to resolve disputes directly between independent theater owners and any of the *Paramount* defendants.[63] Ultimately, the decree was unsuccessful because the government did not compel the separation of production and exhibition. At the three-year term, affiliated circuits continued to control exhibition.[64] As such, independent production companies failed to gain any progress or traction.[65]

By late summer 1944, the *Paramount* defendants gained control over 17.35% of the theaters in the United States[66] which equated to the control of 90% of the most significant theaters in major markets throughout the country.[67] This control combined with the reality that the *Paramount* defendants distributed 75% of all motion pictures in the United States[68] provided substantial evidence that that the *Paramount* defendants had achieved their long-term goal to control the distribution market for first-run

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[56] *Id.*

[57] *Id.*

[58] *Id.* at 294.

[59] *Id.* at 291–92.

[60] *Id.* at 292–94.

[61] *Id.* at 292–93. "Blind bidding" is a practice where the exhibitors did not have the opportunity to view the motion picture before they licensed it. *See* CONANT, *supra* note 11, at 78.

[62] *Paramount*, 1940-1943 Trade Cas. Trade Cas. (CCH) ¶ 56,072 at 289–90.

[63] *See supra* text accompanying note 54.

[64] *See* CONANT, *supra* note 11, at 97–99.

[65] *Id.*

[66] United States v. Paramount Pictures, Inc. 70 F.Supp. 53 (S.D.N.Y. 1946).

[67] *See* CONANT, *supra* note 11, at 80–83.

[68] *Id.*

motion pictures.[69] As a result, the United States Justice Department reactivated the *Paramount* case and asked the District Court for the Southern District of New York to enforce all of the remedies of the amended complaint.[70] Moreover, the Justice Department placed specific emphasis on compelling the divestiture of the theaters by the *Paramount* defendants in an attempt to free up trade and create competition by ending the monopoly that the *Paramount* defendants still maintained.[71]

While the district court did not find that the major *Paramount* defendants had fully monopolized production in the entertainment industry, the court did find that the distribution system was restraining trade in violation of the Sherman Act.[72] As part of its decision, the district court issued another decree in December 1946.[73] The decree prohibited activities such as the use of excessive zones and clearances, forced block booking, fixing admission process, expansion in theater ownership, and joint theater ownership by the *Paramount* defendants or between any defendant and an independent theater owner.[74] Additionally, while the government's proposed remedy of separating motion picture exhibition from production and distribution was deemed to be "unnecessary," the court mandated an alternative remedy to correct the then current illegal distribution system.[75] The court's remedy mandated the installment of a competitive bidding system between exhibitors and production and distribution entities that would open doors to all theaters for any movie.[76]

On appeal to the United States Supreme Court, a majority of the district court's holdings relating to the illegality of trade practices carried on by the *Paramount* defendants were upheld.[77]

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[69] *See Paramount*, 70 F.Supp. at 70–71 (findings 145-151). The studios had blocked access to independent producers and distributors and had effectively eliminated competition for audience dollars from non-affiliated theaters by filling 90% of the best theaters with 75% of the movies that they exhibited. *Id.*

[70] ROBERT H. STANLEY, THE CELLULOID EMPIRE 1–49 (1978).

[71] *Id.*

[72] *Paramount*, 70 F.Supp. at 53; United States v. Paramount Pictures, Inc., 66 F.Supp. 323, 323 (S.D.N.Y. 1946).

[73] *Paramount*, 66 F.Supp. at 353.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Paramount*, 334 U.S. at 160–75.

However, the Supreme Court reversed the district court's mandate instituting a competitive bidding procedure.[78] The Court was concerned that a competitive bidding system would "involve the judiciary so deeply in the daily operation of [a] nation-wide business and promises such dubious benefits that it should not be undertaken."[79] The Court's holding suggests that it was more concerned with vertical integration and ordered the district court on remand to consider whether or not the remedy of theater divestiture was a more appropriate remedy.[80]

On remand from the Supreme Court, and prior to any hearings in the case, two major *Paramount* defendants—RKO and Paramount—voluntarily signed consent decrees that divorced their theater circuits and divested certain theaters from the circuits.[81] By signing the decrees prior to a final decision in the case, RKO and Paramount were able to obtain more favorable terms in their decrees than were the remaining major defendants.[82] The final decision for the remaining six defendants was filed in July 1949.[83]

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[78] *Id.*

[79] *Id.* at 162.

[80] *Id.* at 166–75. The Supreme Court established a two-part test to determine whether vertical integration was illegal under the Sherman Act. The test turns on whether: (1) the purpose or intent with which [the practice] was conceived, or (2) the power it creates and the attendant purpose of intent." *Id.*

[81] United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. 1949) [hereinafter Paramount Consent Decree]; United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. 1948) [hereinafter RKO Consent Decree]. Note: The District Court for the Southern District of New York used the term "divorcement" when referring to the required separation by the defendants or exhibition from production and distribution. The court used the term "divestment" to refer to the selling off of theaters by the circuits.

[82] The remaining defendants were Columbia Pictures Corporation, United Artists Company, Inc., Universal Pictures Company, Loew's Inc., Twentieth Century-Fox Film Corp., and Warner Bros. Pictures, Inc. *See also* Paramount Consent Decree, *supra* note 81; *see also* RKO Consent Decree, *supra* note 81.

[83] United States v. Paramount Pictures, Inc., 85 F.Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 974 (1950).

The district court found the defendants had conspired to and had restrained trade in the distribution and exhibition of motion pictures.[84] The court determined that vertical integrations were "a definite means of carrying out the restraints and conspiracies" that were found to be illegal and in restraint of trade.[85] The court further found that divorcing exhibition from production-distribution was necessary in order to free up trade.[86] As such, the district court issued a final decree against the three major defendants and the three minor defendants.[87] The decree was later supplemented with new decrees that described the details of the defendants' divorcement and theater divestiture.[88]

In the end, the result of the government's long-pursued case against all *Paramount* defendants forced the defendants to end the illegal conduct.[89] Moreover, the defendants were required to begin licensing motion pictures on a picture-by-picture basis, entirely upon the merits and without discrimination in favor of affiliated theaters or circuit theaters.[90] The decrees also appeased the government by requiring the divestiture of specific theaters as well as the divorcement of theater circuits by the major defendants.[91]

This case not only set the stage for the modern studio and motion picture theater system. It forced the *Paramount* defendants to divorce theater ownership from their control by creating independent "theater" and "picture" companies that would be separately owned.[92] More significantly, the decree prohibited the theater companies and picture companies from attempting to influence one another's conduct.[93] Newly created theater companies that were created could only enter the distribution

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[84] *Id.* at 892–93.

[85] *Id.*

[86] *Id.* at 896.

[87] United States v. Loew's Inc., 783 F. Supp. 211, 215 (S.D.N.Y. 1992).

[88] *Id.* at 315.

[89] *See, e.g.*, United States v. Loew's Inc., 1950 Trade Cas. (CCH) ¶ 62,573 (S.D.N.Y. 1950).

[90] *Loew's Inc*., 783 F. Supp. at 215.

[91] *See* STANLEY, *supra* note 70 at 134–36.

[92] *Id.*

[93] Charles H. Grant, *Anti-Competitive Practices in the Motion Picture Industry and Judicial Support of Anti-Blind Bidding Statutes*, 13 COLUM. J. OF L. & THE ARTS 349, 361 (1989).

business, and newly established motion picture companies that were created could only enter the exhibition business after petitioning the court, "upon showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures."[94]

After more than a decade, the government had finally succeeded in lessening the control that Hollywood studios had long held over the entire industry. Through eliminating the domination of vertically integrated studios, the control over motion picture distribution was significantly weakened. This weakening gave independent producers access to screens and a chance to succeed in the motion picture business.[95] Between 1946 and 1957, the number of independent producers expanded from 70 to roughly 170.[96]

By the early 1950s, the United States Justice Department found that the decrees provided the opportunity for arms-length dealing in the motion picture industry.[97] "After the *Paramount* case, competitive bidding and competitive negotiations became the predominant method of film licensing."[98] Finally, independent theaters had the opportunity to compete equally for the right to exhibit first run motion pictures.[99]

C. THE EVOLUTION OF HOLLYWOOD IN THE AFTERMATH OF PARAMOUNT

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[94] *Loew's Inc.*, 1950-1951 Trade Cas. (CCH) ¶ 62,765, at 64,273 (Warner Consent Judgment) (stating new theater companies could only acquire additional theaters in the limited situations outlined in the decrees, or with the court's consent after showing that such acquisition would not restrain competition); *see also* Grant, *supra* note 93, at 363.

[95] *See* STANLEY, *supra* note 70 at 146–47.

[96] *See* CONANT, *supra* note 11, at 112–13.

[97] *Id.*

[98] William J. Borner, *Motion Picture Split Agreements: An Antitrust Analysis*, 52 Fordham L. Rev. 159, 164 (1983).

[99] SUZANNE MARY DONAHUE, AMERICAN FILM DISTRIBUTION: THE CHANGING MARKETPLACE 57 (1987); *see also* WHITNEY, *supra* note 48, at 156.

After the Supreme Court ruled that major studios must sell off their theatre chains,[100] the studio system began to unravel. No longer could studios afford the substantial payrolls that were required to maintain movie stars and major motion picture directors, all whom were employed by the studio in multiyear contracts.[101] Many employees left studios to form independent production companies. Movie attendance had fallen sharply with the advent of television,[102] drastically impacting a once substantially lucrative business.[103] In 1946, there were only around eleven thousand television sets in the United States. By 1952, there were fourteen million.[104] As Connie Bruck noted in *When Hollywood Had a King*, "Thousands of hours of entertainment must be available to the television public and any guess as to where it will come from is as good as another."[105]

In response, the Music Corporation of America (MCA), a then Chicago-based band-booking agency, began representing talent in the motion picture business, and in 1936 moved its offices to Beverly Hills, California.[106] In the late 1930s and early 1940s, MCA began buying out movie stars' contracts from other agencies, and buying agencies themselves.[107] In doing so, MCA exponentially expanded its talent roster with several hundred performers, including star actors like Greta Garbo, Fred Astaire, Joseph Cotton, and Henry Fonda.[108] MCA also absorbed leading

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[100] United States v. Paramount Pictures, Inc., 334 U.S. 131, 175 (1948).

[101] CONNIE BRUCK, WHEN HOLLYWOOD HAD A KING: THE REIGN OF LEW WASSERMAN, WHO LEVERAGED TALENT INTO POWER AND INFLUENCE 118 (2003); BERNARD F. DICK, CITY OF DREAMS: THE MAKING AND REMAKING OF UNIVERSAL PICTURES 160–62 (1997).

[102] *Id.* at 157. (stating the television industry began to thrive by hiring Broadway and burlesque artists at a fraction of the costs of major movie stars, ultimately jeopardizing the livelihood of Hollywood actors. As such, members of the Screen Actors Guild ("SAG") were anxious about the future of Hollywood and the motion picture industry).

[103] *Id.* at 209.

[104] SETH SHAPIRO, TELEVISION: INNOVATION, DISRUPTION, AND THE WORLD'S MOST POWERFUL MEDIUM VOLUME 1: THE BROADCAST AGE AND THE RISE OF THE NETWORK 85 (2016).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 90–115.

[108] *Id.*

directors and writers, including Billy Wilder, Joshua Logan, Dorothy Parker, and Dashiell Hammett.[109]

MCA started producing television shows in 1950 through a newly formed subsidiary, Revue Productions. However, Revue's output paled in comparison to what MCA's President, Lew Wasserman had in mind.[110] At the time, the Screen Actors Guild ("SAG"), an actors union,[111] prohibited talent agencies from producing motion pictures because of the inherent conflict of interest in simultaneously being the agent and employer. It seemed clear that SAG would adopt comparable restrictions for television production.[112]

Under the existing regulations, an agent could apply on a case-by-case basis for a waiver to produce a movie, and that, presumably could be applied to television as well.[113] However, MCA wanted unrestricted freedom: a blanket waiver allowing MCA to engage in television production for many years to come.[114] The company realized that control of the talent—writers, directors, and actors—would give MCA an unbeatable advantage of television production, and experience in television production would strengthen MCA's relationship with talent.[115] This

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[109] *Id.*

[110] *Id.*

[111] Actors' unions in the 1950s were the Screen Actors Guild ("SAG") and Actors Equity Association. *Screen Actors Guild History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/screen-actors-guild-history/ (last visited April 23, 2020). The American Federation of Television and Radio Artists (AFTRA) was founded on September 17, 1952. Nikki Finke, *GAG-AFTRA MERGER APPROVED! 81.9% Of SAG Ballots Returned Voted Yes; 86.1% Of AFTRA; Single Union Effective Immediately*, DEADLINE (Mar. 30, 2012), https://deadline.com/2012/03/sag-aftra-merger-approved-screen-actors-guild-american-federation-television-radio-arts-251114/. On March 30, 2012, SAG and AFTRA merged to form SAG-AFTRA, representing artists in all mediums except live performance. *Id.*

[112] Koh Siok Tian Wilson, *Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers*, 21 Loy. L.A. Ent. L. Rev. 401, 413 (2001).

[113] *Id.*

[114] *See* BRUCK, *supra* note 101.

[115] *See* DICK, *supra* note 101.

combination would create a system so powerful that other producers would be unable to compete.[116]

To gain SAG approval, MCA needed an influential ally. It turned to the then president of SAG, Ronald Reagan—one of MCA's oldest clients.[117] In early 1952, MCA pursued the SAG waiver in ways so undetectable that even subsequent Federal Bureau of Investigations and grand-jury investigations were unable to fully reconstruct what MCA had done.[118] Regardless of how many times MCA, Reagan, or SAG executives were questioned, each insisted that a waiver was necessary because if MCA were permitted to go into television production in an unrestricted and unlimited way, it would create badly needed jobs for actors. The increase in those jobs in television would also mean that SAG would stop losing members to the rival television union, the American Federation of Television and Radio Artists.[119]

In late 1952, SAG granted MCA the waiver.[120] With the waiver secured, MCA was propelled into the television production business.[121] MCA already had a sophisticated knowledge of the broadcasting business and well-established relationships with major advertisers and advertising agencies.[122] However, perhaps most importantly, MCA controlled the talent.[123] The final step in its domination of the industry was to form a relationship with one of the three major TV networks.[124] It targeted the Columbia Phonograph Broadcasting Company (CBS).[125] Within months,

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[116] *Id.*

[117] DAN E. MOLDEA, DARK VICTORY: RONALD REAGAN, MCA, AND THE MOB 32 (1986).

[118] *See* BRUCK, *supra* note 101.

[119] AFTRA held jurisdiction over live television. *See* Wilson, *supra* note 112.

[120] *Id.*

[121] *Id.*

[122] *See* BRUCK, *supra* note 101, at 123.

[123] *Id.* at 71.

[124] *Id.* at 124. The three networks were: Columbia Phonograph Broadcasting Company (CBS), the National Broadcasting Company (NBC), and the American Broadcasting Company (ABC). It is interesting to note that MCA already had a relationship with CBS which was second to NBC in entertainment programming for roughly twenty years. *Id.*

[125] *See* DICK, *supra* note 101, at 198.

most of the top talent from the National Broadcasting Company (NBC) moved to CBS.[126]

By early 1957, MCA had established a contractual relationship with NBC, and fourteen series that were either produced or sold by MCA were placed in NBC's prime time slots.[127] With its prominent position of power at NBC, there was no true competition for MCA. It generally treated NBC more favorably than other buyers, and gave all of MCA's best programming to NBC. This arrangement worked to MCA's advantage and provided a major, reliable outlet for MCA's production. MCA garnered even more clients as the common perception became that the best way a producer could get a show on NBC or an actor could get roles in the continuous flow of productions was to be represented by MCA. Once those clients signed on with MCA, they were tied to the agency long term. MCA required its clients to have MCA represent them in all areas of the entertainment business for several years.[128]

As a result of MCA's relationships with the three major television networks, MCA could place a director, star talent, story, and supporting talent in a single deal, and demand ten percent commission on the cost of an entire show even when the network itself was supplying much of the talent and producing the show.[129] By the end of the 1959-1960 season, MCA was producing or co-producing more television series than any other company, and was earning revenue from roughly forty-five percent of all network evening shows.[130] MCA had established a system that produced a

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[126] *See* BRUCK, *supra* note 101, at 133. Top talent such as Burns and Allen, Red Skelton, and Groucho Marx. *Id.*

[127] *Id.*

[128] *Id.* at 105–07.

[129] *Id.* This included all above-the-line (talent) costs and below-the-line (facilities, production) costs. For example, in the 1950s, if a production cost $500,000, MCA would earn $50,000. *Id.*

[130] Among those shows MCA produced were "Wagon Train," "General Electric Theatre," and "Bachelor Father." MCA was also the agent for many shows made by independent producers, including "Alfred Hitchcock Presents," "Tales of Wells Fargo," and "Ford Startime." *Id.* at 134.

perpetual stream of revenue, deriving from multiple sources directly tied to MCA.[131]

The SAG waiver that permitted MCA to be an agent and television producer had enabled MCA, to dominate television production in the span of a few years.[132] However, MCA's success made the company vulnerable as the Justice Department started to pay closer attention to MCA's operations.[133] In 1958, the Justice Department's Antitrust Division had initiated an investigation of MCA which caught the attention of the new Attorney General, Robert F. Kennedy.[134]

In the late 1960s, the Justice Department learned about MCA's use of "packaging," which was a version of an old practice known in antitrust language as a "tie-in"—that is, using MCA's control over one product to sell another. The practice is *per se* illegal because it prevents companies that do not have significant power in a market from breaking into that market.[135] At the time, for example, NBC had production facilities with the capacity to commence production with top scripts, writers, and directors, and only needed star talent from MCA.[136] If MCA agreed to provide star talent, it would do so only if NBC promised to pay MCA commission for all of the producers, directors, writers, etc., employed on the production.[137]

This practice was not only anticompetitive, but also caused MCA to serve its own interests above the interests of its clients.[138] An independent producer may be prepared to pay star

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[131] While MCA prided itself on secrecy, it would not divulge which television series it was representing, or even how many series it handled. In 1960, *Fortune* calculated that MCA was likely to earn seven million dollars from a thirty-nine-week, half-hour television series that MCA produced at it Revenue studios. *Id.*

[132] STEVE NEALE, THE CLASSICAL HOLLYWOOD READER 383 (2012).

