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EDITOR'S NOTE

The Sports and Entertainment Law Journal is proud to complete its eleventh year of publication. Over the past decade, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles.

Volume XVIII has five featured articles discussing issues and proposing solutions for hot topics we face in the sports and entertainment industry.

The first article, written by David Barnes, a student from Stanford Law School, discusses the impact legality and nationalism has had in shaping arguments regarding the repatriation of Swedish explorer and scientist Gustaf Nordenskiöld's Mesa Verde collection. This article also details the influence Nordenskiöld played in impacting the creation of the American Antiquities Act of 1906 and the establishment of Mesa Verde National Park.

Moving into the sports industry, Jude Schmit writes the second article regarding college football's history of anticompetitive behavior in determining a national champion, including an in-depth look at the new college football playoffs.

The third article, by Charles Barrowman, talks about the National Labor Relations Board's recent ruling acknowledging that grant-in-aid student athletes of NCAA universities are employees and may unionize. This article concludes by highlighting the pressing need for Congress to clarify how student-athletes should be compensated and by what means.

The fourth article, written by Naomi Abraham, discusses the accessibility of 3D printing and its impact on the fashion industry, in particular, noting how trademark protection is best suited for the fashion industry and how trademark licensing is the most practical solution to protect fashion brands against infringement due to 3D printing.

Continuing with the discussion of intellectual property, the fifth article, by Andrew Emerson, explores the idea of a unified justification of the right of publicity and reviews landmark decisions defining the parameters of First Amendment protection for nonconsensual, uncompensated use of name and likeness.

We are truly pleased with Volume XVIII's publication and would like to the thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our two outstanding Deans, Dean Emmerich and Dean Moffat, for their invaluable advice and guidance. To the editorial board and staff editors, I appreciate the endless effort and hard work that has perfected the Journal.

Lastly, I would like to thank my parents, Leo and Jodi Vincent, as well as Brianna Miller, Cora Best, Steve Kubik, Lydia Morton, and Mihir Nandkeolyar for their continuous support throughout law school. I truly could not have achieved my accomplishments without your help!

ERICA VINCENT
EDITOR-IN-CHIEF (ACADEMIC YEAR 2015-2016)
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FROM REPATRIATION TO COOPERATION: GUSTAF NORDENSKIÖLD'S MESA VERDE COLLECTION

David M. Barnes[1]

ABSTRACT

Though Swedish explorer and scientist Gustaf Nordenskiöld was far from the first individual to excavate at what is now Mesa Verde National Park in Colorado, reports and rumors that a foreigner was shipping antiquities and human remains excavated at Mesa Verde out of the country sent some American citizens into an uproar. The controversy led to Nordenskiöld's arrest and the seizure of his 1400-plus pound Mesa Verde collection, but charges were dropped when it was later discovered that he broke no laws at the time by digging on American public land. More than 100 years have passed since Nordenskiöld shipped his collection back to Sweden, but inquiries into the possessory status of his collection continue today. This article analyzes those inquiries and the legal bases upon which they rest. It discusses the impact of nationalism and legality in shaping arguments, both for and against, the repatriation of Nordenskiöld's collection. Moreover, it details the influence Nordenskiöld played in impacting the creation of the American Antiquities Act of 1906 and the establishment of Mesa Verde National Park. Using interviews and email communications from private citizens and representatives from the National Park Service and National Museum of Finland, the current home of Nordenskiöld's collection, this article also tells the story of the 1991 loan of 17 objects from the National Museum of Finland to the National Park Service as part of a Nordenskiöld centennial exhibit. Finally,

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[1] Student, Stanford Law School. My appreciation to Robert C. Heyder, Irving L. Diamond, Elizabeth Bauer, Judith Reynolds, Gustaf Arrhenius, and Heli Lahdentausta for taking the time to speak or email with me regarding this project. This article would not have been possible without their generosity and time. I would also like to thank my mother, Elizabeth Barnes, for all of her support and encouragement throughout law school.

it provides a discussion on the current possessory status of Nordenskiöld's Mesa Verde collection.

I. INTRODUCTION

Gustaf Nordenskiöld, son of famed international explorer and discoverer of the Northeast Passage, Nils Adolf Erik Nordenskiöld, first visited the ruins of what is now Mesa Verde National Park in Southwestern Colorado in 1891 while on a journey across the world.[2] Though originally intended to only be a quick "look-see" at the now-famous cliff dwellings of the region, Nordenskiöld's visit transformed into a four-month long stay and the first extensive archaeological study of the Mesa Verde ruins.[3] Nordenskiöld's study culminated in the publication of his landmark work, *The Cliff Dwellers of the Mesa Verde, Southwestern Colorado: Their Pottery and Implements*, and drew scientific acclaim both in the United States and Europe.[4] It also sparked an international controversy that captured the attention of diplomats on both sides of the Atlantic and helped prompt both the creation of Mesa Verde National Park and the American Antiquities Act of 1906.

The unrest regarding Nordenskiöld centered on his shipping of artifacts and human remains excavated at Mesa Verde back to Sweden. Though Nordenskiöld was far from the first individual to remove artifacts from the Mesa Verde region – local residents had started collecting artifacts from the region more than a decade before – many locals took offense at the idea of a "foreigner" shipping American relics out of the country.[5] Within a twenty-four hour span in September 1891, Nordenskiöld found his fifteen crate and two barrel collection of antiquities and remains bound for Sweden seized and himself under arrest for allegedly removing the

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[2] PIRJO VARJOLA, NATIONAL BOARD OF ANTIQUITIES, GUSTAF NORDENSKIÖLD: MESA VERDE 1891 2 (Gillian Häkli, trans., 1992).
[3] *See* JUDITH REYNOLDS & DAVID REYNOLDS, NORDENSKIÖLD OF MESA VERDE: A BIOGRAPHY 55 (Suzanne Ramberg-Becker, trans., 2006); Florence C. Lister, *The Man and His Legacy*, *in* GUSTAF NORDENSKIÖLD: PIONEER ARCHAEOLOGIST OF MESA VERDE 2-3 (1991).
[4] VARJOLA, *supra* note 2, at 2.
[5] REYNOLDS, *supra* note 3, at 49, 69.

artifacts from the Southern Ute Indian Reservation.[6] The contentious case, in which United States Attorney General, Secretary of State, and Secretary of Interior, as well as the Swedish Minister for Foreign Affairs and the Swedish Consulate General in New York became involved, was eventually dropped because it was determined that Nordenskiöld removed the artifacts and remains from public land, which was not forbidden at the time, and not from an Indian reservation.[7]

With the charges dropped, Nordenskiöld shipped his collection of artifacts back to Sweden. He then sold it in 1893 to Finnish collector Herman Frithiof Antell.[8] Upon his death in 1893, Antell bequeathed Nordenskiöld's Mesa Verde artifacts to the Finnish people, with the collection eventually ending up at its current home, the National Museum of Finland's Museum of Cultures.[9] Though more than a century has passed since Nordenskiöld removed his collection of artifacts and remains from Mesa Verde, inquiries into the possessory status of these objects have been raised throughout history and continue today.

This article examines those inquiries and the legal bases upon which they rest. It proceeds as follows. Part II begins by providing the factual background of Nordenskiöld at Mesa Verde and the story of how his collection of artifacts came to arrive at the National Museum of Finland. Part III follows by identifying the principles underlying possessory claims made by various parties to his Mesa Verde collection. Then, Part IV examines relations between the National Park Service and the National Museum of Finland regarding the collection. In particular, the early failed repatriation efforts by the National Park Service, the 1991 loan of 17 objects from the National Museum of Finland's Nordenskiöld collection to the National Park Service, and recent updates on the possessory status of the collection are discussed. Information regarding the 1991 loan was personally obtained from individuals

[6] REYNOLDS, *supra* note 3, at 69-70, 81.
[7] Irving L. Diamond, *Much Trouble Some Expense No Danger*, *in* PROCEEDINGS OF THE ANASAZI SYMPOSIUM 1991 257, 263-65 (Art Hutcinson & Jack. E Smith, eds., 1991).
[8] VARJOLA, *supra* note 2, at 2.
[9] VARJOLA, *supra* note 2, at 2.

representing both the National Park Service and the National Museum of Finland as well as private citizens who facilitated the loan, specfically: Nordenskiöld's grandson, the National Park Service Curator in charge of the centennial exhibit, and a private citizen whose interest in Nordenskiöld thrusted him into the middle of the loan negotiations. Part V provides concluding thoughts.

II. BACKGROUND: FROM COLORADO TO STOCKHOLM TO HELSINKI

Three weeks after the enactment of the American Antiquities Act of 1906, President Theodore Roosevelt established Mesa Verde National Park in Southwestern Colorado to "preserve the works of man." [10] Encompassing more than 5000 known archaeological sites,[11] including 600 cliff dwellings,[12] Mesa Verde was the first national park in the world designated to protect an archaeological site.[13] The park, which currently attracts more than 500,000 visitors per year,[14] was designated as a World Heritage Site in 1978 and is widely considered one of the premier archaeological sites in the world.[15] At the time Nordenskiöld first visited the Mesa Verde region in 1891, however, the scientific community knew very little about the region's cliff dwellings or the people who inhabited them.

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[10] *See American Antiquities Act of 1906*, NATIONAL PARK SERVICE, http://www.nps.gov/history/local-law/anti1906.htm (last visited May 15, 2015); *History & Culture*, NATIONL PARK SERVICE, http://www.nps.gov/meve/learn/historyculture/ index.htm (last visited May 15, 2015) [hereinafter *History and Culture*].

[11] *See Preserving the Works of Man*, NATIONAL PARK SERVICE, http://www.nps.gov/meve/index.htm (last visited May 18, 2015).

[12] Cliff dwellings were rock and adobe dwellings built on the rock ledges and natural recesses of canyon walls and cliffs. *See Cliff Dweller*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/cliff%20dweller (last visited May 23, 2015).

[13] *History & Culture*, *supra* note 10.

[14] *Visitation Statistics*, NATIONL PARK SERVICE, http://www.nps.gov/meve/learn/management/statistics.htm (last visited May 29, 2015).

[15] *Welcome*, MESA VERDE MUSEUM ASS'N., http://www.mesaverde.org/ (last visited May 18, 2015).

A major turning point in Mesa Verde's history was the discovery of the Cliff Palace. Containing 150 rooms and twenty-three kivas,[16] the Cliff Palace is the largest cliff dwelling at Mesa Verde.[17] In 1885, Al Wetherill, a Mancos, Colorado, rancher whose Alamo Ranch was situated in close proximity to Mesa Verde, first saw Mesa Verde's Cliff Palace off in the distance, and in 1888, his son, Richard Wetherill, and future son-in-law, Charles Mason, inadvertently rediscovered the Cliff Palace during a snowstorm.[18] Over the next year, the Wetherills located and mapped 182 nearby cliff structures, including the Cliff Palace, and began removing artifacts from the sites in large quantities.[19] In 1889, after failing to generate interest from the Smithsonian Institution, the Wetherills sold a large collection of pottery, sandals, tools, bones, and other artifacts to the Colorado Historical Society for $3000.[20] The Wetherills realized that the ruins of Mesa Verde had immense untapped potential to attract the attention of both the general public and the scientific community and reoriented their ranch towards attracting tourists, playing host to approximately 1000 visitors prior to losing their ranch in 1902.[21] On July 2, 1891, Nordenskiöld himself arrived as a tourist at the Alamo Ranch.[22]

Nordenskiöld never anticipated that his stay at Mesa Verde would total more than a couple days. In a letter to his father written the evening before he left his hotel in Denver for Mesa Verde, Nordenskiöld discussed his plans to visit Pike's Peak on his return trip

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[16] A kiva is a roofed chamber, usually built underground near homesites, used for ceremonial and political gatherings. *See What is a Great Kiva?*, CROW CANYON ARCHAEOLOGICAL CENTER, http://www.crowcanyon.org/EducationProducts/peoples_mesa_verde/definition_great_kiva.asp (last visited May 20, 2015).

