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“I always turn to the sports section first. The sports section records people’s accomplishments; the front page nothing but man’s failures.”

-Chief Justice Earl Warren

As quoted in SPORTS ILLUSTRATED July 22, 1968.

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THE NCAA'S STUDENT-ATHLETE SCHOLARSHIP – A MODERN VERSION OF BASEBALL'S OLD RESERVE SYSTEM

ROBERT J. ROMANO*

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ABSTRACT

The current NCAA's student-athlete scholarship system is analogous to baseball's historic reserve system that came about in the late 1800s. Under the reserve system, once a player's contract expired, only the club could unilaterally renew it for another season, thus affording a team the rights to 'reserve' a player season after season, or in other words, in perpetuity. This same system also allowed a team to 'reserve' a player's rights without interference from other teams looking to poach a player, or a player looking to competing teams for a more lucrative contract. This was because all team owners colluded, agreeing not to make an offer for another team's player.

Today, college athletes receiving an athletic scholarship are in a similar economic situation to the professional baseball players under reserve. The NCAA's rules mandate that the value of the scholarship is the only form of compensation an athlete is entitled to for playing college athletics, and, for the most part, that scholarship is awarded on a renewable basis at the discretion of

*Robert Romano, JD, LL.M, is an Assistant Professor of Sport Management at St. John's University, an avid college sports fan, and the father of a new little girl nicknamed *Chilly*.

the member institution.[1] *Because of the similarities between the two systems, current college athletes can argue, as did the baseball players in the case of Federal Base Ball Club of Baltimore, Inc. vs. the National League of Professional Base Ball Clubs, that the NCAA's athletic scholarship rules are anticompetitive and therefore a violation of Section 1 of the Sherman Act.*[2]

This paper will examine the history of the NCAA and its rules and regulations involving intercollegiate athletics, the student-athlete, and the scholarship system. Then, because the student-athlete athletic scholarship is analogous, in theory, to baseball's reserve clause, a viable antitrust argument will be made outlining how the NCAA and its member institutions have engaged in an unreasonable restraint of trade counter to federal antitrust laws by agreeing to limit a student-athlete's compensation to the value of a scholarship.

Keywords: NCAA, Student-Athlete, Reserve Clause, Antitrust, Scholarship.

I. THE STUDENT-ATHLETE AND THE STUDENT-ATHLETE SCHOLARSHIP[3]

In February 2011, when the PBS show *Frontline* interviewed NCAA President Mark Emmert, reporter Lowell Bergman did not hold back when he asked the head of the largest intercollegiate sport governing body a series questions regarding the 'student-athlete' and the NCAA's scholarship system:

> You don't see the contradiction that many have pointed out that . . . when we're watching these games, you may have a coach who's being paid six figures, maybe seven figures in some cases. Everyone is being paid – the athletic director, everyone you can see on the screen, and many people you can't – are being paid as part of this, but

[1] 2011-2012 NCAA DIVISION I MANUAL art. 15 § 2.1-3 (2011).

[2] Fed. Baseball Club of Balt. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922).

[3] Note - the author previously published a journal article on a related topic, therefore some of the information in Section 1 of this article may be similar to the following: Robert J. Romano, *The Concept of Amateurism, How the Term Became Part of the College Sport Vernacular*, 1 U.N.H. Sports L, REV. 29 (2022).

> the students aren't. The athletes who are actually performing are not paid.[4]

Without hesitation, the newly appointed executive replied:

> No, I don't find that contradictory at all. Quite the contrary. I think what would be utterly unacceptable is, in fact, to convert students into employees. The point of March Madness, of the Men's Basketball Tournament, is the fact that it's being played by students. We don't pay our student-athletes."[5] He then commented, "And our student-athletes remain student-athletes. And they are preprofessional. They are not professional in anything.[6]

Although Mr. Emmert's responses were somewhat perplexing to those familiar with the amount of revenue being generated off of college athletics, they were in no way surprising because the NCAA's position since the early twentieth century has been: *college athletes are to play sport purely for the enjoyment of the game, without being paid*. However, college sports have had a complex relationship regarding the 'student-athlete' and how that term intersects with the increased commercialization of college athletics and the role revenue plays within the business model.

In what is believed to have been the first intercollegiate sporting competition, an 1852 rowing regatta between Yale and Harvard on Lake Winnipesaukee, New Hampshire, the Elkins Railroad Line sponsored the event, paying for all of the participants' expenses, lavish prizes, and unlimited alcohol.[7] This was not the only time that student-athletes who played at the advent of intercollegiate sport received compensation for their competitive efforts.[8] During the 1870s, Syracuse's rowing team raced and won $400 in prize money,[9] while at another intercollegiate rowing

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[4] Interview by Lowell Bergman with Mark Emmert, President, NCAA (Feb. 14, 2011), https://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/mark-emmert.html [https://perma.cc/ASJ8-GYMX].

[5] *Id.*

[6] *Id.*

[7] ANDREW S. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALIZATION AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6-7 (1999).

[8] Romano, *supra* note 3 at 33.

[9] WILLIAM FREEMAN GALPIN & OSCAR T. BARCK, JR., SYRACUSE UNIVERSITY 151-52 (Richard Wilson ed. 1952).

regatta on Lake Saratoga, New York, the winning team awarded a silver goblet worth an estimated $500.[10]

Crew may have been at the forefront, but football and baseball soon left rowing in their wakes when it came to athlete compensation during the late 1800s. In addition to prize money, other forms of 'payment' included: stipends for professional coaches; funds for athlete 'training tables' to use for team building and better nutrition; and grander, more luxurious dorms to house athletes.[11] As the captain of the Princeton football team in the 1890s once told a recruit, "You will find everything already provided for you in the way of room, food, etc., which of course . . . will be of no personal expense to you."[12] These expenses were significant, with the football training table in the 1890s costing the Princeton team "over $2,500 out of a budget of $16,000."[13]

But student-athletes were not the only ones profiting from college athletics. Schools across the United States used sports as one way to increase revenue. In fact, the 1893 Thanksgiving Day football game between Princeton and Yale generated $26,000,[14] with the Harvard and Yale game the following year netting profits of over $119,000.[15] This noticeable commercialization of intercollegiate sport led to concerns within academia for the need to control these 'economic excesses.'[16]

Charles Eliot, President of Harvard University, unsettled about how revenue was affecting athletics at his school, stated, "lofty gate receipts from college athletics ha[s] turned amateur contests into major commercial spectacles."[17] While at the same time, Francis Walker, President of MIT, pronounced that "if the movement shall

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[10] RONALD A. SMITH, THE MYTH OF THE AMATEUR: A HISTORY OF COLLEGE ATHLETIC SCHOLARSHIPS 45 (2021).

[11] *Id.*

[12] *Garrett Cochran, Princeton Football Captain, to Francis Lane*, PRINCETON UNIV. ARCHIVES (August 20, 1896).

[13] Walter Chauncey Champ, Walter Chauncey Camp Papers: Princeton Football Financial Statements (1882-1893) (unpublished manuscript) (on file with the Yale University Library).

[14] Kavitha A. Davidson, *The Ivy League Origins of Thanksgiving Football*, BLOOMBERG (Nov. 26, 2015), https://www.bloomberg.com/opinion/articles/2015-11-26/the-ivy-league-origins-of-thanksgiving-football [https://perma.cc/M27K-8TQV].

[15] Sean Gregory, *It's Time to Pay College Athletes*, TIME MAG. (Sept. 16, 2013), https://time.com/568/its-time-to-pay-college-athletes/ [https://perma.cc/BHG7-QDB6].

[16] Romano, *supra* note 3, at 34.

[17] Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9, 11 (2000) [hereinafter, Smith, *A Brief History*].

continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics."[18] Along with the commercialization of college athletics were issues about the safety of the students who participated after the *Chicago Tribune* in 1904 reported that college football witnessed the deaths of 18 students and serious injuries to almost 200 more.[19]

With this converge of negative attention placed on college sports, U.S. President Theodore Roosevelt called on universities to review the state of interschool rules and safety regulations. In December 1905, Henry MacCracken, Chancellor of New York University, responding to President Roosevelt's call, organized a series of meetings that eventually led to a reform of intercollegiate athletics and the creation of the Intercollegiate Athletic Association of the United States (IAAUS) on March 31, 1906.[20] Four years later, the IAAUS was renamed the National Collegiate Athletic Association (NCAA).[21]

At its inception, the NCAA did not have the enforcement and revenue-producing responsibilities it currently has because its primary focus was that of a regulatory body tasked with developing rules for the participants' safety.[22] That being said, one of the NCAA's first things that the NCAA did was to create this notion of the 'student-athlete,' identifying it as the base upon which to build the future of college athletics. The NCAA originally designated student-athletes as those who play sport not for money, [23] maintaining that "no student shall represent a college or university

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[18] Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-Time Athletics*, 20 CAP. U. L. REV. 567, 570 (1991) [hereinafter Smith, *Little Ado*].

[19] Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (July 21, 2019), https://www.history.com/news/how-teddy-roosevelt-saved-football [https://perma.cc/SVM4-975W].

[20] Palmer E. Pierce, *The International Athletic Association of the United States: Its Origin, Growth and Function*, in Proceedings of the Second Annual Convention of the Intercollegiate Athletic Ass'n of the United States, 28 (1907) (reflecting on the history of the IAAUS).

[21] W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 874 n.100 (2002).

[22] Romano, *supra* note 3, at 35.

[23] ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH (1998).

in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial assistance."[24]

Even though the NCAA's power and influence grew over the next 50 years, colleges and universities were autonomous and carried out whatever measures they deemed necessary to attract talented athletes to their campuses.[25] Wanting the best players, the commercialization of college sports extended to the 'market for athletes,' with many schools openly participating in a system "under which boys are offered pecuniary and other inducements to enter a particular college."[26] In 1939, the freshman football players at the University of Pittsburgh allegedly did not practice because the upperclassmen were reportedly "earning more money."[27] In the 1940s, University of Washington running back, Hugh McElhenny, purportedly took a pay cut when he began playing professional football,[28] stating, "[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate."[29]

Additionally, this free market for talent transitioned during the 1930s into what has come to be known today as the 'grant-in-aid' or 'student-athlete scholarship' system.[30] Schools with lacking facilities and prestige created the idea of a 'student-athlete scholarship' to compete for talent with established sports powerhouses in the East (the Ivy League) and Midwest (the Big Ten Conference).[31] Primarily southern colleges and universities that had difficulty attracting athletes because of their lesser academic reputation would offer recruits a 'free education' in exchange for participating in athletics at their institution.[32] In 1935, the Southeastern Conference (SEC) voted 11-1 to openly offer athletic scholarships that included tuition, fees, room, board, books, and

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[24] Intercollegiate Athletic Ass'n of the U.S. Constitution By-Laws, Volumes 4-5, Art. VII, Section 3 (1910).

[25] Romano, *supra* note 8, at 38.

[26] Henry S. Pritchett, *Preface* to Howard J. Savage et al., *American College Athletics*, 23 THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING BULL., at xv (1929).

[27] Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 190 (2017).

[28] Zimbalist, *supra* note 7, at 22–23.

[29] *Id.* at 211 n.17.

[30] William C. Rhoden, *Sports of the Times; The System of Awarding Scholarships to Athletes is Worth Saving*, N.Y. TIMES (Mar. 8, 2003), https://www.nytimes.com/2003/03/08/sports/sports-times-system-awarding-scholarships-athletes-worth-saving.html [https://perma.cc/HP52-CKPL].

[31] WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 68 (1995).

[32] *Id.*

laundry.[33] Curiously, this vote by the SEC schools in favor of athletic scholarships came a year after the NCAA called upon its member institutions to oppose all subsidies to athletes and only two weeks after the National Association of State Universities banned athletic scholarships.[34]

This issue of athletic subsidies and scholarships was amplified at the end of World War II when thousands upon thousands of soldiers, sailors, and Marines came back from fighting overseas. These returning young men[35] represented potential 'athletic talent' that resulted in recruiting 'free-for-alls' as "athletic programs looking to insert themselves into the scene of top-flight college football began offering whatever financial inducements they could to incorporate this new talent into their programs."[36] As this 'grant-in-aid' or 'student-athlete scholarship' concept grew and became accepted by more colleges and universities throughout the late 1940s, the NCAA, in 1956, officially changed its position and ratified the utilization of athletic scholarships for all of its member institutions.

The NCAA's original version was a guaranteed four-year scholarship which included the cost of room and board, tuition, fees, books, and a $15 monthly cash allotment during the academic year.[37] Recognizing that this was a form of payment, the NCAA reasoned, "if a player received only expenses, even though it was more than what other students received, he or she was not being paid to perform."[38]

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[33] Romano, *supra* note 3, at 37 (citing Chicago Daily Tribune, 14 December 1935). (Vanderbilt was the only SEC school that opposed athletic scholarships with Sewanee abstaining). The value of these 'payments' were approximately $760.00 per year broken down as follows: $200 for tuition, $355 for board, $90 for room, $44 for fees, $28 for books, and $45 for laundry - Athletic Scholarships 1939-1940, Tulane University Archives.

[34] *Id.* at 37.

[35] The term 'men' is used here since at the time athletic scholarships, for the most part, were not being offered to women to compete in sport, *see* Nick Zaccardi, *As Title IX Era Dawned, A First Women's Athletic Scholarship Created National Buzz*, NBC SPORTS (June 6, 2022), https://olympics.nbcsports.com (The "first nationally advertised athletic scholarship for women" was created in 1972) [https://perma.cc/Q7PD-EEFN].

[36] Neil Gibson, *NCAA Scholarships Restrictions as Anticompetitive Measures*, 3 WM & MARY BUS. L. REV. 203, 213 (2012).

[37] *Id.* at 69.

[38] *Id.*

The lifespan of the four-year athletic scholarship was short, and a plan to end its practice began by the early 1960s.[39] Initially, the reasoning behind ending this form of assistance centered around reducing costs, but the focus shifted when the University of Oklahoma's Earl Sneed publicly acknowledged that his school was frustrated with players who quit athletics but kept their scholarships.[40] Sneed argued that the four-year athletic scholarship made it difficult for coaches and athletic administrators because the NCAA only allotted them a certain number of scholarships per year. He claimed that if players who quit take a percentage of the scholarships, it becomes difficult for a coach to field a competitive team. The NCAA initially resisted pressure from college coaches and athletic directors and maintained that a scholarship was for a "scholar," a student first, and not for athletic performance.[41]

But this was the 1960s, and on college campuses throughout the country, students were taking part in the struggle for civil rights and equality. Participating in these protests, to the embarrassment of many coaches, athletic directors, and athletic departments, were student-athletes receiving athletic scholarships from their college or university. In addition, student-athletes were protesting against what they believed to be discriminatory practices involving minorities within their own athletic departments. And, because the four-year guaranteed athletic scholarship rule was in place, there was nothing a coach or athletic director could do to a student-athlete if they decided to join in on the campaigns against discrimination or even quit athletics in protest altogether.[42]

The fact that the student-athletes were open and vocal about discriminatory practices within college athletic departments both irritated and embarrassed the NCAA and its member institutions. Conversely, and most likely unintentionally, it did provide the NCAA with the ammunition needed to discontinue the practice of offering guaranteed four-year scholarships. The NCAA did this by

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[39] Ray Yasser, *The Case for Reviewing the Four-Year Deal,* 86 Tul. L. Rev. 987, 995 (2012).

[40] *Id.*

[41] *Id.* at 996.

[42] *See* DAVID K. WIGGINS, GLORY BOUND: BLACK ATHLETES IN A WHITE AMERICA, 110 (1997). (During the 1968-69 academic year, thirty-seven events occurred where athletes challenged coaches and athletic departments. Demonstrations continued throughout the late 1960s and into the early part of the 1970s, with conflicts between student-athletes and athletic departments occurring at Iowa, Nebraska, Maryland, San Francisco State, Michigan State University, the University of Oklahoma, the University of Texas at El Paso, Kentucky, and the University of Kansas, amongst a host of others).

redefining the 'serious misconduct'[43] clause within the language of the scholarship itself. This redefining allowed the NCAA to limit athletes' rights by declaring that they could forfeit their scholarship if they quit or were dismissed from the team for any conduct 'unbecoming' or 'embarrassing' to the school, coach, or athletic department.

Until now, the interpretation and enforcement of the 'serious misconduct' clause was governed by the school's administration, outside of athletics. In 1969, the NCAA changed the scholarship's language and transferred the power to interpret the rule and the power to dismiss a student-athlete to the athletic department.[44] The standard was no longer a college or university's definition of 'serious misconduct'; now, at their discretion and without oversight, college coaches and athletic departments could take away a player's guaranteed four-year scholarship because 'serious misconduct' was whatever a coach or athletic director interpreted it to be.

The NCAA's initial commitment to the student-athlete and the guarantees afforded with a four-year scholarship gave that athlete control over his or her own situation. A student-athlete was free to commit to a university and walk away from the athletic program if athletics were too demanding and interfered with their scholastic achievements. A student-athlete who received a four-year scholarship was guaranteed an education, regardless of whether or not they participated in protests or defied a coach or an athletic department when they engaged in arguably unfair, biased, or prejudicial conduct. Most importantly, the athlete could openly and vocally oppose racism or a university's discriminatory practices without the fear of losing out on the opportunity to receive an education.

Now, with this redefined 'serious misconduct' clause, control was securely in the hands of coaches and athletic departments. They no longer had to worry about protests or racial discontent; they had "almost total control over athletes' behavior both on and off the court and playing field."[45] If a student-athlete stepped out of line, it could be deemed 'serious misconduct' and his or her scholarship could be taken away.

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[43] NCAA, NCAA BY-LAW SECTION 15.3.4.2(c), http://ncaa.org **[**https://perma.cc/CG5L-QZ7G]**.**

[44] Yasser, *supra* note 39, at 1001-02.

[45] ALLEN L. SACK, COUNTERFEIT AMATEURS: AN ATHLETE'S JOURNEY THROUGH THE SIXTIES TO THE AGE OF ACADEMIC CAPITALISM, 71 (Penn State Univ. Press 2011).

It did not take long for the NCAA to figure out that even more stringent regulations of athletic scholarships could further control student-athlete behavior. In 1973, the NCAA eliminated the four-year athletic scholarships altogether, mandating that schools could now only provide scholarships to student-athletes on a one-year renewable basis.[46] The NCAA explained the move as a response to the costs associated with athletes who would accept scholarships but then fail to compete. "Member schools were uninterested in spending money on athletes in the form of multi-year scholarships, only to have those athletes quit their teams but keep the guaranteed education."[47] But the actual reason behind the change was for control. With the end of the guaranteed four-year scholarship, control in college sports shifted dramatically to athletic departments and coaches, and away from the student-athlete.

It is hard to imagine in a society where the concepts of free speech and the right to protest are held with the highest of regards, that student-athletes speaking out against discrimination and other injustices would be the catalyst for the NCAA to change how a student-athlete receives and retains an athletic scholarship. It is interesting that coaches and athletic departments, and in some ways the administration, feared the power of student-athletes in voicing their opinions at a level so high, that they decided controlling student-athletes was more important than allowing them the opportunity freely express their opinions or, in some situations, receive an education. The irony is that universities are usually a place for students to learn, think, and speak freely.

The NCAA based the initial scholarship system upon the concept of the 'student-athlete,' wherein a scholarship was for a 'scholar,' a student, and not for athletic performance. However, the guaranteed four-year scholarship model gave student-athletes the freedom to act as they desired and, in some cases, not act at all. The NCAA's response was a quiet change from the four-year guaranteed scholarship to the one-year renewable; but in actuality, its goal was to quiet the student-athlete.

From the 1970s forward, the NCAA—with the power it gained (or more accurately, seized) during the 1950s under then Executive Director, Walter Byers, and with the support of its member institutions—has initiated and enacted a series of rules to further solidify its position surrounding the 'student-athlete' model that an

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[46] James V. Koch &Wilbert M. Leonard, *The NCAA: A Socio-Economic Analysis*, 37 AM. J. OF ECON. & SOCIO. 225, 226-27 (1978).

[47] *Id.* at 228.

athlete is not entitled to compensation for his or her athletic skills above that of an athletic scholarship.[48]

One such rule requires that any student-athletes enrolling at a Division I or II school must register with the NCAA Eligibility Center and receive an 'amateurism certification' before being allowed to compete. By registering, these future college athletes certify that they are amateurs and will only compete as amateurs in accordance with NCAA Section 2.9 *The Principle of Amateurism* which states,

> 12.01.1 Eligibility for Intercollegiate Athletics. Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.
> 12.01.2 Clear Line of Demarcation. Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.[49]

Additionally, Article 12 of the NCAA Division I manual governs rules related to an athlete's continued eligibility as an amateur,[50] with Section 12.1.2 detailing how a student-athlete could lose their student-athlete scholarship:

> An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) uses his or her athletic skill (directly or indirectly) for pay in any form in that sport; (b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) receives, directly or indirectly, a salary, reimbursement of

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[48] Romano, *supra* note 3, at 39.

[49] NCAA, 2021-22 NCAA DIVISION I MANUAL art. 12.01.1-2 (2021), http://ncaa.org [https://perma.cc/Y4HC-3BX5].

[50] The NCAA Manual is 420 pages in length and a student-athlete, upon accepting a Division I scholarship, certifies that he/she has read and understands the content of said manual.

> expenses or any other form of financial assistance from a professional sports organization based on athletic skill or participation, except as permitted by NCAA rules and regulations; (e) competes on any professional athletics team per Bylaw 12.02.12, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) after initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or (g) enters into an agreement with an agent.[51]

Essentially, Section 12.1.2 states that a student-athlete could forfeit his or her athletic scholarship if he or she uses his or her athletic skill for pay in any form. However, Section 12.01.4 provides an exception for payments provided by member schools, reasoning that "grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletic skill, provided it does not exceed the financial aid limitations set by the association's membership."[52]

The NCAA, through the promulgation of various rules and by-laws, together with the use and promotion of terms such as 'student-athlete,' has unilaterally decreed that anyone who participates in athletics at the college level is not entitled to compensation above that of the value of a student-athlete scholarship offered by their institution.[53] The NCAA sells this to the public by proclaiming that both amateurism and the student-athlete are bedrock principles of college athletics and that maintaining these concepts is crucial in preserving an academic environment in which acquiring a quality education is the first priority.[54]

However, the NCAA has revamped its bylaws at times and, in 1974, modified its rules to allow a paid professional in one sport to receive athletic scholarships and compete on an amateur basis in another.[55] And again, some 40 years after implementing the one-year renewable scholarship, the NCAA announced two changes to the one-year renewable student-athlete scholarship system: (1) That as of 2012, the NCAA would permit (not mandate) its member institutions to offer multiyear scholarships in lieu of the one-year

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[51] NCAA, *supra* note 49, art. 12.1.2.
[52] *Id.* art. 12.01.4.
[53] Romano, *supra* note 3, at 40.
[54] NCAA, https://www.ncaa.org/ [https://perma.cc/AE77-FR4M].
[55] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

renewable scholarship,[56] and (2) that the NCAA would permit (again, not mandate) additional aid up to the full cost of attendance for those receiving full athletics scholarships.[57] The latter was more of a calculated move by the NCAA because of pending federal litigation. However, even with the new Name, Image, and Likeness laws that were enacted by several state legislatures beginning in 2021, the NCAA has not amended its rules to allow a student-athlete to receive any compensation for actually playing the sport above that of the value of the student-athlete scholarship itself.

II. MODERN VERSION OF THE OLD RESERVE CLAUSE

The NCAA's student-athlete scholarship system is analogous, in theory, to baseball's historic reserve clause. The development of baseball's reserve system occurred in the late 1800s when the owners in the *National League of Professional Baseball Clubs*, and eventually *The American Association of Baseball Clubs*, entered into the '*National Agreement*' that proscribed a uniform player contract for all of its franchises. Under these '*National Agreement*' terms, once a player's contract expired, only the club, not the player, could unilaterally renew it for another season, with the specific language reading as follows:

> [T]he party of the first part shall have the right to 'reserve' the said party of the second part for the season next ensuing the term mentioned in paragraph 2, [] provided…that the said party of the second part shall not be reserved at a salary less than that mentioned in the 20th paragraph herein.[58]

This clause afforded a team the rights to '*reserve*' a player season after season or, in other words, in perpetuity, binding that player permanently to the club with whom he first signed.

The '*National Agreement*' also allowed a team to '*reserve*' a player's rights without interference from other teams looking to poach a player, or a player looking to competing teams for a more lucrative contract. When the contract expired, all team owners

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[56] Michelle Brutlag Hosick, *DI Board Adopts Improvements in Academic Standards and Student-Athlete Support*, NCAA NEWS ARCHIVE (Oct. 27, 2011), http://ncaanewsarchive.s3.amazonaws.com/2011/october/di-board-of-directors-adopt-changes-to-academic-and-student-athlete-welfare.html [https://perma.cc/BVG7-GW87].

[57] *Id.*

[58] Metro. Exhibition Co. v. Ewing, 42 F.198, 199-200 (C.C.S.D.N.Y. 1890).

colluded, agreeing not to make an offer for another team's player. Each player could only negotiate with one club: their own—a monopsony in economic terms.[59] A player who was offered an unsatisfactory contract had no power or leverage to solicit offers from competing teams. The player's only options were to sign to the terms dictated by his current club, or retire. Under the reserve system, "cartel rules" controlled the movement of players.[60]

Today, college athletes playing per the terms of an athletic scholarship are in an economic situation similar to baseball players during the period of the reserve system. This is because NCAA's rules mandate that the athletic scholarship is the only form of compensation an athlete is entitled to for playing college athletics and, for the most part, it is awarded on a renewable basis at the discretion of the member institution.[61] This mandate is comparable to the reserve system because in the uniform player contract, when the contract expired, only the team retained the option to renew the contract for another season. Like a college athlete, the player had no right to compel an organization to allow him or her to continue playing for another season. The reserve system allowed a team to retain the player's services as long as that player was *not reserved at a salary less* than the previous season—in other words, was paid the same salary as the prior year's. A student-athlete is bound to a college or university in a similar fashion – his or her services are retained for the entire term of the athlete's eligibility for the costs associated with that of a student-athlete scholarship.

Additionally, each student-athlete who desires to play for a college or university, although not required, frequently signs a National Letter of Intent ("NLI").[62] This NLI commits the athlete to a certain school while also limiting their rights if they consider transferring to another institution. This is again similar to the reserve system wherein a player, to play professional baseball, was compelled to sign the contract prescribed by the league, or abandon baseball as a profession. The absolute lack of mutuality, both in obligation and in remedy, within the NLI's language makes it essential for the student-athlete to either sign such as prescribed, or possibly not play college athletics at all. What the student-athlete

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[59] *See* PAUL C. WEILER, ET AL., SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS, AM. CASEBOOK SERIES 128 (West Academic, 4th ed. 2010).

[60] *Id.*

[61] NCAA 2011-2012, NCAA DIVISION I MANUAL, art. 15.2.1-3, at 194-196 (2011).

[62] The NLI is voluntary with regard to both institutions and student-athletes. No prospective student-athlete or parent is mandated to sign the National Letter of Intent, and no institution is required to join the program.

faces, like baseball players under reserve previously, is a "Hobson's Choice",[63] *whether you will have this or none*.

The college or university, however, has the right to revoke a student-athlete scholarship at any time for serious misconduct, voluntary withdrawal from a sport for personal reasons, or if the athlete is rendered academically ineligible.[64] Additionally, an athlete who is injured, ill, does not play well, is replaced by an incoming recruit, one who simply does not fit the scheme because of a coaching change, or has a 'bad attitude,' can be released from the team and have his or her scholarship revoked without cause.[65] The college athletic department's only obligations are to notify the athlete of the nonrenewal decision and of the athlete's right to appeal.[66]

The similarities between the student-athlete who receives a scholarship and a baseball player who signed a contract that included a reserve clause are without question. Under the reserve system, an organization had the right to terminate the player's contract at any time, with 10 days' notice, for any reason: player injury, diminishing player skills, or just because they have a "bad attitude." If the player was terminated, he had no recourse except being allowed to play for a different club.

Under the terms of the '*National Agreement*,' for each contract a player signed that contained a reserve clause, Major League Baseball was able "to perpetuate its control over the services of the player."[67] Similarly, the reason the NCAA eliminated the four-year athletic scholarship was so the NCAA and its member schools could expand their control over the student-athlete. As previously stated, with the end of the guaranteed four-year scholarship, control in college sports shifted dramatically to athletic departments and coaches, and away from the athlete. Because the athletic scholarship is in many ways analogous to baseball's reserve clause, does this open the door for a student-athlete to claim a viable antitrust cause of action exists against the NCAA and its member institutions?

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[63] *Hobson's Choice*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/hobson's%20choice [https://perma.cc/X2HQ-KEE3].

[64] NCAA, *supra* note 61, art. 15.3.4.2, at 201-02.

[65] *Id.* art. 15.3.5.1, at 202.

[66] *Id.*

[67] Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 12 (Sup. Ct. 1914).

III. THE STUDENT-ATHLETE SCHOLARSHIP AND THE SHERMAN ACT[68]

The NCAA argues that student-athletes are only entitled to the value of a scholarship for their athletic skills because they are students first before they are athletes, so there is no need to compensate them as though they were professionals. The rules regarding athletic scholarships could be interpreted as being anticompetitive, however, and therefore, the NCAA and its member institutions, by enforcing such, would be in violation federal antitrust laws: specifically, Section 1 of the Sherman Act.

The Sherman Act was enacted to promote competition while condemning cooperation among competitors, with Section 1 of the Act prohibiting "every contract or conspiracy in restraint of trade or commerce among the several states."69 Therefore, to establish that the scholarship rules violate Section 1 of the Sherman Act, a party must prove that because the NCAA mandates that the value of the scholarship is the only compensation option available to a student-athlete for playing an NCAA-sanctioned sport, it is engaging in a conspiracy to unreasonably restrain trade.70

A conspiracy "must comprise an agreement, understanding or meeting of the minds between at least two competitors, for the purpose of, or with the effect of, unreasonably restraining trade."71 The making of the illegal agreement itself is the violation. 72 Completing the conspiracy, an act furthering the conspiracy, or the success of the conspiracy does not have to be proven because they are not elements of the offense.73 Parties, therefore, violate the Sherman Act just by entering into an illegal agreement.

The NCAA is a voluntary association made up of approximately 1,100 colleges and universities, each an independent center of

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[68] Similar to Section I, some of the analysis found in this Section III of this article overlaps with that found in Robert J. Romano, *The Concept of Amateurism, How the Term Became Part of the College Sport Vernacular,* 1 U.N.H. SPORTS L. REV. 29 (2022).

[69] 15 U.S.C. § 1. ("[E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[70] *See generally* Summit Health, Ltd v. Pihas, 500 U.S. 322, 330 (1991).

[71] Meredith E.B. Bell & Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 359 (1999).

[72] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940).

[73] *Id.*

decision-making.[74] The rules involving athletic scholarships are joint acts of its member schools. Therefore, the NCAA's mandate that the only form of compensation its member institutions can provide, and that a student-athlete can receive, is in the form of an athletic scholarship constitutes a concerted action by its scholarship-granting members is, arguably, enough for a student-athlete to show a contract, combination or conspiracy.

