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UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL
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EDITOR'S NOTE

The University of Denver's Sports and Entertainment Law Journal is proud to complete its seventeenth year of publication. Over the past seventeen years, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles and related content.

Volume XXV has four featured articles discussing relevant issues and proposing solutions for hotly contested topics we face in the sports and entertainment industries.

The first article, written by Joseph Spadoni, examines the NFL's Franchise Tag system and proposes a change to the CBA to address legal issues surrounding the Franchise Tag's impacts on tagged players.

The second article, written by Ani Khachatryan, dives into the issues surrounding copyright rights in the increasingly digital, modern world of music. She also proposes a framework for various types of music and how they should be analyzed in the future under copyright laws.

Continuing in the vein of entertainment, the fourth article, written by Layla Maurer, re-contextualizes the name, image, and likeness rights issues permeating college athletics into the world of e-sports. She explores how e-sports fit into the world of college athletics, and addresses how NIL rights should be expanded to account for e-sports students and competitors.

Our final article is written by Dr. Joel Timmer. Dr. Timmer scrutinizes the presence and efficacy of parental controls in the increasingly digital, streaming-based world of online content. He evaluates various services to understand the existence and availability of streaming controls, and works to propose a plan under which government can more effectively promote parental involvement in content selection.

We are excited and proud to present Volume XXV of the University of Denver Sturm College of Law's Sports and Entertainment Law Journal. We would like to thank all of the authors for their hard work and valuable contributions to this publication. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our outstanding dean, Dean Bruce Smith, for their unwavering support.

A very special thank you to the editorial board, non-editorial board, and staff editors. This publication would not be possible without your hard work and commitment to making the Journal the best that it can be. Every year we grow stronger and I am excited for the future of this Journal. I leave this journal in the hands of Ashlyn Hare, and I know that she is far superior to the challenges ahead.

In closing, I would like to thank my parents, Lee & Lisa, and my sister, Christa. Your support carried me through more struggles than I care to acknowledge the last 24 years, and I owe you all more than I know how to say.

Ryan James Taylor
Editor-In-Chief (Academic Year 2021-2022)
Denver, Colorado

UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL
VOLUME XXV

THE UNCONSCIONABILITY OF THE NFL'S FRANCHISE TAG

Joseph Spadoni

I. INTRODUCTION

Many U.S. workers face a striking injustice which has gone unnoticed for far too long, despite Americans seeing it every Sunday during the professional football season.[1] The National Football League ("NFL") has created a contractual mechanism, the "franchise tag," to repress player bargaining power and strip players of the freedom to contract.[2] Article 10 of the Collective Bargaining Agreement ("CBA") between the NFL owners and the National Football League Players Association ("NFLPA") gives shape to the franchise tag system, a negotiation-killing provision arming NFL franchises with three different designations to force their players to play another season for their current team or not play football at all.[3] Despite having admirably satisfied their contractual obligation to their teams, franchise-tagged players are prevented from securing free agent contracts worth fair market value by signing with the highest-bidding teams.[4] A by-product of this system is that all NFL players' negotiating power is hamstrung because franchise-designated players are robbed of the chance to reset the market for their entire position group; the rising tide cannot lift all boats if the tide itself is prevented from rising.[5] With the

[1] *See* Dom Cosentino, *The History and Future of the Franchise Tag, the Bane of the NFL's Best Players*, DEADSPIN.COM (Apr. 2, 2019, 11:31 AM), https://deadspin.com/the-history-and-future-of-the-franchise-tag-the-bane-o-1833096713. Recently, a few published Notes explored the NFL franchise tag. *See generally* Connor J. Menneto, Note, *Using the MLB's Final Offer Arbitration System to Revamp the NFL's Franchise Tag*, 17 VA. SPORTS & ENT. L. J. 101, 113 (2017) ("The problem with the NFL's Franchise Tag is that the Club's dominant position leads to objectively indefensible salaries for certain players."); David B. Borsack, Note, *Exploration of the NFL Franchise Tag Functioning as a Non-Compete Clause*, 37 CARDOZA ARTS & ENT. L. J. 123, 124-25 (2019) ("One of the more problematic dynamics is caused by the Franchise Tag, because it has the effect of a non-compete clause by restricting player movement.").

[2] Cosentino, *supra* note 1.

[3] *Collective Bargaining Agreement 2020*, NFLPAWEB.NET, https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf (last visited Oct. 9, 2020).

[4] *Id*.

[5] Cosentino, *supra* note 1.

proverbial deck already stacked against NFL players, why should the CBA include Article 10 and steal players' freedom to contract?[6]

Just securing a job in the National Football League is a feat worthy of recognition.[7] With over a million young men suiting-up for high school football games every year, and only three hundred or so NFL job openings a season, aspiring athletes are faced with the daunting prospect of overcoming a terrifyingly low 0.0003% success rate.[8] For those brave and courageous athletes who laugh in the face of such improbable odds and pursue careers as NFL players, yet another obstacle awaits them even if they find tremendous statistical success in the NFL.[9] Despite producing at an elite level on the field, there will be players who are nevertheless subjected to an unjust mechanism designed to strip players of their bargaining power at the moment their power is greatest.[10] The National Football League's franchise tag system is unconscionable and needs to be eradicated in order to restore *every* player's freedom to contract.[11]

Despite overcoming a 0.0003% chance to even play in the NFL, and producing at a high enough level to warrant a top-of-the-market deal, many players are prevented from capitalizing on their opportunity to secure life-altering contracts and guarantee long-term financial security by the NFL's franchise tag system.[12] Take former Chicago Bears defensive tackle, Henry Melton, as an example.[13] With back-to-back successful seasons under his belt—the latter earning the lineman the honor of being named to the Pro Bowl—Melton came to the negotiating table seeking a five-year contract containing approximately $20 million of guaranteed money.[14] Only

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[6] *Id.*
[7] *Getting into the Game*, NFL.COM, https://operations.nfl.com/the-players/getting-into-the-game/ (last visited Oct. 9, 2020).
[8] *Id.*
[9] *See* Albert Breer, *Prison Tag? Franchise Designation Has Changed Over the Years*, NFL.COM (July 18, 2012, 06:54 AM), https://www.nfl.com/news/prison-tag-franchise-designation-has-changed-over-the-years-09000d5d82aa478e.
[10] *Id.*
[11] *Id.*; *see* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).
[12] Cosentino, *supra* note 1.
[13] Robert Mays, *Popping Tags: Why It's Time to Do Away with the Franchise Designation*, GRANTLAND.COM (July 16, 2015), http://grantland.com/the-triangle/popping-tags-why-its-time-to-do-away-with-the-franchise-designation/.
[14] *Id.*

one defensive tackle in the NFL had more sacks than Melton between 2011 and 2013.[15] Rather than either paying Melton what he was worth or allowing him to freely contract with any of the other thirty-one NFL franchises, the Bears used the franchise tag to keep Melton in the Windy City for another season.[16] Playing under a one-year contract—with no future job assurance or long-term financial security—Melton devastatingly tore his anterior cruciate ligament ("ACL"), and his career since has meandered and petered out.[17] Why was this successful, productive player not fairly compensated for his contributions?[18] Armed with the freedom to contract, Melton could have leveraged his performance on the field into a long-term contract with the highest bidding team; deprived of his freedom to contract by the franchise tag, he was forced to play without job security, and he paid a heavy price as a result.[19]

This Comment will explore the doctrine of unconscionability and offer a solution to this injustice; as Brady Williams astutely asserted, unconscionability ought to be harnessed affirmatively.[20] The NFL players should attack the franchise tag system by arguing that it is unconscionable, and therefore should be voided as a matter of law.[21] The origin of the franchise tag and an overview of how its three designations—exclusive, non-exclusive, and transition—work will be provided. This Comment will explore examples of the franchise tag's use, showcasing how this mechanism can be misused to players' disadvantage, while also highlighting how some influential players use their bargaining power to prevent the use of the franchise tag before agreeing to terms with a new team. Additionally, this Comment will discuss the NFLPA's inaction in forcefully seeking the removal of the franchise tag, despite its awareness of the issues the tag presents. Finally, this Comment will provide a suggested

[15] Michael C. Wright, *Henry Melton Injures Left Knee*, ESPN (Sept. 22, 2013), https://www.espn.com/chicago/nfl/story/_/id/9711120/henry-melton-chicago-bears-carted-injured-knee.
[16] Mays, *supra* note 13.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Brady Williams, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CALIF. 2015, 2070 (2019).
[21] *See id.*

argument for implementing this proposed solution and eliminating the franchise tag by evaluating an instance where unconscionability was successfully utilized to overcome injustice.

II. UNCONSCIONABILITY TAKES THE FIELD

With the freedom to contract in unrestricted free agency dangling like a glistening Lombardi Trophy before the noses of NFL players, this Comment proposes that impending free agent players who have been franchise tagged affirmatively assert unconscionability and sue the NFL as a solution to this injustice.[22]

A. *UNCONSCIONABILITY: AN OVERVIEW*

"The doctrine of unconscionability has theoretical roots that extend deep into the English common law."[23] And though the doctrine's use waned towards the end of the twentieth century, "[f]rom 1990 to the present day, there has been a very definite increase, in absolute terms, in the number of reported decisions of litigated cases in which a claim of unconscionability was advanced by one party and taken seriously enough by the court to warrant discussion."[24] According to the Restatement (Second) of Contracts:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of an unconscionable term as to avoid an unconscionable result.[25]

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[22] *See id.*; Jeanna Thomas, *The 2018 NFL franchise tag explained in a 2-minute read*, SBNATION (Mar. 6, 2018, 4:19 PM), https://www.sbnation.com/2018/2/19/17017190/nfl-franchise-tag-explained-free-agency-2018.

[23] Eben Colby, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company*, 34 CONN. L. REV. 625, 628 (2002).

[24] Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 621-22 (2009) ("By 2008, the last year addressed in our study, the total number of reported unconscionability decisions in our collected cases had increased nearly tenfold—from 16 in 1990 to 155 in 2008.").

[25] RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *cf.* Clinton A. Stuntebeck, *The Doctrine of Unconscionability*, 19 ME. L. REV. 81, 85 (1967) ("To define the doctrine of unconscionability is to limit its application. To limit its application is to defeat the purpose for which the doctrine was founded.").

B. *PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY*

Numerous cases comment on unconscionability, such as in *U.S. v. Martinez* where the court stated that "[t]he doctrine of unconscionability seeks to prevent sophisticated parties with 'grossly unequal bargaining power' from taking advantage of less sophisticated parties."[26] The Court for *In re CBGB Holdings, LLC* succinctly proffered: "[t]he party invoking the doctrine of unconscionability must show both an absence of meaningful choice in the contract formation process *and* contract terms unreasonably favoring the other party, *i.e.*, procedural and substantive unconscionability."[27] The Supreme Court of Idaho elaborated on those two concepts,[28] stating that "Procedural unconscionability concerns the bargaining process leading to the formation of a contract."[29] "Indicators of procedural unconscionability generally include a lack of voluntariness and a lack of knowledge."[30] Coercive and oppressive tactics can indicate the absence of voluntariness; additionally, "[a] lack of voluntariness can be shown by an imbalance in bargaining power resulting from the non-negotiability of the stronger party's terms and the inability to contract with another party due to time, market pressures, or other factors."[31] An absence of knowledge can be found when contract terms are hard to understand because of how they were written, one party's inferior experience, or an inability to properly examine the contract.[32] Further, the Idaho Supreme Court also stated that, "substantive unconscionability focuses on the contract's terms."[33] More specifically, "[a] provision is substantively

[26] U.S. v. Martinez, 151 F.3d 68, 74 (2d Cir. 1998) (quoting U.S. v. Bedford Assocs., 657 F.2d 1300, 1314 (2d Cir. 1981)).
[27] *In re* CBGB Holdings, LLC, 439 B.R. 551, 560 (Bankr. S.D.N.Y. 2010).
[28] Wattenbarger v. A.G. Edwards & Sons, Inc., 246 P.3d 961, 974 (Idaho 2010).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

unconscionable if it is a bargain no reasonable person would make or that no fair and honest person would accept."[34]

Another component of an unconscionability evaluation is bargaining power, as the Supreme Court of Arkansas pronounced: "[t]wo important considerations are whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the provision in question."[35] In addition, the Supreme Court of Delaware has said: "'mere disparity between the bargaining powers of parties to a contract will not support a finding of unconscionability.'[36] '[T]here must be an absence of meaningful choice and contract terms unreasonably favorable to one of the parties.'"[37] The court concluded by noting that "[t]here is no deprivation of meaningful choice if a party can walk away from the contract."[38] Notably, some legal scholars and theorists criticize the use of the unconscionability doctrine because of its ambiguity.[39] "Some maintain that equipping courts with wide discretion to strike down certain contract terms would upend freedom of contract and undermine the predictability created by uniform enforcement of agreements."[40]

C. WILLIAMS V. WALKER-THOMAS FURNITURE CO.

The U.S. Court of Appeals for the District of Columbia expounded upon the concept of unconscionability as a question of first impression in *Williams v. Walker-Thomas Furniture Co.* when it disagreed with the lower court's holding.[41] In this case, a furniture company sold items in Washington D.C. and utilized a form contract that constrained its customers into a lease

[34] *Id. See also* C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 80 (Iowa 2011) ("A contract is unconscionable where no person in his or her right senses would make it on the one hand, and no honest and fair person would accept it on the other hand.").
[35] GGNSC Holdings, LLC v. Lamb *ex rel* Williams, 487 S.W.3d 348, 357 (Ark. 2016).
[36] Ketler v. PFPA, LLC, 132 A.3d 746, 748 (Del. 2016) (quoting Rsrvs. Mgmt, LLC v. Am. Acquisition Prop. I, LLC, No. 673, 2012, 2014 WL 823407, at *9 (Del. Feb. 28, 2014)).
[37] *Id.* (quoting Tulowitzki v. Atl. Richfield Co., 396 A.2d 956, 960 (Del. 1978)).
[38] *Id.*
[39] *See* Williams, *supra* note 20, at 2055.
[40] *Id.*
[41] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965).

agreement requiring routine payments.[42] The company's contract featured a provision to "keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated."[43] The contract allowed for "the debt incurred at the time of purchase of each item [to be] secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings."[44] More specifically, appellants Thorne and Williams both defaulted after making purchases of $391.10 and $514.95, respectively, in 1962, and the furniture company sued to replevy all of the appellants' purchases from the store over the preceding years, and both the trial and appellate courts ruled for the furniture company.[45] The appellants argued that the furniture company's contract was unconscionable, but that contention initially fell upon deaf ears, with the lower courts holding that the legislature was responsible for addressing such situations of unconscionability.[46]

In discussing unconscionability, the U.S. Court of Appeals for the District of Columbia stated that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[47] Additionally, the court added that "[i]n determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made."[48] The court held that a contract should not be enforced if "the element of unconscionability is present at the time a contract is made."[49] Here, the case was remanded back to the trial court, to conduct findings on whether the contract was unconscionable.[50] *Williams* "illustrates how inequality of bargaining position, combined with inherently difficult language and unfairness in the substance of the

[42] *Id.* at 447.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 447-48.
[47] *Id.* at 449.
[48] *Id.* at 450.
[49] *Id.* at 449.
[50] *Id.* at 450.

agreement, can lead a court to conclude that certain contract terms are unenforceable under the doctrine of unconscionability."[51]

D. *UNCONSCIONABILITY AS A CAUSE OF ACTION*

In his piece, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, Brady Williams proposes that the doctrine of unconscionability ought to be weaponized.[52] "Unconscionability today is a shield. It must also become a sword."[53] Although Williams focuses his article on the law of consumer credit, he tacitly endorses the utilization of his idea in the context of the NFL's franchise tag.[54] He argues that, "[t]he doctrine of unconscionability has played an important historical role as an equitable safeguard against contractual overreach; however, courts' unwillingness to apply the doctrine affirmatively unjustly enriches wrongdoers . . . ."[55] Williams concludes by asserting that "courts should reclaim the inherent equitable powers long residing in courts of equity by allowing plaintiffs to assert unconscionability offensively under the common law."[56]

E. ROZEBOOM V. NORTHWESTERN BELL TELEPHONE CO.

With the aim of affirmatively using the unconscionability doctrine to eliminate the franchise tag,[57] tagged NFL players should look to the *Rozeboom v. Northwestern Bell Telephone Co.* court's reasoning for guidance in challenging the NFL's owners.[58] In that case,

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[51] Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 98 (1993-94) ("But *Williams* does not make clear when inequality of bargaining position is present, when the language is unclear, or when the substance of the agreement is unfair. These factors require application to particular circumstances which may be very like or very unlike those of *Williams*.").
[52] Williams, *supra* note 20, at 2018 ("[T]he doctrine of unconscionability must be recrafted into an offensive sword that provides affirmative relief to victims of unconscionable contracts.").
[53] *Id.* at 2070.
[54] *Id.* at 2018 ("While this article focuses on consumer credit law, much of its analysis can be readily applied to any other context in which unconscionability is a salient issue.").
[55] *Id.* at 2070.
[56] *Id.*
[57] *Id.*
[58] Rozeboom v. Nw. Bell Tel. Co., 358 N.W.2d 241, 242 (S.D. 1984).

the Supreme Court of South Dakota had to decide whether a liability-limiting clause within a contract between the parties was unconscionable.[59] The plaintiff, an electrical contractor, sued the defendant, the Northwestern Bell Telephone Company, seeking $25,000 after the defendant did not include a listing of the plaintiff's business in its yellow pages directory for the first time in years.[60] The trial court granted the defendant's motion for summary judgment and awarded the plaintiff a meager sum, only $187.79.[61] The court examined the parties' contract, specifically a clause for limiting liability that read:

> If the Telephone Company shall omit said advertisement or any additional advertising from any issue of its directory, in whole or in part, or shall make errors therein, its liability therefor shall in no event exceed the amount of the charges for the advertising which was omitted or in which the error occurred in such directory issue.[62]

The court pointed out that the defendant, the Northwestern Bell Telephone Company, was a monopoly, and declared that "[t]he terms of the agreement between Bell, a monopoly, and [the plaintiff] were substantively unreasonable."[63] Here, the defendant "foisted upon [the plaintiff] a contract form prepared by it with an exculpatory clause on a 'take it or leave it' basis."[64] The plaintiff could only secure advertisement in the yellow pages from the defendant.[65] The court stated that this agreement was a contract of adhesion, and that it "should not be enforced as a matter of public policy" because the plaintiff "did not have equal bargaining power with the monopoly."[66] Thus, the court held that the contract was unconscionable.[67] It quoted the Michigan Court of Appeals' statement reading:

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[59] *Id.*
[60] *Id.* at 242-43.
[61] *Id.* at 242.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 243.

> It is not enough to say that "freedom of contract" is the founding principle of our economy, for freedom of contract is directly related to another basic principle of our economy—"freedom of enterprise." It must be recognized that freedom of enterprise became severely restricted as the giants in our industries and services overwhelmed their competition. It is neither rational nor just to contend that freedom of contract must remain static and immutable as freedom of enterprise inexorably recedes. Both concepts must adjust and adapt to the times.[68]

The defendant had a telephone business monopoly in the area and wielded substantially more bargaining power than the plaintiff; "[w]hen a business entity has a 100% corner on the market, and it is the only one empowered by the law to sell a product, how can that be termed 'free enterprise'?"[69] Having declared the contract unconscionable, the Supreme Court of South Dakota concluded by opining: "In a democratic society, we persevere under a system of laws where change is inevitable. Change can be simple, good, and effectual. Here, we associate with change rooted in simple fairness and opposed to basic oppression."[70]

III. THE FRANCHISE TAG UNDER THE LIGHTS

How did this injustice—which Americans see every Sunday during the NFL season—begin?[71] The NFL players' quest to fully actualize their freedom to contract has been a tedious climb; each and every milestone of their exhausting journey need not be examined in detail for purposes of this Comment.[72]

A. *THE DEVELOPMENT OF THE FRANCHISE TAG*

The first development that must be explained is the "Rozelle Rule"; established in 1963, this owner-created rule required that "whenever a team lost a free agent, the team signing that

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[68] *Id.* at 245 (quoting Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689, 693 (Mich. Ct. App. 1969)).
[69] Rozeboom, 358 N.W.2d at 245 (S.D. 1984).
[70] *Id.* at 245-46.
[71] Cosentino, *supra* note 1.
[72] Alvin Dominique, *NFL History: The Road to Free Agency*, BLEACHER REPORT (Apr. 17, 2008), https://bleacherreport.com/articles/18183-nfl-history-the-road-to-free-agency.

free agent had to compensate his former team."[73] NFL Commissioner Rozelle "had the final authority to decide what the compensation would be" if the teams could not come to an agreement as to the compensation.[74] Between 1963 and 1974, only thirty-four players signed contracts with different franchises, and Rozelle determined compensation in four of those instances.[75] Then, in 1976, the Eighth Circuit Court of Appeals held that "the Rozelle Rule . . . must be set aside as an unreasonable restraint of trade."[76] The NFL players claimed "that the defendants' enforcement of the Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services."[77] Though this battle was won, the war was far from over: after the case, Commissioner Rozelle no longer had the power to determine compensation, but the NFL Collective Bargaining Agreement still required recompense for teams that lost free agents.[78] After more legal skirmishes, the owners finally agreed, in 1993, to allow free agency within the National Football League, but with a substantial caveat.[79]

The NFL owners agreed to implement "unrestricted free agency in exchange for a salary cap and a set of designations that included the franchise tag."[80] Originally referred to as "The Elway Rule," the franchise tag was conceived as a way for Denver Broncos owner, Pat Bowlen, to prevent his star quarterback, John Elway, from entering free agency.[81] However, over the past two decades, the franchise tag has been utilized for more than just preserving generational talents; "teams use[] the tag to keep not just franchise players, but role players coming off

[73] *Id.*
[74] *Id.*
[75] Mackey v. National Football League, 543 F.2d 606, 611 (8th Cir. 1976).
[76] *Id.* at 623.
[77] *Id.* at 609.
[78] Dominique, *supra* note 72.
[79] *Id.*
[80] Cosentino, *supra* note 1.
[81] *See* Adam Stites, *The NFL's franchise tag is a scam. It's time to kill it*, SBNATION (Feb. 24, 2020, 11:00 AM), https://www.sbnation.com/2019/2/19/18225141/nfl-franchise-tag-history-john-elway-nflpa-bargaining-kill-it; Jacob Feldman, *From 'The Elway Rule' to 'The Franchise Tag'*, SPORTS ILLUSTRATED (Feb. 23, 2018), https://www.si.com/nfl/2018/02/23/nfl-franchise-tag-rule-explanation-history-origin-themmqb-newsletter.

breakout years and aging running backs with an unknown number of carries left in them."[82] In reality, NFL teams have violated the initial intention of the franchise tag—to hold on to *face of the franchise* players like Elway—by utilizing the tag to retain players without incurring too much risk or making long-term commitments.[83]

B. *THE FRANCHISE TAG SYSTEM EXPLAINED*

The franchise tag is a leverage-killing mechanism that creates a contract for one season, at a salary determined by formula and varying based on the tagged player's position.[84] According to the most recent NFL Collective Bargaining Agreement, "each Club shall be permitted to designate one of its players who would otherwise be an Unrestricted Free Agent as a Franchise Player each season during the term of this Agreement."[85] And then—emphatically asserting the team's insurmountable dominance over its players—the agreement reads, "any Club that designates a Franchise Player shall be the only Club with which such Franchise Player may negotiate or sign a Player Contract during the period the player is so designated."[86] An NFL team has at its disposal three distinct types of tags to restrict its impending free agent players: the Nonexclusive Franchise Tender, the Exclusive Franchise Tender, and the Transition Player Designation.[87]

The Nonexclusive Franchise Tender is a contract for one season that compensates the designated player either "the average of the five largest Prior Year Salaries for players at the position" or "120% of [the player's] Prior Year Salary, whichever is greater."[88] A tagged player assigned the Nonexclusive Franchise Tender may negotiate with the thirty-one other teams in the league, but his former team must be compensated with a pair of first round picks in the draft

[82] *Id.*
[83] *See id.*
[84] Thomas, *supra* note 22; Jon Benne & Christian D'Andrea, *How does the NFL franchise tag work and how much do players get paid?*, SBNATION (Mar. 16, 2020, 5:10 PM), https://www.sbnation.com/nfl/2017/2/14/14584232/nfl-franchise-tag-free-agency-explained.
[85] Collective Bargaining Agreement, *supra* note 3.
[86] *Id.*
[87] *Id.*
[88] *Id.*

should the tagged player ultimately sign with a new team.[89] The Exclusive Franchise Tender is a contract for one season that compensates the designated player either "the average of the five largest Salaries in Player Contracts for the League Year . . . for players at the position" or "the amount of the Required Tender under [the] Subsection [for Nonexclusive Franchise Tender] . . . whichever is greater."[90] Teams that apply either the Nonexclusive or Exclusive tenders to their players have until July 15 to agree to contract extensions; if no agreement is reached by July 15, the tagging team cannot sign that player until after the season ends.[91]

The Transition Player Designation can be used "to designate one player who would otherwise be an Unrestricted Free Agent or Restricted Free Agent as a Transition Player in lieu of designating a Franchise Player."[92] This tag makes the player "completely free to negotiate and sign a Player Contract with any Club" but awards the "Rights of First Refusal" to the tagged player's original team.[93] If the player plays for his original team under the transition tag, then his salary is the average of the ten highest-paid players at his designated position; if he signs elsewhere, then his original team does not receive draft pick selections.[94]

C. *THE FRANCHISE TAG IN ACTION*

The franchise tag is devoid of long-term financial security for tagged players, and it strips them of their negotiating leverage.[95] In 2012, the New England Patriots placed the Nonexclusive Franchise Tender on wide receiver, Wes Welker, after he led the league in catches—with 122—during the final year of his contract.[96] Welker totaled 554 receptions in five years with the Patriots, the most by any player during that timeframe; the player in second place had 80 fewer catches.[97] But despite this wide receiver's jaw-dropping performance season after season, the

[89] *Id.*
[90] *Id.*
[91] Collective Bargaining Agreement, *supra* note 3.
[92] *Id.*
[93] *Id.*
[94] Benne & D'Andrea, *supra* note 84.
[95] *Id.*
[96] Mike Reiss, *Pats franchise WR Wes Welker*, ESPN (Mar. 5, 2012), https://www.espn.com/boston/nfl/story/_/id/7648141/new-england-patriots-franchise-wes-welker.
[97] *Id.*

Patriots only offered Welker a two-year contract, which he rejected.[98] With no recourse, Welker was then "restrict[ed] . . . from fully experiencing unrestricted free agency."[99]

The franchise tag not only hurts the player to whom it is assigned; the system hurts the entire league.[100] According to wide receiver Brandon Marshall, "It impacts all of us. The best players set the market, and our best players are getting franchise tagged. . . . We are not only affecting those players that are getting tagged, but we are affecting all the other [players] . . . that are going to approach free agency."[101] On its surface, a franchise tag appears only to affect the tagged player, but in reality, the tag actually restricts "the natural growth of the market at all positions by keeping the best [players] from stretching the rubber band to its limit and then allowing others to use their contracts as benchmarks."[102] Essentially, an elite player's compensation in the open market will escalate beyond the tag's formulaic value; "[w]hen teams are competing for a player—especially one who's the best in the NFL at his position—that's when the price tag really spikes."[103]

Despite being recognized as a first-team All-Pro running back in just his second season, Le'Veon Bell was franchise tagged in 2017 *and* 2018.[104] After being offered a smoke and mirrors contract from his current team,[105] Bell decided to not sign the franchise tag, and skip the 2018 NFL season altogether, in an attempt to "save some wear and tear on his body before he gets another shot at free agency."[106] The Tampa Bay Buccaneers placed the franchise tag on Shaquil Barrett; in 2019, the Buccaneers signed Barrett to "a one-year, $4 million prove-it deal"

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[98] *Id.*
[99] *Id.*
[100] Cosentino, *supra* note 1.
[101] *Id.*
[102] Mike Florio, *NFLPA wants to shed franchise tag, but what will it cost?*, PROFOOTBALLTALK (Mar. 19, 2019 10:04 AM), https://profootballtalk.nbcsports.com/2019/03/19/nflpa-wants-to-shed-franchise-tag-but-what-will-it-cost/.
[103] Stites, *supra* note 81.
[104] *Id.*
[105] *See* SBNation.com Staff, *Everything you need to know about Le'Veon Bell's breakup with the Steelers*, SBNATION, https://www.sbnation.com/nfl/2018/11/5/18065634/leveon-bell-steelers-contract-standoff-explained (last visited Oct. 28, 2020). The Pittsburgh Steelers offered Le'Veon Bell a five-year $70 million contract, but the fully guaranteed money amounted only to $10 million. *Id.*
[106] *Id.*

and were pleasantly surprised when Barrett compiled the most sacks in the NFL, at 19.5.[107] Rather than allowing Barrett to negotiate a fair market contract, "[t]he Buccaneers want[ed] to see if he [could] replicate that kind of production before inking him to a long-term, big money deal."[108] Such a tactic is unique to American football; what other industry empowers employers to bet against their employees?[109] "The best doctor in the world isn't forced to stick it out at a hospital. . . . The best professor in the world isn't stuck at a university."[110]

A recent example of an NFL team betting against its player was on full display when star Dallas Cowboys quarterback Dak Prescott was carted off the field in tears during the 2020 season.[111] A fourth-round selection in the 2016 NFL draft, Prescott had been egregiously underpaid,[112] earning under $5 million across four seasons in Dallas.[113] Prescott played very well in the final year of his contract, "setting career-highs with 4,902 passing yards and 30 touchdowns."[114] Prior to that season, however, the Cowboys assigned Prescott the Exclusive Franchise Tender.[115] Then, during the season, "Prescott suffered a compound fracture and dislocation of his right ankle" on the field, which required surgery and ended the quarterback's 2020 season.[116] At the time, Prescott's future was unclear, since "[t]he Cowboys might not [have] want[ed] to commit to Prescott in the long term until they [saw] that their starter ha[d]

[107] Benne & D'Andrea, *supra* note 84.
[108] *Id.*
[109] Stites, *supra* note 81.
[110] *Id.*
[111] Bill Barnwell, *Dak Prescott ankle injury: Answering the biggest questions about the QB, the Cowboys, Andy Dalton and what's next*, ESPN (Oct. 12, 2020), https://www.espn.com/nfl/story/_/id/30094522/dak-prescott-ankle-injury-answering-biggest-questions-qb-cowboys-andy-dalton-next.
[112] *See* Jeremy Cluff, *Highest paid quarterbacks: Ranking NFL QBs by salary for 2019 season*, MSN (Mar. 11, 2020), https://www.msn.com/en-us/sports/nfl/highest-paid-quarterbacks-ranking-nfl-qbs-by-salary-for-2019-season/ar-BBUsTs2 (stating that, as of Jan. 29, 2020, nineteen NFL quarterbacks earned at least $20 million per season).
[113] *Dak Prescott – Contract History*, OVERTHECAP, https://overthecap.com/player/dak-prescott/4848/ (last visited Jan. 23, 2022). *See also* Todd Archer, *With franchise tag signed, what's next for Cowboys' Dak Prescott?*, ESPN (June 22, 2020), https://www.espn.com/nfl/story/_/id/29348052/with-franchise-tag-signed-next-cowboys-dak-prescott.
[114] Stephen Sheehan, *Cowboys Star Dak Prescott Just Enjoyed a $160 Million Day at the Office*, SPORTSCASTING (Sept. 21, 2020), https://www.sportscasting.com/cowboys-star-dak-prescott-just-enjoyed-a-160-million-day-at-the-office/.
[115] Archer, *supra* note 113.
[116] Barnwell, *supra* note 111.

returned to full health."[117] However, fortunately for Prescott, the Cowboys quickly discovered the true value of their quarterback; after Prescott's injury, "the Cowboys' offense suffered drastically . . . going from a unit that was scoring 32.6 points per game with Prescott to 21.1 without him,"[118] and the team ultimately ended a disastrous year with only 6 wins.[119] Having experienced life without their franchise quarterback, the Cowboys and Dak Prescott agreed to a $160 million contract across four years before the 2021 season.[120]

Recouping a player's maximum value—*after* a devastating injury—is no small feat; Prescott may have been able to accomplish it, but he was helped by his position, age, and the impact his absence had on his team.[121] Contrast Prescott's situation to the one wide receiver Chris Godwin now faces.[122] A 2017 third-round pick, Godwin made the Pro Bowl in 2019 and helped the Buccaneers win the Super Bowl in 2020.[123] However, the Buccaneers placed the franchise tag on him, blocking his access to free agency, a "maneuver [that] short-circuited the major, multi-year payday Godwin would have gotten on the open market."[124] Undeterred, Godwin proceeded to catch 98 passes for over 1,100 yards in only 14 games in 2021, but then he suffered a devastating injury—a torn ACL.[125] Now, Godwin will enter free agency unhealthy, with his leverage damaged since "too many players over the years have failed to fully recover

[117] *Id.*
[118] Nick Shook, *Dak Prescott, Cowboys agree to 4-year, $160M contract*, NFL.COM (Mar. 8, 2021, 6:51 PM), https://www.nfl.com/news/dak-prescott-cowboys-agree-to-new-contract.
[119] Michael Shapiro, *Cowboys Sign Dak Prescott to $160 Million Contract*, SPORTS ILLUSTRATED (Mar. 8, 2021), https://www.si.com/nfl/2021/03/09/dak-prescott-contract-extension-cowboys-160-million.
[120] Joel Corry, *Agent's Take: What If Dak Prescott played in 2021 on a second franchise tag instead of signing long-term deal?*, CBS SPORTS (Jan. 20, 2022, 12:58 AM), https://www.cbssports.com/nfl/news/agents-take-what-if-dak-prescott-played-in-2021-on-a-second-franchise-tag-instead-of-signing-long-term-deal/.
[121] Shook, *supra* note 118.
[122] Mike Florio, *Chris Godwin injury is a reminder to players to get what they can, when they can*, PRO FOOTBALL TALK, (Dec. 20, 2021, 9:11 PM), https://profootballtalk.nbcsports.com/2021/12/20/chris-godwin-injury-is-a-reminder-to-players-to-get-what-they-can-when-they-can/.
[123] Tim Daniels, *Chris Godwin Rumors: Some Execs Believe Knee Injury Will 'Slightly' Damage FA Market*, BLEACHER REPORT (Dec. 22, 2021), https://bleacherreport.com/articles/10021807-chris-godwin-rumors-some-execs-believe-knee-injury-will-slightly-damage-fa-market; Florio, *supra* note 122.
[124] Florio, *supra* note 122.
[125] Daniels, *supra* note 123.

from a torn ACL . . . ."[126] The franchise tag was used to force Godwin to play on a risky one-year deal when he had his ultimate negotiating power; now, Godwin is hurt and thus has less negotiating power.[127] A team could still sign Godwin to a lucrative contract, however "the deal he gets then may not be close to the one he would have gotten in March [2021], if he hadn't been tagged . . . ."[128]

It is becoming more clear that "[i]n a league with so many rules in place to put players in positions of weakness at the negotiating table, the franchise tag has far outlived its original purpose."[129]

D. *NEGOTIATING AWAY THE FRANCHISE TAG*

For NFL players with substantial leverage, the franchise tag provision can be negotiated out of a contract.[130] Before signing with the Tampa Bay Buccaneers on a 2-year deal including $50 million guaranteed, Tom Brady secured his future freedom to contract; "[t]he agreement . . . prevents the Buccaneers from using the franchise tag to retain Brady at the completion of the deal."[131] Likewise, star wide receiver DeAndre Hopkins signed an extension with the Arizona Cardinals which made him the highest-paid non-quarterback in NFL history.[132] The extension includes a clause prohibiting the Cardinals from applying the franchise tag to Hopkins.[133] This approach is limited to players with significant negotiating power, but what about the rest of the NFL players who rely on the NFL Players Association?[134] Given how highly the owners value

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[126] Florio, *supra* note 122.
[127] *Id.*
[128] *Id.*
[129] Mays, *supra* note 13.
[130] *See* Michael Middlehurst-Schwartz, *Tom Brady announces official contract with Tampa Bay Buccaneers in 'new football journey'*, USA TODAY (Mar. 20, 2020, 8:54 AM), https://www.usatoday.com/story/sports/nfl/buccaneers/2020/03/20/tom-brady-tampa-bay-buccaneers-contract-official-nfl-free-agency/2882865001/.
[131] *Id.*
[132] Kevin Zimmerman, *Cardinals' DeAndre Hopkins signs contract extension through 2024*, ARIZONA SPORTS (Sept. 8, 2020, 9:48 AM), https://arizonasports.com/story/2348374/cardinals-deandre-hopkins-signs-contract-extension-through-2024/.
[133] *Id.*
[134] *See* Breer, *supra* note 9.

the franchise tag system, "the NFLPA didn't fight that hard against the franchise tag."[135] According to one union source "[w]e knew it'd be fruitless."[136] When postulating on the topic, former executive and agent Andrew Brandt stated: "[t]hat is doubtful as a high priority to change with so many other issues they have to address (and with very little if anything to bargain with)."[137] With the players' representatives refusing to take on the NFL owners and fight for the players' freedom to contract, what recourse is left for the average player?[138]

IV. THE UNCONSCIONABILITY GAME PLAN

A. *THE FRANCHISE TAG IS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE*

In order to void the NFL's franchise tag system, the players need to show that it is both procedurally and substantively unconscionable.[139]

The franchise tag is procedurally unconscionable because it lacks voluntariness.[140] "NFL teams can tag one impending free agent per offseason and guarantee that player can't leave for a year . . . ."[141] According to an anonymous agent, "[t]hey should call it the prison tag. It locks the player in, keeps him in jail contractually, doesn't allow him to test what his true market is, or seek what his compensation should be. It's take it or leave it."[142]

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[135] *Id.*
[136] *Id.*
[137] Cosentino, *supra* note 1.
[138] *See id.*
[139] *See* Wattenbarger v. A.G. Edwards & Sons, Inc., 150 Idaho 308, 321 (2010) ("In order for a contractual provision to be voided for unconscionability, it must be both procedurally and substantively unconscionable.").
[140] *See id.* ("Indicators of procedural unconscionability generally include a lack of voluntariness and a lack of knowledge. . . . A lack of voluntariness can be shown by an imbalance in bargaining power resulting from the non-negotiability of the stronger party's terms and the inability to contract with another party due to time, market pressures, or other factors."); *See also* Stites, *supra* note 81.
[141] Stites, *supra* note 81.
[142] Breer, *supra* note 9.

The franchise tag is substantively unconscionable because, in the individual circumstances in which it is applied, a reasonable player would not agree to it.[143] "The players don't like it because they don't have any financial security beyond that one year, and have almost no leverage outside of threatening to hold out."[144] After winning the Super Bowl in 2016, Von Miller threatened to not play football at all the next season if he was tagged, but not for the reason one might assume.[145] "'No, I'm not going to play on the franchise tag,' Miller told ESPN."[146] "I've never really played for money. It's bigger than that for me. It's *a league-wide problem* that I feel like I'm in a situation to help out with."[147] The franchise tag robs players of their leverage at the negotiating table, and it prevents them from securing long-term financial commitments from teams after their strongest statistical performances.[148] Ultimately, "[t]here isn't anything like the franchise tag in other sports . . . ."[149]

B. *THE FRANCHISE TAG ANALYZED UNDER* ROZEBOOM

In evaluating the franchise tag system's unconscionability through the lens of *Rozeboom*, one must evaluate three components, whether: (1) one party is a monopoly, (2) the contract is "take it or leave it," and (3) there is unequal bargaining power between the parties.[150]

First, just as a jury found in 1988, the NFL has a monopoly over professional football.[151] As Stephen F. Ross—a law professor, not to be confused with the owner of the Miami

[143] *See* C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 81 (Iowa 2011) ("Substantive unconscionability involves whether or not the substantive terms of the agreement are so harsh or oppressive that no person in his or her right senses would make it.").
[144] Benne & D'Andrea, *supra* note 84.
[145] Stites, *supra* note 81.
[146] *Id.*
[147] *Id.* (emphasis added).
[148] Jon Benne, *NFL players hate the franchise tag, even if it means a big paycheck*, SBNATION (Feb. 15, 2017, 9:00 AM), https://www.sbnation.com/nfl/2017/2/15/14584704/nfl-players-hate-franchise-tag-salary-holdout-eric-berry-kirk-cousins.
[149] Stites, *supra* note 81 ("The Cleveland Cavaliers couldn't force LeBron James to stay, and neither could the Washington Nationals with Bryce Harper.").
[150] *See* Rozeboom v. Nw. Bell Tel. Co., 358 N.W.2d 241, 242 (S.D. 1984).
[151] U.S. Football League v. National Football League, 842 F.2d 1335, 1353 (2d Cir. 1988) ("The jury found the NFL liable on the USFL's claim of actual monopolization, concluding that the older league had

Dolphins—asserted: "termination of inter-league rivalry through mergers and predatory practices and the expansion of . . . the National Football League to a size that now virtually precludes new entrants explain[s] [its] persistent monopoly status."[152] There are other sources of professional football outside of the National Football League, but the NFL dominates the industry.[153] The NFL approached $16 billion in revenue in 2019, and the cash distributed amongst the teams has increased by 42% over the past six seasons.[154] In 2016, the National Football League generated the greatest revenue of any sports league in the world, surpassing the runner-up by $3.5 billion.[155]

Second, when an NFL team franchise tags a player, that player can either sign the tag, or he can refuse and skip an entire year of football; in effect, the player can take the franchise tag, or he can leave the franchise tag.[156] As discussed earlier, former Pittsburgh Steelers running back, Le'Veon Bell, illustrated this precise concept after his team franchise tagged him in back-to-back seasons; when the two sides did not agree to a contract before the July deadline "[t]he only options available to Bell after that were to sign his one-year franchise tag offer or not sign it and skip part (or all) of the season."[157]

willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United States.").

[152] Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 755 (1989).

[153] *See* Cody Benjamin, *From AAF to XFL to Pacific Pro Football and more, here's a guide to all the new non-NFL football leagues*, CBS SPORTS (Feb. 13, 2019, 03:02 PM), https://www.cbssports.com/nfl/news/from-aaf-to-xfl-to-pacific-pro-football-and-more-heres-a-guide-to-all-the-new-non-nfl-football-leagues/ (noting that, as of 2019, football is played in: the National Football League, Canadian Football League, Arena Football League, Alliance of American Football, XFL, American Flag Football League, Pacific Pro Football, Freedom Football League, Indoor Football League, and Spring League).

[154] Eben Novy-Williams, *NFL Shared Revenue Hits Record $9.5 Billion as Media Payouts Rise*, SPORTICO (July 21, 2020, 01:00 PM), https://www.sportico.com/leagues/football/2020/nfl-shared-revenue-2019-billion-packers-1234609285/.

[155] *See* Steven Kutz, *NFL took in $13 billion in revenue last season — see how it stacks up against other pro sports leagues*, MARKET WATCH (July 2, 2016, 10:53 AM), https://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01.

[156] Cosentino, *supra* note 1.

[157] SBNation.com Staff, *supra* note 105.