[17] *See Cliff Palace*, NATIONAL PARK SERVICE, http://www.nps.gov/meve/learn/historyculture/cd_cliff_palace.htm (last visited May 20, 2015).
2015).

[18] REYNOLDS, *supra* note 3, at 51.

[19] REYNOLDS, *supra* note 3, at 51.

[20] REYNOLDS, *supra* note 3, at 51.

[21] REYNOLDS, *supra* note 3, at 52-53.

[22] REYNOLDS, *supra* note 3, at 55.

from the ruins.[23] Al Wetherill remarked shortly after the lightly-packed Nordenskiöld arrived that Nordenskiöld "probably left all his baggage in Denver or Durango, because he drove out to the Alamo Ranch in a light buggy. His plan was just to go and take a look-see."[24] Nordenskiöld's plans, however, drastically changed when he discovered that the ruins of the Mesa Verde region had largely been ignored by scientific and archaeological study.

The opportunity to publish a groundbreaking scholarly study on Mesa Verde was not one that a budding scientist like Nordenskiöld could forgo. In 1889, Nordenskiöld graduated from Uppsala University in Sweden with an undergraduate degree in chemistry and mineralogy, presently described by the university as being comparable to an American Master of Science degree.[25] Enrolled as a graduate student, Nordenskiöld followed in the footsteps of his father and went on his own arctic expedition to Spitzbergen, an island located halfway between Scandinavia and the North Pole.[26] Nordenskiöld was successful in publishing a 71 page account of his arctic expedition in Sweden's main scholarly journal in geology and mineralogy, *Proceedings*, but he came down with tuberculosis near the end of his voyage.[27]

When Nordenskiöld's doctors suggested the then-popular "travel cure" for tuberculosis, Nordenskiöld planned an ambitious trip that would take him across Europe, North America, and Asia.[28] Though the purpose of the trip was to combat his tuberculosis, Norden-

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[23] Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (June 30, 1891) *in Letters of Gustaf Nordenskiöld*, 28 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *June 30, 1891*].

[24] BENJAMIN ALFRED WETHERILL, THE WETHERILLS OF THE MESA VERDE: AUTOBIOGRAPHY OF BENJAMIN ALFRED WETHERILL 215 (Maurine S. Flether ed., 1977).

[25] REYNOLDS, *supra* note 3, at 22.

[26] REYNOLDS, *supra* note 3, at 26.

[27] REYNOLDS, *supra* note 3, at 34-36.

[28] *See* REYNOLDS, *supra* note 3, at 38-42. Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (June 24, 1891) *in Letters of Gustaf Nordenskiöld*, 35 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *June 24, 1891*].

skiöld also viewed the trip as a unique opportunity to further his research and write additional articles for scholarly publication. Prior to arriving in Colorado, he sent back to Sweden drafts and manuscripts of articles he had written about phosphate caves in Florida and Kentucky's Mammoth Cave.[29] Upon visiting the Mesa Verde region for the first time, Nordenskiöld learned that an in-depth scientific study detailing the archaeological sites of Mesa Verde and its former inhabitants had yet to be conducted.[30] On July 3, 1891, before embarking with the Wetherills on a week-long exploration of some of Mesa Verde's archaeological sites, he wrote to his father, "As far as I can tell, the only scientific expedition which has examined [the archaeological sites of the Mesa Verde region] was the Jackson and Holmes party in 1874 . . . . The result of the expedition seems to have been only a small number of photographs and a rather incomplete knowledge of the appearance and extent of these remarkable buildings."[31]

Nordenskiöld's initial trip through the Mesa Verde region with the Wetherills confirmed his belief that a study of the region's archaeological sites had great scientific potential. For three days, the expedition party explored a cliff house which had not been previously excavated, and Nordenskiöld not only unearthed antiquities, but also he created detailed field sketches and artifact reports.[32] Moreover, the expedition opened Nordenskiöld's eyes to the lack of professionalism with which many artifact hunters and prospectors were treating the archaeological sites of Mesa Verde and the

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[29] *Letter to Nils Adolf Erik Nordenskiöld*, *supra* note 28 at 26; Letter from Gustaf Nordenskiöld to Anna Maria Mannerheim (June 27, 1891) in *Letters of Gustaf Nordenskiöld* (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Anna Marie Mannerheim*, *June 27, 1891*].

[30] *See* REYNOLDS, *supra* note 3, at 48-50 (describing the existing body of Mesa Verde research prior to Nordenskiöld's arrival. The existing scholarly record included studies by William Jackson and William Holmes on archaeological sites nearby, but outside Mesa Verde, and a chapter by Francois-Albert du Pouget, Marquis de Nadaillac that broadly discussed the cliff dwellings of the American Southwest in general without focusing on Mesa Verde).

[31] Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (July 3, 1891) *in Letters of Gustaf Nordenskiöld*, 35 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *July 3, 1891*].

[32] REYNOLDS, *supra* note 3, at 56.

great amount of damage their activities were causing the sites.[33] Many previous visitors to the archaeological sites had left the grounds they excavated in shambles. Walls were broken down to allow light to enter darker rooms, floorboards were removed, and centuries old kivas were destroyed to reveal their contents.[34] Moreover, prospectors who visited the region frequently used wooden beams from the cliff dwellings as their own firewood.[35] The Wetherills, who were greatly familiar with the ruins of the region, provided Nordenskiöld with the opportunity to excavate sites that previous visitors had left untouched.

At the end of his initial expedition, Nordenskiöld penned a letter to his father that served as a de facto grant proposal for a detailed and thorough study of Mesa Verde's archaeological sites.[36] In his letter, Nordenskiöld discussed the existing body of scholarly research on the cliff dwellings of the region, prior collections of artifacts taken from the archaeological sites, the financial costs of his study, and an outline of how his study would proceed.[37] To help persuade his father to help finance his study, Nordenskiöld noted that no museum in Scandinavia had a collection of artifacts from the Cliff Dwellers of the Southwest, selling a collection of Mesa Verde artifacts similar to the Wetherills' could easily cover the costs of his expedition "many times over," and that the warm and sunny climate of Southwest Colorado was having a positive effect on his tuberculosis treatment.[38] Nordenskiöld's father approved his request, Nordenskiöld immediately opened up a bank account at the First National Bank of Durango, and he commenced his study.[39]

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[33] Lister, *supra* note 3, at 2.
[34] Ronald F. Lee, *Vandalism and Commercialism of Antiquities*, *in* THE STORY OF THE ANTIQUITIES ACT, NATIONAL PARK SERVICE (1970), http://www.nps.gov/archeology/pubs/Lee/Lee_CH4.htm.
[35] *Id.*
[36] *See* REYNOLDS, *supra* note 3, at 57.
[37] REYNOLDS, *supra* note 3, at 57.
[38] REYNOLDS, *supra* note 3, at 57.
[39] REYNOLDS, *supra* note 3, at 58.

Nordenskiöld introduced a degree of scientific precision that previous excavations at Mesa Verde were lacking. As a chemistry and mineralogy student in college, Nordenskiöld never received formal archaeological training, but he was able to apply the skills he had learned in college to his archaeological digs at Mesa Verde.[40] In the process, Nordenskiöld taught the Wetherills, who housed him and served as his guides throughout his four months in Southwest Colorado, his careful methods of excavation.[41] Whereas previously the Wetherills excavated relics with shovels and only took some photographs and notes of their dig sites, Nordenskiöld introduced them to the scientific method and tools such as the trowel, whisk broom, and camel's hair brush, as well as the concept of taking before and after photographs of their dig sites.[42] Furthermore, unlike previous relic hunters who discarded and passed over many seemingly trivial items of archaeological sites, such as fragments of pottery and food remains, Nordenskiöld studied and took every individual object that surfaced in a dig.[43] As a result, both his knowledge about the history of Mesa Verde as well as his collection of artifacts began to grow significantly. He also began to attract the attention of influential locals.

On July 18, 1891, Nordenskiöld began a ten day excavation project at three of the cliff dwellings that would eventually compose a significant portion of his artifact collection: Step House, Long House, and Mug House.[44] When the well of artifacts began to run dry at these dig sites, in part because of the previously poor condition in which the sites were left, he began embarking on what he referred to as "tours of discovery," exploratory treks in search of new archaeological sites to excavate, with Al Wetherill.[45] Many of these treks involved Nordenskiöld and Wetherill travelling through rough terrain and dense brush and, most likely, portions of the Southern Indian Ute Reservation.[46] On August 4, 1891, Nordenskiöld left on an eight-to-ten day tour of discovery with Wetherill,

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[40] VARJOLA, *supra* note 2, at 6.
[41] REYNOLDS, *supra* note 3, at 58-59.
[42] REYNOLDS, *supra* note 3, at 58-59
[43] VARJOLA, *supra* note 2, at 6.
[44] VARJOLA, *supra* note 2, at 6; REYNOLDS, *supra* note 3, at 59.
[45] REYNOLDS, *supra* note 3, at 59-60.
[46] *See* REYNOLDS, *supra* note 3, at 59-60; Diamond, *supra* note 7, at 264-65.

but he hastily returned to Mancos upon learning that he had attracted the attention of local law enforcement.[47] On August 23, he wrote the following to his father:

> "I have recently fallen into some difficulties with the authorities. One of the area's two largest merchants became dissatisfied with me, since I bought all of my supplies from the other. He sent some sort of report to interested authorities, stating that a foreigner was busy destroying some of the most beautiful ruins. The result of this was a public notice in the Mancos post office, to approximately the following effect:
>
> > 'Nobody is allowed in this reservation for the purpose of procuring Indian (!) relics from the Aztec (!) ruins . . . No foreigner is allowed on the Indian land without permission . . . fine 1000 dollars.'"[48]

The warning was based on §2134 of the Revised Statutes of the United States.[49] Under §2134, which was not repealed until 1934, any foreign citizen who entered Native American land without a valid passport from either a military or civilian authority stating the time, route, and object of his or her travels was subject to a penalty of $1000.[50] Nordenskiöld wrote to his father that he "rode in haste" to the nearest military station to obtain a passport, and he successfully received a passport from a United States military officer.[51] However, his passport contained the following provision, "[t]his

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[47] REYNOLDS, *supra* note 3, at 61-62.
[48] Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Aug. 23, 1891) *in Letters of Gustaf Nordenskiöld* (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Aug. 23, 1891*].
[49] Diamond, *supra* note 7, at 258.
[50] Diamond, *supra* note 7, at 258.
[51] *Letter to Nils Adolf Erik Nordenskiöld*, *Aug. 23, 1891*, *supra* note 48, at 45; REYNOLDS, *supra* note 3, at 73.

pass do not [sic] include any right of making excavations in the ruins."[52] Nordenskiöld received reassurance from Benjamin Ritter, Chief Official at the United States Land Office in Durango and a close personal friend, that he would be left alone as long as "no ruins were destroyed" by his excavations.[53] On September 8, 1891, Nordenskiöld shipped a collection of seven crates and two barrels of artifacts and remains to the Swedish Consulate in New York, with directions for the consulate to contact the Mineralogical Department of the Swedish National Museum, as a precautionary matter.