In showing that the NCAA's scholarship rules peremptorily involve a conspiracy, a party must next prove the scholarship rules are an unreasonable restraint of trade. The U.S. Supreme Court in *Standard Oil Co. v. United States*[75] found that any contract, by obligating one party to another, must restrain trade to some extent.[76] However, the Court determined that only those restraints of trade that are "unreasonably restrictive of competitive conditions" are to be deemed illegal.[77] An 'unreasonable restraint of trade' refers to a "particular economic consequence, which may be produced by quite different sorts of agreements."[78] Economic consequences may include eliminating competition, creating a monopoly, price-fixing, or interfering with free market forces.[79] Federal courts have developed two different methods for analyzing an agreement to determine whether it constitutes a conspiracy to unreasonably restrain trade: the 'per se rule' analysis or the 'rule of reason' analysis.

In the sports context, however, due to its unique nature and characteristics, courts have generally withheld from ruling that an agreement is a 'per se' violation of the Sherman Act. The sports business is a unique enterprise: "[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[80] If a federal court cannot find that an agreement is illegal 'per se,' it will turn to a 'rule of reason' analysis to determine if it violates federal antitrust laws.

The 'rule of reason' analysis focuses on the state of competition with, as compared to without, the relevant agreement.[81] The

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[74] *See Overview*, NCAA (Feb. 16, 2021), https://www.ncaa.org/sports/2021/2/ 16/overview.aspx [https://perma.cc/LN2K-62QN].

[75] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[76] *See Id.* at 55-64.

[77] *Id.* at 58.

[78] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988).

[79] Bell & Laskin, *supra* note 71, at 360.

[80] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984).

[81] Nat'l Soc'y of Pro. Eng'rs. v. U.S., 435 U.S. 679, 692 (1978).

question is whether the agreement is anticompetitive by "increasing the ability or incentive profitably to raise prices above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."82 Under a 'rule of reason' analysis, however, courts can consider evidence that the alleged anticompetitive agreement may increase economic efficiency and competitiveness and, therefore, does not constitute a violation of the Sherman Act.83 In other words, the pro-competitive components of an agreement can outweigh the anticompetitive components; thus, the agreement is not a violation of the antitrust laws.

For a court to determine that the NCAA's athletic scholarship rules are anticompetitive under a 'rule-of-reason' analysis, a party must show that before the NCAA introduced athletic scholarships in 1956, the student-athletes, and equally colleges and universities, had significant autonomy to determine if, and by which means of compensation, an athlete would participate. Financial incentives offered to student-athletes were "responsive to competitive conditions and consumer demand." 84 As stated previously, potential college athletes could 'test the market' for the most competitive offer from a college's athletic department. Therefore, the argument is that the student-athlete scholarship restrictions are anticompetitive because, in a purely competitive market, an athlete could negotiate with a college or university and possibly receive something of a higher value than that of the scholarship itself.

The scholarship restriction also limits the ability of NCAA member institutions to negotiate and enter into scholarship or other compensation arrangements of their own choosing. This is because at the same time that a student-athlete is bound by the NCAA rules regarding scholarship restriction, so are all member colleges and universities. "Where liberal scholarship rules once saw universities compete with one another to promise student-athletes tuition sufficient to last them through four years of college, a span of time sufficient to earn an undergraduate degree, those same universities have since agreed to no longer compete in that manner."85 A school wanting to attract athletes with additional compensation above that of the traditional student-athlete scholarship could not do so, even if the school could possibly out-compete a rival university that did

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[82] U.S. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2 (Apr. 2000).

[83] *Pro. Eng'rs,* 435 U.S. at 687-89.

[84] *Bd. of Regents*, 468 U.S. at 121.

[85] Gibson, *supra* note 36 at 237.

not offer such an option. The anticompetitive consequences of the scholarship rules are obvious because student-athletes, together with NCAA member colleges and universities, are prevented from entering into agreements that both parties might prefer. This interference with the 'setting of prices' by free market forces is strongly disfavored by well-established antitrust doctrine.86

In addition, an investigation into the reasons as to why the NCAA introduced additional scholarship restrictions in the late 1960s and early 1970s—to shift control from the student-athletes to the athletic departments and coaches—would assist in persuading a court that all scholarship restrictions are presumptively anticompetitive. Therefore, based upon the fact that the NCAA's student-athlete scholarship rule interferes with the setting of a market price by free market forces, together with the NCAA's motives behind its implementation of such rules, a student-athlete can persuasively argue that the anticompetitive effect of the NCAA's rules is sufficient to justify an antitrust violation.

However, even if a federal court agrees and finds that the student-athlete has made a prima facie case that the NCAA's scholarship rules have anticompetitive effects, this does not automatically mean the NCAA has violated federal antitrust laws. In actuality, the NCAA can show a pro-competitive rationale for the reason behind implementing and enforcing its scholarship rules. It can do such by showing that the scholarship restrictions enhance competition and have pro-competitive effects that outweigh any anticompetitive components.

The NCAA will justify the scholarship rule by setting forth two arguments: (1) that student-athlete scholarship system promotes 'competitive balance,' and (2) preserves amateurism in college athletics. These two justifications have been offered up in almost every antitrust case where the NCAA has been a defendant.87 The NCAA's first defense is that its scholarship rule provides for 'competitive balance' at the collegiate level and is, therefore, pro-competitive because the duration and quantity of athletic scholarships ensure that schools with more resources cannot out-compete those of fewer means.88 In essence, the NCAA has a duty "to ensure competitive equity between member institutions in order to produce a marketable product."89

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[86] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 169 (1940).
[87] *Bd. of Regents*, 468 U.S. at 117-18.
[88] *Id.* at 117-20.
[89] Law v. NCAA, 134 F.3d 1010, 1023-24 (10th Cir. 1998).

The flaw in the NCAA's argument is, prior to its enactment of the scholarship system in 1956, various forms of student-athlete compensation were the norm. As stated supra, student-athletes from the 1800s forward received prize money, intangible benefits, and other forms of direct financial compensation to compete on behalf of a college or university. Additionally, in the *NCAA v. Board of Regents* decision, the Supreme Court noted, without referring specifically to scholarship rules, that the NCAA's attempts to restrict intermember competition in aid of encouraging parity had been "strikingly unsuccessful".90 In Board of Regents, the Supreme Court observed the NCAA's attempt to enhance competitiveness has, for the most part, failed, and that there was a history of financial incentives being offered to student-athletes before the NCAA adopted its student-athlete scholarship program. Therefore, an argument could be made that competitive balance in college sport would be better served if a free and open market existed wherein an athlete can pursue his or her education while also receiving a 'pecuniary' amount equivalent to his or her athletic talent.

Regarding the NCAA's second argument that the student-athlete scholarship is proper because it allows it and its member institutions to continue with their long-standing commitment to the concept of amateurism in college athletics, federal courts previously adhered to the view that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."91 Furthermore, courts have recognized the NCAA's pro-competitive efforts boost the popularity of college sports by preserving its unique amateur character.92

Conversely, federal courts have also stated, even in rulings favorable to the NCAA, that it is not exempt from antitrust scrutiny.93 Some federal courts have held that most NCAA rules are protective of amateurism and, thus, safe from commercially-oriented agreements with which the Sherman Act is concerned, while others have stated that financial assistance to students is a commercial transaction.94 In fact, the court in *In re NCAA I-A Walk-On Football Players Litigation*95 drew a distinction between NCAA rules addressing student-athlete eligibility and the rule

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[90] *Bd. of Regents*, 468 U.S. at 109-10.

[91] *Id.* at 120.

[92] *Id.* at 102.

[93] *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

[94] United States v. Brown University, 5 F.3d 658, 668 (3rd Cir. 1993).

[95] In re NCAA I-A Walk-On Football Players Litigation, 398 F. Supp. 2d 1144 (W.D. Wash. Sept. 14, 2005).

implementing scholarship limitations.[96] The court noted NCAA rules imposing scholarship restrictions, while certainly not advancing amateurism, might instead function to unlawfully contain costs, and could thereby become vulnerable to Sherman Act scrutiny.[97] This ruling, coupled with decisions in *O'Bannon v. the NCAA* and *Alston v. the NCAA*, both of which attacked the NCAA's longstanding concepts of 'amateurism' and the 'student-athlete' on antitrust grounds, may have set the stage for a federal court to find that the NCAA's student-athlete scholarship system and compensation rules are a violation of federal law.

In the O'Bannon case, Ed O'Bannon became aware that an EA Sports videogame's number 31 'player avatar' representing his 1995 UCLA men's basketball team not only resembled him, but also shared the same jersey number, a similar skin tone, a similar height and weight, and played the same position.[98] Believing the NCAA engaged in illegal and exploitative practices through its selling of his image and likeness to EA Sports, Mr. O'Bannon filed a federal antitrust and right of publicity lawsuit against both the NCAA and the video game company.[99]

The NCAA, citing *NCAA v. Board of Regents*, defended itself against the federal antitrust claims by arguing that its long-standing definition of the 'student-athlete' shielded it from any liability,[100] and that the strict price cap it placed on a college player's value (the cost of the student-athletes scholarship) was necessary to maintain competitive balance throughout its member institutions.[101] In previous litigation concerning antitrust issues, when the NCAA mentioned the term 'student-athlete,' that predictably ended any arguments about compensation above the value of the scholarship. Nevertheless, in O'Bannon, the district court announced the NCAA needed to prove how its current student-athlete scholarship rules "actually contribute to the integration of education and athletics,"[102] stating that the NCAA "cannot…just tautologically

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[96] *Id.* at 1148-51.

[97] *Id.*

[98] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir., 2015).

[99] Romano, *supra* note 3 at 41.

[100] *See,* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

[101] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

[102] Kevin Trahan, *Explaining the NCAA v. O'Bannon College Athletics Case*, VOX (June 2, 2014, 2:40 PM), https://www.vox.com/2014/6/2/5772266/explaining-the-ncaa-v-obannon-college-athletics-case [https://perma.cc/K63A-28GN].

argue that not paying the players is necessary to preserve the principle that the players are unpaid."[103]

In its decision, the district court rejected the NCAA's 'longstanding commitment to amateurism' as an acceptable defense against antitrust liability, finding instead that the NCAA's definition of amateurism "is 'malleable,' 'changing frequently over time' and in 'significant and contradictory ways.'" [104] The U.S. Appeals Court for the Ninth Circuit, agreeing in part, found that the NCAA is not above antitrust law and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules.[105]

While the O'Bannon court's ruling on its face does not allow for a student-athlete to be compensated above the value of a student-athlete scholarship, or for what has been termed 'pay to play,' it does provide an important departure from prior federal court holdings that protected the NCAA from antitrust liability.[106] This departure opens the door for future litigants to argue that the NCAA's rule that a student-athlete cannot be compensated above the value of a student-athlete scholarship does indeed violate federal antitrust laws.[107]

The second Supreme Court lawsuit testing the NCAA's longstanding adherence to the concept of the 'student-athlete' was *NCAA v. Alston*.[108] In Alston, current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball filed a class action federal antitrust lawsuit against the NCAA and eleven Division I conferences challenging the "current, interconnected set of NCAA rules that limit the compensation that they may receive in exchange for their athletic services."[109]

The NCAA again attempted to persuade the federal courts that the Board of Regents finding that "the NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" [110] was applicable, arguing that the uniqueness of its product and the status of student-athletes as amateurs, requires antitrust deference if not total immunity.[111] Not persuaded, the U.S. Supreme Court in a unanimous decision upheld the U.S. Court of Appeals for the Ninth Circuit's ruling which found the NCAA

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[103] *Id.*

[104] O'Bannon v. NCAA, 802 F.3d 1049, 1058 (9th Cir., 2015).

[105] *Id.* at 1079.

[106] Romano, *supra* note 3 at 43.

[107] *Id.*

[108] NCAA v. Alston, 141 S. Ct. 2141, 2141 (2021).

[109] *Id.* at 2151.

[110] *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

[111] *Alston*, 141 S. Ct. at 2144, 2152.

violated federal antitrust law by placing limits on student-athletes' educational-related compensation, specifically violating Section 1 of the Sherman Act which prohibits any "contract, combination, or conspiracy in restraint of trade or commerce."[112]

Justice Gorsuch, writing the majority opinion, stated that the Court's decision was based on the fact that the business of college sports has changed considerably since the 1984 Board of Regents case and that, over the decades, the NCAA has become a sprawling enterprise consisting of approximately 1,100 colleges and universities.[113] Justice Gorsuch remarked that the NCAA's broadcasting rights fees to March Madness[114] alone had grown from $16 million in 1984 to $1.1 billion in 2016.[115] The Court also noted that the broadcasting fees for the FBS College Football Playoff series are worth approximately $470 million annually for the NCAA and its member institutions and that, in addition, the Division I conferences earn substantial revenue from regular season games.[116] As an example, Justice Gorsuch highlighted that the Southeastern Conference "made more than $409 million in revenues from television contracts in 2017, with its total conference revenues exceeding $650 million that year."[117]

But just as troubling as the total revenue the NCAA and its member institutions generate, the Court noted, was how this money was being spent. Justice Gorsuch underscored this detail by recognizing that while the NCAA limits student-athletes'

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[112] 15 U.S.C. § 1 (2012).

[113] *Alston*, 141 S. Ct. at 2150.

[114] *See* In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp 3d 1058, n.20 (N.D. Cal. 2019). On April 22, 2010, the National Collegiate Athletic Association (NCAA) reached a fourteen-year agreement, worth $10.8 billion (approximately $770 million annually), with CBS and Turner Broadcasting System wherein the two media companies received joint broadcasting rights to the NCAA Division I Men's Basketball Tournament known as March Madness. In April of 2016, the NCAA and CBS/Turner extended their agreement for an additional eight years, through 2032, while increasing the payment from CBS/Turner to the NCAA by an additional $8.8 billion, averaging now more than one billion dollars per year.

[115] *Alston*, 141 S. Ct. at 2158 (citing *In re* NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1077 (N.D. Cal. 2019)).

[116] *Id.* at 2150 (quoting *In re* NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019); *see also* Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J. (Nov. 21, 2012), https://www.wsj.com [https://perma.cc/CT4D-CU3V].

[117] *Alston*, 141 S. Ct. at 2150–51; *see also* Rachel Bachman, *supra* note 116.

compensation to that of the value of a scholarship, those who run 'this enterprise' profit significantly. 118 In his opinion, Justice Gorsuch noted the NCAA's President, Mark Emmert, earns nearly $4 million per year, commissioners of the top college conferences earn between $2 and $5 million, college athletic directors average more than $1 million annually, and the annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million.119

Justice Kavanaugh, in a concurring opinion, was critical of the NCAA's century-long argument that compensation restrictions are necessary to separate amateurs from professionals, stating, "Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product."120 He continued, commenting that "nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate . . . The NCAA is not above the law."121

As a result of the continued commercialization of college athletics and the increased revenue it generates, the U.S. Supreme Court in Alston determined that the NCAA can no longer mandate its member schools to limit athletic scholarships to that of tuition, fees, room, board, books, and other expenses up to the value of the full cost of attendance.122 Now, the Supreme Court concluded, the NCAA must allow its member institutions to reimburse student-athletes for expenses pertaining to other education-related benefits such as computers, equipment, and other tangible items not included in the cost of attendance calculation.123

The significance of Alston is that for future cases involving both the NCAA and federal antitrust laws, since the NCAA has become a massive, powerful, and as some would argue, ruthless commercial 'enterprise,' it will no longer receive the special judicial dispensation on issues concerning student-athlete compensation that it had previously.124 In addition, even with its limited holding,

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[118] *See Alston*, 141 S. Ct. at 2151.

[119] *Id.*; *See* Brief for Players Association of the National Football League et al. as Amici Curiae Supporting Respondents at 17, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512, 20-520).

[120] Alston, 141 S. Ct. at 2168.

[121] *Id.* at 2169.

[122] *Id.* at 2165–66.

[123] *Id.*

[124] Michael McCann, *Supreme Court Rules Unanimously Against the NCAA in Alston Case*, SPORTICO (June 21, 2021, 10:29 AM),

Alston will serve as the 'catalyst for change' that litigants will argue to further dismantle the NCAA's views concerning the 'student-athlete.'125

IV. THE CONCLUSION

The NCAA's argument that its athletic scholarship rules maintain that a student-athlete is a student first and an athlete second and, therefore, cannot be treated or compensated on the same level as that of a professional is flawed. In reality, rather than promoting either the concept of the 'student-athlete' or 'amateurism,' the NCAA's scholarship mandate only increases the level of control that coaches and athletic directors have over athletes. To say that the mandate fosters and protects amateurism is a conjured up rationale with no basis in fact.[126] The rule-of-reason analysis suggests, rather persuasively, that the scholarship mandate NCAA member schools have agreed upon is a conspiracy to unreasonably restrain interstate commerce. In addition, its anticompetitive components are not outweighed by the pro-competitive argument put forth by the NCAA, so said agreement violates Section 1 of the Sherman Act.

Over the years, social commentators have struggled to find the proper analogy for the current collusive college athletics market. Civil Rights historian, Taylor Branch, commented that the NCAA has "an unmistakable whiff of the plantation" since it is easy to see inequity in the level of control that a school exerts over its athletes and the unequal division of the value of their labor.[127] However, economic competition is the great protector of the disadvantaged. History teaches us that the defenders of the reserve clause and college sports—beneficiaries of unjust systems—have great skill in developing rhetoric to defend their injustice. But history also teaches us that if there is economic competition, there is economic justice. Therefore, as long as the NCAA continues to play a role in intercollegiate sports, its rules will face scrutiny under antitrust laws and, one day, a federal court may well find that the student-athletic

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https://www.sportico.com/law/analysis/2021/supreme-court-rules-unanimously-against-ncaa-in-alston-case-1234632182/ [perma.cc/FZ8V-EN6F].

125 *Id.*

126 Yasser, *supra* note 39, at 998.

127 Taylor Branch, *The Shame of College Sports*, ATL. MAG. (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [perma.cc/GWZ8-4KX7].

scholarship "restricts rather than enhances intercollegiate athletics in the Nation's life."[128]

[128] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

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FIXING AUTOMATED COPYRIGHT SCREENING OF CLASSICAL MUSIC

COURTNEY FERRY*

CONTENTS

*Courtney Ferry is a J.D. Candidate for the Class of 2023 at the Sandra Day O'Connor College of Law, Arizona State University and the Executive Managing Editor for the Arizona State Sports and Entertainment Law Journal. Passionate about classical music, she has received a Bachelor's in Music Performance for viola at Barrett, The Honors College, Arizona State University. Special thanks to Dr. Trevor Reed and Professor Jon Kappes for their guidance and mentorship, and to my fiancé Andrew for his constant support.

INTRODUCTION

Imagine beginning a live stream of your own performance of a piece of classical music. After the stream begins, you notice your audience numbers begin to fall rapidly. Then, the streaming service says your content has been taken down for copyright infringement. However, your performance is entirely your own, and the musical work being performed has been in public domain for decades. There is no copyright claim to the public domain. Clearly, what has occurred is not due to infringement. Unfortunately, this is exactly what happened to chamber music organization Camerata Pacifica.[1] Despite efforts to resolve the issue, these false copyright flags are a common occurrence, so much so that they began to preface certain streams with a warning to the audience.[2]

Automated copyright screening systems created to monitor content for copyright infringement are incorrectly taking down recordings and digital performances of classical music. These systems simply do not understand classical music, let alone the legality of having multiple recordings of the same publicly accessible piece.[3] Automated systems, such as YouTube's Content ID, are not sophisticated enough for consistent analysis.[4] They create unnecessary barriers for classical musicians, orchestras, and music professors trying to share legal recordings or performances. Video streaming and social media companies have taken over copyright regulation to supplant the Digital Millennium Copyright

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[1] Michael Andor Brodeur, *Copyright Bots and Classical Musicians Are Fighting Online. The Bots Are Winning.*, WASH. POST (May 21, 2020, 8:00 AM), https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html [https://perma.cc/6ZJG-A5TJ].

[2] *Id.*

[3] *See A Strange Scourge for the Classical Music Industry: Copyright Bots*, THE HUSTLE (May 26, 2020), https://thehustle.co/05262020-classical-music-copywrite-bots/ [https://perma.cc/44V9-P675].

[4] *See generally* Brian Leary, *Safe Harbor Startups: Liability Rulemaking Under the DMCA*, 87 N.Y.U. L. REV. 1135 (2012).

Act ("DMCA").[5] These efforts impermissibly encroach on the public domain. In a copyright infringement suit, the burden of proving infringement is on the plaintiff.[6] Why is the burden on the "defendant" online?

The United States Copyright Office has admitted the way section 512 of the Copyright Act is currently being implemented is not in sync with the DMCA's original intent.[7] A provision of the DMCA, titled Limitations on Liability Relating to Material Online, created a safe harbor for service providers, like YouTube, from copyright infringement. Once an Online Service Provider ("OSP") receives notice of allegedly infringing content on its site, it must take down the material to receive safe harbor.[8] Automated systems supplement this requirement by independently policing their sites. This is where issues have arisen regarding classical music.

This Note addresses how the DMCA's implementation and supplement by OSPs is negatively affecting the classical music industry. Part I discusses copyright law in relation to music and sound recordings, and the DMCA's framework for copyright law in an increasingly digital society.[9] Part II describes how OSPs have implemented and gone beyond the safe harbor provisions in the DMCA with automated copyright screening tools. Part III discusses classical music interpretation and argues that classical music recordings are impermissibly affected by the screening systems in the DMCA age. Part IV looks at the burden this places on classical musicians, and Part V presents potential solutions.

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[5] *See* 17 U.S.C. § 512; Margaret Harding McGill, *Copyright Office: System for Pulling Content Offline Isn't Working*, AXIOS (May 21, 2020), https://www.axios.com/2020/05/21/copyright-office-system-for-pulling-content-offline-isnt-working [https://perma.cc/8XDG-J56A].

[6] *Copyright Infringement*, JUSTIA, (Oct. 2022), https://www.justia.com/intellectual-property/copyright/infringement/ [https://perma.cc/WNA5-WHE5]

[7] *Section 512 Study*, U.S. COPYRIGHT OFFICE (May 21, 2020), https://www.copyright.gov/policy/section512/ [https://perma.cc/4L9U-XGXA].

[8] 17 U.S.C. § 512(c); *DMCA Safe Harbor*, COPYRIGHT ALL., https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-safe-harbor/ [https://perma.cc/G667-D6R3].

[9] 17 U.S.C. § 512; *Digital Millennium Copyright Act*, AM. LIBR. ASS'N (Jan. 24, 2019), https://www.ala.org/advocacy/copyright/dmca [https://perma.cc/UB8H-63JF].

I. THE DIGITAL MILLENNIUM COPYRIGHT ACT LAID THE FOUNDATION FOR ONLINE COPYRIGHT REGULATION.

Copyright law grants certain rights to the authors of original creative works for a limited time.[10] The current United States Copyright Act grants five exclusive rights for life plus 70 years for sole-authored works created after 1978.[11] There are some extensively litigated exceptions to copyright rights found in the Act, including fair use.[12] Books, music, paintings, architecture, and even computer software may be eligible for copyright as long as they are original, independent creations, containing a minimal degree of creativity.[13]

The 1976 Copyright Act officially recognized and incorporated post-1972 sound recordings into copyright protection.[14] 2019's Music Modernization Act extended these rights to pre-1972 sound recordings.[15] However, section 114(b) places a limit on the rights of sound recordings.[16] Sound recording copyright rights are unique.

The DMCA was passed in 1998[17] and was an attempt by Congress to balance technological development and protection of copyright holders from online infringement.[18] One of the main provisions is known as the "safe harbor" provision for service providers that allows them to regulate copyright on their sites.[19]

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[10] Will Montague, *Copyright Law: The Basics*, KY. BENCH & BAR, Mar. 1, 2018, at 14.

[11] The rights included in Section 106 of the copyright act are: reproduction, creation of derivative works, distribution, public performance, public display. *See* 17 U.S.C. § 106. For types of authorship other than sole-authored works created after 1978, see 17 U.S.C. §§ 301-305.

[12] *See* 17 U.S.C. §§ 107-122.

[13] Some courts have said that only works specified in the statute are eligible, others follow the Feist doctrine for originality and creativity but allow other works not enumerated to be included. *See* 17 U.S.C. § 102(a); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[14] 17 U.S.C. § 102(a)(7); Tim Schaefer, *Sampling and the De Minimis Exception: Balancing the Competing Interests of Copyright Law in Sound Recordings*, 55 TULSA L. REV. 339, 343 (2020).

[15] 17 U.S.C. § 1401.

[16] *Id.* § 114(b).

[17] *See* 17 U.S.C. § 512; *See* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C).

[18] Trevor Cloak, *The Digital Titanic: The Sinking of YouTube.com in the DMCA's Safe Harbor*, 60 VAND. L. REV. 1559, 1569 (2007).

[19] This paper focuses on Online Service Providers. 17 U.S.C. § 512.

A. COPYRIGHT LAW AND ITS RIGHTS AND LIMITS

Copyright law includes a broad variety of works that are creative and fixed in a tangible medium.[20] The foundation for copyright law lies in Article I, Section 8 of the United States Constitution, which grants Congress the power to "promote the Progress of Science … by securing for limited Times to Authors … the exclusive Right to their respective Writings."[21] Copyright law, like other types of intellectual property, seeks to benefit both the public and the owners of the works. The public gets the benefit of consuming the creative works, while the owner gets a limited monopoly over the work.[22] At the end of the copyright's term, the work enters the public domain.[23] This creates a dual purpose: allowing public access while incentivizing new creative works.[24]

Today, authors are granted exclusive rights immediately upon creation. Those rights are enumerated in section 106 of the Copyright Act.[25] All authors have the exclusive right to reproduce their work, create derivative works, and distribute the work and its copies.[26] Certain works, such as musical works and paintings, have the additional rights of public performance and public display, respectively.[27] Sound recording authors have the right to publicly perform their work via digital audio transmission.[28] These rights

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[20] Copyright law covers "original works of authorship fixed in any tangible medium of expression" in the following categories of works: literary, musical, dramatic, pantomimes and choreographic, pictorial, graphical, sculptural, audiovisual, sound recordings, and architectural works. *See* 17 U.S.C. § 102(a); Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 223 (1966).

[21] U.S. CONST. art. I, § 8 cl. 8.

[22] *Purpose of Copyright Law*, S. ILL. UNIV. MORRIS LIBR., https://lib.siu.edu/copyright/module-01/purpose-of-copyright-law.php [https://perma.cc/TM4L-7T54].

[23] *See* Eldred v. Ashcroft, 537 U.S. 186, 227 (2003) (Stevens, dissenting).

[24] The overriding purpose of copyright is for the public, not the owners of the works. *Id.*

[25] The performance right only applies to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works," and the public display right only applies to "literary musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work." 17 U.S.C. § 106.

[26] *Id.*

[27] *Id.*

[28] *Id.*

can be enforced against anyone trying to exercise one of the rights without permission, with limitations.

To put this into perspective, imagine I am the owner of both a musical composition and a sound recording of that composition. I now have two separate copyright rights—one in the musical composition, and one in the sound recording. These copyrights act alone. Performing my composition live exercises a right only over the composition, while playing my recording exercises a right over both the composition and the recording.

Infringement occurs when a person exercises one of the exclusive rights without permission.[29] A copyright owner must have registered their work with the United States Copyright Office prior to filing a federal suit.[30] Demonstrating infringement means, in most cases, proving: (1) the defendant had access to the work, and (2) the works at issue are substantially similar.[31] Circumstantial evidence, such as showing wide dissemination, can be used to prove access if direct evidence cannot be obtained.[32] If access is shown, the court will then decide if the works are substantially similar. The substantial similarity doctrine varies among United States circuit courts, most notably in the Second and Ninth Circuits.[33] Generally speaking, courts look at the copyrighted elements of a work and decide if a viewer would deem them similar.[34]

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[29] *Id.* § 501.

[30] *Id.* § 411.

[31] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1054 (9th Cir. 2020).

[32] Henry J. Lanzalottie, *Is Proof of Access Still Required – Proving Copyright Infringement Using the Strikingly Similar Doctrine: An Analysis of the Fourth Circuit's Decision in Bouchat v. Baltimore Ravens, Inc.*, 9 Jeffrey S. Moorad Sports L.J. 97, 103-04 (2002). (The defendant can show independent creation, which is a full defense if they can prove that they created the work entirely independent from the copyrighted work). *See also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[33] These two circuits are most common courts for copyright/entertainment law issues, so knowing how these courts interpret the law can be informative. Andrew L. Deutsch, *Substantial Similarity in Copyright: It Matters Where You Sue*, DLA PIPER: PUBL'NS (Dec. 22, 2020), https://www.lexology.com/library/detail.aspx?g=528665d2-b546-44ea-83f6-017135d81cd4 [https://perma.cc/AV9U-GWNZ].

[34] The Ninth Circuit test asks (1) are the protectable elements of the works so similar such that a reasonable jury could find substantial similarity, and (2) whether the ordinary observer, viewing the works as a whole, finds the works to be substantially similar. The Second Circuit test asks whether the overall look and feel of the works is the same. The "protectible elements" of the work are the parts which meet the originality

In the hypothetical, imagine I have now been granted copyright registrations for both copyrights. Later, I see a video online of someone I have never met playing a song similar to mine. I contact my lawyer and file a lawsuit. Suppose I only want to enforce my copyright on the composition. To win my case, I would need to show that this person had listened to or seen my work, and that their work sounds substantially similar because they copied it. Access here could be that we have a mutual friend on social media who shared my work on their page prior to when this person wrote the similar work. Then, I could submit evidence showing the works have many similar aspects, like tempo, melody, and key. Barring any copyright defenses, I may win my case.

However, the law limits the power of copyright owners to serve the public purpose of copyright. The public does not want copyright owners to have an unlimited monopoly. Thus, the law retains for the public certain rights to balance everyone's interests.[35] Sections 107–122 of the Copyright Act describe the various limitations on the exclusive rights.[36] Fair use is arguably the most known public right.

Fair use is considered a full defense in court.[37] Reproductions of works may be considered fair use for uses such as "criticism, comment, news reporting, teaching [], scholarship, or research."[38] To decide whether an "infringement" constitutes fair use, the statute provides the following factors courts must consider:

> (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;

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requirement. Facts, ideas, processes, etc. are never copyrightable, but can incorporated into a protectable work. 17 U.S.C. § 102(b); Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020); Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright's Substantial Similarity Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 581-82 (2019); *see* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).

[35] *Purpose of Copyright Law*, *supra* note 22.

[36] Limitations other than fair use include reproduction by libraries, cable transmissions, exemption of certain performances, and more. The limitations for specific rights for sound recordings will be described later. 17 U.S.C. §§ 107-122.

[37] 17 U.S.C. § 107.

[38] Fair use also encapsulates the other exclusive rights as applicable. *Id.*

> (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.[39]

The doctrine outlined in the statute is to be interpreted flexibly, supporting the principle that copyright law exists to incentivize creativity and the creation of new works for the public.[40]

In the hypothetical, suppose now a party asserts fair use as a defense. They claim they used my musical composition to create a new piece, called an étude, that acts as a practice guide to help teach the techniques necessary to play my work.[41] Going through the fair use factors, we can see that the purpose of the work, to teach, is different from my performance piece. But both works are musical compositions. To serve the work's educational purpose, they only took what was necessary from my work, about 10 percent. Finally, the work may help the market for my piece because purchasers of the étude likely want it so they can learn my work. Likely, their work is fair use and, therefore, is not infringement.