Third, the NFLPA has ostensibly thrown in the towel on removing the franchise tag from the CBA, believing any such attempt is doomed to fail.[158] If the players' union—their bargaining representative and advocate—has given up hope of removing the franchise tag because "signing away the farm to repeal a tag that . . . affects a smaller percentage of the [players], just [is not] worth it," what are individual players supposed to do?[159] According to a former team executive, the NFLPA does not have much to bargain with, and has prioritized resolving numerous other issues.[160] The players could dangle the prospect of a longer season as an effective bargaining chip in exchange for ridding themselves of the franchise tag, but this notion was not strongly supported by the players, and even a concession of that magnitude might not suffice to remove the franchise tag.[161] In any event, this proposition is flawed; to secure their freedom to contract, players would have to subject their bodies to even greater risk of injury.[162]

V. CONCLUSION

By continuing to utilize the franchise tag, the NFL owners have shown that they are unwilling to play fairly with the athletes with whom they have contracted.[163] In order for the best players to even be in a position to sign life-changing contracts with NFL teams, they first had to overcome a daunting 0.0003% success rate.[164] Were the franchise tag system deemed unconscionable and cast aside, these elite players would be free to perform well under their contracts and then be fairly compensated under new contracts.[165]

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[158] Breer, *supra* note 9.
[159] *Id.*
[160] Cosentino, *supra* note 1.
[161] Florio, *supra* note 102.
[162] *See* Alex Jenny, *NFL: 6 Reasons an 18-Game Schedule Is a Bad Idea*, BLEACHER REPORT (Aug. 26, 2010), https://bleacherreport.com/articles/443786-five-reasons-an-18-game-nfl-schedule-is-a-bad-idea ("If players are required to play more games there is obviously a greater chance of a player getting injured.").
[163] Stuntebeck, supra note 25, at 91 ("The true significance of the doctrine of unconscionability lies in the policing function that it performs. History has indicated that freedom of contract cannot be absolute. Our competitive economy has caused the skilled draftsmen to *lose sight of minimal standards of fairness and decency*." (emphasis added)).
[164] NFL Operations, *supra* note 7.
[165] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

In closing, consider the response of Judge Skelly Wright—one of the Circuit Judges who decided *Williams v. Walker-Thomas Furniture Co.*[166]—to a question about utilizing unconscionability: "Well, it was just the right thing to do."[167] This, too, is *just the right thing to do*. If this Comment's proposal is successfully executed, one day it will be said that there *was* a striking injustice facing numerous workers that Americans *could* catch a glimpse of every Sunday during the NFL season, but that the unconscionability doctrine was used to rectify it.[168]

[166] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965).
[167] Knapp, *supra* note 24, at 613 n.24.
[168] Cosentino, *supra* note 1.

The Stairway to Fairness: Copyright and Creativity in the Digital Age

Ani Khachatryan[*]

TABLE OF CONTENTS

[*] J.D. 2022, Pepperdine Caruso School of Law; B.A., University of California, Los Angeles. This Comment is dedicated to my brilliant piano teacher, Hasmik Kotelyan, who gave me the greatest gift of all—music. Thank you to my parents and family for their unwavering support. I would also like to express my gratitude to Professors Marc P. Goodman and Alan Tzvika Nissel for their valuable insight and careful review. Finally, thank you to the members of the Sports and Entertainment Law Journal for their patience and diligence during the editing process.

I. INTRODUCTION

"Music expresses that which cannot be put into words and that which cannot remain silent."

—Victor Hugo[1]

Music is the universal language of the twenty-first century.[2] It is everywhere—it permeates nearly every aspect of people's lives.[3] Today, much of the music that people listen to is protected by copyright.[4] Copyright owners possess a bundle of exclusive rights granted by the government.[5] More specifically, copyright allows artists, record label companies, and music publishers to control how people use music, who can exploit music for profit, and who can receive payment for music.[6] Since copyright laws directly and indirectly impact the rights and responsibilities of these stakeholders, copyright will inevitably shape the future of the music industry.[7]

Beginning in 2003, copyright infringement claims steadily increased, briefly falling in 2006, and then reaching a high in 2018.[8] This is in stark contrast to trademark and patent

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[1] LEAH E. KALMANSON, INEFFABILITY: AN EXERCISE IN COMPARATIVE PHILOSOPHY OF RELIGION, 42 (Leah E. Kalmanson & Timothy D. Knepper eds., 2017).

[2] *See* Helena Asprou, *Music is a Universal Language, New Harvard University Study Proves*, CLASSIC FM (Jan. 9, 2020, 4:44 PM), https://www.classicfm.com/music-news/study-proves-music-is-universal-language/.

[3] *See* Tom Goulding, *Music is an Integral Part of Our Lives, Study Shows*, DJ MAG. (Oct.16, 2018, 9:55 PM), https://djmag.com/news/music-integral-part-our-lives-study-shows.

[4] *See* Chris Wickens, *6 Surprisingly Famous Royalty Free Songs*, AUDIOSOCKET (Aug. 28, 2020), https://blog.audiosocket.com/6-surprisingly-famous-royalty-free-songs/.

[5] Alexander K. Fleisher, *Confused by Music Copyright? Here Are 5 Things You Definitely Need to Know*, DIGITAL MUSIC NEWS (Mar. 11, 2018), https://www.digitalmusicnews.com/2018/03/11/music-copyright-basics/. The bundle of rights includes the right to reproduce a copyrighted work, distribute copies, publicly perform the work, publicly display the work, and publicly perform a work embodied in a sound recording by digital audio transmission. *Id.*

[6] *How To Copyright Music, Why It Matters*, HYPEBOT, https://www.hypebot.com/hypebot/2018/08/how-to-copyright-music-why-it-matters.html (last visited Mar. 19, 2021).

[7] Peter K. Yu, *How Copyright Law May Affect Pop Music Without Our Knowing It*, 83 UMKC L. REV. 363, 366 (2014).

[8] *Just the Facts: Intellectual Property Cases –Patent, Copyright, and Trademark*, U.S. CTS. (Feb. 13, 2020), https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark. From 1996 to 2018, California had the greatest number of copyright claims, which represented 22% of the national caseload. *Id.* New York, which had the second highest number of claims, constituted 15% of the caseload. *Id.* In third place, Texas claimed 7% of the national caseload. *Id.*

infringement claims, which stabilized and decreased, respectively.[9] Among copyright claims, music copyright infringement claims have been slowly increasing.[10] In addition, experts estimate that by 2030, the online streaming market could multiply to include around 1.2 billion users.[11] Furthermore, in 2021, these experts expect music publishing and the global music industry to grow by 3.5% and 45%, respectively.[12] Today, revenue from streaming services like YouTube, Spotify, Apple Music, and Amazon Music Unlimited constitutes 63% of total industry revenue.[13] Unfortunately, rapid developments in technology, such as the upsurge in streaming platforms, will only continue to magnify the quantity of copyright infringement claims in the United States.[14]

The sudden influx of music copyright claims in recent years, coupled with the growth of new media technologies, calls into question the efficacy of current copyright laws.[15] Indeed, a recurring theme in the music industry is that in an era of digital culture, it has become nearly

[9] *See id.*
[10] Kat S. Hatziavramidis, Esq., *Attorneys Baffled by Music Copyright Infringement Laws*, FORENSISGROUP (Sept. 6, 2016), https://www.forensisgroup.com/attorneys-baffled-by-music-copyright-infringement-laws/ ("Music copyright infringement cases appear to be on the rise, and the differing verdicts rendered in recent lawsuits may be confusing to attorneys.").
[11] Sam Meredith, *Music Industry to Nearly Double Value by the End of the Decade, Goldman Sachs Says*, CONSUMER NEWS & BUS. CHANNEL (May 20, 2020, 2:17 AM), https://www.cnbc.com/2020/05/20/coronavirus-music-industry-to-nearly-double-in-value-by-2030-goldman-sachs-says.html. The estimates for 2030 represent nearly a four-fold rise from 341 million paid streaming subscribers in 2019. *Id.*
[12] *Music in the Air: The Show Must Go On*, GOLDMAN SACHS 4, 58 (July 2020), https://www.goldmansachs.com/insights/pages/infographics/music-in-the-air-2020/report.pdf.
[13] Bill Rosenblatt, *Music Industry's Revenue Continues to Grow, But Beneath the Surface Are Warning Signs*, FORBES (Mar. 2, 2019, 9:35 AM), https://www.forbes.com/sites/billrosenblatt/2019/03/02/the-warning-signs-among-the-music-industrys-revenue-growth/?sh=4ef5bd07de3b.
[14] *See* Adrian Adermon & Che-Yuan Liang, *Piracy and Music Sales: The Effects of an Anti-Piracy Law*, 105 J. ECON. BEHAVIOR & ORG. 90, 91 (2014) ("Inventions such as the photocopier, CD burners, and the Internet have made the copying of books, music, and movies inexpensive and easy and the enforcement of copyright more difficult."). Essentially, music has become a "public good," placing "guidelines for and evaluation of intellectual property rights policy issues" at the center of the digital age. *Id.*
[15] *See* Edvard Pettersson, *Music Copyright Law in Search of New Standard for Infringement*, INS. J. (Sept. 23, 2019), https://www.insurancejournal.com/news/national/2019/09/23/540734.htm; Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018); Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020); Griffin v. Sheeran, 17 Civ. 521 (LLS), 2020 U.S. Dist. Lexis 52908 (S.D.N.Y. Mar. 24, 2020).

impossible for musicians to produce songs that are entirely original.[16] Artists and musicians, whether industry veterans or up-and-comers, embrace the Internet as a means to "make, market, and sell their creative works."[17] The Internet allows them to develop relationships with fans and musical colleagues, find inspiration, and engage in various commercial activities.[18] At the same time, however, social media and streaming services have greatly increased people's access to many popular songs.[19] Since these technologies provide for the wide dissemination of music, people can listen to more songs.[20] Under these conditions, more people can derive inspiration from the songs they listen to on a daily basis.[21] When elements of artists' subsequent musical compositions bear similarities to the songs that inspired them, plaintiffs bring copyright infringement claims against them, arguing that the similarities are evidence of copying.[22] In reality, however, such similarities are not always determinative of infringement; rather, they are often indicators of musical influence.[23] Therefore, this vicious cycle—one of the hallmarks of the digital age—muddles the copyright infringement analysis.[24]

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[16] *See* Computer Music, *Does Today's Software Make Music Production Too Easy?*, MUSIC RADAR (Nov. 19, 2014), https://www.musicradar.com/news/tech/does-todays-software-make-music-production-too-easy-610209. Today's music production software has greatly expanded the ease by which artists may reproduce other artists' productions. *Id.*

[17] Mary Madden, *Artists, Musicians and the Internet*, PEW RES. CTR. (Dec. 5, 2004), https://www.pewresearch.org/internet/2004/12/05/artists-musicians-and-the-internet/. According to a national survey of 2,755 musicians, 52% of all online artists and 59% of paid online artists claim that they find ideas and inspiration for their works from online searches. *Id.* Another 30% of online artists and 45% of paid online artists admit that the Internet plays an important role in creating and disseminating their art. *Id.*

[18] *Id.*

[19] *See* Shelley Hepworth, *Streaming Spells the End of the 'Ownership' Era of Music, But Are We Ready to Let Go?*, THE GUARDIAN (Feb. 1, 2020, 2:00 PM), https://www.theguardian.com/music/2020/feb/02/streaming-spells-the-end-of-the-ownership-era-of-music-but-are-we-ready-to-let-go.

[20] Ailey Butler, *Why Streaming is a Good Thing for the Music Industry*, 2 BACKSTAGE PASS 1, 1 (2019).

[21] *See How Can Songwriters Be Influenced by Music They Hear and Still Be Unique?*, BROADCAST MUSIC (May 21, 2019), https://www.bmi.com/news/entry/how-can-songwriters-be-influenced-by-music-they-hear-and-still-be-unique.

[22] *See* Michael Kreiner, *Song Sound-Alike Suits: Recent Music Copyright Cases Strike a Different Note*, JD SUPRA (May 27, 2020), https://www.jdsupra.com/legalnews/song-sound-alike-suits-recent-music-22335/.

[23] *See* Anjelica Oswald, *18 Hit Songs That Allegedly Stole From Other Songs*, BUS. INSIDER (Apr. 20, 2016, 8:00 AM), https://www.businessinsider.com/songs-that-sound-like-other-songs-2016-4.

[24] *See generally* Tyler Jordan, *Beyond Streaming: The Future of Music Monetization in the Digital Age*, MEDIUM (July 9, 2019), https://medium.com/@tylerjtyler_70323/beyond-streaming-the-future-of-music-

Just a few years ago, for example, *Williams v. Bridgeport Music, Inc.*[25] swept the music industry into a state of panic.[26] The jury found that the plaintiffs—Pharrell Williams, Robin Thicke, and Clifford Joseph Harris (better known by his stage name, "T.I.")—created a musical composition that infringed on acclaimed Motown singer Marvin Gaye's song.[27] There was an extensive rise in copyright infringement claims in the United States following the court's decision.[28] Unfortunately, much of this ensuing litigation involved frivolous cases.[29] Under these circumstances, many in the music industry traced the rapid uptick in copyright infringement claims to *Williams*' "chilling effect" on the creative community.[30]

In 2020, the Ninth Circuit took the first steps towards resolving the problem of frivolous copyright infringement claims.[31] In the seminal case, *Skidmore v. Led Zeppelin*,[32] the court held that English rock band Led Zeppelin did not infringe on American rock band Spirit's song, and

monetization-in-the-digital-age-719c43e93721 (discussing potential future complications of the digital age in relation to music).

[25] Williams v. Bridgeport Music, Inc., No. LA CV13–06004 JAK (AGRx), 2014 WL 7877773 (C.D. Cal. Oct. 30, 2014).

[26] *See* Yuntao Cui, *Williams v. Gaye: "Blurred Lines" Appeal Hearing Centers on Admissibility of Evidence About Original Sound Recording*, HARV. J. L. & TECH. (Oct. 31, 2017), https://jolt.law.harvard.edu/digest/williams-v-gaye-blurred-lines-appeal-hearing-centers-on-admissibility-of-evidence-about-original-sound-recording.

[27] *See* John Quagliariello, *Blurring the Lines: The Impact of Williams v. Gaye on Music Composition*, 10 HARV. J. SPORTS & ENT. L. 133, 138 (2019). The plaintiffs filed a preliminary complaint against the defendants—members of acclaimed Motown singer Marvin Gaye's family—in 2015. *Id.* at 136. The plaintiffs sought a declaratory judgment that stated that their song, "Blurred Lines," did not infringe the copyright on Gaye's song, "Got to Give it Up." *Id.* at 136–37. Gaye's family brought a counterclaim against the plaintiffs for copyright infringement. *Id.* at 137. After musicologists from both sides offered different evaluations on whether "Blurred Lines" infringed Gaye's song, the jury concluded that a genuine issue of material fact existed as to the similarity of the compositions, therefore rendering summary judgment in favor of Williams and Thicke inappropriate. *Id.* Many players in the music industry, including artists, reporters, and other insiders were shocked by the ruling—never before had the "'groove'" of songs figured into a copyright analysis. *Id.* at 138.

[28] *See* Mark Savage, *Blurred Lines: Robin Thicke and Pharrell Williams to Pay $5m in Final Verdict*, BRIT. BROAD. CO. (Dec. 13, 2018), https://www.bbc.com/news/entertainment-arts-46550714. After *Williams*, artists like Bruno Mars, Mark Ronson, Madonna, and Miley Cyrus faced copyright infringement claims. *Id.*

[29] Dexter Thomas, *The 'Blurred Lines' Creators Are Still Trying to Reverse the Marvin Gaye Verdict*, VICE (Aug. 26, 2016, 9:14 AM), https://www.vice.com/en/article/ev99nw/the-blurred-lines-creators-are-still-trying-to-reverse-the-marvin-gaye-verdict.

[30] *Id.*

[31] *See infra* Part IV.

[32] Skidmore v. Led Zeppelin, 952 F.3d 1051, 1056 (9th Cir. 2020).

in doing so overturned the inverse ratio rule—restoring the pre-*Williams* status quo for copyright infringement cases.[33] There was also increased "pressure to extend songwriting credits to anyone who may have influenced new music…" in *Williams*' aftermath.[34] *Skidmore*, however, functionally softened the practice of expanding songwriting credits, and it "held true to the purpose of the copyright statutes: incentivizing creation for the benefit of the public."[35]

Paradoxically, the music industry's booming success is leading to its demise.[36] Artists need inspiration to produce music, and experimentation cultivates creativity.[37] Without it, music cannot evolve.[38] Faced with the prospects of looming copyright suits, however, artists no longer have incentives to create by moving beyond their comfort zones.[39] Furthermore, while the purpose of copyright law is to foster creativity, the digital age has only restrained the music industry's growth.[40] Until music copyright laws adapt to today's challenges, the music industry will continue to stagnate.[41] Thus, while *Skidmore* is a step in the right direction, there are still improvements that must be made so that copyright laws can accommodate the digital age.[42] The Supreme Court should use a genre-specific substantial similarity test for music copyright

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[33] Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018); *see* Ben Sisario, *The 'Blurred Lines' Case Scared Songwriters. But Its Time May Be Up.*, N.Y. TIMES (Mar. 24, 2020), https://www.nytimes.com/2020/03/24/arts/music/blurred-lines-led-zeppelin-copyright.html.
[34] *Skidmore v. Led Zeppelin*, 134 HARV. L. REV. 1543 (2021).
[35] *Id.*
[36] *See* Hayden Cunningham, *Is the Music Industry in Decline?*, TALON (Apr. 17, 2017), https://thetalonohs.com/opinion/2017/04/17/is-the-music-industry-in-decline/ (Because of the Internet, "[t]here are many musicians today that perform well and their work is of good merit . . . [b]ut the amount of originality and creativity is beginning to shrink.").
[37] *See* Kat Crow, *Why Artists Must Experiment*, MEDIUM (June 12, 2019), https://medium.com/swlh/why-artists-must-experiment-e9107f3abf1e.
[38] *See* Sumit-Paul Choudhury, *What Will Music be Like in 20 years?*, BRIT. BROAD. CO. (May 21, 2019), https://www.bbc.com/culture/article/20190521-what-will-music-be-like-in-20-years.
[39] *See* Elise M. Erhart, *Copyright Laws in the Music Industry*, 2 LINE BY LINE: J. BEGINNING STUDENT WRITING 1, 2 (2016).
[40] *See* Savannah Tyk LeDoux, *How Social Media is Killing the Music Industry*, MEDIUM (Dec. 4, 2017), https://medium.com/@savannahtykledoux/how-social-media-is-killing-the-music-industry-e6fea4cc6e30 ("[R]ecord labels and record sales alone are dramatically declining due to the new digital era.").
[41] *See* Jamieson Cox, *The Music Industry is Begging the US Government to Change Its Copyright Laws*, VERGE (Apr. 1, 2016, 9:45 AM), https://www.theverge.com/2016/4/1/11344832/music-industry-copyright-law-change-christina-aguilera-katy-perry.
[42] *See* Kathryn Penick, *The Life Cycle of Copyright Law: A Push for Copyright Reform*, 21 TUL. J. TECH. & INTELL. PROP. 71, 77–78 (2019). The Copyright Act of 1976 and the Digital Millennium Copyright Act are "ill-equipped to handle technological advances brought on by the digital age." *Id.*

claims.[43] Such a test provides the best chances of fair outcomes for both plaintiffs and defendants in the digital age, while also preserving the purpose of copyright laws.[44] Until then, however, the current state of copyright law will likely trammel the very creativity it seeks to protect.[45]

This Comment analyzes the challenges underlying the music industry in the digital age and the ways in which the digital age has complicated copyright infringement analysis.[46] Part II provides an introduction to U.S. copyright law, with an emphasis on policy objectives, foundational concepts, and the emergence of the digital age.[47] Part III describes the current state of copyright law (focusing on the problems surrounding copyright infringement claims), highlights copyright jurisprudence in the federal circuit and the Supreme Court, and illustrates the Ninth Circuit's unique approach to evaluating copyright infringement cases.[48] Part IV explains the probable consequences of the Ninth Circuit's ruling in *Skidmore v. Led Zeppelin* and addresses the need for a uniform substantial similarity test for musical works.[49] Part V proposes a new framework for copyright infringement claims involving musical works.[50] Finally, Part VI provides a future outlook on copyright, and emphasizes the ways that continuing technological developments will impact the music industry.[51]

II. PRINCIPLES OF COPYRIGHT LAW

[43] *See infra* Part V (The legal doctrine of substantial similarity assesses whether there is such a degree of similarity between two expressive works that a reasonable person would conclude that the defendant—the alleged infringer—unlawfully copied the plaintiff's work); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 733 (1987).
[44] Cohen, *supra* note 43, at 733.
[45] *See infra* Part VI.
[46] *See infra* Parts II–VI.
[47] *See infra* Part II.
[48] *See infra* Part III.
[49] *See infra* Part IV.
[50] *See infra* Part V.
[51] *See infra* Part VI.

Copyright law is territorial in nature.[52] In other words, copyright protection applies only in the country where an author obtains registration for a creative work.[53] In accordance with this principle of territoriality, many nations have implemented copyright laws reflecting their particular cultures and goals.[54] In the United States, there are several requirements for copyright protection, which are discussed below.[55]

A. Foundations of Copyright

The origin of U.S. copyright law stems from the United States Constitution.[56] Article I, Section 8, Clause 8 of the Constitution states that Congress shall have the 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."[57] In light of this provision, copyright law seeks to balance the need for a rich, thriving public forum against the need to protect private property interests.[58] The copyright clause reflects society's desire to nurture

[52] *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 523–24 (1997). While the 1976 Copyright Act does not explicitly indicate that copyright's "scope is generally limited to the U.S. borders…courts consistently have held that U.S. copyright law…does not apply beyond U.S. territorial boundaries." *Id.*

[53] *See* Michael S. Denniston, *International Copyright Protection: How Does It Work?*, BRADLEY (Mar. 28, 2012), https://www.bradley.com/insights/publications/2012/03/international-copyright-protection-how-does-it- w__#:~:text=As%20noted%20above%2C%20copyright%20law%20is%20territorial.&text=The%20central%20feature%20of%20the,in%20the%20country%20of%20origin.

[54] *See* Emmanuel Kolawole Oke, *Territoriality in Intellectual Property Law: Examining the Tension between Securing Societal Goals and Treating Intellectual Property as an Investment Asset*, 15 SCRIPTED 313, 315 (2018).

[55] *See infra* Part II.

[56] *See* Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 863 (2006).

[57] U.S. CONST. art. I, § 8, cl. 8.

[58] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (discussing that copyright laws struggle with the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").

creativity and incentivize people to create while simultaneously promoting knowledge.[59] The underlying rationale is that a more knowledgeable citizenry leads to a more prosperous society.[60]

Because of its many different goals, "[c]opyright is an innovation policy, a competition policy, and a free expression policy."[61] Copyright laws are the engine that propels change and free expression.[62] While free expression helps promote "democratic self-governance, truth, and happiness," innovation stimulates "economic growth, prosperity, development, and happiness."[63] Since copyright helps improve science and creates a rich public domain, its focus "should be the public interest."[64] In this way, the copyright system not only serves as a touchstone for cultural progress, but also reflects American society's deeply-rooted values.[65]

The idea/expression dichotomy is copyright law's defining feature.[66] Copyright protects the expression of ideas, not the ideas themselves.[67] The personhood theory of intellectual property best expresses this distinction.[68] According to this theory—developed from the writings of Immanuel Kant and Georg Wilhelm Friedrich Hegel—intellectual property involves an investment and expression of an individual's personality.[69] As such, individuals' expressive

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[59] *See* Amanda Reid, *Copyright Policy as Catalyst and Barrier to Innovation and Free Expression*, 68 CATH. U. L. REV. 33, 33 (2019).
[60] *See Knowledge is Now the Basis of Economic Prosperity*, IRISH TIMES (Sept. 25, 1996, 1:00 AM), https://www.irishtimes.com/news/knowledge-is-now-the-basis-of-economic-prosperity-1.89264.
[61] Reid, *supra* note 59, at 33.
[62] *See id.* at 36.
[63] *Id.*
[64] *Id.*
[65] *See* Lv Yingli et al., *A Study on American Individualistic Values from the Movie The Pursuit of Happiness*, 123 ATL. PRESS 473, 474 (2017) (arguing that by producing original, expressive works, an individual becomes independent and fosters self-determination because "[t]he core thought of American individualistic values refers to the spirit of independence, that is, a person is encouraged to be independent, self-supporting and self-improved, and to create his/her own world through his/her efforts.").
[66] *See* Richard H. Jones, *The Myth of the Idea/Expression Dichotomy In Copyright Law*, 10 PACE L. REV. 551, 551 (1990).
[67] *See id.*; *see also* Baker v. Selden, 101 U.S. 99, 102–04 (1879) (addressing the differences between ideas and expressions within a copyrighted book and distinguishing between the protections offered by patent and copyright).
[68] *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (explaining that property ownership is necessary for developing one's potential and discussing that protection of an author's persona requires copyright protection).
[69] *See* KURT M. SAUNDERS, INTELLECTUAL PROPERTY LAW: LEGAL ASPECTS OF INNOVATION AND COMPETITION 12 (2016).

works represent an offshoot of themselves, and are a unique expression of their personhood.[70] Therefore, copyright, like other kinds of intellectual property, seeks to encourage individuals to place their personal stamps on creations by expressing their ideas in a distinctive way.[71]

The copyright statute has undergone many changes; the most recent version was enacted in 1976 (while the Music Modernization Act was passed in 2018, the relative lack of time for litigation to occur under the MMA means this article will focus on the substantive history of the 1976 statute).[72] The current statute, the 1976 Copyright Act, awards copyright holders more expansive rights than prior statutes.[73] Compared to the 1909 Copyright Act, which protected a work for only twenty-eight years, current copyright law provides longer protection: the life of the author plus seventy years.[74] The current copyright statute also recognizes more categories for works of authorship, which include the following: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any 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."[75]

B. Eligibility for Copyright Protection

Copyright protects "original works of authorship fixed in any tangible medium of expression."[76] To qualify for copyright protection as a registered work, a work must fall within one of the aforementioned authorship categories.[77] Moreover, there are additional requirements to qualify for copyright protection.[78]

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[70] *See id.*
[71] *See id.*
[72] *See* Kevin R. Davis, *Copyright Act of 1790 (1790*), FIRST AMEND. ENCYCLOPEDIA (2009), https://mtsu.edu/first-amendment/article/1030/copyright-act-of-1790 (last visited Nov. 3, 2020).
[73] *See* SAUNDERS, *supra* note 69, at 261.
[74] *See id.*
[75] 17 U.S.C. § 102(a); *see also* SAUNDERS, *supra* note 69, at 263–64 (providing an overview of the works of authorship).
[76] 17 U.S.C. § 102(a).
[77] *See* SAUNDERS, *supra* note 69, at 263.
[78] *See infra* Part II.B.

To meet the originality requirement, an author must independently create a work and the work must display a minimal degree of creativity.[79] An independently created work is one that owes its creation to an author.[80] To possess creativity, a work must contain a sufficient number of protectable elements.[81] Only those elements that are protectable may receive copyright protection; however, copyright still extends to works using non-original elements in an original way.[82] Over the years, courts have identified distinctions between protectable and unprotectable elements.[83] For instance, copyright protection does not extend to facts or useful articles (also known as functional elements).[84] Furthermore, it does not protect *scènes à faire*, which are elements of a work that traditionally apply to a particular genre or form.[85] *Scènes à faire* vary

[79] *See* SAUNDERS, *supra* note 69, at 271.
[80] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("The sine qua non of copyright is originality…[o]riginal…means only that the work was independently created by the author (as opposed to copied from other works)…").
[81] *See id.*
[82] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (noting that "[n]o author may copyright his ideas or the facts he narrates" and discussing the idea-expression dichotomy generally); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1008 (2017) (ruling that [t]he [Copyright Act] does not protect useful articles"). *See generally* David H. Bowser, *Understanding the Scope of Architectural Copyright Protection*, AM. INST. ARCHITECTS (Jan. 18, 2017), https://www.aia.org/articles/26591-understanding-the-scope-of-architectural-cop (stating that "[u]nprotected elements of a copyright work can include: (1) ideas, as opposed to expression; (2) expressions that are indistinguishable from the underlying ideas; (3) standard or stock elements (called scènes à faire); and (4) facts and other public information").
[83] *See* Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1841–42 (2013).
[84] *See id.* One of copyright's purposes is to safeguard artistic expressions, which are elements that exhibit a degree of creativity. *See id. See also* Meredith Filak Rose, *Copyright, Props, and Armor Replicas: "Yer a Statue, Harry"*, PUB. KNOWLEDGE (Aug. 29, 2018), https://www.publicknowledge.org/blog/copyright-props-and-armor-replicas-yer-a-statue-harry/ (explaining the limits of copyright protection for functional elements). Functional elements, however, serve a utilitarian purpose; in other words, they serve to "do a job, and don't get copyright protection as a result." *Id.* The Copyright Act defines a "useful article" as any article "having intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." *Copyright FAQ: What is a "Useful Article?"*, HG.ORG, https://www.hg.org/legal-articles/copyright-faq-what-is-a-useful-article--32153 (last visited Jan. 11, 2020). Examples of useful articles include clothing, furniture, dinnerware, and lighting fixtures. *See id.*
[85] *See* SAUNDERS, *supra* note 69, at 293. Translated from French, *scènes à faire* refer to "'scenes to do.'" Torrean Edwards, *Scènes à Faire in Music: How an Old Defense is Maturing, and How It Can be Improved*, 23 MARQ. INTELL. PROP. L. REV. 105, 108 (2019). In a typical western movie, *scènes à faire* include horses, saloons, and cowboys. *See What Can and Can't be Copyrighted?*, NEW MEDIA RTS. (Oct. 27, 2020, 8:38 PM), https:///www.newmediarights.org/business_models/artist/ii_what_can

among works of authorship; in musical works, they consist of elements like rhythm, chord progressions, melodies, and harmonies.[86] These elements are not eligible for copyright protection because protection of such elements would essentially grant a copyright holder "a monopoly on…commonplace ideas…"[87] Under the merger doctrine, copyright protection does not apply when an idea is inseparable from its expression.[88] By imposing significant limitations on protection for expressive works, these doctrines ensure that expressions which belong in the public domain remain there for society to use.[89]

To meet copyright's fixation requirement, a work must exist in a copy or phonorecord.[90] An author's creation must be fixed in a medium that is relatively stable and able to be communicated for a sufficient period of time: it cannot be transient.[91] In addition, humans must

_and_can't_be_copyrighted. In the music industry, and the R&B genre more specifically, melisma is a common technique. *See* Paymaneh Parhami, *Williams V. Gaye: Blurring the Lines of Copyright Infringement in Music*, 34 BERKELEY TECH. L. J. 1113, 1142 (2019). For example, Mariah Carey's chart-topping single, "Vision of Love," relies heavily on melisma on the words "love," "me," "dream," "nights," "all," and "eventually." *See id.* Melisma occurs when a musician sings a syllable over a string of notes. *See* Mike Katzif, *How 'American Idol' Uses (and Abuses) Melisma*, NAT'L PUB. RADIO (Jan. 11, 2007, 4:37 PM), https://www.npr.org/templates/story/story.php?storyId=6791133. In contrast, in a syllabic melody, such as "Happy Birthday," each syllable gets one note. *See* KRISTINE FORNEY ET AL., THE ENJOYMENT OF MUSIC 35 (Maribeth Payne & Chris Freitag eds., 12th ed. 2015).

[86] *See* SAUNDERS, *supr*a note 69, at 293.

[87] Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222, 1236 (3d Cir. 1986) (quoting Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984)).

[88] *See* Michael R. Mazzella III & R. Harrison Dilday, *Oracle America, Inc. V. Google Inc.: Copyrightability of Application Programming Interfaces and a Fair Use Defense*, 1 GEO. L. TECH. REV. 62, 65 (2016). Merger occurs when an author can express an idea in a limited number of ways. *See id.* An example of an idea that merges with its expression is "the use of a picture of cinnamon sticks on a box of cinnamon tea." Zachary Strebeck, *Idea vs. Expression – What is Protected under Copyright Law?*, ZACHARY STREBECK ATT'Y L., https://strebecklaw.com/idea-expression/. Since there are very few ways of creating advertisements of cinnamon tea that reflect the nature of the product itself, "[i]t would not be a violation for another party to create such a box with a similar picture…" *Id.*

[89] *See* Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 461 (2009).

[90] *See* 17 U.S.C. § 102(a) (specifying that a copyrighted work must be "fixed in any tangible medium of expression . . . from which [it can be perceived . . . or otherwise communicated . . . with the aid of a machine or device."); 17 U.S.C. § 106(1) (2012). The statute stipulates that the copyright owner may reproduce the work in "copies" and "phonorecords." *Id.* Phonorecords include "material objects in which sounds…are fixed," like CDs, vinyl records, and digital files. *Id.* at § 101.

[91] *See* SAUNDERS, *supr*a note 69, at 266. For example, while a beach sandcastle would not meet the fixation requirement, a picture of the sandcastle would meet the requirement because the photograph constitutes a reproducible medium. *See* Jon Pfeiffer, *What May be Copyrighted?*, PFEIFFER L. (June 17, 2015), https://www.pfeifferlaw.com/entertainment-law-blog/what-may-be-copyrighted.

have the ability to perceive the copyrighted material with or without the aid of a machine.[92] Therefore, fixation is "a constitutional requirement,…[an] originality requirement, and…an evidentiary tool."[93]

While registration of a copyright is not mandatory, it confers numerous benefits.[94] Registration creates a "legal presumption of ownership of a valid copyright."[95] It also indicates a "public record of copyright ownership" and allows authors to collect statutory damages and attorney fees.[96] Furthermore, a claimant must file an application for registration before bringing a copyright infringement claim in federal court.[97]

However, works that are not subject to copyright protection exist in the public domain, and as such the public can use them freely.[98] The public domain includes creative works whose copyright protection has expired, abandoned works, and ideas and other expressions that are generally not entitled to protection.[99] Thus, the public domain embodies the realm "where no

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[92] *See* 17 U.S.C. § 102(a) (specifying that a copyrighted work must be "fixed in any tangible medium of expression . . . from which [it can be perceived . . . or otherwise communicated . . . with the aid of a machine or device.").

[93] Megan Carpenter, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221, 2236 (2014). The fixation requirement derives from the Constitution. *See id.* The requirement also "cabins the writ of copyright, as a range of original works would be copyrightable but for the lack of fixation." *Id.* at 2239. Finally, fixation provides a tangible form of evidence for a copyrighted work. *See id.*

[94] *See* SAUNDERS, *supra* note 69, at 334.

[95] *Id.*

[96] *Id.* at 335.

[97] *See id.* at 334.

[98] *See* Timothy Vollmer, *The Public Domain and 5 Things Not Covered by Copyright*, CREATIVE COMMONS (Jan. 16, 2017), https://creativecommons.org/2017/01/16/public-domain-5-things-not-covered-copyright/ ("From a legal perspective, the public domain is the space where no intellectual property rights exist.").

[99] *See* Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137, 149 (1993). Generally, a work's copyright protection expires seventy years after the author's death. *See* Coe Ramsey, *Music Law 101: How Long Does Copyright Protection Last?*, JD SUPRA (Jan. 30, 2019), https://www.jdsupra.com/legalnews/music-law-101-how-long-does-copyright-57301/. Courts consider a copyright abandoned when the owner intends to "unilaterally dispossess themself of a copyright" and "engage[s] in some overt act reflecting that intent." Dave Fagundes & Aaron K. Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 498–99 (2020). One way an owner could abandon a copyright, for instance, is if he expresses that anyone has the right to use or share his video clip, commercially or otherwise. *See* Steve Vondran, *Copyright "Abandonment" Explained*, VONDRAN LEGAL: ATT'Y STEVE BLOG (July 2, 2020), https://www.vondranlegal.com/copyright-abandonment-

intellectual property rights exist" because the public, instead of individuals, owns creative works.[100] In this way, the public domain ensures that the copyright system grants authors limited monopoly powers, rather than absolute, exclusive rights.[101]

C. Elements of a Successful Copyright Infringement Claim

The Supreme Court set the current standard for copyright infringement claims nearly 30 years ago.[102] In *Feist Publications, Inc. v. Rural Telephone Services Co.*, the Supreme Court clarified the idea/expression dichotomy.[103] Rural Telephone Service, a company that published a telephone directory of subscribers, brought a copyright infringement claim against Feist Publications.[104] Feist, a different company providing telephone directories, used more than a thousand of the same listings from Rural's white pages in its compilation.[105] The Court held that a successful copyright infringement claim requires a plaintiff to show: (1) ownership of a valid copyright and (2) copying of original elements of a work.[106] To obtain copyright protection, a work must possess a minimal degree of creativity.[107] The Court determined that, though facts do not typically constitute protectable forms of expression, an original selection or arrangement meets the requirement of minimal creativity.[108] Applying this analysis, the Court found that while Rural dedicated its efforts to creating a useful directory, it did not exert sufficient creativity to make an original compilation; it merely used subscriber data and listed information alphabetically.[109] Because Rural's directory did not contain enough copyrightable expressions to merit copyright protection, Feist's use of the listings was not copyright infringement.[110]

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explained#:~:text=An%20example%20might%20be%20if,affirmative%20defense%20of%20abandonment%20of.
[100] Vollmer, *supra* note 98.
[101] *See* Lloyd J. Jassin, *New Rules for Using Public Domain Materials*, COPYLAW.COM, https://www.copylaw.com/new_articles/PublicDomain.html (last visited Mar. 20, 2021).
[102] *See* Radin, *supra* note 68.
[103] Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340 (1991).
[104] *Id.* at 342–44.
[105] *Id.* at 343–44.
[106] *Id.* at 361.
[107] *Id.* at 345.
[108] *Id.* at 350.
[109] *Id.* at 362–63.
[110] *Id.* at 364.

Since then, the Supreme Court's holding in *Feist* has significantly shaped the trajectory of U.S. copyright law.[111] *Feist* was the first case in which the Court first considered the extent of creativity required for copyright protection by applying the doctrine of substantial similarity.[112] The case essentially introduced the creativity analysis into the originality inquiry.[113] *Feist* further imposed a constitutional requirement that creative works must be both independently originated and "sufficiently creative" to merit copyright protection.[114] The substantial similarity doctrine is still used across federal circuits.[115] Unfortunately, since *Feist* "[did] not promulgate a definition or test for determining creativity," a number of different and sharply conflicting interpretations arose across the federal courts.[116] Nevertheless, *Feist* still clarified the standards for copyrightability and infringement.[117]

Henceforth, to successfully raise a copyright infringement claim, a plaintiff must prove several elements: (1) ownership of a valid copyright, (2) copying of a work, and (3) a relation between the copying and the copyrightable material (which therefore constitutes misappropriation).[118] To establish ownership of a valid copyright, a plaintiff must either show valid registration of her work or prove that her work is eligible for copyright protection.[119] To show copying, a plaintiff may use direct or indirect evidence.[120] Admissions, eyewitness

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[111] *See* Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3, 5 (1992).
[112] *See id.* Substantial similarity occurs when two creative works are similar enough that a reasonable person would believe that an alleged infringer copied another's work. *See* Cohen, *supra* note 43.
[113] *Id.*
[114] *Id.* at 14.
[115] *See* Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J. L. & TECH. 469, 483 (2015).
[116] *Id.* at 15; *see infra* Part III.B.
[117] *See* Daniel Bliss, *Can You Register a Copyright on a Short Work of Words and Artistic Designs?*, JD SUPRA (Sept. 23, 2020), https://www.jdsupra.com/legalnews/can-you-register-a-copyright-on-a-short-19010/.
[118] *See* Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 633 (2019) (articulating the Supreme Court's test for copyright infringement claims).
[119] *See infra* Part II.B.
[120] *See, e.g.*, Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc, 150 F.3d 132, 137 (explaining that "[a]ctual copying may be established 'either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the work, and expert testimony.'") (quoting Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 139–40, 22 U.S.P.Q.2d (BNA) 1811, 1819 (2d Cir. 1992)).

testimonies, and surveillance videos comprise direct evidence, while indirect (or circumstantial) evidence of copying stems from an analysis of the plaintiff's and defendant's individual works.[121] Circumstantial evidence may include either: (i) proof of access to the allegedly infringed work and "probative similarity" between the works, or (ii) proof of a "striking similarity" between the works.[122] A showing of access requires a plaintiff to demonstrate that the defendant had a "reasonable opportunity to view" the allegedly infringed work.[123]

Finally, even if a plaintiff shows that the defendant copied her work, the defendant is not liable for infringement unless there is evidence the defendant appropriated an improper amount of a work's protected expressions.[124] Thus, to prove the third element of an infringement claim, the plaintiff must show that the defendant's work is substantially similar to her work.[125] Substantial similarity arises between two works when there is such a degree of similarity that a reasonable person would conclude that the defendant unlawfully copied the plaintiff's work.[126] Furthermore, copying is not automatically illegal; to constitute improper appropriation, the copying must be substantial, meaning that there must be more than *de minimis* copying.[127]

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[121] *See* Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL J. ART, TECH. & INTELL. PROP. L. 43, 45–46 (1995).
[122] Gen. Universal Syss., 379 F.3d at 142; Bridgmon v. Array Syss., 325 F.3d 572, 577 at n.7.
[123] Ferguson v. National Broad. Co., 584 F.2d 111, 113 (5th Cir. 1978).
[124] *See* Jarvis v. A & M Recs., 827 F. Supp. 282, 290 (D.N.J. 1993).
[125] *See* Daniel Gervais, *Improper Appropriation*, 23 LEWIS & CLARK L. REV. 599, 600 (2019).
[126] *See* Cohen, *supra* note 43.
[127] *See* Oren Bracha, *Not De Minimis: (Improper) Appropriation in Copyright*, 68 AM. U. L. REV. 139, 167; *see also* Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 131 (2d Cir. 2003) (discussing that substantial similarity occurs when there is copying of a protectable expression and the amount of copying is "more than de minimis.'"). Derived from Latin, *de minimis* is short for the maxim *de minimis non curat lex* ("The law does not concern itself with trifles."). *See* BLACK'S LAW DICTIONARY 443 (7th ed. 1999); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997); Pierre N. Levai, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997); Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, BERKELEY TECH. L. J. 945, 947 (2006).

D. The Digital Age

The digital age, also known as the information age, refers to the period (beginning in the 1970s) which marked the introduction of personal computers.[128] Furthermore, the term describes additional technologies developed during this time, such as the Internet, mobile devices, social networks, and big data.[129] Hallmarks of the digital age include mass customization, individualized communication, and an information-driven culture.[130] The following discusses the implications of the digital age on copyright law as well as the challenges it presents to the music industry.[131]

1. The Role of Technology in Copyright Law

Copyright laws are inextricably connected to the current state of technology.[132] More than 500 years ago, society first felt technology's strong impact on daily life.[133] When Johannes Gutenberg invented movable type, he revolutionized the copyright industry and caused widespread social change.[134] The movable type press improved printing efficiency, providing for mass publication of writings.[135] Literacy rates improved and allowed for the circulation of

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[128] *See* Robert Kormoczi, *What is the Digital Age?*, TIMES INT'L (June 6, 2020), https://timesinternational.net/the-digital-age/.
[129] *See id.*; Nicole Laskowski, *SMAC (Social, Mobile, Analytics, and Cloud)*, TECHTARGET (Dec. 2017), https://searchcio.techtarget.com/definition/SMAC-social-mobile-analytics-and-cloud.
[130] *See* Kormoczi, *supra* note 128; James Blake, *Personalisation in the Digital Age*, http://www.brandquarterly.com/personalisation-digital-age (last visited Mar. 16, 2021).
[131] *See infra* Part II.D.
[132] *See generally* Eric Fleischmann, *The Impact of Digital Technology on Copyright Law*, 8 J. MARSHALL J. INFO. TECH. & PRIVACY L. 1, 2 (1987) (stating that "[c]opyright law faces three immediate problems due to recent advances in digital technology."). First, "[n]ew digital systems will result in more infringements." *Id.* at 2. Next, "the fair use doctrine will continue to undermine the copyright system by permitting private unauthorized use of copyrighted works." *Id.* Finally, "present definitions of copyrightable work will prove overly narrow." *Id.*
[133] *See* Heming Nelson, *A History of Newspaper: Gutenberg's Press Started a Revolution*, WASH. POST (Feb. 11, 1998), https://www.washingtonpost.com/archive/1998/02/11/a-history-of-newspaper-gutenbergs-press-started-a-revolution/2e95875c-313e-4b5c-9807-8bcb031257ad/.
[134] *See* Amanda Littlejohn, *Johannes Gutenberg and the Printing Press: Social & Cultural Impact*, OWLCATION (Sept. 4, 2019), https://owlcation.com/humanities/Johannes-Gutenberg-and-the-Printing-Press-Revolution ("The sudden widespread dissemination of printed works—books, tracts, posters and papers—gave direct rise to the European Renaissance."). Furthermore, with movable type, "Protestant tracts and the arguments between Martin Luther and the Catholic Church which led to the Reformation could be widely disseminated." *Id.* All in all, Gutenberg's innovation precipitated the Protestant revolution and the Age of Enlightenment. *See id.*
[135] *See* Heather Whipps, *How Gutenberg Changed the World*, LIVE SCI. (May 26, 2008), https://www.live

revolutionary ideas threatening the political elite.[136] Many years later, photocopying machines and digital transmission systems further transformed the landscape of modern copyright law.[137] Since technology is a fundamental part of the music industry, recent digital developments present unique problems to industry stakeholders.[138]

2. Challenges Posed by the Digital Age

In the digital age, many of the challenges relating to the music industry involve recorded music.[139] Despite music's long-standing history, recorded music is a relatively new concept that has been established for little more than a century.[140] The music business has constantly evolved alongside changing technology during this time.[141] Digitalization's emergence in the twentieth century, for instance, had far-reaching consequences on the music industry.[142] Digital media storage devices replaced analog media storage devices.[143] New technologies, such as digital downloads, streaming services, and social media greatly changed consumer behavior.[144] Digitized media storage helped consumers keep more content in a relatively small space and made products cheaper for the public.[145] The most significant drawback of the digital age,

science.com/2569-gutenberg-changed-world.html.

