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FOUNDER'S FOREWORD

Sam Renaut*

It was a typical day in the life: I was eating lunch with a small group of students, including Amara Edblad and Nick Scavio, at the Sandra Day O'Connor College of Law at Arizona State University (ASU). We were like-minded, either fans of sports and professional competitions, or fans of the performing arts and entertainment—two distinct fields which have been successfully combined into one program by several trailblazers of legal education before us. We were blissfully ignorant of the sheer scope of sports and entertainment law at that point, and we had no inkling of the adventure that lay before us. But we decided that day to be the next pioneers in our field and build a center for the study and development of sports and entertainment law. We would lay its foundations at one of the centers of the sports and entertainment world—Phoenix, Arizona, a haven for professional athletes, agents, actors, A-list celebrities and, most important, the lawyers who protect and represent them.

When my classmates and I arrived in Tempe as first-year law students, we did not find much of a sports and entertainment law program. Consequently, we took a J.D. program that offered a Sports and Entertainment Law Students Association (SELSA), with fewer than ten members, and one sports law class, offered every spring. We took it upon ourselves to break new ground and create the foundation of a diverse and vibrant program. Soon, SELSA grew to well past sixty members. We coordinated with our administration on the addition of courses on entertainment contracts, virtual governance, sports agency, and more. To offer an interactive medium for the discussion and interpretation of current and novel sports and entertainment law issues, we created The Sports and Entertainment Law Blog (www.sportsandentertainmentlawblog.com), where members of SELSA and the ASU Sports and Entertainment Law Journal (Journal) write and post weekly articles. There, thousands of visitors have read and commented on articles including opinion pieces on

* *J.D., Sandra Day O'Connor College of Law at Arizona State University, 2011; B.A., Virginia Tech, 2005.* On a personal note, I would like to thank my fellow students who believed in my dream and trusted my guidance. This Journal required a significant amount of dedication in both time and effort, two things that are in very high demand and at very low supply during law school. Without the help of our executive board and editorial staff, and our friends and colleagues within the law school, we could never have created the Sports and Entertainment Law Journal. I consider this one of my finest achievements, and I will be forever proud of what we have accomplished.

major court rulings, factual summaries of new laws and regulations, explanations of legal issues involving athletes, franchises, actors and actresses, professional and amateur sports leagues, etc. We created the Journal and published this inaugural edition, which contains scholarly articles from highly regarded legal experts from around the country. To give students the opportunity to work side-by-side with sports and entertainment agents and lawyers, we laid the groundwork for the Sports and Entertainment Law Clinic—an externship program—where students can gain invaluable hands-on experience in activities such as negotiating, drafting, and reviewing client contracts. By expanding a robust curriculum into sports and entertainment law subjects, creating a new journal, and initiating a unique clinic, we hope to have set in motion ASU's historic transformation to a nationally recognized center for sports and entertainment law.

The publication of this Journal symbolizes the first tangible step toward realizing our goals. When we first consulted with Dean Paul Schiff Berman, he suggested that we host a conference to introduce the Journal. Invitations went out shortly thereafter. The conference attracted lawyers and professionals from across the United States who wished to present ideas for articles to be published in the first edition of the Journal. We were overwhelmed and humbled by the responses that poured in. When the day arrived to host the conference last October, we proudly welcomed twenty speakers to ASU from as far as New York, Washington, D.C., Los Angeles, and Atlanta. In addition, we registered over 200 guests: some were law students or undergraduates; some were supporting friends and family, and others were lawyers and/or educators.

We would like to thank personally each and every speaker for his or her contribution to this first edition. Without all of you, this Journal would not exist. Thank you to our Keynote Speaker, David Cornwell of DNK Cornwell; to Steven Adelman of The Adelman Law Group; to Leonard Aragon of Hagens Berman; to Matthew Bester of the Department of Justice; to Allison Brehm and Lee Brenner of Kelley Drye & Warren LLP; to Joy Butler of the Law Office of Joy R. Butler; to my personal friend and mentor Gregg Clifton, and his associate Jeffrey Toppel of Jackson Lewis LLP; to Elsa Cole, formerly of the NCAA; to Betsy Goff of UMass Amherst's Isenberg School of Management; to Jennifer Hodulik of Paramount Pictures; to Tania Hoff of NBC Universal; to our personal friend and advisor, Dana Hooper of Greenberg Traurig LLP; to Neville Johnson of Johnson & Johnson LLP; to our faculty advisor Professor Myles Lynk of the Sandra Day O'Connor College of Law; to Connie Mableson of Mableson Law Group; to James Marovich of the Marovich Law Firm; to Stuart Paynter of The Paynter Law Firm; to Marci Rolnik of the Chicago Lawyers for the Creative Arts; and to Jaia Thomas of The Law Office of Jaia Thomas. We would also like to thank Dean Paul Schiff Berman for his guidance and assistance in creating the Journal, planning and hosting of the conference, and provision of crucial advice along the way. Thank you to Shelli Soto for helping us navigate the law school's administrative hierarchy and offering constant and unconditional support of our efforts. Thank you to the Office of Communications and to Business Services, to Terry McManus, to Sharon Yates, to Victoria Trotta, and to all of the law school administration and staff who helped make this dream a reality. A special thank you also goes to Rick J. Lopez, of Greenberg Traurig LLP, who is a close friend, a mentor, and a professional advisor to the Journal whose dedication and commitment will ensure its continued success.

Although it felt like much longer, it took just over a year to publish this Journal. Now, as many of us wrap up life as a law student and begin work as a lawyer, the first edition is finally in publication. Moving forward, we have full faith and confidence in the staff we recruited to succeed us in running the Journal. We send Kellen Bradley and the rest of the executive editorial staff our sincerest wishes of good luck and good fortune not only to keep our dreams alive, but also to improve upon them and guide their evolution. Our work in sports and entertainment law is intended to become a mainstay at the Sandra Day O'Connor College of Law. The experience will bring students to Tempe by virtue of its value as an academic and a professional opportunity in addition to its prestige as a unique program for any aspiring lawyer. In closing, one final thank you is in order. To our readers (present and future): thank you for having the confidence in us to publish a Journal worth reading, enjoying, and learning from.

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JOINT VENTURES AND THE SINGLE ENTITY DOCTRINE AFTER *AMERICAN NEEDLE, INC. V. NATIONAL FOOTBALL LEAGUE*

Matthew Bester*

I. INTRODUCTION

In May 2010, the Supreme Court in *American Needle, Inc. v. National Football League*,[1] decided against the NFL and its teams in their quest to be viewed as a single entity for purposes of Section 1 of the Sherman Antitrust Act.[2] The dispute centered on whether they met Section 1's multiple entity requirement[3] when a subsidiary of the NFL granted an exclusive, blanket license to Reebok to make hats with the teams' logos. American Needle, Inc. ("ANI") argued that when the NFL and its teams imposed this exclusive license through the NFL's licensing arm, it restrained competition for team licenses among horizontal competitors—the teams—in

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* Matthew Bester is a trial attorney in the U.S. Department of Justice, Antitrust Division. The views expressed are not purported to reflect the views of the U.S. Department of Justice. The author played no role in any of the Department of Justice's briefs filed in *American Needle, Inc v. National Football League*. The author would like to thank Mark Merva, Bennett Matelson, Mike Guzman and Steve Benz for their helpful comments.

1. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2216-17 (2010).

2. Section 1 of the Sherman Antitrust Act says that, "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade" is illegal. 15 U.S.C. § 1 (2004).

3. Section 1 of the Sherman Act requires an agreement among two or more entities to restrain trade. It is "the 'basic distinction' . . . 'between concerted and independent action' that distinguishes § 1 of the Sherman Act from § 2." *Am. Needle, Inc.*, 130 S. Ct. at 2208 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984)).

violation of the antitrust laws. In response, the League claimed its subsidiary's agreement with Reebok was the act of a unified business entity and thus could not violate Section 1. The Supreme Court held for ANI, and found that despite some integration by the teams they still had "divers[e] entrepreneurial interests"[4] that precluded a finding that they acted as one economic unit for purposes of Section 1. The decision will raise the bar for sports leagues and other joint ventures to argue successfully that they are a single entity.

American Needle further refines the judiciary's approach on the duality of actors requirement under Section 1.[5] Members of a joint venture who, like the NFL teams, combine in some ways but remain competitors for others, will not be considered a single entity under Section 1. Rather, the NFL's decision to license exclusively certain intellectual property ("IP") to Reebok on behalf of all the teams will be evaluated under the rule of reason.[6] It will be for the lower courts to evaluate whether on balance, the benefits to competition from the exclusive, league-wide licensing for hats outweigh their harms.

This article will look broadly at the single entity jurisprudence in light of the Supreme Court's decision in *American Needle*. It will first look in detail at the decision and why the Court reached the right result. Next, it will formulate a two-step process, based on *American Needle* and other cases, to determine whether joint ventures fall within the scope of the single entity doctrine. It will look separately at fully and partially integrated joint ventures to illustrate the dividing line.

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4. *Am. Needle, Inc.*, 130 S. Ct. at 2212 (quoting Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 57 (1st Cir. 2002)).
5. *See, e.g.,* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984); *see also* Texaco Inc. v. Dagher, 547 U.S. 1 (2006).
6. *Am. Needle, Inc.,* 130 S. Ct. at 2206-07. Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (citing Bd. of Trade of City of Chicago v. United States, 246 U.S. 231 (1918)).

This section also will classify two types of joint venture rules or conduct that should be treated differently. Third, it will look at what is likely to happen on the remand of *American Needle*. It will argue that some of the internal functions of the NFL joint venture should survive without serious antitrust scrutiny, but that the licensing practice at issue in this litigation should undergo more serious analysis. Last, it will discuss the framework in light of one Court of Appeals' decision since the Supreme Court ruled in which *American Needle*'s holding was not clearly applied.

II. THE AMERICAN NEEDLE DECISION

A. Licensing by the NFL Trust and the Individual Teams

Before getting to the Supreme Court's decision in *American Needle*, it is critical to understand the structure of the NFL and its licensing arm. Throughout their history, NFL teams have been owned and managed individually. Each team has separate profits and losses, sets its own ticket prices and hires and fires players and coaches independently.[7] In the early 1960s, the National Football League created NFL Properties ("NFLP") as a central repository from which to develop, market, license, and enforce the individual team-owned IP, as well as promote the league and the teams.[8] In 1982, twenty six of the then-twenty eight NFL teams created the NFL Trust to jointly market individual team and league IP.[9] NFLP became

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7. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737, 741 (7th Cir. 2008). For more detail on the background to *American Needle* and discussion of the Seventh Circuit's decision, *see* Matthew J. Bester, *The NFL's Quest To Be Treated Like General Motors Should Stop at the Supreme Court,* A.B.A. ENTERTAINMENT AND SPORTS LAWYER, Winter 2010, at 1, 27-31, *available at* http://new.abanet.org/Forums/entsports/PublicDocuments/winter10.pdf.

8. *Am. Needle, Inc.*, 538 F.3d at 737.

9. The Oakland Raiders and Miami Dolphins contracted directly with NLFP instead of joining the Trust.

the exclusive licensor of these marks and funneled licensing revenue back to the Trust for distribution to the teams.

The teams, however, did not pledge all of their licensing rights to the Trust. They could still use their IP: (a) in local advertising, (b) in third party advertising in local sections of the team's home game program, and (c) in the team's own publications.[10] Further, the teams did not pool the revenue from these latter activities, nor from merchandise sales at local team-owned stores.[11] But not all of the teams liked the idea of pooling and then evenly sharing the licensing revenue. Recognizing the marketing potential of one of the most popular sports teams, the Dallas Cowboys attempted in the mid-1990s to individually license its IP, creating separate sponsorship agreements with American Express, Dr. Pepper, and Nike. These deals ran counter to the NFL's sponsorships with companies including Visa and Coca-Cola to be the NFL's "official" partners.[12] The NFL then sued the team for $300 million in damages. In its complaint, the NFL claimed that team owner Jerry Jones's attempt to individually license Cowboys' IP to these companies violated the NFL Trust and "misappropriate[d] revenue that belongs to plaintiff and should be shared among all the Member Clubs."[13] The team and the league settled the case, with the league permitting many of the Cowboys' practices to continue. The case nevertheless illustrated two points highlighted in *American Needle*: the teams' IP had distinct value apart from other teams, and that teams had an incentive (and would act on it, if permitted) to license it themselves.

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10. William J. Hoffman, Comment, Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown with the NFL, 7 SETON HALL J. SPORT L. 255, 266 (1997).

11. Brief of Petitioner Am. Needle, Inc. at 3, Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008) (No. 08-661).

12. Hoffman, *supra* note 10, at 256.

13. Nat'l Football League Properties, Inc. v. Dallas Cowboys Football Club, Ltd., 922 F. Supp. 849, 851 (S.D.N.Y. 1996).

B. The Litigation Below and the Supreme Court's Opinion

The dispute with ANI originated in 2001, when NFLP granted an exclusive, blanket license to Reebok, Inc. to produce hats with the teams' logos and other IP.[14] Before that time, ANI had licensed the NFL marks from NFLP. As a result of the change, ANI lost its license and sued NFLP, the NFL, the individual teams, and Reebok, charging that the NFLP exclusive arrangement violated Section 1 of the Sherman Act.[15] ANI claimed that the exclusive license was a horizontal agreement among the NFL teams and the league to restrain trade.

Despite the parties' limited discovery on the single entity issue, the district court found that the NFL and its teams operated as a single entity.[16] The teams pledged their IP to NFLP, which sold, enforced and gathered nearly all the licensing revenue from the IP of each individual team.[17] The district court found that even though the teams remained the owners of their IP, the league had for many years managed its licensing.[18] The court treated the formation of the NFLP as a merger that ended all subsequent competition among the joint venture partners, and focused on the benefits generated by such an arrangement in justifying its single entity treatment for the licensing practice.[19] It found that the league would be at a "competitive disadvantage" relative to other sports leagues if it left the licensing to each team.[20] Further, pooling revenues from this licensing also served the league's interest in

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14. NFLP only offered a blanket, all-or-nothing license. That is, licensees could pay for and license all the teams' IP or none of it. The teams could not contract individually with licensors. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2207 (2010).
15. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007).
16. *Id.* at 944.
17. *Id.* at 942.
18. *Id.* at 944.
19. *Id.* at 943-44.
20. *Id.* at 943.

maintaining a competitive balance. The court did not discuss the separate incentives held by each team that stem from their individual ownership of their IP.

"[R]ecognizing that others might well disagree,"[21] Judge Moran held that under *Copperweld Corp. v. Independence Tube Corp.*,[22] there was no "sudden joining of independent sources of economic power."[23] As a result, the NFL's licensing practices were those of a single entity and did not violate Section 1.[24] Judge Moran's recitation of *Copperweld* is the correct starting point for any single entity analysis. In *Copperweld*, the Supreme Court held that a parent and its wholly owned subsidiary could not conspire under Section 1 because they were ultimately owned as one unit and guided by the same top-level corporate leadership.[25] The corporation was not conflict-free, but the Court found "their objectives [were] common" and their corporate actions were guided by one "corporate consciousness."[26] The Court found no Section 1 conspiracy because the two business units had a "complete unity of interest."

In *American Needle, Inc. v. National Football League*, ANI appealed to the Seventh Circuit,[27] where it claimed among other things, that the district court misconstrued prior Supreme Court holdings when it ruled that the defendants acted as a single entity.[28] The court of appeals acknowledged that the single entity issue led the court "into murky waters" and lacked

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21. *Id.* at 944.
22. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
23. *New Orleans La. Saints*, 496 F. Supp. 2d at 943.
24. *Id.* at 944.
25. In *Copperweld,* the Supreme Court found that holding otherwise placed form over substance, and ignored the reality in corporate governance that a corporate parent and its subsidiary (even if managed by separate staffs) "are not unlike a multiple team of horses drawing a vehicle under the control of a single driver." *Copperweld Corp.*, 467 U.S. at 771.
26. *Id.* at 753.
27. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737 (7th Cir. 2008).
28. *Id.* at 741.

a "definitive opinion" but nonetheless held for the defendants.[29] Despite possibly having competing interests when licensing their IP, that alone did not prevent the defendants from acting as a single entity.[30] The court relied mainly on two findings to justify its holding. First, that NFLP had been operating as a group licensing body for many years, and second, that this group licensing function enabled the league to compete more effectively against other forms of entertainment.[31] As discussed below, neither of these reasons withstood the Supreme Court's scrutiny.

Seeing the chance to reduce future antitrust liability under Section 1 of the Sherman Act, the NFL took the "unusual step"[32] of joining ANI in asking the Supreme Court to review the Seventh Circuit's holding.[33] Before the Supreme Court, ANI argued that separately owned and controlled teams cannot be found to be one economic entity for purposes of Section 1.[34] In response, the defendants argued that this highly "interdependent"[35] joint venture should be considered a single entity, at least for core venture functions. The NFL argued these core functions included IP licensing and were broadly defined as the production, marketing and sale of their joint product—NFL football.[36]

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29. *Id.* at 741, 744.
30. *Id.* at 743.
31. *Id.* at 743-44.
32. Brief for the NFL Respondents on Petition for a Writ of Certiorari at 4, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661).
33. The question presented for Supreme Court review, according to ANI, was whether "an agreement of the 32 teams of the National Football League not to compete with each other or a jointly selected monopoly licensee in the licensing of their individually owned intellectual property" violated Section 1 of the Sherman Act. Brief of Petitioner at i, Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (2008) (No. 08-661).
34. *Id.* at 16.
35. Brief for the NFL Respondents at 24, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661).
36. *Id.* at 15.

A unanimous Supreme Court rejected that argument and the notion that their "common interests" in promoting NFL football justified single entity status.[37] Rather, Justice Stevens relied on the Court's earlier holding in *Copperweld*, and reasoned that the Court could not find the unified "corporate consciousness" of the defendants necessary to prevail.[38] The Court framed its analysis by finding that, consistent with its cases following *Copperweld*, it favored a functional analysis of the parties' relationship rather than its form.[39] That is, the Court based its decision largely on factors bearing on how the defendants arranged themselves and interacted with each other.

The key to the Court's decision stemmed from its conclusion that the teams were independently owned. Further, despite collectively pledging some of their licensing responsibilities to NFLP, each team remained the owner of its IP.[40] The Court's holding grows from these principles. Each of the teams has independent economic incentives overall as independent business units, and in particular in the context of IP licensing. NFL teams compete with each other in the licensing of their IP, and their collective decision to centralize licensing "deprive[d] the marketplace of independent centers of decisionmaking."[41] Accordingly, there could be no single entity under Section 1.[42]

Significantly, the Court was not persuaded by either of the NFL's primary arguments. First, it did not agree that that the defendants must be considered a single entity because cooperation for licensing was necessary to produce the venture's product—broadly defined as the production and promotion of NFL football games.[43] The league contended that

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37. *Am. Needle, Inc.*, 130 S. Ct. at 2212.
38. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).
39. "We have eschewed such formalistic distinctions in favor of a functional consideration . . . " *Am. Needle, Inc.*, 130 S. Ct at 2209.
40. *Id.* at 2213.
41. *Id.* at 2212 (quoting *Copperweld Corp.*, 467 U.S. at 769).
42. *Am. Needle, Inc.*, 130 S. Ct at 2212.
43. *Id.* at 2214.

restraints imposed by the league on individual teams' licensing practices were necessary "if [the product] was to be available at all."[44] This "necessity" argument raised by the NFL was borne out of cases determining the standard by which joint venture restraints[45] should be evaluated.[46] Where a restraint among competitors is necessary to produce the venture's product, it will be evaluated under the rule of reason. Where it is not, it will be considered a naked agreement to restrain competition and will be *per se* illegal.

The Court correctly rejected the notion that it was necessary to jointly license each individual team's IP if NFL football was to be available at all. Finding otherwise would have meant that a *per se* legal "zone of antitrust immunity" surrounds any restraint that is found to be necessary to produce the venture's products.[47] This would have opened a large gap in the ability to evaluate joint venture conduct under Section 1. Instead, the Court analogized the NFL's necessity argument to a price fixing cartel that simply called itself a joint venture. "Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products."[48] The Court held that the question was "closer" on whether the NFLP's licensing decisions (rather than collective decisions by individual teams) were those of a single entity because of its separate management and equal

44. Brief for the NFL Respondents at 43, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661) (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101-02 (1984)).

45. Throughout this article, I will refer to a joint venture's rule or practice that restrains competition as a restraint. Of course, that does not mean necessarily it is illegal under the antitrust laws. As the Supreme Court has stated, every agreement restrains competition in some capacity. Only unreasonable restraints of competition will be found illegal. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 98.

46. *Am. Needle, Inc.*, 130 S. Ct. at 2214 n.6; *see also Bd. of Regents of Univ. of Okla.*, 468 U.S. at 101.

47. *Am. Needle, Inc.*, 130 S. Ct. at 2214 n.7.

48. *Id.*

distribution of revenues to the teams.[49] But this consideration did not change the Court's ruling.

Second, the Court also rejected the argument that the NFLP's centralization of the IP rights, combined with a common manager and profit pooling, was "akin to a merger" and thus immune under Section 1.[50] This put form over substance. "[I]llegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties."[51] The NFL contended that it had some interests in common with the teams—namely promoting NFL football and the league's interests.[52] But that was not enough. The NFL could not meet *Copperweld*'s "complete unity of interest" threshold for single entity treatment because individual teams have incentives both to promote the interests of the joint venture as a whole and their own individual economic interests when making licensing decisions.[53]

III. AN ANALYTICAL FRAMEWORK FOR JOINT VENTURES POST-AMERICAN NEEDLE

A. A Two-Step Analysis

Single entity status for joint ventures should be evaluated using two steps. First, one should consider the level of form and functional integration between the venture partners. For purposes of this article, joint ventures will be divided into those that are fully and partially integrated. While Judge Cudahy in *Chicago Professional Sports Limited Partnership v. National Basketball Association* described the level of joint venture integration as falling along a

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49. *Id.* at 2214.
50. *Id.* at 2213.
51. *Id.*
52. *Id.* at 2214.
53. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

"continuum,"[54] the key distinction is whether the venture is completely integrated, or falls short of that. The second consideration is to determine whether the venture's rule or practice may restrain competition between the partners "inside" or "outside" the venture. Put differently, this examines whether the venture's rule/practice is a decision that is only internal to the venture, or whether it could affect competition among those other than the venture partners.

B. Fully and Partially Integrated Joint Ventures

The level of integration is one of the vital "functional consideration[s]"[55] to determining single entity status. It is the promise of efficiency gains and other consumer welfare benefits that permit previously competitive entities to structure themselves in "ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment."[56] The more economically integrated the partners are, the less they are considered competitors than they are investors in the venture.[57] In a single entity, this does not mean that employees of a corporation cannot have different views or different economic interests under one umbrella. Indeed, Chevrolet and Buick have some divergent interests, even though they are both divisions of General Motors. The decisions on the overall direction of the company are nonetheless centralized, and the parent ultimately controls the subsidiary. Courts take a broad look when evaluating whether the two (or more) entities accused of conspiring to restrain trade "suddenly bring together economic power that was previously separate."[58]

That begs another question: how would courts measure integration? Chief Judge Boudon in *Fraser v. Major League*

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54. Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 602 (7th Cir. 1996) (Cudahy, J., concurring).
55. *Am. Needle, Inc.*, 130 S. Ct. at 2209.
56. *Copperweld Corp.*, 467 U.S. at 773.
57. Texaco Inc. v. Dagher, 547 U.S. 1, 6 (2006).
58. *Copperweld Corp.,* 467 U.S. at 769.

Soccer, L.L.C. wondered aloud: beyond a "classic single enterprise . . . it is difficult to find an easy stopping point or even decide on the proper functional criteria" for deciding which attributes should be considered in a single entity analysis.[59] In light of *American Needle*, this article will put forward "functional" criteria by which to evaluate the single entity status of a venture.

i. Fully Integrated Joint Ventures

Fully integrated joint ventures combine assets and risk in very similar ways that a merger does and thus, should be evaluated as a merger at formation. They fall short of a full corporate merger, but not by much. These ventures should be considered single entities for the same reasons the law favors mergers that are not substantially likely to reduce competition.[60] These ventures, like mergers, have the "potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[61] A corporate arrangement that closely approximates it should be treated similarly because many of the same consumer welfare gains can be realized by a venture short of a full merger.[62]

The Supreme Court explored this in the context of a Section 1 claim in *Copperweld.* As stated above, *Copperweld* provided that a corporation and its wholly owned subsidiary cannot be found liable under Section 1 because this sort of parent-subsidiary coordination does not join previously

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59. Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 59 (1st Cir. 2002).
60. *See* 15 U.S.C. § 18 (1996).
61. U.S. Dep't of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines*, at 29 (Aug. 2010), http://www.ftc.gov/os/2010/08/100819hmg.pdf.
62. U.S. Dep't of Justice and Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors,* at 5-6 (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

separate sources of economic power. The Court held that, "the very notion of an 'agreement' in Sherman Act terms lacks meaning"[63] for two reasons. One, the parent and subsidiary share a common purpose that by definition falls outside of Section 1's purview. Two, the parent may exert control over its subsidiary if it "fails to act in the parent's best interest."[64]

Similarly, fully integrated joint ventures will be insulated from attack on Section 1 grounds for agreements between the venture partners when they combine their operations as if the parent companies were merging. This can be accomplished by pledging relevant assets, sharing financial risks and rewards, possibly obtaining regulatory approval, and completely ending all competition between them.[65] Given that many of the efficiency gains can be achieved by a joint venture less integrated, it is no wonder that this arrangement is used less frequently.[66]

The defendants in *Texaco Inc. v. Dagher* established that their venture was fully integrated and a single entity under Section 1 when the Supreme Court found that the two venture partners had effectively merged their operations. Texaco and Shell formed Equilon Enterprises, L.L.C., a joint venture to market and sell gasoline in the western United States. The two companies would keep the names of the gasoline stations and their individual gasoline brands as they were before the formation of the venture, but their retail operations would be

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63. *Copperweld Corp.*, 467 U.S. at 771.
64. *Id.* at 771-72.
65. A joint venture created in this way would be immune from a Section 1 attack challenging the joint venture's formation. A fully integrated joint venture would not be insulated from a Section 1 challenge for its subsequent conduct with third parties that may restrain competition.
66. The distinction between a fully and partially integrated joint venture is not precise. For instance, in *Dagher,* the Supreme Court found that Equilon was fully integrated despite Texaco and Shell not merging their entire corporate existence. Texaco Inc. v. Dagher, 547 U.S. 1, 6-7 (2006). Justice Thomas reached his holding in part by relying on facts unlikely to occur often in a partially integrated venture, such as regulatory approval, including divestitures, and rebuking the Ninth Circuit's use of the ancillary restraints doctrine. *Id.* at 4, 7-8.

merged in every other respect. The companies pooled their profits, and shared risks for losses.[67] Equilon had an independent management staff, it created a Board of Directors with representatives from both of the partners and the partners acted as investors, instead of managers.[68] The Federal Trade Commission had evaluated the formation under Section 7 of the Clayton Act,[69] approved it, and even ordered appropriate divestitures.[70] This was, for all intents and purposes, a merger of the companies' retail operations. When the plaintiffs (a class of gasoline station owners who competed with the Equilon stations) filed suit alleging the companies *per se* violated Section 1, the Supreme Court soundly rejected the plaintiffs' claim. The Court found no problem with Equilon under *Copperweld* and its progeny. The two parents had integrated all of their downstream operations, and there was no contention that the venture partners still competed outside of the venture. Justice Thomas quoted Judge Fernandez's dissent in the Ninth Circuit opinion: "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products."[71]

By contrast, the defendants' claim failed in *Arizona v. Maricopa County Medical Society* that a fully integrated single entity existed, and the court held the defendant joint venture liable for price fixing.[72] There, doctors formed medical societies through which they fixed fees charged to patients.[73] While the medical societies were the umbrella organization under which the doctors regulated their rates, the doctors met and voted individually for the policy. This conduct was found

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67. *Id.* at 4.
68. *Id.* at 4, 6.
69. 15 U.S.C. § 18 (1996).
70. *Dagher*, 547 U.S. at 4.
71. *Id.* at 8, (quoting Dagher v. Saudi Ref., Inc., 369 F.3d 1108, 1127 (9th Cir. 2004) (Fernandez, J., dissenting)).
72. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 357 (1982).
73. *Id.* at 339-40.

ultimately to be price fixing.[74] The defendant organizations did not integrate their operations, sold no new products, and did not pool capital or share profits and losses.[75] Notwithstanding that, the defendants argued that their fixed fee schedules were pro-competitive and were merely price fixing "in only a literal sense" but not in an antitrust sense.[76] The Supreme Court rejected both arguments, instead holding that the fee agreements "fit squarely into the horizontal price-fixing mold."[77] As a result, they could not be considered an integrated joint venture and thus were liable under Section 1.[78]

ii. Partially Integrated Joint Ventures

In situations where the entire venture is not completely integrated "akin to a merger,"[79] single entity status may still be possible and should be evaluated on a function-by-function basis. Partially integrated ventures are far more common than fully integrated combinations. But the analysis starts similarly, looking to the level of integration between the venture partners with respect to the function alleged to be causing the competitive harm. The law encourages these efficiency-enhancing combinations for the same reasons as in mergers or fully integrated joint ventures. Evaluating joint venture conduct one facet at a time is especially applicable in sports league joint ventures, where a unique level of interdependency exists. The member teams must coordinate schedules, rules, equipment standards and the hiring of officials to make the games (the product) available. But they also must remain separate competitors on and off the field. The teams' ability to compete for inputs—players, coaches, stadium leases—impacts their

74. *Id.* at 341.
75. *Id.* at 356.
76. *Id.* at 351, 355.
77. *Id.* at 357.
78. *Id.* at 356-57.
79. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2213 (2010).

performance on the field and their financial status, and thus impacts the separate incentives they hold.

The concept of examining a venture's single entity status on a functional basis was endorsed in *American Needle* and originally comes from *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n,* where the Seventh Circuit clearly struggled with the question of whether the NBA and its teams could be considered a single entity. In the 1990s, the Chicago Bulls won several titles and wished to market itself outside the league-wide efforts.[80] In particular, the team wanted to license rights to televise more games than was provided for in the league-negotiated contract.[81] The league objected, and the Bulls sued, claiming that because the league and teams were separate entities the restriction violated Section 1.[82] The court decided that *Copperweld*'s single entity analysis did not yield one "'right' characterization."[83] The NBA had characteristics of both a partially and fully integrated joint venture, "depending on which facet of the business one examines."[84] The league looked like a partially integrated joint venture when its teams competed for players and coaches,[85] but it resembled a fully integrated single entity when it competed for advertisers with other forms of entertainment.[86] Where joint venture conduct "deprive[d] the marketplace of the independent centers of decisionmaking," it should not be considered a single entity under Section 1.[87] The right test is to "ask *Copperweld's* functional question one league at a time—and perhaps one facet of one league at a time."[88] Ultimately, the Seventh Circuit decided that the NBA could be "sufficiently integrated" to be

80. Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n, 95 F.3d 593, 596 (7th Cir. 1996).
81. *Id.*
82. *Id.*
83. *Id.* at 600.
84. *Id.* at 599.
85. *Id.*
86. *Id.*
87. *Id.* at 598.
88. *Id.* at 600.

considered single entity for purposes of negotiating a national television licensing deal.[89]

A key to examining the functional integration of a joint venture is determining how the venture manages the functions related to the restraint. A partially integrated joint venture is more likely to earn single entity status for that function when it can show that the venture has independent authority to manage itself. Where the venture management can be influenced by the partners' separate economic interests, it is less likely to be considered a single entity. It is the joint venture's "legal ability to determine the course of business activity" independently from its parent-partners that makes it eligible for single entity status.[90] Evaluating this issue will include analyzing who controls the venture management, the revenues, and profits related to the venture rule in question.

In *American Needle*, the Court found that teams generally operated independently of each other and, in particular, the teams retained some control over their licensing rights. The teams kept some of the licensing responsibilities and the revenues generated from them. The NFLP itself was controlled by a supermajority of team-shareholders.[91] This meant that each team's interest in licensing activities was not completely aligned with the other teams and the league's. Given the NFLP's separate management and pooling of revenues, it was a "closer" question whether its decisions could be considered those of a single entity. Ultimately, the Court

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89. *Id.* But given that NBA teams also negotiate local television contracts (and therefore have some independent economic interests), it's not clear that the case would come out the same way after *American Needle*. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010).

90. Sonitrol of Fresno, Inc. v. Am. Tel. & Tel. Co., No. 83-2324, 1986 WL 953, at *5 (D.D.C. April 30, 1986). The court there, for *Copperweld* purposes, treated the subsidiaries over which AT&T exercised *de facto* control as if they were wholly owned subsidiaries. *Id.* at *2 n. 2. But the quote is also a concise way to think about the necessary level of control in a single entity joint venture.