B. RIGHTS TO SOUND RECORDING OWNERS

The Sound Recording Amendment of 1971, Digital Performance Right in Sound Recordings Act of 1995, and The Orrin G. Hatch–Bob Goodlatte Music Modernization Act enumerate specific provisions about the exclusive rights and limitations on sound recordings.[42] Sound recordings are different from many

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[39] *Id.*

[40] *See* U.S. CONST. art. I, § 8, cl. 8; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (explaining that the fair use doctrine fosters creativity because it avoids a rigid application of the statutes).

[41] *See* The Editors of Encyclopaedia Britannica, *Étude*, BRITANNICA (Apr. 19, 2007), https://www.britannica.com/art/etude-music [https://perma.cc/6BKE-K23N].

[42] Note that for purposes of this note, we are not talking about audiovisual works. Audiovisual works have different rights than sound recordings. In a movie for example, the audio of the soundtrack is not its own copyrightable sound recording because it is considered part of the audiovisual work. *See* Schaefer, *supra* note 14.

other copyrightable works in that they can contain two copyrights: one in the recording and another in the underlying music.[43]

Section 114 of the Copyright Act provides a significant limit on the rights of sound recording owners. Specifically, section 114(a) excludes the right of public performance and, instead, section 106(6) grants the right to public performance via digital audio transmission.[44] Section 114(b) limits the right of reproduction and derivative works only to copies that "directly or indirectly recapture the actual sounds fixed in the recording" and "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds," even if the sounds imitate the original recording.[45]

Due to these limitations, copyright infringement of sound recordings works differently. Courts have found that substantial similarity does not apply to sound recordings because infringement of it requires use of the actual recording.[46] For classical music in the public domain, infringement cases are relatively simple because all that must be proved is whether the alleged infringer used the exact sounds from the copyrighted recording. It is more complex when the composition's copyright is also at issue. Further, fair use should apply to sound recordings.[47]

Applying these rights and limitations to the hypothetical, imagine a new scenario where the person has created a false performance, syncing my audio to their video. I have a claim for infringement of the sound recording because they mechanically

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[43] A good illustration of these rights is Taylor Swift. She is re-recording all her past albums because while she owns the rights to the lyrics and underlying musical composition, she does not own the master recordings of her old albums. To regain control of her discography, she is taking advantage of §114(b), which gives her the right to re-record the music without infringement. Cody King, *In Case You're Wondering, This is Why Taylor Swift is Re-Recording Her Old Hits*, KSAT.COM (Nov. 12, 2021, 3:32 PM), https://www.ksat.com/news/local/2021/11/12/in-case-youre-wondering-this-is-why-taylor-swift-is-re-recording-her-old-hits/ [https://perma.cc/7UC7-DJDZ].

[44] This does not necessarily include streaming, which is generally considered a public performance under §106(4). 17 U.S.C. §§ 106(4), 106(6), 114(a).

[45] *Id.* § 114(b).

[46] Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 657 (6th Cir. 2004).

[47] *See* Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 82-92 (2d Cir. 2014) (finding that Bloomberg's use of Swatch's entire sound recording was fair use).

reproduced my recording and digitally transmitted it as a performance on social media. Now assume that the person released the video for commercial purposes on YouTube and falsely claims that the audio is their own. Fair use is unlikely to apply here, and I have a good case for infringement.

Limitations on the rights of sound recordings are part of the reason that covers of songs exist all over the internet. People creating the cover audio or video know that they are copying the underlying musical work[48] but are creating their own audio, thus not infringing on the sound recording.

C. DIGITAL MILLENNIUM COPYRIGHT ACT SAFE HARBOR PROVISIONS

The DMCA attempts to address our ever-growing digital world by alleviating the worries of OSPs and copyright owners regarding copyright infringement on the internet.[49] Enacted in 1998, the DMCA implemented two treaties, made bypass software for internet security systems illegal, and, most importantly here, updated copyright law as it relates to content on the internet.[50]

As the internet grew, many musicians became increasingly frustrated with the unauthorized distribution of their music on the internet.[51] OSPs were targeted in infringement suits because tracking down internet infringers can be extremely difficult.[52] The DMCA sought to give copyright owners the protection they desired while limiting liability towards OSPs for infringing content on their sites.[53] OSPs can still be held liable if they knowingly allow

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[48] There are some legal requirements like compulsory licenses for posting 100% legal song covers, but the average person generally relies on the automated copyright systems to act as a pseudo-license. Chris Robley, *Posting Cover Songs on YouTube: Music Video Licensing Explained*, DIY MUSICIAN (July 19, 2017), https://diymusician.cdbaby.com/music-rights/posting-cover-songs-on-youtube-music-licensing-law-explained/ [https://perma.cc/3WYZ-EA7R].

[49] Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL J. ART, TECH. & INTELL. PROP. L. 397, 397-98 (1999).

[50] *Id.* at 398-99.

[51] This was mainly because the infringing distributions affected their royalties on the music.

[52] David Balaban, *Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998*, 7 UCLA ENT. L. REV. 311, 318 (2000).

[53] *Id.* at 312.

infringing works to remain on their services.[54] However, if OSPs fulfill certain conditions, they can avoid liability.

In an effort to draw a compromise between the interests of OSPs and sound recording owners, the DMCA does not require OSPs to police their sites but does not necessarily punish them for doing so.[55] Many OSPs have chosen to police their sites because they can avoid many of the formalities in the DMCA while still fulfilling the criteria for the "safe harbor."[56] There are a few different versions of the safe harbor, but this paper focuses on section 512(c) of the Copyright Act.[57] Generally, the OSPs must meet the definition of "service provider," which in section 512(c) is "a provider of online services or network access, or the operator of facilities therefor."[58] This encompasses a wide range of providers, including social media companies like YouTube.[59] The law also requires OSPs to have a policy for dealing with repeat infringers.[60] Finally, an OSP cannot interfere with standard technical measures used by copyright owners to combat infringement.[61]

Section 512(c) has additional criteria. As long as the service provider does not have actual or constructive knowledge of the infringing material, a service provider will not be liable for

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[54] *See id.* at 317 (Clearly, OSPs are able to make money off of infringing content and without an incentive to do anything about it they would be likely to leave it there).

[55] *Id.*

[56] *Id.*

[57] The other three safe harbors relate to OSPs which include, providing transitory digital network communications, intermediate and temporary storage of material, and suggesting or linking its users to infringing material or activity. Typically, all of these require that the OSP not have actual knowledge of the infringement. 17 U.S.C. § 512(a), (b), and (d).

[58] 17 U.S.C. § 512(k)(1)(B).

[59] *See* Kevin J. Hickey, *Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview*, CONG. RESEARCH SERVICE (Mar. 30, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11478, [https://perma.cc/XML5-CQHR].

[60] 17 U.S.C. § 512(i)(1)(A).

[61] *Id.*§ 512(i)(1)(B).

infringement of its users.[62] If they do have actual knowledge or awareness, they must work to remove or disable access to the material.[63] Further, an OSP cannot have a direct financial benefit for infringing activity that they have the legal right and ability to control.[64] The last requirement for section 512(c) is the OSP must have an agent to receive notifications of infringement.[65] When an OSP receives valid notice through their agent, thereby obtaining knowledge, it must fulfill its takedown duties to receive the benefit of the safe harbor.[66]

Courts have applied the DMCA in various situations.[67] In the audiovisual work context, the case *Viacom Int'l, Inc. v. YouTube, Inc.* is informative.[68] *Viacom* held that the knowledge requirement means knowledge of the specific instances at issue in the case, and willful blindness can demonstrate knowledge.[69] The Ninth Circuit in *Lenz v. Universal Music Corp.* held that to issue a takedown notice under the DMCA, the copyright holder must first determine whether fair use applies.[70] In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the Supreme Court held that safe harbor does not apply to OSPs that encourage infringement.[71]

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[62] General knowledge of infringing activity on a platform is not sufficient, it must instead by knowledge of specific acts of infringement. Constructive knowledge means that an OSP is actively avoiding obtaining actual knowledge. *Id.* § 512(c); Hickey, *supra* note 59; *see generally* Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 NYU J. LEGIS. & PUB. POL'Y 99 (2005).

[63] 17 U.S.C. § 512(c).

[64] The control must be more than just the ability to remove content. Hickey, *supra* note 59.

[65] *Id.*; 17 U.S.C. § 512(c)(2).

[66] In the instance that someone submits a sham takedown notice, the OSP need not comply. If they do, the user whose content is affected can submit a counter notice. *See* Andrepont, *supra* note 49, at 416.

[67] *See, e.g.*, Mavrix Photographs, LLC v. LiveJournal, Inc., 873 F.3d 1045 (9th Cir. 2017) (discussing posts of copyrighted photographs).

[68] Audio that accompanies a video or film is part of the audiovisual work and not a separate sound recording if the audio is created for the film or video. *See* 17 U.S.C. §§ 101, 102(a).

[69] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012).

[70] Lenz v. Universal Music Corp., 815 F.3d 1145, 1153 (9th Cir. 2016).

[71] MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005); Leron Solomon, *Fair Users or Content Abusers: The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 247 (2015).

As we will see, OSPs avoid the DMCA formalities by policing their sites themselves. Because infringement of a sound recording only applies to the mechanical reproduction of the work, copyright owners may have trouble identifying whether content posted online actually does that. However, because of the automated systems on OSP sites, OSPs do not delve into this inquiry and instead directly compare the works based on similarity, an analysis that does not consider the mechanics.

II. AUTOMATED SCREENING SYSTEMS ARE USED BY OSPS TO DETECT COPYRIGHT INFRINGEMENT AND GO BEYOND DMCA SAFE HARBOR REQUIREMENTS.

Arguably, the DMCA granted a lot of power to internet companies, which became more noticeable with the rise of social media companies.[72] The safe harbor provisions allow, to an extent, for online regulation of copyright separate from the judiciary.[73] In response to this grant of power, companies sought to bypass DMCA formalities (while remaining in safe harbor) by creating automated copyright screening systems that identify infringing content without formal takedowns.[74] These systems work well in some instances but not for copyrighted sound recordings that use music from the public domain. Notably, the system fails to account for fair use. YouTube's Content ID is a good example of how the software works to flag infringement and to see its problems.

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[72] *See* Dave Hauser, *The DMCA and the Privatization of Copyright*, 30 HASTINGS COMMC'N. & ENT. L.J. 339, 344 (2008).

[73] *Id.*

[74] *See* Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*, ELECTRONIC FRONTIER FOUNDATION (Dec. 10, 2020), https://www.eff.org [https://perma.cc/PQK9-7Z7V].

A. AUTOMATED SCREENING SYSTEMS ARE NOT INFALLIBLE, AND CONTENT OWNERS HAVE TROUBLE FIGHTING BACK.[75]

An automated software program detecting copyright infringement sounds like a great idea from both a business owner's and a copyright owner's standpoint. OSPs can fulfill their DMCA safe harbor requirements yet go beyond the DMCA and police their sites to avoid many formal takedown notices. If a copyright owner still wants to do a formal takedown, nothing is stopping them, but automated screening can protect their works without having to search endlessly to find infringing material themselves. However, it is inevitable that some of the content flagged by the automated system will not be infringing content.

The systems compare works to screen for infringement using a database of "fingerprints." [76] YouTube's Content ID database creates fingerprints when the copyright owner uploads video, audio, and metadata to the database.[77] An audio fingerprint is generally defined as "a condensed digital summary of an audio signal."[78] The copyright owner can submit as much or as little of their work as they want the database to hold. The fingerprint is thus the data to which new content is compared.[79]

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[75] Lauren D. Shinn, *Youtube's Content ID as a Case Study of Private Copyright Enforcement Systems*, 43 AIPLA Q.J. 359, 370-72, 381-83 (2015); *see Dispute a Content ID Claim*, YOUTUBE, https://support.google.com/youtube/answer/2797454 [https://perma.cc/D6EW-DEE6]; Julia Alexander, *YouTubers and Record Labels are Fighting, and Record Labels Keep Winning*, THE VERGE (May 24, 2019, 7:37 AM), https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover [https://perma.cc/GPG3-6VQM].

[76] *Content Id – A Quick Guide for YouTube Creators*, TUNETANK: BLOG, https://tunetank.com/blog/content-id-for-youtube-creators/ [https://perma.cc/54JQ-ETS5].

[77] *See* Trendacosta, *supra* note 74; Krishna Rao Vijayanagar, *Automatic Content Recognition (ACR) – How Does it Work?*, OTTVERSE (Nov. 24, 2020), https://ottverse.com [https://perma.cc/7T6K-PE3B].

[78] Brais, *Audio Fingerprinting – How We Identify Songs*, BMAT MUSIC INNOVATORS: BLOG (Mar. 1, 2018), https://www.bmat.com/audio-fingerprinting-songs-identification/ [https://perma.cc/XRK3-W7AE].

[79] *See generally* Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Media Creation*, 24 UCLA ENT. L. REV. 51, 61-64 (2017).

When someone uploads a work to create their fingerprint, they also choose what happens when a match is found.[80] The rightsholder can choose to (1) block the video entirely, (2) monetize the video either exclusively for themselves or share with the user that posted the content, or (3) gain access to the viewer statistics of the flagged content.[81] Every time someone uploads a video to YouTube, it is compared to all the fingerprints. If there is a match, the copyright owner does not have to take any action, and their choice will go into effect automatically.[82]

Content ID grants copyright owners more power. YouTube only allows certain owners to use the system. YouTube's Help site says copyright owners must have exclusive rights to their submission and sign an agreement affirming exclusive ownership of the work.[83] However, a problem is not everyone who applies for and is approved for Content ID is legitimate, so multiple claims can come from different "owners" for the same audio or video.[84]

No one expects perfection from an automated system that uses an algorithm.[85] A system like this cannot be perfect. But YouTube could, for example, clean up the fingerprint database and eliminate duplicates or illegitimate claims.[86] Though perfection is not expected, the system is both overinclusive and underinclusive.

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[80] Trendacosta, *supra* note 74.

[81] *How Content ID Works*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797370?hl= [https://perma.cc/U6NS-L3QW].

[82] One user, Scott Smitelli, decided to test YouTube's system by uploading videos with various alterations to see how similar it needed to be to pass the fingerprinting algorithm. Out of the 82 videos he posted, 35 had Content ID flags. He found that at the time of his experiment, changing speed or pitch by slightly more than 5% would allow it to bypass the system. In 2010, he updated that he was unsure if these methods still worked, but also that his YouTube account had been removed without notice. Scott Smitelli, *Fun with YouTube's Audio Content ID System*, SCOTTSMITELLI.COM, https://www.scottsmitelli.com/articles/youtube-audio-content-id (Apr. 21, 2010) [https://perma.cc/2DT5-Z28Z].

[83] *Qualify for Content ID*, YOUTUBE HELP, https://support.google.com/youtube/answer/1311402 [https://perma.cc/AV48-ALKQ].

[84] Trendacosta, *supra* note 74.

[85] Jonathan Bailey, *YouTube's Copyright Insanity*, PLAGIARISM TODAY (Jan. 10, 2019), https://www.plagiarismtoday.com/2019/01/10/youtubes-copyright-insanity/ [https://perma.cc/YRD3-BS8D].

[86] *See id.*

Some scholars claim that false flags occur more often than legitimate ones due to the system's overzealousness, trolling by those who falsely claim ownership of content in the database, or human error.[87] As we will see, false flags also occur on works that legally use copyrighted or public domain content.[88]

When Content ID flags a post, the user can either accept it and take the automatic penalty or fight it.[89] Though YouTube says users are successful 60% of the time when disputing claims, less than 1% of claims are disputed.[90] Users have trouble fighting against these claims because they are often smaller entities than those claiming copyright ownership. Individual content holders posting online have less information on the system, less information on their rights, and may not have the money or power to fight it.[91] They may also be worried that a claim will turn into a formal takedown notice that counts as a strike on the website.[92] A more simple answer is many content holders do not know that their work or post is permitted by law and accept the flag. This is likely a larger problem than YouTube claims because it does not know whether a flag is false until a content holder disputes a claim.[93]

Audible Magic is another system, which for the purpose of this paper, is virtually identical to Content ID. Cases involving Audible Magic show that these systems hold weight in court, despite their problems. More websites use Audible Magic than Content ID,

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[87] Shinn, *supra* note 75, at 372-73; Riyad Febrian Anwar, *10 YEARS OF YOUTUBE CONTENT-ID: Causing False Positive Since 2007*, LINKEDIN (June 29, 2017), https://www.linkedin.com/pulse/10-years-youtube-content-id-causing-false-positive-since-anwar/ [https://perma.cc/C3UL-RN8F].

[88] Shinn, *supra* note 75, at 375.

[89] *See* Trendacosta, *supra* note 74.

[90] The low number of disputes does not mean that the other 99% of claims are correct, since many just do not bother disputing. *Id.*

[91] *See* Solomon, *supra* note 71, at 256-57.

[92] YouTube keeps track of the strikes and bans users that obtain 3 strikes. *Copyright Strike Basics*, YOUTUBE HELP, https://support.google.com/youtube/answer/2814000?hl=en [https://perma.cc/NY4W-7GWU].

[93] Additionally, the DMCA attempted to mitigate these concerns through § 512(f), which provides a cause of action for those whose content has been falsely removed. Due to either lack of knowledge or cost, this provision is ineffective because it is rarely used. 17 U.S.C. § 512(f); Asha Velay, *Using the First Fair Use Factor to Screen DMCA Takedowns*, 17 VA. SPORTS & ENT. L.J. 54, 56 (2017).

explaining its appearance in court.[94] Courts have accepted Audible Magic's software as evidence of substantial similarity.[95] Its method of analysis has been relied upon and is considered a widely recognized technology in the industry.[96] In *UMG Recordings, Inc. v. Grande Communications Networks, LLC*, the court recognized that evidence of similarity using data from Audible Magic raised a genuine issue of fact.[97] In *UMG Recordings, Inc. v. Escape Media Group, Inc.*, another court held that Audible Magic can be used to show copyright infringement of sound recordings.[98] This ruling makes Audible Magic's software seem very advanced because infringement of sound recordings involves mechanical copying and not a re-creation. However, the claim in *Escape Media* was for violation of the right to digital performance, not reproduction, where the bar in proving mechanical reproduction may have been higher.[99]

B. ERRORS IN THE SYSTEM OCCUR FREQUENTLY FOR FAILURE TO CONSIDER CONTEXT.

The systems at issue here are effective at matching patterns. An enormous problem facing them, however, is they are not capable of looking at the context of a match.[100] As discussed above, someone partaking in fair use is statutorily permitted to copy a work without infringing on the copyright owner's exclusive rights.[101] Even to the companies with this software, it is known that the technology does not understand this type of context.[102] Admittedly, how could it?

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[94] *See Identification*, AUDIBLE MAGIC, https://www.audiblemagic.com/identification/ [https://perma.cc/MT2Q-CMGW].

[95] UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC, 384 F. Supp. 3d 743, 762 (W.D. Tex. 2019).

[96] *Id.*

[97] *Id.* at 763.

[98] We can likely extend this to Content ID as well, if/when it comes up in court. UMG Recordings, Inc. v. Escape Media Grp., Inc., No. 11 Civ. 8407, 2014 WL 5089743 at 20 (S.D.N.Y. Sept. 29, 2014).

[99] *Id.* at 19.

[100] Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, 27 MICH. TECH. L. REV. 299, 317-18 (2021).

[101] *See* 17 U.S.C. § 107.

[102] An Audible Magic representative for Facebook admitted that its technology cannot understand context. Samuelson, supra note 100, at 318. YouTube's Help site expressly states that the system does not consider fair use. *Frequently Asked Questions About Fair Use*, YOUTUBE HELP, https://support.google.com [https://perma.cc/6YE3-UDEL**]**.

Fair use is a fact-based analysis and requires complex reasoning that this technology cannot yet do.

However, it is impermissible that so many false flags go undetected due to this fatal flaw. In our modern age, content creators and artists rely on social media to spread their works and should be able to do so without the system falsely flagging their content. Not everyone can be successful without the use of social media. Content creators may not even know that fair use exists, but that is not an excuse for allowing indefinite censorship of their content if they do not dispute the flag. Copyright law is supposed to incentivize creativity for the benefit of the public, and Congress retained some rights for the public to further this purpose.[103] Automated screening systems should not nullify these interests.[104]

These systems are also unable to recognize what is in the public domain and free to use by everyone. Some people may wrongly claim ownership of a work in public domain and be granted a Content ID fingerprint that prevents others from utilizing the work. When a copyright owner makes a new sound recording of a public domain work, the owner only has rights in that particular sound recording. However, the system may flag other people's recordings because they sound similar.[105] Thus, when someone else uses a public domain work independently from another user, it will be flagged even though the work is not infringing. False flags are the crux of the issue for classical music.

Overall, section 512(c) is the most widely used safe harbor but is problematic in practice. Companies are going beyond what the statute requires to retain safe harbor, and the flaws are obvious.[106] Section 512(c) has been extended to a wide category of service providers and may be more broadly construed than intended.[107] The overexertion of section 512(c) is helpful for those seeking to misuse Content ID to incite wrongful takedowns.[108] Various courts have touched on potential problems with the DMCA, such as making fair

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[103] *See generally* U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 107.

[104] Another issue is that many content creators nowadays live off of the revenue made from their videos. Content ID flags takes away their lifeline before they can even dispute it.

[105] Shinn, *supra* note 75, at 373.

[106] Bailey, *supra* note 85.

[107] *See Section 512 Study*, *supra* note 7.

[108] Velay, *supra* note 93, at 60-62.

use more difficult.[109] The United States Copyright Office has also stated that courts have been too favorable to OSPs in their efforts to construe the safe harbor provisions.[110]

III. WESTERN CLASSICAL MUSIC RECORDINGS TEND TO BE SIMILAR.

There is a vast database of classical music in the public domain, spanning multiple centuries. 111 Musicians all over the world perform this music regularly, both publicly and for recordings.112 This practice creates many different sound recordings for the same piece of music, each of which can be copyrighted.113 Norms in classical music, such as short articulation for Baroque period music,114 and more intense emotion for Romantic era music,115

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[109] *See, e.g.*, Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008); U.S. v. Elcom Ltd., 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002) (explaining that the DMCA has not eliminated fair use but that it may become more difficult). *See also* Green v. U.S. DOJ, 392 F. Supp. 3d 68, 87-88 (D.D.C. 2019) (holding that plaintiff failed to state overbreadth claim of the DMCA provisions).

[110] *Section 512 of Title 17: A Report of the Register of Copyrights*, U.S. COPYRIGHT OFFICE 1, 197 (May 21, 2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

[111] IMSLP is a public domain database for music with over 214,000 works and over 77,000 recordings. IMSLP PETRUCCI MUSIC LIBR., https://imslp.org/wiki/Main_Page (last visited Mar. 6, 2023).

[112] Orchestras often repeat classic public domain pieces. The New York Philharmonic has performed Beethoven's 3rd Symphony at least 377 times according to their performance archives. *Search the Performance History*, NEW YORK PHILHARMONIC, https://archives.nyphil.org/performancehistory/#program (last visited Mar. 6, 2023) (search in "By Composer/Work" for Beethoven and Eroica, then click the title of the symphony for the full list of performances).

[113] Maria Scheid, *When Does Music Enter the Public Domain in the United States?*, OHIO ST. UNIV.: UNIV. LIBRS. (July 27. 2020), https://library.osu.edu/site/publicdomain/2020/07/27/when-does-music-enter-the-public-domain-in-the-united-states/ [https://perma.cc/74M5-GKMM].

[114] Robert Donington, *On Interpreting Early Music*, 28 MUSIC & LETTERS 223, 223-24 (1947).

[115] *The Romantic Period of Music*, STRING OVATION (Mar. 20, 2019), https://www.connollymusic.com/stringovation/the-romantic-period-of-music [https://perma.cc/2CAQ-3DPD].

inform how we interpret and play each work.[116] These norms inform hundreds of performances of the same work by different people. The result? A broad range of recordings that sound similar to the untrained ear.

A. THERE IS A VAST DATABASE OF CLASSICAL MUSIC IN THE PUBLIC DOMAIN THAT ANYONE IS ALLOWED TO USE.

What we consider to be the "classical" music genre consists of works spanning hundreds of years split into eras, like the Baroque period, Classical era, and Romantic era. The composers of many works have been deceased for a long time and, therefore, no longer have any copyright claim to their musical compositions. Clearly, no one has copyright ownership in Beethoven's 5th Symphony. Thus, many of these works live in the public domain and are freely available for people to use, copy, and perform.[117] If a work is not in the public domain, the purchase of sheet music alone does not grant someone the rights to perform or record the work because it is only a legal copy. Licenses are still required for performance or recording.[118]

The legality of performing copyrighted works can be complicated. For example, creating a recording of a Philip Glass piano composition requires contacting Lisa Dean, Glass' Royalties and Licensing specialist, to obtain recording rights.[119] This is necessary even if the sheet music has been purchased. University students typically bypass this issue because their recitals usually fall into an exception.[120] Colleges and universities also typically have licensing agreements with performing rights organizations that

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[116] *See* Bret Pimentel, *What Does it Mean to "Interpret" Music?*, BRETPIMENTEL.COM (Apr. 9, 2019), https://bretpimentel.com/what-does-it-mean-to-interpret-music/ (explaining music interpretation is like analyzing raw data, and that the composer or time period may be informative) [https://perma.cc/S785-7RSM].

[117] *See* IMSLP, *supra* note 111.

[118] Rental agreements for sheet music may give you additional rights, so it is important to know ahead of time what you are getting. Lawrence G. Townsend, *I Bought the Sheet Music. Can I Perform the Song in Public?*, LGT: BLOG (Feb. 22, 2018), https://www.lgt-law.com/blog/2018/02/i-bought-the-sheet-music-can-i-perform-the-song-in-public/ [https://perma.cc/RQ78-W87F].

[119] *Contact*, PHILIPGLASS.COM, https://philipglass.com/contact/ [https://perma.cc/4N2A-JE6N].

[120] If these performances are published online, they may still run into Content ID issues. *See* 17 U.S.C. § 110.

allow the school and students to perform any music they wish.[121] On the other hand, a Beethoven piano sonata can be found online and performed or recorded an infinite number of times for free.

As stated earlier, musical compositions and sound recordings represent separate copyrightable works.[122] This means a musical composition found in the public domain may be recorded into a new copyrightable sound recording, even though there is no copyright to the underlying piece of music.[123] As the founder of Shockwave-Sound eloquently stated, "You play it—you own it."[124] This allows for multiple recordings of the same pieces of music. No one must ask for permission to record their own version, but they do need to ask for permission to use a specific recording.[125]

Allowing multiple recordings of the same piece of classical music makes sense. A person may not have exerted creativity in writing the composition, but they still exercise creativity in performing with their personal touch. Analogizing to popular music, think of the recording of a popular pop song. If one searches for a song for on YouTube, someone's cover of that song will appear. While similar, it sounds different because they have put their own style and voice into it. Cover singers need permission to use the

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[121] *See, e.g.*, *Music License for College University*, BMI, https://www.bmi.com/forms/licensing/gl/58.pdf [https://perma.cc/YC9H-M2MH]; *ASCAP Music License Agreements and Reporting Forms*, ASCAP, https://www.ascap.com/music-users/licensefinder [https://perma.cc/UF9B-V9D5].

[122] This is different from the music accompanying an audiovisual work, which is considered part of the audiovisual work and is not itself separately copyrightable unless it was not made for the video.

[123] For example, a violinist's recording of the Tchaikovsky Violin Concerto would be copyrightable, but Tchaikovsky died in 1893 and there is clearly no more copyright ownership in the musical composition. *See* HILARY HAHN, ROYAL LIVERPOOL PHILHARMONIC ORCHESTRA & VASILY PETRENKO, HIGDON/TCHAIKOVSKY: VIOLIN CONCERTOS (Deutsche Grammophon 2010).

[124] Bjorn Lynne, *Copyrights in Public Domain Music and Classical Music*, SHOCKWAVE SOUND: BLOG (May 14, 2010), https://www.shockwave-sound.com/blog/copyrights-in-public-domain-music-and/ [https://perma.cc/YE8H-MZ36].

[125] *Id.*

underlying composition, but they own their recording because it is their creative work.[126]

This idea is similar in classical music, albeit not nearly as transparent. Due to the nature of classical music having themes and norms to follow, it is not as flexible as creating a cover version of a pop song. In many cases, only trained musicians can differentiate between recordings of works. Further, someone may interpret a ritardando more expressively than another musician or may have an overall slower-faster tempo.[127] That being said, these differences do not detract from the prevailing factors—pitch, rhythm, style of composer, or time period—that lead to similar sounding recordings.[128]

B. MUSICIANS TEND TO INTERPRET PIECES SIMILARLY TO MAINTAIN HISTORICAL THEMES AND COMPOSER STYLES, LEADING TO SIMILAR SOUNDING RECORDINGS.

Musicians trained in Western classical music have more "instructions" given to them for a piece of music than a pop studio musician gets. Classical music performances begin with the underlying piece of music. The composer may have given—in addition to the key, rhythm, and pitches—instructions on dynamics, articulation, or other variations other than the notes on the staff. The composer writes the score to best memorialize what they intended the music to sound like, and the performer is the conduit through which that sound is created.[129] While performers may interpret details differently or disregard some instructions entirely, the effort to realize the composer's music is still there.[130]

Composers did not always notate every detail for a piece of music, due to the performer's deference to conventions of the time

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[126] That is not to say they would not have an infringement claim in the underlying composition, which they very well could if the cover artist does not acquire the proper licenses. *See* Kurt Dahl, *Legal Beat: Do You Need Permission to Upload a Cover Song to YouTube?*, DRUM! (Feb. 2017), https://drummagazine.com/legal-beat-do-you-need-permission-to-upload-a-cover-song-to-youtube/ [https://perma.cc/D7DR-GWGQ].

[127] *Compare* Yo-Yo Ma, *#SongsOfComfort: Bach Cello Suite No. 3 "Sarabande"*, YOUTUBE (Nov. 26, 2020), https://www.youtube.com [https://perma.cc/828F-J8EN], *with* Aparté Music, *Bach: Sarabande, Cello Suite Nr. 3 | Ophélie Gaillard*, YOUTUBE (May 18, 2011), https://www.youtube.com [https://perma.cc/854V-SHSY].

[128] *Id.*

[129] *See* Terence J. O'Grady, *Interpretive Freedom and the Composer-Performer Relationship*, 14 J. AESTHETIC EDUC. 55, 56 (1980).

[130] *See id.*

period.[131] We still know this today, and performances of works tend to sound a certain way not only because of the composer's style, but also because we fill in the gaps with informed techniques.[132] Some musical eras, such as the Baroque period, allowed for performers to embellish works however they saw fit, leading to more variation.[133] There is less concern with this than with music from other eras, where this variation is not present. Performers may feel a "prima facie obligation" to the composer that prevents them from interpreting details in a way contrary to the composer's desire.[134]

Through my experiences as a musician and collegiate level music student, I have witnessed the interpretive norms firsthand. Professors taught and coached us on how they and their former teachers would play. Reflecting on my viola playing, I clearly emulate my professor's style, technique, and interpretations. I was also told to prepare by listening to recordings or videos of professional performances of a piece that I was playing for interpretive ideas. A more specific example I remember is my symphony orchestra conductor telling us to play Brahms' Symphony No. 2 a certain way because that was Brahms' style. Our performance of that symphony would not infringe on anyone's sound recording rights, yet it will still sound similar because of the way we interpreted the music.

High-level similarities in techniques and interpretations are present no matter where you are in the world, even if minor variation occurs based on location.[135] These similarities become obvious when hundreds of pieces have been played thousands of times.[136] There are common strategies for interpretation, like starting with the

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[131] *Id.* at 59.

