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The *Arizona State Sports & Entertainment Law Journal* is edited by law students of the Sandra Day O'Connor College of Law, Arizona State University. As one of the leading sports and entertainment law journals in the United States, the Journal infuses legal scholarship and practice with new ideas to address today's most complex sports and entertainment legal challenges. The Journal is dedicated to providing the academic community, the sports and entertainment industries, and the legal profession with scholarly analysis, research, and debate concerning the developing fields of sports and entertainment law. The Journal also seeks to strengthen the legal writing skills and expertise of its members. The Journal is supported by the Sandra Day O'Connor College of Law.

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*Brad Holmes*







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**CAS AND THE BREAKDOWN OF OLYMPIC DISPUTE  
RESOLUTION: HOW THE CHILES CASE REVEALS THE  
STRUCTURAL GAP BETWEEN ARBITRATION AND JUDICIAL  
REVIEW**

PETER CARLISLE\*

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## INTRODUCTION

The Olympic movement often cites the Court of Arbitration for Sport (CAS) as evidence that international sport possesses a sophisticated and independent system of legal oversight. Athletes are told that when disputes arise during the Olympic Games, their claims will be heard by competent, neutral arbitrators under established, reliable procedure. Those decisions are also expected to be subject to judicial review before the Swiss Federal Supreme Court (SFT). Although CAS awards are formally subject to review before the SFT, that process is rarely accessible to athletes, and the structure of international arbitration places strict limits on the scope of judicial review. As a result, the system's safeguards are more limited than they appear, leaving athletes with far less meaningful recourse than they are led to expect.

The arbitration arising from the women's floor exercise final at the 2024 Paris Olympic Games provides a concrete case to examine these issues. Instead of confirming the system's safeguards operate as intended, it reveals the limits of those safeguards and the questions that follow.

*Judicial Alchemy: How Cascading Procedural Failures Upended the Jordan Chiles Arbitration and Rewrote Olympic History* examined the CAS proceedings that resulted in Jordan Chiles being stripped of her Olympic bronze medal and argued the arbitration was shaped by a series of procedural failures that distorted the adjudicative process.<sup>1</sup> That analysis concluded the only meaningful opportunity to correct those failures lay with the SFT, the sole court with jurisdiction to review CAS awards.<sup>2</sup> If the SFT

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<sup>1</sup> Peter Carlisle, *Judicial Alchemy: How Cascading Procedural Failures Upended the Jordan Chiles Arbitration and Rewrote Olympic History*, 14 ARIZ. ST. SPORTS & ENT. L.J. 141 (2025) [hereinafter *Judicial Alchemy*].

<sup>2</sup> *Id.*

were willing to set aside the decision, the Olympic dispute resolution system might still demonstrate an ability to correct serious procedural breakdowns; if it were not, the implications would extend well beyond a single medal dispute. In a series of decisions addressing challenges and revision requests arising from the arbitration, the SFT declined to annul the CAS award and accepted the arbitration as legally valid under Article 190 of the Swiss Private International Law Act (PILA). Although the Court permitted limited revision based on newly discovered evidence and remanded the case to the CAS tribunal for reconsideration of a narrow factual issue, it did so without revisiting the procedural failures that shaped the arbitration.

The Chiles case exposes a structural gap in Olympic dispute resolution. Olympic arbitrations conducted before the CAS Ad Hoc Division (AHD) during the Games operate under extraordinary conditions, including compressed timelines and limited evidentiary development. Those proceedings are governed by procedural rules designed to preserve fairness under time pressure, but panels retain broad discretion which may depart from those rules. These conditions affect not only the speed of decision-making but also the reliability of the process. By contrast, the SFT's review is designed for conventional commercial arbitrations conducted under more stable conditions. Because the SFT must accept the factual record established by the arbitral tribunal and may intervene only on narrow procedural grounds, it reviews Olympic CAS awards within a structure that assumes procedural safeguards which often do not exist in Olympic proceedings.

The result is a system in which arbitrations marked by significant procedural distortions are paired with a judicial review mechanism incapable of correcting them. The Chiles litigation illustrates how the Olympic dispute resolution system can preserve the appearance of judicial review while leaving intact the procedural structure that produced the disputed outcome, making similar outcomes under the current structure not just possible, but difficult to correct when they occur.

In Olympic dispute resolution, the conditions under which proceedings occur shape the arbitral record, on which judicial review depends; that record defines the scope of review, and the limits of such review restrict the ability to correct error.

The discussion is organized in four parts. Part I revisits the CAS arbitration examined in *Judicial Alchemy*, focusing on the procedural context of Olympic arbitration and the panel's reasoning in departing from the field-of-play doctrine. Part II addresses the limits of judicial review under Article 190 PILA and the restricted

role of the SFT. Part III examines the structural imbalance revealed by the Chiles case. Part IV considers the broader implications of that imbalance for the legitimacy and future governance of Olympic dispute resolution.

## I. THE CAS ARBITRATION AND THE CONDITIONS OF OLYMPIC ADJUDICATION

### A. THE OLYMPIC AD HOC ARBITRATION STRUCTURE

Disputes arising during the Olympic Games are resolved through CAS's AHD under rules designed to produce binding decisions within extremely limited timeframes (Ad Hoc Rules). Under the Ad Hoc Rules, panels may be constituted within hours, hearings may occur the same day a dispute is filed, and arbitrators are required to "give a decision within 24 hours of the lodging of the application,"<sup>3</sup> unless an extension is granted in exceptional cases. Because the AHD operates only during the Games, awards must be issued before the end of the Games. For more complex disputes, the Ad Hoc Rules permit referral to the CAS Appeals Division for adjudication under the Code of Sports-related Arbitration (CAS Code), which provides more time and structure and is not limited to the duration of the Games.<sup>4</sup> This structure reflects the practical demands of the Olympic competition schedule, and the system prioritizes speed and finality over the procedural safeguards associated with conventional arbitration or court proceedings. These features do not necessarily undermine the legitimacy of Olympic arbitration, but they create procedural conditions fundamentally different from those of most arbitral systems. During the Olympic Games, parties have limited time to investigate factual claims, obtain evidence, or analyze complex legal questions, and arbitrators operate under similar pressures, often issuing decisions within hours of the hearing.

Despite these conditions, it is important to recognize the purpose of the AHD, as reflected in the SFT's description of the system: "*The CAS specifies that it is in the interest of athletes, their entourage, national Olympic committees and the public that disputes related to the Olympic Games, especially those relating to the award of a medal, be decided quickly.*"<sup>5</sup> Although they depart from the CAS Code, the Ad Hoc Rules are intended to preserve a

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<sup>3</sup> CT. ARB. FOR SPORT, ARBITRATION RULES FOR THE OLYMPIC GAMES, art. 18.

<sup>4</sup> *Id.* at art. 10.

<sup>5</sup> Tribunal Fédéral [TF] [Federal Supreme Court] Jan. 23, 2026, 4A,\_494/2024 Arrêts du tribunal fédéral suisse [ATF] 6.2.7 (Switz.).

baseline level of procedural fairness within a process necessarily defined by extremely limited timelines.

The arbitration arising from the women's floor exercise final at the Paris Olympic Games illustrates the pressures inherent in this system, and the importance of adherence to the Ad Hoc Rules.<sup>6</sup>

## B. PROCEDURAL FAILURES IN THE CHILES ARBITRATION

While the AHD operates under significant procedural limits, the record reflects a series of departures from governing rules and basic adjudicative principles that were not compelled by time pressure. These failures affected notice, participation, evidentiary development, and the panel's legal reasoning, and they shaped the course of the arbitration in ways that call into question the reliability of the outcome.

First, the arbitration was marked by deficiencies in notice and party participation that were avoidable within the Ad Hoc process. The panel proceeded despite failures to ensure affected parties received timely and effective notice, limiting their ability to participate effectively in the proceedings. These deficiencies were not the product of unavoidable time pressures, but of a failure to adhere to the procedural rules designed to govern the arbitration and preserve fairness under those conditions. The resulting record therefore reflects the absence of full adversarial engagement.<sup>7</sup>

Second, the arbitration proceeded without resolving threshold questions concerning the legal framework on which the application was based. During the Games, parties have limited time to investigate factual claims or obtain relevant evidence, and in this case, key information was not available to the parties or the panel at the time of the hearing. However, more fundamentally, the panel accepted and adjudicated the application without first establishing that the asserted procedural requirement existed within, or was enforceable under, the governing rules. The structure of Olympic arbitration places control of much of the relevant information in the hands of third parties, including event organizers and broadcast partners, leaving athletes dependent on access to information they do not control. In this context, the absence of mechanisms to verify

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<sup>6</sup> CAS OG 25-15 Fed'n Rom. Gymnastics and Barbosu v. Sacchi and Fed'n Internationale de Gymnastique; CAS OG 24-16 Fed'n Rom. Gymnastics and Maneca-Voinea v. Sacchi and Fed'n Internationale de Gymnastique, Arbitral Award (2024) [hereinafter *Written Decision*].

<sup>7</sup> See *Judicial Alchemy*, *supra* note 1, at 146–64, for a more detailed analysis of the procedural flaws of the CAS arbitration.

compliance became a basis for adjudication, rather than a reason to question whether the claim itself was legally grounded.

Third, the panel's reasoning reflected a departure from established limits on adjudicative authority, most notably in its treatment of the field-of-play doctrine. Despite the absence of any finding of bad faith or arbitrariness, the panel adopted an interpretation of the applicable rules that allowed it to revisit and alter the outcome of a competition result. That approach rested not on the application of any existing enforcement mechanism, but on the conclusion that no mechanism existed to verify compliance with the asserted requirement. In doing so, the panel effectively expanded its authority beyond traditional limits, substituting its judgment for that which was rendered on the field of play without a clear legal foundation.

Finally, these issues were compounded by the interaction between compressed procedure, inconsistent adherence to governing rules, and broad arbitral discretion. The Ad Hoc Rules require decisions be rendered within 24 hours of the lodging of the application, absent a formally granted extension.<sup>8</sup> In this case, the proceedings extended over multiple days in a manner inconsistent with those requirements, including the acceptance and amendment of the application and the effective extension of the decision timeline without compliance with the Rules. At the same time, the panel did not avail itself of the option to refer the dispute to the CAS Appeals Division, which would have permitted a more structured process and provided a meaningful opportunity for party participation. This combination of departures from the governing rules and the exercise of broad discretion allowed the arbitration to proceed outside the structure intended to govern it, while still producing a final award insulated from meaningful review.

Taken together, these deficiencies do not reflect the unavoidable imperfections of a fast-moving process. They reflect a breakdown in the application of governing rules and adjudicative discipline, and a lack of recourse for those failures. To narrow procedural grounds, and because the SFT's review is confined to the record produced by the arbitration, these failures were effectively insulated from meaningful judicial correction. The result is not simply a flawed proceeding, but a framework in which such flaws can persist without remedy.

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<sup>8</sup> CT. ARB. FOR SPORT, *supra* note 3.

## C. THE PANEL'S CIRCUMVENTION OF THE FIELD-OF-PLAY DOCTRINE

The field-of-play doctrine has long served as a central limit on arbitral intervention in sporting disputes. Under that principle, decisions made in the course of competition are afforded substantial deference and may be disturbed only in limited circumstances, such as bad faith, arbitrariness, or a clear failure to apply the governing rules.<sup>9</sup> The doctrine reflects a recognition that the integrity of sport depends in part on the authority of officials and federations to regulate competition without retrospective second-guessing by bodies outside the sport.

The panel did not apply the field-of-play doctrine in any conventional sense. The parties who initiated the CAS proceedings never alleged, and the panel never identified, bad faith or arbitrariness. Instead, the panel focused on the absence of mechanisms within the applicable rules to enforce a timing requirement derived from their interpretation of those rules.<sup>10</sup> That interpretation was accepted without full examination of the underlying regulatory framework or the operational context of the Olympic Games. Moreover, because Fédération Internationale de Gymnastique (FIG) and other Parties were excluded from meaningful participation at critical stages, that interpretation was not tested through full adversarial engagement. The panel thus proceeded on the premise that no mechanism existed to verify compliance with the asserted requirement and treated that absence not as a reason for restraint, but as a basis for intervention. To the extent that the governing rules did not include mechanisms to enforce the asserted requirement, that absence may reflect a deliberate allocation of discretion to competition officials, rather than a gap requiring arbitral intervention.

In effect, the panel concluded that because FIG rules did not contain a structure sufficient to ensure enforcement under its interpretation, it was appropriate for the panel to supply that structure by revisiting and altering the competition result.<sup>11</sup> This reasoning departs from the traditional limits of the field-of-play doctrine. It permits intervention not because a rule was clearly violated under established standards, but because the governing structure did not contain mechanisms sufficient to satisfy the panel's

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<sup>9</sup> *The Doctrine of the Field of Play: Understanding Referees' Immunity in Sports*, ELITE LAW, <https://www.elitelaw.ch/> [<https://perma.cc/FYY4-7PVC>].

<sup>10</sup> *Written Decision*, *supra* note 6, ¶ 137.

<sup>11</sup> *Id.* ¶138.

interpretation—an interpretation formed in the absence of meaningful adversarial consideration.

This approach creates an imbalance. Where a federation's rules lack mechanisms sufficient to satisfy the panel, CAS may intervene. No comparable principle permits intervention when CAS departs from its own procedural rules. The issues identified in the Chile arbitration arose in part from failures to follow governing procedures, including those relating to notice, timing, and the conduct of the proceedings. Those failures did not invite external correction; instead, they were absorbed into the arbitral record and treated as part of a legally valid process.

This imbalance is reinforced at the level of judicial review. While CAS may look beyond the formal structure of federation rules to justify intervention, the SFT confines its review to the arbitral award and applies a narrow standard that does not account for comparable deficiencies in CAS proceedings. The result is a system in which gaps in federation governance may justify arbitral intrusion, while gaps in arbitral procedure remain insulated from meaningful correction.

The implications extend beyond the facts of a single dispute. International federations are charged with regulating competition within their sports and are afforded a degree of autonomy in doing so. A system that permits arbitral bodies to override competition outcomes based on untested interpretations of rules and perceived deficiencies in enforcement structures, while insulating those same bodies from comparable scrutiny, alters that balance. It places ultimate authority not in the rules adopted by federations, but in the discretionary judgments of arbitral panels operating under compressed procedural conditions.

Under this approach, the absence of enforcement mechanisms justifies intervention when the rules belong to a federation, but not when the rules govern the arbitration itself. That imbalance raises questions about the consistency of the doctrine applied and the stability of the system it is meant to support.

#### D. THE WRITTEN AWARD AS THE RECORD OF REVIEW

A final aspect of the arbitration is critical to understanding the limits of judicial review: Under Swiss arbitration law, the SFT does not independently reassess the facts or reconstruct the proceedings. Instead, it evaluates challenges to arbitral awards primarily through the written decision issued by the tribunal. The factual record set forth in the award therefore becomes the controlling foundation for judicial review and, once issued, defines the version of events against which the SFT assesses the arbitration.

This structure creates a significant imbalance. The arbitral tribunal both conducts the proceedings and produces the written account of those proceedings that is subject to review. Procedural irregularities that are minimized, reframed, or omitted in the written decision are therefore difficult to challenge on appeal, not because they did not occur, but because they are not reflected in the record the SFT may consider. Judicial review is therefore based on the tribunal's written account of what occurred, without an independent way to revisit the proceedings.

In the Chiles arbitration, the written decision became the authoritative record on which the SFT relied, despite limitations in how the proceedings were reflected in that account. As the following sections demonstrate, the SFT's review of the dispute was shaped not only by the scope of review, but by the record as constructed in the CAS award itself.

## II. JUDICIAL REVIEW OF CAS AWARDS UNDER SWISS ARBITRATION LAW

### A. CAS, SWISS ARBITRATION LAW, AND THE FINALITY OF OLYMPIC AWARDS

Although CAS operates as the primary dispute resolution body for international sport, and the exclusive forum for disputes arising during the Olympic Games, its legal authority ultimately derives from Swiss arbitration law. CAS is headquartered in Lausanne, Switzerland, and like other arbitral bodies based in Switzerland, its awards are governed by the framework for international arbitration set forth in the Swiss Private International Law Act (PILA).<sup>12</sup> Challenges to CAS awards therefore fall within the jurisdiction of the SFT, which serves as the sole judicial authority capable of reviewing those decisions under Swiss law.

This arrangement is often presented as an important safeguard within the Olympic dispute resolution system. The availability of review before the SFT creates the impression that CAS awards remain subject to judicial review which ensures compliance with fundamental procedural guarantees. However, the significance of that safeguard must be understood in light of both the contractual structure of Olympic dispute resolution and the limits of review permitted under PILA.

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<sup>12</sup> Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, *An Symposium*, 2012 J. DISP. RESOL. 63, 68 (2012).

As a condition of participation in the Olympic Games, athletes are required to agree that disputes arising in connection with the Games must be submitted exclusively to CAS and resolved in accordance with its procedures.<sup>13</sup> The applicable Olympic entry forms and dispute resolution provisions further emphasize that CAS awards are final and binding. As discussed in *Judicial Alchemy*, this structure channels all disputes into a single arbitral forum operating under conditions designed to ensure speed and finality and presents that forum as the definitive mechanism for resolving Olympic disputes.

Although Swiss law preserves a limited right to challenge arbitral awards before the SFT, that right exists outside the structure presented to athletes and is not meaningfully incorporated into the Olympic dispute resolution system. The result is a system in which disputes are subject to mandatory arbitration and immediate finality, while any recourse beyond that process is both procedurally narrow and practically difficult to pursue. The availability of judicial review therefore functions more as an external legal constraint than as a safeguard embedded within the Olympic dispute resolution system.

#### B. ARTICLE 190 PILA AND THE LIMITS OF JUDICIAL REVIEW

The limited role of the SFT is defined by Article 190(2) PILA, which provides the exclusive grounds for annulling an international arbitral award. CAS arbitrations fall within this framework because they involve non-Swiss parties and are therefore governed by the provisions applicable to international arbitration. The grounds for annulment are narrowly defined and include: (1) defects in the constitution of the tribunal, (2) lack of jurisdiction, (3) decisions beyond the scope of the claims submitted, (4) violations of the right to be heard or equal treatment, and (5) incompatibility with public policy.<sup>14</sup>

These grounds reflect a deliberate choice within Swiss arbitration law to prioritize finality and arbitral autonomy over judicial intervention. The SFT does not reassess the facts, reconsider the evidence, or revisit the merits of the dispute. Instead, it confines its review to the arbitral award, which defines both the factual record and the scope of review, and to a limited set of procedural guarantees. Built into this framework is an expectation that the

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<sup>13</sup> Steven P. Finizio & Miranda Elvidge, *Take Your Marks, Get Set ... Arbitrate? Resolving Disputes at the Paris Olympic Games*, WILMERHALE (July 26, 2024), <https://www.wilmerhale.com/> [<https://perma.cc/233G-HVNS>].

<sup>14</sup> Federal Act on Private International Law of 17 December 1987, SR 291, art. 190(2) (Switz.).

arbitral process adheres to its own procedural rules and reflects an adversarial process capable of producing reliable outcomes. As a result, even significant failures in the conduct of the arbitration may fall outside the scope of meaningful correction, particularly where those failures are not fully reflected in the award itself.

The procedural failures identified in the Chiles arbitration illustrate the consequences of this structure, particularly where the AHD departs from its own procedural requirements. Issues relating to notice and party participation implicate the right to be heard, but that protection is narrowly construed. The SFT does not examine whether a party had a full and fair opportunity to develop its case in a broader sense, but only whether it was formally afforded an opportunity to present its position within the proceedings as reflected in the written decision. Where the record indicates that a party was able to submit arguments, the threshold for a violation is rarely met.

Similarly, limitations in the evidentiary record do not provide grounds for annulment. The SFT does not review the sufficiency or completeness of the evidence before the arbitral tribunal, nor does it consider whether relevant evidence was unavailable during the proceedings. As long as the tribunal did not refuse to consider evidence that was properly submitted, gaps in the factual record remain beyond the scope of review. The SFT's approach to the arbitral record is reflected in its own articulation of that limitation: "The Federal Court rules on the basis of the facts found in the contested judgment. It cannot rectify or supplement the findings of the arbitrators *ex officio*, even if the facts were established in a manifestly inaccurate manner or in violation of the law."<sup>15</sup> This confirms that the SFT's review is confined not only by the grounds set forth in Article 190, but also by its reliance on the tribunal's account of the proceedings.

The findings of the arbitral tribunal regarding the course of the proceedings are also binding on the Federal Court, whether they relate to the conclusions of the parties, the alleged facts or the legal explanations given by the latter, the statements made during the trial, the requisitions of evidence, or even the content of a testimony or an expert opinion or the information collected during

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<sup>15</sup> Tribunal Fédéral [TF] [Federal Supreme Court] Jan. 23, 2026, 4A\_494/2024 Arrêts du tribunal fédéral suisse [ATF] 5.2 (Switz.).

an eye inspection.<sup>16</sup>

The panel's interpretation of the governing rules, including its treatment of the field-of-play doctrine, likewise falls outside the reach of Article 190. Even where the panel adopts an expansive or novel interpretation of its authority, such reasoning does not ordinarily constitute a basis for annulment. The SFT does not correct errors of law unless they rise to the level of a fundamental incompatibility with basic legal principles.<sup>17</sup> As a result, the Court's review remains tied to that account rather than to an independent reconstruction of the proceedings.

Finally, inconsistencies in the application of procedural rules, including deviations from the timing requirements of the Ad Hoc Rules or the acceptance and amendment of claims, do not readily support grounds for annulment. Unless such deviations amount to a clear denial of equal treatment or the right to be heard, they remain within the discretion afforded to the arbitral tribunal and are not subject to meaningful review.<sup>18</sup> The only record of these deficiencies is the written decision itself, which may not fully capture the course of the proceedings. As evidenced in Chiles, such deficiencies are unlikely to be reflected in that decision.

Taken together, these limitations define the boundary of the SFT's authority. It does not evaluate whether the arbitration was conducted in a manner that produced a reliable or well-supported outcome. It evaluates only whether the minimum procedural guarantees recognized under Article 190 have been formally respected. Where the arbitral award presents a record that satisfies those minimal criteria, the decision will be upheld even if the underlying process was marked by significant procedural failures. By relying on the written decision as the authoritative record, the structure of review limits the ability to challenge deficiencies that are not fully reflected in that record.<sup>19</sup>

### C. JUDICIAL REVIEW UNDER ARTICLE 190: THE CHILES CASE

The SFT's treatment of the Chiles arbitration illustrates how the limitations imposed by Article 190 PILA operate in the Olympic context. In addressing the challenges to the CAS award, the SFT adhered closely to the limits of its review, accepting the factual record as established by the arbitral panel and evaluating the claims

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<sup>16</sup> *Id.*

<sup>17</sup> Federal Act on Private International Law of 17 December 1987, SR 291, art. 190(2) (Switz.).

<sup>18</sup> *Id.*

<sup>19</sup> See *Judicial Alchemy*, *supra* note 1, at 180–94, for a more thorough analysis of the inaccuracies of the written award in the CAS arbitration.

within the narrow procedural grounds recognized under Swiss arbitration law.

At the outset, the SFT declined to revisit the factual record underlying the arbitration. Consistent with its established approach, it treated the findings set forth in the CAS award as binding and did not examine whether the evidentiary record on which those findings were based was complete or reliable. As a result, the procedural conditions under which the record was developed, including limitations on access to potentially relevant evidence and the absence of material not obtained during the proceedings, fell outside the scope of the Court's analysis.

The SFT's treatment of the right to be heard followed a similar pattern. Allegations concerning notice and party participation were evaluated in terms of whether the procedural minimum recognized under Article 190 had been formally satisfied, rather than whether the affected parties had a meaningful opportunity to develop and present their case under the conditions of the arbitration. Where the record reflected that submissions had been made and arguments presented, the SFT found no violation, notwithstanding the conditions under which those submissions occurred.

The SFT likewise declined to engage with the panel's interpretation of the governing rules, including its treatment of the field-of-play doctrine. Questions concerning the correctness or scope of that reasoning were treated as matters beyond the reach of judicial review. Even where the panel's interpretation reflected an expansive view of its authority, such reasoning did not fall within the limited grounds for annulment recognized under Article 190.

Procedural irregularities arising from the conduct of the arbitration itself were addressed within the same framework. Deviations from the timing requirements of the Ad Hoc Rules, as well as issues relating to notice, participation, and the handling of the application, were not treated as independent grounds for annulment. Absent a clear showing of a violation of the narrowly defined rights to be heard or to equal treatment, such matters fall within the arbitral tribunal's discretion.

Taken together, these aspects of the SFT's review demonstrate how Article 190 defines the limits of judicial intervention. The Court does not assess whether the arbitration produced a reliable or well-supported outcome. It evaluates only whether the minimum procedural guarantees recognized under Swiss arbitration law have been formally respected, based on the record as constructed by CAS and reflected in the arbitral award.

In the context of Olympic arbitration, where the evidentiary record may be shaped by compressed timelines, limited access to

information, and procedural irregularities not fully reflected in the written decision, these limitations take on particular significance. The SFT's review of the Chiles arbitration illustrates how a proceeding conducted under such conditions may satisfy the formal requirements of Article 190 while leaving unaddressed the factors that shaped the development of the record and, ultimately, the outcome of the dispute.

#### D. REVISION AND THE ILLUSION OF CORRECTIVE REVIEW

The limited revision permitted by the SFT in the Chiles case has been interpreted by some observers as evidence the Olympic dispute resolution system is capable of correcting error. That characterization overstates both the scope and the significance of revision within Swiss arbitration law.

Revision is not a form of appellate review. It is an extraordinary remedy available only under narrowly limited circumstances, including newly discovered evidence that could not have been presented during the original proceedings despite exercising due diligence. Even where those conditions are satisfied, revision does not reopen the arbitration in a general sense. It permits reconsideration of specific issues within the confines of the existing legal framework and before the same arbitral tribunal that issued the original award.

In the context of Olympic arbitration, these limitations take on particular significance. The evidentiary record is often shaped by factors outside the control of the parties, including restricted access to broadcast footage and other materials controlled by event organizers and affiliated entities. The availability of revision may therefore depend less on the merits of the dispute than on whether relevant evidence emerges after the conclusion of the proceedings and whether the affected party has the resources to pursue further relief.

The revision granted in the Chiles case reflects these dynamics. The SFT did not revisit the procedural conditions under which the arbitration was conducted, nor did it address the failures that affected the development of the record. Instead, it permitted reconsideration of a narrow factual issue based on newly discovered evidence, leaving intact both the structure of the original proceeding and the legal framework applied by the panel.

As a result, revision does not meaningfully alter the limits of judicial oversight. It provides a conditional and highly restricted mechanism for addressing discrete factual developments, rather than a reliable means of correcting procedural failures. Although revision may affect the outcome in particular cases, it operates independently of the procedural conditions that shaped the original

arbitration and does not address the structural limitations identified in this Article. To the extent it is understood as a safeguard within the Olympic dispute resolution system, revision risks reinforcing the appearance of review without providing a corresponding capacity for meaningful correction.

#### E. THE STRUCTURAL GAP IN OLYMPIC ARBITRATION

Taken together, the features of the Olympic dispute resolution system examined in this Part reveal a structural gap between the conduct of arbitration and the availability of judicial review. Olympic disputes are resolved through a process that prioritizes speed and finality and operates under conditions that may affect the reliability of both the evidentiary record and the adjudicative framework. Those decisions are then reviewed, if at all, under a system of judicial review designed for materially different forms of arbitration and confined to a narrow set of procedural guarantees.

This gap is not the product of a single institutional failure. It arises from the interaction of multiple structural elements: mandatory recourse to CAS, the emphasis on finality, the procedural conditions of the AHD, and the limits of review under Article 190 PILA. Each of these features serves a function within the broader system. In combination, however, they produce a framework in which procedural deficiencies may influence the outcome of a dispute without a corresponding mechanism for meaningful correction.

The Chiles case demonstrates how this structure operates in practice. The arbitration was conducted under conditions that affected notice, participation, evidentiary development, and the application of governing principles. The resulting award established the record that defined the scope of judicial review. The SFT, applying the limits of Article 190, evaluated that award without revisiting the procedural conditions that produced it. The limited revision permitted by the Court did not alter this structure but instead operated within it.

The result is a system in which the existence of judicial review does not ensure that it is meaningful. Procedural safeguards are recognized, but their enforcement depends on a framework that is not designed to address the types of deficiencies that may arise in Olympic arbitration. In this respect, the gap identified in this Part is not incidental. It is structural, and its consequences extend beyond the circumstances of a single dispute.

### III. THE STRUCTURAL MISALIGNMENT REVEALED BY THE SFT'S DECISION

#### A. THE DUTY OF CURIOSITY UNDER OLYMPIC CONDITIONS

One of the most revealing aspects of the SFT's decisions in the Chiles appeal is its application of standards from conventional arbitration without adjustment for the conditions of Olympic adjudication.

The SFT acknowledged the arbitration was conducted under the tight timelines of the AHD. These pressures were further compounded by departures from procedural rules, including deficiencies in notification that limited the time available for the parties to assess the composition of the arbitral tribunal and to prepare their arguments.<sup>20</sup> Despite these circumstances, the SFT concluded that Chiles's challenge to the panel chair was time-barred on the ground that the relevant information had been disclosed and she had failed to exercise the required duty of curiosity. Under Swiss arbitration law, parties are expected to investigate potential grounds for challenging arbitrators and to raise such objections promptly once the relevant information becomes available.

The application of this standard in the Chiles arbitration illustrates the problem. Her ability to investigate potential grounds for challenge was affected by both the compressed timelines of the proceedings and the manner in which information relevant to the composition of the tribunal was communicated. The SFT emphasized the availability of alternative means of inquiry, including publicly accessible materials, while placing less weight on the procedural conditions under which disclosure occurred. This approach assumes parties can supplement incomplete or delayed notification through independent investigation, even where the procedural conditions materially limit their ability to do so.

That expectation reflects assumptions embedded in conventional arbitration practice, including that parties have a meaningful opportunity to review disclosures and assess potential conflicts. Those assumptions do not readily translate to Olympic proceedings conducted under severe time constraints, particularly where those conditions are compounded by deficiencies in notice.

The result is a misalignment between the legal framework of the SFT's review and the procedural realities of Olympic arbitration. The SFT applied a standard that presumes the availability of time and information that were materially restricted in the arbitration

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<sup>20</sup> See *Judicial Alchemy*, *supra* note 1, at 148–50, for a more thorough analysis of the notification failures in the CAS arbitration.

itself. In doing so, it imposed a level of diligence that presumes procedural conditions that did not exist.

## B. PROCEDURAL IRREGULARITIES AND THE LIMITS OF THE RIGHT TO BE HEARD

The Chiles arbitration also illustrates the limits of judicial intervention under Article 190 PILA when significant procedural irregularities arise within the arbitration itself.

As discussed in Part I, the arbitration unfolded under circumstances that raised significant concerns about both the development of the evidentiary record and the ability of the parties to present their arguments in a meaningful way.<sup>21</sup> Nevertheless, in reviewing the award, the SFT concluded that no violation of the parties' right to be heard had occurred within the meaning of Article 190(2)(d) PILA.<sup>22</sup>

That conclusion reflects the restrictive interpretation that the SFT traditionally applies to the right-to-be-heard guarantee in arbitration proceedings. The doctrine focuses on whether parties were afforded a formal opportunity to present their arguments, rather than on whether those arguments could be developed under conditions that would support a reliable adjudication.

The circumstances of the Chiles arbitration illustrate how this distinction functions in practice. Although the record states that submissions were ultimately made, the timing and manner in which notice was provided dramatically affected her ability to participate on equal footing with the other parties. Delayed or incomplete communication of filings and the late introduction of Chiles into the proceedings shaped both the development of the evidentiary record and the scope of the arguments presented. These conditions underscore the limits of that guarantee as a mechanism for ensuring meaningful participation under the procedural conditions of Olympic arbitration.

In the context of Olympic arbitration, this distinction becomes especially consequential. Proceedings conducted under severe time constraints may satisfy the formal requirement that parties be heard while simultaneously limiting their ability to investigate factual claims, obtain relevant evidence, or respond to opposing arguments in a meaningful way. Where those conditions affect the development

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<sup>21</sup> See *Judicial Alchemy*, *supra* note 1, at 195–200, for a more thorough analysis of the denial of Chiles' Right to Participate and Right to be Heard.

<sup>22</sup> Tribunal Fédéral [TF] [Federal Supreme Court] Jan. 23, 2026, 4A\_494/2024 Arrêts du tribunal fédéral sussie [ATF] 7.4 (Switz.).

of the record, the resulting limitations are not addressed by the right-to-be-heard doctrine as it is applied under Article 190.

The SFT's review of the CAS ruling in the Chiles case therefore demonstrates how the formal requirements of Swiss arbitration law may be satisfied even where the procedural conditions of the arbitration materially affect the reliability of the outcome. The Court's review confirms the right-to-be-heard guarantee does not extend to ensuring parties have a meaningful opportunity to develop the record under the conditions presented in Olympic proceedings.

### C. THE FINALITY OF CAS AWARDS AND THE LIMITS OF REVISION

A third issue revealed by the Chiles decisions concerns the relationship between the principle of finality and the availability of revision under PILA.

The SFT places significant weight on finality in international arbitration, a principle that is particularly important in the Olympic context, where disputes must be resolved quickly to ensure competition results can be confirmed and the Games can proceed without prolonged uncertainty. This emphasis on finality shapes both the structure of arbitral proceedings and the limited scope of judicial review available under Article 190 PILA.

At the same time, the Court granted revision of the CAS award based on newly discovered audiovisual evidence that could affect the factual basis of the decision, remitting the matter to the panel for reconsideration of that issue.<sup>23</sup> This outcome might be understood as demonstrating the availability of a corrective mechanism within the system. Properly understood, however, revision operates within the same framework of finality that governs the original arbitration.

Revision does not authorize a reviewing court to reconsider the reasoning of the arbitral tribunal or to revisit alleged procedural failures that may have influenced the development of the record. It is limited to determining whether newly discovered evidence, which could not have been presented earlier despite due diligence, is capable of affecting the factual findings underlying the award.<sup>24</sup> The original procedural system, including the conditions under which the evidence was gathered and evaluated, remains unchanged.

In this respect, revision does not mitigate the effects of procedural failures identified in the Chiles arbitration. As discussed

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<sup>23</sup> Tribunal Fédéral [TF] [Federal Supreme Court] Jan. 23, 2026, No. 4A\_510/2024 Arrêts du tribunal fédéral sursie [ATF] 10 (Switz.).

<sup>24</sup> Joe E. Richardson & Harold Noh, *Admissibility of new evidence when seeking set-aside*, GLOB. ARB. REV. (June 16, 2025), <https://globalarbitrationreview.com/> [<https://perma.cc/7XRY-E9GH>].

in Sections A and B, those deficiencies include limits on time, notice, and evidentiary development that may influence both the content of the record and the ability of the parties to present their case. Because revision does not reach those aspects of the proceeding, it does not provide a mechanism for addressing the conditions that shaped the arbitral record on which the outcome depends.

The availability of revision therefore does not operate as a counterweight to finality. It functions as a limited exception that preserves the overall structure of the arbitral process while permitting targeted reconsideration of discrete factual issues. To the extent it is viewed as a safeguard within the Olympic dispute resolution system, it risks reinforcing the perception of corrective oversight without altering the underlying conditions that define the system itself.

#### D. THE WRITTEN AWARD AND THE LIMITS OF JUDICIAL REVIEW

The structure of judicial review under Article 190 PILA places significant weight on the written award as the authoritative record of the arbitration. In reviewing arbitral decisions, the SFT generally accepts the factual findings set forth by the tribunal and does not conduct an independent evidentiary inquiry.<sup>25</sup> As a result, the award defines both the factual framework and the scope of the Court's review.

This approach reflects a broader commitment within Swiss arbitration law to preserving the autonomy and finality of arbitral proceedings. At the same time, it introduces a structural feature of the review process that is particularly significant in the context of Olympic arbitration. The arbitral tribunal not only conducts the proceedings but also produces the written account of those proceedings on which judicial review depends.

The Chile arbitration provides a concrete illustration of this dynamic. The record available to the SFT consisted of the account set forth in the CAS award, including the characterization of procedural events and the description of party participation. To the extent that aspects of the proceedings were not fully reflected in that account, they did not form part of the record available for judicial review. The Court's analysis, therefore, proceeded based on the narrative presented in the award itself.

This structure has important implications for the review of procedural irregularities. Elements of the proceedings that are

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<sup>25</sup> *Id.*

minimized, reframed, or omitted by the written decision are unlikely to be examined by the SFT. Because the Court does not independently reconstruct the record, its review remains tied to the tribunal's presentation of the case.

In the context of Olympic arbitration—where the development of the record may be affected by compressed timelines, limitations on access to evidence, and irregularities in communication—this dynamic becomes particularly consequential. The reliability of judicial review is linked not only to the legal standards applied by the SFT, but also to the completeness and accuracy of the arbitral award on which that review depends.

The SFT's reliance on the award as the authoritative record extended to its acceptance of the tribunal's description of notice, disclosure, and party participation, without independent examination of the underlying communications.

#### E. THE FIELD-OF-PLAY DOCTRINE AND THE EXPANSION OF ARBITRAL AUTHORITY

CAS jurisprudence has long recognized the need for restraint in reviewing decisions made by competition officials during sporting events. The field-of-play doctrine reflects the practical reality that referees and judges must be able to apply competition rules in real time without the constant prospect of post-competition review. Under that standard, decisions made during competition are afforded substantial deference and may be disturbed only in limited circumstances, such as bad faith, arbitrariness, or a clear failure to apply the governing rules.<sup>26</sup>

In the Chiles arbitration, however, the panel concluded that it could intervene and alter the competition result despite the absence of any allegation that the officials had acted in bad faith or outside the scope of their authority.<sup>27</sup> The tribunal's reasoning rested on its interpretation of the applicable rules, including the conclusion that those rules did not provide mechanisms sufficient to verify compliance with a procedural requirement that the tribunal viewed as mandatory.<sup>28</sup>

In reviewing the award, the SFT accepted that characterization without independently examining those rules or the extent to which they authorized the actions taken by the competition officials. Questions concerning the correctness of the panel's interpretation, or the consistency of that interpretation with the governing rules,

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<sup>26</sup> *The Doctrine of the Field of Play: Understanding Referees' Immunity in Sports*, *supra* note 9.

<sup>27</sup> *Written Decision*, *supra* note 6.

<sup>28</sup> *Id.* ¶ 135.

were treated as matters beyond the scope of judicial review under Article 190 PILA.<sup>29</sup>

This interaction between arbitral interpretation and limited judicial review has broader implications for the operation of the field-of-play doctrine. Rather than functioning solely as a constraint on arbitral intervention, the doctrine may, in practice, become dependent on the tribunal's own characterization of the dispute and its interpretation of the governing rules. Where that interpretation expands the scope of arbitral authority, the absence of substantive review means that such expansion is unlikely to be revisited by the SFT.

The Chiles arbitration illustrates how this dynamic may operate in practice. The panel's intervention was premised on an interpretation of the applicable rules that emphasized the absence of enforcement mechanisms, rather than on a finding that the competition officials had acted in bad faith or in disregard of the governing rules.<sup>30</sup> The SFT's acceptance of that reasoning reflects the limits of judicial review under Article 190, but it also underscores how the boundary traditionally maintained by the field-of-play doctrine may shift when arbitral interpretation is not subject to substantive review.

The result is not simply uncertainty in the application of the field-of-play doctrine. It is a structural imbalance in which arbitral authority may expand through interpretation, while judicial review remains confined to procedural grounds that do not address the substance of that expansion.

#### IV. IMPLICATIONS FOR OLYMPIC DISPUTE RESOLUTION

##### A. THE LIMITS OF JUDICIAL REVIEW IN THE OLYMPIC SYSTEM

The structure of judicial review under Article 190 PILA reflects a deliberate balance between finality and procedural oversight in international arbitration. In conventional arbitration, this balance operates under conditions that allow for the development of a reliable evidentiary record and meaningful participation by the parties. The limitations imposed on judicial review are therefore designed for a process that includes procedural safeguards in arbitration.

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<sup>29</sup> Tribunal Fédéral [TF] [Federal Supreme Court] Jan. 23, 2026, 4A\_494/2024 Arrêts du tribunal fédéral sussie [ATF] 5.2 (Switz.).

<sup>30</sup> See *Judicial Alchemy*, *supra* note 1, at 164–80, for a detailed discussion of the CAS panel's interpretation of the FIG rule forming the basis for its application of the field-of-play doctrine.

When applied to Olympic arbitration, however, this balance becomes more difficult to sustain. As discussed in Parts I and III, disputes arising during the Olympic Games are often resolved under conditions that include compressed timelines, limitations on evidentiary development, and constraints on party participation. These conditions do not necessarily prevent arbitration from functioning, but they affect the procedural environment within which arbitral decisions are made.

The interaction between these procedural conditions and the structure of judicial review under Article 190 produces a system in which the availability of review does not ensure meaningful judicial review. Judicial review operates within a structure that assumes the existence of procedural safeguards that may not be present in Olympic arbitration. As a result, the capacity of judicial review to address procedural failures is shaped not only by the limits of Article 190, but also by the conditions under which the arbitral record is created.

#### B. FINALITY AND THE LIMITS OF CORRECTIVE MECHANISMS

Finality is a central feature of international arbitration and serves an important function in the Olympic context, where disputes must be resolved promptly to preserve the integrity and continuity of competition. The emphasis on finality supports the efficient resolution of disputes and provides certainty for athletes, federations, and organizers.

At the same time, the Chile arbitration illustrates the limits of the mechanisms available to correct potential error within this structure. The SFT's decision to permit limited revision based on newly discovered evidence demonstrates that Swiss arbitration law provides a mechanism for addressing certain factual issues. However, that mechanism operates within narrowly defined parameters and does not extend to reconsideration of the procedural conditions that influenced the original arbitration.

As a result, the availability of revision does not alter the structure of the system. It allows for reconsideration of discrete factual issues but does not provide a means of addressing broader procedural failures that may have influenced the development of the record or the outcome of the dispute. The balance between finality and correction therefore remains weighted toward the preservation of the arbitral award.

#### C. INSTITUTIONAL LEGITIMACY AND THE APPEARANCE OF JUDICIAL REVIEW

The legitimacy of any system of dispute resolution depends on both its procedural integrity and its capacity to correct error. In the

Olympic context, that legitimacy is closely tied to the perception that disputes affecting competition outcomes are resolved through a process that is both fair and reliable.

The Chiles arbitration raises questions about how that legitimacy is maintained when the procedural environment of arbitration and the structure of judicial review are not aligned. As this article has shown, the system provides judicial review, but that review is confined to a set of procedural guarantees that do not fully account for the conditions under which Olympic arbitration occurs.

This does not suggest that Olympic arbitration lacks legitimacy as a whole. Rather, it highlights a misalignment between the expectations placed on the system and the mechanisms available to support those expectations. Where procedural conditions shape the development of the record and judicial review remains limited to that record, the relationship between fairness, finality, and oversight becomes more complex.

#### D. THE STRUCTURAL GAP IN OLYMPIC DISPUTE RESOLUTION

The structural features identified in this article are not unique to the Chiles arbitration. They reflect characteristics of Olympic dispute resolution that are likely to persist so long as arbitration during the Games operates under compressed timelines and judicial review remains so narrowly confined by PILA.

Addressing these issues does not require abandoning arbitration as the primary mechanism for resolving Olympic disputes. Arbitration serves important functions in providing a neutral forum and enabling the timely resolution of disputes during competition. However, the interaction between procedural conditions at the arbitral stage and the limits of judicial review suggests that further consideration is warranted as to how these processes are aligned.

Possible responses may include adjustments to the procedural rules governing Olympic arbitration, greater attention to how the evidentiary record is developed, or increased clarity regarding the scope of arbitral authority in relation to competition decisions. Whatever the approach, the issues identified in this article extend beyond a single dispute and implicate the broader governance of Olympic sport.

### V. CONCLUSION

The Chiles arbitration does not represent an isolated breakdown in the administration of Olympic justice. It illustrates the interaction of conditions, arbitral discretion, and judicial review within a structure not designed to address the realities of Olympic

adjudication. The limits imposed by Swiss arbitration law reflect a deliberate commitment to finality and arbitral autonomy. When applied to Olympic proceedings conducted under materially different conditions, those same limits restrict the capacity of judicial review to address procedural failures that affect the reliability of arbitral outcomes.

This conclusion does not depend on any single error in the Chiles arbitration. The procedural failures identified in that case, and the limited avenues available to address them, arise from structural features of the system itself. Olympic arbitration operates under compressed timelines, limited opportunities for evidentiary development, and broad discretion, while judicial review remains confined to a narrow set of procedural guarantees and a record defined by the arbitral tribunal. The interaction of these elements creates a structure in which significant procedural distortions may influence outcomes without a corresponding mechanism for meaningful correction.

The implications extend beyond a single dispute or a single Olympic cycle. As long as Olympic arbitration continues to function as the primary forum for resolving disputes arising during the Games, and judicial review remains structured as it is under Swiss law, the relationship between arbitral finality and meaningful oversight will remain unresolved. Addressing that tension does not require abandoning arbitration as a mechanism for resolving Olympic disputes. It requires more direct engagement with the conditions under which that arbitration operates and with the limits of the review mechanisms on which its legitimacy depends.

Within the current system, the primary safeguard lies in adherence to the procedural rules that govern arbitral proceedings. Where those rules are applied consistently and enforced as written, they provide a measure of discipline capable of mitigating the effects of tight timelines and limited review. Where they are not, those limitations become more pronounced. Within this structure, the integrity of Olympic dispute resolution depends on that adherence, because judicial review cannot reliably correct failures when they occur.

Confidence in the integrity of Olympic competition depends on the assumption that disputes are resolved through a competent process conducted according to established procedural rules. The Chiles arbitration, and the SFT's response to it, call that into question. Where procedural failures of this magnitude do not provide a basis for judicial intervention, the incentive to pursue costly appeals to the SFT diminishes. Athletes may seek relief in civil courts where fundamental rights grounded in public law are implicated. This also affects the finality of Olympic dispute

resolution, especially where participation in the Olympic Games is conditioned on accepting arbitration as the exclusive forum. Although the system is structured to limit external intervention, it cannot be entirely insulated from such scrutiny, as reflected in *RFC Seraing v. FIFA*,<sup>31</sup> where EU courts were required to ensure effective judicial protection notwithstanding CAS arbitration. This raises questions about the stability of Olympic dispute resolution as a self-contained system. The same considerations may arise in other jurisdictions, including the United States, where upcoming Olympic and World Cup competitions may bring these questions into sharper focus, and courts may be asked to consider whether arbitration agreements required as a condition of participation can preclude judicial review of claims grounded in due process or other fundamental rights.

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<sup>31</sup> Case C-600/23, *Royal Football Club Seraing SA v. FIFA, UEFA & URBSFA*, ECLI:EU:C:2025:617 (Aug. 1, 2025).



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**THE “HELPLESS” LEADING PLAYER: A CASE FOR  
COPYRIGHT PROTECTION OF STAGE DIRECTORS’ WORK**

DANNY HUTCHINS\*

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## ABSTRACT

*Ever since Hamilton's "Helpless"<sup>1</sup> first echoed through the Richard Rodgers Theatre, musical theatre has grown in popularity. Every year, practitioners push the boundaries and find different and interesting ways to tell stories. Stage directors are at the forefront of this movement in the way they have continued to find inventive and engaging staging concepts to bring stories to life for audiences. However, despite their immense contribution to the art form and American culture, stage directors are currently unable to receive copyright protection for their staging. This is because of an administrative pronouncement from the United States Copyright Office stating the office will refuse to register the staging of a stage director unless the office receives notice that the playwright has consented to this registration.*

*This paper argues that this rule runs contrary to the policy justifications underpinning the American copyright regime, and argues further that it is inconsistent with the statutory requirements for a copyright registration. This paper will examine the stage director's role and the work they contribute to musical productions and analyze those contributions under existing copyright standards.*

## INTRODUCTION

Congratulations! You are graduating with a degree in theatrical directing, and you are ready to take the world by storm. You have studied, prepared, and practiced your craft. After many years spent learning theory, concepts, and principles of composition, you are ready to direct and stage your first production. In preparation for rehearsal and production, you've assembled a stellar team, including a dance choreographer; a musical director for the songs and orchestrations; and scenic, lighting, and costume designers. You cast the show and embark on a collaborative rehearsal process where you work with your team to bring your artistic vision to life.<sup>2</sup> You work with the writers to ensure that the show is clear and

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<sup>1</sup> PHILLIPA SOO & ORIGINAL BROADWAY CAST OF "HAMILTON," *Helpless, on Hamilton* (Original Broadway Cast Recording) (Hamilton Uptown, LLC, 2015).