91. *Am. Needle, Inc.*, 130 S. Ct. at 2215.

viewed it as an "'instrumentality' of the teams"[92] with each team owning an independent share of the jointly managed assets. Also contributing to the lack of unified control was the Court's holding that each team's IP was unique and purposefully distinctive to each team.[93] Unlike a situation where the joint venture's product was "rather fungible,"[94] the teams' IP was distinct and may have led to competition by licensees.

When this happens, each team is "pursuing separate economic interests" and therefore must be considered a distinct economic actor.[95] The members of the joint venture are potential competitors in the licensing of IP with each other and the joint venture itself.[96] One way this could manifest itself is by apparel manufacturers, in the absence of these rules, competing for the best team licenses. This was the strategy Jerry Jones pursued in the 1990s. When each team possesses these independent incentives, they "capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for the NFLP."[97] As a result, the team cannot be said to be part of a single entity with respect to that function. They have both the joint venture's and their own individualized economic well being to consider.

Other cases have found joint venture control to be a key element in establishing the necessary integration. In 2000, the United States challenged a policy established by both the Visa and MasterCard credit card networks restricting their members from also issuing Discover or American Express cards. The networks' governing bodies were non-profit associations organized as "open joint ventures" with no stock or

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92. *Id.* at 2215 (quoting United States v. Sealy, Inc., 388 U.S. 350, 352-54 (1967)).
93. *Am. Needle, Inc.*, 130 S. Ct. at 2207.
94. United States v. Daily Gazette Co., 567 F. Supp. 2d 859, 867 (S.D.W. Va. 2008) (citing Texaco Inc. v. Dagher, 547 U.S. 1, 6-7 (2006)).
95. *Am. Needle, Inc.*, 130 S. Ct. at 2212 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).
96. *Am. Needle, Inc.*, 130 S. Ct. at 2215.
97. *Id.*

shareholders.[98] Any financial institution eligible for Federal Deposit Insurance Corporation deposit insurance could issue a Visa card. The ventures' "profit" was used to cover the costs in the event of a member bank's failure. The twenty thousand consortium member banks between the two networks "owned and effectively operated" them and set the policies for the cards' use, including the exclusionary rule challenged.[99] Given the lack of integration, the court had no problem classifying the credit card networks as "consortiums of competitors"[100] and condemning the rule as anti-competitive.

Contrast that arrangement with the one in *Kentucky Speedway v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, where the Sixth Circuit could find no Section 1 conspiracy between NASCAR and International Speedway Corporation.[101] The plaintiff track owner sued the defendants after they refused to sanction a Sprint Cup race for it and allegedly prevented the plaintiff from buying other race tracks that already hosted a Sprint Cup race. The ownership and control features of the two defendant companies were key to the court's decision. While not a joint venture case, it is a useful illustration of how a court views corporate control in the context of a Section 1 conspiracy claim. NASCAR is wholly owned by Bill France and his family. Its relevant role in the litigation was its sanctioning of Sprint Cup races.[102] That is, NASCAR set the rules for the race, picked the venues, and selected the drivers. Co-defendant

98. United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322 (S.D.N.Y. 2001).

99. United States v. Visa U.S.A., Inc., 344 F.3d 229, 242 (2d Cir. 2003). In a case decided since *American Needle*, the district court held that it was for the jury to decide whether having a minority of Board seats may have evidenced lack of control for single entity purposes. The court focused its attention when analyzing the single entity issue on the ownership percentages (in other words, its form) and the number of board seats. In re Sulfuric Acid Antitrust Litig (No. 03-C4576) (N.D. Ill., Sept. 24, 2010).

100. *Visa U.S.A., Inc.*, 344 F.3d at 242.

101. Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 920-21 (6th Cir. 2009).

102. *Id.* at 911-12.

ISC is a public company that owns tracks on which NASCAR races are run. It is managed by a Board of Directors, but the France family owned sixty five percent of the voting stock and "retain[ed] control and ha[d] made all the major decisions for the company."[103] Kentucky Speedway alleged that ISC and NASCAR conspired to prevent it from hosting a Sprint Cup race.[104] The Sixth Circuit held for the defendants because the plaintiffs failed to prove a relevant market.

The Court, however, separately rejected plaintiff's arguments that under *Copperweld,* NASCAR and ISC were not a single entity. It found that the plaintiff would have to prove that the two companies were not under common control and did not share a "single corporate consciousness."[105] Rather, the court described Kentucky Speedway as a "jilted distributor" of Sprint Cup races.[106] While it did not explicitly find that NASCAR and ISC were a single entity, the Court correctly expressed skepticism that the plaintiff could have established that the defendants were separate economic actors for Section 1 purposes.

The duration of the venture may also affect the integration analysis. Joint venture partners may compete after the conclusion of the venture, and the former horizontal competitors may have an interest in emerging from the combination in a better market position than their partner. Imagine that in the Equilon joint venture from *Dagher*, that Shell and Texaco would resume competition upon completion of the joint venture in three years. They then have a current independent interest outside the venture (their respective market positions in year four) in years one through three that may affect their behavior. In such a case, the shorter the

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103. *Id.* at 912.
104. *Id.* at 913 (Kentucky Speedway was awarded other NASCAR races, including a Craftsman Truck race and a Busch-series race. But it failed to attract a Sprint Cup race, "the most profitable and high-profile racing series.").
105. *Id.* at 920.
106. *Id.* at 921.

duration of the venture, the more likely those independent, post-combination incentives enter the picture. The earlier they emerge, the less likely the joint venture can be considered completely unified. Likewise, the *American Needle* Court noted the ability of the teams to withdraw from their relationship with NFLP.[107]

C. Competition "Inside" and "Outside" the Joint Venture

The second part of the inquiry is to determine the relationship of the alleged restraint to the purpose of the joint venture and its partners. This examines the functional competitive dynamic between the venture and its partners, and measures the extent to which the restraint "impact[s] . . . the market behavior of the individual" venture partners.[108] This seeks to find out if competition is being restrained solely among the venture partners, or "inside" the joint venture, or whether the rule or practice impacts competition "outside" the venture among other entities.

i. Restraints Inside the Venture

A useful way to distinguish restraints inside versus outside the venture is to look at the restraint's relationship to the purpose of the venture. Decisions that relate immediately to the joint venture's internal workings should be considered restraints inside the venture. The *Copperweld* Court described these restraints as "internal 'agreement[s]'" that implement a

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107. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2207 (2010).

108. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1478d2 (3d ed. 2006). In *Oksanen v. Page Memorial Hospital*, the members of the medical staff that made the recommendation to deny the plaintiff staff privileges at a Virginia hospital had no "independent personal stake" given that only one doctor on the medical staff had a practice area overlap with the plaintiff, and he did not participate in the proceedings giving rise to the suit. Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 705-706 (4th Cir. 1991).

single, unitary firm's policies.[109] They are "really unilateral behavior flowing from decisions of a single enterprise."[110] A more apt description comes from *Freeman v. San Diego Ass'n of Realtors*.[111] In *Freeman*, real estate brokers participating in a real estate listings database had agreed to limit discounting of their fees. There, the Ninth Circuit properly carved out the venture rule at issue from "wholly internal" joint venture decisions exempt from scrutiny under Section 1. These were described as internal venture functions for the joint venture itself, such as salaries for its employees or office leases. In the end, the Ninth Circuit found the joint venture operating the database could not be considered a single entity under *Copperweld* because its partners lacked the necessary integration.

In *Dagher*, Justice Thomas described internal restraints as those that affect the "core activity" of the venture.[112] But this definition is too broad, and was passed over by the *American Needle* Court. The Court referred to this issue in footnote seven of its opinion. Justice Stevens criticized the Seventh Circuit for "carv[ing] out a zone of antitrust immunity" for conduct "arguably related" to league activities.[113] Just because NFL teams have to coordinate to produce football games, does not mean that the competitive effects of that cooperation are immune under Section 1. In *American Needle,* it is likely that operations of the league itself such as licensing the NFL logo, renting office space, or hiring officials, would be wholly internal decisions by the NFL joint venture. Nearly all other rules would be considered to affect competition outside the venture.

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109. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).
110. *Id.* at 767.
111. Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1149 (9th Cir. 2003).
112. Texaco Inc. v. Dagher, 547 U.S. 1, 7-8 (2006).
113. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2214 n.7 (2010).

ii. Restraints Outside the Venture

A rule that restrains competition outside the venture affects everything that is not wholly internal to the venture's operation. It captures agreements by the partners for a broad spectrum of conduct that does not fit into the narrow category of agreements inside the venture. Typically, the partners agree to form a joint venture, and as part of that agreement will limit the ability of the partners to compete in ways unrelated to the venture's activity. A good example occurred in the 1990s, when the Three Tenors (José Carreras, Placido Domingo, and Luciano Pavarotti) held concerts coinciding with the World Cup finals in 1990, 1994, and 1998.[114] PolyGram Holding, Inc. had distributed the 1990 concert recording, and Warner Communications, Inc. had distributed the 1994 recording. Polygram and Warner agreed to jointly distribute the recording of the 1998 concert. Warner would distribute the recording in the United States and PolyGram would distribute it everywhere else. The partners did not integrate any other operations. In planning the release of the 1998 concert recording, the two companies agreed to cease all promotion and advertising for the earlier two recordings. The D.C. Circuit condemned the agreement because it "had a deleterious effect" on consumers and lacked any pro-competitive justification. Here, the agreement to cease promotion of earlier recordings had very little to do with the parties' ability to perform their agreement to distribute the 1998 recording, and hence, was a restraint outside the venture.

In *American Needle,* the NFL's case fell apart on this issue because of the high degree of competition (as Jerry Jones also believed) among NFL teams for the IP. Acting with common purpose "often" wasn't enough.[115] Unsurprisingly, several of the sports league cases have found independent interests outside the venture that prevent them from being considered single entities. For instance, in *Los Angeles*

114. Polygram Holding, Inc. v. F.T.C., 416 F.3d 29, 31 (D.C. Cir. 2005).
115. *Am. Needle, Inc.*, 130 S. Ct. at 2213.

Memorial Coliseum Commission v. National Football League,[116] the Ninth Circuit did not find the NFL and its teams to be a single entity when the league attempted to block a move by one of its teams. The NFL invoked its exclusive territory restriction when Al Davis, owner of the Oakland Raiders, wanted to move his team from Oakland to Los Angeles. In rejecting the single entity argument, the Ninth Circuit found the NFL and its teams competed in several ways, including for players, coaches and personnel.[117] Importantly, the exclusive territory rules restricted competition by stadium owners competing for NFL tenants outside the venture.[118] They were found to be unreasonable because they were not ancillary to the venture's agreement to produce its product—football games.

IV. EVALUATING AGREEMENTS UNDER THE FRAMEWORK

Evaluating the agreements under the framework involves employing the two steps in the analysis. This section will illustrate the framework by examining several cases.

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116. Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984).

117. Likewise, the Second Circuit in *North American Soccer League v. National Football League,* held the NFL was not a single entity in the context of a challenge to the NFL's rule on franchise allocation. N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1250 (2d Cir. 1982). The teams were separately owned, had separate capital expenditures, and did not pool their local broadcast revenues. In short, the financial condition of one team did not rise and fall with the others. *Id.* at 1252. The court found that the purpose of the rule was not only to protect the NFL as a league from competing with another professional sports league, but also to protect individual teams from competition from professional soccer's individual teams. *Id.* at 1257.

118. *See Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1395 (citing Smith v. Pro Football, Inc., 593 F.2d 1173, 1185 (D.C. Cir. 1978)).

A. A Fully Integrated Joint Venture Restraining Competition Inside and Outside The Venture

While fully integrated joint ventures have a higher threshold to satisfy in order to be considered a single entity, once established, they enjoy freedom from Section 1 attack in many cases. At that point, measuring competition inside or outside a fully integrated joint venture is an exercise with little value. Simply put, if the integration analysis is correct, there will be little antitrust cognizable competition left among the partners, either inside or outside the venture. Of course, there still could be an anticompetitive effect from agreements between the fully integrated joint venture and a third party.

Texaco Inc. v. Dagher provides an example of how this analytical framework can be employed. Recall that in *Dagher*, the Court established first that the joint venture was completely unified. Next, the Court held that this restraint among the partners to unify the pricing of the two partners' retail operations was an agreement related to the "core activity" of the venture. Justice Thomas quoted Judge Fernandez's Ninth Circuit dissent: "What could be more integral to the running of a business than setting a price for its goods and services?"[119] The ancillary restraints doctrine had no place in the analysis with a fully integrated joint venture because the challenged agreement was not ancillary to the underlying agreement forming the venture.[120] The agreement between the partners was "price fixing in a literal sense, [but] it [was] not price fixing in the antitrust sense."[121] Based on *American Needle*'s standard for finding independent economic interests and

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119. Texaco Inc v. Dagher, 547 U.S. 1, 8 (2006) (quoting Dagher v. Saudi Ref., Inc., 369 F.3d 1108, 1127 (9th Cir. 2004) (Fernandez, J., dissenting)).
120. Under the ancillary restraints doctrine, agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1395 (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 797-98 (1965)).
121. *Dagher*, 547 U.S. at 6.

multiple entities, it is unclear if *Dagher* would come out the same way today. After all, Texaco and Shell did not merge their upstream operations and kept their brands separate. This level of competition remaining outside the venture may have precluded a finding that it was a single entity in the *American Needle* Court.

Notwithstanding the above, fully integrated joint ventures would be subject to ordinary Section 1 scrutiny if they restrained competition with third parties outside the venture. For example, if the companies selling gasoline in *Dagher* also agreed that they would fix the prices of their gasoline with non-venture oil companies such as Chevron, they could be sued successfully for entering into a naked price fixing agreement.

B. Partially Integrated Joint Venture Restraining Competition Inside and Outside The Venture

Examining restraints by partially integrated joint ventures requires a slightly different analysis. In these situations, as stated above, the partners will integrate some of the venture's functions while keeping some outside the venture. The result of a Section 1 claim will turn on the nature of the restraint and the level and areas of integration.

Partially integrated joint ventures may escape liability under Section 1 if they can show the partners' agreement was wholly internal. For example, in *Oksanen v. Page Memorial Hospital,* a hospital's medical staff (comprised of doctors) and its Board of Directors was found to be a single entity under Section 1 for the purpose of peer review of its medical staff.[122] The plaintiff doctor alleged that a decision to deny his hospital staff privileges was the result of a conspiracy among these two groups. The Board considered and accepted the medical staff's recommendation to deny privileges, but the medical staff played no role in the final decision. Because of this, the court found that there was no competition between the medical staff

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122. Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 703 (4th Cir. 1991).

and the defendant.[123] As a result, the Fourth Circuit held that the medical staff acted as an agent of the Board and would, for this purpose, be considered a single entity. This was, in *Copperweld*'s language, an "internal 'agreement' to implement a single, unitary firm's policies."[124] An antitrust conspiracy cannot be "very meaningful in antitrust terms" if one of the alleged conspirators played no role in the final decision alleged to be restraining competition.[125]

Conversely, the defendants in *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.* could not establish their partially integrated joint venture restrained competition inside the venture only. The defendants, a Health Maintenance Organization and an association of radiology doctors, denied a competing radiology group entry into the venture.[126] The association included independently employed doctors, including radiologists, who the Second Circuit found had "separate economic interests."[127] They lacked the agency relationship with the HMO that the *Oksanen* court found persuasive.[128] This meant that either party had final authority to enter into the agreement. Further, the court found some evidence that fear of competition motivated the exclusion, including not following its internal procedures for membership admission and that it recruited other doctors to the group to build its business.[129] Thus, it could not be considered a single entity.

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123. *Id.* at 706-07.
124. *Id.* at 703 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).
125. *Oksanen*, 945 F.2d at 706. The court also found that because the conduct was "consistent with legitimate activities," which, "weigh[ed] against inferring a conspiracy." *Id.* (quoting Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278, 282 n.14 (4th Cir. 1986)).
126. Capital Imaging Associates, P.C. v. Mohawk Valley Med. Associates, Inc., 996 F.2d 537, 540 (2d Cir. 1993).
127. *Id.* at 544.
128. *Id.*
129. *Id.* at 545.

The far more common situation occurs when a partially integrated joint venture is sued for allegedly restraining competition outside the venture. This is *American Needle*. On the first issue of integration, the Court found the teams to be separately owned and managed entities with separate corporate objectives. Directly relevant to the case, the teams had an interest in promoting the NFL brand, but they also had individual interests in promoting their own team's brand. Further, the teams did not pool all of the licensing revenues they earned. The structure of the league and its teams creating this split of priorities meant it could not be fully integrated.

Second, the exclusive license affected competition outside of the venture. The licensing decisions by the NFL could not fairly be described as wholly internal to the joint venture, even if they had been performed by the league for many years. Because the teams individually own the IP, there is nothing that would stop them—absent the agreement—from licensing their IP individually. The exclusivity of the license prevented individual teams from licensing their IP, and the requirement of licensor to take all or none of the teams' licenses prevented licensors from licensing only those teams' IP they wanted. This is a classic example of a partially integrated joint venture restraining competition outside the venture.

V. AFTER *AMERICAN NEEDLE*: REMAND, THE "QUICK LOOK", AND THE TENNIS PROFESSIONALS' JOINT VENTURE

A. American Needle on Remand

When *American Needle* returns to the lower courts, it will start from the premise that the Supreme Court has settled the first issue in the above analysis: it is a partially, not fully integrated joint venture. The next step is to determine whether the rule in question restrains competition inside or outside the venture. There too, the Court offered its guidance that it considers the licensing rule to be affecting competition outside the venture. As Justice Stevens put it, "apart from their agreement to" sell jointly the IP exclusively, "there would be nothing to prevent each of the teams from making its own market decisions" relating to the purchases, sale and license of its trademarks.[130] The lower courts will have to balance the competitive effects of this rule to determine if it violates the antitrust laws.

The Court in *American Needle* acknowledged that lower courts could be drawn into frequent disputes regarding ordinary league activities as a result of its ruling. Its remedy was to apply a "quick look" rule of reason examination. The quick look application of the rule of reason has been used in the past to invalidate restraints that are not unlawful *per se* "but [are] sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry."[131] Put differently, a quick look can evaluate restraints, "when the great likelihood of anticompetitive effects can easily be ascertained."[132] The Supreme Court thought the quick look rule of reason could be applied "in the twinkling of an eye,"[133] and used to approve many league activities. The example the Court gave was rules or practices that relate to the league's legitimate interest in maintaining a competitive balance. It would likely also approve restraints described here as inside the joint venture, such as decisions like rules of play, salaries for officials, and election of a Commissioner. This latter class of decisions restrains competition, but only among the venture partners. They are necessary to make it possible for the teams to produce NFL games.

It would be a mistake, however, for the lower courts on remand to evaluate the restraints at issue in *American Needle*

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130. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2214-15 (2010).

131. Cal. Dental Ass'n v. F.T.C., 128 F.3d 720, 727 (9th Cir. 1997), *rev'd*, 526 U.S. 756, 763 (1999).

132. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).

133. *Am. Needle, Inc.*, 130 S. Ct. at 2217 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 n.39 (1984)).

under a quick look. As stated above, a full-blown rule of reason analysis is necessary to test restraints outside the joint venture. The courts must take a thorough view and weigh the pro-competitive benefits of the exclusive, blanket license against its harms of reduced output (both because the license is exclusive and the number of licenses available is reduced) and possibly higher prices. The NFL will no doubt attempt to establish that the exclusive, blanket license offers substantial efficiency-enhancing benefits that the individual teams could not offer by themselves. These include spreading the transaction and enforcement costs across all of the teams, and pooling the licensing revenue so that all teams in the league benefit from strong selling teams' IP.[134] At this point, when the court weighs the pro-competitive benefits against the anticompetitive effects, the NFL may assert its earlier misplaced argument that the restraint is necessary "if the product is to be available at all."[135]

Lower courts should be mindful that the Supreme Court found little connection between joint licensing of this property and the ability to organize football games. "[E]ven if league-wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football."[136] With this, the Court properly has made clear that justifying single entity status for collective action will be examined much more closely. Going forward, joint ventures will have a more difficult argument that their conduct must be immunized because it is necessary for their venture to exist at all.

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134. Justice Sotomayor, while sitting on the Second Circuit, penned a strong concurrence analyzing a very similar restraint. Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 334 (2d Cir. 2008).
135. Bd. of Regents of Univ. of Okla., 468 U.S. at 101.
136. *Am. Needle, Inc.*, 130 S. Ct. at 2214 n.7.

B. American Needle's Early Application: Bund v. ATP Tour, Inc.

In one of the earliest cases to apply *American Needle*, the Third Circuit in *Deutscher Tennis Bund v. ATP Tour, Inc.*[137] confronted the single entity argument in a suit under Section 1.This case provides a useful illustration of the framework described above. The Association of Tennis Professionals is a group of professional men's tennis players and tournament owners.[138] It is responsible for creating rules of play, tournament schedules and rules governing player rankings.[139] The ATP awards tournaments to members and holds championship tournaments at the end of each season.[140] In 2007, ATP's Board of Directors, in an effort to increase fan interest in its tournaments, undertook several changes to the format of the tour, including two this article will discuss.[141] The seven-member Board was comprised of three representatives elected by the players, three elected by the tournament members, and one Chairman/President.[142] The ATP Bylaws gave the Board discretion over the format for the Tour.[143] The first change re-designated the player ranking points available at some tournaments.[144] That had the effect of changing the relative importance of those tournaments to the players.[145] Second, the changes also restricted the ability of the Top 50 ranked players to play in non-ATP events immediately prior to an ATP event, and required them to play at several top tier ATP tournaments.[146]

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137. *See generally* Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010).
138. *Id.* at 824.
139. *Id.* at 825.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 825.
144. *Id.* at 825-26.
145. *Id.* at 825.
146. *Id.* at 826.

Owners of three tennis tournaments upset with the Board's decisions on these rules filed a Section 1 suit against the ATP. They alleged that the ATP conspired "to control the supply of top men's professional tennis players' services . . . [and] preclud[ed] other tournaments from competing for such player services."[147] The plaintiffs lost ultimately because they failed to prove a relevant market, but the court in *dicta* responded to their claim that the ATP was not a single entity.[148] The court held that the ATP's revisions "might have deprived the marketplace of potential competition."[149] Relying on *Brown v. Pro Football, Inc.*,[150] the court held that similar to sports teams that compete for the best players, tournaments also compete for the best players. The changes by ATP "restrict[] this competition."[151]

For purposes of discussion, the Board's changes are separated here even though the plaintiffs in this case sued under a theory that alleged all of the changes were acts of multiple entities. The two rules appear to restrain competition differently and should have been treated differently by the court. The tiering changes appear to restrain competition inside the venture, while the player restrictions appear to restrain competition outside the venture. The issues raised in the decision provide an illustration of the analytical framework discussed in this article.

To start, there is little doubt that the ATP is a partially rather than fully integrated joint venture. The players have independent economic interests separate from each other and from the tournament organizers. Further, the two groups pool only parts of the revenue generated from the tournament. Under the framework discussed herein, the tournament tiering changes likely should have survived Section 1 scrutiny, under a quick look application of the rule of reason. The Board's

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147. *Id.* at 827.
148. *Id.* at 837.
149. *Id.*
150. *Id.* at 837 (citing Brown v. Pro Football, Inc., 518 U.S. 231 (1996)).
151. *Id.*

decision here likely was very nearly wholly internal to this partially integrated joint venture and should be examined as a decision restraining competition inside a partially integrated joint venture. The Board was given unilateral authority to create the scheduling. There was nothing in the opinion to indicate that the individual members of the joint venture could express their individual corporate interests through the Board in the same way the teams could with their supermajority voting structure in *American Needle*. In *Kentucky Speedway v. Nat'l Ass'n of Stock Car Auto Racing*, discussed above, the Sixth Circuit called similar decisions "quintessential business judgment" when an auto race track alleged a Sherman Act violation because NASCAR refused to grant it a race.[152] Designing a schedule of tournaments and assigning relative importance to them is why the ATP exists. As long as there is a reasonable pro-competitive justification for the choices, it should not be condemned.[153]

The changes related to the restrictions on players' ability to play in non-ATP events are much more troubling and require more scrutiny. This is an agreement among competitors, both at the player level and tournament-owner level, to restrict competition outside the venture for professional tennis players' availability at matches. Unlike the re-tiering rules which arguably could be wholly internal to the venture, the ATP rules here restrict competition outside of the venture and impact the market behavior of its members. When the ATP forces its top players to agree that they will not play in

152. Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 920 (6th Cir. 2009).

153. In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, the Third Circuit upheld rules for tires imposed by a race track sanctioning body. Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57 (3d Cir. 2010). As long as those requirements have a pro-competitive justification supported by the record, the court said in its post-American Needle decision, they will often be upheld. "Sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport (and therefore their own business interests)." *Id.* at 83.

other tournaments around the time of its tournaments, it is limiting competition for players in those tournaments. Rules like this should be condemned expeditiously under the rule of reason.

VI. CONCLUSION

In response to the Supreme Court's decision in *American Needle*, the NFL likely will argue that under the rule of reason, the benefits to competition from these exclusive, blanket licenses outweigh their harms.[154] The independent economic interests in the NFL's structure mean that the level of integration is incomplete, even if the partners often act with unified interests. That competition outside the joint venture must be protected under Section 1. As long as the NFL teams continue to be separately owned and operated, their separate economic incentives will prevent them from meeting the "complete unity of interest" standard in *Copperweld*.

The lesson for litigants going forward is that the Court made it clear that it would be difficult to establish the necessary unity of interest to reach single entity status. This article has argued that some prior judicial decisions even may have come out differently under the Court's construction of Section 1 in *American Needle*. Much like the judicial pronouncements that antitrust immunities must be "construed narrowly,"[155] single entity status should be earned only after rigorous analysis. *American Needle* established that even smaller levels of competition existing outside the venture,

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154. It is highly unlikely that sports league joint ventures would reorganize themselves as single entities as Visa and MasterCard recently did. Chris Sagers, *American Needle, Dagher and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1*, THE ANTITRUST SOURCE, August 2009, at 5, *available at* http://www.antitrustsource.com.

155. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 511 (4th Cir. 2005).

coupled with independent ownership of the venture partners, can scuttle an argument that a single entity exists.

UNRAVELING *AMERICAN NEEDLE*

Kellen W. Bradley

In "Joint Ventures and the Single Entity Doctrine After *American Needle, Inc. v. National Football League*," Matthew Bester analyzes the *American Needle* decision, discusses the implications of the Supreme Court's holding, and introduces a two-step method for determining which joint ventures fall within the scope of the single entity doctrine. The Court reached the proper conclusion. Additionally, applying Mr. Bester's method benefits courts as well as joint ventures in terms of efficiency.

In *American Needle*, the Supreme Court rejected the National Football League's ("NFL") argument that the thirty-two separately owned teams and the marketing corporation they created were a single entity for purposes of Section 1 of the Sherman Act.[1] This case was borne out of an agreement between NFL Properties ("NFLP") and Reebok, Inc., which licensed the right to produce hats with the teams' logos and other intellectual property ("IP") exclusively to Reebok.[2] Subsequently, American Needle, Inc. lost its license and sued NFLP, contending that the license was a horizontal agreement that restrained trade and violated Section 1.[3] The NFL defended that any restraint was necessary for the production of NFL games.[4] As Mr. Bester articulates, the "necessity" argument appropriately failed and halted a potential gap for joint ventures to argue the necessity of restraints to

1. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010).
2. *Id.* at 2206-07.
3. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007).
4. *Id.* at 2214.

production.[5] Similarly, Mr. Bester's two-step method for evaluating single entity status seeks to protect competition outside joint ventures.

Courts should first consider the level of form and functional integration between venture partners. Within this process, determining whether a venture is fully or partially integrated, and whether the venture's rule or practice might restrain competition between the partners "inside" or "outside" the venture is crucial to the evaluation of single entity status. The second step is to identify the relationship of the alleged restraint to the purpose of the joint venture and its partners. The teams in *American Needle* were separately owned and managed entities with separate corporate objectives, and the exclusive license affected competition outside of the partially integrated venture.[6] The teams ultimately owned their IP and, short of the agreement, would have every reason to market it themselves.[7] As such, the agreement restrained competition outside the venture. Noting the nonessential relationship of marketing IP and producing football, the restraint was deemed unnecessary to the venture's purpose.[8] In accord with Mr. Bester's article, joint ventures will now struggle to assert that similar conduct is necessary and thus immune to Section 1.

On remand, it would be a mistake for the lower courts to evaluate the restraints in *American Needle* under the "quick look" rule of reason, which can invalidate restraints that are unlawful on their face. Instead, a full-blown rule of reason analysis is needed to balance restraints outside the venture. In weighing the license's pro-competitive benefits against its harms of reduced output, the courts should emphasize the connection between the restraint and the purpose of the venture. Certain league-wide agreements may be necessary to

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5. *Am. Needle, Inc.,* 130 S. Ct. at 2214 n.7.
6. *Id.* at 2215.
7. *Id.* at 2214-15.
8. *Id.* at 2214 n.7.

produce football. It should not follow that league-wide agreements in marketing IP are necessary to produce football.

Since *American Needle,* the Third Circuit addressed a Section 1 suit in *Deutscher Tennis Bund v. ATP Tour, Inc*.[9] Although the single entity issue was not dispositive, the court noted that changes to the ATP rules might have restricted competition and been condemned under a thorough rule of reason analysis.[10] As Mr. Bester maintains, rules that restrain competition differently should be treated differently. Moreover, the immunity enjoyed by single entities is so valuable that it should be earned only after rigorous analysis. With Mr. Bester's method courts now have a straightforward procedure for reaching such a decision and, most important, preserving competition.

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9. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010), cert. denied, 131 S. Ct. 658 (2010).

10. *Id.*

THE GOVERNING SIMILARITY STANDARD IN IDEA SUBMISSION CASES

Lee S. Brenner*

It seems that just about everyone who has ever watched television has an idea for a television program, and anyone who has sat in the dark in a movie theater with a bucket of popcorn has an idea for a script. Despite the number of would-be filmmakers, novel ideas are few and far between. This makes idea submission an arena ripe for breach of contract claims, with conflict and claims of stolen ideas as predictable as most plots.

Those seeking guidance from courts on whether they have an actionable claim regarding an idea submission often assert that the applicable standards seem ephemeral. However, a close look at case law reveals a relatively straightforward test and guidelines for potential plaintiffs to consider. Moreover, while no bright-line rule has emerged to apply in every situation, there are two basic questions that must be answered affirmatively if a plaintiff wants to succeed in an idea submission case:

(1) After considering the level of similarity between the plaintiff's idea and the defendant's work, is it fair for the plaintiff to receive some compensation for performing the service of disclosing his or her idea?

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(2) If the plaintiff should be compensated, is it fair for the defendant to be the person or entity required to do the compensating?

There are two central issues as to whether an actionable breach of contract claim exists. First is the similarity between the two works–that is, whether a comparison of the works reveals enough similarity that the plaintiff is entitled to recovery. Second is whether the plaintiff's idea in fact has some value–an issue that encompasses access and independent creation. If the defendant did not have access to the plaintiff's work or independently created his or her own work, the defendant will prevail in an idea submission case.[1]

Not every set of two seemingly similar works will be deemed sufficient to establish a cause of action. Indeed, an examination of California case law over the last 50 years reveals a "substantial similarity" test in idea submission cases.[2] Even when the court did not use the phrase "substantial similarity" it is clear that the standard was still being employed. In applying this test, courts compare the plots, themes, characters, storytelling techniques, and gimmicks of the subject works to determine whether they are similar enough to warrant a breach of contract claim. And contrary to many plaintiffs' assertions, the substantial similarity test, as applied

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1. Klekas v. EMI Films, Inc., 198 Cal. Rptr. 296, 303-04 (Ct. App. 1984) (upholding the dismissal of the plaintiff's implied contract claim when there was no evidence that the defendants had access to the plaintiff's work, notwithstanding the existence of numerous similarities between the plaintiff's and the defendants' works); Hollywood Screentest of Am., Inc. v. NBC Universal, Inc., 60 Cal. Rptr. 3d 279, 291-93 (Ct. App. 2007) (affirming dismissal of the plaintiff's entire idea submission case on summary judgment when the undisputed evidence showed that the defendant's work was the product of independent creation).

2. *See Klekas*, 198 Cal. Rptr. at 296. The substantial similarity test is comparable but not identical with the test of the same name in copyright cases. For example, the issue of copyright protectability of elements is required in almost all copyright infringement cases, but is not so required in contract cases. *See* Lionel L. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 69 (1994).

by the courts, requires a high threshold of proof that the similarity is indeed substantial.