[132] *Id.*

[133] *Id.*

[134] *Id.*; *See* Aron Edidin, *Playing Bach His Way: Historical Authenticity, Personal Authenticity, and the Performance of Classical Music*, 32 J. AESTHETIC EDUC. 79, 90 (1998).

[135] *See How Music Theory Works in Different Countries*, CLASSIC FM (Mar. 21, 2018, 5:30 PM), https://www.classicfm.com/discover-music/music-theory/music-theory-different-countries/ [https://perma.cc/6DAH-J9BJ]; Roger Mantie, *A Comparison of "Popular Music Pedagogy" Discourses*, 61 J. RESEARCH IN MUSIC EDUC. 334 (2013).

[136] *See* StringOvation Team, *Music Interpretation Across the Centuries*, STRING OVATION (Nov. 14, 2019), https://www.connollymusic.com/stringovation/music-interpretation-acros-the-centuries [https://perma.cc/7MH3-5PV2].

composer's style and then moving to the score itself.[137] Another common thread in classical music are musical family trees. Teachers all over the world can trace their musical lineage to a few historical prodigies, who have informed the way music is taught.[138]

Regardless of any idiosyncrasies among recordings, classical music is a creature of habit. We cannot get around the fact that essentially all the recordings of a piece play the same pitches and rhythm and are the same general tempo. Pitch and timbre are not going to change much between performances.[139]

Looking back to Camerata Pacifica, they owned the sound recording that was removed from the livestream.[140] They did not intend to "copy" the recording from the fingerprint, it just sounded similar and thus was flagged.[141] Slight variation in interpretation may have been present, but it was not enough to prevent automatic detection because it was the same piece as the fingerprint.

C. DUE TO THE SIMILARITIES IN RECORDINGS, AUTOMATED COPYRIGHT SYSTEMS ARE NOT EFFECTIVE.

As previously stated, automated copyright screening systems are more prone to issues when it comes to classical music. When we hear two different recordings of the same piece of music, we know

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[137] Robert T. Kelley, *Musical Interpretation Strategies*, ROBERTKELLEYPHD.COM (July 2001), http://robertkelleyphd.com/home/teaching/keyboard/musical-interpretation-strategies/ [https://perma.cc/EJV9-8ZC4].

[138] I have personally done it myself as a project during my undergraduate studies tracing my undergraduate professor Nancy Buck, back to Arcangelo Corelli, a baroque violinist. John Lindsey is an American violinist, who has published his teaching family tree on his website. This is a great example, as many, including mine (even though I play viola) look similar. John Lindsey, *Teaching Family Tree*, VIOLINJOHNLINDSEY.COM, https://www.violinjohnlindsey.com/teaching-family-tree-1 [https://perma.cc/2H3F-CTF6].

[139] Timbre is defined as the variation that "allows us to distinguish notes of identical pitch, intensity, and duration that are produced by different types of instruments." Peter Nicolas, *Harmonizing Music Theory and Music Law*, SSRN (Mar. 15, 2022), https://ssrn.com/abstract=3919339 **[**https://perma.cc/8L64-6WV8**];** Alexander Lerch et al., *Music Performance Analysis: A Survey*, PROC. OF THE 20TH ISMIR CONF., DELFT, NETH. (Nov. 2019), https://archives.ismir.net/ismir2019/paper/000002.pdf **[**https://perma.cc/3SC9-FENA].

[140] Brodeur, *supra* note 1.

[141] To be clear, the system's flag essentially claims they copied the copyrighted sound recording mechanically, which we know was not the case. *Id.*

they are the same piece just by listening to them. There may be some differences, but since the overall effect is nearly identical, and Content ID is pattern-based, the recordings risk being flagged.[142]

Further, the differences among sound recordings may not matter for this kind of system. Content ID could flag the whole thing, or just a few seconds. It is impossible to predict how much content will be flagged.[143] Even different musical interpretations will inevitably have some similarity that could lead to a false flag. The fact is that non-infringing recordings are falsely flagged, even though the only "copying" is the choice of music.[144] It is illogical for a snippet of the recording to be infringing since performers play the piece without stopping.[145] Some sound mixing may be involved, but splicing together recordings is difficult unless they were made by the same person at the same place.[146]

On the other hand, assuming two recordings are "substantially similar," it simply is not infringement. It just does not matter whether they are similar, there is no mechanical reproduction of the sound recording. The issue is that both recordings originate from the same piece of music, and the system cannot handle it. Musicians are explicitly allowed, and encouraged, to copyright their own recording of a work found in the public domain, regardless of whether their recordings sound similar to another.[147] Why do the systems not pick up the intricate differences between recordings? Perhaps it is because only niche genres like classical music have these characteristics and the system was not built with them in mind.

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[142] Articulation defines by symbols in the music how a particular note or combination of notes will sound. Conductors will often interpret the music their own way, but it's still essentially the same music, it just affects how musical critics see the performance. *See* James Bennett II, *Explainer: Why Conductors Change Classical Music Scores*, WQXR: BLOG (Jun. 21, 2017), https://www.wqxr.org/story/why-conductors-change-classical-music-scores/ [https://perma.cc/W67K-Q5HD].

[143] *See* Trendacosta, *supra* note 74.

[144] Brodeur, *supra* note 1.

[145] For example, an orchestra playing for a live audience on a streaming service is not going to insert another orchestra's audio during their performance. Orchestra's generally do not "lip sync" like some pop artists may.

[146] Jett Galindo, *Classical Music: Recording, Mixing, and Mastering Fundamentals*, IZOTOPE (Jul. 3, 2019), https://www.izotope.com/en/learn/classical-music-recording-mixing-and-mastering-fundamentals.html **[**https://perma.cc/SSZ2-ZGQB**].**

[147] *See* 17 U.S.C. § 114.

Camerata Pacifica is not alone in vocalizing these problems.[148] A Baltimore pianist, Michael Sheppard, also had a performance taken down because of a match with a Naxos-owned recording, stating this was not the first occurrence.[149] German music professor Ulrich Kaiser, in an effort to create an online catalog of public domain recordings, posted content on YouTube for his students.[150] Within minutes, his videos were flagged for infringement. No infringement occurred, but the system could not determine that these were different from other recordings and in the public domain.[151] These are not isolated incidents. Though musicians all over the world run into this issue, they are not powerful enough to fight back or are desensitized to it and choose not to speak up.

IV. FALSE FLAGGING OF CLASSICAL MUSIC RECORDINGS PLACES INDUSTRY BARRIERS THAT NEED TO BE ADDRESSED.

As we have seen, these flags are frequent and take time to dispute.[152] In the interim of these disputes, musicians can lose their audiences and revenues because the OSP may stop them from posting until a dispute is resolved.[153] The time and money wasted on false flags of classical music should not be considered a

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[148] Kansas State University Library has a Research Guide on content flagged for copyright infringement and states that false flags *most often* occur with classical music. *Using Copyrighted and Library Content*, KAN. STATE UNIV. LIBR., https://guides.lib.k-state.edu **[**https://perma.cc/QW7V-DPX5].

[149] Brodeur, *supra* note 1.

[150] Karl Bode, *This Music Theory Professor Just Showed How Stupid and Broken Copyright Filters Are*, VICE (Aug. 30, 2018, 7:00 AM), https://www.vice.com/en/article/xwkbad/this-music-theory-professor-just-showed-how-stupid-and-broken-copyright-filters-are [https://perma.cc/R6RR-ZEQZ].

[151] *Id.*

[152] Adam Eric Berkowitz, *Classical Musicians v. Copyright Bots: How Libraries Can Aid in the Fight*, INFO. TECH. & LIBR., June 2022 at 1, 4, https://ejournals.bc.edu/index.php/ital/article/view/14027 [https://perma.cc/U8ZA-UZZX].

[153] During the COVID-19 pandemic in particular, musicians may be relying on online "tip jars" to stay afloat. *Id.*

necessary evil. The classical music industry is still quite large[154] and should not be disproportionately affected by OSPs sidestepping the DMCA. The Copyright Act needs updating to address the inequitable treatment of classical musicians and to streamline disputes.

A. FLAGGING NON-INFRINGING VIDEOS PLACES UNNECESSARY BURDENS ON THE CONTENT HOLDER.

Due to the automated nature of these flags, it is up to the non-infringing content holder to dispute the false claim.[155] Smaller users may be too intimidated to dispute the claim or may not know their content is legal.[156] Because it also takes time to dispute a flag,[157] many content holders simply do not have the time to fight it. Instead, it is left as-is even if they know the flag is false.[158] Many musicians like Michael Sheppard accompany their content with virtual tip jars.[159] While some musicians have income outside of performing, the pandemic has increased use of virtual tips for performers due to cancelled gigs and concerts. This highlights the effect that erroneously demonetizing or blocking content can have on musicians trying to make a living.[160] Demonetizing exacerbates the issue when it lasts for the entire dispute proceeding.[161]

Classical musicians, and any other content holder practicing fair use, should not bear the burden of proving they did not infringe. The copyright owner, or supposed owner, should instead have to prove exactly what the content holder did to infringe, just like they would in court. To repeat the question posed at the beginning: the burden of proving infringement is on the plaintiff in court, why is this different online? The standard should not change, especially when the latter occurs outside of judicial scrutiny.

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[154] *See generally*, Maddy Shaw Roberts, *Research Shows Huge Surge in Millennials and Gen Zers Streaming Classical Music*, CLASSIC FM (Aug. 19, 2020, 10:28), https://www.classicfm.com/music-news/surge-millennial-gen-z-streaming-classical-music/ [https://perma.cc/4REX-2FLG].

[155] Trendacosta, *supra* note 74.

[156] Shinn, *supra* note 75, at 374.

[157] It took Camerata Pacifica more than six hours to get one of their streams released. While shorter than litigation, it is still lost views and potential revenue on a legal post. Brodeur, *supra* note 1.

[158] *Id.*

[159] I imagine this practice as online busking. Brodeur, *supra* note 1.

[160] *Id.*

[161] Shinn, *supra* note 75, at 374-75.

Additionally, this phenomenon goes against the policy reasons for copyright. If a private company blocks content for similarity that is legally not considered infringement, the public gains no benefit out of that. Only the OSPs and large record companies benefit from this practice. Copyright is protectable only to incentivize creativity and innovation so the public can benefit—authors receive benefits incidental to that purpose.[162] It was not made solely for the protection of copyright holders, let alone for the benefit of private companies. Yet currently, under the DMCA, companies are benefiting while the public is harmed.

V. POTENTIAL SOLUTIONS

Overall, the DMCA and systems like Content ID have been regarded as successful in many ways.[163] The issue is they do not seem to operate as successfully with classical music. Though it is true that copyright owners may benefit in some cases because the automated system catches infringing content without needing to look for it, this benefit is minimal when weighed against the negation of rights to content creators. Whether in classical music or not, the systems are not capable of accounting for context.[164] Finding a way to improve Content ID and similar systems begins with looking at ways to improve the DMCA provisions—perhaps creating requirements as to how OSPs should approach copyright screening.

It is important to keep in mind that the DMCA was created to promote the interests of copyright holders and limit the liability of OSPs.[165] Without the DMCA, there would be an overwhelming amount of infringing content online, and tracking every single direct infringer would be impossible. In many cases, it is not the OSPs' fault that infringing content is on their sites. However, the promotion of these interests can be improved. The DMCA does not tell companies like YouTube to implement a Content ID system to flag for infringement, they do so because they deem it better than

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[162] *See* Sherwin Siy, *Two Halves of the Copyright Bargain: Defining the Public Interest in Copyright*, 31 CARDOZO ARTS & ENT. L.J. 683, 684 (2013).

[163] *See* Samuelson, *supra* note 100.

[164] Lester, *supra* note 79, at 64; *see* Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: Youtube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 69 (2014-2015).

[165] *See* Katharine Trendacosta, *Reevaluating the DMCA 22 Years Later: Let's Think of the Users*, ELECTRONIC FRONTIER FOUNDATION (Feb. 12, 2020), https://www.eff.org/deeplinks/2020/02/reevaluating-dmca-22-years-later-lets-think-users [http://perma.cc/7CY9-WM4V].

the DMCA.[166] Congress could act on this problem by adjusting the criteria in section 512(c) to only apply when OSPs police their sites in a way that considers context, rather than exclusively considering comparison. The Act could be amended to accept automated copyright screening systems as the norm but require OSPs to better inform their uses about how it works and how to dispute claims. The Act could also provide guidelines for the dispute process so that no content holders are left accepting false flags.

Alternatively, it is feasible to create a modified system that uses some human involvement. Human review by OSPs could lessen the burden placed on classical music or other fair use content holders. One strategy could be utilizing the metadata of a post to identify classical music and send only that content to a human for manual review.[167] This would allow a (musically trained) person to review the flag for authenticity, mechanical reproduction, and to consider context. Anyone can do a quick internet search to see whether a piece of classical music is in the public domain. Then, they could consider whether the person took a copyrighted sound recording and mechanically reproduced it, then apply the fair use factors before making a final decision. This would eliminate many of the automated system's errors.

OSPs are also capable of creating a second database for public domain works. There is no reason why they could not keep the system they have now but send flagged videos through the second system to determine whether it is copyrighted material or if it is public domain. This would at least provide a secondary "check" on the flags and hopefully lessen the amount of falsely flagged classical music recordings. Alternatively, OSPs could better verify content that has been or is added to the fingerprint database.[168] Better screening of what gets put into the database could prevent duplicates and allow the algorithm to better see what is or is not copyrightable. The rightsholders may have put their work into the Content ID database not realizing they should not have. This contributes to the

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[166] 500 hours of content is uploaded to YouTube every minute. There is no conceivable way humans could possibly manage monitoring that. Maryam Mohsin, *10 YouTube Stats Every Marketer Should Know in 2021*, OBERLO: BLOG (Jan. 25, 2021), https://www.oberlo.com/blog/youtube-statistics [http://perma.cc/78TP-44Y2].

[167] *See* Shinn, *supra* note 75, at 389.

[168] A potential problem occurs with classical music sound recordings, as this may then prevent owners of sound recordings from getting their work uploaded to the Content ID database.

false flags, so cleaning up the number of fingerprints living in the system may be beneficial.[169]

Instead of creating a new database, OSPs could try to create another screening tool that secondarily screens flagged works. I imagine this working well where the fingerprint is only a sound recording, and mechanical reproduction is the threshold for infringement. The creation of a second system capable of analyzing works on a more detailed level may be able to pick up on the differences between sound recordings of classical music and determine whether the content is a mechanical reproduction of the copyrighted sound recording. This new counterpart could identify the intricate details found in individual interpretations of classical music rather than relying on a more generalized matching system.

Some people have suggested reducing the number of false flags by creating a minimum time threshold for what can be flagged.[170] Rather than allowing flags to be any length, they suggest Content ID be amended to disregard flags that are only a few seconds long. Because short flags are harder to assess and difficult to match accurately, this method would likely help eliminate clearly false flags.[171]

One final suggestion would be to enhance the dispute provisions of the automated systems. Rather than a "guilty until proven innocent" standard that Content ID currently uses,[172] they could flip the standard and require the copyright holder to directly prove ownership over the flagged content when the content creator disputes the claim. Taking it a step further, the DMCA could be amended to apply the *Lenz v. Universal Music Corp.* holding to not just copyright owners, but to OSPs as well. *Lenz* held that the copyright owner must consider fair use before submitting a takedown notice.[173] The holding could easily be expanded to consider context in general to incorporate public domain considerations. Applying this rule to OSPs and copyright owners would force them to forego automatic decision making, requiring them to take a second look at Content ID flags before blocking the content or otherwise reducing the rights of the content holder or, alternatively, send flags to the purported copyright holder for them to review. Rather than placing the burden on the defendant to prove

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[169] Bailey, *supra* note 85.

[170] *Id.*

[171] *Id.*

[172] Shinn, *supra* note 75, at 379.

[173] Lenz v. Universal Music Corp., 815 F.3d 1145, 1153 (9th Cir. 2016).

non-infringement, requiring the plaintiff to prove infringement would be more in line with today's legal requirements.

CONCLUSION

The DMCA is not in itself an evil to the copyright law of the United States or to classical music. The problem comes from how OSPs have reacted to it. OSPs have a clear and reasonable interest in limiting the liability of the users of their websites, but they are acting in such a way that places barriers on those users. Sound recording rights in the Copyright Act allow classical musicians to have a copyright in their recording of a work that exists in public domain. Hundreds of these recordings exist. The problem regarding Content ID is they all sound similar by virtue of being the same underlying piece of music. Content ID currently does not know how to handle this issue and is ineffective at allowing different musicians to post their own recordings and benefit from their copyrights in them. Automated copyright infringement screening is not likely to go away, but there are better ways for OSPs to utilize this system to be more inclusive of content that is otherwise at risk of false flags.

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REACHING THE OPPORTUNITY END-ZONE: USING § 1400Z TO FINANCE MODERN STADIUMS

ETHAN RANDECKER*

CONTENTS

*J.D. Candidate, Class of 2023, Sandra Day O'Connor College of Law, Arizona State University; Technology Editor, Arizona State Sports & Entertainment Law Journal. I would like to thank the SELJ staff for making this publication possible and Professor Erin Scharff for her guidance.

INTRODUCTION

As a result of the Tax Cuts and Jobs Act of 2017, a professional sports team owner can invest the proceeds from a sale of a capital asset to build a new stadium and mixed-use development in a distressed community and receive substantial tax benefits. 26 U.S.C. § 1400Z, covering "Opportunity Zones," creates such potential benefits.[1] Accordingly, if a taxpayer invests their proceeds subject to capital gains tax in a Qualified Opportunity Zone Fund, the taxpayer can defer their tax liability for the gains until 2026, earn a basis step-up for holding the investment for five years, and earn an additional step up for holding the investment for seven years.[2] A taxpayer can also pay no taxes on the opportunity zone investment's appreciation if the taxpayer holds the investment for ten years.[3] As a result of this provision, the tax benefits available to team owners who build their stadiums in opportunity zones are noteworthy. However, the positive impacts that stadium development in opportunity zones offers communities are even more significant.

Congress created opportunity zones to draw capital into distressed communities by encouraging investors to recognize their capital gains then invest them in opportunity zones. In return, Congress grants the investors tax benefits. While the federal government foregoes some tax revenue, it incentivizes investments in areas that investors may have overlooked to aid in economic growth.

Opportunity zones have earned their share of criticism, largely from having few requirements; but few requirements are part of what makes the incentive worthwhile. The legislation's flexibility encourages investors to provide various types of investments, large and small, that can meet a wide range of community needs.[4] For example, the legislation has led to "restoring a historic hotel in Selma, Alabama," "bringing a robotics startup from Silicon Valley to Baltimore," and brownfield remediation.[5]

The legislation harnesses a new source of capital: trillions in unrecognized capital gains that investors can direct into disadvantaged areas.[6] In fact, by 2020, opportunity zone incentives

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[1] 26 U.S.C. § 1400Z.

[2] *Id.* § 1400Z-2(b)(2)(B).

[3] *Id.* § 1400Z-2(c).

[4] KENAN FIKRI ET AL., ECON. INNOVATION GRP., OPPORTUNITY ZONES, STATE OF THE MARKETPLACE 6 (2021).

[5] *Id.* at 3, 6.

[6] *Id.* at 5; Patrick Lipaj, *Opportunity in Ohio: Rethinking Northeast Ohio's Opportunity Zones with Local Legislation*, 68 CLEV. ST. L. REV. 835, 843-44 (2020).

moved over $29 billion of equity capital into opportunity zones,[7] and private estimates suggest this number has grown by a factor of three or more since 2020.[8] By 2020, in a survey regarding state government officials' views on the overall impact of the opportunity zone tax incentive, positive responses outnumbered the negative twenty to one.[9]

One investment in particular that offers great potential to catalyze economic growth is the modern professional sports stadium. This Note analyzes why professional sports stadiums represent promising investments in opportunity zones, can generate economic revitalization, and warrant extending the legislation past its current expiration. In Part I, I explain how section 1400Z works, including the benefits it provides, how areas are designated as opportunity zones, and its legislative intent. I also consider skepticism about the effectiveness of opportunity zones on the grounds that they incentivize unfettered investments that may not benefit communities. Part II analyzes opportunity zone applicability to stadiums. Modern stadiums with mixed-use development represent positive opportunity zone investments because of their potential to benefit and revitalize the community[10] through economic growth. Part III addresses the potential for negative externalities from opportunity zone investments like stadiums, including how Congress, local and state governments, and federal agencies can tackle them. Some amendments to section 1400Z are warranted, specifically by mandating reporting and increasing requirements in designations. However, local, state, and federal governments can prevent negative outcomes that arise because of

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[7] U.S. GOV'T ACCOUNTABILITY OFF., OPPORTUNITY ZONES, CENSUS TRACT DESIGNATIONS, INVESTMENT ACTIVITIES, AND IRS CHALLENGES ENSURING TAXPAYER COMPLIANCE 36 (2021), https://www.gao.gov/assets/gao-22-104019.pdf [https://perma.cc/NJP2-QGYS] [hereinafter GAO REPORT].

[8] *GAO Evaluation of Early Opportunity Zones Activity Finds Promise, Need for Data*, ECON. INNOVATION GROUP (Nov. 10, 2021), https://eig.org/news/gao-evaluation-of-early-opportunity-zones-activity-finds-promise-need-for-data [https://perma.cc/Q8NK-NA4U].

[9] *Id.* After surveying officials from all 50 states, Washington D.C., and the five U.S. territories., and receiving 56 responses, 20 stated that the impacts were net positive, while only one stated that it was net negative. GAO REPORT, *supra* note 7. Ten respondents stated that the impacts were net neutral, five said no impact, and 20 said they were not sure.

[10] I use the term "community" to include the neighborhood, city, and region broadly. I address the distinction in the benefits that stadium investments provide each level of the community in Part II(B)(1)(a).

rapid economic growth from opportunity zone investments and maximize opportunity zone benefits to communities.

This Note concludes that Congress should extend the opportunity zone program and reject arguments for disqualifying stadiums because stadiums reflect the value that opportunity zone incentives can bring to communities. Opportunity zones encourage investors to unlock unrealized gains and flow them into disadvantaged areas, bringing capital to communities that investors have overlooked. Stadiums illustrate the advantages of opportunity zones and are a win for owners and communities.

I. OVERVIEW OF OPPORTUNITY ZONE

Through section 1400Z, Congress created substantial tax benefits for investors who invest in opportunity zones, and those benefits increase the longer the taxpayer holds their investment. Congress created such benefits to incentivize investment and spur economic growth in low-income areas. This Part provides an overview of opportunity zones including the benefits the tax incentive provides to investors, how communities gain opportunity zone status, and the legislation's congressional intent and history. This Part also points out that the investors and communities are running out of time to take advantage of the opportunity zone legislation because it is reaching its expiration and has yet to be extended. Lastly, this Part describes the criticism that the legislation faces.

A. BENEFITS

When a taxpayer invests capital gains from selling property in Qualified Opportunity Zone Funds ("QOF"), the taxpayer receives several tax benefits.[11] First, the taxpayer can defer paying tax on the invested gains until divestment from the QOF, or up until December 31, 2026.[12] Second, the taxpayer can increase basis in the investment by holding on to it for at least five years.[13] Initially, the taxpayer's basis in the investment is zero, reflecting the fact that the taxpayer has not paid taxes on the gains the taxpayer is investing.[14] If the taxpayer holds the investment for five years, basis increases by ten percent of the gains the taxpayer deferred.[15] Then, basis is increased by another five percent if the taxpayer holds the

[11] *See* 26 U.S.C. § 1400Z.
[12] *Id.* §1400Z-2(b)(1).
[13] *Id.* § 1400Z-2(b)(2)(B)(iii).
[14] *Id.* § 1400Z-2(b)(2)(B)(i).
[15] *Id.* § 1400Z-2(b)(2)(B)(iii).

investment for seven years.[16] When the taxpayer recognizes the gain at the end of 2026, basis in the investment is increased by the amount recognized.[17] If the taxpayer holds the investment for ten years, the basis in the property will be equal to its fair market value when it is sold, thus removing the gain on the appreciation in the QOF from taxation.[18]

For example, imagine Buffalo Bills owner Pegula Sports & Entertainment ("PSE") received $100 million in capital gains in 2018 from selling one of its businesses and then invested those gains in a QOF to build a new stadium and mixed-use development. As a result of this investment, PSE would not pay capital gains tax on that $100 million, but its basis in the new stadium would be $0. If PSE held on to the investment until 2024, basis in the project would increase to $10 million. In 2025, seven years after the investment, basis would increase to $15 million. Then, PSE would recognize a gain of $85,000,000 on December 31, 2026, and basis in the investment would increase to $100,000,000. However, if PSE holds on to the property until 2028, any gain beyond that will escape taxation at sale. Imagine the investment is worth $200,000,000 in 2028, basis will be adjusted to match that fair market value on sale.

B. EXPIRATION

But here is the catch. The legislation expires in 2026, and taxpayers cannot take advantage of the opportunity zone program after that year.[19] If a taxpayer invests gains in an opportunity zone, the taxpayer can defer taxation on the initial gains until 2026, and the Treasury Regulations make clear the advantage of the tax-free appreciation within the QOF continues.[20] However, the IRS also stated that 2026 is the last year that taxpayers can increase their basis by holding their investment for five or seven years.[21] Thus, 2021 was the last year to invest and benefit from the five-year, ten percent step-up in basis, and 2019 was the last year to benefit from the seven-year, additional five percent step-up in basis. A taxpayer could invest between 2022 and 2026, earn deferral to 2026, and

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[16] *Id.* § 1400Z-2(b)(2)(B)(iv).

[17] *Id.* § 1400Z-2(b)(2)(B)(ii).

[18] *Id.* § 1400Z-2(c).

[19] *Id.* § 1400Z-2(a)(2)(B).

[20] The regulations for § 1400Z-2 indicate that a taxpayer can recognize gains in 2026, keep holding the investment for ten years, then qualify for the ten-year benefit 26 C.F.R. § 1.1400Z2(c)-1(b)(i). Further, a taxpayer can qualify even if the opportunity zone ceases to exist, as long as they dispose the property before 2048. § 1.1400Z2(c)-1(c).

[21] T.D. 9889, 19 Treas. Dec. Int. Rev. 471 at 108 (2019).

eliminate tax liability if the taxpayer held the investment for ten years. However, investors' and communities' opportunities to mutually benefit from opportunity zones are fleeting and, with efforts in Congress to extend the programs making little progress, this may be the end of the controversial program.[22]

C. DESIGNATING OPPORTUNITY ZONES

States designate population census tracts as opportunity zones if such tracts meet the definition of low-income communities under 26 U.S.C. § 45D(e).[23] According to section 45D(e), a population census tract is a "low-income community" if its poverty rate is at least twenty percent.[24] Further, a tract within a metropolitan area is a low-income community under the statute if its median family income does not exceed eighty percent of the greater of the state's median family income or the metropolitan area's median family income.[25] Tracts not within metropolitan areas are low-income communities under the statute if the median family income does not exceed eighty percent of the state's median family income.[26]

There are a few limitations on the number of tracts that states can designate as opportunity zones.[27] States with 100 or more low-income communities can only designate twenty-five percent of such low-income communities as opportunity zones.[28] Additionally, five percent of the tracts states designate as opportunity zones may be tracts that are contiguous to low-income communities the state designates as an opportunity zone, although the tracts are not low-income communities themselves.[29]

To designate a tract as an opportunity zone, the chief executive officer of each state had to nominate the tract and notify the U.S.

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[22] *See* H.R. 970, 117th Cong. (2021) (introduced in February 2021); H.R. 4177, 117th Cong. (2021) (introduced in June 2021); H.R. 4608, 117th Cong. (2021) (introduced in July 2021); S. 4065, 117th Cong. (2021) (introduced in April 2022); H.R. 7467, 117th Cong. (2021) (introduced in April 2022). Each of the bills proposed to extend opportunity zones but have not made it out of Committee.

[23] 26 U.S.C. §§ 1400Z-1(a), (c)(1).

[24] 26 U.S.C. § 45D(e)(1).

[25] *Id.*

[26] *Id.*

[27] *See id.* § 45D(e)(2)-(5).

[28] States with less than 100 low-income communities may only designate 25 of such tracts as opportunity zones. 26 U.S.C. § 1400Z-1(d)(1). There is no limit to the number of low-income communities that officials can designate as opportunity zones in Puerto Rico. *Id.* § 1400Z-1(d)(2).

[29] The tract's median family income may not exceed 125% of the median family income of the contiguous tract. 26 U.S.C. § 1400Z-1(e).

Secretary of the Treasury within ninety days of the Tax Cuts and Jobs Act enactment.[30] Once designated, the tract qualified as an opportunity zone for ten years.[31]

D. LEGISLATIVE HISTORY & PURPOSE

A group of bipartisan economists introduced the current version of opportunity zones in 2015 with the idea of unlocking unrealized capital gains, estimated at over $6 trillion in the United States,[32] and reinvesting them in low-income communities that investors have overlooked.[33] This idea became the Investing in Opportunity Act in 2016, which was enacted as part of the Tax Cuts and Jobs Act of 2017.[34] Republican sponsor, Senator Tim Scott of South Carolina, stated Congress's goal was to benefit residents, businesses, and property in opportunity zones long-term, without gentrification.[35] Senator Scott explained the legislation eschewed more stringent investment requirements to limit red tape and encourage more investment.[36] Scott further suggested that long-term benefits are possible from opportunity zones because investors wishing to take advantage of opportunity zones will make long-term investments to take advantage of the legislation.[37]

While the legislation will likely create long-term benefits and investments, it was only enacted for ten years, likely because the Tax Cuts and Jobs Act was passed under the budget reconciliation process.[38] Reconciliation allowed Congress to pass a budget bill with a simple majority, but required the budget to be revenue neutral over a ten-year budget window.[39] As a result, many of the Tax Cuts

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[30] *Id.* § 1400Z-1(b), (c)(2).

[31] *Id.* § 1400Z-1(f).

[32] Lipaj, *supra* note 6.

[33] *Id.*

[34] *Id.* (citing Investing in Opportunity Act, S. 2868, 114th Cong. (2d Sess. 2016); Investing in Opportunity Act, H.R. 5082, 114th Cong. (2d Sess. 2016).

[35] *The Promise of Opportunity Zones: Hearing Before the J. Econ. Comm.*, 115th Cong. 7 (May 17, 2018) (statement of Sen. Tim Scott).

[36] Lipaj, *supra* note 6.

[37] *Id.*

[38] Stephen Pieklik et al., *Deducting Success: Congressional Policy Goals and The Tax Cuts and Jobs Act of 2017*, 16 Pitt. Tax Rev. 1, 9 (2018).

[39] *Id.* Because the tax reforms cause loss in revenue, their timeframe was limited to minimize such loss and keep the budget neutral. The Opportunity Zone provisions in particular were estimated to cause $1.6 billion in lost revenue. *Id.*

and Jobs Act provisions expire in 2026, including the Investing in Opportunity Act.[40] What will come of the opportunity zone provision remains to be seen, but its future is bleak.[41]

Nonetheless, section 1400Z currently allows investors to earn substantial tax benefits by investing their capital gains in opportunity zones—namely, tax deferral, basis step-up, and, for long-term investments, no tax liability should the investment increase in value. While investors can obtain immense tax savings, Congress passed the legislation mainly to encourage investment in distressed communities and create long-term economic growth.