<sup>2</sup> The responsibility for developing a concept and supervising all collaborators falls squarely within the purview of the director. *See Career Communities: Director (Theatre and Opera)*, BERKLEE, <https://www.berklee.edu/> [<https://perma.cc/9JLL-PRX7>].

compelling for an audience. You have taken risks with your staging and pushed boundaries.

To your great surprise, the production is a hit! It transfers to Broadway and results in a successful run. The reviews describe your staging as engaging, cutting-edge, and dynamic. The show would not have been the same without the compositions you created. It is time to license the show to professional, educational, and community theaters nationwide.<sup>3</sup> While visiting family in another state, you see that a local theater company is producing your piece and you decide to go. You take your seat, the house lights go down, and what you witness is shocking. There, right before your eyes, is your staging. No credit in the program. No compensation paid to you for the work this production has copied. What now?<sup>4</sup>

This is not some far-fetched hypothetical situation created for the purposes of this paper. This happens to Stage Directors<sup>5</sup> every day. Do these hundreds of artists have any recourse under Copyright

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<sup>3</sup> See *About Us*, MUSIC THEATRE INT’L, <https://www.mtishows.com/> [https://perma.cc/738F-9VWN]. There are several major licensing companies that contract with writers to license their work. See, e.g., *id.*; *Who We Are*, CONCORD THEATRICALS, <https://www.concordtheatricals.com/> [https://perma.cc/6HB3-87L8]; *About Us*, THEATRICAL RTS. WORLDWIDE, <https://www.theatricalrights.com/> [https://perma.cc/V5QZ-LGLD]; *About Dramatic Publishing*, DRAMATIC PUBL’G, <https://www.dramaticpublishing.com/> [https://perma.cc/4UVN-79FT].

<sup>4</sup> This pathway—from Broadway to regional theaters—is very common. See Ryan Byrnes, *Give My Regards to the United States Copyright Office? A Determination of Whether Copyright Protection Should Be Extended to Stage Directions*, 1 ARIZ. ST. SPORTS & ENT. L.J. 189, 189 (2011). Regional theaters make their money on producing and re-staging shows after the pieces have had their debut on Broadway. *Id.* For example, the musical *Waitress* closed on Broadway in 2021, and has since been produced by dozens of regional theaters. See, e.g., Glenn Garner, “*Waitress*” the Musical Closing on Broadway Ahead of Schedule Due to Surge of COVID Cases, PEOPLE (Dec. 23, 2021, at 20:37 EST), <https://people.com/> [https://perma.cc/2ADM-XQL9]; *Waitress*, OGUNQUIT PLAYHOUSE, <https://www.ogunquitplayhouse.org/> [https://perma.cc/8MX4-48UJ]; *Waitress*, N. SHORE MUSIC THEATRE, <https://www.nsmt.org/> [https://perma.cc/5AJV-R942]; *Waitress*, DUTCH APPLE DINNER THEATRE, <http://secure.dutchapple.com/> [https://perma.cc/5QA7-N6K4].

<sup>5</sup> “[A] unique professional who takes charge of the production process and shapes almost every aspect of the show.” *Career Communities: Director (Theatre and Opera)*, *supra* note 2. For the purposes of this paper, the director of a theatrical production will be called the “stage director.”

law? Not as it stands today. For example, in *Mullen v. Society of Stage Directors & Choreographers*, the District Court for the Northern District of Illinois held that a stage director could not pursue a copyright infringement claim against a regional theater that copied his staging because he did not (and could not) own a valid copyright.<sup>6</sup> Before the court was a motion for declaratory judgment asking the court to declare that a Chicago production of *Urinetown: The Musical* did not infringe on any copyright rights held by the Broadway production team members.<sup>7</sup> The production team, including stage director John Rando, sent the Chicago team a “cease and desist letter. . . from the lawyers representing the Broadway Team . . . [stating] that ‘original contributions’ of each member of the Broadway Team were ‘copied willfully, blatantly and practically wholesale’ by each member of the Chicago Team.”<sup>8</sup> The letter alleged that the Chicago Team “set out to willfully duplicate [the Broadway Team’s creative elements] in their entirety with extraordinary precision.”<sup>9</sup>

While the court’s holding was narrowly focused on whether the Stage Directors and Choreographers Society<sup>10</sup> and other affiliated unions could claim copyright infringement on behalf of their impacted members,<sup>11</sup> the case represents the current tension in copyright law. Choreographic works are explicitly registrable and protectable by the Copyright statute.<sup>12</sup> The Copyright Office defines choreography as a “[d]ance,” which, in the words of the Copyright Office, is “the ‘static and kinetic succession[] of bodily movement

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<sup>6</sup> *Mullen v. Soc’y of Stage Dirs. & Choreographers*, No. 06 C 6818, 2007 WL 2892654, at \*5 (N.D. Ill. Sep. 30, 2007).

<sup>7</sup> *Id.* at \*1–2. The original Broadway production was nominated for a Tony Award for Best Musical. See *1947 to Present, Winners and Honorees, Nominations: 2002*, TONY AWARDS, [https://www.tonyawards.com/\[https://perma.cc/M4RU-RUNT\]](https://www.tonyawards.com/[https://perma.cc/M4RU-RUNT]). Additionally, the stage director of the production, John Rando, won the Tony Award for Best Direction of a Musical. See *1947 to Present, Winners and Honorees, Winners: 2002*, TONY AWARDS, [https://www.tonyawards.com/\[https://perma.cc/XR89-GFH8\]](https://www.tonyawards.com/[https://perma.cc/XR89-GFH8]).

<sup>8</sup> *Mullen*, 2007 WL 289265 at \*2.

<sup>9</sup> *Id.*

<sup>10</sup> “[The Stage Directors and Choreographers Society] is the theatrical union that unites, empowers, and protects professional stage directors and choreographers throughout the United States.” STAGE DIRS. & CHOREOGRAPHERS SOC’Y, [https://sdcweb.org/\[https://perma.cc/2CUE-45ZR\]](https://sdcweb.org/[https://perma.cc/2CUE-45ZR]).

<sup>11</sup> The answer was a firm no from the court on standing grounds. See *Mullen*, 2007 WL 289265 at \*5.

<sup>12</sup> 17 U.S.C. § 102(a)(4).

in certain rhythmic and spatial relationships.”<sup>13</sup> Furthermore, when examining theatrical design, at the very least, descriptions or illustrations of costumes, scenery, props, and lighting are registrable.<sup>14</sup> This is because illustrations of the various design elements fall under “the enumerated subject matter of pictorial, graphical, sculptural, and architectural works under copyright law.”<sup>15</sup>

What about stage directors? The Copyright Office is very clear in offering no copyright protection unless the playwright agrees:

Where a director submits an application to register a claim to copyright in the text<sup>16</sup> of his or her stage

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<sup>13</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 805.1 (3d ed. 2021) (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986)) [hereinafter COMPENDIUM (THIRD)].

<sup>14</sup> COMPENDIUM (THIRD) § 804.3(F). Many scholars argue that this protection should be more expansive, but that is beyond the scope of this paper. *See generally, e.g.*, Mark L. Bailey, *Exit stage, Enter Streaming: Copyright of the Theatrical Stage Design Elements in a Changing Theater Industry*, 28 J. INTEL. PROP. L. 365 (2021) (arguing that theatrical designers should be able to register more than just their illustrations and descriptions); Maggie Kieffer, “*The World Was Wide Enough*”: *Granting Copyright Protection to Theatrical Costumes in the Streaming Era*, 2023 U. ILL. L. REV. 575 (2023) (arguing that theatrical costumes should receive copyright protection).

<sup>15</sup> Bailey, *supra* note 14, at 376. While this is true, the question of whether these design elements “as they appear on stage” should be entitled to protection is subject to much debate around scholars. *Id.* Regardless, as it stands today, these elements are *not* protectible in their final manifestation on stage. *Id.* Whether these design items should be protected under copyright law is outside of the scope of this paper, especially as there are considerations present for these design elements that are not present for the work of a stage director. *See generally, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017) (discussing the difficulties in receiving protection for items of clothing). However, the policy concerns articulated in this paper would likely be important to consider when evaluating the protectability of these design elements, because the purpose of the Copyright Act is to foster and protect creativity. *See infra* Section V.

<sup>16</sup> As discussed later in this paper, this definition is highly problematic because it assumes (1) that the stage directions are a comprehensive articulation of the stage action in the original production; and (2) that the only way to meet the fixation requirement is to articulate them as stage directions in the script. Both of these arguments rest on faulty premises that misunderstand the job of a stage director and the role that stage

directions, the registration specialist will communicate with the applicant to determine whether the copyright owner of the play gave the director permission to create a derivative work. If the copyright owner of the play did not grant permission, the specialist will refuse registration. If the applicant confirms in writing that the copyright owner of the play granted permission to use the play as a basis for the derivative work, the specialist will register the claim in the text of the stage directions as a derivative work of the play, provided that the text is copyrightable.<sup>17</sup>

Therefore, despite the inequities, it is commonly accepted in the theater industry that a stage director's work is not copyrightable.<sup>18</sup>

This paper will argue that at least some of a stage director's work—especially connected to their work on a musical—is copyrightable under the statute. Part II gives a brief overview of the various players in the production of a musical and how their competing interests set up the current legal tension, and Part III will briefly summarize the framework of copyright law in the United States. Part IV will examine whether the work of a stage director is eligible for copyright protection, and Part V will discuss the barriers to protection. Finally, Part VI will analyze whether the work of a stage director *should* be eligible for copyright protection by examining the policies and rationales behind the Copyright Clause and associated statutes.

As will be described below, theater (especially musical theater) is a complex art form that takes dozens of discrete players to create one piece of art. Each of these contributors, who are too numerous to name in this paper,<sup>19</sup> may have individual copyright interests in

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directions play in the licensed versions of the script. *See infra* Section III(C).

<sup>17</sup> COMPENDIUM (THIRD) § 804.9(D)(3).

<sup>18</sup> *See, e.g.,* Natalie Clare, *Copyright in Theatre: What you need to know.*, DRAMATICS, <https://dramatics.org/> [<https://perma.cc/D6ZC-UA5H>]; Jenn McKee, *Property Rights and Wrongs*, AM. THEATRE (Jan. 19, 2018), <https://www.americantheatre.org/> [<https://perma.cc/7AKU-3TAV>].

<sup>19</sup> For example, what rights do actors have in the work performed on stage? *See generally, e.g.,* *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (using the “work made for hire” doctrine to discuss the limits on an actor’s ability to receive copyright in a film). What rights does a creative partner, such as a dramaturg who assists in the work (but does not create it themselves) have in the work? *See generally* *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (holding that the dramaturg who worked on the original

aspects of the production. The copyrightability of those works, or how the rights may be adjusted by contract, is outside the scope of this paper. However, this paper will seek to identify those additional issues, when relevant, to help the reader fully understand the problems theater presents, and to raise issues for future scholarship.

## I. THE KEY PLAYERS: THE COLLABORATORS

To understand why stage directors are not afforded copyright protection for their work, it is essential to establish the critical relationships at the production’s helm: author (including playwright/librettist,<sup>20</sup> and, in a musical, the composer,<sup>21</sup> and lyricist<sup>22</sup>),<sup>23</sup> producer, and stage director.

### A. THE AUTHORS, STAGE DIRECTORS, AND PRODUCERS

The authors, stage directors, and producers are represented by different unions and trade groups that are not all in contractual privity with one another.<sup>24</sup> The authors are represented by the Dramatists Guild (“the Guild”), which defines itself as:

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production of *RENT* had no copyright interest in the musical). These are just a few examples.

<sup>20</sup> The playwright/librettist “writes the script[,]” creating “the story, dramatic structure, and text” for the work. *Career Communities: Librettist*, BERKLEE, <https://www.berklee.edu/> [<https://perma.cc/XSC5-C6G8>].

<sup>21</sup> The composer is “responsible solely for a show’s music.” *Career Communities: Composer*, BERKLEE, <https://www.berklee.edu/> [<https://perma.cc/EQ9A-E6VE>].

<sup>22</sup> The lyricist “write[s] the words” to the songs. *Career Communities: Lyricist*, BERKLEE, <https://www.berklee.edu/> [<https://perma.cc/2L9D-5LK2>].

<sup>23</sup> For the remainder of this paper, these parties will simply be called the “authors.”

<sup>24</sup> The nature of these contracts and how they interact with each other is outside the scope of this paper, but merits consideration beyond the conclusions this paper reaches grounded in copyright law. For example, is it important that the agreement between the SDC and League is a collectively bargained agreement because SDC is an NLRB recognized labor union, whereas the agreement between the Guild and the League is the result of a consent decree? What are the practical implications of the fact that the League is entering into contracts with multiple players which contain provisions that are in conflict with one another? This consideration should be addressed regardless of the protectability of the stage director’s work under copyright law.

[T]he national, professional membership trade association of theatre writers including playwrights, composers, lyricists, and librettists. The Guild was established for the purpose of aiding dramatists in protecting both the artistic and economic integrity of their work.<sup>25</sup>

Importantly, the Guild is not a labor union; instead, it is a trade organization that seeks to advance the interests of authors.<sup>26</sup> This is relevant because only labor unions can collectively bargain leverage the binding nature of a collectively bargained agreement.<sup>27</sup>

Stage directors and choreographers<sup>28</sup> are represented by the Stage Directors and Choreographers Society (SDC),<sup>29</sup> a national labor union. SDC's mission is to:

[F]oster a national community of professional stage directors and choreographers by protecting the rights, health and livelihoods of all our Members; to facilitate the exchange of ideas, information and opportunities, while educating the current and future generations about the role of directors and choreographers; and to provide effective administrative, negotiating and contractual support.<sup>30</sup>

Stage Directors can elect to join the SDC in two different ways: full membership or Associate membership.<sup>31</sup> Full members must, with limited exceptions, file an SDC contract every time they

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<sup>25</sup> *Mission & History: The National Trade Association of Playwrights, Composers, Lyricists, and Librettists*, DRAMATISTS GUILD, <https://www.dramatistsguild.com/> [<https://perma.cc/ER46-72EC>].

<sup>26</sup> *Id.*

<sup>27</sup> See 25 U.S.C. § 151.

<sup>28</sup> “[a] choreographer conceives, creates, and directs dance and movement in a wide range of performance contexts, including dance, theater, film, television, opera, and live events.” *Carrer Communities: Choreographer*, BERKLEE, <https://www.berklee.edu/> [<https://perma.cc/DN8S-KLV2>].

<sup>29</sup> See STAGE DIRS. & CHOREOGRAPHERS SOC’Y, <https://sdcweb.org/> [<https://perma.cc/N4AA-WPJL>].

<sup>30</sup> *Id.*

<sup>31</sup> *Prospective Members FAQs*, STAGE DIRS. & CHOREOGRAPHERS SOC’Y, <https://sdcweb.org/> [<https://perma.cc/EJ5E-7TTL>].

work.<sup>32</sup> Associate members, on the other hand, need not file a contract when they work.<sup>33</sup> Because all work on Broadway requires full membership and a contract,<sup>34</sup> the rest of this paper will proceed as if the stage director is a full member of the SDC.

Finally, Broadway producers are represented by the Broadway League (“the League”), a trade association representing Broadway producers and theater owners.<sup>35</sup> The League defines itself as:

[T]he national trade association for the Broadway industry. Our 700-plus members include theatre owners and operators, producers, presenters, and general managers in North American cities, as well as suppliers of goods and services to the commercial theatre industry. Each year, League members bring Broadway to more than 30 million people in New York and more than 200 cities across the U.S. and Canada.<sup>36</sup>

## B. CONTRACTUAL OBLIGATIONS BETWEEN THE GUILD, SDC, AND THE LEAGUE

Because an agreement between the author, stage director, and producer, does not exist, the ownership of property rights delineated by contract is complex. While a complete examination of the contractual obligations and enforceability of such provisions is beyond the scope of this paper, this section will briefly describe the various (and conflicting) contractual obligations that exist in creating and producing a Broadway musical.

First, the SDC and League have collectively bargained under the National Labor Relations Act;<sup>37</sup> therefore, every stage director

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* In fact, with limited exceptions, associate members cannot file a contract with the SDC for their work.

<sup>34</sup> *Broadway & First-Class Tours*, STAGE DIRS. & CHOREOGRAPHERS SOC’Y, <https://sdcweb.org/> [<https://perma.cc/W26Z-YGXM>].

<sup>35</sup> THE BROADWAY LEAGUE, <https://www.broadwayleague.com/> [<https://perma.cc/JB99-XEUP>].

<sup>36</sup> *About the League*, THE BROADWAY LEAGUE, <https://www.broadwayleague.com/> [<https://perma.cc/SP6N-W3CJ>].

<sup>37</sup> See National Labor Relations Act, 29 U.S.C. §§ 151–169.

on Broadway operates under this contract.<sup>38</sup> As it relates to property rights, the SDC Broadway contract explicitly states:

In order to facilitate the Director's and/or Choreographer's ability to prevent the unauthorized re-creation of direction and/or choreography, the Producer and the [Director] agree that, as between themselves, all rights in and to the [Direction] created by the [Director] in the course of the rendition of his/her services shall be, upon its creation, and will remain the sole and exclusive property of the [Director] . . . ; it being understood, however, that the Producer and its licensee(s) shall have a perpetual and irrevocable license to use such direction . . . in any stage production of the play for which the [Director] is entitled to receive a payment under an applicable SDC minimum basic agreement. Any additional use or license of the [direction] by the Producer shall be subject to further agreement between the Producer and [the Director]. The foregoing is not intended to alter, diminish or affect, in any way, any of the Author's rights in the play.<sup>39</sup>

At first glance, this clause would seem to protect the *Mullen* production team because the original Broadway producers did not authorize the production at issue.<sup>40</sup> Therefore, because the stage director reserves all property rights for themselves, any existing copyright would be registrable by the stage director.<sup>41</sup>

However, this collective bargaining agreement only tells half the story. The League is also required to sign the Dramatist's Guild Approved Production Contract, "granting all rights in the production to the dramatist, including 'any change of any kind whatsoever in the manuscript, title, stage business or performance

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<sup>38</sup> See, e.g., *The Broadway League Inc. and Stage Directors and Choreographers Society, Inc., Collective Bargaining Agreement*, STAGE DIRS. & CHOREOGRAPHERS SOC'Y (Sep. 1, 2015), <https://sdcweb.org/https://perma.cc/3V23-RRK5> [hereinafter *Collective Bargaining Agreement*].

<sup>39</sup> *Id.* at 51.

<sup>40</sup> See *Mullen v. Soc'y of Stage Dirs. & Choreographers*, No. 06 C 6818, 2007 WL 2892654, at \*5 (N.D. Ill. Sep. 30, 2007).

<sup>41</sup> See *infra* Section III for a discussion of what, if anything, the director could register.

of the Play.”<sup>42</sup> “Stage business or performance” is the operative language that comes into conflict with the SDC contract. It is argued that the stage directions published in the script are a complete and comprehensive recording of the stage director’s work.<sup>43</sup> Accordingly, the authors argue, because the producers must sign this contract in order to mount the author’s work, and because the SDC contract includes the language “[t]he foregoing is not intended to alter, diminish, or affect, in any way, the Author’s rights in the play,” the author necessarily retains any copyright created by the stage director’s work on the production.<sup>44</sup>

There is currently no resolution to this dispute, as the SDC has not yet attempted to litigate this tension. Regardless, this paper will argue that this contention is unsound for two reasons. First, the argument that the stage directions, as published in the script, represent a complete and comprehensive recording of the stage director’s work rests on misunderstanding of the purpose of stage directions and the stage director’s role in their creation.<sup>45</sup> Second, the SDC has likely not attempted to litigate this point because, as established above, the Copyright Office currently holds that no work by the stage director is eligible for copyright. Because this paper argues that this determination is an erroneous reading of the statute and case law, this paper also argues that the SDC should litigate the conflicting contracts’ meaning to ascertain the full scope of the director’s copyright rights.

## II. OVERVIEW OF COPYRIGHT LAW

Before delving into the potential copyrightability of a stage director’s work, this section establishes the legal framework underpinning the American copyright system. Copyright protections in the United States have their origin in Article I of the United States Constitution, which says that Congress shall have the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>46</sup> Congress has

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<sup>42</sup> David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683, 688 (1996).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 687.

<sup>45</sup> See *infra* Section III(C) for a robust analysis of stage directions.

<sup>46</sup> U.S. CONST. art. I, § 8, cl. 8.

created several iterations of copyright legislation, with the Copyright Act of 1976 being the most recent.<sup>47</sup>

Several categories of artistic works are covered under the statute:

- (1) Literary works;
- (2) Musical works, including any accompanying words;
- (3) Dramatic works, including accompanying music;
- (4) Pantomimes and choreographic works;
- (5) Pictorial, graphic, and sculptural works;
- (6) Motion pictures and other audiovisual works;
- (7) Sound recordings; and
- (8) Architectural works.<sup>48</sup>

Importantly, even if a work falls within one of the above categories, protection is not “extend[ed] to any idea, procedure, process, system, method of operation, concept, principle, or discovery,” regardless of its form.<sup>49</sup> To receive protection, the artistic work must be an “original work[] of authorship fixed” in a “tangible medium of expression.”<sup>50</sup>

If a piece of artistic work falls within the enumerated categories and satisfies the above standard, courts are not to pass their own judgment on whether the work is sufficiently “artistic.”<sup>51</sup> In *Bleistein*, Justice Holmes cautioned that it “would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges” of artistic work.<sup>52</sup> This principle has been called the nondiscrimination principle and is an essential limitation on the power of judges to pass judgment on the quality of art.<sup>53</sup> Oftentimes, artistic work is not appreciated when it is first created. This is especially true of cutting-edge or avant-garde new work.

Additionally, when evaluating whether a work is creative enough to receive copyright protection, only a “modicum of

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<sup>47</sup> See Copyright Act of 1976, 17 U.S.C. §§ 101–1511.

<sup>48</sup> 17 U.S.C. § 102(a)(1)–(8).

<sup>49</sup> *Id.* § 102(b).

<sup>50</sup> *Id.* § 102(a).

<sup>51</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

<sup>52</sup> *Id.* at 251.

<sup>53</sup> See *id.*

creativity” is required.<sup>54</sup> Once an artist creates a work that meets this standard, they get certain exclusive rights in the work, including the right:

- (1) To reproduce the copyrighted works in copies or phonorecords;
- (2) To prepare derivative works based upon the copyrighted work;
- (3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) In the case of 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, to display the copyrighted work publicly; and
- (6) In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>55</sup>

These protections exist for the copyrighted work’s duration unless an affirmative defense applies.<sup>56</sup> Additionally, the copyright holder has the sole right to create “derivative works.”<sup>57</sup> Derivative works are those works which “incorporate[] the original copyrighted work in some form, and yet which [are] substantially different from the original work.”<sup>58</sup> Importantly, a work is not a derivative work “unless it is ‘based upon one or more preexisting

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<sup>54</sup> See generally *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>55</sup> 17 U.S.C. § 106(1)–(6).

<sup>56</sup> The most common affirmative defense is the doctrine of fair use found in 17 U.S.C. § 107. This Paper will not go into depth regarding affirmative defenses.

<sup>57</sup> 17 U.S.C. § 103.

<sup>58</sup> *Dream Custom Homes, Inc. v. Mod. Day Constr., Inc.*, 773 F.Supp.2d 1288, 1310 (M.D. Fla. 2011).

works' and, to qualify as a 'preexisting work,' the underlying work must be copyrightable."<sup>59</sup>

### III. COULD THE WORK OF A STAGE DIRECTOR RECEIVE A COPYRIGHT?

Critically, the Copyright Office maintains that a stage director's work is not eligible for registration with the Office.<sup>60</sup> However, this is an administrative pronouncement, so for it to be valid, it must be consistent with the statute's meaning and the authority Congress gave the Copyright Office.<sup>61</sup> This is especially true now that administrative agencies are entitled to no deference for their legal interpretations.<sup>62</sup> Therefore, to determine whether this pronouncement from the Copyright Office is legally correct, a statutory analysis is required in pursuit of determining whether stage directors' work is included in the statute.<sup>63</sup>

As established above, the Copyright Act of 1976 states that protection subsists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated."<sup>64</sup> Courts have distilled this statutory language to require three elements: (1) original work of authorship, including appropriate subject matter; (2) minimal degree of creativity; and (3) fixation.<sup>65</sup> This section will take each element individually to determine whether the work of a stage director should be eligible for copyright protection.

#### A. ORIGINAL WORK OF AUTHORSHIP AND APPROPRIATE SUBJECT MATTER

The originality requirement is not a difficult threshold to meet.<sup>66</sup> In fact, "[a]n original work of authorship is any work that originates from the author and is not copied."<sup>67</sup> For example, in *Fred Fisher, Inc. v. Dillingham*, Jerome Kern (one of the most prolific musical theater composers of the early twentieth century), wrote a song

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<sup>59</sup> *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1078 (9th Cir. 2000).

<sup>60</sup> *See* COMPENDIUM (THIRD) § 804.3(D)(1).

<sup>61</sup> *See* *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 412.

<sup>64</sup> 17 U.S.C. § 102(a).

<sup>65</sup> *See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

<sup>66</sup> Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317, 322 (2001).

<sup>67</sup> *Id.*

entitled “Kalua” that was released around the same time as “Dardanella,” written by a different composer.<sup>68</sup> The court held that, so long as there was no conscious or subconscious copying, Kern could successfully copyright his work despite another composer having a copyright to a similar work because Kern’s work was sufficiently original.<sup>69</sup> Beyond originality, the “work of authorship” requirement is met so long as the piece fits into one of the enumerated categories.<sup>70</sup>

There is no dispute that one piece of stage movement, in isolation, would likely not be an original work of authorship, just as individual facts are not copyrightable.<sup>71</sup> However, when examined in its entirety, a stage director’s work can transform into an original work of authorship. The comparison to choreography is apt here. In *Horgan v. MacMillan*, the Second Circuit reasoned that individual choreographic moves are not protectable.<sup>72</sup> Still, when arranged and composed in a deliberate order, these steps combine to create a choreographic work.<sup>73</sup>

The *Horgan* case has been used to reach similar conclusions about “choreography” as simple as poses.<sup>74</sup> In *Hanagami*, the court was tasked with determining whether a portion of Hanagami’s choreography (which included poses) was infringed by Epic Games, which included the movement in their popular game *Fortnite*.<sup>75</sup> Epic moved to dismiss the suit, arguing that Hanagami’s “allegedly copied dance steps were not protectable.”<sup>76</sup> The court acknowledged that the Copyright Act of 1976 includes little guidance about the definition of “choreography,”<sup>77</sup> so the court looked towards the definition used by the Copyright Office.<sup>78</sup> As such, the court adopted the “features” the Copyright Office uses to determine if a work is registerable:

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<sup>68</sup> *Id.*; see *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924).

<sup>69</sup> *Fred Fisher, Inc.*, 298 F. at 149.

<sup>70</sup> See *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 161–63 (2d Cir. 1986).

<sup>71</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991).

<sup>72</sup> See *Horgan*, 789 F.2d at 161.

<sup>73</sup> See *id.*

<sup>74</sup> See generally *Hanagami v. Epic Games, Inc.*, 85 F.4th 931 (9th Cir. 2023).

<sup>75</sup> *Id.* at 936.

<sup>76</sup> *Id.* at 937.

<sup>77</sup> See *Bikram’s Yoga Coll. of India, L.P., v. Evolution Yoga, LLC*, 803 F.3d 1032, 1043 (9th Cir. 2015).

<sup>78</sup> *Hanagami*, 85 F.4th at 939.

The Compendium outlines several elements that choreographic works typically contain, “although the presences or absences of a given element is not determinative” . . . [t]hese features include “rhythmic movement in a defined space,” “compositional arrangement,” “musical or textual accompaniment,” “dramatic context,” “presentation before an audience,” and “execution by skilled performers.”<sup>79</sup>

The district court concluded that each of the individual steps (“eight bodily movements, set to four beats”) was not protectable on its own, but that the steps “as a whole” were sufficient to receive copyright protection.<sup>80</sup> This is because there “exists a ‘continuum between copyrightable choreography and uncopyrightable dance.’”<sup>81</sup> The uncopyrightable dance steps (simple steps, such as the waltz, or individual steps in isolation) are therefore not “works of authorship” that are protected by copyright law.<sup>82</sup> However, when a choreographer strings these movements together to create a piece, they transform into “copyrightable choreography.”<sup>83</sup>

The same is true of a stage director’s work. Simple movements around the stage, such as picking up props or placing them down on the table, are likely not protectable as they are analogous to the “simple routines” the Copyright Act does not protect.<sup>84</sup> This makes good sense; letting one stage director protect the simple movement of picking an envelope up off the table would prevent all future stage directors from using that action. It would be hard to argue that protecting that kind of movement furthers the purposes of copyright law. The critical point of analysis is where on the “continuum” does the movement fall?

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<sup>79</sup> See *id.* (quoting COMPENDIUM, § 805.2(A)–(F)). While the court does not assign these requirements to a specific step of the copyrightability analysis, the *Hanagami* court cites to *Horgan*, which focuses, in part, on whether the “work” is sufficient to receive protection (meaning, whether this is the type of work that can be protected). See *Horgan v. MacMillian*, 789 F.2d 157, 161–63 (2d Cir. 1986). Therefore, this analysis proceeds in the same way.

<sup>80</sup> *Hanagami*, 85 F.4th at 938.

<sup>81</sup> *Id.* (quoting COMPENDIUM, § 805.1).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *id.*

For example, take the sequence in “Wait for Me (Reprise)” from *Hadestown*.<sup>85</sup> In isolation, the sequence consists primarily of reaching, simulated upper body walking movements, and actual walking on the turntable.<sup>86</sup> Individually, these movements would almost certainly not satisfy the originality requirement. Together, however, it is hard to argue that they do not. The movement is set to the music, it tells the dramatic story of Eurydice and Orpheus trying to finish their journey back from the Underworld so that they can let their love blossom, the movement is rhythmic and defined in space,<sup>87</sup> and the story is executed by skilled performers who rehearse for weeks to tell this story with their bodies. In the end, the story of Eurydice and Orpheus’ journey is told when watching the movement together. The movement has transformed into something else: choreography. The stage director may create it, but it is the same type of movement that a choreographer would create. Yet, as of today, no protection is afforded to that movement.

Those opposed to a finding of originality will argue that not everything a stage director does is original, and the analysis would require a movement-by-movement examination.<sup>88</sup> While this is likely true, this should not lead to the conclusion that the work of a stage director can never be copyrightable. As established above, this movement-by-movement examination is the same process required for choreography. This shows that protecting a stage director’s work would not require the Copyright Office to create new systems or procedures. It would simply follow the same procedure it uses for choreography. If anything, administrative burden is created by the Office’s current policy of drawing this arbitrary line of exclusion.

The problematic nature of the stage director’s exclusion is further illuminated when one considers the convention of a Director/Choreographer.<sup>89</sup> For example, Susan Stroman was the

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<sup>85</sup> See THEATERMANIA, *Maia Reficco Sings “Wait for Me (Reprise)” from Hadestown on Broadway*, (YouTube, July 30, 2024), <https://www.youtube.com/> [<https://perma.cc/C9ZH-JDBP>].

<sup>86</sup> *Id.*

<sup>87</sup> Compare this movement to a line dancing class, where folks can stand wherever they would like and copy the movement demonstrated by the instructor. There is no defined space to that movement; it occurs wherever the participants decide to stand. The same is true for yoga; while the moves may be rhythmic, the relation of different bodies in the space is not a consideration. This staging from *Hadestown* is different. The actors are deliberately placed to create stage pictures and tell the story.

<sup>88</sup> See Leichtman, *supra* note 42, at 708–09.

<sup>89</sup> The SDC collective bargaining agreement expressly contemplates a situation, very common in musical theater, where one person is employed

director and choreographer for the award-winning Broadway production of *The Producers*.<sup>90</sup> Stroman could register at least some of her work in that production (meaning, she could register anything deemed “choreography”). But how would the Copyright Office make that distinction when she created it all? The only way to do so would be to engage in a movement-by-movement examination. On the other hand, Stroman was recently the stage director for the Broadway production of *Smash*.<sup>91</sup> In that instance, just by nature of her title, she can register nothing.

Actually, this process is required for most potentially copyrightable works.<sup>92</sup> For example, the Second Circuit requires “protectable expression” to be identified and “nonprotectable material . . . sifted out before comparing the two works at issue” in an infringement case.<sup>93</sup> Courts and the Copyright Office are well accustomed to engaging in this work.

Therefore, so long as there is no actual or subconscious copying, the work of a stage director likely satisfies the originality requirement.

## B. MINIMAL DEGREE OF CREATIVITY AND COMPILATIONS

When examining the degree of creativity required, “minimal” is the operative word.<sup>94</sup> The seminal Supreme Court case on the degree of creativity required to receive copyright protection is *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>95</sup> In that case, Rural Telephone Company was a public utility required to issue an “annually . . . updated telephone directory” by state law.<sup>96</sup> The directory contained white pages (names of subscribers listed alphabetically by last name) and yellow pages (business subscribers listed by category).<sup>97</sup> Feist Publications was a private publishing

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as the director and the choreographer. See *Collective Bargaining Agreement*, *supra* note 38, at XI.

<sup>90</sup> *The Producers*, PLAYBILL, <https://playbill.com/> [<https://perma.cc/D3LK-APEK>].

<sup>91</sup> *Smash*, PLAYBILL, <https://playbill.com/> [<https://perma.cc/BA9R-2AM9>].

<sup>92</sup> *E.g.*, *Comput. Assocs., Inc. v. Altai*, 982 F.2d 693 (2d Cir. 1992) (holding that determining copyright protection requires filtering a work element-by-element to separate protectable expression from unprotectable ideas and functional components).

<sup>93</sup> *Leichtman*, *supra* note 42, at 708 (citing *Altai*, 982 F.2d at 704).

<sup>94</sup> See generally *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (establishing the low-bar standard for minimal degree of creativity).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 342.

<sup>97</sup> *Id.*

company which covered a much larger geographical area.<sup>98</sup> Because Rural provided telephone services, it easily collected the directory information from its subscribers, whereas Feist had to approach Rural and other local telephone companies and offer to “pay for the right to use [their] white pages listings.”<sup>99</sup> Rural refused, so Feist hired “personnel to investigate” and confirmed the data.<sup>100</sup> As a result of this investigation, Feist’s publication included additional information, namely the “individual’s street address.”<sup>101</sup> Nevertheless, many of Feist’s directory listings were identical to those found in Rural’s publication.<sup>102</sup> Rural sued for copyright infringement, arguing that Feist could not use “information contained in Rural’s white pages” in its own directory.<sup>103</sup>

Justice O’Connor, writing for the majority, held that Rural’s white pages lacked originality, and therefore Feist’s listings did not constitute infringement.<sup>104</sup> In her discussion regarding the constitutional requirement for creativity, Justice O’Connor made a point that “the requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>105</sup> In fact, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious.’”<sup>106</sup> Conversely, no one can claim ownership of facts because “facts do not owe their origin to an act of authorship.”<sup>107</sup> Next, Justice O’Connor distinguished facts, which are not protectable, from factual compilations, which can be protected.<sup>108</sup> This is because the “compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers.”<sup>109</sup> When examining a compilation, the protection is narrow: “copyright protection may extend only to those components of a work that are original to the author.”<sup>110</sup>

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<sup>98</sup> *Id.* at 342–43.

<sup>99</sup> *Id.* at 343.

<sup>100</sup> *Feist*, 499 U.S. at 343.

<sup>101</sup> *Id.* at 344.

<sup>102</sup> *Id.* at 344.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 364.

<sup>105</sup> *Id.* at 345.

<sup>106</sup> *Feist*, 499 U.S. at 345 (quoting 1 M. Nimmer & D. Nimmer, COPYRIGHT § 1.08(C)(1) (1990)).

<sup>107</sup> *Id.* at 347.

<sup>108</sup> *Id.* at 347–48.

<sup>109</sup> *Id.* at 348.

<sup>110</sup> *Id.*

While *Feist* makes clear that the bar for creativity is low, the bar still exists. For example, in *Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*, the Ninth Circuit found that a combination of yoga poses was not protectable because they were a “process” and thus not sufficiently creative.<sup>111</sup> There, Bikram Choudhury, the “self-proclaimed ‘Yogi to the stars,’” attempted to protect a sequence of yoga poses, marketing that his sequence provided many health and fitness benefits.<sup>112</sup> The court found that the poses were not artistic, and instead were meant to “further the basic goals of the method”—achieving a healthy lifestyle.<sup>113</sup> Therefore, no matter how many different variations of these poses Choudhury curated, the sequence was unprotectible because it was a process.<sup>114</sup>

Stage directors have a similar hurdle: the individual steps that make up their staging are pedestrian and likely analogous to facts. When a stage director stages a scene or a song, the staging consists of a sequence of pedestrian movements or dance steps that, when strung together, tell a story and create stage pictures. For example, Sara Valentine,<sup>115</sup> an actress, director, and former Associate Professor of Theatre at the University of Southern Maine, uses a “metronome [in] rehearsal to establish rhythm and pace,” all to help combine the different “interpretations” of the piece into one collective that works for that particular production.<sup>116</sup> Critically, Valentine notes that “two directors staging the same play at the same time are likely to have a different organization of performers in terms of specific placement, which will also be determined by the playing space.”<sup>117</sup> This is additional evidence that a stage director’s work is more similar to a compilation than facts or procedures; thus, the creative work gets at the core justifications for the existence of copyright law.

It would be difficult to argue that stage directors could copyright the individual movements, as that would defeat the entire policy justification for copyright protection.<sup>118</sup> Therefore, arguing that stage directors’ works are compilations is likely the only, and best,

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<sup>111</sup> See *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1042 (9th Cir. 2015).

<sup>112</sup> *Id.* at 1035.

<sup>113</sup> *Id.* at 1042.

<sup>114</sup> *Id.*

<sup>115</sup> See *Sara Valentine, Associate Professor of Theatre*, UNIV. S. ME. DEP'T THEATRE, <https://usm.maine.edu/> [<https://perma.cc/UVY4-AHDJ>].

<sup>116</sup> Interview with Sara Valentine, Assoc. Professor of Theatre, Univ. S. Me. (May 5, 2025).

<sup>117</sup> *Id.*

<sup>118</sup> See *infra* Section V describing the policy justifications underlying copyright law.

route for them to receive copyright protection.<sup>119</sup> This makes *Feist* particularly relevant to the analysis.

The Second Circuit’s analysis in its seminal case, *Horgan v. Macmillan, Inc.*,<sup>120</sup> supports the argument that stage directors’ work can be a compilation. The dispute in *Horgan* revolved around a book titled “The Nutcracker: A Story & a Ballet,” which portrayed “in text and photographs, the New York City Ballet Company’s production” of *The Nutcracker*.<sup>121</sup> This particular version of *The Nutcracker* was choreographed by the iconic choreographer George Balanchine, and, after premiering in 1954, has been performed by the New York City Ballet Company each Christmas season to sold-out audiences.<sup>122</sup> Not only is it the nation’s most popular ballet, but many ballet companies across the country pay royalties to perform this particular version.<sup>123</sup> If you have seen *The Nutcracker* in your hometown, it is more likely than not you have seen this version.

MacMillan, a publisher, planned to publish a book for young people about this production of *The Nutcracker*.<sup>124</sup> The book included “60 color photographs . . . of scenes from the New York City Ballet Company production of *The Nutcracker*, following the sequence of the ballet’s story and dances.”<sup>125</sup> In its examination of whether choreography is even protectable, the Second Circuit noted that “[s]ocial dance steps and simple routines are not copyrightable . . . . Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.”<sup>126</sup> The court ultimately found that “the composition of dancers’ bodies or the placement of dancers on the stage” is sufficiently creative to receive protection.<sup>127</sup>

Upon examination of the *Feist* rule, as applied in *Horgan*, a stage director’s work is sufficiently original to receive copyright protection. It is true that the stage director uses a sequence of seemingly pedestrian movements and choreographic steps to create

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<sup>119</sup> Meaning, as established above, that the individual movements are not protectable on their own. *See supra*, Section III(A). The staging could only receive protection by looking at it as a whole. *See id.*

<sup>120</sup> *See generally* *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986).

<sup>121</sup> *Id.* at 158.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

<sup>124</sup> *Id.* at 158–59.

<sup>125</sup> *Id.* at 159 (emphasis added).

<sup>126</sup> *Horgan*, 789 F.2d at 161 (quoting THE COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.03(a) (2d ed. 1984)).

<sup>127</sup> *Id.* at 163.

their composition on stage. Those steps and movements alone would be analogous to facts and therefore not protectable. However, when strung together to create a sequence, they are a sufficiently protectable compilation.

Take the end of “Defying Gravity” from *Wicked* as an example.<sup>128</sup> The song ends the first Act of the blockbuster musical, where we see Elphaba (the Wicked Witch of the West) fly high above the audience as she sings about finding freedom and escape.<sup>129</sup> This song has become iconic—not just because of its sweeping music and soaring vocals—because of how Elphaba rises above the stage, towering over the rest of the actors as she sings.<sup>130</sup> While this staging was likely the result of a collaboration between the stage director and designers, the responsibility to stage the show ultimately falls to the stage director.<sup>131</sup> Therefore, Joe Mantello<sup>132</sup> is responsible for creating this iconic moment.

When *Wicked* is eventually released for general licensing, should stage directors around the country be able to copy Mantello’s staging without compensating him? Whether or not they should, they indisputably can, and there is recent evidence to show it. On a recent season of the popular television show *Dancing with the Stars*, Elaine Hendrix performed “Defying Gravity” on the Wicked-themed evening of performance.<sup>133</sup> At the end of her contemporary dance, she rose in the area, mimicking the staging that Mantello used in the same song on Broadway.<sup>134</sup> Unsurprisingly, there was no mention of Mantello or any of the other creatives after the dance or in the credits. Nor is it likely Mantello or any other Broadway creative received compensation. Did the Broadway producers approve the use of the staging? They almost certainly did, as they necessarily needed to approve the use of the song. If it were not for the Copyright Office’s pronouncement, Mantello would be entitled to compensation and credit under the SDC contract. However, due

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<sup>128</sup> LEGALLYWICKED, *Idina Menzel - Defying Gravity (HQ Proshot)*, at 06:05 (YouTube, Mar. 24, 2024), [https://www.youtube.com/\[https://perma.cc/6MRJ-6DPU\]](https://www.youtube.com/[https://perma.cc/6MRJ-6DPU]).

<sup>129</sup> *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> *See Career Communities: Director (Theater and Opera)*, *supra* note 2.

<sup>132</sup> Joe Mantello is the director of the *Wicked* stage musical. *See Cast & Creative*, WICKED, [https://wickedthemusical.com/\[https://perma.cc/EC9F-PJ9N\]](https://wickedthemusical.com/[https://perma.cc/EC9F-PJ9N]).

<sup>133</sup> DANCING WITH THE STARS, *Elaine Hendrix’s Wicked Night Contemporary | Dancing with the Stars* (YouTube, Oct. 21, 2025), [https://www.youtube.com/\[https://perma.cc/5XP3-YHCG\]](https://www.youtube.com/[https://perma.cc/5XP3-YHCG]).

<sup>134</sup> *Id.* at 01:20.

to this erroneous bright-line rule, *Dancing with the Stars* unjustly profited from Mantellos’ creation.

Does this further the policy rationale behind the Copyright Act?<sup>135</sup> It almost certainly does not. If this were a dance sequence, the Copyright Office would likely find that Mantello has a copyrightable interest. Furthermore, unlike the sequence of poses in Bikram’s Yoga, this compilation of staging seeks to serve no health or wellness purpose. In fact, the purpose is simple: to tell the story. The staging seeks only to further the narrative and story for the audience. Therefore, Mantello should not be prevented from protecting his work simply because he uses a combination of “pedestrian” steps instead of a combination of “simple routines,” like choreography.

However, Mantello’s protection would be somewhat narrow under the compilation theory. The individual elements of staging would not be copyrightable by themselves; only when they are strung together to create the musical staging would Mantello have copyright protection. That does not mean that a subsequent stage director can make a slight variation and avoid a copyright infringement claim. The standard for copyright infringement is “substantial similarity,”<sup>136</sup> and the test is whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”<sup>137</sup> Therefore, a small change would not be enough; the next stage director would have to make enough changes that an ordinary observer would regard the staging as different.

Another example from the 2025 season of *Dancing with the Stars* is illustrative here. For her freestyle dance, Elaine Hendrix danced to “I Hope I Get It” from the Broadway musical *A Chorus Line*, choreographed by Michael Bennett.<sup>138</sup> In the piece, Hendrix and the other dancers told the story of auditioning for, and getting cast in, a Hollywood or Broadway production.<sup>139</sup> As part of that dance, Hendrix used two of the choreographic steps from the original Broadway choreography (two reaches), and the general

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<sup>135</sup> See *infra* Section V.

<sup>136</sup> *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986).

<sup>137</sup> *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

<sup>138</sup> DANCING WITH THE STARS, *Elaine Hendrix’s Finale Freestyle | Dancing with the Stars* (YouTube, Nov. 25, 2025), <https://www.youtube.com/> [<https://perma.cc/C7DV-KKF5>].

<sup>139</sup> *Id.*

story remained similar.<sup>140</sup> Is Bennett due credit and compensation here for use of his copyrighted work? Almost certainly no, as an ordinary observer would likely regard the staging as different. Is the story the same? Yes. Could it be argued that the *Dancing with the Stars* dance attempts to pay tribute to the original choreograph? Sure. However, that is not the analysis. The critical question is whether an ordinary observer would see them as different due to the substantial deviation, and the deviation is likely sufficient here.

What if the deviation was not sufficient? In that case, *Dancing with the Stars* would have infringed Bennett's copyright. Compare that to the *Wicked* and *Dancing with the Stars* example above. There is likely not a significant enough deviation there, nor need there be because Mantello has no copyrightable interest in that staging. These two dances on one of the most popular reality shows on television currently<sup>141</sup> demonstrate the problem with categorically excluding the work of a stage director.

Other scholars argue this protection would be so limited that it would render the copyright protection essentially meaningless.<sup>142</sup> In fact, some say that “[b]ecause a play has a much longer life than any one individual production, granting the first a monopoly where there are such a limited number of variations would hardly encourage future production.”<sup>143</sup> This contention fails to consider the policies underlying copyright law. Copyright law does not exist to protect recreations of the original production of a musical or play. Instead, it exists to encourage creativity.<sup>144</sup> A regime that encourages copying by allowing stage directors to copy each other's work with no legal recourse is antithetical to that policy aim.

Instead, allowing stage directors to receive a copyright under a compilation theory will encourage other stage directors to make different choices: create, reinvent, and dream the next “Defying Gravity” moment. This is evidenced by the number of Broadway revivals recently produced with a radically reimaged concept.<sup>145</sup>

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<sup>140</sup> Compare *id.* at 00:24, with NETWORKS ON TOUR, “*I Hope I Get It*” - *A Chorus Line on Tour*, at 00:00 (YouTube, Feb. 2, 2011), <https://www.youtube.com/> [<https://perma.cc/SA7X-EXDP>].

<sup>141</sup> See Emily Longoretta, *How ‘Dancing With the Stars’ Revived Itself in Season 34 and Brought Back Must-See Live TV — But How Will They Top It?*, VARIETY (Nov. 25, 2025, at 14:06 PT), <https://variety.com/> [<https://perma.cc/574F-NYPW>].

<sup>142</sup> See, e.g., Leichtman, *supra* note 42, at 707–09.

<sup>143</sup> *Id.* at 717.

<sup>144</sup> See *infra* Section V.

<sup>145</sup> See, e.g., Patrick Ryan, ‘*Sunset Boulevard*’ review: Nicole Scherzinger is transcendent in bold new revival, USA TODAY (Oct. 21, 2024, at 17:37 ET) <https://www.usatoday.com/> [<https://perma.cc/5N4F->

The current regime does not prevent creativity, but it does hinder stage directors from receiving compensation and acknowledgment for restaging their work. Changing the Copyright Office’s rules would benefit the industry: it would continue to encourage creativity by disincentivizing the original production’s copying while also protecting stage directors’ original works.