[133] *See* DICK, *supra* note 101, at 211.

[134] *Id.* It is interesting to note that when Robert F. Kennedy started to take an interest in the MCA case, no less than eight investigations by the Antitrust Department into MCA's practices had been terminated since 1941. *Id.* at 213.

[135] *See* BRUCK, *supra* note 101, at 305.

[136] *Id.* at 136.

[137] *See* MOLDEA, *supra* note 117.

[138] *See* BRUCK, *supra* note 101, at 83.

talent ten thousand dollars for a production.[139] If MCA demanded ten percent of all above-the-line costs[140] (e.g., twenty-five thousand dollars) regardless of the fact that the independent producer had already hired a director and other talent, the producer would have to pay thirty-five thousand dollars for a star worth only ten thousand dollars.[141] As a result, the independent producer may not be able to hire the star talent.[142]

The Justice Department's investigation continued for nearly a year and a half. During this time, Robert Kennedy collected internal memorandums to encourage "faster action."[143] Early on, Leonard Posner, a young attorney in the Justice Department, advocated for the use of a grand jury in the matter because the witnesses were frightened of MCA.[144] Posner also noted that there was no likelihood of obtaining any direct evidence from MCA. At this point, the Justice Department concluded the evidence was not strong enough to bring a criminal case against MCA for bribery or coercion.[145]

The scales finally tipped in favor of the Justice Department when MCA acquired Decca Records and its

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[139] *Id.*

[140] Generally, "above-the-line" refers to producers, directors, writers, cast (including name actors/movie stars, etc.), and stunt cast/personnel. *Id.*

[141] *Id.*

[142] *Id.* In early 1961, Leonard Posner, an attorney in the Justice Department, wrote a detailed description of MCA's antitrust practices. *Id.* Among several details outline in the memorandum there were tie-ins, exclusive contracts, packaging, demanding packaging commissions even when MCA had not done the packaging, conflicts of interest, omnibus contracts, coercive dealings, blacklists, bribes, procuring women, luring talent from other agencies with houses, cars, and huge sums of money, and withholding top talent from competitors. *Id.*

[143] *See* BRUCK, *supra* note 101, at 182.

[144] *Id.*

[145] The primary questions the Justice Department considered were: (1) Did MCA bribe SAG to receive the waiver?; and (2) Did MCA actually do the tie-ins? Ultimately, the Justice Department concluded that the evidence was not strong enough to bring a criminal case against MCA. *Id.* at 188. "There was a lot of smoke, but no fire." *Id.*

subsidiary, Universal Pictures, in 1962.[146] At the same time, MCA was proceeding with a plan to "spin off" its talent agency to two senior MCA agents and go primarily into production.[147] However, on June 13, 1962, the Justice Department intervened and brought a civil antitrust suit against MCA.[148] The Justice Department also named SAG as a co-conspirator, charged MCA with a series of violations, and asked for court orders to halt any named violations.[149] Moreover, the Justice Department's suit asked that MCA be required to completely divest itself of Decca Records and Universal, and that MCA be ordered to dissolve—rather than "spin off" the talent agency.[150] MCA would be prohibited from controlling both the production side and the talent representation side of film business.[151]

Ten days after the Justice Department filed its suit, MCA agreed to dissolve its talent agency and operate solely as a production company. [152] Two months later the terms of the consent decree were finalized.[153] While MCA ultimately accepted the specific restrictions on its business, its only major loss was the dissolution of the talent agency.[154]

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[146] *Id.* at 189. The acquisition of Decca Records fulfilled MCA's goal of becoming a diversified entertainment company, dedicated to television, movie, and music production. *Id.*

[147] *Id.*

[148] *Id.* at 182.

[149] *See* Wilson, *supra* note 112.

[150] *Id.*

[151] *See* BRUCK, *supra* note 101, at 189.

[152] U.S. DEP'T. OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 114 (1962).

[153] United States v. MCA, Inc. 1962 Trade Cases ¶ 70,459 (MCA Consent Decree) (S.D. Cal. 1962). As part of the consent decree, MCA agreed not to engage in the talent agency filed and, for a period of seven years, to be restrained from merging with other picture companies or television production or distribution firms. *Id.*

[154] *See id.* In the end, giving up the agency business was not a tough choice for MCA owners, Lew Wasserman and Jules Stein. By 1961, MCA's gross revenues were about $82 million, according to Wasserman's biographer, Connie Bruck, with the agency's share only accounting for about ten percent of that. *See* BRUCK, *supra* note 101, at 189. As head of Universal, Lew Wasserman would go on to create the studio's lucrative back-lot tour, and would pioneer the summer blockbuster with films like *Jaws*. *See id.*

The Justice Department's antitrust case against MCA and the subsequent consent decree set a precedent in Hollywood that dictated the relationships and boundaries between talent agencies, studios, and production companies.[155] For roughly sixty years after, Hollywood talent agencies shied away from producing both of its clients' motion picture and television content. Now, major talent agencies find themselves towing the same line that MCA did only sixty years ago.

II. THE CURRENT ANTITRUST CONFLICT IN HOLLYWOOD

A. THE PLAYERS

The Writers Guild is the labor union that is the exclusive collective bargaining representative for writers in the entertainment industry. The Creative Artists Agency ("CAA"), United Talent Agency ("UTA"), and William Morris Endeavor ("WME") are talent agencies licensed under California law to procure and negotiate terms of employment for artists working in the entertainment industry including Writers Guild members. Under California law, only a licensed talent agent may procure and negotiate terms of employment for artists working in the entertainment industry.[156]

B. THE CONFLICT

As aforementioned in the Introduction, the Writers Guild dismissed its suit in state court and consolidated its claims against CAA, UTA, and WME in the United States District Court in the Central District of California, Western Division adding alleged antitrust violations.[157] The conflict between the Writers Guild and CAA, UTA, and WME comes down to two alleged anticompetitive issues: the fees associated with packaging, and the

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[155] *See* BRUCK, *supra* note 101, at 189.

[156] *See* CAL. LAB. CODE § 1700.5. Talent agencies are defined in the California Labor Code as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists . . . . Talent agencies may, in addition, counsel or direct artists in the development of their professional careers." *Id.* § 1700.4(a).

[157] *See* Handel, *supra* note 8.

rising trend of agencies working with "affiliated producers" owned by their parent companies. If the Writers Guild prevails, its proposed changes would dramatically affect how Hollywood agencies do business and the entertainment industry at large.

C. SETTING THE SCENE

In April 2019, with the expiration of the AMBA and failed negotiations between the ATA, of which CAA, UTA, and WME are members, the Writers Guild organized a group boycott targeting CAA, UTA, WME, and other talent agencies.

The Writers Guild instructed its members to refuse to deal with CAA, UTA, WME, and other talent agencies unless the agencies accepted and signed a revised Code of Conduct. This agreement would require the agencies, among other things, to absolutely, categorically, and without exception cease to engage in and withdraw from the decades-long practice of "packaging" arrangements, and any affiliation with or investment in any entity that produces or distributes content.[158]

If the Writers Guild members do not follow the union's instructions to refuse to deal with agencies that reject the terms of the Code of Conduct, members face sanctions including expulsion from the union. Such a sanction is effectively a death sentence for a writer's (or writer-producer's) career. As a result, most Writers Guild members—even those opposed to the Writers Guild actions—have fired their agents, including those at CAA, UTA, and WME.[159]

Given that "agency packaging" has been an industry wide practice since the 1950s, why is it now at the center of the Writers Guild's conflict with the major agencies? With the express contractual permission of the Writers Guild, talent agencies have brought together some or all of the key creative talent and intellectual property for certain television shows, motion pictures, and radio.[160] Historically, each "package" deal is different and the deals are highly idiosyncratic, depending on the particular deal and particular agency. In broad terms, "packaging" occurs when an agency presents to a studio one or more of the key creative

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[158] *See* Robb, *supra* note 3.

[159] *Id.*

[160] Generally, "packaging" is a type of product bundling where a top-level talent agency creates a project using writers, directors and/or actors it represents. *Packaging*, COLLINS ENGLISH DICTIONARY–COMPLETE AND UNABRIDGED (12th ed. 2014).

elements for a television production, such as writers, actors, directors, or the intellectual property on which the project is based.

Functionally, the presentation of a package might convince the studio that the project is sufficiently compelling to justify the studio's risk of financing and producing the project. Moreover, in television, as production continues over multiple episodes or seasons, the agency ordinarily will help to provide a pipeline of additional talent (e.g., staff writers, actors, directors mid- and lower-level employees of different kinds) necessary to support a television program's continued production and provide other ongoing services to ensure the production's success.

Packaged deals generally do not end with the development of a project. The ongoing services that an agency may provide to a packaged project are substantial. These services include (a) working with a showrunner on a television program's budget after it is organized for production including facilitating discussions with a production company or studio and negotiating for an overall higher initial writer budget; (b) providing lists of available writers to help "staff" the program; (c) helping identify opportunities for actors to work on productions and for decision-makers on shows to become aware of available talent that would contribute to the success of the show; (d) helping to find series and episodic directors; (e) research and social media support; (f) publicity and marketing assistance; (g) programming and scheduling assistance; and (h) offering to help with off-network sales.[161] Beyond this, if a television program is cancelled, the agency may assist in helping to set up the project at a new network or platform.[162]

"[T]alent agencies spend substantial time and resources searching for and fostering new talent—and then leverage that

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[161] First Consolidated Complaint at 10–12, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[162] *See* Wendy Lee, *Hollywood writers fired their agents. Now agencies are sidelining writers in new deals*, L.A. TIMES (Nov. 14, 2019), https://www.latimes.com/entertainment-arts/business/story/2019-11-14/despite-the-wgas-objections-talent-agencies-continue-to-package-tv-shows; *see also* Jonathan Handel, *Television Packaging Deals: All the Confusing Questions Answered*, HOLLYWOOD REP. (April 3, 2019), https://www.hollywoodreporter.com/news/what-exactly-are-packaging-fees-a-writers-agents-explainer-1198974.

new talent to help its clients penetrate the television and motion picture ecosystem that might otherwise be closed to them."[163] Packaging is important for writers "in the current media economy, because it helps agencies and their [writer] clients secure better deals . . . [with] studios that relentlessly seek to reduce the costs of [producing]," including artists' salaries.[164]

When a talent agency's project is packaged, none of its clients—including writers—pays the standard ten percent commission that agents otherwise charge their clients.[165] In exchange for waiving its clients' fees and providing the studio with a package, the agency receives a packaging fee, which is typically paid by the entity that produces the television program or motion picture.[166] Packaging fees are discussed in detail in the following section.

When television programs or motion pictures are successful enough to generate meaningful back-end profits, a talent agency can earn more from package fees than it would under a traditional commission system.[167] This is because agencies will often receive a percentage of the back-end profits as part of the package fee.[168]

Additionally, as an outgrowth of an agency's longstanding work with financiers and independent producers, the major agencies have invested in independent productions companies in which they hold an ownership interest.[169] The agencies' goal with these production companies is to offer an innovative, talent-friendly alternative to traditional television and motion picture studios and production companies.[170] Agency-affiliated production companies offer opportunities that might not otherwise exist to both the specific agency's clients as well as artists not represented by the agency.[171] Moreover, these

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[163] First Consolidated Complaint at 10, ¶ 32, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[164] *Id.* at 10, ¶ 34.

[165] *Id.* at 10, ¶ 35.

[166] *See id.* at 10, ¶37.

[167] *See* at 17, ¶ 52.

[168] *See id.*

[169] *See id.* at 22, ¶¶ 65–67. CAA has invested in "wiip," WME has invested in "Endeavor," and UTA has invested in "Civic Center Media." *See id.* at 21–23.

[170] *Id.* at 23–24.

[171] *Id.* at 24–25.

production companies provide an opportunity to get entertainment projects made that might otherwise die for lack of independent financing and producers willing to take on riskier projects.[172]

III. WHO IS THE NEWEST ANTAGONIST IN THE NEWEST ANTITRUST BATTLE?

A. THE WRITERS GUILD OF AMERICA HAS AN OBLIGATION TO PROTECT THE PROFESSIONAL AND ARTISTIC INTERESTS OF ITS MEMBERS

The Writers Guild has a duty to protect the professional and artistic interests of its members. This duty includes promoting fair dealing between the Writers Guild members and "organizations, groups or individuals with whom [the writers] have mutual aims or interests or with whom [the writers] work or have business or professional dealings."[173] The conflict between the Writers Guild and CAA, UTA, and WME arises out of the Writers Guild's efforts to protect its members from an allegedly unlawful compensation system and an allegedly inherent conflict of interest associated with agency-affiliated production companies.

According to the Writers Guild, packaging creates two substantial issues that infringes on its members' interests. First, the Writers Guild alleges that packaging creates a conflict of interest between a talent agency and the writer it represents as well as perpetuates agencies' collusive efforts to maintain a system through agreed upon price structures.[174] Over time, this practice has "depressed writers' compensation, employment opportunities," choice of talent for productions, and quality of productions "while greatly enriching the talent agencies."[175]

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[172] *Id.*

[173] Writers Guild of America, *Constitution and By-Laws* art. II, § 3.

[174] First Consolidated Complaint at 15, ¶ 45, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[175] Answer and Counterclaims at 2, ¶ 1, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB-AFM (C.D. Cal. Aug. 19, 2019)

"[T]he entertainment industry is a freelance industry, and because writers may negotiate compensation above the minimum [fees] established" between the Writers Guild and Hollywood studios, "the vast majority of working writers have procured employment through talent agents . . . ." [176] The writer's expectation is that the agency will find work and negotiate for the best possible compensation. However, while the Writers Guild concedes that packaging began as a service to writers in their negotiations with production companies and studios, it has become an "unlawful, price-fixing cartel dominated by a few talent agencies"[177] that use their position to advocate for its own respective interests, rather than the interests of the writers the agencies represent.

Second, the Writers Guild further contends that agency-affiliated production companies, through vertically integrated parent corporations, are equally as detrimental to its members' interests.[178] A member of the Writers Guild's negotiating committee claims that "seventy-five percent of writers creating projects at [agency-affiliated] studios . . . are clients of that agency."[179] To the Writers Guild, agency-affiliated production companies are a step-beyond packaging projects. Rather than earning ten percent of a production's back-end profits, an agency could earn fifty to sixty percent of the profits through owning a writer's property.[180]

Agency-affiliated production companies pose further risks to writers' interests. When a writer delivers a script to an agent, the agent's responsibility is to shop the script to production companies and studios where the project has the best opportunity for success.[181] The Writers Guild is concerned that an agent will take the script to the agency's production company first rather

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[176] *Id.* at 2, ¶ 3.

[177] Mike LaSusa, *WGA Takes Antitrust War With Talent Agencies Federal*, LAW360 (Aug. 19, 2019 10:38 PM EDT), https://www.law360.com/articles/1190298/wga-takes-antitrust-war-with-talent-agencies-federal.

[178] *See* David Robb, *WGA Says 75% Of Projects At Agency-Affiliated Production Companies Are Written By Agencies' Own Clients*, DEADLINE (May 15, 2019), https://deadline.com/2019/05/writers-guild-agency-affiliation-argument-hollywood-production-wga-1202615758/

[179] *Id.*

[180] *Id.*

[181] *See id.*

than to the marketplace.[182] There are two substantial risks involved, according to the Writers Guild. First, if the agency-affiliated production company chooses to purchase the writer's script, then the agency will have to negotiate with itself to finalize the deal. The issue here is whether the client is getting the best possible deal for the project.[183] Second, if the agency-affiliated production company chooses to pass on the client's project, then it can create tension between the client and the agency.[184]

Based on these conflicts, the Writers Guild contends that its members' interests are fading into the background and that agency interests are being placed front and center. As such, the Writers Guild has a duty to protect its members' interests. Seeking to fulfill this duty, the Writers Guild issued the mandate requiring all members fire agents who refuse to adhere to the Writers Guild's new Code of Conduct.[185] The Writers Guild believes this mandate is necessary to protect its members from exploiting writers' talent and work-product.[186]

B. OTHER OPPORTUNITIES CREATED FOR WRITERS THROUGH PACKAGING AGREEMENTS AND AGENCY-AFFILIATED PRODUCTION COMPANIES

1. *AGENCY PACKAGING IS PRO-COMPETITIVE*

The Writers Guild's contention that agency compensation from packaging agreements and fees are unlawful is misguided and short-sighted. For an agency's services in bringing together major creative personnel for a production, the agency receives a "packaging fee," paid by the producer or other entity responsible for financing the production. When an agency receives a packaging fee, the agency forgoes its commission that it otherwise would obtain from the compensation earned by its clients in connection with the packaged project. As such, packaging fees do not harm writers nor is there an inherent conflict of interest caused by the packaging fees. In effect, packaging benefits most writers

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[182] *See id.*
[183] *See id.*
[184] *See id.*
[185] Ingber, *supra* note 5.
[186] *Id.*

because the agency facilitates the actual production of a writer's project.