E. CRITICISM OF OPPORTUNITY ZONES

In the wake of the Tax Cuts and Jobs Act's passage, many criticized the opportunity zone program, largely fearing that investors could pour money into an opportunity zone investment that harms rather than helps the community yet receive substantial tax benefits.[42] Critics mostly point to the lack of transparency or reporting requirements, the potential to cause resident displacement, the lack of restriction on uses, and the process of designated opportunity zones itself.[43]

Without reporting requirements, critics caution there is no way to know whether investments benefit the community.[44] Others argue large opportunity zone investments could increase property values, displacing current residents.[45] Some also critique the opportunity zone legislation for including few use restrictions on QOF

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[40] *Id.* (citing Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a)-(b), 131 Stat. 2054, 2054-58 (2017) (codified at 26 U.S.C. § 1(j)(1)).

[41] *See supra* Part I.B.

[42] *See* Samantha Jacoby, *Potential Flaws of Opportunity Zones Loom, as Do Risks of Large-Scale Tax Avoidance*, CENT'R ON BUDGET AND POLICY PRIORITIES (Jan. 11, 2019), https://www.cbpp.org/research/federal-tax/potential-flaws-of-opportunity-zones-loom-as-do-risks-of-large-scale-tax [https://perma.cc/LAK3-EYXJ].

[43] *See e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82, 90, 126, 135-37 (2020); *see also Wyden Launches Investigation into Opportunity Zones*, *Chairman's News*, U.S. SENATE COMM. ON FIN. (Jan. 13, 2022), https://www.finance.senate.gov/chairmans-news/wyden-launches-investigation-into-opportunity-zones [https://perma.cc/MZS2-YEMP].

[44] *See e.g.*, *Wyden Launches Investigation into Opportunity Zones*, *Chairman's News*, *supra* note 43.

[45] *See, e.g.*, Bre Jordan, *Denouncing the Myth of Place-Based Subsidies as the Solution for Economically Distressed Communities: An Analysis of Opportunity Zones as a Subsidy for Low-Income Displacement*, 10 COLUM. J. RACE & L. 65, 87 (2020).

investments, which could lead to investments that do not contain a public benefit.[46] For example, Senate Finance Committee Chair Ron Wyden critiques the legislation for allowing luxury real estate investments to qualify.[47] Wyden also points out that some investors would have invested in opportunity zones without the tax incentive, indicating that they did not need the subsidy.[48]

There is also criticism regarding opportunity zone designation. Some suggest areas were designated as opportunity zones only because they represented investment opportunities and were not truly poverty-stricken.[49] Others suggest the designation process was susceptible to lobbying efforts, allowing landowners and developers to dictate designation at the expense of low-income communities.[50] Overall, critics argue areas that are not truly distressed could be designated as opportunity zones, despite Congress's intent to revitalize distressed areas.[51]

More broadly, critics suggest the opportunity zone tax incentive is another place-based federal incentive lacking evidence of success.[52] Additionally, a potential argument from other tax contexts is that a laissez-faire investment approach could amount to wealthy investors choosing what the federal government subsidizes rather than elected officials with accountability to the electorate.[53] Professor Michelle Layser even argues the opportunity zone tax incentive was created with hidden objectives to support gentrification.[54]

Overall, the opportunity zone program has been scrutinized since its inception for having few requirements regarding reporting, types of investments, or designations. Critics also fear that economic growth from opportunity zones will ultimately cause displacement. Additionally, there is skepticism that opportunity

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[46] *See e.g.*, De Barbieri, *supra* note 43, at 143.

[47] *See Wyden Launches Investigation into Opportunity Zones*, *Chairman's News*, *supra* note 43.

[48] *Id. But see* text accompanying note 132.

[49] *See* Jordan, *supra* note 45, at 92.

[50] *See* De Barbieri, *supra* note 43, at 95.

[51] *See, e.g.*, Jacoby, *supra* note 42.

[52] *See* Michelle D. Layser, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 771.

[53] *Cf.* BANKMAN ET AL., FEDERAL INCOME TAXATION 586 (Wolters Kluwer, 18th ed. 2018) (discussing the argument that elected officials, rather than individuals should choose what charitable donations are deductible).

[54] *See* Layser, *supra* note 52, at 788-89.

zone investments will benefit communities and that the legislation had communities, rather than investors, in mind.

To summarize, Congress passed the opportunity zone legislation to help revitalize and spur economic development in low-income communities. Accordingly, by granting investors capital gain tax deferral and basis step-ups, the legislation incentivizes investments in low-income communities that gain opportunity zone designation. To designate areas as opportunity zones, states' chief executive officers simply had to nominate a limited number of their state's low-income and contiguous communities. The designation process, along with the legislation's lack of use or reporting requirements and potential for displacement all led to criticism regarding opportunity zones.

II. STADIUMS ARE AN EFFECTIVE USE OF THE OPPORTUNITY ZONE TAX INCENTIVE

The advantages that stadium developments offer communities demonstrate their potential as opportunity zone investments, and the potential that the opportunity zone tax program has to impact distressed areas positively. This Part first explains the requirements for stadiums to qualify for opportunity zone tax benefits. This Part then analyzes how stadium investment, particularly investment in modern stadiums with mixed-use developments, is a good use of the opportunity zone program. Despite criticism regarding stadiums' effects on communities and opportunity zone applicability to stadiums, stadiums further the goals of opportunity zone legislation, namely because stadiums create positive outcomes for communities, and such usage can incentivize private stadium financing. Lastly, this Part addresses distinctions among the benefits a stadium can provide to its surrounding neighborhood, city, and region.

A. HOW CAN STADIUM DEVELOPMENTS QUALIFY?

1. *BASIC REQUIREMENTS*

Stadiums, like other investments, face several challenges to qualify for opportunity zone tax incentives. First, the stadium owner must have a capital gain from a sale with an unrelated party.[55] Within 180 days of the sale, the developer must invest the gain in a QOF.[56] A QOF is an "investment vehicle . . . organized as a corporation or partnership for the purpose of investing in qualified

[55] *See* 26 U.S.C. §§ 1400Z-2(a)(1), 2(e)(2).
[56] *Id.* § 1400Z-2(a)(1)(A).

opportunity zone property," and it must hold "at least [ninety] percent of its assets in qualified opportunity zone property," or it must pay a penalty.[57] Qualified opportunity zone property includes qualified opportunity zone stock, qualified opportunity zone partnership interest, and qualified opportunity zone business property. [58] Qualified opportunity zone stock and qualified opportunity zone partnership interest refer to stock or interest in a qualified opportunity zone business.[59] A qualified opportunity zone business is a trade or business "in which substantially all of the tangible property owned or leased by the taxpayer is qualified opportunity zone business property."[60] Qualified opportunity zone business property is tangible property used in a trade or business of the QOF or qualified opportunity zone business.[61] Further, the QOF or qualified opportunity business must have acquired the property after 2017. [62] Additionally, the property's original use must commence concurrently with the QOF or qualified opportunity zone business unless the QOF or qualified opportunity zone business substantially improves the property.[63]

To summarize, to meet the asset requirement, a QOF could operate as a qualified opportunity zone business, where substantially all of its tangible property is used in the business. A QOF could also invest in other qualified opportunity zone businesses. Thus, a team owner could create and invest capital gains in a QOF. The QOF can then build (or improve) and operate a stadium and surrounding businesses, or invest in other businesses

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[57] *Id.* §§ 1400Z-2(d)(1), 1400Z-2(f)(1).

[58] *Id.* § 1400Z-2(d)(2)(A).

[59] *Id.* § 1400Z-2(d)(2)(B)-(C). Additionally, the stock or interest must be acquired by the QOF after 2017, at its original issue, solely in exchange for cash, and for substantially all of the QOF's holding period, the business must qualify as a qualified opportunity zone business. *See id.* § 1400Z-2(d)(2)(A).

[60] 26 U.S.C. § 1400Z-2(d)(3). Additionally, "at least 50 percent of the total gross income of such entity is derived from the active conduct of such business"; "a substantial portion of the intangible property of such entity is used in the active conduct of any such business"; and "less than 5 percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to nonqualified financial property," as defined in § 1397C(e). *See id.* § 1400Z-2(d)(3)(ii); § 1397C(b). The business could also be disqualified by § 144(c)(6)(B). *See id.* § 1400Z-2(d)(3)(A); *infra* Part II.A.2.

[61] 26 U.S.C. § 1400Z-2(d)(2)(D)(i).

[62] *Id.*

[63] *Id.*

inside of the opportunity zone. The QOF can lease properties within the opportunity zone as well.

Additionally, investments only qualify for the tax incentive up to the qualifying gains.[64] Thus, if a portion of the investment includes other funds, such as public financing or cash that is not capital gains, the investment is bifurcated, and those portions do not qualify whereas the capital gains portion does qualify.[65]

2. *DISQUALIFICATIONS*

With few explicit exclusions, stadiums and most of their surrounding commercial property will generally qualify, despite congressional attempts to explicitly disqualify stadiums from the statute.[66] However, if the stadium owner operates a business described in I.R.C. § 144(c)(6)(B), the business does not qualify for opportunity zone tax incentives.[67] That section includes "any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises."[68] When Congress passed section 1400Z, it was unclear whether a business would disqualify if only a portion of its services fell under section 144(c)(6)(B). For example, it was unclear whether stadiums with sportsbooks would be considered gambling facilities and thus not qualify. Should a stadium owner lease or invest in business property surrounding the stadium, it was also unclear whether hotels with spas or breweries qualify. Arguably, a brewery's principal business is the sale of alcohol off-premises.

The IRS addressed the ambiguity in the final regulations, stating "[d]e minimis amounts of gross income attributable" to a disqualifying trade or business "will not cause a trade or business to fail to be a qualified opportunity zone business."[69] Additionally, businesses cannot lease "more than a de minimis amount of property to" a disqualifying trade or business.[70] The regulations further define de minimis gross income as less than five percent "of the gross income of the qualified opportunity zone business."[71] The regulations also define de minimis leased property as less than five percent "of the net rentable square feet for real property and less

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[64] *Id.* § 1400Z-2(e)(1).
[65] *Id.*
[66] *See* S. 2787, 116th Cong. (2021); H.R.5042, 116th Cong. (2021).
[67] 26 U.S.C. § 1400Z-2(d)(3)(A)(iii)
[68] *Id*. § 144(c)(6)(B)
[69] 26 C.F.R. § 1.1400Z2(d)-1(d)(4)(ii) (2020).
[70] *Id.* § 1.1400Z2(d)-1(d)(4)(i) (2020).
[71] *Id.* § 1.1400Z2(d)-1(d)(4)(iii) (2020).

than [five] percent of the value for all other tangible property."[72] Thus, a team owner should not have issues qualifying its QOF or qualified opportunity zone businesses that the QOF holds an interest in so long as less than five percent of its gross income comes from disqualifying businesses and less than five percent of the square feet it leases is used for disqualifying businesses.

Because stadiums contain sportsbooks, they will not disqualify the stadium so long as the sportsbooks are de minimis. However, more states have begun to legalize sports betting, and more stadiums are beginning to include sportsbooks within the stadium.[73] The growth of in-stadium sports betting could lead a court to conclude that a stadium is a "facility used for gambling" in and of itself, which would disqualify the stadium.

Further, team owners wishing to qualify for opportunity zone tax benefits by renovating an existing stadium face an additional hurdle. One article indicated several professional sports stadiums are located within and can take advantage of opportunity zones.[74] However, these stadiums would require very large expenditures to qualify. To qualify, the property's original use must commence with the QOF unless the owner substantially improves the property.[75] The Internal Revenue Code defines substantial improvement in section 1400Z as additions to basis in a thirty-month period greater than the basis at the beginning of the thirty-month period.[76] Thus, a team would have to make expenditures for renovations that exceed its current basis. Aside from very old stadiums whose bases are significantly lower from depreciation, most stadiums would have to undertake more than simple renovations to qualify for substantial

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[72] *Id.*

[73] *See* Wayne Parry, *Half of US Offers Legal Sports Betting as NFL Season Begins*, AP NEWS (Sept. 8, 2021), https://apnews.com/ [https://perma.cc/4B6M-643S]; Maury Brown, *Why Nearly All MLB Ballparks Will Have a Sportsbook Attached to Them in the Future*, FORBES (Aug. 10, 2021, 4:54 PM), https://www.forbes.com/sites/maurybrown/2021/08/10/why-nearly-all-mlb-ballparks-will-have-a-sportsbook-attached-to-it-in-the-future/ [https://perma.cc/ALY3-SQ9E]. This could shift the perspective of stadiums to a facility used for gambling.

[74] Ryan Bender, *Balancing the Carrot and the Stick: Achieving Social Goals Through Real Property Tax Programs*, 16 NW. J. L. & SOC. POL'Y, no. 2, 2021, at 1, 15.

[75] 26 U.S.C. § 1400Z-2(d)(2)(D)(i)(I)-(II). Vacant property may also qualify as "original use." *See* 26 C.F.R. § 1400Z2(d)-2(b)(3)(B). Perhaps a developer could invest in the Houston Astrodome, located within an opportunity zone, using a QOF.

[76] 26 U.S.C. § 1400Z-2(d)(2)(D)(ii).

improvement. Team owners who opt for improvements rather than building new stadiums likely own teams with relatively newer stadiums. Professional sports league stadiums built across the United States in the last ten years range from about $95 million to $5 billion.[77] For most of these stadiums, renovations would need to be very expensive to qualify for substantial improvement.

While some team owners may be willing to make such large expenditures in improvements with gains from selling their capital assets, it is unlikely that most teams located in opportunity zones will make expenses large enough to qualify. There may be less value to team owners in putting so much of their capital gains into renovating a newer stadium rather than developing other commercial properties and businesses.

Therefore, opportunity zone legislation only benefits a few current stadiums. Owners whose stadiums presently exist in opportunity zones could take advantage of opportunity zones by developing the area around the stadium. Even if renovations to the stadium would not meet the substantial improvement test, team owners could create a QOF and develop commercial properties nearby.

B. WHY STADIUMS ARE A GOOD USE OF OPPORTUNITY ZONES

Professional sports stadiums are a use of opportunity zones that have the potential to benefit communities and reflect the merit of the tax incentive. However, some have argued the opposite, claiming stadiums are often "designed to benefit transient or out-of-town populations, . . . to the detriment of existing neighborhood residents."[78] There have even been failed proposals in Congress to amend section 1400Z to exclude stadiums.[79] Scholar Ryan Bender claims that stadiums harm rather than help communities.[80] Bender argues stadium opportunity zone investments do not promote

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[77] *See Sports Facility Reports*, 21 MARQ. UNIV. L. SCH. NAT'L SPORTS L. INST. apps. 1-5 (2020), https://law.marquette.edu/national-sports-law-institute/sports-facility-reports-volume-21-2020 [https://perma.cc/4VEL-AR3B]. Houston' BBVA Stadium is the least expensive professional sports stadium of the last 10 years at $95 million and was built in 2012, and Los Angeles's SoFi Stadium is the most expensive at $5 billion, built in 2020. *See id.*, at apps. 1, 5. The NFL tends to have the most expensive stadiums, while the MLS tends to have the least expensive. *See id.*, at apps. 1, 5.

[78] De Barbieri, *supra* note 43, at 146.

[79] Investing in Opportunity Act, S. 2868, 114th Cong. (2d Sess. 2016); Investing in Opportunity Act, H.R. 5082, 114th Cong. (2d Sess. 2016).

[80] Bender, *supra* note 74, at 14-15.

economic growth or provide services and housing for low-income residents; rather, they take funding away from other projects, they only allow wealthy non-residents to enjoy the stadium, and the stadiums take up opportunity zone space that could be used for better projects.[81] However, Bender misses the mark. As this section discusses, modern stadiums have the potential to impact local communities positively. True, ticket costs often price out low-income families, an issue that the locality should address.[82] However, stadiums lead to more investment, more revenue for the city and local businesses, and additional services.[83] If areas within opportunity zones were only available to public services investments, they would likely draw fewer investments. Stadium developments can serve as the linchpin to rejuvenating distressed areas. Moreover, stadiums also encourage private financing, shifting the environment in stadium finance and further benefitting cities.

1. *STADIUMS CAN BENEFIT COMMUNITIES*

Stadiums, particularly modern stadiums, have the potential to greatly benefit communities. Scholars, however, have argued that stadiums do not benefit communities for decades.[84] They argue the so-called "multiplier effect" does not exist and that little revenue returns to the community because stadiums only operate a portion of the year, and wealthy professional athletes spend the money elsewhere because they do not live in the community.[85] Critics further argue people in the community have a fixed amount of money to spend on entertainment, so if people spend in the stadium or surrounding development, they are spending what they would have spent elsewhere.[86] In other words, a stadium generating revenue is simply a form of "robbing Peter to pay Paul."[87]

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[81] *See id.*

[82] *See infra* note 90.

[83] *See* Brad Humphreys & Li Zhou, *Sports Facilities, Agglomeration, and Public Subsidies*, 54 REG'L SCI. & URB. ECONS. 60, 67-71 (2015).

[84] Andrew Zimbalist & Roger G. Noll, *Sports, Jobs, & Taxes: Are New Stadiums Worth The Cost?*, BROOKINGS (June 1, 1997), https://www.brookings.edu/articles/sports-jobs-taxes-are-new-stadiums-worth-the-cost/ [https://perma.cc/9B6S-SHXP].

[85] *Id.*

[86] *Id.*; Rick Paulus, *Sports Stadiums Are a Bad Deal for Cities*, THE ATLANTIC (Nov. 21, 2018), https://www.theatlantic.com/technology/archive/2018/11/sports-stadiums-can-be-bad-cities/576334/ [https://perma.cc/KG38-CVAF].

[87] Paulus, *supra* note 86.

However, studies indicate professional sports stadium development does have positive impacts. First, stadiums can increase nearby home values.[88] Though increased property values benefit property owners, not all property owners are residents, and not all residents are property owners. Nonetheless, some residents are property owners, and the increase in value is good to the extent that they can afford property taxes. Governments have stepped in and aided owners who cannot afford the property taxes and renters who experience increased rents due to rapid economic growth.[89]

Further, stadiums provide intangible social benefits in that hosting a sports team creates a sense of community and civic pride.[90] Supporting a local team is a commonality that transcends all differences and can bring together families, friends, and neighbors.[91] Teams become embedded in cities' and regions' cultures, so much so that soccer fans in Columbus, Ohio successfully banded together and created a movement that helped

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[88] *Eg.*, Keeler et al., T*he Amenity Value of Sports Facilities: Evidence from The Staples Center in Los Angeles*, J. SPORTS ECONS. 799, 813 (2021) (revealing that home values near Staples Center in Los Angeles increased after it opened); Charles Tu, *How Does a New Sports Stadium Affect Housing Values? The Case of FedEx Field*, 81 LAND ECONS. 379, 380 (2005) (finding that FedEx field in Maryland led to higher nearby home values); Tim Arango, *Inglewood Has Experienced Dramatic Change. The Super Bowl Is Proof of That.*, N.Y. TIMES (Feb. 13, 2022), https://www.nytimes.com/2022/02/13/us/super-bowl-inglewood-los-angeles.html [https://perma.cc/JBY2-SKA3]. *But see* John Charles Bradbury, *A Home Run for Cobb? A Comprehensive Report on the Economic Impact of Truist Park and The Battery Atlanta on Cobb County*, KENNESAW STATE U. COLES COLL. BUS. (March 2022), https://coles.kennesaw.edu/econopp/docs/Bradbury_Cobb_report_March 2022.pdf (finding that property value growth near Truist Park and The Battery was only typical compared to surrounding areas; however, the study only analyzes two years of property values while The Battery was fully operational) [https://perma.cc/CP26-GHQK].

[89] *See infra* Part III.B.

[90] Irwin Kishner & David Hoffman, *Fields of Dreams, The Benefits of Public and Private Cooperation in Financing Professional Sports Stadiums*, 28 ENT. & SPORTS LAW 20, 21 (2010).

[91] However, ticket prices for professional sporting events have increased dramatically, preventing many fans from having the opportunity to attend games. Bill Shaikin, *Good Luck Getting a Family of Four Into a Professional Sport for $100 — Not In Good Seats, But Any Seats*, L.A. TIMES (Dec. 26, 2019 6:00 AM), https://www.latimes.com/sports/story/2019-12-26/most-affordable-tickets-prices-dodgers-lakers-clippers-rams-chargers [https://perma.cc/5X5H-4S99]. This issue should be addressed by local governance boards. *See infra* Part III.B.4.

prevent their MLS team from relocating.[92] Still, researchers point to mixed evidence regarding the impacts of stadiums on communities;[93] nonetheless, the modern stadium has even more potential to generate positive externalities.

a. MODERN SPORTS STADIUMS

Many arguments against stadiums benefitting communities arise in the context of public financing and the negative outcomes associated with cities paying for the stadium.[94] Today's sports world is evolving, however. Team owners are finding value in privately financing their stadiums.[95] Also, increasingly, owners and communities are developing the area around the stadium, and such projects have the potential to benefit the community greatly.[96]

These projects include the $5 billion SoFi stadium and surrounding development in Inglewood, California that Rams owner Stan Kroenke financed.[97] SoFi stadium opened its doors in

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[92] Kim McCauley, *Save The Crew Stopped a Bad Sports Owner from Relocating Their Team, And So Can You*, SBNATION (Nov. 13, 2018, 11:00 AM), https://www.sbnation.com/soccer/2018/11/13/18085660/save-the-crew-columbus-anthony-precourt [perma.cc/DG55-VTPM].

[93] John Charles Bradbury, *The Impact of Sports Stadiums on Localized Commercial Activity: Evidence from a Business Improvement District*, 62 J. REG'L SCI. 194, 194-196 (2022).

[94] *See e.g.*, De Barbieri, *supra* note 43, at 146 ("Sport stadiums, which already receive massive public subsidy, have recently come under scholarly focus as they tend to offer little value to insiders."); Bradbury, *supra* note 88.

[95] Andrew McIntyre, *Private Financing for Stadiums Becoming the New Norm*, LAW360 (Aug. 17, 2015), https://www.law360.com/real-estate-authority/articles/671460/private-financing-for-stadiums-becoming-the-new-norm.

[96] *See* Keith Scheider, *Welcome to the Neighborhood: America's Sports Stadiums Are Moving Downtown*, N.Y. TIMES (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/business/sports-arena-development.html; Jason Scott, *Mixed-Use Districts Become a Trend in Stadium Development*, ATHLETIC BUS. (June 4, 2019), https://www.athleticbusiness.com/facilities/stadium-arena/article/15157339/mixed-use-districts-become-a-trend-in-stadium-development [https://perma.cc/F2HQ-9Z74]; David Malone, *The Rise of Entertainment Districts and The Inside-Out Stadium*, BLDG. CONSTR.+DESIGN, Aug. 25, 2021, https://www.bdcnetwork.com/rise-entertainment-districts-and-inside-out-stadium [https://perma.cc/4G2R-6PK5].

[97] Nathan Fenno & Sam Farmer, *Vision Becomes Real*, L.A. TIMES, https://enewspaper.latimes.com/infinity/article_share.aspx?guid=1993697c-5e91-42df-8240-2a2cf250a6de [https://perma.cc/59YD-U9LH].

2020 and is the "centerpiece of a 298-acre development" that will include "millions of square feet of retail, restaurants, office space, residences and parks." [98] The development also includes a performance venue and an artificial lake. [99] Additionally, the Glendale City Council recently approved an agreement to develop a 62-acre, mixed-use development near State Farm Stadium, which houses the Arizona Cardinals.[100] In the MLB, the Atlanta Braves' new stadium, Truist Park, opened in 2017, and anchors a 60-acre mixed-use project, The Battery. [101] Similarly, in the NBA, the Milwaukee Bucks' new stadium, the Fiserv Forum, opened with a surrounding 30-acre entertainment district, the Deer District, that includes restaurant, commercial, entertainment, and residential space. [102] These are just a few of many projects and proposals occurring across professional sports.[103]

Economists indicated that new "arena districts," where sports lead urban redevelopment projects, can increase city welfare. [104] The increase in welfare transpires through agglomeration effects, increasing profits for service providers near the stadium and property values near the facility.[105] While such effects could merit governments subsidizing sports stadiums, subsidies can decrease the net benefits to welfare.[106] Further, some potential for negative externalities still exists and requires consideration. New stadiums can create "local urban congestion externalities" including increased crime, traffic, pollution, and declines in police response

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[98] *Id.*

[99] *Id.*

[100] Corina Vanek, *Glendale Partners with Developer to Build Large Mixed-Use Project Near Cardinals Stadium*, Phoenix Bus. J. (Aug. 10, 2021), https://www.bizjournals.com/phoenix/news/2021/08/10/glendale-partners-developer-mixed-use-project.html?ana=knxv; City of Glendale, Meeting Minutes, (Aug. 10, 2021) (on file with the City of Glendale) https://destinyhosted.com/agenda_publish.cfm?id=45363&mt=ALL&get_month=8&get_year=2021&dsp=min&seq=3886 [https://perma.cc/HK3Q-H56T].

[101] *See The Battery Atlanta at Suntrust Park*, HGOR, https://www.hgor.com/our-work/battery-atl, [https://perma.cc/WS3F-HFVZ].

[102] Scott, *supra* note 96.

[103] *See* Scheider, *supra* note 96.

[104] *See* Humphreys & Zhou, *supra* note 83, at 60, 67-68. The article also indicates that these effects are best when the arena district does not compete with an existing consumption center as service providers and property owners could be negatively impacted. *Id.* at 67.

[105] *Id.* at 67.

[106] *See id.* at 68.

time to emergency calls.[107] Such consequences can and should be considered in designing new stadiums and working with the local government in employing governance regimes.[108]

Nonetheless, new mixed-use stadium areas impart a shift from the stadium construction previously under scrutiny, and the positives far outweigh the negatives. In this world, stadiums are more than massive domes surrounded by parking lots. New stadium mixed-use development allows teams to help revitalize communities, and the stadium and surrounding area is used for more of the year than just the team's season. Ultimately, stadium construction could generate thousands of jobs and, after completion, thousands more.[109] Stadium development has helped decrease unemployment and crime.[110] Also, because communities use stadiums with mixed-use projects for more than the team's regular season and the commercial property requires additional employees, such projects generate more jobs, economic activity, and city tax revenue than traditional stadiums. Further, stadiums and surrounding commercial development could drive local small business growth. For instance, business owners in Inglewood and

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[107] Keeler et al., *supra* note 88, at 800; John Gonzalez, *SoFi Stadium Went Up—and Then Everything Changed*, SPORTS ILLUSTRATED (Feb. 9, 2022), https://www.si.com/nfl/2022/02/09/sofi-stadium-changed-everything-inglewood-daily-cover (discussing the increased congestion resulting from SoFi Stadium) [https://perma.cc/TH53-N3D2].

[108] *See infra* Section III.B.1.

[109] According to SoFi stadium's managing director, Jason Gannon, the stadium construction involved more than 17,000 workers, and they were looking to fill about 3,000 full and part time jobs. Rob Hayes, *SoFi Stadium Looks to Hire Thousands*, ABC7 (July 31, 2020), https://abc7.com/sofi-stadium-hiring-jobs-nfl-job-listings/6345927/ [https://perma.cc/BXC5-BLXA].

[110] Tim Arango, *Inglewood Has Experienced Dramatic Change. The Super Bowl Is Proof of That.*, N.Y. TIMES (Feb. 13, 2022), https://www.nytimes.com/2022/02/13/us/super-bowl-inglewood-los-angeles.html; Joe Ripley, *Businesses Have Record Year During Braves Postseason Run*, 11 ALIVE (Oct. 11, 2021, 10:21AM), https://www.11alive.com/article/news/local/businesses-have-record-year-during-braves-postseason-run/85-f2c9018a-0550-43d3-862d-f11916e57e07 [https://perma.cc/S44V-2RYE].

Cobb County have reported their businesses are thriving.[111] The success of these areas over the next several years will be telling; however, they already create more potential than stadiums of yesterday.[112]

Many of the stadium investment benefits accrue more broadly to the region. For instance, not all property or business owners that benefit are residents; economic growth could be captured on a larger scale than the stadium neighborhood alone. Additionally, the jobs the stadium development creates would consist mostly of service sector and construction jobs, which are available for people outside of the neighborhood and may not be jobs that all neighborhood residents need. Finally, more services and the social benefits of housing a new team accrue not only to the neighborhood, but to the region in general.

Indeed, many of the region-based benefits apply to the stadium's neighborhood as well. Many property and businesses owners likely are residents who would benefit from increases in home prices and revenues, respectively. While service sector and construction jobs would not cater to all residents, they would cater to some, and economic growth could lead to even more job creation in the future. Additionally, though residents may not enjoy some new services like upscale restaurants because they are too expensive, they would benefit from other new services like pharmacies, for example.

To the extent the larger regional benefits do not spillover to the neighborhood, the city the neighborhood is in will gain an increase in tax revenue. The city can use the increase in tax revenue to address the neighborhood's specific needs, thereby supporting economic growth and its current residents. Thus, a lack of spillover from regional benefits to the neighborhood that stadiums create is a worthy tradeoff for increased tax revenue that cities can use how they see fit.

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[111] Joe Ripley, *supra* note 110. Some businesses have not seen success because of increased traffic. *See* Arango, *supra* note 110. However, this issue should be addressed by governments through infrastructure improvements as the City of Inglewood has been attempting. *See Beyond Attractions, Inglewood is Creating Good Jobs and Lives for its Residents*, L.A. TIMES: INGLEWOOD RENAISSANCE (Feb. 3, 2022), https://www.latimes.com/inglewoodrenaissance/story/2022-02-03/beyond-attractions-inglewood-is-creating-good-jobs-and-lives-for-its-residents [hereinafter *Beyond Attractions*].

[112] *See* Scott, *supra* note 96; Humphreys & Zhou, *supra* note 83, at 61 (stating that it will take time before evidence about the effects of the "sports-led urban revitalization projects" appear since they are relatively new).

Further, if a development causes a negative externality for some residents but a positive externality for the region, governance can overcome such disparities while still allowing the positive to accrue to the region. Local, state, and federal governments have already begun to attack negative externalities that economic growth causes at the neighborhood level as outlined in Part III. For instance, increases in home values may be good for the region in terms of economic growth and property-owning residents, but may lead to displacing the neighborhood's residents and business owners due to increases in rent, taxes, and new service prices. Governments can and have addressed displacement using tools such as affordable housing initiatives and taxpayer relief funds.

2. *OPPORTUNITY ZONES CAN ENCOURAGE PRIVATE STADIUM FINANCING*

Furthermore, opportunity zones can encourage team owners to privately finance the team's stadium rather than rely on public funding, which can cost cities hundreds of millions in taxpayer dollars. As more team owners see the value in privately financing their new stadiums, [113] especially to generate revenue from surrounding mixed-use development, opportunity zones may be the push that more owners need to continue the trend.[114] The use of local taxpayer funds to help teams build stadiums has come under fire in recent years.[115] Cities may spend millions on a new stadium then fail to reap a return on their investment.[116] Further, announcements of new stadiums using increased property taxes as funding could have the effect of decreasing property values.[117] Additionally, teams could relocate, with cities left holding the bag. Even if cities

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[113] *See* Nicholas Baker, *Playing A Man Down: Professional Sports and Stadium Finance--How Leagues and Franchises Extract Favorable Terms from American Cities*, 59 B.C. L. REV. 281, 286-89 (2018).