[136] *See id.* (stating that Gutenberg's invention of the movable type press meant that Protestant tracts and the arguments between Martin Luther and the Catholic Church which led to the Reformation could be widely disseminated).

[137] *See Information Infrastructure Task Force*, U.S. DEP'T COM., INTELL. PROP. & NAT'L INFO. INFRASTRUCTURE 7 (1994) [hereinafter INFORMATION INFRASTRUCTURE].

[138] *See* Aditya Prasad, *From Techno to "Tech.-Yes'! How Technology is Revolutionising the Music Industry*, ENTREPRENEUR (Aug. 6, 2019), https://www.entrepreneur.com/article/337811.

[139] *See* Patrik Wikström, *The Music Industry in an Age of Digital Distribution*, CHANGE: 19 KEY ESSAYS ON HOW INTERNET IS CHANGING OUR LIVES, 422, 428 (BBVA ed., 2013).

[140] *See* ANDI STEIN & BETH BINGHAM GEORGES, AN INTRODUCTION TO THE ENTERTAINMENT INDUSTRY 75 (2018).

[141] *See* INFORMATION INFRASTRUCTURE, *supra* note 137, at 7 (stating that "[c]opyright law has had to respond to photocopiers, radio, television, videocassette recorders, cable television and satellites.").

[142] *See* Joel Waldfogel, *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television*, 31 J. ECON. PERSPS. 195, 197 (2017).

[143] *See* Andrea Leontiou, *World's Shift from Analog to Digital is Nearly Complete*, NAT'L BROAD. CO. NEWS (Feb. 10, 2011, 2:15 PM), https://www.nbcnews.com/id/wbna41516959.

[144] *See* STEIN & GEORGES, *supra* note 140, at 78, 81–82.

[145] *See* Kurt D. Bollacker, *Avoiding a Digital Dark Age*, AM. SCI., https://www.americanscientist.org/article/avoiding-a-digital-dark-age (last visited Nov. 4, 2020).

however, is the growth of piracy.[146] The MP3 format, developed in the 1990s, created a digitally compressed file that was "so small it could easily be sent via the Internet."[147] Eventually, the ease with which consumers could upload or download music files made piracy a very thorny problem.[148] The Recording Industry Association of America (RIAA) maintains that "global music piracy causes '$12.5 billion of economic losses every year, 71,060 U.S. jobs lost, a loss of $2.7 billion in workers' earnings, and a loss of $422 million in tax revenues, $291 million in personal income tax and $131 million in lost corporate income and production taxes.'"[149]

In addition to piracy and the economic harm stemming therefrom, the rise of streaming services in the digital age presents additional challenges for the music industry.[150] According to a Morgan Stanley analysis, in the future, "subscription streaming will escalate, eventually leaving digital downloads in the dust."[151] Streaming platforms like Spotify, Deezer, Tidal, and Apple Music allow listeners to "access thousands of songs through their computers or mobile devices" for a small charge.[152] With streaming services, listeners' options are endless: they can decide how and when they consume music.[153] In 2016, revenue from streaming services accounted for $1.6 billion, whereas revenue from digital downloads comprised $1 billion.[154] In addition to enhancing listeners' accessibility to music, streaming services also help up-and-

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[146] *See* Ashley Johnson, *22 Years After the DMCA, Online Piracy is Still a Widespread Problem*, INFO. TECH. & INNOVATION FOUND. (Feb. 7, 2020), https://itif.org/publications/2020/02/07/22-years-after-dmca-online-piracy-still-widespread-problem.
[147] STEIN & GEORGES, *supra* note 140, at 76.
[148] *See* Brian Feldman, *Piracy is Back*, N.Y. MAG.: INTELLIGENCER (June 26, 2019), https://nymag.com/intelligencer/2019/06/piracy-is-back.html. For a period of time, "[p]iracy declined because the legal options for consuming media became easier than the illegal options." *Id.* However, today, "the legal options for media consumption are once again becoming overly burdensome in both a financial and logistical sense." *Id.* Because of this, the "best centralized place to find media is, once again, through piracy." *Id.*
[149] Recording Industry Association of America, *Resources & Learning*, https://www.riaa.com/resources-learning/for-students-educators/ (last visited Mar. 12, 2021).
[150] *See* Rob Anders, *Art for the Digital Age: How Streaming Will Change the Art World*, GLOB. BANKING & FIN. REV. (June 22, 2020), https://www.globalbankingandfinance.com/art-for-the-digital-age-how-streaming-will-change-the-art-world/ ("We are living in the digital age . . . and the rising consumption of media is fueling [sic] the inexorable rise of streaming giants like Netflix, Spotify and Amazon Prime.").
[151] STEIN & GEORGES, *supra* note 140, at 85.
[152] *Id.* at 78.
[153] *See id.* at 79.
[154] *Id.*

coming artists.[155] Streaming allows these artists "to develop a fan base without the benefit of a big record label behind them."[156] It is now much easier for fans and artists to share music because of these seemingly limitless streaming options.[157]

Technology and social media will likely further change the production, distribution, and marketing of music.[158] Because streaming technology and social media have made it easier for emerging artists to attract an audience, it is likely that the market will become extremely concentrated with musical artists in the coming decade.[159] Thus, music's increasing availability on digital platforms will expose people to more music, in turn priming the entertainment industry for even more copyright infringement claims.[160]

Furthermore, the increasing accessibility of music, and evolving music production technology, means new musical genres are constantly developing.[161] These changes have

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[155] *See* Bobby Owsinski, *3 Music Streaming Services Offer Emerging Artists Programs*, HYPEBOT (May 2, 2019), https://www.hypebot.com/hypebot/2019/05/3-music-streaming-services-offering-emerging-artists-programs.html. YouTube Music, SoundCloud, Spotify, and YouTube serve as marketing tools for emerging artists. *See id.*; *see also* Paula Mejía, *The Success of Streaming Has Been Great for Some, but is There a Better Way?*, NAT'L PUB. RADIO (July 22, 2019, 6:00 AM) (explaining that despite the exposure that streaming services provide for new artists, the platforms are also changing the nature of songwriting by incentivizing artists to produce shorter songs).

[156] STEIN & GEORGES, *supra* note 140, at 85.

[157] *See* Matt Mahoney, *Easy Access: On Playlists and Piracy in the Digital Age*, MEDIUM (Oct. 4, 2016), https://medium.com/the-compendium/on-playlists-and-piracy-in-the-digital-age-610248b47a31.

[158] *See* Sean Cole, *The Impact of Technology and Social Media on the Music Industry*, ECONSULTANCY (Sept. 9, 2019), https://econsultancy.com/the-impact-of-technology-and-social-media-on-the-music-industry/. New technology is causing musicians to "[bypass] labels . . . and [speak] to their fans directly through their social media." *Id.* With the diminishing influence of vinyl, cassette and compact discs (CDs), artists are now free to control the length of their songs, "which is why there has been an increase in the length of albums from popular artists like Chris Brown, Migos and Rae Stremmurd." *Id.* However, "singles are getting shorter." *Id.*; *see also* Zachary Evans, *How Social Media and Mobile Technology Has Changed Music Forever*, SOC. MEDIA WK. (Aug. 24, 2015), https://socialmediaweek/org/blog/2015/08/social-mobile-changed-music/ (discussing that social media also eliminates the barrier between artists and fans, leading to "an increased level of interaction" between them).

[159] *See* STEIN & GEORGES, *supra* note 140, at 85. According to Bobby Borg, "'the world will be saturated with music'" in the next ten years. *Id.*

[160] *See* Nicholas Rozansky & Michael Bernet, *From TikTok to Instagram: How to Legally Live Stream*, IP WATCHDOG (Apr. 30, 2020), https://www.ipwatchdog.com/2020/04/30/tiktok-instagram-legally-live-stream/id=121150/. When it comes to streaming, "[t]he more views you get and successful you become, the bigger target you become for copycats and infringement claims." *Id.*

[161] *See How Tech Developments of the Past 10 Years Have Changed the Face of Electronic Music*, DJ MAG., (Dec. 21, 2018, 10:18 AM), https://djmag.com/content/how-tech-developments-past-10-years-

brought artistic expression and experimentation in music to new heights.[162] New genres have also emerged thanks to constant innovations in deejay (DJ) technology in syncing, sampling, looping, and re-editing.[163] For example, the introductions of grime and dubstep were closely connected to greater accessibility of music software such as Fruity Loops.[164] With its diverse range of audio options and infinite choices for sampling, instrumentation, and tempo, the beat-making program has captured the attention of prominent musicians and up-and-coming artists alike.[165] In addition, the electronic dance music (EDM) trap style developed in the mid-2000s and early 2010s.[166] EDM trap music combines "a mix of pipe flutes, drums, hip-hop samples, light piano chords and dance tunes."[167] This genre traces its origin to the Roland TR-808 Drum Machine.[168] When the machine was released in 1980, it did not draw widespread attention.[169] The release of another drum machine, the LM-1, further hindered the TR-808's chances of success.[170] Despite its lackluster appeal, the TR-808 made serious headway in the twentieth

have-changed-face-electronic-music. For example, the development of grime and dubstep was tied to "increased availability of easy-to-use music software such as Fruity Loops, and increased laptop ownership." *Id.*

[162] *See id.*

[163] *See id.*

[164] *See id.*; *see also Image Line FL Studio*, VINTAGE SYNTH EXPLORER, http://www.vintagesynth.com /misc/fruity.pph (last visited Mar. 17, 2021). Fruity Loops, a pattern-based sequencer, allows users to produce "songs in pieces (patterns) using the Step Sequencer and the Piano Roll view and then weld those pieces together using the Playlist window…" Afterwards, users have the ability to include different effects to instruments, like reverb and phaser, and then "route the resulting mixer tracks in any way…to create complex mixing chains with ease." *Id.* Users can then export the finished product to a WAV/MP3 file. *See id.*

[165] *See* Dan Weiss, *The Unlikely Rise of FL Studio, The Internet's Favorite Production Software*, VICE (Oct. 12, 2016, 3:00 PM), https://www.vice.com/en/article/d33xzk/fl-studio-soulja-boy-porter-robinson-madeon-feature. For example, artists like Daft Punk, Avicii, Martin Garrix, Soulja Boy, Porter Robinson, and Madeon have relied on Fruity Loops to create some of their hit songs. *See id.*

[166] *See* Bryan Dasilva, *EDM Sub-genres – a New Ravers Guide*, FACES OF EDM, https://thefacesofedm.com/edm-blog/edm-sub-genres-a-new-ravers-guide/ (last visited Nov. 4, 2020).

[167] Brianna Holt, *A Quick Guide to Trap Music*, ONE37PM (Aug. 1, 2019), https://www.one37pm.com/culture/music/trap-music-artists-history-impact-evolution.

[168] *See What is Trap Music? Trap Music Explained*, RUN THE TRAP, https://runthetrap.com/what-is-trap-music/ (last visited Jan. 11, 2021) [hereinafter *What is Trap Music?*].

[169] *See* Scot Solida, *TR-08 vs TR-09: How Do Roland's New Breed of Digital Drum Machines Stack Up?*, MUSICRADAR (Aug. 8, 2019), https://www.musicradar.com/features/tr-08-vs-tr-09-how-do-rolands-new-breed-of-digital-drum-machines-stack-up.

[170] *See id.*

century as EDM trap artists used its percussion samples.[171] "[T]he use of techno, dub, and dutch house like sounds incorporated with the inclusion of the original Roland TR-808 drum samples" charted EDM trap genre's emergence and left an indelible mark on popular music.[172]

Perhaps more than any other industry, the music industry heavily draws on inspiration from previous musical works.[173] The music industry's increasing reliance on inspiration from previous works has led to a proliferation of copyright infringement actions brought by artists whose works are used in subsequent songs.[174] The rampant growth of copyright lawsuits has put music industry stakeholders on edge, creating an atmosphere of fear and uncertainty in the recording studio.[175] "Ideas rarely emerge in complete isolation" because artists across the world are "working from the same component parts."[176] Because of this, much of the music people hear "sounds similar—and also like what came before."[177] As artists seek inspiration from others for new songs, the uncertainty regarding permissible uses further adds to the problems posed by the digital age.[178] Since average listeners, rather than trained musicologists or musicians, determine the outcome of most copyright infringement cases, labels worry about new

[171] *See What is Trap Music?*, *supra* note 168.
[172] *Id.*
[173] *See* Jon Caramanica*, It's Got a Great Beat, and You Can File a Lawsuit to It*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2020/01/06/arts/music/pop-music-songs-lawsuits.html; *see also* Joseph M. Santiago*, The "Blurred Lines" of Copyright Law: Setting a New Standard for Copyright Infringement in Music*, 83 BROOK L. REV. 289, 305–06 (Dec. 17, 2017) (explaining that "all music draws from…basic foundational elements" which include "pitches…limited to a certain number of keys (both major and minor)…[as well as] melodic minor and harmonic minor scales, which represent variants of the natural minor."); Gersham Johnson, *All Songs Are Derivative Works: Copyright and the Reality of Music Composition*, COLUM. J. L. & ARTS (Dec. 17, 2020) (arguing that "[b]orrowing has long been a defining feature of the creation of music" and "[m]usicians of all stripes borrow.").
[174] *See* Caramanica, *supra* note 173. New songs develop from older ones as artists channel the sounds and styles of their favorite musicians. *See id.*
[175] *See* Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan. 9, 2020, 2:08 PM), https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-9.
[176] Caramanica, *supra* note 173; *see also* Santiago, *supra* note 173, at 305–06 (explaining that "all music draws from…basic foundational elements" which include "pitches…limited to a certain number of keys (both major and minor)…[as well as] melodic minor and harmonic minor scales, which represent variants of the natural minor").
[177] Caramanica, *supra* note 173.
[178] *See* Wang, *supra* note 175; *see also* Santiago, *supra* note 173, at 306 (explaining that "[a]rtists often use their influences to craft new and unique music, and this has the potential of being confused with copyright infringement").

song releases.[179] Not knowing where an average listener would draw the line between inspiration and theft, more and more labels are hiring musicologists to screen new releases for potential copyright claims, and seeking protection via insurance.[180]

The widespread appeal of inexpensive music production software presents even greater risks.[181] Given the "finite number of notes, chord progressions, and melodies available," songs are highly unlikely to sound completely unique.[182] Moreover, "[p]eople are using the same sample packs, the same plug-ins, because it's efficient."[183] Therefore, the onslaught of digital technology, coupled with the lack of clear guidelines for substantial similarity, threatens the music industry's continuing growth.[184]

All in all, in the digital age, where entertainment and inspiration are freely available at the push of a button, new music constantly derives inspiration from preexisting works.[185] Furthermore, artists' use of the same music production software and audio effects results in an environment of "similar ideas, melodies, or compositional seeds."[186] These circumstances, combined with the inherent constraints of musicality, foster a climate ripe for music copyright infringement litigation.[187]

III. CURRENT LANDSCAPE OF COPYRIGHT LAW

[179] *See* Wang, *supra* note 175.
[180] *See id.*
[181] *See id.*
[182] *Id.*
[183] *Id.*
[184] *See* Jaime Walsh, *No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music*, 16 DEPAUL J. ART, TECH. & INTELL. PROP. L. 261, 293 (2006). Without a uniform substantial similarity test across federal circuits, "the current inadequate methods for determining substantial similarity are an injustice to consumers and the creative community who are unsure of acceptable practices and run the risk of being labeled as thieves." *Id.*
[185] *See* Jaliz Maldonado, *Are Copyright Laws Outdated? The Challenges of the Digital Age*, NAT'L L. Rev. (Mar. 16, 2019), https://www.natlawreview.com/article/are-copyright-laws-outdated-challenges-digital-age.
[186] Michael Donaldson, *How Songwriters Got Thrown into a Minefield*, 8SIDED: BLOG (Jan. 17, 2020), https://8sided.blog/how-songwriters-got-thrown-into-a-minefield/. Hence, much of "the inspiration provided by the built-in options potentially send[s] producers to common destinations." *Id.*
[187] *See* Ben Edwards, *Can You Steal the 'Feel' of a Song?*, RACONTEUR (Jan. 30, 2020), https://www.raconteur.net/legal/intellectual-property/music-copyright-laws/.

The doctrine of substantial similarity plays a critical role in U.S. copyright law.[188] Over the years, courts across federal circuits have developed a myriad of substantial similarity tests to determine whether a work of authorship infringes on another work.[189] The following section explains the different issues in copyright infringement claims and the practical considerations underlying these marked differences.[190] This section concludes with the various substantial similarity tests that circuit courts use for copyright infringement claims; these tests will serve as a template for a new substantial similarity framework that the Supreme Court should adopt to account for the digital age.[191] Under this proposed framework, each genre would have its own specific substantial similarity test.[192]

A. Issues Regarding Copyright Infringement Claims

While the Copyright Act affords a broad scope of protections, it does not substantially address infringement-related issues.[193] The blurry line between creation and theft raises questions surrounding the limits of copying and the precise manner of inquiry required in infringement claims.[194] Absent legislative guidance, courts have implemented their own infringement standards.[195] Since the birth of federal copyright law, federal courts have created a framework for assessing copyright infringement claims through the doctrine of substantial similarity.[196] The substantial similarity doctrine focuses on whether two works (an original work and another work allegedly infringing on the former) are substantially similar because the defendant (the alleged infringer) "appropriated a material amount of the plaintiff's original expression."[197] Unfortunately, however, the substantial similarity doctrine does little to resolve

[188] *See* Moon Hee Lee, *Seeing's Insight: Toward a Visual Substantial Similarity Test for Copyright Infringement of Pictorial, Graphic, and Sculptural Works*, 111 NW. U. L. REV. 833, 843 (2017).
[189] *See infra* Part III.
[190] *See id.*
[191] *See infra* Part III.B.
[192] *See infra* Part V.
[193] *See* Gabriel Godoy-Dalmau, *Substantial Similarity: Kohus Got It Right*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 231, 233 (2007).
[194] *See id.* at 232.
[195] *See id.* at 241.
[196] *See id.* at 232.
[197] *Id.*; *see* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946). *See also* Blunt v. Patten 3 F. Cas. 762, 762 (C.C.S.D.N.Y. 1828) (becoming the first U.S. copyright case to recognize substantial similarity as the

questions about the scope of creative protection, due to line-drawing problems between no similarity and complete, literal similarity.[198] There are nearly half a dozen different substantial similarity tests across U.S. jurisdictions.[199] The copyright statute's ambiguity and the resulting effects are more clearly felt in the current "substantial similarity" circuit split than anywhere else.[200]

B. Copyright Jurisprudence Across the Federal Circuits

Different jurisdictions across the U.S. apply different substantial similarity tests.[201] There are four main tests: (1) the ordinary observer test, (2) the extrinsic/intrinsic test, (3) the "total concept and feel" test, and (4) the abstraction/filtration/comparison test.[202] However, many jurisdictions use these tests as building blocks for their own unique variations.[203] While most courts use either the ordinary observer test or the Ninth Circuit's extrinsic/intrinsic test, a few rely on an abstraction/filtration/comparison test.[204]

The ordinary observer test asks whether a layperson would perceive two works as substantially similar.[205] It is the oldest test for deciding copyright infringement claims, finding

method for evaluating infringement claims). In *Blunt*, the court assessed the manner by which the defendant unlawfully used elements of the plaintiff's copyrighted chart. *Id.*

[198] *See* Godoy-Dalmau, *supra* note 193, at 232.

[199] *See* Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 WASH. U. L. REV. 681, 683 (2016).

[200] *Id.* at 233.

[201] *See id.* at 690–95.

[202] *Id.*

[203] *See* Godoy-Dalmau, *supra* note 193, at 243. Across American federal courts, "[e]ach circuit has used one or more of these tests and promulgated its own take on it." *Id.*

[204] *See* Daryl Lim, *Substantial Similarity's Silent Death*, 48 PEPP. L. REV. 713, 726 (2021). The Sixth and Tenth Circuits use the abstraction/filtration/comparison test for all copyrighted works, whereas the Second Circuit only uses the test for copyright cases involving computer software. *See id.* at 730, 729. The Fourth, Eighth, and Ninth Circuits use the extrinsic/intrinsic test. *See id.* at 729. The First, Third, Fourth, Fifth, and Seventh Circuits all use different versions of the ordinary observer test. *See* Hickey, *supra* note 199, at 691; s*ee also* Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J. L. & POL'Y 1375, 1386 (2008) (explaining the various substantial similarity tests across circuits).

[205] *See* Hickey, *supra* note 199, at 690–91. For example, in 1988, the Rolling Stones' lead singer, Mick Jagger, was the target of a copyright infringement suit in New York. *See* Jon Pareles, *U.S. Jury Says Jagger Did Not Steal Hit Song*, N.Y. TIMES (Apr. 27, 1988), https://www.nytimes.com/1988/04/27/arts/us-jury-says-jagger-did-not-steal-hit-song.html. Patrick Alley,

its origins in *Arnstein v. Porter*.[206] According to the *Arnstein* court, the issue of whether the defendant, a composer and songwriter, copied plaintiff's musical works required a specific inquiry.[207] In crafting this test, the Second Circuit weighed two considerations: (1) whether the defendant copied from the registered work and (2) whether the copying, if shown, amounted to "improper misappropriation."[208] Essentially, this test extrapolates the reasonable person standard used in tort cases to form a substantial similarity test.[209] The First, Third, Fourth, Fifth, and Seventh Circuits all use variations of the ordinary observer test.[210] Courts favor the ordinary observer test because it does not require expert testimony, thereby avoiding technical analysis,[211] and the accompanying risk of experts misleading the jury.[212] The ordinary observer test's greatest flaw is that it does not instruct juries on how to judge similarities in protectable and unprotectable elements of a copyrighted work.[213] To account for this issue, the Second Circuit refined the "ordinary observer" test, creating the "more discerning observer" test.[214] This test asks a court to divide the unprotectable elements from the protectable elements, and then determine whether there is substantial similarity.[215] The problem with the ordinary observer test, therefore, is that the test assumes that jury members are well-informed in matters governing

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a Jamaican reggae artist, claimed that Jagger's song, "Just Another Night" infringed the copyright of his song, "Just Another Night." *See id.* A New York jury found that the two works were not substantially similar despite their same titles. *See id.* The musicologist testifying for Jagger's side argued that "the melodies had only their closing, tonic note in common when transposed into the same key." *Id.* The songs had marked differences in "tempo, rhythm, and structure." *Id.*

[206] Arnstein v. Porter, 154 F.2d 464, 467 (2d Cir. 1946).

[207] Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 802 (2016).

[208] *Id.* at 804.

[209] *See* Nicole Lieberman, *Un-Blurring Substantial Similarity: Aesthetic Judgments and Romantic Authorship in Music Copyright Law*, 6 N.Y.U. J. INTELL. PROP. & ENT. L. 91, 117 (2016).

[210] *See* Hickey, *supra* note 199, at 691.

[211] *See* E. Scott Fruehwald, *Copyright Infringement of Musical Compositions: A Systematic Approach*, 26 AKRON L. REV. 15, 27 (1992).

[212] *See id.* The ordinary observer test "avoids experts who can hoodwink a jury with their eruditeness and learning." *Id.*

[213] *See* Hickey, *supra* note 199, at 691 (stating that the ordinary observer test offers "'scant guidance' in similarity analysis").

[214] *See* Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001).

[215] *See* Graham Ballou, *Substantial Disparity: Copyright Chaos in the Second Circuit*, 2 N.Y. U. INTELL. PROP. & ENT. L. 45, 47 (2011).

copyright law.[216] This conflicts with the test's purpose: to gauge two works' similarity from a layperson's perspective, rather than from a musicologist's viewpoint.[217] As a result, jurisdictions using the ordinary observer test risk assigning copyright infringement liability to defendants even when the allegedly stolen parts of a plaintiff's work were not copyrightable.[218]

The "total concept and feel" test emerged from *Roth Greeting Cards v. United Card Co*.[219] In *Roth,* the plaintiff argued that the United Card Company illegally copied several of its greeting cards.[220] The court found substantial similarity between the cards and held that United Card Company infringed Roth's cards because there were only "minor variations of color and style."[221] The total concept and feel test focuses on whether a more discerning observer would ascribe the similarity between two works to protected elements unique to the allegedly infringed work, instead of to ideas from the public domain.[222] Implicit in this analysis is that a "work may be copyrightable even though it is entirely a compilation of unproctectible elements."[223] As such, the total concept and feel test's greatest weakness is that it provides a mechanism for the jury to weigh on conceptual similarities in infringement claims, despite copyright law not protecting concepts.[224] Additionally, this approach fails to direct the jury to consider certain expressions of a plaintiff's work or to determine whether the defendant copied these elements.[225]

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[216] *See* Hickey, *supra* note 199, at 691 (explaining that the ordinary observer test "does not specify what the lay observer should be looking for").
[217] *See id.* It flows logically that "the legal conclusion of substantial similarity . . . is precisely the type of issue where a factfinder may need guidance from expert musicologists . . . and the like." *Id.*
[218] *See id.*
[219] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970); *see, e.g.*, Atkins v. Fischer, 331 F.3d 988, 993 (D.C. Cir. 2003); Roulo v. Russ Berrie & Co., 886 F.2d 931, 939 (7th Cir. 1989).
[220] Andrew C.S. Efaw, *Total Concept and Feel: A Proper Test for Children's Books*, 5 UCLA ENT. L. REV. 141, 153 (1997).
[221] *Roth Greeting Cards*, 429 F.2d at 1110.
[222] *See* Lee, *supra* note 188, at 846.
[223] Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1003–04 (2d Cir. 1995) (citing Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340 (1991)).
[224] *See* Samuelson, *supra* note 83, at 1832 ("Indeed, [the total concept and feel test] practically directs the trier of fact to consider conceptual similarities as a basis for infringement, even though concepts have never been protectable by U.S. copyright law.").
[225] *See id.*

Altogether, the total concept and feel test produces seemingly random infringement determinations, making it more difficult for reviewing courts to reverse prior holdings.[226]

The Tenth Circuit uses the abstraction/filtration/comparison test, a modified version of which is applied by the Sixth and D.C. Circuits.[227] The abstraction/filtration/comparison test, derived from computer software copyright cases, is a trifurcated analysis.[228] The first step, abstraction, requires a court to decide "where to draw the line between idea and expression."[229] Next, the test "filters out unprotected ideas and functional elements."[230] The final step is to compare the works.[231] The greatest weakness of the abstraction/filtration/comparison test is that it risks being less protective.[232] Since many important elements may be filtered before comparison, the test fails to consider the overall similarity of the works involved.[233] By considering individual elements in isolation, the test fails to capture the relationship of individual elements to the overall work.[234]

C. The Ninth Circuit's Approach to Copyright Infringement Claims

The Ninth Circuit figures prominently in copyright jurisprudence because of the extensive network of creative centers therein.[235] Accordingly, many fundamental concepts regarding substantive and procedural rules for copyright infringement claims are well settled in this jurisdiction.[236] The Ninth Circuit follows the extrinsic/intrinsic test, a special variation of the main substantial similarity tests.[237] This test divides responsibility between experts and

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[226] *See id.*
[227] *See* Roodhuyzen, *supra* note 204, at 1386.
[228] *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 704 (2d Cir. 1992).
[229] Stephen H. Eland, *The Abstraction-Filtration Test: Determining Non-Literal Copyright Protection for Software*, 39 VILL. L. REV. 665, 694 (1994).
[230] Hickey, *supra* note 199, at 684.
[231] *See, e.g.*, Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 834 (10th Cir. 1993).
[232] *See* Jon S. Wilkins, *Protecting Computer Programs as Compilations under Computer Associates v. Altai*, 104 YALE L.J. 435, 436 (1994).
[233] *Cf.* Computer Assocs., 982 F.2d at 706.
[234] *Cf. id.*
[235] *See* Laura W. Brill, *The Shape of Copyright Infringement Claims: Coming in 2020 to a Circuit Near You. Maybe.*, KENDALL BRILL KELLY, http://www.kbkfirm.com/the-shape-of-copyright-infringement-claims-coming-in-2020-to-a-circuit-near-you-maybe/ (last visited Mar. 20, 2021). Hollywood, for example, is perhaps the most well-known creative center under the Ninth Circuit's jurisdiction. *See id.*
[236] *Id.*
[237] *See* Roodhuyzen, *supra* note 204, at 1385.

juries.[238] The extrinsic/intrinsic test finds its origins in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp*.[239] This case involved the plaintiff, H.R. Pufnstuf, a children's TV show, and the defendant, McDonald's, a hamburger restaurant chain.[240] The issue was whether the defendant's advertising campaign, through the use of various characters, was substantially similar to the plaintiff's program, which featured "several fanciful costumed characters."[241] In the extrinsic step, the court asked whether the ideas were substantially similar.[242] Next, in the intrinsic step, the trier of fact determined whether there was "substantial similarity in the expressions of the ideas."[243] After *Krofft*, the Ninth Circuit revised the extrinsic/intrinsic test.[244] In *Shaw v. Lindheim*,[245] the court replaced the second prong from the

[238] *Cf. id*. *See generally* Godoy-Dalmau, *supra* note 193, at 246 (The Fourth and Eighth Circuits have adopted a modified form of the extrinsic/intrinsic test); Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987).
[239] Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977), *overruled by* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020).
[240] *See id.* at 1161–62.
[241] *Id.* at 1161.
[242] *See* Godoy-Dalmau, *supra* note 193, at 237. In the extrinsic analysis, the court determined that the similarities between "the imaginary land in Pufnstuf and McDonaldland had caves, ponds, roads, castles, and human faces on inanimate objects" essentially "went beyond idea similarity and into expression infringement." Robert M. Winteringham, *Stolen from Stardust and Air: Idea Theft in the Entertainment Industry and a Proposal for a Concept Initiator Credit*, 46 FED. COMM. L. J. 373, 384 (1994).
Since the extrinsic step requires expert testimony and does not use juries, it involves a more objective analysis. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977), *overruled by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020). Experts are usually musicologists who dissect the two works into their constituent elements and determine whether they are substantially similar. *See* Talia Smith, *Forensic Musicologists Need to Know These 5 Things*, BERKLEE ONLINE, https://online.berklee.edu/takenote/forensic-musicologists-need-to-know-these-5-things/ (last visited Jan. 11, 2021). The most favorable feature of the extrinsic test is its capacity to limit the scope of copyright protection through the use of the idea/expression dichotomy. *See* Lieberman, *supra* note 209, at 113. However, the extrinsic test is costly because both the plaintiffs and defendants have the responsibility of hiring experts like musicologists to testify. *See Chance The Rapper Sued for Alleged Copyright Infringement Over Song "Windows,"* CHI. SUN TIMES (Sept. 12, 2017, 6:37 PM), https://chicagofinancialtimes.com/2017/09/12/chance-the-rapper-sued-for-alleged-copyright-infringement-over-song-windows-consumer-news/.
[243] *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) *overruled by* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020). The Ninth Circuit determined that in the intrinsic analysis, the "expression . . . is sufficiently similar so that a jury applying an intrinsic test could find infringement." *Id.* at 1175.
[244] *See* Godoy-Dalmau, *supra* note 193, at 246.
[245] Shaw v. Lindheim, 919 F.2d 1353, 1357 (9th Cir. 1990). The plaintiff in *Shaw*, a notable writer and producer, argued that the defendant, a past NBC executive, unlawfully used the plaintiff's script and

original extrinsic/intrinsic test, requiring a "comparison of subjective aspects of the plaintiff's expression," rather than "a comparison of expression of ideas."[246] Rather than simply comparing the ideas of two works, courts must identify various elements of each, and assess whether expressions of such elements contain similarity.[247] For example, if the court determined whether there was substantial similarity between two literary works, then it would "compare the elements plot, themes, dialogue, mood, setting, pace, sequence of events, and characters."[248] In the end, though, the extrinsic/intrinsic test comes down to a battle of experts.[249]

In *Skidmore v. Led Zeppelin*, the Ninth Circuit broke its own precedent for evaluating copyright infringement claims.[250] Randy Wolfe, also known as Randy California, was a member of the 1960s rock band, Spirit.[251] Wolfe wrote the song "Taurus" sometime between 1966 and 1967.[252] In 1967, Hollenbeck Music Company registered the copyright in the musical composition and listed Wolfe as the author.[253] One of the songs in Led Zeppelin's 1971 album was "Stairway to Heaven."[254] Michael Skidmore, the trustee of Wolfe's estate, sued the English band for allegedly infringing on Wolfe's copyrighted song, "Taurus," with its song, "Stairway to

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thereby infringed the plaintiff's copyright. *See id.* According to the district court, "reasonable minds could conclude that the two scripts were substantially similar as to the objective characteristics of theme, plot sequence of events, characters, dialogue, setting, mood and pace." Jamie Busching, *Shaw v. Lindheim: The Ninth Circuit's Attempt to Equalize the Odds in Copyright Infringement*, 11 LOY. L.A. ENT. L. REV. 67, 69–70 (1991).

[246] Godoy-Dalmau, *supra* note 193, at 246.

[247] *See* Emily Flasz, *War of the Dolls: Did the Ninth Circuit Fail to Apply the "Intended Audience Test" in Holding Substantial Similarity Should be Determined from the Perspective of the "Ordinary Observer" and Not a "Child" in Mattel, Inc. v. MGA Entertainment, Inc.?*, 2 PACE INTELL. PROP., SPORTS & ENT. L.F. 167, 177 (2012).

[248] *Id.*

[249] *See* Fruehwald, *supra* note 211, at 16; *see also* Michael Der Manuelian, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 128 (1988) (explaining that "[b]oth parties usually come armed with experts, and the ensuing battle often constitutes a significant segment of a music infringement trial").

[250] Skidmore v. Led Zeppelin, 952 F.3d 1051; *see* Jon Blistein, *A New Led Zeppelin Court Win Over 'Stairway to Heaven' Just Upended a Copyright Precedent*, ROLLING STONE AUSTL. (Oct. 6, 2020, 9:43 AM), https://au.rollingstone.com/music/music-news/led-zeppelin-stairway-to-heaven-copyright-infringement-ruling-appeal-2-17670/.

[251] *Skidmore*, 952 F.3d at 1056 (9th Cir. 2020).

[252] *See id.*

[253] *See id.* at 1057.

[254] *See id.*

Heaven."[255] Skidmore's claims alleged direct, contributory, and vicarious infringement.[256] Led Zeppelin challenged on the basis of copyright ownership, substantial similarity, and access.[257] The band argued that the plaintiff, Skidmore, did not own a valid copyright in "Taurus."[258] The band raised the defense of independent creation and argued that the similarities alleged by Skidmore amounted to unprotectable musical elements or were random.[259]

At the trial, two experts testified as musicologists.[260] The plaintiffs argued that the defendants unlawfully used parts of Taurus in the "opening guitar riff" from "Stairway to Heaven."[261] The defendants' musicologist argued that the chord progressions at issue were "too basic to be protected by copyright" because "similar patterns have popped up in music for over 300 years."[262] During the trial, the district court did not include the inverse ratio rule—a method for assessing substantial similarity—in the jury instructions.[263] Because the jury never reached the question of whether copying occurred, the court declined to include an inverse ratio

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[255] *See id.* The complaint also named Super Hype Publishing, Inc.; Warner Music Group Corporation; Warner/Chappell Music, Inc.; Atlantic Recording Corporation; and Rhino Entertainment Company as defendants. *Id.*
[256] *See id.*
[257] *See id.* at 1058.
[258] *See id.*
[259] *See id.* While the initial burden of proving the elements of a prima facie case of copyright infringement rests with the plaintiff, under certain circumstances, the burden switches to the defendant. *See* Christopher Schiller, *Legally Speaking, It Depends: Copyright in Court*, SCRIPT (May 27, 2014), https://scriptmag.com/career/legally-speaking-depends-copyright-in-court. To challenge a plaintiff's copyright infringement claim, a defendant may use the independent creation defense. *See* Christopher B. Jaeger, *"Does That Sound Familiar?": Creators' Liability for Unconscious Copyright Infringement*, 61 VAND. L. REV. 1903, 1912 (2008). This defense essentially attacks the plaintiff's prima facie case by arguing that there was no copying. *See* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y.1924) (ruling that the "law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted."). Essentially, a defendant using this defense concedes that his work and the plaintiff's work are identical, but argues that a court should excuse him from liability because he did not copy the plaintiff's work to develop his own, but rather independently created his work. *See also* Fogerty v. MGM Grp. Holdings Corp., Inc., 379 F.3d 348, 352 (6th Cir. 2004) (ruling that the defendant supplied a successful independent creation defense).
[260] *See Skidmore*, 952 F.3d at 1059.
[261] Reuters, *Led Zeppelin Emerges Victorious in 'Stairway to Heaven' Plagiarism Case*, NBC NEWS (Oct. 5, 2020, 1:53 PM), https://www.nbcnews.com/pop- culture/music/led-zeppelin-emerges-victorious-stairway-heaven-plagiarism-case-n1242186.
[262] Ben Sisario, *Led Zeppelin Prevails in 'Stairway to Heaven' Appeal*, N.Y. TIMES (Mar. 9, 2020), https://www.nytimes.com/2020/03/09/arta/music/led-zeppelin-lawsuit-stairway-to-heaven.html.
[263] *See Skidmore*, 952 F.3d at 1060.

instruction.[264] The jury found in favor of Led Zeppelin, and Skidmore appealed.[265] On appeal, the Ninth Circuit focused on whether the district court erred in not including the inverse ratio rule.[266] The inverse ratio rule allows strong evidence of access to compensate for weaker evidence of substantial similarity.[267] The court began its analysis by highlighting the problematic nature of the rule and citing its own inconsistent approach.[268] According to the court, it was difficult to reconcile the access requirement with the consequences of the digital world.[269] The court reasoned that the inverse ratio rule favors individuals with highly accessible works by lowering their burden of proof at trial.[270] This, coupled with the unpredictable outcomes caused by the court's inconsistency, led the Ninth Circuit to abrogate the rule.[271] Thus, going forward, the Ninth Circuit will continue applying the substantial similarity doctrine but will not use the inverse ratio rule in copyright infringement claims.[272]

IV. LESSONS FROM *SKIDMORE*

The Ninth Circuit's ruling in *Skidmore* marks an important shift in its approach to copyright law and is of great significance to the music industry.[273] Since the Ninth Circuit operates as a hub for copyright infringement claims, *Skidmore* safeguards the concept of influence in the music industry.[274] While the court's decision may ease some of the problems following *Williams*, meaningful copyright reform is impossible without a uniform substantial similarity test imposed by the Supreme Court for music copyright infringement claims.[275]

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[264] *Skidmore v. Led Zeppelin*, 134 HARV. L. REV. 1543, 1547 (2021).
[265] *See id.* at 1545.
[266] *See Skidmore*, 952 F.3d at 1065.
[267] *See* Part II.C.
[268] *See* Skidmore, 952 F.3d at 1068.
[269] *See id.*
[270] *See id.*
[271] *See id.* at 1069.
[272] *See* David A. Steinberg, *Appeals Court Rules in Favor Of Zeppelin*, NAT'L L. REV. (Mar. 11, 2020), https://www.natlawreview.com/article/appeals-court-rules-favor-zeppelin.
[273] *See* Jonathan Bailey, *Burying Blurred Lines*, PLAGIARISM TODAY (Apr. 7, 2020), https://www.plagiarismtoday.com/2020/04/07/burying-blurred-lines/.
[274] *See* Khushi Joshi, *Analysing Skidmore v. Zeppelin: An Examination of How the US Copyright Law Treats Influence in Music*, NAT'L L. U. JODHPUR (Aug. 1, 2020), http://www.nlujlawreview.in/analysing-skidmore-v-zeppelin-an-examination-of-how-the-us-copyright-law-treats-influence-in-music/.
[275] *See* Part IV.B–C.