Packaging fees are arranged in industry standard 3-3-10 percentage distribution.[187] There is an upfront fee of three percent of the licensing fee from the production company or studio.[188] For television, this fee can range anywhere from $15,000 to $75,000 per episode.[189] There is also a deferred fee of three percent when the production hits its net profit.[190] However, this fee is often done away with due to few projects hitting the net profit.[191] The final ten percent refers to the modified adjusted gross profits of the packaged production. Often, this number is zero unless the production runs for multiple seasons—generally five to six seasons—and is sold into syndication.[192]

The Writers Guild argues that packaging fees are worse for writers. The Writers Guild claims that agents can become complacent and not negotiate for better pay since the agency receives a back-end profit from the production, thereby aligning its interests with the production company rather than the client. Again, the Writers Guild's argument is misguided. By packaging a project, the agency waives commission from compensation earned by its clients and takes an interest in the prospective profitability of the writer's production. The agency is effectively gambling on its client's project to be successful and run for at least five seasons when the production starts to become profitable. Only then will the agency profit from the packaged project.

The packaging agency is incentivized by ensuring the success of a packaged project. For a project to be successful it must facilitate the staffing of high-quality writers, directors, actors, and producers. This benefits both the writer's and the agency's interest. The writer's project thrives from high-quality talent, and the agency begins to position the project to run for multiple seasons. Further, the writer's interests are served because a production's success will likely create future opportunities for the writer.

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[187] Dan Nagan, *Writers & Agents Split Over Packing Fees*, LEGAL SOLUTIONS BLOG (May 3, 2019), https://blog.legalsolutions.thomsonreuters.com/top-legal-news/writers-agents-split-over-packaging-fees/.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

The entertainment industry has dramatically evolved since MCA's venture into both talent representation and producing content. The practice of packaging that the Justice Department determined per se illegal likewise evolved. Perhaps most distinguishable, is that the modern major talent agencies do not receive the standard ten percent commission on their clients' projects if the project has been packaged. Rather, the client retains ten percent and the agency collects revenue from the project's back-end profits. MCA collected both commission from its clients and back-end profits.

In 2020, "packaging" is the practice by which an agency brings together some or all of the major creative elements of a potential television program or motion picture. Studios and the other entities that produce television and motion picture content want a compelling total package of talent (e.g., writers, actors, directors, etc.) to be attached to the project. The agency helps create opportunities for its clients by connecting them with one another.[193] Agencies are able to use its package of talent as a means of facilitating the actual production of television and motion picture projects and help ensure that television and motion picture programs that would otherwise never get produced, in fact, get made and distributed to the public.

CAA, UTA, and WME did not enter in any agreement or conspire to restrain trade through the packaging of their respective clients' projects. This is distinctly different than the industry practices deemed illegal by the Supreme Court and the District Court for the Southern District of New York in the 1948 *Paramount* case. The standard industry practice of agency packaging—existing since the 1950s—does not create the vertical integrations from production distribution to exhibition used by the major studios and motion picture theater circuits. The *Paramount* defendants clearly entered into contracts aimed at controlling

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[193] For example, David Simon, writer and creator of HBO's *The Wire*, was represented by CAA. *'The Wire' Creator David Simon Rips "Greedhead" Agencies Over Packaging, Urges Lawsuit Against ATA*, DEADLINE (Mar. 19, 2019), https://deadline.com/2019/03/david-simon-writers-agents-packaging-fight-wga-ata-commentary-1202578152/. When Simon was still an unknown writer (by industry standards), CAA was able to get *The Wire* produced by packaging the project with A-List producer, Barry Levinson (also a CAA client). *See id.* Without CAA and Levinson's clout, *The Wire* would likely not have been produced at the time. *See id.*

distribution and exhibition of first-run motion pictures enabling theaters to set their desired price of admission. This practice not only detrimentally affected consumers, but also affected other theaters competing in the market to exhibit first-run motion pictures.

In fact, agency packaging enhances competition, rather than stifling it. The practice is a market-making business model that creates economic opportunities for artists and projects. It provides a convenient, efficient, and long-term commitment to studios, production companies, and the packaging agency's client. Should this practice be prohibited, there will likely be longer development periods, friction, and costs between agencies, studios, and production companies involved in greenlighting[194] television programs and motion pictures. This economic friction could inevitably harm the entertainment industry by reducing output of television programs and motion pictures.

For agency packaging to be declared anticompetitive, the Writers Guild must show that that CAA, UTA, and WME conspired to restrain trade. It must also show that there was "a definite means of carrying out the restraints and conspiracies" that are alleged to be illegal.[195] The Writers Guild has a steep, uphill battle. First, the Writers Guild will need to prove there was an agreement or conspiracy to restrain trade in the entertainment. Then, and more significantly, the Writers Guild must prove that the major agencies control the clients whose work is being packaged with a studio or production company. This is where the Writers Guild will inevitably fail.

Talent agencies do not own or control their clients. Unlike the studio system in the first half of the twentieth century where an artist (e.g., actor, director, or writer) exclusively signed with a studio for a designated number of productions, agencies do not require such commitment. Clients will sign with an agency, but the agency does not control the client. Rather, the relationship between an agent and client is fiduciary. The agent guides and advises the client but cannot mandate that the client participate in a certain production or with a specific studio. In fact, should a

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[194] "Greenlight" is an industry term that means "to give permission to go ahead with (a project, i.e., a movie)." *Greenlight*, COLLINS ENGLISH DICTIONARY–COMPLETE AND UNABRIDGED (12th ed. 2014).

[195] United States v. Paramount Pictures, 85 F. Supp. 881, 893 (S.D.N.Y. 1949).

client determine that the agency is failing to progress the client's career, the client is entitled to fire the agency and sign with a competitor.[196]

Agency packaging promotes rather than restrains competition in the entertainment industry. The long-standing agency practice of packaging clients will not be seen as anticompetitive or a restraint on trade in the entertainment industry. CAA, UTA, and WME represent a majority of the entertainment industry's most influential and sought-after artists. However, those agencies do not control their client or their clients' respective projects. As such, agency packaging encourages competition between the major agencies to place their clients with a desired studio or production company. If the agency is unable to do so, the client is free to terminate the relationship and sign with a competitor. Agency packing promotes rather than restrains competition in the entertainment industry.

2. *AGENCY-AFFILIATED PRODUCTION COMPANIES ARE PRO-COMPETITIVE*

CAA, UTA, and WME's ownership of agency-affiliated production companies is testing the boundaries of the law in terms of anticompetitive practices. The ownership of agency-affiliated production companies starts to mirror the very practices that the United States Justice Department deemed illegal in the 1962 MCA

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[196] While termination provisions in writers' contracts may vary depending on the agency, a general termination clause will read "[i]n the event of failure of Writer to obtain employment or a bona fide offer therefor from a responsible employer, in the fields of endeavor specified in this agreement for a period of time in excess of four consecutive months, such failure shall be deemed cause for the termination of the agreement by either party; provided, however, that the Writer shall at all times during the period of four consecutive months be ready, willing, able and available and to render the services required in connection therewith. Notices of intention of either party to terminate must be given in writing to the last known address of said party. In the event Writer accepts employment prior to any written notice of termination, said right of termination is deemed waived as to all past periods of unemployment but not as to future four consecutive months of employment." *See* 8 C.C.R. § 12001 (2002).

consent decree.[197] Like MCA, the major agencies claim that agency-affiliated production companies create "badly needed" jobs for artists, especially writers.[198] However, there are stark differences between MCA's practices and the major talent agencies of the twenty-first century.

The media marketplace is exponentially larger and more diverse than the 1960s. The entertainment industry has rapidly expanded with the advent of cable television and, more recently, digital streaming platforms (e.g., Netflix, Hulu, Amazon, etc.). In the 1960s, there were three major television networks and six major studios. MCA was earning revenue from forty-five percent of network productions. At the moment, the major agencies do not come remotely close to MCA's figures. At the time, MCA had either absorbed talent agencies that represented star talent or purchased star talents' contracts from other talent agencies. Moreover, as a production company, MCA operated much like the studio system of the early 1900s, owning its clients' contracts and controlling the projects in which its clients participated. This is largely a result of the limited number of television networks and studios in existence. When MCA purchased Universal in 1962, it acquired a significant percentage of the production outlets in Hollywood in addition to owning a majority of star talent. As such, competition between talent agencies, studios, and production companies was substantially affected.

CAA, UTA, and WME's ownership of agency-affiliated production companies does not reach the level of control held by MCA over the entertainment industry yet. In fact, wiip, Civic Center Media, and Endeavor Content create, rather than limit, opportunities for artists. They provide an alternative to the traditional studios and in-house production by television networks that have dominated the entertainment industry for the last seventy years. The agency-affiliated production companies compete with existing studios and networks to offer new productions, and more opportunity to talent by providing additional jobs for talent, including writers. Moreover, by creating opportunities with agency-affiliated production companies, employment opportunities will become available at traditional studios and television networks.

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[197] *See* United States v. MCA, Inc. 1962 Trade Cases ¶ 70,459 (MCA Consent Decree) (S.D. Cal. 1962).

[198] *Cf.* Connie Bruck, *The Monopolist*, THE NEW YORKER (April 14, 2003), https://www.newyorker.com/magazine/2003/04/21/the-monopolist

To counter any conflicts of interest, the major agencies with agency-affiliated production companies encourage their clients to obtain independent counsel to analyze a potential deal or employment opportunity between the client and the agency-affiliated production company. Beyond this, the potential for a harmful conflict of interest involving an agency-affiliated production company is strictly limited, given the intensely competitive market in which agencies look for clients and in which writers hire talent agents. The major agencies know that if they act contrary to the interests of the client, the agency can be replaced. As such, agency-affiliated production companies, in the modern marketplace, offer pro-competitive benefits for artists, including writers, in an ever-expanding entertainment marketplace.

Despite the pro-competitive benefits agency-affiliated production companies offer, the major agencies should proceed with caution. Agencies and agency-affiliated production companies could potentially violate antitrust laws like the *Paramount* defendants and MCA. For such to occur in 2020, the Writers Guild would need to prove that the major agencies conspired to induce their clients to only work at the respective agency's affiliated production company. Additionally, the agency-affiliated production company would have to set a subscription price in which the consumer paid to view the created content. If this were to occur, the Writers Guild could more effectively show that the agency and agency-affiliated production companies are vertically integrated and, thus, in violation of the Sherman Act.

While this is possible, it is not necessarily plausible. First, clients are not controlled by the agency; rather, they are free to fire an agency and sign with a competitor. If an agency influenced a client to only work with the agency-affiliated production company, then the agency would be limiting the client to a single opportunity in a marketplace of hundreds of production companies and several studios. This practice would likely result in a client terminating a relationship with the talent agency.

Second, the agency-affiliated production companies do not currently control exhibition, like the *Paramount* defendants of the 1940s. In 2020, the agency-affiliated production companies exist to create a platform for writer's projects. This includes writers signed with competing agencies which suggests that the agency-affiliated production companies are more interested in

creating quality content with all writers in the entertainment industry; not limiting opportunities solely for its own clients.

C. THE WRITERS GUILD OF AMERICA'S ACTIONS COULD SUBJECT THE UNION TO ANTITRUST VIOLATIONS

Before the district court hearing the case can consider whether a labor union violated federal antitrust law, it first must determine whether the labor union is exempt from antitrust violations under both statutory and non-statutory labor exemptions.

1. *THE WRITERS GUILD WILL NOT BE ABLE TO RELY ON STATUTORY LABOR UNION EXEMPTIONS*

The Writers Guild cannot rely on the limited statutory labor exemption to the antitrust laws. In brief, the Writers Guild may attempt to claim immunity from any antitrust violations through the statutory labor exemption set forth in the Antitrust Act of 1914.[199] Congress created a statutory labor exemption to protect from antitrust scrutiny certain union activity that is in pursuit of legitimate labor union goals.[200] Without this exemption, most union activity would constitute an unreasonable restraint on trade and, thus, an antitrust violation. However, this exemption is not a catch-all immunity from the antitrust laws for all union conduct.

Labor laws give labor unions, like the Writers Guild, a limited right to exercise monopoly power over the labor market

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[199] Clayton Antitrust Act of 1914, 15 U.S.C.A. § 13(a) (West 1994). Generally, the main antitrust exemption deals with the formation of labor unions. *Id.* § 17. Unions are designed to protect employees from unfair business practices. *All About Unions*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/labor-unions (last visited April 23, 2020). Picketing and boycotting endorsed by labor unions are generally exempt from antitrust enforcement. *See* Brown v. Pro Football, 50 F.3d 1041, 1048 (D.C. Cir. 1995) (citations omitted). Labor unions may also collectively bargain for employees' wages and benefits. *See id.* However, an action or agreement between a union and a nonunion party is not exempt from these laws. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625 (1975).

[200] *See* Clayton Antitrust Act of 1914, 15 U.S.C.A. § 17 (West 1994).

for their members' services. That monopoly exists to facilitate collective bargaining (i.e., to grant unions the exclusive authority to negotiate with employers over the terms and conditions of the union members' employment), but because that monopoly is so influential, it is subject to only a limited exemption from the antitrust laws.

For the statutory labor exemption to apply, a union (i) must not be acting in concert with non-labor groups and (ii) must be confining its concerted action to the accomplishment of a legitimate union interest.[201] The Writers Guild fails both tests. The Writers Guild's boycott is being conducted in conjunction with one or more non-labor groups (i.e., non-licensed talent managers and attorneys). As such, the statutory labor exemption does not apply on this ground alone.

As to the first point, the Writers Guild has induced non-licensed managers and attorneys to assist it with the group boycott.[202] The Writers Guild has urged managers and attorneys to take the place of talent agents in procuring employment for the Writers Guild's members even though this practice is prohibited by California law.[203] Moreover, to the extent that non-licensed managers and attorneys follow the Writers Guild's urging that they procure employment for talent, these managers and attorneys would be competing in the same market as the major talent agencies to a sufficient degree that they would be capable of committing an antitrust violation against the major agencies regardless of the Writers Guild's involvement.

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[201] *Connell Constr. Co.*, 421 U.S. at 621–22; *see also* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 459–515 (1981).

[202] Mike Fleming, Jr., *WGA to Membership: Lawyer Up! David Goodman Explains Why Attorneys & Managers Can Fill The Gap*, DEADLINE (April 16, 2019), https://deadline.com/2019/04/wga-to-membership-lawyer-up-david-goodman-explains-why-attorneys-managers-can-fill-the-gap-1202597247/; *see also* Dave McNary, *WGA Authorizing Managers, Lawyers to Make Deals if Agents Are Fired*, VARIETY (Mar. 20, 2019), https://variety.com/2019/film/news/wga-managers-lawyers-deals-agents-fired-1203168913/.

[203] *See* CAL. LAB. CODE § 1700.44 (West 1986) (stating an unlicensed person is not prohibited from working with a licensed talent agent).

As to the second point, the Writers Guild's boycott oversteps the legitimate scope of any union interest or concern. The Writers Guild's group boycott seeks to entirely ban agency packaging and agency-affiliated production without regard to the existence of any actual harm to writer's interests. It appears that a genuine concern of a "conflict of interest" is not the true motive for the Writers Guild's group boycott. Rather the Writers Guild's true motive, as expressly acknowledged by the Writers Guild's President, is a "power grab" designed to increase institutional power of the Writers Guild by anti-competitively hurting talent agencies and reshaping a significant portion of the entertainment industry whatever the cost to individual writers or to others in the industry.[204]

The Writers Guild's activity does not resemble, in scope, scale, or method, the traditional labor union methods that courts have protected from application of the antitrust laws. The Writers Guild's campaign to eliminate packaging and agency-affiliated production affects commercial markets far beyond writer employment and, thus, beyond traditional union activity. Moreover, encouraging non-licensed managers and attorneys to break California law is not a traditional union activity. As such, the Writers Guild has no legitimate union interest in organizing and conducting a group boycott to restrict competition in commercial markets.

2. *THE WRITERS GUILD WILL NOT BE ABLE TO RELY ON NON-STATUTORY LABOR EXEMPTIONS*.

The Supreme Court has created an additional labor exemption from the antitrust laws, commonly known as the "non-statutory exemption," in areas where courts have deemed the exemption necessary to the proper functioning of the collective bargaining laws.[205] The purpose of the non-statutory labor exemption is to provide unions and employers the ability to bargain over wages, hours, and working conditions.[206]

However, this is not addressed by the Writers Guild's Code of Conduct. Agency packaging and agency-affiliated

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[204] Jonathan Handel, *Writers Guild Sets Vote Targeting Talent Agents: "We Are Making a Power Grab—Divide and Conquer"*, HOLLYWOOD REP. (Feb. 20, 2019), https://www.hollywoodreporter.com/news/writers-guild-sets-vote-targeting-talent-agents-1188615.

[205] *Connell*, 421 U.S. at 622.

[206] *See id.*

production are not mandatory subjects of collective bargaining. They are not part of the collective bargaining process. Thus, the non-statutory labor exemption does not apply.