Therefore, a stage director’s work is sufficiently creative to receive copyright protection.

### C. FIXED IN A TANGIBLE MEDIUM

The final requirement for copyright protection is that the work be “fixed in any tangible medium of expression.”<sup>146</sup> Three main arguments exist against finding a director’s work to be fixed. First, opponents argue that freezing a work is the “antithesis of the creative process.”<sup>147</sup> This argument is unavailing because the Actor’s Equity Association<sup>148</sup> contract specifically references the show eventually being “frozen.”<sup>149</sup> This makes good sense, as audiences expect to see the same show regardless of the date of attendance. While the performances may vary slightly, any change would be slight and insignificant. Second, stage directions—or simply text written in the script to provide context—are written in

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8UMH] (describing a reimaged staging using, among other things, cameras and a live video projected from the streets of New York City into the theater); Ben Brantley, *Review: A Smashing ‘Oklahoma!’ Is Reborn in the Land of Id*, N.Y. TIMES (Apr. 7, 2019), [https://www.nytimes.com/\[https://perma.cc/W8SG-MW4Z\]](https://www.nytimes.com/[https://perma.cc/W8SG-MW4Z]) (describing reimaged, stripped-down, conceptual staging); Charles Isherwood, *Review: ‘Spring Awakening’ by Deaf West Theater Brings a New Sensation to Broadway*, N.Y. TIMES (Sep. 27, 2015), [https://www.nytimes.com/\[https://perma.cc/KWY9-2DFB\]](https://www.nytimes.com/[https://perma.cc/KWY9-2DFB]) (describing a staging where every role includes a hearing and a deaf actor); Frank Rizzo, ‘1776’ Review: Bold Choices Enliven Broadway Revival of Revolutionary Musical, VARIETY (Oct. 6, 2022, at 18:00 PT), [https://variety.com/\[https://perma.cc/5RMY-SXK4\]](https://variety.com/[https://perma.cc/5RMY-SXK4]) (describing a reimaged staging where all the founder fathers are played by women).

<sup>146</sup> Leichtman, *supra* note 42, at 690 (quoting 17 U.S.C. § 101 (1994)).

<sup>147</sup> *Id.* (quoting Joseph Taubman, *Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 J. ARTS MGMT. & L. 219, 246 (1980)).

<sup>148</sup> Actor’s Equity Association is a labor union that represents American actors and stage managers. See *About Equity*, ACTORS’ EQUITY ASS’N, [https://www.actorsequity.org/\[https://perma.cc/QUV3-4QEE\]](https://www.actorsequity.org/[https://perma.cc/QUV3-4QEE]).

<sup>149</sup> See *Agreement and Rules Governing Employment at Council of Resident Stock Theatres (C.O.R.S.T.)*, ACTORS’ EQUITY ASS’N (Feb. 27, 2023), at 12 (on file with author).

the script and therefore belong to the author.<sup>150</sup> Third, “a videotape of the production also does not justify copyright registration by the director.”<sup>151</sup>

In response to the second argument, it is not industry practice to view the stage directions in the published script as binding on subsequent productions’ directors. For example, the published script for *Falsettos* by William Finn opens with the following stage direction: “FOUR MEN—MARVIN, MENDEL, JASON, and WHIZZER—enter in darkness. EACH carries a flashlight and wears sunglasses. WHIZZER has a toy bed.”<sup>152</sup> In the most recent Broadway production, however, the characters of Marvin, Mendel, Jason, and Whizzer come on stage, are isolated in their top light, and are dressed as shepherds.<sup>153</sup> Would anyone seriously argue the 2016 Broadway production violated the copyright? No, because stage directions do not belong to the author; they are merely notes from the stage manager’s book that are eventually written into the published script. This is where one of the fundamental discrepancies and misunderstandings arises in the scholarship.

The view that the stage directions are (1) a full recounting of the staging as it existed in the original production; and (2) the only way to fix the piece is unpersuasive. First, the stage directions are not a full recounting of what happens in the production. Take, for example, the following stage direction in the recently published script for the musical *Suffs*: “Two months later—August. Alice is on the telephone in her office. Carrie appears in her home office, also on the phone. They are mid-conversation.”<sup>154</sup> Does this tell you where the office is on stage? No. What about the appearance of the phone? Is Carrie talking on the phone? Are the characters sitting or standing? This is all information required to stage this scene, and all this information is missing from the stage directions. Therefore, the stage directions cannot possibly be a full recounting of the staging as it existed in the original production.

Turning to the modes of fixation argument, Leitchman notes shows are periodically recorded, and those recordings are housed at the New York Public Library Lincoln Center Theatre on Film and Tape Collection.<sup>155</sup> Leitchman argues something should be gleaned from the fact that the SDC is the most protective of all the unions

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<sup>150</sup> Leitchman, *supra* note 42, at 693.

<sup>151</sup> *Id.* at 690.

<sup>152</sup> WILLIAM FINN & JAMES LAPINE, *FALSETTOS* 9 (Samuel French, 1995).

<sup>153</sup> *FALSETTOS*, BroadwayHD (Public Broadcasting Service 2017).

<sup>154</sup> SHAINA TAUB, *SUFFS THE MUSICAL*, act 1, sc. 14, 69 (Theatre Communications Groups, 2024).

<sup>155</sup> *See* Leitchman, *supra* note 42, at 690 n.37.

over who has access to the recording.<sup>156</sup> This should not be seen as any admission their work is not copyrightable, and the videotape could not serve as a fixation. It is unsurprising the one collaborator in the room who cannot receive protection for their work would be most protective of their art. If anything, SDC’s aggressive protection of these recordings should be seen as evidence of the union’s concern about copying, adding weight to the argument that these tapes are sufficient to meet the fixation requirement. After all, the fixation requirement aims to determine if something is stable enough to be “reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>157</sup> Video recordings certainly meet this requirement.

In conclusion, the work of a stage director meets the requirements for copyright protection, and the Copyright Office’s pronouncement to the contrary is inconsistent with the statute and case law. While the copyright may be somewhat thin (meaning, it only protects that staging), the work is still sufficient to receive protection.

#### IV. ARE THERE ANY BARRIERS TO COPYRIGHT PROTECTION?

Having established the work of a stage director should be eligible for copyright protection, the next step in the analysis is to identify additional barriers to copyright protection. Two major doctrines must be examined to decide whether they prohibit protection of the stage director’s work: (1) the work made for hire doctrine;<sup>158</sup> and (2) the joint authors doctrine.<sup>159</sup>

This section will argue, while there may be a general work made for hire concern, the SDC collective bargaining agreement contracts around the work made for hire issue. Therefore, work made for hire is only a concern for stage directors who do not file SDC contracts for their work. Additionally, the section will argue the joint authorship issue (1) only arises in the work between the musical’s director and choreographer; (2) the factors weigh slightly against a joint authorship finding; and (3) even if the choreographer and stage director were found to be joint authors, this would not prevent the stage director from receiving copyright protection—it would merely

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<sup>156</sup> *Id.*

<sup>157</sup> *Williams Elec., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982) (quoting 17 U.S.C. § 101).

<sup>158</sup> 17 U.S.C. § 201(b) (2026).

<sup>159</sup> *Id.* § 201(a).

complicate the right's exclusivity. The responsibility would fall to the SDC to work with its own members to determine how to adjust its collective bargaining agreement to reflect this joint authorship.

#### A. WORK MADE FOR HIRE

The 1976 Act defines “work made for hire” as “a work prepared by an employee within the scope of his or her employment,” or “a work specifically ordered or commissioned,” if it falls within one of the enumerated work categories.<sup>160</sup> In the seminal case, *Community for Creative Non-Violence v. Reid*,<sup>161</sup> the Supreme Court held that, to determine whether someone was an employee who created work “within the scope of his or her employment,” one must look to the common law of agency, and the non-exhaustive factors in Section 220(b)<sup>162</sup> of the Restatement (Second) of Agency (1958).<sup>163</sup> The Supreme Court created additional factors including: (1) “whether the hiring party has the right to assign additional projects to the hired party;” (2) “the hired party’s role in hiring and paying assistants;”

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<sup>160</sup> *Id.* § 101. While this provision existed in earlier iterations of the Copyright Act, the doctrine as it exists today developed through robust negotiations between entertainment executives and authors. See Jessica D. Litman, *Copyright Compromise and Legislative History*, 72 CORN. L. REV. 857, 859, 888–91 (1987).

<sup>161</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

<sup>162</sup> These factors are:

- (a) the extent of control which, by the agreement, the [hiring party] may exercise over the details of the work;
- (b) whether or not one of the employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2) (A.L.I. 1958).

<sup>163</sup> *Cnty. for Creative Non-Violence*, 490 U.S. at 738–41; RESTATEMENT (SECOND) OF AGENCY § 220(2) (A.L.I. 1958).

(3) “the provision of employee benefits;” and “the tax treatment of the hired party.”<sup>164</sup>

When applying these factors to the stage director’s work, *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.* is instructive.<sup>165</sup> The controversy in that case centered around copyright ownership in Martha Graham’s<sup>166</sup> dances after she passed away.<sup>167</sup> Before she passed, she assigned all her intellectual property interests to Ronald Protas, her business partner.<sup>168</sup> When Protas sued the school, the school disputed the copyrights’ ownership under the work made for hire doctrine.<sup>169</sup>

The Second Circuit ruled in the school’s favor, finding, despite her “artistic talent,” once she became the show and company’s artistic director, Graham engaged in the sort of “employee relationship that results in work made for hire.”<sup>170</sup> The same is likely true for stage directors, given the producer is the employer in the relationship. Stage directors may point towards the amount of control they often exercise over the schedule, hiring, firing, and other details of rehearsal and production. Under the reasoning in *Martha Graham School*, this is likely not enough. Just because the stage director may be *given* wide latitude to make decisions does not mean the producer relinquishes the *right* to exercise that control. In fact, the following passage is illustrative here:

The fact that Graham was extremely talented understandably explains the Center’s disinclination to exercise control over the details of her work, but does not preclude the sort of employee relationship that results in a work for hire. The Restatement (Second) of Agency notes that there are many occupations in which an employer would not

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<sup>164</sup> *Cnty. for Creative Non-Violence*, 490 U.S. at 751–52.

<sup>165</sup> See generally *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004). This case is particularly instructive because it is likely to be binding precedent on many theater causes of action, given that it is a case from the Second Circuit (home to New York City).

<sup>166</sup> Martha Graham was a titan in the dance industry, and she is widely regarded as “the founder of modern dance.” *Id.* at 628.

<sup>167</sup> *Id.* at 629–30.

<sup>168</sup> *Id.* at 629.

<sup>169</sup> *Id.* at 631.

<sup>170</sup> *Id.* at 642.

normally exercise control over the details of the employee's work. The "control or right needed to establish the relation of master and servant may be very attenuated."<sup>171</sup> The Restatement offers the example of a "full-time cook" over whose culinary activity "it is understood that the employer will exercise no control."<sup>172</sup> The Restatement further notes that "ship captains and managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them."<sup>173</sup>

The same is likely true here for stage directors. Oftentimes, producers will hire a certain director over another because of the trust built up between the two of them. Therefore, the fact that the producer gives the director wide latitude because of that trust cannot be interpreted to mean the producer relinquishes the right to reassert that control at the time of their choosing. Therefore, the work made for hire doctrine applies to a stage director's work.

However, like most things, the work made for hire doctrine can be contracted away, precisely what the SDC has done for its members. Recall that the SDC contract includes the following provision: "all rights in and to the [Direction] created by the [Director] in the course of the rendition of his/her services shall be, upon its creation, and will remain the sole and exclusive property of the [Director]."<sup>174</sup> Therefore, for stage directors who are operating under an SDC contract, the rights to their work have been reserved for them under the collective bargaining agreement.

It is important to note this only applies to full members who file an SDC contract every time they work. Otherwise, stage directors are likely to encounter work-made-for-hire concerns each time they work, and they should be aware of this so that they can attempt to contract around this issue if they so choose.

## B. JOINT AUTHORSHIP

The Act defines a "joint work" as "a work prepared by two or more authors with the intention their contributions be merged into

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<sup>171</sup> RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d (A.L.I. 1958).

<sup>172</sup> *Id.*

<sup>173</sup> *Martha Graham Sch. and Dance Found., Inc.*, 380 F.3d at 642 (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. a (A.L.I. 1958)).

<sup>174</sup> *Collective Bargaining Agreement*, *supra* note 38, at XVIII(A).

an inseparable or interdependent part of the unitary whole.”<sup>175</sup> In the Second Circuit’s seminal case *Thomson v. Larson*, the court said “the touchstone of the statutory definition is the intention at the time the [work is created] that the parts be absorbed or combined into an integrated unit.”<sup>176</sup> The Second Circuit has imposed a “more stringent inquiry” than the statutory requirements of the Act, because it has held:

[A limited inquiry] would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expressions. Both intend their contributions to be merged into inseparable parts of the unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright of the unpublished work.<sup>177</sup>

Therefore, in the Second Circuit, to make a joint authorship claim, the claimant must show “each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended<sup>178</sup> to be co-authors.”<sup>179</sup>

Before examining the joint authorship issue, it must first be established where this barrier would come up for a stage director. The choreographer is the most likely party who would claim joint authorship (when talking about a musical). The stage director and choreographer work closely together to stage the show, and while it is true the choreographer does much of their work independently of the stage director, numerous occasions arise when the two collaborate in a way that may be difficult to parse apart. Those instances would give rise to a joint authorship claim because the show’s sections where only the stage director contributed (or only

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<sup>175</sup> 17 U.S.C. § 101 (2026).

<sup>176</sup> *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998).

<sup>177</sup> *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

<sup>178</sup> This is also called “mutual intent.” See *Caffey v. Cook*, 409 F.Supp.2d 484, 499 (S.D.N.Y. 2006).

<sup>179</sup> *Thomson*, 147 F.3d at 200.

the choreographer contributed) would not be subject to a joint authorship claim.

While *Thomson* may be the seminal case in the Second Circuit, a Southern District of New York District Court case, *Caffey v. Cook*,<sup>180</sup> is more apt here because the facts are more analogous. Therefore, this next section will summarize the facts of that case before walking through the analysis of a joint authorship claim by a choreographer if a stage director attempted to copyright their work.

### 1. *THE FACTS OF CAFFEY V. COOK*

Caffey was a “writer, choreographer, producer, and director of live musical theater.”<sup>181</sup> Not only did he direct shows, but he also conceived several musical shows.<sup>182</sup> One of his conceptions was the subject of dispute in the case.<sup>183</sup> Cook, Dixon, and Young were all singers who participated in Caffey’s show *Three Mo’ Tenors*.<sup>184</sup> Caffey created *Three Mo’ Tenors* to show Black singers in a similar light as the classic *The Three Tenors* performance.<sup>185</sup>

The production first started as a “showcase performance,” that included performances by Cook, Dixon, and Young.<sup>186</sup> To create the showcase, Caffey asked the performers to suggest songs from their own repertoire that Caffey then selected “and sequenced.”<sup>187</sup> While this showcase featured many of the songs that would eventually end up in the show, Caffey “insist[ed] that the showcase was not intended to be a precursor or version of the Show.”<sup>188</sup> Following the showcase, Caffey, Cook, Dixon, and Young “engaged in a series of workshops to develop the show.”<sup>189</sup> While Cook, Dixon, and Young participated in the song selection and sequences, Caffey insisted he was the driving force behind the decisions.<sup>190</sup> Caffey and some other business partners (that did not include Cook, Dixon, or Young) formed Three Mo’ Partnership “to produce the show.”<sup>191</sup> Caffey identified himself as the show’s “conceiver and author” and licensed his rights to the partnership.<sup>192</sup> Cook, Dixon, and Young entered into

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<sup>180</sup> See generally *Caffey v. Cook*, 409 F.Supp.2d 484 (S.D.N.Y. 2006).

<sup>181</sup> *Id.* at 486.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 486–87.

<sup>185</sup> *Id.*

<sup>186</sup> *Caffey*, 409 F.Supp.2d at 488.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *id.* at 489.

<sup>191</sup> *Id.* at 489–90.

<sup>192</sup> *Caffey*, 409 F.Supp.2d at 490.

negotiations with the partnership to perform in the show.<sup>193</sup> The Engagement agreement “stated that the Show was ‘conceived and directed by Marion J. Caffey and produced by the [Three Mo’] Partnership.’”<sup>194</sup> Eventually, Cook, Dixon, and Young began performing outside the agreed-upon dates.<sup>195</sup> These performances led to the litigation.<sup>196</sup>

## 2. *INDEPENDENTLY COPYRIGHTABLE CONTRIBUTIONS*

The independently copyrightable standard is exactly what it sounds like: did the claimants make contributions that would be copyrightable on their own?<sup>197</sup> In *Caffey*, the court found that Cook, Dixon, and Young made sufficient contributions by presenting “portions of their individual repertoire” and by contributing words for the dialogue.<sup>198</sup>

The same is probably true for a stage director and a choreographer. This is especially true because the choreographer’s work is indisputably copyrightable under the Copyright Act. The stage director may attempt to argue the choreographer’s contributions are like the role an editor plays in the process of writing a book, which was the whole reason for the more stringent test adopted by the Second Circuit.<sup>199</sup> This argument is unlikely to be successful, at least in most instances. While the choreographer’s suggestions can be rejected, so too could the suggestions by Cook, Dixon, and Young in the *Caffey* case. The contributions of a choreographer are more like Cook, Dixon, and Young’s contribution of words for dialogue, rather than the edits a copyeditor would make to a writer’s work.

Therefore, it is likely, in almost all circumstances, a choreographer would meet the independently copyrightable contributions element.

## 3. *MUTUAL INTENT*

In order for mutual intent to be met, the parties must “entertain in their minds the concept of joint authorship.”<sup>200</sup> This analysis is fact-specific.<sup>201</sup> However, the critical factors are (1) decision-

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 492–95.

<sup>196</sup> *Id.* at 486.

<sup>197</sup> *See id.* at 489.

<sup>198</sup> *Caffey*, 409 F.Supp.2d at 489.

<sup>199</sup> *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

<sup>200</sup> *Thomson v. Larson*, 147 F.3d 195, 201 (2d Cir. 1998).

<sup>201</sup> *Id.* at 201 n.16.

making authority; (2) billing; and (3) written agreements with the receiver.<sup>202</sup>

Regarding decision-making authority, in *Caffey*, “Caffey possessed, and at times exercised, his right to make final decisions as to the ordering of the songs and phrasing of the bridge dialogue.”<sup>203</sup> Additionally, in the agreement, Caffey was identified as the “conceiver and author,” which is sufficient to show Caffey retained decision-making authority.<sup>204</sup> The relationship between a stage director and a choreographer is less straightforward. On the one hand, like in *Caffey*, the stage director retains the ability to make final decisions about the piece’s staging. The stage director is the ship’s captain, and final creative decisions rest with them. On the other hand, it is unlikely there would ever have been an agreement or contract that called the stage director the “conceiver” or “author;”<sup>205</sup> those titles would be reserved for the playwrights and composers. However, if the crux of the analysis is the ability to control the decision-making process, stage directors have a strong argument that they retain this right because of the centralization of power around them.

Turning to billing, “[t]he manner in which the parties ‘bill or credit’ themselves is ‘a window [into] the mind of the party who is responsible for giving the billing or credit.’”<sup>206</sup> In *Caffey*, the playbills identified Caffey as the person who “Conceived and Directed” the project, and did not mention Cook, Dixon, or Young’s involvement in the piece’s creation.<sup>207</sup> This is more complicated when looking at the billing of a stage director and choreographer. For example, the *Wicked* playbill lists “Musical Staging by Wayne Clineto,” followed by “Directed by Joe Mantello” in the same font.<sup>208</sup> Because they are in the same font and right next to one another, the fact that the stage director is listed last is likely not enough for this factor to weigh in the stage director’s favor. Therefore, the billing factor would likely weigh in favor of joint authorship.

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<sup>202</sup> *Caffey*, 409 F.Supp.2d at 499–501.

<sup>203</sup> *Id.* at 499.

<sup>204</sup> *Id.*

<sup>205</sup> This would require the director to actually be one of the “conceivers” or “authors.” Unlike in film and television, it is uncommon in theater for the director to be listed as an “author” simply because they contributed ideas during the creation and development of the piece.

<sup>206</sup> *Caffey*, 409 F.Supp.2d at 500 (quoting *Thomson v. Larson*, 147 F.3d 195, 203 (2d Cir. 1998)).

<sup>207</sup> *Id.*

<sup>208</sup> *Wicked*, PLAYBILL, [www.playbill.com/](http://www.playbill.com/) [<https://perma.cc/4YSE-46YD>] (last visited Apr. 24, 2025).

Finally, regarding written agreements with the receiver, this factor is not likely to be of significant assistance in a case between a stage director and a choreographer because both parties are members of the SDC and sign the same agreement. Therefore, the agreement does not contemplate the delineation of property rights between the stage director and the choreographer, and this factor is likely neutral.

In conclusion, the decision-making authority factor likely weighs in favor of no joint authorship, but the billing factor likely weighs in favor of a finding of joint authorship. Because the question is whether the parties actually intended their contributions to merge, it could be argued the decision-making authority factor should be given more weight. This is because the choreographer's work is subject to the stage director's final approval, so it becomes part of the stage director's overall work. Even from the beginning, the choreographer's job is to bring the stage director's vision to life.

Regardless, even if it were found that a stage director and a choreographer were joint authors, this would simply mean they both retain an undivided property interest in the piece.<sup>209</sup> It would then fall to the SDC to adjust its agreements to reflect this and delineate the rights between the two parties. The SDC is uniquely suited to do this because it represents both parties, and its mission is to protect *both* stage directors and choreographers. Therefore, even if the parties were found to be joint authors, this would be nothing more than a complication—it would not be a barrier to the stage director's rightful copyright rights in their work.

## V. DOES THE PUBLIC POLICY UNDERPINNING COPYRIGHT LAW SUPPORT PROTECTION OF A STAGE DIRECTOR'S WORK?

Having established that stage directors' work should be eligible for copyright protection and that there are no outright barriers, one final question remains: Should stage directors receive copyright protection for their work? Does it serve the policy justifications of copyright law?

This section will examine this question by exploring four theoretical justifications for the copyright system: (1) utility and public good; (2) protection of author's rights; (3) economic theory; and (4) protecting the marketplace of ideas. Examining these justifications shows that the balance between the public good and the author's rights is best served by granting stage directors the same

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<sup>209</sup> Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).

limited protection that choreographers of musicals receive. Furthermore, granting protection stage directors' work will advance the First Amendment interest underpinning American copyright law.

#### A. UTILITY AND THE PUBLIC GOOD

Intellectual property law's general purpose "is to bring forth the work of creative people."<sup>210</sup> The exclusive grant of rights provided to authors is meant to "give them a financial incentive to create works,"<sup>211</sup> which in turn serves the public because artists are contributing to the culture.<sup>212</sup> When examining copyright law from a utilitarian perspective, the analysis must be grounded in the theory's "call[] for the maximization of the most goods for the most people."<sup>213</sup> Therefore, the individual's interests are not the primary purpose; the primary purpose is the public good.<sup>214</sup> This public interest does not ignore the author. Instead, the general public derives a benefit "from the labor of authors,"<sup>215</sup> and copyright law seeks to incentivize this labor. "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."<sup>216</sup> This requires balancing the author's interests against the public's interests.<sup>217</sup>

The public has an indisputable interest in the advancement and development of theater and musical theater as an art form. Just like all other art forms, musical theater builds on itself and the new, cutting-edge pieces build from those who come before them. For example, Rodgers and Hammerstein's *Oklahoma!* is largely regarded as being the first "integrated musical,"<sup>218</sup> paving the way

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<sup>210</sup> Byrnes, *supra* note 4, at 198.

<sup>211</sup> *Id.*

<sup>212</sup> See Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143 (2011).

<sup>213</sup> Byrnes, *supra* note 4, at 198.

<sup>214</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

<sup>215</sup> *Am. Soc'y for Testing & Materials v. UpCodes, Inc.*, 752 F.Supp.3d 480, 506 (E.D. Pa. 2024).

<sup>216</sup> *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 178–79 (2d Cir. 2024) (quoting *Twentieth Century Music Corp. v. Aiken*, 442 U.S. 151, 156 (1975)).

<sup>217</sup> See *Hachette Book Grp.*, 115 F.4th at 178.

<sup>218</sup> An "integrated musical" is one where song, dance, and dialogue are "blended together into a unity, a seamless whole." See Bradley Rogers, *The Emergence of the Integrated Musical: Otto Harbach, Oratorical Theory, and the Cinema*, 63 THEATRE SURV. 160, 160 (2022).

for all others that came after it.<sup>219</sup> Similarly, Hal Prince, the original director of Kander and Ebb’s *Cabaret*, is largely credited with creating the first “concept musical,” where the piece is built around a “central metaphor” instead of a linear plot.<sup>220</sup> It is important that groundbreaking pieces of this nature are encouraged while protecting the ability of others to build off their ideas.

The utilitarian perspective perfectly serves this aim. Take *Oklahoma!*, for example: the most groundbreaking part of that production is the dream ballet at the end of Act I, choreographed by the legendary Agnes De Mille.<sup>221</sup> During this sequence, Laurey is forced to decide whether she wants to marry Curly, the charming cowboy, or pursue Jud, the frightening and isolated farmhand who Laurey has a more sexual attraction towards.<sup>222</sup> For the first time in a commercially successful musical, De Mille used dance to tell this story without dialogue or singing.<sup>223</sup> Copyright law effortlessly balances the utilitarian interests here: De Mille’s choreography is protected, and anyone who recreates her *choreography* (not the concept of a dream ballet) would infringe on her copyright. On the other hand, future choreographers are free to (and have)<sup>224</sup> stage their own versions of the dream ballet. Moreover, numerous subsequent productions of other musicals have utilized a dream ballet without infringing on De Mille’s copyright. De Mille was incentivized to contribute her choreography to this groundbreaking moment in musical theater history, while others are still able to build from that work with their own choreography.

Compare this to *Cabaret*, with inventive staging by Hal Prince (and later by Sam Mendes in the 1998 revival).<sup>225</sup> The piece was

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<sup>219</sup> *Id.*

<sup>220</sup> Ben Rimalower, *Game Changers: The Broadway Musicals That Shaped the Art Form*, PLAYBILL (Mar. 29, 2014), <https://playbill.com/https://perma.cc/2JY2-QRTM>.

<sup>221</sup> Laurence Maslon, *Out of My Dreams: The Psychological Canvas of Choreographer Agnes de Mille*, RODGERS & HAMMERSTEIN ORG., <https://rodgersandhammerstein.com/https://perma.cc/KGZ9-7HNY>.

<sup>222</sup> *See id.*

<sup>223</sup> *Id.*

<sup>224</sup> For example, Susan Stroman, the prolific Broadway choreographer, staged the dream ballet in a recent revival. *See Oklahoma! Note From Stro.*, SUSAN STROMAN, <https://www.susanstroman.com/https://perma.cc/FB7Z-ZGAU>.

<sup>225</sup> *See* Logan Culwell-Block, *50 Years of Cabaret: The Surprisingly Transformative Journey of a Classic*, PLAYBILL (Nov. 20, 2016), <https://playbill.com/https://perma.cc/4PA4-L8VM>.

groundbreaking in the way it was staged (not choreographed).<sup>226</sup> Similar to De Mille's work in *Oklahoma!*, the work Prince and Mendes did paved the way for decades of concept musicals.<sup>227</sup> However, unlike De Mille, Prince and Mendes cannot protect their work under the current copyright regime. While it is true that the current licensing contracts for *Cabaret* expressly prevent future productions from copying the staging of previous productions,<sup>228</sup> stage directors should not have to rely on licensing companies to protect their work.<sup>229</sup> The distinction in how De Mille and Prince/Mendes are treated demonstrates copyright law's categorial exclusion of stage director's work. The work is the same,<sup>230</sup> but the Copyright Office creates an arbitrary distinction.

This distinction does not further the utilitarian aims of copyright law. Instead, it frustrates these aims by freely allowing copying of a stage director's work while preventing copying of a choreographer's work.<sup>231</sup> The better approach would be to provide stage directors with the same protection that choreographers receive.

## B. PROTECTION OF AUTHOR'S RIGHTS

While the United States does not have the same "moral rights" justifications for copyright law that can be found in European countries,<sup>232</sup> under John Locke's theories, there is some natural rights incorporated into American intellectual property law.<sup>233</sup> For example, Professor Wendy Gordon sums up Locke's impact on American copyright law as follows:

To the extent that [Locke's] theory purports to state a nonconsequentialist natural right in property, it

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<sup>226</sup> *Id.*

<sup>227</sup> Leading to today, where musicals like *Hadestown* have taken the concept musical beyond the scope they were originally imagined.

<sup>228</sup> Tams-Witmark Musical Agreement for an Amateur Performance of *Cabaret* (1998) (on file with the author).

<sup>229</sup> This is especially true because the licensing companies contract with the writers, not the directors, and, as this Paper has already established, the Guild seeks to prevent the ability for stage directors to receive copyright protection for their work.

<sup>230</sup> If anything, the work of stage directors represents *more* of the production than the work of a choreographer.

<sup>231</sup> See *supra* Section III(A) for an example of this frustrating principle in the work of Susan Stroman.

<sup>232</sup> See generally, e.g., Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992 (1990).

<sup>233</sup> See JOHN LOCKE, TWO TREATIES ON GOVERNMENT ch. 5 (1690).

is most firmly based on the most fundamental law of nature, the “no-harm principle.” The essential logic is simple: Labor is mine and when I appropriate objects from the common I join my labor to them. If you take the objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore, I have property in the objects. Similarly, if I use the public domain to create a new intangible work of authorship or invention, you should not harm me by copying it and interfering with my plans for it. I therefore have property in the intangible as well . . . .<sup>234</sup>

Under this theory, a stage director should receive some protection for the fruits of their labor. It can take several years for a show to make it to Broadway,<sup>235</sup> and a stage director is often involved from the early days of the process. As has been established earlier in this paper, the stage director is involved in almost every creative choice that ends up on stage. However, a stage director would be unable to receive copyright registration for many of their contributions, despite the significant investment of the stage director’s human capital.<sup>236</sup> Allowing a stage director to obtain registration for their staging recognizes this labor without granting them a monopoly on the entire production.

### C. ECONOMIC THEORY

As an initial matter, it is important to remember that “neither intellectual property nor copyright law is interpreted simply to

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<sup>234</sup> Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1553, 1554–55 (1993).

<sup>235</sup> Paul Mroczka, *How a Show Gets to Broadway*, BROADWAYEDUCATORS.COM (Jan. 28, 2015), <https://broadwayeducators.com/> [<https://perma.cc/NHZ5-5JEY>].

<sup>236</sup> For example, how would one quantify the stage director’s input on the scenery? On the costumes? It would be impossible, except maybe under a joint authorship theory, which would be impracticable and time-consuming to prove for every show.

advance economic ends.”<sup>237</sup> However, scholars have posited that the balancing approach discussed above<sup>238</sup> “seems to mirror the economic idea that social gains and losses should be a central concern when determining when copyright protection should and should not be granted.”<sup>239</sup> When examining externalities, “positive externalities are particularly crucial. There are strong economic reasons to allow those who create positive externalities—benefits enjoyed by others based on the work of another—to be compensated for their creativity.”<sup>240</sup> Scholars argue “any protection beyond the minimum necessary does not increase the social benefit of the work and is thus burdensome in terms of administrative, transaction, and exclusivity costs.”<sup>241</sup>

Scholars who argue against protecting a stage director’s work posit that granting even limited rights would “curtail the access to the works currently enjoyed by the public” because the director can pick and choose to whom they grant a license.<sup>242</sup> However, this is true of all copyright law. For example, if a theater company wants to produce *West Side Story* and use Jerome Robbins’ original choreography, the company must contact The Robbins Rights Trust to receive permission.<sup>243</sup> If this excludability is allowed for choreographers, why does it create a negative externality if applied to stage directors’ work? As has been argued throughout this paper, this view is likely caused in large part by misunderstanding the interaction between the written stage directions (as general context in the script) and the stage director’s work in creating the compositions.<sup>244</sup> This misunderstanding should not be enough to exclude the work of a stage director. If a choreographer can receive a narrow protection for their work on the very same show, the stage director should receive the same. This would create positive externalities by encouraging stage directors’ creativity, giving the public new and exciting works contributing to our common culture, and allowing future practitioners to build off of (but not stealing) the work that came before them.

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<sup>237</sup> Byrnes, *supra* note 4, at 201 (citing Jeffery Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTEL. PROP. L. 1, 5 (2005)).

<sup>238</sup> *See supra*, Section V(A).

<sup>239</sup> Byrnes, *supra* note 4, at 201–02.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 203.

<sup>242</sup> *Id.* at 212.

<sup>243</sup> *See Performance and Licensing Information*, LEONARD BERNSTEIN OFF., <https://leonardbernstein.com/> [<https://perma.cc/UJN6-ZMMZ>].

<sup>244</sup> *Compare supra*, Section II(C), with Byrnes, *supra* note 4, at 212–13.

## D. PROTECTING THE MARKETPLACE OF IDEAS

Copyright law is also seen as a system designed to support our democratic society by advancing the First Amendment’s interests.<sup>245</sup> Those who advance this argument claim the regime “encourages creative expression on a wide array of political, social, and aesthetic issues.”<sup>246</sup> Further, these works often have “broad political and social implications even if they do not appear or even seek to convey an explicit ideological message.”<sup>247</sup> Allowing the protection of these ideas is a “pillar of public liberty.”<sup>248</sup>

While much of a show’s political or ideological message is conveyed through the author’s work, the choices made by the stage director enhance or add perspectives that are worth protecting. Take the end of the musical *Cabaret* as an example. In the 1998 revival, the Emcee takes off his coat and reveals he is wearing the clothes of a concentration camp prisoner.<sup>249</sup> This is meant to make the audience consider how many people stood by and did nothing as the Nazis took power and committed their genocide.<sup>250</sup> Compare this to the 2024 revival, where the entire cast comes out in costumes that highlight a different theme: “[the] loss of individuality.”<sup>251</sup> These are two very different thematic messages that were created by the stage directors—not the authors. Following Professor Netanel’s logic, providing the stage director with the same protection as all the other collaborators would protect the marketplace of ideas and encourage First Amendment expression.

Therefore, all the major policy theories and justifications underpinning American copyright law lead to one conclusion: the Copyright Office is incorrect, and stage directors should receive protection for their work.

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<sup>245</sup> See generally Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); see also U.S. CONST. amend. I.

<sup>246</sup> Netanel, *supra* note 245, at 347.

<sup>247</sup> *Id.* at 350.

<sup>248</sup> *Id.* at 356.

<sup>249</sup> JOE MASTEROFF ET AL., *CABARET: 1998 VERSION 97* (TAMS WHITMARK, 1967).

<sup>250</sup> See *id.*

<sup>251</sup> Gillian Blum, *Cabaret 2024 Musical Ending Explained*, THE DIRECT (June 29, 2024), <https://thedirect.com/> [<https://perma.cc/8U4V-HVBY>].

## VI. CONCLUSION

Theatrical directors are often called the “captain of the ship.”<sup>252</sup> Not only that, but the stage director is the person who “sets the overarching creative vision for the piece” and is the person “who has the challenging task of bringing together the many complex pieces of a production—the script, actors, set, costuming, lighting, sound, and music—into a unified whole.”<sup>253</sup> Despite the immense responsibility, the stage director is one of the few creative team members who has no opportunity to receive a copyright registration for their innovative contributions to the production. This is a negative outcome unsupported by the policy justifications underpinning copyright law. Moreover, it is inconsistent with the legal standard. Rather, the stage director should be eligible to receive the same, somewhat narrow, copyright protection as everyone else involved in the production.

Thankfully, this problem has an easy fix: the Copyright Office can change its administrative pronouncement to treat stage directors the same way it treats choreographers. If the Copyright Office is unwilling to change its administrative practice, stage directors or the SDC should litigate the pronouncement’s validity in court. Under the *Loper Bright* regime, this should be an easier case to make than under the previous *Chevron* regime.<sup>254</sup> Should that challenge be successful, the SDC will need to iron out the conflicting agreements the Broadway League makes with the SDC and the Guild.

Theater, and musical theater specifically, play an important role in the development of American culture.<sup>255</sup> Within the industry, stage directors play a vital role. It is time for them to receive protection for their contributions.

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<sup>252</sup> Greg Braun, *How to Get Along With Your Theater Director*, BACKSTAGE (May 24, 2021), [https://www.backstage.com/\[https://perma.cc/JQD2-YESZ\]](https://www.backstage.com/[https://perma.cc/JQD2-YESZ]).

<sup>253</sup> *Theatre Roles*, UNION HOUSE THEATRE, at 3, [https://umsu.unimelb.edu.au/\[https://perma.cc/9XM7-VS84\]](https://umsu.unimelb.edu.au/[https://perma.cc/9XM7-VS84]).

<sup>254</sup> The case would be easier under *Loper Bright* because of the lack of deference afforded to the Copyright Office as an administrative agency. Therefore, a litigant would simply need to raise the statutory and constitutional arguments contained in this Paper; the Copyright Office could not rely on its expertise and experience in the way it could under the *Chevron* regime.

<sup>255</sup> For example, approximately 12.29 million people attended a Broadway show during the 2023-2024 season. *Broadway Season Statistics*, THE BROADWAY LEAGUE, [https://www.broadwayleague.com/\[https://perma.cc/SA5H-EHKG\]](https://www.broadwayleague.com/[https://perma.cc/SA5H-EHKG]).

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**WAGERING ON REGULATION: EVALUATING MOBILE  
SPORTS BETTING ADVERTISING RESTRICTIONS**

ROBERT SROKA \*

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## ABSTRACT

*Following *Murphy v. NCAA*, state legalization of mobile sports betting has expanded rapidly, accompanied by an unprecedented surge in gambling advertising. This Article provides the first comprehensive analysis of state-level restrictions on mobile sports betting advertising across all U.S. jurisdictions with operational online wagering. Drawing on statutory and regulatory sources and the National Council on Problem Gambling's evaluative framework, this Article maps significant variation in state approaches, ranging from comprehensive consumer-protection regimes to minimal reliance on voluntary industry standards. The Article situates these regulatory choices within the constitutional constraints of commercial speech doctrine, focusing on the Central Hudson test and relevant Supreme Court precedent. It identifies common regulatory elements, persistent enforcement challenges in the digital advertising ecosystem, and interstate competitive pressures that may discourage robust regulation. The analysis proposes that narrowly tailored, evidence-based advertising restrictions can advance public health objectives while remaining constitutionally defensible, and it proposes a framework to guide some future state reforms.*

## I. INTRODUCTION

In *Murphy v. National Collegiate Athletic Association*, the U.S. Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA), holding that the federal statute's prohibition on state authorization of sports betting violated the Tenth Amendment's anti-commandeering doctrine.<sup>1</sup> The decision unleashed a state-level regulatory experiment unprecedented in American gaming history. Within seven years, over 30 states and the District of Columbia legalized online sports betting, creating a patchwork of regulatory frameworks governing an industry that generated almost \$14 billion in operator revenue during 2024 alone.<sup>2</sup>

This rapid expansion has coincided with an explosion in sports betting advertising that pervades American media. Industry data

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<sup>1</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 474 (2018).

<sup>2</sup> Matthew Waters, *Sports Betting States: Latest US Legislation & Bill Tracker*, LEGAL SPORTS REP. (Nov. 21, 2025), <https://www.legalsportsreport.com/> [<https://perma.cc/3VCH-QRG5>]; Doug Greenberg, *U.S. sports betting industry posts record \$13.7B revenue for '24*, ESPN (Feb. 19, 2025, at 14:16 ET), <https://www.espn.com/> [<https://perma.cc/C7A5-GQ5K>].

reveals that major operators spent nearly \$1.5 billion on advertising in 2023, saturating broadcasts, digital platforms, and social media with promotional messages.<sup>3</sup> Sports fans encounter betting advertisements during game broadcasts, on team websites, in stadium signage, and through push notifications from mobile applications. This omnipresence raises questions about the appropriate scope of state regulatory authority over advertising content, the effectiveness of consumer protection measures, and the constitutional limits on restricting commercial speech.

Despite growing scholarly attention to sports betting regulation generally, existing literature has not systematically examined advertising restrictions across state jurisdictions. Most academic commentary has focused on the broader strokes and risks of state regulatory frameworks, while advertising regulation has received comparatively limited analysis.<sup>4</sup> Industry reports have documented the growth of promotional spending but have not evaluated the legal frameworks governing such expenditures.<sup>5</sup> This gap is particularly concerning given mounting evidence that exposure to gambling advertising correlates with increased betting activity and elevated risks of problem gambling, especially among vulnerable populations including minors and individuals with gambling disorders.<sup>6</sup>

This Article addresses this scholarly deficit by providing the first comprehensive examination of state-level advertising regulations across all operational mobile sports betting jurisdictions. Drawing on the National Council on Problem Gambling's (NCPG) evaluation of state regulations, as well as original analysis of statutory and regulatory materials, this Article maps the current regulatory landscape and identifies significant variation in state approaches to advertising restrictions. The analysis reveals that advertising regulation represents perhaps the most contested dimension of sports betting governance, reflecting fundamental tensions between commercial speech protections, public health objectives, and revenue generation priorities.

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<sup>3</sup> *Sports Betting Advertising Trends*, AM. GAMING ASS'N (May 2, 2024), <https://www.americangaming.org/> [<https://perma.cc/3UUM-LFKB>].

<sup>4</sup> See, e.g., John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020 WIS. L. REV. 907 (2020).

<sup>5</sup> *Sports Betting Advertising Trends*, *supra* note 3.

<sup>6</sup> See Andre Syvertsen et al., *Relationships Between Exposure to Different Gambling Advertising Types, Advertising Impact and Problem Gambling*, 38 J. GAMBLING STUD. 465, 475–78 (2022).

The Article proceeds in the remaining five parts. Part II provides background on the post-*Murphy* regulatory landscape, examining the Supreme Court's decision to overturn PASPA, the subsequent proliferation of sports betting advertising, and the public health concerns that have emerged as problem gambling rates increase. Part III analyzes the constitutional framework governing advertising restrictions, focusing on commercial speech doctrine and its application to gambling advertising. Part IV presents a detailed comparative analysis of advertising regulations across the 31 jurisdictions with operational mobile sports betting, categorizing state approaches and identifying common regulatory elements. Part V examines critical challenges facing state advertising regulation: enforcement difficulties in the digital advertising ecosystem and regulatory competition dynamics that may discourage robust restrictions. Part VI proposes a model regulatory framework that addresses these challenges while remaining constitutionally defensible.

This analysis yields several key findings. First, states exhibit significant variation in advertising regulation, with some jurisdictions imposing comprehensive restrictions while others rely almost entirely on voluntary industry standards. Second, more recently-authorized states generally adopt more stringent advertising restrictions, suggesting regulatory learning and evolving public attitudes toward gambling promotion. Third, despite this variation, certain common elements emerge across jurisdictions, including prohibitions on advertising to minors and restrictions on false or misleading claims. Fourth, constitutional constraints substantially shape regulatory possibilities, though well-designed restrictions can likely satisfy intermediate scrutiny when narrowly tailored to serve substantial governmental interests.

## II. BACKGROUND: THE POST-*MURPHY* REGULATORY LANDSCAPE

### A. *MURPHY V. NCAA* AND STATE REGULATORY AUTHORITY

For nearly three decades, federal law effectively prohibited sports betting in most American jurisdictions. The PAPSA made it “unlawful” for states or private entities “to sponsor, operate, advertise, promote, license, or authorize” sports gambling.<sup>7</sup> PASPA

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<sup>7</sup> National Council on Problem Gambling & Vixio Regulatory Intelligence, *U.S. States' Online Sports Betting Regulations: An Evaluation Against National Council on Problem Gambling Standards* (Sep. 2024), <https://www.ncpgambling.org/> [<https://perma.cc/8BJV-58L8>] [hereinafter *NCPG Report*].

contained grandfather provisions exempting Nevada's established sports betting market and providing other states a limited window to opt in, which only Delaware, Montana, and Oregon used to varying degrees.<sup>8</sup>

New Jersey mounted a sustained challenge to PASPA, arguing that the federal prohibition violated state sovereignty.<sup>9</sup> Writing for the majority, Justice Alito held that PASPA's prohibition on state authorization violated the Tenth Amendment's anti-commandeering principle.<sup>10</sup> The Court explained that while Congress may regulate sports gambling directly through its commerce power, it cannot issue "direct orders" to state legislatures regarding what they may or may not authorize.<sup>11</sup> PASPA's command that states shall not authorize sports betting thus exceeded federal authority and impermissibly commandeered state legislative processes.<sup>12</sup>

The decision's immediate effect was to return sports betting policy to state control. Within months of the decision, Delaware, New Jersey, Mississippi, and West Virginia launched legal sports betting operations.<sup>13</sup> As of January 2026, 38 states and the District of Columbia have legalized some form of sports betting, with 31 jurisdictions authorizing online or mobile wagering.<sup>14</sup>

## B. THE EXPLOSION OF SPORTS BETTING ADVERTISING

The legalization of sports betting triggered an unprecedented surge in gambling advertising. Major operators including DraftKings, FanDuel, BetMGM, and Caesars Sportsbook invested billions in customer acquisition campaigns designed to establish market share in newly authorized jurisdictions.<sup>15</sup> Industry data reveals that total advertising expenditures reached approximately \$1.1 billion in 2023.<sup>16</sup> These campaigns employed sophisticated marketing strategies across multiple platforms, including broadcast

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<sup>8</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (1992), *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018).

<sup>9</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018).

<sup>10</sup> *Id.* at 462–67.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 484–85.

<sup>13</sup> Waters, *supra* note 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Dan Holmes, *Sports Betting Operators Cut Ad Spending by 21% in 2023*, GAMING TODAY (May 6, 2024), [https://www.gamingtoday.com/\[https://perma.cc/Y7ZF-9KP6\]](https://www.gamingtoday.com/[https://perma.cc/Y7ZF-9KP6]).

media, digital advertising, social media, affiliate partnerships, and sponsorship arrangements with sports leagues and teams.<sup>17</sup>

Television advertising proved particularly pervasive. Sports betting advertisements frequently feature celebrity endorsers, especially athletes, promoting bonus offers and simplified betting interfaces.<sup>18</sup> Digital advertising presents distinct challenges.<sup>19</sup> Mobile applications employ push notifications to alert users about promotional offers, live game opportunities, and personalized betting suggestions.<sup>20</sup> Social media platforms host targeted advertisements based on user demographics and browsing behavior, potentially reaching audiences below the legal gambling age despite platform policies prohibiting such targeting.<sup>21</sup> Affiliate marketing programs compensate third-party websites and influencers for customer referrals, which creates distributed promotional networks that are difficult for regulators to monitor.<sup>22</sup>

The promotional content itself raised additional concerns. Many advertisements emphasized bonus offers described as “risk free” bets or “no sweat” wagers that required users to stake their own money before receiving promotional credits.<sup>23</sup> Such marketing language arguably misrepresented the actual risk involved and exploited behavioral biases including loss aversion and the endowment effect.<sup>24</sup> Advertisements frequently depicted betting as seamlessly integrated into sports viewing, suggesting that wagering enhanced entertainment value without acknowledging associated risks.<sup>25</sup>

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<sup>17</sup> *Sports Betting Advertising Trends*, *supra* note 3.

<sup>18</sup> See Wenjia Han & V.V. Saunak, *Bet More – But Only with Me: Role of Celebrity Endorsers in Sports Betting Advertising*, 41 J. GAMBLING STUD. 1657 (2025).

<sup>19</sup> See Johannes Singer et al., *Gambling Operators’ Use of Advertising Strategies on Social Media and Their Effects: A Systematic Review*, 11 CURRENT ADDICTION REPS. 437 (2024).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See generally Nerilee Hing et al., *The ‘Wild West’ of Wagering Affiliate Marketing and Implications for Gambling Harm*, 24 INT’L J. MENTAL HEALTH & ADDICTION 451 (2026).