With Ritter's backing and his permit handy, Nordenskiöld carried on with his excavation of Mesa Verde's archaeological sites. What he did not know, however, was that some local citizens had caught wind that Mesa Verde artifacts and human remains were en route to Sweden. On September 16, 1891, after what Nordenskiöld described as an "ignorant newspaper" accused him of "vandalism" and "robbery" and claimed that he "must be stopped at once," he wrote home that it was time for him to ship the rest of his collection back home and leave Southwestern Colorado.[54] Unfortunately for Nordenskiöld, though, neither his collection nor he would be leaving the United States in the foreseeable future.

On September 17, 1891, Nordenskiöld and Al Wetherill rode into Durango to ship Nordenskiöld's newest collection of eight crates of artifacts and remains back to Sweden.[55] When they arrived at the shipping station for the Denver and Rio Grande Railroad, Nordenskiöld and Wetherill were informed not only that the railroad was refusing to ship Nordenskiöld's eight crate collection, but also that the previous collection of seven crates and two barrels

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[52] *Letter to Nils Adolf Erik Nordenskiöld*, *Aug. 23, 1891*, *supra* note 48, at 45.
[53] Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Sep. 9, 1891) *in Letters of Gustaf Nordenskiöld*, 51 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Sep. 9, 1891*].
[54] Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Sep. 16, 1891) *in Letters of Gustaf Nordenskiöld*, 52 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Sep. 16, 1891*].
[55] REYNOLDS, *supra* note 3, at 69.

had been impounded while in transit to New York City.[56] Rumors circulated throughout Durango and Mancos that an arrest of Nordenskiöld was imminent, and a distraught Nordenskiöld sent a telegraph home to his father in Sweden stating, "[m]uch trouble some expense no danger Gustaf."[57] A United States Marshal arrested Nordenskiöld near midnight that evening for allegedly violating §2134 of the Revised Statutes of the United States by illegally excavating Native American ruins.[58] Bail was set and posted at $1000,[59] equivalent to over $13,000 in 2015.[60]

Nordenskiöld's arrest captured international attention, making headlines in newspapers from Colorado to New York City and London.[61] Meanwhile, in Sweden, the Wild West arrest of the son of one of the country's most famous explorers captured the attention of both the public and government officials. Swedish Foreign Secretary Carl Lewenhaupt sent the following command via telegraph to his delegate in Washington, D.C., "[h]elp Nordenskiöld out of difficulties related in Herald London edition for about the twentieth."[62] While the Swedes agreed to hold Nordenskiöld's shipments that were bound for Sweden until the legal matters were resolved,[63] the Swedish Minister for Foreign Affairs and the Swedish Consul in New York left numerous messages for the United States Commissioner of Indian Affairs, T.J. Morgan, pleading Nordenskiöld's case.[64] From local citizens in Durango to United

[56] REYNOLDS, *supra* note 3, at 69.
[57] Letter to Nils Adolf Erik Nordenskiöld (Sep. 17, 1891) *in Letters of Gustaf Nordenskiöld*, 53 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Sep. 17, 1891*].
[58] REYNOLDS, *supra* note 3, at 70.
[59] REYNOLDS, *supra* note 3, at 70.
[60] *CPI Conversion Factors from 1774 to Estimated 2024 to Convert Dollars of 1999*, OREGON STATE UNIV., http://liberalalerts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/excel.cv1999.xls (last visited May 30, 2015).
[61] REYNOLDS, *supra* note 3, at 71.
[62] REYNOLDS, *supra* note 3, at 76.
[63] Diamond, *supra* note 7, at 262.
[64] REYNOLDS, *supra* note 3, at 77.

States Government Officials, Americans were torn on what action, if any, should be taken against Nordenskiöld.

Nordenskiöld's controversy divided the people of Southwestern Colorado. Some local citizens went as far as to hire a lawyer, Reece McCloskey, partner at the Durango law firm Wilson and McCloskey, to advocate against Nordenskiöld shipping his collection to Sweden.[65] The most prominent opponent in the anti-Nordenskiöld faction, however, was Charles Bartholomew. As United States Indian Agent for the Southern Ute and Jicarilla Apache Reservations, Bartholomew had ordered the posting of the $1000 warning signs at the Mancos Post Office in mid-August.[66] When Bartholomew learned that Nordenskiöld had been issued a passport to travel through the Southern Ute Reservation, he denied the legitimacy of the passport among his colleagues. Against the plain language of the statute, Bartholomew insisted that approval for Nordenskiöld's passport had to be granted from both a military and civilian authority and that Nordenskiöld's military-authorized passport was consequently invalid.[67]

Upon learning that Nordenskiöld had shipped seven crates and two barrels of artifacts and remains back to Sweden, Bartholomew sent a formal letter of complaint to his supervisor, T.J. Morgan.[68] Bartholomew's persistent efforts eventually persuaded the United States District Attorney for Colorado, John D. Fleming, to issue the warrant that led to Nordenskiöld's arrest.[69] Bartholomew took full credit for the arrest of Nordenskiöld in a letter to Morgan, "I commenced an investigation and discovered that the Baron [Nordenskiöld] had . . . shipped several barrels and boxes of relics for Sweden. I therefore caused his arrest . . . ."[70]

Nordenskiöld was not without his supporters, though. A significant number of local citizens actually supported Nordenskiöld and

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[65] *See* REYNOLDS, *supra* note 3, at 73; Diamond, *supra* note 7, at 259.
[66] REYNOLDS, *supra* note 3, at 70.
[67] REYNOLDS, *supra* note 3, at 73.
[68] *See* REYNOLDS, *supra* note 3, at 72.
[69] Diamond, *supra* note 7, at 262.
[70] REYNOLDS, *supra* note 3, at 72.

believed that he did not do anything illegal.[71] Though Nordenskiöld hired his own attorney, Adair Wilson, co-partner with Reece McCloskey at Wilson and McCloskey,[72] the most influential ally in his camp proved to be the same individual who had told him earlier that he could continue digging as long as he did not damage the ruins: Benjamin Ritter. On September 19, 1891, two days after Nordenskiöld's arrest, Ritter penned a letter directly to O.P. Hubbard, Secretary of the Attorney General of the United States.[73] Ritter emphasized that Nordenskiöld in fact had a valid passport under §2134 and that he did not destroy any ruins.[74] His letter concluded:

> "It does look hard that unscientific vandals, both native and foreign, should be permitted to efface and destroy, and they have done that, when an enthusiastic man who has some learning and preparation in such matters comes and does not even throw down a single stone, but prosecutes his investigations intelligently and for a scientific purpose, we should arrest him and hound him with every annoyance."[75]

Hubbard forwarded the letter to the Attorney General for the United States, William Miller.[76] On September 25, 1891, Miller passed the letter on to the Secretary of the Interior, John Noble, with the instruction that, unless there were other grounds for the claim, "such prosecution must be abandoned."[77]

Ritter was not Nordenskiöld's only ally. The acting United States Secretary of State, William F. Wharton, telegraphed Durango Mayor J.W. McHolland with a request for information on Nordenskiöld's case. McHolland telegraphed back stating that the purpose of Nordenskiöld's visits was scientific, Nordenskiöld had permis-

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[71] REYNOLDS, *supra* note 3, at 71.
[72] REYNOLDS, *supra* note 3, at 73.
[73] Diamond, *supra* note 7, at 261-62.
[74] REYNOLDS, *supra* note 3, at 75.
[75] Diamond, *supra* note 7, at 261-62.
[76] Diamond, *supra* note 7, at 262.
[77] Diamond, *supra* note 7, at 262.

sion to travel through Native American lands, the relics taken by Nordenskiöld were of small value, and the people of Durango desired that the prosecution be dropped.[78] Wharton directly quoted this letter in drafting his own correspondence on the case to Attorney General Miller.[79] As Nordenskiöld's scheduled October 2 trial date inched closer, it was becoming more apparent in Washington that the government did not have a valid case against Nordenskiöld.

On September 29, 1891, Commissioner of Indian Affairs Morgan suggested to Secretary of the Interior Noble that the prosecution of Nordenskiöld be dropped and that a verdict of *nolle prosequi* be entered.[80] A *nolle prosequi* entry does not entail dismissing a case, but instead it is a "formal entry upon the record, by . . . prosecuting officer in a criminal action, by which he declares that he will 'no further prosecute' the case . . . ."[81] Noble concurred with Morgan's suggestion, and later on the same day, advised Attorney General Miller that a *nolle prosequi* order be entered by the government.[82] While it was clear among District Attorney Fleming's superiors that the government could not prove beyond a reasonable doubt that Nordenskiöld had violated §2134, the decision on how to proceed with the case was ultimately Fleming's. When travel delays prevented Fleming from arriving to Denver by Friday, October 2, the long-awaited trial was postponed three more days until the following Monday.[83]

For all the drama and tension leading up to Nordenskiöld's day in court, the trial itself was anticlimactic. Attorney General Fleming informed the court that the excavations were made on public land, not the Southern Ute land, and recommended to the court that the charges against Nordenskiöld be dropped.[84] Judge Cyrus New-

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[78] REYNOLDS, *supra* note 3, at 76.
[79] REYNOLDS, *supra* note 3, at 76.
[80] REYNOLDS, *supra* note 3, at 77.
[81] *What is a Nolle Prosequi?*, BLACK'S LAW DICTIONARY (2d online ed.), http://thelawdictionary.org/nolle-prosequi/.
[82] REYNOLDS, *supra* note 3, at 77.
[83] REYNOLDS, *supra* note 3, at 77.
[84] REYNOLDS, *supra* note 3, at 78.

comb agreed, dismissing the government's case.[85] Nordenskiöld was a free man. Notably absent from the trial was Nordenskiöld's staunchest opponent, Indian Agent Charles Bartholomew.[86] Bartholomew, who had earlier claimed credit for Nordenskiöld's arrest and whose testimony would have played an integral role in the case against Nordenskiöld, never revealed why he did not attend the trial. Many people believed that Bartholomew was ordered by his supervisors to drop the case.[87] Al Wetherill stated that Bartholomew blamed members of the Southern Ute tribe for lying to him about Nordenskiöld excavating on their land and that he changed his stance on Nordenskiöld's guilt.[88] Regardless, with the charges against him dropped, Nordenskiöld was now able to shift his focus towards getting his collection of artifacts and human remains back to Sweden.