[114] *See Liberty Media Corporation Reports Third Quarter 2021 Financial Results*, LIBERTY MEDIA CORP. (Nov. 4, 2021, 8:15 AM), https://www.libertymedia.com/news/detail/304/liberty-media-corporation-reports-third-quarter-2021 (Table showing operating results of Braves Holdings, LLC: $12M in "Development Revenue" in Q3 2021 derived from The Battery, primarily rental income) [perma.cc/SZ2L-DZY6]; McIntyre, *supra* note 95.

[115] *See* Bradbury, *supra* note 93.

[116] Zimbalist & Noll, *supra* note 84.

[117] *See* Bradbury, *supra* note 93, at 199-200 (citing Carolyn A. Dehring et al., *The Impact of Stadium Announcements on Residential Property Values: Evidence from a Natural Experiment in Dallas-Fort Worth*, 25 CONTEMP. ECON. POL'Y 627 (2007)).

incorporate specific performance clauses in their leases, courts may be unwilling to enforce them.[118] However, the NFL and Rams recently agreed to a $790 million settlement with the City of St. Louis after the Rams relocated to Los Angeles, which could discourage team owners from seeking public funds.[119]

As local public financing has gained public scrutiny, local governments may be less willing to spend money on a new stadium, and the opportunity zone tax incentive could serve as a bargaining chip for them. Teams that approach the city to help them build a stadium may face pushback, as the city may know that the team has federal tax incentives at its disposal and can rely less on public funds. Whether opportunity zones are the last push teams needed to decide to privately finance, or whether cities use them to bargain for more favorable terms from teams or refuse to bargain at all, opportunity zones have the potential to encourage private financing.

If investors privately finance in part to take advantage of opportunity zones, the federal government is subsidizing stadiums. This is positive for a few reasons. First, the federal government has a policy goal of improving poverty and poverty-stricken areas, and stadiums have the potential to benefit communities. While professional sports team owners do not need federal tax subsidies, publicly funded stadiums may be unfavorable to cities. By easing this pressure on cities, they can benefit from housing a sports team, while also maintaining tax revenue for other uses as well. Further, federal subsidies like opportunity zones for beneficial uses like stadiums are a part of a larger scheme encouraging investments to create community benefits across the United States on a much larger scale than what the subsidies could accomplish elsewhere. The legislation could unlock trillions of dollars in unrealized gains at the expense of $1.6 billion in lost revenue. However, the estimated lost tax revenue would have far less potential to benefit the 8,764 opportunity zones if spent directly in the community.[120]

Ultimately, modern sports stadium investments can provide positive impacts, demonstrating their usefulness as opportunity zone investments. The stadiums can create positive externalities

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[118] *See* Paul Anderson, *Sonic Bust: Trying to Retain Major League Franchises in Challenging Financial Times*, 21 J. LEGAL ASPECTS OF SPORT 117, 126, 139-47 (2011).

[119] Jabari Young, *NFL and Rams Reach $790 Million Settlement in St. Louis Relocation Case*, CNBC (Nov. 24, 2021, 3:03 PM), https://www.cnbc.com/2021/11/24/nfl-and-rams-reach-more-than-700-million-settlement-in-st-louis-relocation-case-report-says.html [https://perma.cc/WPJ2-4FBQ].

[120] *See* OPPORTUNITY NOW, https://opportunityzones.hud.gov/ [https://perma.cc/HT6U-GY5E].

through increased property values, increased profits for service providers near the stadium, job creation, and tax revenue, all contributing to economic growth which could lead to additional investment. Further, housing a sports team could generate communality and civic pride. Though some of the positive externalities may not accrue to all of the residents near the stadium—and some may face negative externalities—governments have tools available to prevent such negative externalities while maintaining the positives.[121] Additionally, opportunity zones encourage privately financing stadiums, benefitting communities in that they gain the stadium and save millions in spending that can be used for other uses. The advantages that stadiums pose in opportunity zones reflect their merit as opportunity zone investments and the opportunity zone legislation's merit generally.

III. MAXIMIZING OPPORTUNITY ZONES' POSITIVE IMPACTS

Stadium investment is a good use of opportunity zone incentives, indicating there is value in extending the program and a massive upside in that trillions of unlocked capital gains can enter distressed areas that have little access to investor capital. However, critics' concerns regarding potential negative externalities that could stem from opportunity zone investments, including stadiums, are warranted. If opportunity zones work as intended, areas should recognize economic development quickly. With more development, residents will benefit from more services, more customers, less crime, more employment, and increased home value.[122] Of course, increased property values may lead to increased rents, taxes, and service costs, causing displacement, and more negative externalities could exist in the form of traffic and congestion.[123] Federal agencies and state and local governments have nonetheless implemented initiatives across the United States bolstering the positive effects from opportunity zones that largely offset the negatives. Additionally, some amendments to section 1400Z could further ensure the investments meet the goals of the legislation.

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[121] *See infra* Part III.B.

[122] *See Gentrification and Neighborhood Revitalization: What's the Difference?*, NAT'L LOW INCOME HOUS. COAL. (Apr. 5, 2019), https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference [https://perma.cc/2FDF-APA6].

[123] *See* Humphreys & Zhou, *supra* note 83, at 68.

A. CHANGES TO SECTION 1400Z

As previously stated, even stadium development, which has immense potential to benefit communities, could have negative effects. Amendments to section 1400Z can ensure opportunity zone investments are consistent with the goals of the statute and support local, state, and federal governments in thwarting negative externalities. However, the statute should be carefully amended to maintain investment flexibility, allowing community members to determine what investments best serve its interests. For example, the statute should not limit investment to specific uses because that could discourage potential investors from realizing and reinvesting their gains if they cannot choose an investment they find profitable. Rather, the statute should first be amended to improve the designation process, preventing distressed communities from being overlooked.[124] Second, section 1400Z should be amended to require QOFs to report the details of their investments, informing community members of the investments impacting the area and providing them with information needed to initiate governance solutions to ensure future investments that deliver positive change.

1. *DESIGNATION PROCESS*

Currently, the chief executive officer of a state can only nominate twenty-five percent of the state's low-income communities as qualified opportunity zones. It may make sense that only a limited number of low-income areas can qualify to funnel more investments into an area. However, because only a limited number of areas will be able to qualify, the current legislation allows some tracts to be chosen over others that have even higher poverty levels.[125] In fact, Professor Edward W. De Barbieri noted that Oregon designated downtown Portland as an opportunity zone even though its economy was booming.[126] The Government Accountability Office reported that, on average, the opportunity zones states designated "had higher poverty and a greater share of non-White populations than eligible, but not selected, tracts."[127] Still, Congress can sharpen the designation process so that states designate the most qualifying tracts as opportunity zones.

Should Congress extend section 1400Z, the legislation should require states to demonstrate why they should pass over a lower income population tract, considering factors like other initiatives currently in place in the poorer area, or proof that the area is

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[124] *See generally* Jordan, *supra* note 45, at 92.
[125] *See* Jacoby, *supra* note 42.
[126] De Barbieri, *supra* note 43, at 89-90.
[127] *See* GAO Report, *supra* note 7.

currently improving and projected to improve. Such an amendment would help ensure that designated opportunity zones would benefit most from gaining investments such as stadiums.

2. *REPORTING REQUIREMENT*

Congress can also improve the opportunity zone legislation by adding reporting requirements. As the White House Opportunity and Revitalization Council stated, "[b]est practices require transparency, accountability, and integrity."[128] However, investors are not currently required to report any data on how they believe their investment will benefit the community or whether such benefits will materialize. Reporting requirements have bipartisan support, but legislative gridlock has prevented amendments to establish such requirements.[129]

Currently, investors only report the details of the QOFs voluntarily.[130] The U.S. Impact Investing Alliance and the Beeck Center for Social Impact and Innovation at Georgetown University created a voluntary reporting framework that many QOFs have adopted.[131] The framework includes fund information such as its size and location of investments; intended impact like numbers of jobs and affordable housing; community engagement such as partnerships with local organizations and types of feedback incorporated; and transparent outcomes reported by working with independent evaluators and researchers.[132] Congress should amend section 1400Z to require preliminary and annual reporting to local government based on the aforementioned framework. Such reporting will provide valuable information to residents and community leaders regarding the impact of uses in the opportunity zone and subject QOFs to public scrutiny. If a team owner invests in businesses around the stadium through a QOF, the local government and residents should be informed whether the

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[128] Memorandum from the White House Opportunity and Revitalization Council to President Donald Trump, *Opportunity Zones Best Practices Report*, 8 (May 2020), https://opportunityzones.hud.gov/sites/opportunityzones.hud.gov/files/documents/OZ_Best_Practices_Report.pdf [https://perma.cc/H75G-BHP3] [hereinafter *Best Practices Report*].

[129] FIKRI ET AL., *supra* note 4, at 4.

[130] *Id.*

[131] *See id.* at 8; The U.S. Impact Investing Alliance and Beeck Center for Social Impact and Innovation, *Prioritizing and Achieving Impact in Opportunity Zones*, 1 https://static1.squarespace.com [https://perma.cc/CR7G-FCPU**]**.

[132] *Prioritizing and Achieving Impact*, *supra* note 131 at 2-4.

investments are positively impacting the community. If a particular type of investment is negative, the local government can utilize governance tools by excluding such use from future incentives, for example, and providing incentives and facilitation for uses it finds more positive. Additionally, stakeholders can seek to encourage such businesses to adjust so they can help in the process of revitalizing the community, especially in today's Corporate Social Justice age where stakeholders have power to push companies to benefit communities.[133]

a. MORE THAN REPORTING REQUIREMENTS

Nonetheless, the National Low Income Housing Coalition suggested reporting requirements without more amounts to an "empty exercise" and, thus, requirements and incentives are necessary to ensure long-term benefits.[134] However, the lack of requirements and incentives currently allow flexibility so different types of investments, large or small, can receive the full benefit of incentives and can attune to the needs of the community.[135]

As for requirements, it is difficult to establish a standard for investors since community needs and investment sizes and types can vary. An investor who sells $50,000 worth of stock to establish a business in an opportunity zone surely cannot be held to the same standard for community benefits like number of jobs or amount of tax revenue created as a multi-million dollar stadium investment. Neither could an investor who develops real estate like housing complexes be required to create the same number of long term jobs as a labor-intensive factory. Congress could prefer one investment over another, but different investments could be better for different communities. Congress could require investors to support the community based on the size and nature of the investment. However, even a proportional standard of community contribution is untenable. One small investment could be better positioned to establish more jobs or contribute to the community than another small investment, but the latter investment could come from a resident's entrepreneurial endeavor, which is contributes more positively to the community.

Thus, whether a use satisfactorily contributes to the community will depend on the facts and circumstances of each investment.

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[133] *See* Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice [https://perma.cc/QWB4-5C6S].

[134] *See Gentrification and Neighborhood Revitalization*, *supra* note 122.

[135] *See* FIKRI ET. AL., *supra* note 4, at 6.

Congress could require a federal agency to determine whether a QOF satisfactorily contributes to the community; however, this would create additional costs and the federal government, unlike local government, is not poised to determine whether an investment meets a community's specific needs. Congress could alternatively require local governments to approve investments; yet, that could constitute a Tenth Amendment violation.[136] Therefore, imposing approval tasks on federal or local governments within section 1400Z or the regulations is unlikely to work.

On the other hand, Congress could develop additional benefits for opportunity zone investments that meet specific criteria, incentivizing positive community contributions. Nevertheless, such an incentive would pose additional challenges. For example, Congress could create categorical incentives, such as additional basis step-ups for investments that create jobs or housing for residents, provide substantial tax revenue, or engage in community outreach. However, the legislation could not include a benchmark for ways that the QOF would meet most incentives. Congress could reward QOFs whose staff is mostly composed of residents; but for other incentives, categorical benchmarks would be ineffective. Congress could not simply reward QOFs that create *any* amount of housing, as large QOFs could qualify for the investment by providing very limited housing. Further, any quantitative benchmarks would create the same line-drawing problems that imposing requirements would create. Congress could provide additional incentives for investments that primarily and objectively provide community benefits, like affordable housing, but because of the benefits provided to all qualifying opportunity zone investments, this would not likely encourage QOFs to primarily benefit the community.

So why not limit the opportunity zone benefits to QOFs that primarily and objectively benefit the community? First, the legislation serves to help revitalize communities and bring investor capital to areas that have been overlooked. While incentivizing those with unlocked capital gains to invest primarily in community benefits would create positive change in many opportunity zones, it would not have the potential to revitalize communities' economies to the extent that it would if investors were encouraged to undergo development within opportunity zones. Second, it is unlikely that as many investors would realize their capital gains and invest in

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[136] *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding that Congress "cannot command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

socially optimal and beneficial uses as investors who could create businesses, thus bringing capital to opportunity zones. One solution to prevent investments that do not benefit opportunity zones is amending section 1400Z to prevent some negative uses from qualifying. Yet, whether an investment is negative or valuable to a community depends on the circumstances and is best left for members of the community to decide. Also, restrictions could prevent residents from taking advantage of opportunity zone tax benefits to create QOFs or start qualified opportunity zone businesses that QOFs could then invest in. For instance, in Indiana, a couple sold their business and reinvested "the proceeds into a range of investments in their small rural community."[137]

Ultimately, particularized requirements or incentives within section 1400Z would be impractical because whether a QOF satisfactorily benefits a community depends on the circumstances. Further, limiting opportunity zone benefits to specific uses would discourage investments and prevent communities from participating to drive revitalization investments that meet their needs. [138] Therefore, while increased transparency through reporting requirements does not itself guarantee that QOFs will benefit communities, it provides accountability to local governments and citizens. Such governments and citizens are better positioned to know the needs of the community and can act to adjust their own incentives and initiatives towards particular uses and investments.

B. GOVERNANCE SOLUTIONS

Governance initiatives offer the best solution to maximizing the opportunity zone program. While opportunity zone investments like stadiums have great potential to benefit the community, they have some negative externalities that section 1400Z amendments cannot resolve. Through the federal incentive, Congress is not in the best position to perceive the needs of every community, but opportunity

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[137] *See GAO Evaluation of Early Opportunity Zones Activity Finds Promise, Need for Data*, *supra* note 8.

[138] Some developers would have invested in opportunity zones without the tax incentive, so the incentive may seem like a windfall. *See Wyden Launches Investigation into Opportunity Zones, Chairman's News*, *supra* note 43. However, in a survey of representatives from QOFs, most reported that they would not have invested without the incentive. *See* GAO Report, *supra* note 7, at 22. Further, Congress found that investments in opportunity zones were positive when enacting the tax incentive, so awarding benefits to investors, even if they did not need an incentive, is meritorious. *See GAO Evaluation of Early Opportunity Zones Activity Finds Promise, Need for Data*, *supra* note 8. Similarly, some Americans would have purchased electric cars without subsidies. *See id.*

zones have the potential to create large scale community revitalization. To minimize any negatives that arise from rapid opportunity zone investment and to amplify benefits, local and state governments and federal agencies can adopt several initiatives. For instance, agencies can provide grants for affordable housing and workforce development, states can develop programs such as education and job training, and local governments could implement zoning and community coalitions. Each level of government could install initiatives to help support current opportunity zone residents and meet the legislation's goal of long-term growth, without gentrification.[139]

1. *LOCAL GOVERNMENTS*

Local governments are in the best position to understand the needs of their communities. Thus, local governments can protect their citizens' interests in several ways if, for example, a team owner seeks to invest in businesses surrounding the stadium that is incompatible with the community's needs. For example, cities can leverage local zoning requirements.[140] In Cleveland, Ohio, "city officials plan to use zoning regulation to prevent harmful development in [o]pportunity [z]one areas."[141] Additionally, in Washington D.C., officials track and review proposed development and zoning map amendments in opportunity zones to "ensure that proposed projects align with existing plans and provide benefits to the surrounding community."[142] Local governments could also create community coalitions where "developers promise communities a variety of support structures, from affordable housing to youth sports programs, in exchange for the coalition's support of the project."[143]

Local governments can take steps to increase affordable housing options and aid current residents should rents increase due to increasing property values stemming from opportunity zone investment. If authorized by state law, local governments could

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[139] *See The Promise of Opportunity Zones: Hearing Before the J. Econ. Comm.*, 115th Cong. 5-6 (2018) (statement of Sen. Tim Scott).

[140] *See Opportunity Zoning*, URBAN INST. (July 26, 2019), https://www.urban.org/features/opportunity-zoning [https://perma.cc/F8NX-EJEH].

[141] *Id.*

[142] *Id.*

[143] *See* Andrew Ruskin, *Smells like Team Spirit: A Framework for Cooperation Between Community Advocates and Municipal Authorities in Stadium Contracting*, 28 SPORTS L.J. 67, 70-71 (2021); *Gentrification and Neighborhood Revitalization*, *supra* note 122.

impose vacancy taxes to prevent developers from sitting on property and preventing properties from being rented out.[144] Further, localities could institute "Just Cause" eviction ordinances, prohibiting landlords from refusing to renew a lease at the end of the lease term.[145] The City of Atlanta even used public-private partnerships to create a taxpayer relief fund that pools "private philanthropic and corporate donations and is expected to pay the difference between the baseline of property taxes paid in 2015 and whatever is due for up to 20 years on behalf of eligible homeowners at risk of displacement."[146]

Additionally, because the presence of stadiums can increase local tax revenue, local governments can allocate that revenue as it sees fit. Local governments could use the revenue to attend to the community's more pressing issues like creating workforce training programs, affordable housing developments or grants, taxpayer relief, infrastructure, or improved schooling. In short, local governments are better suited to satisfy the community's interests than federal programs.

Local governments can also enhance opportunity zone benefits and offset negative externalities from stadiums and other uses, as the White House Opportunity and Revitalization Council outlined in its Opportunity Zone Best Practices Report to the President.[147] Local governments have created partnerships with community leaders to ensure residents' voices were heard; developed revitalization plans to facilitate new investments; and monitored QOF projects and created websites where residents can see which QOFs have strong community backing.[148] Furthermore, local governments have leveraged the opportunity zone legislation by

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[144] *See Gentrification and Neighborhood Revitalization*, *supra* note 122.

[145] *See id.* (noting that "Just Cause" eviction ordinances work best when paired with rent controls).

[146] Oscar Perry Abello, *Displacement Risk in Atlanta's Opportunity Zones, Mapped*, NEXT CITY (July 16, 2020), https://nextcity.org/urbanist-news/displacement-risk-in-atlantas-opportunity-zones-mapped [https://perma.cc/F349-M556]; *See Major Initiatives*, ATLANTA COMM. FOR PROGRESS, http://atlprogress.org/major-initiatives.php [https://perma.cc/PZ2U-BZSB].

[147] *Best Practices Report*, *supra* note 128, at 11-14. The council was created in 2018 by a Trump Executive order to "carry out the Administration's plan to target, streamline, and coordinate Federal resources to be used in [o]pportunity [z]ones and other economically distressed communities." *Id.* at 6. It is comprised of 17 federal agencies and Federal-State partnerships and is tasked with identifying best practices for utilizing opportunity zones. *Id.*

[148] *Id.* at 11-14.

granting qualifying investments other tax or non-tax incentives.[149] For example, the Charleston City Council in South Carolina passed rules that "qualify [o]pportunity [z]one affordable housing projects for 'an unlimited level of residential density, lower parking requirements, and leeway that allows [developers] to spend less time getting approvals with the city[.]'"[150]

2. *STATE GOVERNMENTS*

State governments have also leveraged opportunity zones by conforming to federal rules for opportunity zones or granting state benefits to opportunity zone investments if certain requirements are met—either simply by qualifying for the federal incentive or by undertaking particular projects such as affordable housing.[151] As of August 2019, thirty states have conformed to federal rules for opportunity zones.[152] States have additionally played a role in maximizing opportunity zone benefits and weakening negative externalities such as opportunity zone businesses hiring nonresident employees. For example, Michigan's governor signed an executive directive requiring a state department to increase contracts with businesses in opportunity zones, particularly ones with employees residing in opportunity zones; and Colorado implemented tracking systems to measure QOF impact and started education programs.[153]

State governments can also pass legislation that increases affordable housing options and aids current renting residents. Specifically, states can impose rent controls to prevent quick economic revitalization and increasing rents from displacing renters.[154] Such controls could place a cap on the percentage that landlords increase rents.[155]

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[149] *Id.*

[150] *Id.* at 12

[151] *Id.* at 15-20.

[152] Joe Scalio et al., *Opportunity Zones Unlock New Opportunities*, KPMG 1, 8 (2019), https://assets.kpmg/content/dam/kpmg/be/pdf/2020/02/877925_QOZ_June_Whitepaper_v8web.pdf [https://perma.cc/JL8G-7LHV].

[153] *Best Practices Report*, *supra* note 128, at 17–18.

[154] *Gentrification and Neighborhood Revitalization*, *supra* note 122 (discussing how rent controls could raise other issues in that landlords may refuse to improve and maintain rental properties if they cannot recoup their improvements and maintenance through increased rents) (explaining how enforceable building standards may prevent landlords from refusing to maintain rental properties).

[155] *Id.*

3. *FEDERAL AGENCIES*

Rapid economic growth can be positive, but also negative to the extent that governments do not resolve resulting negative externalities. New stadiums and other developments can create negative externalities including increased traffic, pollution, and declines in police response time to emergency calls.[156] Moreover, federal agencies have emphasized opportunity zones and partnered with communities to thwart such negative externalities from opportunity zones and maximize opportunity zone benefits.[157]

Accordingly, federal agencies have targeted education and workforce development: the Department of Education prioritized opportunity zone placement in a grant competition; the Department of Energy provided over $1 million in funding to workforce development projects; and the Community Economic Development program has provided grants to organizations for workforce and business development within opportunity zones specifically. [158] Additionally, the Department of Labor provides preference for grants to organizations within opportunity zones, providing millions to such organizations; and the Small Business Administration has "guaranteed billions of dollars in loans to communities located within [o]pportunity [z]ones."[159]

Federal agencies have also focused on environmental concerns, healthcare, affordable housing, crime, and infrastructure within opportunity zones. The Environmental Protection Agency has helped to alleviate environmental concerns, particularly in distressed areas; the Health Resources and Services Administration made opportunity zones a factor in considering which areas to service; and the Administration for Children and Families encouraged organizations in opportunity zones to apply for Early Head Start Child Care funding. [160] Further, the Department of Housing and Urban Development "added preference points to competitive grants for projects within [o]pportunity [z]ones," providing millions in funding to projects within opportunity zones including affordable housing; and "reduced mortgage insurance application fees for multifamily properties and healthcare facilities in [o]pportunity [z]ones." [161] The Department of Justice has provided funding to community crime reduction and other

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[156] Keeler, *supra* note 88, at 800.
[157] *See Best Practices Report*, *supra* note 128, at 37.
[158] *See id.* at 42–43, 47–49.
[159] *See id.* at 57–60.
[160] *See id.* at 44-47.
[161] *See id.* at 51-54.

programs.[162] Lastly, the Department of Transportation has made efforts to incorporate opportunity zones in grant programs and awarded hundreds of millions to projects in opportunity zones.[163]

4. *BEST GOVERNANCE PRACTICES FOR STADIUMS*

For stadiums, local and state governments as well as federal agencies can implement many of the above-outlined governance examples to overcome any negative outcomes associated with the stadium development and economic revitalization. A local government in an area gaining a new professional sports stadium should first work to amend its zoning laws to ensure developments arising around the stadium meets its needs. Next, a local government should initiate a community coalition and work toward entering a community benefits agreement with the team owner that could include a requirement that the QOF hire residents, for instance. In exchange, the government could grant tax or non-tax benefits to the team owner such as exemptions from some land use requirements. When Kroenke built SoFi Stadium, city officials and Kroenke made a concerted effort to benefit Inglewood. [164] Agreements with developers required them to hire thirty-five percent of their construction workers and tradespeople from Inglewood.[165] The agreements also included clauses that prohibited disqualification solely due to a felony conviction.[166] Further, the agreements required developers to source supplies and services from diverse local firms, leading to contracts totaling over a half-billion dollars to eighty local minority- and women-led businesses.[167] In its efforts to enter agreements with the team, cities should also seek affordable event tickets for residents who would not otherwise get to attend games due to rising ticket costs.

Overall, the local government should accept input from community leaders and residents to create a revitalization plan that maximizes the benefits the new development will bring, while also considering congestion, displacement, and other issues that may arise. The local government can minimize displacement by initiating a taxpayer relief fund and by passing ordinances authorized by state law such as rent controls. It can also aid its residents in obtaining employment by initiating workforce training

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[162] *See id.* at 55-57.
[163] *See id.* at 60.
[164] *See Beyond Attractions*, *supra* note 111.
[165] *Id.*
[166] *Id.*
[167] *Id.*

programs. Where potential weaknesses are predicted, the government can grant incentives for particular uses like affordable housing, or seek state assistance and federal grants. As stadium QOFs engage in voluntary and mandatory reporting, the local government can continue to adapt to the changing economic and social environment.

States and federal agencies should also monitor stadium development. States can initiate programs aimed at benefitting residents such as education and workforce development. States can also legislate to prevent displacement with rent control and to incentivize particular uses. Federal agencies are already positioned to engage in community revitalization by providing grants and funding to housing projects, education and workforce development, and infrastructure projects, along with environmental and health support.[168] Overall, each level of government is capable of maximizing community revitalization from stadium development that benefits and protects its residents.

CONCLUSION

Stadium development is a striking example of opportunity zone investment that significantly contributes to community revitalization and prosperity. The opportunity zone program encourages team owners to build stadiums within distressed areas, thereby stimulating economic revitalization and utilizing private—rather than public—financing to take full advantage of the legislation. While opportunity zone investments like stadiums could result in rapid economic growth that causes some negative externalities, legislative amendments paired with the application of local, state, and federal governance tools can minimize negative externalities and maximize opportunity zone potential. Thus, because stadium development represents the capability this legislation has to benefit distressed areas, Congress should both continue rejecting proposals to exclude stadiums from opportunity zone incentives and extend the opportunity zone program, providing more investors and communities with the opportunity to mutually benefit from development.

[168] *Best Practices Report*, *supra* note 128, at 37-64.

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RAP ON TRIAL: RAP LYRICS AS EVIDENCE IN CRIMINAL CASES

BENNET HERBERT*

CONTENT

*Bennett Herbert is an associate specializing in intellectual property at the law firm of Frost Brown Todd LLP. He previously worked as a legal fellow for the Ohio Innocence Project and has served as a data consultant for NBA agents.

INTRODUCTION

> "Mamaaa,
> Just killed a man.
> Put a gun against his head, pulled my trigger,
> Now he's dead." – Queen, *Bohemian Rhapsody*[1]
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> "Momma, I just killed a man,
> My body still trembling, can you feel my hand?
> Don't shed no tears,
> It won't be long before they find out it was me,
> Momma." – J. Cole, *Killers*[2]

In December of 2020, a Maryland court upheld a conviction where the defendant appealed, arguing lyrics from a rap song he recorded should not have been presented to the jury as evidence.[3] This was far from the first time that a defendant's rap lyrics have been used as evidence against him at a criminal trial, and it will not be the last.

From its inception in the early 1970s, to its evolution to a more socially conscious genre of art in the 1980s, to its massive mainstream appeal in the 2010s, rap music has always been perceived through a more negative and threatening lens than other genres.[4] This largely racially motivated sentiment is especially prevalent in the criminal justice system. Courts continue to rule that the probative value of vague, violent rap lyrics outweigh their

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[1] QUEEN, *Bohemian Rhapsody*, *on* A NIGHT AT THE OPERA (EMI 1975).

[2] J. COLE, *Killers*, *on* THE GLORIFICATION OF GANGSTER (Alex Haldi 2011).

[3] Montague v. State, 243 A.3d 546 (Md. 2020).

[4] *See* Carrie B. Fried, *Bad Rap for Rap: Bias in Reaction to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2141-42 (1996).

prejudicial impact and often allow rap lyrics to be admitted as evidence.[5]

Recently, musical artists such as Jay-Z, Meek Mill, and Killer Mike, and activists such as Michelle Alexander have signed a statement supporting a bill in the New York legislature. This bill would limit when prosecutors could introduce rap lyrics as evidence.[6] The statement highlights the issues of racial disparity, undue prejudice, and the importance of a musician's freedom to create art without fear of prosecution.[7]

The use of rap lyrics as evidence in criminal trials is becoming increasingly common for both famous rappers and less notable defendants.[8] In Part II, this paper summarizes a brief history of hip-hop music, discussing its inception at New York block parties in the 1970s, its rise to the top of popular music today, and the social and racial perceptions that have plagued it for decades. Part III of this paper offers background to the relevant Federal Rules of Evidence and constitutional issues at play when evaluating the use of rap lyrics in a courtroom and provides examples of when rap lyrics have been used at trials. Part IV describes the bill being proposed in the New York legislature, one that is endorsed by prominent musical artists, that would narrow when judges can admit lyrics as evidence and analyze the effect and likely success of the bill. Part V summarizes this paper and offers final recommendations.

I. HISTORY OF HIP-HOP MUSIC

Hip-hop began in the early 1970s in the South Bronx as a result of community violence, gang activity, and poverty.[9] As hip-hop evolved through the decades, rap lyrics took on socially conscious

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[5] Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent at 17–18, State v. Skinner, 95 A.3d 236 (N.J. 2014) (No. A-57/58-12 (071764)).

[6] Shirin Ali, *Jay-Z, Other Artists Call to Ban Using Rap Lyrics as Criminal Evidence*, THE HILL (Jan. 19, 2022), https://thehill.com/changing-america/enrichment/arts-culture/590381-jay-z-other-artists-call-to-ban-using-rap-lyrics-as/ [https://perma.cc/R4TV-PD46].

[7] *Id.*

[8] Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent, *supra* note 5, at 17–18.

[9] Fernando Orejuela, *Timeline of African American Music: Rap/Hip-Hop*, CARNEGIE HALL https://timeline.carnegiehall.org/genres/rap-hip-hop [https://perma.cc/S839-2FEN]

themes and eventually reached widespread commercial success, becoming the most popular genre of music in the United States.[10]

A. ORIGINS OF HIP-HOP (1973-1981)

In the early 1970s, young Black and Hispanic communities in the South Bronx wanted somewhere to party amidst the economic struggles of the area and unemployment.[11] At these parties, Black New Yorkers brought their love of funk and jazz, while Hispanic New Yorkers brought Caribbean and Latin musical influences.[12] Eventually, this fusion created the first traces of what we recognize as hip-hop.[13] The youth movement became known as "hip-hop" over time as artists such as the Furious Five's Keith Cowboy used the terms in their raps.[14]

Many iconic features of modern hip-hop music can be traced to these block parties. For example, the block parties were hosted by a Master of Ceremonies ("MC") to ensure the crowd was having a good time.[15] The hip-hop parties also lacked the technology to automatically and smoothly transition from one song to the next, so disc-jockeys ("DJs") used two turntables to manually extend the break between records to ensure a smooth transition from one record to the next.[16] Through this process, hip-hop DJs began experimenting with "scratching" the record, giving hip-hop music some of its most iconic sounds.[17]

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[10] John Lynch, *For the First Time in History, Hip-Hop Has Surpassed Rock to Become the Most Popular Music Genre, According to Nielsen*, BUSINESS INSIDER (Jan. 4, 2018), https://www.businessinsider.com/hip-hop-passes-rock-most-popular-music-genre-nielsen-2018-1 [https://perma.cc/H2L8-PFFJ].

[11] Ryan Salem, *History of New York City: Hip-Hop*, SETON HALL UNIV.: BLOG (Feb. 21, 2020), https://blogs.shu.edu/nyc-history/2020/02/21/hip-hop/ [https://perma.cc/EW2Q-T7WV].