<sup>23</sup> Brody J. Ruihley & Andrea Beissel, *Sports Gambling Cultivation: The Sports-Media-Gambling Industrial Complex and the Rise of Integrative Media*, in SPORT, ADVERTISING AND GLOBAL PROMOTIONAL CULTURE 75 (Steven J. Jackson & David L. Andrews ed., 2025).

<sup>24</sup> See Connor Edge, *Don’t Bet on It: Examining State Prohibitions of “Risk-Free” Language in Sports Betting Advertisements Under Central Hudson*, 55 SETON HALL L. REV. 923 (2025).

<sup>25</sup> Syvertsen et al., *supra* note 6, at 475.

### C. PUBLIC HEALTH CONCERNS AND PROBLEM GAMBLING

The proliferation of sports betting and associated advertising generated significant public health concerns. Research demonstrates that accessibility to gambling opportunities correlates with increased prevalence of gambling disorders.<sup>26</sup> Unlike traditional casino gambling that requires physical presence at licensed facilities, mobile sports betting enables continuous access through smartphones. This convenience, combined with aggressive promotional campaigns, creates conditions conducive to problematic gambling behaviors.<sup>27</sup>

Advertising exposure appears particularly harmful to vulnerable populations. Studies demonstrate that exposure to gambling advertisements functions as a precipitator for relapse among individuals with gambling disorders.<sup>28</sup> For adolescents and young adults, gambling advertising exposure correlates with increased gambling participation and positive attitudes toward betting.<sup>29</sup> Research on advertising's effects on behavior suggests that sustained exposure to promotional messages normalizes gambling and influences perceptions of risk, particularly among less experienced bettors.<sup>30</sup>

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<sup>26</sup> See, e.g., Nancy M. Petry & Christopher Armentano, *Prevalence, Assessment, and Treatment of Pathological Gambling: A Review*, 50 PSYCHIATRIC SERVS. 1021, 1021–22 (1999).

<sup>27</sup> See Syvertsen et al., *supra* note 6, at 477–78.

<sup>28</sup> See Javier García-Castro et al., *Effects of advertising on problem gambling: Neural-cue reactivity as a possible underlying mechanism*, 31 PROFESIONAL DE LA INFORMACIÓN 1 (2022); see also Teodora Tavares, U. S. Fla., “Sad to say I have a problem”: How Online Support Communities Navigate and Counteract Gambling Advertisements, Conference Presentation at the Ass’n for Educ. in Journalism and Mass Comm’n (Aug. 7–10, 2025); see also Per Binde, *Exploring the Impact of Gambling Advertising: An Interview Study of Problem Gamblers*, 7 INT’L J. MENTAL HEALTH & ADDICTION 541 (2009).

<sup>29</sup> See Gianluca Di Censo et al., *The impact of gambling advertising and marketing on young people: A critical review and analysis of methodologies*, 24 INT’L GAMBLING STUD. 1 (2023); see also Franziska Clemens et al., *Exposure to Gambling Advertisements and Gambling Behavior in Young People*, 33 J. GAMBLING STUD. 1 (2017); see also Nerilee Hing et al., *Adolescent exposure to gambling promotions during televised sport: An exploratory study of links with gambling intentions*, 14 INT’L GAMBLING STUD. 281 (2014).

<sup>30</sup> See Gloria Nwakego Chukwuemeka et al., *Perception and Exposure of Bet9ja Online Gambling Advertisement Among Nnamdi Azikiwe University Undergraduates*, 10 SOC. SCI. RSCH. 115 (2024).

### III. THE CONSTITUTIONAL FRAMEWORK: COMMERCIAL SPEECH AND THE *CENTRAL HUDSON* TEST

#### A. THE EVOLUTION OF COMMERCIAL SPEECH DOCTRINE

Sports betting advertising restrictions must navigate constitutional constraints imposed by the First Amendment's protection of commercial speech. Understanding these constraints requires examining the Supreme Court's commercial speech doctrine, articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>31</sup> At issue was a New York regulation prohibiting electric utilities from promotional advertising, adopted during the 1973 energy crisis to discourage electricity consumption.<sup>32</sup>

The Court crafted a four-part test for evaluating commercial speech restrictions. First, courts must determine whether the expression concerns lawful activity and is not misleading.<sup>33</sup> For commercial speech to receive constitutional protection, it must at minimum satisfy this threshold requirement.<sup>34</sup> Second, the government must assert a substantial interest justifying the regulation.<sup>35</sup> Third, the restriction must directly advance that governmental interest.<sup>36</sup> Fourth, the regulation must be no more extensive than necessary to serve that interest.<sup>37</sup>

The *Central Hudson* framework has governed commercial speech analysis for over four decades, though its application has generated substantial uncertainty. Some subsequent decisions concerning alcohol<sup>38</sup> and tobacco<sup>39</sup> regulation suggested movement toward heightened protection for commercial speech. Still, *Central Hudson* remains good law and continues governing commercial speech analysis.<sup>40</sup> For advertising regulation, *Central Hudson* establishes the constitutional boundaries states must operate within. The question becomes not whether states may restrict sports betting advertising, but what restrictions can satisfy intermediate scrutiny's requirements.

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<sup>31</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>32</sup> *Id.* at 558–59.

<sup>33</sup> *Id.* at 563–64.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 564.

<sup>36</sup> *Id.*

<sup>37</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>38</sup> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

<sup>39</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>40</sup> *Cent. Hudson*, 447 U.S. at 557.

## B. APPLYING *CENTRAL HUDSON* TO SPORTS BETTING ADVERTISING

Applying *Central Hudson's* four-part test to sports betting advertising reveals both opportunities and limitations for state regulation.<sup>41</sup> Under the first prong, courts must determine whether the commercial speech concerns lawful activity and avoids misleading content. Sports betting is now legal in most states, and licensed sportsbooks are permitted to advertise their services.<sup>42</sup> However, advertisements that misrepresent odds, falsely describe bonuses as risk-free, or target minors would likely fail this threshold inquiry as either unlawful or misleading. Such content receives no First Amendment protection and may be prohibited outright.<sup>43</sup>

The second prong requires identifying substantial governmental interests justifying regulation. States possess multiple substantial interests relevant to gambling advertising restrictions. Protecting minors would be an obvious start. Reducing problem gambling and associated social costs similarly qualifies as substantial, particularly given empirical evidence linking gambling accessibility to disordered gambling behaviors. Supporting existing self-exclusion programs by preventing advertising to individuals who have voluntarily excluded themselves likely represents another interest meeting the threshold of substantial, as such advertising could undermine treatment efforts and therapeutic interventions.

The third prong's requirement that restrictions directly advance asserted interests presents greater analytical complexity. States must demonstrate (not merely speculate) that challenged regulations will materially advance identified governmental objectives.<sup>44</sup> For restrictions targeting youth exposure, evidence that limiting advertising during certain time periods or on particular platforms reduces underage gambling would satisfy this requirement. For restrictions aimed at reducing problem gambling, states could cite research demonstrating correlations between advertising exposure and gambling participation, though establishing causation may prove more challenging.

The fourth prong demands reasonable fit between regulations and governmental interests.<sup>45</sup> The regulation cannot be more extensive than necessary to protect the interest outlined in the third

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<sup>41</sup> *Id.*

<sup>42</sup> See *NCPG Report*, *supra* note 7.

<sup>43</sup> *Cent. Hudson*, 447 U.S. at 557.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

prong's analysis.<sup>46</sup> Total advertising bans would likely fail this inquiry as overly extensive, as the Court indicated when striking down Rhode Island's prohibition on liquor price advertising.<sup>47</sup> However, narrowly tailored restrictions targeting specific harmful practices can satisfy the reasonable fit requirement. Time-channel restrictions limiting advertising during periods when minors constitute significant audience segments, prohibitions on inducement-based promotions exploiting behavioral biases, and mandatory disclosures about gambling risks and responsible gaming resources represent examples of tailored approaches more likely to withstand scrutiny.<sup>48</sup>

Recent scholarship has analyzed how sports betting advertising restrictions might fare under *Central Hudson* review.<sup>49</sup> Mark Conrad proposes that the Federal Communications Commission (FCC) could constitutionally impose time-based restrictions on sports betting advertisements broadcast during hours when children are likely watching, analogizing to the FCC's authority over indecent content.<sup>50</sup> Others have drawn parallels to tobacco advertising regulation. In particular, it has been argued that the Federal Trade Commission could adapt the regulatory framework developed for tobacco advertising to sports betting, imposing content restrictions and placement limitations while preserving commercial speech rights.<sup>51</sup> This approach would prohibit advertisements that appeal to minors, require prominent disclosure of addiction risks, and restrict advertising in media with significant youth audiences.<sup>52</sup>

### C. GREATER NEW ORLEANS AND GAMBLING ADVERTISING

The Supreme Court's decision in *Greater New Orleans Broadcasting Association v. United States* provides some of the most applicable precedent for sports betting advertising

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<sup>46</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

<sup>47</sup> *Id.*

<sup>48</sup> See Mark Conrad, *Betting on Addiction Money: Can Sports Betting Advertising be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?*, 15 *HARV. J. SPORTS & ENT. L.* 127 (2024).

<sup>49</sup> See *id.*; see also Edge, *supra* note 24.

<sup>50</sup> See Conrad, *supra* note 48.

<sup>51</sup> Cole Eisenshtadt, *Betting on Oversight: Repurposing Regulations for Cigarette and Tobacco Advertising to Address Sports Gambling, America's Fastest Growing Vice Industry*, 74 *ADMIN. L. REV.* 387 (2022).

<sup>52</sup> *Id.*

restrictions.<sup>53</sup> At issue was a federal statute prohibiting broadcast advertising for casino gambling applied to radio and television stations in states where such gambling was legal.<sup>54</sup> The Court struck down the restriction as violating the First Amendment, finding that the government failed to demonstrate the regulation directly advanced its asserted interest and constituted a reasonable fit.<sup>55</sup>

The Court's analysis emphasized the interrelatedness of *Central Hudson's* four parts, noting that each "raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."<sup>56</sup> Although the government possessed a substantial interest in reducing social costs associated with gambling, Congress had simultaneously encouraged casino gambling through various measures including promotion of tribal gaming through tribal-state compacts.<sup>57</sup> This inconsistency undermined the government's claim that its advertising restriction materially advanced its asserted interest.<sup>58</sup> Additionally, the statute contained numerous exceptions that rendered it "so pierced by exemptions and inconsistencies" that it could not constitute a reasonable fit.<sup>59</sup>

*Greater New Orleans* does not prohibit gambling advertising restrictions, but it establishes demanding requirements for such regulations.<sup>60</sup> States must demonstrate consistency between their broader gambling policies and advertising restrictions; regulations riddled with exceptions or applied inconsistently will fail *Central Hudson* review.<sup>61</sup> The decision also suggests that total advertising bans face particular constitutional obstacles, as such broad prohibitions typically fail the reasonable fit requirement.<sup>62</sup>

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<sup>53</sup> *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

<sup>54</sup> *Id.* at 176–78.

<sup>55</sup> *Id.* at 174.

<sup>56</sup> *Id.* at 184.

<sup>57</sup> *Id.* at 186–87.

<sup>58</sup> *Id.* at 189.

<sup>59</sup> *Greater New Orleans Broad. Ass'n*, 527 U.S. at 190.

<sup>60</sup> See Nicholas P. Consula, *The First Amendment, Gaming Advertisements, and Congressional Inconsistency: The Future of the Commercial Speech Doctrine after Greater New Orleans Broadcasting Ass'n v. United States*, 28 PEPP. L. REV. 353 (2001); See also Edward J. Schoen, *From Posadas to Greater New Orleans: Expanding Commercial Speech Protection for the Gaming and Alcohol Industries*, 3 ACAD. STUD. BUS. L.J., June 2000, at 1.

<sup>61</sup> See Schoen, *supra* note 60, at 2.

<sup>62</sup> *Id.* at 5.

However, targeted restrictions addressing specific harms (e.g., protecting minors, preventing relapse among problem gamblers, or prohibiting misleading claims) can satisfy *Greater New Orleans's* requirements when supported by empirical evidence and applied consistently.<sup>63</sup>

#### IV. STATE MARKETING AND ADVERTISING REGULATIONS: A COMPARATIVE ANALYSIS

This Part presents an analysis of 12 aspects of marketing and advertising regulations identified by the NCPG across all 31 jurisdictions with operational mobile sports betting as of 2024. These aspects are: promoting gambling as a solution to financial problems; promoting excessive gambling; misleading players on chances of winning; appealing to minors; presenting gambling as risk-free; encouraging problematic play; marketing risk assessment; clear conditions of bonus offers; separation of responsible gambling and product marketing; advertising to adults-only; avoiding higher risk groups; age gating of social media marketing; opt out and limits on advertising available.<sup>64</sup>

Additionally, the analysis reveals three distinct regulatory approaches: (1) comprehensive frameworks imposing detailed content restrictions and disclosure requirements; (2) moderate frameworks prohibiting specific harmful practices while relying substantially on industry self-regulation; and (3) minimal frameworks deferring almost entirely to voluntary compliance.

##### A. INCIDENCE OF MARKETING AND ADVERTISING REGULATIONS

Nine jurisdictions prohibit promoting gambling as a solution to financial problems.<sup>65</sup> Such messaging can prey on financially vulnerable individuals who may turn to gambling hoping to escape debt, potentially worsening their situation through losses.<sup>66</sup> Arizona, for instance, outlines that “[a]dvertising, marketing, and promotion of event wagering shall not promote irresponsible or excessive participation in event wagering, or suggest that social, financial, or personal success is guaranteed by engaging in event wagering.”<sup>67</sup>

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<sup>63</sup> See Consula, *supra* note 60, at 370.

<sup>64</sup> NCPG Report, *supra* note 7, at 8.

<sup>65</sup> *Id.*

<sup>66</sup> See Morgane Guillou-Landreat et al., *Gambling Marketing Strategies and the Internet: What Do We Know? A Systematic Review*, 12 FRONT. PSYCHIATRY 1 (2021).

<sup>67</sup> ARIZ. ADMIN. CODE § R19-4-110(C) (2023).

Maine prohibits “guarantees of success, riches or gambling winnings.”<sup>68</sup> Kentucky frames its restriction slightly differently, focusing on defining an advertisement as misleading if it “makes representations about average winnings without equally prominently representing the average net winnings of all patrons.”<sup>69</sup>

Only seven jurisdictions expressly prohibit promoting excessive gambling.<sup>70</sup> These restrictions help prevent normalization of compulsive betting patterns that can lead to gambling addiction and associated harms.<sup>71</sup> North Carolina prohibits any “advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, distributed ... [that] promote irresponsible or excessive participation in Wagering.”<sup>72</sup> New York adds mention of indirect marketing through affiliates.<sup>73</sup>

Misleading players on their chances of winning is addressed directly in 23 jurisdictions. False or exaggerated claims about odds can manipulate players into wagering more than they otherwise would based on unrealistic expectations of success. Some states are simple and direct, such as Wyoming, which outlines that its gaming commission “shall prohibit sports wagering advertising that it determines to be deceptive to the public.”<sup>74</sup> Virginia outlines that “[a]dvertising, marketing, or promotional materials may not imply that chances of winning increase the more one participates in, or the more one spends on, sports betting.”<sup>75</sup> Indiana likewise sets out that materials distributed by or on behalf of operators “[s]hall not imply greater chances of winning based on wagering in greater quantity or amount.”<sup>76</sup>

Seventeen jurisdictions address marketing appealing to minors.<sup>77</sup> Early exposure to gambling marketing can normalize betting behavior and potentially lead to underage gambling or problem gambling in adulthood. Beyond direct marketing content, Colorado prohibits marketing on media “where the majority of the

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<sup>68</sup> 16-633-64 ME. CODE R. § 3(B) (2023).

<sup>69</sup> 809 KY. ADMIN. REGS. 10:007 § 3(2) (2023).

<sup>70</sup> *NCPG Report*, *supra* note 7, at 8.

<sup>71</sup> See Jeffrey L. Derevensky & Lynette Gilbeau, *Preventing Adolescent Gambling Problems*, GAMBLING DISORDER 297 (Andreas Heinz, Nina Romanczuk-Seiferth & Marc N. Potenza eds., Springer Nat. Switzerland AG, 2019).

<sup>72</sup> 24 N.C. ADMIN. CODE 06A.0907(d)(1) (2023).

<sup>73</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 5329.37(b)(2)(i) (2023).

<sup>74</sup> 038-8 WYO. CODE R. § 5 (2023).

<sup>75</sup> 11 VA. ADMIN. CODE § 5-70-240(M) (2023).

<sup>76</sup> 68 IND. ADMIN. CODE 27-17(b)(5) (2023).

<sup>77</sup> *NCPG Report*, *supra* note 7, at 8.

demographic audience or players/performers are known to be under the legal age to gamble.”<sup>78</sup> Colorado also extends this prohibition to affiliates.<sup>79</sup> Similarly, the District of Columbia requires providers to “ensure that all advertising, public relations activities and marketing campaigns do not target, either via content or placement, those under the age of eighteen.”<sup>80</sup>

Eleven jurisdictions specifically prohibit the promotion of gaming as “risk free.”<sup>81</sup> Labeling bets as risk free when patrons must still risk their own money and only receive a bet credit if they lose is deceptive and can encourage excessive wagering based on false security.<sup>82</sup> Maine outlines that “[a]ll promotions and bonuses related to sports wagering must not be described as risk free if the patron needs to incur any loss or risk the patron’s own money to use or withdraw winnings from the risk-free bet.”<sup>83</sup> New Jersey likewise requires that “[a]dvertising shall not be misleading in any way, such as using slogans portraying ‘guaranteed wins’ or ‘risk free’ bets, particularly when patrons are required to deposit their own funds into a wagering account and are unable to be fully compensated for any loss of patron funds.”<sup>84</sup>

11 jurisdictions also directly address marketing encouraging problematic play.<sup>85</sup> Such messaging can trigger or reinforce harmful gambling behaviors, including chasing losses and prioritizing betting over financial responsibilities.<sup>86</sup> Massachusetts has one of the more encompassing provisions, outlining that “[n]o advertising, marketing, branding, and other promotional materials published, aired, displayed, disseminated, or distributed by or on behalf of any Sports Wagering Operator shall: [...] Promote irresponsible or excessive participation in Sports Wagering; [or,] Portray, suggest, condone or encourage Sports Wagering behavior that is socially

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<sup>78</sup> COLO. CODE REGS. § 1 CCR 207-2:9.4(2) (2026).

<sup>79</sup> *Id.*

<sup>80</sup> D.C. Mun. Regs. tit. 30, § 2131.2(f) (2026).

<sup>81</sup> *NCPG Report*, *supra* note 7, at 8.

<sup>82</sup> See Benjy Apelbaum, *There’s No Such Thing as a Free Bet: How to Stop Misleading the Public in Gambling Advertisements*, U. MICH. J. L. REFORM CAVEAT (Feb. 2024), <https://mjlr.org/> [<https://perma.cc/BMC8-KPBJ>].

<sup>83</sup> 16-633-64 Code Me. R. § 6(D) (2023).

<sup>84</sup> *Advertising Standards*, N.J. DIV. OF GAMING ENF’T, <https://www.njoag.gov/> [<https://perma.cc/BL76-NAPB>].

<sup>85</sup> *NCPG Report*, *supra* note 7, at 8.

<sup>86</sup> See Sally M. Gainsbury et al., *Reducing Internet Gambling Harms Using Behavioral Science: A Stakeholder Framework*, 11 FRONTIERS PSYCHIATRY 1 (2020).

irresponsible or could lead to financial, social or emotional harm.”<sup>87</sup> New York goes even further by specifying nine grounds on which licensees and affiliates cannot directly or indirectly promote or make representations that touch upon problematic play.<sup>88</sup> Some of these address “risk free” bets or solving financial problems, but others are more novel, like chasing losses or “re-invest winnings,” portraying “sports wagering behavior as a rite of passage,” or suggesting that “social, financial or personal success is guaranteed by engaging in sports wagering.”<sup>89</sup>

Only three jurisdictions require a marketing risk assessment.<sup>90</sup> Pre-approval processes allow regulators to prevent harmful advertising before it reaches vulnerable populations. Delaware operators, for instance, need to submit new advertising materials to the Delaware Lottery for approval prior to use.<sup>91</sup> Materials are approved unless they (in the view of the agency) “would result in an appearance which reflects adversely on the agency, would reasonably be expected to offend a substantial number of people, contain inaccurate or misleading information, or [would] otherwise be inappropriate.”<sup>92</sup>

The most common marketing and advertising measure required is ensuring that conditions of bonus offers are clear.<sup>93</sup> Transparent disclosure prevents deceptive practices where complex terms trap players into wagering requirements they did not fully understand. Among the 25 jurisdictions with this type of provision, Connecticut requires online gaming operators clearly disclose all conditions and limitations for “complimentaries” (such as expiration dates or wagering requirements) in advertisements, through pop-up messages when added to accounts, and when using matching font sizes when comparing complimentary amounts to required wagers.<sup>94</sup> Patrons must have access to comprehensive terms for incentive offers, including presentation and expiration dates, eligibility requirements, withdrawal restrictions, and wagering requirements.<sup>95</sup> The disclosure must also specify how patrons are notified of awards, that the order funds are used for wagers, and cancellation rules. These requirements ensure transparency, so

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<sup>87</sup> 205 MASS. CODE REGS. 256.04(6)(a), (h) (2025).

<sup>88</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 5329.37(b)(2)(i)–(ix) (2023).

<sup>89</sup> *Id.*

<sup>90</sup> *NCPG Report, supra* note 7, at 8.

<sup>91</sup> 10 DEL. ADMIN. CODE § 204-10.0 (2026).

<sup>92</sup> *Id.*

<sup>93</sup> *NCPG Report, supra* note 7, at 8.

<sup>94</sup> CONN. AGENCIES REGS. § 12-865-25(o) (2022).

<sup>95</sup> *See id.*

patrons fully understand the conditions before accepting promotional offers.<sup>96</sup>

Conversely, only seven jurisdictions mandate separation of responsible gaming and product marketing.<sup>97</sup> Mixing promotional content with harm-prevention resources undermines the credibility and effectiveness of responsible gaming messages. The District of Columbia sets out that “[a]dvertising and promotions may not be on any web pages that are geared towards responsible gaming.”<sup>98</sup> Virginia is similarly succinct: “Advertising, marketing, or promotional materials may not be placed on any website or printed page or medium devoted primarily to responsible gaming.”<sup>99</sup>

19 jurisdictions explicitly limit advertising to adults only.<sup>100</sup> Age-restricted advertising helps prevent minors from being exposed to gambling promotions during their formative years. Some restrictions are basic and formal, such as Illinois: “All advertising and marketing materials published, aired, displayed, or distributed by or on behalf of any licensee [...] Must not directly advertise or promote sports wagering to individuals under 21 years of age.”<sup>101</sup> Indiana has very similar language.<sup>102</sup> Kansas is more encompassing of the margins of what targeting may include, specifically addressing that “the form, content, quantity, timing and location of such advertisements, do not target children and minors.”<sup>103</sup>

Likewise, 17 jurisdictions have restrictions on advertising or marketing to higher risk groups.<sup>104</sup> Targeting those already vulnerable to gambling problems exploits existing susceptibilities and can accelerate progression toward addiction. Delaware outlines that providers “shall ensure that all advertising, public relations activities and marketing campaigns do not target groups of people that are considered moderate and high-risk groups for gambling addiction.”<sup>105</sup> Kansas merges this with its provision prohibiting targeting of minors.<sup>106</sup> Louisiana has a similar catch-all provision that requires operators and licensees to “ensure that all

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<sup>96</sup> *See id.*

<sup>97</sup> *NCPG Report, supra* note 7, at 8.

<sup>98</sup> D.C. OFF. OF LOTTERY AND GAMING, SPORTS WAGERING MINIMUM INTERNAL CONTROL STANDARDS § 9.8.3 (2023).

<sup>99</sup> 11 VA. ADMIN. CODE § 5-70-240(O) (2020).

<sup>100</sup> *NCPG Report, supra* note 7, at 8.

<sup>101</sup> ILL. ADMIN. CODE tit.11, § 1900.340(e)(1) (2020).

<sup>102</sup> 68 IND. ADMIN. CODE 27-7-17(b)(1) (2021).

<sup>103</sup> KAN. STAT. ANN. § 74-8785(a) (2022).

<sup>104</sup> *NCPG Report, supra* note 7, at 8.

<sup>105</sup> DEL. SPORTS WAGERING MINIMUM INTERNAL CONTROL STANDARDS § 9.8.2 (2023).

<sup>106</sup> KAN. ADMIN. REGS. § 87-74-8785(a) (2022).

advertisements of sports wagering do not target prohibited players, persons under the age of 21, or self-restricted or excluded persons.”<sup>107</sup>

Despite widespread limits on targeting marketing and advertising to minors, only two jurisdictions (Connecticut and Massachusetts) specifically age gate social media marketing, where minors are most likely to find such ads.<sup>108</sup> In Connecticut’s case, this includes media outlets that appeal primarily to individuals under 21.<sup>109</sup>

Finally, 12 jurisdictions mandate some sort of limit or opt-out of advertising.<sup>110</sup> Allowing players to control their exposure to promotional content helps those managing gambling problems avoid triggering marketing messages. New Jersey, for instance, provides several pathways for operators to comply when it comes to new and existing customers: “This can be achieved for new customers by including an option on the operator’s registration page for the patron to opt out of all advertising materials. For current customers that have already registered an account with the operator, this can be achieved by having the option presented on the responsible gambling page to opt out of all advertising materials.”<sup>111</sup>

## B. COMPREHENSIVE REGULATORY FRAMEWORKS

A minority of states have adopted what can be classified as comprehensive advertising regulatory frameworks, which impose detailed requirements addressing multiple dimensions of promotional content and placement. Eight jurisdictions exemplify this broad approach, each addressing at least nine areas of Marketing to Avoid as identified by the NCPG: Arizona (9), Connecticut (10), the District of Columbia (9), Massachusetts (12), New York (11), North Carolina (11), Ohio (9), and Virginia (10).<sup>112</sup> However there is significant variation in specific requirements.

Massachusetts implements particularly stringent advertising restrictions, addressing all but risk assessment. Massachusetts prohibits sports betting advertising that targets minors, promotes gambling as risk-free or a solution to financial problems, or encourages excessive play.<sup>113</sup> Operators cannot mislead players

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<sup>107</sup> LA. ADMIN CODE tit. 42, pt. VI, § 517(D) (2023).

<sup>108</sup> *NCPG Report*, *supra* note 7, at 8.

<sup>109</sup> CONN. AGENCIES REGS. § 12-865-25(e)(7) (2022).

<sup>110</sup> *NCPG Report*, *supra* note 7, at 8.

<sup>111</sup> *Advertising Standards*, *supra* note 84.

<sup>112</sup> *NCPG Report*, *supra* note 7, at 8.

<sup>113</sup> 205 MASS. CODE REGS. 256.04(6) (2023).

about winning chances or suggest that increased time spent wagering or money wagered improves odds.<sup>114</sup> All advertising must state the 21-plus age requirement and cannot appear on platforms where 25 percent or more of the audience is under 21 without adequate age controls.<sup>115</sup> Marketing materials cannot use celebrity endorsements or imagery designed to appeal primarily to minors.<sup>116</sup> Operators must clearly disclose all bonus offer terms and cannot target individuals enrolled in self-exclusion programs or those at high risk of gambling addiction.<sup>117</sup> Direct marketing must include opt-out options.<sup>118</sup>

New York prohibits sports betting advertising that promotes gambling as risk-free, a solution to financial problems, or encourages excessive or irresponsible play.<sup>119</sup> Operators cannot mislead about winning chances, encourage “chasing” losses, or suggest success is guaranteed.<sup>120</sup> Advertising cannot target minors (under 21) through cartoon characters, entertainers appealing to youth, or placement where the underage audience exceeds the state’s underage population percentage.<sup>121</sup> Ads are banned on college campuses and in college-owned media and cannot depict underage persons except professional athletes.<sup>122</sup> All websites with sports betting content must display age reminders.<sup>123</sup> Operators must clearly disclose all promotional terms, obtain informed consent for deposit-required promotions, and submit promotions for approval 15 days in advance.<sup>124</sup> Direct advertising must include opt-out methods processed within 15 days.<sup>125</sup> Affiliate marketing partners must disclose promotional relationships.<sup>126</sup>

Connecticut requires all sports wagering advertising to include a problem gambling helpline message and state that patrons must be 21 years or older to participate.<sup>127</sup> Operators cannot target or directly

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 256.05(1), (4).

<sup>116</sup> *Id.* at 256.05(3).

<sup>117</sup> *Id.* at 247.09(2), 256.06(1), 256.07.

<sup>118</sup> *Id.* at 256.06(5).

<sup>119</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 5329.37(b)(2)(i), (iii)–(iv), (vi) (2023).

<sup>120</sup> *Id.* § 5329.37(b)(2)(ii), (b)(2)(v), (b)(2)(ix).

<sup>121</sup> *Id.* § 5329.37(b)(3)(i), (e).

<sup>122</sup> *Id.* § 5329.37(e).

<sup>123</sup> *Id.* § 5329.37(f).

<sup>124</sup> *Id.* § 5329.37(c)(1), § 5330.38(a) (2023).

<sup>125</sup> 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 5329.37(c)(3) (2023).

<sup>126</sup> *Id.* § 5329.37(b)(4).

<sup>127</sup> CONN. AGENCIES REGS. § 12-865-25(e)(1), (e)(3) (2023).

advertise to minors or excluded persons.<sup>128</sup> Advertising cannot contain images, celebrity endorsements, or language designed to appeal specifically to minors, feature anyone appearing under 21, or appear in media outlets or before audiences that appeal primarily to or consist of a majority of minors.<sup>129</sup> Materials cannot contain misleading information, imply greater winning chances versus other operators or based on increased wagering amounts, or suggest sports wagering guarantees social, financial, or personal success.<sup>130</sup> Operators must clearly disclose all bonus conditions, including expiration dates, wagering requirements, and withdrawal restrictions in advertisements and pop-up messages.<sup>131</sup> Advertising cannot be placed on responsible gaming websites.<sup>132</sup> Direct marketing must include a one-click unsubscribe link.<sup>133</sup>

These comprehensive frameworks share several common elements. All prohibit targeting minors through age-appropriate content restrictions, audience composition limits, and bans on youth-appealing imagery or endorsements.<sup>134</sup> Each jurisdiction forbids misleading claims about winning chances, presenting gambling as risk-free or a financial solution, and promoting excessive play.<sup>135</sup> The states uniformly require clear disclosure of promotional terms and provide opt-out mechanisms for direct marketing. Additionally, all three states prohibit advertising to self-excluded individuals and on responsible gaming platforms.<sup>136</sup> This multi-layered approach creates robust consumer protections addressing both content restrictions and targeting practices.

### C. MODERATE REGULATORY APPROACHES

Most states with online sports betting adopt moderate regulatory frameworks that prohibit specific harmful advertising practices while relying substantially on industry self-regulation for broader content standards. These jurisdictions typically establish baseline requirements in some areas, but do not impose comprehensive content restrictions or placement limitations. Colorado (6), Indiana (6), Louisiana (6), Maine (7), Maryland (5),

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<sup>128</sup> *Id.* § 12-865-25(e)(2), (j).

<sup>129</sup> *Id.* § 12-865-25(e)(4), (e)(6)–(8).

<sup>130</sup> *Id.* § 12-865-25(e)(5), (e)(9)–(11).

<sup>131</sup> *Id.* § 12-865-25(o).

<sup>132</sup> *Id.* § 12-865-25(k).

<sup>133</sup> CONN. AGENCIES REGS. § 12-865-25(e)(13).

<sup>134</sup> See *NCPG Report, supra* note 7, at 8.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

New Jersey (8), Oregon (7), Tennessee (5), and Vermont (8) exemplify this approach.<sup>137</sup>

Colorado is an interesting case, with a mid-range number of regulatory areas addressed, but some addressed in strong depth. Colorado prohibits sports betting operators from engaging in false or misleading advertising and from targeting underage persons through age-appropriate content or media where the majority of the audience is under the legal gambling age.<sup>138</sup> All bonus offers must include full, accurate, clear, and transparent terms and conditions displayed in close proximity to headline claims in reasonably prominent size.<sup>139</sup> Offers cannot be described as “free” unless absolutely free without any customer risk, and cannot be labeled “risk free” if customers must incur losses or risk their own money to use or withdraw winnings.<sup>140</sup> Operators must submit annual reports describing their responsible gaming promotional efforts and plans.<sup>141</sup> While Colorado’s framework addresses fewer specific areas than comprehensive northeastern models, it demonstrates strong regulatory depth through detailed bonus disclosure requirements and strict truth-in-advertising standards that effectively prevent deceptive marketing practices.

Moderate frameworks share reliance on general standards, such as truthfulness, age-appropriateness, and responsible gambling disclosures, rather than detailed prescriptive requirements. This approach provides operators flexibility in advertising content and placement while establishing baseline consumer protection standards. However, enforcement challenges may be more acute in moderate framework jurisdictions, as general standards often require fact-intensive determinations about whether specific advertisements violate regulatory requirements. Additionally, more reliance on industry self-regulation raises concerns about whether voluntary commitments will be honored absent robust oversight mechanisms.

#### D. MINIMAL REGULATORY STRUCTURES

Many states have adopted minimal advertising regulatory structures that defer substantially to voluntary industry standards. These jurisdictions typically establish only the basic requirements while leaving content and placement decisions to operator discretion. Some of these jurisdictions, such as New Hampshire and

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<sup>137</sup> *Id.*

<sup>138</sup> COLO. CODE REGS. § 207-2, Rule 6.12, 9.4(2) (2023).

<sup>139</sup> *Id.* at Rule 9.4(1)(a)–(b).

<sup>140</sup> *Id.* at Rule 9.4(1)(c)–(d).

<sup>141</sup> *Id.* at Rule 9.4(3).

West Virginia, do not address any of the 12 Marketing to Avoid areas identified by the NCPG.<sup>142</sup> Based on published regulations, the following states fall within this minimal category: Arkansas (1), Delaware (3), Florida (1), Illinois (4), Iowa (1), Kansas (3), Kentucky (4), Michigan (1), New Hampshire (0), Nevada (2), Pennsylvania (2), Rhode Island (1), West Virginia (0), and Wyoming (2).<sup>143</sup>

Nevada presents an interesting case as the state with the longest history of legal sports betting. Nevada's regulations have historically focused on traditional brick-and-mortar sportsbooks rather than online operations, and the state has not developed comprehensive advertising restrictions for digital platforms.<sup>144</sup> While Nevada prohibits false or misleading advertising generally, it does not impose specific requirements for responsible gambling messaging, age-gating, or content restrictions beyond truthfulness.<sup>145</sup> This minimalist approach may reflect Nevada's long experience with gambling regulation and confidence in market forces and industry self-regulation.<sup>146</sup>

Delaware similarly maintains a minimal regulatory structure despite being among the first states to launch sports betting after *Murphy*.<sup>147</sup> The state conducts its sports betting operations through the Delaware Lottery, which may reduce the need for extensive advertising regulations given the public monopoly structure. However, even state-operated sports betting involves promotional activities that could benefit from more detailed regulatory oversight to protect consumers.

Florida presents a different case as sports betting is authorized exclusively through the Seminole Tribe's compact with the state.<sup>148</sup> The compact itself contains minimal advertising restrictions beyond general prohibitions on false or misleading content.<sup>149</sup>

Minimal regulatory frameworks raise several concerns. These frameworks provide limited consumer protection beyond general prohibitions on false advertising, which may prove inadequate given the sophistication of modern marketing techniques and behavioral targeting capabilities. Additionally, they create

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<sup>142</sup> *NCPG Report*, *supra* note 7, at 230–31, 372–73.

<sup>143</sup> *Id.* at 26–27, 72–73, 95–96, 105–06, 127–28, 137–38, 148–49, 207–08, 220–21, 230–31, 315–16, 325–26, 372–73, 384–85.

<sup>144</sup> *Id.* at 216–17.

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Id.* at 91–92.

enforcement challenges by failing to establish clear standards against which advertising practices can be evaluated. This type of design may also enable a race to the bottom as operators exploit regulatory gaps to engage in aggressive promotional practices.

## V. REGULATORY CHALLENGES AND INTERSTATE DYNAMICS

### A. DIGITAL ADVERTISING ENFORCEMENT

State advertising regulations confront enforcement challenges from the distributed and dynamic nature of digital advertising. Unlike traditional broadcast or print advertising, subject to centralized gatekeepers, digital advertising uses programmatic bidding, real-time targeting, affiliate networks, social media influencers, and personalized content delivery.<sup>150</sup> This technological complexity creates multiple enforcement difficulties that may undermine even well-designed regulatory frameworks.

Monitoring compliance across digital platforms requires technological capabilities and resources that many state regulators lack. Sports betting operators may deliver millions of daily advertisements across hundreds of websites, mobile applications, and social media platforms. Sports betting operators can dynamically generate each advertisement based on user characteristics, making it impossible to review all variations *ex ante*.<sup>151</sup> Regulators more typically rely on complaints or periodic audits rather than comprehensive monitoring, meaning many violations may go undetected.

Attribution and jurisdiction questions further complicate enforcement. When an advertisement appears on a national platform like Instagram or Google, it can reach audiences in multiple jurisdictions—thus muddying which state's regulations apply. Operators might argue that advertisements targeting out-of-state residents should not be subject to in-state regulations even if in-state residents occasionally view such content. Additionally, affiliate marketers and third-party advertisers operating on behalf of licensed operators may not face the same regulatory oversight as the operators themselves, creating enforcement gaps.

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<sup>150</sup> See, e.g., David B. Nieborg & Thomas Poell, *Analyzing institutional platform power: Evolving relations of dependence in the mobile digital advertising ecosystem*, 27 *NEW MEDIA & SOC'Y* 1909, 1912–13 (2025).

<sup>151</sup> See Grace Schuette et al., *How Should Regulators Address Sports Betting Advertisements?*, *REGUL. REV.* (Sep. 6, 2025), <https://www.theregreview.org/> [<https://perma.cc/ZW62-LBGG>].

The rapid pace of technological change further challenges regulatory adaptability. New advertising formats, platforms, and targeting techniques emerge continuously, potentially outpacing regulatory responses.<sup>152</sup> For example, operators can use artificial intelligence for personalized marketing—a tactic that may simultaneously manipulate vulnerable individuals while evading existing regulations.

Likewise, content moderation at scale presents inherent difficulties. Determining whether specific advertisements violate general standards like “targeting minors” or “misleading about odds” requires judgment calls. Operators may design advertisements to exploit ambiguities in regulatory language, technically complying with literal requirements while undermining regulatory purposes. This creates a regulatory cat-and-mouse game where operators continually test boundaries and regulators respond with clarifying guidance or enforcement actions.

Some states have responded to enforcement challenges by requiring operators to submit advertising materials for pre-approval or maintain comprehensive records of advertising campaigns. Delaware’s requirement that operators submit advertisements for regulatory approval is an example of the pre-approval approach.<sup>153</sup> However, pre-approval raises First Amendment issues, such as prior restraint, and may be administratively burdensome for both regulators and operators.<sup>154</sup> Record-keeping requirements facilitate ex post enforcement but do not prevent violations from occurring initially.

## B. REGULATORY COMPETITION AND THE RACE TO THE BOTTOM

State advertising regulations operate within a competitive federal system where jurisdictions compete for tax revenue from sports betting operations. This competition can incentivize permissive advertising standards and may undermine consumer protection objectives. In the sports betting context, states may fear

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<sup>152</sup> See Srivathsan Karanai Margan, *The Pacing Problem Unplugged Part 1*, AM. ACAD. ACTUARIES (Jan. 1, 2025), <https://actuary.org/> [<https://perma.cc/8LAL-H4TE>].

<sup>153</sup> See 10 DEL. ADMIN. CODE § 204-10.0 (2026).

<sup>154</sup> See *The Doctrine of Prior Restraint*, JUSTIA, <https://law.justia.com/> [<https://perma.cc/8GRF-SZ8N>] (for discussion of prior restraint).

stringent advertising restrictions will disadvantage local operators, reduce betting activity, and decrease tax revenues.<sup>155</sup>

The competitive dynamic operates through several mechanisms. First, operators may threaten to reduce investment in jurisdictions with stringent advertising regulations, potentially influencing regulatory decisions. While the American Gaming Association has publicly committed to responsible marketing practices, individual operators may advocate for permissive rules that maximize their competitive position. State regulators dependent on tax revenues to fund programs or budget priorities may prove susceptible to such pressure.

Second, interstate mobility creates competitive pressure. Although the Wire Act prohibits interstate wagering<sup>156</sup> and geofencing requirements restrict betting to physically present individuals,<sup>157</sup> advertising reaches across state lines. Residents of states with restrictive advertising rules may observe permissive advertising from neighboring states in the same media market, potentially creating political pressure to relax restrictions. Additionally, major operators typically maintain footprints in multiple states, allowing them to arbitrage regulatory differences—these operators can concentrate their spending in permissive jurisdictions or those with higher growth potential while reducing their investments in restrictive ones.

Third, first-mover disadvantages may discourage stringent regulation. The first states to authorize sports betting post-*Murphy* adopted regulations before they understood advertising's harms and before public concern about problem gambling intensified.<sup>158</sup> These states may resist updating regulations to match more recent entrants' stricter standards, creating path dependency that perpetuates permissive frameworks. Additionally, if early authorized states attempt to strengthen their regulations, they may face political economy challenges: not only do operators hold immense lobbying power, but state budgets also depend on the revenue that operators generate.

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<sup>155</sup> See Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153 (2018).

<sup>156</sup> Elizabeth Lewis, *Old Laws in Modern Times: How a 1961 Law Could Mean Game Over for Online Sports Betting*, N.Y.U. PROCS. (Dec. 6, 2022), <https://proceedings.nyumootcourt.org/> [<https://perma.cc/R444-ZPR6>].

<sup>157</sup> See, e.g., MICH. ADMIN. CODE r. 432.731 (2020).

<sup>158</sup> *Study Reveals Surge in Gambling Addiction Following Legalization of Sports Betting*, SPORTS LITIG. ALERT (Apr. 18, 2025), <https://sportslitigationalert.com/> [<https://perma.cc/Y7BG-74G6>].

### C. CONSTITUTIONAL CHALLENGES AS ENFORCEMENT OBSTACLE

State advertising regulations face additional enforcement obstacles beyond digital complexity and competitive pressures: the threat of constitutional challenges that may deter regulators from adopting or enforcing meaningful restrictions. The prospect of First Amendment litigation creates regulatory chill, particularly given recent trends in commercial speech jurisprudence and the substantial resources major operators possess to fund constitutional challenges. Despite this chill, Connecticut has successfully enforced its gaming laws. In fact, DraftKings agreed to return approximately \$3 million to Connecticut consumers following an investigation into alleged violations of Connecticut gaming laws related to marketing and advertising arising from bonus offers that promised deposit matches or deposit bonuses.<sup>159</sup>

The constitutional landscape presents significant uncertainty. While *Central Hudson* provides a framework for evaluating commercial speech restrictions, recent Supreme Court decisions suggest increasing judicial skepticism toward government regulation of commercial expression. In *Sorrell v. IMS Health Inc.*, the Supreme Court struck down Vermont's restriction on pharmaceutical data mining, emphasizing that the First Amendment protects even commercial speech that is neither false nor misleading when the regulation is content-based.<sup>160</sup> More recently, in *Moody v. NetChoice, LLC*, the Supreme Court grappled with content moderation and speech regulation in digital and social media contexts, emphasizing courts' limited role compared to government actors in responding to emerging challenges.<sup>161</sup> This trend suggests that broad advertising bans, such as complete prohibitions on electronic advertising or geographic restrictions affecting substantially adult audiences, would likely fail constitutional scrutiny.

Moreover, litigation costs and risks create asymmetric burdens. Major sports betting operators possess significant resources to mount constitutional challenges, while state regulators operate under budgetary constraints. A single operator challenging advertising restrictions can impose substantial litigation costs on state agencies, potentially deterring other jurisdictions from

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<sup>159</sup> Kirk Geller, *DraftKings agrees to \$3m settlement for alleged Connecticut gaming violations*, GAMINGAMERICA (July 10, 2025), <https://gamingamerica.com/> [<https://perma.cc/3YHM-SV5L>].

<sup>160</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

<sup>161</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024).

adopting similar regulations. This dynamic favors permissive regulatory approaches even when stronger restrictions might satisfy constitutional requirements if properly designed.

The constitutional uncertainty particularly hinders innovative regulatory approaches. Restrictions on algorithmic targeting, artificial intelligence-driven personalization, or behavioral advertising techniques raise novel First Amendment questions without clear doctrinal guidance. Regulators may hesitate to adopt such measures even when they directly address significant public health concerns, fearing costly litigation with uncertain outcomes. This regulatory caution allows operators to exploit emerging advertising technologies that may encourage problem gambling while evading existing regulatory frameworks.

## VI. TOWARD MORE EFFECTIVE ADVERTISING REGULATION

### A. OVERVIEW OF EXISTING REFORM PROPOSALS

Regulatory responses to sports betting advertising challenges have emerged from three principal sources: federal legislative proposals, industry self-regulation initiatives, and academic scholarship. These reform efforts reflect growing recognition that current regulatory frameworks inadequately address the public health concerns raised by aggressive sports betting promotion. However, the reformists disagree about the appropriate scope and mechanics of these changes.

At the federal level, the Supporting Affordability and Fairness with Every Bet (SAFE Bet) Act represents the most comprehensive legislative response.<sup>162</sup> Introduced in September 2024, the SAFE Bet Act would require states offering sports betting to meet minimum federal standards in three areas: advertising, affordability checks, and artificial intelligence.<sup>163</sup> The proposed legislation would prohibit sportsbook advertisements during live sporting events including “no sweat” or “bonus” promotions, ban in-game betting, and limit customer deposits to five in a 24-hour period.<sup>164</sup> However,

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<sup>162</sup> SAFE Bet Act, S. 1033, 119th Cong. (2025–2026).

<sup>163</sup> Jessica Golden, *U.S. lawmakers introduce bill to put regulations on sports betting operators*, CNBC (Sep. 13, 2024, at 12:57 EDT), <https://www.cnbc.com/> [<https://perma.cc/26GH-2KHC>].

<sup>164</sup> *Id.*; see also Brian Pempus, *SAFE Bet Act: Inside The Federal Sports Betting Bill (2025)*, GAMBLING HARM (Sep. 5, 2025), <https://gamblingharm.org/> [<https://perma.cc/K4V6-9CY6>].

<sup>164</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 474–76 (2018).

the SAFE Bet Act confronts constitutional challenges under the anti-commandeering doctrine established in *Murphy v. NCAA*.<sup>165</sup> Requiring states to adopt federal standards may constitute impermissible commandeering of state regulatory functions, similar to the defects that led the Court to strike down PASPA.<sup>166</sup>

Academic scholarship has proposed alternative regulatory approaches focused on narrower restrictions less vulnerable to constitutional challenge. As noted, some have advocated FCC regulation of sports betting advertisements on broadcast media, drawing parallels to the FCC's indecency framework that restricts certain content to late-night hours when children are unlikely to be viewing.<sup>167</sup> Conrad argues time-based channeling restrictions prohibiting sports betting advertisements between 6:00 a.m. and 10:00 p.m. and limiting the display of betting odds during sporting events would satisfy *Central Hudson* scrutiny because they directly advance the governmental interest in preventing minors from exposure to gambling promotion without imposing blanket prohibitions.<sup>168</sup>

However, other scholars emphasize the need for proactive federal regulation rather than relying on tort litigation.<sup>169</sup> For example, Sadie Sand argues addiction liability lawsuits provide insufficient and fragmented remedies that come too late to prevent harm, advocating instead for comprehensive federal standards, including stricter advertising limits and mandatory industry funding for addiction treatment.<sup>170</sup>

Industry self-regulation represents a third approach. The American Gaming Association's Responsible Marketing Code for Sports Wagering, established in 2019 and most recently updated in March 2023, sets voluntary standards for member operators.<sup>171</sup> The Code restricts target audiences by requiring sports wagering advertising be placed only where at least 73.6 percent of the

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<sup>165</sup> *Id.*

<sup>166</sup> See Ben MacLean & Whitney Fore, *The SAFE Bet Act: Not-So-Safe from Tenth Amendment Issues?*, ZWILLGEN (Oct. 10, 2024), <https://www.zwillgen.com/> [https://perma.cc/7PJA-LGR2].