In the eyes of some government officials, even if Nordenskiöld was not found criminally guilty of violating §2134, he still should have been required to return the artifacts and human remains he excavated to their original resting place. In light of the charges against Nordenskiöld being dropped, Bartholomew was ordered by his supervisor, R.V. Belt, to write a letter to Nordenskiöld informing him that he was permitted to keep the relics he excavated but required to return any bones or skeletons he excavated to their original resting place.[89] Once again, Ritter advocated on Nordenskiöld's behalf. Ritter sent another letter to O.P. Hubbard, this time claiming that Nordenskiöld's collection was smaller and of insignificant value in comparison to collections the government now possessed; District Attorney Fleming added his name and concurrence to the bottom of the letter.[90] Attorney General Miller forwarded the letter to Indian Commissioner Morgan, who responded with the conclusion that the relics and remains were not excavated from the Southern Ute Reservation and that Nordenskiöld was free

[85] REYNOLDS, *supra* note 3, at 78.
[86] REYNOLDS, *supra* note 3, at 78.
[87] REYNOLDS, *supra* note 3, at 78.
[88] REYNOLDS, *supra* note 3, at 78.
[89] REYNOLDS, *supra* note 3, at 79.
[90] REYNOLDS, *supra* note 3, at 79.

to ship his entire collection back to Sweden.[91] An exhausted Nordenskiöld wrote home to his father, giving credit to Ritter for the happy ending in his case, and stating, "[a]ll of the ridiculous quibbling and arresting is now completely over, and I have permission to ship out as many relics as I want."[92]

On November 7, 1891, more than four months after Nordenskiöld first arrived at the Wetherills Alamo Ranch, his collection of artifacts and human remains were loaded onto the steamship Thingvalla and bound for Scandinavia.[93] His collection composed of 15 crates and two barrels full of artifacts and human remains and weighed more than 1400 pounds.[94] Among other objects, the collection consisted of three mummies, human and animal bones, pottery, textiles, and stone tools.[95] Nordenskiöld returned home to Sweden in January 1892 and pored through his field notes, photographs, and artifact collection, before eventually producing two articles in the Swedish Society for Anthropology and Geology's journal *Ymer* and his landmark work, *The Cliff Dwellers of the Mesa Verde*.[96] While these works were heralded in the scientific community, they provided very little financial return to Nordenskiöld, who insisted on repaying his father for the expenses of his trip across Europe and North America. His prized Mesa Verde collection offered a quick and easy financial fix.

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[91] REYNOLDS, *supra* note 3, at 79.

[92] *See* Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Oct. 7, 1891) *in Letters of Gustaf Nordenskiöld*, 59 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Oct. 7, 1891*]; Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Oct. 21, 1891) *in Letters of Gustaf Nordenskiöld*, 59 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Oct. 21, 1891*].

[93] REYNOLDS, *supra* note 3, at 81.

[94] *See* REYNOLDS, *supra* note 3, at 81. Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Nov. 1, 1891) *in Letters of Gustaf Nordenskiöld*, 65 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Nov. 1, 1891*].

[95] VARJOLA, *supra* note 2, at 6. Jay Pridmore, *Mesa Verde Exhibit Shows How the Past Can Enchant*, CHICAGO TRIBUNE (June 26, 1992), http://articles.chicagotribune.com/1992-06-26/entertainment/9202260365_1_mesa-verde-national-park-archeology-exhibit.

[96] *See* REYNOLDS, *supra* note 3, at 111-13.

Nordenskiöld came from an affluent family and was engaged to the daughter of the wealthiest man in Stockholm, but he insisted on being self-supporting.[97] He originally desired to sell his Mesa Verde collection to a Swedish museum, but no museum in the country at the time could afford to pay him for it.[98] As a result, Nordenskiöld entered into a loan agreement with Finnish physician and avid art collector Herman Frithiof Antell for 1000 kronor – equivalent to $6000 today – with the Mesa Verde collection held as collateral.[99] Nordenskiöld biographers Judith and David Reynolds speculate that both Antell and Nordenskiöld never expected the loan to be repaid and that a loan agreement was originated to allow Nordenskiöld to have the option to sell his collection to a museum if the opportunity arose in the future.[100] Such an opportunity never presented itself, and when Antell died in 1893, he bequeathed his entire art collection to the people of Finland.[101] Antell's donation, which alongside Nordenskiöld's Mesa Verde collection contained Moroccan and Siberian artifacts and a sizable coin collection, still remains the largest single donation ever made to the National Museum of Finland.[102]

The Mesa Verde collection, along with all of the other antiquities and artwork donated by Antell was originally placed in the control of the Finnish State Museum of History and Ethnography in Helsinki.[103] The collection was supervised by the Finnish Parliament until it was transferred to the Finnish National Board of Antiquities in 1977.[104] The National Board of Antiquities placed the collection

[97] REYNOLDS, *supra* note 3, at 135.
[98] REYNOLDS, *supra* note 3, at 66, 155.
[99] REYNOLDS, *supra* note 3, at 155.
[100] REYNOLDS, *supra* note 3, at 155.
[101] REYNOLDS, *supra* note 3, at 155.
[102] REYNOLDS, *supra* note 3, at 155-56. E-mail from Heli Lahdentausta, Keeper, Nat'l. Museum of Fin., to author (May 4, 2015, 06:26 PDT) (on file with author) [hereinafter Email from Heli Lahdentausta]
[103] REYNOLDS, *supra* note 3, at 157.
[104] E-mail from Heli Lahdentausta, *supra* note 102.

in the National Museum of Finland's separately-administered Museum of Cultures, where it remains today.[105]

After parting with collection, Nordenskiöld went on to publish *The Cliff Dwellers of the Mesa Verde* in 1893.[106] The book, which contained 174 pages of text, 30 pages of photographs, and a 30 page appendix on human remains, was written by a leading anthropology scholar at the time and was heralded in both the United States and Europe and is still considered a seminal work in Southwester archaeology.[107] Though *The Cliff Dwellers of the Mesa Verde* appeared to be the beginning of an extremely promising career in science for the 25 year-old Nordenskiöld, his career and life were cut tragically short. In the spring of 1894, his tuberculosis returned, and, on June 6, 1895, Nordenskiöld succumbed to his condition while in a train car en route to a tuberculosis sanitarium in Mörsil, Sweden.[108] He left behind his wife of 20 months, Anna, and nine-month old daughter, Eva.[109] Though Nordenskiöld was gone, the fascination both with his life and his collection of Mesa Verde artifacts and human remains has persisted to this day.

III. PRINCIPLES UNDERLYING POSSESSORY CLAIMS

Inquiries into whether Gustaf Nordenskiöld's Mesa Verde collection should remain in Finland or be returned to Southwestern Colorado continue to arise. Judith Reynolds, biographer of Gustaf Nordenskiöld and Adjunct Professor of Art History at Durango's Fort Lewis College, gives numerous lectures on the life of Nordenskiöld and stated in personal communication that the question of "when will the artifacts in Finland be returned to Mesa Verde?" is one that invariably arises at each speech.[110] Before examining

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[105] E-mail from Heli Lahdentausta, *supra* note 102.
[106] REYNOLDS, *supra* note 3, at 120.
[107] *See* REYNOLDS, *supra* note 3, at 121-23. Ferdinand von Richtofen, a leading geographer and geologist in Nordenskiöld's time, praised, "'The *Cliff Dwellers of the Mesa Verde*,' unsurpassed in a technical regard, the contents are superbly developed."
[108] REYNOLDS, *supra* note 3, at 137-39.
[109] REYNOLDS, *supra* note 3, at 135-36, 139
[110] E-mail from Judith Reynolds, Adjunct Professor, Fort Lewis Coll., to author (May 29, 2015, 17:59 PDT) (on file with author) [hereinafter Email from Judith Reynolds].

these inquiries, past and present, it is useful to first outline the principles that impact arguments for and against the repatriation of Nordenskiöld's Mesa Verde collection. Two major principles in particular, legality and nationalism, prominently influence possessory claims to the collection and are examined below.

A. Legality

A general principle of property law is that the ownership of an object obtained legally at the time it is acquired remains legal even if the law subsequently changes.[111] In line with this principle, if the artifacts and human remains in Nordenskiöld's Mesa Verde collection are to be conceived of as property, then a key determination in whether the collection should be returned is whether Nordenskiöld removed them from Mesa Verde legally or illegally. The answer to this question is ambiguous and varies depending on the perspective from which the question is addressed and the standard of proof considered.

On one hand, the vast majority of government officials involved in Nordenskiöld's case were of the opinion that he never conducted illegal excavations on the Southern Ute Indian Reservation. With Nordenskiöld's activities in the Mesa Verde region having predated the passage of the American Antiquities Act of 1906 by 15 years, there was no law in place that prevented the removal of antiquities from United States public land.[112] Nordenskiöld was only charged with violating §2134 of the Revised Statutes of the United States for allegedly making excavations on the Southern Ute Indian Reservation. The pivotal argument in Ritter and Nordenskiöld's defense was that, while Nordenskiöld did possibly crossed Southern Ute lands while traveling the Mesa Verde region, he never conducted excavations on the reservation. The prosecution was unable to present any evidence to the contra-

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[111] *See* John Henry Merryman, *Introduction*, *in* IMPERIALISM, ART, AND RESTITUTION 11, (John Henry Merryman ed. 2006) (explaining how different principles guide claims from source nations for the restitution of art and antiquities and describes how these principles interact, and frequently, clash).
[112] *See* REYNOLDS, *supra* note 3, at 86.

ry, resulting in the charges being dropped. In Ritter's letter to O.P. Hubbard, written shortly in the aftermath of the case's dismissal, Ritter wrote that Nordenskiöld even brought proof with him to the courtroom that the artifacts he obtained were not obtained from the reservation.[113] With the exception of Charles Bartholomew, United States government officials were confident that Nordenskiöld never conducted any illegal excavations. Indian Commissioner Morgan found the government's case against Nordenskiöld unconvincing and remarked in the trial's aftermath that "the relics in question were not taken from the Southern Ute Indian Reservation . . . this office recedes from its demand for the surrender of the relics and claims no jurisdiction whatsoever over them."[114] While the government was unable to prove that Nordenskiöld violated §2134 or any other law, prior research has found it likely that Nordenskiöld at least trespassed onto the reservation and that he did possibly illegally excavate on the reservation.

Though he believed that Nordenskiöld never excavated illegally on the Southern Ute lands, Colorado District Attorney Fleming conceded that Nordenskiöld did likely trespass on the reservation without a permit. At the end of Nordenskiöld's trial, he asserted, "[t]he offense of Nordenskiöld was at best a technical one. He did in fact, being a foreigner, go upon the Southern Indian Ute Reservation without a passport, in contravention of the statute [§2134]. . . ."[115] Earlier studies have verified that Nordenskiöld did likely trespass onto the reservation. Irving Diamond, a private American citizen who helped facilitate the 1991 loan of 17 objects of Nordenskiöld's collection from the National Museum of Finland to the National Park Service, superimposed the current boundary of the Southern Indian Ute Reservation onto the map Nordenskiöld presented in *The Cliff Dwellers of Mesa Verde*.[116] Diamond's study found not only that it was likely that Nordenskiöld crossed the Southern Indian Ute Reservation without a passport, but also that most, if not all, of his excavation sites fell within the reservation.[117] With the Department of the Interior having previously refused to

[113] Diamond, *supra* note 7, at 264.
[114] REYNOLDS, *supra* note 3, at 80.
[115] REYNOLDS, *supra* note 3, at 78.
[116] Diamond, *supra* note 7, at 264.
[117] Diamond, *supra* note 7, at 264.

allow the Southern Utes to lease any of the reservation's lands and no record of a transfer of reservation land found, Diamond found that, absent contrary evidence, Nordenskiöld did likely violate §2134 by illegally excavating from the reservation.[118] Drawing their conclusion from Diamond's study, Nordenskiöld biographers Judith and David Reynolds assert that it was "probable, though not certain, that Gustaf passed through and excavated on the reservation."[119]

Both proponents and opponents of repatriating Nordenskiöld's Mesa Verde collection could cite the legality principle in support of their case. Those who support the repatriation of the collection could cite Diamond's study and the likelihood that Nordenskiöld did in fact trespass onto the Southern Ute Reservation. Opponents, meanwhile, could counter that the charges against Nordenskiöld were dropped and Nordenskiöld was never actually found to have done anything illegal. In line with the conclusion of District Attorney Fleming, an argument can also be made that, even if Nordenskiöld did trespass upon the Southern Ute Reservation in traversing the Mesa Verde region, that it cannot be proved that he actually excavated any artifacts or human remains from the reservation. As applied to Nordenskiöld's case, the legality principle is inconclusive. It is worth noting, however, that even though subsequent changes in the law do not impact arguments made under the legality principle, Nordenskiöld's actions at Mesa Verde helped spur the creation of a future law, the American Antiquities Act of 1906, as well as the establishment of Mesa Verde National Park.