A. Weitzenkorn and Its Progeny

The substantial similarity test was first advanced by the California Supreme Court in 1953 in *Weitzenkorn v. Lesser*. Although plaintiffs commonly cite *Weitzenkorn* for the notion that only a very low standard of similarity is required to support a claim,[3] they are misinterpreting the court's analysis in that case.

Plaintiff Ilse Lahn Weitzenkorn wrote a literary composition titled: "*Tarzan in the Land of Eternal Youth*," about the already famous Tarzan character. Weitzenkorn alleged that she entered into an express oral agreement with the producer defendants entitling her to compensation if the producers used "all or any part of" her composition.[4] The defendants produced a motion picture titled *Tarzan's Magic Fountain,* which was also about Tarzan and eternal youth, but did not compensate Weitzenkorn.

Weitzenkorn brought causes of action for breach of express and implied contract. In evaluating whether a demurrer to Weitzenkorn's complaint should be overruled, the Supreme Court considered "whether there is substantial similarity between [the two works]." Without substantial similarity, "as a matter of law" the plaintiff's complaint could not survive a demurrer.[5]

The court decided to overrule the demurrer, holding that "similarity may exist because of the combination of characters, locale, and myth." Indeed, a portion of the basic dramatic core of the works "might be found similar," including the characters of Tarzan, Jane, and Cheta appearing in an African locale within the context of a mythical fountain of eternal youth.

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3. Weitzenkorn v. Lesser, 256 P.2d 947, 957 (Cal. 1953).
4. *Id.* at 780.
5. *Id.* at 791.

Although the court stated that it was applying a substantial similarity test, it noted that if the defendants agreed to pay Weitzenkorn for the use of "any part" of her work, an even lower standard of similarity may be required. Though dubious that the defendants had made such a broad agreement with the plaintiff, the court permitted the claim to survive demurrer because of the possible existence of supporting evidence.[6]

Less than two months after the *Weitzenkorn* decision, the California Court of Appeal applied the substantial similarity standard in *Sutton v. Walt Disney Productions*. The court explained that to state a cause of action for breach of contract on an idea submission theory, the plaintiff must "demonstrate a substantial similarity between her ideas as embodied in her [work]" and the defendants' work.[7] After reviewing the two works, the court held that they were not substantially similar and affirmed dismissal of the plaintiff's case on demurrer. The court reasoned that a single, general instance of similarity between the two works in *Sutton*—both works were about animals—was not sufficient to state a claim.[8]

An idea submission case was again before the California Supreme Court approximately three years later. Victor Desny, the plaintiff in *Desny v. Wilder,*[9] submitted a well-developed synopsis of the life and death of Floyd Collins to defendant Paramount Pictures Corporation. He then claimed that the defendants used his synopsis in the creation of a motion picture but failed to pay him for the use of his property. In permitting the case to proceed past summary judgment on a breach of contract theory, the Supreme Court did not articulate any particular standard of similarity that was required for the

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6. *Id.* at 791-92.
7. Sutton v. Walt Disney Prods., 258 P.2d 519, 521 (Cal. Ct. App. 1953).
8. *Id.* The court held that such a general similarity was not enough to survive demurrer, even though it expressly noted that the protectability of the plaintiff's work is not at issue in express and implied contract cases. *Id.* at 521-22.
9. Desny v. Wilder, 299 P.2d 257 (Cal. 1956).

plaintiff to recover. However, after considering the two works in great detail, the court simply stated that the defendant's work "closely parallel[ed]" and "closely resemble[d]" the plaintiff's work.[10]

When the California Court of Appeal granted the plaintiffs a new trial on their idea submission case in *Donahue v. Ziv Television Programs, Inc.*–ten years following the *Desny* decision–the court found a high degree of similarity between the two works in dispute.[11] The plaintiffs had created a television series titled *The Underwater Legion*. They alleged that they entered into a contract with defendant Ziv Television Programs, Inc., in which Ziv agreed to pay the plaintiffs if it used their work. Subsequently, Ziv created a program called *Sea Hunt* that was arguably based on *The Underwater Legion* but did not compensate the plaintiffs, who sued for damages.

At trial, the jury found for the plaintiffs, but the court granted Ziv's motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeal reversed the judgment notwithstanding the verdict but affirmed the order granting a new trial.

Without announcing a bright-line standard, the Court of Appeal based its reversal of the judgment notwithstanding the verdict on the high degree of similarity between the works. In particular, it stated a jury could find the format of each work "quite similar" to the other–indeed, according to the court, "[t]he list of differences is shorter than that of the similarities." The court further noted a strong similarity in the "basic dramatic core[s]" of the works, their use of "various types of equipment for operating under water," and their extensive use of underwater photography. In addition, "[s]imilarities in basic theme and dramatic situations" could be found, as well as similarities in "basic plot ideas, themes, sequences and dramatic 'gimmicks.'" Indeed, the court explained that the

10. *Id.* at 276, 272.
11. Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130 (Ct. App. 1966).

defendant's work followed the plaintiffs' "format in most of its important facets."[12]

The Court of Appeal again applied a high degree of similarity standard two years later when considering, and quickly dismissing, an idea submission case. In *Henried v. Four Star Television*, plaintiff Paul Henried alleged that the defendant breached a contract to pay him for using his work, which consisted of a seven-page synopsis for a television series.[13] In determining whether the plaintiff had a viable cause of action for breach of contract, the court compared the two works in order to determine whether there was "a substantial or material similarity between plaintiff's material and defendant's series." After examining the plots, characters, motivations, subject matter, and milieu of the two works, the court found a lack of substantial similarity.[14] As a result, the court upheld dismissal of the case on demurrer. The court noted that while both works contained heroes who traveled in a chauffeur-driven Rolls Royce, this fact seemed "grossly inadequate to sustain a claim of substantial or material similarity."[15]

Four days after the *Henried* decision, the Court of Appeal decided *Minniear v. Tors*. Despite the prior cases finding that a high threshold of similarity is required for idea submission cases, plaintiffs frequently cite to *Minniear* for the proposition that a low threshold of similarity will suffice.[16] Indeed, plaintiffs sometimes claim that, according to *Minniear*, as long as their work is the "inspiration for" the defendant's work, they have sufficiently stated a cause of action for breach

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12. *Id.* at 134-35. After the second trial, the Court of Appeal upheld the jury verdict for the plaintiffs based upon a finding of a high degree of similarity between the two works. Indeed, there was abundant evidence that the defendants had made "a substantial use" of plaintiffs' work in an "important and material respect." Donahue v. United Artists Corp., 83 Cal. Rptr. 131, 138 (Ct. App. 1969) (citations omitted).
13. Henried v. Four Star Television, 72 Cal. Rptr. 223, 223 (Ct. App. 1968).
14. *Id.* at 223-24.
15. *Id.* at 224.
16. Minniear v. Tors, 72 Cal. Rptr. 287, 294 (Ct. App. 1968).

of contract to pay for use of their work. This assertion misinterprets case law. In fact, *Minniear* did not articulate a low standard at all.

The Court of Appeal held that plaintiff Harold Minnier had presented sufficient evidence at trial regarding the similarity of his underwater adventure television series to the defendant's series to overcome a motion for non-suit. Although the court used the words "inspiration for" in its opinion, it once again focused on the high level of similarity between the two works in deciding to permit the plaintiff's case to survive. Indeed, the court dissected the two works and found that there were "enough similarities in the basic plot ideas, themes, sequences and dramatic 'gimmicks'" for the jury to infer that plaintiff's work was in fact used by the defendants.[17] The court noted that both works were "based on an underwater adventure format involving an ex-Navy frogman named Mike, using scuba and special underwater equipment. In each work, the heroes operated their own boat on a commission for dangerous underwater work. Attractive young girls were featured in both works." Moreover, both works featured a character named Mike Gilbert and contained similar jet pilot incidents.

The Court of Appeal applied the substantial similarity test in the 1970 case of *Fink v. Goodson-Todman Enterprises, Ltd.*[18] Plaintiff Harry Fink created a presentation for a proposed television series titled *The Coward,* which he alleged the defendants used without compensation to Fink in developing the television series *Branded*. The court compared the two works, found a high degree of similarity between them, and held that Fink had stated causes of action for breach of express contract and breach of implied contract, among others.

Explaining that it was looking for the most feasible way "to look for substantial similarity" between two works, the *Fink* court considered the plot, themes, and storytelling

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17. *Id.*
18. Fink v. Goodson-Todman Enters., Ltd., 88 Cal. Rptr. 679 (Ct. App. 1970).

techniques of the works.[19] The plots and basic themes of the two works were "strikingly similar," if not entirely "the same." In both stories:

(1) The hero is a young military officer who takes command upon the infirmity of his superior.
(2) Men in the hero's military unit are killed after he assumes command, which leads to a court martial and internal turmoil for the hero.
(3) The main character is on a mission and carries a physical reminder of that mission.
(4) The main character has a Scottish name.

In addition to these similarities in plot and theme, the techniques of portrayal and other storytelling devices, such as

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19. *Id.* at 690-91. Notably, the *Fink* court explained that the same points of similarity are analyzed for contract and noncontract claims. *Id.* In copyright infringement claims, for example, the points of similarity that courts analyze include plot, theme, dialogue, mood, setting, pace, characters, and sequence of events. Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994).
There is one significant difference in the analysis of contract versus noncontract idea submission claims. While novelty of the idea is not required in contract-based idea submission claims, it is a requirement for noncontract actions, such as copyright infringement claims. *Fink*, 88 Cal. Rptr. at 689-90. However, law professor Lionel L. Sobel argues persuasively that novelty should be a requirement in implied contract cases, as opposed to cases involving an express agreement. Lionel L. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9, 61-63 (1994) (citing Apfel v. Prudential-Bache Sec., Inc., 616 N.E.2d 1095, 1098 (N.Y. 1993) ("[T]here is no equity in enforcing a seemingly valid contract when, in fact, it turns out upon disclosure that the buyer already possessed the idea. In such instances, the disclosure . . . is manifestly without value.")).
A California case supports Sobel's argument. Ware v. Columbia Broad. Sys., Inc., 61 Cal. Rptr. 590 (Ct. App. 1967). In rejecting an implied contract claim on summary judgment, the *Ware* court explained that it would have been "fatuous" for a plaintiff to claim that a defendant impliedly agreed "to pay him if they ever in the future made a picture embodying any stock situation which" the plaintiff had also used in creating the plaintiff's work. *Id.* at 594.

dream sequences, were alike as well. The numerous similarities of the two works were deemed sufficient to withstand demurrer.

In 1982, the Court of Appeal reiterated the high standard for similarity in *Mann v. Columbia Pictures, Inc.*,[20] an implied contract case. The court stated, without discussion, that an instruction directing the jury to consider whether "the defendants based [their work] substantially upon [the] plaintiff's ideas" was correct.[21]

In the famous *Buchwald v. Paramount Pictures Corporation* case, the plaintiffs succeeded in proving to the Superior Court that the defendants had breached a contract with the plaintiffs in making the motion picture *Coming to America.* [22] Although the court considered whether the defendants' motion picture "was inspired by" the plaintiffs' work, it expressly stated that it based its determination on the quantitative and qualitative points of similarity–as identified in *Fink* –between the works.[23]

The court found "compelling evidence of similarity between [the works]," in the abstract and in the details. Both were modern-day comedies in which the protagonist is a young black member of royalty from a fictional African kingdom. Both protagonists are extremely wealthy and well-educated and, in both stories, the protagonist comes to a large city on the American East Coast. Both stories contained "fish out of water" and "love triumphs over all" themes. Moreover, both main characters find themselves without their royal trappings, experience the realities of "ghetto life," and are enriched by these experiences. Each protagonist falls in love with a young American woman whom he marries and makes his queen in the mythical African kingdom. Also, each main character is

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20. Mann v. Columbia Pictures, Inc., 180 Cal. Rptr. 522, 526 (Ct. App. 1982).
21. *Id.* at 533 n.6.
22. Buchwald v. Paramount Pictures Corp., No. C706083, 1990 WL 357611, at *14-15 (Cal. Super. Ct. Jan. 8, 1990).
23. *Buchwald*, 1990 WL 357611, at *10.

employed by a fast food restaurant. In both works the protagonist foils a robbery attempt by using a mop. Each work was to star Eddie Murphy, who eventually took the lead in the defendants' motion picture, and each work was to be directed by John Landis, who ultimately directed the defendants' work.

In 2008, in an unpublished opinion, the California Court of Appeal, in upholding the dismissal of an idea submission claim in *Reginald v. New Line Cinema Corporation,* affirmed the high level of proof required by the substantial similarity test. [24] The plaintiff, Rex Reginald, claimed that the 2005 blockbuster motion picture *Wedding Crashers* was based on his submission of material titled "*Party Crashers Handbook*" to New Line Cinema prior to the development of the motion picture. The trial court dismissed Reginald's claims on summary judgment on the ground that his submission was not substantially similar to the motion picture. On appeal, Reginald argued that California courts have not applied a consistent standard to the idea submission analysis. The Court of Appeal rejected this argument.

The appellate court affirmed the trial court's dismissal of the case as a matter of law. The Court of Appeal independently compared the works and held that summary judgment was properly granted because there was no substantial similarity between the plaintiff's concept and *Wedding Crashers*. It did so by employing a standard for idea submission cases involving a claim of a breach of implied contract:

> Where . . . there is no direct evidence showing that a defendant used a plaintiff's idea, the plaintiff must show that the defendant's work is substantially similar to plaintiff's idea in order to raise an inference that the defendant used plaintiff's idea. . . . While there may be no

24. Reginald v. New Line Cinema Corp., No. B190025, 2008 WL 588932, at *5 (Cal. Ct. App. Mar. 5, 2008).

> precise formula established by law . . . the degree of similarity required to meet the substantial similarity test is high in the idea submission context. . . . [T]he points of comparison used in determining similarities are material features of the works, not merely words and phrases or the same basic idea.[25]

Ultimately, the Court of Appeal rejected Reginald's identification of fourteen alleged similarities between the works as a matter of law. In doing so, the court stated that the alleged similarities did "not play a material role in the specific elements of the works at issue, such as characters, character motivation, settings, basic dramatic core and themes, storylines, plot ideas, the dramatic sequence, and dramatic gimmicks."[26]

So case law dating back fifty years confirms that plaintiffs must establish a substantial similarity between their work and the defendant's work to be successful in an express or implied contract idea submission claim. Clearly, the courts look to several factors in determining whether the requisite level of similarity has been met:

(1) A similar combination or sequence of elements;
(2) (2)Similar characters, settings, dramatic cores and plots;
(3) Similar formats;
(4) Similarities in theme or subject matter;
(5) Similar gimmicks;
(6) Similar storytelling techniques; and
(7) Similar portrayal elements (such as identical casting).

Ultimately, the considerations in idea submission cases are largely identical to the elements considered in the extrinsic

25. *Id.* at *4-6.
26. *Id.* at *7.

test for copyright infringement–namely plot, theme, dialogue, mood, setting, pace, characters and sequence of events.

B. Altering the Required Degree of Similarity

Although substantial similarity is the benchmark in idea submission cases, the necessary degree of similarity may be heightened or lessened depending on the factual circumstances of the case. These circumstances may include the language used by the parties in making their agreement, which may alter the level of similarity required to show a later breach in contract.

In *Weitzenkorn*, for example, the California Supreme Court explained repeatedly that the language of the parties' agreement may require a different standard of similarity be applied.[27] Underlying the court's opinion was its reasoning that producers and writers are free to make any contract they desire – and set any standard they want – regarding the buying of ideas. Indeed, the *Weitzenkorn* court stated that however "improbable" it may be, the plaintiff might be able to show that the defendants agreed to pay her "no matter how slight or commonplace the portion which they used."[28] Courts of appeal and the Los Angeles Superior Court have followed *Weitzenkorn* by stating that the terms of the contract–that is, what the parties actually agreed to–will be controlling.[29]

Accordingly, contracting parties can modify the level of similarity required to trigger an obligation to pay for use of the work. As in *Weitzenkorn*, a person presenting an original work may seek an agreement requiring compensation for the use of even the slightest element of his or her work. On the other hand, production companies may negotiate arrangements in which they only need to compensate parties when they use

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27. Weitzenkorn v. Lesser, 256 P.2d 947, 957-58 (Cal. 1953).
28. *Id.* at 792.
29. Chandler v. Roach, 319 P.2d 776, 781 (Cal. Ct. App. 1957); Buchwald v. Paramount Pictures Corp., No. C706083, 1990 WL 357611, at *10 (Cal. Super. Ct. Jan. 8, 1990).

unchanged significant portions of the work, including the exact plot, theme, characters, and settings. Theoretically, the contracting parties could agree that only a "striking similarity" (a standard with a higher level of proof than substantial similarity) will suffice to trigger a producer's obligation to compensate the plaintiff. Producers can also protect themselves by making it clear during negotiations that absent an express written agreement to the contrary, the producer does not agree to pay for the use of general ideas or non-original elements of the work.

Although access to the original work is often at issue in copyright infringement cases, it is questionable whether the degree of access is influential in an idea submission case. Under the "inverse ratio rule," less similarity may be required when a defendant has been granted unfettered access to the work. As the California Supreme Court stated in *Golding v. R.K.O. Pictures, Inc.,* "where there is strong evidence of access, less proof of similarity *may* suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown before the inference of copying may be indulged."[30] Citing *Golding*, lower courts have stated that less similarity is required when the defendant had "unlimited access" to the plaintiff's work or the evidence of access is "overwhelming."[31] However, the *Golding* court also explained that "[p]roof of access, however, establishes no more than the opportunity to copy and not actual copying. . . . And liability for damages must rest upon substantial evidence of similarity between" the two works.[32]

30. Golding v. R.K.O. Pictures, Inc., 221 P.2d 95, 98 (Cal. 1950) (emphasis added).
31. Fink v. Goodson-Todman Enters., Ltd., 88 Cal. Rptr. 679, 688 n. 14 (Ct. App. 1970) (noting that "[l]ess similarity is required when access is strong" and explaining that there was "unlimited access" pleaded in the plaintiff's case, which was permitted to survive demurrer); *Buchwald*, 1990 WL 357611, at *11 ("[W]here, as here, the evidence of access is overwhelming, less similarity is required.").
32. *Golding*, 221 P.2d at 99.

Since access to the original work is often undisputed, idea submission cases typically hinge on whether the new work is sufficiently similar to what was submitted. Indeed, according to *Nimmer on Copyright*, "even massive evidence of access cannot by itself avoid the necessity of also proving the full measure of substantial similarity."[33] However, in *Funky Films, Inc.* v. *Time Warner Entertainment Company, L.P.,* the Ninth Circuit implied that the inverse ratio rule has stronger applicability in cases in which the defendant expressly has conceded access to the plaintiff's work.[34]

To the extent the rule applies and can alter the requisite degree of similarity, courts have provided virtually no guidance regarding how much the rule can affect the required level of similarity in a given case. The question of how much or how little the inverse ratio rule can affect the applicable standard remains unanswered.

C. Development of the Initial Idea

Another factor that plays a role in idea submissions claims is the degree to which the initial idea was developed. For example, if a person simply suggests that a producer "make a comedy this year," must that person be compensated if the producer later produces a comedic work within the year?[35] The answer is most likely no. But how much more detailed must the

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33. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[D] (Matthew Bender, rev. ed. 2010).

34. Funky Films, Inc. v. Time Warner Entm't Co., L.P., 462 F.3d 1072, 1081 n.4 (9th Cir. 2006).

35. To the extent that recovery can be premised upon such a minimal, vague idea, it would likely be easier for the defendant to show independent creation, and avoid liability on that basis. *See* Hollywood Screentest of Am., Inc. v. NBC Universal, Inc., 60 Cal. Rptr. 3d 279, 292 (Ct. App. 2007). Failing that, the defendant could argue that the circumstances were such that no agreement should be implied in the first instance and, even if one could be implied, that the potential damages for a plaintiff to recover should be quite low. Moreover, the defendant can argue that the plaintiff's idea is so vague and general as to be worthless and therefore cannot constitute consideration for the defendant's alleged promise to pay.

idea be? It is unclear whether suggestions that a reality show be developed around the concept of a singing competition or remaking a film provide sufficient basis for a claim. Unfortunately, there is little guidance on this topic.

Notably, the *Desny* court left open the possibility that an idea transmitted by a plaintiff to a defendant may be valueless–and thus not the proper subject of a contract. The court explained that only "some ideas are of value to a producer" and that other ideas "may be considered totally devoid of . . . any practical value."[36] The court's opinion emphasizes that those who convey valuable ideas may seek to recover on breach of contract grounds.[37]

Moreover, the Court of Appeal in *Chandler* v. *Roach* has held that an idea must have "sufficient concreteness so as not to be too vague to be consideration for a contract."[38] To the extent that the plaintiff has mislead the producer about the value of his or her idea, gross inadequacy of consideration may be relevant to a claim of fraud.[39]

The line to be drawn between what is vague and what is valuable is difficult to discern. Some very general ideas can, in fact, support a claim. In *Fink,* for example, the court noted that a "mere basic theme" may be an idea that can support a contract-based claim.[40] Moreover, the *Chandler* court noted that there is no requirement of either novelty or concreteness for an idea to be the subject of a contract,[41] a statement directly at odds with its opinion that an idea needs to have "sufficient concreteness" to constitute consideration. In addition, the timing of the disclosure of the idea may make the idea valuable. In particular, an idea "may be valuable to the person

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36. Desny v. Wilder, 299 P.2d 257, 265, 272 (Cal. 1956).
37. *Id.* at 267; *see also id.* at 269 (stating that the conveyance of "ideas which are valuable and which [producers] can put to profitable use" may form the basis of an agreement).
38. Chandler v. Roach, 319 P.2d 776, 782 (Cal. Ct. App. 1957).
39. Restatement (Second) of Contracts §79 (2007).
40. Fink v. Goodson-Todman Enters., Ltd., 88 Cal. Rptr. 679, 688 n.15 (Ct. App. 1970).
41. *Chandler*, 319 P.2d at 780-82.

to whom it is disclosed simply because the disclosure takes place at the right time."[42] Finally, the person who conceives an idea may elucidate the value of its disclosure through testimony at trial.[43]

Several basic contract principles also suggest that very general ideas may be the subject of a contract-based claim. The terms of a contract will be controlling,[44] so if the defendant actually agreed to pay for a general idea, it is unlikely that the courts will interfere to protect the defendant from its own decision. Indeed, an underlying principal of contract law is that "the promisor that promises to pay a fee in exchange for services will be held to their promise, regardless of the value of the services, and even though they may be valueless in fact."[45] Moreover, as many plaintiffs have argued, courts ordinarily do not question the adequacy of consideration in contract cases.[46]

However, these principles belie the fact that no court has ever held that a general, minimal idea may support a contract claim. For example, in *Desny*, the plaintiff's idea was a well-developed storyline set forth in a four-page synopsis.[47] In *Fink*, the plaintiff's idea was presented in a detailed plot summary for a television series, along with a pilot script.[48] In

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42. Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130, 134 (Ct. App. 1966).
43. Donahue v. United Artists Corp., 83 Cal. Rptr. 131, 134-35 (Ct. App. 1969); *see also Donahue*, 54 Cal. Rptr. at 140; Golding v. R.K.O. Pictures, Inc., 221 P.2d 95, 100-01 (Cal. 1950).
44. Weitzenkorn v. Lersser, 256 P.2d 947, 957-58 (Cal. 1953); *Chandler*, 319 P.2d at 781.
45. 3 Samuel Williston & Richard A. Lord, Williston on Contracts §7.21 (4th ed. 2008).
46. *See Chandler*, 319 P.2d at 782; *see also* RESTATEMENT (SECOND) OF CONTRACTS §79 cmt. (2007) (Courts do not ordinarily inquire into the adequacy of consideration, especially when one or both of the values exchanged are uncertain or difficult to measure.); Harris v. Time, Inc., 237 Cal. Rptr. 584, 587 (Ct. App. 1987) ("Courts [generally] will not…question the adequacy of the consideration.").
47. Desny v. Wilder, 299 P.2d 257, 262 (Cal. 1956).
48. Fink v. Goodson-Todman Enters, Ltd., 88 Cal. Rptr. 679, 682 (Ct. App. 1970).

Donahue, the plaintiff's idea was delineated in twelve story outlines, one screenplay, and a proposed budget.[49] In *Minniear*, the plaintiff's idea took the form of a script and a booklet that outlined prospective episodes.[50] In *Buchwald*, the plaintiff's idea consisted of at least a three-page treatment.[51] In *Weitzenkorn*, the plaintiff's idea comprised a composition with an extensive storyline.[52]

The case most routinely cited for the proposition that a general idea may support a contract claim is *Blaustein v. Burton.*[53] However, the plaintiff's concept for the transformation of a Shakespearean play into a motion picture was in fact well detailed. Indeed, among other things, the plaintiff proposed to create a motion picture out of the play *The Taming of the Shrew* starring Elizabeth Taylor and Richard Burton and directed by Franco Zeffirelli. The plaintiff proposed to remove the "play within a play" device found in the original play and to include the enactment of two scenes that occur off-stage in the play. The plaintiff also proposed to film the movie in Italy. Considering these proposals and the fact that the resulting movie included each of these elements, the *Blaustein* court concluded that the plaintiff's idea was one that might be protected by contract.[54]

California case law elucidates that a substantial similarity standard is applied in breach of contract claims arising in idea submission cases. A high degree of similarity between the plaintiff's and the defendant's works is required in order to support a breach of contract claim. In determining whether the standard has been satisfied, courts will analyze the works and look for similarities regarding plot, theme, dialogue, mood, setting, pace, characters, sequence of events, gimmicks,

49. Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130, 131 (Ct. App. 1966).
50. Minniear v. Tors, 72 Cal. Rptr. 287, 290-91 (Ct. App. 1968).
51. Buchwald v. Paramount Pictures Corp., No. C706083, 1990 WL 357611, at *1 (Cal. Super. Ct. Jan. 8, 1990).
52. Weitzenkorn v. Lesser, 256 P.2d 947, 951 (Cal. 1953).
53. Blaustein v. Burton, 88 Cal. Rptr. 319 (Ct. App. 1970).
54. *Id.* at 334.

storytelling devices, portrayal techniques, and combinations of these factors.

Courts will also look to the language of the parties' contract to decide whether the parties have agreed to apply a higher or lower standard of similarity in a given case. Less clear, however, is the effect, if any, of the inverse ratio rule. The law remains unsettled regarding when the inverse ratio rule applies and, if it does, whether it alters the level of similarity that is required to trigger a defendant's obligation to pay in an idea submission case.

Also uncertain is the extent to which an idea must be developed before it can be the subject of a contract claim. Lawyers on both sides of the table could give more definitive advice to their clients if clearer guidelines existed. However, because no case has yet to affirm the existence of a contract based on a general, ill-defined idea, it is best to conclude that an idea requires more certainty if it is to form the basis of a contract.

NO COPYRIGHT, NO PROBLEM: *BENAY V. WARNER BROTHERS* SHOWS THE SUBSTANTIAL SIMILARITY TEST APPLIED IN IDEA SUBMISSION CASES DOES NOT REQUIRE COPYRIGHT-LEVEL SIMILARITY

Paige C. Pataky

The California substantial similarity test applied in idea submission cases requires a high degree of similarity between the two works, but the standard is not as high as what is required for copyright claims. Last year's Ninth Circuit decision in *Benay v. Warner Bros. Entertainment* demonstrates that in breach of contract cases substantially similar elements that are not protected by copyright law can nevertheless be used to show unauthorized use of the plaintiff's material.[1] In *Benay*, the Ninth Circuit held that a screenplay titled *The Last Samurai* and the film *The Last Samurai* were not substantially similar for purposes of copyright infringement, but for purposes of the implied-in-fact contract claim, the screenplay and the film *were* substantially similar.[2]

The Benay brothers wrote a screenplay titled *The Last Samurai*, which they registered with the Writer's Guild of America in 1999 and with the federal copyright office in February 2001. In May 2000, the brothers' agent "pitched" the screenplay to the president of production at Bedford Falls. According to the agent, he gave a copy of the screenplay to Bedford Falls with the implicit understanding that if the production company used the screenplay to produce a film the

1. Benay v. Warner Bros. Entm't, Inc., 607 F.3d 620, 631 (9th Cir. 2010).
2. *Id.* at 631-32.

Benay brothers would be compensated.[3] Bedford Falls "passed" on the screenplay because it already had a similar project in the works, a screenplay titled *West of the Rising Sun*. In April 2000, one month before the Benays' agent pitched their screenplay to Bedford Falls, the theme of *West of the Rising Sun* was described in a fax as "a cattle drive to a starving city as provocation for a civil war; a rich and modern metaphor in the introduction of an American passion (beef) and an American agenda (trade), to a culture that has lived happily for thousands of years without either."[4] *West of the Rising Sun* eventually became the Tom Cruise film *The Last Samurai*. The Benays claimed that the film borrowed important elements from their screenplay.[5] The defendants claimed the film developed independently and the Benays could not prove that the defendants actually used the brothers' screenplay.[6]

The Ninth Circuit noted two important aspects of the film that resembled the Benays' screenplay and differed from *West of the Rising Sun*:

> First, the Civil War veteran is no longer a transplanted American cowboy helping to lead a Western-style cattle drive; he is now a military expert helping to modernize the Japanese Imperial Army. Second, the veteran no longer comes to Japan to work side-by-side with the samurai; he now comes to Japan to fight against the samurai.[7]

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3. *Id.* at 622-23.
4. *Id.* at 630.
5. *Id.* at 623.
6. *Id.* at 622, 629-30.
7. *Id.* at 630.

The court also examined the similarities between the film and the Benays' screenplay:

> Most notably, in both works, the protagonist is an embittered American war veteran who travels to Japan where he meets the Emperor, trains the Imperial Army in modern warfare, fights against the samurai, and in the end is spiritually restored. Both works are set at the time of the Satsuma Rebellion of 1877; both works rely heavily on the historical figure Saigo Takamori; and both works share the same title.[8]

These similarities failed the extrinsic test for copyright substantial similarity because they involved unprotectable elements, such as shared historical facts, familiar stock scenes, and "characteristics that flow naturally from the works' shared basic plot premise."[9] Though these similarities were not substantial for purposes of copyright law, the court found these similarities to be substantial for purposes of an implied-in-fact contract under California law. The district court's grant of summary judgment on the copyright infringement claim was affirmed, but the grant of summary judgment on the breach of contract claim was reversed.[10] The district court was tasked with determining whether the defendants actually used elements or ideas from the Benays' screenplay.

Even without language specifying a lower standard of similarity, the Ninth Circuit has shown a willingness to apply a lower standard in breach of contract claims under California law than that required for a copyright claim.

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8. *Id.* at 632.
9. *Id.* at 625.
10. *Id.* at 634.

TAKING A SACK: THE NFL AND ITS UNDESERVED TAX-EXEMPT STATUS

Andrew B. Delaney[†][♦]

> An insider trading scheme dressed up as a professional sport, pro football finance incorporates everything fishy in the worlds of municipal finance, urban planning, government subsidies, cable television, and, even sometimes, sports.[1]

> The pride and presence of a professional football team is far more important than 30 libraries.[2]

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† Against all odds, the author passed the bar exam and the character and fitness review, and is now an attorney practicing in central Vermont with Martin & Associates, P.C. He earned his J.D., cum laude, in 2010 from [redacted] Law School. The author would like to thank (and absolve of any responsibility) Professor Michael McCann for help and encouragement, his parents (who prefer not to be named), his wonderful fiancée (who also prefers not to be named), his soon-to-be stepchildren (who would be mortified if named), and his dog Opal (who whimpered a bit, but did not otherwise object to being named). The author would also like to thank the staff and editors of the *Sports and Entertainment Law Journal* for their hard work in making "the best out of a bad situation" and their chutzpah in publishing this so-called "article." It's brave men and women like them that make this country great.

♦ This article was written in May 2010. Other than a few minor changes, it remains intact. This saves the lazy author from having to rewrite entire sections. It's still just as much fun to read ("fun" being like an exploratory root canal). We're all well aware that the Supreme Court has already decided *American Needle*. Deal with it.

1. Matthew Stevenson, *The Football Franchise Hustle: Financing the NFL*, NEWGEOGRAPHY.COM, Jan. 2, 2010, http://www.newgeography.com/content/001299-the-football-franchise-hustle-financing-nfl.

2. GREG LEROY, THE GREAT AMERICAN JOBS SCAM: CORPORATE TAX DODGING AND THE MYTH OF JOB CREATION 157 (2005) (quoting Art Modell, owner of the Cleveland Browns and later, the Baltimore Ravens).

Sometimes words don't make a whole lot of sense.[3] You know what I mean? Like when you call a multi-billion-dollar, profit-focused business a "nonprofit"? That's nonsensical.[4] But who doesn't enjoy an interesting story?