A. Implications of the Ninth Circuit's Ruling

1. The Inverse Ratio Rule

The Ninth Circuit wisely abolished the inverse ratio rule for a number of reasons.[276] The rule provides that strong evidence of access to a work of authorship permits weaker evidence of substantial similarity.[277] Essentially, this means that courts require a "lower standard of proof on substantial similarity when a high degree of access is shown."[278] Therefore, "the stronger the evidence of access, the less compelling the similarities" must be to infer copying.[279] Because of the digital revolution, however, proving access is now much easier.[280] Due to the rise of the Internet, "wide dissemination has become a minimal barrier to plaintiffs seeking to establish access."[281] People with highly accessible works can more easily raise copyright infringement claims.[282] This means that better-funded people are in favorable positions because they can market their works to a broader audience through multiple platforms.[283]

The fact that many defendants admit to access in copyright claims indicates that "access is now a plaintiff's tool."[284] Before the digital revolution, it was much more difficult for a

[276] *See Skidmore*, 952 F.3d at 1079.
[277] *See* Eriq Gardner, *Led Zeppelin Wins "Stairway to Heaven" Copyright Fight upon Appellate Replay*, HOLLYWOOD REP. (Mar. 9, 2020, 8:50 AM), https://www.hollywoodreporter.com/thr-esq/led-zeppelin-wins-stairway-heaven-copyright-fight-appellate-replay-1283184.
[278] Daniel Fox, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV., 223, 233 (2006).
[279] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1124 (9th Cir. 2018); *see* Metcalf v. Bochco, 294 F.3d 1069, 1074–75 (9th Cir. 2002) (ruling that because access was not disputable, the court "could easily infer that the many [generic] similarities between [the works] were the result of copying, not mere coincidence.").
[280] *See* Mark Kuivila, *Exclusive Groove: How Modern Substantial Similarity Law Invites Attenuated Infringement Claims at the Expense of Innovation and Sustainability in the Music Industry*, 71 U. MIAMI L. REV. 238, 265 (2016) ("[a]long with exponential growth in the sheer volume of music being created through accessible and inexpensive digital recording, 'sound alikes' are essentially guaranteed.").
[281] Karen Bevill, *Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value*?, 52 RUTGERS L. REV. 311, 331 (1999).
[282] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020).
[283] *See* Rory Pq, *Being an Independent Artist vs. Signing to a Record Label*, ICON COLLECTIVE (July 29, 2019), https://iconcollective.edu/independent-artist-vs-signed-artist/.
[284] Bevill, *supra* note 281, at 331; *see* Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1992) (showing how defendant conceded access to plaintiff's copyrighted material); *see also* Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc., 895 F. Supp. 651, 656 (S.D.N.Y. 1995) (presenting defendant's admission of accessing plaintiff's box design).

plaintiff to prove that a defendant had access to her work; defendants would have an advantage "if the plaintiff's work was not widely disseminated and if the plaintiff could propose no other theory by which the defendant might have been given the opportunity to view the plaintiff's work."[285] Musicians backed by major record labels, for instance, have their songs played on various radio stations.[286] Artists with the "increased prestige, exposure, and financial support" of these labels experience higher chances of success.[287] With more airtime devoted to their songs, access is essentially presumed.[288] On the other hand, musicians operating without record labels must promote their material through streaming services and social media.[289] As such, by minimizing the impact of disparate funding on copyright infringement determinations, the Ninth Circuit's reversal of the inverse ratio rule helps level the playing field for all artists.[290]

[285] Bevill, *supra* note 281, at 331.
[286] *See* Ludovic Hunter-Tilney, *The Hitmakers: Why Music Pluggers Are Thriving in the Digital Age*, FIN. TIMES (Apr. 26, 2018), https://www.ft.com/content/73233636-418b-11e8-97ce-ea0c2bf34a0b. Pluggers "lobby [on behalf of a record label's artists] for radio and television airtime." *Id.* Plugging "is a key strand in the promotional tactics used by record labels to drive a hit song." *Id.*
[287] Bryan Lesser, *Record Labels Shot the Artists, But They Did Not Share the Equity***,** 16 GEO. J. L. & PUB. POL'Y 289, 294 (2018).
[288] *See* Heather McDonald, *How to Get Your Song on the Radio*, BALANCE CAREERS (Feb. 9, 2020), https://www.thebalancecareers.com/how-do-i-get-my-song-on-the-radio-2460806.
[289] *See* STEIN & GEORGES, *supra* note 140, at 82–85.
[290] *See* Gene Maddaus, *Led Zeppelin Scores Big Win in 'Stairway to Heaven' Copyright Case*, CHI. TRIB. (Mar. 9, 2020, 11:15 AM), https://www.chicagotribune.com/entertainment/music/ct-ent-led-zeppelin-stairway-to-heaven-copyright-lawsuit-20200309-sxgesyw5frgy7apda4b3bdwxyy-story.html.

2. The Music Industry

Innovative ideas lie at the heart of the entertainment industry.[291] Whether represented in film, music, or television, they reach millions of consumers.[292] The Ninth Circuit is home to Los Angeles, a center of the entertainment industry.[293] The entertainment industry requires unprotectable ideas to "create the finished product, which will attract audiences into theaters or viewers to television sets."[294] When legal measures for idea protection fail, copyright infringement claims typically result.[295] Most copyright claims either occur in the Ninth or

[291] *See* Shikhar Sahni, *Entertainment Industry: Field of Future Innovation and IP*, GREY B, https://www.greyb.com/entertainment-industry-field-future-innovation-ip/ (last visited Nov. 4, 2020); *see also Intangible Assets in the Media and Entertainment Industries: In Depth Analysis*, INT'L TAX REV. (Feb. 18, 2014), https://www.internationaltaxreview.com/article/b1fyg9wg61n4m9/intangible-assets-in-the-media-and-entertainment-industries-in-depth-analysis (indicating that "[i]ntangibles permeate each stage of the media and entertainment supply chain, from idea conception to content production, marketing, merchandising, distribution, packaging, and delivery."). *See Ideas, Concepts, Scripts & Stories — Protecting Ideas in the Entertainment Industry Part I*, BANANA IP (July 23, 2019), https://www.bananaip.com/ip-news-center/ideas-concepts-scripts-stories-protecting-ideas-entertainment-industry-part-i/. An idea is "a thought, which cannot be seen, touched or heard . . . an idea is entirely intangible in nature." *Id.* In the entertainment industry, "'idea theft' has become almost pandemic . . . becoming a serious cause for concern." *Id.* For example, the ideas of authors or writers for film or television that are dismissed by entertainment executives often "resurface as actual programmes or productions at a later time." *Id.* The problem is that "ideas . . . by themselves . . . are not qualified to obtain protection." *Id.* Thus, "[u]nless the owners of these original ideas disclose [them] with a binding agreement or have these ideas registered with the right associations . . . they are bound to have [a] hard time proving their authority over [them]." *Id.*

[292] *See* Mark Beech, *COVID-19 Pushes Up Internet Use 70% And Streaming More Than 12%, First Figures Reveal*, FORBES (Mar. 25, 2020, 3:49 PM), https://www.forbes.com/sites/markbeech/2020/03/25/covid-19-pushes-up-internet-use-70-streaming-more-than-12-first-figures-reveal/?sh=744588393104; Tom Ferber, *Idea Theft: Protecting All Sides*, THE WRAP, https://www.thewrap.com/idea-theft-protecting-all-sides-44746/ (June 19, 2012, 9:50 AM). Since the famed case of *Desny v. Wilder*, the general practice in Hollywood is that "the parties who are most often the recipients of…submissions usually have strict policies against accepting any 'unsolicited' submissions (whether they are idea pitches, story treatments or full-length screenplays). *Id.*; *see also* Desny v. Wilder, 299 P.2d 257, 267 (Cal. 1956) (ruling that there is an implied contract when a writer submits material to a producer with the understanding that he will be paid if the producer uses it).

[293] *See* Robert Kleinhenz et al., *The Entertainment Industry and the Los Angeles County Economy*, L.A. CNTY. ECON. DEV. CORP. 1 (Nov. 2012), https://laedc.org/reports/EntertainmentinLA.pdf (stating that "Los Angeles has long been regarded the Entertainment Capital of the World.").

[294] Winteringham, *supra* note 242, at 374.

[295] *See* K. J. Greene, *Idea Theft: Frivolous Copyright-Lite Claims, or Hollywood Business Model?*, 7 HASTINGS SCI. & TECH. L. J. 119, 139–40 (2015).

Second Circuit.[296] The Second Circuit, which encompasses New York City, also plays a prominent role in copyright jurisprudence and the development of intellectual property law because many business segments, like "television, music, advertising, publishing, and theater," for which intellectual property is indispensable, are located near New York.[297]

Within the entertainment industry, music is the most popular form of entertainment.[298] In 2019, the U.S. music industry generated $11.1 billion in revenue.[299] Today, a select few record labels dominate the music industry.[300] In the early 1900s, Edison, Columbia, and Victor

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[296] *See* Douglas Y'Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 U. GA. J. INTELL. PROP. L. 285, 285 n.1 (1999) (stating that "[t]he two courts most significant (past, present, and future) to the development of copyright law are the Second and Ninth Circuits."); *see also* Andrew L. Deutsch, *Substantial Similarity in Copyright: It Matters Where You Sue*, DLA PIPER (Dec. 22, 2020), https://www.dlapiper.com/en/us/insights/publications/2020/12/ipt-news-q4-2020/substantial-similarity-in-copyright/ (explaining that the Second and Ninth Circuit Courts are important because the "industries that generate the most copyright disputes are located in New York (publishing, media) and California (entertainment, software/gaming)."); Maury Klein, *When New York Became the U.S. Media Capital*, CITY J. (1996), https://www.city-journal.org/html/when-new-york-became-us-media-capital-11973.html (discussing how "[e]ven before the Civil War, the major New York dailies, notably the *Tribune*, the *Times*, and the *Herald*, already dominated the national news."). *Skidmore*, which was heard by the Ninth Circuit, will have important implications for the jurisdiction because "vast quantities of music are created, performed and produced" there. Julian Cordero, *Another New Rule Announced by Ninth Circuit Likely to Cut Music Copyright Infringement Filings*, CORDERO L. (Nov. 2, 2020), https://www.mycorderolaw.com/blog/2020/another-new-rule-announced-by-ninth-circuit-likely-to-cut-music-copyright-infringement-filings.

[297] Kenneth A. Plevan, *The Second Circuit and the Development of Intellectual Property Law: The First 125 Years*, 85 FORDHAM L. REV. 143, 143 (2016).

[298] *See* Ricky O'Bannon, *Music is Top Form of Entertainment*, BALT. SYMPHONY ORCHESTRA, https://www.bsomusic.org/stories/music-is-top-form-of-entertainment/ (last visited Jan. 11, 2021). O'Bannon notes that according to a report on consumer tastes and habits, "music is the top form of entertainment for Americans." *See id.*; *see also Music 360: Americans Make Music Their Top Entertainment Choice*, NIELSEN (Oct. 2, 2014), https://www.nielsen.com/us/en/insights/article/2014/music-360-americans-make-music-their-top-entertainment-choice/#:~:text=For%20hundreds%20of%20millions%20of,of%20watching%20television%20at%2073%25 (explaining that 93% of Americans listen to music, spending more than 25 hours weekly listening to songs) [hereinafter *Music 360*].

[299] Agence France-Presse, *Streaming Continues to Boost US Music Industry Growth*, JAKARTA POST (Feb. 26, 2020, 8:06 PM), https://www.thejakartapost.com/life/2020/02/26/streaming-continues-to-boost-us-music-industry-growth.html. Streaming revenue consisted of nearly 80%, or $8.8 billion, of total 2019 revenue. *Id.*

[300] *See* Paul Resnikoff, *Two-Thirds of All Music Sold Comes from Just 3 Companies*, DIGITAL MUSIC NEWS (Aug. 3, 2016), https://www.digitalmusicnews.com/2016/08/03/two-thirds-music-sales-come-three-major-labels/. The three major labels—Sony Music Entertainment, Warner Music Group, and

controlled the recorded music industry.[301] By 2016, most sales in the music industry were controlled by three companies: Sony Music Entertainment, Warner Music Group, and Universal Music Group.[302] Because these companies market artists' recorded music, plaintiffs typically sue them in addition to alleged infringers in copyright infringement cases on the basis of contributory infringement, vicarious infringement, and inducement of copyright infringement.[303] For example, in *Skidmore*, Skidmore also sued Warner Music Group, since the company was the parent organization of Atlantic Records, Led Zeppelin's record label.[304]

There are two kinds of copyrights in the music industry.[305] First, there is a copyright for a song or underlying musical composition.[306] A second separate copyright exists for the sound recording.[307] Typically, the songwriter and publisher both hold the copyright for the composition.[308] However, recording labels usually own the copyright to sound recordings.[309] *Skidmore*'s elimination of the inverse ratio rule greatly reduces these companies' stronghold on

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Universal Musical Group—enjoy the most music sales. *See id.*; *see also* STEIN & GEORGES, *supra* note 140, at 76 (noting that "[i]n the early twentieth century, the recorded music industry was controlled by Edison, Columbia, and Victor.").

[301] *See* STEIN & GEORGES, *supra* note 140, at 76.

[302] *See id.*

[303] *See* Eriq Gardner, *Major Record Labels Sue over Ripping Audio Tracks from YouTube Videos*, HOLLYWOOD REP. (Sept. 26, 2016, 10:05 AM), https://www.hollywoodreporter.com/thr-esq/major-record-labels-sue-ripping-932455.

[304] *See* Murray Stassen, *Led Zeppelin Win Stairway to Heaven Copyright Battle as 2016 Verdict Is Upheld by US Court of Appeals*, MUSIC BUS. WORLDWIDE (Mar. 9, 2020), https://www.musicbusinessworldwide.com/led-zeppelin-win-stairway-to-heaven-copyright-battle-as-2016-verdict-is-upheld-by-us-court-of-appeals/.

[305] *See* Marc Hogan, *What to Know About Music's Copyright Gold Rush*, PITCHFORK (Jan. 25, 2021), https://pitchfork.com/thepitch/what-to-know-about-musics-copyright-gold-rush/.

[306] *See id.*

[307] *See id.* The sound recording, also known as a "master," represents the original recording of a song. *See* Seraphina DiSalvo, *What is a Master Recording and Why is Taylor Swift So Mad Hers Just Got Sold?*, PHILA. INQUIRER (July 2, 2019), https://www.inquirer.com/entertainment/music/taylor-swift-master-recordings-scooter-braun-20190702.html.

[308] *See* Dmitry Pastukhov, *Music Publishing 101: Copyrights, Publishing Royalties, Common Deal Types, & More*, SOUNDCHARTS (Nov. 20, 2019), https://soundcharts.com/blog/how-the-music-publishing-works.

[309] *See* Steve Masur, *Understanding the Two Types of Copyright in Music*, MASUR GRIFFITTS AVIDOR LLP (Feb. 11, 2011), https://masur.com/songs-and-records-two-types-of-music-copyrights/. Record labels often own "the physical recordings (i.e. the original recording you can physically hold in your hand) as well as the *sound recording* copyright." *Id.*

copyright laws.[310] Since the inverse ratio rule benefits those with popular works, which also tend to be highly accessible, powerful companies that own the rights to songs possess an enormous advantage in alleging copyright infringement.[311] This directly conflicts with the purpose of the Copyright Act, which works to incentivize the creation of expressive works by all Americans—no matter their popularity or financial backing.[312] Therefore, by reversing the inverse ratio rule, *Skidmore* avoids "punish[ing] songwriters and musicians whose music is less well-known."

B. Achieving Uniformity in Copyright

Given that copyright laws derive from a federal statute, it is surprising that there is so little uniformity in their application.[313] As evidenced by the diverse substantial similarity tests used across federal circuits, jurisdictions have considerable latitude in tailoring their own approaches.[314] The current framework of copyright law is very uneven and has led to inconsistent results across federal circuits, especially in the Ninth Circuit.[315] The result is that copyright claims' case outcomes largely hinge on geographical location, rather than on the merits.[316] This incentivizes plaintiffs to forum shop for the jurisdiction most conducive to their claims.[317] Forum shopping occurs when plaintiffs choose jurisdictions based on the likelihood

[310] *See* Daniel A. Schnapp, *Good Times, Bad Times: Ninth Circuit Does Away With "Inverse Ratio Rule" in Led Zeppelin Copyright Case and Questions Need to Prove "Access*," NIXON PEABODY (Mar. 10, 2020), https://www.nixonpeabody.com/en/ideas/articles/2020/03/10/inverse-ratio-ruling-in-zeppelin-copyright-case.
[311] *See id.*
[312] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1068 (9th Cir. 2020) (noting that "nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.").
[313] *See* Roodhuyzen, *supra* note 204, at 1418.
[314] *See* Sergiu Gherman, *Harmony and its Functionality: A Gloss on the Substantial Similarity Test in Music Copyrights*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 483, 486 (2009).
[315] *See Skidmore*, 952 F.3d at 1068–69.
[316] *See* Roodhuyzen, *supra* note 204, at 1418.
[317] *See id.*

that they will receive a favorable outcome.[318] This, in turn, leads to overburdened court systems and high costs of administration.[319]

Because of growing "uncertainty and confusion" regarding substantial similarity, courts are "moving further and further away from a uniform copyright law."[320] Since there is great diversity among works of authorship, courts should apply uniform substantial similarity tests for each work of authorship.[321] Because "[c]omposers lack guidance as to what constitutes copyright infringement," they may "employ different techniques . . . which may prevent misappropriation, or at least make copying more obvious when it does occur."[322]

Furthermore, the lack of uniformity necessarily implies that there are jurisdictions favoring plaintiffs and others favoring defendants.[323] One copyright infringement suit might be easier or harder for a plaintiff to win solely depending on the jurisdiction.[324] Thus, in order to fulfill its policy objectives, copyright laws must focus on fairness.[325]

In pursuit of this end, the Sixth Circuit—the only remaining jurisdiction still using the inverse ratio rule—should follow the Ninth Circuit's example in *Skidmore* by eliminating the rule from its copyright infringement calculus.[326] By doing so, the federal circuits can achieve greater uniformity in their copyright laws.[327]

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[318] *See* People v. Posey, 82 P.3d 755, 774 n.12 (Cal. 2004) (quoting Black's Law Dictionary 666 (7th ed. 1999)). The court defined forum shopping as "the practice of choosing the most favorable jurisdiction . . . in which a claim might be heard." *Id.*
[319] *See id.*
[320] Roodhuyzen, *supra* note 204, at 1418.
[321] *See* Walsh, *supra* note 184, at 306.
[322] *Id.* at 310.
[323] *See* Roodhuyzen, *supra* note 204, at 1418.
[324] *See id.* at 1418. The author says that "litigants will forum shop for a Circuit that is friendly to plaintiffs in copyright infringement suits." *Id.*
[325] *See* Ilanah Fhima, *Fairness in Copyright Law: An Anglo-American Comparison*, 34 SANTA CLARA HIGH TECH. L. J. 44, 44 (2017).
[326] *See* Mike Chernoff, *Inverting the Inverse Ratio Rule: Leveling the Playing Field for Copyright Infringement Defendants*, U. CINCINNATI L. REV. (Apr. 14, 2020), httsp://uclawreview.org/2020/04/14/inverting-the-inverse-ratio-rule-leveling-the-playing-field-for-copyright-infringement-defendants/.
[327] *See supra* Part IV.B.

C. Why Has the Supreme Court Neglected to Adopt a Uniform Test for Substantial Similarity?

Though the Constitution expressly grants the federal government the power to establish laws for the development of the arts and sciences, federal courts hesitate to override state law in the copyright context.[328] Without an express preemption provision, "federal courts often fail to find implied preemption" in this area.[329] Because of the challenges posed by the digital age, it is now more important than ever for the Supreme Court (and perhaps Congress) to resolve the circuit split by introducing a uniform standard for substantial similarity that emphasizes fairness for plaintiffs and defendants involved in music copyright claims.[330] To ensure fairness in the digital age, the Court must provide a substantial similarity test that protects copyrighted works irrespective of financial backing.[331] Without a uniform substantial similarity test for musical works, parties can freely exploit jurisdictional differences in copyright laws.[332]

Since individuals who possess copyright receive nationwide protection, it is important to establish uniformity in substantial similarity tests.[333] Today, there is great divergence in substantial similarity tests; the varying use of the inverse ratio rule is simply one illustration of this diversity.[334] Some courts even apply multiple substantial similarity tests.[335] In order to effectively regulate behavior, copyright laws must exhibit some degree of predictability.[336] While there is an "inherent tension in the law between predictability, on the one hand, and

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[328] *See* Sharon Sandeen, *The Myth of Uniformity in IP Laws*, 24 J. INTELL. PROP. L. 277, 282 (2017). In light of federalism, courts are reluctant to displace state laws because of a concern for producing a more overreaching federal government. *See id.*

[329] *Id.*

[330] *See* Roodhuyzen, *supra* note 204, at 1418.

[331] *See* Schnapp, *supra* note 310.

[332] *See* Deutsch, *supra* note 296 ("[A] complaint filed in California is often more likely to survive a pre-discovery motion to dismiss than one filed in New York.").

[333] *See* Michael S. Denniston, *United States: International Copyright Protection: How Does It Work?*, MONDAQ (Apr. 3, 2012), https://www.mondaq.com/unitedstates/copyright/171306/international-copyright-protection-how-does-it-work.

[334] *See* Roodhuyzen, *supra* note 204, at 1377.

[335] *See id.* at 1385 (For example, the Ninth Circuit uses a two-prong test that has both an extrinsic and intrinsic component.).

[336] *See id.* at 1386; *see also* Roodhuyzen, *supra* note 204, at 1377 (arguing that courts often inconsistently apply and illy define substantial similarity tests, which is why "decisions in copyright infringement cases are unpredictable and often seem ad hoc.").

flexibility, on the other," the rule of law requires predictability to inform individuals about the repercussions of their behavior.[337]

To remedy the substantial similarity circuit split, the Supreme Court should adopt a fair and uniform test for music copyright claims.[338] As the Ninth Circuit articulated in *Skidmore*, the inverse ratio rule unevenly applied the burden of proof to the parties involved in a copyright infringement claim.[339] Although the "burden of proof in a civil case is preponderance of the evidence," the rule unfairly advantaged "highly popular works, like *The Office*, which are also highly accessible."[340] Therefore, a new framework is necessary to promote fairness in copyright claims given evidentiary concerns stemming from the digital age.[341] The following section outlines a potential solution addressing these needs.[342]

V. A NEW FRAMEWORK FOR THE DIGITAL WORLD

While *Skidmore*'s abrogation of the inverse ratio rule certainly made strides toward fairness in the Ninth Circuit, U.S. copyright laws still have room to improve.[343] Substantial similarity tests for musical works require a determination of whether there was infringement based on both the lay listener's impressions and an expert's insight.[344] The difficulty, then, is where to draw a line delineating their respective responsibilities.[345] Unlike the film, television, and publishing industries, where there is a somewhat bright-line test for infringement, there is no such equivalent in the music industry.[346] Some scholars argue the test for substantial similarity

[337] Richard Garner, *Flexible Predictability: Stare Decisis In Ohio*, 48 AKRON L. REV. 15, 15 (2015).
[338] *See* Roodhuyzen, *supra* note 204, at 1418.
[339] *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020) (Calling the inverse ratio rule the "'inverse burden rule,'" the Ninth Circuit stated that the rule "improperly dictates how the jury should reach its decision.").
[340] *Id.* at 1068–69.
[341] *See supra* Part IV.
[342] *See infra* Part V.
[343] *See* David H. Donaldson Jr., *After 40 Years, Copyright Law Needs To Be Tweaked*, U. TEX. NEWS (Jan. 8, 2018), https://news.utexas.edu/2018/01/08/after-40-years-copyright-law-needs-to-be-tweaked/.
[344] *See* Walsh, *supra* note 184, at 295 (An "appropriate" substantial similarity test for musical works "must consider the technicalities of composition, and also the effect on the listener.").
[345] *Cf.* Williams v. Gaye, 895 F.3d 1106, 1138 (9th Cir. 2018) (Nguyen, J., dissenting).
[346] *See* Edwin F. McPherson, *Crushing Creativity: The Blurred Lines Case and Its Aftermath*, 92 S. CAL. L. REV., 67, 77 (2019) ("With a film, an expert conducts the extrinsic test by comparing the plots,

should hinge on the work of authorship at issue.[347] One test cannot be used for all works of authorship because each kind of expression requires a distinct medium of communication; therefore, substantial similarity tests must be specific to the type of expression at issue.[348] Where the expression involves music, the most appropriate substantial similarity test requires a genre-specific approach.[349]

Generally, a musical genre refers to the "overall character" of a work, including its form, style, and cultural influence.[350] Certain genres are comparatively obscure, and therefore better evaluated by experts, whereas others are more familiar to listeners and should be assessed by juries.[351] Furthermore, each musical work contains different *scènes à faire* common to its genre.[352] Though *scènes à faire* are currently a defense to copyright infringement claims, they should become the focus of music copyright claims.[353] Because *scènes à faire* are so genre-

sequence of events, characters, theme, mood, and pace of the two works. The expert also filters out all of the *scènes à faire*, such as a car chase featured in an action movie…").

[347] *See, e.g.*, Sarah Brashears-Macatee, *Total Concept and Feel or Dissection?: Approaches to the Misappropriation Test of Substantial Similarity*, 68 CHI-KENT L. REV. 913, 923 (1993); *see* Walsh, *supra* note 184, at 293 (According to Brashears-Macatee, the dissection and "total concept and feel" test are appropriate for visual works, while the abstractions test is an attractive option for fictional works).

[348] *See* McPherson, *supra* note 346, at 77–78 (Unlike expressions like films and novels, music is a special creative realm that attracts appeal from the masses but possesses few followers that understand the nuances and highly technical aspects of music theory. As such, musicologists play an important role in copyright infringement claims, since they "speak a language that is often foreign to judges (and juries)…").

[349] *See infra* Part VI.

[350] FORNEY ET AL., *supra* note 85, at 53; Katie Senn, *The Basics of Music: Genre*, WEST MUSIC (Oct. 9, 2018), https://content.westmusic.com/the-basics-of-music-genre/ ("[G]enres…describe the music's form, style, and cultural influence.").

[351] *See* Walsh, *supra* note 184, at 298 (stating that because of the "complexity of music, similarities may be very difficult to perceive aurally by even a sophisticated listener, let alone a lay listener." Thus, with more complicated genres like classical music, "[a]n expert is most likely necessary to decipher all the similarities that are hidden to the lay person.").

[352] *See* Jeffrey Cadwell, *Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 149 (2005) (explaining that "[m]usic written in the tonal system contains its own *scènes à faire* and 'clichés' that must be taken into account in music plagiarism cases."); *see also* Edwards, *supra* note 85, at 112 (expressing that the court "should have distinguished the melody, that small string of notes, as something typical for [the] type of music and groove.").

[353] *See, e.g.*, Edwards, *supra* note 85, at 116 (arguing that "the court must find a consistent approach to make scènes à faire a palatable tool in musical copyright…").

specific, substantial similarity tests for musical works should depend on the specific genres of allegedly infringing works.[354]

Depending on the exact *scènes à faire* characteristic to a specific genre, some genres are more complex and harder to evaluate.[355] Generally, complexity is measured by acoustics, timbre, rhythm, and melodic and harmonic instrumentation.[356] For example, pop music features limited timbral variety and pitch content, meaning that there are less chords and different melodies.[357] One problem in the current substantial similarity framework is its assumption that musical analysis is similar across genres.[358] This is far from the truth.[359] The most popular U.S. musical genres require different scopes of analysis due to the varying ways that basic musical elements combine to form a song.[360] Jurisdictions using only one substantial similarity test for claims involving different genres of musical works fail to account for the shared set of conventions representing a particular music genre.[361]

Another issue with applying the same substantial similarity test to different genres is that such application assumes every individual who listens to music possesses the same critical

[354] *See infra* Part VI.
[355] *See* Walsh, *supra* note 184, at 309 (When "music becomes more intricate and developed," as is common in classical and jazz music, "similarities between works are less likely to be coincidental, and copying will become more obvious.").
[356] *See* Gamaliel Percino, Peter Klimek, & Stefan Thurner, *Instrumental Complexity of Music Genres and Why Simplicity Sells*, PLOS ONE (Dec. 31, 2014), https://doi.org/10.1371/ journal.pone.0115255 (explaining that acoustics are "the dynamic range and the rate of change in dynamic levels of audio tracks," and timbre is "the quality of a sound that distinguishes one voice or instrument from another."); *see also* FORNEY ET AL., *supra* note 85, at 10 ("Rhythm is the controlled movement of music in time."); FORNEY ET AL., *supra* note 85, at 7, 13 (explaining that melodic instrumentation is "a line, or tune, in music," whereas harmonic instrumentation refers to "the vertical aspects of music: that is, how notes (pitches) sound together.").
[357] Rose Eveleth, *Science Proves: Pop Music Has Actually Gotten Worse*, SMITHSONIAN MAG. (July 27, 2012), https://www.smithsonianmag.com/smart-news/science-proves-pop-music-has-actually-gotten-worse-8173368/.
[358] *See* Nolan A. Foxworth, *Musical Genre Identification and Differentiation of Rock, R&B/Hip-Hop, and Christian Songs Through Harmonic Analysis*, SE. U. (2017).
[359] *See infra* Part V.
[360] *See id.*
[361] *See* Jimmy Hayes, *Genres of Music: Defining Different Types of Genres*, OPEN MIC UK (Aug. 8, 2019), https://www.openmicuk.co.uk/advice/types-genres-of-music/ (expressing that people categorize a genre "based on various musical elements").

listening skills.[362] However, this is not the case.[363] People "often 'listen' to music while performing another activity—perhaps studying, driving, or just relaxing."[364] In these cases, active listening—which allows one "not only [to] hear a song, but understand it"—does not occur.[365] This is not an issue for musicologists, who are trained to "critically listen for subtle differences in music."[366] However, lay listeners' lack of experience can substantially impact their evaluation of infringement claims.[367] Thus, on top of the inherent uncertainty regarding the jury's understanding of the idea/expression dichotomy is still another hurdle: the jury's ability to accurately assess the technical elements of musical works.[368] As such, using the same substantial similarity test regardless of genre only further complicates juries' obligation to determine whether infringement has truly occurred.[369]

Therefore, the proper substantial similarity framework for music copyright cases should consider the essential elements of different musical genres, and the genre at issue should determine the applicable substantial similarity test.[370] Otherwise, the absence of clear guidelines

[362] *See, e.g.*, Katherine M. Leo, *Musical Expertise and the "Ordinary" Listener in Federal Copyright Law*, 13 MUSIC & POL.1, 2 (2019).
[363] *See* Walsh, *supra* note 184, at 295 (Because "the aural sense of the ordinary person is undeveloped," it is "difficult for most people to knowledgably compare two musical works.").
[364] FORNEY ET AL., *supra* note 85, at 4; *Music 360*, *supra* note 298 ("Nearly a quarter of all music listening happens when we're behind the wheel; and listening at work or when doing chores at home both account for around 15% of our weekly time spent with music.").
[365] Rory Seydel, *Why Active Listening Is the Most Important Skill for Musicians*, LANDR (Apr. 16, 2016), https://blog.landr.com/active-listening-skill-producers/. Forensic musicologists must "be able to hear a melody, know what the notes are, and be able to transcribe the rhythmic values, harmony context, and more." *Id.*
[366] Smith, *supra* note 242.
[367] *See* Der Manuelian, *supra* note 249 n.46 (1988).
[368] *See id.* at 139.
[369] *See* Fruehwald, *supra* note 211, at 27.
[370] *See supra* Part IV.A–D.

in copyright laws risks stifling the very creativity the laws are designed to protect in the music industry.[371] The following proposes solutions for the U.S.'s five most popular musical genres.[372]

A. Pop Music

For numerous reasons, pop music should use an extrinsic/intrinsic test.[373] Pop music's wide appeal has significant implications for its musical style, shaping the most appropriate substantial similarity test for pop.[374] Since "pop music is designed to appeal to the masses," it "must be simple…"[375] Therefore, pop songs tend to be "short, repetitious, and express readily identifiable emotions—love, sadness, anger, etc."[376] With a single melody and harmonic accompaniment, the musical themes in pop music are "easy to recall and understand."[377]

Pop music is best suited for an extrinsic/intrinsic test because of two key characteristics: its intended audience and its for-profit nature.[378] Since pop music caters to a young demographic, technical extrinsic analysis is unfruitful.[379] Unlike listeners of other musical

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[371] *See* Ron Mendelsohn, *Will the "Blurred Lines" Decision "Stifle Creativity"?*, LINKEDIN (Apr. 1, 2015), https://www.linkedin.com/pulse/blurred-lines-decision-stifle-creativity-ron-mendelsohn?trk=mp-reader-card; *see also* Michael L. Sharb, *Getting A "Total Concept and Feel" of Copyright Infringement*, 64 U. COLO. L. REV. 903, 906 (explaining the possible effects of copyright laws on the music industry: "If infringement is found too easily, authors will create less for fear of infringing upon the works of another author, thus giving the public less than the desired access to works…If infringement is not found easily enough, authors will not be motivated to create because of the potential for insufficient reward.") (1993).
[372] *See infra* Part V.A–D.
[373] *See infra* Part V.A.
[374] *See* Walsh, *supra* note 184, at 262–63. Pop music requires simplicity "because it is marketed toward young and musically unsophisticated audiences," which creates "resemblances among numerous pieces within the pop genre." *Id.* Pop music is the most popular music genre in the world. *See* Felix Richter, *The World's Favorite Music Genre*, STATISTA (Oct. 12, 2018), https://www.statista.com/chart/15763/most-popular-music-genres-worldwide/#:~:text=Deserving%20of%20its%20name%2C%20pop,and%20third%20most%20popular%20genres. In the United States, it is the second most popular genre. *See Leading Music Genres According to Consumers in the United States as of May 2018*, STATISTA (May 2018), https://www.statista.com/statistics/442354/music-genres-preferred-consumers-usa/ [hereinafter *Leading music genres*]. Nearly 56.1% of respondents indicated that they preferred pop music, whereas 56.8% of respondents stated that rock was their favorite. *Id.*
[375] *See* Walsh, *supra* note 184, at 276.
[376] *Id.*
[377] *Id.*
[378] *See id.*
[379] *See id.*

genres, youth mostly listen to pop music "for overall general impressions."[380] This causal approach is significant because important differences between pop songs are probably not as readily apparent to youth unless the differences are audibly noticeable.[381] Thus, the "most important" issue in copyright cases involving pop music is the reaction a song elicits in its audience, rather than listeners' ability to identify subtle differences.[382]

Additionally, pop music should use an extrinsic/intrinsic test because pop songs are created for profit.[383] Unlike other musical genres, pop music is "music produced commercially, for profit, as a matter of enterprise not art."[384] Other genres, like classical music, "are predominantly artistic."[385] However, because pop music is so profit-driven, there is a lack of variety among songs.[386] Once a record company discovers that a "formula or pattern . . . makes money in the market," it tends to create similar content to maintain profits.[387] Furthermore, chart-topping singles "show signs of unusual conformity" because they are written by the same producers.[388] In the last fifty years, pop music has also become melodically less complex.[389] Unlike classical, jazz, and rock songs, pop songs possess "simple melodies and a repeating structure" while using "simple musical techniques" and "refraining from complex solos and using odd time signatures."[390] Most pop songs feature a verse and a chorus to build an

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[380] *Id.*
[381] *See id.*
[382] *Id.*
[383] *See id.* at 275.
[384] SIMON FRITH, *Pop Music*, THE CAMBRIDGE COMPANION TO POP AND ROCK MUSIC 93, 94 (Simon Frith et al. eds., 2001).
[385] Walsh, *supra* note 184, at 303–04.
[386] *See id.* at 276.
[387] *Id.* at 276–77.
[388] Hannah Evans, *Why Does Today's Pop Music Sound the Same? Because the Same People Make It*, INDEPENDENT (Nov. 29, 2012, 4:54 PM), https://www.independent.co.uk/voices/comment/why-does-today-s-pop-music-sound-same-because-same-people-make-it-8368714.html. For example, three of the "most commercially successful songs" in 2012 (Taylor's Swift's "We are Never Ever Getting Back Together, Maroon 5's "Payphone," and Katy Perry's "Part of Me") were written by the same team of people. *Id.* "[I]n an industry which is in trouble," when producers find "something that actually works, [they] stick to it." *Id.*
[389] *See* Fraser McAlpine, *Has Pop Music Lost Its Fun?*, BRIT. BROAD. CO. (Jan. 12, 2018), https://www.bbc.co.uk/music/articles/fb84bf19-29c9-4ed3-b6b6-953e8a083334; *see also* Joan Serrà et al., *Measuring the Evolution of Contemporary Western Popular Music*, 2 SCI. REPS. 521, 521 (July 26, 2012).
[390] *Pop Music*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/

association to the listener through musical and lyrical repetition.[391] At the heart of almost every pop song is a series of common chord progressions.[392] These chord progressions "provide an approachable framework for [pop] songs."[393] When artists use these chord progressions, songs become "'easier to digest' for the listeners."[394] Essentially, these progressions and other elements represent the *scènes à faire* of pop music.[395] These characteristics, combined with pop music's reduced musical sound diversity, illustrate the need for an extrinsic/intrinsic test.[396]

The explosion of the digital age also further highlights the need for this test.[397] While the simplicity and repetitious nature of pop music suggests only lay listeners should evaluate claims,

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pop_music (last visited Jan. 11, 2021). Time signatures tell musicians how to count music; they express the number of beats in the measure and the note value that receives one beat. *See* Evelyn Lamb, *Uncommon Time: What Makes Dave Brubeck's Unorthodox Jazz Styling So Appealing?*, SCI. AM. (Dec. 11, 2012), https://www.scientificamerican.com/article/uncommon-time-dave-brubeck/.

[391] *See* Dr. Justin Wildridge, *Characteristics of Pop Music: An Introduction*, CMUSE (Dec. 9, 2019), https://www.cmuse.org/characteristics-of-pop-music/.

[392] *See* Victoria Longdon, *These Four Chords Are at the Heart of Every Pop Song*, CLASSIC FM (Feb. 28, 2019, 5:06 PM), https://www.classicfm.com/discover-music/music-theory/four-chords-every-pop-song/; Rodi Kirk, *Common Chord Progressions*, MELODICS MAG., https://melodics.com/blog/index.php/2018/11/13/common-chord-progressions/ (last visited Feb. 7, 2021). A chord progression is the order that chords are played in. *See id.*

[393] Alper Tuzcu, *The Most Common Chord Progressions in Pop Music*, TAKE LESSONS (Dec. 29, 2020), https://takelessons.com/blog/2020/12/the-most-common-chord-progressions-in-pop-music. Chord progressions are the "backbone" of the modern pop song. *Id.* Adele's "Someone Like You" and John Legend's "All of Me" feature the I-V-vi-IV chord progression. *See id.* Ed Sheeran's "Perfect" is an example of the I-vi-IV-V chord progression, while Joan Osborne's "One of Us" uses the vi-IV-I-V progression. *See id.* Bob Dylan's "Knockin on Heaven's Door" uses the I-V-IV progression, while Richie Valens' "La Bamba" uses I-IV-V. *See id.* Common chord progressions in pop music include the following: (1) I-V-vi-IV, (2) I-vi-IV-V, (3) vi-IV-I-V, (4) I-IV-V or I-V-IV, and (5) ii-V-I. *See id.*

[394] *Id.*

[395] *See also* Edwards, *supra* note 85, at 111 (explaining that "[s]ince 1910, the copyright rule has . . . [allowed] scènes à faire to be stretched to nonliteral elements like melody.").

[396] *See* Serrà et al., *supra* note 389, at 521 (The study found that in the past fifty years, there has been a growing trend toward "less variety in pitch transitions, towards a consistent homogenization of the timbral palette, and towards louder and, in the end, potentially poorer volume dynamics.").

[397] *See* Etienne Lee, *Infringing Copyright Infringement: How the Digital Age Challenges Intellectual Property*, MCGILL INT'L REV. (Oct. 1, 2018), https://www.mironline.ca/infringing-copyright-infringement-how-the-digital-age-challenges-intellectual-property/ ("Increased interconnection due to the internet, along with technological advancements digitalizing contemporary society, have produced fundamental concerns and implications regarding the current state of IP law."). "With the arrival of the internet, distribution and sharing becomes more accessible with inexpensive costs through public domains of free access." *Id.* Furthermore, the digital age "exposes a critical paradox in IP: attempting to promote the production of works from human creativity, whilst simultaneously restricting access to them." *Id.*

this is far from the case.[398] Pop music is already inherently inclined to feature resemblances between different pop songs.[399] Now, in the digital age, "the popularity of cheap music-production software" has amplified these similarities.[400] With an extrinsic/intrinsic test, musicologists can search common chord progressions in pop songs and guide a jury to disregard any similarities between two pop songs stemming from these progressions.[401] In this framework, any similarities existing beyond common chord progressions and other *scènes à faire* could indicate possible infringement.[402] Therefore, the advent of the digital age makes it crucial for pop music to use an extrinsic/intrinsic substantial similarity test to account for the genre's nature and songs' musical commonalities.[403]

In an extrinsic/intrinsic framework for pop music, the court in *Copeland v. Bieber*[404] applied the wrong substantial similarity test in its copyright infringement analysis.[405] Plaintiffs, singer Devin Copeland and songwriter Mareio Overton, filed a copyright infringement lawsuit against Justin Bieber and Usher, arguing Bieber's song "Somebody to Love" was based on the

[398] *See* Walsh, *supra* note 184, at 261 (It is fairly common in pop music to see "'common themes frequently reappear in various compositions'" because of the limited options of notes and chords.).
[399] *See id.* at 261–62. In pop music, it is particularly likely for "'common themes [to] frequently reappear in various compositions.'" *Id.*
[400] Wang, *supra* note 175. According to Ross Golan, a well-recognized producer and songwriter who has collaborated with the likes of Ariana Grande and Justin Bieber, "[p]eople are using the same sample packs, the same plug-ins, because it's efficient." *Id.*; *see also* Amy X. Wang, *The Music-Making Site That Can Get You a Global Hit (Or a Lawsuit)*, ROLLING STONE (May 28, 2019, 4:10 PM), https://www.rollingstone.com/music/music-features/beatstars-lil-nas-x-old-town-road-826936/ (stating that BeatStars, a digital production marketplace, was the origin of Lil Nas X's hit song, "Old Town Road."). At BeatStars, artists can sign license agreements for beats, but there is no guarantee that those beats themselves are protected by copyright. *See id.* For example, if an artist purchases a beat with an uncleared sample, courts can hold him liable for copyright infringement. *See id.*
[401] *See, e.g.*, Swirsky v. Carey, 376 F.3d 841, 846 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004) (finding after expert testimony that the choruses of both songs "shared a 'basic shape and pitch emphasis' in their melodies, which were played over 'highly similar basslines and chord changes, at very nearly the same tempo and in the same generic style.").

[402] *See* Edwards, *supra* note 85, at 113. Even when substantial similarity exists, *scènes à faire* is a defense. *See id.*
[403] *See infra* Part V.A.
[404] Copeland v. Bieber, No. 2:13CV246, 2014 WL 10935943 (E.D. Va. Mar. 28, 2014), *vacated and remanded*, 789 F.3d 484 (4th Cir. 2015).
[405] *See infra* Part V.A.

plaintiffs' composition, for which they did not receive credit.[406] The plaintiffs argued that Bieber's song, like theirs, used the same hook—"I need somebody to love!"[407] The district court used the "total concept and feel" test to determine whether the two songs were substantially similar.[408] It dismissed the case, finding that "no reasonable juror could believe that…the songs…[were] similar."[409] On appeal, however, the circuit court found that there was sufficiently substantial similarity between the songs to support a copyright infringement claim.[410] Specifically, the shared choruses, when listened to in the songs' entire context, were similar because the lyrics were "delivered in . . . an almost identical rhythm and a strikingly similar melody."[411] Had the district court initially applied the extrinsic/intrinsic test, the case probably would not have been dismissed.[412] As a pop song, the copyright infringement analysis should have focused more predominantly on the interplay between the chorus and other shared musical elements from the perspective of both the lay listener and musicologist.[413] Since the chorus, or hook, is what lay listeners normally associate with a song, it is "important not only aesthetically but also commercially, where it may be central to a song's economic success."[414] Had the district court "listen[ed] to the choruses that way and in the context of the entire songs," it more likely would have perceived the "meaningful overlap on which a reasonable jury" could find substantial similarity.[415]

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[406] *See* Randy Lewis, *Justin Bieber, Usher Sued over 'Somebody to Love'*, L.A. TIMES (May 7, 2013, 12:00 AM), https://www.latimes.com/entertainment/music/la-xpm-2013-may-07-la-et-ms-justin-bieber-usher-lawsuit-somebody-to-love-20130507-story.html.
[407] *See* Eriq Gardner, *Justin Bieber, Usher Beat $10 Million Song Plagiarism Lawsuit (Exclusive)*, HOLLYWOOD REP. (Mar. 28, 2014, 1:37 PM), https://www.hollywoodreporter.com/thr-esq/justin-bieber-usher-somebody-love-lawsuit-691945.
[408] Copeland v. Bieber, 789 F.3d 484, 489 (4th Cir. 2015).
[409] Copeland v. Bieber, 2014 WL 10935943, at *6 (E.D. Va. Mar. 28, 2014). The court found that though there were some commonalities between the songs, "their mood, tone, and subject matter differ[ed] significantly." *Id.*
[410] *Copeland*, 789 F.3d at 495.
[411] *Id.* at 494.
[412] *See supra* Part V.A.
[413] *Id.*
[414] *Id.*; *Copeland*, 789 F.3d at 494.
[415] *See supra* Part V.A.; *Copeland*, 789 F.3d at 494.