The enactment of the American Antiquities Act of 1906 and the creation of Mesa Verde National Park occurred within a three-week window in June 1906.[120] Enacted into law during the presidency of Theodore Roosevelt, the American Antiquities Act of 1906 made it illegal to "appropriate, excavate, injure, or destroy

[118] Diamond, *supra* note 7, at 264-65.
[119] REYNOLDS, *supra* note 3, at 80.
[120] *See History & Culture*, *supra* note 10; *See also American Antiquities Act of 1906*, *supra* note 10.

any historic or prehistoric ruin or monument, or object of antiquity" on any public grounds without first obtaining a passport issued from a United States governing body with appropriate jurisdiction.[121] Furthermore, the Antiquities Act provided the president the authority to create, by presidential proclamation, national monuments from public land to protect landmarks, structures, and objects of historic and scientific value.[122] Three weeks after the enenactment of the Antiquities Act, Theodore Roosevelt took further steps towards protecting American archaeological and historical sites and established Mesa Verde National Park with the goal of "protect[ing] the works of man."[123] Nordenskiöld's role in the creation of Mesa Verde National Park and the passage of the American Antiquities is acknowledged both by his supporters and critics, though attitudes towards regarding the impact he played vary widely.

Gustaf Nordenskiöld: *Pioneer Archaeologist of Mesa Verde*, a National Park Service publication created for the 1991 centennial of Gustaf Nordenskiöld's visit to Mesa Verde, credits Nordenskiöld with having played a causal role in both the park's creation and the act's passage.[124] Duane Smith, Professor of History at Fort Lewis College, asserted in the publication, "[Nordenskiöld's] activities made the residents of [S]outhwestern Colorado more appreciative of the Anasazi culture in their midst. In doing so, Nordenskiöld helped set in motion the chain of events which led to the creation of Mesa Verde National Park and the passage of the Antiquities Act."[125] Heli Lahdentausta, Keeper at the National Museum of Finland, remarked similarly, labeling Nordenskiöld's visit to Mesa Verde as a "key factor" in the passage of the Antiquities Act.[126] Former National Park Service Historical Robert F. Lee, meanwhile, paints an entirely different picture of Nordenskiöld's influence on American law. According to Lee, Nordenskiöld's shipping a valuable collection of American artifacts back to Swe-

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[121] *American Antiquities Act of 1906*, *supra* note 10.
[122] *American Antiquities Act of 1906*, *supra* note 10.
[123] *History & Culture*, *supra* note 10.
[124] *See* Duane Smith, *Preserving Archaeological Resources*, *in* GUSTAF NORDENSKIÖLD: PIONEER ARCHAEOLOGIST OF MESA VERDE 26-27 (1991).
[125] *Id.*
[126] Email from Heli Lahdentausta, *supra* note 102.

den prompted Congress to pass legislation to in order to protect American archaeological sites from vandals.[127] While perspective influences whether one views Nordenskiöld as a hero or villain and whether his actions were legal or illegal, his impact in spurring the creation of Mesa Verde National Park and the American Antiquities Act cannot be denied.

B. Nationalism

Nationalistic principles often prove relevant when considering the possessory status of allegedly-stolen antiquities and artwork. Antiquities are commonly perceived as being part of a nation's cultural "patrimony" or "heritage."[128] For example, some supporters of repatriating the Elgin Marbles to Greece argue that "they belong in Greece because they are Greek."[129] From the moment Nordenskiöld began excavating at Mesa Verde to long after the establishment of Mesa Verde National Park, nationalism has had a monumental impact in debates regarding the possessory status of his collection. Historically, some opponents of Nordenskiöld have believed that the objects he took from Mesa Verde "belong in America because they are American."

Nordenskiöld was well-aware that arguments against him shipping Mesa Verde artifacts back to Sweden were rooted in nationalism. To start, §2134 only applied to "foreigner[s]" who travelled onto Native American land.[130] United States citizens did not need permits stating the purpose and time of their travels through Native American reservations and could travel freely. Moreover, Nordenskiöld was far from the first individual to excavate artifacts and human remains at Mesa Verde: the Wetherills and others had removed objects from Mesa Verde archaeological

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[127] Lee, *supra* note 34.
[128] *See* Merryman, *supra* note 111, at 10.
[129] Merryman, *supra* note 111, at 10.
[130] Diamond, *supra* note 7, at 258 (while Nordenskiöld's father had been granted title of "Baron," Nordenskiöld himself was never bestowed the title. Had Nordenskiöld, the eldest son his family, survived his father, he would have inherited the title).

sites undeterred for years prior to his arrival.[131] Despite the fact that Nordenskiöld's excavations left the archaeological sites he visited in much better shape than those of American relic hunters and prospectors, unrest stirred within the community when it was discovered that a foreigner was shipping American antiquities and human remains out of the country.

Local newspapers falsely referred to Nordenskiöld as "the [B]aron" when reporting on the Mesa Verde controversy.[132] Nordenskiöld biographers Judith and David Reynolds explain that the title carried with it an "aroma of pretentious nonsense" in the late nineteenth-century American West.[133] Additionally, local newspapers misrepresented the nature of Nordenskiöld's digs and portrayed him as a hapless tourist who did not respect the ruins. In an article titled, "He is Under Arrest," *The Rocky Mountain News* described the arrest of the individual they referred to as "Baron Lordenskiold" [sic], "[m]uch indignation is expressed by the people here, as it is believed that the [B]aron's expedition was one of devastation, more than mere pleasure jaunt."[134]

Nordenskiöld expressed frustration over the treatment he received as a foreign citizen in a letter written to his father approximately two weeks before his scheduled court date, "Americans would rather that cowboys, miners, etc., dig amongst their antiquities than foreigners."[135] Ritter's influential letter to Attorney General Miller articulated this concern, and emphasized that, unlike the "vandals both native and foreign" who defaced Mesa Verde's archaeological sites, Nordenskiöld's investigations carried a scientific purpose.[136] The influence of nationalism into inquiries over the possessory status of Nordenskiöld's Mesa Verde has persisted

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[131] *See supra* note 17. The Wetherills sold an entire collection of Mesa Verde artifacts to the Colorado Historical Society for $3000 in 1889.
[132] *See* REYNOLDS, *supra* note 3, at 67.
[133] REYNOLDS, *supra* note 3, at 67.
[134] REYNOLDS, *supra* note 3, at 71.
[135] Letter from Gustaf Nordenskiöld to Nils Adolf Erik Nordenskiöld (Sept. 19, 1891) *in Letters of Gustaf Nordenskiöld*, 53 (Irving Diamond & Daniel M. Olson eds., Daniel M. Olson trans., 1991) [hereinafter *Letter to Nils Adolf Erik Nordenskiöld*, *Sep. 19, 1891*].
[136] *See supra* note 72 (containing an excerpt of Ritter's letter).

in the decades following the shipment of his collection back to Sweden.

In 1991, the National Museum of Finland held an exhibition honoring the centennial of Nordenskiöld's visit to Mesa Verde.[137] The exhibit, which did not showcase any of the collection's mummies or human remains, was the last time the artifacts in Nordenskiöld's collection have been shown on the whole at the National Museum of Finland.[138] As part of the exhibit, the National Museum of Finland published the booklet, *Gustaf Nordenskiöld: Mesa Verde 1891*.[139] The portion of the booklet that describes Nordenskiöld's arrest and the seizure of his collections examines the role nationalism played in his legal troubles. After describing the impact early artifact hunters had in damaging the ruins and the Wetherills' failed efforts to sell their collection to the Smithsonian Institution, the booklet asserts, "[i]t was only when Nordenskiöld started to transport his finds back to Sweden that a local movement tried to interfere [to protect Mesa Verde]."[140] Just as many of the arguments that Nordenskiöld should not have been permitted to ship his collection back to Sweden were influenced nationalism, nationalism has played a major role in some of the more recent critiques of Nordenskiöld's work at Mesa Verde.

In their biography of Nordenskiöld, Judith and David Reynolds listed nationalism as one of the likely forces behind continued efforts to repatriate Nordenskiöld's collection.[141] Reynolds' claim has proven accurate. In 1970, Ronald Freeman Lee, former Chief Historian for the National Park Service, authored a historical account of the American Antiquities Act in advance of the centennial of Yellowstone National Park in 1972.[142] In a chapter titled "Vandalism and Commercialism of Antiquities, 1890-1906," Lee described what he deemed to be the "indiscriminate

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[137] Email from Heli Lahdentausta, *supra* note 102.
[138] Email from Heli Lahdentausta, *supra* note 102; VARJOLA, *supra* note 2, at 6.
[139] *See* VARJOLA, *supra* note 2.
[140] VARJOLA, *supra* note 2, at 6.
[141] *See* REYNOLDS, *supra* note 3, at 157.
[142] Lee, *supra* note 34.

digging" in which Nordenskiöld "needed no one's permission" to take part.[143] Lee asserted that the loss of a valuable collection of American artifacts caused "deep resentment among American archaeologists" and voiced his support for the failed efforts of previous attempts at repatriating Nordenskiöld 's collection.[144] Before discussing these attempts, it is important to analyze one last aspect of the nationalism principle and how it can impact debates over allegedly-stolen antiquities.

The controversy over Nordenskiöld 's collection is unique from many debates over the possessory status of antiquities because the United States is playing the role of alleged "victim." Opponents of repatriating Nordenskiöld's collection could counter the argument that the collection "belongs in America because it is American" by noting that the loss of this one collection of artifacts does not deprive the United States of its cultural identity. John Henry Merryman applied a similar argument when advocating that the Elgin Marbles should stay at the British Museum instead of being returned to Greece.[145] Merryman noted that, even without the Elgin Marbles, Greece is still a nation rich in monuments of antiquity and museums full of Greek art from all of its historic pieces.[146] Similarly, opponents of repatriating the objects could argue that the United States still has ample museums and monuments honoring the American identity. This argument is bolstered by the fact that, while Nordenskiöld's collection was unsurpassed at the time he excavated it, later excavations at Mesa Verde have given American museums larger and more representative collections than Nordenskiöld's.[147] The National Museum of Finland's centennial booklet on Nordenskiöld describes his collection as a "representative and valuable, but by no means unique, record of the life of the canyon Pueblo Indians."[148] A similar sentiment was

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[143] Ronald F. Lee, *Vandalism and Commercialism of Antiquities*, *in* THE STORY OF THE ANTIQUITIES ACT, NATIONAL PARK SERVICE (1970), http://www.nps.gov/archeology/pubs/Lee/Lee_CH4.htm.
[144] *Id.*
[145] JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 103 (2nd ed. 2009).
[146] *Id.*
[147] VARJOLA, *supra* note 2, at 6.
[148] *Id.*

expressed in 1960 by American archaeologist Charlie Steen when he cataloged the Nordenskiöld collection at the National Museum of Finland.[149]

IV. RELATIONS BETWEEN THE NATIONAL PARK SERVICE AND NATIONAL MUSEUM OF FINLAND: REPATRIATION, THE 1991 LOAN, AND THE FUTURE

Relations between the National Park Service and the National Museum of Finland in regards to the Nordenskiöld collection have shifted dramatically over the last century. Despite continued interest in the question of whether Nordenskiöld's Mesa Verde artifacts and human remains should be returned to the United States, there have been very few formal efforts at repatriation .[150] Early efforts at repatriating Nordenskiöld's collection were made by Dr. Jesse Nusbaum.[151] Nusbaum, who grew up reading *The Cliff Dwellers of the Mesa Verde* as a child in Greeley, Colorado,[152] became Superintendent at Mesa Verde National Park in 1921 and eventually the first archaeologist hired by the National Park Service.[153] As park superintendent, Nusbaum tried repeatedly in the early decades of the twentieth century to secure the return of Nordenskiöld's collection but was unsuccessful in these endeavors.[154] With the exception of Nusbaum's efforts at bringing the collection back to the United States, research revealed no other formal American repatriation efforts. The National Museum of Finland's Nordenskiöld centennial booklet suggests that repatriation efforts dwindled after American archaeologists obtained similar, if not larger,

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[149] REYNOLDS, *supra* note 3, at 6.
[150] *See supra* note 107 (describing modern interest in the possible repatriation of Nordenskiöld's collection but the lack of formal repatriation movements).
[151] Lee, *supra* note 143.
[152] *The Nusbaum Years*, *in* MESA VERDE NATIONAL PARK, SHADOWS OF THE CENTURIES, NATIONAL PARK SERVICE (2002), http://www.nps.gov/parkhistory/online_books/smith/chap7.htm.
[153] Francis P. McManamon & Jesse L. Nusbaum, *First National Park Service Archaeologist*, NATIONAL PARK SERVICE (2009), http://www.nps.gov/parkhistory/online_books/smith/chap7.htm.
[154] Lee, *supra* note 34.