3. *THE WRITERS GUILD IS VIOLATING THE VERY ANTITRUST LAWS THAT IT CLAIMS ARE BEING VIOLATED*

Ironically, the Writers Guild is at risk of violating the antitrust laws that it claims are being violated by the major talent agencies. Because no exemption from the antitrust laws apply, the Writers Guild's group boycott and concerted refusal to negotiate in good faith could be deemed by the district court as a per se violation of Section 1 of the Sherman Antitrust Act.[207] A Section 1 claim requires a contract, combination, or conspiracy in restraint of trade or commerce.[208] The District Court could find that the Writers Guild has orchestrated a series of such agreements with its members, non-licensed talent managers, and attorneys as part of an overall conspiracy.

First, the Writers Guild instructed and possibly coerced a majority of its members, who themselves compete with one another to hire the services of talent agents, to enter into an unlawful horizontal agreement to boycott and refuse to deal with talent agencies,[209] unless the agencies agree to and adopt the Writers Guild's Code of Conduct. Moreover, the Writers Guild has threatened severe disciplinary action, including expulsion from the union, unless the writers agree to participate in the boycott and group refusal to deal.[210]

Second, the Writers Guild has encouraged certain other talent agencies, who are CAA, UTA, and WME's direct

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[207] *See* 15 U.S.C.A. § 1 (West 2004).

[208] *Id.*

[209] Gregg Mitchell & Isabel Urbano, *Writers Guild of America Announces Lawsuit to End Talent Agencies' Conflicted Business Practices*, WRITERS GUILD OF AM. WEST (April 17, 2019), https://www.wga.org/news-events/news/press/2019/writers-guild-of-america-announces-lawsuit-to-end-talent-agencies-conflicted-business-practices. The WGA has not released an exact number, but according to WGA lawyer Anthony Segall, who is representing the union in its lawsuit, a 'vast majority' of the roughly 8,500 agent-represented Guild writers have signed letters to sever ties with their agents. *Id.*

[210] *See* Ingber, *supra* note 5.

competitors to sign the "Code of Conduct," thus operating as a horizontal agreement to boycott non-complying agencies (i.e., CAA, UTA, and WME) to the direct, anticompetitive benefit of other agencies.[211]

Third, the Writers Guild has encouraged showrunners,[212] when acting in their capacity as non-writing producers, to boycott non-complying agencies, like CAA, UTA, and WME, to the agencies' detriment.[213] And fourth, the Writers Guild has attempted to induce and has induced non-licensed managers and attorneys to procure employment for its members in an effort to achieve the ends of the group boycott and harm non-complying talent agencies.[214]

These contracts, combinations, and conspiracies among horizontal competitors to boycott and refuse to deal could be considered per se violations of Section 1 of the Sherman Act. Even if the District Court were to decline a per se test, the Writers Guild's conduct may constitute an illegal restraint of trade in violation of Section 1 of the Sherman Act.

Under the rule-of-reason analysis, a court will weigh the anticompetitive harm caused by the Writers Guild's restrictions against the potential pro-competitive benefit of those same restrictions.[215] The anticompetitive harm caused by the Writers Guild's conduct is clear, and there are seemingly no pro-competitive benefits. The Writers Guild has restricted its members from using certain agencies that do not adopt the Writers Guild's

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[211] First Consolidated Complaint at 3, ¶ 7, William Morris Endeavor, LLC v. Writers Guild of Am., Inc., 2:19-cv-05465-AB (C.D. Cal. Sept. 27, 2019).

[212] A showrunner is a non-writing executive producer on a production. *See Excellent Advice From Hollywood Producer Laverne McKinnon*, GIRLBOSS (June 10, 2016), https://www.girlboss.com/work/2016-6-10-girlboss-is-coming-to-netflix-an-interview-with-executive-producer-laverne-mckinnon. Generally, showrunners are viewed as the "CEO" of productions. *See id.*

[213] Will Thorne, *Drama Showrunners Talk WGA-ATA Dispute, Evolving Industry at Variety's 'A Night in the Writers' Room*, VARIETY (June 14, 2019), https://variety.com/2019/tv/news/wga-ata-showrunners-a-night-in-the-writers-room-1203243292/.

[214] *See* Fleming, Jr., *supra* note 202.

[215] See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 97 (1984), for detailed analysis of per se violations and the rule-of-reason.

Code of Conduct without providing any pro-competitive justifications or benefits.

The rule-of-reason analysis also requires that a relevant economic market be defined in which the Writers Guild is restraining competition.[216] The Writers Guild's market power in this relevant market is then assessed, and consideration is given as to whether the Writers Guild could achieve any ostensible pro-competitive benefit in a less restrictive manner, and, if necessary, balance the anti- and pro-competitive effects against one another.

The Writers Guild has stifled competition in the relevant market[217] through its group boycott. The major talent agencies compete in a market to sell their representation services to writers negotiating with producers. Additionally, writers compete with each other to acquire the representation services of agents. The geographic scope of this relevant market is the United States. There are no substitutes for the representation services provided in this market because, under California law, only licensed talent agents may procure and negotiate employment in the entertainment industry for writers.[218]

The Writers Guild not only has market power, but also a full monopoly over the relevant market because of its status as the exclusive collective bargaining representative of all writers for television production companies and Hollywood studios. The district court could find that the Writers Guild's ban on agency packaging unreasonably restrains competition in the market for the development and production of scripted television shows. The Writers Guild is leveraging its monopoly power in the labor market for writers to eliminate the agencies as competitors for packaging. As a result, talent agencies will be driven out of packaging entirely, thereby transforming a significant market in the entertainment industry.

The Writers Guild's ban on agency-affiliated production companies likewise unreasonably restrains competition in the market for development and production of scripted television shows and motion pictures. If the Writers Guild leverages its monopoly power in the labor market for writers to eliminate agency-affiliates such as wiip, Endeavor, or Civic Center Media as competitors, with the established studios in the relevant market

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[216] *Id.*

[217] The market being talent agencies, production companies, and studios.

[218] CAL. LAB. CODE § 1700.5.

for television and motion picture production, then it is effectively eliminating new entrants in the market. As such, the anticompetitive effects are substantial because the established studios and production companies directly benefit from the reduction in competition.

The Writers Guild's group boycott also provides an anticompetitive advantage to non-licensed managers and attorneys who are being asked to replace the boycotted talent agents. The Writers Guild has not required non-licensed managers and attorneys to refrain from participation in packaging and content production.[219] In fact, the Writers Guild has knowingly allowed non-licensed managers to produce and own television and motion picture content for multiple decades.[220]

Complete bans on agency packaging and agency-affiliated production cause significant anticompetitive effects in the relevant markets with no offsetting pro-competitive benefits. Moreover, even if there were pro-competitive effects, the Writers Guild could achieve such pro-competitive objectives through far less restrictive alternatives than an absolute bar on agency packaging and agency-affiliated production.

The district court may find that the major talent agencies have suffered antitrust injury to their business and property as a direct and proximate result of the Writers Guild's mandated group boycott, refusal to deal, and instruction to Writers Guild members to fire their agents. Talent agencies have lost a substantial number of clients and work. Moreover, the talent agencies that do not adopt the Writers Guild's Code of Conduct will continue to lose work, lose clients, lose packaging fees, and suffer irreparable harm to their respective business and property.

As such, the district court may find that the Writers Guild's group boycott and refusal to deal violates Section 1 of the Sherman Antitrust Act.

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[219] Talent management companies are permitted to produce content. *See* Matthew Blake, *Private Equity Shines Spotlight on Talent Reps*, L.A. BUS. J. (April 2019), https://labusinessjournal.com/news/2019/apr/05/private-equity-shines-spotlight-talent-reps/.

[220] David Ng, *Talent agencies are reshaping their roles in Hollywood. Not everyone is happy about that*, L.A. TIMES (April 6, 2018), https://www.latimes.com/business/hollywood/la-fi-ct-talent-agencies-20180406-story.html.

D. WRITERS GUILD'S BEST COURSE OF ACTION IS TO CLOSELY MONITOR AND HOLD ACCOUNTABLE AGENCY-AFFILIATED PRODUCTION COMPANIES

The Writers Guild has dug itself into a hole by alleging antitrust violations against the major talent agencies. Now the agencies are firing back, and the Writers Guild may be subject to antitrust violations based on its conduct. The district court will likely find that both the practice of packaging and agency-affiliated production companies do not violate Section 1 of the Sherman Act. Therefore, the Writers Guild will likely lose its battle with the CAA, UTA, and WME.

The Writers Guild could bring a claim against the CAA, UTA, and WME for a potential violation of the California Labor Code, which strictly regulates the business operations of talent agencies. If the Writers Guild prevailed, the agencies could be required to dissolve their respective agency-affiliated production companies.

According to § 1700.40(b) of the California Labor Code, "[n]o talent agency may refer an artist to any person, firm, or corporation in which the talent agency has a direct or indirect financial interest for other services to be rendered to the artist."[221] Arguably, this statute could create problems for agency-affiliated productions. Its language suggests that a talent agency cannot direct its clients to projects in which the agency holds a financial interest, regardless of whether that interest is direct or indirect. For whatever reason, though, the Writers Guild did not turn to the California Labor Code for a remedy.

The rationale for this decision might be based on the Writers Guild's determination to halt the practice of packaging entirely. From the Writers Guild's perspective, the agency-affiliated production companies are ancillary—or in supporting roles—to the larger packaging role. The agency-affiliated production companies, therefore, provide an easier avenue for agencies to package their own clients' projects because the agency has an ownership in the platform that is providing employment to their artists, including writers. This ultimately expands the practice of "packaging" in the entertainment industry, at least in the eyes of the Writers Guild.

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[221] CAL. LAB. CODE § 1700.40(b) (West 1994).

CONCLUSION

The Writers Guild and CAA, UTA, and WME are locked in an antitrust standoff that appears to be headed to trial. It is a battle that could ultimately upend television and movie production and threaten the livelihoods of thousands of people. Consequently, the entertainment industry is closely watching in anticipation of the final outcome. The outcome will inevitably have a ripple effect throughout Hollywood.

Depending on the district court's determination, other unions may follow the Writers Guild's lead. The Writers Guild is one of many unions that have agreements with talent agencies and studios.[222] Each union has unique and idiosyncratic agreements that relate to its members and the services that the members provide in the entertainment industry. Should the court come out in favor of the Writers Guild, it will set a dangerous precedent for future issues and conflicts. The Writers Guild will then be empowered to withhold its members from providing services to a production until an agency or studio agrees to the Writers Guild's terms. Moreover, it will empower other unions to mandate its members to fire or refuse to work with agencies, studios, or production companies that do not agree to the respective union's demands. Were this to occur, it would effectively stall production on all levels, leaving thousands of people unemployed until an agreement is reached, if at all.

In fact, the Writers Guild may soon be leading its members to a strike against major Hollywood studios and production companies if those studios and production companies continue to work with CAA, UTA, and WME. The Writers Guild's conflict with the major talent agencies is currently trickling into the Writers Guild's upcoming franchise negotiations with Hollywood Studios. The Writers Guild is enticing major studios and production companies to take its side in the current conflict. The Writers Guild's demands require studios to negotiate

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[222] Other unions include the Producers Guild of America (PGA), the Screen Actors Guild/American Federation of Television and Radio Artists (SAG-AFTRA), and the Directors Guild of America (DGA). *Guilds and Unions*, DIRECTOR'S GUILD OF AM., https://www.dga.org/Resources/Additional/Guilds-and-Unions.aspx (last visited April 23, 2020).

"only with agents franchised by the [Writers Guild]."[223] Should the studios and production companies collectively fail to acquiesce to the Writers Guild's demands, the result may end up in a group boycott of both talent agencies and studios—building a stronger case for antitrust violations against the Writers Guild.

The Writers Guild conflict with CAA, WME, and UTA comes at a time when economic realities are changing for both writers and agents in the digital Hollywood era. The period of peak television has led to more content creation and a greater need for writers than ever before. It has also led to shorter production seasons, lower salaries for writers, unpredictable production cycles and, in the case of some digital platforms like Netflix, no potential back-end profits for the sale of successful shows to other markets.[224]

At the same time, the business of talent representation has changed dramatically as the three major agencies have expanded and acquired capital from outside investors, requiring a larger revenue stream to be profitable. Within the last decade, the major agencies have taken in hundreds of millions of dollars in private-equity money.[225] Moreover, in 2019, WME planned for an initial public stock offering. However, the agency withdrew its public

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[223] Dave McNary, *Writers Guild Members Strongly Endorse Demand for Studios to Ban Non-Franchised Agents*, VARIETY (Feb. 7, 2020), https://variety.com/2020/biz/news/writers-guild-studios-non-franchised-agents-1203496917/.

[224] *Id.* And the streaming service retains ownership of all its original content. *Id.*

[225] The majority owner of CAA, for example, is TPG Capital, a giant private-equity firm with a prime mandate of growth. *See TPG Deepens Strategic Partnership with Creative Artists Agency*, BUS. WIRE (Oct. 20, 2014), https://www.businesswire.com/news/home/20141020006374/en/TPG-Deepens-Strategic-Partnership-Creative-Artists-Agency. In 2017, WME-IMG received a $1.1 billion investment by a Canadian pension fund and a Singaporean sovereign wealth fund. *See* Gene Maddaus, *WME-IMG to Receive $1.1 Billion Cash Infusion (EXCLUSIVE)*, VARIETY (Aug. 2, 2017), https://variety.com/2017/biz/news/silver-lake-wme-img-1-1-billion-investment-1202513182/. The majority owner of WME-IMG is Silver Lake Partners, a private equity firm. The investment is intended to enable further acquisitions. *Id.*

offering mere hours before it was to begin trading on the New York Stock exchange.[226]

As a result of the infusion of outside capital, the major talent agencies are being forced to reevaluate and reassess their business practices. To remain relevant, no longer can they operate solely as a traditional agency; they must operate as entertainment conglomerates.[227] Interestingly, this is the situation that the Supreme Court decision in *Paramount* and the 1962 federal consent decree with MCA was designed to prevent. However, the modern packaging system and agency-affiliated production companies are distinguishable from the *Paramount* defendant's and MCA's packaging practices.

Perhaps the largest difference between the practice of packaging by MCA and modern agencies is that the agencies now waive standard commissions for their clients, who are combined together on a particular project, while taking fees and back-end ownership stakes for themselves. Moreover, unlike the Hollywood eras in which Paramount Pictures and MCA operated, the modern era of Hollywood holds the most production companies, television networks, studios, and digital platforms ever recorded in Hollywood history.

Should this dispute go to trial, the district court will favorably view the pro-competitive benefits that packaging practices and agency-affiliated production companies offer to writers. Additionally, the Writers Guild's mandate for its members to refuse to work with agencies that do not agree to the Code of Conduct, coupled with its recent strong-arming of Hollywood studios and production companies will not be viewed positively in court. As such, the Writers Guild would be best served by settling its dispute with CAA, UTA, and WME out of court, recognizing that while writers' wages may have stagnated over the past few years, the marketplace has expanded exponentially. In a more diversified marketplace, CAA, UTA, and WME are only adding to the ever-expanding market by introducing more opportunities for writers, and artists in general.

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[226] Gene Maddaus & Cynthia Littleton, *Endeavor IPO Delay Sends Shockwaves Through Agency Business*, VARIETY (Sept. 27, 2019), https://variety.com/2019/biz/news/endeavor-ipo-wme-delay-agents-1203351170/.

[227] Benjamin Mullin, Dana Cimilluca & Erich Schwartzel, *Endeavor Sets Stage for Late-2019 IPO*, WALL ST. J. (Mar. 29, 2019), https://www.wsj.com/articles/endeavor-sets-stage-for-late-2019-ipo-11553875439.

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AUTHORS VS. AUDIBLE: A FIGHT FOR THEIR RIGHTS

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ABSTRACT

In 2019, multiple book publishers sued Audible, Inc., the world's largest audiobook distributer and Amazon subsidiary for copyright infringement. The lawsuit centers on Audible's latest feature: Audible Captions. The Captions feature displays spoken words in real time using speech-to-text technology enabling the listener to visually follow the narration. The publishers argue that the visual text is an infringing derivative work. Audible argues that the parties' licensing agreement bars the suit and, regardless, Captions is a fair use. The parties announced a settlement in January 2020, but did not state whether Captions would be launched commercially. Regardless, this Note proposes that the Captions feature creates infringing works under 17 U.S.C § 106 that are not protected as fair use under 17 U.S.C. § 107.

INTRODUCTION

Today, a single device can store movies, television shows, books, podcasts, games, news, and more.[1] The rise in smartphone usage has caused a growth in a previously underutilized section of the entertainment industry: audiobooks.[2] The American Foundation for the Blind procured the first "audiobooks" on vinyl

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[1] *See* Jennifer Maloney, *The Stars Align for Audiobooks: Thanks to the Ubiquity of Smartphones and Changes in Consumer Behavior, Audiobooks Have Become the Fastest-Growing Format in the Publishing Industry; In Response, Publishers Are Dramatically Expanding Their Offerings*, WALL ST. J., July 22, 2016, at D1.

[2] *Id.*

records in 1932.[3] Development in the industry continued slowly until new technology, such as cassette tapes and compact discs, spurred growth in the 1960s and 1980s, respectively. Today, thanks in large part to smartphones, digital audiobooks are the fastest growing format in the publishing industry.[4] In July 2019, The Association of American Publishers reported a 17.5 percent increase in total revenue for downloaded audiobooks compared to July 2018.[5] In comparison, hardback, paperback, and eBooks only saw a 4.7%, 4.3%, and 0.4% increase in revenue, respectively.

