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FOREWORD

Christopher Thiele¹

It is with great pleasure that I present Volume 2, Issue 2 of the Sports and Entertainment Law Journal. This Issue marks the beginning of our third year as a Journal, a year where we are no longer a *new* but rather a *known* commodity. Not only is this issue available directly through our website (sportsandentertainmentlawjournal.com/issues/); but it is also found on *Amazon*, *Barnes & Noble*, and *Google Books* as well. Submissions are through the roof, we have had to reject at least ten articles for every article we decided to publish. Because of this, we have been able to maintain the same level of high quality legal analysis this Journal was founded on.

For our *fourth* issue to publish, we've selected four articles. Our lead article is by **Darren A. Heitner**, a sports and entertainment attorney and *Forbes* writer, and **Jason B. Belzer**, the President of Global Athlete Management Enterprises, Inc. Their article, titled "An Offer They Should Refuse: Why Conflicts of Interest Raised by Dual Representation among Player Agents is a Major Threat to the NCAA and Professional Leagues", examines the plethora of conflicts of interest that Player Agents deal with each and every day. To remedy the ambiguity in dealing with these conflicts, the Authors suggest adoption of portions of the Model Rules of Professional Conflict.

Following that is an article by **Wesley Ryan Shelley**, a student in the School of Law, University of Mississippi. His article, titled "The Big Picture: Balancing Artists' First Amendment Rights with the Trademark Interests of Sports Teams in the Wake of the University of Alabama v. Daniel Moore", reviews the University of Alabama's lawsuit against artist Daniel Moore who, for decades, has painted and sold

¹ Sandra Day O'Connor College of Law, Arizona State University (J.D. Law, 2013 exp.)

works depicting University sporting events. The Author suggests that a new judicial standard be adopted to more adequately protect trademark holders from the First Amendment.

Next is a collaborative article by **Christopher Doval, Esq.**, an Assistant Professor of Management and Marketing at Virginia State University, **Don Anque**, a Business Consultant and Web-developer, and **Angela Lohman**, a Program Specialist for the Federal Emergency Management Agency. Their article, titled “Hip-Hop and Other Professor's Pedagogy”, explores the use of Hip Hop Culture to make classroom instruction more inclusive to minority groups. The Authors suggest supplementing, rather than supplanting, traditional forms of education with material from Hip-Hop Culture.

Finally is an Article by **Ruoke Yang**, a student in the Department of Statistics, Stanford University. His article, titled “The Personal and Economic Utility of Virtual World Bots: A Defense for Fair Use” uses market data from the on-line game *Runescape* to argue that Virtual World Bots supply the necessary macroeconomic liquidity to ensure a well-functioning virtual world market. With this value realized, the Author suggests that Virtual World Bots may be entitled to a fair use defense to copyright infringement violations.

In addition to these four articles, we've decided to expand our solicitation of Notes from Journal members from an *annual* to a *bi-annual* event. Thus, accompanying each Article is a Note that comments on the Article, offering constructive criticism to expand on the substance or direction provided by the original article. The overriding purpose of the Note is to ensure, simply, that each article has a partner to dance *with*, not *against*. Every Journal member had an opportunity to participate on an article of their choosing, and only the four best were chosen.

In conclusion, I would like to thank each author for your quality submission to the Journal. Finding quality submissions has always been a priority for us, so we are very grateful that you've helped us out to this regard. I would like to thank each Journal member (2Ls + 3Ls) who contributed substantially above and beyond the bare minimum required. It

is this dedication to your craft that will pay immense dividends to you in your future. Those who deserve the most of this thanks include **Robbie Hendricks**, **Casey Johnson**, and **Stephen Vincent**. Finally, I would like to thank **Shelli D. Soto**, Assistant Vice Provost, at the Sandra Day O'Connor College of Law, Arizona State University. It is with her substantial support we have been able to accomplish so much so fast for such a young Journal.

Christopher Thiele
Editor-in-Chief

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AN OFFER THEY SHOULD REFUSE: WHY CONFLICTS OF INTEREST RAISED BY DUAL REPRESENTATION AMONG PLAYER AGENTS IS A MAJOR THREAT TO THE NCAA AND PROFESSIONAL LEAGUES

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JASON B. BELZER^{**}

Abstract

Professional sports leagues, players associations, and the NCAA have adopted countless rules and regulations to protect the interests of the players they employ or represent. For all the effort put into policing their respective sports and adding integrity to their brands, the majority of professional and

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amateur sports organizations have done little-to-nothing with regards to limiting the myriad of adverse effects that arise when sports agents are allowed to represent both players and coaches or front-office personnel. Although the Model Rules of Professional Responsibility provide ethical standards of conduct for attorneys, many agents who are not members of a bar continue to use the lack of conflict of interest rules to take advantage of leagues, teams and players to benefit their own bottom line. This article explores the issues that arise from such conflict of interest, presents examples of nefarious behavior by agents, and provides solutions to fix a grave threat to professional and amateur athletics.

I. INTRODUCTION

At the start of the 2012 National Football League (NFL) season, Cleveland Browns President Mike Holmgren, Executive Vice President Bryan Wiedmeier, General Manager Tom Heckert, Head Coach Pat Shurmur, and Quarterbacks Coach Mark Whipple were all represented by the same agent—Bob LaMonte. While Lamonte did not represent any professional football players at the time, the National Football League Players Association (NFLPA), which holds itself out to the public as a union for professional NFL players that assures “proper recognition and representation” of those players’ interests¹, would have had no qualms with Lamonte concurrently advising multiple players on the Browns and working on behalf of a plethora of Browns executives. In fact, many sports agents licensed by the major players associations in the United States [including the NFLPA, National Hockey League Players’ Association (NHLPA), and Major League Baseball Players Association (MLBPA)], represent both players and coaches, and oftentimes those coaches and players

¹ *About Us*, Nat’l Football Players Ass’n, <https://www.nflplayers.com/about-us/> (last visited Aug. 6, 2012).

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are signed to contracts with the same professional club. These situations lead to ethics questions, specifically concerning the potential of real conflicts of interest for agents who represent coaches and players in the same sport.

As will be discussed later in this article, the National Basketball Players' Association (NBPA) has taken a step to distance itself from the NFLPA, NHLPA, and MLBPA by instituting a rule that prohibits an agent from representing NBA players and professional coaches. However, basketball divisions within sports agencies have been able to take advantage of loopholes in the NBPA's rule and continue to benefit from maintaining clients with the clipboard and those who lace up to perform for the spectators. In fact, it would be fair to assert that those agencies representing players and coaches in the same sport hold a competitive advantage over those that choose to represent one class of individuals or the other.

This article explains how the players associations, including the NBPA, have turned a blind eye to the vast potential for, and apparent existence of, conflicts of interest in the representation of the members in their respective unions. Part I of this article provides an overview of the American Bar Association's Model Rules of Professional Conduct, which provide the minimum level of conduct permissible for a lawyer to avoid disciplinary action. While not all agents are lawyers (albeit many have passed at least one state bar examination, even if they do not consider themselves to be practicing attorneys), the Model Rules of Professional Conduct is a respected moral code for any profession, including that of being a sports agent. Part II will specifically focus on the rules related to conflicts of interest. Part III explores various players associations' rules and regulations governing player agents. Part IV provides real-life examples of conflicts that prominent agents experience in the co-representation of professional athletes and coaches and/or front-office personnel. Finally, Part V seeks to find solutions to the inherent problems that

exist in the current system that tacitly permits cross-representation.

II. MODEL RULES OF PROFESSIONAL CONDUCT

From what once was a means of recreation to today's highly commercialized business endeavor, sport has gained the financial attention of not only the public and the athletes, but those who represent the athletes themselves. Working in almost in a cyclical context, both the market in becoming, and the mobility of upholding a position as a sports agent is much more demanding than years past. Although not all sports agents are licensed attorneys, the ones that have such a distinction are bound to formal rules of professional conduct. In accordance with the rules of conduct as a member at least one state bar, understanding the Model Rules of Professional Conduct (MRPC) is essential to avoid allegations of any malicious or unethical business practice. This also ultimately establishes and maintains one's integrity and reputation in the community.

The primary duty of an agent is to provide competent and able representation to one's clientele. With the constant changes and development in the clients' needs, it is imperative for agents to perform their responsibilities in an ethical approach. Using a disciplined procedure of representation in accordance with MRPC is a key guide for accomplishing this end. As an everyday practice, the MRPC should serve as an exposition that governs the behavior of a licensed attorney. The MRPC's purpose is to identify and provide rules to establish a safe-ground for the legal wellness of the client and lawyer's relationship. Specifically as it relates to the context of this article, MRPC Rule 1.7 governs Client Conflict of Interests, and specifically states,

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if... there is a significant risk that the representation of

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one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.²

As members of the industry have turned a blind-eye toward the existence of conflict of interest, practitioners need to be acutely aware of the pitfalls and calamity that may follow from the failure to properly identify and address conflict of interests in the attorney-client relationship. This also applies to the agent-client relationship. An apparent conflict of interest would be if an agent represents two different players at the same position on the same team, or players of the same position who are both free agents and vying to sign a contract in a limited market.³ A more concerning conflict of interest arises when a sports agent and/or sports agency represents players and management (including coaches, general managers, and other team personnel), effectively influencing the decision makers on both sides of the negotiation table. Unfortunately, the conflict of interest in sport agency will continue to be difficult to avoid, but it can be managed.

III. NFLPA, NBPA, MLBPA, NHLPA RULES AND REGULATIONS

a) NATIONAL FOOTBALL PLAYERS ASSOCIATION (NFLPA)

One with an understanding of the strict process promulgated by the NFLPA prior to an individual earning the classification of “NFLPA Contract Advisor” and being granted

² Model Rules of Prof'l Conduct R. 1.7 (2012), *available at* http://www.americanbar.org/groups/professional_responsibility/publication/s/model_rules_of_professional_conduct/rule_1_7_sale_of_law_practice.html (last visited Sept. 31, 2012).

³ Darren Heitner, *David Dunn of Athletes First Speaks to SBR*, SPORTSAGENTBLOG.COM, (May 8, 2009), <http://www.sportsagentblog.com/2009/05/08/david-dunn-of-athletes-first-speaks-to-sbr/>.

the right to represent players eligible to participate in the NFL, would likely believe that negotiations contemplating the dual representation of players and management would clearly be barred due to the strong potential of a conflict of interest. Yet, conflicts of interest continue to exist despite the efforts listed in the NFLPA's Standard of Conduct for Contract Advisors (SCCA). Although it is clearly stated that contract advisors are prohibited from "Engaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL player"⁴, there is not a single regulation sidelining the act of dual representation. In specific relation to conflict of interest, the SCCA was implemented to make sure that a Contract Advisor provides "effective representation at fair, reasonable, and uniformly applicable rates to those individual players he/she represents, *and to avoid any conflict of interest which could potentially compromise the best interests of NFL players*"⁵ (emphasis added). However, it is unclear as to what constitutes a conflict of interest according to the NFLPA, and at what point such conflicts potentially compromise the best interests of NFL players.

Currently, the NFLPA requires that contract advisors "[d]isclose in an addendum . . . attached to the Standard Representation Agreement between the Contract Advisor and player, the names and current positions of any NFL management personnel or coaches whom Contract Advisor represents or has represented in matters pertaining to their employment by or association with any NFL club."⁶ The referenced section of the NFLPA Regulations Governing Contract Advisors impliedly permits contract advisors to concurrently represent players and team personnel, since the

⁴ NFLPA Regulations Governing Contract Advisors § 3(B)(8) (Nat'l Football League Players Ass'n) (amended through June 2012), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/2012_NFL_PA_Regulations_Contract_Advisors.pdf.

⁵ *Id.* at §3.

⁶ *Id.* at §3(A)(16).

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requirement merely states that such dual representation be disclosed to NFL player clientele.

b) NATIONAL BASKETBALL PLAYERS' ASSOCIATION (NBPA)

On the surface, it appears that the NBPA takes a different, more ethical approach (in comparison with the other leagues) to deal with the concern of dual representation. Written within the NBA Regulations Governing Players Agents §3(B)(f), the NBPA prohibits:

Representing the General Manager or coach of any NBA team (or any other management representative who participates in the team's deliberations or decision concerning what compensation is to be offered an individual player) in matters pertaining to his employment by or association with any NBA team; or any other matters in which he has any financial stake by or association with any NBA team.

It is assumed that the NBPA applies these regulations in an effort to persuade agents to avoid conflicts of interest, otherwise protecting an athlete from "agent-abuse." However, while the text of the rule appears to be written with good intentions, there is a clear way around the regulation.

Many NBPA certified agents sign employment contracts or independent contractor agreements with sports agencies, which employ or hire additional independent contractors who are also certified by the players association. Between protecting athletes in the social realm and overseeing financial and tax matters (depending on the scope of the agent's representation), an agent can also be viewed as a modern-day matchmaker. The legality of this status creates numerous issues within the realm of conflict of interest. For example, an agent is equipped (based on the strict language of the aforementioned rule) to negotiate a contract for his athlete client with a coach, general manager, and/or team president who is represented by another agent belonging to the same

sports agency as the player's agent. The rule merely prohibits the player's agent from dual representation, but effectively does nothing to curb the practice of a sports agency running afoul of the spirit of the rule by designating separate agents to represent the various parties. There remains a clear path for agencies to duly represent, or perhaps even monopolize, an organization. To abolish this predicament, the NBPA needs to alter the wording of its regulation in order to rid itself of any possibility of dual representation and exterminate the potential of conflicts of interest.

c) MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION (MLBPA)

Effective as of October 1, 2010, the MLBPA amended its long-lived Regulations Governing Player Agents (RGPA). This document serves as the rulebook for all acting "Player Agents" representing those members recognized as "Players" by the MLBPA. A section of the RGPA states,

The scope of the Regulations has been extended to regulate the conduct and to require certification of individuals who, on behalf of Player Agents, Recruit players or provide Client Maintenance Services to players, even if those individuals do not themselves represent Players in negotiations of their playing contracts.

The introduction of the RGPA reads, "The ways Player Agents acquire and maintain Players as clients are directly related to the MLBPA's objectives in regulating Player Agents."

An objective of the MLBPA in regulating player agents is to encourage player agents to provide representation and advice "honestly, competently, loyally, and zealously." The RGPA makes no mention of the potential of a conflict of interest should a player agent represent both players and team management. However, it could be argued that player agents cannot provide representation and advice honestly, competently, loyally and/or zealously if such dual

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representation exists. That would be true even if a player agent represents only players and another individual within the same company represents team personnel.

d) NHL PLAYERS' ASSOCIATION (NHLPA)

In order for an individual to be licensed to represent NHL players, he or she must first complete the NHLPA's Application for Certification as an NHLPA Player Agent. Upon being certified, player agents are subject to the rules communicated in the NHLPA Regulations Governing Agent Certification. Within those regulations is language that stipulates actual and potential conflicts of interest that may lead to the suspension or revocation of a player agent's certification. However, no specific provision prevents a player agent from also representing a hockey club's management.

IV. ADVERSE EFFECTS OF CONFLICT OF INTEREST ON PLAYERS AND TEAMS

a) CONFLICT OF INTEREST IN COLLEGIATE ATHLETICS

i) CREATIVE ARTISTS AGENCY

In 2012, Creative Artist Agency (CAA) represented an unprecedented seven first round NFL draft picks.⁷ Although CAA has long had a successful showing at the NFL Draft since forming its football representation division, the 2012 NFL Draft was the company's first draft since agent Jimmy Sexton left his previous firm, SportsTrust Advisors, to join the football

⁷ Darren Heitner, *2012 NFL Draft Rounds 1-7 Picks and Player Agents*, SPORTSAGENTBLOG.COM (Apr. 26, 2012), <http://www.sportsagentblog.com/2012/04/26/2012-nfl-draft-rounds-1-7-picks-playeragent/>.

practice at CAA.⁸ Sexton, an NFLPA Contract Advisor who represents many popular NFL players, including Tim Tebow and Phillip Rivers,⁹ is also arguably the top coach agent in the United States. Sexton's staple of coaching clients includes Alabama's Nick Saban, Virginia Tech's Frank Beamer and South Carolina's Steve Spurrier, among many others. Coincidentally, of the seven players in CAA's 2012 first round NFL Draft class, Sexton also represented five of the players' former college head coaches.¹⁰ This most certainly allowed Sexton not only increased access to the players, but what amounts to a de facto endorsement of his services, whether or not his coaching clients chose to outright recommend him to their players.¹¹

Sexton has long been a center of controversy surrounding amateurism issues, yet he has been able to rise above it all and cement himself time and again as one the top agents in the business of sports agency. For example, in 2002, University of Tennessee wide receiver Donte Stallworth lost

⁸ Darren Heitner, *Jimmy Sexton Leaves Sportstrust Advisors to Join CAA*, SPORTSAGENTBLOG.COM (Nov. 30, 2011), <http://www.sportsagentblog.com/2011/11/30/report-jimmy-sexton-leaves-sportstrust-advisors-to-join-caa/>.

⁹ Liz Mullen, *CAA Adds Prominent Player, Coach Agent Jimmy Sexton to Roster*, SPORTS BUS. J., (Dec. 1, 2011), <http://m.sportsbusinessdaily.com/Daily/Issues/2011/12/01/Labor-and-Agents/Sexton.aspx>.

¹⁰ Neil Stratton, *College Football Coach Agent List*, INSIDE THE LEAGUE, <http://www.insidetheleague.com/index.asp> (last visited Sept. 12, 2012).

¹¹ Ironically, during the fallout surrounding the 2010 agent investigation at the University of North Carolina, prominent Jimmy Sexton client Nick Saban told the media, "I don't think it's anything but greed that's creating it right now on behalf of the agents The agents that do this – and I hate to say this, but how are they any better than a pimp?" Saban's rant occurred before the start of the 2010-11 season, after which Alabama Wide Receiver Julio Jones would sign with Sexton and be picked sixth overall by the Atlanta Falcons in the 2011 NFL Draft. Associated Press, *Saban Compares Agents to a 'Pimp'*, ESPN.COM (July 22, 2010), <http://sports.espn.go.com/ncf/news/story?id=5399270>.

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his collegiate eligibility after receiving almost \$1,300 in benefits from Jimmy Sexton in the twenty-four hours between declaring for the NFL Draft and then removing his name from the pool of draft eligible players, even though Stallworth did not sign with Sexton during that time.¹² Not surprisingly, then Tennessee football head coach Phil Fulmer, a Sexton client, defended Stallworth in his attempts to regain his student-athlete eligibility from the NCAA.¹³

In 2009, former Sexton client Jerome Woods was awarded almost a million dollars in damages from financial planning firm Morgan Keegan and Co. after allegedly being misled on a number of high risk investments.¹⁴ A similar judgment against the firm was awarded to fellow Sexton client Horace Grant several months later. What is of critical note is that during the time period in which the alleged financial negligence occurred, Morgan Keegan and Co. had an ownership interest in Jimmy Sexton's then agency, Athlete Resource Management (ARM), and employed Sexton's brother, G. Scott Sexton.¹⁵ More significantly, Jerome Woods played football at the University of Memphis, and his college head coach, Rip Scherer, was most certainly close to Jimmy

¹² *Stallworth Broke Rules, But Wants Eligibility Back*, THE L.A. TIMES (July 25, 2002), <http://articles.latimes.com/2002/jan/25/sports/sp-newswire25>. *NCAA Denies Stallworth's Request to Reinstate Eligibility*, ACCESSNORTHGA.COM (Feb. 22, 2002, 7:28 AM), <http://www.accessnorthga.com/detail.php?n=199370&c=3>.

¹³ Access North GA, *NCAA Denies Stallworth's Request to Reinstate Eligibility*, Feb. 22, 2002, <http://www.accessnorthga.com/detail.php?n=199370&c=3>.

¹⁴ Thomas Bailey, Jr., *NFL retiree gets \$950,000 for Morgan Keegan mutual fund losses*, THE COMMERCIAL APPEAL, (Apr., 14, 2009), <http://www.commercialappeal.com/news/2009/apr/14/nfl-retiree-recovers-950000/>.

¹⁵ Thomas Bailey, Jr., *Ex-NBA star Horace Grant Presses Claim for \$3M from Morgan Keegan*, THE COMMERCIAL APPEAL, (Nov. 4 2010), <http://www.commercialappeal.com/news/2010/nov/04/ex-nba-star-grant-presses-claim-for-3m/>.

Sexton, who has represented the majority of coaches at the Memphis over the last two decades.

In a bold move that surprised many in the industry, CAA hired arguably the most well-known runner (a third party who acts as an intermediary between an agent and athletes) in the business, William Wesley (a.k.a. “World Wide Wes”), to join its coaching representation practice in 2010.¹⁶ Wesley, who has been linked to dozens of NBA players and coaches, including most notably LeBron James and John Calipari, has developed a notorious reputation for his behind-the-scenes deal making in the world of both college and professional basketball.¹⁷ Wesley’s relationship with CAA basketball agent Leon Rose provides CAA unprecedented access to college basketball personas. Additionally, the addition of Wesley allowed CAA to sign Calipari as well as Auburn’s Tony Barbee and Rutgers’ Mike Rice as coaching clients.¹⁸

CAA also has an extensive roster of sports broadcasting clients, especially those connected to the NFL. Chris Mortensen, Adam Schefter, and Todd McShay all provided live coverage of the NFL Draft on ESPN, and all three are represented by CAA.¹⁹ Of course, whether there is a conflict of interest when it comes to representing athletes and the journalists that cover those athletes is a complicated issue. One could spend vast amounts of time analyzing whether a journalist was biased towards one agency’s clients versus another and come up with no legitimate data to make a conclusive argument. The situations that provide hard

¹⁶ Seth Davis, *Wesley to Become Rep for Coaches*, SPORTS ILLUSTRATED, (Mar. 5, 2010, 7:06 PM), <http://sportsillustrated.cnn.com/2010/basketball/ncaa/03/05/wesley.agent/index.html>.

¹⁷ Pete Thamel, *Agency Role Could Limit Basketball Broker’s Power*, N.Y. TIMES, Aug. 2, 2010, <http://www.nytimes.com/2010/08/02/sports/ncaabasketball/02wes.html>.

¹⁸ *Id.*

¹⁹ *Broadcasters*, CREATIVE ARTIST AGENCY, <http://sports.caa.com/broadcasters.aspx> (last visited Aug., 15 2012).

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evidence, though, are those that are quantifiable through the use of numbers, or in this case mock draft rankings. Before the 2012 NFL Draft, Todd McShay's published mock draft gave CAA's eventual seven first round athletes an average position of 8.57²⁰, a full two spots higher than that of fellow ESPN draft analyst Mel Kiper (10.57).²¹ It is hard to determine whether a journalist hyping players in a mock-draft has a tangible effect on where the players are actually drafted, but it is not difficult to see why it behooves an agency to represent someone like McShay in this scenario.

ii) EXCEL SPORTS MANAGEMENT

One of the most visible and long standing conflicts of interests concerning dual representation was that of former University of Connecticut head men's basketball coach Jim Calhoun and his agent, Jeff Schwartz of Excel Sports Management. For over a decade, the Connecticut basketball program has acted as a de facto farm system for Schwartz, with his agency signing a proverbial all-star team of collegiate players, including Emeka Okafor, Charlie Villanueva, Hilton Armstrong, A.J. Price, Kemba Walker, and Jeremy Lamb.²² Clearly, Schwartz's access to the Connecticut basketball program through Coach Calhoun, coupled with his endorsement (whether inferred or direct) provides a superior advantage over competing agents when it comes to the recruitment of players from the program. In fact, when Charlie Villanueva was being recruited by Calhoun, his AAU coach

²⁰ Todd McShay, *Final Word on the First Round*, ESPN INSIDER, (Apr. 26, 2012) http://insider.espn.go.com/nfl/draft2012/story/_/id/7857571/2012-nfl-mock-draft-todd-mcshay-final-first-round-projection.

²¹ Mel Kiper, *Final 2012 NFL Mock Draft*, ESPN INSIDER, (Apr. 26, 2012), http://insider.espn.go.com/nfl/draft2012/story/_/id/7845687/mel-kiper-final-mock-draft-year.

²² *Excel Sports Management*, DRAFT EXPRESS, <http://www.draftexpress.com/agents/agency/Excel-Sports-Management-5/> (last visited Aug.15, 2012).

opposed Villanueva signing with Connecticut because of his fear that Villanueva would eventually sign with Schwartz rather than his own preferred agents.²³ In order to appease the AAU coach, Calhoun supposedly told him that he would instruct Villanueva to sign “with any agent in the country except for one—Jeff Schwartz.”²⁴ Much to the chagrin of the AAU coach, two years later Villanueva signed with Jeff Schwartz and was drafted seventh overall in the 2005 NBA Draft.²⁵

iii) PRO TECT MANAGEMENT

The most public scandal involving coaches and agent access to players occurred in the summer of 2010 at the University of North Carolina-Chapel Hill (UNC). UNC associate head football coach John Blake was accused of funneling players to longtime friend and NFL agent Gary Wichard in return for cash payments.²⁶ Blake received approximately \$31,000 in cash transfers from Wichard in 2007-09, as well as a \$45,000 loan during the same time period in return for steering players to Wichard’s agency, Pro Tect Management.²⁷ Blake denied the allegations, which included a claim that he previously worked for Pro Tect Management, even though he was formerly listed in the agency’s brochure as the “Vice President of Football Operations.”²⁸ After a 16-month investigation, during which UNC head football coach

²³ David Falk, *THE BALD TRUTH* 11 (2009).

²⁴ *Id.*

²⁵ *2005 Draft Board*, NAT’L BASKETBALL ASSOC., <http://www.nba.com/draft2005/board.html> (last visited Aug., 16, 2012).

²⁶ *John Blake Denies Working With Agent*, ESPN, (Oct. 27, 2011), http://espn.go.com/college-football/story/_/id/7153494/former-north-carolina-tar-heels-assistant-john-blake-denies-steering-players-agent.

²⁷ *Id.*

²⁸ Charles Robinson & Bryan Fischer, *Coach-agent Ties Probed*, YAHOO SPORTS, Aug. 9, 2010, <http://rivals.yahoo.com/ncaa/football/news?slug=ys-agentcoach080910>.

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Butch Davis was fired, the NCAA found UNC guilty of “fail[ing] to monitor” its program properly, and imposed penalties that included the vacating of all wins during Blake’s tenure, a one year bowl ban and loss of fifteen scholarships.²⁹

Did Butch Davis, whose friendship with Blake spanned over thirty years since he first taught him biology in high school, have any knowledge of Blake’s prior employment and dealings with Wichard’s agency? Brian Bosworth, an ex-Wichard client who played under Blake at Oklahoma in the late 1980’s, stated that Blake was pushing him and his teammates to Wichard back in his playing days.³⁰ Although Davis adamantly denied he had any knowledge of Blake’s alleged behavior during his stint at UNC or before and has even stated, “I’m sorry that I trusted John Blake,” it is doubtful that he could remain ignorant to such information for so long while maintaining a close friendship and working relationship with Blake for many years. What is certain is that the student-athletes, who had limited access to information on the process of going from student-athlete to professional athlete, were likely influenced by Blake’s endorsements to Wichard in return for cash payments.

iv) NEIL CORNRICH

In 2005, NFLPA Contract Advisor Neil Cornrich began serving a one-year suspension handed down by the NFLPA for violating one of the union’s few conflict of interest rules when he acted as an expert witness for General Motors (GM) in a lawsuit brought against the manufacturer by the estate of

²⁹Charles Robinson, *North Carolina Ruled Ineligible for a Bowl Next Season and Must Forfeit 15 Scholarships*, Yahoo Sports, Mar. 12, 2012, http://rivals.yahoo.com/ncaa/football/news?slug=crrobinson_north_carolina_sanctions_031212.