Mesa Verde collections.[155] As the twentieth century was drawing near its conclusion and the centennial of Nordenskiöld's visit to Mesa Verde approached, the National Park Service's interest in the Nordenskiöld collection took an entirely different tone.

In 1991, 17 objects from Nordenskiöld's Mesa Verde collection made their way back to Southwestern Colorado.[156] These objects were not being permanently returned to Mesa Verde as a result of a repatriation effort, but instead were sent to help honor the man who excavated them. Both Mesa Verde National Park and the National Museum of Finland concurrently held centennial exhibits honoring Nordenskiöld and his 1991 visit to Mesa Verde. Information regarding the loan was obtained through interviews and email communications with representatives of the National Park Service and the National Museum of Finland, former National Park Service employees who helped create the loan agreement and Nordenskiöld exhibit, and private citizens who helped fund and facilitate the loan. Additionally, loan agreements and copies of other correspondence between the National Park Service and National Museum of Finland were obtained.

Former Mesa Verde National Park Superintendent Robert C. Heyder first conceived the idea of creating an exhibit honoring the centennial of Nordenskiöld's visit to Mesa Verde when the National Park Service and the Mesa Verde Museum Association hosted an Anasazi Symposium at Mesa Verde National Park in 1981.[157] Elizabeth Bauer, former Mesa Verde National Park Museum Curator, recalled Heyder approaching her with the idea of the exhibit.[158] Bauer shared Heyder's belief that a Nordenskiöld exhibit would be a fitting tribute to an individual they both felt helped protect Mesa Verde and answered affirmatively when asked if she

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[155] VARJOLA, *supra* note 2, at 6.

[156] Letter from Pirjo Varjola, Curator, Nat'l Museum of Fin., to Robert C. Heyder, Former Superintendent of Mesa Verde Nat'l Park (Apr. 5, 1991) (on file with author) [hereinafter Letter from Pirjo Varjola to Robert C. Heyder].

[157] Telephone Interview with Robert C. Heyder, Former Superintendent of Mesa Verde Nat'l Park (May 8, 2015) [hereinafter Telephone Interview with Robert C. Heyder].

[158] Telephone Interview with Elizabeth Bauer, Former Museum Curator at Mesa Verde Nat'l Park (June 4, 2015) [hereinafter Telephone Interview with Elizabeth Bauer].

was interested in helping organize the exhibit.[159] In 1987, one year before the centennial of Richard Wetherill and Charles Mason's rediscovery of Cliff Palace, noted Heyder, Bauer and he began working very heavily on planning a centennial exhibit honoring Nordenskiöld.[160]

Heyder and Bauer both remarked that they had initial concerns that the Nordenskiöld exhibit would never come to form due to a lack of funding.[161] As was expressed in a November 1990 letter from the National Museum of Finland to the National Park Service, Mesa Verde National Park was expected to cover all costs related to the loan: packing, shipping, insurance, export, and import costs, and any unforeseen expenses.[162] The National Park Service was limited in the funds it could provide for the exhibit, so Bauer and Heyder had to look to outside funding sources. A major breakthrough came when a grant request written by Bauer was approved by the Colorado National Endowment for the Humanities.[163] According to Bauer, the grant "gave us a good part of what was needed for the exhibit."[164]

Both Bauer and Heyder openly acknowledged that, without the assistance of some private individual citizens, the Mesa Verde exhibit likely would not have been a success. Heyder quickly contacted Gustaf Arrhenius, Professor of Earth and Planetary Sciences at the University of California, San Diego, and grandson of Gustaf Nordenskiöld, upon deciding to move forward with the

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[159] *Id.*
[160] Telephone Interview with Robert C. Heyder, *supra* note 157.
[161] Telephone Interview with Robert C. Heyder, *supra* note 157; Telephone Interview with Elizabeth Bauer, *supra* note 158.
[162] Letter from C.J. Gardberg, Former Dir. Gen. of the Nat'l Museum of Fin., & Osmo Vuoristo, Former Dir. of the Nat'l Museum of Fin. to Robert C. Heyder, Former Superintendent of Mesa Verde Nat'l Park, (Nov. 22, 1990) (on file with author) [hereinafter Letter from C.J. Gardberg and Osmo Vuoristo to Robert C. Heyder, Nov. 22, 1990].
[163] Telephone Interview with Elizabeth Bauer, *supra* note 158.
[164] Telephone Interview with Elizabeth Bauer, *supra* note 158.

Nordenskiöld exhibit.[165] Arrhenius, a previous acquaintance and personal friend of Heyder's, helped furnish the exhibit by loaning Mesa Verde National Park photographs and family documents from the Nordenskiöld/Arrhenius family archives.[166] Moreover, Arrhenius contacted representatives at the National Museum of Finland, serving as a liaison between the museum and the National Park Service. According to Heyder, Arrhenius' contributions played an integral role in making the exhibit a success.[167]

Another private citizen, Irving L. Diamond of Wilmette, Illinois, played a crucial role in the loan agreement. Diamond remarked that he became extremely interested in the story of Nordenskiöld after vacationing to Mesa Verde National Park in 1971.[168] Diamond's interest led him to further research the history of Mesa Verde and Nordenskiöld, and in 1985, he presented a paper at Mesa Verde National Park titled, "Mesa Verde Goes Back East."[169] Diamond remarked that it was at this presentation that he met Arrhenius and began speaking with Heyder about the possibility of a Nordenskiöld centennial exhibit.[170] Diamond then went on to note, "[w]e were not sure if we could ever make [the Nordenskiöld exhibit] happen. I began by writing letters on my primitive computer to the Finnish Ambassador in Washington [D.C.]."[171]

Diamond then relayed that Heyder advised him not to use the word *repatriation* in any of his correspondence with the Finns, as the word possibly could have prompted fears that any loaned objects would not be returned.[172] At the same time Diamond began writing to the Finnish Ambassador in Washington D.C., he also began exploring other potential sources of funding for the exhibit, con-

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[165] Telephone Interview with Robert C. Heyder, *supra* note 157; Interview with Gustaf Arrhenius, Professor of Earth and Planetary Sciences at the Univ. of Cal., San Diego (May 20, 2015) [hereinafter Interview with Gustaf Arrhenius].
[166] Interview with Gustaf Arrhenius, *supra* note 165.
[167] Telephone Interview with Robert C. Heyder, *supra* note 157.
[168] Interview with Irving L. Diamond, Former Eng'r and Active Citizen Participant in the 1991 loan between the Nat'l Park Service and Nat'l Museum of Fin., (May 27, 2015) [hereinafter Interview with Irving L. Diamond].
[169] *Id.*
[170] *Id.*
[171] Interview with Irving L. Diamond, *supra* note 168.
[172] Interview with Irving L. Diamond, *supra* note 168.

tacting individuals and organizations he thought might be willing to contribute. One of the individuals whom Diamond contacted about the exhibit was a Finnish diplomat stationed in Chicago.[173] The diplomat forwarded information regarding the Nordenskiöld exhibit to the Leaf Candy Company in Chicago.[174] Leaf, which is known for producing Whoppers, Milk Duds, and Jolly Ranchers, was purchased by Huhtamäki Oyj of Helsinki, Finland, in 1983.[175] After speaking with the Finnish diplomat contacted by Diamond, Oyj agreed to donate $5000 on behalf of the Leaf Candy Company to help make the Nordenskiöld exhibit a reality.[176] While, among other contributions and funds, Leaf's donation and the Colorado National Endowment for the Humanities grant, gave the National Park Service the money it needed to furnish the exhibit, Bauer, Heyder, Diamond, and Arrhenius still faced the hurdle of actually arriving to a loan agreement with the National Museum of Finland.

According to both Bauer and Diamond, representatives from the National Museum of Finland initially expressed some concern about repatriation and the possibility that loaned items from the Nordenskiöld collection could be seized by the United States.[177] Persistent communication and reassurance to the Finnish Museum, however, allayed their concerns, and officials from both sides began drafting a loan agreement in the latter half of 1990. In a meeting held on November 22, 1990, the Finnish National Board of Antiquities agreed to lend 17 items from the Nordenskiöld collection to Mesa Verde National Park.[178] As the National Museum of Finland was simultaneously presenting its own Nordenskiöld centennial exhibit, it was not able to loan the National Park

[173] Interview with Irving L. Diamond, *supra* note 168.
[174] Interview with Irving L. Diamond, *supra* note 168.
[175] *About Us*, LEAF BRANDS, http://leafbrands.com/about-us/ (last visited June 1, 2015).
[176] Interview with Irving L. Diamond, *supra* note 168.
[177] Interview with Irving L. Diamond, *supra* note 168; Telephone Interview with Elizabeth Bauer, *supra* note 158.
[178] Letter from C.J. Gardberg and Osmo Vuoristo to Robert C. Heyder, Nov. 22, 1990, *supra* note 162.

Service all of the items it requested from the collection,[179] but the loan agreement was a major victory for an exhibit that was already years in the making.

The 17 object loan consisted primarily of tools and pieces of clothing excavated by Nordenskiöld at Mesa Verde. Among other items, the loan included: a hardwood arrowhead, flint blade, yucca-plaited sandal, digging stick, and bone flesher.[180] Mesa Verde National Park was responsible for insuring the collection, which was valued at $88,000.[181] Moreover, though Mesa Verde National Park planned a touring version of the Nordenskiöld exhibit to take place upon the conclusion of its own showing, the representatives from the National Museum of Finland explicitly stated that all objects from its collection were being loaned solely for the exhibit at Mesa Verde.[182] In addition to the above terms, Heyder also agreed that Mesa Verde National Park was responsible for transporting the 17 objects from the Finnish Consulate in Los Angeles to Mesa Verde National Park.[183]

Bauer was then placed in charge of transporting the loaned objects from Los Angeles to Mesa Verde. She drove over 11 hours to personally pick up the objects at the Finnish consulate and remarked that the experience demonstrated to her the importance of Nordenskiöld's collection to the National Museum of Finland.[184] "I saw firsthand how much this collection meant to them. The National Museum of Finland bought the box [containing the objects being loaned] its own seat on a direct flight from Helsinki to Los

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[179] Letter from C.J. Gardberg and Osmo Vuoristo to Robert C. Heyder, Nov. 22, 1990*, supra* note 162.