As you may or may not know, the National Football League ("NFL") is technically a nonprofit.[5] With the NFL's current antitrust exemptions and other activities under some scrutiny, I figured it was a good time to jump on the critics' bandwagon.[6] The NFL's "nonprofit" status is questionable at best. At worst, it's a sham that has the public lining already-rich owners' pockets with ill-gotten gold.

Today, boys and girls, I'm going to tell you a wonderful story about the NFL and the Internal Revenue Service ("IRS"), and how they met and fell in love. Okay, in all candor, it might not be a wonderful story and the NFL and IRS may not exactly be in love. Perhaps that entire sentence was just made up because I thought it sounded cute. I'm claiming creative license. So sue me.[7]

I'll try to keep this lively. Law review articles are generally boring. I know this; you know this.[8] Your average

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3. I'm not talking about an oxymoron (although a moron on OxyContin usually doesn't make a whole lot of sense either). I'm talking about regular irony.

4. Yes, I'm going to use contractions in this piece. As a former member of a law review, I've had to slog through some dry, boring, pretentious, excruciatingly "correct" legal scholarship. I believe legal scholarship can—and should—read like normal writing and needn't follow outdated and arguably pointless "rules." On that smarmy note, *see* BRYAN A. GARNER, THE REDBOOK § 1.78(c) (2d ed. 2006). If you noticed that I don't double-space after periods, I have a rule for that too. *Id.* § 4.12. Despite my smarminess complex, I'll do my best to make you smile as you read this. So smile, damn you.

5. 26 U.S.C. § 501(c)(6) (2006).

6. *See* discussion, *infra* Part II.B. Bandwagon circa May 2010.

7. You know you could do it too, you big, bad legal scholar, you.

8. So does Thomas E. Baker. I owe him a great debt for his compilation of law review humor. Indeed, some of the footnotes in this article will be copied (read stolen) directly from his fine work: Thomas E. Baker, *A*

law review article is an unparalleled sleep aid. "Indeed, whenever a judge, a lawyer, a law professor, or a law student writes something truly funny he or she runs the risk of waking up days later, in restraints and sedated in a little room with a fellow in a white coat holding a clipboard."[9]

So in an effort to earn myself a bed at the Danvers State retreat, I embark on this endeavor: write an article about the NFL's tax status that is both informative and funny.[10] This is no easy task. Tax law is a particularly unfunny subject.[11] Add to that the unsexy law-review-article format and you've got a recipe for a real sleeper.[12] But I'm confident that with enough cheap shots, juvenile humor, amusing quotes—and of course, plenty of footnotes—I'll be able to hold your attention for the requisite three or four pages that it'll take to get this pile—err, gem of legal analysis—past the articles committee.[13]

As was drilled into my head often enough during law school, a law-review-style article should have an introduction.[14] Check. The introduction also should have a

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Compendium of Clever and Amusing Law Review Writings: An Idiosyncratic Bibliography of Miscellany with In Kind Annotations Intended as a Humorous Diversion for the Gentle Reader, 33 Drake L. Rev. 105 (2002). Thanks Professor Baker.

9. *Id.* at 106.

10. The first part is required for a particularly wonderful seminar. The latter is for my—and hopefully your—amusement.

11. Says me. *But see* Paul L. Caron, *Tax Myopia or Mamas Don't Let Your Babies Grow up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (discussing the funnier things about tax law and those who practice it).

12. *See* Thomas E. Baker, *Tyrannous Lex*, 82 Iowa L. Rev. 689, 712 (1997) ("[L]aw reviews are to law what masturbation is to sex.").

13. Don't forget, I'm a law-review geek myself. Know how I know *you're* a law-review geek? Because you're reading this footnote and thinking, "Wow, he properly hyphenated 'law-review' when it was used as a phrasal adjective." If I'm wrong, then there's still hope for you.

14. Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL EDUC. 247, 253–54 (1998).

roadmap paragraph.[15] Supposedly, the roadmap paragraph is helpful for the busy reader.[16] But that's a big load of bovine excrement. The roadmap paragraph is for me to organize my otherwise incoherent ramblings into some semblance of cogency—or put another way—to make sense of nonsense.[17] Isn't legal writing fun?

That's a sarcastic rhetorical question. But now that I've talked about a roadmap paragraph and written most of this piece, I suppose it's time to get on with it. Here goes: Part I of this article discusses the NFL's current tax status. Part II attempts to put the NFL's tax and antitrust exemption in proper context. Part III analyzes the NFL business model from a critical perspective, asking whether the NFL's nonprofit status is deserved. More importantly, Part III begins with a great Dave Barry quote. This piece concludes, more or less, that the NFL should stop blowing smoke up a certain orifice of the American taxpayer and start paying its taxes.

I. THE NFL'S TAX STATUS

> Income tax returns are the most imaginative fiction being written today.[18]

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15. *See, e.g.*, Ariana Levinson, *Enhancing Roadmap Paragraphs—Legal Writing Tip*, UNIV. OF LOUISVILLE, Sept. 21, 2009, http://www.law.louisville.edu/node/3742 ("It is vital that an introduction contain such a paragraph because legal readers are busy individuals who like to see the conclusion and supporting points up-front.").
16. *Id.*
17. This necessarily means I wrote it last. I had no idea where I was going with this thing when I added this footnote. Honestly? This footnote is still here to keep my *supras* correct. That doesn't mean you can take it out. Leave it. Otherwise, you have to add a fart joke.
18. JOSEPH L. BARON, A TREASURY OF JEWISH QUOTATIONS 490 (1985) (quoting Herman Wouk).

A. Classification and Recent Filings

The NFL is a trade association, which is a tax-free entity under the Internal Revenue Code.[19] While the NFL is technically a "nonprofit," it's certainly not a soup kitchen.[20] The important thing about tax exemption for the NFL, it seems, is that it enables the NFL to function as a sort of bank for stadium deals, issuing league-backed bonds to finance new stadium construction.[21] We'll discuss that particular use of NFL funds a little more thoroughly later.[22]

But first let's talk about tax filings. It's particularly interesting to read the NFL's 2008 IRS Form 990 for the 2007 tax year. Things get a little mysterious. For example, in Part V-A, Roger Goodell is the only person listed.[23] What's interesting, of course, is that Part V-A asks filers to list "each person who was an officer, director, trustee, or key employee at any time during the year even if they were not compensated."[24] I've read a few pieces that say the NFL didn't have to disclose compensation for its other highly paid employees.[25] That aside, I haven't found anything that provides an exemption from

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19. The Internal Revenue Code is located in title 26 of the United States Code. Trade associations are defined in I.R.C. § 501(c)(6).
20. *See* John D. Colombo, *The NCAA, Tax Exemption, And College Athletics*, 2010 U. ILL. L. REV. 109, 114 (2010).
21. *See* Josh Peter, *Critics Question League's Tax-Exempt Activities*, NEW ORLEANS TIMES-PICAYUNE, July 14, 2002, at Sports 1 (discussing the NFL's financing practices).
22. *See* Part III B, *infra.*
23. NFL, IRS FORM 990 at 5 (2008).
24. IRS, FORM 990 (2007).
25. *E.g.*, Jason Albosta, *Show Me the Money: The NFL's Opposition to the IRS's New Public Disclosure Requirements for Tax-Exempt Organizations*, VANDERBILT JETLAW BLOG, Sept. 2, 2008, http://jetl.wordpress.com/2008/09/02/show-me-the-money-the-nfls-opposition-to-the-irss-new-public-disclosure-requirements-for-tax-exempt-organizations/; Jared Lehman, *The NFL Versus the IRS*, ARTICLESBASE.COM, Dec. 1, 2008, http://www.articlesbase.com/non-profit-organizations-articles/the-nfl-versus-the-irs-665341.html.

listing officers, directors, trustees, or key employees for the NFL.

In fact, the opposite seems true. The IRS's recent guide to the new Form 990 specifically states: "The 2007 Form 990 (Parts V-A and V-B) required compensation reporting regarding current and former officers, directors, trustees, and key employees . . . by all types of reporting organizations."[26] The official instructions for the 2007 Form 990, surprise, surprise, say the same thing.[27]

The only exemption the NFL could've been relying on in the past regards the listing of highly compensated employees. Until somewhat recently, only charities were required to report their top-five highest-compensated employees who received over $50,000, but were not officers, directors, trustees, or key employees.[28] According to the NFL's second-most-recent tax return, Roger Goodell makes all the decisions.[29] That's funny, because New York (where the NFL is based) requires at least three directors for a nonprofit corporation.[30] Yes, the NFL calls itself and has been called an "unincorporated" trade association, but it would seem that the NFL still fits the definition of not-for-profit "corporation" given in the New York statutes.[31] That means: (a) the NFL is

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26. IRS, BACKGROUND PAPER: FORMS 990, MOVING FROM THE OLD TO THE NEW (2008), *available at* http://www.irs.gov/pub/irs-tege/moving_from_old_to_new.pdf.
27. IRS, Instructions for Form 990 and Form 990-EZ 40 (2007).
28. *Id.*
29. *See* NFL, IRS FORM 990 at 5 (2009) (listing "total number of officers, directors, and trustees permitted to vote on organization business at board meetings" as "1").
30. *See* N.Y. NOT-FOR-PROFIT-CORP. LAW § 702(a) (2009) ("The number of directors constituting the entire board shall be not less than three.").
31. *Id.* § 102 ("'Corporation' or 'domestic corporation' means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or

playing loose with its home-state law, or (b) the NFL, uh, creatively manipulated the truth on its 2008 tax return.

The NFL was strongly opposed to the new requirements.[32] This, of course, is not too surprising. The NFL's 2009 return just confirms that the NFL doesn't take its nonprofit status too-too seriously. We're talking about an organization that paid 296 salaries over $100,000; over $7 million in legal fees; nearly a million a month for office space; $6.25 million in "travel services"; and 135 total independent contractors at least $100,000 apiece last year.[33] Clearly, there's no money left over for *taxes*.

B. The Exemption and Its History

One of the most-interesting things about Section 501(c)(6) is that it specifically mentions professional football leagues.[34] I could fill a lot of space here. I could blather on and on about Judge Grim's rulings in two cases against the NFL that, for a brief moment in history would have made the NFL

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enures [sic] to the benefit of, its members, directors or officers except to the extent permitted under this statute.").

32. *See* Albosta, *supra* note 25.
33. NFL, IRS FORM 990 at 7-8 (2009).
34. Section 501(c)(6) includes:

> Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Id. (emphasis added).

subject to antitrust law.[35] But I'm not supposed to do that.[36] Besides, I already have.[37]

One might—indeed "one" now will—speculate that this all goes back to the 1960s when Congress tried to "save" college football.[38] Though I haven't been able to find anything that specifically tells us *why* section 501(c)(6) includes professional football leagues, there are a few things worth noting: (1) the title of the act that added the language doesn't sound even remotely related to football;[39] (2) the act expanded the scope of the NFL's then-existing antitrust exemption;[40] and (3) President Lyndon Johnson didn't say jack-diddley-squat about football when he signed the bill.[41]

What we today call the "AFL–NFL Merger Act" was a couple paragraphs at the end of a bill that started off talking about defining "Section 38 property which is suspension period property . . . ."[42] I'd imagine anyone reading the entire act was

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35. United States v. Nat'l Football League, 116 F. Supp. 319, 325 (E.D. Pa. 1953); United States v. Nat'l Football League, 196 F. Supp. 445 (E.D. Pa. 1961). These cases, combined, stood for the premise that the NFL was not going to get away with pooling broadcasting rights and selling them to the highest bidder. Congress called shenanigans and poor Judge Grim, who was correct, in my opinion, got a congressional smack-down.

36. *See* Volokh, *supra* note 14, at 255 ("No one wants to slog through that.").

37. *See* Andrew B. Delaney, Note, *The NFL Network versus Cable Providers: Throwing a Penalty Flag on the Fans*, 7 WILLAMETTE SPORTS L.J. 1, 5–6 (2009) (blathering on about Judge Grim's rulings).

38. RONALD A. SMITH, PLAY-BY-PLAY: RADIO, TELEVISION, AND BIG-TIME COLLEGE SPORT 95 (2001) (discussing the events surrounding the enactment of the so-called Sports Broadcasting Act and the AFL–NFL Merger Act).

39. A Bill Suspending the Investment Tax Credit and Accelerated Depreciation Allowance, Pub. L. No. 89-800, 80 Stat. 1508 (1966).

40. *Id.*

41. Statement by the President Upon Signing Bill Suspending the Investment Tax Credit and Accelerated Depreciation Allowance, 2 PUB. Papers 596 (Nov. 8, 1966), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=28011.

42. PUB. L. NO. 89-800, 80 Stat. 1508 (1966).

so thoroughly and undeniably bored by the time they slogged through discussion on it that it passed by default. Not to belittle our public servants of 1966—this is my general theory regarding most laws that make little sense: somebody was asleep at the wheel. I like to take a "realist" approach to the law.[43] Later, I'll attribute passage of the Act to marijuana usage—stay tuned.

Presumably, the Sports Broadcasting Act of 1961 was pro-college football in that it "prohibited the pros from playing on Friday night and Saturday afternoon, the traditional times for college football."[44] This meant, theoretically, that the NFL's televised games would not detract from the collegiate fan base.[45] So, as the old saw goes, the road to hell is paved with good intentions.[46]

What I'd really like to see are the NFL's lobbying records from the 1960s. How did the NFL really convince Congress to treat it so favorably? Pete Rozelle, the Commissioner at the time, was a forward-thinking guy, but still . . . . It's a pretty impressive accomplishment. If I had half these guys' savvy, I'd be getting paid to go to law school. The financial results of the NFL's lobbying efforts in the 1960s are probably worth enough to buy several small countries.

And, actually, the roots go even deeper. Apparently, the NFL first filed for tax-exempt status with the IRS sixty-eight years ago.[47] While some of my high-school friends believe that

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43. Sometimes this does not go over so well on exams. "Obviously, the legislature had been drinking when they wrote *that* law . . ." will not win you points on your constitutional law final.
44. SMITH, *supra* note 38, at 96.
45. *Id.*
46. This saying is attributed to various sources, although it seems "the road to" was not part of the original saying. *See, e.g., The Road to Hell is Paved with Good Intentions*, ANSWERS.COM, http://www.answers.com/topic/list-of-english-proverbs (last visited Apr. 25, 2010) (discussing the suspected origins of the saying).
47. *See* Peter, *Critics*, *supra* note 21 (stating that the neither the IRS nor the NFL know where the original filing is).

in 1942 Columbus sailed the ocean blue . . . that's actually when the NFL officially filed with the IRS for tax-exempt status.[48] Much like the ships Columbus sailed, little remains of the NFL's original application.[49]

i. Pretty Decent Salaries for a "Nonprofit"

It's been reported that former NFL Commissioner Paul Tagliabue made $11.3 million in 2003.[50] Tagliabue "retired" in 2006.[51] According to the numbers on the NFL's second-latest publicly available Form 990, he still got over $3.5 million in regular compensation in financial year 2008.[52] Another source speculates that Roger Goodell would have made $11.2 million, prorated, based on the NFL's tax filing for financial year 2006.[53] With the economy in the proverbial toilet in 2008, Goodell took a pay cut for the fiscal year.[54] Then Goodell voluntarily froze his salary for 2009.[55] Not too surprisingly, Goodell just received a five-year contract extension.[56] Goodell, of course, is still making around $10 million a year.[57] Two-

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48. *Id.*
49. *Id.*
50. Tripp Mickle, *Bettman, Daly get $2M raises*, SPORTS BUSINESS DAILY, June 11, 2001, at 1, *available at* http://www.sportsbusinessjournal.com/article/55422.
51. AP, *NFL commissioner Tagliabue to retire in July*, ESPN.COM, Mar. 26, 2006, http://sports.espn.go.com/nfl/news/story?id=2376850.
52. NFL, IRS FORM 990 at 6 (2009).
53. Darren Rovell, *NFL's Roger Goodell—He's Earned His Pay*, CNBC.COM, Feb. 26, 2008, http://www.cnbc.com/id/23353673.
54. *NFL Commissioner Roger Goodell Takes a Pay Cut Because of the Economy*, LATIMES.COM, Feb. 26, 2009, http://articles.latimes.com/2009/feb/26/sports/sp-newswire26.
55. Curtis Eichelberger, *NFL Extends Commissioner Goodell's Contract to 2015*, BLOOMBERG.COM, Feb. 12, 2010, http://www.bloomberg.com/apps/news?pid=20601079&sid=aoGDl1W3SPT8.
56. *Id.*
57. *Id.*; *see also* NFL, IRS FORM 990 at 7 (2009) (listing Goodell's compensation at $9.76 million).

hundred-ninety-six NFL employees made over $100,000 last year, and the NFL paid 135 independent contractors more than $100,000 last year.[58]

So what's my point? Interesting that you should ask—I was just thinking the same thing myself. Most people don't think of the NFL as a nonprofit. Even people who know that the NFL is a nonprofit have a hard time believing it. Take, for example, a recent article that presumably lists the highest-paid nonprofit executives: there's no mention of Roger Goodell's salary although his total compensation is double that of the highest-paid executive on the list.[59]

C. So is the NFL Really a Nonprofit?

John Brothers has made some interesting observations, comparing the NFL and the Courage Center, a small Minnesota nonprofit.[60] Brothers argues that the Courage Center is a true nonprofit whereas the NFL is exploiting the status.[61] He points to the disparities between two February 7, 2010 events: (1) the NFL's Super Bowl and (2) the Courage Center's $15,000-goal fundraiser. One obvious problem with his premise is that the NFL is a 501(c)(6) and the Courage Center is a 501(c)(3). But once you get past that classification, the larger question

58. NFL, IRS FORM 990 at 7 (2009).

59. *See* Del Jones, *Big Non-Profit Organizations Have Highly Paid Leaders*, USA TODAY, Oct. 2, 2009, http://www.usatoday.com/money/companies/management/2009-09-27-nonprofit-executive-compensation_N.htm (listing David Swensen of Yale University as the highest-paid nonprofit employee with a total compensation package of $4,389,727.00). In all fairness, however, there is a disclaimer footnote that reads, "Other non-profit organizations may pay their executives more than executives listed here."

60. John Brothers, "Flag on the Play" for a Multi-Million Dollar Nonprofit, STANFORD SOCIAL INNOVATION REV., Feb. 19, 2010, http://www.ssireview.org/opinion/entry/flag_on_the_play_for_a_multi-million_dollar_nonprofit/.

61. *Id.*

remains: Do we really think the NFL deserves to be exempt from federal tax?

One of the disparities that Brothers points out is poignant. He notes that the NFL brought in over $450 million with the Super Bowl while the Courage Center worked toward a $15,000 goal.[62] "The highest donation category for the Camp Courage event was the 'Mikhail Baryshnikov' level at $100. The Super Bowl sold 30-second commercial advertising space for approximately $2.6 million dollars a spot."[63] Wow. For the price of a 30-second spot, you could give every person who lost their job in 2008 a dollar.[64] Or you could pay off my student loans. Personally, I thought the 2010 commercials were lousy. Doritos set the bar too high in 2009 with the *Snow Globe* commercial.[65]

II. A LOGICAL EXPLANATION?

> A billion here, a billion there—pretty soon it adds up to real money.[66]

And that's the rub. Even if we recognize the social goods the NFL provides through its charity work and its facilitation of sometimes-hilarious Super Bowl Commercials,[67]

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62. *Id.*
63. *Id.*
64. *See* David Goldman, *Worst Year for Jobs Since '45*, CNNMONEY.COM, Jan. 9, 2009, http://money.cnn.com/2009/01/09/news/economy/jobs_december/ (noting that the year's total job losses were at 2.6 million for 2008, the highest level in six decades).
65. You must watch this commercial. DORITOS: SNOW GLOBE (2009), *available at* http://suberbowlads.fanhouse.com/2009/doritos-snow-globe/.
66. ROBERT BYRNE, 1,911 BEST THINGS ANYBODY EVER SAID 177 (1988) (quoting Senator Everett Dirksen).
67. *See, e.g.*, Canisius College, *Laughter is the Best Medicine*, SCIENCEDAILY.COM, Jan. 26, 2008, http://www.sciencedaily.com/releases/2008/01/080124200913.htm (discussing the science-based benefits of laughter). There, now that I've

its tax-exempt status is undeserved. Other than two acts dating from the 1960s—when everybody was high on the wacky-weed[68]—there's no logical explanation for the NFL's tax-exempt status.

Now comes the boring part. Here, I'll attempt to explain legitimate reasons why things currently are structured as they are—and without reference to legislators during the '60s being stoned out of their gourds.[69] First, let's talk about how television worked back before YouTube, Hulu, and Google.[70]

A. TV Nation

Back in the '60s, cable television was not as widespread as it was today. Early on, in the late-'40s to early-'50s "cable" or CATV, was just local broadcast channels "piped" into homes using coaxial cable and signal boosters.[71] By the mid-'50s, microwave technology made it possible for cable providers to provide signals from farther off.[72] But local stations didn't like that, especially since CATV providers started bypassing local stations in favor of big-city stations.[73]

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backed it up with a legitimate source, go watch the Doritos commercial—it's good for what ails you.

68. See my dad and his old college buddies. They'll tell you. My dad will even tell you about how he went to Woodstock with a bunch of sissies who had to go home to shower. I bet it was my dad.

69. Ha! I lied. Just by saying I wasn't going to reference it, I did. Aren't I clever? No, you shut up.

70. And even before the Internet itself. Al Gore didn't invent the Internet until the 1970s. *But see*, Snopes.com, Internet of Lies, http://www.snopes.com/quotes/internet.asp (last visited May 1, 2010) (noting that Al Gore never said that). I told you there would be cheap shots; there you go.

71. *See, e.g.*, Kansas State University, *History of Cable TV*, Sept. 8, 2008, http://www.k-state.edu/infotech/cable/history.html (discussing the history of cable television). CATV stands for "community antenna television." *Id.*

72. *Id.*

73. *Id.*

Congress and the Federal Communications Commission ("FCC") held hearings on the issue during the late-'50s and early-'60s, but business as usual continued.[74]

Then, in 1963, somebody appealed an FCC decision.[75] Ironically, that would set the stage for the exact kind of regulation that was being protested.

Carter Mountain Communications was a carrier that wanted to construct a microwave-radio-communication system to transmit distant signals to CATV systems in Wyoming.[76] They filed an application with the FCC. A local Wyoming television station protested.[77] The FCC denied Carter Mountain's application because, essentially, Carter Mountain's refusal to carry the local station would result in the demise of the local station and cause a loss of service for rural customers not within the CATV system's coverage area.[78]

Carter Mountain appealed the decision and the D.C. Circuit affirmed.[79] This decision led to the FCC issuing two orders that essentially favored local broadcasting over the long-distance cable broadcast model.[80]

So what's with the history lesson? Think back to when the AFL–NFL Merger Act was passed.[81] It was passed about eight months after the FCC said cable companies couldn't screw over the local channels.[82] What that means is that when

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74. *See* Megan Mullen, *Distant Signal: Cable Television Transmission Technology*, MUSEUM OF BROAD. COMM., http://www.museum.tv/eotvsection.php?entrycode=distantsigna (last visited May 1, 2010) (discussing early regulatory efforts).

75. Carter Mountain Transmission Corp. v. F.C.C., 321 F.2d 359 (D.C. Cir. 1963).

76. *Id.* at 361.

77. *Id.*

78. *Id.*

79. *Id.* at 366.

80. 2 F.C.C.2d 725 (1966); 1 F.C.C.2d 453 (1965).

81. November 8, 1966. *See* 2 PUB. PAPERS 596 (Nov. 8, 1966).

82. Actually, that's my colorful distillation of over 100 pages of FCC materials from 1965–66. *See* F.C.C. Rulings, *supra* note 80 (reading them yourself if you don't believe me).

the AFL–NFL Merger Act was passed, it *wasn't that big a deal*. It really wasn't. You didn't have cable or satellite TV like we do today; you didn't have ESPN or the NFL Network. This stuff wasn't on the radar. It was all about local markets. At that point who cared if the NFL pooled broadcast rights and got an antitrust exemption? Who was really getting hurt by that?

Nobody. The 1966 rulings "temporarily limited growth of CATV in the nation's top 100 broadcast television markets."[83] Then, in 1968, the Supreme Court upheld the FCC's freeze on importation of distant signals into the top 100 markets.[84] What this effectively meant was that CATV was only useful in places with poor signal strength—it was local channels first and foremost unless you were out of range of all channels. The market for big-time, big-money cable-based channels was nonexistent. It wasn't until 1972 with a relaxation of the freeze and the advent of HBO that the potential for today's high per-subscriber, sports-broadcasting markets existed.[85] Point is, when the NFL got its exemptions, there wasn't much of anything for anyone to get upset about.

Because the exemptions were granted at the right time, they "flew under the radar" so to speak. Today, those antitrust-exempt media rights are worth several billion per year.[86] ESPN alone pays over a billion a year for its NFL media rights.[87] And for a very long time, football was only on network television—it was 21 years after the exemptions were granted that the NFL first branched out to cable.[88]

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83. Mullen, *supra* note 74.
84. United States v. Sw. Cable Co., 392 U.S. 157 (1968).
85. Kansas State University, *supra* note 71.
86. *See NFL Media Rights Deals For '07 Season*, SPORTS BUS. DAILY, Sept. 6, 2007, http://www.sportsbusinessdaily.com/article/114714 (listing the values of the NFL's various media rights deals).
87. *Id.*
88. Norman Chad, *NFL's New TV Deal Is Set: ESPN to Get 8 Sunday Night Games*, WASH. POST, Mar. 13, 1987, *available at* http://articles.latimes.com/1987-03-13/sports/sp-5390_1_night-games.

The major takeaways from all this: (1) in a historical context, the exemption was relatively benign; (2) time, coupled with changes in technology and potential markets, created the tax-exempt media-rights juggernaut that exists today; and (3) it's all ESPN's fault.[89]

B. Current Events

Closer scrutiny of the NFL's market position is hopefully imminent. With the *American Needle* case before the Supreme Court, the NFL's antitrust exemptions could be called into question.[90] At base level, *American Needle* is a simple contractual dispute over who gets to make NFL-licensed headgear.[91] The dispute at issue, however, gives the Court an opportunity to assess whether the NFL is a "single entity" for antitrust purposes.[92] As some commentators suggest, the NFL is hardly a single entity.[93]

Without turning this piece into a primer on antitrust law, let me attempt to explain briefly the issue in *American*

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89. *Sports Illustrated* had nothing to do with the NFL profiteering from its tax-exempt status. Just saying.

90. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201 (2010).

91. *See* Michael A. McCann, *American Needle v. NFL: An Opportunity To Reshape Sports Law*, 119 YALE L.J. 726, 729 (2010) ("Although American Needle illuminates deep tensions between professional sports league behavior and customary expectations of antitrust law, it concerns a mere contractual dispute over caps, visors, and other headwear.").

92. *See id.* at 729 ("This Feature will conclude with a recommendation that the Court reject the NFL's single entity defense on the grounds that it would belie legal precedent and mistakenly characterize league operations.").

93. *See id.* at 747 (noting that every Circuit Court of Appeals that had considered the issue before the Seventh Circuit in *American Needle* had not adopted the "single entity" argument, and in fact, several circuits have expressly rejected it); *see also* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 893 n.11 (2008) (citing cases).

Needle. Antitrust law, Section One of the Sherman Act specifically, prohibits entities from acting together to unreasonably restrain trade.[94] When the government prosecutes, it's a felony and can carry a pretty hefty fine.[95] A private party can also bring a claim under Section One. One essential premise for our purposes is that a single entity cannot compete against itself—it's analogous to a dog chasing its tail. A single entity is not subject to Section One, whereas a joint venture—which is what the NFL has often been classified as—is.[96]

Here the NFL sold exclusive apparel-licensing rights to Reebok in a departure from its prior practice of selling apparel-licensing rights to various companies. American Needle was one of the companies that previously had a license.[97]

The Seventh Circuit held that the NFL should be treated as a single entity in this transaction because it was promoting a common interest—specifically that of all the member teams as a whole when selling licensing rights.[98] The NFL wants the Supreme Court to adopt the Seventh Circuit's reasoning, perhaps expanding the logic and recognizing the NFL as a single entity in all its dealings.[99] That would be like Chrismahanakwanzaaka for the NFL.

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94. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

95. *See id.* Of course, it would be interesting to see what the NFL would classify itself as if charged. Technically, it's an unincorporated association.

96. *See* McCann, *supra* note 91, at 738 (citing N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982)).

97. *Id.* at 732–34 (discussing background).

98. *Id.* at 734.

99. *Id.* at 734–36.

The fundamental fallacy, of course, is that the NFL must have competition to survive. The NFL can't properly be classified as a single entity because it consists of several independently owned teams that compete against each other. Though those teams might share some common interests, like the league's overall success and the success of its products, they just aren't aligned enough to be considered a single entity for many activities.

Consider, for instance, if all the teams' interests were aligned enough to warrant consistent treatment as a single entity: Would football still be worth following? If the league is treated as a single entity, the integrity of the game is compromised. Who's to stop the league from deciding that a certain team in a certain city needs to win the Super Bowl in a certain year because that will bring in a lot more revenue than if another team wins? It's not so far-fetched: winning teams increase the fan base, revenues, incidental sales, and so on. The NFL already conditions hosting Super Bowls on stadium improvements.[100] Professional football could become professional wrestling. Not that this is necessarily going to happen, but expecting the NFL to play by the rules when there, essentially, are no rules is like putting Gary Glitter in charge of a Girl Scout troop.

This is grossly oversimplified, of course, but should suffice as necessary background. Besides, a gifted and incredibly talented sports-law scholar has already written a poignant article on the *American Needle* case.[101]

At extremes, *American Needle* could either cement the NFL's antitrust-exempt status in all its activities or subject all

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100. *See* Michael David Smith, *Goodell: Dolphins' Stadium Needs Improvements*, PROFOOTBALLTALK.COM, Dec. 7, 2009, http://profootballtalk.nbcsports.com/2009/12/07/goodell-dolphins-stadium-needs-improvements/ ("And if those problems aren't fixed, the NFL says it will take Miami out of the rotation for future Super Bowls.").

101. *See generally* McCann, *supra* note 91. Full disclosure: the particular sports-law scholar I mention also graded this paper.

the NFL's activities to antitrust analysis. While there are sometimes legitimate reasons to consider common goals in professional sports for certain activities, the single entity defense is dangerous because it gives free rein for the NFL to engage in all kinds of anticompetitive behavior.

For purposes of this article, it's sufficient to recognize that revenue that goes to the NFL through apparel-licensing activities, at least in part, gets funneled into tax-exempt income for the NFL in the form of membership dues and assessments paid to the NFL.[102]

III. TYING IT ALL TOGETHER

> Here's my proposal, which is based on the TV show "Survivor": We put the entire Congress on an island. All the food on this island is locked inside a vault, which can be opened only by an ordinary American taxpayer named Bob. Every day, the congresspersons are given a section of the Tax Code, which they must rewrite so that Bob can understand it. If he can, he lets them eat that day; if he can't, he doesn't.[103]

A. So What's Going on, Exactly?

At this point, I should probably mention that apparel-licensing and other media rights are sold, on behalf of the teams, by NFL Properties, LLC, a for-profit company. I should also mention that the NFL Network is owned by NFL Enterprises, LLC, also a for-profit company.[104] Now, before

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102. The NFL received roughly $166 million in unspecified "membership dues and assessments" in the year ending March 31, 2008. NFL, IRS FORM 990 at 1 (2009).

103. Dave Barry, EGTRRA, EGTRRA; Read All About It! Tax Writers Marooned on Island!, WASH. POST, Apr. 13, 2003, at W-32.

104. *See, e.g.*, NFL Enters., LLC v. Comcast Cable Commc'ns, LLC, 841 N.Y.S.2d 220 (Sup. Ct., 2007), *aff'd in part, modified in part*, 851 N.Y.S.2d 551 (App. Div. 2008), *available* at http://decisions.courts.state.ny.us/fcas/

you track me down and send me nasty emails for wasting your time with all that rights-licensing financial data and history, let me tie it all together.

These companies, although technically for-profit, help to finance the NFL—the tax-exempt entity that promotes the interests of its 32 member teams.[105] That might sound a little strange . . . because it is. I like to call it creative reallocation of asset priorities, though some people might call it something ugly like "money laundering."

A donation to the NFL would not be tax deductible (as opposed to a donation to a 501(c)(3) corporation).[106] But membership dues are tax deductible, at least the portion of the dues that are not used for lobbying activity.[107] The league spent just about $1.4 million in 2009 lobbying, up from about $1.0 million in 2008.[108] The 2008 Form 990 discloses an expenditure of just about $1.3 million, on which the NFL elected to pay tax.[109] We just get a cryptic $851,000 from the NFL's 2009 filing, although presumably a lot more should be

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fcas_docs/2007may/3006034692006002sciv.pdf (naming NFL Enterprises, LLC as the plaintiff-in-fact in an NFL Network dispute).