<sup>167</sup> See Conrad, *supra* note 48.

<sup>168</sup> *Id.*

<sup>169</sup> Sadie Sand, *Courtside to Courtroom: Examining Online Sports Gambling, Liability Litigation, and the Need for Congressional Reform*, 93 U. CIN. L. REV. 867 (2025).

<sup>170</sup> *Id.*

<sup>171</sup> *AGA Responsible Marketing Code for Sports Wagering*, AM. GAMING ASS'N, <https://www.americangaming.org/> [https://perma.cc/5582-ADZU].

audience is reasonably expected to be of legal gambling age, prohibits college partnerships promoting sports wagering, bans all use of “risk free” language in advertising, and imposes age restrictions for individuals featured in advertisements.<sup>172</sup> While representing industry recognition of advertising concerns, voluntary codes face inherent limitations. Compliance depends on industry good faith, enforcement mechanisms lack governmental authority, and competitive pressures may incentivize operators to exploit ambiguities or withdraw from voluntary commitments. Moreover, self-regulatory initiatives may function primarily to forestall more stringent government regulation rather than meaningfully address public health concerns.

These competing approaches reflect different views about regulatory architecture. Federal legislative proposals prioritize uniform national standards but confront constitutional constraints and political opposition from states defending regulatory autonomy. Academic proposals emphasize targeted restrictions designed to pass constitutional scrutiny while protecting vulnerable populations through agency action. Industry self-regulation offers flexibility and avoids First Amendment concerns but provides limited enforcement mechanisms and depends on voluntary compliance. The optimal regulatory framework likely requires elements from each approach: clear statutory prohibitions on the most harmful practices, industry codes that operationalize broad regulatory principles, and enforcement mechanisms that balance constitutional protections with public health imperatives. In this vein, the subsequent subsections propose two headings of practical, but impactful, regulatory reform.

## B. DIGITAL PLATFORM ADVERTISING LIMITATIONS

Digital advertising’s targeting capabilities and youth accessibility necessitate platform-specific restrictions addressing unique risks while respecting commercial speech protections. These restrictions must account for the judicial skepticism toward content-based speech regulations<sup>173</sup> while recognizing states’ substantial

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<sup>172</sup> *Id.*; Dara Cohen, *New Updates to AGA Responsible Marketing Code for Sports Wagering Prohibit “Risk Free,” Enhance College-Aged Protections*, AM. GAMING ASS’N (Mar. 28, 2023), <https://www.americangaming.org/> [<https://perma.cc/WQA7-RDNF>].

<sup>173</sup> See Nat Stern & Mark J. Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171 (2013); see also Viktor Mayer-Schönberger & Terece E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT’L & COMPAR. L. REV. 59 (1995).

interests in protecting minors and preventing manipulation of vulnerable populations.

Properly framed age-gating requirements constitute permissible speech restrictions under the *Reno v. ACLU* framework for protecting minors online.<sup>174</sup> While *Reno* struck down a broad prohibition on indecent content accessible to minors,<sup>175</sup> the Court explicitly recognized “the governmental interest in protecting children from harmful materials” is legitimate and compelling.<sup>176</sup> The decision faulted the statute's overbreadth and vagueness rather than rejecting age-based access restrictions categorically.<sup>177</sup> Age-gating sports betting advertisements to verified adults satisfies this requirement by targeting the specific harm (youth exposure) without prohibiting advertising to adults.

Restrictions must avoid the constitutional defects identified in *Lorillard Tobacco Co. v. Reilly*,<sup>178</sup> where the Court struck down Massachusetts regulations prohibiting outdoor tobacco advertising within 1,000 feet of schools and playgrounds. The Court in *Lorillard* found these restrictions excessively broad because they prohibited advertising to adults in substantial portions of major cities, effectively functioning as near-total bans in certain areas.<sup>179</sup> Thus, the restrictions must be narrowly tailored to the specific context where youth exposure risks are substantial rather than imposing geographic blanket prohibitions.

Regulations should also prohibit use of algorithms and artificial intelligence to identify and target individuals exhibiting signs of problem gambling or those who have visited problem gambling resources. This restriction addresses a category of commercial speech that, while not false or misleading in the traditional sense, exploits known vulnerabilities to encourage harmful behavior.<sup>180</sup> When advertising employs sophisticated algorithms to exploit individual psychological vulnerabilities, it no longer serves an informational function but becomes manipulation. States possess substantial interests in preventing such manipulation and protecting vulnerable populations from predatory marketing practices.

States should consider limiting push notifications from sports betting applications to one promotional message per user per week

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<sup>174</sup> *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844 (1997).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 875.

<sup>177</sup> *Id.* at 884.

<sup>178</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>179</sup> *Id.*

<sup>180</sup> *See Schuette et al.*, *supra* note 151.

and ban notifications triggered by live game events. These restrictions address the uniquely intrusive nature of push notifications that interrupt users' activities and create urgency inconsistent with deliberative decision-making. Push notification restrictions arguably satisfy *Central Hudson* scrutiny. States have substantial interests in preventing aggressive marketing tactics that exploit urgency and real-time game excitement to encourage impulsive betting. The restrictions directly advance these interests by limiting the volume and timing of promotional interruptions while preserving operators' ability to communicate with users through in-app messaging and other less intrusive channels.

### C. SUBSTANTIVE CONTENT STANDARDS

Most states should also establish best practices for clear content standards prohibiting specific categories of false, misleading, or harmful advertising. In particular, regulations should prohibit advertisements that: (1) describe bets as "risk free," "free," or "no sweat" when users must wager their own funds; (2) suggest gambling provides reliable income or solves financial problems; (3) use countdown timers or urgency language designed to prevent deliberative decision-making; (4) employ celebrity or athlete endorsements without prominent responsible gambling messaging; and (5) contain imagery, music, or themes designed primarily to appeal to minors.

These content restrictions are potentially constitutionally defensible on multiple grounds. First, advertisements describing wagers as "risk free" when users must stake their own money are inherently misleading commercial speech that receives no First Amendment protection under *Central Hudson's* first prong.<sup>181</sup> With a "risk free" bet, users only receive a free betting credit if the initial bet loses. This credit must be played through and win to create withdrawable money. If this second-order credited bet loses, the initial stake is completely lost. It is not risk free. The Supreme Court has consistently held "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."<sup>182</sup> Even under the more protective framework suggested by some recent decisions, misleading commercial speech remains unprotected.

Second, restrictions on urgency-based advertising and financial-solution messaging address advertising techniques that, while potentially containing true factual statements, are structured

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<sup>181</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

<sup>182</sup> *Id.* at 563.

to manipulate decision-making processes in ways inconsistent with informed consumer choice. The governmental interest in preventing consumer manipulation through deceptive framing is substantial and well-established.<sup>183</sup> These restrictions directly advance that interest by prohibiting specific manipulative techniques while permitting straightforward factual advertising about odds, game availability, and bonus terms. The restrictions are narrowly tailored because they target particular harmful practices rather than imposing broad content prohibitions.

Third, restrictions on celebrity endorsements and youth-appealing content serve the compelling interest in protecting minors. Research demonstrates celebrity endorsements and youth-oriented imagery increase advertising's appeal to minors and influence youth gambling attitudes.<sup>184</sup> The restrictions are appropriately tailored because they prohibit only endorsements lacking responsible gambling messaging and content specifically designed to appeal primarily to minors, not celebrity appearances altogether or youthful imagery incidentally present in advertising targeted to adults.

## VII. CONCLUSION

The post-*Murphy* expansion of online sports betting has generated new challenges for advertising regulation. States confront questions about appropriate restrictions on promotional content that implicates tensions between commercial speech protections, public health objectives, and revenue generation imperatives. This Article's analysis of advertising regulations across operational jurisdictions reveals substantial variation in regulatory approaches, from comprehensive frameworks imposing detailed requirements to minimal structures deferring almost entirely to voluntary compliance.

Several findings emerge from this analysis. First, advertising regulation varies dramatically across states, reflecting genuine

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<sup>183</sup> See, e.g., Jennifer L. Pomeranz, *United States: Protecting Commercial Speech under the First Amendment*, 50 J.L., MED. & ETHICS 265 (2022); see also Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006); see also Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539 (2012).

<sup>184</sup> See, e.g., DAVID KORN ET AL., COMMERCIAL GAMBLING ADVERTISING: POSSIBLE IMPACT ON YOUTH KNOWLEDGE, ATTITUDES, BELIEFS AND BEHAVIOURAL INTENTIONS (2005).

disagreement about optimal policy and different weighting of competing values. Second, constitutional constraints under the commercial speech doctrine substantially shape regulatory possibilities, requiring restrictions satisfy *Central Hudson's* intermediate scrutiny test. Third, common elements including prohibitions on false advertising and age-targeting restrictions appear across most jurisdictions despite variation in specific requirements.

These findings yield several implications for policy and scholarship. States with minimal regulatory frameworks should consider whether current approaches adequately address youth exposure and problem gambling concerns, particularly given accumulating evidence about advertising's harmful effects. States with moderate frameworks might examine whether specific targeted restrictions (such as inducement-promotion prohibitions) could strengthen consumer protection without imposing excessive burdens on operators or raising serious constitutional concerns.

Digital advertising's personalization capabilities, behavioral targeting, and algorithmic delivery create novel questions about manipulation and consumer autonomy that existing doctrine may inadequately address. Future scholarship should examine whether *Central Hudson's* framework developed for traditional advertising remains appropriate for algorithmic targeting that exploits individual psychological vulnerabilities.

Additionally, litigation may clarify constitutional boundaries for advertising restrictions. If states implement more comprehensive content regulations, operators may mount First Amendment challenges that would test *Central Hudson's* application to sports betting advertising. Such litigation could produce judicial guidance about permissible regulatory approaches.

The sports betting advertising landscape remains in flux. States continue to authorize online wagering, operators continually develop new promotional strategies, and public concern about problem gambling intensifies as evidence of gambling-related harms accumulates. In this environment, effective regulation requires balancing multiple competing values: protecting consumers while respecting commercial speech rights, generating tax revenues while addressing public health concerns, and maintaining competitive markets while preventing harmful practices.

This Article has argued that practical, realistic, and well-designed advertising restrictions can help achieve this balance. Sports betting advertising shapes millions of Americans' exposure to gambling opportunities and influences normative attitudes toward betting as a recreational activity. Permissive advertising

regulation may normalize gambling in ways that increase problem gambling prevalence and associated social costs. Conversely, overly restrictive regulation may violate constitutional rights, inhibit legitimate commercial activity, and drive consumers toward unregulated offshore operators or prediction markets where states do not have as predictable revenues. The stakes of getting it right are significant.



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**WRONG NOTES: COPYRIGHT RISKS FOR BAR AND  
RESTAURANT OWNERS**

CHRISTA M. CAIN\*

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## INTRODUCTION

Owning a bar or restaurant is challenging. Inflation has created dramatic price increases for food and related items. Liquor licenses, employee wages, and other business costs put financial strain on restaurants, particularly those owned by individuals or small businesses. One essential aspect of a food or drink establishment is the atmosphere. Customers unconsciously make choices based on the atmosphere. Frequently, business owners seek to provide a unique customer experience that involves inviting interior design, lighting, seating, customer service, and especially background music.

Music plays a key role in establishing the atmosphere of a bar or restaurant. It shapes customers' perceptions about the dining experience.<sup>1</sup> Background music has a significant influence on the moods, thoughts, and behaviors of customers.<sup>2</sup> A high-quality playlist attracts more guests and leads to loyal customers.<sup>3</sup> The ambience of a bar or restaurant plays an essential role in encouraging customers to return and spend more money.<sup>4</sup> For example, a study found sales increased by 9.1% when a restaurant plays a playlist with hit songs that were selected to fit the particular restaurant's brand.<sup>5</sup> Another study found 60% of restaurant patrons would pay for more food and drinks in an environment with enjoyable background music.<sup>6</sup>

However, playing background music comes with associated fees and risks.<sup>7</sup> Many musical compositions are protected under copyright laws.<sup>8</sup> The music industry depends on copyright to protect and promote its creations.<sup>9</sup> Bar and restaurant owners face

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<sup>1</sup> *How Restaurants Can Use Music to Increase Customer Retention*, SONOS, <https://www.sonos.com/> [<https://perma.cc/4J2E-LSKF>].

<sup>2</sup> *Id.*

<sup>3</sup> *See Why do restaurants play music? The science of music and restaurant sales*, SOUNDTRACK (Jan. 29, 2024), <https://www.soundtrackyourbrand.com/> [<https://perma.cc/87DY-G42T>].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *5 Legal Considerations for Restaurant Background Music*, TASTYIGNITER, <https://tastyigniter.com/> [<https://perma.cc/A7V4-AQ5C>].

<sup>8</sup> 17 U.S.C. § 102(a)(2).

<sup>9</sup> *See 6 Basics of Music Copyright Law: What It Protects and How to Copyright a Song*, SOUNDCHARTS (Dec. 31, 2023), <https://soundcharts.com/> [<https://perma.cc/G5H2-MPTM>].

significant costs when playing music to ensure they comply with the law.<sup>10</sup>

If a bar or restaurant owner plays a copyrighted song without permission, they may violate copyright law. Performing Rights Organizations (PROs) play a crucial role in protecting music rights.<sup>11</sup> PROs monitor businesses and ensure they are complying with copyright law.<sup>12</sup> PROs actively police bars and restaurants looking for potential infringers and take legal action against them.<sup>13</sup> Any bar or restaurant that does not purchase the appropriate music licenses is a potential target of a PRO lawsuit.<sup>14</sup>

Recently, Bourbon Jacks, an American tavern, known for its country rock theme and live music, was a victim of a PRO.<sup>15</sup> In March 2024, a PRO sued Bourbon Jacks in the U.S. District Court for the District of Arizona for allegedly infringing eight copyrighted songs.<sup>16</sup> According to the complaint, despite receiving multiple warning letters, the tavern remained unconcerned about the urgency of needing a license.<sup>17</sup> Eventually, the PRO filed a lawsuit against Bourbon Jacks claiming a significant amount of damages because of its unauthorized performances.<sup>18</sup>

Bourbon Jacks, like many businesses, depends on its atmosphere to attract customers. With many competing bars, restaurants, and taverns, it created a distinct environment to enhance its customers' experiences and increase sales. However, Bourbon Jacks' fatal decision to ignore the importance of a license led to costly consequences. Such a case highlights the importance of complying with copyright laws.

This note aims to explore the legal risks and challenges associated with bar and restaurant owners using music in their establishment. First, this note analyzes the goals of copyright and the balance between public accessibility and incentivizing creativity. It will discuss Congress's attempt of limiting the right to perform and the "small business exemption." After, it will illustrate how failing to purchase music licenses may result in significant

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<sup>10</sup> 5 *Legal Considerations for Restaurant Background Music*, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Complaint at 1, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Mar. 18, 2024).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

consequences through examining Bourbon Jacks' current situation and other business owners who have faced similar situations. After examining situations like Bourbon Jacks', this note will discuss bar and restaurant owners' options that can help reduce costs while also complying with the current law. To conclude, this note will discuss the future of copyright law and how the balance could potentially shift.

## I. COPYRIGHT LAW FOR BARS AND RESTAURANTS

### A. MUSIC PROTECTION UNDER COPYRIGHT LAW

Copyright law lies at the heart of creativity. Creativity itself is the process of bringing something new into being.<sup>19</sup> It involves thinking and producing. Naturally, society flourishes from creativity as it opens more doors for knowledge, arts, culture, problem solving, and innovation.<sup>20</sup> Copyright is a type of intellectual property which protects and promotes human creative works. It extends to all types of original creations "fixed in any tangible medium of expression."<sup>21</sup> Typical categories of copyrighted works include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures; sound recordings; and architectural works.<sup>22</sup> Though this list is non-exhaustive, copyright protection never extends to ideas.<sup>23</sup>

Copyright is essential to societal progress. It was established in England in the late fifteenth century and later included in the U.S. Constitution by the Founders.<sup>24</sup> Copyright protections were included in the Constitution to advance society by creating a market for expressive works.<sup>25</sup> The Founders considered copyright as property. John Adams famously said, "Property must be secured, or

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<sup>19</sup> Anza Sarfraz, *What is Creativity*, MEDIUM (May 18, 2019), <https://medium.com/> [<https://perma.cc/58XW-2ZH5>].

<sup>20</sup> Jessica Carson, *Why is Creativity Important and What Does it Contribute?*, NAT'L YOUTH COUNCIL IR., <https://www.youth.ie/> [<https://perma.cc/7K3D-Q895>].

<sup>21</sup> 17 U.S.C. § 102(a).

<sup>22</sup> *Id.*

<sup>23</sup> 17 U.S.C. § 102(b).

<sup>24</sup> *Copyright Timeline: A History of Copyright in the United States*, ASS'N RSCH. LIBRS., <https://www.arl.org/> [<https://perma.cc/9NDL-UUWQ>].

<sup>25</sup> Terry Hart, *Copyright and the Historical Record*, COPYRIGHT ALL. (Aug. 22, 2017), <https://copyrightalliance.org/> [<https://perma.cc/Q5DQ-UBH2>].

liberty cannot exist.”<sup>26</sup> Therefore, the Constitution granted authors exclusive rights to establish a marketplace for creative works.<sup>27</sup> Moreover, U.S. copyright law stems from Congress’s enumerated power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>28</sup> From this enumerated power, Congress creates copyright systems that incentivize creative works for the public benefit.<sup>29</sup>

Extending copyright to creative works is justified by two main policies. First, creators have a moral right to their original works.<sup>30</sup> Creators have the right to be attributed to their creations.<sup>31</sup> Therefore, they should be permitted to prevent others from using their work.<sup>32</sup> Second, copyright law relies on economic incentives that benefit social progress.<sup>33</sup> Copyright law grants creators exclusive rights to their creations which enable them to receive compensation for their original works.<sup>34</sup> Economic incentives, in turn, encourage more creators to produce more work.<sup>35</sup> Therefore, this incentive benefits social progress by developing more art, knowledge, and culture.<sup>36</sup>

Ultimately, anyone can own copyright. Copyright protection begins the moment a work is fixed in a medium with at least a minimal degree of originality.<sup>37</sup> Creators can register their works with the U.S. Copyright Office to ensure further protections; however, registration is not necessary. Instead, registration is only necessary to enforce exclusive rights through litigation.<sup>38</sup> A copyright owner is granted exclusive rights to reproduce, to distribute, to prepare derivative works, to perform, and to display

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> U.S. CONST. art. I, § 8, cl 2.

<sup>29</sup> *Copyright Timeline: A History of Copyright in the United States*, *supra* note 24.

<sup>30</sup> *Copyright basics*, UNIV. OF MINN. LIBRS., [https://www.lib.umn.edu/\[https://perma.cc/9Q64-JBFS\]](https://www.lib.umn.edu/[https://perma.cc/9Q64-JBFS]).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Copyright basics*, *supra* note 30.

<sup>37</sup> *What is Copyright?*, U.S. COPYRIGHT OFF., [https://www.copyright.gov/\[https://perma.cc/J6KS-6AB5\]](https://www.copyright.gov/[https://perma.cc/J6KS-6AB5]).

<sup>38</sup> 17 U.S.C. § 411.

their works.<sup>39</sup> Typically, copyright protections exist for the creator's lifetime plus 70 years.<sup>40</sup> After the copyright expires, the work enters the public domain.<sup>41</sup> Once a work enters the public domain, anyone can freely use it without facing risks of copyright infringement.<sup>42</sup>

## B. SINGING IN THE SHOWER V. PERFORMING IN PUBLIC - EXCEPTIONS AND LIMITATIONS TO COPYRIGHT RIGHT LAW

Though anyone can be a copyright owner, anyone may also be a copyright user. Reading a book, watching a movie, listening to a song, or playing a video game may implicate copyright law.<sup>43</sup> Every time a bar or restaurant plays a non-public domain song on the radio or through its speakers, those works are also protected by copyright. Balancing the line between protecting copyright and promoting the public good is difficult. Courts and lawmakers struggle with finding this balance, primarily because they must balance the fruits that copyright owners promote while incentivizing more creativity. Under Sections 107–122 of the Copyright Act, Congress created a set of exceptions and limitations to the exclusive rights of a copyright owner.<sup>44</sup> The exceptions range from fair use to limitations on performances and displays.

### 1. COPYRIGHT OWNERS CAN PROHIBIT PUBLIC PERFORMANCES OF THEIR WORKS IN BARS AND RESTAURANTS

Under Section 106, a copyright owner has the exclusive right to perform their work publicly.<sup>45</sup> Third parties cannot perform the work publicly without infringing on the owner's exclusive right. However, the meaning of "performing publicly" remains ambiguous. Situations such as overhearing someone sing in the shower, playing music at a party, or turning on the radio at their bar or restaurant raises questions about possible infringement.

The Copyright Act defines the right to perform as "to recite, render, play, dance, or act" the work, "either directly or by means of any device or process."<sup>46</sup> This definition remains as simple as it sounds; however, the distinction between a public performance and private performance is not as straightforward. A public performance can arise in multiple ways, including: (1) performing in any place

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<sup>39</sup> 17 U.S.C. § 106.

<sup>40</sup> *What is Copyright?*, *supra* note 37.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* Copyright law is not implicated if the work in question was created before 1926.

<sup>44</sup> 17 U.S.C. §§ 107–122.

<sup>45</sup> 17 U.S.C. § 106.

<sup>46</sup> 17 U.S.C. § 101.

open to the public; or (2) performing in a place where a substantial number of people outside a normal circle of a family and the performer's social acquaintances are gathered.<sup>47</sup> Courts interpret these statutory provisions while balancing the primary goals of copyright. For example, in *Twentieth Century Music Corp. v. Aiken*, the U.S. Supreme Court struggled to find a balance between defining a public performance and protecting the public benefit.<sup>48</sup>

## 2. *TWENTIETH CENTURY MUSIC CORP. V. AIKEN*

Imagine owning a small fast-food restaurant, turning on the radio, and suddenly finding the business is now facing a lawsuit for copyright infringement. Unfortunately, such a situation happened to George Aiken in the 1970s.<sup>49</sup> Aiken owned a small fast-food restaurant in Pittsburgh, Pennsylvania called "George Aiken's Chicken."<sup>50</sup> At the restaurant, customers carried out their food or ate quickly at the counters or booths.<sup>51</sup> Here, customers lingered in the restaurant anywhere from five to fifteen minutes.<sup>52</sup> Every morning, Aiken turned on the local radio which broadcasted music, news, entertainment, and commercial advertisements.<sup>53</sup> The radio was connected to four speakers in the ceiling and heard by Aiken, his employees, and customers coming in and out.<sup>54</sup>

On March 11, 1972, the radio unfortunately broadcasted two songs in Aiken's restaurant which were licensed by the American Society of Composers, Authors and Publishers (ASCAP).<sup>55</sup> The two songs played were "The More I See You," owned by Twentieth Century Music and "Me and My Shadow" by Mary Bourne.<sup>56</sup> ASCAP is an association which licenses the performing rights of its members. The radio station held music licenses from ASCAP, but Aiken did not.<sup>57</sup> Shortly after, Aiken received a lawsuit alleging he had infringed ASCAP's licensed copyrighted music when he played his radio in the restaurant.<sup>58</sup> ASCAP argued Aiken infringed because

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<sup>47</sup> *Id.*

<sup>48</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 152 (1975) [hereinafter *Aiken*].

<sup>49</sup> *Id.* at 152–53.

<sup>50</sup> *Id.* at 152.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Aiken*, 422 U.S. at 152.

<sup>55</sup> *Id.* at 152–53.

<sup>56</sup> *Id.* at 153.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

his radio performed the copyrighted work to the public in a place for profit.<sup>59</sup>

In hearing this case, the Supreme Court acknowledged there is a balance between “competing claims upon the public interest.”<sup>60</sup> The Court stated “[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”<sup>61</sup> Moreover, U.S. copyright law must preserve the monopoly over creative works while incentivizing and stimulating artistic creativity for the general public.<sup>62</sup> However, technological changes lead to ambiguous terms within the Copyright Act.<sup>63</sup> Therefore, the Court determined the act must be construed to serve the basic purpose of securing a fair return for creators’ labors which ultimately incentivizes artistic creativity.<sup>64</sup>

The Court considered whether a radio reception in Aiken’s restaurant was considered a performance under the current statute.<sup>65</sup> Radio broadcasting is intended to reach a large audience; therefore, it is performing a musical composition. However, the Court considered whether those who listen to the performance are also considered infringers. The Court decided certainly not.<sup>66</sup> Listeners do not perform the copyrighted work. After considering the previous precedent,<sup>67</sup> the Court analogously concluded, by merely turning on the radio in the restaurant, Aiken did not perform the copyrighted music.<sup>68</sup>

The Court found if they held any different it “would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.”<sup>69</sup> If turning on the radio resulted in a performance, there would be no way to protect oneself from liability

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<sup>59</sup> *Aiken*, 422 U.S. at 153.

<sup>60</sup> *Id.* at 156.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Aiken*, 422 U.S. at 156.

<sup>65</sup> *Id.* at 157.

<sup>66</sup> *Id.* at 159.

<sup>67</sup> *See generally* Fort. Corp. v. United Artists Television Inc., 392 U.S. 390 (1968) (holding that there is a distinct line between broadcasters who perform and viewers who do not perform); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974) (finding that extending the distant signal of a CATV system did not constitute as performing the copyrighted work).

<sup>68</sup> *Aiken*, 422 U.S. at 162.

<sup>69</sup> *Id.*

except by keeping the radio turned off.<sup>70</sup> Therefore, someone in Aiken's position could not be considered performing the work. Furthermore, this would ultimately disrupt the balance of protecting economic interests and allowing the public to benefit from creative works.<sup>71</sup>

### 3. *THE SMALL BUSINESS EXEMPTION*

As illustrated, it is difficult to balance between rewarding a creator for their labor and preventing the formation of oppressive monopolies that may potentially hinder the public good. Cases like *Twentieth Century Music Corp. v. Aiken* (Aiken Decision) led Congress to rethink the balance. In 1976, Congress enacted a revision to the Copyright Act.<sup>72</sup> This revision included an attempt to exempt small commercial establishments from music licensing and legal consequences along with some limitations.<sup>73</sup>

Ultimately, Congress responded to the Aiken Decision by adopting the outcome.<sup>74</sup> However, it rejected the Court's new interpretation of a performance.<sup>75</sup> Congress determined Aiken's actions were infringing; nevertheless, situations like his should be exempt.<sup>76</sup> Therefore, if a business owner like Aiken turns on a radio in their establishment it is considered a performance. However, this infringing action may not require a music license.<sup>77</sup>

Congress passed 17 U.S.C. § 110 to provide exemptions and limitations to the exclusive right to perform. Specifically, Section 110(5) is often referred to as the "small business exemption."<sup>78</sup> This exemption is aimed at small bars, taverns, cafes, and restaurants.<sup>79</sup> It enables establishments to play background music from radio and

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 163–64.

<sup>72</sup> Peggy H. Luh, *Pay or Don't Play: Background Music and the Small Business Exemption of Copyright Law*, 16 LOY. L.A. ENT. L. REV. 711, 718 (1996).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; see generally *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) (holding a broad meaning of a performance).

<sup>76</sup> Luh, *supra* note 72.

<sup>77</sup> See 17 U.S.C. § 110(5).

<sup>78</sup> CONG. RSCH. SERV., COPYRIGHT LAW'S "SMALL BUSINESS EXCEPTION": PUBLIC PERFORMANCE EXEMPTIONS FOR CERTAIN ESTABLISHMENTS, RS21107 (2003).

<sup>79</sup> *Id.*

television programs without needing a music license if they fall within the certain requirements listed in the exemption.<sup>80</sup>

#### 4. *THE THREE MAGIC NUMBERS – 4, 6, & 3,750*

Section 110(5)(B)(ii) of the revised Copyright Act specifically lays out the exemption for food service or drinking establishments.<sup>81</sup> This section indicates an establishment is exempt if it is less than 3,750 gross square feet of space (not including the area for customer parking) and communicates a transmission of a musical work.<sup>82</sup> An establishment greater than 3,750 gross square feet of space can be exempt if the transmission is not communicated by more than six loudspeakers with no more than four located in any single or adjoining room.<sup>83</sup> Therefore, a food service or drinking establishment must abide by the three magic numbers - four, six, and 3,750 to avoid liability.

Unfortunately, the “small business exception” is counterintuitive because it does not necessarily protect smaller businesses from all types of transmissions of copyrighted works. Section 110(5)(B)(ii) only applies to transmissions from radio or television programs. Therefore, bar and restaurant owners are not necessarily protected by simply complying with the four, six, and 3,750 rules. If a bar or restaurant owner plays music off their phone or iPad using a streaming service (such as Spotify, Pandora, or Apple Music), they may still face the full risk of legal consequences.

## II. CONSEQUENCES OF FAILING TO OBTAIN MUSIC LICENSES

### A. PERFORMING RIGHTS ORGANIZATIONS

A Performing Rights Organization (PRO) acquires copyright licenses from songwriters, composers, and music publishers.<sup>84</sup> Music artists join a PRO to protect their copyrighted works from infringement. Notably, the PRO acts as an intermediary between businesses and its members to protect copyrighted works more conveniently.<sup>85</sup> Business owners purchase blanket licenses from

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<sup>80</sup> *Id.*

<sup>81</sup> 17 U.S.C § 110(5)(B)(ii).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *What is a Performing Rights Organization (PRO)?*, SESAC (May 5, 2022), <https://www.sesac.com/> [<https://perma.cc/MET3-7VLH>].

<sup>85</sup> *The National Restaurant Association Answers 11 Questions About Music Licensing For Restaurants*, RX MUSIC (Mar. 20, 2015), <https://rxmusic.com/> [<https://perma.cc/3Z4N-WVM3>].

PROs. Accordingly, this grants them permission to use any music represented by that organization.<sup>86</sup> The PRO then distributes royalty fees to its affiliated members.<sup>87</sup>

The U.S. has at least three major PROs including Broadcast Music Inc. (BMI), American Society of Composers, Authors, and Publishers (ASCAP), and Society of European Stage Authors and Composers (SESAC).<sup>88</sup> Each of these organizations operate in a similar manner; however, each of them may represent a different group of members.<sup>89</sup> Therefore, a business owner cannot simply purchase one blanket music license to protect themselves from liability. Rather, depending on which works or artists the restaurant chooses to play, the owner may need multiple licenses from different organizations to avoid facing legal consequences.

With millions of copyrighted songs, it can easily become confusing whether a business is liable for copyright infringement. Nevertheless, PROs provide a more convenient way to access music without having to pay individual fees.<sup>90</sup> Thus, the PRO blanket authorization enables a more convenient and less expensive approach to playing music.<sup>91</sup>

Bar and restaurant owners can obtain blanket licenses using a form on a PRO's website.<sup>92</sup> Each establishment has its own separate rate for the blanket licenses. Most rates fluctuate based on factors such as the establishment's size, the average number of occupants, and the type of music being played.<sup>93</sup> For example, a small business owner could pay for a license from BMI ranging from \$250 to \$400 a year, while a larger business owner could potentially have to pay over \$2,000 a year.<sup>94</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 17 U.S.C. § 101; Jessica Klausung, *The Three Main PROs - ASCAP, BMI and SESAC, ON THE FLIP SIDE MUSIC* (Sep. 18, 2023), <https://www.ontheflipsidemusic.com/> [<https://perma.cc/J4MX-WLYP>].

<sup>89</sup> See, e.g., *Music Licensing for Bars, Restaurants, Breweries, Wineries and other Eating and Drinking Establishments*, BMI, <https://www.bmi.com/> [<https://perma.cc/N9XH-DZBC>].

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Music License Cost Guide*, PANDORA CLOUDCOVER, <https://cloudcovermusic.com/> [<https://perma.cc/E3EN-LEUD>].

<sup>94</sup> *Id.*

## B. THE WARNING LETTER

PROs do not take infringement lightly. Rather, they continuously identify potential infringers and demand fee payments. Many business owners plug in their phone and play their favorite playlist without realizing the costly legal risks. Nearly 88 percent of businesses use background music daily, but only 17 percent actually have a music license for it.<sup>95</sup> On an average business day, a PRO will send a “secret customer” into the bar or restaurant to listen and record the music they hear, the restaurant’s square footage, the number of occupants coming in and out, and the number of speakers.<sup>96</sup> Shortly after, the business owner will receive a warning letter stating they are in danger of violating the PRO.<sup>97</sup> Further, the PRO requests they pay a certain fee for a music license.<sup>98</sup>

Businesses may receive multiple warning letters. Unfortunately, some owners do not understand the urgency for addressing these letters. Instead, they remain mistakenly unconcerned about it.<sup>99</sup> Ignoring the warning letters could result in even greater legal fees. Courts have great discretion in determining the amount of damages a business owner may owe.<sup>100</sup> PROs may find it difficult to prove actual losses and profits, so they will sue the business under the statutory damages.<sup>101</sup> Under these damages, an infringer could potentially have to pay anywhere from \$750 to \$30,000 for performing a single copyrighted work.<sup>102</sup>

## C. BMI V. BOURBON JACKS AMERICAN TAVERN

Recently, Bourbon Jacks American Tavern (Bourbon Jacks) located in Chandler, Arizona fell victim to the unfavorable warning letters.<sup>103</sup> In March 2024, BMI filed a lawsuit against Bourbon Jacks for copyright infringement. BMI alleges the restaurant owners

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<sup>95</sup> *The Practical Guide to Legally Play Music in your Business*, SOUNDSUIT, <https://soundsuit.fm/> [<https://perma.cc/2LE2-9DRC>].

<sup>96</sup> Steven L. O’Donnell, *Does your business have a music license?*, SAXTON & STUMP LAWS. & CONSULTANTS (Mar. 11, 2024), <https://www.saxtonstump.com/> [<https://perma.cc/Y7E8-5S54>].

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Ganka Hadjipetrova, *When Should a Small Business Pay ASCAP or BMI?*, PALO ALTO AREA BAR ASS’N (Oct. 13, 2011), <https://www.paaba.org/> [<https://perma.cc/69C5-7U2V>].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Complaint at 1, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Mar. 18, 2024).

willfully infringed eight separate copyrighted works protected by BMI, causing “great and incalculable damage.”<sup>104</sup>

Bourbon Jacks is a typical American-styled tavern.<sup>105</sup> It serves a wide collection of bourbon, whiskey, local craft beer, and specialized cocktails.<sup>106</sup> It also serves food such as wings, burgers, sandwiches, and much more.<sup>107</sup> The most attractive features of the tavern are its live music and Sunday night bingo.<sup>108</sup>

One average day at the tavern, BMI sent in a “secret shopper” to take note of Bourbon Jacks’ potential infringing performances.<sup>109</sup> The “secret shopper” noted every song played that BMI held a license for.<sup>110</sup> Following, BMI filed a lawsuit on behalf of its effected members. In the complaint, BMI alleges Bourbon Jacks willfully infringed eight unlicensed musical compositions.<sup>111</sup> Such compositions included Johnny Cash’s “Folsom Prison Blues” and “I Walk The Line.”<sup>112</sup> Others were June Carter Cash’s “Ring Of Fire;” John Rzeznik’s “Name;” Fall Out Boy’s “Sugar We’re Going Down;” Noel Gallagher’s “Wonderwall;” Bridgette Tatum & Danny Myrick’s “She’s Country;” and Elliot T. Straite’s “Poison.”<sup>113</sup>

The complaint further states Bourbon Jacks received multiple warning letters and failed to purchase the required license.<sup>114</sup> Therefore, BMI is seeking statutory damages pursuant to 17 U.S.C § 504(c) along with reasonable attorneys’ fees and interest.<sup>115</sup> With the court’s discretion, Bourbon Jacks could potentially pay anywhere from \$6,000 to \$240,000 just in statutory damages.

On March 15, 2024, BMI filed this complaint against Bourbon Jacks initiating the action.<sup>116</sup> A few months later, the parties stipulated to allow Bourbon Jacks to extend its time to respond to

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<sup>104</sup> *Id.*

<sup>105</sup> Bourbon Jacks American Tavern, TRIPADVISOR, <https://www.tripadvisor.com/> [<https://perma.cc/S8ZU-2Z3G>].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Complaint at 1, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Mar. 18, 2024).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 4.

<sup>112</sup> *See id.* at Schedule Claim No. 1–2.

<sup>113</sup> *See id.* at Schedule Claim No. 3–8.

<sup>114</sup> Complaint at 1, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Mar. 18, 2024).

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.*

the complaint in hopes of finding an amicable resolution.<sup>117</sup> The parties continued their efforts to resolve the matter and stipulated again requesting an additional extension.<sup>118</sup> The goal was to continue negotiations without requiring Bourbon Jacks to incur the costs associated with filing a formal response to the claims.<sup>119</sup> The parties claimed in their request that they anticipated a settlement could be reached by June 10, 2024.<sup>120</sup> Unfortunately, the parties' efforts did not result in a settlement by the anticipated date.<sup>121</sup> On August 9, 2024, BMI amended its complaint adding an additional defendant, a second bar, and two more infringed works.<sup>122</sup> As a result of BMI's amended complaint, the parties continued their negotiations.<sup>123</sup> On October 28, 2024, the parties reached a resolution and stipulated to a consent judgment.<sup>124</sup> Ultimately, Bourbon Jacks settled with BMI for \$114,000.<sup>125</sup>

Bourbon Jacks relies heavily on its musical atmosphere.<sup>126</sup> The bar and restaurant market is competitive; therefore, Bourbon Jacks spent a considerable amount of time creating an atmosphere that makes it stand out. It has established itself as “an all-American tavern for those who love to live life a little too loud.”<sup>127</sup> It “believe[s] in Rock and Roll and [is] proud to be [an] American badass.”<sup>128</sup> Primarily, customers are attracted to the restaurant's live performances while enjoying tasty food and drinks.<sup>129</sup> However,

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<sup>117</sup> Revised Stipulation for Filing Responsive Pleading-Second Request (Amended), *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. May 7, 2024).

<sup>118</sup> Stipulation for Filing Responsive Pleading-Third Request, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. May 17, 2024).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> First Amended Complaint, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Aug. 9, 2024).

<sup>122</sup> *Id.*

<sup>123</sup> Stipulation to Entry of Consent Judgment, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Oct. 28, 2024).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; see also Consent Judgment, *Broad. Music, Inc. v. Bourbon Jacks, LLC*, No. 2:24-cv-00567-MTL (D. Ariz. Oct. 28, 2024).

<sup>126</sup> Bourbon Jacks American Tavern, *supra* note 105.

<sup>127</sup> *Rebel & Rogue Social Hall*, VISIT CHANDLER ARIZONA, <https://www.visit Chandler.com/> [<https://perma.cc/CD4Q-V9PF>]. Bourbon Jacks American Tavern has since changed its name to Rebel & Rogue Social Hall.

<sup>128</sup> *Id.*

<sup>129</sup> See generally *Rebel & Rogue*, YELP, <https://www.yelp.com/> [<https://perma.cc/S5A2-U66V>] (describing customers' experiences with

Bourbon Jacks must pay the fees to keep its well-known and attractive ambience.

*BMI v. Bourbon Jacks* highlights why businesses like Bourbon Jacks must comply with copyright laws and obtain proper licensing. Failing to comply may result in costly legal fees and other avoidable consequences. As a result, of this lawsuit, Bourbon Jacks paid BMI substantial damages, thus, harming the business even further. PRO warning letters should never be taken lightly. Rather, they should be addressed promptly. Importantly, business owners must prioritize securing proper licensing to protect their establishments and ensure their continued success.

#### D. A RESTAURANT OWNER'S POV

Annually, bar and restaurant owners fork over thousands of dollars to PROs.<sup>130</sup> However, some must pay much more for failing to follow the rules. Owners often find themselves struggling to understand the multiple collecting agency system. As a result, many are in danger of violating the rules of multiple PROs.

John Vazzano, a restaurant owner in Connecticut, mentioned in a news report “he knew he had to pay the piper,” but did not realize he owed dues to multiple other PROs.<sup>131</sup> With each agency representing different artists, business owners are responsible for purchasing licenses from multiple PROs each year.<sup>132</sup> Therefore, individual licensing can be confusing. Bar and restaurant owners often find themselves violating PROs and facing lawsuits because of misunderstanding the system.

Owners like Vazzano who ignore the warning letters find themselves in difficult situations. Most owners settle with the collecting agency for a pricey amount. Like the majority of owners in these situations, Vazzano had no other choice but to settle with BMI for \$18,000.<sup>133</sup> Smaller bars and restaurants can find this amount of money to be burdensome.<sup>134</sup> It can force business owners to increase their prices just to pay their fees and keep their

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the restaurant and their love for the particular ambience. Consumers mention the ambience is “welcoming,” “such a cool place,” “a good time,” “great for live bands and whiskey.” One comment even said the restaurant is “the best downtown chandler has to offer.”).

<sup>130</sup> foxctvictory, *Special report: Local restaurants fined for playing music*, FOX61 (May 7, 2015, at 15:18 EDT), <https://www.fox61.com/> [<https://perma.cc/US6H-BMF8>].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

businesses alive.<sup>135</sup> However, this is far from what they could end up paying in legal fees.<sup>136</sup>

Constantly, bar or restaurant owners make difficult choices. They must decide how to best spend their limited resources. With rising food prices and increasing labor costs, a music license may not seem important.<sup>137</sup> However, when it comes to playing music in your establishment “an ounce of prevention is worth a pound of cure.”<sup>138</sup>

### III. STRATEGIC CHOICES

#### A. STREAMING FOR COMMERCIAL USE

In the digital world, copyrighted works are rarely bought but rather licensed.<sup>139</sup> Moreover, digital materials have consumed the first-sale doctrine.<sup>140</sup> Traditionally, the first-sale doctrine enables a buyer to transfer ownership of copyrighted works.<sup>141</sup> For example, if a consumer purchases a physical book, they are now the sole owner of said book. They can use the book, resell the book, or even throw away the book.

However, a digital marketplace completely changes the rules of copyright. Now, copyright owners can license their works without losing control of them.<sup>142</sup> When a purchaser clicks “buy,” they merely license the digital content rather than exchange ownership.<sup>143</sup> Such terms are often found in the fine print of the purchase.<sup>144</sup> Consumers are easily confused whether they own their digital material. Therefore, they may believe tapping “buy” or “download” grants them complete access to do what they want with the digital material. However, that is far from reality.

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<sup>135</sup> *See id.*

<sup>136</sup> *See* Hadjipetrova, *supra* note 100.

<sup>137</sup> Adam Barraza, *When It's Time to Pay the Piper: Music Licenses and Copyright Infringement*, AXLEY (June 14, 2024), [https://www.axley.com/\[https://perma.cc/6K9E-5AGH\]](https://www.axley.com/[https://perma.cc/6K9E-5AGH]).

<sup>138</sup> *Id.*

<sup>139</sup> Dan Gillmor, *In our digital world you don't own stuff, you just license it*, THE GUARDIAN (Apr. 5, 2013, 08:30 EDT), [https://www.theguardian.com/\[https://perma.cc/UH8E-GEN5\]](https://www.theguardian.com/[https://perma.cc/UH8E-GEN5]).

<sup>140</sup> *Id.*

<sup>141</sup> *See* 17 U.S.C. § 109(a).

<sup>142</sup> Amy Hebert, *Do you really own the digital items you paid for?*, FTC CONSUMER ADVICE (Apr. 17, 2024), [https://consumer.ftc.gov/\[https://perma.cc/2HDR-ZZQR\]](https://consumer.ftc.gov/[https://perma.cc/2HDR-ZZQR]).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

Such issues arise when consumers use personal music accounts for commercial purposes. An individual can freely listen to their Spotify or Pandora playlist while driving in their car, but if they play that same playlist at their business, they are now violating their license agreement.<sup>145</sup> For example, Spotify specifically lists in its terms and conditions that an account is only for personal use and not commercial use.<sup>146</sup> A Spotify account cannot be broadcasted publicly.<sup>147</sup> Therefore, bars and restaurants cannot use these accounts in their businesses.<sup>148</sup> Moreover, bar and restaurant owners must find alternative options that allow them to play music in their businesses while also keeping the costs down from multiple music licenses.

## B. PLAYING THE LEGAL GAME

Food prices, liquor licenses, and employee wages continue to limit the options for improving a business' ambience. Background music is essential for bars and restaurants, but it comes with significant licensing fees or potential legal risks. As a result, some establishments diligently follow the statute to make sure they are exempt from licensing, while others use third-party streaming services.

Under Section 110 of the Copyright Act, the law limits the reach of the right to perform.<sup>149</sup> The "small business exemption" protects certain businesses from purchasing a license if they are simply playing music from a radio or television.<sup>150</sup> For business owners of smaller restaurants, bars, or taverns looking to avoid licensing fees altogether, this approach is much more appealing. Smaller businesses may want to avoid paying extra fees because of the substantial costs in other parts of their business. If the establishment is less than 3,750 gross square feet, then there is no need to worry about any fees. However, if the bar or restaurant is more than 3,750 gross square feet, it must follow the four and six guidelines.

Another option to limit fees or legal risks is to play music that has entered the public domain.<sup>151</sup> Currently, any music written

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<sup>145</sup> *Spotify for Business + Alternative Options*, PANDORA CLOUDCOVER, <https://cloudcovermusic.com/> [<https://perma.cc/4X95-SJ5U>].

<sup>146</sup> *Spotify for public or commercial use*, SPOTIFY, <https://support.spotify.com/> [<https://perma.cc/3C6H-KUL3>].

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> 17 U.S.C. § 110.

<sup>150</sup> *Id.*

<sup>151</sup> Richard Stim, *Playing Music in Your Store: How to Avoid Paying for It!*, NOLO, <https://www.nolo.com/> [<https://perma.cc/4W53-WP6X>].

before 1928 is fair game.<sup>152</sup> If an owner's business atmosphere allows for it, playing classical music such as Beethoven or Mozart could save them hundreds by avoiding licensing fees.<sup>153</sup> Additionally, bar and restaurants can hire artists or bands that will play their original music.<sup>154</sup> Many new musicians are eager to play their own music in public and may agree to waive their performing rights fee.<sup>155</sup>

Though playing music from a personal streaming service is illegal, some third-party services grant commercial access. Services like Spotify and Pandora provide commercial accounts that offer business owners the opportunity to play their music legally.<sup>156</sup> These bigger third-party platforms have their own arrangements with PROs that simplify the process of streaming music in a business.<sup>157</sup> Popular business platforms include Pandora Cloudcover, Soundtrack, and Rockbot.<sup>158</sup>

A third-party streaming service is much more convenient than dealing directly with a PRO. Primarily, third-party platforms can offer services that PROs cannot.<sup>159</sup> Many of these platforms offer customized playlists, AI personalization, and detailed analytics.<sup>160</sup> Soundtrack, which is associated with Spotify, grants access to 100 million songs<sup>161</sup> across multiple PROs.<sup>162</sup> This platform provides business owners with access to a wide variety of playlists.<sup>163</sup> They can transfer their Spotify playlists from their personal accounts, play playlists personalized to specific businesses, and generate AI playlists.<sup>164</sup> Some other unique features of Soundtrack include playlist scheduling (users drop playlists into their calendar that automatically play), explicit filtering, and song blocking.<sup>165</sup>

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<sup>152</sup> *Id.*; see also PD INFO, <https://pdinfo.com/> [<https://perma.cc/GM65-K22W>] (offering a complete list of royalty free music).

<sup>153</sup> Stim, *supra* note 151.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Spotify for Business + Alternative Options*, *supra* note 145.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Music for your business*, SOUNDTRACK, <https://www.soundtrack.io/> [<https://perma.cc/U3KL-UN6E>].

<sup>162</sup> *Music Licensing in USA*, SOUNDTRACK, <https://www.soundtrack.io/> [<https://perma.cc/HU3V-R7TT>].

<sup>163</sup> *Music for your business*, *supra* note 161.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

Bar and restaurant owners have a variety of options available to them to help reduce significant fees. From following the “small business exemption” to using third-party streaming services, businesses can choose affordable alternatives to background music to help improve the overall ambience of their establishment.

#### IV. LOOKING TO THE FUTURE

##### A. THE FIGHT FOR RIGHTS

Whether to prohibit bars and restaurants from performing musical works is a legal and moral debate. Primarily, copyright law aims to strike the balance between encouraging creative works and promoting the public good. However, Congress struggles to develop fair systems that economically incentivize more creativity while also limiting creators’ rights for the public good. Therefore, balancing these interests often results in one side being left more vulnerable.