³⁰ Andy Staples, *The Case Against John Blake*, SPORTS ILLUSTRATED, Oct. 26, 2011, http://sportsillustrated.cnn.com/2011/writers/andy_staples/10/21/john.blake/1.html

former player Derrick Thomas.³¹ Cornrich was paid approximately \$1,000 per hour by GM for preparing a report outlining Thomas' expected earnings had he not passed away, and used proprietary and confidential information regarding player salary figures available only to licensed agents via the Association's website.³² Although the information was probably available to GM by subpoena, then union head Gene Upshaw said that any punishment levied against Cornrich was because the league had issues with an agent testifying against a player, deceased or otherwise.³³

What is noteworthy about the union's decision to suspend Cornrich for his actions is that the NFLPA has had little issue with Cornrich's conflict of interest when it comes to representing both players and coaches within the NFL. Cornrich represents a number of college coaches, including Oklahoma's Bob Stoops and Arkansas's Bret Bielema, as well as NFL coaches, such as the New England Patriots' Bill Belichick.³⁴ If the league had a problem with Cornrich distributing proprietary data concerning player salaries to an outside third party, what prevents him or any other agent in a similar position from giving that same information to one of their management clients so that they can obtain the upper hand in a player contract negotiation? Bob Lamonte, who represents dozens of coaches and general managers in the NFL, stopped representing players after he felt he could not properly represent clients on both sides of the negotiation table. "I've

³¹ Liz Mullen, *NFL Player Agent Neil Cornrich Begins One-Year Suspension*, SPORTS BUS. J., (August 10, 2005), <http://www.sportsbusinessdaily.com/Daily/Issues/2005/08/Issue-220/Sports-Industrialists/NFL-Player-Agent-Neil-Cornrich-Begins-One-Year-Suspension.aspx>.

³² Mike Florio, *Rumor Mill Archive*, PRO FOOTBALL TALK, Jan. 15, 2005, <http://archive.profootballtalk.com/1-01-05through1-15-05.htm>.

³³ *Id.*

³⁴ Neil Cornrich and NC Sports, <http://www.neilcornrich.com/>, (last visited Aug. 20, 2012).

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turned down players over the last ten years at an enormous rate because I knew I had to police myself. The potential for conflict is clear. It's stupid. It's dumb. It's an obvious conflict of interest."³⁵

b) PLAYER DISSATISFACTION AFFECTING PERFORMANCE

In 1987, then NFL Commissioner Pete Rozelle wrote a letter to the front office staff of all the league's teams, urging them to be weary of conflicts of interests concerning agents representing both coaches and players.³⁶ Rozelle gave mention of such dual-representation causing player dissatisfaction and thus decreased performance if the player felt that his representative might not be representing his best interests, or "low balling" him, when negotiating with management, if the representative had his own contract management.³⁷ Moreover, although they are professionals, it is not unreasonable to believe that a coach's impartiality may be compromised when deciding between signing two equal players, one represented by his agent and the other by a third party.³⁸

During the late 1980's, agent Bob Farley represented both New York Giants' Bill Parcells and backup quarterback Jeff Rutledge.³⁹ As the battle for the starting position heated up

³⁵ Paul Domowitch; *Agents Walk Fine Line When Representing Both Coaches and Athletes*, THE PHILA. DAILY NEWS, October 12, 2001.

³⁶ Pete Rozelle, *Memorandum to NFL Club Presidents RE: Player Agents-Multiple Representation of Player and Non-Player Employees*, Sept. 4, 1987, reprinted in Robert E. Fraley & F. Russell Harwell, *Sports Law and the "Evils" of Solicitation*, 9 LOY. ENT. L.J. 21, 21 (1989).

³⁷ *Id.*

³⁸ Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents* 18-20, April 2007, http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=melissa_neiman

³⁹ Craig Neff; *Den of Vipers: A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED, October 19, 1987,

in the preseason, first string quarterback Phil Simms voiced his disapproval and worry about the dual representation and Farley's influence over Parcells. Fortunately, Simms was later named the starter.⁴⁰ In 2002, when Wayne Gretzky hired his longtime agent Mike Barnett to become the general manager of the Phoenix Coyotes, several players voiced their disapproval to the NHLPA on the issue, stating that, "it just doesn't feel right . . . we're uncomfortable," when it came to Barnett suddenly dropping his agent certification and taking over the team.⁴¹

Is a player's performance or mental well-being compromised by a potential conflict of interest by his agent? The reality is that uncertainty has a tremendous effect on human psychology.⁴² Although someone may be innocent until proven guilty, the potentiality for wrongdoing, no matter how small, will cause one to worry and affect his behavior. For instance, if one learns that his child's bus driver has possibly been implicated on a drunken driving charge, regardless of whether the charges are patently false, the mere potential of the truth may cause that person to drive his child to school.⁴³ Likewise, an athlete's mere thought that his agent may not be representing his best interests because of the agent's dual representation may adversely affect the athlete's performance at just the critical moment where the athlete needs to be at his best.

<http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1066585/index.htm>.

⁴⁰ *Id.*

⁴¹ Darren Rovell, *NHL's New Penalty Box*, ESPN SPORTS BUS., (June 11, 2002, 8:52 AM)

<http://www.espn.go.com/sportsbusiness/s/2002/0605/1391275.html>.

⁴² LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS - AND A PLAN TO STOP It* 30, (Hachette Book Group, 2011).

⁴³ *Id.*

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c) AGENT INFLUENCING COACHING CLIENTS TO MAKE A PLAYER PERSONNEL DECISION

The NBPA was the first major players association to adopt a conflict of interest policy concerning the dual representation of both players and coaches or management personnel.⁴⁴ That said, the rule was almost never enforced by the Association until recently. In fact, in 2008, NBPA executive director Billy Hunter sent out an “inflexible” memo stating that the players association, after twenty years of overlooking conflicts of interest, would start enforcing the provision.⁴⁵ The memo was inspired by the reigning conflict of interest of agents such as Keith Glass, who with his father, Joe Glass, had represented both players and coaches such as Larry Brown for decades.

Glass is no stranger to controversy; he was also embroiled in a tampering dispute with basketball agent Andy Miller over former Rutgers star Quincy Douby. Glass won a rare NBPA arbitration decision, which fined Miller \$40,000 for “illegally interfering” with Glass and Douby’s relationship.⁴⁶ What is of particular interest, and virtually unknown, is that Glass’s son, Tyler, coincidentally transferred on to the Rutgers squad as a walk-on upon Douby’s arrival in 2003.⁴⁷ Tyler, who now works with his father full-time as an agent, certainly provided an incredible advantage for Keith while he recruited

⁴⁴Peter Vecsey, *Brown’s next town? Vincent’s firing can make way for Larry*, N.Y. POST, (April 27, 2008 4:57 AM), http://www.nypost.com/p/sports/item_KC2ISrESaIESFXZf1uuM;jsessionid=F9094A46329EE56E8877E75D57C0B82E.

⁴⁵ *Id.*

⁴⁶ Howard Beck, *Tampering Leads to Rare Penalty Against Agent*, N.Y. TIMES, (Sept. 17, 2010), <http://www.nytimes.com/2010/09/18/sports/basketball/18agent.html?pagewanted=all>.

⁴⁷ Sam Amick, *NBA Agent Keith Glass Stands up to Poaching*, AOL NEWS, (Oct. 28, 2010, 2:59 PM), <http://www.aolnews.com/2010/10/28/nba-agent-keith-glass-stands-up-to-poaching/>

Doubt out of Rutgers. The players association and NCAA have no power to prevent such advantageous circumstances from occurring, but it is worth noting just how far an agent may go in his pursuit of a player.

Although the NBPA has adopted rules concerning the dual representation of both players and management, mega agencies focusing on dual representation have circumvented the rules by having different agents within the same agency represent individual talent, which is enough to “prove compliance” with the Association’s conflict of interest rules. Although one agent is not directly representing both the athlete and his coach, it is not unreasonable to surmise that the two agents working in the same office can just as easily collude to push their management client into making a particular decision about the player. For example, during the 2010 NBA free agency period, after being wooed by a dozen other teams, CAA client LeBron James made “the decision” to join fellow CAA clients Dwyane Wade and Chris Bosh in Miami to help bring a championship to the Miami Heat.⁴⁸ Both James and Bosh signed matching six-year, \$110.1 million contracts, while Wade took a slight pay cut to accommodate the team’s soft salary cap with a six-year, \$107.5 million deal.⁴⁹ Although it is widely known that all three superstar free agents were represented by the same agency, of lesser knowledge was the fact that both Miami Heat president Pat Riley and head coach Eric Spoelstra were also clients of CAA.⁵⁰ After an NBA championship and back-to-back NBA Finals appearances within their first two seasons together, one can draw his own conclusion as to whether CAA orchestrated the creation of

⁴⁸ Associated Press, *LeBron Makes His Pick: He’s Going to Miami*, NBA NEWS, (July 9, 2010, 2:01 PM), <http://www.nba.com/2010/news/07/08/lebron.decision/index.html>.

⁴⁹ *Heat Stars Sign Six-year Deals*, ESPN.COM, (July 10, 2010, 1:37 PM) <http://sports.espn.go.com/nba/news/story?id=5368003>

⁵⁰ *Coaches*, CREATIVE ARTIST AGENCY, <http://sports.caa.com/broadcasters.aspx> (last visited August, 20, 2012).

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nothing less than a sports juggernaut that will reap the team millions of dollars in player and coach contract and marketing commissions.⁵¹

The agency's conflict of interest in representing front office personnel and players is not limited to the NBA either, as CAA also represents international soccer star Cristiano Ronaldo of Real Madrid, as well as world renowned team manager José Mourinho.⁵² Real Madrid paid approximately €80 million in transfer fees for Ronaldo upon acquiring him from Manchester United, in addition to his €72 million, six-year contract.⁵³ Mourinho, who himself is making €10 million a year, recently stated that he would coach Chelsea if offered a raise, and would be willing to bring along Ronaldo with him.⁵⁴ Being that CAA represents both individuals, as well as Chelsea from a property standpoint, the negotiation of such a transaction would not seem out of reach for the agency. That said, the €1 billion buyout clause in Ronaldo's contract could pose a problem for any new team seeking his services.⁵⁵

The NFLPA, which does nothing to alleviate conflicts relating to dual representation, has attempted to police other concerns surrounding conflict of interests that may occur by

⁵¹ See Vecsey, *supra* note 45.

⁵² Soccer, CREATIVE ARTIST AGENCY, <http://sports.caa.com/broadcasters.aspx> (last visited August 21, 2012).

⁵³ Mark Ogden, *Cristiano Ronaldo Transfer: Real Madrid Agree £80 million fee with Manchester United*, THE TELEGRAPH, June 11, 2009, <http://www.telegraph.co.uk/sport/football/teams/manchester-united/5505073/Cristiano-Ronaldo-transfer-Real-Madrid-agree-80-million-fee-with-Manchester-United.html>.

⁵⁴ *Mourinho will return to Chelsea for £12m-a-year... AND Ronaldo*, MIRROR FOOTBALL (May 3, 2012), <http://www.mirrorfootball.co.uk/news/Chelsea-Jose-Mourinho-wants-12m-salary-and-buy-Cristiano-Ronaldo-to-return-as-manager-according-to-report-article874745.html>.

⁵⁵ *Real Madrid shield Christiano Ronaldo with €1bn buy-out clause*, INSIDER WORLDSOCCER (June 23, 2009), <http://www.insideworldsoccer.com/2009/06/cristiano-ronaldo-real-madrid-contract.html>.

agents who own interests in teams. In the summer of 2012, the NFLPA denied recertification to agent Andrew Bondarowicz after he did not disclose to the union that he had ownership rights in two indoor football league clubs.⁵⁶ Although Bondarowicz argued that, “nothing in the NFLPA regulations . . . prevented [him] from the role that [he] had” in the management of the team, a representative of the NFLPA said that specific Association regulations demonstrate that “holding or seeking to hold, either directly or indirectly, a financial interest in any professional football club or any other business entity when such an investment could create an actual conflict or the appearance of a conflict of interest in the representation of NFL players.”⁵⁷

While the NFLPA represents players in a different league than those signed to the previous examples using the Miami Heat and Real Madrid, it is disconcerting that a sports agent can represent the primary front office decision makers of a professional team without hindrance but is found to have a substantial conflict of interest when it owns a minor league team unrelated to the NFL itself. In the Bondarowicz case, of the two teams in which he had an ownership interest, no evidence surfaced that he represented any of the players, and even if he did, it is highly unlikely that any of them would ever have an opportunity to participate in the NFL.⁵⁸ In 2011, the MLBPA drew attention to a similar situation when it was discovered that Player Agent Bill Rose had a small ownership

⁵⁶ Liz Mullen, *Mistakenly answered call was the break Forte's agent needed*, SPORTS BUS. J. (July 30, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/07/30/Labor-and-Agents/Labor-and-Agents.aspx>.

⁵⁷ Liz Mullen, *Figure behind effort to organize agents owned football teams*, SPORTS BUS. J. (June 4, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/06/04/Labor-and-Agents/Labor-and-Agents.aspx>.

⁵⁸ Sammy Batten, *Sources: Fayetteville Force Players Go unpaid*, FAYETTEVILLE OBSERVER (Apr. 27, 2011), <http://m.fayobserver.com/articles?path=/articles/2011/04/27/1089912>.

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stake in the New York Yankees, which he had inherited from his father in 1996.⁵⁹ The league was aware of the conflict, but according to MLB executive vice president of labor Rob Manfred did not make an issue of it because of the relatively small size of his ownership interest.

Why has the NFLPA been so reluctant to institute regulations banning, or at least placing limits on, registered agents' abilities to represent both players and coaches or front office personnel? One reason may be that, because the practice has gone on for so long without regulation, agencies guilty of such conflicts of interest have been able to firmly embed themselves with key decision makers who have prevented the Players Association from taking action. International Management Group (IMG), one of the oldest sports agencies in the country, long had a reigning conflict of interest when it came to representing players, coaches, and management. In fact, IMG also represented former NFLPA Executive Director Gene Upshaw up until his agent, Tom Condon, left for CAA.⁶⁰ It is doubtful that Upshaw, who ran the union for some 25 years, would institute a rule that would undermine the interests of the agency that represented him and dozens of other players and coaches whom he served.⁶¹ NFLPA general counsel

⁵⁹ Liz Mullen, *Agents Stake in Yankees Draws Attention*, SPORTS BUS. J. (May 23, 2011)

<http://m.sportsbusinessdaily.com/Journal/Issues/2011/05/23/Labor-and-Agents/Agent-Rose.aspx>.

⁶⁰ Liz Mullen, *Reference to Condon Client Upshaw in IMG Recruiting Books Upsets Rivals*, SPORTS BUS. J. (December 17, 2001), <http://m.sportsbusinessdaily.com/Journal/Issues/2001/12/20011217/Labor-Agents/Reference-To-Condon-Client-Upshaw-In-IMG-Recruiting-Book-Upsets-Rivals.aspx?hl=IMG&sc=0>.

⁶¹ Gene Upshaw stated at one point that the union discussed the issue and did not find anything wrong with agents representing both players and coaches. "As long as a player knows when he signs up with an agent that he's representing coaches, too, that shouldn't be a problem. In fact, from the player's standpoint, I think it's a pretty good thing. If an agent represents two, three coaches in the league and he's got a player he's trying to get

defended the relationship between IMG and Upshaw by claiming that no conflict of interest existed because both parties were representing the interests of the players “first and foremost.”⁶² Marvin Miller, considered one of the pioneers of players’ rights during his tenure as executive director of the MLB Players Association, believes otherwise, stating that, “The director of the players association has . . . [the] responsibility to see that agents all act appropriately. . . . If you have one of the agents as your own representative, if it doesn’t provide actual favoritism, it provides the appearance of it.”⁶³ Former NFL commissioner Peter Rozelle maintained a similar stance in his memo to team personnel, urging them to reconsider being represented by agents who worked with players simultaneously.⁶⁴

placed, it might help the player get a job, not hurt him.” Then NFL Vice President of Labor Relations Harold Henderson rebutted Upshaw’s reasoning by saying that the union should be worried that such conflicts can cause players who are not represented by agents who also work with coaches at a disadvantage when it comes to making a team. Florio, *supra* note 33.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ “In my view, common representation of players and management employees can cause significant problems and should be avoided. At the least, such situations create an appearance of impropriety that can be detrimental to particular clubs or to the league as a whole. . . .

One result can be player dissatisfaction. When a player learns that his agent also represents a club management official (particularly, but not exclusively, one involved in personnel decisions or contract negotiations), the player may have reason to suspect that his agent is ‘low-balling’ him because of the agent’s relationship with management. Such suspicions could affect the player’s morale and performance, produce demands for contract renegotiations, or both. . . .

While agents who are attorneys are subject to conflict-of-interest sanctions under the professional-responsibility rules of their respective bar associations, those rules only partially apply to the problem. Where agents are not licensed attorneys, they are not subject to the rules at all. Further, the right to voice objections rests primarily with the agent’s clients; NFL clubs do not necessarily have standing to enforce bar associations’ conflict-of-

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IMG stopped representing players in 2006 when it sold its NFL players division to CAA, and practice head Tom Condon joined SFX agent Ben Dogra (and later Jimmy Sexton) in running the agency's football operations.⁶⁵ Although IMG and Condon represented Upshaw for years without issue, in 2001 the agency was forced to end its representation of the National Hockey League in Europe due to conflict of interest accusations by the NHL Players Association.⁶⁶ IMG represented the league from a marketing and events standpoint out of its office in Sweden, and ran a robust player representation division based in California, but eventually chose its player practice over working with the league to appease the NHLPA. One year later, Mike Barnett, head of IMG's hockey division, was hired to become General Manager of the Phoenix Coyotes by his former client, Wayne Gretzky.⁶⁷ Barnett, who relinquished his agent certification with the NHL Players' Association, forced the union to adopt a new rule that prevents agents from taking any job with a league franchise for

interest rules. Finally, these ethical prohibitions can usually be avoided altogether by full disclosure to all interested parties. . . .

Club management employees, including coaches, should therefore be advised to avoid representation by agents who also represent players. At least one club has gone far enough to negotiate regarding a management employee with an agent who also represented players. We suggest that other clubs seriously consider adopting policies directed towards avoiding these troublesome situations." Rozelle, *supra*, note 36.

⁶⁵ Liz Mullen, *Addition of Sexton balloons CAA's NFL roster*, SPORTS BUS. J. (December 5, 2011) <http://m.sportsbusinessdaily.com/Journal/Issues/2011/12/05/Labor-and-Agents/CAA.aspx>.

⁶⁶ Andy Bernstein, *IMG cuts tie to NHL after conflict alleged*, SPORTS BUS. J. (Apr. 16, 2001), <http://www.sportsbusinessdaily.com/Journal/Issues/2001/04/20010416/No-Topic-Name/IMG-Cuts-Tie-To-NHL-After-Conflict-Alleged.aspx>.

⁶⁷ Jason Diamos, *Plus: Hockey; Agent Becomes G.M. of the Coyotes*, THE N.Y. TIMES (Aug. 29, 2001), <http://www.nytimes.com/2001/08/29/sports/plus-hockey-agent-becomes-gm-of-the-coyotes.html>.

up to nine months following their resignation.⁶⁸ Barnett's actions were the final straw for the NHLPA in a series of conflicts caused by agents being hired as team managers, including: Vancouver Canucks' Brian Burke, San Jose Sharks' Dean Lombardi, Colorado Avalanche's Pierre Lacroix and Washington Capitals' George McPhee.⁶⁹

Interestingly enough, to avoid a conflict of interest similar to the one IMG faced with both the NHLPA and MLB Players Association, SFX Entertainment Inc. separated its athlete representation division into an individual corporate entity independent of its parent company, Clear Channel Communications. This was necessary since a majority shareholder of Clear Channel was Tom Hicks, who at the time owned both the Texas Rangers and Dallas Stars.⁷⁰ In 2000-01, when Michael Jordan came out of retirement to join the Washington Wizards, a team he partially owned, he was represented by long time agent David Falk.⁷¹ This would not have been an issue, except for the fact that Falk also represented two other Wizards players, Juwan Howard and Rod Strickland.⁷² Although the NBPA did nothing to cure the conflict, Falk and Jordan received harsh criticism for furthering a relationship where impartiality was essentially impossible to maintain.⁷³ Ironically, also in 2001, Mario Lemieux's longtime agent Steve Reich resigned from the NHL Players' Association after the union told him it was a conflict of interest to continue

⁶⁸ Darren Rovell, *Super Market Streak*, ESPN SPORTS BUS., (June 11, 2002), <http://www.espn.go.com/sportsbusiness/s/2002/0605/1391275.html>.

⁶⁹ *Id.*

⁷⁰ Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193, 208-09 (2004).

⁷¹ Richard Sandomir, *Sports Business; Jordan-Falk Relationship Poses Conflict-of-Interest*, THE N.Y. TIMES (July 30, 2000), <http://www.nytimes.com/2000/01/30/sports/sports-business-jordan-falk-relationship-poses-conflict-of-interests.html>.

⁷² *Id.*

⁷³ *Id.*

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to represent Lemieux as shareholder of the Pittsburgh Penguins.⁷⁴ Reich did not question the move, as Lemieux was his first client out of law school and his loyalty and friendship far outweighed the potential benefits he would have received had he ignored the conflict of interest.

V. PROTECTING THE GAME: HOW TO FIX CONFLICT OF INTEREST

a) NCAA AGENT LICENSING

Throughout this article, we have presented evidence of numerous cases wherein the appearance of improper behavior between licensed agents and their college coaching clients would lead one to believe that there are indeed unethical and even illegal transactions occurring in the recruitment of college athletes. Although the various professional sports players associations can do little (if anything) to prevent the agents they license from representing college coaches, and because college athletes do not themselves belong to a union, the question becomes whether the NCAA has the jurisdictional and/or legal power to place limitations on any individual who represents a coach in the association.

In late 2008, Major League Soccer's board of governors voted to adopt a policy that would prohibit agents from simultaneously representing both players and coaches or front office personnel.⁷⁵ It was the first time an American sports league, rather than its respective players association, drafted

⁷⁴ Liz Mullen, *Longtime agent Reich chooses Lemieux over union*, SPORTS BUS. J. (Jan. 29, 2001), <http://www.sportsbusinessdaily.com/Journal/Issues/2001/01/20010129/Labor-Agents/Longtime-Agent-Reich-Chooses-Lemieux-Over-Union.aspx>.

⁷⁵ Tripp Mickle & Liz Mullen, *Labor Lawyers Cry Foul over MLS Agent Policy*, SPORTS BUS. J. (Dec. 15, 2008) <http://www.sportsbusinessdaily.com/Journal/Issues/2008/12/20081215/This-Weeks-News/Labor-Lawyers-Cry-Foul-Over-MLS-Agent-Policy.aspx>.

rules concerning conflict of interest. In response, labor lawyers immediately stated that such a policy constitutes an illegal boycott under antitrust laws, since the league's teams were colluding by “agreeing with one another that they won’t deal with a certain group of people — that being agents who represent players when they deal with MLS coaches”.⁷⁶ Although no agent has brought a legal challenge against MLS for the adoption of this policy since its implementation, its success thus far provides precedent for the NCAA’s ability to implement a similar regulation. It is also important to note that the NCAA has long been considered to be a cartel⁷⁷ - an agreement among the otherwise independent colleges and universities that make up the NCAA to fix the price offered for athletes’ services, agreeing that no school will offer more compensation than room, board, tuition, fees, and required books and supplies, so there is no direct economic competition. Although in almost any other industry, such a cartel, operating out in the open, would be a per se violation of the antitrust laws, no one has directly challenged the NCAA front-and-center on whether this aspect of the cartel is illegal. The NCAA argues that the Supreme Court has blessed its cartel via *dicta* in the Board of Regents case.⁷⁸

It would thus appear that legal precedent strongly supports the NCAA’s abilities to establish a basic licensing system (that prohibits dual representation) for any agent/agency that represents a coach who is employed by an NCAA member institution, and enforce such a license by prohibiting member institutions from negotiating with any such

⁷⁶*Id.*

⁷⁷A cartel of every buyer in the market is a monopsony. This is the buyers’ analogy of a monopoly, where there is only one buyer. In its dismissal of *Agnew v. NCAA* for failing to state a relevant market, the Seventh Circuit recognized that: “This appears to be a clear monopsony case, since the NCAA is the only purchaser of student athletic labor” *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 337 (7th Cir. 2012).)

⁷⁸ Donald Remy, *Why the New York Times’ Nocera is wrong*, NAT’L COLLEGIATE ATHLETIC ASS’N (Jan. 6, 2012).

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unlicensed representative. Because NCAA student-athletes do not have their own union and because it is the Association's job to protect the interests of those student-athletes, although the NCAA cannot tell a coach who he could or could not hire as a representative, it is reasonable to believe that the NCAA has the authority to adopt bylaws that prohibit (voluntary) member institutions from dealing with anyone not licensed by the association.

Whether the NCAA chooses to pursue such a course of action remains to be seen, but considering its considerable investment in increasing compliance and rules enforcement over the past few years, one cannot help but think that the creation of such a licensing system would be a forgone conclusion. Moreover, if an agent attempted to challenge such a rule by suing the NCAA, it would immediately raise red flags as to whether he was using his coaching client relationship in an unethical manner to recruit players.

b) PLAYERS ASSOCIATIONS MUST ADOPT CONFLICT OF INTEREST RULES

The second suggested change, which should come as quiet obvious, is that the players associations that do not currently have any rules governing conflict of interest arising from the dual representation of players and coaches or management personnel, need to adopt such regulations. In particular, this applies to the NFLPA and MLBPA, which have no rules on this particular subject and very weak conflict-of-interest rules in general. Furthermore, the NBPA must do a better job of enforcing its rules, particularly because it does not require its agent applications to have a post-graduate education, which increases the likelihood that non-attorney agents will seek to be licensed as NBPA agents.⁷⁹

⁷⁹ *Regulations Governing Player Agents*, NAT'L BASKETBALL PLAYERS ASS'N §2(A) (amended Jun., 1991), *available at*

c) PLAYERS ASSOCIATIONS MUST BAN AGENCIES FROM DUAL REPRESENTATION

We have cited numerous examples of agencies skirting players associations' dual representation conflict of interest rules, as well as the Model Rules of Professional Conduct, by having one agent represent a player, while another in the same agency represents that player's coach or general manager. As discussed, *supra*, in situations such as where a large portion of the Miami Heat's players and team personnel are represented by agents at CAA, to the NBPA's conflict of interest rule is clearly circumvented, and consequentially this creates an advantageous situation for the company, which may perversely affect its clients, or the team and league itself. Although agencies will argue that their hands are clean and there is no proof of collusion amongst their agents, the mere appearance of impropriety is enough of a reason to tweak the rule to cover these types of situations. It is no mere coincidence that major player agencies have been buying up and merging with others that represent coaches, which at the very least, afford better access to the recruitment of new clients.

VI. CONCLUSION

It is nearly impossible for any profession to successfully regulate its members and effectively dispel all types of conflicts of interest in practice. However, some professions are able to curb activities that tend to give rise to potential conflicts better than others; sports agency is not at the top of that list. While the NBPA has made an effort (with minimal fanfare or effect), the remaining major United States players associations have promulgated a policy of inaction. If said associations continue to ignore the conflict of interest

<http://www.nbpa.org/sites/default/files/users/sean.brandveen/Agent%20Regulations%20PDF.pdf>.

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problem, that only seems to be getting worse over time, the players that the unions represent will be the victims. Conflict of interest situations will undoubtedly remain no matter what rules the players associations implement or how heavy the enforcement mechanisms may be, but said conflicts can be managed. Instead of turning a blind eye, the associations should look the problem straight in the face and put forth a noble effort to do what is in their players' best interest – attack the conflicts of interest.

NOTE: OPTIONS FOR RESOLVING CONTRACT ADVISOR CONFLICTS THROUGH UNIONS AND THE NCAA

*Robert Dormady**

As illustrated by the authors of this article, athlete-agent conflict of interest problems are interwoven through virtually every level and aspect of amateur and professional athletics. The authors, Heitner and Belzer, advocate a three-prong approach of management solutions to remedy many of the ills associated with agency conflicts throughout collegiate and professional sports. Prong One calls for the NCAA to adopt an agent-licensing program that would place player recruitment limitations on any individual who already represents a college coach. Prongs Two and Three emphasize that the players associations in professional sports should (a) adopt conflict rules similar to the Model Rules of Professional Responsibility, which govern attorney conflicts of interest, and (b) ban agents and agencies from dually representing players and any individuals that make roster decisions for professional franchises. Within this proposed three-prong approach, the authors highlight a notable shift of power and responsibility for the protection of players' interest from exposure to myriad adverse effects resulting from these agency conflicts – namely, the disparity in the power and responsibility that amateur athletes have to implement effective protective measures vis-à-vis the power and responsibility that professional athletes have to do the same.