105. *See, e.g.*, NFL, IRS Form 990 at Additional Data Table (2009) (showing relationships between the tax-exempt NFL and its for-profit subsidiaries).

106. IRS.GOV, PUBLICATION 557, CHAPTER 4 (2008), *available at* http://www.irs.gov/publications/p557/ch04.html.

107. *Id.*

108. *See* Curtis Eichelberger & Jonathan D. Slant, *NFL Owners, Players Lining Up Lobbyists for Labor Showdown*, BLOOMBERG BUS. WEEK, Feb. 5, 2010, http://www.businessweek.com/news/2010-02-05/nfl-owners-players-lining-up-lobbyists-for-labor-showdown.html; *see also* The Center for Responsive Politics, *Lobbying: National Football League*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?lname=National+Football+League&year=2008 (last visited Apr. 11, 2010).

109. 26 U.S.C. § 6033(e)(2)(C) provides that lobbying and political expenditures are taxed as income for otherwise-exempt organizations.

there.[110] As far as the total taxes paid—well, we're talking fractions of a percent on total revenue. Follow the circular route of the money, and the NFL could be called a glorified tax shelter.

Here's how it works.[111] Through for-profit companies, the NFL sells licenses to use NFL intellectual property, broadcast games, etcetera, making a ton of money. That money is then distributed to the individual teams.[112] The individual teams, in turn, pay their "dues and assessments" to the NFL. I don't intend to mislead—some taxes certainly get paid here. The teams are considered for-profit and pay regular taxes. The teams' tax liability is significantly reduced, however, when they pay their tax-deductible "dues and assessments." How much and what gets taxed is just not publicly available. And it should be if the NFL is going to enjoy tax-exempt status.

The NFL does not pay state taxes. As a "tax-exempt trade association" it has no filing requirement. This is straight from the horse's mouth, boys and girls.[113]

The public doesn't get specific data on the "dues and assessments" the NFL reports as its revenue, but it's fair to speculate that, split equally among the 32 teams, you're looking at about $5 million in "dues and assessments" per team.[114] Basically, what you end up with is roughly $160 million in tax write-offs for the teams, and the same $160

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110. *See* NFL, IRS FORM 990 at Schedule C (2009) (espousing vagueness proficiently). *But cf.* Dave Levinthal, *Politicians Score Significant Cash From NFL Owners, Coaches and Players*, OPENSECRETS.ORG, Sept. 17, 2009 ("The NFL's lobbying activity has increased considerably during the past two years, with lobbying expenditures on pace this year to reach $1.4 million.").

111. I own this; any errors are entirely my fault.

112. Whether the income is taxed at this level is not public knowledge—as far as I've been able to tell.

113. Email from Brian McCarthy to the Author (May 14, 2010) (on file with author).

114. Based on 2008 filing; the figure would be higher based on the 2009 filing.

million as tax-free income for the NFL. To be honest, I don't find that particularly disturbing—I'm even impressed with the model's inherent ingenuity.

What bothers me is what the NFL does with the money afterwards. This brings us to perhaps the most important point in this extremely important article.[115] I like to call this corporate welfare at gunpoint. See, the poor NFL teams need new stadiums.[116] For the sake of argument, I'm willing to accept that. But the financing structure is something that only Bernie Madoff's mom could love.

B. The G3 Program

The NFL runs a program to help finance building new stadiums for its teams.[117] This program was started in 1999.[118] "Under . . . G3, the league grabs $1 million in television revenues from each team and uses the money as collateral to float bonds for stadium construction."[119] See, I told you it was all tied together. It's not the fact that the bonds are issued, though; it's the terms that raise my eyebrows. First, the NFL requires teams to get public funding for the project.[120] For a team to get funds, "the stadium construction project must be a 'public–private partnership' to which public authorities and an

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115. Creative license.
116. Excuse the sarcasm, please.
117. *See, e.g.*, Anthony Schoettle, *Labor Tiff Puts Loan for Stadium in Limbo*, INDIANAPOLIS BUS. J., Feb. 27, 2006, *available at* http://www.allbusiness.com/labor-employment/labor-relations-labor/10581919-1.html (describing the G3 loan program).
118. *Id.*
119. Bill Saporito, *Sport: The American Money Machine*, TIME, Dec. 17, 2004, *available at* http://www.time.com/time/insidebiz/article/0,9171,1009631-3,00.html.
120. *See* Josh Peter, *Bank of NFL; Sure, if Teams can Secure Taxpayer Money*, NEW ORLEANS TIMES-PICAYUNE, July 14, 2002, at S1, *available* at http://apse.dallasnews.com/contest/2002/writing/over250/over250.enterprise.fourth2.html.

affected club each have committed funds."[121] From this seemingly benign language springs the requirement that owners secure public financing through their home city, often through tax-free municipal bonds.[122] Owners can threaten to move if a city won't cough up the money.[123]

Some argue that new stadiums bring social benefits to an area by bringing economic benefit to a city and fostering a sense of municipal pride.[124] This argument, of course, has some merit. For me, it's the NFL's play upon that municipal pride and the economic benefits that makes the whole thing Marv-Albert-esque perverted. It's the quintessential "offer you can't refuse" for the team's city.

And then the NFL provides the club. If the city doesn't provide the funds, then the NFL won't either. It needs to be a "public–private partnership." Except the way it works out, the only people who truly benefit from the transaction, the owners, end up contributing just a nominal percentage of the required total.[125] "No matter how the NFL does the math, it's clear

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121. CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE 1999-4 (2006), *available at* http://static.nfl.com/static/content//public/static/html/careers/pdf/co_.pdf; *see also* Peter, *Bank of NFL*, *supra* note 120 (quoting "NFL documents" obtained by the paper).

122. *See* Stevenson, *supra* note 1 (discussing the NFL's financing structure).

123. *See* Peter, *Bank of NFL*, *supra* note 120. There is a restriction under the G3 program if a new stadium involves moving out of the team's "home territory," but the team's "home territory" generally means a 75-mile radius—plenty of room to move to a rival city. *See* CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE 1999-4, ART. 4.1 (2006).

124. *See, e.g.*, Scott Herhold, *A Stadium is not Just About The Money*, MERCURY NEWS.COM, Apr. 19, 2010, http://www.mercurynews.com/ci_14900456 (arguing that new stadiums potentially bring more benefit than costs).

125. *See* Josh Peter, *Building NFL Fortunes*, NEW ORLEANS TIMES-PICAYUNE, July 14, 2002, at S1, *available at* http://apse.dallasnews.com/contest/2002/writing/over250/over250.enterprise.fourth1.html.

who's shouldering stadium costs: The public pays one huge share, and fans pay another."[126]

Once again, here's how it works: The new stadium is financed with a combination of public money, NFL loans, and owner-provided financing, sometimes with private-equity investments thrown in the mix as well.[127] Through creative classification, the NFL loans are considered part of the owner's contribution.[128] But the owner only ends up contributing a very small amount.

Technically, the city owns the stadium.[129] Personal seat licenses ("PSLs") are sold through a public agency, tax-free.[130] Profits are then used to pay down the owner's share of the NFL loan. The money from the PSLs never goes *directly* to the teams, though the teams save millions of dollars in taxes and the loan from the NFL is paid down significantly, providing a very significant benefit to the owners.[131]

It doesn't end there, though. The rest of the owner's debt to the NFL is paid not from the team's coffers, but from the visiting team's share of the seat revenue.[132] "The league saves owners by borrowing the money at lower interest rates than individual teams could, then transferring the money to the owners. Borrowing owners enjoy additional savings because the league charges little interest on the loan money."[133] When you look over the NFL's 2008 Form 990, one particularly disturbing thing jumps out. According to the NFL's filing, there's over $700 million in loans outstanding in the program at 0% interest.

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126. *Id.*
127. *Id.*
128. *Id.*
129. Neil DeMause, Joanna Cagan, Field of Schemes: How the Great Stadium Swindle Turns Public Money Into Private Profit 63 (2008).
130. A personal seat license can best be described as an option to purchase season tickets. These sales are very lucrative. *See id.* at 54–56.
131. Peter, Building NFL Fortunes, supra note 125.
132. *Id.*
133. Peter, *Critics*, *supra* note 21.

C. So What Does "Inure" Mean, Anyway?

Regrettably, I must return to the boring-old tax code for a moment. We need to define "inure" because that's the main issue with the NFL's exemption. What exactly does it mean when the Code requires that "no part of the net earnings . . . inures to the benefit of any private shareholder or individual"?[134]

Black's, that crusty old standby of the legal profession, defines *inure* as "[t]o take effect" or "to come into use."[135] In plain English, "inures to the benefit of" means to get a benefit from. In language Bob could understand: A nonprofit can't pass its financial benefits onto others.

"Well," Bob might say, "then what the hell is the NFL doing loaning money out to teams at rates lower than Bob could *ever* get?"[136] And we'd have to try to explain to Bob that we don't know exactly *why*; that's just the way it is. See, the owners are the real beneficiaries of the transaction. The owners get the benefit of a brand-new stadium that's paid for in large part through public funding. Then funding from a "nonprofit" trade association comprises most of the owners' share, and a good chunk comes from the visiting team's share. The owners contribute some, usually, but not a whole lot.[137]

And while the teams pay rent, the city pays the upkeep.[138] Try telling Bob that's not a racket. Somebody's going hungry on the island tonight.

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134. 26 U.S.C. § 501(c)(6) (2006).

135. BLACK'S LAW DICTIONARY 370 (2d Pocket ed. 2001). I mean *crusty* in the most-affectionate way.

136. I guess our Bob, much like former Senator and Presidential Candidate "Bob" Dole, likes to talk about himself in the third person.

137. Peter, *Bank of NFL*, *supra* note 120.

138. *See, e.g.*, Will Reisman, *Putting a Value on the City's Pigskin Payoff*, S.F. EXAMINER, Apr. 30, 2010, http://www.sfexaminer.com/local/Putting-a-value-on-The-Citys-pigskin-payoff-92554659.html ("[T]he 49ers pay the city agency $5.5 million each year. However, the Recreation and Park Department spends $4.1 million maintaining the facility, making it a net of

But the NFL's lawyers say it's all okay: "Just because it's never been done before doesn't mean that there's anything wrong with it."[139] I don't know about you, but I've always thought that was a great argument. I wonder if that would fly in school. You know: *Uh, Professor Jones? I know I skipped class a lot and didn't ever complete the readings. And I know my essay isn't even about the question on the exam . . . but I still think you should give me an "A"—just because it's never been done before doesn't mean that there's anything wrong with it.* I think I'll try that. Apparently, these gems of logic are worth $7 million-plus a year.[140]

I think we can all agree that the owners benefit from the NFL's nonprofit status. Perhaps the NFL would argue that "net earnings" is the operative language in the clause. The NFL does run at a loss, "losing" about $35 million a year.[141] That's kind of funny because the seven salaries the NFL was required to report alone add up to $26 million last year.[142] And 296 employees make over $100,000.[143] Gee, how is the NFL running at a loss?[144]

If the NFL isn't violating the letter of nonprofit status, it's certainly violating the spirit.

IV. CONCLUSION

Major League Baseball ("MLB") recently made the switch from a not-for-profit business league to a for-profit

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$1.4 million for the agency, a modest contribution for a department with a $117 million budget.").

139. Peter, *Critics*, *supra* note 21 (quoting Andrew Friedman of Covington & Burling).

140. NFL, IRS FORM 990 at 10 (2009) (listing $7,054,664 paid to Covington and Burling for "Legal").

141. NFL, IRS FORM 990 at 1 (2009); NFL, IRS FORM 990 at 1 (2008).

142. That's just the compensation paid by the NFL directly. NFL, IRS FORM 990 at 8 (2009).

143. *Id.*

144. This is pure sarcasm, just in case you haven't caught on by now.

limited-liability company.[145] Presumably, the switch made no change in MLB's tax liability.[146] The switch was made, in part, because MLB didn't want to make the disclosures required under the new Form 990.[147]

There are two choices: if the NFL wants to be a nonprofit, it needs to start acting like one. Otherwise, it needs to change its status and start filing as a for-profit company. Based on its abuse of the status with its shady deals and its stadium "loan" program, I don't think the NFL deserves a chance to right its wrongs.

It's time for the NFL to make the switch. I'm not saying the NFL has to be pure and honest. It does, however, need to play by the rules. I really don't care how they run their business. But call it a business. Don't feed me this line about how the NFL is a nonprofit trade association. Don't try to tell me that the NFL's tax-exempt status is warranted. Show Bob some respect and pay your taxes, NFL. The rest of us do.

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145. *See* Eric Fisher, *Selig's Pay Climbs Past $18 Million*, SPORTS BUS. DAILY, Feb. 2, 2009, http://www.sportsbusinessjournal.com/article/61475 (noting MLB's change in tax status).
146. *Id.* (Yes, I find that hard to believe too, but who knows . . . .).
147. *Id.*

TAX LAWS QUARTERBACK THE BUSINESS OF FOOTBALL

Crystal E. L. Knysh

Mr. Delaney's article argues the National Football League's ("NFL") tax exempt status as a non-profit is undeserved and that there is no logical explanation for the enormous benefit it affords the league. With a profit focused business model, a commissioner speculated to make approximately $10 million each year, hundreds of NFL employees making over $100,000 each year, multitudes of independent contractors being paid more than $100,000 per year, and Super Bowl commercials bringing in millions of dollars for each 30-second spot, it is hard to believe the NFL is in fact a "non-profit."

The NFL's tax exempt status dates back to the 1960s when changes in technology and potential markets led to the Federal Communications Commission's ("FCC") creation of tax-exempt media rights favoring local broadcasting over the long-distance cable broadcast model.[1] Today those antitrust-exempt media rights are worth several billion dollars a year. Judicial scrutiny of the NFL's market position came in May 2010 in a decision by the United States Supreme Court that ruled the NFL is not a single entity for purposes of Section One of the Sherman Antitrust Act when it comes to the marketing of the teams' individually owned intellectual property.[2] The key to the court's decision stemmed from its conclusion that the teams were independently owned.[3] The "teams are acting as

1. Carter Mountain Transmission Corp. v. Fed. Commc'ns Comm'n, 321 F.2d 359, 361, 365-66 (D.C. Cir. 1963).
2. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2201 (2010).
3. *Id.* at 2213.

separate economic actors pursuing separate economic interests, and each team therefore is a potential independent center of decision making".[4] Despite collectively pledging some of their licensing responsibilities to the NFLP, each team within the NFL remains the owner of its intellectual property rights.[5] While Section One of the Sherman Act specifically prohibits entities from acting together to unreasonably restrain trade, the Supreme Court ruled that the NFL teams compete with each other for merchandising and each have their own intellectual property rights so they cannot be considered a single entity for antitrust purposes.[6] They are separate, profit maximizing entities, and their interests in licensing team trademarks are not necessarily aligned.[7]

The U.S. Supreme Court's ruling in *American Needle* corroborates Mr. Delaney's assumption that the NFL cannot properly be classified as a single entity due to the fact that it consists of several independently owned teams that compete against each other. Mr. Delaney argues that although the teams all share common interests in the success of the league and its products, they simply are not aligned enough to be considered a single entity. The *American Needle* decision solidifies the idea that the NFL cannot have free rein to engage in anticompetitive behavior.

The NFL is not the only player in the sports world hiding behind the guise of being a non-profit. The Tostitos Fiesta Bowl was recently forced to disclose to the Internal Revenue Service ("IRS") that it is reviewing expenditures related to political campaign contributions and questionable expenses that may be in violation of its tax-exempt status.[8]

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4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. Dennis Wagner and Craig Harris, Fiesta Bowl Report: CEO Junker Fired Amid Multiple Probes, Ariz. Republic, Mar. 28, 2011, http://www.azcentral.com.

John Junker, Fiesta Bowl president and CEO, was fired for allegedly misusing bowl funds.[9] The Scottsdale, Arizona-based Fiesta Bowl involves four nonprofit sponsorship organizations directed by a 24-member board consisting of community and business leaders.[10] The board oversees the Fiesta Bowl, the Insight Bowl, and a National Championship college football game every four years on a rotating basis.[11] With the current investigation underway, it seems imminent that the IRS will be forced to reevaluate the tax-exempt status given to sports entities which potentially could lead to changes for the NFL.

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9. *Id.*
10. *Id.*
11. *Id.*

WHAT'S THE USE? A PRIMER ON THE DEFENSE OF INDEPENDENT CREATION TO COMBAT ALLEGATIONS OF IDEA THEFT[*]

Allison S. Brehm[1]

In Hollywood, it is not uncommon for an aspiring writer to feel that someone stole his or her idea for the next big hit television show or blockbuster movie. After all, as noted by the California Supreme Court in its well-known *Desny v. Wilder* decision, there are "only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama."[2] The inescapable overlap in general ideas that many works share, coupled with a writer's desire to be credited and compensated for his work, creates an environment ripe for accusations of idea theft.

While writers can sue under copyright or a variety of other theories, California plaintiffs frequently sue for breach of implied contract. These claims are also referred to as idea submission claims or as *Desny* claims.[3] To prevail, the plaintiff must show that:

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[*] This article was originally published in substantially the same form in the *Los Angeles Lawyer* September 2010, at 28.

1. Allison Brehm is a partner of Kelley Drye & Warren LLP, where she litigates idea submission, copyright, trademark, and First Amendment issues.

2. Desny v. Wilder, 299 P.2d 257, 271 (Cal. 1956).

3. Until the Ninth Circuit's *Grosso v. Miramax Film Corp.* decision, defendants previously challenged *Desny* claims on the grounds that they were preempted under §301 of the Copyright Act. In *Grosso*, however, the court found that the element of an "implied promise to pay" for use of the idea saved the claim from preemption, because it distinguished the claim from a copyright infringement claim. Grosso v. Miramax Film Corp., 383 F.3d 965, 968 (9th Cir. 2004). Recently, the Ninth Circuit held that implied

(1) The plaintiff submitted the ideas to the defendant;

(2) The plaintiff conditioned his submission on the defendant's obligation to pay for the ideas if they were used;

(3) The defendant voluntarily accepted the disclosure of the ideas on the terms under which they were disclosed and thereby impliedly agreed to pay the plaintiff for the ideas;

(4) The defendant found them valuable; and

(5) The defendant used the ideas without paying for them.[4]

A crucial component of an idea submission claim is the unlawful use of the idea.[5] "Unlawful use" means "the defendants based the [allegedly offending work] substantially upon [the] plaintiff's ideas rather than on their own ideas or ideas from other sources."[6] The plaintiff bears the burden of proof on this issue.[7] The California Court of Appeal has

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contract claims are still subject to preemption if the plaintiff does not expressly allege an implied promise to pay. *See* Montz v. Pilgrim Films & Television, Inc., 606 F.3d 1153, 1160 (9th Cir. 2010), *vacated*, 623 F.3d 912 (9th Cir. 2010) (upholding an order dismissing implied contract claim pursuant to FED. R. CIV. P. 12(b)(6), with prejudice). On September 30, 2010, however, the Ninth Circuit ordered that the case be reheard en banc, and that the opinion not be cited as precedent by or to any court of the Ninth Circuit. Montz v. Pilgrim Films & Television, Inc., 623 F.3d 912, 912 (9th Cir. 2010).

4. Mann v. Columbia Pictures, Inc., 180 Cal. Rptr. 522, 533 n.6 (Ct. App. 1982).

5. Indeed, no matter the theory, use is a fundamental element of an idea submission claim. *See*, *e.g.*, Hollywood Screentest of Am., Inc. v. NBC Universal, Inc., 60 Cal. Rptr. 3d 279, 286, 295, 297-98 (Ct. App. 2007) (causes of action for breach of written contract, breach of implied contract, breach of covenant of good faith and fair dealing, breach of confidence, unjust enrichment, and unfair competition require showing of unlawful use); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.07[A], at 19D-86 (Matthew Bender, Rev. Ed., 2010).

6. *Mann*, 180 Cal. Rptr. at 529.

7. *Id.* at 533 n.6 (the plaintiff has the "burden of establishing, by a preponderance of the evidence, all of the facts necessary to prove . . . the defendants actually used plaintiff's ideas . . . ."); *see also* Sargent Fletcher, Inc. v. Able Corp., 3 Cal. Rptr. 3d 279, 284 (Ct. App. 2003).

explained what this burden requires: "To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). . . . The burden of proof does not shift during trial—it remains with the party who originally bears it."[8]

A plaintiff may demonstrate actual use of his idea by direct evidence or by circumstantial evidence.[9] Absent direct evidence, the defendant's access to the plaintiff's idea, together with a showing of similarity between the plaintiff's idea and the defendant's alleged offending work, may create an inference that the defendant used the plaintiff's idea.[10] That inference may be rebutted, however, when the defendant can

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8. *Sargent Fletcher, Inc.*, 3 Cal. Rptr. 3d at 284. On the other hand, the burden of producing evidence "may shift between plaintiff and defendant throughout the trial." *Id.* "Initially, the burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact . . . [O]nce that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case . . . Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established." *Id.* at 285. "If the evidence is evenly balanced, the party that bears the burden of proof must lose." *Id.* at 284.

9. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.07[A], at 19D-87 (Matthew Bender, Rev. Ed., 2010). For an example of direct evidence, Nimmer cites the case of *Musto v. Meyer*, in which the defendant candidly credited the plaintiff's article as an inspiration. However, "direct evidence of use is more the exception than the norm." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19D.07[B], at 19D-88-19D89 (citing Musto v. Meyer, 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd*, 598 F.2d 609 (2d Cir. 1979)).

10. *Hollywood Screentest of Am., Inc.*, 60 Cal. Rptr. 3d at 290–91 (citing Teich v. Gen. Mills, Inc., 339 P.2d 627, 631 (Cal. Ct. App. 1959)). For implied contract cases, substantial similarity between the works is necessary to trigger an obligation to pay. Benay v. Warner Bros. Entm't, Inc., 607 F.3d 620, 631 (9th Cir. 2010); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19.07[B], at 19D-90, § 19D.08[A] (Matthew Bender, Rev. Ed., 2010) ("In implied contract . . . cases, 'the weight of California authority is that there must be "substantial similarity" between plaintiff's idea and defendant's production to render defendant liable.'").

demonstrate that he came up with the idea independently—the independent creation defense. This defense is now playing a greater role in defeating idea submission claims. After all, any implied contractual obligation to pay for an idea is contingent upon actual use of that idea. There can be no unlawful use when the alleged offending work was conceived independently of a plaintiff's idea.

While courts have ruled on the issue of independent creation for decades,[11] courts are increasingly doing so prior to trial at summary judgment, as a matter of law. For example, in 2007, the California Court of Appeal in *Hollywood Screentest of America, Inc. v. NBC Universal, Inc*. granted summary judgment in favor of the defendants on the grounds that evidence of independent creation prevents a finding of use and is a complete defense to an idea submission claim.[12] In 2009, two more unpublished decisions on the issue followed suit.[13]

Plaintiffs have frequently challenged any determination of the independent creation defense as a matter of law on the grounds that fact questions exist regarding unlawful use. Plaintiffs typically claim that shared similarities between the works or a defendant's possible access to a plaintiff's work, however remote, preclude any finding of independent creation prior to trial. The recent California appellate decisions confirm

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11. *Hollywood Screentest of Am., Inc.*, 60 Cal. Rptr. 3d at 290-95 (upholding order granting summary judgment on claims for express and implied-in-fact contract based on uncontradicted evidence of independent creation); *Mann*, 180 Cal. Rptr. at 534-36 (affirming order granting judgment notwithstanding the verdict on the grounds that, inter alia, the "'independent effort'" of writers in developing their script provides complete defense against contractual obligation); *Teich*, 339 P.2d at 634 (affirming order granting judgment notwithstanding the verdict on the grounds that proof of independent development provides complete defense even when the defendant's concept was closely similar to that which the plaintiff had submitted); *see also* Klekas v. EMI Films, Inc., 198 Cal. Rptr. 296, 303-04 (Ct. App. 1984).

12. Hollywood Screentest of Am., Inc., 60 Cal. Rptr. 3d at 294-95.

13. *See* Kightlinger v. White, 2009 Cal. App. Unpub. LEXIS 9345 (Ct. App. Nov. 23, 2009); Scottish Am. Media, LLC v. NBC Universal, Inc., 2009 Cal. App. Unpub. LEXIS 3282 (Ct. App. Apr. 28, 2009).

that these challenges by plaintiffs are no longer successful in the face of sufficient independent creation evidence at the summary judgment stage.

As the independent creation defense plays a more prominent role in idea submission claims, questions abound as to what makes evidence of independent creation sufficient. Is testimony from the writer of the offending work enough? What about documentary evidence detailing the creation of the offending work? Does a defendant's access to the plaintiff's work doom the independent creation defense? Are similarities between the plaintiff's and the defendant's works fatal to the defense? A survey of case law reveals that, over time, defendants have learned to amass better documentation and testimony to overcome any inference of use raised by the plaintiff. Indeed, raising the defense at the earliest opportunity can save sometimes staggering litigation costs.

A. From the Marx Brothers to Shampoo

Proponents of the independent creation defense faced skepticism in their initial efforts to persuade the California Court of Appeal. For example, in 1939, in one of the court of appeal's earliest decisions on the issue, the court rejected the defense in an action for plagiarism.[14] The plaintiffs in *Barsha v. Metro-Goldwyn-Mayer* claimed that their script was used to create the Marx Brothers' motion picture *A Day at the Races*.[15] The case went to trial and the jury returned a verdict in favor of the plaintiff.

On appeal, Metro-Goldwyn-Mayer ("MGM") argued that the evidence did not support any finding of use of the plaintiffs' script.[16] The court disagreed, however, explaining that MGM's argument was "based largely upon the testimony of writers in the employ of appellants who testified that they

14. Barsha v. Metro-Goldwyn-Mayer, 90 P.2d 371 (Cal. Ct. App. 1939).
15. *Id.* at 373.
16. *Id.* at 373-74.

did not use plaintiffs' manuscript."[17] The court recognized that "if [the defendants] had independently conceived and prepared [the alleged offending work], they would not be liable to plaintiffs for damages."[18] But the court was not persuaded by MGM's evidence of its independent effort.[19] Rather, the court determined, "[u]ncontradicted denials on the part of employees of appellants [i.e., the writers] did not compel the conclusion on the part of the jury that there had been no copying of plaintiffs' manuscript."[20]

Although the *Barsha* court provided little basis for its reasoning, it appears that MGM's independent creation defense was undermined by evidence that the individual who possessed a copy of the plaintiffs' manuscript for months was the same person who took an "active part in the production of the [motion] picture," made suggestions for the film, and supervised the writer.[21] Further, the motion picture shared "numerous similarities" with the plaintiffs' manuscript.[22] On this record, the court determined that the jury's finding was supported by the evidence.

Decades later, confronted with better facts, the court of appeal in *Teich v. General Mills, Inc*. upheld judgment notwithstanding the verdict in light of the defendant's evidence of independent creation.[23] The plaintiff in *Teich* pitched a promotional idea—a kit for making sun pictures—to be used on the defendant's cereal boxes and subsequently sued for breach of contract when the plaintiff learned of the defendant's use of a similar idea.

At trial, the plaintiff proffered evidence showing that in July 1955, he pitched the idea to Otis Young, a promotions executive in a San Francisco division of defendant General

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17. *Id.* at 374.
18. *Id.* at 376.
19. See id.
20. *Id.* at 374.
21. *Id.* at 373.
22. *Id.* at 374.
23. Teich v. Gen. Mills, Inc., 339 P.2d 627, 634 (Cal. Ct. App. 1959).

Mills. Mr. Young was responsible for premiums for the division, and he had no duty to report his activities to the head office in Minneapolis. The plaintiff and Mr. Young met in person and discussed the plaintiff's idea, but ultimately nothing happened, and Mr. Young ceased responding to the plaintiff's communications.[24] Independently, an advertising agency in Kansas City conceived of a similar promotions idea prior to any contact with the head office for General Mills.[25]

After the jury found in favor of the plaintiff, the defendant filed a motion for judgment notwithstanding the verdict, which the trial court granted.[26] On appeal, the appellate court framed the inquiry at the heart of the case: "[D]oes proof that there was no copying of plaintiff's product make a complete defense, although the thing actually used by defendant was closely similar to the one which plaintiff had presented to it?"[27] In concluding that "[t]he authorities require an affirmative answer," the court held that the defendant had "proved conclusively the fact of independent development" of the idea.[28] This defense, the court explained, was absolute even though the defendant's work shared similarities with the plaintiff's.[29]

In reaching this decision, the *Teich* court looked to a 1924 decision written by Judge Learned Hand in *Fred Fisher, Inc. v. Dillingham*. Judge Hand acknowledged that "the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted."[30] Applying this principle of copyright, the *Teich* court concluded that "it follows from the absence of copying that plaintiff has no cause of action. . . . 'Here seems to be no attempt to coin money out of another's

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24. *Id.* at 629-31.
25. *Id.* at 632.
26. *Id.* at 629.
27. *Id.* at 634.
28. *Id.*
29. *Id.*
30. *Id.* at 635 (quoting Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924)).

labor.'"[31] In short, there simply was no use of the plaintiff's idea.

After *Teich*, the California Court of Appeal faced another independent creation defense in *Donahue v. Ziv Television Programs, Inc.*, a case that involved the television program *Sea Hunt*. The defendants in *Donahue*, however, did not fare as well.

In *Donahue*, the plaintiffs contended that *Sea Hunt* was a copy of the plaintiffs' format for a television show, and that the defendants breached a contract to compensate the plaintiffs for the use of their format. The plaintiffs submitted their idea to a production company, which at the time employed a producer who was working on a different show. That producer later joined forces with the production company to write *Sea Hunt*.[32] Following the jury verdict in favor of the plaintiffs, the defendants successfully moved for judgment notwithstanding the verdict.

On appeal, the defendants pointed to their evidence of independent creation and relied on *Teich* for an affirmance. The court of appeal was not persuaded, holding that the evidence before the court was not conclusive proof to uphold the judgment notwithstanding the verdict. The court explained that the evidence of independent creation may be "impressive" but still not sufficient to support an independent creation defense.[33] According to the court, the defendants' evidence was limited to "uncorroborated" testimony from the writer of the offending work that "differed sharply . . . with [the testimony] of plaintiffs' witnesses."[34] Thus, in *Donahue*, the plaintiffs' evidence was pitted directly against the defendants' evidence, with no third-party witness or genuine documentary evidence

31. *Teich*, 339 P.2d at 636 (quoting Dun v. Lumbermen's Credit Ass'n, 209 U.S. 20, 22 (1908)).
32. Donahue v. Ziv Television Programs, Inc., 54 Cal. Rptr. 130, 131-33 (Ct. App. 1966).
33. *Id.* at 132-33.
34. *Id.* at 133.

to tip the balance in favor of the defendants as there was in *Teich*.

In another paradigmatic case, *Mann v. Columbia Pictures, Inc.*, the court of appeal in 1982 upheld an order granting judgment notwithstanding the verdict on the grounds of, among other things, independent creation. The plaintiff alleged that the film *Shampoo*, which Columbia Pictures, Inc. ("Columbia") produced, was based upon a written story outline the plaintiff had submitted to a Columbia story analyst.[35]

At trial, the plaintiff testified that she registered her work with the Writers Guild of America in October 1969 and, in 1971, put her work in an envelope and gave it to her neighbor to give to Harry Caplan, an executive at Columbia. The plaintiff had never met Mr. Caplan before trial.[36] At the time of the submission, Mr. Caplan was employed by Filmmakers Corporation ("Filmmakers"), but his salary was paid by Columbia because of an arrangement regarding the release of the film *Happy Birthday, Wanda June*.[37] Filmmakers' offices were located on Columbia property, but the court determined that "geographical proximity . . . does not indicate any connection between Mr. Caplan and Columbia's story department."[38] Mr. Caplan was not involved with any creative aspects of Columbia's films, and he never read stories for, or worked in, the studio's story department.

Mr. Caplan admittedly passed the plaintiff's envelope to a "reader" at Filmmakers but not to anyone at Columbia. The reader reviewed material for Filmmakers, not Columbia, and the reader had no association with the production of *Shampoo*. Thereafter, in 1973, Mr. Caplan and the reader began working at Columbia.[39] In February 1974, Columbia

35. Mann v. Columbia Pictures, Inc., 180 Cal. Rptr. 522, 527 (Ct. App. 1982).
36. *Id.*
37. *Id.*
38. *Id.* at 529.
39. *Id.* at 528-29.

entered a written agreement to finance the production of *Shampoo*.