Looking back at the Aiken Decision, the Supreme Court interpreted the right to perform against the PRO.<sup>166</sup> Notably, the Court decided the right to perform should not extend to include turning on the radio.<sup>167</sup> It held such an interpretation tipped the balance against the public good.<sup>168</sup> The Court reasoned if turning on the radio constituted a performance, someone in Aiken’s position would have no way of protecting themselves from potential liability.<sup>169</sup> Even with a music license, they have no ability to foresee or control what the radio broadcasts.<sup>170</sup>

Congress responded by limiting the reach of the exclusive right to perform. Its 1976 revision cut out clear guidelines for using radio and TV broadcasts. The four, six, and 3,750 guidelines enable very small businesses like Aiken’s to be exempted from music licenses. Unfortunately, many small businesses exceed these requirements, even in small ways such as being 3,751 gross square feet and having one extra speaker. Moreover, it almost seems unreasonable to require these establishments to need music licensing while the others compliant with the requirements do not.

In 1993, Congress considered extending the “small business exemption.” The Public Accommodations Exception Act of 1993 introduced an amendment to the Copyright Act which extended the

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<sup>166</sup> *Aiken*, 422 U.S. at 159.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 162.

<sup>170</sup> *Id.*

exceptions and limitations to the right to perform.<sup>171</sup> Specifically, it aimed to exempt all restaurants, bars, taverns, and such like establishments from music licenses if they play background music from a radio.<sup>172</sup> The proposed act suggested a license should not be required when the performance is incidental to the establishment's main purpose and no direct charge is made to see or hear the transmission.<sup>173</sup> Furthermore, business owners argued the current law is confusing and causes hardship on bars, restaurants, and taverns.<sup>174</sup> However, despite the business owners' attempt, the act did not succeed.

Extending copyright protection favors the copyright owner, but limiting its reach favors the public. The Founders ensured Copyright protection in the Constitution because society flourishes from creativity.<sup>175</sup> With more creative works, society opens the doors for more knowledge, arts, culture, problem solving, and innovation. If too much protection is given to a creator's work, the public fears its enjoyment. However, if we do not give an adequate return to the musician, we may hinder the opportunity for more creativity. Typically, Congress favors copyright protection.<sup>176</sup> It believes the best way to "promote the progress of Sciences and useful Arts" is through protecting intellectual property rights.<sup>177</sup> As a result, the balance favoring PROs and musicians will likely continue. Therefore, bar and restaurant owners must learn to strategically navigate copyright laws to protect their establishments from costly legal and financial consequences.

Nevertheless, Congress is actively considering copyright issues. In 2024, Congress focused on categories such as Artificial Intelligence (AI), piracy, and U.S. Copyright Office (USCO) modernization.<sup>178</sup> Accordingly, Congress must work to update

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<sup>171</sup> Public Accommodations Exception Act of 1993, H.R. 3288, 103d Cong. (1993).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Carson, *supra* note 20.

<sup>176</sup> See *United States v. Elcom Ltd.*, 203 F. Supp. 2d. 1111 (Cal. Dist. Ct. 2002) (holding that the governments' interests in the Digital Millennium Copyright Act (DMCA) to prevent piracy and uphold intellectual property rights were sufficiently substantial to uphold the constitutionality of the Act).

<sup>177</sup> *Id.*

<sup>178</sup> Keith Kupferschmid, *Copyright in Congress: 2024 Year in Review*, COPYRIGHT ALL. (Jan. 13, 2025), <https://copyrightalliance.org/> [<https://perma.cc/UH2P-8DCC>].

copyright laws for the digital age.<sup>179</sup> Therefore, copyright will continue to be a prioritized topic in Congress primarily because of the entertainment and technical industries' influence.<sup>180</sup>

## B. CHANGING THE LAW

The law is fluid and ever changing. Moreover, Congress continues to reexamine copyright issues, and the Copyright Act fluctuates accordingly. Typically, Congress favors PROs and music artists. However, with the right amount of influence, the balance could tip in favor of public accessibility. Business owners have a significant influence over lawmakers. Congress may respond to business owners' demands for a variety of different reasons.<sup>181</sup> These reasons include business owners' importance for the economy, self-interest campaigns, and their persuasive tactics.<sup>182</sup> For a long time, lawmakers have preferred prioritizing business interests.<sup>183</sup>

Businesses have the capability of connecting to lawmakers through funding political campaigns, hiring well-connected lobbyists, accessing the media and public, and promoting the exchange of their personnel into government positions.<sup>184</sup> Therefore, while lawmakers traditionally favor PROs and music artists, business owners have a powerful role that cannot be overlooked. As Congress continues to deal with these competing pressures, the balance between protecting exclusive rights and ensuring public accessibility remains flexible. Ultimately, the balance will depend on various stakeholders and their influence on the law.

## V. CONCLUSION

Background music plays a vital role in shaping a bar or restaurant's atmosphere. It sets the tone for a casual gathering or an upscale evening. Moreover, it enhances the overall dining

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<sup>179</sup> Pamela Samuelson, *Copyright Law Needs a Digital-Age Upgrade*, U.C. BERKELEY L. (Sep. 26, 2010), [https://www.law.berkeley.edu/\[https://perma.cc/WJ4N-U2TE\]](https://www.law.berkeley.edu/[https://perma.cc/WJ4N-U2TE]).

<sup>180</sup> *See generally* *Understanding Intellectual Property in Entertainment Law*, UNIV. OF PITT. SCH. OF L. (Dec. 18, 2024), [https://online.law.pitt.edu/\[https://perma.cc/R993-D9PV\]](https://online.law.pitt.edu/[https://perma.cc/R993-D9PV]).

<sup>181</sup> *See generally* Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147 (2009).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

experience which keeps customers coming back for more. However, playing a high-quality playlist comes with associated licensing fees and legal risks. PROs actively monitor and track down potential copyright infringers. As a result, bar and restaurant owners who choose to ignore a PRO's warning may face costly legal fees.

Importantly, bar and restaurant owners must strategically navigate copyright laws to ensure they are using the most cost-effective methods to create an inviting atmosphere. Therefore, it is crucial they understand their obligations and comply with copyright laws to avoid costly legal and financial consequences. Bar and restaurant owners can employ a variety of ways to comply with the law while also keeping the costs down. These can include using public domain music, hiring original live performers, or subscribing to third-party commercial services. Nevertheless, copyright law continues to evolve. The balance between protecting exclusive rights and limiting the scope of these rights may shift. Therefore, bar and restaurant owners should stay informed and adapt their businesses to maximize their establishment while also protecting it from potential legal consequences.

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**CURVEBALLS IN COMPENSATION: THE CHANGING  
DYNAMICS OF MLB SALARY ARBITRATION**

JOSEPH R. CECCARELLI \*

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### ABSTRACT

*In 1986, 35 Major League Baseball (MLB) players arbitrated their salaries in front of independent panels. Since that record-setting year, the league has added four teams and increased active roster limits. Furthermore, the game has undergone a radical shift in player valuation with front offices now filling out the margins of their rosters with younger players who have not yet reached free agency. These developments led to the number of arbitration-eligible players hitting an all-time high in 2023. Despite the vast increase in the number of arbitration-eligible players, 1986 saw more arbitration hearings than the 2024 and 2025 offseasons combined. This is not the product of random variance, as the increased volume of data available to teams and player representatives has enabled them to refine their salary models and avoid arbitration hearings more frequently than in the past. The parties have also begun to incorporate sabermetrics into their arguments to arbitration panels, lessening the influence of player comparisons that were once unshakable benchmarks of the hearing process. MLB's arbitration process faces more scrutiny than ever, as public salary models and disclosures by players have peeled back the curtain and given fans greater insight into the process than ever before.*

*This Comment provides an in-depth analysis of MLB's salary arbitration process and the technological and strategic developments that have impacted teams' and player representatives' approaches to the filing process. The incorporation of an unprecedented number of datapoints has optimized teams' and agencies' salary models and created more uniform standards in the arbitration process. In the rare instance where the parties arbitrate the salary in front of a panel, their arguments go beyond mere player comparisons and now incorporate statistics and metrics that are often unknown to the casual baseball audience.*

## INTRODUCTION

*“[B]aseball’s arbitration process is nothing personal. It’s quite literally a dispute between two algorithms that gets decided by a human.”<sup>1</sup>*

Each winter, hundreds of MLB players are eligible to arbitrate their salaries in front of a three-person panel.<sup>2</sup> However, a vast majority of players agree to a contract in advance of the filing deadline each January.<sup>3</sup> The infrequency of salary disputes has caused many to praise the system, citing its last best offer structure as promoting reasonable bargaining, fairness, and balanced interests of the involved parties.<sup>4</sup> In short, proponents believe the system works because it is designed to incentivize settlement. MLB’s system also provides a quick and private avenue to resolve salary grievances,<sup>5</sup> though some players take issue with team representatives or hired counsel speaking negatively about their performance during hearings.<sup>6</sup> In recent years, the number of players electing to arbitrate their salaries has been significantly lower than in the past, despite the expansion of the league and team rosters since the system’s inception.<sup>7</sup> This system is efficient as more than 95 percent of eligible players settled on a salary ahead of

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<sup>1</sup> Evan Woodbery, *Will Tigers, Casey Mize go to battle over 25 thousand bucks?*, MLIVE (Jan. 12, 2024, at 17:56 MST), <https://www.mlive.com/https://perma.cc/F6RW-YPEW>].

<sup>2</sup> Mark Feinsand, *Who signed and who didn’t? Breaking down the arbitration deadline*, MLB (Jan. 9, 2025), <https://www.mlb.com/https://perma.cc/K4PW-BKU7>].

<sup>3</sup> Steve Adams, *2024 Arbitration Tracker*, MLB TRADE RUMORS (Jan. 11, 2024, at 23:58 CDT), <https://www.mlbtraderumors.com/https://perma.cc/S6GZ-42JW>].

<sup>4</sup> Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 HARV. J. SPORTS & ENT. L. 105, 131–39 (2013).

<sup>5</sup> *What You Need to Know About Arbitration*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Nov. 1, 2023), <https://instituteforlegalreform.com/https://perma.cc/Y7SQ-J5SP>].

<sup>6</sup> Mike Axisa, *Corbin Burnes says arbitration battle with Brewers over \$750K difference ‘hurt’ relationship with team*, CBS SPORTS (Feb. 16, 2023, at 13:59 ET), <https://www.cbssports.com/https://perma.cc/YGS3-WBVD>]; Sheryl Ring, *Let’s Fix MLB’s Salary Arbitration System: Introduction*, FANGRAPHS (Jan. 16, 2019), <https://blogs.fangraphs.com/https://perma.cc/5FTT-9XLL>].

<sup>7</sup> See Bill Gilbert, *Salary Arbitration: Burden or Benefit?*, SOC’Y FOR AM. BASEBALL RSCH. (2006), <https://sabr.org/https://perma.cc/98J2-VCQM>].

the 2025 season.<sup>8</sup> The salary arbitration system has become so ingrained into the legal landscape surrounding MLB—partially because of its positive reception—that multiple universities host mock arbitration competitions for students.<sup>9</sup>

Teams have fared well in the dispute process, winning nearly 60 percent of hearings over the past half-century.<sup>10</sup> Despite this, MLB seems determined to do away with salary arbitration in the near future and replace it with a more uniform, formula-based system.<sup>11</sup> Likewise, some believe that salary arbitration only favors the players, as they continuously receive raises through the system.<sup>12</sup> A player can still benefit greatly even if he is not tendered a contract, as he becomes a free agent and gains access to a slate of competitive bidders with whom to negotiate.<sup>13</sup> Front offices universally criticize the arbitration system because of the time and costs required to create models, negotiate salaries, and prepare for hearings.<sup>14</sup> Rising arbitration salaries and television revenue uncertainty in recent years have also made it nearly impossible for small market teams to retain homegrown stars for their entire team control period, forcing these teams to trade away the players they cannot afford to pay.<sup>15</sup>

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<sup>8</sup> Dan Soemann, *2025 MLB Arbitration: Exchanged Salary Figures*, SPOTRAC (Jan. 10, 2025), [https://www.spotrac.com/\[https://perma.cc/AZP8-WK9E\]](https://www.spotrac.com/[https://perma.cc/AZP8-WK9E]); Dan Soemann, *2025 MLB Arbitration Review*, SPOTRAC (Feb. 15, 2025), [https://www.spotrac.com/\[https://perma.cc/76X7-HSAQ\]](https://www.spotrac.com/[https://perma.cc/76X7-HSAQ]). Out of 201 arbitration-eligible players, only 9 took their case to a hearing.

<sup>9</sup> *Tulane International Baseball Arbitration Competition*, TULANE UNIV. L. SCH., [https://law.tulane.edu/\[https://perma.cc/G8QG-6N2Q\]](https://law.tulane.edu/[https://perma.cc/G8QG-6N2Q]).

<sup>10</sup> Devan Fink, *Team Versus Player? A Study of Baseball Salary Arbitration and the Arbitrator Exchangeability Hypothesis* (June 4, 2023) (B.A. honors thesis, Dartmouth College) (on file with Dartmouth Digital Commons).

<sup>11</sup> Ken Rosenthal, *Rosenthal: Tensions over MLB salary arbitration rulings could translate to another battle*, THE ATHLETIC (Feb. 20, 2023), [https://www.nytimes.com/\[https://perma.cc/SK9A-YLAZ\]](https://www.nytimes.com/[https://perma.cc/SK9A-YLAZ]).

<sup>12</sup> Fink, *supra* note 10; Deborah R. Swank, *Arbitration and Salary Inflation in Major League Baseball*, 1992 J. DISP. RESOL. 159, 167 (1992).

<sup>13</sup> *Non-tendered*, MLB, [https://www.mlb.com/\[https://perma.cc/YH4A-ZTGT\]](https://www.mlb.com/[https://perma.cc/YH4A-ZTGT]); see Darragh McDonald, *Cubs Sign Cody Bellinger*, MLB TRADE RUMORS (Dec. 14, 2022, at 15:00 CDT), [https://www.mlbtraderumors.com/\[https://perma.cc/3R65-ZN6D\]](https://www.mlbtraderumors.com/[https://perma.cc/3R65-ZN6D]).

<sup>14</sup> Rosenthal, *supra* note 11.

<sup>15</sup> Ken Rosenthal, *Rosenthal: Why the Brewers had to trade Corbin Burnes*, THE ATHLETIC (Feb. 5, 2024), [https://www.nytimes.com/\[https://perma.cc/QA22-SZ8F\]](https://www.nytimes.com/[https://perma.cc/QA22-SZ8F]).

The arbitration system incentivizes teams and players to fight for every dollar, as each one-year agreement creates a precedential datapoint that could lead to millions in savings leaguewide.<sup>16</sup> This creates a snowball effect in the market for arbitration-eligible players, where teams reap the consequences of each other's mistakes in the negotiation and filing process. The hardnosed nature of negotiating in this manner has worsened several players' relations with their teams.<sup>17</sup> The arbitration system causes front offices to operate in a manner contradicting modern baseball wisdom, as it determines future salaries using past production and traditional stats in a sport where future projection rules the day. At the same time, the increased use of advanced statistics in arbitration hearings has also lessened the role of player comparisons during hearings. Now, the expansion of the arbitration criteria has created more avenues for players to be compared or distinguished, adding more ammo for teams and players to use during oral arguments. These issues raise questions about whether the salary arbitration system requires reform or if it is even necessary in today's data-driven game.<sup>18</sup>

This paper will discuss the new developments and strategies that have changed the way teams and players approach the salary arbitration process before examining how these trends have influenced the parties' behaviors in specific cases. Finally, this paper will consider proposed changes to the arbitration system and ponder what lies ahead.

## I. HOW THE SALARY ARBITRATION SYSTEM WORKS

### A. BACKGROUND

Generally, MLB players who have less than six years of major league service time must be tendered a contract from their team each offseason.<sup>19</sup> Players accrue service time for each day they spend on

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<sup>16</sup> BASEBALL'S NOT DEAD, *Why Teams Are Fighting Their Star Players Over Small Raises... File and Trial Arbitration*, at 10:06 (YouTube, Jan. 23, 2023), <https://youtube.com/> [<https://perma.cc/8D6K-M46T>].

<sup>17</sup> Axisa, *supra* note 6.

<sup>18</sup> Emily Rollo, *The Need for MLB Salary Arbitration Reform*, VILL. SPORTS L. (Feb. 3, 2024), <https://www.novasportslaw.com/> [<https://perma.cc/NM78-DTW7>].

<sup>19</sup> *Contract Tendered*, MLB, <https://www.mlb.com/> [<https://perma.cc/Z3XZ-X67L>]. There are two ways for players with less than six years of MLB service time to forgo contract tendering, renewal, and arbitration procedures. In the first scenario, a player has signed an extension covering his pre-free agency seasons and is already guaranteed

a Major League active roster or injured list and earn a year of service for each 172 days spent at the big league level.<sup>20</sup> Players with less than three years of service play on one-year contracts at roughly the league minimum salary, with players in their second and third years of service typically receiving miniscule increases above that minimum figure.<sup>21</sup> Although teams often negotiate the terms of these pre-arbitration contracts with players, the parties do not need to come to an agreement, and the team can unilaterally renew the previous season's contract.<sup>22</sup> A player earns the right to arbitrate his salary once he reaches three years of MLB service, and he must agree to a contract with his team to avoid arbitration.<sup>23</sup> Additionally, players with less than three years of MLB service can become arbitration-eligible via the Super Two system if their service time amount ranks in the top 22 percent of service time totals among players with between two and three years of service.<sup>24</sup> The service time amount needed to attain Super Two status varies from year to year, though the cutoff is typically between 2.115 and 2.135 years of service.<sup>25</sup>

The possibility of a player taking his team to an arbitration hearing grants the player more negotiating leverage and the

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a pre-negotiated salary for the upcoming season. In the second scenario, players aged 25 or older who attained six years of service in a foreign professional baseball league before playing for an MLB organization can become free agents at the end of their first MLB contract regardless of the contract's length. Players who start their professional career with an MLB organization, go on to play in a foreign professional league, and subsequently return to America after becoming a free agent in the foreign league can negotiate a free agency clause into their MLB contracts as well.

<sup>20</sup> *Service Time*, MLB, <https://www.mlb.com/> [<https://perma.cc/2XUF-DHCQ>].

<sup>21</sup> *Contract Renewal*, MLB, <https://www.mlb.com/> [<https://perma.cc/EJQ6-HVN6>]. See e.g., *Kutter Crawford*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/74JD-CV9U>]; *Gunnar Henderson*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/LZ3L-UEXT>] (exemplifying the salary increases that players receive in successive pre-arbitration seasons).

<sup>22</sup> *Contract Renewal*, *supra* note 21.

<sup>23</sup> *Salary Arbitration and Arbitration Eligibility*, MLB, <https://www.mlb.com/> [<https://perma.cc/JF6U-PH2C>].

<sup>24</sup> *Super Two*, MLB, <https://www.mlb.com/> [<https://perma.cc/98CV-XSD4>]. MLB service time is notated as a decimal number that rolls over for each 172 days of service accrued. For instance, one year and 145 days of service time is written as 1.145.

<sup>25</sup> Anthony Franco, *Super Two Status Set at 2.118 Years of Service*, MLB TRADE RUMORS (Nov. 6, 2023, at 22:32 CDT), <https://www.mlbtraderumors.com/> [<https://perma.cc/2FEL-7NBG>].

opportunity for substantial salary increases.<sup>26</sup> The criteria allow for salaries to increase as players get closer to free agency, with players in their final year of arbitration eligibility earning considerably more than players in their first year of eligibility on average.<sup>27</sup> The near-assurance of a salary increase is not entirely a boon to the player, as a team can opt to not tender the player a contract if the front office believes the projected arbitration salary outpaces the dollar value of his projected on-field contributions in the next season.<sup>28</sup> Arbitration salaries can decrease by up to 20 percent of the previous year's figure, but front offices will typically not tender contracts to players whose health or performance warrant a pay cut.<sup>29</sup> Most players do not exercise their arbitration rights and agree to a contract with their team before the arbitration filing deadline in early January.<sup>30</sup> In fact, a number of players in their arbitration-eligible seasons sign multi-year contracts to lock in their salaries and avoid the possibility of salary arbitration in future seasons.<sup>31</sup> Similar to many contract negotiations outside of sports, comparisons to similar players are highly compelling factors in salary determination. However, other players and teams cannot use

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<sup>26</sup> AP, *AP Study: 113 percent average raise in baseball arbitration*, FOX SPORTS (Mar. 4, 2020, at 20:53 ET), <https://www.foxsports.com/> [<https://perma.cc/4HZP-T73K>].

<sup>27</sup> See *MLB Arbitration*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/GV62-23V2>].

<sup>28</sup> Steve Adams, *Explaining Non-Tenders*, MLB TRADE RUMORS (Dec. 2, 2014, at 08:00 CDT), <https://www.mlbtraderumors.com/> [<https://perma.cc/V4AU-JMWQ>].

<sup>29</sup> Caitlen Moser, *Salary Arbitration in Baseball Contracts*, ARB. BRIEF (Mar. 15, 2024), [thearbitrationbrief.com/](http://thearbitrationbrief.com/) [<https://perma.cc/5X6U-V5ZT>]. There is no record of a player accepting a decreased salary in the arbitration process, though there was one instance of a player filing at a lower salary than his team's figure. Even players who miss a full season due to injury sign for an identical salary as the previous season or are non-tendered and sign a deal with a lower average annual value. See *Eduardo Rodriguez*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/B8CM-FVGU>]. Rodriguez agreed to an \$8.3 million salary before the 2020 season but was unable to pitch due to complications from myocarditis. He re-upped for \$8.3 million in 2021.

<sup>30</sup> Mike Axisa, *Everything you need to know from MLB's salary arbitration filing deadline*, CBS SPORTS (Jan. 12, 2018, at 19:13 ET), <https://www.cbssports.com/> [<https://perma.cc/8F5Q-2FXP>].

<sup>31</sup> *Salary Arbitration and Arbitration Eligibility*, *supra* note 23. The list of players who signed multi-year deals that covered only arbitration-eligible seasons includes Shohei Ohtani, CC Sabathia, Roy Halladay, and Bryce Harper.

multi-year extensions to make salary comparisons in arbitration negotiations.<sup>32</sup> Even one year-contracts with options for future seasons cannot be used as datapoints in negotiations.<sup>33</sup> Players can only draw comparisons to salaries awarded to players who were in the same service class or the service class above them at the time of the award.<sup>34</sup> For example, if a player has three years of service time, he and his team can only refer to the salaries and statistics of players with either three or four years of MLB service. However, comparisons to players in the same service class are given more weight.

## B. EXCHANGING FIGURES

When a player and his team do not agree on a salary figure in advance of the filing deadline, the parties exchange their proposed salary figures which they will advocate for at the arbitration hearing.<sup>35</sup> While the parties can continue to negotiate until the arbitration hearing, many teams take a “file and trial” approach and refuse to negotiate simple one-year deals after the filing deadline.<sup>36</sup> Instead, internal team policies dictate that teams can only negotiate multi-year contracts or one-year deals with options that they do not intend to exercise so that the settlement cannot be used as a datapoint by future arbitration-eligible players.<sup>37</sup>

## C. THE HEARING

Arbitration hearings are held shortly before Spring Training reporting dates, giving players and teams two to four weeks to

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<sup>32</sup> Steve Adams, *Chat with MLBTR's Steve Adams: 11/5/24*, MLB TRADE RUMORS (Nov. 5, 2024, at 13:50 CDT), <https://live.jotcast.com/> [<https://perma.cc/BT6X-A6SJ>].

<sup>33</sup> *Id.*

<sup>34</sup> Major League Baseball and the Major League Baseball Players Association, *2022–2026 Basic Agreement*, Article VI, at 20, <https://www.mlbplayers.com/> [<https://perma.cc/7DD4-LFRH>] [hereinafter *Basic Agreement*].

<sup>35</sup> *Id.* at 20–21.

<sup>36</sup> *File and Trial*, MLB, <https://www.mlb.com/> [<https://perma.cc/J7YF-2XEY>].

<sup>37</sup> Adams, *supra* note 32; Chris Cotillo (@ChrisCotillo), X (Jan. 29, 2025, at 12:48 MST), <https://x.com/> [<https://perma.cc/64RD-FUHH>]. Not every team operates in this manner. See Jordan Bastian, *Cubs, Tucker agree on 1-year deal, avoid arbitration (source)*, MLB (Jan. 16, 2025), <https://www.mlb.com/> [<https://perma.cc/94JE-YU33>]. It is worth noting the Cubs had just traded for Tucker after the 2024 season. It makes sense why the Cubs would operate differently with a newly acquired star player the team hoped to re-sign.

prepare for the hearing.<sup>38</sup> The cases are heard by a panel of three labor arbitrators with varying levels of knowledge about the MLB arbitration system and advanced statistics.<sup>39</sup>

### 1. *THE CRITERIA*

The MLB collective bargaining agreement (CBA) lists the criteria that arbitrators may consider in salary arbitration hearings.

The criteria will be the quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the Player's past compensation, comparative baseball salaries[,] . . . the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance . . . .<sup>40</sup>

While arbitration salaries can be reduced from year-to-year, the criteria do not seem to support this notion, particularly the points regarding lengths and consistency of career contributions and the player's past salaries. In fact, those are the operative criteria that ensure salaries increase as players get further along in their arbitration eligibility.

Furthermore, the CBA expands on the types of statistics that can be introduced. "Only publicly available statistics shall be admissible. For purposes of this provision, publicly available statistics shall include data available through subscription-only websites (e.g., Baseball Prospectus). Statistics and data generated through the use of performance technology, wearable technology, or 'STATCAST', whether publicly available or not, shall not be admissible."<sup>41</sup> Presumably, because players and teams can introduce these statistics, they can be incorporated into their salary models as

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<sup>38</sup> *Transaction Calendar*, BASEBALL PROSPECTUS, <https://legacy.baseballprospectus.com/> [<https://perma.cc/6PMZ-KP2X>].

<sup>39</sup> Sheryl Ring, *Let's Fix MLB's Salary Arbitration System: The Arbitrators*, FANGRAPHS (Jan. 18, 2019), <https://blogs.fangraphs.com/> [<https://perma.cc/4MUL-P9RT>].

<sup>40</sup> *Basic Agreement*, *supra* note 34, at 20.

<sup>41</sup> *Id.* at 21.

well. It is understandable that neither party can use their own proprietary statistics to value players, as they can be hard to rebut when the other side does not know the statistics' methodology. It also precludes the parties from developing their own statistics with cherry-picked criteria to overstate or underrate a player's contributions.

The CBA also expressly excludes the parties from introducing certain facts pertaining to "the financial position of the Player and the Club; Press comments, testimonials or similar material bearing on the performance of either the Player or the Club... Offers made by either Player or Club prior to arbitration... Salaries in other sports or occupations."<sup>42</sup>

## 2. HEARING STRATEGY

MLB salary arbitration hearings differ from other arbitration hearings in several ways. For instance, neither party is allowed to introduce evidence to the panel, with hearings consisting solely of oral arguments and presentation slides.<sup>43</sup> The parties also do not exchange any materials relating to their arguments except their proposed salary figures before the hearing.<sup>44</sup> Teams can have their in-house counsel present during their argument to the panel, though it is increasingly common for teams to outsource negotiation and oral argument duties to outside counsel as players could be disheartened to hear team personnel discredit their performance.<sup>45</sup>

The arbitrators must choose one of the submitted salary figures; they cannot choose a midpoint or award another salary amount.<sup>46</sup> While it may seem like the parties should base their arguments on why their submitted figure is correct, the midpoint between the submitted figures plays a critical role in the outcome.<sup>47</sup> Essentially, the parties' goal is to convince the arbitrators that their submitted figure is closer to the player's true value in the arbitration system. Rather than present a number of different theories, teams and players often make a handful of their most compelling arguments and expound on those points throughout the entirety of the one-hour

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<sup>42</sup> *Id.*

<sup>43</sup> Andrew J. Wronski, *The Unique Game of Baseball Arbitration*, FOLEY & LARDNER LLP (Feb. 14, 2022), [https://www.foley.com/\[https://perma.cc/4FHB-N754\]](https://www.foley.com/[https://perma.cc/4FHB-N754]).

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* Teams theorize the potential fallout from discrediting their players' performance will be lessened if such criticism comes from a third party.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

case in chief.<sup>48</sup> Player comparisons using traditional statistics are common, as is the use of advanced statistics that the arbitrators sometimes have no knowledge of.<sup>49</sup> Thus, it is important to properly explain and contextualize each statistic and its relevance.<sup>50</sup>

Each side also presents a 30-minute rebuttal.<sup>51</sup> Given the shorter length of the rebuttal, the sides often do not address their opponent's arguments. Instead, they focus on damaging their opponent's credibility, alleging their opponent's arguments were mischaracterized, cherry-picked, or incorrect.<sup>52</sup> The panel sends its decision to the parties within 24 hours of the hearing, though it does not release a written opinion.<sup>53</sup>

## II. THE HISTORY OF MLB SALARY ARBITRATION AND CURRENT TRENDS IN THE SYSTEM

### A. THE ORIGIN OF ARBITRATION IN PROFESSIONAL SPORTS

Arbitration has long been used as the main form of dispute resolution in professional sports.<sup>54</sup> Most North American leagues and players' unions have agreed that the Commissioner will hear most interleague and intrateam disputes, largely to avoid lengthy, publicized trials and ensure the Commissioner has final authority over such matters.<sup>55</sup> MLB's procedure is slightly different: the league and players association have decided that an agreed-upon third-party will hear most disputes,<sup>56</sup> only delegating arbitration authority to the Commissioner for grievances involving the "integrity of the game."<sup>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Wronski, *supra* note 43.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*; Kevin Goldstein, *The Arbitration Clown Show*, FANGRAPHS (Feb. 9, 2021), <https://blogs.fangraphs.com/> [<https://perma.cc/8FLD-W75B>].

<sup>54</sup> Jeffrey D. Meyer, *The NFLPA's Arbitration Procedure: A Forum for Professional Football Players and their Agents to Resolve Disputes*, 6 OHIO STATE J. ON DISP. RESOL. 107, 107 (1990).

<sup>55</sup> See Alessandra Makris, *Arbitration in Professional Sports: Is It Time to Move On?*, CARDOZO J. CONFLICT RESOL. BLOG (Feb. 16, 2024), <https://www.cardozojcr.com/> [<https://perma.cc/GSL8-3XAD>].

<sup>56</sup> *Id.*

<sup>57</sup> *CBA History, BASEBALL PROSPECTUS*, <https://legacy.baseballprospectus.com/> [<https://perma.cc/F2UP-8CP7>]. This authority was given to Commissioner Bowie Kuhn at the

Baseball's first arbitration grievances were a product of the "blacklist," a term for players who had been expelled from either the National League (NL) or American Association during the late-nineteenth century.<sup>58</sup> These hearings were quite modest and merely consisted of the league's Executive Committee hearing appeals from players seeking reinstatement from the blacklist.<sup>59</sup> Arbitration became a popular form of dispute resolution at the start of the twentieth century. Various players associations lobbied American League (AL) and NL owners to agree to have disputes independently arbitrated for over fifty years, but these early associations were weak and often crumbled before gaining any leverage against the owners.<sup>60</sup> A long-term solution for collective representation of MLB players did not develop until the MLB Players Association (MLBPA) was formed in 1954. The MLBPA sought grievance arbitration, and the owners finally obliged in 1970 after Curt Flood's lawsuit alleging that MLB's Reserve Clause violated the Thirteenth Amendment garnered negative publicity.<sup>61</sup>

#### 1. *THE CREATION OF MLB'S SALARY ARBITRATION SYSTEM*

MLB was the second professional league to use arbitration to resolve disputes over player salaries, adopting their system in the 1973-74 offseason.<sup>62</sup> Before then, player salaries were simply the result of negotiations between the teams and players. These salaries were comparatively lower as a result of the players' inability to redress their grievances.<sup>63</sup> At the outset of salary arbitration, players with between two and six years of service time were eligible to have their salaries arbitrated by judges, who would award one of the figures submitted by the team or club.<sup>64</sup> As was often the case in the

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commencement of the 1970-1972 CBA and has remained a staple ever since.

<sup>58</sup> J. Gordon Hylton, *The Historical Origins of Baseball Grievance Arbitration*, 11 MARQ. SPORTS L. REV. 175, 175 (2001).

<sup>59</sup> *Id.* at 177.

<sup>60</sup> *Id.* at 179-81.

<sup>61</sup> *Id.* at 182.

<sup>62</sup> *Id.*; Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO STATE J. ON DISP. RESOL. 485, 500 (2006).

<sup>63</sup> See Michael J. Hauptert, *The Economic History of Major League Baseball*, ECON. HIST. ASS'N (Dec. 3, 2007), <https://eh.net/> [<https://perma.cc/MLC8-CGCB>]. Player salaries quadrupled in the 10 years following the adoption of the first major league CBA in 1967.

<sup>64</sup> *CBA History*, *supra* note 57.

1970s,<sup>65</sup> the league and union sparred over financials and the MLBPA filed a grievance with the National Labor Relations Board (NLRB) after the league refused to provide complete salary information, preventing the union from using player comparisons during oral argument.<sup>66</sup> The next CBA covering the 1976-79 seasons largely kept the arbitration system the same, but a major wrench had been thrown into the game's economics. The age of free agency had begun after the Eighth Circuit affirmed arbitrator Peter Seitz's decision that MLB's Reserve Clause only allowed teams to renew an unsigned contract for one season.<sup>67</sup> Despite the newfound ability to test the open market, free agents could still arbitrate their salaries with their prior club and return on a one-year contract.<sup>68</sup> The next substantive alteration came before the 1985 season, when owners tried to cap the amount salaries could increase through the arbitration system at 100 percent of the prior year's salary.<sup>69</sup> All attempts at placing hard caps on salaries were unsuccessful, but the threshold to reach arbitration eligibility was increased to three years of MLB service.<sup>70</sup> A record number of arbitration cases went to hearing in the following year.<sup>71</sup> In the final year of this collective bargaining agreement, growing distrust between the league and the MLBPA caused 162 players to exchange figures with their team.<sup>72</sup> The following CBA instituted the Super Two system, with the top 17 percent of the service class with between two and three years of service time becoming eligible for arbitration.<sup>73</sup>

The 1994 season began without a CBA in place as owners were hashing out a revenue sharing and salary cap plan.<sup>74</sup> In response, the MLBPA set an August 12 cutoff for the next CBA to be finalized.<sup>75</sup> Infighting between large and small market team owners and pushback from the players association caused that deadline to pass

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<sup>65</sup> Al Yellon, *A look back at MLB's previous labor stoppages and what's ahead for the current lockout*, SBINATION (Feb. 21, 2022, at 08:00 MST), <https://www.bleedcubbieblue.com/> [<https://perma.cc/XBA2-TEY4>].

<sup>66</sup> *CBA History*, *supra* note 57.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Gilbert, *supra* note 7.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Twenty-five years ago, unified players thwarted owners' plan to implement salary cap*, MLBPA, <https://www.mlbplayers.com/> [<https://perma.cc/4TRK-B3M4>].

<sup>75</sup> *Id.*

without an agreement and a devastating strike that cancelled the last three months of the 1994 season ensued.<sup>76</sup> Before the 1995 season, the MLB Player Relations Committee attempted to unilaterally implement a salary cap and eliminate certain elements of prior CBAs, including the salary arbitration system.<sup>77</sup> The NLRB filed suit and the Southern District of New York reimplemented the 1990 CBA terms, holding that the league's acts were not in good faith.<sup>78</sup> Since this ruling, salary arbitration has largely remained unchanged, with the only noteworthy alteration coming when Super Two eligibility was expanded to the top 22 percent of the two-year service class in the 2012-16 CBA.<sup>79</sup>

## B. THE MODERN AGE OF SALARY ARBITRATION AND THE ISSUES FACING ARBITRATION-ELIGIBLE PLAYERS

Since successfully averting the end of salary arbitration, the MLBPA has held onto its title as the most powerful labor union in professional sports, if not the entire United States.<sup>80</sup> To counteract the union's strength, MLB has had to play hardball during negotiations. This led to the 2021-22 MLB lockout over economic issues far less controversial than the matters that precipitated the 1994-95 strike.<sup>81</sup> The MLBPA pushed heavily for players to earn arbitration eligibility after two years of service and free agency after five years, but abandoned those positions in favor of measures that benefited pre-arbitration players.<sup>82</sup> Instead, the 2022-2026 CBA implemented the Prospect Promotion Incentive program, a system

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<sup>76</sup> *Id.*; Dayn Perry, *MLB lockout: A brief history of strikes and lockouts as baseball comes to a halt for first time in 26 years*, CBS SPORTS (Dec. 5, 2021, at 13:50 ET), <https://www.cbssports.com/> [<https://perma.cc/7GD5-TPGV>].

<sup>77</sup> *Silverman v. Major League Baseball Player Rels. Comm.*, 880 F. Supp. 246, 252 (S.D.N.Y. 1995).

<sup>78</sup> *CBA History*, *supra* note 57.

<sup>79</sup> *Id.*

<sup>80</sup> Alec Kassin, *Caught Stealing: The Major League Baseball Players Association – A Union for the Few at the Expense of the Many*, 29 BERKELEY UNDERGRADUATE J. 1 (2016). Additionally, MLB is the only major North American sports league to both fully guarantee salaries for players and eschew a salary cap. Free agent salaries and contract lengths are also substantially higher, on average, than any other league.

<sup>81</sup> Dayn Perry, *MLB lockout: Examining baseball's precedent for arbitration eligibility after two years*, CBS SPORTS (Feb. 8, 2022, at 10:38 ET), <https://www.cbssports.com/> [<https://perma.cc/MCZ5-3T3U>].

<sup>82</sup> *Id.*; Anthony Franco, *MLBPA Drops Push For Earlier Free Agency Eligibility In Latest CBA Proposal*, MLB TRADE RUMORS (Jan. 24, 2022, at 22:05 CDT), <https://www.mlptraderumors.com> [<https://perma.cc/NKE9-NZHH>].

incentivizing teams to promote their top prospects early enough to attain a full year of service in their rookie season rather than manipulate their service time and delay their free agency by a year.<sup>83</sup> The most recent CBA also created the Pre-Arbitration Performance Bonus Program, which splits \$50 million annually among the top 100 pre-arbitration players based on awards voting and a wins above replacement (WAR) formula.<sup>84</sup> While these additions mostly benefit top prospects and high-performing pre-arbitration players, the agreement did nothing to address teams' and players' criticisms of the arbitration system.

In terms of trends in team behavior, the file and trial approach has become more pervasive since the mid-2010s. While only seven teams used the strategy in 2014, it expanded throughout the league over the next few years and caused the number of hearings to reach a 25-year high in 2017.<sup>85</sup> The desire for settlement appears to have increased during the 2020s despite the prevalence of the file and trial strategy. In 2023, 14 of the 33 players who exchanged figures with their team settled on a contract before their hearing,<sup>86</sup> while 8 of 17 settled in 2025.<sup>87</sup>

More notably, teams are opting to forgo the entire arbitration process with their best young players as early-career extensions are becoming more commonplace. Franchise players in their pre-arbitration seasons are increasingly signing long-term megadeals that last into their mid-thirties.<sup>88</sup> Even solid contributors are signing

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<sup>83</sup> Joe Trezza, *Here are the players who could earn teams extra Draft picks this year*, MLB (Feb. 6, 2024), <https://www.mlb.com/> [https://perma.cc/KQ7Q-4PVB].

<sup>84</sup> Basic Agreement, *supra* note 34, at 68–69.

<sup>85</sup> Ken Rosenthal, *Rosenthal: Digging into Harper's defensive slide; Keuchel is more reliable than dominant; Syndergaard to Padres?*, THE ATHLETIC (Nov. 16, 2018), <https://www.nytimes.com/> [https://perma.cc/4VWH-W4K9].

<sup>86</sup> Dean Rosenberg, *MLB's 2023 Salary Arbitration Exchange Date: All 33 Filing Numbers*, CONDUCT DETRIMENTAL (Jan. 19, 2023), <https://www.conductdetrimental.com/> [https://perma.cc/8UB5-VJBN]; Mark Feinsand, *Arb deadline recap: Who signed? Who exchanged numbers?*, MLB (Jan. 12, 2024), <https://www.mlb.com/> [https://perma.cc/ZDY2-ZEMY].

<sup>87</sup> Soemann, *supra* note 8.

<sup>88</sup> Jeff Passan, *Sources: San Diego Padres, Fernando Tatis Jr. agree on 14-year, \$340 million deal*, ESPN (Feb. 17, 2021, at 20:46 ET), <https://www.espn.com/> [https://perma.cc/KCD4-GGJY]; Jeff Passan, *Sources: Bobby Witt Jr. agrees to 11-year, \$288.8M deal with Royals*, ESPN (Feb. 5, 2024, at 13:00 ET), <https://www.espn.com/> [https://perma.cc/8CX5-2QZ3].

extensions that last into their seventh or eighth year of service time.<sup>89</sup> This practice seems to be a win-win for both sides, as forgoing arbitration eligibility allows teams to gain payroll certainty while the players guarantee themselves hefty sums. In some cases, teams even ink their top prospects to long-term deals before they even debut at the MLB level.<sup>90</sup> Now that projection systems can predict player performance somewhat accurately, the risk of signing unproven players to long-term deals is considerably lessened. Given the disdain many front offices have for the salary arbitration process and the hostility that comes with arbitration hearings,<sup>91</sup> the baseball world will likely see this practice continue for the foreseeable future.<sup>92</sup>

### C. PLAYER VALUATION AND THE FACTORS THAT CAUSE A NON-TENDER

Since the dawn of the sabermetric revolution in MLB front offices, teams have created models to quantify the monetary value of players' on-field contributions.<sup>93</sup> More specifically, the industry puts stock in statistics like WAR that approximate how many wins a player has contributed to the team, with each team developing their own proprietary models to predict future contributions.<sup>94</sup> Naturally, teams now operate like investment banks, using these models to place valuations on players based on their projected production and future salaries.<sup>95</sup>

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<sup>89</sup> See Steve Adams, *Guardians, Trevor Stephan Agree To Four-Year Extension*, MLB TRADE RUMORS (Mar. 30, 2023, at 13:15 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/5L7S-EDLM>]; Mark Polishuk, *Red Sox Extend Garrett Whitlock*, MLB TRADE RUMORS (Apr. 10, 2022, at 11:19 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/B3KS-QAPW>].

<sup>90</sup> Matt Kelly, *The earliest MLB contract extensions*, MLB (Aug. 22, 2025), <https://www.mlb.com/> [<https://perma.cc/TQ4F-Z9LG>].

<sup>91</sup> Rosenthal, *supra* note 11.

<sup>92</sup> See Nick Deeds, *Red Sox Interested In Exploring Long-Term Extensions With Top Prospects*, MLB TRADE RUMORS (Jan. 12, 2025, at 22:59 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/3X4Q-BJ7C>].

<sup>93</sup> See generally, MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003) (detailing the use of quantitative models by MLB front offices in the late 1990s and early 2000s to evaluate player performance and identify market inefficiencies in player compensation).

<sup>94</sup> David Seifert, *MLB Draft Review: 2017-2021*, PREP BASEBALL REP. (Jan. 9, 2024), <https://www.prepbaserballreport.com/> [<https://perma.cc/5SEN-393P>].

<sup>95</sup> See *Background*, BASEBALL TRADE VALUES, <https://www.baseballtradevalues.com/> [<https://perma.cc/QBH5-6EU3>];

When one analyzes projected production in light of free agency contracts, arbitration salaries, and non-tender decisions, one can extrapolate the market value of wins. Free agency contract offers are based off the projected value players are expected to contribute over the contract's life, with slight adjustments for increased sponsorships and ticket sales in the case of top-tier free agents.<sup>96</sup> Arbitration-eligible players, however, face a different sort of market as arbitration salaries are backwards facing with an emphasis on prior performance rather than future projections. While advanced statistics that many teams use in their WAR models can be presented at arbitration hearings, public arbitration models built using traditional statistics are quite accurate, indicating that such statistics are highly relevant in the system.<sup>97</sup>

Free agents earn roughly \$8 million per projected win they contribute.<sup>98</sup> Arbitration-eligible players are paid considerably less for each win they contribute, earning an average of \$3.5 million to \$4 million per projected WAR in their final season of eligibility.<sup>99</sup> Because players do not have to contribute as many wins to provide surplus value on their contracts, the bar for a player to be tendered a contract is relatively low. As such, most teams non-tender two or fewer players each year.<sup>100</sup>

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Dan Grossman, *Baseball is big business for companies that invest in players' futures*, SCRIPPS NEWS (June 21, 2023, at 14:11 MST), <https://www.scrippsnews.com/> [<https://perma.cc/5JA3-3Q5P>]. The educational and professional backgrounds of club leadership have also changed alongside this shift in behavior, as many teams have hired executives with advanced degrees or significant professional experience in finance and consulting.

<sup>96</sup> Jack Baer, *Ripple effects of Shohei Ohtani's contract: How the Dodgers will and won't profit off MLB's biggest star*, YAHOO! SPORTS (Feb. 1, 2024), <https://sports.yahoo.com/> [<https://perma.cc/933D-2LMC>].

<sup>97</sup> Ring, *supra* note 39.

<sup>98</sup> *Dollar/WAR in the 2024/2025 MLB Free Agency Market*, THE PARABALL NOTES (Dec. 27, 2024), <https://www.paraballnotes.com/> [<https://perma.cc/U5WL-32K5>].

<sup>99</sup> Ben Clemens, *An Arbitration Compensation Update*, FANGRAPHS (Feb. 4, 2022), <https://blogs.fangraphs.com/> [<https://perma.cc/R7BD-ZRGZ>]; Ben Clemens, *A Super Two Compensation Update*, FANGRAPHS (Feb. 3, 2022), <https://blogs.fangraphs.com/> [<https://perma.cc/U6ZX-V5QM>] [hereinafter *Super Two*].

<sup>100</sup> Eric Longenhagen, *On the Coming Deluge of Non-Tenders*, FANGRAPHS (Nov. 16, 2020), <https://blogs.fangraphs.com/> [<https://perma.cc/5CVE-BE84>]. See also *Complete list of non-tendered players*, MLB (Nov. 23, 2024), <https://www.mlb.com/> [<https://perma.cc/X3BH-5H94>].

Contract tendering decisions are made before a player and his team agree on a salary for the forthcoming season.<sup>101</sup> Teams and agencies use regression models that weigh a player's performance, past salaries, and comparable players' salaries to project what he should receive in the arbitration process.<sup>102</sup> The outputs of arbitration salary models and value projection models are weighed against each other, and the team generally tenders a player if it believes the player could reasonably provide value equal to or in excess of his salary.<sup>103</sup> Factors such as the team's financial position, the presence of big-league ready prospects in its farm system, and its relationship with the player can also contribute to a team's decision to non-tender a player.<sup>104</sup>

Since the arbitration system effectively guarantees a raise every season, there comes a point where injuries or poor play cause some players' projected salaries to outpace their expected production.<sup>105</sup> Arbitration and performance models come into play more often when lower-salaried players are non-tendered, given the low production threshold they must reach to provide surplus value. On the flip side, a low salary projection could make a team more amenable to retain a player and tender a contract rather than lose him to free agency. Most high-profile non-tenders involve former stars whose careers have been derailed by injury, ineffectiveness, or

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<sup>101</sup> Clemens, *supra* note 99; *Super Two*, *supra* note 99.

<sup>102</sup> Sean Dolinar, *Modeling Salary Arbitration: Stat Components*, FANGRAPHS (May 15, 2015), [https://blogs.fangraphs.com/\[https://perma.cc/JP3B-7Z55\]](https://blogs.fangraphs.com/[https://perma.cc/JP3B-7Z55]); Steve Adams, *Projected Arbitration Salaries For 2026*, MLB TRADE RUMORS (Oct. 6, 2025, at 23:59 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/R8P4-7MBA\]](https://www.mlptraderumors.com/[https://perma.cc/R8P4-7MBA]). While rare, pre-arbitration players can also be non-tendered. A pre-arbitration non-tender occurs when the team believes the player, who is earning roughly the league minimum salary, will be worth less than replacement value—the baseline production expected from a AAA player.