As of 2018, at least 50 percent of Americans listen to audiobooks.[6] Incidental to the rise in their popularity, more people have begun listening to audiobooks in their cars rather than in their homes.[7] Additionally, some note that audiobook popularity has grown with "the multitasking nature of consumers."[8] People listen to audiobooks while exercising, doing household chores, commuting, or working.[9] The increasing number of actors recruited to narrate stories has also contributed to the rise in audiobook popularity.[10] A-list celebrities including Reese Witherspoon, James Franco, Meryl Streep, Nick Offerman, and Scarlett Johansson, have been "cast" for audiobook recordings. While the aforementioned actors read for classic works, such as "The Adventures of Tom Sawyer" or "Slaughterhouse-Five," many celebrities-turned-authors are reading their own memoirs. This list includes Trevor Noah, Amy Poehler, Tina Fey, and Shonda Rimes.[11] The Audio Publishers Association ("APA") has

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[3] Alison Thoet, *A short history of the audiobook, 20 years after the first portable digital audio device*, PBS NEWS (Nov. 22, 2017), https://www.pbs.org/newshour/arts/a-short-history-of-the-audiobook-20-years-after-the-first-portable-digital-audio-device.

[4] Maloney, *supra* note 1.

[5] *StatShot: Publisher Revenue at $1.9 Billion for July 2019, Up 5.9% as Compared to July 2018*, ASS'N OF AM. PUBLISHERS (Oct. 1, 2019), https://newsroom.publishers.org/statshot-publisher-revenue-at-19-billion-for-july-2019-up-59-as-compared-to-july-2018/.

[6] *See* Press Release, Michele Cobb, Executive Director, Audio Publishers Assoc., Consumer Survey Results (Apr. 24, 2019), https://www.audiopub.org/uploads/pdf/Consumer-Survey-Press-Release-2019-FINAL.pdf.

[7] *Id.*

[8] Maloney, *supra* note 1.

[9] *Id.*

[10] *Id.*

[11] *Id.*

not determined an exact correlation between celebrity narrations and audiobook usage but notes that "[p]ublishers report seeing a positive impact or they wouldn't repeat it."[12]

The audiobook boom has led to increased industry competition. Audible Inc. ("Audible") is the world's largest seller and producer of audiobooks.[13] As part of the company's attempt to differentiate itself from competitors, Audible developed "speech-to-text" technology that created live captions to accompany audiobook narrations.[14] The company now faces litigation because of this frontline technology.

On August 23, 2019, seven publishing houses ("Publishers") sued Audible for copyright infringement in the United States District Court for the Southern District of New York. The Publishers alleged Audible's new feature, Audible Captions ("Captions"), infringed the copyright of their authors' works because it displays words on a screen during audiobook narration.[15] Audible insisted the feature was quintessential fair use.[16] Moreover, Audible argued their licensing agreement barred the licensor from suing for infringement.[17] However, the Publishers believed the new feature was outside the scope of the licensing agreement and, therefore, infringed on their copyrighted works.[18] The Publishers sought to enjoin Audible from releasing the new feature.[19]

In January 2020, the parties entered into a settlement agreement.[20] While the full settlement agreement is not yet

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[12] *Id.*

[13] AUDIBLE, https://www.audible.com/about/our-company/ (last visited April 23, 2020)

[14] Andrew Albanese & Jim Milliot, *In Captions Settlement, Audible Will Not Use AAP Member Content Without Permission*, PUBLISHERS WEEKLY (Feb. 7, 2020), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/82370-in-final-settlement-audible-agrees-to-limit-its-captions-program.html [hereinafter "Albanese & Milliot"].

[15] *Id.*

[16] *Id.*

[17] *See generally* Defendant's Motion to Dismiss, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913 (S.D.N.Y 2019).

[18] *See id.*

[19] Albanese & Milliot, *supra* note 14.

[20] *Id.*

available, some details have been made public.[21] Audible is "permanently restrained, enjoined, and prohibited" from using Captions for any of the Publishers' works.[22] However, the agreement does not prevent Audible from generating captions for text in the public domain.[23]

This note discusses the merits of the case between the Publishers and Audible. Part I explains the modern framework of the U.S. Copyright system, emphasizing the role technology has played in the formation of copyright law. Next, Part II lays out the Publishers' copyright claims against Audible and provides a summary of Audible's potential defenses. Finally, Part III analyzes the merits of the infringement claims against Audible and predicts the likely outcome of a fully litigated case.

I. COPYRIGHT LAW IN THE UNITED STATES

A. HISTORY OF COPYRIGHT LAW IN THE UNITED STATES

Copyright law is rooted in the Constitution, specifically, in Article I, Section 8 "to promote the progress of science and useful arts."[24] Congress has the power to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[25] From its inception, "copyright law has developed in response to significant changes in technology."[26] For example, the earliest forms of legal protection for an author's creative work arose in connection with the invention of the printing press.[27] Ever since, many of the amendments Congress has made to copyright law were made in response to a continuously developing technological landscape.[28]

Since the enactment of the first U.S. copyright laws, Congress and the courts have faced the challenge of adapting copyright protections in the wake of steadily progressing technologies. The past century has seen copyright issues arise in

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] U.S. CONST. art. I, § 8, cl. 8.

[25] *Id.*

[26] *Id.*

[27] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

[28] *Id.* at 431.

response to photographs, motion pictures, television, video games, online search technology, and more. However, the question remains the same: How does copyright law continue to serve its purpose despite the ever expanding access the public has to copyrighted work through technology? A copyright is a grant of limited monopoly privilege over a work to that seeks to encourage the creative activity of authors without discouraging innovation.[29] Copyright serves the greater purpose of bestowing the public with access to creative works and promoting the dissemination of knowledge.[30]

Today, the Copyright Act of 1976 ("Act"), as amended, governs copyright law.[31] The Act greatly expanded the scope of copyright protection. The Act protects any work of authorship fixed in a tangible medium of expression.[32] Protection begins at fixation and, for known authors, spans for the life of the author plus 70 years.[33]

B. OBTAINING AND OWNING A COPYRIGHT

1. *OBTAINING A COPYRIGHT*

The Act consists of fourteen chapters, the first of which defines the general subject matter of copyright and its limitations.[34] The statutory language lays out three separate requirements for a work to qualify for copyright protection: (1) a work of authorship; (2) that is original; and (3) fixed in a tangible medium.[35] The statute defines works of authorship to include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, sound recordings, and architectural works.[36]

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[29] *Id.* at 429.

[30] *Id.*

[31] *See id.*

[32] *See id.*

[33] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101). The act originally granted protection for life plus 50 years but was amended in 1998 to life plus 70 years. *See id.*

[34] *See id.*

[35] *Id.* § 102.

[36] *Id.*

Although the statute imposes an originality requirement on a work of authorship, it fails to define "originality."[37] However, Supreme Court case law establishes two distinct requirements for an original work. First, the work must be an independent creation of the author.[38] Second, the work must be minimally creative.[39]

Lastly, the statute requires a work to be "fixed" to receive copyright protection.[40] A fixation requirement is necessary because it would be difficult to prove creation or infringement without fixation. Unlike originality, the statue defines the fixed requirement as "[a] work [that] is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently stable to permit it be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[41] However, a lack of statutory guidance regarding the meaning of the phrases "sufficiently stable" and "transitory duration" within the definition for "fixed" has led to judicially created definitions. For example, the United States Court of Appeals for Second Circuit has held audiovisual work in a video game is fixed because of "the repetitive sequence of a substantial portion of the sights and sounds" despite differences during each game play.[42]

2. *OWNERSHIP OF A COPYRIGHT*

In general, the author of the copyrighted material is the owner of the copyright. However, the Act has carved out exceptions to this generalization. One such exception lies within the work-made-for-hire doctrine. If an employee creates work for an employer, the employer is the legal author and, therefore, owns the copyright.[43] Another exception lies with works that have more than one author. If more than one author creates a single work, both authors jointly own the copyright. The Copyright Act defines joint works as works "prepared by two or more authors with the intention that their contributions be merged into inseparable or

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[37] *See id.* § 101.

[38] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[39] *Id.*

[40] 17 U.S.C. § 102.

[41] *Id.* § 101.

[42] Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 854 (2d Cir. 1982).

[43] 17 U.S.C. § 101.

interdependent parts of a unitary whole."[44] Each author owns an equal part of the copyright whether their contributions were equal.

Copyright ownership rights are transferable. Section 201(d)(2) of the Act permits a copyright owner to transfer any or all of six exclusive rights to a third party and still retain ownership of the other rights.[45] Thus, copyright interests are divisible. A copyright owner may transfer their ownership rights through a license or an assignment. An assignment is a transfer of all rights in the work. A license is a transfer of anything less than the entire copyright and can limit the scope, duration and exclusive right of the transferred copyright interest. Section 204 requires exclusive transfers of copyright interests to be in writing, while it does not require the same for non-exclusive licenses.[46] However, the written contract often creates problems of interpretation when ambiguities arise.

Most notably, disputes arise with new technologies. New-use problems have continuously perplexed courts.[47] A new-use problem is whether licensees can capitalize on licensed works through new markets that technological advances created by technologies that arose after the licensing agreement.[48] Courts are not in accord on the answer to this question. In *Boosey & Hawkes Music Publrs. v. Walt Disney Co.*, the Second Circuit contemplated whether a motion picture license covers distribution in video format.[49] Under the principles of contract law, the court held that the license included the right to distribute in video format because the terms of the license were more reasonably read to include the right than to exclude it.[50] Notably, the court reasoned an interpretation of a new-use license must contemplate "the foreseeability of new channels of distribution at the time of contracting" and the burden is placed on the grantor to exclude such possibilities.[51] While the court recognized their conclusion

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[44] *Id.*

[45] 17 U.S.C. § 20.

[46] Effects Assocs. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990).

[47] Boosey & Hawkes Music Publrs., Ltd. v. Walt Disney Co., 145 F.3d 481,486 (2d Cir. 1998).

[48] *Id.*

[49] *Id.* at 485–86.

[50] *Id.* at 487.

[51] *Id.* at 486; *see also* Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 (2d Cir. 1968) (holding that when a license includes

deprived the author-licensor of profits from unforeseen channels of distribution, it found this result more palatable than depriving a contracting party of rights reasonably found in the contract.[52]

However, a court in the same circuit reached the opposite conclusion when a similar issue presented itself in 2001. In *Random House v. Rosetta Books*, the question was whether a contract granting the plaintiffs the right to "print, publish and sell the work[s] in book form" encompassed the right to sell eBooks.[53] The court held that it did not.[54] As such, the defendants were infringing the plaintiffs' rights because the licensing agreements did not grant digital or electronic rights.[55] Again, the court came to this conclusion using principles of contract interpretation.[56] Years prior, in *Cohen v. Paramount Pictures Corp.*, the United States Court of Appeals for the Ninth Circuit came to a similar conclusion, reasoning "the holder of the license should not now 'reap the entire windfall' associated with the new medium."[57] Here, the court argued granting the licensee rights to the works in a new medium would frustrate the purpose behind copyright incentivizing the production of new creative works.[58]

C. EXCLUSIVE RIGHTS & INFRINGEMENT

The Copyright Act lays out the six exclusive rights of a copyright owner in 17 U.S.C. § 106. The rights allow an author or owner of a copyright to exclude others from using the work in certain ways.[59] Further, the exclusive rights permit the owner to do or to authorize others to make use of the work in those ways.[60] These rights are (1) to reproduce the copyrighted work in copies,

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a grant of rights that is reasonably read to cover a new use, at least where the new use was foreseeable at the time of contracting).

[52] *Boosey & Hawkes*, 145 F.3d at 487.

[53] Random House, Inc. v. Rosetta Books LLC, 150 F. Supp. 2d 613, 614 (S.D.N.Y. 2001).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 24.

[57] Cohen v. Paramount Pictures Corp., 845 F.2d 851, 852 (9th Cir. 1988) (holding that the license did not give the right to use a musical composition in videocassette sold to the public).

[58] *Id.* at 855.

[59] *See* 17 U.S.C. § 106.

[60] Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 852 (2d Cir. 1982).

(2) to prepare derivative works based upon the copyrighted works, (3) to distribute copies to the public by sale or other transfer , (4) to perform the copyrighted work publicly, and (5) to display the copyrighted work publicly.[61] The Digital Performance Right in Sound Recordings Act of 1995 added the sixth right, the right to perform copyrighted sound recordings publicly by means of a digital audio transmission, to 17 U.S.C. § 106.[62] The limitations on these exclusive rights are set forth in 17 U.S.C.§ 107 through § 122. Each exclusive right is independent and may transfer individually without affecting the other rights.

Infringement occurs if there is a violation of any one of the exclusive rights.[63] A claim for infringement requires two elements: (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.[64]

1. *TO REPRODUCE THE WORK*

The right of reproduction is the most obvious grant of copyright protection. It allows the owner to exclude others from making copies of his or her work. 17 U.S.C. § 106 (1) grants the owner the right "to reproduce the copyrighted work in copies."[65] Two elements are required to establish infringement on the right of reproduction: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying went too far as to constitute improper appropriation.[66]

First, copying assumes the creation of a tangible copy. The Act defines "copies" as "material objects . . . in which a work is *fixed* by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[67] A work is "fixed" in a tangible medium when it is "sufficiently permanent . . . to be perceived . . . for a period of

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[61] 17 U.S.C. § 106.

[62] *Id.*

[63] 17 U.S.C. § 501.

[64] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[65] 17 U.S.C. § 106.

[66] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[67] 17 U.S.C. § 101 (emphasis added).

more than transitory duration."[68] Thus, two requirements surfaced: (1) embodiment and (2) duration.[69] If these two requirements are not met, the work is not "fixed" in a medium and, thus, not a copy.[70] Without a copy, the right to reproduction is not infringed.

Historically, adversaries rarely disputed fixation in the context of the right of reproduction. As literary works existed only in tangible form, such as a book or newspaper, a copy was necessarily fixed. Technology has changed how we create, share, and store our creative works. As a result, establishing when a work is sufficiently fixed as to create a copy is more difficult. Is a temporary digital copy fixed? The Ninth Circuit considered this question in *MAI Sys. Corp. v Peak Computer, Inc.*[71] Peak loaded MAI's copyrighted software onto a computer's RAM to maintain its customer's computers.[72] The court held "that the loading of software into the RAM create[d] a copy under the Copyright Act."[73] The court reasoned the temporary copy could be "perceived, reproduced or otherwise communicated" because Peak was able to view the system errors and diagnose the problem when the software was loaded onto the RAM,[74] thus, satisfying the Act's embodiment requirement. The court did not discuss the duration requirement in this case.[75]

However, the Second Circuit has also evaluated the duration requirement. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, content providers alleged a cable company's remote storage digital recorder system infringed their right to reproduce their protected works.[76] The system worked by routing a stream of data through a complex system including a buffer.[77] At issue was whether buffering the data from a copyrighted work

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[68] *Id.*

[69] Cartoon Network LLP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).

[70] *Id.*

[71] MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 511 (9th Cir. 1993).

[72] *Id.* at 518

[73] *Id.*

[74] *Id.*

[75] Cartoon Network LLP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008) (noting that the MAI system did not discuss or analyze "transitory duration").

[76] *Id.* at 123.

[77] *Id.* at 124–25.

reproduced a copy of the work. The court held the RS-DVR system did not infringe the right to reproduce.[78] Although the court found the works were embodied in the buffer, the data remained there only for a "transitory" period. Before overwriting the data, the buffer held it for no more than 1.2 seconds.[79] As such, the system did not create copies because it failed the duration requirement.[80]

Once the court determines a copy exists, it must determine if copying actually occurred. Either direct evidence, like an admission, or circumstantial evidence can prove copying.[81] Circumstantial evidence is usually evidence of similarities between the works combined with evidence of the infringing party's access to the protected works.[82] After copying is established, the issue of improper appropriation arises.[83] Improper appropriation is when an ordinary observer would find the works substantially similar.[84]

2. *TO PREPARE DERIVATIVE WORKS*

While the right to reproduce copyrighted works may be the most obvious, the right to prepare derivative works may be the most valuable.