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At the collegiate level, the NCAA wields the authority and responsibility to protect its players and their interests. Amateur athletes are at the mercy of the rules, policies, and prohibitions that the NCAA elects to promulgate on their behalf. The NCAA system and the players' status as amateurs within that system renders players powerless on both an individual and collective basis to implement any meaningful corrective measures for the systemic failures that expose them to the potential agent/agency abuses of their interests spotlighted in the article. Conversely, when players transition from amateur to professional athletics and join the players' union of their respective sports, the onus of protecting player interests shifts from the NCAA to the player collective comprising the unions that the players control. Recognizing this shift in the power dynamic, the authors appropriately urge the players associations to take collective action – as they are the bodies best suited to monitor agent and/or agency behaviors, and react proactively and appropriately to conflict of interest problems within their respective sports. However, these players associations are comprised of individuals that have rights both within the union structure and outside of it under state and federal labor law. If collective action through players associations continues to fail to appropriately regulate representation conflicts of interest for members in their respective unions, and that failure allows an agent to materially compromise the best interests of a player-client, then that affected individual player has recourse to both remedy the situation, and potentially convince the players' association to adopt universal measures similar to those advocated by Heitner and Belzer.

Within the NFL context, one potential way an individual player could put the NFLPA on notice that its representation conflict of interest regulations are not going far enough to protect its players is by filing a grievance with the NFLPA against his agent. As noted in the article, the NFLPA promulgates the rules governing agent/agency behavior with its

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Standard of Conduct for Contract Advisors (SCCA). When an agent “engages in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL player”¹ as prohibited by the SCCA, then the NFLPA has grievance and arbitration procedures that are the “exclusive method for resolving any and all disputes”² between a player and his agent. The arbitration procedures in the NFL are fairly standard. A player would file a conflict of interest grievance with both the NFLPA and his agent, “setting forth the facts and circumstances giving rise to the grievance, the provisions of the agreement between the player and the Contract Advisor alleged to have been violated, and the relief sought.”³ If the facts and circumstances giving rise to the grievance included a conflict of interest not currently prohibited by the NFLPA, such as the dual representation issue alluded to by Heitner and Belzer, then the player could seek relief in the form of the NFLPA amending its rules to prohibit these types of conflicts, in addition to any other relief sought.

After the grievance is filed, the agent would file an answer and the dispute would proceed to a hearing before an outside, impartial arbitrator. A conflict of interest arbitration hearing like this would be unpredictable. As noted by the authors, while the NFLPA instituted the SCCA to ensure that its Contract Advisors “avoid any conflict of interest which could potentially compromise the best interests of NFL Players,”⁴ the term “conflict of interest” is ambiguous, as is the point when these conflicts can potentially compromise the best interests of the players. Further complicating the matter is the implicit permission that the NFLPA gives to Contract Advisors

¹ NFLPA Regulations Governing Contract Advisors § 3(B)(8) (Nat’l Football League Players Ass’n) (amended through June 2012), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/2012_NFL_PA_Regulations_Contract_Advisors.pdf.

² *Id.* at §5(A).

³ *Id.* at §5(B).

⁴ *Id.* at §3.

to engage in the dual representation practices that would give rise to a grievance like this. Assuming that the all concurrent representations were disclosed as required by the SCCA prior to the aggrieved player agreeing to be represented by the Contract Advisor, could an independent arbitrator find against the Contract Advisor for a conflict of interest that arises through conduct that the NFLPA permits? It is definitely possible.

Although the NFLPA permits conduct like dual representation that could result in creating conflicts of interest, the NFLPA seems to have passed the responsibility onto the agents and agencies to make sure that they avoid these conflicts when they solicit their services to potential clients. Furthermore, the ambiguity of the term “conflict of interest” probably would not excuse a licensed professional from making reasonable judgments about what that term means. An arbitrator may read the overarching objective statement of the SCCA and decide that the main function of a competent NFL contract advisor is to provide effective representation and to avoid any conflicts that could compromise his client’s best interests. If the affected player could show by a preponderance of the evidence that his agent took on too many clients and found himself or herself in a situation where he could not avoid potential conflicts of interest, then a judgment in favor of the affected player is likely. At that point, the arbitrator would be free to grant the player relief as against his agent; however, he would be unable to compel the NFLPA to amend its regulations. The SCCA states that an “arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of these Regulations or any other applicable document.”⁵ Although the arbitrator’s hands would be tied in forcing the NFLPA to prohibit these types of conflicts, nothing in the SCCA forbids the arbitrator from making a recommendation.

⁵ *Id.* at §5(E).

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On the other hand, an arbitrator may find that NFL players are grown men who are capable of making their own decisions. Heitner and Belzer point out that contract advisors must “[d]isclose in an addendum . . . attached to the Standard Representation Agreement between the Contract Advisor and player, the names and current positions of any NFL management personnel or coaches whom Contract Advisor represents or has represented in matters pertaining to their employment by or association with any NFL club.”⁶ An arbitrator could view a player’s decision to sign a representation agreement despite the clientele disclosure addendum as constituting informed consent. In the Model Rules of Professional Conduct (MRPC), “informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁷ For attorneys, getting informed consent from clients allows them to continue representation so long as clients understand the risks associated with a potential or actual conflict, and the attorney reasonably believes that he/she can provide competent and diligent representation to each affected client.

However, in the NFL, the MRPC does not govern the conduct of all agents because agents are not required to be attorneys. In fact, many agents are not attorneys. While many aspects of a contract advisor’s job may be similar to that of an attorney, an agent-client relationship is not the same as an attorney-client relationship. An arbitrator would be unlikely to hold a non-attorney contract advisor to the informed consent standard of the MRPC because contract advisors do not have to

⁶ *Id.* at §3(A)(16).

⁷ Model Rules of Professional Conduct R. 1.0 (2012), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_0_terminology.html (last visited Jan. 27, 2012).

be attorneys, and the SCCA never mentions the phrase “informed consent.” The disclosure addendum lets the player know whom else the Contract Advisor represents. A player could decide to sign with an agent in spite of potential conflicts because he wants a high-profile agent, the agent comes at a bargain price, or the agent has invaluable resources like media connections at his/her disposal. There are many reasons a player could choose to overlook potential conflicts in his choice for representation. Depending on the circumstances of the dispute being heard, an arbitrator could decide that because the NFL allows different forms of concurrent representation, a conflict of interest resulting from such a situation would have to be extreme to warrant action against the contract advisor. In whatever manner a player-agent conflict of interest arbitration would play out, the decision of the arbitrator “shall constitute full, final, and complete disposition of the grievance, and will be binding upon the player and Contract Advisor involved.”⁸

The grievance and arbitration procedures mentioned above are not the only way a player could target the NFLPA’s conflict of interest regulatory shortcomings. A proactive player could take it upon himself to gather verifiable evidence that a contract advisor engaged in activities that created a conflict of interest with the effective representation of an NFL player, regardless if the player gathering the information was personally affected or not. That player could then forward that information to the NFLPA Committee on Agent Regulation and Discipline (CARD). Under the SCCA, CARD may initiate disciplinary procedures against any agents by filing a written complaint. These written complaints “are based upon verified information received by CARD from any person having knowledge of the action or conduct of the representative in question, including, but not limited to,

⁸ NFLPA Regulations Governing Contract Advisors § 5(E) (Nat’l Football League Players Ass’n) (amended through June 2012), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/2012_NFL_PA_Regulations_Contract_Advisors.pdf.

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players, NFLPA staff, other contract advisors, NFL Management Personnel, or other associated with professional or amateur football.”⁹ Disciplinary procedures initiated by CARD work similarly to the arbitration process for a player filing the grievance. After CARD files a written complaint detailing the contract advisor’s alleged violation(s), the agent has thirty days to file a written answer admitting or denying the allegation(s) that must include any facts or arguments the representative wishes to state in his or her defense. Within ninety days of receiving the answer, CARD has the discretion to impose disciplinary action. If CARD sanctions the contract advisor, then the he or she can file an appeal to be heard by an impartial, outside arbitrator. Neither CARD nor the arbitrator has the authority to obligate the NFLPA to amend the SCCA to regulate the types of conflicts at issue in this article. In fact, there is no guarantee that CARD would actually file a complaint against a contract advisor for conflicts of interest resulting from concurrent representation. However, it is important to note that this option to a player whether or not he decides to file a grievance against an agent. It is available to a player completely unaffected by a contract advisor’s conflict of interest issues. It is also available to a player after a formal grievance-arbitration procedure like the one above, regardless of the outcome. Even in the event of arbitrator finding for the contract advisor after a dispute with a player, the player would still bound by the arbitrators finding, but he could forward his evidence of agent malfeasance to CARD and they may come to different conclusion. If CARD decided to sanction the contract advisor after the agent won the dispute in arbitration with the player, the agent could appeal and a different arbitrator would be selected to hear the case. This procedure exists to keep agents accountable, and can be used as a tool for players to put

⁹ *Id.* at §6(B).

both agents and the NFLPA on notice that these conflict of interest problems will not be tolerated.

Another NFLPA procedure that an individual player could utilize to implement change in conflict of interest regulations is to file a grievance directly with either the NFLPA, or the team's player representative about its regulatory shortcomings. Unlike the options mentioned above, this procedure has the best chance to get the players association to amend its current conflict of interest rules. Under Article IX of the NFLPA Constitution, the Board of Player Representatives may amend its rules and regulations "at any regularly scheduled or specialized meeting . . . by a vote of two-thirds (2/3) of the votes cast by the members of the Board present at such meeting."¹⁰ The NFL Executive Committee, also comprised of active players has the power to amend the SCCA as well.¹¹ By filing a grievance with either a team player representative or the NFLPA itself, an individual can call for these bodies to vote on any regulatory amendment proposals aimed at eliminating the conflict of interest problems. An even better approach to achieve the changes proposed would be for individual players to organize with other player members to put pressure on the union through actions like group grievances, petitions, and campaigns at union meetings. If players are adamant about eliminating conflicts of interest, the union has to listen.

In addition to the situations mentioned above, individual players or smaller player groups can use other methods to seek the regulatory changes regarding NFLPA's administration of Contract Advisor conflicts of interest within

¹⁰ NFLPA Const. art. IX, § 1, *available at* <https://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPA%20Constitution%20-%20March%202007.pdf>.

¹¹NFLPA Regulations Governing Contract Advisors § 7 (Nat'l Football League Players Ass'n) (amended through June 2012), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/2012_NFLPA_Regulations_Contract_Advisors.pdf.

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the union structure. However, in the event that the union continues to refuse to institute such changes, and conflicts resulting from practices like dual representation continue to persist unchecked, then players still have recourse in the state and federal court system. Federal laws like the Labor Management Reporting and Disclosure Act and the National Labor Relations Act impose a statutory code of conduct for unions, holding them to standard of fair dealing. If players exhaust the internal union procedures and are still unhappy with the results, they proactively can file a claim in federal court or seek help from the National Labor Relations Board to investigate their claims. Again, it is important to remember that individuals inside the various players associations throughout professional sport, and not just the players associations as a faceless collective, are responsible for protecting player interests.

**THE BIG PICTURE: BALANCING ARTISTS’
FIRST AMENDMENT RIGHTS WITH THE
TRADEMARK INTERESTS OF SPORTS TEAMS
IN THE WAKE OF *THE UNIVERSITY OF
ALABAMA V. DANIEL MOORE***

Wesley Ryan Shelley^{*}

Abstract

This article discusses the difficulties of protecting trademark interests of sports teams in the setting of sports art as transpired in *The University of Alabama v. Daniel Moore*. It first goes over the statutory language of the Lanham Act as it relates to trademark law and the First Amendment’s artistic expression protections. It then lists circuit court cases that provide precedent to the intersection of trademark and First Amendment law. Next, it gives an overview of the factual history of Daniel Moore’s relationship with the University of Alabama, followed by a conversation of the procedural history surrounding the lawsuit. The article then gives a detailed explanation of the 11th Circuit Court of Appeals’ opinion in *The University of Alabama v. Daniel Moore* case. It follows with a discussion of the remaining questions and problems concerning the intersection of sports trademarks and artistic expression in light of the circuit court’s opinion. The article

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ends by arguing that the balance is currently too far in favor of First Amendment protection and proposes an amended test to give trademark holders greater deference in cases pitting First Amendment against trademark law.

I. APPLICABLE LAW

The key issue in the Moore case involved the overlap of the University's ability to protect its intellectual property rights in its trademarked images and Moore's interest in realistically depicting events containing those images. The Lanham Act is the predominate source of statutory law with regard to trademarks, while the First Amendment protects artists' rights to free artistic expression. Where the 11th Circuit had not yet clarified the balance of the competing principles of First Amendment and trademark law, other circuits previously addressed the issue.

a) THE LANHAM ACT¹ AND FIRST AMENDMENT²

Congress passed the Lanham Act into law in July 1946, and it serves as the principle source for federal trademark law in the United States today.³ The Lanham Act defines a trademark as “any word, name, symbol, or device, or any combination thereof...used by a person . . . to identify and distinguish his or her goods ... from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”⁴ Additionally, there is a “fair use” defense for “use[s] . . . which [are] descriptive of and used fairly and in good faith only to describe...goods or services . . .

¹ 15 U.S.C. §1051 (2006).

² U.S. CONST. amend. I.

³ *Lanham (Trademark) Act (15 U.S.C.) Index*, BITLAW.COM, <http://www.bitlaw.com/source/15usc> (last Oct. 25, 2012).

⁴ 15 U.S.C. §1127 (2006).

The Big Picture

.”⁵ The question before the court in trademark infringement cases is whether the defendant’s use of the disputed mark is “likely to cause confusion” with prospective buyers as to the product’s source.⁶

The First Amendment expressly prohibits establishment of a national religion, and provides for freedom of speech, press, assembly and exercise of religion.⁷ The Supreme Court has found its protections to specifically include “pictures, films, paintings, drawings, and engravings.”⁸ As is the case with many First Amendment claims, artists are afforded broad leverage with regard to their ability to freely express through imagery. While commercial speech and expression receive less constitutional protection than non-commercial expression⁹, the fact that the dissemination of speech takes place under commercial conditions does not *per se* indicate commercial

⁵ 15 U.S.C. §1115(b)(4) (2006); *see also* Car-Freshner Corp. v. S.C. Johnson & Son, Inc., 70 F.3d 267, 269-70 (2nd Cir.1995). “Under the doctrine of ‘fair use,’ the holder of a trademark cannot prevent others from using the word that forms the trademark in its primary or descriptive sense.”

⁶ ETW Corp. v. Jireh Pub., Inc., 99 F.Supp.2d 829, 832 (N.D.Ohio 2000) [hereinafter ETW District Opinion]; (citing Mktg. Displays, Inc. v. Traffix Devices, Inc., 200 F.3d 929, 933 (6th Cir. 1999)). The eight factor test for whether a trademark use is likely to cause consumer confusion is:

1. strength of plaintiff’s mark;
2. relatedness of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. likely degree of purchaser care;
7. defendant’s intent in selecting the mark;
8. likelihood of expansion of the product lines.

⁷ U.S. CONST. amend. I.

⁸ Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1276 (11th Cir. 2012) (citing Kaplan v. California, 413 U.S. 115, 119-20 (1973)); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

⁹ New Life Art, 683 F.3d at 1276 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 562 (1980)).

speech.¹⁰ In simpler terms, artwork sold for a profit may still receive full protection under the First Amendment.

b) *ROGERS V. GRIMALDI*¹¹

Rogers v. Grimaldi is the landmark case for balancing trademark and First Amendment rights.¹² The case dealt with Ginger Rogers suing the filmmaker of the film “Ginger and Fred” under the Lanham Act, arguing that the film’s title falsely implied that famous dance partners Ginger Rogers and Fred Astaire endorsed the film.¹³ The court determined that while a purchaser of artistic works has the right not to be misled to the work’s source, the Lanham Act should be read narrowly as to not infringe the artist’s First Amendment rights.¹⁴ Thus, the court established a balancing test: the Lanham Act only applies to artistic work “where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”¹⁵ In that case, the court decided that the balance would fall in favor of the artist unless the work had no artistic relevance, or it explicitly mislead as to the source of the work.¹⁶ The court ruled in favor of the defendant movie producer in *Rogers* because the film title was artistically relevant to the work, there was no explicit misleading of the film’s source, and “the slight risk that such use of a celebrity’s name might implicitly suggest endorsement or sponsorship . . .

¹⁰ *Id.* (citing *Smith v. California*, 361 U.S. 147, 150 (1959)).

¹¹ *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

¹² *Id.*

¹³ *Id.* at 996-97.

¹⁴ *Id.* at 997-1000.

¹⁵ *Id.* at 999.

¹⁶ *Id.* at 999-1000 (reasoning that titles such as “Nimmer on Copyright” and “Jane Fonda’s Workout Book,” as well as authorized biographies, as titles with such explicit references to the creator that, if falsely applied to the underlying work, would warrant application of the Lanham Act, but a general reference to a well-known name without any indication of authorship would be protected by the First Amendment).

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is outweighed by the danger of restricting artistic expression.”¹⁷

Circuit courts have since regularly applied the *Rogers* balancing test where trademark law is used to attack the content, rather than title, of works protected by the First Amendment, including books¹⁸, video games¹⁹, and paintings and prints.²⁰

c) *ETW CORP. V. JIREH PUBL'G, INC.*²¹

ETW²² Corporation (“ETW”), the exclusive licensing agent for golfer Tiger Woods, sued Jireh Publishing (“Jireh”), the exclusive publisher of sports artist Rick Rush, in Federal Court in the Northern District of Ohio for trademark infringement based on the sale of a print bearing Woods’ image and its packaging bearing his name.²³ The district court in that case granted summary judgment for Jireh on First Amendment grounds, also holding the image of Woods not to be within the registered trademark because ETW had not repeatedly used the same image as the pictorial depiction of Tiger Woods as an indication of origin.²⁴ In other words, the court said that unless a single image is used repeatedly to indicate commercial origin, all images will not be protected by a general trademark simply

¹⁷ *Id.* at 1000-01.

¹⁸ *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp.*, 886 F.2d 490, 493-97 (2d Cir. 1989).

¹⁹ *ESS Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099-101 (9th Cir. 2008).

²⁰ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) [hereinafter *ETW Circuit Opinion*].

²¹ *Id.*

²² *Id.* at 918. ETW is an acronym for Eldrick Tont “Tiger” Woods. ETW held a trademark for “TIGER WOODS” which specifically included use on art prints and posters. *Id.*

²³ *Id.* at 919. Jireh Publishing is ironically incorporated in Tuscaloosa, Alabama, and Rush had previously depicted Alabama coaching legend Paul “Bear” Bryant. *Id.*

²⁴ *Id.* ETW District Opinion, *supra* note 6, at 829, 833.

because they depict the subject of that mark. In addition, the district court ruled that the packaging of the painting containing Tiger Woods' name was a fair use because the use was a good faith description of the goods within the packaging.²⁵

The 6th Circuit Court of Appeals agreed with the district court that the use of Tiger Woods' name on the prints' packaging fell within the fair use exception as a description of the work.²⁶ In applying the *Rogers* balancing test, the court found that Woods' image on the work had artistic relevance to the painting and did not explicitly mislead as to the source of the work, thus the painting was protected under the First Amendment.²⁷ The court sided with Jireh that the prints were not commercial speech, but rather artistic works expressing "the majesty of a newsworthy moment" protected under the First Amendment.²⁸ Additionally, the court rejected ETW's right of publicity claims because the work was substantially informational and creative and did not adversely affect ETW's market.²⁹ The circuit court held that "as a general rule, a person's image or likeness cannot function as a trademark."³⁰ Further, the circuit court stated, "a piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events."³¹

II. FACTUAL BACKGROUND

Daniel A. Moore graduated from the University of Alabama ("University" or "Alabama") with a Bachelor of Fine

²⁵ ETW District Opinion, *supra* note 6, at 833-34.

²⁶ ETW Circuit Opinion, *supra* note 20, at 920-21.

²⁷ *Id.* at 936-937.

²⁸ *Id.* at 937-38; ETW District Opinion, *supra* note 6, at 834.

²⁹ ETW Circuit Opinion, *supra* note 20, at 938.

³⁰ *Id.* at 922.

³¹ *Id.* at 936.

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Arts in 1976.³² He began a career painting famous scenes of college football games, as well as college basketball, professional football, basketball, golf and baseball, and still life paintings of University landmarks and memorabilia in 1979.³³ Moore developed an international reputation among fine art collectors for his commemorative works, with many limited edition prints and lithographs selling out and increasing in value on secondary markets, and original paintings commanding as much as \$75,000.³⁴ Moore also reproduced the art on calendars, coffee mugs and other items.³⁵ Primarily featuring the University of Alabama in his paintings, Moore additionally depicted the Universities of Arkansas, Florida, Georgia, Kentucky, Miami, Mississippi, Notre Dame, Oregon, Southern Mississippi, Tennessee, Texas, Auburn, Florida State, Louisiana State, Ohio State, Oklahoma, Pennsylvania State, Texas A&M, and Texas Tech Universities.³⁶ In 1996, the United States Postal Service selected Moore to paint stamp designs depicting former Alabama football coach Paul “Bear”

³²Daniel Moore, *University Cannot License Free Expression*, THE CRIMSON WHITE, Feb. 20, 2012, <http://cw.ua.edu/2012/02/20/university-cannot-license-free-expression>.

³³11th Circuit Opinion, *supra* note 8, at 2; *see also* THE DOWNTOWN GALLERY: DANIEL A. MOORE PRINTS, <http://www.thedowntowngallery.com/moore.html> (last visited Oct. 23, 2012) (hereinafter “Downtown Gallery”).

³⁴Downtown Gallery, *supra* note 33. Moore’s painting commemorating Alabama’s 1992 national championship sold 19,920 prints and posters alone. Daniel Grant, *Free Speech vs. Infringement in Suit on Alabama Artwork*, N.Y. TIMES, Jan. 30, 2012, <http://www.nytimes.com/2012/01/31/sports/ncaafootball/artist-still-fighting-alabama-over-football-paintings.html?pagewanted=all>. In 2006, Moore estimated that his paintings have cumulatively sold “in the low millions [of dollars].” Adam Liptak, *Sports Artist Sued for Mix of Crimson and Tide*, THE N.Y. TIMES, Nov. 12, 2006, <http://www.nytimes.com/2006/11/12/us/12artist.html?pagewanted=print>.

³⁵ 11th Circuit Opinion, *supra* note 8, at 3.

³⁶ Downtown Gallery, *supra* note 33.

Bryant for its “Legendary Football Coaches” series.³⁷ The American Sport Art Museum and Archives named him 2005 Sport Artist of the Year.³⁸

Moore’s most common works involve the University of Alabama football team. He painted famous scenes from Alabama football games without any relationship with the University from 1979 to 1990, though the University commissioned Moore for multiple unlicensed prints in the early 1980’s that were resold by the school.³⁹ From 1991 to 1999, Moore entered into a dozen licensing agreements with the University, allowing him to use trademarked Alabama logos on the paintings’ border or packaging and market them as officially licensed products.⁴⁰ During that time, Moore continued to paint Alabama football scenes outside of those licensed by the University and continued to sell paintings and prints completed before 1991 without paying or being asked to pay royalties to the University.⁴¹ The University also gave Moore press credentials to Alabama football games to source material for his work and allowed him to borrow old game programs, helmets, jerseys, and trophies from the University’s Paul W. Bryant Museum.⁴² The school additionally

³⁷ 2005 Sport Artist of the Year- Daniel Moore: “Capturing the Classics,” *Key Sport Works and World Influence*, THE AMERICAN SPORT ART MUSEUM & ARCHIVES, <http://www.asama.org/awards-of-sport/medallion-series/sport-artist-of-the-year/daniel-moore/key-sport-works-world-influence> (last visited Oct. 25, 2012)

³⁸ 2005 Sport Artist of the Year- Daniel Moore: “Capturing the Classics,” *Artist Biography*, THE AMERICAN SPORT ART MUSEUM & ARCHIVES, <http://www.asama.org/awards-of-sport/medallion-series/sport-artist-of-the-year/daniel-moore> (last visited Oct. 25, 2012)

³⁹ 11th Circuit Opinion, *supra* note 8, at 3.

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.* at 4. “Moore said that he would enter into a licensing agreement if he felt that it would help increase the sales of that particular product, or if he wanted the University—his alma mater—to benefit from royalties.”

⁴² *Id.*; Grant, *supra* note 34.

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commissioned Moore to paint an unlicensed picture on live television during a football game.⁴³

In January 2002, the University informed Moore that he would need permission to depict University trademarks in his paintings.⁴⁴ Specifically, the University contended that the portrayal of its uniforms, helmets, and crimson and white color combination required licensing.⁴⁵ Moore countered that, because he painted the uniforms to accurately represent historical public events, his artistic expression of the games was protected under the First Amendment so long as it remained within the image area of the paintings and did not extend to the borders or packaging.⁴⁶ Further, he claimed that a licensing agreement with the University for all of his paintings would cause him to lose income, as the National Collegiate Athletic Association (“NCAA”) does not allow member institutions to license products containing the likenesses of student-athletes still eligible for competition which many of Moore’s paintings feature.⁴⁷ Despite the disagreement, the University of Alabama continued to sell Moore’s unlicensed calendars in its campus stores and display his unlicensed paintings in its Bryant Museum and athletic department office.⁴⁸

III. PROCEDURAL BACKGROUND

The University sued Moore and his company, New Life Art, Inc., in March 2005 in the Northern District of Alabama for breach of contract, trademark infringement, and unfair competition.⁴⁹ The University argued that Moore breached the

⁴³ 11th Circuit Opinion, *supra* note 8, at 4.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 4-5.

⁴⁶ *Id.* at 3, 5.

⁴⁷ Grant, *supra* note 34.

⁴⁸ Moore 2012, *supra* note 8, at 5.

⁴⁹ *Id.* at 3.

licensing agreements they previously entered into by refusing to obtain permission to use the University trademarks in 2002, and that Moore's paintings, prints, calendars, mugs and other objects violated the Lanham Act by infringing the University's trademark on its football uniform color combinations.⁵⁰ Collegiate Licensing Company, the licensing agent for Alabama, the NCAA and more than 100 other universities and athletics conferences, provided legal counsel and financial support for the University in the suit.⁵¹ The American Society of Media Photographers, the Alabama Press Association, and multiple law professors from around the country, filed amicus briefs siding with Moore.⁵²

The case bounced around at the district court level, with seven different district court judges assigned to the case at various points of the litigation.⁵³ Eventually all issues not relevant to the University's Lanham Act claims were stayed and both parties moved for summary judgment.⁵⁴ The district court granted summary judgment to Moore with regard to paintings and prints, while granting summary judgment to the University with respect to calendars, mugs, and other "mundane products."⁵⁵ Both parties appealed.⁵⁶

⁵⁰ *Id.* at 5 (citing 15 U.S.C. § 1125(a)).

⁵¹ Jon Solomon, *Alabama's Embarrassing Lawsuit Against Artist Daniel Moore Continues*, AL.COM, Jan. 26, 2012, http://www.al.com/sports/index.ssf/2012/01/alabamas_embarrassing_lawsuit.html. In an amicus brief filed by universities siding with Alabama, annual worldwide sales of licensed college merchandise was estimated at \$4.3 billion.

⁵² *Artist Battles Alabama Over Football Paintings*, USA TODAY, Feb. 2, 2012, <http://www.usatoday.com/sports/college/story/2012-02-02/daniel-moore-alabama-lawsuit/52933488/1> (hereinafter "Artist Battles Alabama").

⁵³ 11th Circuit Opinion, *supra* note 8, at 5. The 11th Circuit Court also dealt with an interlocutory appeal related to University immunity during this time, which this article will not discuss. See *Bd. of Trs. of the Univ. of Ala. v. New Life Art, Inc.*, 336 Fed. App'x. 860 (11th Cir. 2009).

⁵⁴ *Moore 2012*, *supra* note 8, at 5.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 7.

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A three-judge panel of the 11th Circuit Court of Appeals heard oral arguments in February 2012.⁵⁷ The issues on appeal were whether the prior licensing agreements required Moore to obtain permission to portray the University trademarks; the strength of the University's colors as a trademark; whether Moore's depiction of the uniforms on paintings and prints was protected by the First Amendment and fair use; and whether Moore's depiction of the uniforms on mugs, calendars, and other "mundane products" was not protected by the First Amendment or fair use and was likely to result in consumer confusion as to the objects origin.⁵⁸ The court only addressed claims relevant to those Moore products that were not subject to a previously written licensing agreement, as those subject to an agreement involved contractual issues not addressed by the district court.⁵⁹ The court did address, however, whether the broad language contained in the previous licensing agreements constituted a conveyance of Moore's First Amendment interests.⁶⁰

IV. 11TH CIRCUIT DECISION

The 11th Circuit Court of Appeals separated the parties' appeals by first addressing paintings, prints, and calendars, then addressing objects such as mugs and other "mundane products."⁶¹

⁵⁷ *Artist Battles Alabama*, *supra* note 52.