B. Rock Music

Because rock music significantly differs from pop music, copyright infringement cases involving rock music should use the extrinsic test.[416] Most rock music listeners are older than pop listeners.[417] Unlike youthful pop music listeners, rock music listeners do not listen to rock songs for "overall general impressions."[418] Furthermore, rock music is generally more complex than pop music.[419] While a simple rock harmony is diatonic and usually features triads, a complex harmony features "more chromatic pitches, and four or more separate pitches may sound at the same time."[420] The chords of rock songs are mostly root-position triads or seventh chords.[421] Rock music often features dissonant chords.[422] Furthermore, the rhythmic devices in rock music include offbeats and unusual meter.[423] In rock music, melody and harmony combine to form a rich palette of harmonic choices.[424] The harmonies of rock songs gravitate toward a natural-minor system, chromatic-minor system, and major system.[425] Overall, "the harmonic

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[416] *See infra* Part V.B. Unlike pop music, rock music is the most popular music in the United States. *See Leading Music Genres*, *supra* note 374. Approximately 56.8% of listeners reported that they preferred rock music. *Id.*

[417] *See Favorite Music Genres Among Consumers in the United States as of July 2018, by Age Group*, STATISTA (Jan. 8, 2021), https://www.statista.com/statistics/253915/favorite-music-genres-in-the-us/ (While 48% of 45–54 year-olds listen to rock music, 56% of 25–34 year-olds listen to pop music).

[418] *See* Walsh, *supra* note 184, at 303.

[419] *See* THE OXFORD HANDBOOK OF MUSIC PSYCHOLOGY 162 (Susan Hallam et al. eds., 1st ed. 2011).

[420] *The 1960s: A Transformational Decade in Music*, U.S. ACAD. DECATHLON 30, https://www.eriesd.org/cms/lib/PA01001942/Centricity/Domain/691/Music-Resource-Guide.pdf (last visited Jan. 11, 2021). A triad is a group of three notes that forms a chord. *See id.* Diatonic music possesses a melody and harmony that are "firmly rooted in the key." FORNEY ET AL., *supra* note 85, at 19.

[421] *See* Iona Vallance, *Rock*, GENRE ANALYSIS, https://onagenre.weebly.com/rock.html (last visited Jan. 11, 2021). The most popular chord progression during the 1950s and 1960s was I-vi-IV-V, and it is closely associated with rock music today. *See id.*

[422] *See* Colin Schultz, *Why Do People Hate Dissonant Music? (And What Does It Say About Those Who Don't?)*, SMITHSONIAN MAG. (Nov. 13, 2012), https://www.smithsonianmag.com/smart-news/why-do-people-hate-dissonant-music-and-what-does-it-say-about-those-who-dont-120781501/. Dissonant chords "sound clashing and elicit a feeling of tension." *See* Espie Estrella, *Understanding Dissonant and Consonant Chords*, LIVE ABOUT (Feb. 16, 2019), https://www.liveabout.com/understanding-dissonant-and-consonant-chords-2456562.

[423] *See* Vallance, *supra* note 421. Unusual meter describes a work that includes time signatures of simple and compound beats. *See id.* For example, Pink Floyd's "Money," which is written in 7/4, is counted as 1-2-3-1-2-3-4. *See id.*

[424] *See* KEN STEPHENSON, WHAT TO LISTEN FOR IN ROCK: A STYLISTIC ANALYSIS 74, 75 (2002) ("Melody is allowed to interact with harmony more freely.").

[425] *See id.* at 96.

practice of rock opposes the common practice…"[426] Therefore, rock music should use a different substantial similarity test than pop music.[427]

Rock music has several common musical elements.[428] First, the minor pentatonic scale is the most prominent scale.[429] Amongst pentatonic scales, the A minor pentatonic scale is "the most-used, most-heard, most-seen, and most-demonstrated scale in the rock guitar world."[430] Furthermore, rock songs follow certain modes, or scale patterns.[431] In this genre, songs often use

[426] *Id.* at 111.
[427] *See supra* Part V.A.
[428] *See infra* Part VI.B.
[429] *See* Bryn Hughes, *Pentatonic Harmony*, VIVA OPEN BOOK PUB., https://viva.pressbooks.pub/openmusictheory/chapter/pentatonic-harmony/. The pentatonic scale is a five-note scale. *See id.* It originates from the Blues tradition. *See id.* One of the most striking examples of the pentatonic scale is "My Girl," by the Temptations. *See What Is the Pentatonic Scale? Learn Music Theory*, MASTERCLASS (Aug. 10, 2021), https://www.masterclass.com/articles/what-is-the-pentatonic-scale-learn-music-theory#what-is-the-pentatonic-scale. The opening guitar riff uses a C major pentatonic scale. *See The Definitive Guide To Learning How To Play My Girl on Guitar*, NAT'L GUITAR ACAD., https://nationalguitaracademy.com/how-to-play-my-girl-on-guitar/ (last visited Jan. 30, 2021). Examples of pentatonic scales in rock music include "Let It Be" by the Beatles, which features a C major pentatonic scale; "Sweet Home Alabama" by Lynyrd Skynyrd, which uses a G major pentatonic scale; and "I Love Rock 'N Roll" by Joan Jett, which has an E major pentatonic. *See* Desi Serna, *Major Pentatonic Guitar Scale and Songs*, GUITAR MUSIC THEORY (Jan. 2009), https://www.guitarmusictheory.com/major-pentatonic-scale-guitar-songs/.
[430] *The World's Most-Used Guitar Scale: A Minor Pentatonic*, DEFT DIGITS GUITAR LESSONS, https://deftdigits.com/2012/01/06/the-worlds-most-used-guitar-scale-a-minor-pentatonic/ (last visited Jan. 11, 2021). Examples of A minor pentatonic scales in rock music include the following: "Heartbreaker" by Led Zeppelin and Cream's "Crossroad Blues." *Id*; *see* Brian Parham, *Rock's Secret Super Power: The A Minor Pentatonic Scale*, ROCK DOJO (July 26, 2017), https://rockdojo.org/rock-secret-super-power/.
[431] *See* FORNEY ET AL., *supra* note 85, at 66. There are seven major musical modes: (1) Ionian Mode, (2) Dorian Mode, (3) Phrygian Mode, (4) Lydian Mode, (5) Mixolydian Mode, (6) Aeolian Mode, and (7) Locrian Mode. *See What Are Musical Modes?* MASTERCLASS (Nov. 8, 2020), https://www.masterclass.com/articles/what-are-musical-modes#what-is-a-musical-mode ("Heavy metal and progressive rock bands are fond of modes—especially the 'minor sounding' ones.").

the Mixolydian, Dorian, and Aeolian modes.[432] Rock music also features a number of popular chord progressions.[433]

As a result of its specific structural elements, rock music should use the extrinsic test. For example, the uncommon meters used in rock songs are difficult for untrained jury laypersons to understand.[434] Similarly, it is harder for jury members to follow rock's complex melodic and harmonic lines,[435] which feature chromatic tones and a series of simultaneous pitches. Unlike pop music's simple, consonant chords, which are easier for untrained ears to comprehend and perceive, rock music's dissonant chords are harder for lay listeners to separate and evaluate.[436] Thus, jury laypersons can more readily identify tones in pop music's consonant melodies.[437] While "[s]tandard pentatonic scales have as little dissonance as possible," the more chromatic tones contained in a song, the greater "its potential for dissonance."[438] Musicologists, however,

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[432] *See Rock Solo Using the Aeolian Mode*, GEEKY GUITARIST (Apr. 24, 2018), https://geekyguitarist.com /rock-solo-using-the-aeolian-mode/. The Aeolian mode "has a bleak and mournful sound, often evoking melancholy or even despair." *Id.* It has the same notes of the natural minor scale. *See id.*; *see* Samuel Chase, *The Aeolian Mode: What Is It?*, HELLO MUSIC THEORY (Jul. 12, 2021). Popular rock songs that feature the Aeolian mode include R.E.M.'s "Losing My Religion" and Bob Dylan's "All Along the Watchtower." *See id.*; *see* Rick Beato, *The Mixolydian Mode*, SOUND OF ROCK (Feb. 17, 2020), https://www.youtube.com /watch ?v=YYmzVHRAo94; *The Mixolydian Mode - A Rockers Delight*, MUSICIANS UNITE, http://www.musiciansunite.com/articles/the-mixolydian-mode---a-rockers-delight.html (last visited Jan. 11, 2021) (explaining that the Mixolydian mode is "used quite extensively in rock music."). Examples of the Mixolydian Mode include Guns N Roses' Sweet Child O'Mine and Lynyrd Skynyrd's "Sweet Home Alabama." *See also* Dre Dimura, *The Basics of the Dorian Mode for Guitar*, FLYPAPER (Feb. 18, 2019), https://flypaper.soundfly.com/play/the-basics-of-the-dorian-mode-for-guitar/ (explaining that the Dorian mode is often used by "rock soloists…").

[433] *See* Wanda Waterman, *Everything You Need to Know About Rock Guitar Chord Progressions*, UBERCHORD (Jan. 25, 2017), https://www.uberchord.com/blog/everything-you-need-to-know-about-rock-guitar-chord-progressions/. For musical analysis, musicians "refer to the series of chords in a particular key with Roman numerals." *Id.* "Thus, I is the first chord in the key, ii is the second, iii is the third, IV is the fourth, V is the fifth, vi is the sixth, and vii is the seventh." *Id.* Popular chord progressions in rock music include the following: (1) I -vi - IV -V, (2) I -IV-V-I, (3) I - V - vi - iii - IV - I - IV - V, (4) ii - I - V, (5) I-V-vi-IV, (6) I - I – I - I - IV -IV - I - I - V -V - IV - I, (7) ii - IV -V, (8) vi-IV-I-V, and (9) I - IV - V – IV. *See id.*

[434] *Cf. Meter in Music*, ER SERVS., https://courses.lumenlearning.com/suny-musicapp-medieval-modern/chapter/meter-in-music/ (last visited Mar. 20, 2021).

[435] Anton Schwartz, *Pentatonic Scales: A Deeper Look*, ANTON JAZZ (Jan. 8, 2016), https://antonjazz.com/2016/01/pentatonic-scales/.

[436] *See* Sadie Dingfelder, *Too Discordant for the Masses?*, MONITOR (Apr. 2008), https://www.apa.org/monitor/2008/04/chords.

[437] *See id.*

[438] Schwartz, *supra* note 435.

can distinguish these elements in a musical analysis because they are "trained to analyze music by examining the way chords and pitches interact."[439] As such, the extrinsic test is most appropriate for rock music.[440]

In *Skidmore*, the Ninth Circuit applied the extrinsic/intrinsic test to evaluate the similarities between Led Zeppelin's and Wolfe's songs.[441] Skidmore's expert argued the songs both used descending chromatic scales that return to the tonic, and that the notes in the scale used the same durations.[442] According to Led Zeppelin's testimony, however, the two songs were completely different.[443] The district court jury found in favor of Led Zeppelin.[444] Given the complexities of rock music, however, the court should have applied the extrinsic test.[445] While the time signature of "Stairway to Heaven" is common time, a relatively easy meter to perceive in musical analysis, the chromatic scale is harder to analyze.[446] Furthermore, the layering of musical elements, and the contrasting texture between the consonant introduction and the dissonant end creates a complicated instrumentation for a jury to scrutinize.[447] In light of these challenges, expert testimony—in the form of the extrinsic test—was necessary for a fuller analysis and better appreciation of the works' musical elements.[448]

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[439] Cadwell, *supra* note 352, at 158.
[440] *See supra* Part V.B.
[441] Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020).
[442] *See* Evelina Gentry & Ira Sacks, *After A Long Climb, Led Zeppelin Prevails In The Stairway To Heaven Copyright Battle*, JD SUPRA (Mar. 20, 2020), https://www.jdsupra.com/legalnews/after-a-long-climb-led-zeppelin32053/#:~:text=Alexander%20Stewart%2C%20acknowledged%20that%20a,scale%20have%20the%20same%20durations.
[443] *See id.*
[444] *Id.*
[445] *See supra* Part V.B.
[446] *Id.*
[447] *See* Morgan Happs, *Identifying Musical Instrumentation – Stairway to Heaven by Led Zeppelin*, MORGAN HAPPS (May 11, 2018), http://fsbizsite.com/mthapps/2018/05/11/ididentifyi-musical-instrumentation-stairway-to-heaven-by-led-zeppelin/.
[448] *See Types of Rock Music*, VOCAL BOP (Nov. 16, 2019), https://vocalbop.com/types-of-rock-music/; *see also* Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003) (ruling that expert testimony was necessary to inform lay listeners about specialized issues).

C. Country Music

Country music, like pop music, should use an extrinsic/intrinsic test for a variety of reasons.[449] Over the years, country music has delved into mainstream pop music.[450] Melodies, like those in pop music, are typically basic.[451] Harmonies are also simple, often consisting of "only two or three voices."[452] Lyrics tell stories using a memorable chorus to create a sing-along song.[453] Rhythmically, country music is generally simple, as there is little syncopation and the overwhelming majority of songs are written in Common time (4/4).[454] In addition, country music features repetitious simple melodies and chords.[455] In light of these characteristics, country music is similar to pop music.[456] Thus, an extrinsic/intrinsic test is appropriate for country music.[457]

Considering these qualities of country music, it is evident that the court in *Bowen v. Paisley* applied a substantial similarity test ill-suited for the music at issue.[458] In *Bowen*, singer and songwriter Amy Bowen sued country singer Brad Paisley and his co-writers, claiming that the defendants infringed her song.[459] Bowen argued Paisley's use of the words "remind me" was similar to her song.[460] The district court applied the abstraction/filtration/comparison test to assess the defendants' liability.[461] As part of this test, Bowen's musicologist filtered out the

[449] *See infra* Part V.C.
[450] *See id.*
[451] *See The Difference Between Folk and Country Music*, GRIZZLY ROSE (Nov. 25, 2019), https://grizzlyrose.com/the-difference-between-folk-and-country-music/.
[452] *Id.*
[453] *See id.*
[454] "The most common time signature is 4/4 . . . it's often abbreviated at the start of a piece of music to a large C," which represents common time. *Time Signatures Explained*, SKOOVE, https://www.skoove.com/blog/time-signaturesexplained/#:~:text=Common%20time%20signaturesconsists%20of%20two%20half%20beats (last visited Jan. 11, 2021). In common time, there are four quarter beats in each measure. *See id.*
[455] *See The Difference Between Folk and Country Music*, *supra* note 451.
[456] *See supra* Part V.A.
[457] *See id.*
[458] Bowen v. Paisley, No. 3:13CV0414 (M.D. Tenn. Aug. 25, 2016).
[459] Billy Dukes, *Brad Paisley, Carrie Underwood Win 'Remind Me' Lawsuit*, TASTE COUNTRY (Aug. 26, 2016), https://tasteofcountry.com/brad-paisley-carrie-underwood-win-remind-me-lawsuit/. Both Bowen's and Paisley's songs were called "Remind Me." *See id.*
[460] *Id.*
[461] *Bowen*, No. 3:13CV0414 at 16–17.

required elements, focusing on the lyrics "remind me" and their expression.[462] The court held that even though Paisley used "remind me" nine times in his song, this did not amount to substantial similarity, and therefore, defendants were entitled to summary judgment.[463] If the court had applied the extrinsic/intrinsic test, however, the result might have been different.[464] Since the two songs shared some underlying melodic features, such as melodic leaps and appoggiaturas, an extrinsic/intrinsic test could have yielded a more complete analysis.[465] Because the abstraction/filtration/comparison test "peel[s] back layers of expression so that the result is a spectrum of expression[,]…" the district court's analysis focused too much on specific, individual musical elements rather than the works' overall similarity.[466] Absent the extrinsic/intrinsic test, the court failed to consider whether the melodic similarities between the two works amounted to substantial similarity.[467]

D. R&B/Hip-Hop Music

R&B, or rhythm and blues, should use an abstraction/filtration/comparison test.[468] Unlike other genres, harmonic complexity is not a feature of R&B/Hip-Hop.[469] Instead, the focus is on "rhythmic emphasis and lyrical content."[470] R&B has greatly evolved over the years, "[embracing] technical innovations and [diversifying] the instruments and sounds it uses."[471] Artists from earlier decades are experimenting with different styles by fusing elements from

[462] *Id.* at 20.
[463] *See* Eriq Gardner, *Brad Paisley, Carrie Underwood Beat Lawsuit Claiming They Stole Song*, HOLLYWOOD REP. (Aug. 26, 2016, 7:31 AM), https://www.hollywoodreporter.com/thr-esq/brad-paisley-carrie-underwood-beat-923107.
[464] *See supra* Part V.C.
[465] *See supra* Part III.B.
[466] *See* Walsh, *supra* note 184, at 290.
[467] *See supra* Part III.B.
[468] *See generally* Dan Cavallari, *What is R&B Music?*, MUSICAL EXPERT (May 8, 2022), https://www.musicalexpert.org/what-is-rb-music.htm (explaining that R&B **"**includes steady rhythms and numerous instruments to create multiple layers of sound.").
[469] *See* Nolan A. Foxworth., *Musical Genre Identification and Differentiation of Rock, R&B/Hip-Hop, and Christian Songs Through Harmonic Analysis* (Apr. 28, 2017) (unpublished Honors thesis, Southeastern University-Lakeland) (on file with Southeastern University).
[470] *Id.*
[471] *Category: R&B*, OFFICIAL.FM, https://official.fm/rb/ (last visited Jan. 11, 2021).

EDM, pop, and rock into their music.[472] As a result, contemporary R&B, which focuses mainly on vocals, is now much simpler than traditional R&B.[473] The majority of R&B hits now use electronic-based instrumentation.[474] Nevertheless, because R&B "is a heavily lyric based musical style," it is the most challenging to analyze.[475]

In the digital age, the most appropriate substantial similarity test for R&B songs is the abstraction/filtration/comparison test.[476] Because of R&B music's prominent use of layering, it is very difficult for a lay listener to separate the different musical components of a song without expert aid.[477] For example, R&B singer Jason Derulo's hit song, "Swalla," features multiple layers of vocals.[478] Throughout the song's various sections, there are different combinations of lead vocals, backing vocals, and harmonies.[479] Despite the fact that R&B/Hip-Hop songs contain repetitive chord progression[s], "[i]dentification of R&B/Hip-Hop harmonic structure…[is] difficult…"[480] Therefore, some expert testimony is generally necessary to assist the jury—the trier of fact—in comprehending the evidence in music copyright claims.[481] For copyright claims involving R&B music, the benefit of introducing expert testimony clearly outweighs the risks.[482]

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[472] Shawn Henry, *The Evolution of R&B*, TUC MAG (Nov. 17, 2018), https://www.tucmag.net/music/theevolutionofrb/#:~:text=With%20it%20came%20a%20major,%E2%80%9Cnew%20jack%20swing%E2%80%9D%20era.

[473] Yi Ting, *Music Genre Analysis—R&B*, YI TING AUDIO (Dec. 6, 2017), https://yiting1215.wordpress.com/2017/12/06/music-genre-analysis -rb/.

[474] *R&B/Soul: Hit Songwriting Characteristics*, HIT SONGS DECONSTRUCTED, https://www.hitsongsdeconstructed.com/hsd_wire/rbsoul-hit-songwriting-characteristics/ (last visited Jan. 11, 2021).

[475] Foxworth, *supra* note 469, at 30.

[476] *See infra* Part V.D.

[477] *See generally Beat Breakdown: Making of Hip Hop R&B Beat Ridin' Music*, TCUSTOMZ, https://www.tcustomz.com/blog/beat-breakdown-making-of-hip-hop-randb-beat-ridin-music/ (last visited Jan. 11, 2021).

[478] *See* Robin Wesley, *Song Structure and Dynamics: How to Add More Excitement to Your Songs!*, ROBIN WESLEY INSTRUMENTALS (July 1, 2019), https://www.robinwesleyinstrumentals.com/song-structure-and-dynamics-how-to-bring-more-excitement-in-your-songs/.

[479] *See id.*

[480] Foxworth, *supra* note 469, at 35, 61.

[481] *See* Miah Rosenberg, Note, *Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit*, 39 U.C. DAVIS L. REV. 1669, 1676 (2006).

[482] *See id.* at 1684. In copyright infringement cases, "expert testimony . . . most implicates public policy concerns." *Id.* One issue is that "[t]estimony presented by an expert in the area of music might sway jurors unnecessarily." *Id.*

Recently, in *Pickett v. Migos Touring, Inc.*, the plaintiff, Leander Pickett, sued Migos, a hip hop band, for copyright infringement.[483] Pickett, a rapper, claimed that Migos' 2018 hit song, "Walk It Talk It" infringed on his composition of the same name.[484] The court found that the only similarity between the works was the lyrics "walk it like I talk it," which comprised the hook or chorus of each song.[485] According to the court, these lyrics were not copyrightable because they were not original to Pickett; thus, the defendants' motion to dismiss was granted.[486] The court, however, would have better completed its analysis with the abstraction/filtration/comparison test.[487] Instead, the court focused only on "meaningful similarities."[488] After filtering out the lyrics, which were unprotectable, the court should have compared the two songs to identify any other commonalities.[489] By doing so, the court would have better separated both compositions' various combinations of musical elements.[490]

VI. CONCLUSION

The stakes of the music industry have never been higher than in today's digital age.[491] Copyright is the vessel of the music industry—the source from which musicians, producers, and entrepreneurs may exploit the fruits of their labor.[492] Without copyright laws, stakeholders in the

[483] Pickett v. Migos Touring, Inc., No. 18 Civ. 9775 (S.D.N.Y. Nov. 12, 2019).
[484] Torsten Ingvaldsen, *Migos Win in "Walk It Talk It" Copyright Infringement Lawsuit*, HYPEBEAST (Nov. 14, 2019), https://hypebeast.com/2019/11/migos-walk-it-talk-it-copyright-infringement-lawsuit-victory-report.
[485] *Id.*
[486] *See* Pickett v. Migos Touring, Inc., No. 18 Civ. 9775 (S.D.N.Y. Nov. 12, 2019).
[487] *See supra* Part V.D.
[488] *See* Ingvaldsen, *supra* note 484.
[489] *See supra* Part III.B.
[490] *Id.*
[491] *See Infringement or Inspiration: High Stakes in the Music Industry*, NOVAGRAAF (Apr. 1, 2020), https://www.novagraaf.com/en/insights/infringement-or-inspiration-high-stakes-music-industry (noting in recent years, "[c]opyright cases in the music industry [have become] increasingly high profile—and big business—and many artists seem intent to fight them until the bitter end; after all, there are royalties as well as reputations at stake."); *see also* Der Manuelian, *supra* note 249, at 127 (stating that "the popular music industry has flourished, and the financial stakes in music infringement litigation have risen significantly.").
[492] *See* Ben Lowe, *Intellectual Property & Why It Is Important in Music*, MUSIC GATEWAY (May 6, 2020), https://www.musicgateway.com/blog/how-to/intellectual-property-why-it-is-important-in-music (explaining that players in the music industry "manage, exploit, administer and license their copyrights and this produces income.").

music industry could not control distribution methods or forms of payments, such as performance and mechanical royalties.[493] As such, they are highly protective of their copyrights.[494] As a result, potential copyright infringement lawsuits, and their potential impact on stakeholders' reputation, weigh heavily on artists and producers alike.[495]

After *Williams* created reverberating fears in the music industry, musicians and record labels faced uncertainty regarding song releases, correctly anticipating an increase in music copyright claims.[496] Industry professionals worried about the case's ramifications on creativity in the studio and fundamental fairness.[497] By finding in favor of Gaye's family on its copyright infringement claim because of the apparent use of similar genre elements, the Ninth Circuit opened the door for future litigation involving genre-specific similarities between different musical works.[498]

In *Skidmore's* aftermath, copyright reform is of paramount importance.[499] Notwithstanding the obvious fact that there are a finite number of musical notes, every musical

[493] *See Mechanical Royalties vs. Performance Royalties: What's the Difference?*, ROYALTY EXCHANGE (Jan. 31, 2019), https://www.royaltyexchange.com/blog/mechanical-and-performance-royalties-whats-the-difference#sthash.fxz06kvA.dpbs.
[494] *See* Jonathan Jones, *Music Industry Cracking Down on Copyright Issues Could Change How NFL and Other Leagues Distribute Content*, CBS SPORTS (Nov. 18, 2020, 4:00 PM), https://www.cbssports.com/nfl/news/music-industry-cracking-down-on-copyright-issues-could-change-how-nfl-and-other-leagues-distribute-content/.
[495] *See* Michael Hann, *A Hit, a Writ: Why Music is the Food of Plagiarism Lawsuits*, GUARDIAN (Mar. 26, 2020, 3:00 PM), https://www.theguardian.com/law/2020/mar/26/a-hit-a-writ-why-music-is-the-food-of-plagiarism-lawsuits.
[496] *See* Roisin O'Connor, *'Blurred Lines' Copyright Ruling is a 'Devastating Blow' and Sets Dangerous Precedent for Musicians, Judge Warns*, INDEPENDENT (Mar. 22, 2018, 9:34 AM), https://www.independent.co.uk/arts-entertainment/music/news/blurred-lines-copyright-ruling-upheld-robin-thicke-pharrell-marvin-gaye-latest-a8267941.html.
[497] *See* Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity*, SLATE (Mar. 12, 2015, 12:27 PM), https://slate.com/news-and-politics/2015/03/blurred-lines-verdict-is-wrong-williams-and-thicke-did-not-infringe-on-marvin-gaye-copyright.html (noting that while the Copyright Act aims to foster creativity, the court's ruling "squelches it.").
[498] *See* Krista L. Cox, *Blurred Lines: Can You Copy A Music Genre?*, ABOVE THE L. (Mar. 23, 2018, 10:43 AM), https://abovethelaw.com/2018/03/blurred-lines-can-you-copy-a-music-genre/.
[499] *See* Adi Robertson, *Copyright Could be the Next Way for Congress to Take on Big Tech*, VERGE (Feb. 13, 2020, 12:59 PM), https://www.theverge.com/2020/2/13/21133754/congress-dmca-copyright-reform-hearing-tillis-coons-big-tech.

genre possesses certain combinations of musical elements specific to its expression.[500] Music genres are not meaningless labels; they are labels categorizing music by its fundamental components.[501] When courts fail to account for these genre-specific elements, they assume that all musical genres share identical characteristics, unduly complicating copyright infringement analysis.[502] Furthermore, the traits of the digital age present another dimension in music copyright infringement.[503] With the digital age's technological developments driving an ever-blurring line between inspiration and theft, the future of creativity in the music industry is in grave jeopardy.[504]

To reduce the increasing frequency of copyright litigation, the Supreme Court should adopt a genre-specific approach in evaluating copyright infringement claims in the music industry.[505] Since "[e]ntire genres of music are built upon similar sounds, feelings, and types of music," the likelihood of subconscious copying is substantially high.[506] Furthermore, the emergence of innovative technologies in the digital age has greatly facilitated potential copyright infringement.[507] Current streaming services offer listeners quick access to millions of songs, removing barriers to use by musicians and the general public.[508] In many cases, music is a fusion of the elements artists—as listeners themselves—acquire through inspiration from their

[500] *See* Aphinya Dechalert, *How Developers Are Saving the Music Industry from Suing Each Other*, MEDIUM (Mar. 8, 2020), https://medium.com/young-coder/how-developers-are-saving-the-music-industry-from-suing-each-other-a9adba6a03cb.
[501] *See* Preston Avery, *The Importance of Music Genres*, IRON SKULLET (Feb. 28, 2018), https://ironskullet.com/2018/02/28/the-importance-of-music-genres/.
[502] *See supra* Part V.
[503] *See* Paul Resnikoff, *The Music Industry Has 99 Problems. And They Are….*, DIGITAL MUSIC NEWS (July 22, 2016), https://www.digitalmusicnews.com/2016/07/22/music-industry-99-problems-2/.
[504] *See* Alex Colangelo, *Copyright Infringement in the Internet Era: The Challenge of MP3s*, 39 ALBERTA L. REV. 891, 891 (2002).
[505] *See supra* Part V.
[506] *See* Santiago, *supra* note 173, at 301–02.
[507] *See* Colangelo, *supra* note 504, at 892.
[508] *See* Chris Richards, *Our Access to Music is Unprecedented. Why Does it Stress Us Out So Much?*, WASH. POST (Mar. 9, 2018), https://www.washingtonpost.com/lifestyle/style/our-access-to-music-is-unprecedented-why-does-it-stress-us-out-so-much/2018/03/07/a00686e6-174a-11e8-b681-2d4d462a1921story.html.

conscious or subconscious interaction with music.[509] When these elements belong to specific musical genres, there is even more ambiguity as to whether copyright infringement, rather than creative inspiration, truly occurred.[510] A substantial similarity test tailored to specific musical genres would preserve the fine balance between artistic inspiration and theft against the wave of the digital revolution.[511]

Until the Supreme Court adopts a new framework for substantial similarity tests, U.S. copyright law will fail to reconcile the rapid changes brought on by the digital age with the need to promote creativity.[512] Such continued conflict will send the music industry in a dangerous direction.[513] Music embodies the age-old tension between the old and the new, and represents the juxtaposition between the familiar and the unfamiliar.[514] Without the old, the music industry does not have a canvas for the development of new styles under the influence of preexisting ones.[515] Without the new, the music industry cannot evolve.[516] Both are necessary to sustain a successful future.[517] The most important issue is finding a meaningful way to balance the two.[518]

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[509] *Cf.* Pavle Marinkovic, *Your Subconscious Is Being Bewitched by Music and You Don't Even Know It*, MEDIUM (Nov. 1, 2020), https://medium.com/behavior-design/your-subconscious-is-being-hijacked-by-music-and-you-dont-even-know-it-712a6f33da0.
[510] *See* Katie King, *Creative Inspiration or Copyright Infringement: The "Blurred Lines,"* CAMPBELL L. OBSERVER, (Dec. 20, 2016), http://campbelllawobserver.com/creative-inspiration-or-copyright-infringement-the-blurred-lines/.
[511] *See supra* Part V.
[512] *See id.*
[513] *See* Rawiya Kameir, *Four Industry Experts Explain What's Wrong With Current Copyright Laws*, FADER (June 19, 2015), https://www.thefader.com/2015/06/19/music-copyright-laws-robin-thicke-marvin-gaye.
[514] *See* MICHAEL CHERLIN, SCHOENBERG'S MUSICAL IMAGINATION 65 (Arnold Whittall ed., 2007) (according to the famed pianist Arnold Schoenberg, "Two impulses struggle with each other within man: the demand for repetition of pleasant stimuli, and the opposing desire for variety, for change, for a new stimulus."); FORNEY ET AL., *supra* note 85, at 301, 315 (noting Schoenberg was a prominent figure in the expressionist movement and introduced the twelve-tone technique, which is a method of composing music by using the twelve chromatic pitches).
[515] *See, e.g.*, Imogen Tilden, *What Pop Music Owes to the Classical Masters*, GUARDIAN (Jan. 24, 2013, 1:54 PM), https://www.theguardian.com/music/2013/jan/24/what-pop-music-owes-classical-masters (explaining that Adele's songs owe everything to Schubert and sampling wouldn't exist without Dvorák).
[516] *See* Alice Orszulok, *The evolution of music*, SCI. ILLUSTRATED (June 20, 2012), https://scienceillustrated.com.au/blog/culture/the-evolution-of-music/.
[517] *See* Benjamin Klement, *How Are New Music Genres Born?*, MEDIUM (Mar. 31, 2019), https://medium.com/@klementb/how-are-new-music-genres-born-1d62dee9a019.
[518] *See* Jacob Moore, *What's Next in Music? Everything.*, COMPLEX (Dec. 6, 2019), https://www.complex.com/pigeons-and-planes/2019/12/whats-next-in-music-everything.

Though the balance may be difficult to attain, it is one that the industry must continually strive towards.[519] After all, music requires perfect harmony.[520]

[519] *See* Adam Aziz, *10 Ways The Music Industry Will Change in 10 Years*, VIBE (Mar. 29, 2019, 2:45 PM), https://www.vibe.com/photos/10-ways-music-industry-changes-10-years.
[520] *See* Michael F. Page, *Perfect Harmony: A Mathematical Analysis of Four Historical Tunings*, 116 J. ACOUSTICAL SOC'Y AM. 2416, 2416 (2004).

Name, Gamertag, Image, & Likeness:

Compensating Collegiate Esports Players Post-*Alston*

*Layla G. Maurer**

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INTRODUCTION

The crack of a bat, the roar of the crowd; thousands of fans on their feet as the star quarterback throws a Hail Mary; the surprise slam dunk; the goalie who blocks an impossible shot. The thrill of witnessing a pivotal moment is something every fan, of any sport, has felt coursing through their veins. We, as a society, value that thrill extremely highly: according to a recent Business Research Company report, the global sports market (including player salaries, merchandising, ticket sales, televised events, and more) was projected to hit $440.77 billion in 2021.[1] It is slated to reach $599.9 billion by 2025.[2] That value is created not just by the games themselves, but by their players.

Fans of the games, through viewership and word of mouth, assign star players celebrity status like they would any popular actor, singer, or model;[3] those players demonstrate the "personal effort, achievement, toughness, and strength"[4] that American culture extols. The industry rewards these celebrities with substantially higher salaries, advertising contracts, sponsorships, and other perks.[5] However, recognizing that the players themselves ought to have some say in how their names, images, and likenesses (NILs) were used commercially, professional sports leagues[6] – and some states[7] – have codified that right as a "right of publicity"

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[1] *Global Sports Market Report (2021 to 2030) – COVID-19 Impact and Recovery*, GLOBENEWSWIRE (Mar. 18, 2021, 09:13 ET), https://www.globenewswire.com/news-release/2021/03/18/2195540/28124/en/Global-Sports-Market-Report-2021-to-2030-COVID-19-Impact-and-Recovery.html (citing THE BUSINESS RESEARCH COMPANY, SPORTS GLOBAL MARKET REPORT 2021: COVID-19 IMPACT AND RECOVERY TO 2030 (2021)).

[2] *Id.*

[3] BARRY SMART, THE SPORT STAR: MODERN SPORT AND THE CULTURAL ECONOMY OF SPORTING CELEBRITY, 13-14 (2005) (explaining that cultural appeal similar to Hollywood film heroes and increased media visibility have contributed to society's making celebrities out of sports stars).

[4] *Id.* at 38.

[5] *See, e.g.*, *id.* at 75 (listing sources of income for sports celebrities, including increased salaries, advertising contracts, and corporate sponsorships).

[6] Irwin Raij, *Murphy and Athletes' Publicity Rights*, O'MELVENY (Oct. 31, 2018), https://www.omm.com/resources/alerts-and-publications/alerts/murphy-and-athletes-publicity-rights/ (referencing O'Bannon v. Nat'l Collegiate Athletic Ass'n , 802 F.3d 1049, 1052 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016); Davis v. Elec. Arts, Inc., 775 F.3d 1171, 1175 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1448 (2016), ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 918-19 (6th Cir. 2003); and O'Brien v. Pabst Sales, 124 F.2d 167 (5th Cir. 1941)).

[7] *Id.* ("Many states have codified a right to publicity through state statutes and common law. For example, in Indiana, one of the states affording some of the broadest protections to publicity rights, a person may

identical to that found in intellectual property law.[8] The right of publicity prevents companies from "appropriating players' likenesses and information without a license for commercial gain"[9] and "afford an individual with the exclusive right to control the commercial use of his or her photograph, name, likeness, and other personal characteristics."[10]

This right of publicity thus both protects celebrities from unwanted use of their NIL and enables them to selectively profit from the licensed use of the same. However, until very recently, only professional sports players were entitled to these benefits. The National Collegiate Athletics Association (NCAA) formerly prohibited outside pay for any use of athletic skill (directly or indirectly)[11] and stated that individuals who violated this prohibition could lose their amateur status.[12] Schools took the NCAA's prohibition very seriously: in fact, in 2017, a former varsity football player for the University of Central Florida lost his scholarship after the university discovered that he was simultaneously running a YouTube channel.[13]

In June of 2021, the Supreme Court issued a "narrow but potentially transformative ruling"[14] that already has, and will continue to, significantly alter the amateur athletics landscape.[15] In *NCAA v. Alston*,[16] the Court applied a "rule of reason" analysis in determining that the NCAA's existing limitations on student athletes' salaries were unreasonable in light of NCAA member institutions' "ability to restrain student-athlete compensation without risking [the

not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred years following the personality's death without having obtained prior consent.").

[8] For a definition of the right of publicity in trademark, *see Right of Publicity*, INT'L TRADEMARK ASS'N, https://www.inta.org/topics/right-of-publicity/ (last visited Oct. 5, 2021).

[9] Raij, *supra* note 6.

[10] Raij, *supra* note 6.

[11] 2017-18 NCAA Division I Manual, §§ 12.1.2, 12.1.2(a) (eff. Aug. 1, 2017).

[12] *Id.*

[13] *See* Donald De La Haye (@Deestroying), *I Lost My Full D1 Scholarship Because of My YouTube Channel*, YOUTUBE (July 31, 2017), https://youtu.be/Fh69-X6X55w.

[14] Nina Totenberg, *The Supreme Court Sides with NCAA Athletes In A Narrow Ruling*, NPR (June 21, 2021, 5:45 PM), https://www.npr.org/2021/06/21/1000310043/the-supreme-court-sides-with-ncaa-athletes-in-a-narrow-ruling.

[15] *Id.*

[16] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

institutions'] hold on the market."[17] Using antitrust reasoning and rejecting the NCAA's argument that its amateur market justified specific rules limiting that compensation,[18] the Court effectively indicated student athletes could – and should properly – profit for their performance in the same or similar fashion as professionals.

The *Alston* ruling did not directly secure student athletes' ability to profit from or limit the use of their NIL; however, less than ten days after the ruling, the NCAA announced an interim policy allowing exactly that.[19] The interim policy allows student athletes to "engage in NIL activities that are consistent with the law of the state where the school is located."[20] If a school is located within a state with no NIL laws, the policy indicates that the student can engage "without violating NCAA rules related to name, image and likeness."[21] Further, students may use a "professional services provider" for NIL activities.[22]

The interim policy opened a broad span of opportunities for collegiate athletes to enjoy the same benefits as their professional counterparts, within reason: the policy does not allow colleges to institute pay-for-play or provide "improper inducements" to attend a particular school.[23] This policy will remain in place until new federal legislation is passed that will, according to the NCAA, better "support" student athletes.[24]

The NCAA policy change was a significant step towards appropriate compensation for student athletes who embody the same, or similar, celebrity characteristics as their colleagues in the pro leagues. However, neither the policy nor the NCAA touched on one of the larger and more burgeoning areas of competitive play in the collegiate environment: Esports.

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[17] TaRonda Randall, *NCAA v. Alston Case: Supreme Court Strikes Down NCAA Rules Restricting Benefits to Student-Athletes*, HIGHER ED. L. REP. (June 30, 2021), https://www.bsk.com/higher-education-law-report/ncaa-v-alston-case.
[18] *See* Alston, 141 S. Ct. at 2163, 2166.
[19] Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA.ORG (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* (quoting Division I Board of Directors Chair Denise Trauth, president at Texas State).

Esports (also written as "esports," "e-sports," or "e-Sports") is the colloquial term for "electronic sports;" simply put, Esports are "video games that are played in a highly organized competitive environment."[25] Esports is experiencing a major viewership boom, one so significant that "almost every major popular video game on the market currently has some type of pseudo-professional circuit."[26] Universities and their students are feeling that boom, so much so that colleges are striving to create and support competitive student-manned Esports teams,[27] and reaching beyond their immediate surroundings for management of tournaments and major prize allocations.[28]

This paper will argue that collegiate Esports teams and players, despite not being part of the NCAA, are as much "athletes" as their traditional sports counterparts. As such, Esports teams and players should be provided appropriately competitive compensation packages and the option to benefit from or prevent use of their NIL in a similar manner as their traditional sports counterparts – if not more extensively, due to the Esports's unique qualities and professional opportunities. In Part I, this paper will describe NIL and clarify NIL rights for collegiate athletes, then suggest that NIL be expanded to include "gamertags," the monikers chosen by gamers to represent themselves in digital space.[29] In Part II, this paper will compare the NCAA and NACE (the National Association of Collegiate Esports)[30] and discuss the NCAA's interest, or lack of interest, in Esports generally. In Part III, this paper will explain the significance of the

[25] Marc Leroux-Parra, *Esports Part I: What are Esports?*, HARV. INT'L REV. (Apr. 24, 2020, 6:28 PM), https://hir.harvard.edu/esports-part-1-what-are-esports//.
[26] *Id.*
[27] *See, e.g.*, Bryan Wirtz, *College Varsity Esports Programs on The Rise: How Gaming is Changing College for Gamers*, GAMEDESIGNING.ORG (Oct. 15, 2021), https://www.gamedesigning.org/schools/varsity-esports/; *The 10 Best Colleges for Gamers & Esports Scholarships*, COLLEGE GAZETTE (Apr. 29, 2021), https://collegegazette.com/best-colleges-for-gamers-esports-scholarships/ (illustrating that colleges are now competing to offer the most attractive Esports programs and scholarships).
[28] *See* Part II *infra* for a discussion of external tournament and prize offerings for collegiate Esports players.
[29] TheScore Esports, *What is a Gamertag? The Strange Evolution of Gamers' Chosen Identities*, YOUTUBE (Feb. 24, 2019), https://youtu.be/Aw1gWoV1AAE (discussing that a gamertag is an alias, handle, or nickname that is a "staple" of Esports that has become a "defining trademark" for some of its biggest stars).
[30] *What is NACE?*, NAT'L ASSOC. COLLEGIATE ESPORTS, https://nacesports.org/about/ (last visited Oct. 5, 2021) [hereinafter NACE].

Esports industry globally and at the college level, and describe the potential for "professional" gaming even during college. In Part IV this paper will discuss the similarities and differences between career opportunities for professional athletes and professional gamers, and emphasize the need to codify and protect gamers' NIL rights equally to, or even above, athletes' rights because of those opportunities. Finally, this paper will conclude that colleges and universities stand to benefit significantly from affording their Esports players the same financial considerations as their traditional athletes, and suggest either that the Lanham Act be amended to include gamertag-specific exceptions to trademark registration requirements or, more likely, that existing state laws concerning NIL be amended to (1) include gamertags and (2) not place limitations on profit earned by either student athletes or student-gamers.

PART I: IT'S IN THE GAMERTAG

The *Alston* holding and resulting NCAA policy shift were long overdue. NIL rights are inexorably, fundamentally linked to a player's prowess and popularity, two qualities which benefit the player's home institution as well as the player individually (and which both traditional sports players and Esports gamers share). Collegiate athletes' popularity is not limited to fan bases on campus, sometimes reaching as far beyond the schools as professional athletes. Many colleges recognize the value of that popularity as it relates to the students' rights to profit from it: for the past several years, some colleges have been fighting for – and directly offering, in some cases – NIL rights for their traditional student athletes.[31]

Some other institutions have been misguidedly struggling against NIL rights[32] based on "doomsday" scenarios (i.e., NIL would "disillusion a public in love with 'amateurism,' poison team chemistry, tank smaller schools' competitiveness, and leave obscure athletes and minor sports unfunded while a handful of NFL-bound stars in power conferences commandeered

[31] *See, e.g.*, Brendan Coffey, *NIL Money Already a Recruiting Tool at UNC, Other Power 5 Schools*, SPORTICO (Sept. 10, 2020, 7:02 AM), https://www.sportico.com/business/finance/2020/athlete-nil-cash-recruiting-tool-at-chapel-hill-other-power-5-schools-1234612896/.
[32] *See e.g.*, *Big Ten Statement Regarding NCAA Announcement on NIL*, BIGTEN.ORG (Oct. 31, 2019), https://bigten.org/sports/2019/10/31/GEN_1031195710.aspx [hereinafter Big Ten 2019].

megadeals").[33] Those fears have proven to be unfounded: in the few months since the *Alston* decision, the Big Ten (which previously stated that it had misgivings about allowing NIL)[34] formally changed its messaging and is now expressing deep support for NIL rights.[35] Just recently, after a four-month period of allowing student-athletes to be compensated for NIL without penalty, the NCAA has officially drafted a new constitution that acknowledges collegiate athletes' NIL rights.[36] The draft of the new constitution "[e]mbraces name, image and likeness benefits for student-athletes while prohibiting pay-for-play."[37]

The opposite of NIL naysayers' doomsday scenarios is proving true: the public is receiving the new NCAA constitutional language favorably, and even less-notable institutions are meriting large sponsorship contracts as a result of the relaxed NIL policy.[38] The likely reason for this is that U.S. college sports are "almost level with professional sports,"[39] generating billions of dollars of revenue (and compensating collegiate coaches to the tune of millions of

[33] Sally Jenkins, *Those NCAA Doomsday Scenarios About NIL? Instead, it's Proven to be a Cleanser*, WASH. POST (Sept. 3, 2021, 4:00 AM), https://www.washingtonpost.com/sports/2021/09/03/college-athletics-nil-ncaa-endorsements/.