Columbia based its defense, in part, on evidence that Warren Beatty and Robert Towne—the credited screenwriters of *Shampoo*—developed the ideas for the film before the plaintiff's alleged submission and had never even seen the plaintiff's outline.[40] The jury nevertheless returned a verdict in favor of the plaintiff. The trial court, however, granted the defendants' motion notwithstanding the verdict and entered judgment in their favor.[41]

In its examination of the record of evidence presented by the defendants to establish the independent creation of *Shampoo*, the court of appeal noted that the idea for the screenplay was conceived as early as 1965, and the first screenplay was completed in 1970. The screenplay was submitted to Columbia in 1971—before the date of the plaintiff's alleged submission.[42] The court held that even with the similarities between the works, the "'independent effort' of Towne and Beatty in developing the 'Shampoo' script provides Columbia with a complete defense against the contractual obligation alleged . . . . The defense is established . . . because the inference of access and use was rebutted. Since there was neither a submission of [the plaintiff's work] to Columbia, nor any contact between the screenplay authors and the people alleged to have possessed plaintiff's treatment, there is no substantial evidence to support the jury verdict."[43]

B. Later Decisions Reinforce the Strength of the Independent Creation Defense

Recent defendants can claim a string of successes with the independent creation defense, with victorious motions for summary judgment affirmed by the California Court of Appeal.

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40. *Id.* at 531-33.
41. *Id.* at 526.
42. *Id.* at 533.
43. *Id.* at 535.

This was the case in 2007 in *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.*, in which the defendants' independent creation of a television show demonstrated a lack of unlawful use.[44]

The plaintiff in *Hollywood Screentest* alleged that for several years beginning in 1995, he pitched his idea for a television program, titled *Hollywood Screentest*, to a series of entertainment industry executives. In 1995, the plaintiff allegedly contacted an NBC Universal, Inc. ("NBC") executive about the program, but the executive said she was not interested.[45] In 2001, the plaintiff allegedly contacted defendant Jeff Zucker, president of NBC Entertainment, by e-mail. The plaintiff and Mr. Zucker allegedly discussed the program over many months—off and on from January 2001 through September 2002—with the plaintiff initiating most of the contact. At one point, Mr. Zucker put the plaintiff in contact with another NBC executive, Jeff Gaspin, head of reality television, but Mr. Gaspin rejected the project. In September 2002, Mr. Zucker told the plaintiff that NBC was going to pass on the program. On September 5, 2002, NBC issued a press release announcing that NBC and Silver Pictures would be presenting a new competitive reality series titled *Next Action Star*.[46]

The plaintiff sued for breach of written contract and breach of implied-in-fact contract, among other claims, on the basis that the defendants used *Hollywood Screentest* to conceive the idea for *Next Action Star*. The defendants moved for summary judgment on the grounds that all the plaintiff's claims "were barred because there was no disputed issue of fact that *Next Action Star* was independently created and that NBC

44. Hollywood Screentest of Am., Inc. v. NBC Universal, Inc., 60 Cal. Rptr. 3d 279, 292, 295 (Ct. App. 2007); *see also* Hughes v. Buckland, 2005 Cal. App. Unpub. LEXIS 4808, at *1-4 (Ct. App. June 1, 2005) (granting summary judgment on similar grounds).
45. *Hollywood Screentest of Am., Inc.*, 60 Cal. Rptr. 3d at 282 n.2.
46. *Id.* at 283.

used nothing submitted by [plaintiffs]."[47] In support of their motion, the defendants proffered declarations showing the development and creation of *Next Action Star* by "entities entirely independent from NBC."[48] Against this backdrop, the court of appeal determined that "NBC has successfully shown undisputed evidence of independent creation by entities unrelated to NBC and unassisted by NBC."[49] The court noted that the development of the program began in the summer of 2001 and occurred "over the course of a year before the show's creators presented it to NBC."[50] Moreover, "NBC had no involvement with *Next Action Star* prior to the initial meeting in August 2002."[51]

The court of appeal also rejected the plaintiff's argument that the "numerous similarities" between the works and the timing of NBC's rejection of the plaintiff's proposal and announcement of *Next Action Star* created a question of fact about whether *Next Action Star* was independently created. According to the court, the plaintiff's "speculation" regarding NBC's use was insufficient to create an issue of fact. Thus, the similarities between the works as well as the timing of NBC's acceptance of *Next Action Star* and its final rejection of the plaintiff's idea were insufficient to create a disputed issue.

On this record, the court of appeal concluded that the "uncontradicted evidence [by independent entities] that *Next Action Star* was independently created prior to any of these parties having any contact with NBC negates any inference that NBC used appellants' ideas."[52] Thus, NBC's evidence of independent creation dispelled any inference of use as a matter of law, and the court upheld the order granting summary

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47. *Id.* at 285.
48. *Id.* at 283-84, 291 n.8.
49. *Id.* at 291.
50. *Id.* at 283.
51. *Id.* at 284.
52. *Id.* at 292.

judgment on the plaintiff's claims for breach of express and implied contract.[53]

In 2009, the California Court of Appeal issued two more decisions reaffirming the strength of the independent creation defense at the summary judgment stage. While the decisions are unpublished, they are highly instructive.

The first of these cases was *Scottish American Media, LLC v. NBC Universal, Inc.* The plaintiff alleged that the defendants copied the plaintiff's idea for a reality television show, even though the defendants never actually produced their show. According to the plaintiff, in early June 2004, he telephoned Craig Plestis, a development executive at NBC, and pitched his idea for a reality television show.[54] In August 2004, the plaintiff allegedly gave a copy of his treatment to a trainee in the alternative programming department at NBC. The trainee allegedly said she would give the treatment to Mr. Plestis, but the trainee did not recall the interaction and Mr. Plestis did not recall reading the treatment. The plaintiff also allegedly contacted a producer, Ben Silverman, to pitch his idea, resulting in a meeting with Mr. Silverman and others in June 2004. Mr. Silverman rejected the idea.

Thereafter, Mr. Silverman and his production company, Reveille Productions ("Reveille"), and Mr. Plestis began discussing the development of a reality television show that allegedly was similar to the plaintiff's idea.[55] Mr. Silverman's idea, however, stemmed from a longstanding European reality show titled *Eurovision*, which Mr. Silverman had been interested in importing since the 1990s.[56] Mr. Silverman had pitched the idea to Mr. Plestis and another NBC executive in 2002 and 2005.[57] In June 2005, NBC Chairman Mr. Zucker expressed interest in the show. Mr. Silverman and his

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53. *Id.* at 290-94.
54. Scottish Am. Media, LLC, v. NBC Universal, Inc., 2009 Cal. App. Unpub. LEXIS 3282, at *7 (Ct. App. Apr. 28, 2009).
55. *Id.* at *7-10.
56. *Id.* at *4-5.
57. *Id.* at *5-6.

producing partners at Reveille considered acquiring either the rights to the European show or rights from the plaintiff. The producing partners contacted the plaintiff about the opportunity, but NBC preferred the European show. Thus, in November 2005, the plaintiff learned that his idea would not be used for the NBC show.[58]

Once Reveille and NBC issued a press release announcing their planned development of the American version of *Eurovision*, the plaintiff sued for breach of implied contract, among other claims.[59] Thereafter, NBC decided not to proceed with the show, but the plaintiff nevertheless proceeded with his claim. The defendants moved for summary judgment not only based on the independent creation defense but also on the ground that no show was produced, further negating the element of use. Relying heavily on *Hollywood Screentest*, the trial court granted summary judgment,[60] and the court of appeal affirmed.[61]

On appeal, the plaintiff argued that the defendants' access and the similarities between the works created an inference of use. The defendants' evidence, however, showed that Mr. Silverman discussed importing *Eurovision* since the late 1990s and pitched the idea to NBC in 2002, prior to the plaintiff's pitch in 2004. While the court acknowledged that there were sufficient similarities to raise an inference of use, it held that the defendants dispelled that inference by presenting evidence of independent creation.[62]

The latter 2009 case demonstrating the force of the independent creation defense was *Kightlinger v. White*, a dispute between two well-established writers. Plaintiff Laura Kightlinger alleged that in 2002 or 2003, she gave defendant

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58. *Id.* at *11.
59. *Id.* at *12-13.
60. *Id.* at *15-17.
61. *Id.* at *34-35.
62. *Id.* at *24-30.

Mike White a copy of her screenplay *We're All Animals*.[63] In 2004, the plaintiff allegedly gave the defendant another draft of her screenplay. In late 2005, after the defendant had access to the plaintiff's screenplay, the defendant wrote a screenplay titled *Year of the Dog*.

The plaintiff claimed that *Year of the Dog* was based on her idea and sued for breach of implied contract and breach of confidence. The defendant's motion for summary judgment was granted by the trial court on the grounds that there were no material similarities between the works that could give rise to an inference that the defendant copied the plaintiff's ideas and, even if there were an inference of use, the defendant rebutted that inference with evidence of independent creation.[64]

The court of appeal addressed the independent creation argument by holding that the defendant had submitted sufficient evidence that *Year of the Dog* was based on his own life and not the ideas in the plaintiff's screenplay. According to the court, the "[d]efendant demonstrated, with corroborating evidence, the source of [*Year of the Dog*'s] core premise[,]" and the "uncontroverted evidence also demonstrates that his life served as the source for other material elements of [*Year of the Dog*] . . . ."[65] Specifically, the defendant submitted a declaration detailing his creation of the work, attaching pages from his "compositional notebooks" along with third-party declarations "attesting to the fact that [*Year of the Dog*] very closely, if not exactly, parallels events in defendant's life."[66] The court further found that the defendant's declaration from Alicia Silverstone, a third party, was persuasive. Ms. Silverstone attested to the fact that one of the scenes in *Year of the Dog* was inspired by an incident in her own life that she had recounted to the defendant.

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63. Kightlinger v. White, 2009 Cal. App. Unpub. LEXIS 9345, at *2 (Ct. App. Nov. 23, 2009).
64. *Id.* at *3-5.
65. *Id.* at *31.
66. *Id.* at *27.

Despite the defendant's evidence of independent creation, the plaintiff claimed the evidence was insufficient because it was "untrustworthy" and postdated the defendant's access to *We're All Animals*. The plaintiff also "urge[d] [the court] not to accept defendant's claim of independent creation for fear that any defendant could then fabricate a log of notes, or something similar . . . ."[67] The court disagreed because the defendant's notes were not his only evidence of independent creation and "contrary to plaintiff's claim, there are no competing facts on the issue of independent creation for the trier of fact to weigh."[68] Thus, the defendant's evidence of independent creation precluded the plaintiff from establishing the crucial element of unlawful use.

These recent decisions confirm that independent creation is a defense that is not just viable but one worth raising at the summary judgment stage. Indeed, plaintiffs bear a heavy burden to establish unlawful use of their ideas. The inference of use simply cannot be based on "'suspicion alone, or … imagination, speculation, supposition, surmise, conjecture, or guesswork.'"[69] In turn, defendants can rebut any inference of use with evidence documenting the development and creation of their work. Evidence that is "'clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved . . .'" is sufficient to support summary judgment.[70]

The success of an independent creation defense can be shaped by the timing of the creation of the allegedly offending work and the depth and extent of documentary and testimonial evidence of independent creation. If the allegedly offending work was conceived before the alleged access occurred, the

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67. *Id.* at *29-30.
68. *Id.* at *31.
69. Hollywood Screentest of Am., Inc. v. NBC Universal, Inc., 60 Cal. Rptr. 3d 279, 292 (Ct. App. 2007) (citing Mann v. Columbia Pictures, Inc., 180 Cal. Rptr. 522, 536 (Ct. App. 1982)); *see also Mann*, 180 Cal. Rptr. at 535 (quoting Hicks v. Reis, 134 P.2d 788, 790-91 (Cal. 1923)).
70. Teich v. Gen. Mills, Inc., 339 P.2d 627, 632 (Cal. Ct. App. 1959) (citing Blank v. Coffin, 126 P.2d 868, 870 (Cal. 1942)); *see also Mann*, 180 Cal. Rptr at 535.

defendant may be able to establish independent creation and negate any inference of use raised by access and similarity between the works. Even if the allegedly offending work was conceived after the alleged access occurred, it is still possible for defendants to establish independent creation and rebut an inference of use. A defendant can show that the offending work was conceived by individuals without access to the plaintiff's work. They can do this by producing declarations from those individuals. Also, defendants can demonstrate that they created their work from sources other than the plaintiff's work.

In sum, the independent creation defense is here to stay. Indeed, evidence of independent creation defeats the essential element of use that is required for any idea submission case. Without that crucial factor, an idea submission claim fails. Given the strong impact of the independent creation defense, practitioners can drastically reduce the costs of litigation by producing evidence before trial that will bring doomed cases to a timely end.

THE LAW OF CREATION

Johnny Sinodis

Independent creation has become one of the most oft-advanced defenses to a claim of copyright infringement. This, however, has not always been true. Indeed, the turn of the twentieth century found courts hostile to the concept of independent creation. Even the knowledgeable Judge Learned Hand joined the bandwagon in determining that independent creation was not a defense to an infringement claim.[1] Nevertheless, Judge Hand took the opportunity to correct himself during his time at the court of appeals.[2]

That aside, independent creation is not a mind-blowing notion. In fact, it makes complete sense and is conceptually easy to apply—rebut the plaintiff's circumstantial evidence of access and substantial similarity with facts negating unlawful use. Despite this impenetrable logic, there are exceptions. Independent creation is not always an airtight defense.

First and foremost, procedure is important. A court's misguided determination that independent creation is an affirmative defense can bring an abrupt halt to a party's progress in refuting infringement allegations. Courts are split as to whether independent creation is an affirmative defense.[3]

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1. Hein v. Harris, 175 F. 875 (S.D.N.Y 1910), *aff'd*, 183 F.2d 107 (2d Cir. 1910).

2. Fred Fisher, Inc. v. Dillingham, 298 F.145 (S.D.N.Y. 1924); Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936) (noting that *Hein* was "contrary to the very foundation of copyright law, and was plainly an inadvertence which we not take this occasion to correct.").

3. *See* Calhoun v. Lillenas Publ'g, 298 F.3d 1228 (11th Cir. 2002) ("It should be emphasized that independent creation is not an affirmative defense. . . . Rather, independent creation attempts to prove the opposite of the [plaintiff's] primary claim, i.e., copying by [defendant].") (citing Keeler Brass Co. v. Cont'l Brass Co., 862 F.2d 1063, 1066 (4th Cir.

The distinction is huge: a defendant bears the burden of persuasion to prove an affirmative defense, whereas a mere defense serves to deny an element of a plaintiff's prima facie case. In that instance, the plaintiff continues to carry the burden of production to prove that copying has occurred. Despite the majority trend, the Second Circuit holds independent creation to be an affirmative defense.[4]

Second, a defendant cannot underestimate circumstantial evidence of substantial similarity and access. While reviewing Ms. Brehm's article, I could not help but recall the copyright infringement claim brought against George Harrison, former member of The Beatles, for his song *My Sweet Lord*.[5] Granted, this dispute centered on a musical composition and not a film, but the point remains the same. Despite extensive evidence and third-party testimony in support of Harrison's independent creation assertion, the court held that infringement of copyright "is no less so even though subconsciously accomplished."[6] Plaintiff Ronald Mack prevailed by showing that Harrison's song employed the same unique pattern and sequence of notes that were used in his well renowned composition, *He's So Fine.* In addition to the works being substantially similar, the court noted that Mack's song was number one on the billboard charts for five weeks in the

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1988)); Watkins v. Chesapeake Custom Homes, *LLC*, 330 F. Supp. 2d 563, 575 (D. Md. 2004) ("independent creation defense is not an affirmative defense"; plaintiff has burden of persuasion). *But see*, Repp & K&R Music, Inc. v. Webber, 132 F.3d 882 (2d Cir. 1997) ("[I]ndependent creation is an affirmative defense and may be used to rebut a prima facie case of infringement.") (citing Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 501 (2d Cir. 1982)).

4. Procter & Gamble Co. v. Colgate-Palmolive Co., 199 F.3d 74, 77 (2d Cir. 1999); *Repp*, 132 F.3d at 889.

5. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp 177 (S.D.N.Y. 1976).

6. *Id.* at 181 (citing Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) and Northern Music Corp. v. Pacemaker Music Co., Inc., 147 U.S.P.Q. 358, 359 (S.D.N.Y. 1965)).

United States and number twelve in England for seven weeks. As a result, the requisite access had been proven. Harrison was liable for subconscious copying.[7]

In heeding these words of caution, the central point in *What's the Use*? cannot be understated. Amass documentation to contradict an inference of copying, and do it early in the litigation process. Most courts adhere to the theory that only a presumption of copying is raised even when the infringing work is "practically identical."[8] Should the presumption arise, it is imperative to elicit favorable testimony from the alleged infringing authors detailing their creative process.[9] As Ms. Brehm indicates, this information will often be enough for a favorable decision at summary judgment. At worst, presenting evidence of creation without reference to the allegedly infringed work throws the ball back into the plaintiff's court to establish probative evidence of actual copying.

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7. *Id.*

8. Bruce P. Keller et al., *Practising Law Institute: Copyright Law*, THOMAS REUTERS, Nov. 11, 2010, *available at* WL Copyright L. s 11:7.1.

9. Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 354, 367, 373 (5th. Cir. 2004) (holding that a "defendant need only prove independent creation if the plaintiff successfully establishes factual copying.").

OUTSIDE THE LINES: AN EXAMINATION OF THE LEGAL VERACITY OF FANTASY SPORTS AS AN EXCEPTION TO TRADITIONAL GAMBLING REGULATION

Dana L. Hooper[1]

I. INTRODUCTION

In the immortal words of Norman Tugwater, "I wrote the book on fantasy sports law. I also have the only copy."[2] Although Norman Tugwater, played by the quirky actor Gary Busey, is a fictional character meant to be a tongue and cheek portrayal of a "fantasy sports lawyer" who seeks justice for those wronged by the woes of fantasy sports, combining fantasy sports with the law no longer seems to be a farfetched concept. Indeed, as a result of the massive explosion of the fantasy sports phenomenon, real legal issues have emerged, testing the current state of the law. Although Congress and the courts have recognized some legal concerns arising out of fantasy sports, the body of law related to fantasy sports remains

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2. Debra Weiss, *'Lawyer Norman Tugwater' Ready to Sue for Pro Athletes' Fantasy Rights*, A.B.A. J., Aug. 30, 2010, *available at* http://www.abajournal.com/news/article/lawyer_norman_tugwater_ready_to_sue_for_pro_athletes_fantasy_rights/.

sparse and uncertain. A subject of fervent debate is whether fantasy sports is a form of gambling that falls under the regulation of federal and state anti-gambling statutes.

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA"), expressly exempting fantasy sports from federal regulation of gambling.[3] In 2007, the United States District Court for the District of New Jersey was the first court to address the legality of fantasy sports in the gambling context in *Humphrey v. Viacom, Inc.*[4] The court adhered to the fantasy sports exemption established by Congress and ruled that fantasy sports do not constitute illegal gambling.[5] Primarily due to the UIGEA and *Humphrey*, fantasy sports presently are exempt from anti-gambling laws to the delight of those who reap the financial and social benefits of the industry.

While Norman Tugwater's book on fantasy sports law is fictional, the legal issues arising from fantasy sports will predictably develop into a real and robust body of law. Currently, the number of statutes and case decisions directly addressing fantasy sports is small, but their impact on the future legal treatment of the industry will be substantial. Even though both the UIGEA and *Humphrey* have set the legal standard by exempting fantasy sports from anti-gambling laws, both leave loose ends that expose the fantasy sports exemption to notable criticism.

This article questions whether fantasy sports can remain outside the confines of American anti-gambling laws. Part I provides an explanation and historical background of fantasy sports. Part II discusses the federal and state statutory treatment of fantasy sports in the gambling context with a particular emphasis on the examination of fantasy sports as games of skill

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3. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006).
4. Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648, at *11 (D. N.J. June 20, 2007).
5. *Id.*

versus games of chance. Part III reviews *Humphrey v. Viacom, Inc.*, the only court case that directly addresses whether fantasy sports are a form of gambling. Part IV analyzes the public policy arguments framing the current legal treatment of fantasy football. Finally, Part V concludes the article by assessing the future of fantasy sports law in the United States.

II. THE BACKGROUND OF FANTASY SPORTS

In order to engage in a productive legal analysis of fantasy sports, it is imperative to understand the general activity and its origin.

D. Explanation of Fantasy Sports

Fantasy sports are contests between participants often known as team managers who each create a fictional team of real athletes whose statistics are accumulated pursuant to a scoring system in a particular sport. A manager's fantasy team receives points based on how real athletes (or players) perform in actual games. A typical fantasy league requires an entry fee (to be paid to a provider or the commissioner of the league) and conducts a draft before the start of the particular sport's season, at which time participants select real athletes for their fantasy teams.[6] A fantasy team wins a match if its athletes earn more points than the athletes of its opponent's team. There are a myriad of different ways in which to score points in fantasy leagues. The commissioner of a fantasy league has the ability to customize the league's scoring system. If a real athlete successfully achieves high statistics, so too does the fantasy manager who "owns" the athlete. For example, if LeBron James scores 30 points on a particular night, a fantasy basketball participant might earn 30 points toward his fantasy

6. See Jon Boswell, Note, Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law, 25 CARDOZO ARTS & ENT. L.J. 1257, 1278 n.23 (2008).

basketball team. In other words, players who score a lot of goals in soccer or pitchers with a low earned run average in baseball, for example, are hot commodities in both the real and fantasy sports worlds.

There are many variations of fantasy sports rules, but the general concept is similar among the different sports and leagues. Managers research the statistical performances of real athletes to construct fantasy teams that win or lose based on the success of the athletes on the teams.[7] In the end, the winning manager may receive either cash or prizes. Fantasy sports providers such as ESPN.com and Yahoo.com, among many others, operate websites to assist participants in tracking and examining the statistics and other constructive information for engaging in fantasy sports.[8]

E. The Rise of Fantasy Sports

Historians believe that the concept of fantasy sports has existed since shortly after World War II, yet was not formally organized into a structured league until the 1960s.[9] There is some debate regarding who invented fantasy sports. A group affiliated with the Oakland Raiders is credited with masterminding the first fantasy football league.[10] While on a lengthy road trip during the 1962-1963 National Football League ("NFL") season, Oakland Raiders executives, an Oakland Tribune editor, and an Oakland Tribune sportswriter

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7. Complaint at 16-17, Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648 (D. N.J. June 20, 2007).
8. ESPN Home Page, http://www.espn.com (last visited Dec. 15, 2010); Yahoo! Home Page, http://www.yahoo.com (last visited Dec. 15, 2010).
9. Posting of Ray Vichot to Newsgames, http://newsgames.gatech.edu/blog/2009/01/history-of-fantasy-sports-and-its-adoption-by-sports-journalists.html (Jan. 2, 2009, 07:47 EST).
10. Bob Harris & Emil Kadlec, *A Nod (and a Wink) to the Founders of Fantasy Football*, FANTASY SPORTS PUBS., www.footballdiehards.com/Articles/wink/wink.cfm (last visited Apr. 19, 2011).

were looking for ways to pass the time.[11] While in a New York City hotel, this Oakland-based group developed the first fantasy football league entitled the Greater Oakland Professional Pigskin Prognosticators League.[12]

Also in the 1960s, Harvard research associate William Gamson started "The Baseball Seminar," where Harvard faculty and students "drafted" baseball players for their "rosters" and tracked the statistics for their teams.[13] Around 1965, Harvard student Daniel Okrent learned about and participated in "The Baseball Seminar."[14] After at least a decade of refining and reshaping the concepts presented in the seminar, Okrent invented fantasy baseball as it is traditionally played today.[15]

What began as a hobby has exploded into a major economic and social phenomenon. The fantasy sports industry has grown by developing a broad-based market, expanding beyond the original games of football and baseball, and even beyond other major American sports such as basketball and hockey.[16] Fantasy sports providers have managed to develop a market for fantasy soccer and auto racing, for example.[17]

Fantasy sports "used to be thought of as [something for] just geeks and hard core fans. But this isn't a small closet hobby anymore."[18] It is estimated that at least 27 million

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11. *Id.*
12. *Id.*
13. Sam Walker, Fantasyland: A Sports Writer's Obsessive Bid to Win the World's Most Ruthless Fantasy Baseball League 61-69 (Penguin Books 2006).
14. *Id.*
15. *Id.*
16. *See* C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080-81 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).
17. Fantasy Sports Games, http://www.fantasysports.yahoo.com/moregames (last visited Apr. 19, 2011).
18. Chris Ballard, *Fantasy World*, SPORTS ILLUSTRATED, June 21, 2004, at 85.

Americans participate in fantasy sports today,[19] resulting in a multi-billion dollar economic impact on the sports industry.[20]

The relatively recent burst of popularity of fantasy sports can be attributed to the technological advances of the Internet. The Internet provides easy access to the information and tools utilized to operate and participate in fantasy sports leagues. Prior to the Internet, "fantasy leagues were conducted using pens, calculators, and lots of patience."[21] Today, websites like ESPN.com and Yahoo.com not only provide the statistics and player analysis, but also conduct all of the intricate calculations and even assist managers in drafting their teams each season.[22]

Additionally, increased coverage of real sports has aided the growth of fantasy sports. The expanded television sports coverage not only offers more games for fantasy participants to watch their players live, but also presents in-depth analyses by commentators who educate fantasy participants about injuries, statistics, and other useful data.[23] Advances in radio also provide the same increased exposure to details important to fantasy sports, as SiriusXM Satellite Radio airs every major sporting event along with a broad variety of talk shows focusing purely on fantasy sports.[24] Mobile devices, such as cellular phones and iPads, also provide real-time

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19. Fantasy Sports Business, http://www.fantasysportsbusiness.com (last visited Dec. 10, 2010).
20. Posting of Ray Vichot to Newsgames, http://newsgames.gatech.edu/blog/2009/01/history-of-fantasy-sports-and-its-adoption-by-sports-journalists.html (Jan. 2, 2009, 07:47 EST).
21. Jim Hu, *Sites See Big Season for Fantasy Sports*, CNET NEWS, Aug. 8, 2003, http://www.news.com/2100-1026-5061351.html.
22. ESPN Home Page, http://www.espn.com (last visited Dec. 15, 2010); Yahoo! Home Page, http://www.yahoo.com (last visited Dec. 15, 2010).
23. NFL Home Page, http://www.nfl.com (last visited Apr. 22, 2011); ESPN Fantasy & Games, http://www.espn.com/fantasy (last visited Apr. 22, 2011).
24. SiriusXM Satellite Radio Home Page, http://www.sirius.com (last visited Apr. 22, 2010).

updates to further increase accessibility of information for fantasy sports managers.[25]

II. FEDERAL AND STATE STATUTORY REGULATION OF FANTASY SPORTS IN THE GAMBLING CONTEXT

With the immense growth of fantasy sports in America, there has been an emergence of related legal issues. One such issue is the statutory treatment of fantasy sports within the context of gambling laws. Federal and state legislatures have each approached fantasy sports differently in the area of gambling law. At the federal level, Congress has expressly exempted fantasy sports from the restrictions of federal anti-gambling laws by enacting the UIGEA.[26] On the other hand, state legislatures, with the exception of Montana, have not determined definitively whether fantasy sports should be regulated as a form of gambling, leaving an aura of uncertainty surrounding the fantasy sports industry.[27]

A. Explicit Legalization of Fantasy Sports: The Unlawful Internet Gambling Enforcement Act of 2006

Recent legislative measures to strictly regulate online gambling have made it clear that the government wishes to stifle wagering on the Internet. Due to the unique legal issues created by the emergence of Internet gambling, Congress enacted the UIGEA.[28] In general, the UIGEA threatens

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25. CBC Sports Mobile, http://www.cbssports.com/mobile (last visited Apr. 22, 2011); Yahoo! Mobile, http://www.mobile.yahoo.com/fantasy (last visited Apr. 22, 2011).
26. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006).
27. MONT. CODE ANN. § 23-5-801 (2009).
28. *See* 31 U.S.C. § 5361(a)(4) (2006) ("New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling

criminal prosecution if Internet-based businesses accept any money transfers (for example, credit, checks, electronic fund transfers, drafts) from a United States financial institution for the purpose of online gambling when such acceptance would be illegal under existing state or federal laws.[29] Congress, however, carved out certain exceptions for fantasy sports in the UIGEA, effectively legalizing the activity.[30] Although other federal laws restrict betting on the outcome of a contest or sporting event, the UIGEA modernizes anti-gambling statutes by recognizing that cyberspace facilitates bettors who, with one click of the mouse, can sink into substantial and irreparable debt.[31]

Notably, UIGEA does not attempt to restrict all online gambling. Instead, Congress was particularly concerned about the operation of poker websites when enacting the UIGEA.[32] Like poker websites, fantasy sports websites proliferate the Internet, offering services to participate in the activity for a fee. When Congress explicitly exempted fantasy sports from the limitations of the UIGEA, it marked the first time that

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crosses State or national borders."); *see also* Robert Malone, *Bush Signs Safe Port Act*, FORBES, Oct. 13, 2006, *available at* http://www.forbes.com/2006/10/13/safe-ports-act-biz-logistics-cxrn_1013ports.html.

29. 31 U.S.C. §§ 5361-5367 (2006).

30. *Id.*

31. Travel Act, 18 U.S.C. § 1952 (2007); Interstate Wire Act, 18 U.S.C. § 1084 (2007) (forbids use of wire communication to transmit wagering information across state borders); Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2007) (bars governmental entities and individuals from sponsoring, operating, advertising, and promoting any gaming activity that is based directly or indirectly on performance of athletes); Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2007); Federal Antigambling Statute, 18 U.S.C. § 1955 (2007); Illegal Gambling Business Act, 18 U.S.C. § 1955(b)(1) (2000).

32. Unlawful Internet Gambling Enforcement Act of 2006, H.R. 4411, 109th Cong. (2d Sess. 2006).

Congress included an express exception for fantasy sports in any federal anti-gambling statute.[33]

Section 5362(E)(ix) of the UIGEA exempts

> [p]articipation in any fantasy or simulation sports game . . . in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization. . .and that meets the following conditions: (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events. (III) No winning outcome is based - (aa) on the score, point-spread, or any performance or performances of any single real-

33. *See* Travel Act, 18 U.S.C. § 1952 (2007); Interstate Wire Act, 18 U.S.C. § 1084 (2007) (forbids use of wire communication to transmit wagering information across state borders); Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2007) (bars governmental entities and individuals from sponsoring, operating, advertising, and promoting any gaming activity that is based directly or indirectly on performance of athletes); Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2007); Federal Antigambling Statute, 18 U.S.C. § 1955 (2007); Illegal Gambling Business Act, 18 U.S.C. § 1955(b)(1) (2000).

> world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.[34]

In sum, the UIGEA establishes that a "fantasy sport" must satisfy three requirements to qualify for exemption: (1) the participant must know all prizes prior to participation and the prizes must not reflect the number of participants; (2) winning outcomes must be based upon relative knowledge and skill of participants; and (3) winning must not be based upon a point-spread or a single performance in a single event.[35] The vast majority of fantasy sports leagues meet these requirements.

B. Implicit Legalization of Fantasy Sports: State Gambling Laws

While the UIGEA makes fantasy sports explicitly legal, state laws have not gone that far. Montana is the only state that expressly exempts fantasy sports from its anti-gambling laws.[36] Therefore, to determine whether fantasy sports are legal in a particular state, an examination of that state's treatment of anti-gambling statutes is necessary. State courts and legislatures typically subject "games of chance" to the restrictions of anti-gambling laws, while "games of skill" classically are not covered by such regulations.[37]

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34. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(E)(ix) (2006).
35. *Id.*
36. MONT. CODE ANN. § 23-5-802 (2009).
37. KY. REV. STAT. ANN. § 247.155 (LexisNexis 2010) (any game of chance is forbidden within the boundaries of the Kentucky State Fair); UTAH CODE ANN. § 76-10-1101 (2010) (a game of chance involves risking money or an item of value); People v. Mitchell, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983) (finding that games of chance are subjected to state anti-gambling regulations).