⁵⁸ Moore 2012, *supra* note 8, at 6-7.

⁵⁹ *Id.* at 7-8, n. 7.

⁶⁰ *Id.* at 7.

⁶¹ *Id.* at 8. "Mundane Products" refer to Moore's depiction of University trademarks on mini-prints, mugs, cups, flags, towels, t-shirts, or any other "mundane products." *Id.*, at 26. Calendars were reclassified by the circuit court to go with paintings and prints because of their comparable size and likelihood of the artistic work being valued by purchasers as compared to that of mugs and post-card-sized mini-prints. *Id.*, at 33.

a) *PAINTINGS, PRINTS AND CALENDARS*

The University claimed that the case is distinct from *Rogers* and *ETW* in that it is strictly a trademark infringement case, with none of the subjects of the paintings making a similar right to publicity claim as *Rogers* and *Woods*.⁶² While the title in *Rogers* and images in *ETW* were not specifically trademarked as the University of Alabama did their uniform color combinations, those cases did deal with false endorsement claims which are treated the same as trademark infringement by circuit courts under the Lanham Act.⁶³ For that reason, the 11th Circuit relied on the *Rogers* and *ETW* decisions in determining whether Moore violated the University's trademarks in his artwork.⁶⁴ Unlike the district court, the 11th Circuit included calendars with paintings and prints because of the calendars' similar size and quality of the images on the calendars compared to the paintings, and the likelihood of purchasers considering the artistic work of the product significant.⁶⁵

The court first examined the district court's holding that the broad language of the previous licensing agreements did not require Moore to obtain approval to depict the University uniforms in his work.⁶⁶ The 11th Circuit agreed with the district court finding that the language of the licensing agreements was ambiguous with regards to uniforms.⁶⁷ Based on the ambiguity, the court looked to the parties' behavior after creating the licensing agreements to determine if the agreements required Moore to get approval to depict the

⁶² *Id.* at 23-24.

⁶³ *Id.*; citing *Tana v. Dantanna's*, 611 F.3d 767, 777 n.9 (11th Cir. 2010); *Landham v. Lewis Galoob Toys*, *supra* note 6, at 626. False endorsement and trademark infringement claims each get their base from the same sentence of the Lanham Act. 15 U.S.C. §1125(a)(1).

⁶⁴ Moore 2012, *supra* note 8, at 23-24.

⁶⁵ *Id.* at 33 n. 42.

⁶⁶ *Id.* at 9-16.

⁶⁷ *Id.* at 13.

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University's uniforms.⁶⁸ The court looked to Moore's continual sale of works created before the licensing agreements, as well as his creation of new works, to determine that the parties' actions did not indicate that the previous agreements required University permission to portray the uniforms.⁶⁹ That conclusion was furthered by the University's acquiescence to Moore's paintings, by selling his unlicensed work in its campus store and displaying it in University buildings and brochures.⁷⁰

The court next addressed the University's trademark claims against the prints, paintings and calendars.⁷¹ In doing so, the court briefly looked to whether the works created a likelihood of consumer confusion under the Lanham Act, which it agreed with the district court was unlikely.⁷² The circuit court determined, however, that the question of likelihood of consumer confusion was moot due to Moore's First Amendment claim overwhelmingly outweighing any consumer confusion that may exist.⁷³ Though the University argued that Moore's work was "more commercial than expressive speech and, therefore, entitled to a lower degree" of First Amendment protection, the court found that the mere sale of Moore's work did not mean it was not entitled to full protection of the First Amendment.⁷⁴

In applying the *Rogers* balancing test to Moore's work, the court determined his depiction of the trademarked University uniforms was artistically relevant to the expressive underlying portrayal of Alabama football scenes.⁷⁵ Further, Moore never marketed unlicensed paintings as endorsed or sponsored by the University.⁷⁶ Ultimately, the court concluded

⁶⁸ *Id.* at 14.

⁶⁹ *Id.*

⁷⁰ *Id.* at 15.

⁷¹ *Id.* at 16-26.

⁷² *Id.* at 26-28.

⁷³ *Id.* at 18.

⁷⁴ *Id.* at 19-20.

⁷⁵ *Id.* at 24-25.

⁷⁶ *Id.* at 25.

that even if some members of the public would confuse the paintings, prints, and calendars' origin, Moore's First Amendment interest in artistic expression overrode any violation of the Lanham Act.⁷⁷

b) MUGS AND OTHER "MUNDANE PRODUCTS"

The court again viewed the parties' conduct subsequent to the licensing agreements between Moore and the University to resolve the agreements' ambiguity with regard to mugs and other "mundane products."⁷⁸ As opposed to the extensive conduct concerning paintings and prints, Moore only produced three sets of mugs featuring Alabama, two of which the University licensed.⁷⁹ Additionally, those mugs that the University licensed did not involve the portrayal of University uniforms, but rather University logos explicitly included in the licensing agreements.⁸⁰ Because there were remaining disputed issues of material fact, the court reversed the grant of summary judgment to the University regarding licensing of mugs and other "mundane objects" and remanded the issue back to the district court.⁸¹

The court next addressed Moore's argument that he has a right to produce mugs and other "mundane objects" as derivative works because the original paintings do not infringe University trademarks.⁸² The court rejected this argument, pointing out the obvious loophole that it would allow should they accept it: that an artist could "easily circumvent trademark law by drawing another's trademark and then placing that drawing on various products with impunity."⁸³

⁷⁷ *Id.*

⁷⁸ *Id.* at 26-28.

⁷⁹ *Id.* at 27.

⁸⁰ *Id.*

⁸¹ *Id.* at 28.

⁸² *Id.*

⁸³ *Id.* "Selling the copyrighted drawing itself may not amount to a trademark infringement, but its placement on certain products very well might."

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Moore's last defense with regard to mugs and other "mundane objects" was that the University acquiesced on the use of the trademarks on those objects.⁸⁴ Acquiescence, as opposed to laches, requires active consent that the plaintiff will not assert his trademark rights against the defendant.⁸⁵ The 11th Circuit again stated the evidence regarding University conduct constituting acquiescence of Moore's sale of mugs and other "mundane products" was unclear and remanded the issue to the district court; this was unlike the paintings and prints in which the University clearly acquiesced.⁸⁶

V. UNANSWERED QUESTIONS

A question that remains unanswered is at what point the depiction of a trademarked logo becomes so prevalent in an artwork that it is merely a circumvention of the trademark. In many of Moore's works, he depicts university and other logos both on and off jerseys and helmets. It would seem that the court would question in such an instance whether or not there was a high likelihood of consumer confusion based on the trademark use, though such a question could be more likely to result in an affirmative answer where the logos are more descriptive of the university they represent than simple color combinations. While the Moore case focused mainly on his depiction of the University's jerseys and crimson and white color scheme, in many other works—including some of Moore's—the prominent logos featured on jerseys and helmets

⁸⁴*Id.* at 31. "Acquiescence is a statutory defense under 15 U.S.C. § 1115(b)(9). 'The defense of acquiescence requires proof of three elements: (1) the plaintiff actively represented it would not assert a right or claim; (2) the delay between the active representation and assertion of the right or claim was not excusable; and (3) the delay caused the defendant undue prejudice.'" *citing* *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1207 (11th Cir. 2008).

⁸⁵ Moore 2012, *supra* note 8, at 31.

⁸⁶*Id.* at 32.

may have a much higher likelihood of consumer confusion. It is unknown whether explicitly trademarked logos would draw greater scrutiny from the court than mere university color combinations.

The traditional nature of Alabama's uniforms raises another interesting aspect to the case evaluation. Where the Alabama football uniforms are certainly recognizable to most college sports fans, they are also one of the most generic.⁸⁷ It would seem that a relatively non-specific uniform would be less likely to cause consumer confusion for trademark purposes because they are void of distinct university-identifying logos. That leads to the question of whether courts would treat a helmet or jersey with more prominent trademarked logos differently for the purposes of consumer confusion. That question is, essentially, whether the trademark of a particular logo on a team's uniform can still be enforced against artists despite the general trademark of the uniform itself being unenforceable. Where Alabama only accused Moore of violating the trademarked color combination of the University's uniforms, a team with specifically trademarked university logos on their jerseys may have greater success claiming that there is an increased likelihood of consumer confusion with the use of distinct logos.

Another important element of the *Moore* case was the University's extensive use of Moore's unlicensed works. The University's acquiescence with regard to Moore's paintings played an important role in determining that he did not need a license to use the University trademarks in his art. Should a different artist depict trademarked images in a factually different scenario where the trademark holder has less

⁸⁷Pennsylvania State University and the University of Notre Dame are examples of other schools with ultra-conservative football uniforms. Where Alabama and Notre Dame feature only a small university logo on the jerseys' collars, Penn State has no identifying marks beyond the color scheme and number placement.

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knowledge of the use, it is unknown whether the court would extend the same benefit to the artist as it did to Moore.

One more unaddressed concern is how the *Moore* case translates to other forms of media. While the case focused on paintings and prints, the First Amendment protections associated with artist's rights also apply to film, music, pictures and video games.⁸⁸ Filmmakers have long created fictional sports teams, and sometimes entire leagues, for the subjects of their films.⁸⁹ Like Moore and his fear of licensing agreements with Alabama, at least one filmmaker has stated that his reasoning for creating a fictitious football league for his movie was the NFL becoming "very sensitive" about licensing trademark use due to some of the topics depicted in the film.⁹⁰ In order to maintain creative artistic control of his work, the director was forced to forego using any real NFL teams as part of the movie. In the video game context, video game maker EA Sports licenses the teams depicted in their sports games, though this practice may not be necessary after *Moore*.⁹¹ In light of the

⁸⁸ *ESS Entertainment v. Rock Star Videos*, *supra* note 19.

⁸⁹ *THE PROGRAM* (Touchstone Pictures 1993); *THE WATERBOY* (Touchstone Pictures 1998); *ANY GIVEN SUNDAY* (Warner Bros. 1999); *THE REPLACEMENTS* (Warner Bros. 2000).

⁹⁰ Anthony Lappi, *Any Given (Super Bowl) Sunday: Director Oliver Stone Talks About His Days on the Field, Why Defensive Calls are Ruining the Game and His Favorite Super Bowls Ever*, SALON.COM, Jan. 29, 2000, http://www.salon.com/2000/01/29/stone_5/singleton. The movie contains scenes with nudity, graphic violence, drug use, domestic abuse, intra-team fights and players assaulting referees. The sort of negative images depicted in the film are the kind for which trademark law is available: to keep precious logos and other identifiable images from being associated with images inconsistent with the brand they represent.

⁹¹ *EA Sports FIFA Soccer Franchise Sales Top 100 Million Units Lifetime*, BUSINESS WIRE, Nov. 4, 2010, <http://www.businesswire.com/news/home/20101104006782/en>; *Madden NFL 12 Launches Onto Store Shelves Today*, BUSINESS WIRE, Aug. 30, 2011, <http://investor.ea.com/releasedetail.cfm?ReleaseID=602068>. The games are overwhelmingly successful, with the company's FIFA soccer and Madden football franchises having sold over 100 million and 90 million units, respectively. Not limited to the company's sports games, Electronic

Moore case, it seems entirely possible that a maker of films or video games could legally use trademarked logos without the work coming across as endorsed by the teams or leagues or leading to consumer confusion. More so, those makers could almost certainly reproduce true events without running afoul of trademark law. It is arguable that such works could be considered more merchandise than art under the categories of the *Moore* case due to their high profitability and marketing prevalence, though precedent cases have consistently put other media forms in the same category of First Amendment protection as paintings. The question remains whether licensing is necessary for films and video games depicting sports teams, or if the makers of those art forms can capitalize on the recognizability of sports team names and uniforms without paying royalties under the veil of First Amendment free artistic expression protection.

VI. PROBLEMS

Court documents show that Moore's licensed work raised more than one million dollars in assets for the University over his career, and University representatives agreed that his artwork generated goodwill and positive public relations.⁹² The University's trademark suit against one of Alabama's most beloved artists and alumnus, however, was widely met with criticism from outside viewers.⁹³ University President Robert

Arts as a whole reported over \$3.8 billion in revenue for the fiscal year ending March 2011. *Electronic Arts Reports Q4 FY11 and FY11 Financial Results*, BUSINESS WIRE, May 4, 2011, <http://investor.ea.com/releasedetail.cfm?ReleaseID=574530>.

⁹² Moore, *supra* note 32.

⁹³ Keith Dunnivant, a fellow Alabama alumnus and Paul "Bear" Bryant biography author, stated, "This lawsuit is the equivalent of the Catholic Church suing Michelangelo for painting the Sistine Chapel." Liptak, *supra* note 34. See also Solomon, *supra* note 51; Rick Self, *Your View: Alabama Should Stop Harassing Artist Daniel Moore*, AL.COM, Feb. 5, 2012,

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Witt admitted that the initial blowback against the University as a result of the lawsuit was significant.⁹⁴ The public relations damage to the University, combined with the publicity of the lawsuit portraying Moore as the victim of an over-litigious and money-hungry major University, raises a red flag for those trademark holders considering suit against an artist. Due to the broad protection given to artists under the First Amendment, the potential royalties gained by trademark holders often pale in comparison to the substantial risk and negative impact a plaintiff would be forced to take in the arena of public opinion for a now probably unsuccessful lawsuit. The alternative to not bringing suit, however, is the chance that the artist will have a stronger acquiescence or fair use defense. Trademark holders are left in a precarious position of not being able to control the use of their marks without potentially incurring significant financial and reputational losses, a prospect completely inconsistent with the base ideal that they be able to protect their brand's public perception through the use of their marks.

Artists depicting college sports teams further put themselves at a significant advantage due to NCAA Bylaws prohibiting current student-athletes and the schools they represent from profiting off the student-athlete's image.⁹⁵ NCAA student-athletes have less reason to enforce their right to publicity, as profiting off their publicity would result in the NCAA declaring them ineligible for collegiate competition.⁹⁶ With nothing to gain but an injunction, there is little benefit or incentive for current student-athletes to engage in costly litigation that they could not financially capitalize on if successful without losing their NCAA eligibility. The *ETW* decision adds another caution to current student-athletes

http://blog.al.com/birmingham-news-commentary/2012/02/ua_should_stop_harassing_artis.html.

⁹⁴ Moore, *supra* note 32.

⁹⁵ NCAA Manual, Bylaw 12.5.2 (listing non-permissible promotional activities for current enrolled student-athletes).

⁹⁶ *Id.*

attempting to enforce their right of publicity since such cases have been proven to be likely unsuccessful against First Amendment defenses. The NCAA prohibits boosters and third parties from profiting off student-athlete names or images on commercial products as well, though there is an exception for photographs sold by individuals and news agencies.⁹⁷ While Moore is an individual artist—and previously compared his work to pictures from news outlets, which fall under the NCAA exception—the galleries that sell Moore’s work are surely commercial enterprises under NCAA rule. Moore’s photorealistic paintings leave little confusion about the players he is depicting, and in some cases the athlete’s last name is included as part of the back of the jersey. If college athletes had more incentive to enforce their right of publicity, it is possible they could individually invoke such a right against Moore. The likelihood of such a claim being successful under *ETW v. Jireh*, however, seems fairly unlikely. Though right of publicity claims have been mostly unsuccessful in the face of artistic depictions under the First Amendment, the disincentive for bringing such claims put in place by the NCAA removes yet another arrow from the quiver of those challenging college sports artists.

Another troubling aspect of NCAA Bylaws’ effect on artists in the intersection of First Amendment and trademark law played out in the *Moore* case with regards to licensing. One of Moore’s stated reasons for opposing licensing agreements with the University was his fear of losing artistic choice over his work, primarily the ability to depict current student-athletes.⁹⁸ Moore compared his unwillingness to wait for student-athletes to exhaust their eligibility to news sources publishing pictures of current student-athletes as journalism.⁹⁹ Because the NCAA prohibits schools from profiting off the images of current student-athletes in all but a few instances, it

⁹⁷ *Id.*

⁹⁸ Solomon, *supra* note 51.

⁹⁹ *Id.*

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is reasonable to believe that any license to depict a current student-athlete in Moore's artwork would be limited, or not granted at all due to the decreased market in which the University could sell the work.¹⁰⁰ This adds a major disincentive for artists to comply with universities to license artwork because they must pay royalties to the school and give up at least some control of their subject matter. The severe limitation these NCAA Bylaws place on potential licensing agreements is yet another hurdle in the balance of First Amendment and trademark law.

There may be an ironic situation where an artist creates a more imaginative work, rather than from a photo of a realistic event, yet receives less protection under the First Amendment. Moore was able to compare his work to photographs in the news, the depiction of trademarks being a mere outgrowth of the realistic portrayal, as a sort of defense for his trademark use being necessary to express himself artistically. It is possible that, despite being more creative art than reproduction, the use of trademarked images in an original work will receive less protection since the trademark use is less necessary to the artistic expression than a reproduction of real-life events. Where painting a logo is vital to recreating a real event, one could argue that the inclusion of a trademarked image in a non-reproductive artwork is simply there to capitalize on the exposure and profitability of the mark. A situation where the First Amendment protection afforded to artists under trademark law is lessened by creativity seems to be in conflict with the core values of free artistic expression.

VII. SOLUTIONS

The *Moore* case swung the balance too far in favor of artists' First Amendment rights when conflicting with trademark law. Though the court noted some scenarios where

¹⁰⁰ *Id.*; See also Moore, *supra* note 32.

an artist could not use the shield of the First Amendment as a way to evade trademark law, the practical application of the *Moore* case makes such circumvention too easy. The low standard artists must meet to depict trademarked images makes it incredibly difficult, if not practically impossible, for trademark holders to control the use of their marks on artistic works.

The ideal approach for artists is to obtain permission and licensing agreements from the universities they wish to depict. The obvious hang up with such an arrangement is the cost to the artist to pay royalties for use of the trademarks and the creative control most universities will seek to direct the use of the trademarks. For artists who seek to create unlicensed paintings and prints free from trademark infringement suits, the *Moore* case fairly well settled that they may safely depict real-life events. Further, should the artist wish to depict a trademark on a work inspired by imagination alone, they would be protected under the First Amendment as long as the use was unlikely to cause consumer confusion, was artistically relevant to the underlying work and does not explicitly mislead to its source. Such a low threshold of proof for artists to meet in order to gain full protection under the First Amendment makes it too easy for artists to evade paying trademark royalties.

Instead, courts in the future should reject the trend established under *Moore*, *ETW*, and *Rogers*, and establish a new standard that gives trademark holders greater recourse against artists who use their marks without permission. By merely requiring artists to make their trademark use relevant to the underlying work and not explicitly misleading to its source, artists can now use trademarked images in good faith almost freely. Instead, courts should put more emphasis on the negative effect artistic uses have on trademark holders. In trademark cases, courts should create a factors test balancing the already established likelihood of consumer confusion with the financial and reputational impact of the use. As part of the financial analysis, the court would look at the value of the

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market in which the art depicts the trademarks, the value of potential royalties to the trademark holder, as well as the value that use of the trademark adds to the work. The more an artist profits from artwork containing others' trademarks without paying royalties for the use, the more likely a court should be to find in favor of the trademark holder and award them royalties from the work. Additionally, if such profit is derived primarily from the inclusion of the trademark, royalty fees would be increasingly appropriate since the trademark adds value to the work as a whole. For the reputational analysis, the court would look to the effect the artist's use had on the trademark holder and the brands associated with the mark. If the use portrayed the trademarked images in a negative light or in such a way that was damaging to the greater product the trademark represented, then the use would be more vulnerable to trademark enforcement. If the use provided a benefit or positive publicity to the trademark holder, then the reputational impact factor would be neutral or in favor of the artist.

In analyzing the *Moore* case under a new balancing test, the court would likely award some royalties to the University. The court would expectedly find the likelihood of consumer confusion minimal, and the reputational impact of the use would fall slightly in Moore's favor or be neutral since his depictions of real events did not portray the University trademarks in a negative light and admittedly brought the school good publicity. The case would turn, however, by adding more weight to the facts that Moore's artwork depicting the University netted millions of dollars, much of which capitalized on the inclusion of trademarks associated with the University of Alabama football brand. Though there may not have been a great deal of consumer confusion regarding the source of Moore's work, it is certain that the same football scenes portraying generic or fictional teams and players would have had nowhere near the commercial success as the Alabama paintings. Because Moore was able to gain commercially from the reputation and success of the University of Alabama

football program, paying royalties commensurate with that gain would be appropriate.

A new balancing test would not stifle First Amendment rights because artists would still be able to depict anything they choose in their work, they would simply have a greater likelihood of paying royalties for those works that capitalized on the marketability of the trademarks of others. By changing the standard for balancing trademark claims with First Amendment rights, the profits from artistic works containing trademarked images would be more appropriately split between the artists responsible for the work and the trademark holders that have added to the work's recognizability. Additionally, a revised test would help to seal some of the methods the *Moore* case unintentionally left available for artists essentially to circumvent trademark law. The test would allow artists to retain their artistic freedom while rewarding trademark holders for the profits others make based on their trademarks' recognition.

VIII. CONCLUSION

While some artistic works depicting trademarks relevant to college sports may still be considered violations under the Lanham Act, the *Moore* case has greatly enhanced the artists' First Amendment defense to such claims. Though questions and concerns still remain with regard to First Amendment and trademark analysis, some of those problems can be addressed by applying a modified test to the current standard. In order to more equitably balance the interests of trademark holders and artists' free expression, it is imperative that future courts facing the conflict of First Amendment and trademark law consider the financial and social impact of the use of trademarks in art, in addition to the likelihood of consumer confusion. By giving trademark holders more credence through a fairer balancing test, artists will be less able to circumvent trademark law to capitalize on registered marks

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without licensing. Allowing trademark holders to collect royalties on artwork bearing their marks creates a system where the profits from those works are more reasonably divided in the future between the parties responsible for their value.

NOTE: DAVID (TM) V. GOLIATH (FIRST AMENDMENT) IN REALITY, GOLIATH WINS

*Robbie Hendricks**

Wesley Ryan Shelley (“Shelley”) makes a strong argument that artists have found a potential loophole in trademark infringement thanks to the protection of the First Amendment. Shelley proposes shifting the balance of power towards trademark holders because under current case law the artists possess too much of the power. Shelley provides a new framework that courts could follow going forward to enable this power shift to occur. The framework is nice in theory, but in practical terms it is not going to matter because of the strength of a First Amendment claim. Until the First Amendment defense is dealt with, trademark owners will most likely lose no matter what type of trademark framework the court is utilizing. In order to combat against the First Amendment, a trademark owner needs to prove that the artistic expression deserves either no First Amendment protection or at the least lessened protection under the First Amendment.

The concept of free expression was a major principle on which the United States was founded. In comparison, legal protection of trademarks is relatively brand new. Moreover, throughout the course of U.S. history, there are very few categories of free expression for which courts have refused to grant First Amendment protection. One such category is the encouragement of imminent, lawless behavior.¹ From the 1920s through the 1960s, reaching the category of

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¹ *Schenck v. U.S.*, 249 U.S. 47 (1919).

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encouragement of imminent, lawless behavior was not difficult to meet under the test of clear and present danger.² However, the Supreme Court in 1969 in *Brandenburg v. Ohio*, changed that by altering the clear and present danger test to state that the speech had to be more than advocacy and must be incitement, directed at imminent lawless action and likely to succeed.³ In addition to the strengthening of the test for encouragement of imminent lawless behavior, it seems highly unlikely that artistic expressions involving trademarks will meet the test laid out in *Brandenburg* and be classified as encouragement of lawless behavior.

Another category of free speech that receives no protection under the First Amendment is fighting words.⁴ Words, which are likely to make the person to whom they are addressed likely to commit an act of violence, likely against the speaker, are not protected under the First Amendment.⁵ Due to lack of recent Supreme Court case law, it can be seen that the fighting words category has fallen out of favor. Moreover, as was stated above regarding encouragement of imminent, lawless behavior, artistic expressions regarding trademark issues are unlikely to cause someone to commit an act of violence against the artist, even assuming the artistic expression was directed at an individual.

Two other categories of free speech that receive no protection under the First Amendment are obscenity and child pornography.⁶ It is plausible that an artistic expression could meet the obscenity test laid out in *Miller v. California* of appealing to the prurient interest and patently offensive

² *Id.* at 52; *Abrams v. U.S.*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927).

³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁵ *Id.* at 573.

⁶ *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982).

according to community standards.⁷ If an artistic expression reached this category, while implicating a trademark, the trademark owner would almost certainly win in court for two reasons. First, the defendant artist would have no protection from the First Amendment; second, the Lanham Act would provide many avenues of relief for the expression being scandalous, immoral, and disparaging.⁸ Finally, if an artistic expression involving a trademark was considered child porn, it would certainly lose if a trademark owner challenged the expression.

Several categories of free speech that receive protection, but a lesser form of protection, which generally means laws, can regulate the speech in some fashion. These categories include hostile audience,⁹ offensive words,¹⁰ hate speech,¹¹ commercial speech,¹² and sexually explicit speech.¹³ Proving an artistic expression reached the categories of hostile audience, offensive words, hate speech and sexually explicit speech would create opportunities for a trademark owner to win against the artist because not only would the protection under the First be lessened, but also they would implicate avenues of relief under the Lanham Act for being scandalous, immoral, and disparaging. Under these instances, a trademark owner would be able to lessen the protection of the First Amendment and be able to attack the issue under the Lanham Act as well.

Shelley does a great job of identifying that there is a real issue involving free speech and being able to protect one's trademark. Shelley not only identifies the issue, but offers a

⁷ *Miller v. California*, 413 U.S. 15, 15 (1973).

⁸ Lanham Act of 1946, 15 U.S.C.A. § 1052(a) (1946).

⁹ *Feiner v. New York*, 340 U.S. 315 (1951).

¹⁰ *Cohen v. California*, 403 U.S. 15 (1971).

¹¹ *Nat'l Socialist Part of Am. v. Village of Skokie*, 432 U.S. 43 (1977).

¹² *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

¹³ *Am. Bookseller Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

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solution as well in the form of a new test that court's should utilize that will enable trademark owners to combat against artistic expressions. However, these efforts would be all for not if the First Amendment barrier is not addressed first. Considering the strength of the First Amendment in U.S. history and case law, it just seems unlikely a trademark owner's rights will ever be able to trump someone's First Amendment rights. Proving the artist has no protection or at least lessened protection would enable the trademark owner to at least compete against the artist in court and even bring in arguments under the Lanham Act. After the First Amendment is dealt with, then the court can move on to a more modern and useful test that Shelley provides in his article.

HIP-HOP AND OTHER PROFESSOR'S PEDAGOGY

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Abstract

Hip-hop has been the music of a community oppressed by racism, poverty, over-incarceration, and police brutality. Through a culture of DJs, graffiti, break dancing and rap, in the late 1970s and early 1980s, this community created a voice of its own: a voice that has directly affected America through television, film, fashion, visual arts, and dance. This paper emphasizes the need to take advantage of hip-hop culture and its pervasiveness in our modern society to harness its unifying nature among our students and to better drive their ability to relate with educational lessons.

During the 1990s, hip-hop culture was introduced into the curriculum of many primary and secondary schools throughout the United States, ultimately resulting in higher retention rates and student achievement. Beyond the small

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amount of work produced by a handful of academics, often in the field of African-American studies, hardly any literature exists depicting how and with what tools one might bring hip-hop culture and media into a university setting.

This paper will show that hip-hop culture can be a teaching vehicle, particularly for legal studies, and provide professors a resource through which they can better engage and interact with their students. In the eyes of many, modern mainstream hip-hop has been typecast as fraught with violence, misogyny and materialism. This paper will show that hip-hop culture, included within a legal studies curriculum, can move beyond the obvious applications in criminal and tort law and into the broader scheme of legal studies. Particularly, the intersection where hip-hop convenes with big business provides the educator with countless opportunities to reveal dynamic American cultural views on ethics, social consciousness, and the law in a manner that supports discussion and reflection amongst Millennials.