[180] Proforma from Pirjo Varjola, Former Curator at the Nat'l Museum of Fin. to Robert C. Heyder, Former Superintendent of Mesa Verde Nat'l Park (Apr. 5, 1991) (on file with author) [hereinafter Proforma from Pirjo Varjola to Robert C. Heyder].

[181] *Id.*

[182] Letter from C.J. Gardberg and Osmo Vuoristo to Robert C. Heyder, Nov. 22, 1990, *supra* note 162.

[183] Letter from C.J. Gardberg and Osmo Vuoristo to Robert C. Heyder, Nov. 22, 1990, *supra* note 162; Proforma from Pirjo Varjola to Robert C. Heyder, *supra* note 180.

[184] Telephone Interview with Elizabeth Bauer, *supra* note 158.

Angeles."[185] One hundred years after being shipped away from Southwestern Colorado on a train bound for the Swedish Consulate in New York, these 17 objects were now en route to their original home.

Back at Mesa Verde, Bauer, Heyder, and other National Park Service employees organized the centennial exhibit. Bauer and Heyder both remarked that the exhibit was a major hit among park visitors when it was finally opened to the public. Specifically, Bauer remarked, "[e]veryone loved [the exhibit]. The exhibit felt complete and so much more personal with Nordenskiöld's objects here. Everything was represented."[186] Heyder also praised the exhibit, and, in particular, Bauer's efforts. "I cannot tell you enough how great of a job [Bauer] did. She designed everything from the exhibit layout to the verbiage. It would not have been possible without her."[187] Moreover, Heyder expressed gratitude towards Arrhenius for lending many of Nordenskiöld/Arrhenius family items to the exhibit.[188]

For Gustaf Arrhenius, the Nordenskiöld exhibit was a welcomed acknowledgement of the accomplishments of his grandfather and the impact he had in the creation of Mesa Verde National Park. Arrhenius remarked that negative nationalism and xenophobia commonly impact the way some people perceive his grandfather but that the efforts of the "enthusiastic and knowledgeable" Heyder went a long way towards confronting these misconceptions.[189] "Bob Heyder was the most creative and active Park Superintendent in Mesa Verde's history. My family and I were happy to help make it happen," he asserted.[190] Arrhenius also praised Judith and David Reynolds' biography of Nordenskiöld, *Nordenskiöld of Mesa*

[185] Telephone Interview with Elizabeth Bauer, *supra* note 158.
[186] Telephone Interview with Elizabeth Bauer, *supra* note 158.
[187] Telephone Interview with Robert C. Heyder, *supra* note 157.
[188] Telephone Interview with Robert C. Heyder, *supra* note 157.
[189] Interview with Gustaf Arrhenius, *supra* note 169.
[190] Interview with Gustaf Arrhenius, *supra* note 169.

Verde: A Biography, as the most comprehensive scholarly account of his grandfather's life.[191]

Upon the conclusion of the showing of the Nordenskiöld exhibit at Mesa Verde, a touring version of the exhibit was shown in various cities in New Mexico and Colorado as well as Evanston, Illinois.[192] Though in the original loan agreement, it was stipulated that none of the National Museum of Finland's objects would travel, a later agreement was made to allow the National Park Service to extend its loan on six objects that would be permitted to tour with the exhibit.[193] Irving Diamond lectured about his studies on Nordenskiöld and his role in helping secure the loan when the Nordenskiöld exhibit tour made its stop at the Maxwell Indian Museum in Evanston, Illinois.[194] After the tour made its exhibit made its final stop in Grand Junction, Colorado,[195] these objects once again made the trek from Colorado to Scandinavia. All 17 loaned objects were returned safely to the National Museum of Finland with the loan being considered a success on both ends.

Relatively few new developments or inquiries into the possessory status of Nordenskiöld's collection have been made in the aftermath of the 1991 loan. Lahdentausta remarked that, since she started working as Museum Keeper at the National Museum of Finland in 1994, no inquiries have been made regarding either the repatriation or loan of the Nordenskiöld collection.[196] Tara Travis, current Museum Curator at Mesa Verde National Park, asserted via

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[191] E-mail from Gustaf Arrhenius, Professor of Earth and Planetary Sciences at the Univ. of Cal., San Diego, to author (May 13, 2015, 18:06 PDT) (on file with author) [hereinafter Email from Gustaf Arrhenius].

[192] Letter from Elizabeth Bauer, Former Museum Curator at Mesa Verde Nat'l Park, to Pirjo Varjola, Former Curator at the Nat'l Museum of Fin. (Feb. 29, 1992) (on file with author) [hereinafter Letter from Elizabeth Bauer to Pirjo Varjola].

[193] Letter from C.J. Gardberg, Former Dir. Gen. of the Nat'l Museum of Fin., & Osmo Vuoristo, Former Dir. of the Nat'l Museum of Fin, to Robert C. Heyder, Former Superintendent of Mesa Verde Nat'l Park, (Feb. 7, 1991) (on file with author) [hereinafter Letter from C.J. Gardberg and Osmo Vuoristo to Robert C. Heyder, Feb. 7, 1991].

[194] Pridmore, *supra* note 95.

[195] *See* Letter from Elizabeth Bauer to Pirjo Varjola, *supra* note 192.

[196] E-mail from Heli Lahdentausta, Keeper, Nat'l. Museum of Fin., to author (May 15, 2015, 02:12 PDT) (on file with author).

email that there are currently no plans for another Nordenskiöld in the future.[197] According to Judith Reynolds, while there has not been a recent effort to formally repatriate Nordenskiöld's collection, inquiries into the possessory status of the objects have persisted and likely will persist into the future.[198] Given the tendency of Nordenskiöld's story to stir up nationalistic feelings and debates into the legality of his actions at Mesa Verde, it is likely that, as long as the story as Nordenskiöld at Mesa Verde is told, such inquiries will continue to be made.

V. CONCLUSION

The controversy surrounding the possessory status of Gustaf Nordenskiöld's Mesa Verde collection demonstrates many of the most persistent themes in the study of allegedly stolen art and antiquities. In particular, it demonstrates the impact that nationalism and the legality of art and antiquity acquisition has in shaping arguments over who should pieces of the past. Nordenskiöld's story, furthermore, showcases how nationalism and pride can serve as the impetus in creating new laws to protect a nation's art and antiquities. Regardless of whether one views Nordenskiöld as a scientist who legally excavated on unprotected land or a "baron" who wrongfully stole American treasures, his influence on the creation of the American Antiquities Act of 1906 and the establishment of Mesa Verde National Park must be acknowledged.

The story of Gustaf Nordenskiöld's collection is also valuable because it shows how two agencies, to each of whom the allegedly stolen art and antiquities in question are of great importance, can work together to form a loan agreement for the benefit of the viewing public. As a result of the cooperation between the National Park Service and the National Museum of Finland, the public was able to learn and celebrate the tale of Gustaf Nordenskiöld by viewing firsthand some of the pieces he meticulously excavated from Mesa Verde and the very objects that helped spur an interna-

[197] E-mail from Tara Travis, Museum Curator, Mesa Verde Nat'l Park, to author (May 26, 2015, 08:45 PDT) (on file with author).
[198] Email from Judith Reynolds, *supra* note 110.

tional controversy. Primarily, the success of the loan is best summarized by Former Mesa Verde National Park Superintendent Robert Heyder in *Gustaf Nordenskiöld: Pioneer Archaeologist of Mesa Verde*, "[u]ndoubtedly, Nordenskiöld would be pleased to know that his work not only has withstood the test of time, but has brought together the United States and Finland in a cooperative effort to celebrate the anniversary of his visit."[199]

[199] ROBERT C. HEYDER, *Introduction* to GUSTAF NORDENSKIOLD: PIONEER ARCHAEOLOGIST OF MESA VERDE, 1 (1991).

AFTER FURTHER REVIEW: WHETHER THE COLLEGE FOOTBALL PLAYOFF FALLS SHORT OF THE ANTITRUST MARKER

Jude D. Schmit[1]

I. COIN-TOSS: THE PROLOGUE

In real time, at full speed, it appeared to be a progressive effort to correct the annual inequity of naming college football's top team: Install a playoff system that took the crowning of the champion out of the hands of a powerful few and into the hands of the teams themselves.[2] But slow down the action and it's hard to see any meaningful signs of meritocracy at play. Freeze the frame and you have indisputable evidence that the powerful few are still in charge. Boise State President Bob Kustra bluntly categorized the new structure as "subterfuge for fueling the arm's race" and an impetus for "creat[ing] a plutocracy."[3]

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[1] The author dedicates this article to his grandmothers, Dordy Schmit and Marcia Gaertnier. The author would also like to thank his dad and Professor Edmonds for their helpful comments and a special thanks to the Honorable Judge Geoffrey Tenney, Howard Carp, his mom, and Laura.

The author wrote this article during the CFP's 2014-2015 inaugural season. And while the four teams chosen for the 2015-16 playoff were considered ideal, the author believes it is the methodology of choosing the teams that is at question versus the teams themselves. That is, the ball shouldn't have to bounce perfectly at the end of any given season to ensure a fair playoff system.

[2] Terminology Note: Playoffs now exist within all three divisions of college football and the two subdivisions of Division I. Any references to "college football" and "Playoff(s)" in this article, however, are limited to the Football Bowl Subdivision in Division IA. *See generally* NCAA, *Championships*, http://www.ncaa.org/championships?division=d1 (last visited December 17, 2014).

[3] Dennis Dodd, *Boise State President Blasts NCAA Reform in Letter to Media*, CBS SPORTS, http://www.cbssports.com/collegefootball/writer/dennis-dodd/24569414/boise-state-presidents-blasts-ncaa-reform-in-letter-to-media (last visited December 15, 2014). Kustra's letter discusses the dangers of granting autonomy to the Power Five conferences with regard to the NCAA govern-

Plutocrats and meritocrats have battled to control college football since the sport's inception in 1869, with embarrassingly lopsided results.[4] Because although the roster of the powerful has changed over the years, one constant has remained: An elite few run the big business of college football and, along the way, have used the guise of "tradition" to intercept the game and advance their bankrolls.[5] In full control of the game, they often bench merit in favor of marketability.[6] For their benefit, results on the gridiron are secondary to television profits.[7] A replay of the inaugural season of the new College Football Playoffs ("CFP" or "Playoff(s)") demonstrates the problem and gives reason for Kustra's public criticism. Look at the CFP final rankings and one will notice the conspicuous absence of any team not in a Power Five conference,[8] an aptly named moniker for the collective of the Atlantic Coast Conference ("ACC"), Big Ten, Big 12, Pacific 12 ("Pac-12"), and Southeastern Conference ("SEC").[9] Teams in the less powerful Group of Five conferences[10] — including the Mountain West, home of Boise

ing structure. And while he does not identify the playoff model in his criticism, the inference of what will come of schools outside the Power Five is apparent.

[4] *See infra* Part II(b)(ii) (discussing the pinnacle of the plutocrats' control under the Coalition, Alliance, and the Bowl Championship Series).

[5] *See infra* notes 144-48 and accompanying text (denoting the rivalries shelved in the name of "tradition").

[6] *See infra* note 11 and accompanying text (explaining that the Ohio State brand likely played a role in the Buckeye leapfrog of TCU and Baylor for the fourth seed of the inaugural playoff).