Because many activities involve both skill and chance, states generally utilize the "predominance test" (also known as the "dominant factor test") to determine which activities should be regulated by anti-gambling laws.[38] The predominance test is based on the concept that "the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."[39]

The predominance test, however, does not provide a fool-proof classification of games into the skill or chance categories. There is no clear consistency in how states treat activities under the predominance test, even when it comes to the same game.[40] Courts and legislatures among the states have disagreed on how to apply the predominance test.[41] Also, in some instances, the predominance test cannot be applied because a state's statutory and judicial treatment of games of skill and chance are ambiguous and inconsistent. For example,

38. In re Allen, 377 P.2d 280, 281 (Cal. 1962); People v. Turner, 629 N.Y.S.2d 661, 662 (Crim. Ct. 1995).
39. *See, e.g.*, People ex rel. Ellison v. Lavin, 71 N.E. 753, 755 (N.Y. 1904).
40. *See Mitchell*, 44 N.E.2d at 1155 (holding that games such as bridge and poker are games of chance); State v. Terry, 44 P.2d 258, 260 (Kan. 1935) (holding that poker is a game of skill and chance); *Turner*, 629 N.Y.S.2d at 662 (finding that poker is a game of chance even though it requires skill).
41. *See, e.g.*, WIS. STAT. ANN. § 945.01(3)(b)(3) (West 2006) ("skill" means, within an opportunity provided for all players fairly to obtain prizes or rewards of merchandise, a player's precision, dexterity or ability to use his or her knowledge which enables him or her to obtain more frequent rewards or prizes than does another less precise, dexterous or knowledgeable player); Morrow v. State, 511 P.2d 127 (Alaska 1973) (court outlines multiple factors of skill to analyze); Las Vegas Hacienda v. Gibson, 359 P.2d 85, 87 (Nev. 1961) (holding that a hole-in-one in golf is predominantly skill, regardless of whether some factor of chance was involved); People ex rel. Ellison v. Lavin, 71 N.E. 753, 755 (N.Y. 1904) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?").

Arizona's gambling statute prohibits the promotion of, or knowingly benefitting from, gambling.[42] The statute, however, does not expressly distinguish between chance and skill.[43] Although the Arizona Supreme Court has weighed in on the topic of gambling, it has not clarified the distinction between chance and skill. Instead, the Arizona Supreme Court has determined that the payment of entry fees to participate in a game does not constitute illegal wagering under Arizona law when the entry fee is unconditional and the prizes are not dependent upon the number of participants.[44] South Carolina is another state where the application of the predominance test is unclear or inconsistent.[45] After utilizing the predominance test in the past, the State of South Carolina asserted in 2010 that it would no longer pursue the legal question of skill versus chance in assessing what constitutes "gambling."[46] This decision came in the midst of a hotly contested case that went to the Supreme Court of South Carolina regarding whether casual, in-home poker games were illegal under one of South Carolina's anti-gambling statutes, Section 16-19-40.[47] Essentially, when the State realized that the predominance test was unable to automatically characterize poker as a game of skill or one of chance, the State tossed the test aside.[48]

Thus, the predominance test does not resolve whether fantasy sports are legal under current state gambling laws as its application produces unclear and inconsistent results. Perhaps

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42. ARIZ. REV. STAT. ANN. § 12-3304 (2007).
43. ARIZ. REV. STAT. ANN. § 12-3304 (2001).
44. State v. Am. Holiday Ass'n, Inc., 727 P.2d 807, 812 (Ariz. 1986) (en banc).
45. Meg Kinnard, *Top SC Prosecutor: Casual Poker Games Not Illegal*, BLOOMBERG BUSINESSWEEK, Oct. 19, 2010, http://www.businessweek.com/ap/financialnews/D9IUUHK00.htm (discussing the case of Town of Mt. Pleasant v. Chimento currently pending before the South Carolina Supreme Court).
46. *Id.*
47. *Id.*
48. *Id.*

the predominance test is not the appropriate standard to determine the legality of fantasy sports. But, the question remains: what is the appropriate standard?

III. THE SEMINAL CASE ON GAMBLING AND FANTASY SPORTS: *HUMPHREY V. VIACOM INC.*

Only one case has specifically addressed whether fantasy sports are a form of illegal gambling and explored the skill versus chance debate. In the aftermath of Congress enacting the UIGEA, a New Jersey court considered whether fantasy sports providers who operate pay-for-play online leagues violate the anti-gambling laws of New Jersey and several other states in a case entitled *Humphrey v. Viacom, Inc.*[49] On June 20, 2006, Plaintiff Charles Humphrey, an attorney, filed a lawsuit in New Jersey against fantasy sports providers Viacom Inc., the CBS Corporation, the CBS Television Network, Sportsline.com, Inc., the Hearst Corporation, the Walt Disney Company, ESPN, Inc., Vulcan Sports Media and The Sporting News ("Defendants").[50] The Complaint alleged that Defendants operated fantasy sports websites in violation of the state gambling laws of the District of Columbia, Georgia, Illinois, Kentucky, Massachusetts, New Jersey, Ohio, and South Carolina.[51] By invoking the *qui tam* gambling loss-recovery laws of these states, Mr. Humphrey claimed that he was entitled to recover the individual gambling losses suffered by all fantasy sports participants who utilized Defendants' websites.[52] *Qui tam* laws permit a private citizen to bring a legal action to enforce the law on behalf of the

49. Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648 (D. N.J. June 20, 2007).
50. *Id.* at *1.
51. *Id.* at *2.
52. *Id.*

government in which a portion of the penalties or award may be appropriated to the private citizen.[53]

Mr. Humphrey's case theory was that Defendants' fantasy sports leagues were a form of illegal gambling under state and federal laws because the participants wager their online entry fees for the opportunity to win prizes and also because any success is based mostly on chance.[54] The *Humphrey* court rejected this argument, finding that the entry fee was not a wager, but rather a one-time payment for the services provided by the website equivalent to consideration paid for a contract.[55] Courts consistently have held that it would be "patently absurd" to determine that "the combination of an entry fee and a prize equals gambling," otherwise common-place contests such as essay competitions, spelling bees, beauty pageants, local rodeos, and other such activities would expose participants and operators of the contests to criminal and civil liability.[56] Furthermore, entry fees are not considered "wagers" in the eyes of courts throughout the country due to the unconditional nature of the prize, which can only be won by the participants and not the provider of the prize.[57]

A key conflict in *Humphrey* was also whether fantasy sports are games of skill or chance pursuant to the predominance test.[58] Interestingly, despite the *Humphrey* court's substantive discussion of this legal issue, the court avoided a final determination regarding whether fantasy sports are games of skill or chance: "[T]his Court need not reach this

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53. *Id.*
54. *Id.*
55. *Id.* at *10.
56. *Id.* at *7 (citing State v. Am. Holiday Ass'n, Inc., 727 P.2d 807, 809, 812 (Ariz. 1986).(en banc)).
57. *Humphrey,* 2007 WL 1797648, at *7 (citing Las Vegas Hacienda, Inc v. Gibson, 359 P.2d 85, 86-87 (Nev. 1961)); *see also Am. Holiday Ass'n, Inc.*, 727 P.2d at 810.
58. *Humphrey*, 2007 WL 1797648, at *8-9.

issue in deciding Defendants' motions [to dismiss the lawsuit]."[59]

Instead, the *Humphrey* court relied upon the UIGEA to "confirm that fantasy sports leagues such as those operated by Defendants [fantasy providers] do not constitute gambling as a matter of law."[60] While the *Humphrey* court's reaffirmation of the UIGEA's legalization of fantasy sports adds another layer to the developing body of fantasy sports law, it fails to answer the persistent question of whether fantasy sports are games of skill or chance under the predominance test utilized by most states to determine the legality of contests under gambling laws.[61] Instead, the UIGEA and the *Humphrey* decision ultimately rest upon public policy grounds.

IV. PUBLIC POLICY REASONS FOR LEGALIZING FANTASY SPORTS

In considering the public policy reasons for exempting fantasy football from anti-gambling regulations, it is important to comprehend the public policy behind such legislation, in general. The main reason cited by legislatures for enacting laws with civil or criminal penalties for participation in unlawful gambling is that gambling has been viewed by society and the government as a detrimental activity.[62] The law criminalizes gambling because of its "anti-social effects" that result from the "lure of the chance for 'easy money.'"[63]

Society and the government generally believe that "indebtedness tends to increase with legalized gambling, as does youth crime, forgery and credit card theft, domestic violence, child neglect, problem gambling, and alcohol and

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59. *Id.* at *9.
60. *Id.* at *11 (citing 31 U.S.C. § 5362(1)(E)(ix) (2006)).
61. In re Allen, 377 P.2d 280, 281 (Cal. 1962); *see also* People v. Turner, 629 N.Y.S.2d 661, 662 (Crim. Ct. 1995).
62. State v. Rucker, 134 A.2d 409, 412 (N.J. Super. Ct. App. Div. 1957).
63. *Id.*

drug offenses."[64] Moreover, gambling has been blamed for economic loss, bankruptcy, and gambling addiction, all of which cause problems for financial institutions and government assistance programs.[65] The government also fears that certain groups, such as the indigent and immigrants, are more apt to be victimized by the ills of gambling.[66] Remarkably, even though the alleged causation or correlation between gambling and crime has yet to be proven, this perception remains the core reason for the existence of anti-gambling laws.[67]

Although governmental concerns that gambling could trigger criminal activity should not be taken lightly, fantasy sports do not pose the same potential threat as traditional gambling. The minimal amount of money spent in most fantasy leagues, coupled with the lengthy amount of time expended to participate in a season-long contest, do not create the risk for abuse and excessiveness associated with traditional gambling.[68] Also, the typical demographic of fantasy sports participants does not include the impoverished or immigrant populations that gambling laws seek to protect. Demographic studies have shown that approximately 92% of fantasy sports participants have at least some college education and have an average

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64. Nat'l Gambling Impact Study Comm'n Report 7-18 (1999), http://govinfo.library.unt.edu/ngisc/reports/7.pdf (quoting Katherine Jensen & Audie Blevins, The Last Gamble: Betting On the Future in Four Rocky Mountain Mining Towns 9 (Univ. of Ariz. Press 1998)).
65. *See* Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367 (2006) (declaring that the UIGEA was passed, in part, because online gambling is a "growing cause of debt collection problems"); Aaron Craig, *Gambling on the Internet*, 1998 COMP. L. REV. & TECH J. 61, 64 (1998).
66. NAT'L GAMBLING IMPACT STUDY COMM'N REPORT 7-18 (1999), http://govinfo.library.unt.edu/ngisc/reports/7.pdf.
67. *Id.* at 7-30.
68. Michael J. Thompson, Give Me $25 On Red and Derek Jeter for $26: Do Fantasy Sports Leagues Constitute Gambling?, 8 SPORTS LAW. J. 21, 25 (2001).

household income of $94,000 and that 86% of fantasy sports participants own their homes.[69]

Of note, public policy is a controlling factor not only in the *passage* of anti-gambling laws, but also in the *exemption* of particular activities from anti-gambling laws. In particular, the economic, social, and political impacts of fantasy sports are the driving forces behind the exemption of fantasy sports from gambling laws.

Economically, fantasy sports providers, advertising companies, and professional sports leagues and teams have the most to gain from the fantasy sports industry. Specifically, the fantasy providers offer access to services necessary to participate in a fantasy sports league, such as live statistics, injury reports, and expert opinions, sometimes in exchange for a nominal entry fee paid by the participants.[70] Advertising companies also have realized financial benefit from fantasy sports by capitalizing on the loyalty of participants. According to Steve Snyder, the general manager and senior vice president of CBS SportsLine, "[m]arketers know that people are spending time and energy and passion on [fantasy sports] sites" and fantasy sports are "an advertiser's dream."[71]

In addition, professional sports leagues and teams have a profound economic interest in the success of fantasy sports because of increased revenue attributable to the rise of fantasy sports, mostly evidenced through significantly higher ticket purchases, paraphernalia sales, and television viewership.[72]

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69. World Fantasy Games, Fantasy Sports Demographics, http://www.worldfantasygames.com/site_flash/index-3.asp (last visited Dec. 10, 2010).
70. *See* Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648, at *1 (D. N.J. June 20, 2007).
71. Kristina Knight, *Gamers Flocking to Fantasy Sites*, BIZREPORT, Nov. 27, 2006, http://www.bizreport.com/2006/11/gamers_flocking_to_fantasy_sites.html.
72. Richard J. Dalton Jr., A New Reality for Fantasy Leagues? MLB Argues Its Own States, Which Could Ground Free Games for Many Fans of the Leagues, NEWSDAY, Mar. 22, 2006.

Professional sports leagues and teams have not always recognized the magnitude of the economic benefit associated with fantasy sports, perhaps because of the gray area between fantasy sports and illegal gambling. Despite initial trepidation about fantasy sports, however, leagues and teams increasingly have accepted fantasy sports. The NFL has been particularly supportive of fantasy sports. For example, the NFL Network boasts hours of airtime per week dedicated solely to the analysis of fantasy football, including examination of player injuries, coaching decisions, statistics, and matchups.[73] Current NFL star athletes, such as running back Maurice Jones-Drew, are avid fantasy football participants. Mr. Jones-Drew even hosts his own fantasy football satellite radio show where he doles out fantasy football advice.[74] Furthermore, the NFL has stated publicly its acceptance of fantasy football, declaring that "once we took a good look at what the game actually involved and the kind of information that was required to be successful, we realized that [fantasy football] wasn't a gambling activity . . . ."[75]

From the social perspective, fantasy sports leagues spark a sense of camaraderie and friendly competition among family, friends, and co-workers. Social enjoyment is a key reason that individuals participate in fantasy sports, whether it is the gratification of earning bragging rights at the office or the pleasure of engaging in banter with an uncle across the country. An ESPN writer expressed the enjoyment of fantasy football by stating "[m]aybe its just a fantasy league, but I can't imagine few things I'll miss more . . . than the annual draft at

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73. NFL Network, www.nflnetwork.com (last visited Dec. 15, 2010).

74. Sirius NFL Radio, www.sirius.com/nfl (last visited Dec. 15, 2010).

75. Jerry Magee, *It's No Fantasy--NFL Puts Its Stamp on Gambling*, SAN DIEGO UNION-TRIB., Aug. 17, 2003, at C17 (quoting Evan Kamer, NFL senior director).

Lee's house -- cracking jokes, seeing old friends, laughing for five straight hours, putting another year in the books."[76]

Politically, fantasy sports are also a subject matter of budding interest. The Fantasy Sports Trade Association, a forum dedicated to businesses connected to fantasy sports, announced in December 2010 the hiring of its first lobbyist, who will "work alongside legislators to create laws that will foster growth in the fantasy sports industry and will pay particular attention to the gaming laws that affect fantasy businesses."[77] Furthermore, the NFL has been active in the political forum, making significant effort to push the passage of the UIGEA's fantasy sports exemption.[78] In fact, it was reported that the NFL "used big bucks lobbyist to ram through Internet gambling-curbing legislation in the final minutes of the legislative session . . . ."[79]

In exempting fantasy sports from gambling regulation and finding that fantasy sports are not gambling as a matter of law, Congress and the *Humphrey* court recognized that fantasy sports do not pose the same public policy concerns as traditional forms of gambling. Moreover, Congress and the *Humphrey* court understood the importance of the economic, social, and political elements entrenched in fantasy sports and based their explicit approval of fantasy sports primarily on those public policy grounds. There is, however, an inherent risk in placing the legality of fantasy sports squarely on the shoulders of public policy. Public policy is fluid and subject to continual change. The unavoidable dynamic nature of the economic, social, and political issues giving rise to the fantasy

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76. Bill Simmons, *Draft Day Swan Song*, ESPN, http://sports.espn.go.com/espn/page2/story?page=simmons/021114 (last visited Nov. 13, 2007).

77. *FTSA Hires Lobbyist*, FANTASY SPORTS BUSINESS, www.fantasysportsbusiness.com/wordpress/2010/12/10/fsta-hires-a-lobbyist (last visited Dec. 19, 2010).

78. Geoff Earle, *NFL Makes Fantasy Pass*, N.Y. POST, Oct. 10, 2006.

79. *Id.*

sports exemption creates uncertainty for the future legality of fantasy sports.

III. CONCLUSION: WHAT IS THE FUTURE OF THE LEGALITY OF FANTASY SPORTS?

Are fantasy sports forever immune to scrutiny under the anti-gambling laws? Will the legal system eventually shine a spotlight on the similarities between the fantasy sports leagues and traditional gambling, or will fantasy sports remain outside of gambling regulation? Will the social, economic, and political prevalence of fantasy sports outweigh adversities that may arise as a result of the ever-growing popularity of fantasy sports? Will the law reconcile the quandary created by fantasy sports, the ultimate hybrid of skill and chance, or will state laws remain rocky and unpredictable?

As with any new legal development, there undoubtedly will be amendments, modifications, lawsuits, appeals, and new governmental interests that influence the legal status of fantasy sports. With a sparse and undeveloped body of law premised upon a public policy rationale highly susceptible to change, the legality of fantasy sports stands on shaky ground. The inconsistency and unpredictability of the state laws exacerbates the uncertainty of the future legality of fantasy sports.

Fantasy sports providers and enthusiasts can only hope that the legal status quo remains in place, yet it is only a matter of time before a disgruntled fantasy sports debtor, a state or federal legislator, or another *qui tam* plaintiff challenges the veracity of the law exempting fantasy sports from gambling regulation. While such challenges will put the fantasy sports industry on pins and needles, new lawsuits and legislation will develop the burgeoning body of fantasy sports law. After all, Norman Tugwater needs some more material for his book.

NON-EXEMPT BUT UNENFORCED: THE STATUS OF FANTASY SPORTS UNDER THE UIGEA

David A. Palanzo

While the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA")[1] explicitly exempts "fantasy or simulation sports game[s]" from its definition of "bet or wager,"[2] it is unclear whether most fantasy sports leagues that involve prize money actually would qualify for this exemption. One requirement for exemption is that the value of "the prizes and awards offered to winning participants . . . is not determined by the number of participants or the amount of fees paid by those participants."[3] Those who have participated in fantasy sports leagues with their friends for money know that the amount of fees paid by the participants almost *always* determines the amount of the prizes offered to the winning participants.

For example, in a fantasy baseball league with ten participants and a $20 entry fee per participant, a typical payout might be $140 for the winner, $40 for second place, and $20 for third place. Clearly, the payout amounts total the $200 total in fees collected for entry into the league ($20 x ten participants). Given that most fantasy sports websites offer the majority of their services for free (including league setup), this arrangement makes sense: how else would one determine the prize amount? If the website does not charge a fee, and the participants arrange entrance fees and the amount of prize winnings independent of the website, where would the money

1. 33 U.S.C. §§ 5361 – 5367 (2006).
2. *Id.* § 5362(1)(E)(ix).
3. *Id.* § 5362(1)(E)(ix)(I).

go other than back to the participants as some form of prize money?

Nevertheless, this example league does not appear to meet the requirements for exception under the UIGEA. Consequently, under the remedies provisions of the UIGEA, the federal government (or a state government) could seek both civil and criminal penalties against the providers and participants of that league.[4] Despite this apparent violation of the UIGEA, however, no government has prosecuted ESPN.com, Yahoo.com, CBSSports.com, or any other website for offering free fantasy sports services (including services that allow league commissioners to track the payment of dues by league participants). Similarly, the author is unaware of any civil or criminal lawsuits involving individuals who have violated the UIGEA in a manner similar to the example above.

One possible explanation for the government's failure to enforce the UIGEA in this example is that it views such leagues as extended and elaborate "poker nights." Rather than meeting in someone's basement to ante up, a group of friends meets online to draft players and organize a fantasy sports league. In both situations, the group of friends coordinates its own finances; the fantasy sports website just provides the virtual basement and poker table. In fact, before the Internet, fantasy sports leagues operated in much the same fashion as a neighborhood poker night. And technically, if a group of friends pooled some money together for a poker game and then logged on to a free poker website to play and determine each participant's prize amount, the group's conduct would violate the UIGEA.

Ultimately, regardless of any public policy arguments for or against the characterization of fantasy sports as gambling, Congress' goal in promulgating the UIGEA arguably was to regulate Internet monetary transactions concerning games of skill, chance, or any combination of the

4. *See id.* §§ 5365–5366.

two because of their general detriment to society.[5] Free fantasy sports unquestionably are not gambling; fantasy sports that involve monetary prizes, however, are close enough to gambling to fall under the umbrella of the UIGEA. Therefore, despite the UIGEA's clear language that exempts fantasy sports from its definition of "bet or wager," it is questionable that fantasy sports involving monetary prizes actually qualify for that exemption. Although the government has not enforced the UIGEA in such a manner, the statute has been in force for less than five years. Only time will dictate the UIGEA's future impact on the fantasy sports industry.

5. *See id.* § 5361(a)(3) ("Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.").

STATE FILM TAX INCENTIVES: A RED CARPET HIT OR MISS

Jaia Thomas[1]

I. INTRODUCTION

In 2010, film tax incentives may have garnered more attention than any big budget blockbuster in Hollywood. As William Luther of The Tax Foundation recently observed, "in the last decade, state governments have 'gone Hollywood,' or tried to, by enacting dozens of movie production incentives, including tax credits for film production."[2] Film tax incentives are increasingly becoming the new bait that lawmakers are using to attract film production to their respective states. States anticipate that local businesses and taxpayers will reap the benefits of locally producing big budget Hollywood films or television projects. Hotels, restaurants, and bars see increased traffic, catering to the temporarily displaced cast and crew.[3] Small, entertainment-oriented businesses like hair and make-up stylists may be called on to assist with the daily preparation of the cast, while nearby talent agencies are often called upon to

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2. William Luther, Movie Production Incentives: Blockbuster Support for Lackluster Policy, TAX FOUNDATION SPECIAL REPORT, Jan. 2010, at 1.
3. See Joshua Schonauer, Star Billing? Recasting State Tax Incentives for the "Hollywood" Machine, 71 OHIO ST. L.J. 381, 385 (2010).

provide extras and small bit actors.[4] Even local hardware stores and equipment rental services get in on the action, providing the raw material and labor for much of the behind-the-scenes technical work.[5]

As Scott Ahmad aptly noted, "states and filmmakers alike recognize and embrace film incentives as an integral part of selecting a production location."[6] From the state's perspective, the competition for film production is stiff. States compete not only with one another, but with the rest of the world.[7] States realize that film incentives are a major, if not the primary, factor in luring filmmakers and film production companies to their states.[8] Filmmakers must consider which incentives will maximize savings on production costs, allow them to hire and maintain competent crews, and realize adequate returns on their investments.[9]

As more and more states seek to implement film tax incentive programs, the blinding glare of Hollywood's flashing lights has hindered lawmakers' abilities to see the true impact of film tax incentives on taxpayers. Film tax incentives were created to be of mutual benefit to both filmmakers and states. Recently, however, states have been getting the short end of the stick. Therefore, as film tax incentives continue to flourish, it is imperative for states to take a more aggressive approach in managing how incentives are applied, distributed, and monitored.

This article examines the inner working of film tax incentives and the effect these incentives have on film professionals, state lawmakers, and ordinary taxpayers. Part II

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4. *Id.*
5. *Id.*
6. See Scott Ahmad, Can the First Amendment Stop Content Restrictions in State Film Incentive Programs?, 16 UCLA ENT. L. REV. 395, 400 (2009).
7. *Id.*
8. *Id.*
9. *Id.* at 402.

of this article provides a brief overview of film tax incentives that sets forth the analytical framework for measuring the effectiveness of such incentives. Part III of this article explains how states apply, distribute, and monitor film tax incentives. Particular attention is given to Louisiana, Georgia, and Michigan, in light of the acclaim these states have received. Part IV seeks to determine the true economic benefit of film tax incentives to the taxpayers who subsidize them. Part V endeavors to expose the inherent flaws of film tax incentive programs, highlighting many of the recent lawsuits filed in conjunction with the misuse of film tax incentives. Part V concludes by offering recommendations for increased state legislation and reform. Finally, Part VI highlights many of the states scaling back on film tax incentive programs and concludes by urging more states to think twice about the correlation between incentive programs, economic growth, and job creation.

II. FILM TAX INCENTIVES: A BRIEF OVERVIEW

As Mark Robyn, a Staff Economist for The Tax Foundation, recently stated, "over the past decade, film tax credits have gone from being an obscure tax benefit available only in a few states to ubiquitious nationwide policy tool."[10] Currently, forty-four states offer film tax incentives, cash rebates, or grants to filmmakers.[11] This number is much higher than the five states that offered incentives in 2002. Not only has the number of states offering incentives grown over the past few years, but also the programs have grown in magnitude and scale. Early adopters had developed infrastructure and

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10. Mark Robyn, *Film Production Incentives: a Game California Shouldn't Play*, TAX FOUNDATION, Mar. 21, 2011, http://www.taxfoundation.org/files/robyn_statement_california_20110321.pdf.
11. The six states without film tax incentives include: Nevada, Delaware, New Hampshire, Nebraska, North Dakota, and Vermont.

economies of scale that made production cheaper. States entering the game late have sought to overcome this disadvantage by offering even larger incentives.

A tax incentive can best be described as an inducement offered in the form of an abatement of taxes. To calculate film tax incentives, states simply multiply the qualified expenditure by the film tax incentive percentage. For instance, in a state that offers a 20% film tax incentive: If a production company spends $20 million in that particular state to shoot a film, the production company's savings would amount to $4 million. Most states specify what types of expenditures qualify for these incentives.[12]

While all forty-four states offer basic film tax incentives, these states differ in the types of film tax incentives offered. The various types of incentives include:

- *Transferable Tax Credits:* Fourteen states offer transferable tax credits, which allow production companies to sell their credits to other companies or individuals. Brokers facilitate the sale of tax credits by the production companies, taking a cut between 25 and 30%.[13] These brokers break the credits down into smaller amounts and resell them to companies or individuals who use them like coupons on their tax returns.[14]

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12. Costs are qualified only to the extent attributable to the use of tangible personal property or the performance of services within that state. A sample list of qualified expenditures for New York State includes: video cassettes, negative splicing, wire removal, optical development, employer taxes, cast insurance, legal fees, office space rental, and completion bonds. Items used, or personnel or services employed, within and outside that particular state can qualify only for the pro rata portion of costs incurred directly in that state. New York State & New York City Film Production Tax Credit Form B: Schedule of Qualified Expenditures, http://www.nyc.gov/html/film/html/incentives/tax_credit_overview.shtml (last visited Feb. 20, 2011).
13. *See* Luther, *supra* note 2, at 5.
14. *Id.*

- *Refundable Tax Credits:* Fifteen states offer refundable tax credits, which allow filmmakers to sell excess tax credits directly back to the state. Some states only refund a percentage of a credit's value, while other states have allowed the companies to receive the full benefit of every credit, even though it means paying production companies with taxpayer money.[15]
- *Sales Tax and Use Tax:* Many states offer a sales and use tax exemption for qualified production companies on purchases used in the production.[16] The exemption applies to items used on location such as film, videotape, makeup, fabric, costumes, set construction, and props used directly on set, as well as expendable items purchased for use by the film crew, such as tape, fasteners, and compressed air.

It should also be noted that thirty-two states offer lodging tax credits if cast and crew members stay at hotels for a length of time greater than thirty (30) days. Several states are also beginning to waive taxes and fees on the use of city police officers, who usually direct traffic during productions, and emergency crews.

III. A STATE-BY-STATE COMPARISON OF FILM TAX INCENTIVE PROGRAMS

Each state differs in its approach to applying film tax incentives. Some states allow for an up-front exemption at the point of purchase, while others offer a cash rebate upon a final audit of receipts.[17] The following section outlines the film tax

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15. *Id.*
16. Goods used in a state are usually subject to a sales tax or use tax, but not both. The use tax compensates when a sales tax has not been paid. Examples of use tax includes goods purchased in another state that do not have a sales tax or goods purchased from someone who is not authorized to collect a sales tax.
17. *See* Schonauer, *supra* note 3, at 402.

incentive programs offered in Louisiana, Georgia, and Michigan. These states stand out for the recent acclaim their programs have received from industry insiders and film executives.

A. Louisiana: The Pelican State

Dubbed by *Variety* as "the other LA," the Bayou State was the first state to adopt a film tax incentive. In 2002, Louisiana enacted a tax credit for "investment losses in films with substantial Louisiana content."[18] Under the original 2002 plan, qualifying producers were eligible for transferable tax credits of up to 15% of total production costs.[19] Additionally, Louisiana offered another 20% in tax credits for in-state payroll costs, as well as state sales tax exemptions. In its first two years, the state experienced an astounding 2,850% growth in its entertainment production industry, with economic impact increasing more than 500%.[20]

Since the introduction of film tax incentives in Louisiana, blockbusters such as *Ray*, *Runaway Jury*, *Cadillac Records*, and *The Curious Case of Benjamin Button* have been filmed in the Pelican State. Under the current Louisiana Motion Picture Incentive Act, Louisiana offers a 30% transferable incentive for total in-state expenditures related to the production of a motion picture and an additional 5% labor incentive can be earned on the payroll of Louisiana residents that are employed by a state certified motion picture production. The incentives are fully transferable and Louisiana has no limit on the amount of incentives that can be earned by a single production.

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18. Stewart Yerton, *Counting on Film Credits*, NEW ORLEANS TIMES-PICAYUNE, May 11, 2003.
19. *See* Ahmad, *supra* note 6, at 408-09.
20. *See* Schonauer, *supra* note 3, at 402.

To qualify for the incentives, film producers undertake a multi-tiered application process. Producers must first submit an application outlining the preliminary budget, a distribution plan, and a notarized statement that the project meets the definition of state certified production. The Director of Film for the Office of Entertainment Industry Development evaluates the application, and, if approved, the Film Office sends an initial certification letter to the filmmaker.

Upon either completion of the entire production, completion of the Louisiana portion of the production, or meeting the in-state spending requirement of $300,000, producers may then submit an audit and request incentives. The audit is reviewed by the Louisiana Economic Development's legal department, and, if approved, a final certificate letter is issued and the incentives are certified. The incentives can be applied to any Louisiana income tax liabilities, transferred to the Office of Entertainment Development for $0.85 on the dollar, or transferred to another Louisiana taxpayer.

The success of Louisiana's film tax incentive program has encouraged other states to follow suit. Seeking to outbid Louisiana, states such as Georgia and Michigan recently began offering bigger and better film tax incentive packages.

B. Georgia: The Peach State

Hollywood has Georgia on its mind. Broderick Johnson, producer of *The Blind Side*, said that "the magnitude of Georgia's tax break is one of the best, if not the best, in the country."[21] Georgia currently has one of the highest film tax credits in the country.

Before Georgia offered a film tax credit, the state was on a hot streak in the late 1990s and early 2000s, attracting such studio films as 1999's *The General's Daughter* and *The Legend of Bagger Vance.* But in 2003, Louisiana and New

21. Jack Egan, *Georgia Shoots Take Off,* VARIETY, May 17, 2010, at 1, http://www.variety.com/article/VR1118019132?refCatId=13.

Mexico made available rich incentive packages, luring away productions that would have otherwise gone to the Peach State. The Georgia Legislature fought back with a 9% tax credit in 2005, leading to record-setting economic impact: In 2006, film, television, and video game companies contributed $475 million to the state economy, a significant increase from the $124 million contributed in 2004.[22]

Hoping to increase its competitive edge, Georgia beefed up its film tax incentive program in 2008. According to Kevin Klowden, "in May 2008, the state made a bold increase in its tax credit, going from a potential total of 17% up to an eye-catching 30% on all qualified film-related spending in Georgia."[23] Since increasing its tax incentive program, Georgia has emerged as one of the top five states for film production, attracting such movies as the Academy Award-winning *The Blind Side*, the Woody Harrelson horror-comedy flick *Zombieland*, and the fifth installment of Universal's *Fast and Furious* franchise. In 2009, the film industry, taking advantage of favorable tax credits, invested more than $800 million in Georgia's economy.

Currently, the Georgia Entertainment Industry Investment Act offers a 30% tax credit incentive on all qualified film-related spending in Georgia. The tax credit includes a 20% base credit for filming and post-production work with a minimum expenditure of $500,000 in a single year. An additional 10% tax credit called the "Georgia Entertainment Promotion" is available if filmmakers include a Georgia logo in the final project. Up to 8% in sales tax relief is also available to qualifying productions.

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22. Todd Longwell, *Filmmakers Have Georgia on Their Minds*, HOLLYWOOD REPORTER, May 21, 2008, http://www.hollywoodreporter.com/news/filmmakers-have-georgia-minds-112367.
23. Kevin Klowden et al., *Film Flight: Lost Production and Its Economic Impact on California*, MILKEN INST. RES. REP., July 2010, at 14, http://www.milkeninstitute.org/pdf/FilmFlight.pdf.

To claim the tax credit, producers must submit an application to the Georgia Department of Economic Development Film, Music and Digital Entertainment Division for certification of the production.[24] The certified production letter is then attached to the production company's tax return when claiming the credit. The tax credit may be claimed once a minimum of $500,000 of expenditures have been made, and the tax return covering those expenditures is filed with the Georgia Department of Revenue. Upon completion of the project, applicants must also provide the Georgia Film, Music and Digital Entertainment Office with posters of the film, a DVD of the finished project, and electronic press kits.