[12] *See* LA VERDAD: AN INTERNATIONAL DIALOGUE ON HIP HOP LATINIDADES (Melissa Castillo-Garsow & Jason Nichols eds., 2016).

[13] *See id.*

[14] Jeff Chang, *How Hip-Hop Got Its Name*, MEDIUM (Oct. 10, 2014), https://medium.com/cuepoint/how-hip-hop-got-its-name-a3529fa4fbf1 [https://perma.cc/36F6-YYQ5].

[15] Daudi Abe, *MC/Master of Ceremonies (Emcee)*, BLACKPAST (Dec. 26, 2013), https://www.blackpast.org/african-american-history/mc-emcee-master-ceremonies/ [https://perma.cc/L3RZ-87RU].

[16] *See* David McNamee, *Hey, What's That Sound: Turntablism*, THE GUARDIAN (Jan. 11, 2010), https://www.theguardian.com/music/2010/jan/11/hey-whats-that-sound-turntablism [https://perma.cc/W5QC-SYTM].

[17] *Id.*

As the Caribbean influence from Hispanic New Yorkers melded into these hip-hop parties, some began incorporating the Jamaican tradition of "toasting," a boastful type of spoken poetry and speech over music.[18] Many credit charismatic MC "DJ Kool Herc" for extending his toast between long breaks at a block party and being the first person to truly rap.[19] Early lyrical content of rap music primarily revolved around how good the rapper was at rhyming, how much of a good time he was to hang out with, and how he was cooler than some unidentified third party that was not the listener.[20]

For the first few years of hip-hop, the music was not recorded and only existed at these parties in a live setting.[21] Eventually, since partygoers would go home from a night of dancing and want to listen to the music they heard the night before, MCs began recording their music for distribution sometime in the late 1970s.[22] These recordings became popular in Harlem, the South Bronx, and eventually other cities on the East Coast, but they remained an arm's length away from crossover success to white audiences.[23]

That changed in 1979 when The Sugarhill Gang released *Rapper's Delight*.[24] Often wrongly cited as the first rap song, and more recently amended to be considered the first mainstream rap song, *Rapper's Delight* was the first rap song that most white people at the time had ever heard.[25] Rhyming over an irresistibly catchy

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[18] Mike Pawka, *What is "Dub" Music Anyway? (Reggae)*, STASON, https://stason.org/TULARC/music-genres/reggae-dub/3-What-is-Dub-music-anyway-Reggae.html [https://perma.cc/CA4V-SS9S].

[19] *See* Rebecca Laurence, *40 Years from the Party Where Hip Hop Was Born*, BBC (Oct. 21, 2014), https://www.bbc.com/culture/article/20130809-the-party-where-hip-hop-was-born [https://perma.cc/8PZL-MFDL].

[20] Friedrich Neumann, *Hip Hop: Origins, Characteristics and Creative Processes*, 42 THE WORLD OF MUSIC 51, 57-58 (2000).

[21] MICKEY HESS, HIP HOP IN AMERICA: A REGIONAL GUIDE (2009).

[22] *Id.*

[23] *Id.*

[24] Joe Lynch, *Chart Rewind: In 1979, Sugarhill Gang's 'Rapper's Delight' Made Its First Chart Appearance*, BILLBOARD (Oct. 13, 2014), https://www.billboard.com/pro/sugarhill-gang-rappers-delight-first-chart-appearance-anniversary/ [https://perma.cc/3HQB-C96L].

[25] This white writer would like to take this moment to share a personal anecdote: My parents amassed a record collection featuring hundreds of records from the 1970's and 1980's, and Rapper's Delight was for years the sole rap record in their collection. (The writer has since alleviated that). *See also* Elizabeth Blair, *'Rapper's Delight': The One-Take Hit*, NPR (Dec. 29, 2000), https://www.npr.org/2000/12/29/1116242/rappers-delight [https://perma.cc/8SYP-MDXL].

disco beat, members Wonder Mike, Master Gee, and Big Bang Hank boasted about their smooth flows, reputation with the ladies, and ability to compel partygoers to dance.

> I said a **hip, hop**, the hippie, the hippie,
> To the hip hop-a-you don't stop the rock it,
> To the bang-bang-boogie, say up jump the boogie,
> To the rhythm of the boogie, the beat.
> **Now what you hear is not a test: I'm rapping to the beat**.[26]

Wonder Mike's opening line would officially calcify hip-hop's namesake in the music industry, and the fifth line is essentially directed at white listeners: he is not testing the microphone; this is not some gimmicky introduction; what you are hearing *is* the vocal part of the song. This is rap music, and you better get used to it.

B. GOLDEN AGE OF HIP-HOP (1982-1997)

In the early 1980s, rappers expanded upon the lyrical themes of boasting about their vernacular skill and swagger and began to incorporate their personal stories and societal issues into their songs.[27] Several songs did this before 1982, but that year, Grandmaster Flash and the Furious Five released the first hit to pull this off with *The Message*, which described the realities of living in low-income housing projects:

> [B]ill collectors, they ring my phone, and scare my wife when I'm not home. Got a bum education, double-digit inflation. Can't take the train to the job, there's a strike at the station...It's like a jungle sometimes, it makes me wonder how I keep from going under.[28]

Because of how popular hip-hop music has become today, many do not know that for the first ten years of its existence, it was mostly considered a phase; a gimmick that would come and go,

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[26] THE SUGARHILL GANG, *Rapper's Delight, on* SUGARHILL GANG (Sugar Hill Records 1979).

[27] *See* Jon Pareles, *Hip-Hop is Rock 'n' Roll, and Hall of Fame Likes It*, THE NEW YORK TIMES (Mar. 13, 2007), https://www.nytimes.com/2007/03/13/arts/music/13hall.html [https://perma.cc/L77A-P8B3].

[28] GRANDMASTER FLASH & THE FURIOUS FIVE, *The Message, on* THE MESSAGE (Sugar Hill Records 1982).

quicker than disco and certainly less popular.[29] After *Rapper's Delight*, only a few artists were able to maintain the crossover appeal to white audiences, most notably Run DMC and the Beastie Boys, but even they were considered the exception.[30] It was assumed that in due time rap would run its course and all popular music would return to lyrics that were sung.[31]

This notion was not necessarily destroyed overnight, but there were a few notable landmarks that caused many to realize rap music was not going anywhere. Perhaps the most notable was Public Enemy's 1990 record *Fear of a Black Planet*.[32] The critical and commercial success of Public Enemy and other rap artists around the time such as A Tribe Called Quest, N.W.A., and Tone Lōc compelled *Billboard* editor Paul Grein to dub 1990 "the year that rap exploded."[33] At the time of this quote, nearly one-third of songs in the *Billboard 100* were hip-hop tracks, an exponential growth from the few "gimmicky" exceptions of only five years ago.[34] Rap music was growing, evolving, driving conversations, being both more artistically respected and more harshly criticized, and was not going away any time soon.

As rap expanded beyond its birthplace of New York City throughout the 1980s, it morphed into subgenres.[35] Perhaps the most important evolution—and certainly the most relevant for this paper—was the rise of gangsta rap in Los Angeles.[36] Though the term itself is dismissed by several of its most notable artists, gangsta rap has been defined in various ways; but possibly the most cited definition is that it is Though the term itself is dismissed by several of its most notable artists, gangsta rap generally reflects the realities

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[29] Robert Hilburn, *Rap – The Power and the Controversy: Success Has Validated Pop's Most Volatile Form, But Its Future Impact Could Be Shaped by the Continuing Public Enemy Uproar*, LOS ANGELES TIMES (Feb. 4, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-02-04-ca-470-story.html [https://perma.cc/53JY-GBFB].

[30] *Id.*

[31] *See id.*

[32] *Id.*

[33] *1990's: Mainstream Breakthrough*, HISTORYOFHIPHOP, https://historyofthehiphop.wordpress.com/history/1990s/ [https://perma.cc/5USU-Q5WW].

[34] Hilburn, *supra* note 29.

[35] Murray Forman, *'Represent': Race, Space, and Place in Rap Music*, 19 POPULAR MUSIC 65, 74 (2000).

[36] *See id.* at 78.

of inner-city life, or "street level journalism."[37] Some smaller L.A. artists recorded gangsta rap songs before 1986, Ice-T's "Six N' the Mornin'" was the first rap song to be considered both gangsta rap and a nationwide hit.[38] In the following years, artists like N.W.A., Snoop Dogg, and 2Pac would use gangsta rap to take hip-hop music to new places both commercially and artistically.[39]

Despite its value in popularity, musical achievement, and social commentary, this also marked the first time the general public strongly pushed back against hip-hop music from an ethical standpoint. At the center of many of these debates was whether the unfiltered lyrics—often violent, angry, or criminal in nature—were merely *portraying* the world in which the rappers lived or actively *endorsing* the actions and behaviors contained within. On one album, you could have an artist rap on one song about feeling like a victim in an urban nightmare; on the next song, the artist might rap about feeling complicit in contributing to such a toxic environment; and on the next, the artist would rap about experiencing both and feeling conflicted about their place in the system. Most of this nuance was lost on many important figures, though, as both the George H. W. Bush and Bill Clinton administrations blamed gangsta rap for causing negative societal conditions of inner cities across America[40]; Vice President Dan Quayle went as far as to say 2Pac's album *2pacalypse Now* should be pulled from shelves.[41]

C. RAP GOES PREMIER (1998-2014)

Gangsta rap saw its unofficial death in 1997 with the assassinations of Notorious B.I.G. and 2Pac merely seven months apart. For the next few years, hip-hop music was in a bit of an uncertain place. There was, however, still significant progress:

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[37] Eric Harvey, *Reality Meets Rap: The Legacy of Hip-Hop and the L.A. Riots*, RINGER (April 29, 2022, 6:20 AM) https://www.theringer.com/2022/4/29/23047296/los-angeles-riots-uprising-1992-ice-cube-ice-t [https://perma.cc/QG74-W6KC].

[38] *Ice-T…….6 N' The Mornin'*, ASK HIPHOP, https://history.hiphop/ice-t-6-in-the-morning/ [https://perma.cc/7B6N-6N97].

[39] *See generally id.*

[40] Tevi Troy, *Bill Clinton's Rap Music Quandry*, NEW REP. (Sept. 12, 2013), https://newrepublic.com/article/114601/bill-clintons-rap-music-quandary [https://perma.cc/JS8Y-HUJG].

[41] B. Drummond Ayres Jr., *The 1992 Campaign: The Campaign Trail; On Quayle's List: A Rapper and a Record Company*, N.Y. TIMES (Sept. 23, 1992), https://www.nytimes.com/1992/09/23/us/1992-campaign-campaign-trail-quayle-s-list-rapper-record-company.html [https://perma.cc/3VLM-6HLU].

female artists like Ms. Lauryn Hill, Missy Elliot, and Lil' Kim broke open the doors for massively successful female rappers; Atlanta groups Outkast and UGK added a southern funk to hip-hop production that gave it more catchy sensibilities without sanding off any of its core, raw elements; and the Jay-Z and Nas feud ensured that the headline-snatching crossover appeal of major rap beefs would not die with Biggie and 2Pac's feud.[42] Even with these developments, though, the genre had hit somewhat of a plateau in terms of growing mainstream (white) audiences and, in 1999, it was far behind the most popular genres in America: rock, pop, and country.[43] Yet, a few landmarks in the first 12 years of the 21st century took rap to new heights commercially and artistically.

Given the racial implications at play with white people's view of rap (more on that later), it makes sense that it took a white rapper with a name that sounds like a famous candy for many white people to give the genre a chance. Eminem's lyrics were violent, raunchy, and cinematically descriptive, but often they were ironic and funny.[44] His flows were technical and precise, and his voice would oscillate between whiny and nasally to angry and terrifying.[45] He was far from the first or best rapper to attempt these paradoxes, but he was the first white rapper to do it well.[46] Simply put, Eminem's skin color allowed him to reach a level of popularity and avoid a level of criticism that an identical Black rapper simply could not have achieved.[47]

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[42] *See e.g.*, Johnny Silvercloud, *Lady of War.*, MEDIUM (Aug. 1, 2014), https://medium.com/afrosapiophile/female-rapper-1be314192e02 [https://perma.cc/W8DT-N73V]; *The Sourth Got Something to Say: A Celebration of Southern Rap (1995-1999)*, NPR (Aug. 3, 2000, 12:00 PM), https://www.npr.org/2020/08/03/896254950/the-south-got-something-to-say-a-celebration-of-southern-rap-1995-1999 [https://perma.cc/KD85-KXUQ]; Catherine Walthall, *Behind the Beef: The "Supa Ugly" Rap Battle Between Jay-Z and Nas*, AM. SONGWRITER (June 2022), https://americansongwriter.com/behind-the-jay-z-and-nas-feud/ [https://perma.cc/4K3P-75DC].

[43] Lori Dorn, *Timeline of the Most Popular Music Genres (1910-2019)*, LAUGHING SQUID (Nov. 14, 2019), https://laughingsquid.com/most-popular-music-genres-1910-2019/ [https://perma.cc/EMG7-TE5D].

[44] Paul Edwards, HOW TO RAP: THE ART AND SCIENCE OF THE HIP-HOP MC 138 (Chicago Review Press 2009).

[45] *Id*. at 244.

[46] *See Eminem: The New Slim Shady*, BBC (Nov. 11, 2002, 6:10 PM), http://news.bbc.co.uk/2/hi/entertainment/2442507.stm [https://perma.cc/5FZJ-QGLA].

[47] *See id.*

Throughout the early 2000s, two of the most respected hip-hop producers were The Neptunes (a duo composed of Pharrell Williams and Chad Hugo) and a young producer from Chicago that went by the moniker Louis Vuitton Don.[48] Both expanded hip-hop's soundscape for the 21st century, with production that featured R&B hooks, catchy 808 drumbeats, and iconic samples from 1970s soul and funk music. While The Neptunes stuck mostly to producing for others—outside of some notable vocal features and Pharrell's brief visit as a mainstream solo artist around 2013—Louis Vuitton Don was itching to start his solo rap career and, in 2004, with the help of mentor Jay-Z, he released his debut album under his legal name, Kanye West.

With 2004's *The College Dropout*, Kanye incorporated funk, rock, blues, techno, soul, jazz, and even folk into the production without losing the core of hip-hop's sound.[49] Additionally, he gave rap musicians a path to rapping about Black identity without resorting to gang culture.[50] In doing these two things, Kanye massively expanded hip-hop's commercial reach and critical appreciation.[51] His subsequent ten year run (2004–2013) may be one of the best runs in rap history but in the history of music, regardless of genre.[52]

Lil Wayne successfully straddled the gangsta rap sensibilities he cultivated in the late 1990s with this newer, more accessible "hip-pop" to be the first gangsta rapper with massive crossover appeal to white audiences.[53] Soulja Boy weaponized the rise of the internet to

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[48] Nigel D., *Billboard's Top Ten Producers of the Decade*, UPROXX (Dec. 18, 2009), https://web.archive.org/web/20111004171119/http://realtalkny.uproxx.com/2009/12/topic/topic/news/billboards-top-10-producers-of-the-decade/ [https://perma.cc/FGH9-ST2W].

[49] Brad Callas, *25 Greatest Soul Chipmunk Soul Beats from Roc-A-Fella Dynasty*, DJBOOTH (Jan. 22, 2019), https://web.archive.org/web/20190714072000/https://djbooth.net/features/2019-01-22-25-greatest-chipmunk-soul-beats-roc-a-fella [https://perma.cc/LXT4-9PD3].

[50] Ike Okwerekwu, *Where's the Old Kanye?*, MEDIUM (May 13, 2019), https://medium.com/music-for-inspiration/wheres-the-old-kanye-fc51a6905c33 [https://perma.cc/H4TA-A3Q3].

[51] *Id*.

[52] David Drake, *Is Kanye West Having the Best Run in Rap History?*, COMPLEX (Sept. 19, 2012), https://www.complex.com/music/2012/09/is-kanye-west-having-the-best-run-in-rap-history [https://perma.cc/DA93-FA8K].

[53] Sophie Schillaci & Shirley Halperin, *Is Lil Wayne a Pop Star?*, HOLLYWOOD REPORTER (Sept. 7, 2011, 3:00 PM), https://www.hollywoodreporter.com/news/general-news/is-lil-wayne-a-pop-232192/ [https://perma.cc/2WWL-3MAC].

force his way into the conversation and, in doing so, gave white middle school administrators an easy dance to show students that they were not the enemy.[54]

In 2009, Aubrey Graham parlayed his success as an actor of a paraplegic highschooler on Degrassi into an attempt at a rap career with the moniker Drake. By combining the 808-heavy production of Kanye's later albums, a crooning R&B voice to sing more vulnerable lyrics about loss, love, and anxiety, and an admittedly questionable level of ferocious rapping proficiency (but at least a baseline level above practically all of the R&B singers of the 2000s), Drake had an entire generation of sad boys texting their exes at 2:00 A.M. By 2017, hip-hop had passed rock music as the most popular genre in America.[55]

D. RECENT DEVELOPMENTS IN HIP-HOP (2015–2022)

The rise of the internet has provided avenues for rappers outside the conventional necessity of a record deal.[56] Outlets like SoundCloud and YouTube have opened avenues for rappers to go viral and become overnight sensations, circumventing the arduous process and, oftentimes, parasitic relationship between label and artist.[57]

Throughout its nearly 50-year history, the epicenter of hip-hop had mostly shifted between the west coast and the east coast.[58] But in the mid-2010s, the South took center stage, particularly Atlanta, Georgia, and the South Florida region.[59] This transfer accompanied a shift in production to a more aggressive, bass-heavy "trap" style

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[54] As corny as this moment may have been, it legitimately broadened rap's appeal and accessibility to suburban soccer moms. Also, Soulja Boy provided us with one of the best hip-pop songs of this era with *Zan with that Lean*, so he gets a pass. *See generally* Meaghan Garvey, *The Influencer: A Decade of Soulja Boy*, PITCHFORK (July 9, 2015), https://pitchfork.com/features/article/9682-the-influencer-a-decade-of-soulja-boy/ [https://perma.cc/4MLK-LKQG].

[55] Lynch, *supra* note 10.

[56] *See* Garvey, *supra* note 54.

[57] *Id.*

[58] *See* Jewel Wicker, *Atlanta, the City that Defined the 2010s and Altered the Sound of the World*, DAZED (Dec. 17, 2019), https://www.dazeddigital.com/music/article/47166/1/atlanta-changed-the-sound-of-the-world-migos-zaytoven-gucci-mane/ [https://perma.cc/4WF2-XTXL].

[59] *Id.*; *see The Surge of South Florida Hip-Hop: Introduction to the Music*, UNIV. MIAMI LIBRS., https://sp.library.miami.edu/subjects/floridahip-hop [https://perma.cc/99KF-4CLX].

of music.[60] Artists like Future and Young Thug launched trap into the fastest rising and eventually most popular subgenre of hip-hop, while older trap artists like Gucci Mane and 2-Chainz saw a commercial rebound for the sound they helped cultivate ten years prior.[61]

Lyrically, young rappers of this era placed less emphasis on clearly enunciating every word; instead, the style was defined by changing the inflection of one's voice to communicate the emotional catharsis the artist was feeling at the time.[62] Often dismissively called "mumble-rap," this change expanded on the more vulnerable and emotional shift that hip-hop had undergone at the beginning of the 2010s.[63] Hip-hop also embraced a less machismo quality than ever before, with Young Thug often seen wearing dresses and Lil Nas X being the first successful and openly gay rapper.[64]

E. HISTORY OF RACIAL IMPLICATIONS

Since its inception, rap music has been undeniably intertwined with the Black identity in modern America.[65] As much of white America pushed back on the rise of gangsta rap in the late 1980s, it became indisputable that the racial component of hip-hop music contributed to its perceptions. Some notable academic studies have concluded that this underlying bias goes beyond a mere musical preference, resulting in egregious prejudices against hip-hop artists. Additionally, law enforcement has long had a predatory relationship with rap artists.

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[60] Wicker, *supra* note 58.

[61] *Id.*

[62] *See* PNL, *Black Thought on Mumble Rap: 'I Essentially Invented It*,' COMPLEX (Dec. 26, 2017), https://www.complex.com/music/2017/12/black-thought-on-mubmle-rap-i-essentially-invented-it, [https://perma.cc/Q3U3-EW6K].

[63] *Id.*

[64] *See* Gerrick Kennedy, *Lil Nas X Makes Grammy History as the First Openly Gay Rapper Nominated in Top Categories*, L.A. TIMES (Nov. 20, 2019), https://www.latimes.com/entertainment-arts/music/story/2019-11-20/grammy-nominations-2020-lil-nas-x-old-town-road, [https://perma.cc/NL8B-HYZL].

[65] Deena Zaru & Lakeia Brown, *Hip-Hop has Been Standing Up for Black Lives for Decades: 15 Songs and Why They Matter*, ABC NEWS (July 12, 2020), https://abcnews.go.com/Entertainment/hip-hop-standing-black-lives-decades-15-songs/story?id=71195591, [https://perma.cc/3FP5-DP2X].

1. *ACADEMIC STUDIES*

In 1996, Indiana University's Dr. Carrie Fried conducted a study to gauge how people react to words in a rap song versus a song of another genre.[66] One group of subjects received written lyrics and were told they were rap lyrics, while another group was given the same lyrics, but told they were folk or country lyrics.[67] The results showed the group that was told the lyrics belonged to a rap song were much more likely to find the lyrics threatening, dangerous, and much more likely to take them literally and believe they were recounting a true story.[68] This group was also more likely to support regulating, censoring, and outright banning the song.[69] A similar divide appeared when the subjects were not told which genre the lyrics belonged to but were simply shown a photo of either a Black artist or a white artist in conjunction with the lyrics.[70]

More shocking, perhaps, is a study from Dr. Stuart Fischoff on gangsta rap's impact on jurors. The study featured four groups of subjects: one group was told a story of a young man charged with a violent crime and shown a violent rap song he had written; one group was told a story of a young man charged with a violent crime who had never written a song; one group was shown violent rap lyrics from a young man that had never been charged with a crime; and one group was told a story about a young man that had never been charged with a crime and had never written a rap song.[71] Some results made perfect sense: the subjects saw the man who was charged with a crime and had written violent rap lyrics as more threatening and dangerous than the man who had done neither, for example.[72] However, more horrifying was the conclusion that, on average, subjects shown the violent rap lyrics from the man who had never been charged with a crime were more threatened and harbored more negative feelings towards him than the subjects who were told about the young man being charged with rape or murder who had never written a rap song.[73] Dr. Fischoff concluded that, in many

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[66] Fried, *supra* note 4.

[67] *Id.* at 2136-37.

[68] *See id.* at 2141-44.

[69] *Id.*

[70] *Id.*

[71] Stuart P. Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 798-99 (1999).

[72] *Id.* at 801-03.

[73] *Id.*

parts of America, being a rapper was more damning than being charged with murder.[74]

2. *POLICING HIP-HOP*

In 2004, an investigation from the *Miami Herald* revealed that the New York Police Department and Miami Police Department both featured unofficial "hip-hop units."[75] Officers in these units would invest time and money into monitoring up-and-coming local rap artists solely to see whether they were up to no good, often partaking in racial stereotyping.[76] "Hip-hop units" were far from the first time police had been illegally predatory towards rap artists. In the late 1980s, as gangsta rap was gaining prominence, police would occasionally show up to concerts and arrest rappers on stage for obscenity with respect to their lyrics.[77] These bogus charges rarely stuck, but they cost the artist a concert with no repercussions for the arresting officers.[78] Rap artists have criticized police for harassing the artist's crew and fans backstage for something as innocuous as signing autographs for fans.[79]

In an article for the American Prosecutors Research Institute, Alan Jackson gave advice to practicing prosecutors on how best to paint defendants in a negative light to secure a conviction from juries and lengthy sentences from judges and, in the article, he specifically recommends using a defendant's musical lyrics:

> The real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing the jury to that person. Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant's true personality. Gang

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[74] *Id.* at 802.

[75] Dasun Allah, *NYPD Admits to Rap Intelligence Unit*, VILLAGE VOICE (Mar. 16, 2004), https://www.villagevoice.com/2004/03/16/nypd-admits-to-rap-intelligence-unit/ [https://perma.cc/7T5C-PREZ].

[76] *See id.*

[77] Hunter Schwarz, *25 Years Ago, 2 Live Crew Were Arrested for Obscenity. Here's the Fascinating Back Story.*, WASH. POST (June 11, 2015, 1:54 PM), washingtonpost.com/news/the-fix/wp/2015/06/11/25-years-ago-2-live-crew-were-arrested-for-obscenity-heres-the-fascinating-back-story/ [https://perma.cc/9AYE-XQNS].

[78] *Id.*

[79] *See* Allah, *supra* note 75.

investigators should focus on these items of evidence during search warrants and arrests.80

II. RAP LYRICS USED AS CRIMINAL EVIDENCE

Congress enacted the Federal Rules of Evidence in 1975 to codify the evidence law that applies in United States federal courts.[81] Many states quickly adopted these Rules or revised their rules to be similar to the Federal Rules.[82] Between 1991 and 2013, prosecutors attempted to introduce rap lyrics as evidence in criminal cases with varying degrees of success. In 2014, the Supreme Court of New Jersey decided *New Jersey v. Skinner*, a case that many future courts would grapple with when deciding whether to permit rap lyrics as evidence against a criminal defendant.[83] In *Dawson v. Delaware*, the Supreme Court raised the standard for courts to admit artistic works as evidence.[84] However, courts consistently admit rap lyrics in violation of that standard. Several famous artists have had their lyrics used against them in court.

A. FEDERAL RULES OF EVIDENCE

In 1975, Congress passed the Federal Rules of Evidence to guide courts when discerning whether to admit certain evidence into the courtroom.[85] Rule 403 and Rule 404(b) help regulate the evidence that a court may allow a jury to hear to assist in reaching a verdict.[86] These Rules placed more trust in jurors' hands to hear questionable evidence and encouraged admitting evidence in close cases.[87]

1. *RULE 403*

Federal Rule of Evidence 403 states in part:

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[80] Alan Jackson, *Prosecuting Gang Cases What Local Prosecutors Need to Know*, AM. PROSECUTORS RSCH. INST. at 16 (April 2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [https://perma.cc/VB83-NTGF].

[81] LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 382 (Oxford Univ. Press, 4th ed. 2019).

[82] *Id.*

[83] State v. Skinner, 218 N.J. 496 (2014).

[84] Dawson v. Delaware, 503 U.S. 159 (1992).

[85] Friedman, *supra* note 81, at 382.

[86] *Id.*

[87] *Id.*

> The court may exclude relevant evidence if its *probative value* is *substantially outweighed* by a danger of one or more of the following: *unfair prejudice*, confusing the issue, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[88]

This rule gave courts a balancing test to determine whether the probative value of the evidence outweighs these other negative factors. Unfair prejudice is the most relevant factor for courts to weigh when considering rap lyrics.

2. *RULE 404(B)*

Federal Rule of Evidence 404(b) states in part:

> Evidence of a crime, wrong, or other act is not admissible *to prove a person's character* in order to show that on a particular occasion the person *acted in accordance with the character*… This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[89]

B. EARLY CASES OF RAP LYRICS AS EVIDENCE

From 1991 to 2013, courts across America inconsistently decided to allow or deny the use of rap lyrics as evidence in a way that seemed contrary to the Federal Rules of Evidence.

1. *U.S. V. FOSTER*

U.S. v. Foster is the first recorded case of an American court using a defendant's rap lyrics as evidence against him in a criminal case.90 After acting suspicious while getting off a train, police searched Derek Foster's luggage and discovered a large amount of cocaine.91 Police also found a notebook with lyrics Foster had written for a rap song he planned on recording:

> Key for key, pound for pound,
> I'm the biggest dope dealer and I serve all over town.92

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[88] FED. R. EVID. 403 (emphasis added).
[89] FED. R. EVID. 404(b) (emphasis added).
[90] *See* United States v. Foster, 939 F.2d 445 (7th Cir. 1991).
[91] *Id.* at 449.
[92] *Id.*

When the prosecution attempted to use these lyrics as evidence, Foster argued the lyrics were fictional and would cause undue prejudice from the jury.[93] The Seventh Circuit held that the lyrics exhibited knowledge and motive and, therefore, the probative value of the lyrics outweighed any undue prejudice.

2. *STATE V. CHEESEBORO*

Prosecutors charged Felix Cheeseboro with armed robbery and murder.[94] While he awaited trial, Cheeseboro wrote a song called *The Ruckus*:

> Ruckus, I believe you're a perpetrator, gold and platinum hater,
> Cuz me and J.D. is a force like Dark Vador.
> Like the 4th of July**, I spray fire in the sky**.
> If I hear your voice, better run like horses.
> Or like metamorphis, **turn all y'all to corpses**.
> No fingerprints or evidence at your residence.
> Fools leave clues, **all I leave is a blood pool**.
> Ten murder cases, why the sad faces?
> Cause when I skipped town, **I left a trail [of] bodies on the ground**.[95]

The trial court allowed these lyrics to be used as evidence. However, the Supreme Court of South Carolina found that Cheeseboro's lyrics, unlike those in *Foster*, were "too vague in context" and, therefore, the minimal probative value was far outweighed by their prejudicial impact as evidence of Cheeseboro's bad character.[96]

3. *COOK V. STATE*

The same year *Cheeseboro* was decided, the Supreme Court of Arkansas came to a different decision with quite similar facts.[97] In Keyono Cook's aggravated robbery trial, his lyrics were used as evidence against him:

> Look out for this motherf***ing killa,
> on the for real n***a, you bets to give up the strilla.
> Or getta, motherf***ing slug assigned to you ass,

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[93] *Id.*
[94] State v. Cheeseboro, 552 S.E.2d 300, 302 (S.C. 2001).
[95] *Id.* at 312.
[96] *Id.* at 313.
[97] Cook v. State, 45 S.W.3d 820, 822 (Ark. 2001).

> Or you can do the shit the easy way, give up the cash.[98]

The Supreme Court of Arkansas upheld the use of these lyrics because they described an aggravated robbery, despite no specifics or identifying information about the facts of the crime in question.[99]

4. *GREENE V. COMMONWEALTH*

As the introduction of this paper posits and as will be fully argued later, many courts do not correctly factor in how unduly prejudicial rap lyrics are, or overstate their probative value, or both. It is worth recognizing, then, that there certainly are examples of lyrics wherein the rules of evidence—and common sense—dictate that the lyrics should be introduced as evidence.

A month after his wife's throat was slashed, Dennis Greene released a song that included the following lyrics:

> B***h made me mad, and I had to take her life.
> My name is Dennis Greene and I ain't got no f***ing wife,
> I knew I was gonna be givin' it to her… when I got home,
> I cut her mother***in' neck with a sword.100

The Supreme Court of Kentucky ruled that these lyrics established premeditation and motive, which outweighed any risk of prejudice.[101] This makes perfect sense, as Greene's lyrics not only attach internal motive to the act, but also describe in grisly detail the facts of the crime.

5. *HANNAH V. STATE*

In *Hannah v. State of Maryland*, a Maryland appellate court found that the following lyrics were too vague and prejudicial to be admitted because they were only presented to show that Hannah was a "violent thug" with a propensity to commit violent crimes:

> One, two, three shot ya ass just got got drop,
> I ain't got guns got a duz unda da seat.
> Ya see da tinted cum down n out come da glock,
> Ya just got jacked, we leave da scene in da lime green.
> So you betta step ta me before I blow off ya feet,

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[98] *Id.*
[99] *Id.* at 826.
[100] Greene v. Commonwealth, 197 S.W.3d 76, 85 (Ky. 2006).
[101] *Id.* at 87.