[34] The Big Ten released a statement in 2019 indicating that "[w]e believe that our students who participate in intercollegiate athletics are students, not employees. We also believe that our students who participate in intercollegiate athletics are not professional athletes, that they are not paid to play their sports and that any payment for name, image or likeness cannot be used as a substitute for compensation related to athletic performance or participation. We also believe that whatever rules are adopted in this area, in order to allow for a national system of recruiting, competition and fair play, must apply nationally. Our collegiate model cannot be sustained if the rules are applied on a state-by-state basis." Big Ten 2019, *supra* note 32.

[35] The Big Ten responded positively to the *Alston* ruling in June 2021 and subsequent NCAA change to its policies. *See Big Ten Conference Statement on Monday's Supreme Court Ruling*, BIGTEN.ORG (June 22, 2021), https://bigten.org/news/2021/6/22/general-big-ten-conference-statement-on-mondays-supreme-court-ruling.aspx [hereinafter Big Ten 2021] ("The Big Ten Conference strongly supports NCAA NIL rules that protect student-athletes without putting them in the untenable position of risking their NCAA eligibility by exercising the rights soon to be afforded to them under state law.").

[36] Joshua Bloomgarden, *NCAA Drafts New Constitution Acknowledging Student-Athletes' NIL Rights*, JD SUPRA (Nov. 12, 2021), https://www.jdsupra.com/legalnews/ncaa-drafts-new-constitution-4302857/.

[37] Letter from Robert M. Gates, NCAA Constitution Committee Chair, to NCAA Membership, Nov. 8, 2021.

[38] *See id.*; Jenkins, *supra* note 33.

[39] Felix Richter, *U.S. College Sports are a Billion-Dollar Game*, STATISTA (July 2, 2021), https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/.

dollars a year),[40] creating a fandom-based economy that benefits institution and player alike. The same is true of collegiate Esports.[41]

College fandom is, however, unique from professional fandom in that most fans begin as colleagues (classmates) and co-competitors in the same games. Collegiate Esports fandom echoes this model where fans begin as colleagues to an extent, but reaches farther into the professional sphere due to the potential for "professional" status to be assigned or earned during the students' college years. The extent to which Esports players are afforded career and professional opportunities is discussed in more depth in Parts III and IV of this paper; for the purposes of this section, it is worthwhile to note that Esports players' fame, and careers, are largely linked not to their names (or, in some cases, likenesses) but rather to their gamertags.[42]

A gamertag is a gamer's or streamer's self-chosen moniker, one identifying them to the rest of the digital community and representing their gaming persona.[43] A modern gamertag "should represent you, speak to your audience, [and] should be memorable and somewhat creative."[44] Depending on the style of gameplay (organized/professional league versus individual gamer/streamer), Esports fans may be more familiar with a player's chosen gamertag than that player's physical appearance. Indeed, in the organized/pro space, where the focus is on streamed team play, players' faces will likely not appear at all until the end-of-match celebratory or commiserative/conciliatory scene. Professional leagues themselves advertise their rosters with gamertags, as opposed to given names.[45] Collegiate Esports recruiting and awarding of scholarships is based both upon candidates' submitting a recruitment form, and upon coaches' monitoring major tournaments[46] – for which coaches record and consult statistics by gamertag.

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[40] *Id.*
[41] For a discussion of the particulars of the finances behind the Esports industry, *see* Part II *infra*.
[42] *See* Hacket et al., *supra* note 29.
[43] *See* Harry Thompson, *How to Create a Good Gamertag or Stream Name*, THE NERD STASH (July 14, 2020), https://thenerdstash.com/how-to-create-a-good-gamertag-or-stream-name/.
[44] *Id.*
[45] *See, e.g.*, *Official LCS Rosters 2021*, ESPORTS ONE (Dec. 4, 2020), https://esportsone.com/blog/official-lcs-rosters-2021/ (listing rosters including players' gamertags alone).
[46] *Complete Guide to Esports Scholarships*, NCSA (NEXT COLLEGE STUDENT ATHLETE), https://www.ncsasports.org/college-esports-scholarships (last visited Nov. 22, 2021).

Gamertag statistics are broadly available online for anyone looking to rank a specific player.[47] The gamertag is, in essence, a representation of "you" as a player, including your skill and worth as a potential recruit, and thus ought to be a compensable and protectable trait.

An Esports player's gamertag is associated with the notoriety and fame they have achieved through gameplay, in parallel to traditional sports players' names. This, coupled with the fact that pro and nonprofit organizations for Esports players are embracing NIL rights, insinuates that "NIL" should be more properly expanded to "NGIL" (name, gamertag, image, & likeness) or "NIL/GIL" (name, image, & likeness/gamertag, image, & likeness). For the remainder of this paper, these rights will be referred to as "NGIL" (name, gamertag, image, & likeness), to properly encompass the rights that ought to be afforded to Esports players.

PART II: ACHIEVEMENT UNLOCKED?

The NCAA may have finally decided to extend NGIL rights to its student-athletes, but it has failed to take Esports players under its wing despite their indications they were interested in the enterprise as far back as 2017.[48] However, because the principle behind fair compensation for athletes applies directly to collegiate Esports leagues (whether or not the NCAA has oversight of those leagues), the NACE and comparable organizations are filling in the gaps in that oversight – including creating opportunities for gamers and allowing gamers to profit from their NGIL.

[47] *See, e.g.*, *GB Rank Leaderboard*, GAMEBATTLES, https://gamebattles.majorleaguegaming.com/leaderboards/gb-rank (last visited Nov. 22, 2021). Similar leaderboards exist on a per-game basis; for example, the author is ranked, at the time of writing this paper, in the top 25% of *Hearthstone Battlegrounds* players.

[48] *See* Chris Radford, *Intersport to Help NCAA Research Esports*, NCAA (Nov. 30, 2017, 4:15 PM), http://www.ncaa.org/about/resources/media-center/news/intersport-help-ncaa-research-esports (referencing Intersport (i.e., Kurt Melcher, discussed *infra* notes 48 and 70)); *see also* Kieran Darcy, *College Esports is the Next Big Thing in Varsity Athletics*, ESPN (Oct. 23, 2017), http://www.espn.com/college-sports/story/_/id/21113602/thenext-big-thing-collegiate-athletics-esports.

Why did the NCAA "whiff"[49] on the Esports market? The board's poorly-thought-out 2019 decision not to include Esports hinged on two factors: (1) video games are predominantly played by males and (2) the "violent nature" of some games is not in line with the NCAA's image.[50] Further, Intersport, the task force responsible for investigating the NCAA decision whether to take Esports under its wing (and which recommended the NCAA do so), believed that the NCAA's reservations stemmed from the inability to "get past the fact that gamers might . . . have a personal brand already built in their streaming following, and could easily have a sponsorship deal in place with a vendor prior to accepting an NCAA scholarship."[51] Intersport also believed that the "amateurism definition was not something [the NCAA] was ready to change in order to accommodate the esports athletes."[52]

The NCAA has since adapted its view regarding amateurism, and its objections around "personal branding" are ill-conceived: branding only serves to reinforce the popularity and earning potential of an Esports team. Regarding the ratio of male gamers to female or nonbinary players in collegiate leagues, the NCAA missed the fact that, as of 2019, female gamers constituted 46% of the total U.S. gaming population.[53] Included in that contingent are female-identifying streamers, who have created successful careers from viewership and sponsorship[54] – the precise elements needed for profitable use of NGIL rights. The NCAA mistakenly discounted the possibility that the next few years would see a large uptick in Esports leagues' non-male-identifying memberships, and also did not foresee that collegiate Esports leaguers could (and would) become as famous and well-loved as their traditional sports counterparts. The last concern, that of violence in video games, can be easily addressed by internal policies: if the

[49] Ellen Zavian, *The NCAA Whiffed on Esports. It's Paying a Price but Can Still Learn a Lesson*, WASH. POST (Aug. 6, 2020), https://www.washingtonpost.com/video-games/esports/2020/08/06/ncaa-whiffed-esports-its-paying-price-can-still-learn-lesson/.
[50] *Id.*
[51] *Id.*, quoting Kurt Melcher, now Executive Director of Esports for Intersport and formerly of Robert Morris University. *See infra* note 70.
[52] *Id.*
[53] *The Rise of Female Gamers: Esports' Underappreciated Fans*, TEKNOS ASSOC., https://www.teknosassociates.com/the-rise-of-female-gamers-esports-underappreciated-fans/ (last visited Nov. 20, 2021).
[54] *Id.*

NCAA wished to forbid students from competing in games labeled as "M" (for Mature) by the ESRB,[55] or even forbidding specific types of violence, the NCAA as a private, non-governmental entity could choose not to sponsor training and competition for those titles.

It may have been a stroke of luck that the NCAA did not absorb Esports, as NACE's scholarship opportunities are not, and have never been, dependent upon a definition of "amateurism" that would limit professional growth. Instead, NACE embraces an "amateur" mindset that gives its players direct access to tournaments leading to professional recruitment. NACE is in active partnership with CSL Esports, Nerd Street Gamers, and Mainline[56] to promote recruitment and retention of students for its newest venture, "NACE Starleague."[57] This competition will afford students more and better opportunities to compete at high levels, and will offer prize money. It will also train students more thoroughly in tournament preparation and participation, skills that will benefit them directly in their private competitive lives.

CSL Esports and Nerd Street Gamers are, respectively, organizations that either provide "turnkey solutions"[58] in Esports or manage tournaments for youth and collegiate Esports players.[59] In Nerd Street's case, the goal is to make gaming accessible to more players, and to provide them opportunities within the space.[60] Together, through ventures like Starleague, the companies offer competitive prize pools to winning teams and individuals in the collegiate

[55] The Entertainment Software Rating Board (ESRB) utilizes the tools created by the International Age Rating Coalition (IARC) to denote the preferred market for any particular piece of gaming software. *See Ratings Process*, ESRB.ORG, https://www.esrb.org/ratings/ratings-process/ (last visited Nov. 22, 2021). The categories range from "E" for "Everyone" to "AO" for "Adult Only," with "M" meaning "Mature" audiences. *Rating Categories*, ESRB.ORG, https://www.esrb.org/ratings-guide/ (last visited Nov. 22, 2021).

[56] Mainline provides "turnkey" equipment and support for Esports tournaments. *See Get to Know Us*, MAINLINE, https://mainline.gg/about/ (last visited Nov. 18, 2021).

[57] *NACE Starleague: Introduction*, CSL ESPORTS, https://cslesports.com/nace-starleague-faq/ (last visited Nov. 19, 2021).

[58] *Who We Are*, CSL ESPORTS, https://cslesports.com/#who (last visited Nov. 19, 2021).

[59] *See About: Nerd Street*, LINKEDIN, https://www.linkedin.com/company/nerdstreet/ (last visited Nov. 22, 2021) ("Nerd Street Gamers (Nerd Street) is a national network of esports facilities (Localhost) and events dedicated to powering competitive opportunities for gamers. The company promotes greater access to the esports industry, laying a national framework for esports talent development and high-quality gaming tournaments.").

[60] *See, e.g.*, Nick Fiorellini, *Business for Good: Nerd Street Gamers*, THE PHILADELPHIA CITIZEN (Mar. 24, 2021), https://thephiladelphiacitizen.org/nerd-street-gamers/.

Esports world.[61] These organizations have been able to grow and thrive in the collegiate space because, unlike NCAA programs, "esports leagues are more flexible since there are no rules against players working or having sponsors outside the university's league. Many players . . . receive money through donations, advertisement revenue, subscriptions and sponsors. Players frequently enter into tournaments where they can make thousands of dollars in prize money."[62]

Despite the NCAA's mistaken concerns regarding Esports, the associations that filled its place (particularly NACE[63]) have handily filled the gap left by the NCAA's refusal to adopt Esports. The NACE and other organizations are offering highly competitive opportunities and, even prior to *Alston*, were giving their players NGIL rights as much as possible under state laws.[64] NACE rules permit Esports participants to "license their [NGIL] rights and to exclude any prize or award money earned from third-party competition from grant-in-aid limits."[65] A "grant-in-aid" is a government financial subsidy for research, educational, or cultural purposes;[66] in other words, a government-granted scholarship. The NACE rules provide that competitors may earn more than the government limit would otherwise allow, which is reasonable and sensible given the nature of Esports, its broad visibility, and its wide potential for income earned outside of college leagues and competitions.

Colleges can also take steps in formalizing internal policies surrounding their players' abilities to profit from NGIL. The stage is set for NGIL rights to be available equally to Esports leaguers as well as NCAA players. The question now is to what extent existing policy, state law,

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[61] Adam Fitch, *CSL Esports Secure New Partners to Grow NACE Starleague*, DEXERTO (Oct. 21, 2021), https://www.dexerto.com/esports/csl-esports-announce-five-new-partners-to-benefit-nace-starleague-student-athletes-1680595/.
[62] Karissa Tirinzoni & Ryan Berezansky, *Esports in Higher Education: Key Considerations for Starting a Program at Your College or University*, BAKERTILLY (May 10, 2021), https://www.bakertilly.com/insights/esports-in-higher-education-key-considerations
[63] NACE, *supra* note 30.
[64] Ling Kong & Jesse Rubinstein, *Recruitment, Revenue, & Risks: Navigating Intercollegiate Esports*, JD SUPRA (Nov. 2, 2020), https://www.jdsupra.com/legalnews/recruitment-revenue-and-risks-55667/.
[65] *Id.*
[66] *Grant-in-Aid*, DICTIONARY.COM, https://www.dictionary.com/browse/grant-in-aid (last visited Nov. 19, 2021).

or internal contractual limitations may hinder this effort; proposed changes to state and federal laws and policies are discussed briefly in the conclusion of this paper.

PART III: HUGE SUCCESS: ESPORTS AS A HARD-HITTING ECONOMIC FORCE

Is there really enough economic opportunity to justify allowing Esports gamers to profit off of their gamertags? Yes, without question. Esports is still a relatively new industry, but is far enough past its infancy that it has become a major player in the sports and entertainment business generally. While the Esports model "isn't as mature" as traditional sports,[67] its audience is "growing astronomically"[68] and, as a result, Esports players at all skill levels are seeing their earning potential rise through the roof.

Esports earnings may shock those unfamiliar with the term or the industry. In 2022, the projected number of Esports viewers per month is 29 million globally;[69] this figure is up 11.5% from 2021.[70] Investments in the Esports industry rose from just $490 million in 2017 to a staggering $4.5 billion in 2018, a growth of 837%.[71] Professional-level Esports teams and leagues are valued as highly as $410 million (for Team SoloMid (TSM), owned by Andy Dinh b/k/a @Reginald).[72] The global Esports ecosystem is projected to hit $1.8 billion in revenue in 2022,[73] with the majority of revenue coming from sponsorships and advertising.[74] The industry is absolutely booming, and colleges are taking advantage of the skyrocketing interest in competitive play.

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[67] Brandon Byrne, *How Esports Can Save Colleges*, TECHCRUNCH (Nov. 16, 2020), https://techcrunch.com/2020/11/16/how-esports-can-save-colleges/.
[68] *Id.*
[69] *Esports Ecosystem 2021: The Key Industry Companies & Trends Growing the Esports Market*, INSIDER INTELLIGENCE (Aug. 3, 2021), https://www.insiderintelligence.com/insights/esports-ecosystem-market-report/.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

Although competitive, paid video gaming has existed since at least the first Nintendo World Championship of 1990,[75] the birth of modern collegiate Esports teams took place in 2014. That year, Kurt Melcher, an associate athletics director at Robert Morris University in Illinois,[76] announced a "scholarship-sponsored *League of Legends* team"[77] at the school after noticing the potential benefits that coordinated play could bring to his students. *League of Legends* ("LOL")[78] is a multiplayer online battle arena (MOBA)[79] game created by Riot Games, Inc.[80] Esports teams and leagues began springing up across the United States like wildfire in the years following the Robert Morris University team's creation, and colleges and universities are now supporting (a) varsity, (b) "club" teams, and (c) privately formed, student-run recreational teams.[81]

Professional/nonprofit associations centered on Esports leagues began to form shortly after the creation of multitudes of college-level competitive teams and leagues in the years between 2014-19. Currently, there are 175 colleges and universities participating in the largest

[75] The Nintendo World Championship of 1990 involved a timed challenge where players would compete to collect coins in *Super Mario Bros. 3*, finish a race in *Rad Racer*, and finally score as many points as possible within the time limit in *Tetris*. The Championship toured 29 cities, eventually culminating in a final round held at Universal Studios, Hollywood. *See* Luke Winkie, *The Nintendo World Championships: A History*, OTIS (May 10, 2021), https://www.withotis.com/mag/the-nintendo-world-championships-a-history.

[76] *See* David A. Moreno, Jr. & Alvin Benjamin Carter III, *Will the NCAA's NIL Ruling Impact Collegiate Esports?*¸SPORTS LITIG. ALERT (Oct. 8, 2021), https://sportslitigationalert.com/will-the-ncaas-nil-ruling-impact-collegiate-esports/ ("In 2014, Kurt Melcher, an associate athletics director at Robert Morris University, called up an executive at Riot Games . . . the reason? He was laying plans to form the first collegiate esports team.").

[77] Sean Morrison, *List of Varsity Esports Programs Spans North America*, ESPN (Mar. 15, 2018), https://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america.

[78] LOL was released in 2009. It is now the "most-played PC game in the world and a key driver of the explosive growth of esports." *Our Story*, RIOT GAMES, https://riotgames.com/en/who-we-are (last visited Nov. 10, 2021).

[79] "MOBA" refers to a genre of online real-time strategy video games in which two teams of characters compete head-to-head with the goals of protecting their home base and destroying the towers, turrets, or other structures of the opposing team's stronghold. *MOBA*, DICTIONARY.COM, https://www.dictionary.com/browse/moba (last visited Nov. 20, 2021).

[80] Riot Games, *supra* note 78.

[81] *See* Thomas A. Baker III & John T. Holden, *College Esports: A Model for NCAA Reform*, 70(1) S. C. L. REV. 55, 64 (2018).

organization, the NACE,[82] a nonprofit organization dedicated to advancing collegiate Esports in the varsity space.[83] The NACE also works to promote competition and scholarships at its member schools.[84]

In addition to the NACE, there are numerous other collegiate Esports leagues and nonprofit associations in the United States. Those include: the American Collegiate Esports League (ACEL), born from the Eastern Esports Conference (EEC);[85] "Esports Collegiate," which was founded in 2020 and currently holds teams from 12 founding universities;[86] the National Esports Association (NEA), which is focused upon "esports education and engagement;"[87] the North American Collegiate League (NACL), which hosts and streams tournaments and league play for collegiate esports athletes;[88] and the Esports news site "Esports.gg" which purports to "create news and analysis for all gamers, esports fans and streaming enthusiasts."[89] Interestingly, sites like Esports.gg base their content on "expert" analysis and insights (i.e., commentary from well-known Esports players)[90] – inferring that those experts play a similar role in Esports fandom to popular traditional sports athletes, pundits, and broadcasters.

The Esports boom has been largely unnoticed or discarded by fans of traditional sports, though a rather interesting 2018 statistical study by FanAI indicates that basketball (specifically, the NBA, rather than collegiate basketball) has more than double the fans in common with Esports than any other traditional league.[91] Regardless of this chasm of attention, studies suggest

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[82] *List of Colleges with Varsity Esports Programs*, NEXT COLLEGE STUDENT ATHLETE (NCSA), https://www.ncsasports.org/college-esports-scholarships/varsity-esports (last visited Oct. 5, 2021).
[83] NACE, *supra* note 30.
[84] *Id.*
[85] *About*, AM. COLLEGIATE ESPORTS LEAGUE, https://acelesports.org/about# (last visited Nov. 10, 2021).
[86] *FAQs*, ESPORTS COLLEGIATE, https://esports-collegiate.com/f/faqs (last visited Nov. 12, 2021).
[87] *About the National Esports Association*, NAT'L ESPORTS ASS'N, https://nea.gg/about (last visited Nov. 12, 2021).
[88] *About Us*, NORTH AM. COLLEGIATE LEAGUE, https://playnacl.com/about-us (last visited Nov. 13, 2021).
[89] *About Us*, ESPORTS.GG, https://esports.gg/about-us (last visited Nov. 13, 2021).
[90] *Id.*
[91] Chris Pursell, *Comparison of Esports and Traditional Sports Fandoms*, ESPORTSBIZ (Aug. 9, 2018), https://www.esportsbiz.com/comparison-of-esports-and-traditional-sports-fandoms/. The author's

that viewership of traditional sports is declining – especially among "Gen Z" (those born between 1997 and 2012) – amid the Esports surge.[92] This is particularly meaningful for colleges, as many Gen Z members are currently enrolled undergraduates or recently-graduated alumni whose viewership and fandom are invaluable to the college; the eldest of the generation would be 25 at the time of this paper. Gen Z-identifying students may also be high school or middle school aged children looking to enter the college space in the coming years, and for whom Esports are especially relevant.[93]

Melcher was on to something big. Viewers of Esports leagues recognize that players have an immense amount of skill, coordination, and talent that compares to professional sporting organizations, and Esports is based on viewership: players establish their "status, skill, and community through . . . the help of gamer-spectators, the fans. Even amateur players have become gamer celebrities."[94] Thus, Esports allows "all users to be involved in some way, whether watching passively or actively participating within the platform . . . [it] can't exist without its fandom."[95] Esports streamers, those who broadcast and "livestream" their gameplay on video hosting platforms such as Twitch,[96] Discord,[97] and YouTube,[98] are innumerable. Some

suggested reason for the overlap is that basketball, like Esports, is a more active, lively, play-by-play spectator sport than its American football and baseball cohorts.

[92] *See, e.g.*, Alex Silverman, *The Sports Industry's Gen Z Problem*, MORNING CONSULT (Sept. 28, 2020), https://morningconsult.com/2020/09/28/gen-z-poll-sports-fandom/ (providing evidence that Gen Z is statistically less interested in traditional sports viewing than other "adult" generations and more interested in Esports than those same generations, to the tune of 16%).

[93] *See, e.g.*, Mary Ellen Flannery, *Esports See Explosive Growth in U.S. High Schools*, NAT'L ED. ASS'N (Sept. 16, 2021), https://www.nea.org/advocating-for-change/new-from-nea/esports-see-explosive-growth-us-high-schools.

[94] KELLEY STUETZ & JULIA CROUSE WADDELL, ESPORTS FANDOM AND THE COLLEGIATE STUDENT-ATHLETE EXPERIENCE: ACTIVE AUDIENCES AND SPONSORSHIP 241 (2020).

[95] *Id.*

[96] For a discussion of the influence of Twitch streamers, *see* Werner Geyser, *Top 20 Twitch Streamers Every Gamer Should Follow*, INFLUENCER MKTG. HUB (Sept. 21, 2021), https://influencermarketinghub.com/twitch-streamers/.

[97] Discord, a hybrid chat-streaming platform, offers a list of public Esports streaming servers. *Public Esports Discord Servers*, DISCORD.ME, https://discord.me/servers/category/esports (last visited Nov. 21, 2021).

[98] YouTube has been gaining in popularity as a gaming streaming service, and in recent months (as of the date of this paper) has begun offering more competitive tools to Esports streamers in an effort to lure them from Twitch. *See* Connor Bennett, *YouTube Gaming Finally Adding Gifted Subs & Raids as Twitch*

streamers can claim followers numbering in the millions and nearly half a billion views in six months' time.[99] College-aged students can and do earn competitive salaries based on streaming alone;[100] meanwhile, professional Esports teams earn on average $3,000 to $5,000 per player per month[101] and can earn supplemental tournament winnings of up to $40 million for a high-level competition.[102] Platform-owned professional leagues, such as the Overwatch League (OWL)[103] run by Blizzard,[104] recruit "pro" level players via internal competitions that pay handsome winnings and offer career chances as platform-sponsored professional players.[105] This year, the available prize pool for OWL is $1.3 million.[106] Compensating Esports players at the collegiate level, allowing competitive play outside of college leagues, and providing NGIL rights for those players to encourage players to continue in an Esports career is the only logical option, considering their widespread influence and earning potential in the current and forthcoming college-aged generations.

Streamers Move Platforms, DEXERTO (Oct. 29, 2021), https://www.dexerto.com/entertainment/youtube-gaming-finally-adding-gifted-subs-raids-as-twitch-streamers-move-platforms-1687057/.

[99] Twitch streamer Michael "shroud" Grzesiek racked up nearly half a billion views of his content between January and July of 2021. *See* Matt Gardner, *The Top 10 Twitch Streamers and Games of 2021 So Far*, FORBES (July 17, 2021, 8:50 am), https://www.forbes.com/sites/mattgardner1/2021/07/17/here-are-the-top-10-twitch-streamers-and-games-of-2021/?sh=27a4f6ab1b15.

[100] *See, e.g.*, Helena Madden, *Meet the Teenage Gamers Raking in Millions in the High-Stakes World of Esports*, ROBB REPORT (May 2, 2021), https://robbreport.com/lifestyle/sports-leisure/teenage-esports-millionaires-1234608428/ (discussing the examples of Kyle Giersdorf b/k/a @bugha, the now-college-aged top-ranked *Fortnite* player, and Jeremy Wang b/k/a @DisguisedToast, the 20-year-old who, at age 18, made a career streaming Blizzard's *Hearthstone* and Riot Games' *Legends of Runeterra* and *Teamfight Tactics*).

[101] Brian O'Connell, *How Much do eSports Players Make?*, THESTREET (Oct. 15, 2019, updated Feb. 12, 2020, 9:43 AM), https://www.thestreet.com/personal-finance/how-much-do-esports-players-make-15126931.

[102] *Id.* The $10 million competition in question was the Dota 2 International (for "Defense of the Ancients"), and its 2021 prize pool is set at just over $40 million. *See* Göhkan Çakir, *How Much is The International 10's Prize Pool?*, DOT ESPORTS (Oct. 4, 2021), https://dotesports.com/dota-2/news/how-much-is-the-international-10s-prize-pool.

[103] *About the Overwatch League*, OVERWATCHLEAGUE.COM, https://overwatchleague.com/en-us/about (last visited Nov. 2, 2021).

[104] *See Overwatch Esports*, BLIZZARD, https://playoverwatch.com/en-us/esports/ (last visited Nov. 5, 2021).

[105] For a description of "Overwatch Contenders," *see Welcome to Overwatch Contenders*, OVERWATCHLEAGUE.COM, https://overwatchleague.com/en-us/contenders (last visited Nov. 5, 2021).

[106] *Id.*

PART IV: READY TO WORK

There is no immediately obvious major difference between collegiate Esports players and traditional collegiate student-athletes. Both are recruited to college teams from high school and awarded scholarships based on skill; both entertain scouting offers post-college for professional employment in a chosen league. Yet Esports players have vast opportunities available to them outside of the direct college-to-pro-league recruitment pipeline for traditional athletes. Esports players may gain popularity and additional revenue via streaming platforms; they are able to register themselves for outside, independent competitive play through company-run tournaments;[107] and they may entertain and accept offers from professional leagues even before graduation. Esports players may even gain significant attention within a specific game platform and ranking system by working their way up the competitive ladder without ever touching a streaming platform.[108] In this manner, collegiate Esports teams and leagues differ greatly from their NCAA counterparts.

These alternative means of success have not been broadly addressed by colleges and universities beyond the NCAA's misgivings about college players bringing in their own followings and streaming revenues.[109] Whether or not Esports players choose these alternative routes towards earning professional gaming salaries, the fact remains that Esports is indeed an academic pursuit above and beyond traditional sports[110] that affords players new, and competitive, chances at long-term professional employment past their college careers.

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[107] *See* O'Connell, *supra* note 101; *see also* Niels van der Vlugt, *What is the MTG Arena Ranking System and How Does It Work?*, DRAFTSIM (Apr. 22, 2021), https://draftsim.com/mtg-arena-ranking-system/ (describing the *Magic The Gathering: Arena* ranking system and its use in determining "who's eligible to participate in MTG's championship event, the Mythic Invitational.").

[108] For a discussion on why some Esports players do not independently stream, *see* Jimmy Russo, *BenjyFishy and Zayt Discuss Why Some Pro Players Don't Stream*, FORTNITE INTEL (Mar. 26, 2020), https://fortniteintel.com/benjyfishy-and-zayt-discuss-why-some-pro-players-dont-stream/30804/.

[109] *See* Zavian, *supra* note 49.

[110] Bill Shackner, *Still Think it's Not a College Sport? Buckle Up: Esports is Now an Academic Pursuit, Too*, POST-GAZETTE (Oct. 25, 2021), https://www.post-gazette.com/news/education/2021/10/25/esports-West-Virginia-University-WVU-Fortnite-Dota-video-gamers-jobs-students-scholarships-major/stories/202110240214.

Contrarily, some players opt to skip the college experience altogether;[111] professional leagues have been seen recruiting players as young as age 8[112] or 13[113] for competitive play, and middle- and high-school students begin crafting their gamertag-based personae as soon as they join their schools' teams. While this certainly raises questions about child labor and whether gaming before age 18 is "employment,"[114] that debate goes beyond the scope of this paper.

Because vast opportunities exist for gamers beyond the traditional sports pipeline, it is even more critical that state and federal laws surrounding NIL be updated to include language that protects Esports gamers' gamertags. It must also do so from a young enough age that young gamers with enough skill and talent to profit (or, at the very least, allow their parents to profit) from their abilities are able to do so, much the same as child actors would. The "right of publicity" language[115] could be directly applied to gamertag protections.

CONCLUSION: HEY! LISTEN!

Legislators need to be aware of the vibrant and changing Esports space. Esports, like its traditional sports counterparts, inspires deep, almost primordial responses in viewers and fans. Watching the crowd at a LOL World Championship[116] waiting in line, flooding a stadium, and cheering on their favorite players is a sheer adrenaline rush directly comparable to any sporting event drawn to mind. Esports gamers are as, if not more, likely to earn money directly from play

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[111] *See, e.g.*, Alex Andrejev, *An Overwatch Star at 16, Elite Gamer Will Weigh College Offers Against Turning Pro*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/video-games/esports/2019/12/10/an-overwatch-grandmaster-elite-gamer-will-weigh-college-offers-against-turning-pro/.

[112] *See* Joe Tidy, *Fortnite: From Piano Player to Pro Gamer – Aged Just Eight*, BBC NEWS (Mar. 2, 2021), https://www.bbc.com/news/technology-56239242.

[113] Before 2021, the youngest officially signed Esports player was 13 years old. *See* Kevin Breuninger, *This 13-Year-Old is the Youngest Professional 'Fortnite' Gamer*, CNBC (May 8, 2018, 7:53 PM), https://www.cnbc.com/2018/05/08/this-13-year-old-is-the-youngest-professional-fortnite-gamer.html.

[114] *See, e.g.*, Jonathan Stoler, *10 Labor and Employment Considerations in Esports*, SHEPPARD MULLIN: GAME COUNSEL (June 12, 2019), https://www.mygamecounsel.com/2019/06/articles/esports/labor-employment-considerations-esports-athletes/.

[115] *See* Raij, *supra* note 6.

[116] @Fandom Games, *League of Legends – the Fans at Season Two World Championship (Raw Footage)*, YOUTUBE (Oct. 14, 2012), https://youtu.be/YTgSiKWGI9M; *see also* @ProHighlights, *LEAGUE OF CROWDS | Best Crowd Moments in History*, YOUTUBE (May 28, 2016), https://youtu.be/rJkZg5bLsCE.

than their traditional collegiate sports counterparts, whether through NACE-hosted tournaments, company/platform internal rankings and competitions, streaming revenue, or minor regional contests. Those gamers stand a decent chance at earning competitive salaries from play even before graduation. Thus, "NGIL" (NIL + gamertag) rights modeled after the intellectual property "right of publicity" are absolutely crucial for gamers: exploitation by third parties is easy, and the right to protect and profit from the name/gamertag that represents gamers and their skill is paramount in a world where that profit is entirely based on digital prowess and presence.

The best solution would be to federally codify the right for collegiate players – both of traditional sports and Esports – to profit from, and protect from unwanted use of, their names and gamertags. Esports necessarily cross state lines, and a number of existing federal laws are implicated in the Esports industry, including anti-gambling legislation[117] and, more importantly for the purpose of name/gamertag protections, the Lanham Act.[118] The Lanham Act is the primary trademark law in the United States, and prohibits activities such as trademark infringement, trademark dilution, and false advertising.[119] A player's gamertag is, in essence, that person's trademark, and should be treated as such under the Lanham Act; the Act could be amended to add a provision that does not require direct trademark registration for individuals who have selected, and have a proven record of profiting from the use of, a gamertag in tournament-level Esports competitions.

However, given legislatures' high degree of misunderstanding of technology and the Esports industry, a more likely solution would be individual states updating their NIL laws to become NGIL laws. Existing state laws do not directly address gamertags, and ought to be updated to include gamertags as a protected and profitable pieces of identifying information where they are not already broad enough to do so.

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[117] *See, e.g.*, the Illegal Gambling Business Under the Organized Crime Control Act, 18 U.S.C. § 1955; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961(1) - (8), the Unlawful Sports Gambling Act, 28 U.S.C. § 3702; and the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), 31 U.S.C. ch. 53, subch. IV §§ 5361(a)(1) – (4).
[118] Lanham Act, 15 U.S.C. §§ 1051(a)(1) – (4).
[119] *Id.* For comparison on international standards, s*ee generally* DLA PIPER, ESPORTS LAWS OF THE WORLD 175 (Ben Mulcahy & Gina Reif Ilardi, eds.) (2020).

UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL
VOLUME XXV

Streaming Television and Children:
An Examination and Method of Evaluating SVOD Parental Controls

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February 6, 2022

Abstract: With the growth of streaming television in recent years, and particularly subscription video on demand (SVOD) services like Netflix and Disney+, children are increasingly viewing programming online rather than on traditional broadcast and cable television platforms. This provides children with instantaneous access to vast libraries of programming, which may include a significant amount of programming that is inappropriate for them. However, with the exception of the Parents Television Council, little attention has been paid to the parental controls provided by these services to allow parents to monitor and control their children's access to programming on the services. This article examines the parental controls currently provided by the major SVOD services, proposes additional parental control capabilities that should be provided by the services, and identifies issues with existing controls that could be addressed to improve their effectiveness. In doing so, the article proposes a system for evaluating SVOD parental controls, and identifies steps government can take to help improve their effectiveness.

I. Introduction

Subscription video on demand (SVOD) streaming television services like Netflix, Disney+, and Amazon Prime have become major providers of television programming in recent years, providing a challenge to traditional broadcast and cable linear television program providers. As of January 2021, streaming is estimated to account for 68% of television viewing, compared to traditional linear television's 28%.[1] The largest United States SVOD services in 2021 were Netflix, Amazon Prime Video, Disney+, HBO Max, Hulu, Peacock, Paramount+, and Apple TV+.[2]

These SVOD services provide subscribers access to a vast video library after payment of a subscription fee.[3] The relatively low cost of SVOD services compared to traditional cable and satellite television packages has contributed to cord cutting in recent years. Cord cutting involves people canceling their cable or satellite television subscriptions, often due at least in part to the high cost of those subscriptions.[4] Also contributing to cord cutting is the fact that SVOD services also offer consumers greater convenience by offering programming on demand, rather than on a specifically scheduled day and time as on linear television.[5]

For children, the shift to watching programming on streaming services over traditional linear television sources is particularly pronounced. Children's viewing of traditional linear programming sources has declined sharply in recent years, as children are increasingly viewing programming online.[6] Historically, the government and the public have paid significant attention

[1] PARENTS TELEVISION AND MEDIA COUNCIL, DOLLARS AND SENSE: A PARENT'S GUIDE TO STREAMING MEDIA (Apr. 4, 2021), https://www.parentstv.org/resources/dollars-and-sense-a-parents-guide-to-streaming-media.pdf [hereinafter PTC 2021 REPORT] (emphasis in original omitted).
[2] *See e.g.*, Samuel Spencer, *How Many Subscribers Do Netflix, Disney+ and the Rest of the Streaming Services Have?*, NEWSWEEK (May 11, 2021, 10:39 AM), https://www.newsweek.com/netflix-amazon-hulu-disney-most-subscribers-streaming-service-1590463.
[3] FED. COMMC'N. COMM'N., 2020 Communications Marketplace Report, 36 FCC Rcd. 2945, ¶¶ 152, 177 (2020).
[4] *See, e.g.*, Nick G., *19 Cord Cutting Statistics and Trends in 2021*, TECHJURY (Apr. 22, 2022), https://techjury.net/blog/cord-cutting-statistics/#gref.
[5] *See, e.g.*, David Katzmaier, *Save Yourself Some Money and Cut the Cable TV Cord Already*, CNET (Jan. 28, 2022, 5:00 PM), https://www.cnet.com/tech/home-entertainment/how-to-cut-the-cord/.
[6] Alex Dudok De Wit, *Disney, Nick, And Cartoon Network Saw Double-Digit Ratings Plummet (Again) This Year*, CARTOON BREW (Dec. 31, 2021, 12:34 PM), https://www.cartoonbrew.com/business/disney-nick-and-cartoon-network-saw-double-digit-ratings-plummet-again-this-year-211989.html.

to promoting the use of broadcast and cable television for the benefit of children, and to protecting children from exposure to inappropriate programming on those platforms.[7] However, little attention has been paid to the relatively new SVOD services in these regards.

SVOD streaming services are in their early stages of development, with many of the major SVOD services being less than three years old.[8] As such, these services are early in the processes of determining, developing, and implementing the full range of content and capabilities they want to offer to attract and retain subscribers. One capability that appears to be under development at many SVOD services involves the parental controls they provide to allow parents to monitor and control the program content which their children can access and view on the services. Without proper parental controls, children may be able to access and view a great deal of programming that is inappropriate for them.

The focus of this article is on the parental controls that are, and that should be, provided by the major SVOD services. In doing so, it relies on research by the Parents Television and Media Council (PTC, formerly the Parents Television Council) on parents' ability to control their children's viewing on the major SVOD services,[9] and on the accuracy and consistency of the TV Parental Guidelines, the system used in conjunction with the V-chip to rate programming by age and content on traditional broadcast and cable television outlets.[10] The PTC has called for SVOD services to apply the TV Parental Guidelines ratings to their programming as part of the parental

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[7] *See, e.g.*, Joel Timmer, *Changes in the Children's Television Marketplace, The Children's Television Act, and the First Amendment*, 37 CARDOZO ARTS AND ENT. L. J. 731, 734 (2019); Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment*, 10 COMMC'N L. & POL'Y 179, 180 (2005); Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMMC'N L. & POL'Y 351, 352 (2004).

[8] *See, e.g.*, Todd Spangler, *Disney Plus: Half of U.S. Homes With Kids Under 10 Have Already Subscribed, Data Shows*, VARIETY (March 17, 2020, 5:39 AM), https://variety.com/2020/digital/news/disney-plus-half-us-homes-kids-subscribe-1203536676/; Todd Spangler, *HBO Max Sets Monthly Pricing, May 2020 Launch Date*, VARIETY (Oct. 29, 2019, 3:29 PM), https://variety.com/2019/digital/news/hbo-max-price-launch-date-may-2020-1203387216/; Todd Spangler, *NBCU's Peacock to Be Available on Apple Devices for National Launch*, VARIETY (May 6, 2020, 10:11 AM), https://variety.com/2020/digital/news/peacock-apple-tv-app-national-launch-1234599581/.

[9] *See* PTC 2021 REPORT, *supra* note 1; PARENTS TELEVISION COUNCIL, OVER-THE-TOP OR A RACE TO THE BOTTOM: A PARENT'S GUIDE TO STREAMING VIDEO 2 (2017), https://www.parentstv.org/resources/OTT2017_D.pdf [hereinafter PTC 2017 REPORT].

[10] *See infra* notes 24-27 and accompanying text.

control systems they offer, and also to offer additional capabilities.[11] The PTC's call for the use of the TV Parental Guidelines by SVOD services has been echoed by the TV Parental Guidelines Oversight Monitoring Board (Oversight Monitoring Board or Board), an industry organization created to oversee the operation of the TV Parental Guidelines rating system.[12]

Part II of this article examines children's usage of SVOD services and their ability to view programming that is inappropriate for them on the services. Part III then provides an overview of the TV Parental Guidelines rating system that was created and implemented to work in conjunction with the V-chip to allow parents to block programming they do not want their children to view on linear television sources. In Part IV, reports by the Parents Television Council on the parental controls offered by the major streaming services are discussed, including findings on the services' usage of the TV Parental Guidelines ratings in the streaming environment. Part V then provides a discussion of best practices guidelines recommended by the PTC for streaming services, while Part VI describes similar best practices guidelines recommended by the industry's TV Parental Guidelines Oversight Monitoring Board.

Part VII turns to an examination of criteria that can be used to evaluate parental controls as outlined by the Federal Communications Commission (FCC). The article uses these criteria, as well as those contained in the best practices guidelines provided by the PTC and the Oversight Monitoring Board, to evaluate the parental controls currently offered by the major SVOD services. To do this, the criteria are broken into four categories: the provision of controls by SVOD services, parental awareness and understanding of the controls available to them, the capabilities of the parental controls, and the effectiveness of those controls.

Among the conclusions herein are that the major SVOD services all provide parents the ability to restrict their children from viewing programming above a selected maturity level. The maturity level is determined using the TV Parental Guidelines and Motion Picture Association age-based ratings that indicate for which ages TV shows and movies are appropriate. However, studies have identified problems with the accuracy and consistency of these ratings, which

[11] PTC 2021 REPORT, *supra* note 1, at 12.
[12] TV PARENTAL GUIDELINES OVERSIGHT MONITORING BOARD, TV PARENTAL GUIDELINES RATINGS BEST PRACTICES FOR STREAMING SERVICES 1-2 (2021), http://www.tvguidelines.org/resources/RatingsBestPracticesGuidanceForStreamingServices_2021.pdf [hereinafter OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES].

lessens the effectiveness of the SVOD services' parental control systems. All the major services also provide parents to require the use of a PIN to help prevent children from being able to access programming above a selected maturity level. However, there are other parental control features not widely provided by SVOD services that could increase parents' ability to monitor and control their children's viewing, such as providing the ability to block individual titles and to access their children's viewing history, and by providing more information about program content.

Finally, in Part VIII the article suggests ways that the government could productively take action in this area, such as by studying the level of parental understanding of the TV Parental Guidelines rating system and the accuracy of the ratings applied to TV programs. The government can also keep attention on the industry to motivate the services to improve their parental controls and their effectiveness. In particular, government could encourage the industry to take steps to provide more information about program content and to improve ratings accuracy and consistency, which is crucial for effective operation of the system. Furthermore, by keeping attention and pressure on the industry to take action in areas such as these, the government might help motivate the industry to act on these issues, as seems to have been the case in the past.