Hip hop means the whole culture of the movement . . . when you talk about rapRap is part of the hip hop culture. . . . The emceeing The djaying is part of the hip hop culture. The dressing the languages are all part of the hip hop culture. The break dancing the b-boys, b-girls. . . how you act, walk, look, talk are all part of hip hop culture. . . and the music is colorless. Hip Hop music is made from Black, brown, yellow, red, white . . . whatever music that gives you that grunt . . . that funk, that groove or that beat. . . . It's all part of hip hop.¹
—Afrika Bambaataa

¹AFRIKA BAMBAATAA, DEFINITION OF HIP HOP 1 (1996), *available at* <http://www.daveyd.com/whatisbam.html>.

Hip-hop and Other Professor's Pedagogy

I. 1520 SEDGWICK AVE. IN THE "REC ROOM"² —DJ KOOL HERC

During the mid-1970s, economically disadvantaged African-American, Latin, and Afro-Caribbean youths in the South Bronx of New York City began an aesthetic and sociopolitical rebellion against an oppression that had consumed their struggling community.³ Between the excessive policing practices in a population already diminished by over incarceration and the experience of genuine inequalities in access to proper housing and meaningful employment opportunities, this community needed a means for hope, change, and survival.⁴ They found hope through the development and embodiment of a voice—a self-expression. This lifestyle would become hip-hop.

The vulgarity, misogyny, violence, and materialism of modern mainstream hip-hop, is the result of decades of corporate influence commodifying the urban voice.⁵ "Cars . . . clothes . . . money and . . . hoes" simply sell more records and concert tickets than socially conscious content, resulting in a perpetual cycle of stereotypes fostered by corporations seeking higher sales.⁶ Since hip-hop was a response to a condition of oppression, it is considered best to discuss the individual

²1520 Sedgwick Ave.: Birthplace of Hip-Hop – Bronx NY, *available at* http://www.cincystreetdesign.com/1520_Sedgwick/index.html. 1520

Sedgwick Avenue, in the South Bronx, is considered the birthplace of Hip-hop. DJ Kool Herc, hip-hop's founding father, would regularly perform for the community in this building.

³Greg Dimitriadis, *Hip Hop: From Live Performance to Mediated Narrative*, 15 CAMBRIDGE U. PRESS 179, 179 (1996); M.K. ASANTE, JR., *IT'S BIGGER THAN HIP HOP 9* (St. Martin's Press 2008).

⁴See JEFF CHANG, *CAN'T STOP, WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION* (St. Martin's Press 2005).

⁵See generally *Hip-Hop: Beyond Beats & Rhymes*, *available at* <http://www.pbs.org/independentlens/hiphop/>.

⁶Dreamer, *available at* <http://www.metrolyrics.com/dreamer-lyrics-wiz-khalifa.html>.

elements as constituent parts of the development and formation of hip-hop.⁷ Through MCs (or “rappers”), DJs (or “disc jockies”), graffiti art, breaking or b-boying (or “break dancing”), street entrepreneurship, street language, street fashion, street knowledge, and beat boxing, hip-hop would become a world changing aesthetic.⁸ These were the outlets innovators provided their communities against poverty and isolation during troubled times; there was little focus on the more negative tenets of modern hip-hop.⁹ From their origin in the streets to the embracement of the major industry, these nine elements have grown to dramatically influence pop culture well beyond the New York City limits for over thirty years.¹⁰

II. TO THE BLACK, TO THE WHITE, THE RED, AND THE BROWN, THE PURPLE AND YELLOW¹¹—WONDER MIKE

Fast-forward thirty plus years and the Goliath that is hip-hop barely resembles the David it once was. While its beginnings were humble, hip-hop’s current annual contribution to the U.S. economy is in the billions.¹² Many successful record moguls, actors, and politicians began their careers as rappers and hip-hop artists.¹³ Hip-hop’s impact and reach has been unstoppable for decades, permeating globally throughout cultures and industries. Of the nine elements of hip-hop, we

⁷See generally Fundamentals of Hip Hop, available at <http://www.houseofnubian.com/IBS/SimpleCat/Product/asp/hierarchy/0100/product-id/682385.html>.

⁸*Id.*

⁹See Chang, *supra* note 4.

¹⁰AYA DE LEON, HIP HOP CURRICULUM: A VALUABLE ELEMENT FOR TODAY’S AFTERSCHOOL PROGRAMS 2, available at <http://www.afterschoolresources.org/kernel/images/aahiphop.pdf>.

¹¹Rapper’s Delight, available at <http://www.lyricsondemand.com/onehitwonders/rappersdelightlyrics.html>.

¹²Alan Hughes, *Hip-hop Economy*, BUSINESS LIBRARY, May 2002, at 1.

¹³PAUL BUTLER, LET’S GET FREE 125 (The New Press 2009).

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can see this influence particularly through rap music, DJs, graffiti art, and breakdancing.

It is important to note that rap is not hip-hop. Although rap is perhaps the most pervasive form of the culture, it is but a piece of that culture. Unlike the spoken word, rap is performed in time with a beat and takes into consideration factors such as “content,” “flow” (rhythm and rhyme), and “delivery.”¹⁴ In the United States, hip-hop acts have been traditionally composed of male African-Americans, which makes it surprising that the largest population of rap music purchasers is suburban white youth. However, over the years, female and white artists have had record-breaking sales.”¹⁵ Internationally, notable MCs hail worldwide, from the favelas of Brazil to Palestine and East Africa.¹⁶ Given the 2.5 million self-ascribed hip-hop acts on Myspace (compared to the 1.8 million rock acts), one can imagine the endless permutations and transformations hip-hop has embodied when including the variable factors of ethnicity, gender, socio-economic disposition, and even sexual orientation that have been touched and influenced by hip-hop.¹⁷

Beyond the MC, there is the DJ. DJs, who often accompany one or more MCs, use turntables on which they can either mix several audio tracks into a continuous performance or create a distinctively new work.¹⁸ Early DJs considered themselves scientists tweaking, repurposing, and reinventing the use of turntables to produce unique sounds and experiences. This took skill and ingenuity to accomplish; whereas today,

¹⁴DEREK ATTRIDGE, *POETIC RHYTHM: AN INTRODUCTION* 90 (Cambridge U. Press 2002); PAUL EDWARDS, *HOW TO RAP: THE ART & SCIENCE OF THE HIP-HOP MC* 63 (Chicago Rev. Press 2009).

¹⁵ Lynette Holloway, *The Angry Appeal of Eminem Is Cutting Across Racial Lines*, N.Y. TIMES, Oct. 28, 2002, at C1; DE LEON, *supra* note 10, at 1–2; *See 2008 U.S. Music Purchases Exceed 1.5 Billion; Growth In Overall Music Purchases Exceeds 10%*, BUSINESS WIRE, Dec. 31, 2008.

¹⁶ ASANTE, *supra* note 3, at 2.

¹⁷ IFPI, *DIGITAL MUSIC REPORT 2009* 18 (IFPI 2009).

¹⁸ Aaron Jentzen, *Girl Talk Finds Ways to Grow*, SAN ANTONIO EXPRESS, June 23, 2011, at 2.

producers can replicate the entire experience via digital technology in seconds.¹⁹ In recent years, DJs from around the globe have not only taken the art of mixing hip-hop with countless other genres, but have repurposed the tools to create whole new musical experiences, thusly, replacing the United States as the former dominating figure behind the “remix.”²⁰

As for hip-hop’s impact on graffiti, much of today’s graffiti is no longer limited by the social stigma of vandalism as artists and entrepreneurs have been able to muster a commercially viable business of “street art.”²¹ Aside from the legality of the practice, the distinction between vandalism and street art often lies in the skill or intricacy used to tag the property.²² It may be fair to say that all art on the street that is not graffiti is street art, but aside from markers and spray paint, street art often includes the use of stencils, posting stickers or posters, installations, etc.²³ Such ingenuity and art has been considered worthy of preservation in museums, display in galleries, and distributing in mass; in fact, the embodiment of street art has even drawn comparisons to the work of a modern day Andy Warhol.²⁴ This is not to say that graffiti has lost the gruff that it once had, but rather, much like one can juxtapose gangster rap against more socially conscious rap music, so can one distinguish the genres of graffiti.²⁵ To further attest to the

¹⁹GrandMaster Flash at Master of the Mix, *available at* http://www.youtube.com/watch?feature=player_embedded&v=X8-0M-jSOE4#!.

²⁰ Top 100 DJs, *available at* <http://www.djmag.com/top100>.

²¹See generally Exit Through the Gift Shop, BANKSYFILM.COM, *available at* <http://www.banksyfilm.com/>.

²²Graffiti, HUNTFOR.COM, *available at* <http://www.huntfor.com/arthistory/C20th/graffiti.htm>.

²³See CEDAR LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION (Abrams 2008).

²⁴Exit Through the Gift Shop, *supra* note 21.

²⁵Tavis Smiley, *Examining Hip Hop Culture*, PBS, Aug. 22, 2011, *available at* <http://www.pbs.org/wnet/tavissmiley/features/examining-hip-hop-culture/>.

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variety of graffiti, beyond the quality of the work, distinctions can be made worldwide between national and even regional styles and identities.²⁶

Much like the other elements of hip-hop, b-boying—breaking or the colloquial “breakdancing”—has spanned the globe and evolved much in style and as a genre.²⁷ As much a sight to see as the Statue of Liberty, New York b-boys entertain tourists in the streets, parks, metro, and even in the subway cars for tips. Beyond urban dance battles held in community centers and the schoolyard, b-boying has launched worldwide. Since 2004, Red Bull, the beverage company, has sponsored an annual World Breakdancing Championship, along with qualifying competitions.²⁸ Outside of the United States, the championships have been held in South Africa, France, Germany, Russia, Switzerland, Tokyo, and Brazil, and boasts competitors and champions with a dozen more nationalities.²⁹ Competitions—aside from television, music videos, and film—have promulgated the hip-hop aesthetic to celebrate elite dance troupes and performers for their creativity and grandiose spectacles of physical strength and dexterity.³⁰

Regardless of its form, we see hip-hop exhibiting an ever-present influence over popular culture, most particularly with adolescent and young adults in the United States.³¹

²⁶See Worldwide Graffiti, FATCAP.COM, available at <http://www.fatcap.com/geograffiti.html>.

²⁷See generally The Freshest Kids, available at <http://www.imdb.com/title/tt0361638/>.

²⁸Red Bull: BC One, available at <http://www.redbullbcone.com/>.

²⁹*Id.*

³⁰See generally Jabbawockeez, available at <http://www.montecarlo.com/entertainment/jabbawockeez.aspx>.

³¹See generally S. CRAIG WATKINS, HIP HOP MATTERS: POLITICS, POP CULTURE, AND THE STRUGGLE FOR THE SOUL OF A MOVEMENT (Beacon Press 2005).

III. “HIP HOP IS THE DOMINANT LANGUAGE OF YOUTH CULTURE, AND THOSE OF US WHO WORK WITH YOUNG PEOPLE NEED TO SPEAK THEIR LANGUAGE.”³² –AYA DE LEON

There were two main reasons for writing this article. First, we, as fans of the aesthetic, cannot recall a time where there was not hip-hop, and secondly, neither can our students.³³ The culture in which we live is a result of a series of generations fueled by an amalgam of ethnicities, technology, and globalization.³⁴ For those of us coming into our own as hip-hop scholars, we can provide for our students an inter-generational, cultural bridge between new content and application.³⁵ It is a well-known fact that educators in general struggle to connect with their students despite any racial or cultural affinity. In many places in the United States, educators are pervasively unfamiliar with popular youth culture.³⁶ Rather than “keep in the closet” what can easily be considered one of our greatest assets—our life experiences—and quash the “cultural capital” we have developed, we ought to embrace how hip-hop culture has affected our means of life and use it to better connect with and engage our students.³⁷

One out of two students report boredom and lack of relevance of lessons to their lives as major factors for not

³² DE LEON, *supra* note 10, at 1–2.

³³ DAN CHARNAS, *THE BIG PAYBACK: THE HISTORY OF THE BUS. OF HIP-HOP* 636 (NAL Trade 2011); Salima Koroma, *Occupy Hip Hop: The Dilemma of the Rap Music Mogul*, HIP HOP DX, Nov. 30, 2011, at 1.

³⁴ MARTHA DIAZ, DR. EDWARD FERGUS & DR. PEDRO NOGUERA, *RE-IMAGINING TEACHING AND LEARNING: A SNAPSHOT OF HIP-HOP EDUC.* 6 (NYU Steinhardt 2011).

³⁵ *Id.*

³⁶ Charles Beady, *Whatever It Takes 2 Motivate 2-Daze Youth*, EDUCATION WEEK, Apr. 11, 2001, at 39.

³⁷ MARCELLA RUNELL HALL, *EDUC. IN A HIP-HOP NATION: OUR IDENTITY, POLITICS & PEDAGOGY* 8, 54 (University of Massachusetts Amherst 2011).

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attending class.³⁸ Since the inception of hip-hop, we have seen three generations of urban students enter and leave high schools, either by graduating or dropping out.³⁹ In 2008, 71 percent of all students who attended high school graduated.⁴⁰ Once we factor in race, class, gender, sexual orientation, and population density, these numbers become far more difficult to swallow. Although African-Americans and Latinos embody 41 percent of students in kindergarten through 12th grade, their graduation rates are at a startling 55 percent and 58 percent, respectively.⁴¹ At the collegiate level, graduation rates for Black students in 2009 was 39.1 percent and for Hispanic students 46.4 percent.⁴² These percentages represent generations of students who are either fighting through or losing to the education system with little in their studies that they can identify with their actual lives.

Educators can increase overall attendance and their students' motivation and engagement for learning by bringing aspects of hip-hop into the classroom because of hip-hop's broad appeal and the increased diversity of classrooms.⁴³ Furthermore, students often perpetuate the lessons learned into active dialogues and even provide more content previously

³⁸SAM SEIDEL, HIP HOP GENIUS: REMIXING HIGH SCHOOL EDUC.100 (R&L Education 2011).

³⁹Denise Taliaferro Baszille, *Deal with It We Must: Education, Social Justice, and the Curriculum of Hip Hop Culture*, 42 EQUITY & EXCELLENCE IN EDUC. 6, 2 (2009).

⁴⁰School to College: Can State P-16 Councils Ease the Transition?, available at http://www.edweek.org/media/ew/dc/2008/dc08_presentation_final.pdf [hereinafter School to College].

⁴¹ HALL, *supra* note 37, at 13; School to College, *supra* note 40.

⁴² LAURA HORN, PLACING COLLEGE GRADUATION RATES IN CONTEXT: HOW 4-YEAR COLLEGE GRADUATION RATES VARY WITH SELECTIVITY AND THE SIZE OF LOW-INCOME ENROLLMENT 30 (National Center for Education Statistics 2006).

⁴³ Ernest Morrell & Jeffrey M. R. Duncan-Andrade, *Promoting Academic Literacy with Urban Youth Through Engaging Hip-Hop Culture*, 91 ENGLISH J. 88, 88 (2002); HALL, *supra* note 37, at 50–52.

unavailable to the educator simply by reflecting on their culture and life experiences.⁴⁴

The solution to inspiring students to appreciate and absorb content is not by solely becoming “hip” to the times, but by making an educational classroom connection with our students’ lives. Without this understanding, as educators, we lose the opportunity to connect with our students and to teach important skill-sets such as media literacy, critical thinking, and cultural studies.⁴⁵ Critics that harp on the value of hip-hop typically point to the vulgarity, misogyny, violence, and materialism of modern mainstream hip-hop. They fail to recognize the opportunity for teaching moments particularly when the obvious proof is sitting in front of them. From the way our students dress to even the way they speak, it should be clear that hip-hop already has a significant presence in our classrooms.⁴⁶

IV. THE MESSAGE

Universities do teach hip-hop as its own subject area and law schools are beginning to realize the value behind hip-hop in the curriculum. Currently, there is not a body of literature that suffices to fill an entire syllabus for a university or graduate level legal studies course beyond a lecture series.⁴⁷ This being said, it is the responsibility of scholars attuned to hip-hop to flush out the assignments and opportunities to integrate Hip-hop into the curriculum and create a canon from which educators can pull from.

⁴⁴ HALL, *supra* note 37, at 22–23.

⁴⁵ DE LEON, *supra* note 10, at 1–2.

⁴⁶ A. A. Akom, *Critical Hip Hop Pedagogy as a Form of Liberatory Praxis*, 42 EQUITY & EXCELLENCE IN EDUCATION 52, 53 (2009).

⁴⁷ HALL, *supra* note 37, at 40; Hip Hop and the American Constitution, available at <http://hiphoplaw.blogspot.com/2012/01/hip-hop-and-american-constitution.html>.

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My colleagues and I have spent two years tinkering with opportunities to make the law tangible to undergraduate students entering our business program. Using hip-hop as a vehicle for legal content has been successful. Undoubtedly, the argument will arise that our target demographic, a historically African-American campus, has been a major factor behind our success. We would like to stress that the positive reception of the legal curriculum has little to do with our students' skin color, but rather their age and the culture in which they live. Due to the scope of hip-hop as a worldwide phenomenon and students' access to that culture, this point should be clear.

While we do see the value and appreciate the level of commitment from the educator who is required to perhaps play music before class or quote lyrics to draw the attention of students into today's lecture, this is not the purpose of this paper. Hip-hop should be the vehicle through which students learn substantive law.

V. HIP-HOP HOORAY – NAUGHTY BY NATURE

Where we will share some direction, it is ultimately the educator's responsibility to formulate lessons and strategies. Of the nine elements of hip-hop—MCs, DJs, graffiti art, breaking, street entrepreneurship, street language, street fashion, street knowledge, and beat boxing—some have been easier to implement than others; however, due to the inherent illegality surrounding much of hip-hop's history, it makes a prime choice to deliver legal content.

With a tool rampant with questionable material, a line should be drawn in the sand. It is recommended that if an instructor decides to cross the line and introduce, for instance, profanity into the course, we stress that the professor should show no more than what is needed to make the point that is trying to be conveyed understandable to the students. This would apply to any area deemed questionable. We actively chose not to include any content promoting hateful speech or

violence. Granted, there is little relevance for either in business law, but where the opportunity exists, we have chosen not to use these aspects of hip-hop as the tool in which we teach our students.

VI. THE BLUEPRINT

Rather than proceed as a definitive method of application, we would rather approach the inclusion of the elements of hip-hop into your legal curriculum as a brainstorm session, identifying potential areas from which one may wish to start.

One particular scenario an instructor may wish to use—along with all the relevant legal applications tied to the example—is the following:

*a) THE SCENE: LATE 1970S. MID-SUMMER. THE BRONX.
YOU ARE POOR AND A MINORITY.*

i) MCING AND DJING

In reality, all you might need to spur your first block party are two turntables, a microphone, and some speakers. Considering the cost for equipment, potentially several hundred dollars, one might not want to incur the burden. How might you get your party started? You can always borrow equipment (Bailments) rather than purchase (U.C.C.) or perhaps arrange for another performer (Agency and Contracts). Given the heat and the size of your apartment, it is unlikely you will be able to host the crowd you have envisioned due to crowd control issues (Negligence) so you decide that an outside location might be best (Property). Will it be in the park (Public Property and Public Administration), a friend's yard (Licenses, Easements, Covenants, Trespassing) or in the street (Reasonably Prudent Person Standard). Due to cost and troubles with the location, powering the equipment begins to be a problem; traditionally, this was resolved by dismantling the

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covers at the bases of streetlights and plugging the equipment directly into the grid (Theft of Services).⁴⁸

Prior to arranging for the event, it might be prudent to practice and hone your skills as a performer. MCs and DJs typically are required to abide by certain norms of the trade. First, performers generally choose for themselves a hip-hop name different from their given name (Trademarks) and the name is often a derivative of MC X or DJ Y (Likelihood of Confusion), but they do not necessarily need to take such an action.

The MC or the rapper's duties are to control the crowd and to "spit rhymes" in conjunction with the music. As every culture builds upon its past, so does hip-hop; often an MC will want to pay homage to another rapper through the direct use of the other's lyrics (Copyright). Where there can be the respectful copying of work, there also is the malicious where MCs will claim the lyrics as their own, also known as "biting" (The Importance of Legal Citation and Copyright). In the modern era of hip-hop, it has been popular to attack, in lyrical form, performers who bite (Defamation).⁴⁹

The DJ, beyond practice, needs equipment and records (U.C.C.). As mentioned earlier, the first DJs would tweak and customize their turntables from their intended use to get the effects they needed (Product Liability), specifically the ability to mix together different records live for others (Licensing and Copyright).

MCs and DJs were relatively unknown during this time and the new burgeoning sound of hip-hop could be found nowhere other than the parties themselves, unless you were given or purchased a mix tape or recording of a performance (U.C.C., Licensing, and Copyright).⁵⁰ Given the musical style being far different than what your parents were raised listening

⁴⁸ See generally Fundamentals of Hip Hop, *supra* note 7.

⁴⁹ Kim D. Chanbonpin, *Legal Writing, the Remix: Plagiarism and Hip Hop Ethics*, 63 MERCER L. REV. ____ (forthcoming 2012).

⁵⁰ See generally Fundamentals of Hip Hop, *supra* note 7.

to, you may have wanted to conceal the work from them as they may not be happy with the content (Sale of Harmful Materials to a Minor).

ii) *GRAFFITI*

Of the nine elements, graffiti stands out as the most inherently illegal and has been a thorn in the side of property owners and municipalities for decades (Legislative Interpretation and Development of Laws). In many jurisdictions, the sale of spray paint to minors or being a minor in possession of spray paint is illegal (Negligence and Strict Liability).⁵¹ The notoriety behind graffiti within the culture proves difficult for communities as each individual artist is driven by the want to be recognized, i.e., “known all over town.” This want drives artists not only to be prolific but to also be grandiose when possible, completing work in hard to reach places therefore making the graffiti more difficult to remove (Trespass to Chattels, Conversion, Trespass to Land, Intrusion, Licensees, Attendees, Invitees).

Many communities and business owners, to combat the problem of vandalism, have turned to commissioning graffiti art to support local artists and give graffiti artists an appropriate canvas (Service Contracts, Trademark, and Copyright).

iii) *ENTREPRENEURSHIP*

When we speak of street entrepreneurship, we are not talking about selling cocaine on a street corner (Agency), although it may be included. Street entrepreneurship is better described as turning what little you have into a commodity or service that has value (Business Structures). If the owner of a 1981 Ford Escort fell into dire financial straits, he would embody the element of street entrepreneurship if he started a

⁵¹Hal Dardick, *Minors’ Buying or Using Spray Paint is Prohibited*, CHICAGO TRIBUNE, May 26, 1994, at 1.

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business driving people around in his car called “The Escort Service” (Trademark). Survival entrepreneurship may be a better term.

Having students develop hypothetical gray economies, or underground economies, and develop them into legitimate businesses, challenges them to be creative and resourceful, while developing their understanding behind many legal protections (Ethics, Negligence, Labor Law, Employment Discrimination, Piercing the Corporate Veil, Tax Law).

iv) OF THE REMAINING ELEMENTS . . .

Where the previously mentioned elements have proven fruitful with opportunities for analogy and distinction, the remaining elements of hip-hop have shown less promise in our experience only for our lack of creativity and need to be further developed. Breakdancing in terms of its role in street performing has fit nicely within the constructs mentioned in street entrepreneurship and with the particular skillset required has also spawned conversations in worker's compensation. Street fashion conjures opportunities for trademarks and copyright, particularly useful articles. Street language and knowledge have entertained discussions regarding contemporary moral standards and the reasonable prudent person, but ultimately are the most difficult to discuss seriously, as a professor, amongst undergraduate students.

VII. CONCLUSION

Since its inception thirty years ago, hip-hop has changed the world. Through media access and technology, hip-hop has touched generations well beyond U.S. borders. In an ever-diversifying world, educator's need new tools to engage and retain students. Using hip-hop as a vehicle for content, particularly legal studies, allows education to be accessible and

of interest. If the new traditional student cannot experience a world without hip-hop, how can we, as educators, not as well?

NOTE: WHAT ABOUT TODAY'S HIP-HOP?

Kyle Cummings^{*}

A common problem for all teachers, from kindergarten instructors up to college professors, is the need to answer the student question of why the material is worth learning. Considering the importance of educating future generations, it is unsurprising that a great deal of study has gone toward answering this question, with the end goal being to increase students' interest in and desire to learn.¹ The authors of the article *Hip-Hop and Other Professor's Pedagogy* present one possible answer to this question, asserting that hip-hop can be used to help interact and engage with students, particularly when applied to a legal education. However, there are multiple points where the article's argument fails to stand up to scrutiny.

To start with, although there are a number of problems with the article's stance, it needs to be stated that there is nothing inherently wrong with the hip-hop movement, or with teachers making use of its pervasiveness in our society to better connect with students. As the article demonstrates, hip-hop has a rich history grounded in the struggle of minority groups to escape oppression and students familiar with both the struggle and its background are likely to become more engaged when focusing on a familiar topic. Unfortunately, just as the authors urge protestors to look beyond the violence and materialism seen in some present-day aspects of hip-hop, they are just as guilty as the detractors of only focusing on one part of hip-hop.

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¹Monica Johnson, Robert Crosnoe & Glen Elder, Jr., *Students' Attachment and Academic Engagement: The Role of Race and Ethnicity*, 74 SOCIOLOGY OF EDUC. 318, 319 (2001).

Hip-Hop and Other Professor's Pedagogy presents a review of hip-hop's history, from its origins in the 1970s as a form of self-expression in the face of oppression to its present-day status as an industry generating billions in revenue.

Assumedly, the article's authors want focus to remain on both these historical roots and the modern portions of hip-hop that do not glorify misogyny, violence, and other negative traits, and it is in this approach that they make a mistake. After all, it is unreasonable to argue that hip-hop can be used as an educational tool when the approach championed involves ignoring the kinds of hip-hop with which students are most likely familiar. As the authors themselves state, hip-hop has seen a dramatic shift in focus towards less savory topics, and this needs to be taken into consideration – not only due to possible concerns of both parents and students, but because if the hip-hop the students are familiar with is not the hip-hop presented in class, then the familiarity the authors are depending on to engage the students' attention will not exist.

Aside from the lack of familiarity failing to hold students' attention, there is also the fact that the students themselves may only view this learning strategy with derision. To repeat the authors, hip-hop has changed over the course of its existence, transforming from a social movement meant to inspire hope into a movement holding up the social value of wealth, materialism, and so forth.² The students may not perceive the teacher using a method of expression created by an oppressed group, but instead using the mediums of wealthy rappers and DJs, and thereby endorsing said artists' views. Again, this does not mean that hip-hop is inherently bad, but the prevalence of the sort of hip-hop the authors wish to avoid injecting into the education system has increased over the years³; the impression of many is not that hip-hop has serious

²Angela Ards, *Organizing the Hip-Hop Generation*, THAT'S THE JOINT!: THE HIP-HOP STUDIES READER 357, 359 (2004).

³Katrina R. Stapleton, *From the Margins to the Mainstream: The Political Power of Hip-Hop*, 20 MEDIA, CULTURE & SOCIETY 219, 226 (1998).

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social value, but rather the opposite. So long as this view remains strong, the likelihood of hip-hop being considered as a valuable educational tool is low.

Of course, aside from just the modern content and perception of hip-hop causing problems, there is also the fact that the article only provides an abstract idea, without going into adequate detail. Much like how it may be stated that it is possible to end world hunger with the currently existing food supplies, the article gives a broad overview to which everyone may agree, but does not offer a concrete plan for reaching that goal.

While the authors make valid points that hip-hop could be used in some contexts, the argument itself is lacking, due to how questions of implementation are inadequately addressed – the article gives some examples of using hip-hop fact patterns in legal discussions, but there is nothing concrete beyond that; it is a simple thing to say that teachers may use hip-hop to help them connect to their students, but in what manner? Do they present examples of hip-hop songs or graffiti art for the class to discuss, or use hip-hop as the key to bring to students the topics hip-hop addresses? Even with such examples, there are problems: there are topics hip-hop might not adequately address, and there will also be students who do not have any interest in hip-hop, and are therefore more likely to find the material boring. For those students who do not have the hip-hop background needed to relate to such material, a curriculum making use of hip-hop could do more harm than good. There is no question that hip-hop is very wide-spread, but there are other areas of culture to consider as – why not make the sports culture a part of the curriculum as well?