Protection for derivative works originates from the 1870 Copyright Act ("1870 Act").[85] In the 1870 Act, Congress created protection for translations and dramatizations in response the U.S. Supreme Court's decision in *Stowe v. Thomas*.[86] At issue in *Stowe v. Thomas* was whether a German translation of Harriet Beecher Stowe's book, *Uncle Tom's Cabin*, violated copyright law.[87] Decided in 1853, the Court held the translation was not a violation

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[78] *Id.* at 140.
[79] *Id.* at 125.
[80] *Id.*
[81] Arnstein v. Porter, 154 F.2d 464, at 468 (2d Cir. 1946).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *See* JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 148 (Foundation Press, 2012) [hereinafter "GINSBURG"].
[86] Stowe v. Thomas, 23 F. Cas. 201, 201–04 (C.C.E.D. Pa. 1853).
[87] *Id.*

of copyright law because it only took the novel's idea.[88] In the opinion, the Court quickly set aside the notion that a translation constitutes a transcript or copy of the book. The Court reasoned an author's only exclusive property in her work is not her conceptions or inventions, but her right to reproduce exact copies and profit therefrom.[89] The Court notes that an author, as the inventor of the ideas and the expression, is the exclusive possessor of her work prior to publication. However, the Court goes on to suggest publication necessarily surrenders the author's "thoughts, sentiments, knowledge or discoveries to the world."[90] The Court also emphasized the substantial intellectual effort a translator contributes in preparing the derivative work as reasoning for the decision.[91] Ultimately, Congress overruled this decision with the enactment of the 1870 Act, establishing the first rights in some types of derivative works.[92]

The 1976 Act further solidified protection for derivate works. Section 106(2), also referred to as the "adaptation right," gives the owner exclusive rights "to prepare derivative works based upon the copyrighted work." [93] Section 101 defines a "derivative work" as:

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work.[94]

Granting authors or owners the exclusive right to prepare derivative work is both economically and morally justifiable. Economically speaking, the right to prepare derivative works is

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[88] *Id.* at 208.
[89] *Id.* at 207.
[90] *Id.* at 206.
[91] *Id.* at 207.
[92] GINSBURG, *supra* note 85, at 148
[93] 17 U.S.C. §106(2).
[94] *Id.* § 101.

valuable. This value is derived from the ability to license.[95] For example, an author of a book could allow a third party to create a movie, artwork, theater performance, audiobook, sequel, or translation, by way of a license. Thus, the financial incentive to create a new work is great because of the profit available in licensing the rights to derivative works.[96] Moreover, derivative works may so similarly resemble the original work that they may substitute or replace the original work in the marketplace.[97] Having rights over derivative work allows authors to maintain control of their original work in the market. Moral justifications also exist for the adaptation right also exist. Following a natural rights theory of copyright, which provides that an individual who has created a product should be entitled to full property rights in the product, the adaptation right protects an author's full interest in his or her work.[98] The adaptation right allows an author to retain control over the integrity and public perception of his or her work.[99]

As with other areas of copyright, technology is creating new challenges that affect the scope of protection provided by 17 U.S.C. § 106(2). In the past, a derivative work was not required to be fixed in tangible medium.[100] However, the Ninth Circuit parted from that line of reasoning in *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*[101]

In *Lewis Galoob*, Nintendo, the copyright owner, appealed the district court's holding that the alleged infringer's device, Game Genie, did not violate copyrights.[102] The Game Genie allowed a video game player to alter features of a Nintendo game temporarily.[103] It did not alter stored data.[104] The Ninth

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[95] GINSBURG, *supra* note 85, at 150.

[96] Lydia P. Loren, *The Changing Nature of Derivative Works in the Face of New Technologies*, 4 J. SMALL & EMERGING BUS. L. 57, 59 (2000); *see also* Kelly M. Slavitt, *Fixation of Derivative Works in a Tangible Medium: Technology Forces a Reexamination*, 46 IDEA 37, 98 (2005).

[97] Slavitt, *supra* note 96 at 47.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 53.

[101] 964 F.2d 965, 967 (9th Cir. 1992).

[102] *Id.*

[103] *Id.*

[104] *Id.*

Circuit held the displays created by the Game Genie were not derivative works.[105] The court reasoned the game alterations did not "incorporate a portion of a copyrighted work in some concrete or permanent form."[106] Moreover, the court concluded the Game Genie enhanced, rather than incorporated, the copyrighted Nintendo game.[107] The court in *Lewis Galoob* recognized the balance between copyright protection and innovation, noting "stretching that definition [of derivative works] further would chill innovation and fail to protect society's competing interest in the free flow of ideas, information and commerce."[108]

3. *TO DISTRIBUTE COPIES OF THE WORK*

A copyright owner has the exclusive right to distribute their work to the public.[109] Courts have discussed what it means to "distribute" the work, recognizing the Act's lack of definition for "distribute".[110] However, the Act indirectly defines distribution in its definition of "publication":

> [T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.[111]

Courts are divided on how to interpret this definition. For example, New York courts find that the definition of "distribute" is synonymous with the definition of "publication"[112] On the other

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[105] *Id.* at 968.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 969. (citing Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 429 (1984)).

[109] 17 U.S.C. § 106(3).

[110] *See* Elektra Entm't Grp., Inc. v. Barker, 551 F. Supp. 2d 234, 240 (S.D.N.Y. 2008); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 168 (D. Mass. 2008).

[111] 17 U.S.C. § 101.

[112] *Elektra*, 551 F. Supp. 2d at 244.

hand, Massachusetts courts hold that "publication" and "distribution" are not identical.[113]

Regardless of how a court defines "distribution," introduction of technology into this space brought into question whether to limit the right to distribute to physical, tangible objects. In *London-Sire Records v. Doe 1*, the plaintiff record companies brought suit against forty anonymous defendants alleging their use of peer-to-peer software to download and distribute music infringed the plaintiffs' exclusive right to reproduction and distribution.[114] The defendants argued the distribution right was limited to physical objects and electronic file-sharing was outside the scope of the right.[115] The court concluded that "[a]n electronic file transfer is plainly within the sort of transaction that 17 U.S.C. § 106(3) was intended to reach."[116]

The court reached this conclusion by examining whether an electronic file is a material object and whether the transmission of an electronic file is a distribution within the meaning of the statute.[117] First, the court found materiality referred to "a medium in which a copyrighted work can be 'fixed,'" rather than "a tangible object with a certain heft."[118] This definition distinguished between the original work and the numerous material objects in which it can be embodied.[119] Next, the court looked at the scope of the distribution right. The defendants argued an electronic transfer did not divest the sending computer of its file.[120] Thus, the transaction was outside the scope of distribution because there was no transfer of ownership as described in 17 U.S.C. 106(3).[121] The court was unpersuaded, and reasoned that 17 U.S.C. § 106(3) is about creating ownership in someone else rather than the distributor's ability to retain ownership.[122]

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[113] *London-Sire Records*, 542 F. Supp. 2d at 169.
[114] *Id.* at 159.
[115] *Id.* at 169.
[116] *Id.* at 173.
[117] *Id.* at 171-73.
[118] *Id.* at 171.
[119] *Id.* at 170.
[120] *See id.* at 172
[121] *Id.*
[122] *Id.* at 174.

4. *TO PERFORM AND DISPLAY THE WORK PUBLICLY*

17 U.S.C. § 106(4), (5) give a copyright owner the right to perform and display the work publicly. The Act defines "to perform" as "to recite, render, play, dance, or act [a work] by means of any device."[123] Further, it defines "publicly" as "a place open to the public or at any place where a substantial number of persons . . . is gathered."[124] To perform a work publicly also includes:

> [T]o transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[125]

Also known as the Transmit Clause, the Supreme Court expounded upon this language in *ABC, Inc. v. Aereo Inc.* Aereo used a system of servers, transcoders and antennas to offer subscribers broadcast television over the internet.[126] Each subscriber streamed data from a separate and individualized antenna.[127] Plaintiffs owned the copyrighted works that made up most of the streamed programming.[128] Plaintiffs argued Aereo's service infringed their right to perform works publicly.[129] The Court's inquiry was twofold. First, did Aereo "perform"? And, if so, did Aereo do so "publicly"?[130]

First, the Court concluded Aereo was not just an equipment supplier and Aereo did, in fact, perform.[131] The Court reasoned Aereo's services were similar to services that cable companies provided.[132] The Court resolved that Congress' intent was "to bring the activities of cable systems within the scope of

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[123] 17 U.S.C § 101.
[124] *Id*.
[125] *Id.*
[126] ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 436–37 (2014).
[127] *Id.*
[128] *Id.*
[129] *Id.* at 437.
[130] *Id.*
[131] *Id.* at 442.
[132] *Id.* at 439.

the Copyright Act," and, thus, could not exclude Aereo's system.[133]

Next, the Court considered whether Aereo performed publicly. Arguing against a finding of public performance, Aereo emphasized the individualized nature of each transmission.[134] No two subscribers received the same transmission.[135] Unpersuaded, the Court held Aereo transmitted a performance of the copyrighted works to the public.[136] The Court found little difference between transmitting via personal copies or the same copy. If multiple people received the same program, then Aereo performed the work publicly.[137] The Court concluded that Aereo's subscribers were considered "the public" within the meaning of the Act.[138] Moreover, the Court noted "the public need not be situated together, spatially or temporally."[139] Thus, the fact that subscribers received programs in various locations did not defeat a finding of public performance.[140]

D. DEFENSES

An alleged copyright infringer has several options to defend their unauthorized copying. First, the alleged infringer can argue the implicated copyright does not, or should not, exist because it fails to comply with statutory requirements. An alleged infringer can also overcome an infringement claim by offering evidence either that their work was independently created or their work lacks substantial similarity to the copyrighted work. Additionally, several statutory limitations to the use of copyrighted works that can serve as defenses. One of the most asserted defenses is fair use.

1. *FAIR USE*

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[133] *Id.* at 444.
[134] *Id.* at 445–46.
[135] *Id.* at 446.
[136] *See id.* at 448.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*

The notion some unauthorized copying may be permissible when it "promote[s] the Progress of Science and useful Arts" has been around for hundreds of years.[141] However, the doctrine of fair use was not statutorily recognized until the 1976 Copyright Act.[142] Fair use is an affirmative defense to a copyright infringement claim.[143] The burden to prove the use is on the alleged infringer. The fair use doctrine is a flexible standard that requires courts to weight four factors.[144] These factors are (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyright work.[145]

Determination of fair use is a highly factual analysis that aims to define the boundary limit of the author's exclusive rights in order to best serve the overall objectives of copyright law to expand public learning while protecting the incentives of authors to create for the public good."[146] While courts consider all the factors in totality, historically, they have given the most weight to the first and fourth factors.[147]

The first factor examines two elements: the broader purpose and character of the work and the commercial nature of the use.[148] Courts have found the first factor favors works with transformative uses over works that supplant the purpose of the original; the more transformative the use, the less significant the commercial nature of the use.[149] Thus, the first factor calls for a balancing of interests.[150]

The second factor, nature of the copyrighted work, does not typically necessitate a large discussion in court opinions. However, courts have recognized that when the nature of a

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[141] *Id.*

[142] Authors Guild v. Google, Inc., 804 F.3d 202, 212 (2d Cir. 2015).

[143] *See id.*

[144] Campbell v. Acuff–Rose Music, Inc., 510 U.S 569, 575 (1994) (citing 17 U.S.C. § 107).

[145] 17 U.S.C. § 107.

[146] *Authors Guild*, 804 F.3d at 213–14.

[147] *Id.*

[148] 17 U.S.C. § 107(1).

[149] *Campbell*, 510 U.S at 578–79.

[150] *Id.* at 584.

copyrighted work is "closer to the core of intended copyright protection," copying is less likely to be fair use.[151]

The third factor takes "the amount and substantiality" of the copying into consideration.[152] Essentially, it looks at whether the copying is reasonable in relation to the purpose for the copying.[153] This inquiry necessarily blends with the first and fourth factors.[154]

The fourth statutory factor is "the effect of the use upon the potential market for or value of the copyrighted work."[155] In addition to harm on the market for the original, Courts must consider harm to the potential market for derivative works.[156] Finally, a complete fair use analysis weighs the statutory factors together, in light of the purpose of copyright.[157]

Fair use issues often arise in connection with new technology. Years before the seminal case, the invention of the home video recorder and the ability to "time-shift" copyrighted programming was a point of contention that turned into litigation before the Supreme Court.[158] Despite the opposition warning "that the VCR is stripping . . . those markets clean out of [their] profit potential," and of "devastation in [the] marketplace," the Court found fair use.[159] Innovation is often met with the same rhetoric. Photocopiers, cassette tapes, digital music, and the DVR each saw opposition from copyright holders.[160] Ultimately, the opposed technologies did not have the devasting effect that rightsholders cautioned. Instead, these technologies opened new markets for monetization.[161] Recent fair use cases continue to balance the purpose of copyright against the benefits of new technology. For example, in 2015, the Second Circuit found fair use when Google

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[151] *Id.* at 586.

[152] 17 U.S.C. § 107(3).

[153] *Campbell*, 510 U.S at 586.

[154] *Id.* at 587–88.

[155] 17 U.S.C. § 107(4).

[156] *Campbell*, 510 U.S. at 590.

[157] *Id.* at 578.

[158] Nate Anderson, *100 years of Big Content fearing technology-in its own words*, ARS TECHNICA (Oct. 11, 2009), http://arstechnica.com/tech-policy/news/2009/10/100-years-of-big-content-fearing-technologyin-its-own-words.ars.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 2.

digitally scanned complete copies of millions of books to provide an online search function.[162]

II. PUBLISHING HOUSE LAWSUIT AGAINST AUDIBLE, INC.

A. HISTORY OF THE LAWSUIT AGAINST AUDIBLE, INC.

Audible developed the Audible Captions feature in response to feedback received in their 2017 "Project Listen Up" with Newark public high schools.[163] Students and educators expressed interest in being able to follow along with the text while listening to the audiobook to improve understanding.[164] In July 2019, Audible formally announced its intention to release the newly developed Audible Captions feature.[165] The plaintiff Publishers immediately sent cease and desist letters informing Audible that the feature constituted copyright infringement.[166] Despite Publishers' objections, Audible continued its plans to release the new feature.[167] Audible also refused Publishers' requests to limit the captions to public domain works or to include an opt-out option.[168] Thus, the Publishers filed suit in August 2019, seeking to enjoin Audible from releasing the Captions feature. Audible was planning to release Captions on September 10, 2019. Audible has not released Captions as of this writing.

The plaintiff Publishers were seven major publishing companies in the United States with well-established markets including the following: Chronicle, publishing approximately 300 titles per year; Hachette, a publishing company made up of multiple brands; HarperCollins, publishing approximately 10,000 new books a year; Macmillian, operating eight publishing divisions in the U.S.; PRH, publishing 15,000 new titles annually and selling close to 800 million works annually; Scholastic, the

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[162] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 207–08 (2d Cir. 2015).

[163] Defendant's Memorandum of Law at 12, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913-VEC (S.D.N.Y. filed Aug. 23, 2019).

[164] *Id.*

[165] Complaint at 11, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913-VEC (S.D.N.Y. 2019) [hereinafter "Complaint"].

[166] *Id.*

[167] *Id.*

[168] Albanese & Milliot, *supra* note 14.

world's largest publisher and distributor of children's books; and S&S, publishing 2000 titles annually.[169]

Publishers filed the complaint along with a motion for preliminary injunction on August 23, 2019.[170] On August 28, 2019, the parties filed a joint stipulation agreeing Audible would refrain from releasing Captions until the court ruled on the Publishers' motion for preliminary injunction.[171] Additionally, the parties stipulated to Audible's response deadline, and oral arguments were set for September 25, 2019.[172] Audible replied with a motion to dismiss arguing, *inter alia*, Audible Captions was fair use.[173] The court deferred ruling on the preliminary injunction at the oral arguments.[174] The court found no imminent harm to the publishers if Audible continued to delay the launch of the new feature.[175] On January 13, 2020 the parties reached an agreement and the case was dismissed.[176] As of this writing, the full details of the agreement have not been released.

However, a substantial portion of the agreement is public. Audible agreed to refrain from releasing Captions for the Publishers' copyrighted works and to obtain permission before moving forward with Captions for the Publishers' works.[177] Moreover, Audible agreed to pay the Publishers an undisclosed

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[169] Complaint, *supra* note 165, at 7.

[170] Porter Anderson, *US Publishers' Lawsuit of Amazon's Audible: 'Captions' Delayed*, PUBLISHING PERSPECTIVES (Aug. 30, 2019)., https://publishingperspectives.com/2019/08/american-publishers-lawsuit-amazon-audible-captions-rollout-delayed/

[171] Stipulation Letter, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913 (S.D.N.Y. filed Aug. 23, 2019).

[172] *See id.*

[173] Defendant's Motion to Dismiss, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913 (S.D.N.Y 2019). In addition to a fair use defense, defendants argued that the existing licensing agreements between the parties barred the plaintiff's claims. *Id.*

[174] Transcript of Oral Argument at 70, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913 (S.D.N.Y. filed Aug. 23, 2019) [hereinafter "Transcript"].

[175] *Id.* at 65–66.

[176] Letter to Judge Valerie E. Caproni, Chronicle Books, LLC v. Audible, Inc., (No. 1:19-cv-07913 (S.D.N.Y. filed Jan. 13, 2020).

[177] Settlement Agreement at 6, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913 (S.D.N.Y. 2020); *see also* Albanese & Milliot, *supra* note 14.

amount.[178] Though the parties have settled, this paper discusses the likely outcome of a fully litigated case. Additionally, this paper questions whether the likely outcome best serves the purposes of copyright law.

B. PUBLISHERS ALLEGE INFRINGEMENT OF COPYRIGHTED WORKS

1. *AUDIBLE'S INFRINGEMENT AND COMMERCIAL EXPLOITATION OF COPYRIGHTED WORKS*

The copyright status of the works is not in dispute. Moreover, the Publishers either own or license exclusive rights to the works.[179] Audible admits that it licenses the audiobook rights from the Publishers.[180] However, the Publishers alleged "the right to perform or distribute an audiobook [did] not automatically include the right to perform or distribute the book's text, and vice-versa."[181] As such, the Captions feature infringes on the Publishers' copyrighted works. Ostensibly, the text Captions produces was a reproduction of Publishers' copyrighted text and a derivative work of the licensed audiobook.[182] The Publishers alleged Audible distributed, performed, and displayed the copyrighted text through Captions in violation of the Publishers' exclusive rights.[183]

Audible attempted to veil the innovative feature as an educational tool which would enhance a user's understanding of the text.[184] The Publishers suggested the educational purpose masked Audible's attempt to exploit an existing market, thereby

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[178] Andrew Albanese, *Settlement Terms Revealed (Mostly) in Audible Captions Litigation; Judge Signs Off*, PUBLISHERS WEEKLY (Mar. 5, 2020), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/82598-settlement-terms-revealed-mostly-in-audible-captions-litigation.html.