II. Overview of SVOD Streaming Television Services and Children

Children are increasingly viewing programming from online sources and watching significantly less traditionally scheduled linear television programming.[13] There are good reasons for children to prefer viewing online programming over traditional linear programming. For one, with the major SVOD services, children have the ability to access vast quantities of programming, including age-appropriate and educational programs. In addition, online programming is typically available on demand, meaning children can view programming at their convenience, rather than when it is scheduled to air on linear television. Furthermore, many of the SVOD services offer programming with few or no commercials. Finally, children can view

[13] *See, e.g.*, Dudok De Wit, *supra* note 6.

SVOD programming on a variety of devices, including tablets and smartphones, which frees children from having to sit in front of the family television set to view programming.[14]

As part of their efforts to attract a wide subscriber base, SVOD services are increasingly targeting families and expanding their offerings of children's programming. One SVOD service, Disney+, specifically caters to this market. For its part, Netflix has also been focused on adding to the amount of children's programming it offers, investing in its own original children's programming as well as licensing children's programming from sources like Nickelodeon.[15] The major SVOD services, however, are focused on providing content for the full range of potential audience members, not just children. This means that the major services, with perhaps the exception of Disney+, also provide a significant amount of programming that is aimed at, and only appropriate for, an adult audience.

In general, all of the programming offered by an SVOD service is easily accessible by anyone with access to the service, unless the service provides some controls that allow for some programming to be blocked or restricted. Without such parental controls in place children can easily access a vast programming library, including a considerable amount of programming that is not appropriate for them.[16] Compounding this concern is the fact that children can access these services through mobile devices, which makes it difficult for parents to monitor and oversee the programs their children view.[17] Compared to the time before these SVOD services were available, parents "are now tasked with monitoring their child's media consumption across a plethora of wireless and mobile devices, rather than on one or two stationary, hard-wired, household TVs."[18]

Because of the vast amount of potentially inappropriate programming that children can easily access and view, and the increased challenge of monitoring their children's viewing due to technological advances, parents need the ability to monitor and restrict their children's viewing

[14] Melanie M. Rosen, *New Kid Vid Rule: An Analysis of the FCC's Deregulation of the Children's Television Act*, 20 J. HIGH TECH. L. 492, 519-22 (2020) (citations omitted).
[15] PTC 2021 REPORT, *supra* note 1, at 5.
[16] Aubrey Chorpenning, *Study: Netflix, Disney+ Offer Best Parental Controls*, THE STREAMABLE (April 20, 2021, 9:01 AM), https://thestreamable.com/news/study-shows-netflix-disney-plus-offer-best-parental-controls.
[17] Rosen, *supra* note 14, at 519-21 (citations omitted).
[18] PTC 2021 REPORT, *supra* note 1, at 5.

on SVOD services. While the major SVOD services offer some parental controls that allow such monitoring, a 2021 study by the Parents Television and Media Council (PTC) found that these controls are often inadequate and ineffective.[19] Before turning to an examination of the parental controls currently offered by the major SVOD services, this article first examines the parental controls currently available for traditional linear television programming through the V-chip and its TV Parental Guidelines rating system.

III. The TV Parental Guidelines Rating System

In 1996, Congress passed the Parental Choice in Television Programming Act,[20] to help "to limit the negative influences of video programming that is harmful to children," particularly that containing content of a violent or sexual nature.[21] To achieve this, the law required most new television sets sold in the United States to be equipped with "V-chip" technology that parents could use to block programs with sexual, violent or other content to which they did not want their children exposed.[22] In order for the V-chip to know what programs to block, programs must be rated, and program distributors need to include these ratings on their programs.[23]

The V-chip law allowed the television industry to devise the rating system that would work in conjunction with the V-chip. Led by the National Association of Broadcasters (NAB), the National Cable Television Association (NCTA), and the Motion Picture Association of America (MPAA, now Motion Picture Association or MPA), the industry first devised an age-based rating system. Under this system, programs are rated based on the age groups for which they are deemed appropriate: TV-Y designates a program designed for children, TV-Y7 programs are appropriate for children 7 and older, TV-G programs are appropriate for all ages, TV-PG indicates programs that may not be suitable for younger children, TV-14 indicates

[19] PTC 2021 REPORT, *supra* note 1.
[20] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 551 (1996). The Parental Choice in Television Programming Act was passed by Congress as part of the Telecommunications Act of 1996.
[21] Telecommunications Act of 1996 § 551(a)(8) (1996).
[22] 47 U.S.C. § 303(x) (2021).
[23] Telecommunications Act of 1996 § 551(b) (1996).

programs that may not be suitable for children younger than 14, and TV-M (later TV-MA) designates programs designed for adults.[24]

This age-based rating system was widely criticized by legislators, advocacy groups, and researchers for failing to indicate the specific types of content that might concern parents.[25] In response, the industry modified the rating system to include content-based ratings in addition to the original age-based ratings: V for violence, FV for fantasy violence in children's programming, S for sexual situations, L for strong language, and D for suggestive dialogue.[26] Referred to as the "TV Parental Guidelines," this rating system can be used by parents to set their television sets to block programming that they don't want their children to see.[27]

The TV Parental Guidelines age- and content-based ratings are assigned to programs by the producers of those programs or by the networks or stations that air them.[28] The ratings are applied to most TV programs, with the exception of news, sports, home shopping, and religious programming, as well as advertisements or commercials.[29] TV series are generally rated on an episode-by episode basis, meaning individual episodes within a series may carry different ratings. The ratings are displayed at the beginning of a program in the upper-left corner of the TV screen, and at the beginning of the second hour of a program for programs longer than an hour. Ratings are also often displayed after each commercial break.[30]

The TV Parental Guidelines rating system is overseen by the TV Parental Guidelines Oversight Monitoring Board. When the industry developed the TV Parental Guidelines rating

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[24] Public Notice, Federal Communications Commission, Commission Seeks Comment on Industry Proposal for Rating Video Programming 1 (Feb. 7, 1997) (CS Docket No. 97-55, FCC 97-34), http://transition.fcc.gov/Bureaus/Cable/Public_Nfotices/1997/fcc97034.pdf (last visited Feb. 24, 2013) [hereinafter FCC 1997 Public Notice].
[25] *See, e.g.*, Heather Fleming, *Senate Pressuring for Content Ratings*, BROAD. & CABLE, May 5, 1997, at 10; Jane Hall, *Senators Push Content-Based TV Ratings*, L.A. TIMES, Feb. 28, 1997, at A4; Sheryl Stolberg, *TV Ratings Code Said Highly Flawed*, L.A. TIMES, Mar. 27, 1997, at A23.
[26] *See* Joel Timmer, *Television Violence and Industry Self-Regulation: The V-Chip, Television Program Ratings, and the TV Parental Guidelines Oversight Monitoring Board*, 18 COMMC'N L. & POL'Y 265, 271-72 (2013) (citations omitted).
[27] *Controls*, TVGUIDELINES.ORG, http://www.tvguidelines.org/controls.html (last visited Jan. 28, 2022).
[28] FCC 1997 Public Notice, *supra* note 24, at 2.
[29] *Ratings*, TVGUIDELINES.ORG, http://www.tvguidelines.org/ratings.html (last visited Jan. 28, 2022); Implementation of the Consolidated Appropriations Act of 2019; Report on Television Ratings and The Oversight Monitoring Board, *Report*, 34 FCC Rcd. 3205, ¶ 5 (2019) [hereinafter FCC 2019 Report].
[30] *Ratings*, *supra* note 29.

system, it also created this Board "to ensure that the Guidelines are applied accurately and consistently to television programming." As part of this effort, the Board would "provide information to producers and other program distributors concerning the Guidelines" and "review the guidelines on a regular basis and make sure that the uniformity and consistency of the guidelines [are] maintained to the greatest extent that is possible."[31] The Board consists of up to 24 members, with up to 18 industry representatives appointed by the NAB, NCTA, and MPA. Five non-industry members are appointed by the Board Chair, which is held by the head of the NAB, NCTA, or MPA on a rotating basis.[32]

The TV Parental Guidelines were developed for broadcast and cable television programming in 1997, years before the emergence of today's SVOD streaming television services. As those services have emerged and grown, there have been calls from both the Parents Television Council and the TV Parental Guidelines Oversight Monitoring Board for online program providers to apply the TV Parental Guidelines ratings to online programming in order to assist parents in controlling the program content to which their children are exposed. This article now turns to an examination of the parental controls that have been provided by the major SVOD services, including their usage of the TV Parental Guidelines rating system.

IV. Parents Television Council Reports on Parental Controls Offered by SVOD Services

In 2017, the Parents Television Council released its first examination of the major streaming programming providers.[33] Noting the importance of attracting family subscribers for these services, the report concluded that "Families seeking a child-safe or family-friendly alternative to traditional broadcast and cable television are not well-served in the current Streaming Video On Demand (SVOD) . . . marketplace." A major factor contributing to this conclusion was the PTC's finding that there was no consistency among the leading SVOD providers "in the application or visibility of aged-based content ratings." This led the PTC to

[31] *See* Timmer, *supra* note 26, at 272 (citations omitted).
[32] FCC 2019 Report, *supra* note 29, at ¶ 9.
[33] PTC 2017 REPORT, *supra* note 9.

recommend that streaming services "agree to and adopt a uniform standard for applying age-based and content ratings."[34]

The report also found deficiencies in other parental control capabilities offered by the major SVOD services. For example, the report noted that "While Hulu and Netflix both provide the option of a separate user profile for child viewers, there is nothing to stop a child from switching over to an adult profile with either service," while Amazon did not provide the option of creating a child profile.[35] Child profiles generally exclude programming offered by the service which is inappropriate for children, although that programming would be available to subscribers using other profiles. Without some means of restricting children's access to adult profiles, children could easily access inappropriate adult programming.

The PTC released a follow-up report in 2021,[36] which similarly concluded "that families are not well-served in the current streaming video marketplace because the content ratings are not applied consistently and there is a lack of robust parental controls."[37] The report did acknowledge that there was some improvement since the 2017 report in the use of age-based ratings by streaming services, with most of the major streaming services offering "some variation of content controls based on age-rating." Typically, these controls involve the creation of separate user profiles for different family members, "choosing an age or rating threshold (most often using a combination of TV Parental Guidelines and Motion Picture Association ratings)" for the programming available on each individual profile, and using a PIN to restrict a user's access to content above the age or rating threshold for their profile.[38] However, the 2021 report found that most streaming services were still not applying the S, D, L, or V content descriptors.[39]

[34] *Id*. at 2. In addition, the PTC recommended that explicit titles be blocked by services when those services "parental controls are turned on: If a parent has deployed parental controls to block a child from viewing TV-MA, or R-rated content, those titles should no longer be visible on the menu screen, especially if those titles contain explicit words, descriptions or cover art." *Id*.
[35] *Id*. at 4.
[36] PTC 2021 REPORT, *supra* note 1.
[37] *Id*. at 5.
[38] *Id*. at 9.
[39] *Id*. at 3.

Evaluating the major streaming services individually, the report concluded that Netflix had the best parental controls, and Hulu had the worst.[40] The report examined in detail the parental controls offered by each of the major streaming services. The report described how Netflix allowed parents to create profiles for their children and select specific maturity ratings for each of those profiles,[41] a capability provided by most of the other major streaming services as well, with some variation.[42] These maturity ratings utilize the TV Parental Guidelines age-based ratings (TV-Y, TVY7, TV-G, TV-PG, TV-14, and TV-MA) as well as MPA movie ratings. Under the MPA system, a G-rating signifies movies that are appropriate for all ages. PG indicates that movies may include some material that is not suitable for children, while PG-13 indicates that some movie material may not be suitable for children under 13. R signifies that a movie contains some adult material, and NC-17 indicates that a film is for adults only.[43] Netflix thus allows parents to set their children's profiles at any of the following levels, from lowest maturity rating to the highest: TV-Y, TV-Y7, TV-G/G, TV-PG/PG, PG-13, TV-14, R, TV-MA, and NC-17.[44] With these options, parents can set up profiles for their kids that will exclude all content above the selected maturity rating for that profile. The default maturity setting for kids' profiles on Netflix is TV-PG/PG, although parents can set the level higher or lower for individual children. Netflix also allows parents to block specific movie or program titles from being viewed on a particular profile, even if that title is within one of the acceptable maturity ratings for that profile, a capability not offered by the other major streaming services.[45] To set or change the maturity level on individual profiles on Netflix, or to block or unblock individual titles, the account password first needs to be entered, providing parents with another level of protection and control. Netflix also allows parents to see the viewing history on their account.[46]

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[40] *Id*.
[41] *Id*. at 10.
[42] *See infra* notes 51-63 and accompanying text.
[43] *The Film Rating System*, FILMRATINGS.COM, https://www.filmratings.com/Content/Downloads/mpaa_ratings-poster-qr.pdf (last visited Jan. 28, 2022).
[44] On Netflix.com, select "Manage Profiles," then choose "edit" "Maturity Settings." To change viewing restrictions on a profile, the Netflix account password first needs to be entered.
[45] PTC 2017 REPORT, *supra* note 9, at 9.
[46] *How to see and download viewing history*, NETFLIX.COM, https://help.netflix.com/en/node/101917#:~:text=You%20can%20see%20the%20TV,Open%20Viewing%20activity (last visited Jan. 28, 2022).

The report found Hulu to be on the other end of the spectrum, as it offered "the least-robust parental controls of the major streaming services."[47] The PTC's 2021 report observed that while Hulu allowed parents to create kid's profiles, parents were not able to specify the maturity levels of the programming that would be available on those profiles. For example, parents could not specify that only content rated TV-PG/PG or below would be available on a child's individual profile, as Hulu's kid's profiles included content rated PG-13 and TV-14 as well.[48] Even "teen" profiles on Hulu allowed users to access R and TV-MA-rated content.[49] Moreover, Hulu did not provide "PIN-restrictions or other barriers to prevent a child from switching profiles to view adult content on a parent's profile."[50] These concerns seem to have been addressed by Hulu as of July 2021, as it now appears that no programming rated above TV-PG/G is available on Hulu kid's profiles. Parents can now also require the use of PINs on Hulu to access non-kid profiles or to create new profiles.[51]

As for the other major streaming services, Disney+ is more targeted at a family audience than the other major streaming services. As such, Disney+ does not offer any programming rated TV-MA under the TV Parental Guidelines or R under the MPA movie ratings.[52] [Editor's Note: Disney+ has since added TV-MA content with the 2022 additions of content such as *Daredevil* and *Luke Cage* to the Disney+ library]. Disney+ allows parents to set up kid's profiles that feature only that content that is "suitable for all viewers."[53] Parents can prevent their children from exiting their kid profile to view content on other profiles with the use of a "kid-proof exit

[47] PTC 2021 REPORT, *supra* note 1, at 11.
[48] *Id*.
[49] Press Release, Parents Television and Media Council, Next Hulu President Must Improve Parental Controls, Parents Television and Media Council (Oct. 5, 2021), https://www.parentstv.org/press-releases/next-hulu-president-must-improve-parental-controls.
[50] PTC 2021 REPORT, *supra* note 1, at 9.
[51] *Kids Profiles and Parental Controls on Hulu*, HULU.COM, https://help.hulu.com/s/article/restrict-content#restrict (last visited Jan. 28, 2022).
[52] *Content Ratings on Disney+*, DISNEYPLUS.COM, https://help.disneyplus.com/csp?id=csp_article_content&article=content-ratings (last visited Jan. 28, 2022).
[53] *Parental Controls on Disney+*, DISNEYPLUS.COM, https://help.disneyplus.com/csp?id=csp_article_content&sys_kb_id=2321ed89db37b0144ade269ed39619db (last visited Jan. 28, 2022); PTC 2021 REPORT, *supra* note 1, at 10.

feature" that requires kids to answer an "exit question," rather than entering a PIN or password.[54] Because kid's profiles on Disney+ are designed to feature child-friendly content only, maturity levels cannot be specified or adjusted for those profiles. However, maturity levels can be set on regular profiles using the TV Parental Guidelines and MPA ratings.[55] PINs can also be used to restrict access to different user profiles.[56] HBO Max also offers parents the ability to create kid's profiles, and it allows parents to set kids and other profiles at different maturity levels by choosing both a TV Parental Guideline and a MPA rating. Parents can also require the use of a PIN to create and change the settings on kid's profiles, and to allow viewers to switch profiles.[57]

Paramount+, Peacock, Amazon Prime, and Apple+ TV also allow parents to restrict access to programming above a selected maturity level, although each of the services categorizes the maturity levels a bit differently. Peacock allows kids profiles to be created containing only content rated TV-PG/PG or below.[58] Paramount+ allows kids profiles at two possible maturity levels, younger kids, with only TV-Y and G-rated programming, and older kids, with programming up to TV-PG/G.[59] Amazon Prime provides kids profiles that offer only content that is rated as being appropriate for kids 12 and under.[60] Apple TV+ allows parents to use a PIN to restrict access to programming above a selected maturity level, using the TV Parental Guidelines

[54] *Kids Profiles on Disney+*, DISNEYPLUS.COM, https://help.disneyplus.com/csp?id=csp_article_content&article=kids-profiles (last visited Jan. 28, 2022); PTC 2021 REPORT, *supra* note 1, at 10.
[55] *Kids Profiles on Disney+*, *supra* note 54.
[56] *Parental Controls on Disney+*, *supra* note 53; PTC 2021 REPORT, *supra* note 1, at 10.
[57] *Set HBO Max parental controls*, HBOMAX.COM, https://help.hbomax.com/us/Answer/Detail/000001260 (last visited Jan. 28, 2022); *All about Kid profiles*, HBOMAX.COM, https://help.hbomax.com/us/Answer/Detail/000001271#:~:text=The%20Home%20screen%20for%20Little,and%20movies%20on%20HBO%20Max.&text=Kids%20(and%20adults%20too!),see%20Add%20a%20profile%20picture (last visited Jan. 28, 2022); PTC 2021 REPORT, *supra* note 1, at 10.
[58] *Does Peacock have Kids profiles?*, PEACOCKTV.COM, https://www.peacocktv.com/help/article/does-peacock-have-kids-profiles (last visited Jan. 28, 2022).
[59] *What are profiles and how do they work on Paramount+?*, PARAMOUNTPLUS.COM, https://help.paramountplus.com/s/article/PD-What-are-profiles-and-how-do-they-work-on-paramount#KidsFeature (last visited Jan. 28, 2022).
[60] *What are Prime Video Kid's Profiles?*, AMAZON.COM, https://www.amazon.com/gp/help/customer/display.html?nodeId=GTYL2UYVAAPUD6WE#:~:text=Prime%20Video%20ensures%20only%20age,is%20visible%20in%20Kids%20profile.&text=However%2C%20all%20downloads%20including%20those,accessed%20through%20the%20Kids%20profiles (last visited Jan. 28, 2022).

for TV shows and MPA ratings for movies.[61] None of these four services provide the capability to require a user to enter a PIN before switching profiles. However, they each allow content to be restricted by maturity level on all profiles across the service, with a PIN required to view content above the selected maturity level.[62] Along with Netflix, both Amazon Prime Video and Apple+ TV allow subscribers to access their account's viewing history.[63]

It thus appears that all of these major streaming services do allow parents to restrict access to content at or above a selected maturity level. There is some variation in the services in terms of how they label and categorize their various maturity levels, but all of the services make use of the TV Parental Guidelines age-based ratings and the MPA's age-based audience ratings for movies. Furthermore, all of the services require the use of a PIN for a user to view restricted content. However, the configuration of how these controls work varies by service. Netflix, Hulu, Disney+, and HBO Max all allow PINs to be required for children to switch from kid profiles to other profiles on the same account. Paramount+, Peacock, Amazon Prime, and Apple+ TV allows PINs to be required to watch any restricted content on the service, regardless of the profile being used. The former method allows adult content to be restricted across all profiles, although it requires adults using non-kid profiles to enter the PIN each time they want to watch adult or restricted programming. Netflix, Amazon Prime Video, and Apple+ TV allow parents to view the viewing history on those services. Only Netflix provides parents with the ability to block specific programs.

The major SVOD services, then, all provide parents with some ability to restrict their children's viewing of inappropriate content. However, the capabilities vary by service, as do the specific options available to parents to restrict the maturity level of programming available to their kids. To help improve the capabilities and effectiveness of the parental controls provided by

[61] PTC 2021 REPORT, *supra* note 1, at 10; *Restrict access to content on Apple TV*, APPLE.COM, https://support.apple.com/guide/tv/restrict-access-to-content-atvbbaf126df/tvos (last visited Jan. 28, 2022).
[62] PTC 2021 REPORT, *supra* note 1, at 10-11; *Does Peacock have Kids profiles?*, *supra* note 58; *What are profiles and how do they work on Paramount+?*, *supra* note 59; Apple TV User Guide, *Restrict access to content on Apple TV*, *supra* note 61.
[63] See Abigail Abesamis Demarest, *How to view and delete your Amazon Prime Video watch history*, INSIDER (Oct. 15, 2021, 4:08 PM), https://www.businessinsider.com/amazon-prime-watch-history#:~:text=To%20view%20and%20delete%20your%20Amazon%20Prime%20watch%20history%2C%20go,by%20clicking%20the%20Edit%20button.

streaming services, the PTC made a number of recommendations in its 2021 report, discussed next.

V. Parents Television and Media Council Recommended Best Practices Guidelines

In its 2021 report, the PTC acknowledged the parental controls offered by the major SVOD services, but nevertheless stated that "Families urgently need basic protections from these streaming services, as well as the confidence and ease of functionality to use those protections, especially given how much families are increasingly relying on streaming." Consequently, the PTC urged the entertainment industry and the major streaming services to participate in a symposium that would produce industry best practices guidelines to be adopted by the industry.[64] The PTC outlined a number of proposals to include in those best practice guidelines.

First were reliable gating or blocking technology measures. The PTC noted that since its 2017 report on streaming television, there had been some movement by the industry "toward a more consistent standard, as many streaming services have adopted separate user profiles for different members of the family; age-restricted access to content based on some combination of TV Parental Guidelines Monitoring Board and Motion Picture Association ratings; and PIN-controlled access to age-restricted content."[65] The PTC urged Hulu and Paramount+ specifically to "move more in this direction," although it appears they have done so since the PTC's 2021 report.[66] The PTC also called on streaming services to "allow parents to block individual titles," as Netflix does.[67]

The PTC also recommended that best practice guidelines include the consistent application of age-based ratings to programming. On this point, the PTC observed that "to the extent that children's access to content is based on the TV Parental Guidelines Monitoring Board and Motion Picture Association ratings, they need to be uniformly and consistently applied."[68] While the PTC's 2021 report did not examine ratings accuracy, a 2020 PTC report found that the

[64] PTC 2021 REPORT, *supra* note 1, at 12.
[65] *Id.*
[66] *See supra* notes 51, 59 and accompanying text.
[67] PTC 2021 REPORT, *supra* note 1, at 12.
[68] *Id.*

majority of Netflix programs targeted at teens were rated as inappropriate for them, and that many Netflix TV-14-rated programs contained content that merited a higher age-rating.[69] Other previous PTC studies also identified issues with ratings accuracy.[70] The PTC also recommended that content ratings "be used consistently across streaming platforms."[71]

In addition, the PTC recommended that the Federal Communications Commission (FCC) and Congress take action as well. Specifically, the PTC urged the FCC to revisit the Child Safe Viewing Act of 2007,[72] which required the FCC to provide a report to Congress assessing "the current state of the marketplace with respect to: the existence and availability of advanced blocking technologies; methods of encouraging the development, deployment and use of such technologies that do not affect the packaging or pricing of programming; and the existence, availability and use of parental empowerment tools and initiatives already in the market."[73] The FCC provided that report to Congress in August 2009,[74] a time when "most of the major streaming media platforms did not even exist."[75]

For its part, the industry-led TV Parental Guidelines Oversight Monitoring Board in 2020 began focusing more on the parental controls provided by streaming services, which led it in 2021 to provide recommendations of its own regarding parental controls provided by streaming services. These recommendations are discussed next.

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[69] *Id*.
[70] *See infra* notes 157-158 and accompanying text.
[71] PTC 2021 REPORT, *supra* note 1, at 12.
[72] *Id*. at 13.
[73] Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, *Report*, 24 FCC Rcd. 11,413, ¶ 1 (2009) [hereinafter FCC 2009 Child Safe Viewing Act Report] (citing Child Safe Viewing Act of 2007, Pub. L. No. 110-452, 122 Stat. 5025, §§ 2(a)&(d) (December 2, 2008) [hereinafter Child Safe Viewing Act of 2007].
[74] *See* FCC 2009 Child Safe Viewing Act Report, *supra* note 73.
[75] PTC 2021 REPORT, *supra* note 1, at 13. The PTC also called on Congress to "update the Family Movie Act of 2005 to include streaming media platforms." This act allowed home entertainment technology providers to engineer and sell "DVD players that could be set to 'skip past' explicit content contained in mainstream motion pictures." However, a court ruling held that the act does not apply to streaming television programming. As a result, the PTC recommended that Congress update the act "to provide parents greater control over the explicit content that might reach their children on streaming media, just as it did nearly 16 years ago for explicit content on DVDs." *Id*. Since this proposal does not necessarily involve parental controls provided by streaming services themselves, it is not given further consideration here.

VI. TV Parental Guidelines Oversight Monitoring Board Best Practices Guidelines

In response to the growth of streaming services in recent years, in 2020 the TV Parental Guidelines Oversight Monitoring Board created a Streaming Task Force "to engage in conversations with Board member companies that operate some of the newest and most popular video streaming services available today . . . to examine how ratings information is incorporated into these and other streaming platforms."[76] The aim of the Streaming Task Force was to formalize lines of communication with streaming services about program ratings to help educate the services on the TV Parental Guidelines; "to encourage streaming services that do not currently participate in the TV ratings system to apply ratings in a manner consistent with the TV Parental Guidelines; and, to improve consistency regarding the application of ratings across all streaming platforms."[77] To help achieve these aims, and to help "encourage a consistent ratings experience for parents regardless of whether they and their families are watching content via traditional TV networks or through streaming services," the Board released a set of best practice guidelines which it urged streaming services to adopt.[78]

Many of the Boards' eight best practice recommendations basically recommend that streaming services apply age- and content-based ratings, such as the TV Parental Guidelines or MPA ratings to their programming.[79] Thus, streaming services should "include age-based ratings and applicable descriptor information" for programming originally aired on linear television and for original programming produced specifically for a streaming service.[80] For programming originally aired on linear television, the same ratings that were applied there should be applied in the streaming environment, unless the programming has been edited. Ratings should be applied "on an episode-by-episode basis for episodically rated programs."[81]

[76] Press Release, TV Parental Guidelines Oversight Monitoring Board, TV Parental Guidelines Monitoring Board Releases Ratings Guidance for Streaming Services 1 (Sept. 16, 2021), http://www.tvguidelines.org/resources/Release_091621.pdf.
[77] TV PARENTAL GUIDELINES MONITORING BOARD, 2020 ANNUAL REPORT 6 (2020), http://www.tvguidelines.org/resources/TV_Parental_Guidelines_2020AnnualReport.pdf [hereinafter OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT].
[78] OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 1.
[79] *See id*. at 1-2.
[80] *Id*. at 1.
[81] *Id*. at 2.

For TV series acquired from third parties that were not originally shown on TV in the U.S. with TV Parental Guidelines ratings, streaming services should "at a minimum apply ratings on a per-series or per-season basis…Alternatively, services can apply a Not Rated (NR) classification if the streaming service's parental control functions can recognize an NR classification and if those functions would preclude viewers from accessing NR content when parental controls have been activated." For MPA-rated films that have not been edited for television, "the applicable MPA rating and descriptor" should be applied.[82] The Board excluded some program content from these recommendations, including news, sports, and advertising.[83]

Other best practice guidelines deal with the manner in which ratings information should be provided to parents. The Board recommended that streaming services display program ratings onscreen at the time that a viewer begins watching a program.[84] In addition, streaming services should "include age-based ratings within the product experience (e.g., as part of narrative program summaries contained on program description screens or within online menus and navigation guides)."[85] The Board also specified that "[s]ervices that wish to do so also may include additional information, such as a parental advisory bumper card or similar, or additional details about the types of content that are contained within a video asset (e.g., to indicate the presence of smoking or non-sexual nudity)."[86] Finally, the Board recommended that streaming services "continue to study ratings capabilities and, if practicable in the future, apply TV Ratings to additional content, including, for example, archival content that originally was shown on television prior to the adoption of the TV Parental Ratings system."[87]

For its part, the Parents Television Council welcomed the Board's guidelines, but cautioned that the new guidelines were "only a small step towards improving content ratings

[82] *Id*.
[83] *Id*. at 1.
[84] OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 1 ("This display shall be either: (1) an overlay of the TV Ratings icons at the beginning of video playback; or (2) inclusion of the TV Ratings icons on a stand-alone advisory bumper card that appears on-screen immediately in advance of video playback.").
[85] *Id*. ("Video streaming services should also include age-based ratings within the product experience… to the extent practicable after taking into account technical and other reasonable limitations (such as screen size and platform capabilities.").
[86] *Id*.
[87] *Id*. at 2.

systems and parental controls." PTC president Tim Winters said his organization was "encouraged" that the industry was taking action on its "suggestion to create more content ratings uniformity between various platforms," but stated that the industry "needs to do more." In particular, the PTC noted that it had found problems with content ratings being "accurately and consistently applied," and with "blocking/parental controls" being "effective and consistent."[88]

Both the Parents Television Council and the TV Parental Guidelines Oversight Monitoring Board, then, have recognized that SVOD streaming services can do more to provide parents with the ability to effectively control their children's viewing of programming on those services. However, while there is some overlap in the recommendations made by the two groups, the Board's recommendations mainly deal with the application and display of ratings for streaming programming. The PTC's recommendations include many of the Board's recommendations, but also call for the inclusion of additional capabilities. This article now turns to an examination of the specific parental controls and capabilities that should be provided by SVOD services to allow parents to effectively control their children's viewing on those services. As a starting point, the FCC's findings on parental controls available in the online environment in its 2009 report to Congress as required by the Child Safe Viewing Act of 2007 are examined next.

VII. A System and Criteria for Evaluating Parental Controls

The Child Safe Viewing Act of 2007 required the FCC to provide a report to Congress on the FCC's "assessment of the current state of the marketplace with respect to: the existence and availability of advanced blocking technologies; methods of encouraging the development, deployment and use of such technologies that do not affect the packaging or pricing of programming; and the existence, availability and use of parental empowerment tools and initiatives already in the market."[89] It should be noted that this report focused on the parental

[88] Press Release, Parents Television and Media Council, PTC Issues Critique of TV Industry Group's Streaming "Best Practices," Parents Television and Media Council (Sept. 28, 2021), https://www.parentstv.org/press-releases/ptc-issues-critique-of-tv-industry-groups-streaming-best-practices.
[89] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 1 (2009) (citing Child Safe Viewing Act of 2007, *supra* note 73, at §§ 2(a)&(d)).

controls available in 2009 for several forms of media used by children at the time, including "over-the-air television; cable and satellite television; audio-only programming; wireless services; non-networked devices such as videocassette recorders ("VCRs") and DVD players; and the Internet."[90] Further, the report focused on video on the Internet accessed by children by various means, not just through the major SVOD streaming services, many of which did not even exist at the time.[91] Those that did exist were just in their infancy.[92] The 2009 report's focus, then, was much broader than streaming television services.

Part of this report focused on the V-chip and its associated TV Parental Guidelines rating system used by traditional broadcast and cable television outlets. Here, the FCC observed that "The V-chip's effectiveness depends on accurate program ratings,"[93] and that "[s]everal commenters contend that the current V-chip scheme has not achieved its full potential in part because the TV Parental Guidelines are confusing and are applied inaccurately and inconsistently to television programming."[94] This led a number of commenters to argue for improvements in the application of the TV Parental Guidelines ratings to broadcast and cable programming.[95]

Also in the report, the FCC identified and discussed numerous criteria which could "be useful in comparing and contrasting the usefulness and effectiveness of parental control technologies across various media platforms."[96] The criteria that the FCC identified, however, included those for filtering and blocking software that parents might use to monitor and control all of their children's online activity. The criteria therefore cover a broader range of activities and controls than the viewing of video on subscription streaming television services, so some of those criteria are not applicable in this context. The criteria, however, do provide a useful starting

[90] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 4.
[91] PTC 2021 REPORT, *supra* note 1, at 13.
[92] At the time of the report in 2009, Hulu was the second largest online video site measured by streams, with 3.9% of total streams, far behind leader YouTube with 58.1%. FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 161 (citations omitted). Netflix began offering streaming video in 2007, although it did not make the list of the top five online video sites of the time. *See, e.g.*, Cynthia Littleton and Janko Roettgers, *Ted Sarandos on How Netflix Predicted the Future of TV*, VARIETY (Aug. 21, 2018, 6:30 AM), https://variety.com/2018/digital/news/netflix-streaming-dvds-original-programming-1202910483/.
[93] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 24 (citations omitted).
[94] *Id*. at ¶ 27 (citations omitted).
[95] *See id*. at ¶ 24.
[96] *Id*. at ¶ 187.

point, so those that are relevant to SVOD services, or that can be adapted to be, are examined in further detail below.

The criteria identified by the FCC in its 2009 report are: "(i) cost to consumers; (ii) level of consumer awareness/promotional and educational efforts; (iii) adoption rate; (iv) customer support; (v) ease of use; (vi) means to prevent children from overriding parental controls; (vii) blocking content/black listing; (viii) selecting content/white listing; (ix) access to multiple ratings systems; (x) parental understanding of ratings systems; (xi) reliance on non-ratings-based system; (xii) ability to monitor usage and view usage history; (xiii) ability to restrict access and usage; (xiv) access to parental controls outside of the home; and (xv) tracking."[97] Many of these criteria seem to be desirable characteristics of parental controls in the streaming environment, with each of these criteria examined and analyzed in more detail below.

Two factors on the FCC's list have been excluded from consideration herein. The first is cost to consumers. As the FCC observed at the time, "many parental control technologies are included in the price of a service or device with no additional cost apparent to the consumer."[98] That is true of the major streaming services, which make whatever parental controls they offer available to subscribers with no extra charge. The second is tracking. In regard to this factor, the FCC observed that "some wireless devices offer parties the ability to locate their children and monitor their whereabouts using GPS technology."[99] This would seem to be a desirable feature to be offered on mobile devices which might be used by children to access and view streaming service programming, but not a feature that would be offered by the streaming services themselves.

On the other hand, there are criteria that are helpful in examining SVOD service parental controls that are not included on the FCC's list, but are included in the best practice guidelines recommended by the PTC and/or the Oversight Monitoring Board. Those criteria involve the provision of ratings information by streaming services; the format of ratings disclosure; the disclosure of program content in ratings systems; and the accuracy and consistency of the ratings

[97] *Id*. at ¶ 187.
[98] *Id*. at ¶ 188.
[99] *Id*. at ¶¶ 187, 204.

system.[100] This article organizes the relevant and applicable criteria identified by the FCC's 2009 report and by both the PTC's and Oversight Monitoring Board's best practices guidelines by grouping them into four general categories: (1) the provision of parental controls, (2) parental awareness and understanding of available controls, (3) parental control capabilities, and (4) the effectiveness of the parental control system. The above-listed criteria for evaluating parental control systems are examined next, grouped into each the four categories just listed.

A. Category One: Provision of Controls

A threshold matter here is simply that streaming services provide parental control capabilities in the first place, as well as the type of information provided by those controls and the format of this information's disclosure to parents. Thus, many of the recommended best practices released in 2021 by the TV Parental Guidelines Oversight Monitoring Board's encourage streaming services to provide TV Parental Guidelines or MPA ratings information alongside their programming.[101] Both age-based ratings and content descriptor information are encouraged for all programming, whether it be movies or television series, or initially aired on television or produced specifically for a streaming service, with the exception of news, sports, and advertising.[102] The Parents Television and Media Council 2021 report found that the major SVOD services all offered some parental control information and/or capabilities, meaning this threshold criteria of simply offering parental controls has been met by those services, although there may still be issues with the information provided by the parental control system and the format of the disclosure of that information to parents.

A major issue for the PTC is that ratings for SVOD programming should indicate what types of content can be found within particular programming, and not just indicate the age of the audience that programming is appropriate for. On this point, the PTC's 2021 study found that while many streaming services were providing age-based ratings for their programing, "most streaming services are still not using content descriptors (S, D, L, or V to indicate elevated levels

[100] PTC 2021 REPORT, *supra* note 1, at 12-13; *see* OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 1-2.
[101] *See* OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12.
[102] OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 1-2.

of sexual content, adult dialogue, foul language or violence)."[103] For its part, the Oversight Monitoring Board recommended that both age-based ratings and content descriptors be provided by streaming services.[104] Since parents may be more concerned about their children viewing programming with some types of content than others, providing both age- and content-based ratings could provide more meaningful information to parents than a rating that just applies broad, age-based considerations.

An issue closely related to providing ratings information is the format in which that information should be provided alongside the rated programming. The Oversight Monitoring Board's best practice guidelines recommend that ratings be displayed when viewers begin viewing a program, and that ratings be provided in other contexts as well, such as within program descriptions.[105] These recommendations are focused on providing ratings information in a manner that makes it easy for parents to find that information.

Thus, category one focuses on whether program services provide parental control capabilities. If they do, it considers what type of information about programming is provided to parents by those controls, and the manner and ease with which parents may find that information. While all of the major services are providing some parental controls, those controls could provide more information, particularly about program content. The manner in which this information is provided to parents by the various SVOD services was not examined by the PTC in its reports, and is an area in which additional study would be beneficial. The next category of criteria to be examined involves parental awareness and understanding of the controls available to them.

B. Category Two: Parental Awareness and Understanding of Available Controls

Once a service provides parents with some ability to control their children's viewing of programming on that service, it is important both that parents be made aware that they have that capability, and that they understand how to utilize these controls. A number of criteria identified in the FCC's 2009 report are included in this category, including level of consumer

[103] PTC 2021 REPORT, *supra* note 1, at 9.
[104] OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 1-2.
[105] *Id*. at 1.

awareness/promotional and educational efforts, parental understanding of ratings systems, ease of use, customer support, and adoption rate.[106]

Regarding level of consumer awareness/promotional and educational efforts, the FCC observed in its 2009 report that "[e]fforts to promote and to educate the public about a particular parental control technology may lead to an increase in awareness and adoption of the technology," whether these efforts be led by industry or government.[107] The FCC outlined various ways that the public might be educated about the parental controls available to it, "including advertising campaigns, PSAs, websites, customer hotlines, and written materials."[108] At the time of its 2009 report, the FCC determined that "[f]urther study is needed to determine (i) the extent to which parents are aware of specific parental control technologies; (ii) to what extent does the level of awareness differ among media; and (iii) whether and, if so, what additional promotional and educational efforts would be effective in increasing awareness of these parental control technologies."[109] These are questions that should be asked about parental awareness of the available parental control technologies from the major SVOD services as well.

In 2019, Congress directed the FCC to provide a report on the accuracy of the TV Parental Guidelines ratings as applied to television content, and the ability of the TV Parental Guidelines Oversight Monitoring Board "to oversee the rating system and address public concerns about it."[110] In that report, the FCC considered parental awareness and understanding of the TV Parental Guidelines, reporting that the television industry, as represented by the National Association of Broadcasters (NAB), the National Cable Television Association (NCTA), and the Motion Picture Association of America (MPAA),[111] asserted that the industry "has invested substantial resources in educating parents about the TV Parental Guidelines and the V-chip," and that its educational efforts were "ongoing."[112]

[106] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 187.
[107] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶¶ 179, 189 (citations omitted).
[108] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 189 (citations omitted).
[109] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 206.
[110] FCC 2019 Report, *supra* note 29, at ¶ 1 (citation omitted).
[111] FCC 2019 Report, *supra* note 29, at ¶ 4.
[112] *Id*. at ¶ 23.

On the other hand, the FCC observed that many commenters argued that additional educational efforts were need to help increase parental use of the V-chip,[113] which led the Commission to conclude that further study was needed "to determine the most effective ways to educate parents about the V-chip and the TV Parental Guidelines in order to increase V-chip use and awareness."[114] This conclusion applies with equal force to educating parents about the parental control capabilities provided by the major streaming services.

Closely tied to the criteria of parental awareness of available parental controls is parental understanding of how those controls work. Accordingly, the objectives of an educational campaign on parental controls should be not only to make parents aware of the controls available to them, but to help parents understand the operation of the controls and how to utilize them. As the FCC observed in its 2009 report, "the extent to which parents are familiar with the ratings system used by a parental control technology will greatly increase its usefulness among parents…With respect to the TV Parental Guidelines, the record indicates that most parents have heard of the ratings but many do not understand what they mean."[115] The FCC noted that several commenters contended that TV Parental Guidelines were "confusing."[116] Similarly, the FCC reported to Congress in 2019 that the record included reports of "a lack of understanding or education about the system," with many commenters agreeing that "academic research shows that most parents do not understand the TV rating system . . . ."[117]

These FCC observations are in stark contrast to the Oversight Monitoring Board's own findings regarding parents' perception and understanding of the TV Parental Guidelines. In 2020, a Board-sponsored survey of parents "revealed that usage and positive sentiment toward the TV ratings system remains high . . . ." The survey found that "90 percent of parents understand the TV ratings system," and "[n]early nine in 10 parents (88 percent) are aware that the TV ratings provide guidance based on a child's age."[118] Given this apparent disagreement between the

[113] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 53 (citations omitted).
[114] *Id*. at ¶ 55 (citations omitted).
[115] *Id*. at ¶ 199 (citation omitted).
[116] *Id*. at ¶ 27 (citations omitted).
[117] FCC 2019 Report, *supra* note 29, at ¶ 19 (citations omitted).
[118] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77, at 4.

industry and other commenters regarding the level of parental understanding of the TV Parental Guidelines ratings system, additional research on this point may be beneficial.

Another criteria here is the ease with which parents may use the controls provided to them. On this point, the FCC observed that the ease of usage for a parental control system will affect the rate with which parents adopt it.[119] This factor, then, is closely related to the previous factor regarding parents' understanding of the ratings system and how to use it. As discussed above, there are conflicting reports on whether, and the extent to which, parents understand the ratings system which further study could help resolve. One of the PTC's recommendations could enhance the ease with which parents might understand and use a ratings system, that being that "All streaming video providers should agree to and adopt a uniform standard for applying age-based and content ratings,"[120] which would be easier for parents to understand than if each service used those ratings differently, as currently appears to be the case.[121]

The adoption rate for a particular parental control is another criteria by which such controls may be evaluated, and again, this is closely related to those criteria just discussed. The FCC observed that "[t]he extent to which a particular parental control technology has been adopted by parents may provide an indication of how well that product has been promoted, how well parents have been educated about the product, and how useful and effective that technology is for parents."[122] Once again, however, the FCC stated that "Further study is needed to better understand (i) the extent to which parents are using specific parental control technologies; (ii) to the extent that the usage rate is low, what reasons, if any, besides lack of awareness keep parents from using parental control technologies, and to what extent do these reasons differ among media; and (iii) whether and, if so, what actions could be taken to increase use of these parental control technologies."[123]

A final criteria with which to evaluate the provision of parental controls in this category involves the availability of customer support for the controls. As the FCC observed, "Once a

[119] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 192.
[120] PTC 2017 REPORT, *supra* note 9, at 2.
[121] *See supra* notes 41-63 and accompanying text.
[122] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 190.
[123] *Id*. at ¶ 207 (citations omitted).

parent starts using a particular control technology, effective customer support in addressing questions from parents may increase understanding and usage of the technology. . . Providing information on websites and use of hotlines are two methods providers use to provide customer support."[124] Neither the Parents Television and Media Council nor the Oversight Monitoring Board's recent recommendations on parental controls for streaming services address customer support. Nor did the FCC's 2019 Report to Congress consider the issue in the context of the TV Parental Guidelines. However, an examination of the parental controls offered by the various streaming services reveals that many of the services provide brief explanations of how parental controls operate and how to use them on their websites.[125] However, these explanations might be expanded to be more informative and thus more helpful. It does not appear that any of the major streaming services provide customer support hotlines that subscribers can call to ask for additional assistance with using parental controls. This, then, appears to be an area where streaming services could expand their efforts.