> Bring da whole click, we put em permanently sleep.
> Wa you think, I ain't got burners, got a duz unda da seat,
> So pull your f***in' trigga n***a go pop, pop,
> One, two, three shot ya ass just got drop.
> I'll put you in a funeral.[102]

C. THE KEYSTONE CASE: *NEW JERSEY V. SKINNER*

Up to this point, there was not much consistency with respect to the analysis conducted for whether courts should admit lyrical evidence. In 2014, the Supreme Court of New Jersey issued a ruling marking it as the keystone case that seemingly every future court would reconcile with when determining whether to admit lyrical evidence.

Vonte Skinner was convicted in 2008 for attempted murder.[103] At his trial, the prosecutor read 13 pages of lyrics of his songs, which mostly included vague, general descriptions of crimes, such as:

> In block wars I'm a vet. **In the hood, I'm a threat**.
> It's written on my arm and **signed in blood on my Tech**.
> I'm in love with you, death.[104]

After serving six years, Skinner's conviction was overturned by the Supreme Court of New Jersey.[105] Citing Rule 404(b), the court explained that to be admitted as evidence, lyrics must: 1) have a *strong nexus* to the facts of the case; *and* 2) have probative value that outweighs the prejudicial impact.[106]

In an often-cited passage, the court reasoned, "One would not presume that . . . Edgar Allen Poe buried a man under his floorboards, as depicted in his short story 'The Tell-Tale Heart.'"[107] The court accurately described the phenomenon observed in Dr. Carrie Fried's 1996 study that concluded people are more likely to interpret rap lyrics as autobiographical confessions instead of fictional expressions of art.[108]

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[102] Hannah v. State, 23 A.3d 192, 195-196 (Md. 2011)
[103] State v. Skinner, 95 A.3d 236, 242 (N.J. 2014)
[104] *Id.* at 241.
[105] *Id.* at 252.
[106] *Id.* at 238-39.
[107] *Id.* at 251.
[108] Fried, *supra* note 4, at 2141-44.

D. RECENT CASES OF RAP LYRICS AS EVIDENCE

The second prong of the Skinner test is in essence a rewording of Rule 404(b), but the first prong, that the lyrics must have a strong nexus to the facts of the case, was significant in clarifying another hurdle for lyrics to enter evidence. Lyrics without a strong nexus to the facts of the case, such as those lyrics Cook was convicted for, would not come in under the Skinner test. Though the Skinner court only holds stare decisis for state courts within New Jersey, courts across the country since Skinner have applied this two-prong test.

1. *COMMONWEALTH V. TALBERT*

One year after *Skinner*, a Pennsylvania appellate court upheld the use of rap lyrics in a murder case. Zaiee Talbert was convicted after the following lyrics were presented at his trial:

> Running and running the Badlands like an Afghan,
> Choppers on deck, slide up in the caravan.
> Hit ya legs up, turn that n***a into half a man.[109]

Here, the Pennsylvania court found the lyrics to carry probative value that outweighed the risk of prejudice, and distinguished *Skinner* by noting these lyrics had a strong nexus to the facts of the case, while the lyrics in *Skinner* did not.[110] It is worth inspecting, however, the strength of the nexus to the facts of the case.

The court pointed to "Badlands," the area of Philadelphia where the crime occurred; but thousands of people live in the Badlands, and tens of thousands travel through it on a regular basis.[111] The court pointed to "choppers," or AK-47s, being the weapon of the crime, but many rap songs incorporate choppers into their storytelling.[112] The court also noted the word "caravan," and pointed out that a van was the getaway car; however, a caravan, by definition, can be any getaway vehicle and does not have to be a van at all.[113] So, while Talbert's lyrics might provide a stronger nexus to the facts of the crime than those in *Skinner*, it is debatable whether that nexus was so much stronger to warrant a different outcome.

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[109] Commonwealth v. Talbert, 129 A.3d 536, 540 (Pa. Super. Ct. 2015).

[110] *Id.* at 541-42.

[111] *Id.* at 540.

[112] *Id.*

[113] *Id.*

2. *WARD V. INDIANA*

More understandable is an Indiana appellate court's reasoning for distinguishing from *Skinner* in *Ward v. Indiana*.[114] Troy Ward released a remix to 2-Chainz's "I'm Different" on SoundCloud, which featured the following opening bar:

> I creep up to the door silently and slow,
> I opened up that b***h and now we clashing poles.
> **Two shots to the body, two shots to the dome,**
> Finesse the f***ing stash and then I took it home.[115]

The Indiana court distinguished *Skinner* because Ward's lyrics described details of the case that were only known to police at the time of the song's release, particularly "two shots to the body, two shots to the dome."[116]

3. *MONTAGUE V. MARYLAND*

More baffling is the way a Maryland appellate court recently distinguished *Skinner*. Lawrence Montague was charged with second-degree murder and, while he awaited trial, he released a song with the following lyrics:

> I be playin the block b***h,
> And if you ever play with me, I'll give you a dream,
> **a couple shots snitch**.
> It's like hockey pucks the way I dish out this,
> **It's a .40** when that b***h goin' hit up shit.[117]

The court distinguished from *Skinner* in two ways. First, it concluded the lyrics held a strong nexus to the facts of the case: particularly that a .40 caliber gun was the weapon used and that "a couple shots snitch" could be Montague's way of threatening any potential witnesses who might testify against him.[118] Second, the court noted that while Skinner's lyrics were from songs released before the crime in question occurred, Montague released this song *after* he had been charged with the crime.[119]

While these facts *are* different than the facts in *Skinner*, Judge Shirley Watts, the sole Black judge on the court, wrote a compelling dissenting opinion. She reasoned it was "pure fiction" to interpret

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[114] Ward v. State, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019).
[115] *Id.*
[116] *Id.*
[117] Montague v. State, 243 A.3d 546, 554 (Md. Ct. App. 2020).
[118] *Id.* at 567-68.
[119] *Id.*

the lyrics of Montague's song as sharing a nexus to the facts of the case, and that the violence described in the song could apply to any type dispute between parties because there were no specific indications in the lyrics that connected the song to the facts at hand.[120] She further argued the majority's focus on the lyrics mentioning "snitches" and determining that he must be threatening potential witnesses was unfounded and irrelevant to the question of whether the lyrics have a strong nexus to the facts of the crime.[121] Finally, Judge Watts argued the majority was underselling just how damaging the prejudice of rap lyrics could be to a Black defendant.[122]

E. THE FIRST AMENDMENT

Along with questionable analysis with respect to the Federal Rules of Evidence, several courts are allowing rap lyrics to be admitted as evidence in violation of a defendant's First Amendment rights as protected in *Dawson v. Delaware*.[123]

1. *DAWSON V. DELAWARE*

While trying him for murder, the prosecution introduced David Dawson's tattoo as evidence that he was in a white supremacist, Aryan gang.[124] The Supreme Court vacated Dawson's sentence, ruling it was unconstitutional to use protected speech as evidence when that speech is irrelevant to the underlying crime.[125] This decision heightened the evidentiary standard when it comes to forms of art.[126]

The key question under *Dawson* is how relevant the lyrics are to the facts of the case. It is worth noting that under this standard, the lyrics from *Greene v. Commonwealth* would certainly get in, because they are *very* relevant to the facts of the case.[127]

However, many courts view all rap lyrics as inherently factual statements, which removes them from being defined as what they are: pieces of art. In fact, the American Civil Liberties Union has argued in amicus briefs that rap music's central placement to Black identity, social commentary, use as protest music, and expression of the lower class distinguishes it from other genres of music in such a

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[120] *Id.* at 573 (dissenting).

[121] *Id.* at 573-74.

[122] *Id.* at 575-76.

[123] Dawson v. Delaware, 503 U.S. 159, 162 (1992).

[124] *Id.*

[125] *Id.* at 168-169.

[126] *See* Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent, *supra* note 5.

[127] *Dawson*, 503 U.S. at 160.

way that rap music should be presumed to be political speech.[128] No court has made such a ruling, but doing so would raise the bar for admitting rap lyrics as evidence.

2. *TENNESSEE V. BASSETT*

In 2021, Christopher Bassett was convicted for murder after lyrics from one of his songs were used as evidence that Bassett was in a gang.[129]

Bassett argued that, like *Dawson*, admission of such art to prove gang membership is a violation of his First Amendment right.[130] A Tennessee appellate court disagreed and distinguished from *Dawson.* The court noted that in *Dawson*, the tattoo was the *only* evidence that he was in a gang, while Bassett's lyrics were corroborated by witness testimony and text messages which provided further evidence Bassett was in a gang.[131]

While this is a factual difference, the Court in *Dawson* did not cite lack of corroborative evidence as the reason for its ruling; it merely said that using Dawson's tattoo to prove he was in a gang was a violation of his First Amendment rights because his gang membership was irrelevant to the crime.[132] Similarly, the murder Bassett was charged with was not alleged to be gang-related by any means, and gang membership was not an element of the crime.[133] Therefore, the court should not have admitted Bassett's lyrics because they were only being presented to prove his gang membership and, thus, to disparage his character in a way irrelevant to the crime. It is worth reiterating that David Dawson was white, and Christopher Bassett is Black.

F. FAMOUS ARTISTS

Famous rap artists have had their lyrics used as evidence against them as well, sometimes in egregious ways.

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[128] Brief of Amicus Curiae ACLU of N.J. in Support of Defendant-Respondent, *supra* note 5, at 16.

[129] Brief for American Civil Liberties Union and American Civil Liberties Union of Tennessee as Amici Curiae Supporting Appellant, Tennessee v. Bassett, (Tenn. Crim. App. 2020) (No. E2019-02236-CCA-R3-CD), [https://perma.cc/PRR2-EPGG].

[130] *Id.* at 3.

[131] *Id.* at 8.

[132] *Dawson v. Delaware*, 503 U.S. 159, 162 (1992).

[133] Brief for American Civil Liberties Union and American Civil Liberties Union of Tennessee as Amici Curiae Supporting Appellant, *supra* note 129.

1. *BOBBY SHMURDA*

In 2014, Bobby Shmurda blew up as one of the bigger rap successes of the year with the release of Hot N***a.[134] As Craig Jenkins of Pitchfork wrote, "The beat's fierce, the dance is hilarious, and the hat never lands. A star is born."[135]

> I been selling crack since like the fifth grade…
> …Mitch caught a body about a week ago[!][136]

Shmurda's breakout single not only put him on the top of streaming charts, but also caught the attention of the NYPD who was relatively transparent that the popularity of Shmurda's music is what compelled them to look into the young rapper's activity.[137] After charging him with weapons and conspiracy charges, the lyrics to Hot N***a were read at Shmurda's indictment.[138] NYPD's James Essig said Shmurda's songs were "almost a real life document of what they were doing on the street."[139]

Shmurda ended up taking a plea deal, so his lyrics were never read at trial, but there was a possibility prosecutor would have sought to admit his lyrics, citing to the press an interview with New York Magazine in which Shmurda boasted, "My music is straight facts."[140] Shmurda later contradicted himself, stating that his lyrics were fake.[141]

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[134] *The 100 Best Tracks of 2014*, PITCHFORK (Dec. 15, 2014), https://pitchfork.com/features/lists-and-guides/9555-the-100-best-tracks-of-2014/?page=7 [https://perma.cc/AW5V-EH69].

[135] *Id.*

[136] BOBBY SHMURDA, *Hot N***a, on* SHMURDA SHE WROTE (Epic Recs. 2014).

[137] *See* James C. McKinley Jr., *Rapper Bobby Shmurda Takes 7-Year Plea Deal in Gang Case*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/nyregion/rapper-bobby-shmurda-takes-7-year-plea-deal-in-gang-case.html [https://perma.cc/7PZN-25NA].

[138] *Id.*

[139] Aron A., *Music on Trial Bill & YSL Indictment*, HOT NEW HIP-HOP (July 11, 2022, 5:00 PM), https://www.hotnewhiphop.com/415967-bobby-shmurda-speaks-on-rap-music-on-trial-bill-and-ysl-indictment-news [https://perma.cc/3HCQ-RU9H].

[140] McKinley Jr., *supra* note 137; *Bobby Shmurda Pleads Not Guilty to Gun, Drug Charges*, BILLBOARD (Dec. 18, 2014), https://www.billboard.com/music/rb-hip-hop/bobby-shmurda-pleads-not-guilty-gun-drug-charges-6413836/ [https://perma.cc/L3TA-ABGG].

[141] Chris Deville, *Bobby Shmurda Says His Lyrics Are Fake and Epic Records Should Pay His Bail*, STEREOGUM (Feb. 23, 2015, 4:28 PM), https://www.stereogum.com/1782825/bobby-shmurda-says-his-lyrics-are-fake-and-epic-records-should-pay-his-bail/news/ [https://perma.cc/LP78-HGZT].

Though outside the scope of this paper, it is worth mentioning the degree to which New York's gang laws were used against Shmurda and his rap group, particularly in order to charge Shmurda with crimes for which he was not even present.[142]

2. *DRAKEO THE RULER*

Before his untimely death in 2021, Drakeo the Ruler spent the last several years of his life gradually gaining a reputation as one of the most unflinching, skilled, and lyrically dense West Coast rappers of his generation.[143] Unfortunately, he also dealt with tremendous legal issues that stemmed from bad faith state actors.

In 2017, the police arrested Drakeo for a shooting at a party at which he was not even present and used the lyrics from his song *Flex Freestyle* as evidence he was guilty, despite the song seemingly sharing no nexus to the facts and, if anything, narrowly describing a completely different situation:

> Sheesh, everything I state is facts,
> I'm not these other street n***s, b***h I can really rap.
> I'm ridin' round town with a tommy gun and a Jag,
> And you can disregard the yelling, RJ tied up in the back.144

The "RJ" referenced in these lyrics refer to rival rapper RJ.[145] Neither Drakeo nor RJ was at the scene of the crime; a tommy gun was not the weapon used at the crime; a Jaguar was not the getaway car.[146] The State's theory was, inexplicably, that since members of

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[142] McKinley Jr., *supra* note 137; Sidney Madden & Rodney Carmichael, *Montage of a Dream Deferred*, NPR (Nov. 28, 2020), https://www.npr.org/2020/11/28/933436082/bobby-shmurda-authenticity-conspiracy-flatbush-dream-deferred [https://perma.cc/8PXZ-9RPE].

[143] Grant Rindner, *Time to Take Over the World: An Interview with Incarcerated Rapper Drakeo the Ruler*, COMPLEX (June 14, 2018), https://www.complex.com/pigeons-and-planes/2018/06/drakeo-the-ruler-interview [https://perma.cc/8QY9-RXHJ].

[144] Eddie Fu, *Drakeo The Ruler Acquited of All Murder & Attempted Murder Charges*, GENIUS (July 25, 2019), https://genius.com/a/drakeo-the-ruler-acquitted-of-all-murder-attempted-murder-charges [https://perma.cc/P9W5-SK34].

[145] Jeff Weiss, *The Assassination of Drakeo the Ruler*, L.A. MAG. (Jan. 13, 2022), https://www.lamag.com/culturefiles/the-assassination-of-drakeo-the-ruler/ [https://perma.cc/PVU7-FDM6].

[146] Fu, *supra* note 144.

Drakeo's rap crew were at the scene of the crime, the shooting was an effort to target RJ as directed by Drakeo, but the shooters, thinking RJ would be there, got the wrong person.[147] RJ himself would later dismiss the prosecution's theory as fanciful, stating the party in question never even crossed his radar and that he never felt threatened by *Flex Freestyle*.[148]

It is hard to overstate the level of police misconduct in this case. In the 48 hours after the crime occurred and police learned that members of Drakeo's rap crew had been at the party, officers spent dozens of hours watching Drakeo's music videos before arresting him.[149] While arresting him, Detective Francis Hardiman told Drakeo his music would be the "soundtrack of his trial," and that "jurors don't like to see that stuff . . . your rap videos of you[.]"[150]

The police told prosecutors that Drakeo's music group was a front for a criminal street gang and his stage name "the Ruler" indicated he was the leader of the gang.[151] The police later tried to convince the prosecution that they could attach bullets they saw in music videos to the ballistics of the crime scene, a truly ludicrous proposition that the prosecution did not attempt to pursue.[152] While awaiting trial, Drakeo had his friend tweet from his personal account that he was quitting music and would have his songs removed from streaming services since "DETECTIVE HARIDMAN TRYNA USE MY LYRICS AGAINST ME."[153] Hardiman would subsequently have Drakeo placed in solitary confinement for eight months, alleging the tweet was a threat to his life.[154] At trial, the judge dismissed jurors from the case on three different occasions for referring to Detective Hardiman as "Detective Fuhrman," a reference to the racist officer in the O.J. Simpson trial.[155]

While awaiting trial, Drakeo was given a gag order from the judge that prohibited him from posting on social media or releasing

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[147] *Id.*

[148] *See id.*

[149] *Id.*

[150] Sam Levin, *The Jailed LA Rapper Whose Songs Were Used to Prosecute Him*, GUARDIAN (Oct. 2, 2019, 1:00 PM), https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs [https://perma.cc/J8NW-UX3A].

[151] Ashwin Rodrigues, *Why Drakeo the Ruler's Legal Battle Should Concern Us All*, VICE (Dec. 2, 2020, 12:49 PM), https://www.vice.com/en/article/dy8vmz/why-drakeo-the-rulers-legal-battle-should-concern-us-all [https://perma.cc/6MQH-RFVX].

[152] Levin, *supra* note 150.

[153] *Id.*

[154] *Id.*

[155] Weiss, *supra* note 145.

music—many would argue this violated his First Amendment rights.[156] In an amazing act of defiance, Drakeo found time to secretly rap into a jail phone while his collaborator JoogSzn recorded him on the other end.[157] This series of recordings would be released as an album titled *Thank You for Using GTL*, a reference to the telephone company that connects inmates to callers on the outside.[158]

Thank You for Using GTL was met with widespread critical acclaim as one of the most proficient, ambitious, and socially conscious rap albums in years.[159] Daniel Bromfield of Spectrum Culture praised the album's themes on "the carceral state, capitalism, the prison-industrial complex, the U.S. criminal justice system's targeting of rap and rappers, and the ongoing game of real vs. fiction taking place within hip[-]hop itself."[160] On the closing song on the album, *Fictional*, Drakeo raps about the disparity in how rap is perceived compared to other genres, and the injustice of his lyrics being used against him:

> It might sound real, but it's fictional
> I love that my imagination gets to you…
> … This shit crazy, man
> It's not real, like, n***a.
> Like, this is the only way I can do music, like...
> …I'm not gonna shoot up a sc'ool, I'm not gonna shoot nobody in front of the police sta'ion.
> I'm not gonna shoot nobody on camera.
> If I say something in a 'ap, it's not real
> My Id is... I have a lot of imag'nation
> It's fictional'
> So I don't want my words misinterpreted or any of that misconstr'ed
> If you're gonna use my music against me, I expect you use it the same way yoI would...
> (This call is being recorded)

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[156] *Id.*

[157] Matthew Ismael Ruiz, *Thank You for Using GTL*, PITCHFORK (June 10, 2020), https://pitchfork.com/reviews/albums/drakeo-the-ruler-thank-you-for-using-gtl/ [perma.cc/K4LU-CDZW].

[158] *Id.*

[159] *Id.*

[160] Daniel Bromfield, *Drakeo the Ruler: Thank You for Using GTL*, SPECTRUM CULTURE (June 16, 2020), https://spectrumculture.com/2020/06/16/drakeo-the-ruler-thank-you-for-using-gtl-review/ [perma.cc/8DRF-BZ4G].

> …Country music, punk rock, metal,
> Jazz, whatever, Blues, whatever,
> Treat rap the same'way that you're gonna treat any oth'r genre.
> You're not gonna hold Denzel Washington accountable for his role in Training Day,
> So don't do the same thing with m' music.'That's all I'm saying.[161]

Even though the lyrics to *Flex Freestyle* were used against him at trial, Drakeo was found not guilty.[162] Drakeo said about the investigation:

> The whole point of me starting to rap is I get to rap and talk about these things and not *do* these things. And would you rather, me rapping about stuff that I'm not actually doing, or out there doing it? It's not real. Rapping is rhyming and pretending. It's a persona. How are you gonna tell me what *I* mean?[163]

3. *TAY-K*

In 2017, blog rap, a new phenomenon in which rappers have found viral success by taking advantage of nearly every possible internet vehicle, had its own version of the O.J. Simpson Bronco chase when Tay-K released the song *The Race* and its accompanying music video. Tay-K was out on bail and awaiting trial for a home invasion and felony murder when he went on the run and spent weeks evading law enforcement.[164] In the song, he brags about how police are unable to catch him; authorities would capture him less than 20 hours later.[165]

> F*** a beat, I was tryna beat a case,
> But I ain't beat the case, b***h I did the race.[166]

The music video sparked immediate buzz on social media, as the footage was essentially a live look behind the scenes from a

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[161] DRAKEO THE RULER & JOOGSZN, *Fictional*, *on* THANK YOU FOR USING GTL (Drakeo the Ruler, 2020).

[162] Weiss, *supra* note 145.

[163] Levin, *supra* note 150.

[164] Nerisha Penrose, *Viral Rapper Tay-K: A Rundown of the Tumultuous Journey of 'TheRace,'* BILLBOARD (Aug. 16, 2017), https://www.billboard.com/music/rb-hip-hop/viral-rapper-tay-k-the-race-story-jail-co-signs-7905178/ [perma.cc/QX34-KS7P].

[165] *Id.*

[166] *Id.*

famous artist on the run from law enforcement.[167] The video garnered over 100 million views on YouTube within the first week of its release.[168] Making it all the more uncanny was the artist's physical appearance; though 19 years old, he resembled something closer to a 13-year-old than a fully grown adult.

The lyrics to *The Race* and the accompanying video was presented to jurors at Tay-K's trial, even though the lyrics describe his act of going on the run and not the facts of the home invasion for which he was on trial.[169] Tay-K was convicted and sentenced to 55 years in prison.[170]

4. *MAYHEM MAL*

Rap lyrics can be used in a trial for reasons aside from just evidence. For example, Mayhem Mal was charged and convicted for the following lyrics in his song F*** the Police:

> Takin' money from the Beaz and all that shit away from me?
> **Well your shift over at 3**,
> And **I'm gonna f*** you up where you sleep**.[171]

The lyrics were interpreted to be real threats against the officers, and Mayhem Mal was convicted and sentenced to three years in prison for making terrorist threats.[172]

5. *YNW MELLY*

YNW Melly ("Melly"), an artist on trial for double-murder, provides another example of a famous rapper's lyrics being used

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[167] *Id.*

[168] *Id.*

[169] Convicted Murderer, *Teen Rapper Taymor McIntyre Has Hit Song Used as Evidence Against Him in Sentencing Phase*, CBS News (July 22, 2019, 7:08 PM), https://www.cbsnews.com/texas/news/convicted-murderer-teen-rapper-taymor-mcintyre-hit-song-evidence-sentencing-phase/ [https://perma.cc/UDC9-4FJN].

[170] *Id.*

[171] GHETTO SUPERSTAR COMMITTEE, FUCK THE POLICE (FT. SOULJA BEAZ & MAYHEM MAL) (2012); *see* Taylor Hosking, *Rappers Are Defending Their Right to Anti-Cop Lyrics in the Supreme Court*, Vice (Mar. 7, 2019, 1:58 PM), https://www.vice.com/en/article/zma8ax/rappers-are-defending-their-right-to-anti-cop-lyrics-in-the-supreme-court?utm_source=vicetwitterus [https://perma.cc/7TU6-MRMW].

[172] Hosking, *supra* note 171.

against him.[173] The judge has already ruled that Melly's tattoos may be presented as evidence in spite of *Dawson*.[174] The lyrics to Melly's breakout single *Murder on My Mind* were used against him when he broke probation as a 16-year-old in 2017, and legal experts expect prosecutors to attempt to use them again at his new trial even though *Murder on My Mind* was released before the night in question.[175]

> I didn't even mean to shoot him, he just caught me by surprise,
> I reloaded my pistol, cocked it back, **and shot him twice**.[176]

III. STATUTORY INTERVENTION

The all-too-common theme in many of these cases is that courts are not properly weighing the prejudice that accompanies the presentation of rap lyrics to juries. Because the public interprets rap lyrics as significantly more literal than other genres and people view violent rap lyrics as more threatening than an actual charge of a violent crime, the minimal probative value of reading to the jury the musician's work of art is rarely worth it. In addition to violating the Federal Rules of Evidence, many admissions of lyrical evidence are roughhousing artists' freedom of speech under the *Dawson* test.

This dissonance is exemplified in the massive disparity in the number of cases where lyrics are used as evidence. There are over 500 examples of a prosecutor using a defendant's rap lyrics against him in court—over 1,000 including indictments—and judges have admitted such evidence well over 50% of the time.[177] There is exactly one example on record of lyrics of a different music genre being used against a defendant.[178] Until courts can consistently and more soundly account for the great prejudice and constitutional

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[173] Bill Donahue, *YNW Melly Takes Death Penalty Question to Florida Supreme Court*, BILLBOARD (Feb. 8, 2023), https://www.billboard.com/pro/rapper-ynw-melly-death-penalty-question-florida-supreme-court/ [https://perma.cc/8JEU-U4ZL].

[174] Jordan Darville & Raphael Helfand, *YNW Melly's Tattoos May Be Used as Evidence in Murder Trial*, FADER (April 12, 2022), https://www.thefader.com/2022/04/12/ynw-mellys-tattoos-may-be-used-as-evidence-in-murder-trial [https://perma.cc/7BAH-WAEB].

[175] *Id.*

[176] YNW MELLY, *Murder on My Mind*, *on* I AM YOU (P2018, 2018) (emphasis added).

[177] ERIC NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 8-10 (2019).

[178] *Id.* at 2-3.

issues of admitting a defendant's rap lyrics as evidence, states can pass legislation to better guide courts in conducting Rule 403 and Rule 404(b) inquiries for admitting lyrical evidence.

In early 2022, New York's legislature proposed such a bill. The language of the bill reads in part:

> 1. Evidence of a defendant's creative or artistic expression, whether original or derivative, may not be received into evidence against such defendant in a criminal proceeding unless such evidence is determined by the court to be relevant and admissible, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and an on-the-record statement by the court of the findings of fact essential to its determination.
>
> 2. In order to overcome the presumption of inadmissibility of evidence of defendant's creative expression, the proffering party must affirmatively prove by clear and convincing evidence:
>
> (a) literal, rather than figurative or fictional, meaning and, where the work is derivative, that the defendant intended to adopt the literal meaning of the work as the defendant's own thought or statement;
>
> (b) a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged;
>
> (c) relevance to an issue of fact that is disputed; and
>
> (d) distinct probative value not provided by other admissible evidence.[179]

Many famous artists have signed their support for the bill, including but not limited to Meek Mill, Kelly Rowland, Jay-Z, Killer Mike, Robin Thicke, Fat Joe, and Big Sean.[180] Notable

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[179] S.B. 7527, § 1 Reg. Sess. (N.Y. 2021).

[180] Shirin Ali, *Jay-Z, Other Artists Call to Ban Using Rap Lyrics as Criminal Evidence*, The Hill (Jan. 19, 2022), https://thehill.com/changing-america/enrichment/arts-culture/590381-jay-z-other-artists-call-to-ban-using-rap-lyrics-as/ [https://perma.cc/5H3Y-NGB9].

activists like *The New Jim Crow* author Michelle Alexander also signed her support for the bill.[181]

These artists and activists argue musicians will be afraid to tell their stories if their lyrics can be held against them in a criminal trial.[182] Rap music often possesses a cinematic storytelling element that appeals to the listener. For those living in similar situations, the lyrics can be relatable, while those detached from such a lifestyle see it as a voyeuristic getaway. Artists also cite the immense racial undertones accompanying such prosecution of rappers for their lyrics, and cite the research referenced earlier regarding the public's perception of rap versus other genres, Black defendants to white defendants, and how these phenomena have played out in the courtroom. [183] Finally, artists feel that treating lyrics as autobiographic confessions instead of music with the purpose of entertaining and providing social commentary removes it from being defined as art, which is first and foremost what rap is.[184] As *Genius News*' Jacques Morel says, "At times, but of course not in all cases, hip-hop can be more like the WWE than the UFC."[185]

The sponsors of New York's "Rap on Trial" bill hope this bill will establish a presumption of inadmissibility with respect to lyrical evidence. If passed, this bill would likely direct New York courts to apply the standard laid out in *Skinner*. It is worth noting that not all lyrics would come in under this test. Dennis Greene's lyrics about murdering his wife, for example, possess a literal connection to the facts of the case such that a New York judge would likely find they clear the standard this bill proposes.

New York's "Rap on Trial" bill can successfully guide courts in conducting a proper *Skinner* analysis when evaluating the admissibility of rap lyrics as criminal evidence. By narrowing the instances in which juries hear rap lyrics as evidence, laws like this

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[181] *Jay-Z, Fat Joe, Killer Mike and Michelle Alexander Urge NY Legislature to Pass "Rap Music on Trial" Legislation*, HARLEM WORLD MAG., https://www.harlemworldmagazine.com/jay-z-fat-joe-killer-mike-and-michelle-alexander-urge-ny-legislature-to-pass-rap-music-on-trial-legislation/ [https://perma.cc/NG5T-B5C3].

[182] Ali, *supra* note 180.

[183] Safia Samee Ali, *Black Rappers Call Out Double Standard of Using Hip-Hop Lyrics as Evidence in Rapper Young Thug's Criminal Trial*, NBC NEWS (Jan. 13, 2023), https://www.nbcnews.com/news/us-news/black-rappers-call-double-standard-using-hip-hop-lyrics-evidence-rappe-rcna65529 [https://perma.cc/R2VH-DUGV].

[184] *See* Ali, *supra* note 180.

[185] Genius News, *How Rap Lyrics Are Landing Rappers in Jail*, YOUTUBE (Oct 1, 2018 https://www.youtube.com/watch?v=HlMS0IS0ivU&t=7s [https://perma.cc/3ZPH-MY8G].

will preserve the purpose of the Federal Rules of Evidence, strike a more optimal balance between the minimal probative value that many rap lyrics bring to a trial and the undue prejudice that inherently comes with being associated with rap songs, and better protect artist's First Amendment rights.

CONCLUSION

From its earliest years, rap has had a negative reputation among the general public, and rappers have been illegally targeted by law enforcement. Despite its recent rise to the forefront of American popular music, the racial biases and the disparate treatment between rap music and other genres remain. These charged views of rap leave its lyrics particularly susceptible to causing undue prejudice when presented to juries.

Courts should better account for this phenomenon when conducting their Rule 403 and Rule 404(b) analyses to determine if rap lyrics should be admitted as evidence. Often, the probative value of a jury hearing the musical work of the defendant does not shine much light on the facts of the case, and the prejudice that such lyrics inflict on the members of the jury significantly outweighs such probative value.

Several admissions of rap lyrics as evidence additionally violate the defendant's First Amendment right as established under the *Dawson* standard. Like the defendant's tattoo in *Dawson*, rap lyrics are being presented for the primary purpose of establishing that defendants are members of a gang, even when the crime that is being charged is not an alleged gang-related event.

Until courts change to better account for these factors in a consistent manner, legislation such as New York's proposed bill can protect an artist's right to rap without fear of the lyrics being used as evidence of guilt in a court of law.