[179] Complaint, *supra* note 165, at 7.

[180] Reply Memorandum of Law at 12, Chronicle Books, LLC v. Audible, Inc., No. 1:19-cv-07913 (S.D.N.Y. 2019) [hereinafter "Reply Memorandum"].

[181] Complaint, *supra* note 165, at 10.

[182] *Id.* at 12.

[183] *See generally id.*

[184] *Id.* at 21.

gaining commercial advantage over competitors without paying the customary fee for doing so.[185]

2. *THE HARM TO PUBLISHERS*

The Publishers alleged that Captions would harm their protected works in several ways. First, the text would have directly competed with the existing market for the publishers works, including cross-format services.[186] Audible currently offers "Immersion Reading" which allows users to both listen to the audiobook while simultaneously reading the text.[187] This feature is remarkably similar to the proposed Captions; however, Immersion Reading requires the user to purchase both the audiobook and the eBook.[188] The Publishers alleged that since Captions was offering a similar product for free, the program would likely undermine the existing cross-format market.[189]

Second, the Captions feature cheapens the value of any potential license granted by the Publishers, thus, devaluing the Publishers' works.[190] If Audible copied for free what other companies would normally pay a fee to have, then the program could diminish the Publishers ability to license the work to other companies.[191] The Publishers claim that Captions eliminates the market for exclusive licenses of the works.[192] Further, they argued that the harm was not theoretical because of the already existing market for cross-format licensing.[193]

Third, Publishers argued they would lose control over "the quality, presentation, and distribution choices for the Works."[194] The loss of control could have resulted in harm to the reputation of both the author and the publisher.[195] Each work that any one of the Publishers produces is carefully curated "so that a

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[185] *Id.* at 22.
[186] *Id.* at 18.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 19.
[190] Transcript, *supra* note 174, at 17–18.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] Complaint, *supra* note 165, at 20.
[195] *Id.*

rich variety of titles are readily available for readers." [196] The Publishers invest heavily in discovering works and creating the works' presentation for distribution to the market.[197] By generating text through Captions, Audible has taken for itself the works' display. Additionally, the speech-to-text technology produces the text with an error rate as high as six percent.[198] This could cause an end-user to conflate errors made by Captions with errors made by authors or publishers. This conflation could potentially harm the author's carefully curated reputation and could result in the loss of that reader. Theoretical loss of readers and harm to an author's reputation are difficult damages to measure. Calculation for compensation is not easy with this type of harm.[199]

Fourth, the Publishers made a public policy argument. Copyright law serves to incentivize creation of works and dissemination of knowledge. Incentive to create works is largely based on an economic reward. The Publishers argued that there should be a "symbiotic relationship" between companies like Audible and those that provide companies like Audible works to share so that those works are presented in the way that their creator intended.[200] Moreover, the Publishers emphasized the moral rights argument for copyright. Copyright ensures owners receive fair compensation for their labor.[201]

C. AUDIBLE, INC. RESPONDS DEFENSIVELY

Notably, Audible relied solely on defenses rather than asserting non-infringement. This suggests Audible believed that Captions did, in fact, infringe on the Publishers' work. Although copyright ownership was not disputed, Audible suggested their existing licensing agreements provided rights to the works.[202] Audible asserted that Captions merely aided the listening experience of the user, thereby expanding upon their existing right

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[196] *Id.* at 8.

[197] Reply Memorandum, *supra* note 180, at 9.

[198] Complaint, *supra* note 165, at 21.

[199] Transcript, *supra* note 174, at 23.

[200] *Id.*

[201] *See* Authors Guild v. Google, Inc., 804 F.3d 202,at 212 (2d Cir. 2015).

[202] Defendant's Memorandum of Law, *supra* note 163, at 14.

to the work.[203] Secondly, Audible argued even if Captions exceeded the scope of their agreements, the use of the text was fair use.[204] Audible emphasized the educational benefit of the product while minimizing the commercial benefit in attempt to establish fair use.

1. *LICENSING AGREEMENT BARS THE INFRINGEMENT CLAIM*

Audible insisted the Publishers did not have a copyright infringement claim against them because of the existing licensing agreements between the parties.[205] The Publishers had previously authorized Audible to use their content in exchange for royalty payments.[206] While Audible alleged the speech-to-text technology used for Captions was within the scope of the agreement, the Publishers disputed this assertion.[207]

As neither party provided the licensing agreements, the merits of the claim are hard to reconcile. If Audible was exceeding the scope of the license, the law permits a licensor to sue its licensee for copyright infringement.[208] However, if found to include rights to the disputed text, the existence of the licensing agreements would have proven fatal to the Publishers' claims. As the lawful owner of a copyright interest, a licensee cannot be liable for copyright infringement.[209] Instead, a disgruntled licensor may seek relief for breach of contractual obligations.[210]

Regardless of the language in the alleged licensing agreement, Audible contended the Publishers' failure to produce the licensing agreements warranted dismissal regardless of the language in the licensing agreement.[211] Audible's argument was three-fold. First, where a license governs, the plaintiff alleging

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[203] *Id.* at 9.

[204] *Id.* at 1–2.

[205] *Id.* at 13–14.

[206] *Id.* at 11.

[207] *Id.* at 16.

[208] *Id.* at 15 (citing Graham v. James, 144 F.3d 229, 236–37 (2d Cir. 1998)).

[209] U.S. Naval Inst. v. Charter Communs., Inc., 936 F.2d 692, 695 (2d Cir. 1991).

[210] *Id.*

[211] Reply Memorandum, *supra* note 180, at 12–13.

infringement has the burden of proving unauthorized copying.[212] Second, the existence of a license is undisputed.[213] Third, the plaintiff could not have argued Audible exceeded the scope of the license without producing the license terms.[214] Since the terms of the license were not plead and the licensing agreements were not submitted, the court could not have evaluated whether Captions exceeded the scope of the license. Thus, Audible maintained the case warranted dismissal because the Publishers had not met their burden of proof.

2. *CAPTIONS AS A FAIR USE*

If the licensing agreements did not bar the claims, Audible asserted the Captions feature was fair use of the copyrighted works.[215] Audible believed each of the fair use factors weighed in their favor.[216] As to the first factor, "purpose and character," Audible claimed Captions purpose was to enhance the audio experience for the user.[217] Captions would increase a user's comprehension of the work, thus, providing an elevated audio experience.[218] Audible emphasized the educational potential and benefits Captions could provide those "with reading challenges, who are hard of hearing, or are learning English."[219] Additionally, the company suggested the commercial benefit did not adversely affect the finding of fair use under the first factor largely because the user and Audible have already paid for the work.[220] Audible went on to acknowledge the second factor, however, it was quickly dismissed as irrelevant because "the fair use analysis hinges on the other three factors."[221]

The third factor looks at the quantity of work used in relation to the entire work.[222] Audible analogized their situation to

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[212] *Id.* 2–3.
[213] *Id.* at 11.
[214] *Id.* at 15.
[215] *Id.* at 18–19.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at 23.
[220] *Id.* at 25–26.
[221] *Id.* at 26 (quoting Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 98 (2d Cir. 2014)).
[222] *Id.* at 27.

the situation in *Google Books*, where the court found fair use despite complete unchanged copying.[223] Rather than outright admitting to the use of entire copyrighted works, Audible highlighted the ways Captions failed to create a substitute for the original work; small portions were doled out in a transient manner and the user could not access the full text.[224]

The same reasoning works into the fourth factor, the effect of the use on the market for or value of the protected work.[225] If Captions failed to create a substitute for the original work, then there was no market effect. While the Publishers suggested they would lose out on potential licensing revenues because of Captions, Audible rejected the existence of a market for speech-to-text generated captions.[226] Audible stated the public already has free access to the technology used to create Captions.[227] Thus, the notion the Publishers could have received additional licensing fees for something already freely existing was without merit and the fourth factor of fair use weighed in their favor.

III. CAPTIONS INFRINGEMENT IS NOT FAIR USE

A. AUDIBLE IS LIKELY INFRINGING PUBLISHERS COPYRIGHT

Before discussing the merits of the 2019 case, it should be noted that ten years earlier some of the same parties were in a similar dispute. However, the opposite technology was at issue. In 2009, Amazon[228] came under fire for releasing their Kindle 2 with a text-to-speech feature.[229] Publishers and the Authors Guild

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[223] *Id.* at 27.

[224] *Id.* at 28–29.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] Audible, Inc. is a subsidiary of Amazon.com, Inc. AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=202162230 (last visited April 23, 2020).

[229] Judy Mottl, *Authors Want Amazon Kindle to Stop Talking*, INTERNETNEWS.COM (Feb. 13, 2009), http://www.internetnews.com/mobility/article.php/3802826/Authors+Want+Amazon+Kindle+to+Stop+Talking.html; *see also* Jeremy B. Francis, *The Kindle Controversy: An Economic Analysis of How the Amazon Kindle's Text-to-Speech Feature*

united against Amazon alleging the feature created unauthorized audiobooks.[230] Despite the rightsholders' concerns, Amazon maintained the text-to-speech technology did not create a copy, derivative, or performance of the work.[231] Moreover, they denied the text that the speech generated through the text was intended to, or would, serve as a substitute for professionally narrated audiobooks.[232] Compellingly, some in the copyright community supported Amazon expressing their belief copyright law had become unduly burdensome to innovators.[233] However, Amazon ultimately allowed the rightsholders to opt-out of this feature and avoided a lawsuit, thus, appeasing the publishing community.[234]

Now, Audible has not so readily backed down. In support of Captions, Audible did not argue non-infringement as their parent company did in 2009.[235] Instead, the company relied on the shield of their licensing agreement and the fair use defense.

Despite the lack of non-infringement discussion in the pleadings, this case brings up several interesting infringement questions. This section considers the strength of the Publishers' infringement claims in a fully litigated case. The first question is whether Captions created either a reproduction of the protected work or a derivative work. Next, this Note analyzes whether there was a public performance or public distribution of the work. Finally, assuming infringement, this Note looks at the strength of Audible's defenses, concluding Captions is likely not fair use. The analysis highlights copyright's purpose and how copyright protection intersects with new technology.

1. *CAPTIONS ARE "FIXED"*

Violates Copyright Law, 13 VAND. J. ENT. & TECH. L. 407 (2011) (discussing potential copyright issues posed by Kindle 2 text-to-speech technology).

[230] Francis, *supra* note 229, at 409.

[231] *Id.* at 412–13; *see also* Press Release, Amazon.com, Statement from Amazon.com Regarding Kindle 2's Experimental Text-to-Speech Feature (Feb. 27, 2009), http://www.businesswire.com/news/home/20090227005816/en/Statement-Amazon.com-Kindle-2%E2%80%99s-Experimental-Text-to-Speech-Feature.

[232] Francis, *supra* note 229, at 412–13.

[233] *Id.*

[234] *Id.*

[235] Amazon Press Release, *supra* note 231.

Infringement on the right to reproduction requires actual copying of the protected work and improper appropriation.[236] In this case, copying is uncontestable. Moreover, the copying is difficult to differentiate from improper appropriation. The text Audible Captions produced was identical to the text of the protected work, absent the admitted six percent error rate. Ironically, Audible likely hoped to achieve greater similarity than 94 percent.[237]

Although Captions seem to be a reproduction of the work, copying assumes the creation of a tangible copy. Audible could attempt to argue that the Captions feature does not create a tangible copy because the fleeting text is not "fixed" as required to create a copy. To create a copy the work must be embodied in a tangible medium for more than a transitory period.[238] Audible is unlikely to convince the court Captions does not embody the work. A work is embodied when it is sufficiently permanent to permit it to be perceived.[239] If a listener could not perceive Captions, the feature would serve no purpose. Thus, Audible should focus on arguing a lack of the duration requirement.

This argument is not without precedent. In *Cartoon Network*, the Second Circuit found data from copyrighted work embodied when held in a buffer, however, only for a transitory period.[240] And as such, the court found no reproduction of the work.[241] Similar to the buffered data in *Cartoon Network*, which was overwritten as it was processed, Captions generated words only remain on the screen momentarily before the audio progresses and subsequent words appear.[242] The text is temporary. However, substantial differences distinguish Audible Captions from the non-infringing DVR System in *Cartoon Network.* First, the data in the DVR System remained in the buffer for only 1.2

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[236] Cartoon Network LLP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).

[237] *See Top publishers sue Audible over planned captioning feature*, WTOP NEWS (Aug. 23, 2019), https://wtop.com/entertainment/2019/08/top-publishers-sue-audible-for-copyright-infringement/.

[238] *Cartoon Network LLP*, 536 F.3d at 127.

[239] 17 U.S.C. § 101.

[240] *Cartoon Network LLP*, 536 F.3d at 130.

[241] *Id.*

[242] Defendant's Memorandum of Law, *supra* note 163, at 1.

seconds.[243] Captions' text remains on the screen for a longer period. Moreover, if a listener pauses the audio, the words halt.[244] Once paused, the listener can interact with the text to find definitions, translations, or additional information.[245]

Even if the court found the text lasted for a mere "transitory period," the listener's device stores a file containing the transcription. The file contains encrypted data and the user cannot access it, but this is of little help. The Act indicates that copies are "material objects . . . from which a work can be perceived . . . either directly, or *with the aid of a machine or device*."[246] Like *Mai Systems*, which found software on a computer's RAM could create a copy, the listener's device perceives the encrypted file to display the text.[247] Even more fatal to Audible's argument is the fact that a server caches the file for ninety days.[248] If another user chooses to generate captions for the same audiobook, the cached file is then sent to that user.[249] These facts likely compel a court to find Captions generated text sufficiently fixed and, thereby, a copy of the protected works. As a result, Audible infringes on the exclusive right of reproduction.

Audible could have taken precautions to avoid reproduction of the Publishers' works. They could have chosen to generate new text for each user to avoid storing the encrypted file. If a file had to be stored locally, the software could have been created to re-write the file as the text is "streamed" to the user. These methods would take more computer processing power and be more inefficient, but Audible would have a stronger argument for non-infringement. Instead, Audible opted for a more efficient software that exposed them to copyright infringement.

2. *CAPTIONS ARE NOT DERIVATIVE WORKS*

The next inquiry would be whether Captions created a derivative work. The Copyright Act provides examples of derivative works such as a motion picture, abridgement, sound

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[243] *Cartoon Network LLP*, 536 F.3d at 125.

[244] Defendant's Memorandum of Law, *supra* note 163, at 7.

[245] *Id.*

[246] 17 U.S.C. § 101 (emphasis added).

[247] MAI Sys. Corp. v Peak Computer, Inc. 991 F.2d 511, 518 (9th Cir. 1993).

[248] Defendant's Memorandum of Law, *supra* note 163, at 6.

[249] *Id.*

recording, or translation based upon one or more preexisting works.[250] As such, an audiobook is clearly a derivative work of literal text. The Publishers argued Captions' display of text is a recasting of an audiobook into an eBook.[251] The Merriam-Webster Online Dictionary defines an e-Book as "a book composed in or converted to digital format for display on a computer screen or handheld device."[252] Audible argued Captions was not a book, but more like subtitles.[253] It is unclear whether captions can be considered an e-Book. The Publishers line of reasoning assumes closed captioning of a film or television show creates an e-Book. This seems non-sensical.

Unlike a reproduction, a derivative work does not have to be fixed. However, in an unprecedented opinion, the Ninth Circuit found "a derivative work must incorporate a protected work in some concrete or permanent form."[254] So the question becomes whether Captions incorporates the protected work in some concrete or permanent form. The Publishers insisted Captions was a quintessential derivative work.

Since the Act's definition of derivative work does not answer this question, a court would need to turn to case law. There is no indication whether the Second Circuit would adopt the Ninth Circuit's "concrete and permanent test" laid out in *Lewis Galoob* but, the *Lewis Galoob* case provides an interesting analysis framework for the parties' arguments. If adopted, Audible could have the stronger argument.

In *Lewis Galoob*, the Ninth Circuit found that Game Genie, a device for altering Nintendo games, was not a derivative work.[255] The fact the Game Genie only enhanced the audiovisual display rather than incorporated Nintendo's game "in some concrete or permanent form" was central to the decision.[256]

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[250] *See* 17 U.S.C. § 106.

[251] Transcript, *supra* note 174, at 11.

[252] *e-book*, MERRIAM WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/ebook (last visited April 23, 2020).

[253] Edward Pollitt, *Amazon Is Being Sued By Book Publishers For Trying To Add Subtitles To Audiobooks*, B&T (Aug. 26, 2019)., https://www.bandt.com.au/amazon-audible-sued-publishers/.

[254] Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 968–69 (9th Cir. 1992).

[255] *Id.* at 965.

[256] *Id.* at 968–69.

Moreover, Game Genie could not produce an audiovisual display; it required the Nintendo System and game cartridge to produce the display.[257] The court found it important the product enhanced, but not replaced, the copyrighted works.[258]

Like Game Genie, Audible Captions enhances rather than replaces the protected works. The captions help a listener comprehend the audiobook. For example, if the audiobook narrator has an accent or uses an unfamiliar word, the listener can see the spelling or look up the definition to clarify their understanding. This useful tool enhances the user's listening experience.