Thus, with regard to the category two criteria involving the level of parental awareness and understanding of the controls available to them, it appears that there are issues on which further study could be beneficial, but also indications that there is room for improvement in this area. Commenters in FCC proceedings have argued that many parents don't understand the TV Parental Guidelines rating system and that more could be done to educate parents about the system and how to use it.[126] Providing control systems that are uniform across SVOD services could make the controls easier for parents to understand and use. Streaming services could also improve the customer support they offer for their parental controls. There do not appear to be any studies on the adoption rate for the parental controls offered by SVOD services, which could

[124] *Id.* at ¶ 191.
[125] *See, e.g.*, *Maturity Ratings*, AMAZON.COM, https://www.amazon.com/gp/help/customer/display.html?nodeId=G2C2CPZWGZWHZ42J#:~:text=Maturity%20Ratings%20combine%20movie%20and,with%20recommended%20audience%20age%20groups (last visited Jan. 28, 2022); *Restrict access to content on Apple TV*, *supra* note 61; *Parental Controls on Disney+*, *supra* note 53; *Set HBO Max parental controls*, *supra* note 57; *Kids Profiles and Parental Controls on Hulu*, *supra* note 51; *How do I set up parental controls for Paramount+?*, PARAMOUNTPLUS.COM, https://help.paramountplus.com/s/article/PD-How-do-I-set-up-parental-controls-for-paramount (last visited Jan. 28, 2022); *Does Peacock have Kids profiles?*, supra note 58.
[126] *See* FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶¶ 181-82, 199.

shed light on the other criteria in this category. Considered in the next category are the specific capabilities of the controls provided to parents.

C. Category Three: Capabilities of Parental Controls

The third category under which parental controls may be evaluated focuses on the capabilities of the parental controls provided by SVOD services. The criteria examined in this category are the means provided to prevent children from overriding parental controls; the ability to block content (black listing); the ability to restrict access and usage; the ability to select content (white listing); reliance on non-ratings-based system; the ability to monitor usage and view usage history; access to parental controls outside of the home; and access to multiple ratings systems.[127]

Regarding the means provided to prevent children from overriding parental controls, the FCC has observed that "Most parental control technologies use password protection to prevent children from overriding the settings established by the parent."[128] This method appears to be utilized by the major streaming services, with the PTC reporting in 2021 that a number of streaming services provide for "PIN-restricted access to content above [a particular] age or rating threshold."[129] Further, it appears that since the release of the PTC's report, those services that at that time were not providing this capability have since added it.[130] Thus, it does appear that this is a capability offered by all of the major streaming services.

Another potential parental control capability identified by the FCC is the ability to block content, sometimes referred to as "black listing." With black listing, "any content on the filter's list is blocked."[131] While black listing is more associated with Internet blocking and filtering software, its equivalent in the streaming context would be to provide parents with the ability to block certain content offered by the streaming service so that their children are unable to view it.

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[127] *Id.* at ¶ 187.
[128] *Id*. at ¶ 193 (citations omitted).
[129] PTC 2021 REPORT, *supra* note 1, at 9.
[130] *See supra* notes 51, 59 and accompanying text.
[131] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 145 (citations omitted). "Black lists are lists of URLs or Internet Protocol ("IP") addresses that a filtering company has determined lead to content that contains the type of materials its filter is designed to block." Am. Civ. Liberties Union v. Gonzales, 478 F. Supp. 2d 775, 790 (E.D. Pa. 2007).

The PTC observed that most of the major streaming services allow parents to prevent their children from accessing certain content based on maturity level, or on the age-based ratings applied to the programming.[132] Although the specifics can vary by streaming services, parents could, for example, set their child's profile to block all content rated above TV-PG/PG, meaning that all programming rated higher than that, TV-14 or PG-13 for example, would be blocked. The Oversight Monitoring Board's best practices guidelines also recommend that age- and content-based ratings be applied to programming to allow parents to block programming containing certain content or ratings.[133]

In addition to the ability to block content in the manner just discussed, the PTC has also urged streaming services to provide parents with the ability to block their children from viewing specific titles, regardless of the age-based rating of those titles. The PTC found that Netflix was the only service to provide this capability.[134] An additional recommendation made by the PTC regarding blocking capabilities is that explicit titles be blocked by services when those services' "parental controls are turned on: If a parent has deployed parental controls to block a child from viewing TV-MA, or R-rated content, those titles should no longer be visible on the menu screen, especially if those titles contain explicit words, descriptions or cover art."[135] However, the PTC's reports do not address whether and to what extent this capability is offered by the major SVOD services.

Another criteria on which to evaluate parental controls is the ability to select content, also referred to as "white listing." White listing allows "parents to affirmatively select the programming that can be viewed by their children."[136] With white listing, then, "any content on the list is permitted."[137] With the major SVOD services, parents have the ability to broadly select

[132] PTC 2021 REPORT, *supra* note 1, at 9.
[133] OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 1-2.
[134] PTC 2021 REPORT, *supra* note 1, at 9. See also Julia Alexander, *Netflix will allow parents to remove movies and shows, filter by rating in new update*, THE VERGE (April 7, 2020, 1:00 PM), https://www.theverge.com/2020/4/7/21211338/netflix-parent-controls-filter-movies-tv-shows-rating-pin-password.
[135] PTC 2017 REPORT, *supra* note 9, at 2 (2017).
[136] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 197.
[137] *Id*. at ¶ 145 (citations omitted). "White lists are lists of URLS or IP addresses that a filtering company has determined do not lead to any content its filter is designed to block, and, thus, should never be blocked. A very restrictive filter, like a 'walled garden' filter, might block all URLs except those

the content available to their children by setting up a kids profile for each child and selecting the maturity level of programming that is available for viewing within that profile.[138] Thus, a parent can select only TV-G and G-rated programming be available within a kid's profile, meaning only programs or movies with one of those ratings will be available. As was discussed above, this also has the effect of black listing, or blocking programming with a higher maturity rating.

The Parents Television and Media Council has a recommendation that takes this a step further. It recommends that the major streaming services allow subscribers to select "a 'family friendly' package that excludes explicit programming…" However, the PTC had a purpose for this recommendation beyond just ensuring that parents have the option to select packages that only contain family friendly programming. The PTC recommended that these family friendly packages be offered "at a slightly reduced fee," so that families were not forced "to underwrite, with their subscription dollars, content they find objectionable in order to get family-quality content."[139] However, the PTC observed that none of the major streaming services have taken this step, although it acknowledged that "Disney+ was built chiefly with family audiences in view."[140]

Another potential capability of parental controls is to "allow parents to monitor and view the history of their children's media usage."[141] This is not an issue that was addressed in either the PTC's or Oversight Monitoring Board's recent recommendations. Nevertheless, some streaming services do provide this capability. Netflix provides a "Kids Activity Report" feature, which allows parents to access the viewing history of individual profiles to see what their children have watched.[142] Amazon Prime and Apple+ TV also allow parents to view the content

included on a white list." Am. Civ. Liberties Union v. Gonzales, 478 F. Supp. 2d 775, 790 (E.D. Pa. 2007).

[138] *See supra* notes 41-63 and accompanying text.

[139] PTC 2017 REPORT, *supra* note 9, at 2. Regarding this proposal, the PTC noted that "[w]hen Sirius and XM Satellite Radio companies were seeking regulatory approval to merge, the PTC called on corporate leaders of the combined entity to offer a separate subscription tier for families that did not want to underwrite explicit content. To this day Sirius XM subscribers can select a '"family friendly"' package that excludes explicit programming at a slightly reduced fee. A similar option should be available to streaming video subscribers." *Id*.

[140] PTC 2021 REPORT, *supra* note 1, at 9.

[141] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 201.

[142] PTC 2021 REPORT, *supra* note 1, at 10; Chorpenning, *supra* note 16.

that has been watched on their services.[143] Other services should also be encouraged to provide parents with this capability.

The ability to access parental controls from outside the home is another criteria identified in the FCC's 2009 report on which to evaluate parental controls.[144] This is a feature provided by the major streaming services, as parents can log onto their accounts from any computer to set or adjust their parental control settings, whether at home or not. There is also another way to think about this criteria in the SVOD setting, although it was not considered by the FCC at the time of its 2009 report: that being for parental controls, once set, to apply regardless of the device or platform through which children access the service, or the location from which children access the service. This was not a topic addressed by the PTC's reports on streaming services, though it is one which should be investigated. If parental controls only apply when certain devices or platforms are used by children to watch a streaming service's programming, then there will be a major gap in the effectiveness of those controls.

Another criteria identified by the FCC for evaluating parental control systems is "reliance on a non-ratings-based system." On this criteria, the FCC stated that "Given conflicting studies on the usefulness of the TV Parental Guidelines, a parental control technology that blocks or selects programming without the use of ratings may be attractive to parents."[145] White listing may be a means of doing this. There may be other methods as well, and while it is worth considering whether a different rating system would be more effective than the TV Parental Guidelines and MPA ratings, that is not an issue that will be considered here. Rather, this article will proceed with the assumption that it is desirable for the TV Parental Guidelines to be utilized in the streaming environment.

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[143] See Abesamis Demarest, *supra* note 63; *Watch History and My List on Apple TV*, STAN.COM, https://help.stan.com.au/hc/en-us/articles/219137187-Watch-History-and-My-List-on-Apple-TV.
[144] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 203 (citation omitted). Another criteria discussed by the FCC was "Tracking," about which the FCC observed, "While not possible for fixed technologies, some wireless devices offer parties the ability to locate their children and monitor their whereabouts using GPS technology." *Id*. at ¶ 204 (citation omitted). This criteria, however, does not seem particularly relevant to streaming service parental controls.
[145] *Id*. at ¶ 200 (citations omitted).

A number of factors support this assumption. First, this system has been used for more than two decades on a widespread basis for broadcast and cable television programming,[146] and the major streaming services examined in this article have all adopted the TV Parental Guidelines age-based ratings at a minimum.[147] Thus, this is the major ratings system currently utilized for television programming, streaming or not, and there is no significant likelihood that an alternative system will be widely adopted in the near future. It is also the only ratings system that currently works with the V-chip.[148] Nevertheless, that does not prevent streaming services from providing information on program content or suitability in addition to that provided by the TV Parental Guidelines, as the Oversight Monitoring Board's best practice recommendations make clear.[149]

Further, the TV Parental Guidelines are modeled on the MPA movie ratings[150] that have been in use for theatrical films, with some modifications, since the 1960s.[151] This is partly because parents are already familiar with the MPA ratings, so it was hoped that modeling the TV ratings on the MPA ratings would make them more easily understood by parents.[152] Furthermore, the TV Parental Guidelines have been in use for more than twenty years, which could contribute parental awareness and understanding of the ratings and their meanings. There are ways to improve the capabilities and/or effectiveness of the operation of the TV Parental Guidelines, as discussed throughout this article. However, as previously stated, this article will proceed under the assumption that the TV Parental Guidelines are among the controls that should be available to parents in the streaming environment. That is not to say, however, that the application and display of the TV Parental Guidelines and MPA ratings should be the totality of the parental control capabilities that streaming services provide. Indeed, there may be other desirable controls that should be provided in addition to these ratings.

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[146] FCC 2019 Report, *supra* note 29, at ¶¶ 3-5 (citations omitted).
[147] PTC 2021 REPORT, *supra* note 1, at 3.
[148] FCC 2019 Report, *supra* note 29, at ¶¶ 3-5 (citations omitted).
[149] OVERSIGHT MONITORING BOARD BEST PRACTICES GUIDELINES, *supra* note 12, at 2.
[150] Timmer, *supra* note 26, at 297.
[151] *History of Ratings*, CLASSIFICATION AND RATINGS ADMINISTRATION, https://www.filmratings.com/History.
[152] Timmer, *supra* note 26, at 297.

Similarly, the FCC identified "access to multiple ratings systems" as another potential feature of parental control systems.[153] The PTC observed that some streaming services used age and/or content ratings other than the TV Parental Guidelines, and the Oversight Monitoring Board's recommendations allow for services to provide information about program content in addition to that provided by the TV Parental Guidelines. Ideally, parents would be able to use this additional information to select the content that their children can view. However, with the exception of Netflix, which allows parents to block access to individual titles, it does not appear that this is a capability provided by the major streaming services, which only allow content to be blocked by maturity level as indicated by the TV Parental Guidelines or MPA ratings, and not based on any other program content information provided by a service.

In sum, the major SVOD services provide some of the desirable capabilities for parental controls, but lack others. They all require the use of a PIN to help prevent children from overriding parental controls. The services all allow parents to block programming above a selected maturity level, which has the effect of selecting only content at or below that maturity level to allow their children to view. However, only Netflix allows parents to block individual titles. The PTC also recommends that blocked titles and their cover art no longer appear on menu screens that children can view, although it has not reported on whether streaming services provide this capability. Parents should also have the ability to view a list of the programs their children have watched, a capability that is only provided by Netflix, Amazon Prime Video, and Apple TV+. Finally, streaming services should be encouraged to provide information about their programming in addition to that provided by the TV Parental Guidelines and MPA ratings, and parents should be able to use that additional information to control the programming to which their children have access. Considered next is the effectiveness of the parental controls provided.

D. Category Four: Effectiveness of the Controls

In 2009, the FCC observed that "The V-chip's effectiveness depends on accurate program ratings."[154] That statement applies with equal force to the ratings applied to the programming offered by the major SVOD services. Because the main way that parents can

[153] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 198.
[154] *Id*. at ¶ 24 (citations omitted).

restrict the content their children are able to view on these services depends on the maturity level selected by parents using the TV Parental Guidelines and MPA ratings, the accuracy of those ratings is crucial. If ratings are inaccurate or inconsistent, children may be able to access programming that is inappropriate for them according to their parents' maturity level selections, and the controls provided to parents will not effectively and reliably prevent their children from viewing programming they don't want them to see. Thus, key considerations in evaluating the effectiveness of parental controls are the accuracy and consistency of program ratings.

For nearly as long as the TV Parental Guidelines have been in use, there have been allegations that not all programs are accurately and consistently rated.[155] A 2002 study found that while age-based ratings were generally applied accurately, content descriptors were lacking in a large majority of programs with content calling for the application of such descriptors.[156] A 2004 study found there was more objectionable language in programs rated TV-PG than in those rated TV-14.[157] Studies by the Parents Television Council in both 2005 and 2007 found problems with the accurate and consistent application of content descriptors to programming.[158] In addition to these studies, the PTC has regularly conducted studies over the years that conclude that programs

[155] There are also studies which indicate some inaccuracies and inconsistencies in the application of MPA ratings. *See, e.g.*, Kia Afra, *PG-13, Ratings Creep, and the Legacy of Screen Violence: The MPAA Responds to the FTC's "Marketing Violent Entertainment to Children" (2000-2009)*, 55(3) CINEMA J. 40 (2016); Lucille Jenkins et. al., *An Evaluation of the Motion Picture Association of America's Treatment of Violence in PG-, PG-13--, and R-Rated Films*, 115 PEDIATRICS 512 (2005); Ron Leone, *Contemplating Ratings: An Examination of What the MPAA Considers 'Too Far for R' and Why*, 52 J. OF COMMC'N 938 (2002). Because the bulk of streaming programming is likely to consist of TV series, and because the issues regarding ratings accuracy in either context are largely similar, only issues with the accuracy of the TV Parental Guidelines ratings are considered in depth herein. However, many of the observations and conclusions regarding the accuracy of the TV Parental Guidelines would apply to the MPA ratings. One significant difference, however, is that the MPA Classification and Ratings Administration is responsible for overseeing the MPA ratings, instead of the TV Parental Guidelines Oversight Monitoring Board. MOTION PICTURE ASSOCIATION AND NATIONAL ASSOCIATION OF THEATER OWNERS, CLASSIFICATION AND RATING RULES 1, 2000, https://www.filmratings.com/Content/Downloads/rating_rules.pdf.

[156] Dale Kunkel et al., *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. OF COMMC'N 112, 136 (2002).

[157] Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 J. OF BROAD. & ELEC. MEDIA 554, 563-64 (2004).

[158] PARENTS TELEVISION COUNCIL, THE RATINGS SHAM 1 (2005), http://www.parentstv.org/PTC/publications/reports/tvratings2005/study.pdf; PARENTS TELEVISION COUNCIL, THE RATINGS SHAM II 2 (2007), http://www.parentstv.org/PTC/publications/reports/ratingsstudy/RatingsSham11.pdf.

are frequently inaccurately and inconsistently rated, with at least nine such studies between 2008 and 2020.[159] In addition, in 2016, an academic study published in the journal *Pediatrics* also identified problems with ratings accuracy, such as TV-Y7 rated shows containing as much violence as TV-MA rated shows.[160]

In its 2009 report to Congress, the FCC observed that several commenters asserted that the TV Parental Guidelines were "applied inaccurately and inconsistently to television

[159] PARENTS TELEVISION COUNCIL, HAPPILY NEVER AFTER: HOW HOLLYWOOD FAVORS ADULTERY AND PROMISCUITY OVER MARITAL INTIMACY ON PRIMETIME BROADCAST TELEVISION, 2008, https://www.parentstv.org/resources/Marriagestudy-PDF-4_200224_173834.pdf (identifying problems with the broadcast networks accurately and consistently applying the "S" and "D" ratings to their programming); PARENTS TELEVISION COUNCIL, SEXUALIZED TEEN GIRLS: TINSELTOWN'S NEW TARGET: A STUDY OF TEEN FEMALE SEXUALIZATION IN PRIME-TIME TV, 2010, https://www.parentstv.org/resources/2010_SexualizedTeenGirls_200224_174629.pdf (finding programs with explicit sexual content featuring underage girls lacking an "S" rating); PARENTS TELEVISION COUNCIL, CARTOONS ARE NO LAUGHING MATTER: SEX, DRUGS AND PROFANITY ON PRIMETIME ANIMATED PROGRAMS, 2011, https://www.parentstv.org/resources/Final_AnimationStudy_200224_173926.pdf (finding inaccurate ratings applied to primetime animated programming); PARENTS TELEVISION COUNCIL, MEDIA VIOLENCE: AN EXAMINATION OF VIOLENCE, GRAPHIC VIOLENCE, AND GUN VIOLENCE IN THE MEDIA, 2013, https://www.parentstv.org/resources/VStudy_dec2013_200224_173302.pdf (finding programs that contained graphic violence lacking the appropriate content descriptor); PARENTS TELEVISION COUNCIL, REMEMBERING FAMILY: INSIGHTS AND NEW RESEARCH ON FAMILY AND MEDIA, 2014, https://www.parentstv.org/resources/2014_Family_Study_Report.pdf (finding TV-PG-rated programs that contained explicit language lacking the appropriate content descriptor); CHRISTOPHER GILDEMEISTER, PROTECTING CHILDREN OR PROTECTING HOLLYWOOD?: A TWENTY-YEAR EXAMINATION OF THE EFFECTIVENESS OF THE TV CONTENT RATINGS SYSTEM, 2016, https://www.parentstv.org/resources/2016RRStudy.pdf (finding broadcast network programs with mature content lacking a TV-MA rating); PARENTS TELEVISION COUNCIL, MEDIA VIOLENCE: A DRESS REHEARSAL FOR TRAGEDY: VIOLENCE, GUN VIOLENCE, AND TV CONTENT RATINGS ON PRIME-TIME BROADCAST TELEVISION, PARENTS TELEVISION COUNCIL, 2018, https://www.parentstv.org/resources/2018GunStudy.pdf (finding programs containing guns and violence inappropriately rated for children under 14); PARENTS TELEVISION COUNCIL, A DECADE OF DECEIT: HOW TV CONTENT RATINGS HAVE FAILED FAMILIES, 2018, https://www.parentstv.org/resources/Decades-Report.pdf (identifying numerous instances of inaccurate application of content ratings); PARENTS TELEVISION COUNCIL, TEEN-TARGETED BROADCAST TV CAN BE VULGAR…BUT STRANGER THINGS ARE HAPPENING ON NETFLIX, 2020, https://www.parentstv.org/resources/Teen-Report.pdf (finding that many Netflix programs aimed at teens included content that merited adult ratings).

[160] Joy Gabrielli et al., *Industry Television Ratings for Violence, Sex, and Substance Use*, 138(3) PEDIATRICS (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5005023/; Susan Scutti, *TV rating system not accurate, little help to parents, study says*, CNN.COM (Aug. 23, 2016), https://www.cnn.com/2016/08/22/health/tv-ratings-not-accurate-parents/index.html.

programming."[161] The Commission reiterated this point in its 2019 report to Congress, observing that "Concerns about the accuracy of the TV Parental Guidelines are not new," noting that "commenters in previous Commission proceedings have argued that the TV Parental Guidelines are applied inaccurately and inconsistently to television programming." The FCC went on to indicate its belief "that a better job could be done aligning the rating system with the video content being shown in at least some instances," but was unable to reach its own conclusions on the accuracy of the rating system given the limited time it was given by Congress to prepare this report.[162]

On the other hand, the Oversight Monitoring Board conducted spot checks of television programming in 2020 to help it gauge the accuracy of the ratings applied to specific programs. The Board's findings were at odds with those of other interested parties just discussed. According to the Board, "The 2020 spot check process indicated that age ratings were applied consistently and accurately to all reviewed programs," and that "descriptors generally were applied accurately and consistently as well." As a result of these spot checks, the Board concluded that "the vast majority of content is rated correctly." Nevertheless, the Board did acknowledge that "there were two instances in which the process resulted in networks agreeing to add a descriptor to a program following the reviews."[163]

Accuracy and consistency of the ratings applied to programming is essential to the effective functioning of the system. If all of the other pieces of an effective parental control system are in place, the system will nevertheless fail to achieve its objective if programming is not accurately rated. While there is conflicting evidence on whether ratings are accurately applied, there appears to be sufficient evidence to question their accuracy in some instances. Only the industry's own spot checks led to the conclusion that ratings were generally applied accurately. Evidence provided by all other interested parties point to the opposite conclusion. For its part, the FCC was unable to reach a conclusion on this issue, given the limited time it had to complete its 2019 report to Congress.

[161] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 27 (citations omitted).
[162] FCC 2019 Report, *supra* note 29, at ¶ 14 (citations omitted).
[163] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77, at 5.

There are some characteristics of the TV Parental Guidelines rating system that may contribute to ratings inaccuracy and inconsistency. One is that many different parties are involved in applying ratings to programs. Ratings may be determined by program producers, television networks, or television stations.[164] This is in contrast to the MPA movie ratings, which are assigned by a single ratings Board.[165] The different parties applying the TV Parental Guidelines ratings may understand and interpret the ratings definitions differently, which could lead to inconsistent application of ratings. In addition, for advertiser-sponsored programming, networks may have an incentive to under-rate programs. For example, some advertisers "will not advertise on programs rated TV-MA (mature audiences only), and that therefore the networks have an incentive to apply a more lenient rating to programs than they may warrant in order to increase the advertising revenue generated by the program."[166]

Another characteristic of the TV Parental Guidelines rating system that can contribute to the likelihood of programs being inaccurately and/or inconsistently rated is that the definitions of the ratings categories are so brief as to provide little guidance in how to interpret and apply those definitions to specific program content. For example, programs rated TV-PG may contain moderate violence, ones rated TV-14 may have intense violence, and ones rated TV-MA may have graphic violence.[167] However, no guidance is provided on how to distinguish moderate violence from intense violence from graphic violence. These brief definitions require somewhat subjective judgments, and reasonable people could differ on whether the violence in a program is moderate or intense, for example, particularly on the fringes. For its part, the industry has defended its decision not to provide a more detailed system, saying that a more complex system could be too difficult for parents to understand and utilize.[168] The industry also argues that "rating programs is not an 'objective' science,'" so that determining ratings involves a degree of subjectivity and "editorial judgement."[169]

[164] Timmer, *supra* note 26, at 300.
[165] MOTION PICTURE ASSOCIATION AND NATIONAL ASSOCIATION OF THEATER OWNERS, *supra* note 155, at 1.
[166] FCC 2019 Report, *supra* note 29, at ¶ 16 (citations omitted).
[167] *Ratings*, TV PARENTAL GUIDELINES, http://tvguidelines.org/ratings.html.
[168] Timmer, *supra* note 26, at 297.
[169] FCC 2019 Report, *supra* note 29, at ¶ 21.

Each of the major broadcast television networks and many cable networks have a mechanism in place to oversee the application of ratings to programs airing on those networks: a standards and practices department, although the name of the department can vary by network. The purpose of standards and practices is "to review all non-news broadcast matter, including entertainment, sports and commercials, for compliance with legal, policy, factual, and community standards."[170] While a major function of standards and practices departments is to ensure that the programming provided by their networks complies with the law, their purpose is broader than that. Standards and practices departments seek to ensure that network programming "is acceptable to the bulk of the mass audience," as well as to a network's affiliates and advertisers.[171] Standards and practices departments also strive to protect their network's image from being tarnished by airing program content that could reflect poorly on the network. Content concerns for standards and practices involves, among other things, language, sexual content, and even "the suitability of advertising, especially of personal products."[172]

Standards and practices departments have been viewed as necessary for broadcast networks because they are more heavily regulated by the FCC than cable or streaming platforms.[173] Cable network programming is not regulated by the FCC to the extent that broadcast content is,[174] so cable networks are free to include content in their programming that could be problematic for broadcasters. Nevertheless, "cable networks also employ [standards and

[170] JAY BLACK & CHRIS ROBERTS, DOING ETHICS IN MEDIA: THEORIES AND PRACTICAL APPLICATIONS 405 (2011).
[171] GEORGE DESSART, STANDARDS AND PRACTICES, ENCYCLOPEDIA OF TELEVISION 2187 (Horace Newcomb ed., 2nd ed. 2013).
[172] George Dessart, *Standards and Practices*, MUSEUM OF BROADCAST COMMUNICATIONS, http://www.museum.tv/eotv/standardsand.htm.
[173] Michael Schneider, *As TV Consumption Shifts, Streamers Struggle With How to Apply Programming Standards*, VARIETY (Nov. 20, 2019, 10:15 AM), https://variety.com/2019/digital/features/streamers-content-standards-tv-1203409601/.
[174] *See, e.g.*, Timmer, *Seven Dirty Words*, *supra* note 7, at 185-87; *Cable Television*, FCC.GOV, https://www.fcc.gov/media/engineering/cable-television#:~:text=The%20Federal%20Communications%20Commission%20first,received%20signals%20by%20microwave%20antennas.&text=The%20Supreme%20Court%20affirmed%20the,392%20U.S.%20157%20.

practices] to make sure programming shares a channel's core values and voice, and doesn't reflect poorly on its brand."[175]

The newer SVOD streaming services, however, typically don't have a standards and practices department, or its equivalent.[176] These services are not regulated by the FCC,[177] unlike broadcast and cable networks. In addition, some of the SVOD services do not carry advertising, and so do not need to be concerned about advertiser response to program content.[178] However, executives at linear networks have expressed the view that it might be beneficial for streaming services to implement some sort of standards and practices function: "Standards and practices execs usually keep tabs on how language, nudity, sexual situations, violence or other depictions and themes might be received by viewers (and in the case of commercial TV, advertisers), and also monitor what elements might be problematic down the line."[179] For example, at NBC, standards and practices' duties include "working with showrunners to help them tackle sensitive subjects such as sexual assault and harassment, as well as issues of gender and race, which they coordinate with the network's diversity team."[180]

Many streaming services offer a significant amount of programming that originally appeared on broadcast or cable networks where there was oversight by standards and practices, making that particular programming less likely to be problematic. However, original programming produced specifically for a streaming service does not necessarily have this oversight. Instead of having standards and practices departments, the streaming services each handle content oversight differently, with most relying "on their programming executives and their showrunners to police themselves."[181] Reportedly, "Netflix and Apple have dedicated

[175] Schneider, *supra* note 173.
[176] *Id.*
[177] *See* 2020 Communications Marketplace Report, *supra* note 3, at ¶ 341 (2020). "There are some exceptions. For example, the Commission's closed captioning rules, 47 CFR § 79.4, require programming distributed via IP to be captioned if the programming was previously shown on television with captions." *Id*. at n. 984; Michael O'Reilly, *FCC Regulatory Free Arena*, FCC.GOV (June 1, 2018, 11:15 AM), https://www.fcc.gov/news-events/blog/2018/06/01/fcc-regulatory-free-arena; PTC 2021 REPORT, *supra* note 1, at 5.
[178] Schneider, *supra* note 173.
[179] *Id.*
[180] *Id.*
[181] *Id.*

internal departments devoted to rating every episode of their series."[182] Hulu apparently has the most detailed standards and practices policy of all the major SVOD services. While it doesn't have an actual standards and practices department, it does have "a policy where a cross-functional team of execs might be asked to take a look when something requires an extra eye or needs additional consideration. The execs come together from various departments — legal, corporate communications and elsewhere — to weigh in if there's a debate over a certain piece of content."[183] It appears that the other major SVOD services don't have specific procedures for handling these types of issues, "or if they do, they're loath to share that information."[184]

In 2019, the NAB, NCTA, and MPA explained to the FCC that "an individual network's standards and practices division has final authority on the assignment of ratings and may consult with standards and practices executives in other networks to ensure consistency in applying ratings across networks."[185] In its 2019 report to Congress, the FCC found that the Oversight Monitoring Board "facilitates regular calls among industry standards and practices executives…to promote ratings consistency across companies."[186] These calls may include standards and practices personnel from various networks to allow them to discuss "questions and issues that have arisen as they attempt to apply ratings to programs."[187] Some of the issues that reportedly "have been considered in this manner involve where the boundaries are between the different age-based rating categories, what language is appropriate in the different age-based categories, and what effect bleeping language or covering the lips of someone using foul language should have on the ratings assigned to a program. The results of these discussions, however, are generally not made public."[188] Nevertheless, according to the Board, these meetings and calls have resulted in "'a more common and consistent understanding' of how ratings should be applied."[189]

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[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] FCC 2019 Report, *supra* note 29, at ¶ 21.
[186] *Id.* at ¶ 9.
[187] Timmer, *supra* note 26, at 289 (citation omitted).
[188] *Id.*
[189] FCC 2019 Report, *supra* note 29, at ¶ 21 (citations omitted).

According to the Board, these types of efforts are ongoing. The Board reported that in 2020, "15 content creators reached out to the Monitoring Board asking for information on how to apply ratings to their shows." In addition, the Board reported formalizing its process in 2020 "for connecting content creators with standards and practices professionals at participating Monitoring Board networks to aid them in the process of ensuring their shows are accurately rated and use the correct descriptors."[190] The Board also reports assisting with the training of new standards and practices personnel at the networks.[191]

Regardless of the Board's behind-the-scenes work to promote ratings accuracy and consistency, there are a number of studies that show room for improvement in these areas.[192] While the FCC was "unable to draw any definitive conclusions [on ratings accuracy] in the limited time" it was given to prepare its 2019 report to Congress, it did express its belief "that sufficient concerns have been expressed in the record to merit additional Board action to analyze the accuracy of ratings" and recommended that the Board take action to address this.[193] There may be a productive role for the government to play in promoting such action by the Board, and in promoting the adoption of effective parental controls by SVOD streaming services, which is discussed next.

VIII. Role of Government

In its 2021 report, the Parents Television Council identified a role for government to play to facilitate the provision of effective parental controls in the SVOD environment. Specifically, the PTC urged Congress and the FCC to revisit the Child Safe Viewing Act. The PTC observes that "Much has changed since the law was passed in 2008, and services and platforms that have emerged in recent years were not included in the evaluation of blocking technologies and parental controls called for by that Act."[194] Thus, the PTC would have the FCC examine the

[190] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77, at 9.
[191] Timmer, *supra* note 26, at 289 (citation omitted).
[192] *See supra* notes 156-164 and accompanying text.
[193] FCC 2019 Report, *supra* note 29, at ¶ 35.
[194] PTC 2017 REPORT, *supra* note 9, at 2.

major SVOD services to determine "the existence and availability of advanced blocking technologies" that the services could offer; "methods of encouraging the development, deployment and use of such technologies" by the services; and "the existence, availability and use of parental empowerment tools and initiatives already" provided by the major SVOD services.[195]

There is reason to believe that government attention to the issue could be beneficial. As discussed above, there have been conflicting findings on the level of parental understanding of the TV Parental Guidelines system,[196] as well as on the accuracy and consistency of the ratings.[197] The government could play a role in resolving those conflicts through additional study. In addition, the government, by simply focusing its attention on the issue, might help spur the industry to action: there are historic examples of this kind of impact.

For example, in response to the directive to create a rating system to work in conjunction with the V-chip, the television industry initially adopted an age-based rating system, with no content descriptors.[198] This system was widely criticized for failing to indicate specific programs' content types,[199] which prompted the FCC to direct the industry to meet with advocacy groups to revise the rating system to address this concern.[200] In response to this criticism and pressure, the industry met with advocacy groups to work on modifying the rating system, during which time "lawmakers continued their threats to legislate, forcing industry representatives to remain at the table."[201] This eventually resulted in the industry's modifying the rating system to include content-based ratings along with the original age-based ratings.[202] Government pressure and the threat of further legislation, then, appear to have helped motivate the industry to take action here.

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[195] FCC 2009 Child Safe Viewing Act Report, *supra* note 73, at ¶ 1 (citing Child Safe Viewing Act of 2007, *supra* note 73, at §§ 2(a)&(d)).
[196] *See supra* notes 115-120 and accompanying text.
[197] *See supra* notes 156-164 and accompanying text.
[198] Timmer, *supra* note 26, at 271 (citation omitted).
[199] *See, e.g.*, Fleming, *supra* note 25; Hall *supra* note 25; Stolberg, *supra* note 25.
[200] Timmer, *supra* note 26, at 271 (citation omitted).
[201] KATHRYN C. MONTGOMERY, GENERATION DIGITAL: POLITICS, COMMERCE, AND CHILDHOOD IN THE AGE OF THE INTERNET 47-48, 56 (2007).
[202] Timmer, *supra* note 26, at 271-72.

Even less formal governmental action may be sufficient to motivate the industry to act. When the Oversight Monitoring Board was created in 1997, it pledged to regularly conduct research on the TV Parental Guidelines rating system to determine whether any changes were needed to the system, among other things.[203] However, it does not appear that the Board followed through on this pledge until 2012, when for the first time, the Board publicly announced the results of research it had sponsored, which generally found high levels of awareness, satisfaction, and usage of the TV ratings by the public.[204]

It is possible this the Board was motivated to sponsor and publicly release this research by FCC attention to the issue. In May 2011, FCC staff met with the Board to learn what the Board had done to follow through on its commitment to conduct research on the rating system.[205] The timing of the two events, combined with "the fact that the Board had apparently not conducted or sponsored any research since it was created in 1997," suggests that the FCC's interest in the issue helped spur the industry to action.[206] Similarly, when the FCC began working on its 2019 report to Congress, the FCC observed that "the Board's website did not even include a phone number that someone could call to reach it." However, by the time the FCC finished its report, it noted that the Board had "recently reactivated a telephone number" the public could use to contact the Board.[207]

The Board also seems to have taken more significant actions in response to the FCC's 2019 report on it and the TV Parental Guidelines ratings. In that report, the FCC made a number of suggestions for making improvements to the Board's operations and the ratings process. First, the FCC urged the industry and the Board to do more to increase "public awareness of the Board

[203] *Id*. (citations omitted).
[204] Media Release, TV Parental Guidelines Monitoring Board, New Study Reveals Americans Believe TV Parental Guidelines Are Effective (Apr. 6, 2012) (available at http://www.tvguidelines.org/resources/TVGuidelines_Release_4-5-2012.pdf). "In a 2004 congressional hearing, Anthony Podesta, identifying himself as 'Executive Secretariat' of the board, testified, 'We know from our own polling and from surveys done by organizations like the Kaiser Family Foundation, that parents find the system helpful.' However, nothing more about this polling was released to the public, nor was any other board-sponsored research released for the next several years." Timmer, *supra* note 26, at 290-91 (citation omitted).
[205] Timmer, *supra* note 26, at 272-73 (citation omitted).
[206] *Id*. at 294-95.
[207] FCC 2019 Report, *supra* note 29, at ¶ 32.

and its role in overseeing the rating system." One way the FCC suggested the Board might to this was by releasing an annual report,[208] which the Board subsequently did, for the first time ever, in 2020.[209] Another of the FCC's 2019 suggestions was that the Board conduct "random audits or spot checks analyzing the accuracy and consistency of the ratings being applied pursuant to the TV Parental Guidelines."[210] That same year, the Board voted to "formally establish a spot check review program…to assess whether television programs are receiving accurate and consistent ratings across different networks and time slots." In its 2020 annual report, the Board reported on the results of its first spot check review in 2020, which generally determined that ratings were applied accurately to programs.[211]

> The FCC's 2019 report also recommended that:
>
> the Board consider ways to inform the public regarding the number of complaints it receives, the nature of each complaint, the program and network or producer involved, and the action taken, if any, by the network/producer or the Board in response to the complaint. For instance, the Board could consider issuing an annual report on the complaints it has received about the ratings of programs, how those complaints were adjudicated, and whether complaints led to the rating of a program being changed in future airings.[212]

The Board responded by reporting on some, but not all, of this information in its 2020 annual report. In that report, the Board reported on the number of comments it received from the public, and provided a general breakdown of the subject matter of those comments, the vast majority of which were about topics other that the TV Parental Guidelines ratings. The Board also reported receiving a small number of complaints about ratings—23 in total—and briefly outlined its procedures for handling such complaints.[213] The report went on to provide short summaries of

[208] *Id*. at ¶ 33.
[209] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77.
[210] FCC 2019 Report, *supra* note 29, at ¶ 35.
[211] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77, at 5. *See also supra* note 163 and accompanying text.
[212] FCC 2019 Report, *supra* note 29, at ¶ 33.
[213] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77, at 9.

three of the complaints the Board received in 2020 about the ratings applied to specific programs, as well as "a brief overview of the actions taken to address the complaints."[214]

Attention by the public might have this effect as well. For example, the PTC's 2021 report on SVOD parental controls found Hulu to have "the least-robust parental controls of the major streaming services,"[215] partly because parents were not able to specify the maturity level of content available on kid's profiles, resulting in PG-13 and TV-14 being available on kid's profiles, and R and TV-MA content being available on teen profiles, regardless of a parent's preferences.[216] In addition, Hulu did not provide any measures to prevent kids from switching to adult profiles to watch adult content.[217] Soon after the release of these findings, Hulu altered its controls so that no programming with a maturity level above TV-PG/G is available on Hulu kid's profiles, and parents can now require use of PIN to access non-kid profiles.[218]

These examples provide support for the conclusion government and public attention to an issue can help motivate the industry to take action on the issue. A government examination of the availability and capabilities of parental controls in the SVOD environment, along with strategies that could be used to promote the provision of effective parental controls by SVOD services, and the use of those controls by parents, could help identify areas in which the government might productively motivate the industry to act.

IX. Conclusion

Children are increasingly viewing television programming on SVOD streaming services rather than on traditional linear broadcast and cable television. There are many reasons for children to prefer viewing programming this way, including having instantaneous access to a vast library of programming that they can watch at their own convenience, on a number of devices, and in a variety of locations. This increased choice and convenience for children makes it harder for parents to monitor their children's television viewing, so as to prevent exposure to inappropriate content. Because of these considerations, it is all the more critical for SVOD

[214] OVERSIGHT MONITORING BOARD 2020 ANNUAL REPORT, *supra* note 77, at 10.
[215] PTC 2021 REPORT, *supra* note 1, at 9.
[216] *Id*. at 9, 11.
[217] *Id*. at 9.
[218] *Kids Profiles and Parental Controls on Hulu*, *supra* note 51.

services to provide parents with the tools and capabilities to allow them to effectively restrict the programming their children can access and view on these services.

With its 2017 and 2021 reports, the Parents Television and Media Council has studied the parental controls provided by the major SVOD services and identified areas in which the services could do more. The PTC's 2021 report shows some improvement in the controls provided by some of the services since the 2017 report, and it appears there have been further improvements since the 2021 report as well. Nevertheless, the PTC has called on the industry to develop and adopt best practices guidelines for parental controls in the streaming environment, and identified some components to be included within those guidelines. The industry, through the TV Parental Guidelines Oversight Monitoring Board, has also adopted a set of best practices guidelines which it encourages streaming services to implement.

Using these best practices guidelines, as well as criteria identified by the FCC on which to evaluate parental controls and their capabilities, this article proposes a system by which to evaluate the parental controls provided by SVOD streaming services by grouping them four general categories. The first category considers whether services are offering parental controls in the first place, and if they are, the format and type of information provided by those controls. The second category examines parental awareness and understanding of the controls available to them. It considers promotional and educational efforts about the controls, the ease with which parents can use the controls, the adoption rate for parental controls, and the availability of customer support. The third category examines the capabilities of the parental controls provided. The criteria considered here include the means provided to prevent children from overriding the controls, the ability to block and select content using the controls, and the ability to monitor children's viewing history. The final category focuses on the effectiveness of the parental controls provided, with the accuracy and consistency of the ratings systems used in conjunction with the controls being a key consideration here. Together, these categories and criteria can be used to compare and evaluate the parental controls provided by SVOD streaming services.

Applying these categories of criteria to the parental controls currently offered by the major SVOD services, this article makes a number of observations. First, all of the major SVOD services offer parents some ability to restrict the content that their children can view on the services by allowing parents to choose a maturity level above which children's access to

programming is restricted. The services do this by allowing parents to select some combination of the TV Parental Guidelines and MPA age-based ratings. There is some variation in how the services categorize the different maturity levels that parents can select using these ratings. It may be that a more uniform system could promote parental understanding and use of these controls. Along these lines, there are studies with conflicting results about the degree to which parents understand how to properly use the controls available to them, so this is a topic on which further study might be beneficial.

Regarding the capabilities of the controls provided by the major streaming services, they all allow parents to block their children from viewing content above a selected maturity level, which has the effect of only allowing them to view content at the selected maturity level or below. The major services also provide parents with a means to prevent their children from overriding the controls by requiring the use of a PIN to access programming above the selected maturity level. However, there are other desirable capabilities not currently provided by many of the major services' controls, such as providing the parents the ability to block individual titles, and allowing parents to access their children's viewing history.

The final category involves the effectiveness of the parental controls. Here, accuracy and consistency are primary considerations. The parental controls provided by the major SVOD services all rely on the TV Parental Guidelines age-based ratings for television programs and the MPA audience ratings for films, in that parents can select what programming is available, and is not available to their children by using these ratings. This makes the accuracy and consistency of those ratings crucial, because if the ratings applied to individual programs are inaccurate, children may be exposed to program content that their parents chose to restrict the children from viewing. Here again there are conflicting studies on the accuracy and consistency of the ratings, as well as characteristics of the ratings system itself that can contribute to ratings inaccuracy. This too is an area where further study could be beneficial.

While the Parents Television and Media Council has called on the industry to take action on many of the issues identified above, it has also called on the government to act as well. The government could study some of the questions raised above, such as the degree to which parents understand and use the parental controls available to them, as well as whether ratings are accurately and consistently applied to programming. Furthermore, the government can draw

industry and public attention to areas in which action can be taken to improve the operation and effectiveness of the parental controls provided. Government can also apply pressure on the industry to make these improvements, a strategy which has had some success in the past. These actions could help encourage and motivate the major SVOD services to provide parents with the full range of tools to make their children's use of those services a safer experience.