There is also the issue of scope to consider. While similar to the question of implementation, the matter of scope accounts not for the *method used*, but rather the *amount to which said method is used*. The article goes into detail about hip-hop's pervasiveness and how teachers can use said pervasiveness and their own experiences with hip-hop in the

classroom to help connect with the students, but the extent of this strategy is never discussed. At no point in the article is it clearly stated just how heavily hip-hop should be used in the classroom, whether it should only be used occasionally as illustrative examples of how the material impacts the students' lives, or whether have it fully integrated it into every aspect of education.

Despite the lack of description in the article, it is possible to roughly determine the envisioned scope of hip-hop's use within a classroom setting. Considering how there are certain areas of education that are less likely to receive any real benefit from using hip-hop to connect with the students – mathematics and sciences come to mind – it may be assumed that the article's desired curriculum involved hip-hop having a somewhat limited focus; the social sciences, literature, and history would be likely areas where hip-hop might be used. However, even with such limited use being assumed, the article is silent on how much hip-hop is to be used in these categories. At one point the authors mention having made use of hip-hop in their classrooms, and achieving good results with this use, so it could be possible that any use of hip-hop in future educational settings would use this demonstration as a model. The authors never give any details regarding this use, though, and this example of successful use of hip-hop in the classroom presents its own problems.

One of the problems with the authors' supporting their argument with the example of their own successful integration of hip-hop into a classroom setting is the fact that they offer no actual data about this experience. How many classes did they use in this experiment? How many times and in what ways did they use hip-hop? None of these questions are answered in this article, and even if the authors provide such information, it is likely that the data set made available would be too small to be

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of any use in giving an objective answer.⁴ All of this makes the authors' assertions suspect, and actually weakens the argument for hip-hop's usefulness as an educational tool because it begs the question of why they decided not to give more details regarding their methods and results.

To further address how the authors' assertions of success regarding the use of hip-hop in their own classrooms, the lack of information provided again comes back to haunt them in the form of their claim that the success of using hip-hop in the classroom is unrelated to race. As before, they offer no data to back this claim, instead merely acknowledging that some would argue that the college in which these classes occurred was "historically an African-American campus," and that this contributed to the success; they dismiss such a claim by stating that the success instead had to do with the students' age and culture. Also, the authors' admission of using a historically African-American campus, in combination with their focus on statistics showing low graduation rates for certain minorities, gives the impression that the use of hip-hop as a teaching is being geared more towards specific racial groups.

As has been shown, the article makes a number of valid points regarding hip-hop and its potential as an educational tool, but it also fails to offer solid evidence of its claims or ways to implement them. Despite this, a number of useful insights are given regarding hip-hop and its place in the classroom, to the point that while hip-hop may not serve as a foundation for a new educational system, the movement may still be incorporated.

⁴Jason W. Osborne & Anna B. Costello, Sample Size and Subject to Item ratio in Principal Components Analysis, PRACTICAL ASSESSMENT, RESEARCH & EVALUATION (2004), <http://pareonline.net/getvn.asp?v=9&n=11>.

THE PERSONAL AND ECONOMIC UTILITY OF VIRTUAL WORLD BOTS: A DEFENSE FOR FAIR USE

Ruoke Yang^{*}

Abstract

This paper addresses the issue of virtual world bots whose presence is perceived by some players and game developers as a form of disruption within the virtual worlds. The main complaint is that players who use bots progress faster in the game than those who do not use them and, as a consequence of increased industrial production, lower sale prices for certain goods. From this inappropriate gameplay arise legal claims in which the use of bots is considered a violation of copyright license agreements as well as sections of the Digital Millenium Copyright Act.¹ However, applying commodities exchange transaction data from *Runescape*, this paper finds that contrary to the common complaint, virtual world bots serve a vital macroeconomic function in that they liquidate the market by providing cheap input goods used by players to performed complex manufacturing tasks. Thus, like Luddites fighting textile factories in 19th Century England, those pains to low-skilled players from virtual world bots are more than offset by the gains to high-skilled players reliant on those bots. And in turn, the developers themselves are reliant on these high-skilled players for a sustainable business model.

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¹ Pub. L. 105-304 (1998).

Thus, using this finding and other social/economic reasoning, this paper concludes that virtual world bots meet the four factors test necessary for a fair use defense against copyright violations codified in the Copyright Act of 1976.²

I. INTRODUCTION

The wizards have been at every turn forced to make social decisions. Every time we made one, it seemed, someone took offense, someone believed that we had done the wrong thing, someone accused us of ulterior motives.

-Pavel Curtis, LambdaMOO

The first electronic games like Will Crowther's Adventure found their existence in the computers of hobbyists. Although fascinating and novel for their time, these games were primitive in graphics, gameplay, and more importantly, social interaction.³ The popular ones, such as Pacman that eventually went commercial, formed a core group known as *arcade games*.⁴ While these arcade games and their online derivatives still hold mass appeal today, they rarely ever go beyond single- or two-player mode. At that time, another group of games emerged, known as *Multi-User Dungeons* (MUDs). Still quite primitive in graphics (i.e. still the text-based worlds), the level of social interaction was vastly improved because the experimental stages of internal networks and the ARPANET allowed MUDs to draw tight groups of people into a collective virtual sphere. With the rise of the Internet and other digital technologies, this audience that once was limited to students and computer scientists soon grew into to millions globally

²Fair Use, 17 U.S.C. § 107 (1976).

³See generally GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 29-44 (2010) (offers a broad overview of the history of early electronic games and their evolution into virtual worlds).

⁴Includes first-person shooter games, etc. that do not fall in the domain of massive multiplayer online games (MMOs).

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outside the research community. Eventually, some games had sufficient participants immersed in the virtual experience that the concept of virtual worlds was soon born.

Humans can be contentious creatures, especially given the multitude of conflicting individual interests. As rosy as the idea is of people coexisting pseudo-anonymously in a virtual society, largely free of real world constraints⁵, disputes are bound to arise. Even as early as the days of Pacman, private interests and businesses clashed.⁶ When people were brought together in LambdaMOO, a world run by Pavel Curtis and colleagues at the Palo Alto Research Center (PARC), the controversial incident of Mr. Bungle's virtual rape sparked an outrage among members within the community.⁷ Clearly, no one was actually hurt in this case, but the indecency involved prompted some in LambdaMOO, with the consent of the wizards, or game operators, to introduce a virtual democratic government and its set of policies. For a variety of reasons, this measure never quite worked out.⁸ Most policies governing user behavior within virtual worlds now come in the form of Terms of Service (ToS), End User License Agreements (EULA), and other click-wrap contractual agreements. Moreover, despite the eroding "magic circle" argument voiced by certain scholars, real world laws, such as those on copyright infringement, are consistently being invoked to resolve virtual world conflicts.⁹

⁵See *infra* note 9.

⁶See, e.g., *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 617-18 (7th Cir. 1982) (holding a video game operator liable for copyright infringement in an altered version of Pac-man produced by the operator from modified computer code).

⁷ See Julian Dibbell, *A Rape in Cyberspace*, THE VILLAGE VOICE, Dec. 21, 1993, at 36, available at <http://www.villagevoice.com/2005-10-18/specials/a-rape-in-cyberspace>.

⁸Attempts at self-governance by players ultimately were moot as any change rested on the absolute power of the developer, whose attentions were so limited. See LASTOWKA, *supra* note 3, at 80, 81.

⁹The original magic circle concept of the demarcation of games from reality came from Johan Huizinga's *Homo Ludens*. JOHAN HUIZINGA, *HOMO*

To be sure, the evolving complexity of virtual worlds has made litigation concerning problematic issues within them to be all but a straightforward application of existing statutes. Fortunately, recent case law regarding the Internet and a handful of virtual world topics does offer some guidelines. In particular, one important ongoing dispute that has surfaced in several courtrooms, made headlines, and spurred legislation abroad is the issue of virtual world bots.

II. WHAT ARE VIRTUAL WORLD BOTS AND WHY DO PEOPLE SAY THEY ARE BAD?

A virtual world bot has been defined in a plethora of ways, but in practice, it is simply a software or computer

LUDENS 10 (1938). The modern application of this terminology to virtual worlds was popularized by Katie Salen and Eric Zimmerman. *See* KATIE SALEN & ERIC ZIMMERMAN, RULES OF PLAY: GAME DESIGN FUNDAMENTALS 95-96 (2003). More recently, the traditional view of an autonomous virtual space free of certain real world rules while constrained by arbitrary internal rules has been challenged by numerous authors, *see* Mark A. Lemley, *The Dubious Autonomy of Virtual Worlds* (Stanford Public Law, Working Paper No. 2021521, 2012), *available at* <http://www.law.uci.edu/lawreview/vol2/no2/lemley.pdf>; Vili Lehdonvirta, *Virtual Worlds Don't Exist: Questioning the Dichotomous Approach in MMO Studies*, 10 GAME STUDIES 1 (April 2010); Joshua A. T. Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823 (2009), due in no small part to the increasing real world value of virtual property and related entanglements where actions in the virtual environment create very real benefit or harm to those in the real world, *see, e.g.*, Justin Olivetti, *Dutch Supreme Court Declares Runescape Theft a Real-world Crime*, MASSIVELY (Jan. 31, 2012, 5:00PM), <http://massively.joystiq.com/2012/01/31/dutch-supreme-court-declares-runescape-theft-a-real-world-crime/>; Lester Haines, *Online gamer stabbed over 'stolen' cybersword*, THE REGISTER (Mar. 30, 2005, 12:30 AM), http://www.theregister.co.uk/2005/03/30/online_gaming_death/; Bragg v. Linden Research, 487 F. Supp. 2d 593 (E.D. Pa. 2007); Eros LLC v. Doe, No. 8:07-CV-01158 (M.D. Fla. filed July 3, 2007).

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program that simulates avatar actions (i.e. the human player).¹⁰ These bots come in all forms, from the crudest macro that follows a preset list of keystrokes to more sophisticated code that utilizes machine learning, thus providing a bit of artificial intelligence. Players within the virtual world use them to do routine tasks (e.g. field labor picking virtual flax). The consequence is a dedicated workforce producing goods essential to the growth of the virtual economy. Yet in spite of their complex programming code and abstract game environment, one perspective on the modern implications of bots on virtual worlds can be explained through the story of George Mellor the Luddite.¹¹

George Mellor was an English wool-cloth finisher of the Victorian era. As it was the case in those days, craftsmen like him began as apprentices to masters who had dedicated their entire lives to perfecting their skilled trade. Despite the reduction in trade and monetary inflation, he still fared better than the average man. However, half past midnight on an April Sunday in 1812, he was neither at his workbench nor at home. He was at war.¹²

More precisely, he and over a hundred Yorkshiremen were at war, not against a foreign country, but against the local mill that housed an impressive array of steam-powered looms.¹³ Armed with pikes, guns, and hatchets, they smashed these machines because of the threat the machines posed to their livelihoods. At a ratio of one machine to five laborers, the entire collection would send hundreds of these self-respecting weavers to penury.¹⁴

¹⁰ The avatar is the virtual representation of the human player in the virtual environment. In most usage, this term is synonymous to the term player, but will often be used to convey a more precise meaning.

¹¹ KIRKPATRICK SALE, *REBELS AGAINST THE FUTURE* 7-13 (1996).

¹² *Id.*

¹³ *Id.*

¹⁴ *See id.*

In the virtual world, the exact labor ratio of bot to player is not known. But given the fact that virtual world bots can work at the same rate without human error or rest, they are undoubtedly more efficient workers. Unsurprisingly, some players have voiced objection to this technological presence. In *Runescape*, a fantasy-themed Massive Multiplayer Online Roleplaying Game (MMORPG) developed by Jagex Ltd., demonstrations in city squares and rants on forums have emerged. A few have gone as far as to sabotage avatars whose mechanical nonsocial behavior is suspected to be the result of a bot controller.¹⁵ Their argument is simple: bots distort the overall gameplay by giving advantages to the few over the many (in the same way the handful of looms distorted Mellor's old world). While attributed to an entirely separate cause of real monetary trading (RMT), similar claims of unfair changes to gameplay have been the subject of litigation.¹⁶

¹⁵ Examples can be found in audiovisual recordings of *Runescape* players depicting their interference with bots at a flax field, see GMan16RS, *How to Kill Runescape Bots 101*, YOUTUBE (Jul. 11, 2007), <http://www.youtube.com/watch?v=BWGYfg0LX5Q>, and in wilderness areas where player avatar violence is permitted, see thematrix1623, *Runescape: How to Kill Green Dragon Bots for Profit*, YOUTUBE (Apr. 21, 2011), <http://www.youtube.com/watch?v=lou6p3bZztA&feature=related>. Unlike the first example in which the narrator derives purely the satisfaction of thwarting bots, the latter appears to include a new attraction: an alternative pastime in which human players can profit from the presence of bots.

¹⁶ See, e.g., *Hernandez v. Internet Gaming Entertainment Ltd.*, No. 07-21403 (S.D. Fla. filed on May 31, 2007); *Blizzard Entertainment, Inc. v. In Game Dollar, LLC*, No. 07-0589 (C.D. Cal. filed on May 22, 2007). RMT is the exchange of virtual currency between real world currencies and is one of the two virtual world business models discussed later. While players cannot really complain about RMT behavior of a game developer, whose virtual world they chose to play in, the core opposition to third party RMT entities is that the entire exchange introduces an artificial imbalance that favors players rich in real world wealth. On the other hand, a RMT-free world would simply favor players rich in time, a resource less available for those who have many real world commitments and are therefore denied access to certain features of the virtual world.

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As for the game developers, they have their business obligation to customer service; and thus try to address as many complaints from their constituency as costs permit. Since player protests can sometimes be rather vocal to the point of spamming, the anti-bot lobbyists can make quite an impression.¹⁷ Besides the trickiness of determining popular impressions, developers are worried on a more practical concern: keeping players busy in their endless virtual pursuit of the *American Dream*.

In almost every virtual world out there, the player “washes up on Ellis Island” among the other newcomers with possessions little to none. By doing typically simple tasks that require basic thought, the player accumulates a little wealth. At the same time, the avatar gains experience that goes into increased skill levels that unlock better-rewarding tasks. The wealth, meanwhile, is utilized for better equipment that facilitates the numerical augmentation of skills. At a certain point, the numerical augmentation reaches its maximum level and the player feels like he has accomplished his goal of beating the game and stops.

Of course, in *Runescape*, for instance, there are quests, bonus quests, mini-games, local chores (i.e., Achievement Diaries), boss monsters, prizes, and traveling that add to the above basic set of tasks. If one player decides to use a bot, the impact is trivial, aside from arousing a few petty jealousies. However, when many players decide to use bots, the proliferation causes acceleration in whatever tasks the bot performs within the player population. The resultant burst in game activity and subsequent faster achievement alters the dynamics of the original virtual world. In response, game publishers are compelled to develop extra content to keep new

¹⁷The high rate of spam messages found in the chat dialogue box during protests can be potentially attributable to the use of auto-talker bots by the protesters themselves, see RSlordVIDEOS, *Runescape Bot Riot Falador 2011* (Aug. 18, 2011), <http://www.youtube.com/watch?v=wacDLkA8HCU&feature=related>.

challenges forever flowing.¹⁸ Even so, the very nature of adding new content is inevitable since players naturally progress in logging on more game hours.

Not all operators of virtual worlds share such sentiments about bots as briefly described above. Some do not care or feel that it is a significant issue in their domains.¹⁹ On the other hand, Linden Lab, operators of *Second Life*, explicitly encourages certain manufacturing bots by providing an internal scripting language.²⁰ The only time any serious opposition existed in *Second Life* to these bots was in the controversy of Copybot²¹, which, as the name suggests, fueled claims of direct copyright infringement of user-generated content.

The above discussion offers a brief survey of some of the prevailing opposition against virtual world bots. Players who use bots are perceived as cheaters achieving levels faster through longer hours of play and in the process devalue the price of certain goods produced from the flood of in-game

¹⁸An accelerated pace of content development due to bots is a *theoretical* concern deduced from the structure of MMORPGs and their business models. Nothing has been documented to suggest a significant causal relationship between bots and the creation of additional game content, especially in light of the overriding objective to have new content flowing anyways just to keep regular players engaged and attract a greater audience.

¹⁹See, e.g., Entropia Universe, *Entropia Universe Account Terms of Use* (Sept. 13, 2011), <http://legal.entropiauniverse.com/legal/terms-of-use.xml>, and *Entropia Universe End User License Agreement* (May 5, 2011), <http://legal.entropiauniverse.com/legal/eula.xml>. Virtual world operators against bots typically state their ban in explicit terms and no such policy for bots is defined for Entropia Universe. The closest provision found in either of the two user agreements for Entropia Universe potentially applicable to bots or anything else for that matter is a prohibition of cheating.

²⁰See Linden Lab. *Terms of Service* (December 15, 2010), <http://secondlife.com/corporate/tos.php>. For a quick reference to Linden Scripting Language (LSL), please visit http://wiki.secondlife.com/wiki/LSL_Portal.

²¹See Daniel Terdiman, “*Second Life*” Faces Threat to Its Virtual Economy, ZDNET (Nov. 15, 2006, 4:00 PM), <http://www.zdnet.com/news/second-life-faces-threat-to-its-virtual-economy/150290>.

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progress.²² To some degree, these points and others to be mentioned later can indeed form a compelling argument, as entered in several recently settled cases.²³ For the rest of the paper, an examination of the economics and culture within the virtual worlds, with a focus on *Runescape*, will reveal precisely the shortsighted nature of the opposition to virtual world bots. Ultimately, in light of other preliminary studies, this analysis of the circumstances surrounding bots will in turn provide a clear defense for fair use.

III. A VIRTUAL ECONOMIC RECESSION OF OCTOBER 25, 2011

Before we launch into a discussion on the economic merits of virtual world bots and their transformative effect on the original copyrighted work, we should note that substantial effort has been devoted to analyzing the economic structure and social characteristics of virtual worlds.²⁴ Notably, a

²² Stephano De Paoli & Aphra Kerr, *On Crimes and Punishments in Virtual Worlds: Bots, the failure of punishment and players as moral entrepreneurs*, 14 ETHICS & INFO. TECH. 73 (2012).

²³ See *Jagex Ltd. v. Impulse Software*, 750 F. Supp. 2d 228 (D. Mass. 2010) 750 F. Supp. 2d 228 (serving as an example of the recent legal disputes concerning specifically virtual world bots); see also *MDY Indus., LLC v. Blizzard Entm't, Inc.* 629 F.3d 928 (9th Cir. 2010). A thorny issue found in both cases is the claim of tortious interference of click-wrap contracts. A finding for the use of virtual world bots as 'fair' will, however, make such contractual terms less likely to be enforced, see Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 UC DAVIS L. REV. 45, 49-50, 87 (2006) for a discussion of the impropriety of contracting around fair use and how such attempts may be preempted when taking into consideration federal copyright policies and state contract laws.

²⁴ See, e.g., Thomas Chesney, Swee-Hoon Chuah, & Robert Hoffmann, *Virtual World Experimentation: An Exploratory Study* (The Ctr. for Decision Research & Experimental Econ., Sch. of Econ., Univ. of Nottingham, Working Paper No.14, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1068225; Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 112 B.U.J. SCI. & TECH. L. (2005); VILI LEHDONVIRTA & MIRKO

quantitative study by Edward Castranova and his team analyzed the macroeconomic aspects of *Everquest II* based on in-game data provided by Sony Online Entertainment.²⁵ Through a series of test hypotheses, they demonstrated that a certain instance of virtual worlds followed real world macroeconomic behavior. This result and an earlier experiment confirming the law of demand in virtual worlds overruled prior objections that people behave irrationally in fantasy environments.²⁶

In fact, studies on a variety of virtual worlds have shown that player behavior is not only rational but also intricate and involved to the point where social experiences can go so deep as to establish in-game reputation and celebrities.²⁷ Even with MMORPGs like *Runescape* that fix the levels required for skill advancement, these designs are mere outlines from which players establish their own prevailing social norms and tastes.²⁸ While some of this user-generated content can be rather unexpected for game developers, we will immediately see that, at least in our case with *Runescape*, the game

ERNKVIST, THE WORLD BANK, KNOWLEDGE MAP OF THE VIRTUAL ECONOMY (2011).

²⁵ See E. Castranova et al., *As Real As Real? Macroeconomic Behavior in a Large-scale Virtual World*, 11 *New Media & Society* 685 (2009).

²⁶ See Edward Castranova et al., *A Test of the Law of Demand in a Virtual World: Exploring the Petri Dish Approach to Social Science*, (CESifo, Working Paper No. 2355, 2008); see *id.*

²⁷ See T. L. TAYLOR, *PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE* 43, 80 (2009).

²⁸ See VILI LEHDONVIRTA, TERHI-ANNA WILSKA, & MIKAEL JOHNSON, *Virtual Consumerism*, 12 *INFO., COMM. & SOC'Y*, 1059-1079 (2009); NICK YEE ET AL., *The Unbearable Likeness of Being Digital: The Persistence of Nonverbal Social Norms in Online Virtual Environments*, 10 *CYBERPSYCHOLOGY & BEHAV.* 115 (2007); DAVID GRUNDY, *The Presence of Stigma Among Users of the MMORPG RMT: A Hypothetical Case Approach*, 3 *GAMES AND CULTURE* 225 (2008).

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developer identifies a key functionality²⁹ in its virtual world creation to be dependent on this user-generated content.

A basic feature in almost all the virtual worlds is the exchange of goods between users. In *Runescape*, player-to-player trading takes place as either an over-the-counter (OTC) transaction through a secure trade interface or a limit order via the Grand Exchange, a direct access spot commodities exchange. Unlike the unregulated player-owned exchanges found in *Second Life*, the Grand Exchange is operated and regulated by Jagex, which has taken some additional measures to combat pumping and dumping amongst other fraudulent schemes. Although players are allowed to trade at any price on the exchange, intraday price movements tend toward the guide prices, as these guide prices are updated daily based on the previous day's transactions. A public record is made of these price histories and trade volume by Jagex in an effort to abet transparency and educated decisions in trading. From these exchange transaction records provided by Jagex, we can quantitatively assess the impact of bots on the virtual world economy.

In addition, we safely assume that the majority of transactions are executed via exchange trading as our data reveals daily trade volume in the tens of billions from a range of virtual industries (e.g. woodcutting, fletching). This assumption is further supported by the sheer convenience of placing an electronic limit order (and the almost nonexistence of OTC trading floors for most commodities post-Grand Exchange release) as opposed to finding a player on the exchange floor and negotiating with that player in an OTC transaction.

The presence of bots or the lack thereof can be first understood through price histories of commodities representing the fishing,³⁰ runecrafting³¹ and lumber³² industries, as

²⁹*Runescape Grand Exchange*, http://services.runescape.com/m=itemdb_rs/frontpage.ws (lasted visited on July 12, 2012).

³⁰ See *infra* Figure 1.

depicted in Figures 1, 2, and 3, respectively. For the runecrafting industry, the runes, used for casting magic spells, consist of the entirety of the products from the runecrafting skill. Commodities for the fishing and woodcutting industries were selected from a daily index of top 100 most traded commodities.

In general, commodities produced by these three industries, whose repetitive nature are widely observed to favor the use of bots, spiked in value, denominated in the *Runescape* virtual currency gp, after October 25, 2011 (as indicated by dotted lines in the plots). This is the day when an update called Bot Nuke released sweeping technical modifications that effectively prevented the operations of 98% of bots in *Runescape*.³³ Although a weak rise by market speculators can be seen before Bot Nuke, which was publicly heralded several weeks before its release,³⁴ the long-term increase in value over the subsequent months is attributed to the systematic changes, which in this case is Bot Nuke as our later discussion will show.

³¹ See *infra* Figure 2.

³² See *infra* Figure 3.

³³ See Mark Gerhard, *Bot-busting and Bonuses for All*, RUNESCAPE, <http://services.runescape.com/m=news/g=runescape/bot-busting-and-bonuses-for-all> (last visited Feb. 25, 2012).

³⁴ See *id.*

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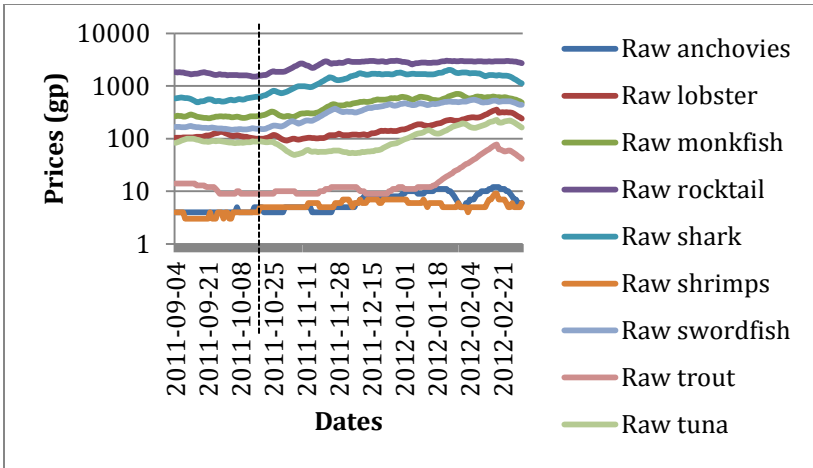


Figure 1. Spot prices over 180 days on *Runescape* fishing industry commodities.

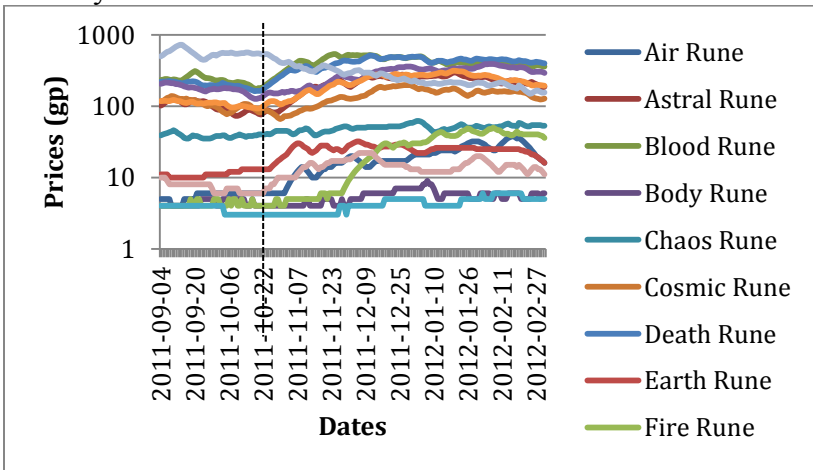


Figure 2. Spot prices over 180 days on *Runescape* runecrafting industry commodities.

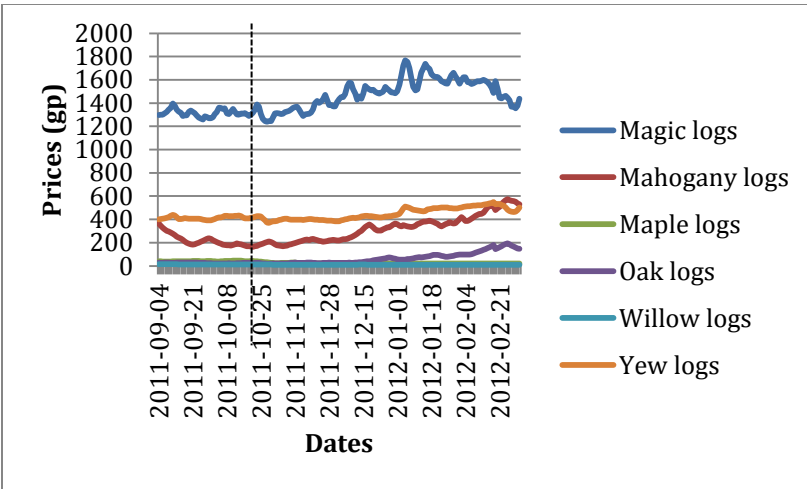


Figure 3. Spot prices over 180 days on *Runescape* woodcutting industry commodities.

Minor exceptions to the price growth trend described do certainly exist. In Figure 2 for instance, soul runes are not as affected as others.³⁵ This is largely due to the technical fact that soul runes are created as a chance reward requiring the highest runecrafting skill level relative to the level required to deterministically craft other runes. For bot players with short lifespans due to account banning³⁶ and hence less time to reach the ability to craft soul runes, soul runes would be one of the few exceptions among raw materials that bots can reliably generate.

The Efficient Market Hypothesis would hardly insist that prices reflect just the Bot Nuke event; even in a relatively controlled virtual world environment, there can be special

³⁵ See *supra* Figure 2.