Furthermore, Captions does not incorporate the copyrighted work in "a concrete or permanent form." This is a different requirement than "fixed" for the purposes of reproduction. As with the Game Genie, Captions requires the input of the copyrighted material. The function of Captions is useless until the user has access to the underlying audiobook. A listener cannot read Captions like an eBook, or separated in any way from the narration. The copyrighted work is only incorporated when a user is listening to an audiobook. The text cannot stand alone. Thus, it does not replace the copyrighted work. For these reasons Captions likely does not create a derivative work under the Ninth Circuit "concrete and permanent" test.

3. *CAPTIONS ARE PUBLICLY DISTRIBUTED AND PERFORMED*

Audible is likely distributing copyrighted works to the public through Captions. The court has found unauthorized electronic file transfers to infringe the distribution right.[259] Unless permitted by fair use or the licensing agreement, the copyright owners have not authorized Audible to distribute an electronic file of the text to its users. Audible violates the distribution right by sending the encrypted file to a user's device.

Additionally, Captions likely constitutes a public performance of the work. The Copyright Act directly supports this conclusion: "to perform a work means to . . . render it, either directly or by means of any device."[260] The streaming text is a

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[257] *Id.*

[258] *Id.* at 969.

[259] *See, e.g.*, London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 173 (D. Mass. 2008).

[260] 17 U.S.C. § 101.

rendition of the copyrighted work. A listener generally consumes an audiobook individually. However, the text "performed" in synchronization with the narration would be a public performance. A work is performed publicly if it is transmitted to the public.[261] Audible planned to offer Captions to the public. Moreover, multiple people might enable Captions for the same work, they may even share the same encrypted file. Once the program has generated text for the first time, the file is cached so the work can be sent to any user who chooses to activate Captions for that work. It does not matter whether the viewers are situated together "spatially or temporarily."[262]

B. EXAMINING AUDIBLE'S DEFENSE

As discussed above, Audible Captions likely infringes upon several of the Publishers' exclusive rights. Audible attempted to defend the infringement by alleging the license agreements permitted such use. Additionally, Audible claimed fair use. The strongest and most frequently used defense in copyright infringement cases is fair use. Under existing law, Audible's use of the copyrighted works is likely not fair use. The statutory factors would most likely weigh in favor of the Publishers. However, it is unclear if this finding is best suited considering the purposes of copyright law. This section discusses the strengths and weaknesses of Audible's two defenses.

1. *LICENSING AGREEMENT AS A SHIELD*

The suit at hand is between Audible and seven Publishers, each with a vast collection of works. As follows, the licensing agreements are unique, at least, to each party, if not each protected work. Interpreting the licensing agreements would prove a substantial task for the finder of fact. The merits of the claim are difficult to discern without access to the licensing agreements. However, speculation of the results is possible.

If the language granting Audible the right to the work has a narrow construction, Captions would likely be outside the scope of the agreement. For example, the agreement could grant Audible authority only to sell, distribute, or perform audio recordings of

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[261] *See id.*

[262] ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 436–37 (2014).

the licensed work. Another possibility is that the licensing agreement is a general grant of authority. For example, perhaps the agreement grants Audible authority "to use, reproduce, display, market, sell and distribute the Audiobook throughout the Territory in all formats now known or hereafter invented from the date you accept this agreement . . . ."[263] If the licensing agreement is construed in this manner, Audible would likely be allowed to reproduce the text through Captions.

Interestingly, courts turn to the principles of contract interpretation rather than copyright law when interpreting licensing agreements.[264] The court has suggested the burden to prove a deviation from the most reasonable reading is on the party supporting the deviation.[265] The party supporting the deviation is unknown, as the language of the agreement is not available. Here, the sophistication of the parties and the fact Audible has now settled, lead to the assumption the licensing agreements were probably narrow. Thus, Captions would likely not be within the scope of the licensing agreements.

2. *WEIGHT IS AGAINST FAIR USE*

Under existing law, each factor most likely weighs in favor of the Publishers. However, this may not be the best outcome to serve the purposes of copyright law. Thus, perhaps modern copyright jurisprudence should aim to become more in line with these purposes. This section addresses each side's argument factor by factor in comparison to the *Google Books* case.[266] In *Google Books*, Google made digital copies of the plaintiff's books to create a search function which allowed a user to search for a specific term and view snippets of texts from works that contained their searched-for term.[267]

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[263] ACX, *Audiobook License and Distribution Agreement*, ACX, (last visited April 23, 2020) (June 1, 2017) https://www.acx.com/help/audiobook-license-and-distribution-agreement/201481900 (listing examples of an audiobook licensing agreements).

[264] *See* Complaint, *supra* note 165, at 4–5.

[265] Random House, Inc. v. Rosetta Books LLC, 150 F. Supp. 2d 613, 619 (S.D.N.Y. 2001).

[266] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 202 (2d Cir. 2015).

[267] *Id.* at 207.

a) *Purpose and Character*

The first factor is the "purpose and character" of the use.[268] The Publishers said there is no difference between the purpose of the original work and the purpose of Captions; both are to read a literary work.[269] The Publishers also emphasized a lack of transformative use. They argued Captions did not (1) shed new light on the work's text, (2) comment on or criticize the text, (3) help find authorized versions of the text, or (4) make access easier for the entitled user.[270] Thus, rather than adding something more to the protected works, Captions purpose supplanted the original work. Moreover, the fact Audible Captions would be available to all paying users shows it had a commercial benefit.[271] In sum, the Publishers asserted factor one goes against fair use because of the commercial nature and lack of transformative use.

On the other hand, Audible argued the "purpose and character" of Captions use was utility-expanding and the commercial benefit did not affect the fair use. First, the utility-expanding purpose was to deliver content the user had already paid for in a more convenient and usable form.[272] They pointed to the profound benefit of connecting listeners to the content, aiding learning, and providing significant information about text.[273] Audible did not believe Captions provides a competing purpose to the original as the snippets of text did not create a book for the user to read.[274] The purpose was "to improve a listener's ability to understand the work she has purchased."[275] Audible did not dispute the existence of a commercial benefit.[276] However, the company maintained it did not alter the analysis.[277]

The two elements of consideration, transformative use and commercial benefit, would serve as guidance for the court's analysis within the first factor. In *Google Books*, Google's purpose

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[268] 17 U.S.C. § 107.
[269] Transcript, *supra* note 174, at 4.
[270] *Id.* at 8.
[271] *Id.* at 11.
[272] *See* Complaint, *supra* note 165, at 1.
[273] *Id.* at 23.
[274] *Id.* at 21.
[275] *Id.*
[276] *Id.* at 24.
[277] *Id.*

for copying the works was to allow a searcher to identify works of interest and provide information about the work without threatening the rightsholders interest.[278] Google took many precautions to ensure the digital copy did not provide a substitute for the original.[279] The court found the purpose highly transformative.[280] Google created a database of material for electronic searches previously unavailable to humankind. The court emphasized the transformative purpose claim derived from providing otherwise unavailable information about the original work to others.[281] Because of the useful purpose, the commercial motivation did not concern the court.[282]

Audible attempted to equate Captions' "transformative purpose" with *Google Books*. Captions would have been a useful tool for aiding a listener's comprehension of the audiobook. However, it is not a tool previously unavailable to the public like the search function in *Google Books*. A listener could already choose to follow along simultaneously with the narration of the audiobook if she had purchased both the audiobook and the e-Book.[283] Moreover, Captions may have provided a transformative and useful purpose to the *audiobook*, but this purpose was lacking in regard to the underlying literary work.

b) *Nature of the Work*

The second factor of fair use is rarely a substantial portion of analysis.[284] A finding of fair use does not turn on the nature of the work. However, it adds weight against the finding of fair use if the work is more deserving of copyright protection, i.e. a fictional or unpublished work.[285] Copying of factual work or a work that has already been disseminated to the public is more likely to be fair use.[286]

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[278] Authors Guild v. Google, Inc., 804 F.3d 202, 214–19 (2d Cir. 2015).

[279] *Id.* at 210.

[280] *Id.*

[281] *Id.* at 215.

[282] *Id.* at 210.

[283] Complaint, *supra* note 165, at 11.

[284] *Authors Guild*, 804 F.3d at 220.

[285] *Id.*

[286] *Id.*

The Publishers asserted the second factor weighed in their favor because a large portion of their audiobooks are fictional works that are more creative by nature and deserve greater protection, emphasizing the importance of protecting authors rights.[287] Audible pointed out that it already licenses the published works, both fictional and non-fictional, from the Publishers.[288] In addition, Audible asserts the second factor is only relevant because it combines with the analysis of the first factor.[289] The court in *Google Books* noted the second factor is not considered in isolation, instead the second factor considers the "nature" of the copyrighted work "to permit assessment of whether the secondary work uses the original in a 'transformative' manner . . . ."[290] As discussed above, Captions likely lacks a "transformative purpose." This becomes more obvious when the secondary use is compared to the "nature" of the original."[291] Moreover, the court expressed that even if the works at issue are literary works. The secondary use, Captions, could also be seen as literary work. In addition, Audible sought to provide Captions for their entire library, so it would copy both fictional and factual works.[292] This diminishes the Publishers' argument. For these reasons, the second factor likely weighs against fair use.

c) *Amount and Substantiality of the Portion Used*

The Publishers believed the third factor weighs against fair use because Captions used a protected work in its entirety.[293] They argued it did not matter if Captions replicated the work in bits and pieces because it eventually distributed the entire work.[294] Alternatively, Audible contends that it uses no more of the work than was necessary to fulfill Caption's purpose.[295] Although they conceded the purpose requires use of the entire work, their

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[287] *See* Transcript, *supra* note 174, at 4.
[288] *See* Complaint, *supra* note 165, at 1.
[289] *See* Transcript, *supra* note 174, at 4.
[290] *Authors Guild*, 804 F.3d at 220.
[291] *Id.*
[292] *Id.*
[293] *See* Transcript, *supra* note 174, at 13.
[294] *Id.*
[295] *See* Complaint, *supra* note 165, at 1.

argument highlighted the measures taken to prevent Captions from offering a substitute for the original works.[296]

Similar to Audible, Google's purpose required an unauthorized digital copy of the entire work. Google took steps to minimize the public's access to the entire work.[297] These included blacklisting 22 percent of a book's text and revealing only one snippet view per page for each search term, among other things.[298] Thus, the court found the amount and substantiality used was reasonable in relation to the purpose for copying. However, the court noted situations which could lead to a different conclusion:

> [T]he larger the quantity of the copyrighted text the searcher can see and the more control the searcher can exercise over what part of the text she sees, the greater the likelihood that those revelations could serve her as an effective, free substitute for the purchase of the plaintiff's book,

or if a searcher could view a coherent block of a book, rather than fragmented or scattered snippets.[299] Both of these descriptions seem to effectuate what Captions offered. The listener could see snippets of the books in a coherent manner and she could exercise control over what part of the text she saw. Thus, the outcome of the third factor would turn on a few key decisions.

First, the court must decide if a listener could see a large quantity of the work. On one hand, Captions only displays, an average, of fifteen words at a time. A relatively low quantity in relation to the work as a whole. On the other hand, the words displayed continuously change with the audio so, Captions could have exposed a listener to entire chapters in one sitting. As opposed to Google, which displayed the text in fragmented, incoherent snippets, Captions provided small portions of the work in cohesive order.

Next, the court must consider the amount of control a user is able to exert over the material. The Google searcher had limited control over the portion of text they saw depending on the search term used.[300] A user could not use searches as a means of piecing together the entire work.[301] Whereas, an Audible listener can pause, rewind, and interact with the Captions provided text. They

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[296] *See* Transcript, *supra* note 174, at 15.
[297] *See Authors Guild*, 804 F.3d at 222.
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*

can control the text displayed by listening to different parts of the audiobook. Nevertheless, the reader has limited control compared to the control she would have over an eBook or physical book. Audible Captions undoubtably grants greater access to the protected works than Google books. However, an Audible user already paid to access the entire underlying work, at least in audio format and a Google searcher had no right to access the underlying work.

Ultimately, the court's third factor decision comes down to whether the secondary use provides enough of the work, in both quantity and quality, that it serves as free substitute for the original. Additionally, the court could by-pass the difficult analysis described above by deciding the encrypted file stored on the listener's device, and a remote server for 90 days, encompasses the entire work. As such, the third factor tips in the Publishers' favor.

d) *Effect on the Market*

The Publishers alleged the copying harmed the market in four ways: (1) Captions directly competed with the existing market, including cross-format services, replacing publishers as providers of their text; (2) Captions devalued the work by cheapening actual and potential licenses for the work; (3) treating the text of work as a free-add to the audiobook decreased the value of the text; and (4) Audible took for itself the right to an existing market.[302] Audible refuted these allegations on the premise that Captions was not a book, nor a replacement for one.[303] Moreover, Audible dismissed the possibility of potential licensing revenues because the speech-to-text technology is a free, publicly available tool.[304] Even assuming some financial impact on the market, Audible believed public benefit outweighed speculative impact on book sales.[305]

In *Google Books*, the court recognized that the fourth factor inherently intertwines with the first factor.[306] Essentially, the more transformative the purpose of the secondary use the less

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[302] Transcript, *supra* note 174, at 13–18.
[303] *See* Complaint, *supra* note 165, at 1.
[304] *Id.* at 29–30.
[305] *Id.* at 30.
[306] *Authors Guild*, 804 F.3d at 222

likely it would be to harm the market for the original. As such, the court in *Google Books* was willing to accept the loss of some sales.[307] However, the court acknowledged even when the secondary use is transformative, "such copying may nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute."[308]

Unlike the snippet view in *Google Books*, Captions would reveal significant portions of the original text. And, as previously discussed, Captions did not have a highly transformative purpose like the search function in *Google Books*. Thus, the court would likely scrutinize even a small effect on the potential market.

The most obvious market effected by Captions would be the existing cross-format services market. Audible already offers Immersion Reading and WhisperSync.[309] Immersion Reading allows a user to simultaneously listen and read, if the user has purchased both the audiobook and the eBook.[310] Immersion Reading provides the user with more control and access to the text than Captions, however the utility is the same.[311] WhisperSync allows a user to switch between formats.[312] Immersion Reading and WhisperSync make up a small portion of Audible customers.[313] Both existing cross-format services serve a similar purpose to the proposed Captions function. Thus, Captions would be a likely substitute for the original work; it could have had a large impact on the cross-format service market, despite the relatively small market size. For the foregoing reasons, the court is likely to find the fourth factor weighs in favor of the Publishers.

e) *Considering the Purpose of Copyright – An Argument for Fair Use*

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[307] *Id.*at 224.

[308] *Id.*

[309] *Keep the story going*, AMAZON, https://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000827761 (last visited April 23, 2020).

[310] Complaint, *supra* note 165, at 5–6.

[311] AMAZON, *supra* note 309.

[312] *Id.*

[313] Defendant's Memorandum of Law, *supra* note 163, at 10 (stating that in 2019 Immersion reading only made up 2.5% of customers).

As shown above, a strict analysis under current law would likely lead to finding Captions is not a fair use. However, this outcome may not be best considering the purpose behind copyright law. The court in *Google Books* eloquently stated "[t]he ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create."[314] Finding Captions to be fair use may be better policy for several reasons. First, there would likely be little harm to the financial incentive of creation. Second, Captions serve the goal of copyright: expanding knowledge and understanding.

Although Captions may cause some harm to the cross-format services market,[315] the diminutive impact on the market would likely not disincentive authors to create. A large market for audiobooks, books, and eBooks would still exist even if three percent of users stop purchasing the work in two formats. In fact, adding Captions to audiobooks may even create financial incentive. The cost for an audiobook is sometimes double the cost of the e-book.[316] The Publishers were concerned Captions would disrupt the e-book market[317], but if Captions did convert some eBook readers to audiobook listeners the author could be better off financially.

Moreover, Audible created Captions to promote learning.[318] Captions had the potential to be a useful tool for many, but especially people with learning disabilities, hearing loss, second-language learners, and children.[319] A reader likely only enables Captions because the ability to follow along with the narration increases their understanding of the work. If the reader did not find Captions beneficial, they would not enable the feature. The foremost aim of copyright is to incentivize creative work for

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[314] *See Authors Guild*, 804 F.3d at 212.

[315] *See* discussion *supra* Section III.B.2.d.

[316] Piotr Kowalczyk, *Audiobook Prices Compared to EBooks And Print Books*, EBOOK FRIENDLY (July 3, 2018) https://ebookfriendly.com/audiobooks-price-comparison-ebooks-print-books/#:~:text=.

[317] *See* discussion *supra* Section III.B.2.c.

[318] Defendant's Memorandum of Law, *supra* note 163, at 8.

[319] *Id.* at 9.

the public benefit. So, Captions promotes learning without disincentivizing creation. However, the four-factor analysis of Captions work finds against fair use.[320] Perhaps a better policy would be to find Captions as fair use.

CONCLUSION

Technology continues to challenge copyright law. Audible's proposed Captions feature is no exception. While Audible sought to gain a competitive edge in the audiobook industry, they did so at the copyright holders' expense. The text generated by Captions certainly infringed on several of the Publishers' exclusive rights. Audible attempted to justify their infringement as quintessential fair use, yet under existing law the most likely outcome of a fair use analysis would not fall in Audible's favor. This may be the most equitable outcome. However, at the core Captions strove to promote learning and understanding by connecting listeners to the material. Promoting the progress of science and knowledge for public benefit is the ultimate goal of copyright law. Perhaps a better outcome would be to allow a feature like Captions as fair use.

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[320] *See* discussion *supra* Section III.B.2.

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