C. Michigan: The Great Lakes State

In 2008, Michigan adopted the most competitive film tax incentive in the United States. The state currently offers a 40% transferable tax rebate on expenditures incurred while filming projects in the state. The rate rises to 42% if filming is done in core communities.[25] As Kevin Klowden notes, "compensation expenditures for above-the-line workers, regardless of residency, and for below-the-line Michigan workers are eligible for the 40% to 42% rebate; for non-resident below-the-line workers, a 30% rebate applies."[26]

Michigan also offers a workforce development tax credit and an infrastructure tax credit. The workforce development credit applies to hiring and training Michigan-based crew members. In an effort to create a sustainable film workforce, the state allows film producers and production

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24. *See* Georgia Film, Music and Digital Entertainment Tax Incentives, at 7, http://www.georgia.org/SiteCollectionDocuments/Industries/Entertainment/Tax%20Credits/FMDE_tax%20brochure_2009.pdf (last visited Sept. 24, 2010).
25. Sample core communities include: Detroit, Traverse City, Muskegon, Lansing, and Ann Arbor.
26. *See* Klowden et al., *supra* note 23, at 16.

companies to apply for a 50% refundable business tax credit for spending toward on-the-job training provided for Michigan residents hired in below-the-line positions.[27] Under the infrastructure tax credit, Michigan production companies may claim a 25% credit for capital expenditures related to film or digital media infrastructure such as studios, equipment, and other facilities.[28] The expenditure must be at least $350,000.

According to Janet Lockwood, Michigan Film Commissioner, "in 2009, 126 companies applied for the refundable tax credit. Of those 126 companies, 62 were approved and 46 completed their work in 2009."[29] She further states that, "filming expenditures in Michigan have increased from $125 million in 2008 to an estimated $223.6 million in 2009."[30] Films currently in production include *A Very Harold and Kumar Christmas* (featuring Kal Penn and Neil Patrick Harris) and *Real Steel* (featuring Hugh Jackman and Evangeline Lilly).

Compared to other states, the application process for Michigan tax incentives is arduous. Producers must first submit a preliminary application and set of documents, including the applicant's most recent financial statement, loan agreement, marketing plan, distribution plan, budget, and a list of expected job hires for production. Filmmakers must also include a copy of the film script, insurance documents, and an application fee of $100. Additionally, filmmakers must answer a list of short essay questions such as "discuss the extent to which the qualified production may have the effect of promoting Michigan as a tourist destination" and "discuss the extent to

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27. *Id.*
28. Several movie studios are currently being developed under the capital expenditure credit, including Motown Motion Pictures and Wonderstruck.
29. Memorandum from Janet Lockwood, Michigan Film Commissioner, to the Honorable Jennifer Granholm (Mar. 1, 2010), *available at* http://www.michiganfilmoffice.org/cm/The-Film-Office/MFO2009ANNUALREPORT(revised).pdf.
30. *Id.*

which the qualified production may have the effect of promoting economic development or job creation in Michigan." Upon completion of the initial paperwork, the project must commence pre-production within 90 days of approval. Once filming is complete, filmmakers must submit a full audit of production expenses. If approved, the Film Office issues the incentives.

IV. A FISCAL ANALYSIS OF FILM TAX INCENTIVES

As Cornell Professor Susan Christopherson recently noted, "as subsidies to film and television producers have increased, questions are being raised about the use of public money to lure media producers to states and cities."[31] Skeptics are beginning to ask whether the cost of attracting media producers outweighs the benefit to states' economies.[32] While many states are quick to boast high job creation and economic growth, heightened scrutiny of such statistics reveals that many of these numbers are often inflated or incorrect. Professor Christopherson aptly notes that, "the overwhelming majority of fiscal impact analyses of film subsidy programs conclude that the subsidies actually have a negative impact on state revenues, particularly if they take the form of saleable tax credits."[33] As journalist David Nicklaus noted, "every state loves to have more stars visit, and many are willing to spend money to attract moviemaking activity. Rarely does anyone try to figure out what the state gets for its money."[34]

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31. Susan Christopherson & Ned Rightor, *The Creative Economy as 'Big Business': Evaluating State Strategies to Lure Filmmakers*, JOURNAL OF PLANNING EDUCATION AND RESEARCH, Dec. 21, 2009, at 337.
32. *Id.*
33. *Id.* at 341.
34. David Nicklaus, *A Harsh Assessment of Film Tax Credits,* ST. LOUIS POST-DISPATCH, Sept. 22, 2010, http://www.stltoday.com/business/columns/david-nicklaus/article_1232007a-c68a-11df-896f-0017a4a78c22.html.

States are beginning to examine more carefully the impact film tax credits have on their economies. Many of the studies conducted by state fiscal officers provide statistics that prove many of these programs have a considerable negative impact on state revenue.[35] Studies all demonstrate that state residents are essentially providing grants to film producers to locate productions to their state.[36]

According to statistics recently compiled by the State of Rhode Island Department of Revenue, for every dollar invested in film production tax credits, the state earns back $0.28 from direct economic investment.[37] More importantly, they calculated that the multiplier needed for their state to break even on those credits was 3.57; every dollar spent by a production company in the state must generate $3.57 in additional expenditures for the state to recoup the tax funds expended to finance production in the state.[38] The study also found that very few of the wages paid by subsidized film productions actually went to Rhode Island residents, negating the argument that film tax incentives create jobs for in-state residents.

In 2009, the Wisconsin Department of Commerce also issued a report arguing that film tax incentives provided little net economic benefit for the state.[39] The report also stated that the film industry was ineffective at creating new jobs. The Department of Commerce noted that film incentives were 75% less effective at generating jobs than other state programs and that each job created costs twenty times more than those created under other state programs.[40] In response to these

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35. Christopherson & Rightor, *supra* note 31, at 349.
36. *Id.*
37. *Id.* at 341.
38. *Id.*
39. *Commerce Study Slams Film Incentives Law,* THE BUSINESS JOURNAL, Mar. 31, 2009, http://www.bizjournals.com/milwaukee/stories/2009/03/30/daily29.html.
40. *Id.*

findings, Governor Jim Doyle of Wisconsin proposed eliminating film tax incentives. He sought to replace the program with a $470,000 annual grant program for projects that create permanent jobs in the state.[41] As Professor Christopherson observed, "in a period of fiscal austerity and declining state budgets, these allocations mean that other state activities necessary to economic development—for example, investments in school construction, infrastructure repair, or job training—will receive less funding."[42]

At first blush, film tax incentive programs appear successful, but many programs are inefficient and fail to deliver expected results. As the prior paragraphs illustrate, many states have failed to recoup the investments made in film production. Of those states that have recouped investments, many have seen only minimal returns.

While the efforts of Rhode Island and Wisconsin to monitor incentives should be applauded, more states should follow suit in an effort to regularly examine the economic impact of these programs. In its first year, the Pennsylvania Film Tax Incentive Program spent $58 million and generated only $18 million in state and local tax dollars, producing a total net loss of $40 million for state and local government in Pennsylvania.[43] These figures were compiled under the directive of Pennsylvania Senate Resolution 2009-20 and House Resolution 2000-127. These resolutions required the Legislative Budget and Finance Committee to study the effectiveness of eighteen tax credit programs, including the Film Production Tax Credit. The Committee contracted with

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41. Much of the criticism surrounded Jonny Depp's film, *Public Enemies*, which was filmed in the state. The State Department of Commerce reported that the film was nearly a wash, bringing in $5 million but costing $4.6 million in tax credits.

42. Christopherson & Rightor, *supra* note 31, at 349.

43. Economic Research Associates, *Pennsylvania's Film Production Tax Credit and Industry Analysis,* May 2009, at 54, *available at* http://lbfc.legis.state.pa.us/reports/2009/35.pdf.

the firm Economics Research Associates to conduct a cost-benefit analysis of film tax incentives.

Such periodic studies as the one required by the Pennsylvania Budget and Finance Committee are crucial to the existence of film tax incentives. While many states have conducted studies, whether through their Departments of Revenue or through their Finance Committees, the studies are either conducted only once or on an irregular basis. To fully understand the continued impact of film tax incentive programs, states must be willing to undergo audits and conduct studies on a regular basis.

State legislative mandate should require states to undergo biennial or annual audits. Due to the costly and time-intensive nature of preparing studies, requiring a bare minimum cost-benefit analysis would suffice, as long as enough data was obtained to determine whether each state was gaining or losing money through its film tax incentive program. Legislative mandate should also require each state to incorporate minimum financial requirements into its film tax incentive bill. States should be specific in determining the financial goals they hope to achieve through film tax incentive programs. Once financial goals are set (for example, during the FY 2011-2012, a minimum 10% return on film tax incentives must be met by the state), they should be codified into formal legislation. States should not continue to allocate money for programs that fail to meet the basic threshold of return.

V. A LEGAL ANALYSIS OF FILM TAX INCENTIVES

Since their inception, state film tax incentive programs have offered a mixed bag of success and disappointment.[44] While the cases of Louisiana, Georgia, and Michigan highlight some of the successes of film tax incentives, as the adage goes, "all that glitters isn't gold." While the previous section

44. *See* Ahmad, *supra* note 6, at 412.

highlights the economic shortcomings of film tax incentive programs, this section highlights their legal shortcomings in and out of the courtroom. This section also exposes some flaws in film tax incentive programs and highlights the recent lawsuits and upcoming court cases concerning film tax incentives. The section concludes by analyzing pending policy reform and suggesting increased state reform.

D. Lawsuits and Litigation

While film tax incentives have attracted celebrities such as Sandra Bullock and Josh Lucas, these incentives have also attracted criminals such as Joseph Peters and Wendy Runge. Recently, filmmakers have begun committing acts of fraud and misrepresentation in an effort to exploit film incentive programs throughout the United States. Film tax incentives have become the oft-used means by which filmmakers achieve their ends, whether legally or illegally.

In 2010, the State of Iowa brought suit against filmmaker Wendy Runge for fraudulent use of film tax incentives. Ms. Runge currently faces twelve felony charges: one count of criminal conduct and eleven counts of fraudulent practice.[45] The complaint alleges that Ms. Runge fraudulently obtained $1,850,777.85 in film tax incentives from the State of Iowa and attempted to obtain more than $57 million in such incentives.[46] Her film project, entitled *The Scientist*, had an initial production budget of $767,250, of which an estimated $625,000 was to be spent in Iowa.[47] The budget, however, was later increased to $1,795,387.00, of which an estimated

45. A charge of first-degree fraudulent practice carries a potential sentence of up to ten years in prison, as well as a fine up to $10,000. Ongoing criminal conduct carries a possible prison sentence of up to twenty-five years.
46. Complaint at 1, State v. Runge, No. 09-57792 (Iowa Dist. Ct. June 2, 2010).
47. *Id.* at 5.

$1,700,000 was to be spent in Iowa.[48] Final production expenditures claimed by Ms. Runge and her business partners after completion of filming totaled $3,701,555.69.[49] Based on the final production claims, much of which were allegedly falsified or inflated, the Iowa Department of Economic Development issued transferrable tax credits worth $1,850,777.85, or 50% of the claimed expenditures.[50] Subsequently, Ms. Runge and her business partners sold their rights to the tax credits to third parties for cash.

A later inspection by the Attorney General indicated that Ms. Runge and her business partners defrauded the state of hundreds of thousands of dollars. It was discovered that, of the hundreds of items listed on the invoice, at least twenty-five items appeared at two separate places on the invoice. If each item were counted only once, those twenty-five items would have totaled $525,375.[51] Because those items were listed twice on the invoice, however, they totaled $1,050,750.[52]

Many other figures also appeared embellished and highly exaggerated. For instance, the initial invoice inflated the cost of grip and lighting for the film by 16,000% ($12,050 to $2,018,925).[53] Even labor services were priced at several times the rate at which comparable labor was readily available in the market.[54] Not only were production costs exaggerated, but also the invoice inflated the number of days equipment was used on the film. The invoice charged for 45 days of rental when the film was actually completed in 33 days. The 45-day rental period on the invoice represents a 36% increase in the number of days that the film actually needed the equipment.[55] Other

48. *Id.*
49. *Id.* at 9.
50. *Id.*
51. *Id.* at 8.
52. *Id.*
53. *Id.* at 5.
54. *Id.* at 7.
55. *Id.*

items listed on their invoice went "far beyond the fair market rate."[56] According to the affidavit, most, if not at all, rental items could have been purchased several times over for the amounts that were listed in the invoice.[57]

Alleged misuse of film tax incentives has ignited several other lawsuits. Most recently, Michigan brought suit against a film producer charged with fraud. In August 2010, Michigan Attorney General Michael Cox filed felony charges against Michigan investor Joseph Peters. Under the 25% infrastructure tax incentive, Peters allegedly sought to defraud the state out of a $10 million tax credit based on the supposed $40 million purchase of a film studio (Hangar42).[58] The credit was ultimately denied when Peters could not properly document the alleged purchase. Peters was charged in the 61st District Court in Kent County and is facing a maximum penalty of up to five years in prison.[59] Arrangements to have Peters prosecuted are underway and the investigation remains ongoing.

E. Policy Development and Legislative Reform

In an effort to curb fraud, many policymakers suggest federal action to amend state film tax incentive programs. William Luther of The Tax Foundation suggested that "state officials could request Congress to enforce a multilateral pact

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56. The invoice was also highly inflated because it failed to account for the "industry practice of packaging and discounting which leads to significant reduction in rental costs." The invoice included a daily rate when the standard is a discounted weekly rental rate. Industry standard is to rent packages of equipment at a discount when the project is to last more than a few days. *Id.* at 8.
57. *Id.* at 7.
58. *Investor in Michigan Film Studio Charged in Fraud*, Aug. 5, 2010, ASSOCIATED PRESS, http://www.publicbroadcasting.net/michigan/news.newsmain/article/0/0/1683280/West.Side.Stories/Investor.in.Michigan.film.studio.charged.in.fraud.
59. *Id.*

or Congress could impose a moratorium on the states."[60] While admirable, this approach seems unlikely to gain traction. The likelihood of all forty-four film tax incentive states agreeing to a moratorium is slim. States have been met with varying degrees of successes and failures, so a one-size-fits-all approach would be counterproductive.

The impracticability of federal regulation does not, however, preclude the option of state regulation. State lawmakers should begin conducting more in-depth analyses of their respective film tax incentive programs and introducing legislation that will enhance fiscal transparency and curtail acts of fraud.

Michigan is currently spearheading the movement for reform. Senator Nancy Cassis (R-Novi) is leading the effort to end the outpouring of tax incentives to filmmakers and production companies in Michigan. In September 2009, Senator Cassis introduced Bill 796, which increases the disclosure requirements for state film subsidies. Under Bill 796, the Michigan Film Office would be required to file a report with the legislature twice a year detailing the previous six months, including applications received, productions proposed, and the amounts of post-production tax credits awarded. Annual reports from the office would also have to specify how many crew members on film projects receiving aid were Michigan residents. Moreover, Treasury officials would be obligated to release film credit specifics to the public and report to the legislature when film credits were awarded, including when a check was written for a qualified production.

After introducing Bill 796, Ms. Cassis subsequently introduced Bill 889 in October 2009. Bill 889 would remove a confidentiality option for film companies regarding qualified expenditures. In support of her bills, Cassis asks "how long will the Legislature tolerate [Michigan Economic Development Corporation] and the Film Office hiding behind confidentiality

60. *See* Luther, *supra* note 2, at 16.

instead of disclosing important information that will aid the Legislature in making decisions about accountability and oversight of the program?"[61]

Ms. Cassis's bills were approved in the Senate in December 2009, but stalled in the House. On June 30, 2010, the House Tax Policy Committee voted unanimously to send Senate Bills 796 and 889 to the full House for consideration. In mid-September 2010, the House sent the bills to the Senate, where Senate committee hearings were underway as of January 2011.

While awaiting a final vote on the bills, Cassis managed to garner the support of colleagues, including Michigan State Representative Tom McMillin (R-Rochester Hills). Mr. McMillin, who called for an immediate freeze on the state film credits, stated that "the nonpartisan economists agree that the film credit program is extremely costly and is failing miserably—costing the state $100 million more than it brings in, and costing families about 7,500 full time jobs from the private sector."[62] He further stated that "the primary thing the films credits are producing are headlines at the expense of jobs."[63]

The bills recently passed in Michigan provide a blueprint that other states can use to guide them in the restructuring of their respective film tax incentive laws. Each state offering film tax incentives should codify legislation that increases transparency and creates safeguards to protect the state against acts of fraud and other forms of deception. The aforementioned lawsuits are a sign of what is to come if states do not take proactive steps to curtail fraud.

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61. *Bills would shed light on movie money,* Aug. 17, 2010, *available at* http://www.senate.michigan.gov/gop/readarticle.asp?id=3390&District=15.
62. Posting of Joseph Henchman to Tax Foundation Tax Policy Blog, http://www.taxfoundation.org/blog/show/25719.html (Jan. 18, 2010).
63. *Id.*

VI. RECOMMENDATIONS AND CONSIDERATIONS

As more and more film professionals seek to take advantage of film tax credits, state film offices should institute a more stringent application processes. Applicants should be subject to background checks. Background checks can help determine the integrity of an applicant as well as the likelihood of criminal conduct. Film offices should specifically check for past criminal convictions pertaining to fraud, embezzlement, and any other acts that would deem applicants untrustworthy candidates for incentives.

Not only should film offices conduct mandatory background checks on applicants, but they should also conduct mandatory background checks on potential film office hires. Recent headlines indicate that filmmakers and producers are not the only people inclined to commit criminal acts. In 2009, former Louisiana Film Chief, Mark Smith, was sentenced to two (2) years in prison for accepting bribes from a film producer in exchange for giving away too many lucrative state film incentives.[64] Mr. Smith cooperated with federal investigators after a two-year probe uncovered $135,000 worth of bribes channeled from producer Malcolm Petal.[65] During Mr. Smith's tenure as Louisiana Film Chief, Mr. Petal's production company exaggerated production costs for Kevin Costner's *Mr. Brooks*. The film was initially cleared for tax credits based on $34 million in expenditures despite a slated budget of less than $20 million.[66]

In addition to conducting background checks, state film offices should make applicants more aware of the criminal penalties associated with fraud or illegal practices. Whether on their websites or application materials, state film offices should

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64. Eriq Gardner, *Louisiana Film Recruiter Sentenced to Two years for Tax Credit Bribery*, THE HOLLYWOOD REPORTER, July 30, 2009, http://reporter.blogs.com/thresq/2009/07/louisiana-tax-credits-bribery-.html.
65. *Id.*
66. *Id.*

clearly indicate the legal ramifications for fraud in association with the film tax incentive program. Hopefully, publicizing penalties will deter applicants from conducting criminal activity. Moreover, all applicants should be required to sign a separate affidavit certifying the authenticity of information provided in conjunction with their application materials.

It should be noted that before lawmakers undertake film office restructuring or introduce legislation, states should strongly consider whether film tax incentives are truly needed. Many states should undertake objective evaluations as to whether they have the resources needed to thrive in the film industry. North Carolina Representative Marilyn Avila (R-Wake) recently criticized what she thought was an excessive focus on encouraging film production in North Carolina, pointing out that the film industry accounted for only four hundredths of a percent of the state's gross domestic product between 1997 and 2007.[67] She noted that North Carolina was "expending a lot of time, energy and discussion when we have industries that make up a much greater part of our GDP in this state that we could be working with."[68] All 50 states cannot simultaneously be the premiere state for television and film production. States must determine if the industry is truly most beneficial to their residents.

Many states are beginning to scale back on their film incentive programs. For instance, in 2009, Indiana began pulling back on its tax incentives for film, eliminating a sales tax exemption for production-related purchases and cutting in half an income tax credit meant to encourage filming in the state.[69] Governor Mitch Daniels advocated for the elimination

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67. Bill Flanigen, *Economic Incentives Package Heavy on Subsidies for Film Industry*, CAROLINA JOURNAL ONLINE, June 21, 2010, http://www.carolinajournal.com/exclusives/display_exclusive.html?id=6545
68. *Id.*
69. Lesley Stedman Weidenbener, *Indiana Exits Film Tax Credit*, THE COURIER-JOURNAL (Louisville), July 15, 2009, *available at* 2009 WLNR 15687256.

of the income tax credit entirely. It was estimated that the move could save the state as much as $3.5 million annually, according to a fiscal analysis prepared by the nonpartisan Legislative Services Agency.[70]

Nebraska lawmakers introduced film tax incentive bills in each of the past two legislative sessions, but neither got farther than the first round. Supporters have failed to win over Governor Dave Heineman, who has adamantly opposed tax incentives for filmmakers. Governor Heineman recently stated "my focus is on tax relief for hard-working middle-class Nebraskans, not Hollywood producers."[71] The second quarter of 2011 has already seen major changes and controversies pertaining to film tax incentive programs played out on the legislative floors of such other states as Illinois, Rhode Island, Oregon, Ohio, and Texas. Undoubtedly, these debates are only a prelude of what's to come.

VII. CONCLUSION

For those states that deem film tax incentives an essential component to their economic well-being, it is advisable to regularly measure and monitor growth and structure these programs in a manner that lawmakers, taxpayers, and film producers find beneficial. Moving forward, lawmakers, taxpayers, and film producers must work to ensure these programs thrive. Taxpayers must advocate for increased transparency and lawmakers must increase oversight and strengthen regulation.

Film tax incentives have the unique ability to transplant film production outside of Los Angeles and into cities such as Savannah, Buffalo, and Cleveland, that otherwise would never have the opportunity to partake in the movie-making process.

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70. *Id.*
71. Bob Fischbach, *Running in Place*, OMAHA WORLD-HERALD, June 21, 2009, http://www.omaha.com/article/20090621/ENTERTAINMENT/706219920/0/FRONTPAGE.

As states continue to roll out the red carpet for the arrival of celebrities, cast, and crew, they must do so with caution. Unstructured programs and insufficient oversight will ultimately lead to red carpet mishaps and misfortunes.

STATE FILM TAX INCENTIVES: "I'M READY FOR MY CLOSE-UP"

Selina Baschiera

Implementing state tax incentives for film and television production has created a lucrative market in which several states have seen notable fiscal increases.[1] Many states have issued or are attempting to modify incentive programs[2] to effectively compete in this new arena. Widespread economic deficits are influencing states' negotiation tactics as production companies use leverage to bargain for better deals with states like Hawaii, where two production companies are offering to build "environmentally-friendly" production facilities in exchange for significant tax credit increases.[3] Though

1. Jaye A. Clahoun, Hooray for Hollywood!: A Film-by-Film Primer on the Louisiana Film Industry's Blockbuster Success Thanks to Motion Picture Tax Incentives, 58 LA. BAR J. 88, 88 (2010) (discussing the impact Louisiana tax incentives have had on the state's film industry and citing specific examples); Steven R. Miller & Abdul Abdulkadri, The Economic Impact of Michigan's Motion Picture Production Industry and the Michigan Motion Picture Production Credit, CENTER FOR ECONOMIC ANALYSIS, MICHIGAN STATE UNIVERSITY, Feb. 6, 2009, http://129.33.81.41/documents/filmoffice/MSU_Economic_Impact_Study_269263_7.pdf (discussing the impact Michigan's film tax incentive program has had on the state's budget and future predictions for the program).
2. Tradeable Film Tax Credits: State to State Comparison, TaxCreditsLLC.com, http://www.taxcreditsllc.com/State-to-State_Comparison.pdf (last visited Apr. 20, 2011).
3. Derrick DePledge, *2 Entertainment Firms Appeal for Film Tax Credits*, HONOLULU STAR-ADVERTISER, Feb. 11, 2011, http://www.staradvertiser.com/news/20110211_2_entertainment_firms_appeal_for_film_tax_credits.html.

professionals and analysts disagree[4] as to whether widespread adoption of these programs is indicative of their overall success, praise may be premature as sweeping program flaws come to light.

Film tax credits have brought uncertainty and unease to the film industry as producers encounter problems with adoption, implementation, and corruption.[5] Ms. Thomas' article addresses potential pitfalls in these programs, and although states like Louisiana and Georgia continue to reap the benefits of their programs (even in the face of corruption[6]), other states are issuing suspensions due to budget or fraud concerns.[7] The potential for corruption pervades the media, and Ms. Thomas's discussion of *State v. Runge* seems to be only the tip of the iceberg. Runge pled guilty to felony fraud,[8] but Runge's plea implicated Iowa's former film chief Tom Wheeler.[9] He is now charged with several felonies, including

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4. Sacha Pfeiffer, *Mass. Film Tax Credits: Blessing or Boondoggle?*, WBUR.org, Feb. 25, 2011, http://www.wbur.org/2011/02/25/film-tax-credits-3.

5. William Luther, Movie Production Incentives: Blockbuster Support for Lackluster Policy, Tax Found. Special Report No. 173 (Jan. 14, 2010), *available at* http://www.heartland.org/custom/semod_policybot/pdf/28857.pdf.

6. Press Release, Dep't of Justice, Film Producer Sentenced to Five Years in Federal Prison for Conspiring to Bribe State Official (Apr. 23, 2009), *available at* http://neworleans.fbi.gov/dojpressrel/pressrel09/no042309a.htm.

7. *State Film Tax Incentive Environment Remains Positive*, ENTERTAINMENT, MEDIA AND COMMUNICATIONS TAX NEWSLETTER (PricewaterhouseCoopers, U.S.), Mar. 2010, *available at* http://www.publications.pwc.com/DisplayFile.aspx?Attachmentid=3166&Mailinstanceid=15588.

8. Tim Molloy, *Filmmaker Pleads Guilty to Iowa Fraud Charge in Tax Scandal*, THE WRAP, Feb. 17, 2011, http://www.thewrap.com/movies/column-post/filmmaker-pleads-guilty-iowa-fraud-charge-24820.

9. Jannay Towne, Guilty Plea: Wendy Weiner Runge Reaches Plea Deal With Prosecutors in Film Tax Credit Fraud Trial, WHOtv.com, Feb. 16, 2011, http://www.whotv.com/news/who-story-film-tax-credit-trial-021611,0,1357982.story.

official misconduct for abusing the incentive program and incurring financial gain.[10] This incident of moral turpitude garnered national attention and led to the abrupt suspension of Iowa's film incentive program, financially damaging those production companies that had ongoing or pending projects there.[11] The threat of corruption among state actors in this unregulated market is very real, and from this corruption stems the threat to production companies of sudden, costly rescission.

After several years of practice and promise, some legislative officials have opted to diminish or even dismantle their states' incentive programs[12] citing the programs' lost profits and lack of overall benefit to the states. New Jersey's governor Chris Christie recently quashed the state's tax incentive program citing dubious financial gains for New Jersey and its people.[13] Pennsylvania, however, has chosen to maintain its tax incentive program despite a massive $33 million dollar loss in profits in 2009-2010.[14] Maintaining a positive outlook, Pennsylvania legislators have even discussed implementing a video game tax credit similar to its film tax credit. Perhaps they are hoping that the draw of film, television, and video game development will increase the lure

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10. Richard Verrier, *Iowa Film Tax Credit Program Racked by Scandal*, L.A. TIMES, Jan. 19, 2011, *available at* http://articles.latimes.com/2011/jan/19/business/la-fi-ct-onlocation-20110119.

11. Rod Boshart, *Felony Charges Filed Against Former Head of Iowa Film Office, 3 Filmmakers*, WCF COURIER, Jan. 11, 2011, http://wcfcourier.com/news/local/govt-and-politics/article_b60528de-1d61-11e0-a213-001cc4c002e0.html.

12. Posting of Nellie Andreeva to Deadline Hollywood, *Georgia's Film Tax Credit Stays Intact*, Arizona's Bill To Restore Its Incentive Dead, http://www.deadline.com/2011/03/georgias-film-tax-credit-to-stay-intact (Mar. 25, 2011 2:14 PDT).

13. Douglas B. Brill, *Incentives for Filming: N.J. Halts Production, Pa. Has Full Cast*, THE EXPRESS-TIMES (Lehigh Valley, Pa.), Mar. 13, 2011, http://www.lehighvalleylive.com/entertainment/index.ssf?/base/living-1/129999271358091.xml&coll=3.

14. *Id.*

for companies by creating a "one-stop shop,"[15] but only time will tell whether or not this plan succeeds.

Ms. Thomas lists the potential pitfalls of state film tax incentive programs, including economic deficits when films fail to achieve projected profit margins and the risk that states may never recover the economic losses sustained under these initiatives.[16] Combining producers' lack of faith in the states with the states' lack of faith in the programs' profitability, it is likely that the number of states preserving film tax incentive programs will decrease. After analyzing risks and real financial gains, the competitive market between states will fluctuate as some states realize that they cannot, and should not, compete for film industry business with tax incentives.

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15. Erick Schwartzel, *State Tax Breaks Considered For Video Game Firms*, PITTSBURGH POST-GAZETTE, Oct. 12, 2010, http://www.post-gazette.com/pg/10285/1094425-28.stm.

16. Posting of Kailee Tkacz to Tax Found. Tax Policy Blog, http://www.taxfoundation.org/blog/show/27050.html (Feb. 16, 2011).

STATE FILM TAX INCENTIVES: "THAT'S A WRAP!"

Matthew Hamilton

As Ms. Thomas indicated, many states have begun diminishing their film tax incentives programs.[1] With several newly elected state officials assuming office earlier this year, that trend has intensified. Specifically, due to the unprecedented budget deficits that many newly elected officials are encountering, film tax incentives programs have become a recurring target. Programs have been eliminated, capped at a certain amount, or in the case of the *Sports and Entertainment Law Journal*'s home state, blocked in renewal.

The most surprising development since Ms. Thomas's article is currently happening in Michigan. As Ms. Thomas mentioned, Michigan adopted the most competitive state film tax incentives program in 2008, which offered a 40 percent transferable tax rebate on expenditures incurred while filming in the state.[2] The program, which many considered to be an immense success, attracted big studio films such as *Gran Torino*, *Scream 3*, and *Up in the Air*.[3] Furthermore, with the ratification of Bills 796 and 889 in December 2010, the Michigan program attained an exemplary level of transparency.[4] Michigan's film tax incentives program, however, is currently in jeopardy. Michigan's new governor,

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1. Jaia Thomas, *State Film Tax Incentives: A Red Carpet Hit or Miss*, ARIZ. ST. SPORTS & ENT. L.J, May 2011.
2. *Id.*
3. Julie Halpert, *Michigan's Next Big Blow: The Film Industry*, FORTUNE (Mar. 21, 2011), http://money.cnn.com/2011/03/21/news/companies/michigan_film_industry.fortune/.
4. Michigan Votes, http://www.michiganvotes.org/Legislation.aspx?ID=100528 (last visited Mar. 27, 2011).

Rick Snyder, recently released his budget proposal for 2012, and if passed, it would limit the state's film tax incentives program to $25 million annually.[5] With such a small budget (as compared to the state's expenditures in recent years), many filmmakers are concerned that the state's program will only be able to accommodate a few major films each year.[6] Furthermore, as the governor's budget proposal remains pending until a decision is reached later this year, the proposal has already impaired the state's influence in the film industry. The Michigan Film Office is delaying decision-making on 43 pending applications until the state's budget is resolved, and as a result, many studios have decided to film elsewhere.[7] After achieving what looked to be a promising new industry, Michigan's days as a leader in offering film tax incentives may soon be over.

Several other state film tax incentives programs have recently come under fire as well. For instance, in Rhode Island, newly elected governor, Lincoln Chafee, recommended as a part of his budget proposal, that the state's film tax incentives program be cut entirely as a way of saving money and reducing the state's deficit.[8] Across the country, in New Mexico, the state Senate recently approved a $50 million cap on their state's film tax incentives program.[9] Moreover, that program is likely to be capped at an even lesser amount, as Gov. Susan Martinez has publicly said that she will not approve anything greater than $45 million.[10] New Mexico paid out $65.9 million

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5. Halpert, *supra* note 4.
6. *Id.*
7. *Id.*
8. David Klepper, *Filmmakers Urge RI Not to End Film Tax Credit*, BLOOMBERG BUSINESSWEEK, Mar. 25, 2011, http://www.businessweek.com/ap/financialnews/D9M6B5O00.htm.
9. Alex Ben Block, *New Mexico State Senate Votes to Preserve Film Tax Credit Program*, THE HOLLYWOOD REPORTER (Mar. 16, 2011), http://www.hollywoodreporter.com/news/new-mexico-state-senate-votes-168530.
10. *Id.*

in film tax incentives last year.[11] As a final and distinct example, Arizona's film tax incentives program lapsed at the end of 2010, and an effort to renew it was recently blocked. A bill that would have offered a 20 percent tax credit passed in the state Senate, however, a member of the state House unilaterally killed the bill by not reporting it to the appropriate committee.[12]

Altogether, these examples serve as only a sample of the widespread recent resistance towards state film tax incentives programs.

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11. *Id.*

12. Rudabeh Shahbazi, *Future of Arizona Film Industry in Jeopardy*, ABC 15 (Mar. 23, 2011), http://www.abc15.com/dpp/news/state/future-of-arizona-film-industry-in-jeopardy.