³⁶ See generally *supra* note 22 (explaining the role of moral enterprise in helping to define what is right and what is wrong as a way of a guiding principle important to the virtual world player societies). As discussed below, the perception of a lofty moral enterprise disallowing bots can itself be adjusted to an enterprise of equivalent moral standing allowing for bots if current attitudes concerning bots take into account the benefits produced by bots in this paper (i.e. redefining what is good and bad).

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factors that may have dominating impact on a particular item, or a particular asset class. By including many commodities from several asset classes tied to distinct industries, we minimize the influence of such extraneous factors.

To examine at a higher level the resultant impact of Bot Nuke, Figure 4 shows the aggregate index of the Top 100 traded commodities list used earlier plus commodities not represented in that list from the crafting skill, the combat skills, the farming skill, the herblore skill.³⁷ More specifically, the herblore commodities comprise the primary ingredients necessary for potion brewing and the farming commodities comprise the herb seeds used to grow these primary ingredients. The crafting skill is represented by gems, which occur rather commonly in *Runescape*, and the combat-related skills by bones, frost dragon bones and talismans, popular commodities harvested from monster loot. As there currently exist several thousand items in *Runescape*, this index is far from exhaustive. The selection criteria is to include for each skill not already represented in the top 100 traded list a class of keystone commodities used for or produced from that skill. Furthermore, this selection was made before the transaction data arrived.

³⁷ See *infra* Figure 4.

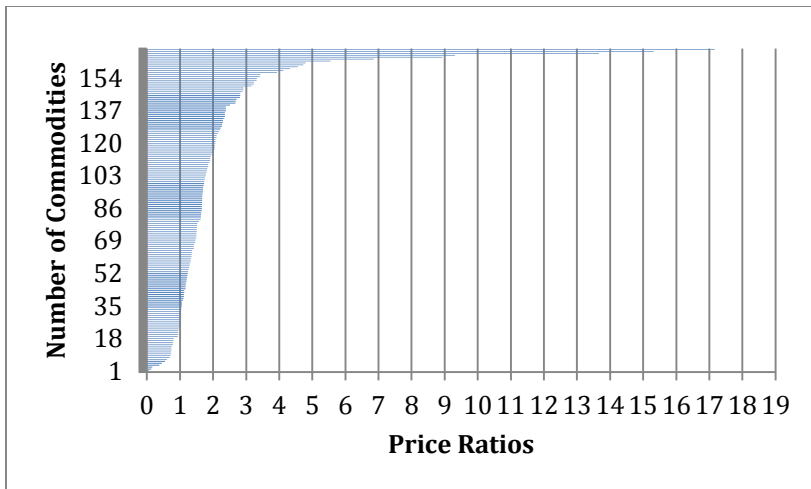


Figure 4. Ratios of January average price to September average price of bulk commodities index.

We see that January average prices rose above September average prices for 142 of the 169 commodities in Figure 4 with 55 of them at doubling in value.³⁸

Prices are by far the most popular indicator of market behavior, but trade volume can be quite revealing of the supply and demand that goes behind the determination of values for commodities. Figure 5 compares the total trade volume of the Top 100 traded commodities index 90 days before and after Bot Nuke was released.³⁹ Since the daily Top 100 traded index changes slightly from time to time, we took the intersection of the two Top 100 traded index lists and seven commodities had to be omitted. With a few minor exceptions⁴⁰, every member of the index lost trade volume post-Bot Nuke. Since the mean is not robust, the more accurate median loss is 0.5004, or 50% of the original trade volume is lost. Our later analysis in this

³⁸ See *supra* Figure 4.

³⁹ See *infra* Figure 5.

⁴⁰ The four exceptions are broad arrowheads, needle, vial, and bolt racks. The first three of which are bought by players from NPCs (non-player characters) on an as-needed basis and the latter occurs as uncommon loot from high-level monsters.

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section will also reveal a contraction in the money supply. Regardless of whether the use of bots is commercial or not, bots are here demonstrated only in their absence to not only significantly transform a copyrighted work but also serve a socially beneficial purpose (i.e. higher productivity).⁴¹

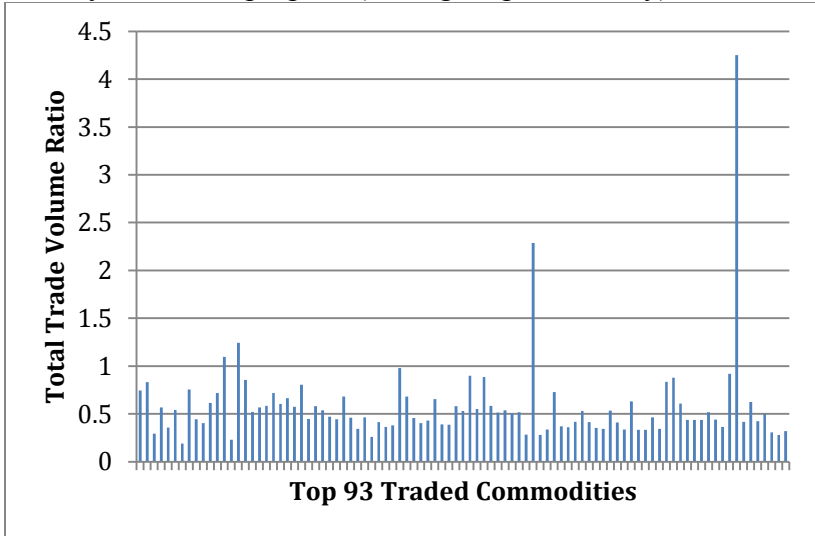


Figure 5. Total trade volume ratio comparison (90 days before/90 days after) Bot Nuke.

Since trade volume can be thought of as a function, in fact the minimum, of quantity demanded and quantity supplied, a decrease in either would result in the plummet in trade volume. If bots were assumed to play only the role of raw material harvesters, as they are well known to do the most tedious of chores, their removal could explain the results in Figure 5. On the other hand, Figure 5 reveals nothing about a

⁴¹ Cf. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1359 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (Explaining since copyright law is intended for the benefit of the public, one of the redeeming qualities was the *socially beneficial* purpose of scientific research conducted by National Institute of Health). See also *MDY Indus. v. Blizzard Entm't* 629 F.3d 928, 936 (9th Cir. 2010) (Arguing further for the bots in World of Warcraft in that they “facilitate disabled players’ access to WoW by auto-playing the game for them”).

potential decrease in demand for certain goods if bots were to perform the additional role of manufacturing or any other form of consumption.

To help resolve this uncertainty, Figures 6 displays the price histories of the elements in the production chain of cannonballs.⁴² At the beginning, one iron ore and two coals, which require Level 15 and 30 mining, respectively, are smelted to make one steel bar. While steel can be used to make a variety of products, most of them are low-level inferior goods, whose value is well below that of steel, thereby explaining for the strong correlation 0.925 between steel bars and cannonballs.

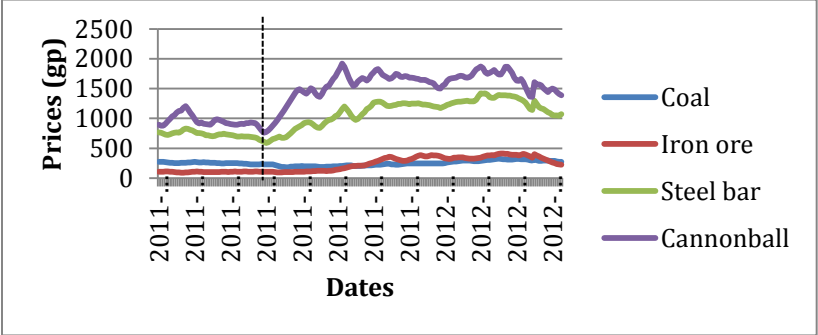


Figure 6. Spot prices of a cannonball ammunition production chain.

⁴² See *infra* Figure 6. The price of each cannonball is actually only a few hundred gp, but because four cannonballs are made from one steel bar, we quadrupled the price of cannonballs in the illustrations for easier comparisons.

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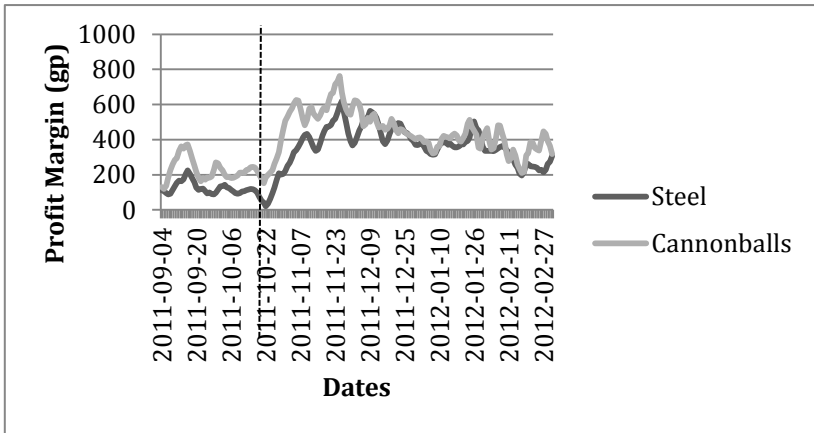


Figure 7. Profit margins for steel and cannonball production.

To be sure, there is a margin of profit involved in smelting steel as well as in producing cannonballs from steel.⁴³ Although it can be hard to determine the figures and composition of the labor force in the production chain, the profit margins in Figure 7 do indicate a dramatic increase post-Bot Nuke in labor costs, as denoted by profit margins, involved in turning raw ores into steel into cannonballs.⁴⁴ If we assume *ceteris paribus*, the reported 98% decrease in bot laborers resulted in a spike in smelting costs. It can then be inferred that bots do indeed occupy higher levels in a production chain, serving well beyond the role of mere resource gatherers.

In another production chain, see Figure 8, a yew longbow is made from an unstrung yew longbow and a bowstring, which derive from yew logs and flax, respectively.⁴⁵ Unlike the clear utility of a cannonball, yew longbows are primarily used for training the magic skill with the alchemy spell. That is, yew longbows, a rather obsolete bow for archery, are commonly consumed by players who convert them to 768 gp per bow. The entire process requires a player to stand in a

⁴³ The skill experience reward obtained is a weak incentive considering the high-level substitutes available.

⁴⁴ See *infra* Figure 7.

⁴⁵ See *supra* Figure 8.

fixed position and repeat click as fast as he or she can on the alchemy spell and the yew longbows. A task very well suited for automation.

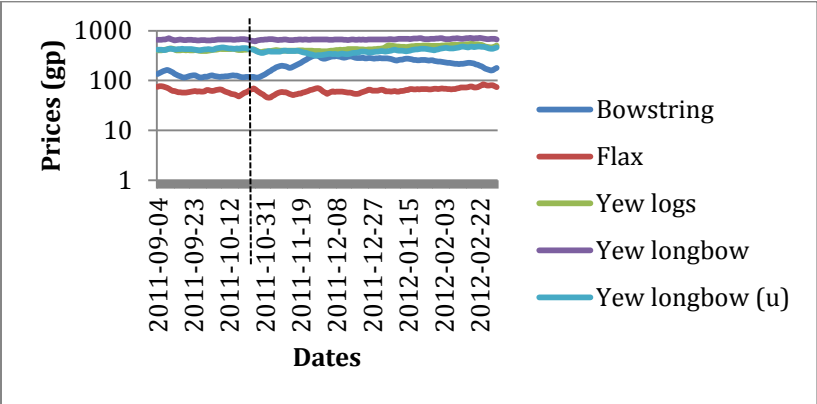


Figure 8. Spot prices of a yew longbow production chain. Notice that the price rises are not so steep compared to the Figure 7.

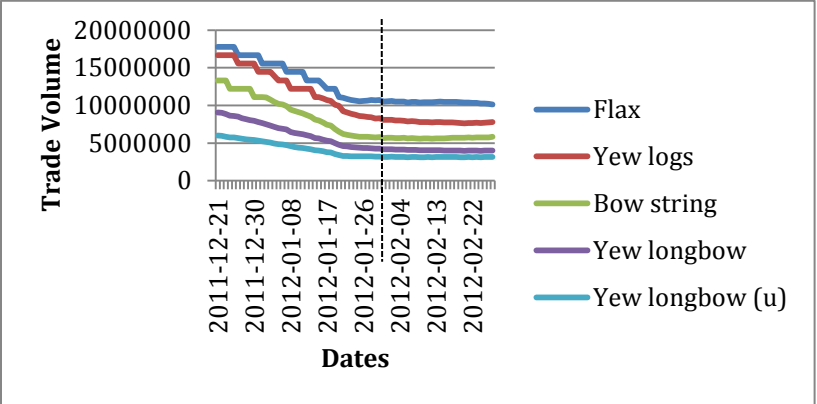


Figure 9. 90-day moving averages of trade volume for the yew longbow production chain.

With the exception of bowstrings, which are made from another repetitive process that offers minimal skill experience, we see that other elements in the yew longbow production chain do not display so strong a rise in value. The prices of these other elements have remained generally consistent through the 180 days, in spite of the fact that the woodcutting

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and fletching tasks involved in the production chain are easily bottled. This is, however, explained in Figure 9, where the 90-day trade volume moving average shows a proportional shrinkage of the trade volume for the production chain.⁴⁶ Since trade volume is a primary indicator of supply and demand, Figures 8 and 9 reinforce the additional demand and consumption role that bots perform in the virtual economy.

At this point, it maybe unclear as to whether the inflation from alchemy or some other source is responsible for any distortions to the post-Bot Nuke economy. One key concern would be that inflation could somehow have caused the widespread appreciation seen in Figure 4. However, such inflation within a few months is extremely unlikely since currency is introduced hand-in-hand with commodities from monster loot or is introduced through the alchemy spell, whose mechanical rote process favoring the use of bots could have only decreased with the removal of bots. Indeed, Edward Castranova's analysis of *Everquest* has revealed virtual currency inflation as the cause for massive price rises in rare or precious commodities (e.g. advanced combat equipment).⁴⁷ If this relationship is to be applied to *Runescape*, which hosts a medieval fantasy MMORPG theme similar to that of *Everquest*, then the Top 100 valuable item index in Figure 10 below is an indicator, by contrapositive, that the *Runescape* economy suffered monetary deflation, a negative sign for the economy as consumers would be encouraged to withhold spending in expectation of future lower prices.⁴⁸ As a note, Figure 10 does not show the names corresponding to the bars, which include discontinued items whose properties are analogous to luxury goods. Historically, due to their scarce and finite supply, they had made reliable growth in value and therefore the subject of long-term investments and a measure

⁴⁶ See *supra* Figure 9. Daily values at day t is the average of values from t to $t-89$.

⁴⁷ See *infra* note 57 at 152.

⁴⁸ See *supra* Figure 10.

of player faith in the game. Since Bot Nuke, these discontinued items have lost as much as one-third of their September value by January.



Figure 10. Ratios of January average price and September average price of the Top 100 valuable index and a handful of high-level player equipment not featured in the Top 100 valuable index.

To summarize, the removal of 98% of bots in *Runescape* through Bot Nuke resulted in many of the most traded, or liquid, commodities to immediately appreciate in value. Some may attribute this fast reaction to market speculators, but the post-Bot Nuke prices of basic commodities over the span of several months are typically seen to be either rising or converging to a new value. At the same time, we can infer the monetary deflation based on Castranova’s hypothesis that would have otherwise sent basic commodities crashing were offset by the severe decline in trade volume for these commodities, as seen in Figure 5.⁴⁹ From our inspection of two major production chains, bots are seen to constitute a sizable manufacturing force and resource consumption factor (in the process of producing higher-end products) in addition to their common role as harvesters. In effect, the elimination of bots has eliminated a technological force of mass production

⁴⁹ See *supra* Figure 5.

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responsible for multiple functions, from resource harvesting to consumption, in the virtual economy.

IV. FAIR USE: VIRTUAL WORLD BOTS

Virtual world bots have been a target for claims of copyright infringement of licensed works.⁵⁰ U.S. Code establishes a four-factor test for a fair use defense to copyright infringement:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work ... is not an infringement of copyright. In determining ... any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

⁵⁰ *Jagex Ltd. v. Impulse Software* No. 10-10216, (D. Mass. filed on Aug. 16, 2010); *See Also MDY Indus., LLC v. Blizzard Entm't, Inc.* 629 F.3d 928 (9th Cir. 2010) (In the decided *MDY* case, the Ninth Circuit reversed the district court's grant of summary judgment to Blizzard on secondary copyright infringement by making the fine distinction that Blizzard's ToS condition specifying a ban on bots was a contractual covenant rather than a copyright license condition. Therefore, claims of direct copyright infringement by individual users, and for that matter, secondary copyright infringement by MDY are vacated. Now whether this interpretation holds for future disputes remains uncertain, though the distinction may be necessary since "the potential for infringement exists only where the licensee's action (1) exceeds the license's scope (2) in a manner that implicates one of the licensor's exclusive statutory rights." Since the use of bots did not affect Blizzard's exclusive statutory rights, it would appear inappropriate to apply copyright infringement as a legal remedy for bots. If secondary copyright infringement for bots were to remain a non-issue, anti-circumvention provisions of the DMCA still apply, *see* §§ 17 U.S.C. 1201(a)(2), (b)(1) (1999). In particular, at least in the final opinion, MDY was still liable for trafficking bot technologies that circumvented Warden, a system that controlled access to the dynamic non-literal elements of the copyrighted work).

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁵¹

This paper will apply the market data used above to the four fair use factors. In doing so, it will conclude that, in *Runescape*, virtual world bots should enjoy a fair use exemption to copyright infringement.

a) PURPOSE AND CHARACTER OF USE

With regard to the first factor, the fundamental purpose of a virtual world bot is to simulate human player actions within a virtual environment. That said, not all virtual world bots are commercial and should not be confused with the dispute over real monetary trading (RMT) or gold farming practices.⁵² Rather, as T. L. Taylor so accurately describes, bots are “pointers either to underlying design insufficiencies within the game itself or alternative play models deemed illegitimate or not fully accounted for.”⁵³ The developers of EQ Macros, a bot software for *Everquest*, states “EQ Macros takes the grunt work out of playing *Everquest* and makes it more fun.”⁵⁴ In other words, bots exist to fulfill a need arising from the flawed existence of unentertaining segments in the virtual world adventure.

⁵¹ 17 U.S.C. § 107 (1992).

⁵² See *infra* note 61.

⁵³ See *supra* note 27 at 138.

⁵⁴ *Id.* at 137. As noted earlier, the existing moral enterprise need not to suffer if the Luddite notion of fair play concerning bots were rejected, see *supra* note 36.

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This need grows from the lack of depth and sufficient freedom in player activities, the majority of which are of the menial sort geared toward beginners familiarizing themselves with the game.⁵⁵ For instance, a player starting in *Runescape* must click a button to chop down a tree in order to train his woodcutting skill. But as his woodcutting skill level advances, he will continue to cut down the same tree, just with a different name and look. Despite the increased experience rewards associated to chopping down a tree that requires a higher woodcutting level, the player is going through the same motions of repeat clicking on a tree, filling up his inventory, depositing the logs into the bank, and moving onto the next tree. The process is the same for other core tasks such as mining, runecrafting, fishing, and even combat. Thus, advancement in through these skills solely depends on the repetition of simply clicking a mouse button.

The reasons behind this dismal affair are twofold. For one, constructing such a rigid system of player achievement is simply more organized and easier to plan out in programming. According to Castranova, the general virtual world design of maintaining a balanced game with equal opportunity and full employment (e.g. every player has full-time access to chopping trees) is a strong motive for this approach.⁵⁶ But what is the point of trying to maintain a balanced game, which, at the same time, is no longer fun? This is not to claim that virtual worlds are not fun; just that parts of them are less fun. For example, trading in *Runescape* through either the Grand Exchange or the OTC market is a respectable activity that ruins this balanced design. Players with slow reaction or poor judgment will find themselves not employed very long as a trader. Those with less

⁵⁵See EDWARD CASTRONOVA, *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* 182 (2007) (The tedium found in these boring activities in virtual worlds is so dire that he adds “you’re thinking about blowing your brains out. No wonder people write macroing programs”).

⁵⁶ See EDWARD CASTRANOVA, *EXODUS TO THE VIRTUAL WORLD* 138- 142 (2007).

capital will find it difficult to have access to all the opportunities in the market. There are so many creative paths to success as a trader that bots could hardly automate the trading experience. Upon comparing this to the predictable monotony of gaining wealth through chopping yew trees, it becomes apparent where the design flaw that motivates bots lie.⁵⁷

In addition to trading, there are numerous other activities in which players discover entertainment⁵⁸, such as raiding boss monsters or group questing. These activities typically require certain equipment and skills, both of which are obtained at some point from the repetitive tasks described earlier. Hence, it comes as no surprise that there is a strong incentive for individual players to utilize machines for manual tasks that pave the way for the real entertainment at the end.

Collectively, if many players were to operate bots, we would find ourselves in the situation where the remaining few who manually spin flax into bowstring, chop yew trees for lumber, fletch yew longbows to be outcompeted very much in the same fashion as George Mellor and his fellow Luddites did. Yet as much as we would like to devote sympathy to the Luddites, our society would be quite different if our clothes were still sewn by hand and our motor vehicles replaced by horses.⁵⁹ Moreover, regarding concerns normally associated

⁵⁷See *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994) (holding that the transformative consideration in fair use can be applied here in that bots are correcting a bug in the design of Runescape and MMORPGs in general).

⁵⁸Yee et al., *Online Gaming Motivations Scale: Development and Validation*, Proceedings of Conference on Human Factors in Computing Systems (2012); D. Williams et al., *Who plays, how much, and why? Debunking the stereotypical gamer profile*, 13 J. OF COMPUTER-MEDIATED COMMUN 993-1018 (2008). Other nuanced incentives besides entertainment exist for players in virtual worlds, but the monotony of repetition and the need to resolve it persist. See generally for a full discussion on player motivations and social composition.

⁵⁹*Cf.* *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1359 (1973) *aff'd by an equally divided court*, 420 U.S. 376 (1975) (Finding that the

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with industrialization⁶⁰, bots clearly are not a source of environmental pollution and players are not tied to a particular skill from which they eke out a livelihood. Even for commercial bot operators, their impact on the virtual world is no different as the commerciality of their enterprise is relegated to a separate issue of RMT, which in some jurisdictions is sanctioned and is estimated by the World Bank in 2011 to contribute billions of dollars in income annually to developing countries.⁶¹

Throughout history, humanity has used tools designed with limited resources to tackle these very same resource challenges. By working within the limited constraints imposed by the programming language in each virtual world, virtual world bots are a tool that allows humanity to participate in relatively more meaningful and intellectually stimulating activities. Unlike the illegitimate exploitation of programming bugs, virtual world bots are not hacks that take advantage of loopholes or break physical laws of the game to gain an unfair advantage. It is no different than the real world employing bots for routine jobs in sectors ranging from traffic surveillance to automobile manufacturing.⁶² In short, the bots do not merely transform their virtual worlds but change them in a socially progressive manner for both the players who use them and the

economic and technological merits of bots form an example of the socially beneficial virtues used to establish fair use for scientific research).

⁶⁰ See *supra* note 11 pp. 248-249.

⁶¹ See Vili Lehdonvirta & Mirko Ernkqvist, *Converting the Virtual Economy into Development Potential: Knowledge Map of the Virtual Economy*, infoDEV/The World Bank 13-14 (2011), <http://www.infodev.org/en/Document.1056.pdf>; Kevin Kozuszek, *Enhancing Automotive Manufacturing with Robots*, EETIMES (Nov. 10, 2006 10:12 AM), <http://www.eetimes.com/design/industrial-control/4013686/Enhancing-automotive-manufacturing-with-robots>.

⁶² Kevin Kozuszek, *Enhancing Automotive Manufacturing with Robots*, EETIMES (Nov. 10, 2006 10:12 AM), <http://www.eetimes.com/design/industrial-control/4013686/Enhancing-automotive-manufacturing-with-robots>.

virtual economy all players are involved in.⁶³ Thus, once divorcing virtual world bots from RMT practices that employ bots, it is clear that bots fulfill a fundamental non-profit educational purpose.

b) NATURE OF VIRTUAL WORLDS

A useful legal decomposition used by the Ninth Circuit breaks a virtual world, in the case of Blizzard's *World of Warcraft*, into three components: the literal elements, the individual nonliteral elements, and the dynamic nonliteral elements. The first two components deal with the source code and audiovisual displays, respectively, both of which are well-established copyright considerations concerning electronic works. More interesting though is the third component, which focuses on the "real-time experience of traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players."⁶⁴ Although none of these components are factual, instead fictional, they do not preclude a possible finding for fair use.⁶⁵

As much as this third component is an improvement from earlier rulings⁶⁶ that considered only the source code and the audiovisual displays, it is actually quite vague. More specifically, the gaming experience involving monsters has always been a persistent theme that holds even for Pacman, where the player avatar travels through the maze and engages

⁶³ *Williams & Wilkins Co.*, 487 F.2d at 1359.

⁶⁴ *MDY Indus.*, 629 F.3d at 948.

⁶⁵ *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (the copyrighted works in question are video games owned by Sega, but their fictional nature did not prevent a determination of fair use for reverse engineering by Accolade).

⁶⁶ *See Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741, 747 (N.D. Ill. 1983) (Courts were traditionally concerned with only two categories, the literary computer code and the audiovisual surface component, when assessing claims of copyright infringement).

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the ghosts. Even in a two-player team shooter game, two players encounter each other as they travel through a game environment maze. However, it is in the virtual world that encountering players becomes significant as players can exchange dialogue and items and express personality through appearances and possessions.

There is certainly the ongoing debate concerning user creations in virtual worlds as copyrightable works of authorship. In *Midway Manufacturing Co. v. Artic International Inc.*, a District Court in the Northern District of Illinois held user-generated content for moving around in Pacman to be too trivial to be copyrighted. The court likened it more to “changing channels on a television than it is like writing a novel or painting a picture.”⁶⁷ A similar fundamental argument can be made for items in virtual worlds, as they are merely derived from the preexisting code and texture displays. On the other hand, a house drawn using the Paint software found in the Windows operating system was copyrightable. Essentially, the critical distinction is the degree of creativity, paying dividends to originality.

In a free-form world⁶⁸ like *Second Life*, there is little doubt regarding the creativity of the user-generated content, as it is routinely sold for Linden dollars equal to approximately 130 million US Dollars. In MMORPGs like *Runescape*, the items created by players are much less novel because they are produced from in-game functions that allow for little to no player contribution. But if we were to consider the dynamic nonliteral elements, then the act of player-to-player trading in *Runescape* is a form of virtual world inhabitant encounter. By

⁶⁷ *Midway Mfg. Co. v. Artic Int’l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982),

⁶⁸ Includes Active Worlds, Entropia Universe, and Dotsoul Cyberpark, *see generally* SACHA WUNSCH-VINCENT & GRAHAM VICKERY, ORG. FOR COOPERATION AND DEV., PARTICIPATIVE WEB: USER-CREATED CONTENT 20 (2007) *available at* <http://www.oecd.org/dataoecd/57/14/38393115.pdf> (offers a comprehensive analysis on the economic and social impact of user-generated content with emphasis on the necessary creative elements).

creating the trade interface and the Grand Exchange, it is the *intent* of the developer for users, not Jagex, to create transactions to keep the market liquid and the economy functioning.⁶⁹ Without the player submitting transactions, the exchange would be empty and the OTC market dry. This is clearly not a good scenario for *Runescape*, which like any other virtual world depends on vibrant player interactions. Contrast these two features with players using NPC (non-player character) shops or monsters, which are essentially the developer's code animated in audiovisual form performing a scripted dialogue or a predetermined sequence of actions. At the same time, users designing player-owned houses using allotted tools and forming clans are additional dynamic nonliteral elements that translate to other virtual worlds as well. Unfortunately, the Ninth Circuit has combined the developer-generated experiences with NPCs and monsters and the user-generated experiences with players into one category belonging to the virtual world owned by the developer.⁷⁰

In a separate set of issues⁷¹ concerning online content derived or copied from third parties, service providers can be held accountable by a form of accomplice liability for the expressions of their users. The traditional responsibilities of users and service providers are clearly demarcated with the user being the author of the online work and the direct infringer if the work is found to be infringing. One application of this guiding principle to virtual worlds is found in *Marvel Enters. v. NCSoft Corp.* in which users created avatars in the image of superheroes through tools provided by the virtual world

⁶⁹ See *RUNESCAPE GRAND EXCHANGE*, *supra* note 29.