<sup>103</sup> See Eric Longenhagen, *Presenting a Mock Non-Tendering*, FANGRAPHS (Nov. 20, 2020), [https://blogs.fangraphs.com/\[https://perma.cc/E4JW-2YN2\]](https://blogs.fangraphs.com/[https://perma.cc/E4JW-2YN2]). *But see* Steve Adams, *Players Avoiding Arbitration: 11/22/24*, MLB TRADE RUMORS (Nov. 22, 2024, at 18:15 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/4FP7-Q96Y\]](https://www.mlptraderumors.com/[https://perma.cc/4FP7-Q96Y]). Some non-tender candidates will sign “pre-tender” deals that are noticeably lower than projections. This is a result of players' lack of negotiating leverage due to poor performance mixed with a preference to stay with their team.

<sup>104</sup> See Longenhagen, *supra* note 103.

<sup>105</sup> R.J. Anderson, *MLB non-tender candidates: Former Cy Young candidate, several All-Stars among 10 most interesting decisions*, CBS SPORTS (Nov. 22, 2024, at 18:03 ET), [https://www.cbssports.com/\[https://perma.cc/6UYJ-JQGD\]](https://www.cbssports.com/[https://perma.cc/6UYJ-JQGD]).

both. Advanced statistics play less of a role in such instances; higher salaries create a higher production threshold that an injured or poor-performing player is almost assured to not reach. Cody Bellinger and Brandon Woodruff were each Super Two players whose strong early-career contributions entitled them to relatively high salaries in their arbitration-eligible years and caused them both to be non-tendered when injuries struck.<sup>106</sup> Bellinger won the 2019 NL MVP after putting up video game-like numbers, leading him to earn a record salary for first-year arbitration-eligible players.<sup>107</sup> He suffered a shoulder injury during the 2020 season,<sup>108</sup> a leg fracture at the start of 2021,<sup>109</sup> and then scuffled to a .611 on-base plus slugging (OPS) over the 2021 and 2022 seasons.<sup>110</sup> Bellinger was non-tendered ahead of the 2023 season after being projected to earn approximately \$18 million in his final season of arbitration eligibility.<sup>111</sup> While the arbitration system valued him as a roughly four to five WAR player,<sup>112</sup> it was clear the Dodgers did not believe a player who had posted a tenth-percentile Expected Weighted On-base Average in 2022 could reasonably return to All-Star form in 2023.<sup>113</sup> Milwaukee Brewers' starter Brandon Woodruff never saw such a downturn in production, instead suffering a shoulder capsule injury in his fifth season of MLB service.<sup>114</sup> The injury was set to

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<sup>106</sup> *Brandon Woodruff*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/7PSC-7NCM>]; *Cody Bellinger*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/2QQM-B8A3>].

<sup>107</sup> Ken Gurnick, *Bellinger sets 1st-year arbitration record*, MLB (Jan. 11, 2020), <https://www.mlb.com/> [<https://perma.cc/3QLW-6CHZ>].

<sup>108</sup> Ken Gurnick, *Bellinger has surgery for dislocated shoulder*, MLB (Nov. 17, 2020), <https://www.mlb.com/> [<https://perma.cc/792G-3CDY>].

<sup>109</sup> Juan Toribio, *Bellinger has hairline fracture in left fibula*, MLB (Apr. 17, 2021), <https://www.mlb.com/> [<https://perma.cc/7ZX5-PJVT>].

<sup>110</sup> *Cody Bellinger*, BASEBALL REFERENCE, <https://www.baseball-reference.com/> [<https://perma.cc/995T-VB7V>].

<sup>111</sup> Alden Gonzalez, *Dodgers non-tender Cody Bellinger, making him a free agent*, ESPN (Nov. 18, 2022, at 18:44 ET), <https://www.espn.com/> [<https://perma.cc/LHM2-999D>].

<sup>112</sup> *Super Two*, *supra* note 99. The 4 to 5 WAR figure comes from the \$3.5 to 4 million approximation for third-year arbitration-eligible players.

<sup>113</sup> *Cody Bellinger*, BASEBALL SAVANT, <https://baseballsavant.mlb.com/> [<https://perma.cc/WX6E-FHMD>].

<sup>114</sup> R.J. Anderson, *MLB non-tender candidates: Brewers' Brandon Woodruff headlines list of 10 most interesting decisions*, CBS SPORTS (Nov. 17, 2023, at 12:37 ET), <https://www.cbssports.com/> [<https://perma.cc/H6DV-HLHH>].

keep him out of game action for more than a full season.<sup>115</sup> The injury's timing and severity meant Woodruff would likely not play in another game before reaching free agency after the 2024 season. Rather than run the risk of paying roughly \$11.6 million to a player who may never suit up for the team, the Brewers non-tendered Woodruff and re-signed him to a two-year deal at a lower annual value.<sup>116</sup>

### III. TRENDS IN PRACTICE: NOTABLE RECENT ARBITRATION CASES

The sheer number of precedent cases has caused teams' and agencies' arbitration models to become optimized, leading both parties to put forth figures that are similar enough to quickly come to an agreement. If no agreement is reached, the hearing process has proven to be contentious as teams and players use their best arguments, often at the expense of their relationship with the other party.<sup>117</sup>

This section will examine a variety of topics such as public information about specific arbitration hearings, how previously discussed practices and front office methodology are used in practice, and the market inefficiencies the system creates. This section will also speculate on how an arbitration panel will treat two-way players.

#### A. PLAYERS' CALLS FOR REFORM – RYAN THOMPSON

The public received its most detailed look into the salary arbitration process in February 2023, when then-Rays reliever Ryan Thompson wrote a thread on X (formerly Twitter) recapping his experience with the arbitration process. Thompson's case highlights the disparity between the traditional statistical framework in which the salary arbitration system is based and the wealth of information that can be introduced during the hearing. The use of advanced metrics appears to be just as persuasive as player comparisons. Each party uses statistics that best support its arguments at the hearing,

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<sup>115</sup> Adam McCalvy, *Woodruff has right shoulder surgery; next season in doubt*, MLB (Oct. 13, 2023), <https://www.mlb.com/> [<https://perma.cc/MJ4Q-Y8HA>].

<sup>116</sup> Adam McCalvy, *Brewers non-tender Woodruff, Tellez*, MLB (Nov. 18, 2023), <https://www.mlb.com/> [<https://perma.cc/NH6G-6E3F>]; Jesse Sanchez, *Brewers bring back injured ace Woodruff on 2-year deal*, MLB (Feb. 21, 2024), <https://www.mlb.com/> [<https://perma.cc/8A78-TS82>].

<sup>117</sup> Corbin Burnes: *Arbitration hurt relationship with Brewers*, ESPN (Feb. 16, 2023, at 16:01 ET), <https://www.espn.com/> [<https://perma.cc/7CDQ-KKYA>].

even if those statistics would not be a factor during negotiations. Thompson's hearing also showcases the hearings' unpredictability, a result of the arbitrators' whims and baseball knowledge (or lack thereof.) However, these events also exhibit the Rays' and their counsel's expertise during these hearings as they have more experience in the hearing process than any individual player or his counsel. Thompson was a fairly solid middle-reliever through his first three seasons, turning in a 3.50 earned run average (ERA) and 1.184 walks plus hits per inning pitched (WHIP) over 103 career innings.<sup>118</sup> He filed for a \$1.2 million salary in his first year of arbitration eligibility, while the Rays countered with \$1 million.<sup>119</sup> Thompson was one of two middle relievers that went to a hearing against the Rays that offseason, with left-hander Colin Poche filing for a \$1.3 million salary compared to the Rays' figure of \$1.175 million.<sup>120</sup> In all, the team took the relievers to hearings over \$325,000, a total amounting to .33% of their previous year's payroll that was eighth-lowest in the league.<sup>121</sup> The Rays prevailed in both cases.<sup>122</sup>

Following his defeat at the hearing, Thompson detailed the approach he and his counsel took towards the hearing. Their approach was to stay as close to the criteria outlined in the CBA and focus on Thompson's 2022 holds and leverage index, which Thompson called "the most important statistics for a middle reliever/set-up man."<sup>123</sup> The Rays countered his counsel's

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<sup>118</sup> *Ryan Thompson*, BASEBALL REFERENCE, <https://www.baseball-reference.com/> [<https://perma.cc/D628-8467>].

<sup>119</sup> Simon Hampton, *Rays Win Arbitration Cases Against Colin Poche, Ryan Thompson*, MLB TRADE RUMORS (Feb. 18, 2023, at 10:14 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/8HJT-S5U2>].

<sup>120</sup> *Id.*

<sup>121</sup> *Tampa Bay Rays 2022 Luxury Tax Payroll*, SPOTRAC, <https://www.spotrac.com/> [<https://perma.cc/LE2H-TK49>].

<sup>122</sup> Hampton, *supra* note 119.

<sup>123</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com> [<https://perma.cc/X3F8-DZRV>]; Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com> [<https://perma.cc/7PFP-UAUV>]. Holds is a statistic that measures how many times a pitcher protects the lead without earning a save. To earn a hold, a pitcher must enter with a lead of three runs or less, or with the tying run on-deck, at the plate, or on the bases, and maintain the lead while recording at least 1 out. Leverage index measures the importance of a game situation based on how much each plate appearance changes the outcome of the game according to win probability calculations. This means that relievers who are used in late and close situations have a higher leverage index.

arguments by referencing his blown saves and lack of usage against left-handed hitters.<sup>124</sup> Thompson was leery of the Rays' use of FanGraphs' Meltdowns statistic,<sup>125</sup> which measures relief appearances where the reliever exits the game with at least a 6% lower win probability than when they entered.<sup>126</sup> He took issue with the fact that Meltdowns is a proprietary statistic created by a third-party, opining that the Rays' use of this statistic possibly strayed from the CBA's criteria.<sup>127</sup> He also believed the Rays' emphasis on the timing of Thompson's triceps injury that caused him to miss the postseason was not allowable in the criteria.<sup>128</sup>

Thompson then detailed the comparable players he relied on at the hearing, namely Dodgers righty Brusdar Graterol. Thompson's camp filed at \$25,000 less than Graterol's first-year arbitration salary, given the similarities in their performance up to that point.<sup>129</sup> Thompson had thrown eight less career innings than Graterol, but had the same number of saves, three more holds, and a much higher leverage index than the hard-throwing Dodger.<sup>130</sup> Other notable comparisons were Josh Staumont, who was bottom-five in ERA and WHIP among first-year arbitration-eligible relievers in 2022<sup>131</sup> and Cam Bedrosian, whom Thompson bested in "[b]asically every single important stat."<sup>132</sup> Notably, Bedrosian earned a \$1.1 million salary in his first year of arbitration eligibility, the exact midpoint between the figures exchanged by Thompson and the Rays.<sup>133</sup>

Despite Thompson's insistence he was comparable or better than each of these players, the panel chose the Rays' \$1 million figure, an amount that was nearly 20 percent lower than Graterol's first-year arbitration salary. The reliever griped about the arbitrators' lack of knowledge about baseball, opining that his

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<sup>124</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/7X8S-QPSA>].

<sup>125</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/KX94-6NVJ>].

<sup>126</sup> David Appelman, *Shutdowns & Meltdowns*, FANGRAPHS (May 6, 2010), <https://blogs.fangraphs.com/> [<https://perma.cc/67UH-X5BA>].

<sup>127</sup> Thompson, *supra* note 125.

<sup>128</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/LX4C-W5WH>].

<sup>129</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/PKY6-YQG8>].

<sup>130</sup> *Id.*

<sup>131</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/Y5QB-43B9>].

<sup>132</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/TB7D-B25M>].

<sup>133</sup> *Id.*

counsel “potentially made unwise assumptions on the arbitrator’s understanding of statistics and the logic of being over the midpoint.”<sup>134</sup> He also was concerned by the secretiveness of the decision-making process and decision’s non-reviewability,<sup>135</sup> expressing that the arbitrators “must have chosen the other side for reasons not stated in the criteria.”<sup>136</sup> Then-Athletics reliever Trevor May concurred with Thompson’s analysis, calling salary arbitration “[a] really bad system and seemingly only getting worse.”<sup>137</sup> May added that the salary negotiation leverage players gain by earning arbitration rights is merely “a weird facade of fairness to give the impression of control for the player.”<sup>138</sup>

Thompson’s characterization that arbitrators lack the requisite baseball knowledge appears to be inaccurate. MLB and the MLBPA select the arbitration panel’s members,<sup>139</sup> and arbitrators who have demonstrated a complete lack of baseball knowledge in the past have been dismissed from the panel.<sup>140</sup> Although some of Thompson’s criticisms merely disagreed with the fundamental nature of arbitration, there are reasons to believe the arbitrators erred in their decision. While blown saves can be indicative of a pitcher’s failure to hold a lead in the late innings, blown saves can result from a myriad of possibilities unrelated to a pitcher’s effectiveness such as poor defense, a subsequent reliever allowing inherited runners to score, or allowing the abhorrently-gimmicky automatic runner to score in extra innings.<sup>141</sup> Multiple sources of

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<sup>134</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/B3BW-4B4V>].

<sup>135</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/3FZZ-JNSJ>].

<sup>136</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:41 MST), <https://x.com/> [<https://perma.cc/2JP4-PBN3>].

<sup>137</sup> Trevor May (@IamTrevorMay), X (Feb. 23, 2023, at 21:37 MST), <https://x.com/> [<https://perma.cc/N956-G56X>].

<sup>138</sup> *Id.*

<sup>139</sup> Heath Law & Nanaimo Lawyers, *Contrasting and Comparing Salary Arbitration in Professional Sport: Major League Baseball vs. National Hockey League*, HEATH LAW LLP (Aug. 8, 2023), <https://www.nanaimolaw.com/> [<https://perma.cc/SWY7-UDV4>].

<sup>140</sup> Anthony Castrovince, *Smells and superstitions: Tales of arbitration*, MLB (Feb. 3, 2018), <https://www.mlb.com/> [<https://perma.cc/JC4U-DM6U>].

<sup>141</sup> Shane Tourtellotte, *The Unofficial Rules: Of Holds and Blown Saves*, THE HARDBALL TIMES (Dec. 28, 2017), <https://tth.fangraphs.com/> [<https://perma.cc/VW73-F8CN>]; Mike Axisa, *What’s behind Yankees closer Clay Holmes’ blown saves? Plus where else the Bombers could turn*

authority also disagree on the criteria for determining a blown save.<sup>142</sup> A blown save could be credited to a pitcher who surrenders the lead while pitching in a relief capacity at any point in the game, including the first inning.<sup>143</sup> The argument regarding Thompson's usage against left-handed hitters was also not very salient as this lack of usage against left-handed hitters was largely a result of Rays manager Kevin Cash's discretion. Small sample size caveats always apply for relievers, but Thompson was better against lefties in 2022, holding left-handed hitters to a .549 OPS compared to a .692 OPS against right-handed hitters. The Rays' argument that Thompson was "protected" from lefties<sup>144</sup> could easily be countered with statistics supporting that the Rays' characterization was untrue and that Thompson was successful against left-handed hitters.<sup>145</sup>

Apart from the player comparisons, Thompson did not mention any of his counsel's arguments or rebuttals during the hearing. It is entirely possible that his loss is attributable to a failure to properly address the Rays' arguments. He also said that his counsel did not "scour the web for positive terminology," although that is precisely the type of material allowed by the criteria.<sup>146</sup> In fact, at the time of Thompson's trial, it was publicly known that statistics created by sites like FanGraphs and Baseball Prospectus were extensively used in arbitration hearings.<sup>147</sup>

Nevertheless, Thompson's case highlights an important facet of the arbitration system. Teams and their outside counsel go through the hearing process far more often than agencies and players'

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*in the ninth*, CBS SPORTS (Aug. 21, 2024, at 11:55 ET), <https://www.cbssports.com/> [<https://perma.cc/6SE2-J6A6>].

<sup>142</sup> *Id.*

<sup>143</sup> See *Red Sox vs. Tigers Box Score*, ESPN (Feb. 27, 2025), <https://www.espn.com/> [<https://perma.cc/AAH5-QQEB>]. Josh Winckowski was credited with a blown save during a Spring Training game in which he surrendered a game-tying run in the fourth inning. David Robertson was also credited with a blown save in the 2017 AL Wild Card game for allowing a tying run in the fourth inning. A relief pitcher who throws at least the final three innings of a game is credited with a save, meaning that a pitcher could relieve a starter in the first inning, record all 27 outs, and be credited with a blown save if they surrender the lead at any point.

<sup>144</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/H9QU-Q9C6>].

<sup>145</sup> Ryan Thompson (@R\_Thompson15), X (Feb. 22, 2023, at 19:39 MST), <https://x.com/> [<https://perma.cc/AP4Q-JSDQ>].

<sup>146</sup> Thompson, *supra* note 125.

<sup>147</sup> Jeff Passan, *Passan: Inside the wild, wonky world of MLB salary arbitration*, ESPN (Jan. 10, 2019, at 09:00 ET), <https://www.espn.com/> [<https://perma.cc/WMZ4-4S8W>].

counsel. Teams know more about the criteria's limits, the types of arguments that resonate with arbitrators, and the most effective ways to communicate the importance of non-traditional statistics. Thompson purported that several of the Rays' arguments such as their reference to meltdowns and the timing of his injury possibly fell outside the criteria.<sup>148</sup> However, if he and his counsel had known that such arguments were fair game, they too could have made similar points in his favor.

## B. THE DISSONANCE BETWEEN THE ARBITRATION SYSTEM AND THE MODERN FRONT OFFICE – CHRIS CARTER

The criteria used in the salary arbitration process are not the same criteria used by front offices in their own player evaluations. Front offices rely on statistical models, advanced statistics, and their professional scouting department to project a player's value and future production. Comparatively, the salary arbitration system is still based in its 1970s roots and is centered around traditional stats, such as home runs and ERA. While it is possible that teams and agencies put some weight into sabermetric statistics when drawing up and negotiating arbitration figures, there nonetheless exists a large gulf between how players are valued in salary arbitration projections versus any other transaction involving player acquisition. This gap between the value of a player's past and projected performance is the crux of many non-tenders. Chris Carter's career exemplified this valuation disparity.

A stereotypical power hitter who posted high home run and strikeout totals, Carter produced enough to be the Astros' everyday first baseman as the team exited its rebuild in the mid-2010s. Carter became arbitration-eligible ahead of the 2015 season and earned a payday of \$4.175 million, a fairly large sum in his first-year of arbitration eligibility afforded to him because of his power production.<sup>149</sup> He followed that up with the worst year of his career as a big-league regular, hitting .199 with a 32.8 percent strikeout rate.<sup>150</sup> While there were reasons to be bullish on Carter's future production such as his 53 percent hard-hit rate and penchant for hitting the ball in the air,<sup>151</sup> the Astros were unable to trade Carter

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<sup>148</sup> Thompson, *supra* note 125; Thompson, *supra* note 128.

<sup>149</sup> *Astros agree to \$4,175,000 contract with Carter*, SI (Jan. 14, 2015), <https://www.si.com/> [<https://perma.cc/RLT8-6HRG>].

<sup>150</sup> *Chris Carter*, BASEBALL REFERENCE, <https://www.baseball-reference.com/> [<https://perma.cc/V633-L272>].

<sup>151</sup> *Id.*

and his projected \$5.6 million salary.<sup>152</sup> Houston non-tendered Carter in December and he signed with the Milwaukee Brewers for \$2.5 million a month later.<sup>153</sup>

Carter performed better than expected in Milwaukee as he continued to make superlatively-hard contact, smacking 41 home runs to tie him with Nolan Arenado for most in the National League (NL).<sup>154</sup> Conversely, Carter led the NL with 206 strikeouts and made contact on only 64.6 percent of his swings, the lowest rate among 146 batters with at least 500 plate appearances.<sup>155</sup> Despite seemingly putting up a career year with 41 home runs and 94 RBIs in 2016, Carter's year-end weighted runs created plus (wRC+) was 113, barely above his career wRC+ mark of 112.<sup>156</sup> His 113 wRC+ mark was only the 13th-best among the 23 first basemen who had at least 500 plate appearances in 2015.<sup>157</sup> Carter projected for an \$8.1 million salary in 2017, and it was widely expected that the Brewers would tender him a contract.<sup>158</sup> However, the Brewers bucked fan consensus and non-tendered Carter in light of his bat-to-ball issues, fairly pedestrian offensive production compared to other first basemen, and high projected arbitration salary.<sup>159</sup> He signed with the Yankees for \$3.5 million with \$500,000 in bonuses

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<sup>152</sup> Jeff Todd, *Astros To Non-Tender Chris Carter*, MLB TRADE RUMORS (Dec. 2, 2015, at 22:30 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/E6HF-6NKX\]](https://www.mlptraderumors.com/[https://perma.cc/E6HF-6NKX]).

<sup>153</sup> Associated Press, *First baseman Chris Carter joins Brewers on 1-year deal*, ESPN (Jan. 6, 2016, at 20:11 ET), [https://www.espn.com/\[https://perma.cc/VK7E-NKM4\]](https://www.espn.com/[https://perma.cc/VK7E-NKM4]). Carter ended up making \$3 million during the 2016 season as he earned \$500,000 in performance bonuses for exceeding 500 plate appearances during the season.

<sup>154</sup> *2016 National League Batting Leaders*, BASEBALL REFERENCE, [https://www.baseball-reference.com/\[https://perma.cc/5KQR-W4FK\]](https://www.baseball-reference.com/[https://perma.cc/5KQR-W4FK]).

<sup>155</sup> *Id.*; *Major League Leaders*, FANGRAPHS, [https://www.fangraphs.com/\[https://perma.cc/4RQM-SPTF\]](https://www.fangraphs.com/[https://perma.cc/4RQM-SPTF]).

<sup>156</sup> *Chris Carter*, FANGRAPHS, [https://www.fangraphs.com/\[https://perma.cc/AQN2-L6ER\]](https://www.fangraphs.com/[https://perma.cc/AQN2-L6ER]). wRC+ is a statistic that compares a player's offensive performance to that of the entire league, taking ballpark effects into account. The statistic is set at a median of 100, so Carter's 2016 mark of 113 indicates he was 13 percent better than the average hitter in 2016.

<sup>157</sup> *Major League Leaders*, FANGRAPHS, [https://www.fangraphs.com/\[https://perma.cc/FE3Z-G58Z\]](https://www.fangraphs.com/[https://perma.cc/FE3Z-G58Z]).

<sup>158</sup> Charlie Wilmoth, *Poll: Should The Brewers Tender Chris Carter?*, MLB TRADE RUMORS (Oct. 23, 2016, at 18:19 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/4KZJ-LN9W\]](https://www.mlptraderumors.com/[https://perma.cc/4KZJ-LN9W]).

<sup>159</sup> Jeff Todd, *Brewers To Non-Tender Chris Carter*, MLB TRADE RUMORS (Nov. 28, 2016, at 20:33 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/A57Z-9W89\]](https://www.mlptraderumors.com/[https://perma.cc/A57Z-9W89]).

based on plate appearances, essentially a \$1 million raise from his 2016 salary.<sup>160</sup> Milwaukee's move proved to be prescient, as Carter was designated for assignment by the Yankees twice during the season, ultimately playing his final big league game on July 4, 2017.<sup>161</sup>

### C. FILE AND TRIAL – CASEY MIZE

The extent of teams' file and trial approach to arbitration proceedings has been more extreme in recent years, as exemplified by the Tigers' bewildering decision to exchange figures over a \$25,000 difference in each party's last best offer.

The first overall pick of the 2018 draft, Casey Mize's early years in MLB did not go to plan. His brief 2020 debut went poorly, though he was likely promoted early to ensure he saw competitive games in a year where the minor league season was cancelled.<sup>162</sup> Mize's 2021 season was more positive and pointed towards a potential mid-rotation future.<sup>163</sup> However, his 2022 season was over almost as soon as it began as he suffered a sprained medial ligament after his second start on April 14.<sup>164</sup> Imaging revealed his ulnar collateral ligament was stretched to the point where it had no elasticity, forcing Mize to undergo Tommy John surgery that summer.<sup>165</sup> He also underwent back surgery while rehabbing from elbow surgery, slightly delaying his timeline to return to the mound.<sup>166</sup> These two procedures wiped out Mize's 2022 and 2023 seasons—his last two pre-arbitration years—meaning he had to settle for a salary near the league minimum.

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<sup>160</sup> Connor Byrne, *Yankees Sign Chris Carter*, MLB TRADE RUMORS (Feb. 16, 2017, at 10:54 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/YZV6-KUDX\]](https://www.mlptraderumors.com/[https://perma.cc/YZV6-KUDX]).

<sup>161</sup> Jeff Todd, *Yankees Designate Chris Carter*, MLB TRADE RUMORS (July 4, 2017, at 16:22 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/RW49-J6QK\]](https://www.mlptraderumors.com/[https://perma.cc/RW49-J6QK]); *Chris Carter*, *supra* note 150.

<sup>162</sup> *See Casey Mize*, FANGRAPHS, [https://www.fangraphs.com/\[https://perma.cc/5D95-F53U\]](https://www.fangraphs.com/[https://perma.cc/5D95-F53U]).

<sup>163</sup> *Id.*

<sup>164</sup> Anthony Franco, *Casey Mize Shut Down From Throwing Due To Continued Elbow Soreness*, MLB TRADE RUMORS (June 7, 2022, at 19:46 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/RA4N-FACV\]](https://www.mlptraderumors.com/[https://perma.cc/RA4N-FACV]).

<sup>165</sup> Darragh McDonald, *Casey Mize To Undergo Tommy John Surgery*, MLB TRADE RUMORS (June 10, 2022, at 22:50 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/V8E4-PC6H\]](https://www.mlptraderumors.com/[https://perma.cc/V8E4-PC6H]).

<sup>166</sup> Darragh McDonald, *Casey Mize Underwent Back Surgery Last Year*, MLB TRADE RUMORS (Feb. 15, 2023, at 21:53 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/2YAQ-DQKT\]](https://www.mlptraderumors.com/[https://perma.cc/2YAQ-DQKT]).

The Tigers tendered a contract to Mize but could not come to an agreement by the filing deadline.<sup>167</sup> Mize filed at \$840,000, while the Tigers filed at \$815,000.<sup>168</sup> Given the preparation time and attorney's fees paid to outside counsel, the Tigers were likely losing money by preparing for a hearing over such a small sum. The Tigers' approach highlights two of the core realities of salary arbitration: saving \$25,000 in salary will create a lower datapoint for future negotiations with other players and increase the Tigers' savings throughout Mize's final two years of arbitration eligibility.<sup>169</sup> Additionally, the parties' inability to settle on a salary figure before the deadline showcases how strictly each side adheres to their arbitration models. However, the salary figures submitted to the league are the final results of negotiations and may not wholly reflect the figures that were discussed before the filing deadline.<sup>170</sup> It is entirely possible that the parties had a larger gap during negotiations, only converging upon exchanging figures in order to potentially appear less extreme to an arbitration panel.

Mize and the Tigers eventually avoided arbitration, coming to terms a week after the filing deadline.<sup>171</sup> As expected from a file and trial team, the contract was not a straightforward one-year deal. Instead, it was a one-year, \$830,000 contract with a \$3.1 million club option for 2025.<sup>172</sup> Mize would receive an additional \$10,000 if the Tigers declined the option, guaranteeing him \$840,000 – his exact filing figure.<sup>173</sup> After the 2024 season, the Tigers declined Mize's option and agreed to a \$2.34 million salary for 2025 in advance of the filing deadline.<sup>174</sup>

Casey Mize's brief arbitration saga demonstrates the role of arbitration models in today's landscape and the extent to which teams stick to their file and trial approach. While it is not publicly known what caused the Tigers to reverse course and guarantee

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<sup>167</sup> Woodbery, *supra* note 1.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Evan Woodbery, *Tigers, Casey Mize reach deal to avoid arbitration hearing*, MLIVE (Jan. 19, 2024, at 18:46 MST), [https://www.mlive.com/\[https://perma.cc/5ETH-B9YN\]](https://www.mlive.com/[https://perma.cc/5ETH-B9YN]).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Anthony Franco, *Tigers Decline Option On Casey Mize, Retain Club Control Via Arbitration*, MLB TRADE RUMORS (Nov. 4, 2024, at 16:27 CDT), [https://www.mlptraderumors.com/\[https://perma.cc/R5UN-9W2P\]](https://www.mlptraderumors.com/[https://perma.cc/R5UN-9W2P]); *Tigers' Casey Mize: Under contract for 2025*, CBS SPORTS (Jan. 9, 2025, at 10:26 ET), [https://www.cbssports.com/\[https://perma.cc/96RW-RL96\]](https://www.cbssports.com/[https://perma.cc/96RW-RL96]).

\$840,000 to Mize, the optics of exchanging figures over \$25,000 certainly did not help. For comparison's sake, among the 17 players who exchanged figures with their clubs in 2025, the average difference in teams' and players' figures was \$650,000.<sup>175</sup> At any rate, the Tigers were able to avoid a potentially contentious hearing and structured the contract in a way that ensured the effects of this filing fiasco could not affect any future arbitration negotiations.

#### D. LATE BLOOMING STARS – GARRETT CROCHET

The salary arbitration system creates inefficiencies in the market for late-blooming player talent, especially those who do not become everyday players until they have already become arbitration-eligible. In these cases, players have lower salaries relative to players who established themselves in their pre-arbitration seasons can more easily provide surplus value. Thus, a player's lack of a track record can cause him to become a more valuable trade asset. In baseball, the lack of prior consistent performance is not dispositive of future success. Teams and analysts have created predictive models and statistics that are more adept at projecting future performance than the traditional statistics that go into arbitration models.<sup>176</sup> As such, the inherent risks of trading for players without much of a track record is significantly lessened and competitive teams are more willing to part with valuable prospects.

Drafted 11th-overall by the Chicago White Sox in 2020, Garrett Crochet debuted that season without playing a minor league game.<sup>177</sup> While advanced Southeastern Conference standouts like Crochet often require less development than other prospects, the promotion came with the assumption that he would pitch out of the White Sox's bullpen during their playoff run before developing into a starter in subsequent seasons.<sup>178</sup> This plan hit several major speed bumps as Crochet dealt with numerous injuries, pitching only 73 innings before attaining arbitration eligibility ahead of the 2024

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<sup>175</sup> See Dan Soemann, *2025 MLB Arbitration Review*, SPOTRAC (Feb. 15, 2025), <https://www.spotrac.com/> [<https://perma.cc/5FPH-ZP6N>].

<sup>176</sup> Dylan Drummey, *Defining Descriptive, Predictive, and Prescriptive Statistics in Baseball*, TDA BASEBALL (Oct. 26, 2022), <https://www.tdatabaseball.com/> [<https://perma.cc/8ESY-THLU>]; Adam Salorio, *Introducing My Stuff+ Model*, MEDIUM (May 30, 2024), <https://medium.com/> [<https://perma.cc/F3VV-FGW3>].

<sup>177</sup> *Garrett Crochet*, BASEBALL REFERENCE, <https://www.baseball-reference.com/> [<https://perma.cc/8T74-VU48>].

<sup>178</sup> See Sam Dykstra, *White Sox call up 2020 first-rounder Crochet*, MiLB (Sep. 18, 2020), <https://www.milb.com/> [<https://perma.cc/QKZ8-QP7Z>].

season.<sup>179</sup> This lack of performance led Crochet to agree to a near-league minimum salary of \$800,000 for the 2024 season.<sup>180</sup> The rebuilding White Sox gave Crochet a chance to stick in the rotation and tabbed him to be the team's Opening Day starter, a decision that was generally met with a mix of derision and apathy.<sup>181</sup> However, Crochet ended up being one of the few bright spots on the historically-terrible 2024 White Sox and quickly became a hot topic in trade discussions.<sup>182</sup> Once a two-pitch reliever, Crochet started pumping a high-octane, five-pitch arsenal that performed at an elite level because of his shallow vertical approach angle and extension at pitch release.<sup>183</sup> His ERA tailed off toward the end of the year, due both in part to fatigue from his increased innings total and the White Sox's poor defense, but pitch models graded Crochet's pitch mix as one of the best in the game. PitchingBot was particularly bullish, grading his entire arsenal as being 1.9 standard deviations above average while Stuff+ gave Crochet the third-highest Pitching+ score among pitchers with 100 innings.<sup>184</sup> He also ended the season with the second-best Fielding Independent Pitching (FIP) mark in the AL, trailing only Cy Young winner Tarik Skubal.<sup>185</sup> FIP, while not inherently a predictive metric, is widely regarded to be far more predictive than traditional statistics and falls within the arbitration criteria outlined in the CBA.<sup>186</sup> However, pitch models fall outside the criteria as their inputs can only be collected through the Hawk-Eye Statcast system and performance technology devices

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<sup>179</sup> *Garrett Crochet*, *supra* note 177.

<sup>180</sup> Steve Adams, *2024 Arbitration Tracker*, MLB TRADE RUMORS (Jan. 11, 2024, at 23:58 CDT), [https://www.mlbtraderumors.com/\[https://perma.cc/YTT8-TJB5\]](https://www.mlbtraderumors.com/[https://perma.cc/YTT8-TJB5]).

<sup>181</sup> See Will Leitch, *Ranking all 15 Opening Day starting pitcher faceoffs*, MLB (Mar. 28, 2024), [https://www.mlb.com/\[https://perma.cc/37NQ-2Z54\]](https://www.mlb.com/[https://perma.cc/37NQ-2Z54]).

<sup>182</sup> Nick Deeds, *Latest On Garrett Crochet's Trade Market*, MLB TRADE RUMORS (July 14, 2024, at 09:37 CDT), [https://www.mlbtraderumors.com/\[https://perma.cc/AWR5-UZ89\]](https://www.mlbtraderumors.com/[https://perma.cc/AWR5-UZ89]).

<sup>183</sup> Thomas Nestico (@TJStats), X (Dec. 11, 2024, at 11:56 MST), [https://x.com/\[https://perma.cc/3AUT-EPNW\]](https://x.com/[https://perma.cc/3AUT-EPNW]).

<sup>184</sup> *Major League Leaders*, FANGRAPHS, [https://www.fangraphs.com/\[https://perma.cc/M7C7-L5TQ\]](https://www.fangraphs.com/[https://perma.cc/M7C7-L5TQ]). Pitch quality models outperform traditional statistics in predicting future success. See Owen McGrattan, *Stuff+*, *Location+*, and *Pitching+* *Primer*, FANGRAPHS (Mar. 10, 2023), [https://library.fangraphs.com/\[https://perma.cc/6B59-VUD2\]](https://library.fangraphs.com/[https://perma.cc/6B59-VUD2]).

<sup>185</sup> *Major League Leaders*, FANGRAPHS, [https://www.fangraphs.com/\[https://perma.cc/F7F6-Z6RF\]](https://www.fangraphs.com/[https://perma.cc/F7F6-Z6RF]).

<sup>186</sup> Xavi Loinaz, *A Brief Analysis of Predictive Pitching Metrics*, FANGRAPHS (Jan. 18, 2018), [https://community.fangraphs.com/\[https://perma.cc/9GMZ-UBHV\]](https://community.fangraphs.com/[https://perma.cc/9GMZ-UBHV]).

like Trackman.<sup>187</sup> Front offices take publicly available pitch models and projection systems into account, but most have their own proprietary models.<sup>188</sup> While these team-created models and statistics cannot be considered in the arbitration process, they can greatly influence a front office's evaluations of players and their decisions to non-tender or acquire players.

Crochet did not receive any Cy Young consideration because of his low workload relative to other starters, but it was clear that he was one of the best pitchers available on the trade market in the offseason. The Red Sox pulled the trigger and traded four players from their top-ranked farm system, including their two most recent first-round draft picks.<sup>189</sup> Conservative estimates pegged the value of the prospects traded at \$41 million.<sup>190</sup> The Red Sox avoided arbitration with Crochet, agreeing on a \$3.8 million salary for 2025.<sup>191</sup> One could estimate that the Red Sox valued Crochet's production in his last two years of team control at somewhere between \$50-55 million in surplus value when accounting for Crochet's projected salary in his final year of arbitration and the prospect capital used to acquire him. The sides later agreed to a six-year, \$170 million extension at the start of the 2025 season.<sup>192</sup> Crochet will earn \$24.67 million in 2026, signaling that his true value was substantially higher than his arbitration salaries indicated.<sup>193</sup>

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<sup>187</sup> *Basic Agreement*, *supra* note 34, at 21.

<sup>188</sup> Eno Sarris, *The baseball statistic that's changing MLB – for better or worse*, THE ATHLETIC (Feb. 5, 2025), <https://www.nytimes.com/https://perma.cc/MB5M-GFF4>.

<sup>189</sup> Ben Clemens, *Red Sox Acquire Garrett Crochet in Winter Meetings Blockbuster*, FANGRAPHS (Dec. 11, 2024), <https://blogs.fangraphs.com/https://perma.cc/5X7D-J6JT>.

<sup>190</sup> *Id.*; *Farm System Rankings*, FANGRAPHS, <https://www.fangraphs.com/https://perma.cc/T2T5-SL8F>. The three position players traded by Boston were given future value grades of 50, 45+, and 40, while the pitcher traded was valued at a 40+. Their values add up to \$41 million on the farm system rankings valuation chart. Other prospect evaluators had the two centerpieces, Kyle Teel and Braden Montgomery, evaluated much more bullishly, hence why FanGraphs' valuation was labeled as "conservative."

<sup>191</sup> Chris Cotillo (@ChrisCotillo), X (Jan. 9, 2025, at 11:14 MST), <https://x.com/https://perma.cc/JDP9-KGSY>.

<sup>192</sup> Ian Browne, *Crochet, Red Sox finalize 6-year, \$170 million extension*, MLB (Apr. 1, 2025), <https://www.mlb.com/https://perma.cc/K6G2-3KK4>.

<sup>193</sup> *Garret Crochet*, *supra* note 177.

While the salary arbitration system was initially created as a way for players to earn salaries similar to comparable players,<sup>194</sup> players like Crochet can slip through the cracks and provide far more value than most players while earning a substantially lower salary than other arbitration-eligible stars. Although Crochet's story is unique, there are some lessons that apply to teams' prospect promotion practices and their effect on arbitration salaries. The Prospect Promotion Incentive has been somewhat effective at stifling service time manipulation, but the pace at which teams promote prospects still varies.<sup>195</sup> While some prospects hit the ground running and bring enough surplus value to outweigh their arbitration salaries, a quicker pace of prospect promotion could result in a longer adjustment period at the MLB level for many players. In turn, these players' lack of consistent production will dampen their arbitration salaries. If they eventually develop into solid major leaguers, they will be more valuable trade assets than those who faced no such adjustment period.

#### E. THE TWO-WAY CONUNDRUM – SHOHEI OHTANI

Words cannot describe the baseball world's fervent obsession with Shohei Ohtani and his skills on the pitcher's mound and in the batter's box. Ohtani's success ushered in a widespread fascination with two-way players across all levels of baseball, increasing organizations' willingness to let players develop two-way capabilities.<sup>196</sup> While some players have dabbled with playing both ways in the big leagues, most players' attempts to ascend to a Ruthian status are merely stunts to circumvent MLB's roster

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<sup>194</sup> Gilbert, *supra* note 7.

<sup>195</sup> Compare Jeff Passan, *Paul Skenes called up to MLB: Inside the Pirates' decision*, ESPN (May 9, 2024, at 07:00 ET), <https://www.espn.com/> [<https://perma.cc/PW4V-X43G>] (Skenes was drafted first overall in 2023 and should have easily made the Pirates 2024 Opening Day roster but was not promoted until May, when he could not have earned a full year of service time without winning Rookie of the Year honors), with Chris Harris, *Spencer Schwellenbach's contract selected by the Atlanta Braves from Mississippi*, MiLB (May 29, 2024), <https://www.milb.com/> [<https://perma.cc/LJW7-PPV5>], and MiLB, *Nolan Schanuel Promoted To Angels For MLB Debut*, (Aug. 18, 2023), <https://www.milb.com/> [<https://perma.cc/QQV6-F5X4>] (Schwellenbach was promoted directly from AA after pitching only 13 innings at the level and Schanuel debuted in the majors one month after being drafted).

<sup>196</sup> Ben Weinrib, *Two-way? MLB Teams say 'yes, way!' with eight in Draft*, MLB (July 12, 2023), <https://www.mlb.com/> [<https://perma.cc/SL8H-NZJX>].

limits.<sup>197</sup> The two-way player is so rare that the arbitration system has no precedent for which to base salary awards. In a system where player comparisons are supposed to be the foundation, what is the result if the player has no comparisons?

Ohtani was dubbed “Japanese Babe Ruth” during his stint in Japan’s Nippon Professional Baseball league, and the bidding war for his services was hotly contested when he announced his intention to sign with an MLB team.<sup>198</sup> He instantly emerged as a productive player on both sides of the ball during his 2018 rookie season with the Angels, but suffered an elbow injury and underwent Tommy John surgery.<sup>199</sup> While Ohtani did not pitch in 2019, he was still able to hit and had another solid year.<sup>200</sup> However, his last pre-arbitration season came during the truncated 2020 season in which he posted a meager .655 OPS and allowed seven earned runs in one and two-thirds innings before shutting down his pitching activities.<sup>201</sup> His injury history and poor 2020 performance suppressed his potential first-year arbitration salary and created questions over his future value. While Ohtani and the Angels were relatively close in salary negotiations over Ohtani’s first year of arbitration eligibility, they did not come to an agreement by the filing deadline.<sup>202</sup> The Angels, a file and trial team, moved on to negotiating multiyear deals with Ohtani and the sides agreed on a two-year deal in which Ohtani made \$3 million in 2021 and \$5.5 million in 2022.<sup>203</sup> Ohtani’s performance and meteoric rise to stardom over those two years has already become ingrained in the canon of American sports history. In all, he hit 80 home runs and posted a batting line 51 percent better than league average while making 51 starts with a 2.70 ERA.<sup>204</sup>

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<sup>197</sup> Ken Rosenthal, *Inside the unique plan to sell free-agent pitcher Michael Lorenzen as a two-way player*, THE ATHLETIC (Dec. 19, 2024), <https://www.nytimes.com/> [<https://perma.cc/AW3V-VZP2>].

<sup>198</sup> Sam Dykstra, *Phenom Ohtani signs with Angels*, MiLB (Dec. 8, 2017), <https://www.milb.com/> [<https://perma.cc/448W-L68U>].

<sup>199</sup> Maria Guardado, *Ohtani to undergo Tommy John surgery*, MLB (Sep. 25, 2018), <https://www.mlb.com/> [<https://perma.cc/37HU-APLQ>].

<sup>200</sup> *Shohei Ohtani*, BASEBALL REFERENCE, <https://www.baseball-reference.com/> [<https://perma.cc/H33A-49DH>].

<sup>201</sup> *Shohei Ohtani*, FANGRAPHS, <https://www.fangraphs.com/> [<https://perma.cc/YDB6-9675>].

<sup>202</sup> Alden Gonzalez, *Los Angeles Angels agree to 2-year, \$8.5 million deal with Shohei Ohtani*, ESPN (Feb. 8, 2021, at 16:10 ET), <https://www.espn.com/> [<https://perma.cc/Z7PY-48DW>].

<sup>203</sup> *Id.*

<sup>204</sup> *Shohei Ohtani*, *supra* note 200.

Shohei Ohtani's dominance in the batter's box and on the mound had not been seen at the MLB level since Babe Ruth's early years. This naturally led to widespread speculation about Ohtani's true market value and what he would receive in free agency.<sup>205</sup> But before he could become a free agent, Ohtani had one last trip through arbitration. Given that Ohtani struggled in his last pre-arbitration season and signed a two-year deal, this was the one opportunity to see how the arbitration system would deal with a productive two-way player. However, the Angels wanted no business in taking their star two-way player to a hearing, signing him to a then-record \$30 million before the 2022 season ended.<sup>206</sup> Ohtani's third-year arbitration salary surpassed Mookie Betts' previous record of \$27 million and represented the largest year-over-year arbitration raise in history, smashing the previous record of \$9.6 million.<sup>207</sup> Although the \$30 million figure was a record, one could argue it grossly undervalued Ohtani's contributions to the club as his dollar value based on WAR was nearly \$70 million annually in 2021 and 2022.<sup>208</sup>

We now have a limited sense of how the arbitration system handles a two-way player, although we do not know how a panel would decide to value a two-way player in a hearing. Several plausible scenarios could crop up in the future. A player could present a panel with a list of comparable pitchers and hitters, arguing that he should be paid the combined salaries of those players. Even if a player is nowhere near as productive as Ohtani, he could point to value statistics to argue that their career contributions far outpace those of their one-faceted peers. Meanwhile, the team would counter with Ohtani's \$30 million figure as a comparison. The lack of precedent in the area harkens back to the early days of salary arbitration when dozens of players would fail to come to agreements because of the lack of datapoints available when making comparisons.<sup>209</sup> Should a talented two-way player pop up in the near future, his team will thank the Angels for agreeing to a fairly pedestrian sum in light of the value the Japanese superstar brought to the franchise.

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<sup>205</sup> Bradford Doolittle, *Ohtani's True Player Value*, ESPN, <https://www.espn.com/> [<https://perma.cc/5UHV-34RL>].

<sup>206</sup> Associated Press, *Shohei Ohtani to make \$30 million in 2023, record amount for arbitration-eligible player*, ESPN (Oct. 1, 2022, at 16:13 ET), <https://www.espn.com/> [<https://perma.cc/GGN2-J3RL>].

<sup>207</sup> *Id.*

<sup>208</sup> *Shohei Ohtani – Value*, FANGRAPHS, <https://www.fangraphs.com/> [<https://perma.cc/BUD3-J7K7>].

<sup>209</sup> Gilbert, *supra* note 7.

The appetite for two-way players has remained fervent since Ohtani's debut. Eight players have been drafted as two-way players since MLB began allowing the two-way designation ahead of the 2022 draft.<sup>210</sup> That figure does not include noteworthy players such as Nolan McLean<sup>211</sup> and Bubba Chandler,<sup>212</sup> who were given the opportunity to develop on both sides of the ball at the start of their professional careers. While there is a possibility that the next CBA could contain guidance or separate criteria for two-way players, it does not seem like a priority for either the league or the players association given the lack of other two-way success stories. In the meantime, the baseball world is sure to follow the next great two-way player with great interest.

#### IV. THE FUTURE OF SALARY ARBITRATION

##### A. OFFICIAL PROPOSALS

During negotiations for the most recent CBA, MLB pined for a radical shift in the arbitration system, pitching two different changes. The first proposal would have abolished the salary arbitration system and replaced it with a \$1 billion pool to be dispersed among arbitration-eligible players.<sup>213</sup> The specifics of the allotment of funds were not disclosed and the MLBPA “responded very negatively” to this idea.<sup>214</sup> The league also proposed that, instead of relying on arbitration models, player comparisons, and the looming threat of a hearing, arbitration should be determined by FanGraphs' Wins Above Replacement statistic (fWAR).<sup>215</sup> While

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<sup>210</sup> 2023 Draft Tracker, MLB, [https://www.mlb.com/\[https://perma.cc/3G2Q-5XM3\]](https://www.mlb.com/[https://perma.cc/3G2Q-5XM3]); 2024 Draft Tracker, MLB, [\[https://perma.cc/W94C-ZWX8\]](https://perma.cc/W94C-ZWX8); 2025 Draft Tracker, MLB, [https://www.mlb.com/\[https://perma.cc/JE8A-MXVS\]](https://www.mlb.com/[https://perma.cc/JE8A-MXVS]).

<sup>211</sup> Anthony DiComo, *Could this Mets prospect be baseball's next unicorn?*, MLB (Apr. 9, 2024), [https://www.mlb.com/\[https://perma.cc/Q5L3-36JW\]](https://www.mlb.com/[https://perma.cc/Q5L3-36JW]).

<sup>212</sup> Justice delos Santos, *Former two-way phenom settling in as pitcher*, MLB (Aug. 16, 2023), [https://www.mlb.com/\[https://perma.cc/S7P3-KNUW\]](https://www.mlb.com/[https://perma.cc/S7P3-KNUW]).

<sup>213</sup> Anthony Franco, *MLB Proposal To Players Association Included Changes To Service Time Structure*, MLB TRADE RUMORS (Sep. 2, 2021, at 17:03 CDT), [https://www.mlbtraderumors.com/\[https://perma.cc/2GJV-XCZC\]](https://www.mlbtraderumors.com/[https://perma.cc/2GJV-XCZC]).

<sup>214</sup> *Id.*

<sup>215</sup> Dayn Perry, *MLB proposes determining arbitration salaries by using the WAR statistic, per report*, CBS SPORTS (Nov. 11, 2021, at 18:36 ET), [https://www.cbssports.com/\[https://perma.cc/GG9F-8LAU\]](https://www.cbssports.com/[https://perma.cc/GG9F-8LAU]).

basing salaries off objective catchall statistics would be much more efficient, fWAR's methodology is always changing and those changes are retroactively applied to past seasons.<sup>216</sup> The MLBPA was understandably wary about allowing a third-party to unilaterally determine hundreds of players' salaries with ever-shifting criteria. Later in negotiations, the MLBPA sought to extend Super Two eligibility to 80 percent of players in the two year service class, which would have paid out roughly an extra \$72 million in salaries in 2022.<sup>217</sup> While MLB's proposal addressed several issues regarding the arbitration system—albeit by adding a whole new host of concerns—the MLBPA's proposal completely ignored the issues that many have identified with the system, consisting solely of a one-sided proposal for more money. This proposal was likely a leverage tactic, as the union dropped its push for Super Two expansion in exchange for the league dropping its proposal to increase competitive balance tax penalties.<sup>218</sup>

Given the lack of changes to the arbitration system over the past thirty years, it appears that changes to the arbitration system are not a priority for the MLBPA, which has mainly pursued earlier free agency and increased luxury tax thresholds.<sup>219</sup> Growing acrimony between the league and the union as a result of the owners' planned pursuit of a salary cap could result in a labor stoppage once the current CBA expires after the 2026 season.<sup>220</sup> While a surefire topic of negotiation, vast alterations to the arbitration system will likely be on the backburner given the sweeping changes to MLB's economics that are a higher priority for both parties in the next CBA.

## B. COMMENTATORS' PROPOSALS

Sources outside the league office and players association have also proposed reforms for the current salary arbitration system. While MLB despises the system enough to seek its abolition, even

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<sup>216</sup> David Appelman, *2024 FanGraphs WAR Update*, FANGRAPHS (Apr. 5, 2024), <https://blogs.fangraphs.com/> [<https://perma.cc/K6S3-GYA6>].

<sup>217</sup> Tim Dierkes, *The Value Of The MLBPA's Super Two Proposal*, MLB TRADE RUMORS (Feb. 21, 2022, at 10:57 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/SR3U-BBQG>].

<sup>218</sup> Tim Dierkes, *MLBPA Drops Proposal To Change Super Two; MLB Drops Increased CBT Penalties*, MLB TRADE RUMORS (Mar. 1, 2022, at 02:08 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/2C9L-NVA8>].

<sup>219</sup> *CBA History*, *supra* note 57; Franco, *supra* note 82.

<sup>220</sup> Darragh McDonald, *Clark: MLBPA Expects Lockout After 2026 Season*, MLB TRADE RUMORS (Mar. 3, 2025, at 14:36 CDT), <https://www.mlptraderumors.com/> [<https://perma.cc/PJ8P-YQD7>].

player-aligned figures dislike arbitration just as greatly as team employees.<sup>221</sup> After his hearing, Ryan Thompson felt jilted by the lack of explanation from the arbitrators.<sup>222</sup> Front office employees and commentators alike have identified this exact issue as well.<sup>223</sup> This creates the impression that the frustration and unpredictability of the hearings motivate the parties to settle just as greatly as the system's lauded last best offer mechanics.<sup>224</sup> Because the arbitrators do not have to justify their decision, many involved with the process have voiced concerns that the arbitration system is indeed arbitrary.<sup>225</sup> While a written opinion would be a great aid in giving feedback to the teams' and players' counsel, it ultimately would not eliminate the frustration inherent to losing a hearing, especially if the opinion is not well-reasoned. At the same time, the demand for a written rationale often comes from those who have personally engaged with the arbitration process, indicating that there is some basis to believe that a written opinion would enhance the arbitration process and lessen the blow of defeat.

Another proposal revolves around ensuring that arbitrators are more well-versed in advanced metrics.<sup>226</sup> This would allow them to more easily understand the parties' arguments and evaluate their credibility. It is an unequivocal positive if the arbitrators are more knowledgeable about the subject matter they are ruling on, but there could be a dangerous downside. Arbitrators with extensive baseball knowledge will likely also know about other statistics and information regarding players' performance that falls outside of the criteria. The arbitrators could have already developed opinions based on prohibited information that could influence the hearing's outcome. Thus, Ryan Thompson's fear that arbitrators could make decisions based on information not allowed in the criteria could become a reality. While it is unlikely that such bias could widely affect salary arbitrations—after all, the arbitrators hear numerous cases per year and are expected to be impartial—there is a possibility that bias could blind the arbitrators just as it affects the average baseball fan.

Some have advocated for expanding the criteria. It would be a step too far to implement Statcast data and wearable technology

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<sup>221</sup> Goldstein, *supra* note 53.

<sup>222</sup> Thompson, *supra* note 135.

<sup>223</sup> Goldstein, *supra* note 53; Ring, *supra* note 39.

<sup>224</sup> Goldstein, *supra* note 53; Ring, *supra* note 39; Monhait, *supra* note 4, at 112–13.

<sup>225</sup> Goldstein, *supra* note 53.

<sup>226</sup> Ring, *supra* note 39.

output into the arbitration criteria. The implementation of Statcast data into the criteria is already a non-starter for the union given the information inequity inherent in using such league-owned information.<sup>227</sup> While expected production statistics are useful for evaluating players' future contributions, they should be excluded from the arbitration criteria as they do not describe the actual value the players contributed.<sup>228</sup> It also makes logical sense that predictive metrics should not solely be used to evaluate past performance.

The NHL salary arbitration model is also not a good system for MLB to model itself after. In NHL salary arbitration, neither side can make comparisons to other players' salaries, and the arbitrator has the discretion to award any salary figure he pleases.<sup>229</sup> Given the optimization of salary arbitration models, the use of player comparisons in salary models is what drives most teams and players to agree on salary figures. Abandoning the last best offer method of determining salaries by allowing the arbitrator to unilaterally choose a salary award also conflicts with the goal of each side submitting a reasonable, good-faith salary figure.<sup>230</sup>

Again, changes to the arbitration system do not seem to be imminent despite mounting frustration. While criticism of salary arbitration is commonplace, it has been called a necessary evil.<sup>231</sup> Ultimately, it appears to be the best system that the league and MLBPA are both willing to agree on. And for now, salary arbitration will remain in its current state for the foreseeable future.

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<sup>227</sup> Passan, *supra* note 147.

<sup>228</sup> Statcast, MLB, <https://www.mlb.com/> [<https://perma.cc/74GX-MZFN>].

<sup>229</sup> Bryan Murphy, *NHL salary arbitration, explained: How restricted free agent contracts are settled by a third party*, THE SPORTING NEWS (July 13, 2023, at 09:39 MST), <https://www.sportingnews.com/> [<https://perma.cc/H7DU-G6FW>].

<sup>230</sup> Monhait, *supra* note 4, at 140.

<sup>231</sup> Brendan Bell, *Salary Arbitration is a Necessary Evil in Major League Baseball*, CONDUCT DETRIMENTAL (Feb. 27, 2023), <https://www.conductdetrimental.com/> [<https://perma.cc/AM5C-TSAX>].

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**DOCUDRAMAS ON TRIAL: NAVIGATING DEFAMATION  
CLAIMS IN THE AGE OF STREAMING**

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**ABSTRACT**

*Most Americans are familiar with docudramas, but with the rise in popularity of streaming platforms such as Netflix, they have catapulted in popularity. From “When They See Us,” to “The Crown” and most recently “Baby Reindeer,” these shows continue to captivate audiences and bring in huge revenue for production companies. But with their rise in success, there comes a host of lawsuits threatening how (and if) these shows are created. Angry with how they are portrayed in the docudramas, the subjects of the shows have begun to sue for defamation, invasion of privacy, and right of publicity. The basis of their defamation claims stem from*

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*the creators' own artistic interpretations: creators can take liberties when portraying these subjects, thereby causing damage to their reputation and image.*

*Central to these legal battles is the tension between protecting individual reputations and upholding First Amendment freedoms. In this tension, strong anti-Strategic Lawsuit Against Public Participation (SLAPP) laws have begun to take shape across the country, giving production companies a possible way to dismiss defamation lawsuits. Although the laws vary by state, they generally allow courts to dismiss frivolous lawsuits implicating First Amendment protections, such as freedom of speech and freedom of the press, when the publication is one of public interest. While these laws provide one possible solution to legal battles, they are not guaranteed to stop defamation lawsuits. As defamation lawsuits multiply, many are looking for answers and solutions about how production companies and subjects of docudramas can handle these issues. One solution may be to enact strong anti-SLAPP laws at the federal level to ensure fair protection. The solution may also be as simple as increasing lawyer oversight and involvement in the early stages of a project to vet and analyze all potential issues and liability concerns.*

*This Note will delve into key aspects of defamation law, using cases such as *Fairstein v. Netflix* and *Gaprindashvili v. Netflix* to illustrate how courts balance claims of reputational harm with artistic expression and freedom. It also explores the application of anti-SLAPP statutes in states such as New York and California, two states home to many defamation lawsuits. Finally, it considers the future implications of these legal challenges and how companies may approach producing docudramas in the future.*

## I. DOCUDRAMAS AND THE LAW

“This is based on a true story” is a disclaimer at the beginning of many movies, television shows, and novels. Tales based on true stories have earned streamers like Netflix countless dollars, awards, and fan and critical acclaim alike. “Baby Reindeer” earned nearly 60 million views in its first month.<sup>1</sup> The show then went on to win four trophies at the Emmy Awards.<sup>2</sup> As of February 2026, “The Queen’s Gambit” is ranked as the eighth most popular show on

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<sup>1</sup> Katie Campione, ‘Baby Reindeer’ Races Toward Netflix Most Popular List With Another Week As Most-Watched Title; ‘A Man In Full’ Debuts At No. 2, DEADLINE (May 7, 2024, at 12:15 MST), <https://deadline.com/> [<https://perma.cc/HR4S-MSRP>].

<sup>2</sup> Ian Youngs, *Baby Reindeer stars win big at Emmy Awards*, BBC (Sep. 15, 2024), <https://www.bbc.com/> [<https://perma.cc/3B3A-XSBT>].

Netflix ever with over 112 million views.<sup>3</sup> But the fast rise in this genre's popularity has a major negative side effect—lawsuits. Since 2019 alone, more than 20 defamation lawsuits have been filed in the United States against Netflix and its production partners, brought by people whose life stories were featured in the streamer's programs.<sup>4</sup> In 2020, former Manhattan Prosecutor Linda Fairstein sued Netflix over her portrayal in "When They See Us."<sup>5</sup> Netflix settled a lawsuit filed by a Georgian chess grandmaster in response to her portrayal in the critically acclaimed series, "The Queen's Gambit."<sup>6</sup> And most recently, Fiona Harvey sued Netflix for over \$170 million in damages for her portrayal in "Baby Reindeer."<sup>7</sup> At the heart of every lawsuit is the claim that false statements harm another's reputation.

Generally, a docudrama is a production that is based on true events or real life but takes certain liberties to invent elements such as dialogue, characters, and scenes.<sup>8</sup> These productions differ from documentaries in their primary purpose: docudramas do not aim to present an accurate historical record; instead, they seek to present a fictionalized and dynamic story. Even though we may not realize it, docudramas have been around for centuries.<sup>9</sup> Consider productions such as Shakespeare's play *Julius Caesar*, where he tells the true story of Caesar but adds fictionalized elements to create a well-rounded, harmonious play.<sup>10</sup> For example, while there is no real evidence that Caesar said "Et tu, Brute?" after he was betrayed, it has become one of the most famous lines from the play.<sup>11</sup> In

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<sup>3</sup> *Most Popular Shows*, NETFLIX, [https://www.netflix.com/\[https://perma.cc/UH82-7CY2\]](https://www.netflix.com/[https://perma.cc/UH82-7CY2]).

<sup>4</sup> Joe Flint & Itzel Luna, *Streamers Can't Get Enough of True Story TV. Cue the Lawsuits.*, WALL ST. J. (Aug. 5, 2024, at 05:30 ET), [https://www.wsj.com/\[https://perma.cc/CLA3-T4GE\]](https://www.wsj.com/[https://perma.cc/CLA3-T4GE]).

<sup>5</sup> Chloe Melas & Dennis Romero, *Former Manhattan prosecutor Linda Fairstein reaches a settlement with Netflix in defamation case*, NBC NEWS (June 4, 2024, at 21:20 MST), [https://www.nbcnews.com/\[https://perma.cc/3X2T-QU4Z\]](https://www.nbcnews.com/[https://perma.cc/3X2T-QU4Z]).

<sup>6</sup> Wendy Lee, *Netflix settles lawsuit with chess champion over 'The Queen's Gambit'*, L.A. TIMES (Sep. 7, 2022, at 11:37 PT), [https://www.latimes.com/\[https://perma.cc/C2WA-249K\]](https://www.latimes.com/[https://perma.cc/C2WA-249K]).

<sup>7</sup> Will Vernon & Max Matza, *Woman sues Netflix over Baby Reindeer character*, BBC (June 7, 2024), [https://www.bbc.com/\[https://perma.cc/6RKC-AHHW\]](https://www.bbc.com/[https://perma.cc/6RKC-AHHW]).

<sup>8</sup> Jean-Paul Jassy, In a Pickle?: *Vetting and Litigating Docudramas*, 38 COMMS. LAW. 15, 15–23 (2023).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

*Partington v. Bugliosi*, the court expressed a belief that most people understand these productions are more fiction than fact and would not assume that they present verifiable fact.<sup>12</sup>

## II. AN EXPLORATION OF DEFAMATION LAW

### A. DEFAMATION IN GENERAL

Defamation law varies by jurisdiction, but at its heart, it encompasses false statements that harm another's reputation.<sup>13</sup> The First Amendment right of freedom of speech often clashes with the purposes served by defamation law.<sup>14</sup> And until the latter half of the twentieth century, the law favored plaintiffs suing for defamation. However, the law significantly changed when the Supreme Court decided the landmark case *New York Times Co. v. Sullivan*.<sup>15</sup> In *Sullivan*, the court reasoned that erroneous statements are inevitable in free debate and allowing critics to punish newspapers for any factual errors would chill free speech.<sup>16</sup> The *Sullivan* Court established the standard of actual malice, requiring plaintiffs to prove that a false statement was made with knowledge that it was false or with reckless disregard for its falsity.<sup>17</sup> Protections against defamation suits protect the fundamental rights of freedom of speech and freedom of the press, but with a rise in defamation lawsuits, they are more important than ever.

To prevail on a defamation claim, a plaintiff must prove the false statements harmed their reputation. In other words, there must be damages upon which the court can grant relief. For example, in *Fairstein v. Netflix*, discussed below, the plaintiff claimed that her publisher dropped her because a Netflix series defamed her character.<sup>18</sup>

Two recent cases filed in New York and California reflect the different ways courts understand and apply the law of defamation.

### B. DEFAMATION LAW IN NEW YORK

On the morning of April 20, 1989, Trisha Meili's body was discovered in New York City's Central Park, and it was evident that

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<sup>12</sup> *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995).

<sup>13</sup> David L. Hudson Jr., *Libel and Slander*, FREE SPEECH CTR. (June 16, 2025), <https://firstamendment.mtsu.edu/> [<https://perma.cc/PPNP5-H7GV>].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Melas & Romero, *supra* note 5.

she was badly beaten and repeatedly raped.<sup>19</sup> The brutal assault of the white investment banker led to public outcry and resulted in the quick arrest and conviction of five black and Latino teens—who came to be known as the Central Park Five.<sup>20</sup> But more than a decade later, in 2002, new DNA evidence and a confession proved that the men were not responsible for the attack.<sup>21</sup> The charges against the five men were vacated.<sup>22</sup> The attack ignited a media firestorm and highlighted racial tensions in the city, with Donald Trump taking out full page ads in the newspapers with the headline, “Bring Back The Death Penalty. Bring Back Our Police!”<sup>23</sup>

In 2019, Netflix released a four-part television series based on the arrest and prosecution of the “Central Park Five.”<sup>24</sup> Plaintiff Linda Fairstein was the chief of the Sex Crime Prosecutions Unit in New York County’s District Attorney’s office during the investigation and prosecution of the Five.<sup>25</sup> According to her complaint, she had supervisory authority over the case, but was not one of the prosecution’s trial attorneys.<sup>26</sup> Fairstein is depicted as the show’s villain, as she quickly concludes the Five are responsible for the attack.<sup>27</sup> Fairstein claimed almost every portrayal of her is false and defamatory.<sup>28</sup> Following the Netflix program’s premiere, there was public outcry and were calls for Dutton to drop Fairstein.<sup>29</sup> Fairstein had a long-standing relationship with the publisher, published 24 books, 16 of which made their way onto the New York Times list of bestselling crime novels.<sup>30</sup>

In New York, courts define defamation as “the making of a false statement which tends to ‘expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their

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<sup>19</sup> *The Central Park Five*, HIST. (Dec. 3, 2025), <https://www.history.com/> [<https://perma.cc/4SU5-3ES7>].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Fairstein v. Netflix, Inc.*, 553 F.Supp 3d 48, 57 (S.D.N.Y. 2021).

<sup>25</sup> *Id.* at 56.

<sup>26</sup> *Id.* at 56–57.

<sup>27</sup> *Id.* at 57.

<sup>28</sup> *Id.* at 59.

<sup>29</sup> Associated Press, *Central Park 5 prosecutor Linda Fairstein dropped by publisher after public pressure*, NBC NEWS (June 7, 2019, at 19:10 MST), <https://www.nbcnews.com/> [<https://perma.cc/7YGJ-GN2V>].

<sup>30</sup> *Id.*

friendly intercourse in society.”<sup>31</sup> New York law outlines a “substantial truth” defense to defendants.<sup>32</sup> A statement will be considered substantially true if, when the courts compare the complained language with the alleged truth, the statement would not have a different effect on the reader or viewer’s mind.<sup>33</sup> Essentially, if the truth is so near the statement, no legal harm is done.<sup>34</sup> Defendants can also raise the privilege of pure opinion, which under New York law is privileged against a claim of defamation.<sup>35</sup> Expression of pure opinion is privileged no matter how offensive the statement may be.<sup>36</sup> Determining whether a statement is fact or opinion is an issue of law for the courts, based on their assessment of how the statement would be understood by the average person exposed to the statement in its full context.<sup>37</sup>

In *Fairstein*, after the plaintiff filed a complaint alleging defamation, Netflix filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for a failure to state a claim upon which relief can be granted.<sup>38</sup> Judge Castel granted in part and denied in part the defendants’ motion.<sup>39</sup> Just as the complaint detailed, the court discussed each scene where Fairstein alleges defamatory content.

Fairstein’s complaint alleged she was falsely depicted in the portrayal of events on the morning of April 20, 1989, when she arrived at the crime scene.<sup>40</sup> Fairstein is shown to ask New York Police Department (NYPD) officers various questions, survey the area, and tell the officers “he” must have dragged the victim into the wooded area.<sup>41</sup> The complaint alleged the scene was defamatory because it falsely portrayed Fairstein as leading the NYPD crime scene unit and concluding only one individual was involved in the rape.<sup>42</sup> The court began its analysis of this scene by viewing it in the context of the entire series and construing the allegation in the light most favorable to Fairstein and concluded the complaint did not

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<sup>31</sup> *Fairstein v. Netflix*, 553 F.Supp.3d 48, 63 (S.D.N.Y. 2021) (internal citations omitted).

<sup>32</sup> *Id.* at 65.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Fairstein v. Netflix*, 553 F.Supp.3d 48, 66 (S.D.N.Y. 2021).

<sup>38</sup> *Id.* at 57.

<sup>39</sup> *Id.* at 58.

<sup>40</sup> *Id.* at 67.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

allege a defamatory meaning.<sup>43</sup> Fairstein's presence at the crime scene and the implication she considered only a single attacker could not expose her to public contempt, ridicule, or induce an evil opinion of her.<sup>44</sup> The average viewer would not have understood her comments as a firm conclusion that only a single attacker was responsible for the attack and would instead interpret the scene as to be a passing observation of a crime scene.<sup>45</sup> The judge therefore dismissed the defamation claims directed towards this scene.<sup>46</sup>

After an analysis of another scene, the court denied the defendants' motion to dismiss and concluded Fairstein plausibly alleged defamation.<sup>47</sup> In this scene, Fairstein instructed officers to investigate young, black males in Harlem and told them to search the projects and stop every "thug" they see.<sup>48</sup> Fairstein asserted she did not instruct officers to round up young black men who were in Central Park and the term "thug" has connotations that implies she is racist.<sup>49</sup> Fairstein's words and the accompanying images of police searching and taking young black men into custody implied she advocated for unlawful police actions thereby subjecting her to contempt.<sup>50</sup> The average viewer would not conclude her remarks were the filmmaker's opinions and would instead conclude Fairstein herself directed these discriminatory actions.<sup>51</sup>

Fairstein and Netflix reached a settlement agreement in 2024, a week before the trial was set to begin.<sup>52</sup> As part of the settlement, Netflix agreed to donate \$1 million to the Innocence Project, with Fairstein receiving no money.<sup>53</sup> Additionally, Netflix agreed to add a disclaimer reading "While the motion picture is inspired by actual events and persons, certain characters, incidents, locations, dialogue, and names are fictionalized for the purposes of dramatization," to the beginning of each episode.<sup>54</sup> Although this case was not ultimately decided by a jury, Fairstein's attorney said

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<sup>43</sup> Fairstein v. Netflix, 553 F.Supp.3d 48, 67 (S.D.N.Y. 2021).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 78.

<sup>48</sup> *Id.*

<sup>49</sup> Fairstein v. Netflix, 553 F.Supp.3d 48, 78 (S.D.N.Y. 2021).

<sup>50</sup> *Id.* at 79.

<sup>51</sup> *Id.*

<sup>52</sup> Gene Maddaus, *Linda Fairstein and Netflix Settle Suit Over Ava DuVernay's Central Park Five Series*, VARIETY (June 4, 2024, at 12:45 PT), <https://variety.com/> [<https://perma.cc/JZ58-C5E8>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

they hope the settlement would be a wakeup call to production companies such as Netflix to expect ramifications if they profit from false villainizations of people.<sup>55</sup> The film's director, Ana DuVernay disagreed with Fairstein's statements and noted Fairstein attempts to be the victim, but played a part in a miscarriage of justice.<sup>56</sup>

### C. DEFAMATION LAW IN CALIFORNIA

In 2021, Nona Gaprindashvili sued Netflix over a false statement made about her in the miniseries, "The Queen's Gambit."<sup>57</sup> The series follows a fictional American woman named Elizabeth Harmon, an orphan who becomes a great chess player and competes in the Moscow International, a fictional chess tournament.<sup>58</sup> After the match's first round, an announcer comments on Harmon's gender and makes the point that male players did not take Harmon seriously as an opponent.<sup>59</sup> In the announcement they state Gaprindashvili is a female world champion but did not face any men.<sup>60</sup> This statement about the plaintiff is inaccurate because the plaintiff frequently competed and defeated male chess players.<sup>61</sup> Gaprindashvili claims the line misrepresented one of her most significant career achievements and tarnished her reputation.<sup>62</sup> Furthermore, she claims the series injured her current participation in chess tournaments and thus affected her ability to earn an income.<sup>63</sup>

In California, to establish a claim for defamation, the plaintiff must prove a publication is false, defamatory, unprivileged, and has a natural tendency to injure or cause special damage.<sup>64</sup> And as a public figure, the plaintiff must also plead the requisite constitutional malice.<sup>65</sup> In programs such as these, courts consider the presence of a disclaimer, but it is not dispositive.<sup>66</sup> California also provides a substantial truth defense where the imputation is

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Gaprindashvili v. Netflix, Inc.*, No. 21-cv-07408-VAP-SKx, 2022 WL 363537, at \*1 (C.D. Cal. Jan. 27, 2022).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*2.

<sup>62</sup> *Id.* at \*3.

<sup>63</sup> *Gaprindashvili v. Netflix*, No. 21-cv-07408-VAP-SKx, 2022 WL 363537, at \*3 (C.D. Cal. Jan. 27, 2022)..

<sup>64</sup> *Id.* at \*4.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*6.

substantially true so to justify the remark, even if there is slight inaccuracy.<sup>67</sup>

In *Gaprindashvili v. Netflix*, a District Court in California considered Netflix's motion to dismiss the plaintiff's complaint, which the court ultimately denied.<sup>68</sup> In the first part of its motion, Netflix argued the Plaintiff failed to prove the element of falsity because a reasonable viewer would not believe the line conveyed a fact.<sup>69</sup> Netflix attempted to make the proposition that fictional works have no obligation to tell the truth, but the court reasoned that even if the work is fictional, that fact does not automatically protect Netflix from defamation claims.<sup>70</sup> However, the series often references real people and events, and given the context of the line in question, viewers may have reasonably believed the comment to be an accurate historical detail incorporated into the series.<sup>71</sup> Although the series has a disclaimer warning viewers it is a fictional work, the court did not consider this to be dispositive.<sup>72</sup> Therefore, because the series purported to have a historical setting and it created the assumption that it was asserting objective facts, the plaintiff sufficiently pleaded falsity.<sup>73</sup>

Netflix also argued that even if viewers believed the line, it was not defamatory because viewers would not assume the plaintiff's inferiority was the reason she never faced men, but because of structural barriers that impacted women's advancement during the 1960s.<sup>74</sup> In California, the legislature developed a specific rule regarding slander *per se*, which includes unprivileged publications that directly injure a plaintiff with respect to their profession, trade, or business.<sup>75</sup> Because the line relates to the plaintiff's reputation and her ongoing professional pursuits, the court held the line constitutes defamation *per se*.<sup>76</sup>

After the court denied Netflix's motion to dismiss and months of mediation, Netflix settled the lawsuit.<sup>77</sup> Although neither party

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<sup>67</sup> *Id.* at \*8.

<sup>68</sup> *Id.* at \*1

<sup>69</sup> *Gaprindashvili v. Netflix*, No. 21-cv-07408-VAP-SKx, 2022 WL 363537, at \*5 (C.D. Cal. Jan. 27, 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*6.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Gaprindashvili v. Netflix*, No. 21-cv-07408-VAP-SKx, 2022 WL 363537, at \*6 (C.D. Cal. Jan. 27, 2022).

<sup>76</sup> *Id.* at \*8.

<sup>77</sup> *Lee, supra* note 6.

disclosed the terms of the settlement, Gaprindashvili's attorneys said they were pleased the matter was resolved.<sup>78</sup>

### III. FIRST AMENDMENT RIGHTS AND HARM TO A PERSON'S REPUTATION

#### A. FIRST AMENDMENT AND FREEDOM OF EXPRESSION

Freedom of speech and expression are ideas that are inherent to us, supported by the First Amendment and a long line of Supreme Court decisions.<sup>79</sup> For artistic expression, the Supreme Court has interpreted its protection under the First Amendment quite broadly.<sup>80</sup> It extends to whatever a human can creatively produce, from music, theatrical works, and comics to movies and television programs. One of the fundamental principles that helps form the guardrails to freedom of expression jurisprudence is content neutrality. The government cannot limit expression just because an audience member, or even a community, is offended by the content.<sup>81</sup> While some may scorn controversial content, a free society must be based on the idea that freedom of expression for us means freedom of expression for others.<sup>82</sup>

Although early Americans enjoyed more freedom compared to other nations, the Framers were not innocent of overstepping bounds in regard to First Amendment protections.<sup>83</sup> For example, in 1798, during the French-American War, Congress passed the Alien and Sedition Act, which criminalized anyone who published false or scandalous writings against the government.<sup>84</sup> Since then, the fight for freedom of speech and expression has been ongoing. First Amendment protections include "pure speech" such as that contained in books, newspapers, leaflets, and rallies.<sup>85</sup> Symbolic speech which is nonverbal expression whose purpose is to communicate ideas such as works of art, slogans, music lyrics, and theatrical performances, is also protected by the First Amendment.<sup>86</sup> While the government can place certain time, place, and manner

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<sup>78</sup> *Id.*

<sup>79</sup> *Freedom of Expression in the Arts and Entertainment*, ACLU (Feb. 27, 2002), <https://www.aclu.org/> [<https://perma.cc/WS2R-VZY6>].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Freedom of Expression*, ACLU (Mar. 1, 2002), <https://www.aclu.org/> [<https://perma.cc/U5P8-U6Q4>].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

restrictions by requiring things such as permits for rallies and meetings, it cannot engage in viewpoint discrimination, which punishes certain speech solely for its content.<sup>87</sup>

## B. FIRST AMENDMENT AND SLAPP

Although individuals possess a right not to be subjected to falsehoods that damage their character and reputation, the interests of the First Amendment often clash with interests served by defamation law.<sup>88</sup> When someone files a suit for defamation, they may have legitimate claims and the defendant's actions are thus not protected by the First Amendment.<sup>89</sup> However, it may also be the case that the plaintiff does not have a legitimate claim and is merely using the lawsuit to silence the defendant.<sup>90</sup> These actions are called strategic lawsuits against public participation, or SLAPP suits.<sup>91</sup> SLAPP suits, prevalent against journalists, have a chilling effect on free speech, as they intimidate others into silence.<sup>92</sup> To give individuals an avenue of recourse against these frivolous lawsuits, states including California and New York have adopted anti-SLAPP laws.<sup>93</sup>

Before Governor Cuomo signed new anti-SLAPP laws in 2020, New York, despite being home to some of the largest media and news organizations, had narrow anti-SLAPP laws.<sup>94</sup> Anti-SLAPP statutes require plaintiffs to show there is a probability that they will win. If they cannot, the suit will be dismissed.<sup>95</sup> Supporters of the legislation argued it is necessary to discourage bullies from weaponizing the courts against free speech.<sup>96</sup> The new amendments broadened the law to cover cases involving any communication in a place open to the public that relates to an issue of public interest.<sup>97</sup> The term “public interest” is broadly construed to mean any subject

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<sup>87</sup> *Id.*

<sup>88</sup> Hudson, *supra* note 13.

<sup>89</sup> Dennis Hetzel & Brandi M. Snow, *SLAPP Suits*, FREE SPEECH CTR. (Mar. 31, 2025), [https://firstamendment.mtsu.edu/\[https://perma.cc/95XW-N7YD\]](https://firstamendment.mtsu.edu/[https://perma.cc/95XW-N7YD]).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Hudson, *supra* note 13.

<sup>93</sup> *Id.*

<sup>94</sup> *New York's Chance to Combat Frivolous Lawsuits*, N.Y. TIMES (Nov. 4, 2020), [https://www.nytimes.com/\[https://perma.cc/QUH8-VFCN\]](https://www.nytimes.com/[https://perma.cc/QUH8-VFCN]).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *New York*, REPS. COMM. FOR FREEDOM OF THE PRESS, [https://www.rcfp.org/\[https://perma.cc/2VSD-HUJP\]](https://www.rcfp.org/[https://perma.cc/2VSD-HUJP]).

other than one involving a purely private matter.<sup>98</sup> The updated law makes it easier for the defendant to dismiss a SLAPP suit.<sup>99</sup> Once the defendant files a motion to dismiss, the burden shifts to the plaintiff to show the suit has a substantial basis in law.<sup>100</sup> Furthermore, plaintiffs may not recover damages in cases involving public petition and participation unless they show by clear and convincing evidence that the defendant made the statement with knowledge it was false or with reckless disregard as to whether it was false.<sup>101</sup> If a defendant prevails on their anti-SLAPP action, they are entitled to receive attorneys' fees and costs.<sup>102</sup>

California, also home to some of the most popular media organizations, has strong anti-SLAPP laws.<sup>103</sup> To challenge a SLAPP lawsuit in California, defendants must show they are being sued for an act in furtherance of a right to petition or free speech under the United States Constitution or California Constitution in connection with a public issue.<sup>104</sup> Under the statute, these rights are categorized as the following activities:

- (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.<sup>105</sup>

California courts consider several factors to determine whether a statement relates to an issue of public interest. These factors

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *California*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/> [<https://perma.cc/3BQN-Y6EE>].

<sup>104</sup> *Id.*

<sup>105</sup> CAL. CIV. PROC. CODE § 425.16 (West 2025).

include whether the subject of the statement was in the public eye, if the statement involved conduct that could affect large numbers of people beyond the direct participants, and whether the statement contributed to debate on topics of public interest.<sup>106</sup> California law allows a defendant to file a motion to strike the complaint.<sup>107</sup> To rule on the motion, the court will first determine whether the lawsuit arose from one of the statutorily defined protected speech or petition activities.<sup>108</sup> If the judge finds in favor of this, the plaintiff must show that there is a probability they can prevail on the claim, or the judge will grant the motion.<sup>109</sup> California law goes a step further than New York and gives the defendants an avenue to “SLAPPback” and allows them to file suit to recover damages because of the abuse of the legal process.<sup>110</sup>

### C. HOW ANTI-SLAPP LAWS AFFECT DEFAMATION CASES

Although popular to help journalists fight back against frivolous lawsuits, anti-SLAPP laws have become stronger, allowing defendants like Netflix to use the protections they offer to fight back against frivolous lawsuits.

In its suit against Nona Gaprindashvili, Netflix challenged a court’s decision to deny its motion to strike based on California’s anti-SLAPP statute.<sup>111</sup> In the first instance, the trial court found that Gaprindashvili made a sufficient showing as to each element of her defamation *per se* claim.<sup>112</sup> The court denied Netflix’s motions to dismiss and strike, ruling that although the statement arose from a protected activity, the plaintiff demonstrated a reasonable probability of success on the merits.<sup>113</sup> The court explained the activity was protected because the claim stemmed from Netflix’s actions in furtherance of its rights of free speech in connection with a public issue.<sup>114</sup>

More recently, a federal judge ruled that the defamation case against Netflix following “Baby Reindeer” will go forward, with

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<sup>106</sup> *California, supra* note 103.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Christina Tabacco, *Netflix Appeals Denial of Anti-SLAPP Motion in ‘The Queen’s Gambit’ Defamation Case*, L. ST. MEDIA (Feb. 7, 2022), <https://lawstreetmedia.com/> [<https://perma.cc/2V92-CRE2>].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

Netflix coming up short on its anti-SLAPP defense.<sup>115</sup> In part of his ruling, Judge R. Gary Klausner argues that the show presents itself to be true, rather than merely expressly Gadd's opinion of the events, highlighted by beginning the show with "This is a true story."<sup>116</sup> The judge noted Netflix failed to win on its "substantial truth" defense because the viewers would reasonably conclude from the show that Harvey was a twice-convicted criminal who had spent five years in prison for stalking.<sup>117</sup> Although untrue, Netflix argued that Harvey could have been convicted and sentenced to five years in prison, and that she did get handsy with Gadd.<sup>118</sup> However, the judge noted there is a major difference between stalking and being convicted of stalking.<sup>119</sup> In addition to striking down Netflix's substantial truth defense, the judge also held that Harvey may be able to prove actual malice if Netflix knowingly depicted fictionalized events as fact.<sup>120</sup>

However, after this ruling, Netflix appealed the District Court's decision.<sup>121</sup> Represented by Latham & Watkins, Netflix argued that Harvey's lawsuit was an attempt to undermine Gadd's First Amendment Rights.<sup>122</sup> Although the title card contained the words, "This is a true story," Netflix argued the line must be viewed from the perspective of a reasonable viewer, in the context of the series' content and dramatic devices including intentionally ironic and absurd scenes and cheeky music.<sup>123</sup> Furthermore, a reasonable viewer would understand the drama is not a real life documentary.<sup>124</sup> This case is still in litigation before the Court of Appeals for the Ninth Circuit.<sup>125</sup>

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<sup>115</sup> Dominic Patten, *Netflix Suffers 'Baby Reindeer' Defamation Suit Defeat As Judge Says Case Will Go Forward*, DEADLINE (Sep. 27, 2024, at 19:02 MST), <https://deadline.com/> [<https://perma.cc/9S3A-7ENA>].

<sup>116</sup> Issy Ronald, *Judge allows defamation lawsuit against Netflix over 'Baby Reindeer' to proceed*, CNN (Sep. 30, 2024, at 23:55 EDT), <https://www.cnn.com/> [<https://perma.cc/J4BP-R642>].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Jake Kanter, *'Baby Reindeer' Legal Battle: Fiona Harvey Pours Scorn On Netflix Claim That "Cheeky Music" Showed Series Was Not Actually A "True Story"*, DEADLINE (June 3, 2025, at 10:11 MST), <https://deadline.com/> [<https://perma.cc/97J8-4DG8>].

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

#### IV. FUTURE OF DOCUDRAMAS

Docudramas make Netflix and other production companies millions of dollars in revenue per year, earn countless awards, and garner fans. Although plaintiffs must overcome a lot of barriers to win defamation cases, the rise in suits is driving up the costs to make such programs.<sup>126</sup> But for the revenue and viewers docudramas receive, Netflix may consider the costs of potential litigation worth it. For instance, in 2019, “When They See Us” was watched by more than 23 million accounts worldwide.<sup>127</sup> The case for defamation brought by Linda Fairstein settled outside of court, thus avoiding many litigation costs.<sup>128</sup> As of 2024, this lawsuit was the first defamation lawsuit of this nature to advance through summary judgement and approach trial.<sup>129</sup> Therefore, if companies like Netflix continue to believe they will win lawsuits and settle them before trial, they may view the benefits associated with reaching high viewership numbers outweigh the costs associated with litigation and dispute resolution.

In the same stroke, as more defamation suits are filed, courts must work to ensure they correctly strike the balance between protecting artistic liberties and protecting plaintiffs whose reputations may have been damaged. The strengthening of measures such as anti-SLAPP laws may help the court in this regard by ensuring that frivolous lawsuits involving First Amendment protections do not go forward. For example, the court will have to tackle the protections provided under the First Amendment in Fiona Harvey’s case against Netflix for “Baby Reindeer.” Netflix has vowed to defend the case vigorously and protect writer Richard Gadd’s right to “tell his story.”<sup>130</sup>

While Netflix may consider the costs of litigation worth it and continue to pursue creating docudramas, various reforms may help strike a fair balance between artistic rights and freedom of expression and reduce the number of lawsuits.

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<sup>126</sup> Flint & Luna, *supra* note 4.

<sup>127</sup> Anita Bennett, ‘When They See Us’ Watched By More Than 23 Million Netflix Accounts Worldwide, DEADLINE (June 25, 2019, at 18:04 MST), <https://deadline.com/> [<https://perma.cc/F4JA-7LSJ>].

<sup>128</sup> Melas & Romero, *supra* note 5.

<sup>129</sup> *Id.*

<sup>130</sup> Vernon & Matza, *supra* note 7.

## A. FEDERAL ANTI-SLAPP STATUTE

As discussed above, anti-SLAPP laws can provide protections for defendants against lawsuits implicating the interests served by the First Amendment. Although states such as California and New York have strong anti-SLAPP statutes, eighteen states have no anti-SLAPP statutes. Among the thirty-two states that do have such statutes, their protections vary significantly.<sup>131</sup> This lack of uniformity among state laws can leave litigants with insufficient protection against SLAPP lawsuits, which can encourage forum shopping among plaintiffs.<sup>132</sup> Proponents of anti-SLAPP statutes argue that for fairness to plaintiffs and a return to balance for First Amendment protections, a federal anti-SLAPP statute is necessary.

At the end of 2024, Senator Ron Wyden and Representatives Jamie Raskin and Kevin Kiley introduced the Free Speech Protection Act (FSPA), a federal anti-SLAPP law providing defendants the means to dismiss frivolous lawsuits.<sup>133</sup> This law is based on the Uniform Public Expression Protection Act (UPEPA), a model law that applies broadly to claims based on an individual's exercise of First Amendment rights on matters of public concern.<sup>134</sup> The UPEPA provides a means for defendants to recover court costs and attorneys' fees and avoid costly discovery if the anti-SLAPP motion is successful.<sup>135</sup> A previous version of this act was introduced to Congress in 2022, but was unsuccessful.<sup>136</sup> FSPA, like the previous version of the law, has bipartisan support which makes proponents hopeful that it will pass in the upcoming Congress.<sup>137</sup>

As discussed above, defendants in lawsuits regarding shows like "Baby Reindeer" and "The Queen's Gambit" took advantage of anti-SLAPP laws to try to get the lawsuits dismissed before having to incur the expenses of discovery. Although the defendants in these cases were able to take advantage of the anti-SLAPP laws of states like California and New York, a federal anti-SLAPP statute would apply those protections to defendants across the entire country. The

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<sup>131</sup> Jason Russell, Adam Lloyd & Or-el Vaknin, *Congress Needs To Enact A Federal Anti-SLAPP Statute*, SKADDEN (June 2, 2023), <https://www.skadden.com/> [<https://perma.cc/PT9L-Z36C>].

<sup>132</sup> *Id.*

<sup>133</sup> Matt Singer, *Bipartisan group of lawmakers introduces federal anti-SLAPP legislation*, REPS. COMM. FOR FREEDOM OF THE PRESS (Dec. 16, 2024), <https://www.rcfp.org/> [<https://perma.cc/8XWP-MBYS>].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Emily Hockett, *A big week for press freedom in Congress*, REPS. COMM. FOR FREEDOM OF THE PRESS (Oct. 3, 2022), <https://www.rcfp.org/> [<https://perma.cc/85JP-TRQ6>].

<sup>137</sup> Singer, *supra* note 133.

UPEPA, which the proposed statute is based on, is an amalgamation of some of the better anti-SLAPP laws in states such as California, Nevada, and Texas.<sup>138</sup> The passage of the FSPA would also have several important benefits. If cases are brought before a U.S. District Court, there is currently no statute the courts can apply when jurisdiction is based on something other than diversity.<sup>139</sup> Even if cases based on diversity jurisdiction are brought before the U.S. Circuit Courts, there is currently a split among the circuits as to whether state anti-SLAPP statutes even apply.<sup>140</sup> This has led to forum shopping by plaintiffs seeking to avoid state anti-SLAPP laws.<sup>141</sup> A federal anti-SLAPP statute would solve these issues, creating an even playing field so that defendants could have a fair chance to dismiss their case if necessary or have a case tried on the merits.

Moreover, given that freedom of speech is codified in the Constitution, it is incredibly important for Congress to pass legislation that continues to protect people against frivolous lawsuits.

## B. RIGHTS CLEARANCE REVIEW

When creating new content or using third-party content in a new work, a rights clearance review should be conducted to ensure the creator is permitted to use the content.<sup>142</sup> To conduct a rights clearance review, one should first identify the protectable content and determine who owns or controls the rights in the content.<sup>143</sup> They should then evaluate whether permission is needed to use the third party content, and if so, it is important to seek permission from the rights owner.<sup>144</sup>

Although rights clearance reviews are often conducted in the context of intellectual property rights such as copyright, trademark, and right of publicity, the concept should also be applied to clearing a work for claims of defamation. A lawyer or other person completing the review should determine whether the content intends to include statements about or based on a natural living

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<sup>138</sup> Jay Adkisson, *Bipartisan Federal Anti-SLAPP Legislation Reintroduced And Improved*, FORBES (Dec. 6, 2024, at 16:27 EST), <https://www.forbes.com/> [<https://perma.cc/N33R-27XL>].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Po Yi, *Rights Clearance*, LEXISNEXIS (June 3, 2016), <https://www.lexisnexis.com/> [<https://perma.cc/Q6LP-L8BK>].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

person or entity.<sup>145</sup> To avoid future claims of defamation, the reviewer should identify any statements that may injure a person or entity and consider whether these statements are based on opinion rather than fact.<sup>146</sup> For statements based on facts, the reviewer should ensure all information in the statements is true and maintain written records supporting the statements.<sup>147</sup> Because defamation claims must be based on false statements of fact, in most jurisdictions, truth is an absolute defense.<sup>148</sup>

Considering the increase in lawsuits filed against creators of programs such as docudramas, many insurance companies require these types of reviews before they sign on to protect a production company. Insurance policies that protect against damages for legal actions filed in response to projects have become more expensive and more difficult to secure.<sup>149</sup> Costs can range from \$15,000 to six figures.<sup>150</sup> Insurance companies and production companies alike have also become more careful in the projects they take on, ensuring they go through a rigorous vetting process. Some insurers require an opinion letter from a lawyer who has reviewed the project for potential defamation, false light, and invasion of privacy claims.<sup>151</sup>

### C. LEGAL DISCLAIMERS

Although courts have held the presence of disclaimers is never dispositive in a defamation lawsuit, disclaimers can set the stage for viewer expectations. If a disclaimer is present, the fact that the program is fictionalized may be more clearly communicated to viewers. Courts have considered a program's claim that it is a "true story" compared to being "based on" or "inspired by" a true story can impact whether it is viewed as defamatory.<sup>152</sup> Recently, because a program began with the disclaimer "based on actual secrets," a court held that no reasonable viewer would interpret the program as one conveying objective facts.<sup>153</sup> An additional disclaimer at the end

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<sup>145</sup> *Rights Clearance*, REUTERS (Feb. 1, 2024), <https://www.reuters.com/> [<https://perma.cc/2UL2-GHRE>].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Flint & Luna, *supra* note 4.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Chris L. Perez & Haley Mark, *Legal considerations for movies and TV shows claiming to be based on true stories*, DAILY J. (Sep. 18, 2024), <https://www.dailyjournal.com/> [<https://perma.cc/7DCC-8YGK>].

<sup>153</sup> *Id.*

of the film stating it is fictionalized for dramatization communicates to viewers that they are watching a fictional program.<sup>154</sup>

Although not dispositive in determining the outcome for a defamation case, production companies creating docudramas should take extra care in crafting their disclaimers. The *Fairstein v. Netflix* settlement included the condition that Netflix adds a note to viewers stating elements of the film were fictionalized, highlighting that disclaimers are still an important part of docudramas.<sup>155</sup> The disclaimer, shown at the beginning and end of every episode, reads, “While the motion picture is inspired by actual events and persons, certain characters, incidents, locations, dialogue, and names are fictionalized for the purposes of dramatization.”<sup>156</sup>

“Baby Reindeer,” the show at the center of Netflix’s latest legal battle, includes a statement at the beginning and end of each episode. At the beginning of each episode, a statement reads, “This is a true story.”<sup>157</sup> At the end of each episode, there is a longer disclaimer that reads, “This program is a based on real events: however certain characters, names, incidents, locations, and dialogue have been fictionalized for dramatic purposes.”<sup>158</sup> If Netflix had placed this legal disclaimer at the beginning of every episode, it may have had an easier time defending the case. Especially when considering Netflix’s auto-play feature, many viewers, unless they purposefully choose to watch the credits, may never see the disclaimer.<sup>159</sup> The plaintiff, Fiona Harvey, begins her complaint with pointing out that Netflix is open and up front about the fact that this program is a true story to argue that the show purposefully and willfully defames her.<sup>160</sup>

Furthermore, while *Harvey v. Netflix* is still in the beginning stages of litigation, it will be interesting to see the role that the disclaimer plays, if at all, in helping the court come to its decision. While it does not guarantee an automatic win, production companies and writers alike should ensure they put time and effort into crafting a thorough legal disclaimer, one viewers will see and understand.

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<sup>154</sup> *Id.*

<sup>155</sup> Melas & Romero, *supra* note 5.

<sup>156</sup> WHEN THEY SEE US (Netflix, released 2019).

<sup>157</sup> BABY REINDEER (Netflix, released 2024).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Complaint, *Harvey v. Netflix, Inc.*, No. 2:24-cv-04744 (C.D. Cal. June 6, 2024).

## V. CONCLUSION

Docudramas are undoubtedly popular. Their rise in popularity is attributable to many factors including the rise in streaming services and the public's general obsession with true crime stories. However, they continue to pose issues for the legal system. As defamation lawsuits are on the rise, the tensions between freedom of expression and protecting reputations have never been more fraught. As docudramas continue to impact the legal system in a variety of ways,<sup>161</sup> it's important for production companies, writers, and lawmakers to strike a balance, encouraging the production of more popular programs while also protecting individuals.

This Note is based on a true story.

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<sup>161</sup> See, e.g., Travis Loller, *True crime's popularity brings real change for defendants and society. It's not all good*, ASSOCIATED PRESS (Nov. 2, 2024, at 22:04 MST), <https://apnews.com/> [<https://perma.cc/QV6P-LY8U>] (explaining that after the release of documentaries and docudramas about the Menendez brothers, the Los Angeles district attorney recommended that they be sentenced).