⁷⁰ See *MDY Indus.*, 629 F.3d at 948.

⁷¹ See, e.g., *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008) (referring to instances where a service provider's qualifications for protection under DMCA's safe harbor provisions are called into question); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009); Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. OF ENT. & TECH. L. 841, 841 (2009).

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developer.⁷² Here, the Central District Court in California found these superhero avatars in NCSoft's *City of Heroes* to be *non-de minimis* creations of users.⁷³ In fact, the additional economic productivity, see **Figure 5**, generated by bots (and their respective users), for better or worse, fall under this same category of *non-de minimis* user-generated content, which can be extended to encompass a number of dynamic nonliteral elements aforementioned.

This is not to say that all user-generated content in a virtual world should be copyrightable works assigned to individual users, especially if the fixation criterion is considered. Instead, it should be recognized that user-generated dynamic nonliteral elements of a virtual world are hardly the original work of the service provider, who has in his design included for user contributions (e.g. avatar outfits, market makers) instrumental to the functioning of the game. Thus, developers should not forfeit their copyright for lack of originality, but rather, that copyright should be second to the fair-use components underlying the dynamic nonliteral elements of a copyrightable virtual world because they constitute a substantial investment from the public. Contrary to the traditional concept of a finished literary work, a virtual world is constantly evolving and thrives through the continuous contribution of user-generated content.

c) DEGREE RELATED TO ORIGINAL VIRTUAL WORLD

Although *interacting within* a host Virtual World, the bots themselves do not copy that Virtual World. Rather, they

⁷² See *Marvel Enters. Inc. v. NCSoft Corp.*, 2005 WL 878090 (C.D. Cal. 2005).

⁷³ See *supra* note 15. New mini-games are part of the regular content put out by developers for virtual worlds. While the wilderness area in Runescape allows for any player avatar to be attacked, the green dragon bots contribute as prey to a special user-generated mini-game in which human players obtain easier profits by hunting bot players rather than other better-equipped human players.

mimic real world player actions that to create a desired outcome (e.g. click the mouse to harvest coal). Thus, the degree of infringement (“amount and substantiality”) is quite small to begin with. Further, the issue of fixation must be discussed: only a work fixed in a medium can be copyrighted, not the ideas behind that work. For a virtual world bot, it only exists itself in the RAM of the virtual world host in which it is operating. Such limited duration and scope may be beyond the bounds of fixation.

As an analogy, take RAM copies. To run a program, one has to not only to *install* but also must actually *execute/run* that program. In running that program, one’s computer loads a copy of that program onto the host’s RAM. That RAM copy is a full duplication of the original literary work. The reason we use RAM is that it dramatically speeds up internal processes. As technical as this step may seem, it has been the foundation from which copyright law has expanded to govern software users in conjunction with license agreements.⁷⁴

Legally, a RAM copy is not a copy that the common user elects, or is often ever aware of, to produce, nor is it a copy that confers utility to the user beyond the scope of running the program. For instance, the user cannot take the RAM copy and market it. Under normal circumstances, the copying of an entire work would weigh against fair use. However, in *A.V. v. Iparadigms*, the 9th Circuit held retaining copies of student essays in database storage for the purpose of detecting plagiarism was fair use because there use was “*limited* in purpose and scope”⁷⁵ The significance of this is even further because the archived copies were not actually RAM copies (which are destroyed upon program termination),

⁷⁴ See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993) (holding that RAM copies were copies as far as the Copyright Act is concerned).

⁷⁵ *A.V. v. iParadigms, LLC*, 562 F.3d 630, 642 (4th Cir. 2009) (emphasis added).

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but were actually saved on a company hard-drive (thus saved in a persistent state).

For virtual worlds, the copies are deleted when the user closes the game client or web browser. While the Ninth Circuit argued that programs in general can be left on indefinitely⁷⁶ (for as long as the computer is turned on), and hence is a fixed copy, users do not stay in virtual worlds indefinitely. In many virtual worlds such as *Runescape* and *World of Warcraft*, a logout timer terminates the virtual world program and its services after a period of inactivity. The lifespan of a RAM copy of a virtual world varies from user to user. A rigorous study by Nicolas Ducheneaut on player behavior in *World of Warcraft* based on in-game census logs has revealed a median playing time of four hours every week.⁷⁷ Ducheneaut acknowledges this statistic is significantly less than previous findings, but even the highest figures put playing time to be between 20 to 30 hours per week (i.e. a few hours per day).⁷⁸

⁷⁶ The concern of a copy of a virtual world persisting in indefinitely is purely theoretical. In *Runescape*, the game developer has set a maximum lifespan of 6 hours playtime, see RUNESCAPE, <http://runescape.com> (last visited Oct. 19, 2012). At the end of this duration, a player is forced to exit the current program and, if he or she wishes to continue to play, open the program again and therefore make a fresh copy. For virtual worlds in general, the lifespan of a virtual world copy is dependent on countless online factors (e.g. servers) well beyond the single requirement of a turned-on computer necessary for a conventional software program (e.g. a text editor) that could be run offline, as originally considered in the *MAI* case. See *MAI Sys. Corp.* 991 F.2d. Even if several hours are sufficient to satisfy the fixation requirement necessary for a copy to exist (and copyright law to apply), the short duration is still a strong limitation to be understood when assessing fair use. Cf. *A.V.*, 562 F.3d at 638-640. (stresses the importance of limitations on permanent copies of student essays when archived solely for plagiarism detection).

⁷⁷ See Nicholas Ducheneaut et al., *Building an MMO With Mass Appeal: A Look at Gameplay in World of Warcraft*, 1 GAMES AND CULTURE 281 (2006).

⁷⁸ See *id.* at 286-87.

Given the short duration of RAM duplications of virtual worlds, part of which also happens to be user-generated, the circumstances appear to parallel automated data streaming feature found in the services of Cablevision.⁷⁹ Since *Cartoon Network v. CSC Holdings, Inc.*, where the 2nd Circuit held a 1.2 second long copy used as a data buffer (to save cable TV to an external DVR) was too short to constitute fixation⁸⁰, speculation has been made for the eventual application of this precedent to issues regarding the duration of software RAM copies.⁸¹ As this matter remains to be decided, the weakly fixated nature of virtual world RAM reproductions should at the very least be seen as a distinct case from general software usage for their limited purpose of playing within a virtual environment.

d) EFFECT ON VALUE OF VIRTUAL WORLDS

Since a virtual world is a dynamically evolving state rather than an immutable software product, the value of a virtual world is constantly changing in response to the market a virtual world attracts. As a consequence, the well-being of a virtual world is directly tied to the health of its economy, which is significant as players do ascribe in-game value, if not real world value, to virtual goods based on the time and labor commitment involved in procuring them.⁸²

To first consider the health of the virtual world economy, it is apparent that during the absence of bots in *Runescape*, production levels have slumped. Prices of manufactured commodities in turn have skyrocketed due to

⁷⁹ See *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008)

⁸⁰ See *id* at 129.

⁸¹ See Zohar Efroni, *The Cartoon Network v. CSC Holdings & Cablevision Systems*, THE CENTER FOR INTERNET AND SOCIETY, STANFORD L. SCH. (August 23, 2008, 3:04 PM), <http://cyberlaw.stanford.edu/node/5841>.

⁸² Thomas Malaby, *Parlaying Value: Capital in and Beyond Virtual Worlds*, 1 GAMES AND CULTURE 141 (2006).

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increased labor costs from the labor pool shrinkage and raw material appreciation. At times, there are abnormalities where prices for low-level goods exceeds the prices of higher-level goods for extended periods of time⁸³ (e.g. iron ore and coal, respectively, see Figure 6) if insufficient production labor is devoted to the former. In a way, this gross skewing of prices pinpoints the lack of player interest, even when given better profits, in performing repetitive tasks like mining the faster iron ore one click at time, as opposed to coal, which has a less dull semi-automated option in which a player would only have to click once to mine all the coal necessary to fill up his or her inventory.

Putting economics aside, some opponents have argued that bots are nevertheless destroying the social nature of virtual worlds. Namely, they claim that the consumer market appeal of a virtual world is ruined when mute bots replace chatting players to create a virtual world of listless “zombies.”⁸⁴ As this sounds like it to be a genuine concern, it is also inaccurate since population centers and clan activities in *Runescape* thrived with chat dialogue before Bot Nuke. To understand why this is not a problem for other activities, there is an online cultural term called away-from-the-keyboard or AFK.⁸⁵ In practice, this simply means that a human player is attending to something else outside the game while logged into the game. For tasks like mining coal just described, players can click once on a rock, grab coffee, and come back minutes later to find their inventory full. If someone tried to talk to that player during the AFK period, that player would be unresponsive. The

⁸³ See *supra* Figure 6.

⁸⁴ Lawstowka, *supra* note 3 at 198.

⁸⁵ TOM BOELLSTORFF, COMING OF AGE IN *SECOND LIFE*: AN ANTHROPOLOGIST EXPLORES THE VIRTUALLY HUMAN 106-107 (2008), (explaining the notion of being completely detached from one’s environment may seem strange in reality, but in *Second Life* and other virtual worlds, such behavior is prevalent and mundane to the point that it rarely becomes “the topic of explicit discussion”).

same is true for woodcutting, fletching, crafting, combat with the auto-attack option, etc. A bot merely assembles these discrete AFK periods of a few minutes each by automating the whole process.⁸⁶

In terms of revenue, most virtual worlds (e.g. *World of Warcraft*) are subscription-based with each account paying some form of a monthly fee. The fact that a bot operates through a subscribed account means that as bots proliferate subscriptions increase, which would offset some of the hypothesized development costs required for producing more challenges in response to the accelerated achievement fueled by bots. Moreover, the burden of generating new content does not rest entirely with the developer as the challenges of trading, for instance, are generated by players. By removing 98% of the bots in *Runescape*, revenue was lost as the ticker on player population at any given time went from approximately 200,000⁸⁷ to around 80,000⁸⁸, with some variation throughout the day.

Virtual world bots perform only a subset of the entire spectrum of player activities, a subset where human players do not have fun experiences. Without bots, human players must grind through the drudgery of repeat clicking before any form of advertised real adventure (e.g. quests) begins. As much as some Luddite-spirited players may complain about the depreciated value of their products, bots are here to transform

⁸⁶ Human players who do not wish to be distracted with conversations and hence are unresponsive to messages while skilling can run the risk of being labeled as a bot and having their accounts and their possessions subsequently terminated. More sophisticated bot detection systems like Blizzard's Warden, see *MDY Industries, LLC v. Blizzard Entertainment, Inc.* 629 F.3d 928 (9th Cir. 2010), can help prevent such misidentification. However, because certain features of the virtual world (e.g. *Runescape*'s woodcutting skill) are conducive to repeated motions, like those performed by an automaton, a gray area persists in distinguishing between innocent human players who act like bots and bots themselves.

⁸⁷ *Runescape*, <http://www.runescape.com> (last visited Sept. 8, 2011).

⁸⁸ *Runescape*, <http://www.runescape.com> (last visited Oct. 30, 2011).

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the old flawed practices with more efficient modes of production. The result allows for the individual player to enjoy the actual entertainment component of the virtual world and the collective to benefit from a greater plenitude of virtual essential goods at cheaper affordable prices. Motivated by the need of individual players, the use of virtual world bots does indeed have a transformative effect on the virtual world through its positive impact on the virtual world economy. This is important because bots then enhance the original work, which is interesting as traditional forms of reproduction do not typically increase the value of the original work.

At the commercial level, with virtual world bots accounting for 50% of gold farming worldwide⁸⁹, the for-profit act of botting does not compete directly against the developer of the original work. For example, MDY's Glider bot did not make copies of *World of Warcraft* to market.⁹⁰ As highlighted above, a dichotomy between RMT and bots should be made for commercial bot enterprises, where their bots perform the same in-game functions as that of an individual player for personal use. The controversial third party RMT activities that derive from the wealth produced by the bots or human gold farmers are an entirely separate issue from our discussion on the impact of bots on virtual worlds.

In consideration of alternative markets for virtual worlds, the issue becomes more complicated as virtual worlds operate under two general business models (subscription-based and virtual economy-based) examined by Alves and Roque.⁹¹ Since *American Geophysical Union v. Texaco*, the market has expanded from direct sales of the work and plausible derivative works to include also potential payments from users that would

⁸⁹ See Lehdonvirta & Ernkvist, *supra* note 61 at 31.

⁹⁰ See *MDY Indus.* 629 F.3d at 948.

⁹¹ Tiago Reis Alves & Licinio Roque, *Because Players Pay: The Business Model Influence on MMOG Design* (Situating Play, Proceedings of DiGRA 2007 Conference, 2007), available at <http://eden.dei.uc.pt/~lir/readings/DIGRA2007.pdf>.

have otherwise paid for licensing.⁹² One consequence is that such potential revenue weighs against fair use as part of market harm.

From our earlier discussion of the subscription-based model, this additional licensing factor is almost trivial as all bots are already licensees paying a monthly subscription for the online service as do regular players. Rather, a weak complication arises from the measurable revenue of license fees versus the management of a nebulous moral enterprise, which is conducive to maintaining the facade of a fair and balanced game.⁹³ One cannot have both as a crusade against bots runs counter to accepting the additional licensing revenue from bots.

While we do not deny the urge for game developers to enhance popularity among certain players through a war on bots, additional market revenue can only be quantified in the latter as demonstrated in the earlier population figures in, for instance, *Runescape*. On the other hand, a withering virtual economy as shown in *Runescape* from the lack of bots discussed before certainly drives a stake into any attempt at promoting popularity, or consumer value of the copyrighted work.

As for a smaller subset of virtual economy-based (more appropriately called RMT) business models, the game operator basically runs its own RMT enterprise, openly trading in-game currency with real world currencies. Since RMT allows an open opportunity for any player to purchase his or her game progress, the moral enterprise of maintaining an equally competitive environment, as originally contended by Luddite-minded players about bots, is completely eroded. A new player

⁹² See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994); Mark A. Lemley, Should a Licensing Market Require Licensing?, 70 *LAW & CONTEMP. PROBS.* 185, 191 (2007).

⁹³ This moral enterprise need not be sacrificed or diluted at all if the utility and positive externalities of virtual world bots described above were better known to the virtual world player audience, see *supra* note 36.

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who has barely spent a few minutes in Entropia Universe for instance can simply spend 10 USD and buy 100 Project Entropia Dollars, or PEDs.⁹⁴ On the other hand, although not so immoral in this particular setting, bots can be quite a nuisance by freely generating in-game wealth that could have otherwise been purchased with real currency. Consequently, at least for the short-term, harm to potential RMT sales is sustained. In the long run however, it is conceivable that if bots were permitted to exist, then the expansion of virtual wealth and gold would dilute the value of the virtual currency against real world currencies. Hence, if a sought-after gun that once traded at 100 PEDs now costs 200 PEDs due to bots, that player may then be compelled to pay 10 USD more to the game developer.

It is the latter model that provides a set of popular examples of virtual worlds in which the developer can hardly insist on as rigorous a moral enterprise as is advocated by certain players in the subscription-based virtual worlds. In light of this fact, the moral enterprise snag that offsets the additional revenue from bot accounts under the subscription-based model does not appear to be so significant after all. For virtual worlds under the virtual economy-based business model, the net effect of bots on the market is more ambiguous and we will leave it to a future discussion.⁹⁵

⁹⁴ Entropia Universe, <http://www.entropiauniverse.com/> (last visited May 29, 2012) (another virtual world). Interestingly, if the virtual wealth produced by bots are sold by a RMT business, it amounts in principle to no more than any wealth human players may sell, since both bot avatars and player avatars generate wealth (e.g. virtual coins, commodities) in exactly the same fashion as permitted within the physical laws of the virtual world. This is in moral terms very different from the artificial injection of in-game wealth purchased from the game developer.

⁹⁵ There are limits to the scope of potential secondary markets, *see* *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1122 (D. Nev.2005). A copyright holder cannot simply assign a previously nonexistent and improbable market as part of market harm for the work (e.g. a virtual world developer who wishes to purge the game of bots makes the hypocritical claim that his potential, or

V. CONCLUSION

One notable aspect in copyright law on virtual worlds is the duality in which user copies of a virtual world are at once physical copies stored in the RAM and extensions to the original virtual world itself. In a way, this particularly unique circumstance may seem paradoxical, since copies are implicitly treated as independent entities from the original work. One approach proposed to understanding the phenomenon is to leave the literal and individual nonliteral elements of the virtual world intact but split the dynamic nonliteral elements into two distinct responsibilities: developer-generated experiences with non-player characters (NPCs) and monsters and the user-generated experiences with players. It is in the latter where bots come into the story.

Virtual world bots have maintained a largely symbiotic relationship with their respective virtual worlds.⁹⁶ The destruction of either will result in great losses to the other since

fictional, sales of bot software to users are diminished by existing third party bots). Furthermore, the entire problem of potential secondary market harm can be avoided if we were to apply the Second Circuit's commentary that "a copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational, or other transformative uses of its own creative work. Copyright owners may not preempt exploitation of transformative markets," *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605, 615 (2d Cir. 2006). This ruling is a natural application of "the more 'transformative' the new work, the less the significance of factors that weigh against fair use," *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

⁹⁶ Copyright infringement claims involving virtual world bots have so far also come hand in hand with claims of tortious interference, *see Jagex Ltd. v. Impulse Software No. 10-10216*. (D. Mass. filed on Aug. 16, 2010); *MDY Industries, LLC v. Blizzard Entertainment, Inc.* 629 F.3d 928 (9th Cir. 2010). Although contract issues are not the focus in this paper, the skepticism expressed by the Ninth Circuit concerning the "the impropriety of [bots'] interference" is supported by our findings of the economic and personal benefits of virtual world bots.

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bots are useless if the virtual world dies. Although virtual worlds can exist as they did in the early days without bots, bots represent a new revolutionary stage of technological innovation that exists within a technological innovation (i.e. the virtual world itself). The distresses caused are no more than the sacrifice the Luddites had to make for the societal advances enjoyed today. The main opposition from players who are harvesters is transient as the rapid rate of advancement within games rarely condemns any single player to a particular menial role in the virtual world. In this respect, the situation with virtual world and bots is quite unlike the plight of the craftsmen who had no alternative role to play and were forced to become Luddites.

This paper evaluates a fair use defense to copyright infringement under the four factor test in 17 U.S.C. § 107. In particular, it looks at the (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

For the first factor, virtual world bots parallel their real world counterparts as a socially useful technological agent used to work on monotonous repetitive activities clearly unsuited for human participation, especially in games depicted as engaging and fun. In process of aiding the individual player in his or her personal tasks in the virtual world, bots bestow a vast bounty of goods upon the virtual world. While transient nostalgic Luddite-minded players may construe this economic externality to be a drawback, the virtual economy (and therefore the virtual world) is transformed from that of the pre-Industrial Era to one similar to our current time where technological efficiency allows essential goods to be obtained at more affordable rates. It is this dual use (personal time-

saving measure and economic modernization) that should enjoy non-profit educational value.

For the second factor, at least for the 9th Circuit, there exists a nontrivial user-generated component of the dynamic nonliteral elements of the copyrighted work. One should not assign ownership to virtual bots as dynamic nonliteral elements, because the bots are not a result of the sole creativity of the developer. Although this joint dynamic nature of the copyrighted work may appear as a unique challenge to our traditional understanding of copyright involving finished literary works, analogies can be found in places online (e.g. Wikipedia, Youtube) where people share content and individual user contributions are openly acknowledged.

For the third factor, at least in the 2nd and 9th Circuit, the copyright granted out on RAM copies of virtual worlds is far more limited in both duration (compared to an offline software that could be left on indefinitely) and scope (comparing alternative uses other than playing the game). As the precise bounds for a copy to be fixed remain largely undecided, the general lifespan of a few hours for a virtual world RAM copy would appear to lean closer to the transitory 1.2 second duration (for content streaming) the 2nd Circuit found to enjoy fair use. Regardless, at least in the 9th circuit, even a copy with a lifespan of infinite could survive fair use defense (for saving former student essays in anti-plagiarism database on a local company hard-drive). Thus, a virtual bot used inside a virtual world is at best, minimally related to the underlying program used, instead is more akin to the *player* using the program.

For the fourth and final factor, there is no direct harm from the use of bots. Indeed, using real world market data from *Runescape* (a free MMORPG), the evidence seems to point to beneficial effect, as virtual bots lubricate the underlying economy by supplying cheap input goods bought by players to manufacture expensive outputs. In games using a subscription-based business model (e.g. *World of Warcraft*, where players

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pay to play), there is additional benefit from the additional subscriptions paid by the bot accounts. But games using a RMT-based business model (where players pay to buy items), the benefit is more tenuous. The net market effect remains uncertain since wealth inflation from bots is likely to immediately cut down RMT sales (by flooding the market) but may also possibly cause monetary inflation that may increase the price of virtual goods sold (depending on the elasticity of the market). Regardless of which business model is applied, the positive economic externalities of saving user time and adding economic liquidity should be more than enough to offset whatever loss results. This, as long with the other factors, supports a finding of fair use for virtual world bots.

NOTE: VIRTUAL WORLD BOTS – WHAT HAPPENS IN *RUNESCAPE* STAYS IN *RUNESCAPE*

Ryan Alcorn *

Ruoke Yang's Article entitled, "The Personal and Economic Utility of Virtual World Bots: A Defense for Fair Use", uses market data published by Jagex, Inc. to analyze the market effects on Virtual Bots and efforts to prohibit them in the MMORPG *Runescape* (i.e. "Bot Nuke" event). While this data analysis is quite valuable to answering the thesis of the article, it is important not to extrapolate *beyond* this limited thesis. This Note will point out three inherent limitations which serve to slightly diminish but not eliminate the value of Yang's work. First, *Runescape* is just *one* MMORPG. What happens in *Runescape* may not happen in (any) other MMORPG. Second, the line between *good* and *bad* bot drawn by Yang may be functionally unclear. Yang's attempt to navigate these murky waters (keep the *normal* bots, but prohibit *RMT* bots) may be impossible to implement in the real world. And seemingly draconian attempts to prohibit Bots, while having a net-negative effect in *Runescape*, may have had a net-positive effect in *Eve Online*. Finally, Yang's analysis is limited to a fair use defense to copyright infringement. Other legal issues (such as contractual violations with the games Terms of Service) may make bots illegal even if they are not specifically illegal as copyright infringement.

First, while Yang's characterizations about *Runescape* may be largely accurate, to then say that *all* MMORPGs follow the *Runescape* model and that everyone has the same

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Runescape experience is far less accurate. Yang characterizes the process of gathering resources, for instance, as static, repetitive and not fun. He also offers some speculation that bots fill roles in environments where an undesirable or an ill-designed mechanic has been put in place by the developers.¹ Sure enough, this is largely true – the mechanics do not generally change from skill level to skill level, only minor variations in graphics do. But developers have begun to adapt to this collective boredom by organizing virtual maps around “nodes”.² Often, these nodes are placed near aggressive enemies. Thus, a player will have to fight in order to get at the resource, further detracting from boredom. Furthermore, some players in fact *do* enjoy wandering and exploring the world looking for that next bit of iron ore. And some games even feature resource gathering as a prominent attraction to the game, and players may spend their entire time engaged in resource gathering of some sort.³ Finally, Yang refers to *Runescape*’s coal gathering process, where a user can simply go “AFK” and return with an inventory full of coal. The vast majority of games do not operate like this.⁴

¹ Citing T. L. TAYLOR, *PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE* at 138).

² For a description of Nodes, See WOWWIKI.COM’S DESCRIPTION OF NODES <http://www.wowwiki.com/Node> (last visited Jan 26, 2013). In *World of Warcraft* particularly, the game’s latest iteration, *Mists of Pandaria*, has expanded the use of this node concept to other, more dynamic game functions such as combat capture objectives, quest objectives, and cinematic triggers.

³ In this Author’s experience and knowledge, the popular science fiction game *Eve Online* is the *only* game to feature the semi-automatic resource gathering that *Runescape* does. In *Eve*, players will fly asteroid mining ships up to asteroids out in the middle of space. One click will begin using their mining laser, and the process will typically take some amount of minutes depending on the power of the player’s laser.

⁴ See *supra* note 7. In this Author’s experience, *Tera Online*, *Lord of the Rings Online*, *World of Warcraft*, *Vanguard 2*, *Ultima Online*, and *Dark Age of Camelot* all featured no semi-automation of this kind whatsoever. None of the previously mentioned games allow a user to go AFK while

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Second, while Yang argues that *some* bots fill a niche by performing menial and undesirable, repetitive tasks inside the game, this fails to take account what *other* bots do. One category of these *other* bot is *cheating* bots, which employ “teleport” or “speed” hacks. This enables the bot to perform a variety of movement feats such as passing through mountains or other types of terrain, and instantly moving to locations near or distant, that the average player cannot.⁵ The result is that these *cheating* bots take all the resources of an area, and leave none for the average player.

Another category of these *other* bots is bots that engaged in Real Monetary Transactions (RMT). These are bots are identical to the *non-cheating* bots Yang described except that the goods they farm are then sold to real world players for real world money. Yang's interpretation of *Runescape* market data may be correct, but it does that follow that *other* games have the same outcome. For example, in *Eve Online*'s “Unholy Rage” event, administrators banned several thousand accounts suspected of being automated bots engaged in RMT. Following the event, developers of *Eve Online* tracked several market statistics as well as computerized, “front-end statistics.”⁶ There were a few products that operated exactly as Yang indicated they would behave, where prices spiked, and the supply plummeted.⁷ However, the developers noted specifically that, “aside from a few [items], the in-game market has been **remarkably unaffected** by all this. We have closely followed the total number of daily market transactions and total amount of [currency] traded per day.”⁸ Contrary to what Yang has

mining a resource, and come back with a full bag. In fact, AFK-ing at a resource most often results in the death of your character.

⁵See, TERA ONLINE SPEED HACK, http://www.youtube.com/watch?v=tAwZq_aR6uQ (last visited Jan. 26, 2013); WORLD OF WARCRAFT SPEED HACK, <http://www.youtube.com/watch?v=zSvUow-fCOU> (last visited Jan 26, 2013).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

argued, “regular players are now starting to see mining as a viable means of making some [money] and they are moving in to take over the business.”⁹ Independent of these direct market effects, the game itself realized a **30% reduction in Server CPU load** (by eliminating RMT bots), translating to a dramatically improved experience for the average player.¹⁰

While conceptually clean, the distinction between *normal* bot and *RMT* bot quickly blurs in the real world. Both bots may have the exact same function (e.g. they both farm goods; their programming looks almost identical). The only difference is *what* the human player does with the output. Because this difference is *independent* of the function/use of the bot, that makes efforts to allow the *normal* bots while excluding the *RMT* bots a very risky game of whack-a-mole. Furthermore, even if developers could distinguish between *normal* and *RMT* bots in their programming, nothing prevents a player from using *normal* bots, then selling that output in a third party black market for money (thus using the *normal* bots output for *RMT* ends).

Finally, while Yang does explore the copyright infringement issue of bots, he avoids the prior contractual legal issue of their use. In short, even if they do not violate copyrights (because of fair use), they still could violate contracts (i.e. the games' terms of service). Yang, himself, recognizes this limitation.¹¹ And because this is the position that the Ninth Circuit has recently taken, all of Yang's good and thorough market data analysis may be irrelevant if future Court's use contract law (instead of copyright law) to shape the legality of virtual world bots.¹²

⁹ *Id.*

¹⁰ UNHOLY RAGE DISCUSSION ON THE EVE INSIDER DEV BLOG, <http://community.eveonline.com/devblog.asp?a=blog&bid=687> (last visited Jan. 26, 2013).

¹¹ Yang, (“contract[ual] issues are not the focus [of] this paper,”)

¹² See *supra* note 3.

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In conclusion, Yang's article is a *noteworthy* application of virtual world market data in *Runescape* to empirically investigate the market effects of attempts to prohibit Virtual World Bots. Such investigation is quite helpful to substantiate a fair use defense to a copyright infringement violation. But it is important to remember not to extrapolate too much from this investigation: (1) Yang analyzes data from *only* one MMORPG, (2) data from other MMORPGs may result in different conclusions, and (3) even if correct, this data does not substantiate any defense to contractual violation, which is important because that is the direction recent case law has begun to decide the legality of Virtual World Bots on.