[7] *See infra* Part II(c)(iii) (outlining the CFP's lucrative partnership with ESPN).

[8] Terminology Note: The conferences within the Power Five are commonly referred to as "equity conferences" or informally the "haves." These conferences have generally remained the same since the realignment shake-up occurring in the early 1990s. During the BCS era, these conferences were referred to as "AQ conferences." *See infra* Part II(b) (recounting the wave of realignments that further consolidated the equity conferences' power). Jude Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219, 242 (2007).

[9] College Football Playoff, *Rankings*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/view-rankings (last visited December 15, 2014) [hereinafter *CFP Rankings*].

[10] Terminology Note: The conferences within the Group of Five are commonly referred to as "non-equity conferences" or informally the "have nots." During

State — have reason to feel excluded, if not threatened, when one of the power conferences itself is left out of the final selection.[11] Snubbing the likes of Boise State has been ongoing to the point it is expected, but snubbing two worthy Big 12 contenders, Baylor and TCU, in favor of a Big Ten heavyweight Ohio State raises serious concerns about the viability of the new format and begs the following questions. First, did the marketability of the Buckeye brand sway the Playoff committee to authorize Ohio State leap-frogging Baylor and TCU?[12] Before their final games of the season, TCU was ranked No. 4, Baylor No. 5, and Ohio State No. 6. All won their final game in convincing fashion, but the new rankings showed a new order: Ohio State No. 4, Baylor No. 5, and TCU No. 6.[13] Second, if marketability was not at issue, then why

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the BCS era, these conferences were referred to as "non-AQ conferences." *See infra* note 129; Schmit, *supra* note 8, at 242.

[11] Pete Thamel, *The End of Cinderella: Where Do Group of Five Teams Sit in Playoff System?*, SPORTS ILLUSTRATED, http://www.si.com/college-football/2014/07/28/group-five-cinderella-college-football-playoff# (last visited December 15, 2014). The Group of Five, in addition to the Mountain West, consists of the American Athletic Conference ("AAC"), Conference USA, the Mid-American Conference ("MAC"), and the Sun Belt Conference.

[12] Mitch Lawrence, *No Upset as Ohio State Makes College Football Playoffs Over Baylor and TCU*, FORBES, http://www.forbes.com/sites/mitchlawrence/2014/12/07/college-football-playoffs-sees-ohio-state-get-no-4-over-baylor-and-tcu-in-a-non-upset/ (last visited December 16, 2014). Chris Smith, *College Football's Most Valuable Teams 2014*, FORBES, http://www.forbes.com/pictures/emdm45ekgfg/9-ohio-state-buckeyes-2/ (last accessed January 25, 2015). The Buckeye's were ranked No. 9 of the most valuable college football teams in 2014 with a value of $87 million. Neither the Bears nor the Horned Frogs broke the top 20 and, of the Big 12, Texas was ranked No. 1 ($123 million value) while Oklahoma was No. 8 ($93 million value). The controversy surrounding the inaugural playoff certainly would have been more polemic had the Buckeyes jumped the Longhorns and the Sooners.

[13] *CFP Rankings*, *supra* note 9. Stewart Mandel, *Ohio State had a Major Playoff Advantage over Baylor and TCU,* FOX SPORTS, http://www.foxsports.com/college-football/story/ohio-state-buckeyes-baylor-bears-tcu-horned-frogs-playoff-reaction-mandel-120714 (last visited December 16, 2014). TCU defeated unranked Iowa State 55-3 while Baylor beat No. 9

was Baylor compelled to hire a marketing firm in a last-ditch effort to curry favor with the powers that be?[14] And, finally, will the likes of Boise State ever have a place at the table when any merit such teams have achieved on the field has always been undermined and any marketability minimized?[15] Future opportunities for teams outside College Football's power circle appear even less likely when you consider there are five power conferences but only four final spots. Whether this decision was made in spite of math, like 14 teams in the Big Ten,[16] or because of it, perhaps for power-control purposes, is hard to discern, but also provides more evidence of how college football's fortunes are controlled from behind closed doors.

Kansas State 38-27. Ohio State, on the other hand, routed Wisconsin 59-0 in the Big Ten championship game.

[14] Marc Tracy, *Playoff Game Plan: Colleges Turn to Lobbying for a Berth*, N.Y. TIMES, http://www.nytimes.com/ 2014/12/04/sports/ncaafootball/playoff-game-plan-colleges-turn-to-lobbying-for-a-berth.html?_r=0 (last visited December 15, 2014). Baylor hired Kevin Smith Communications, a public relations firm headed by a cabinet member under President George W. Bush, to create media attention and propel the Bears into the playoffs. Earlier this season, Conference USA hired Brener Zwikel & Associates on behalf of the conference vanguard, Marshall, in an effort to influence the power structure that the Thundering Herd belongs in the playoff discussion.

[15] DAN WETZEL, JOSH PETER, & JEFF PASSAN, DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES 181-90 (2d. ed. 2011). As for merit, the Broncos won more games than any other team in the 2000s. This era included five undefeated regular seasons and a convincing win against Oklahoma on the big stage at the 2007 Fiesta Bowl (and a 2010 victory against TCU) in what was called the "Separate But Equal Bowl." As for marketability, the 2007 Fiesta Bowl has been dubbed one of the most exciting and famous in college football lore. The game included a hook and letter as well as a halfback pass while the overtime win came from the Bronco's execution of a Statute of Liberty play to running back Ian Johnson. Like a Hollywood script, Johnson seized the moment and proposed to his cheerleader girlfriend during a postgame interview.

[16] Mike Bostick, Shan Carter, and Kevin Quely, *Tracing the History of N.C.A.A. Conferences*, N.Y. TIMES, http://www.nytimes.com/newsgraphics/2013/11/30/football-conferences/ (last accessed January 16, 2015) [hereinafter *Conference Realignment Chart*]. The Big Ten added Penn State in 1990; Nebraska in 2011; as well as Maryland and Rutgers in 2014.

This article attempts to answer these questions by examining college football's history of plutocracy and examines whether the CFP solves, or at least alleviates, the continual widening disparity between conferences. Part II summarizes the history of college football's postseason. Part III examines the relevant antitrust jurisprudence. Part IV analyzes how antitrust law applies to collegiate athletics. Part V offers less-restrictive alternatives to the CFP.

In short, this article recognizes that although the new CFP format is a step forward towards inclusiveness, it might not be enough to protect it from future attack under the Sherman Act: There are, simply put, more-inclusive alternatives that would better shield college football from an antitrust suit. This article also acknowledges that such alternatives (i.e., an expanded playoff) will be relegated to a holding pattern while the powers adopt a wait-and-see approach over the next few seasons. In the meantime, however, the equity divide will continue to grow and, thereby, supply ammunition for a Sherman claim if the anticipated modifications fall short. The question, then, is if the powers balk too long, should Congress intervene?

II. FALSE START: DEVELOPMENT OF POSTSEASON COLLEGE FOOTBALL

Controversy has been intertwined with college football's DNA since its inception. In the inaugural year, Rutgers split the two-game season with Princeton.[17] No rubber match was played.[18] Nonetheless, the National Championship Foundation retroactively awarded Princeton the title.[19] To this day Rutgers supporters main-

[17] ESPN COLLEGE FOOTBALL ENCYCOPEDIA 14, 1084 (Michael MacCambridge ed. 2005). On November 06, 1869, Rutgers won the first game 6-4 on its home field. The rematch occurred a week later when Princeton returned the favor with an 8-0 drubbing on its home field. During the first season, Princeton was known as the College of New Jersey.

[18] *Id.* at 14. The third game was canceled because, according to the schools' faculties, "overemphasis" of the game interfered with academics.

[19] College Football Poll, *College Football National Championships*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com /champions_national.html

tain the maiden throne belongs to the Queensmen.[20] Though the term "mythical national champion"[21] was not used until years later, it was born in that first season. Likewise, thereafter the word "disputed" became the oft-repeated disclaimer in annual college-football debates.

The following sections trace the dysfunctional roots of college football's postseason. The first part examines the evolution of the game's unique bowl game structure and the assent from sideshow pageantries to main-event cash cows. This section also summarizes the game's ranking system and its parallel rise with the bowl games. The second part reviews the events that have shaped college football as we know it today and, ultimately, enabled the game's heightened corruption during the Bowl Championship Series ("BCS"). The third and final part scrutinizes the CFP structure and recounts the final results of the inaugural season.

A. Kickoff: From First Bowls to "Lies, Damned Lies, and Polls"

The University of Chicago pioneered the bowl concept in 1894 when coach Amos "Alonzo" Stagg[22] challenged Notre Dame

(last visited December 17, 2014) [hereinafter *College Football Poll*"]. From 1869-1882, the National Championship Foundation was considered the preeminent source for determining the national champion.

[20] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 14, 740. Three "services" have bestowed the crown to the Rutgers Queensmen. Rutgers became the Scarlet Knights in 1955.

[21] Ray McCarthy, *Navy's Eleven and Syracuse in Title Chase: Two Teams Take Place in Battle for Championship After Fine Showing*, NEW YORK TRIB., Oct. 10, 1921, at pg. 9, col. 4. Perhaps the earliest written reference of a mythical national championship was in the following sentence from the 1921 article: "Two teams took their places well up in the line of the aspirants for the mythical football championship on Saturday."

[22] *History & Awards – Amos Alonzo Stagg*, THE UNIV. OF CHI. ATHLETICS, http://athletics. uchicago.edu/about/history/amos_alonzo_stagg (last visited December 27, 2014). Notre Dame coach Knute Rockne once said, "all football comes from Stagg"; Erik Brady, *Stagg Family Joins Bowl Festivities*, USA TODAY, http://usatoday30.usatoday.com/sports/college/football/2006-12-13-stagg-family_x.htm (last visited December 27, 2014). Not only a pioneer of the

at a neutral playing site — Soldier Field in Chicago.[23] From there, Stagg took his Maroons on a barnstorming tour of the West Coast, again seeking neutral sites and a special essence for each game.[24]

The first official bowl game occurred 8 years later, on January 1, 1902, when the Tournament East-West football game was played at Tournament Park in Pasadena, California.[25] Fielding H. Yost's Michigan Wolverines so thoroughly dominated Stanford that tournament officials shelved future bowl games until January 1, 1916, when State College of Washington (now Washington State University) defeated then-powerhouse Brown University in the first annual East-West football game.[26] In 1923, the game moved to a massive new horseshoe stadium to accommodate increased interest and burgeoning crowds.[27] The New Year's Day

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game, Stagg also was proponent of amateurism in college athletics who held contempt for professional sports. Division III, perhaps the last haven for true amateurism in college athletics, fittingly calls its championship the Stagg Bowl.

[23] *Antitrust Implications of the College Football Alliance: Hearing on Antitrust Business Rights and Competition Before the Subcomm. on the Judiciary*, 105th Cong. 41 (1997) (statement of Cedric W. Dempsey, Exec. Dir., NCAA)); DAVID M. NELSON, THE ANATOMY OF A GAME: FOOTBALL, THE RULES, AND THE MEN WHO MADE THE GAME, 70-71 (1994).

[24] DAVID M. NELSON, THE ANATOMY OF A GAME: FOOTBALL, THE RULES, AND THE MEN WHO MADE THE GAME, 70-71 (1994). During this trip, Stagg challenged Stanford, coached by his mentor, Walter Camp, the "Father of American Football," on a neutral site far from either school's campus and for no discernible educational purpose.

[25] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 14.

[26] *Id.* at 14, 501. The Wolverines lived up to their "Point a Minute" nickname after trouncing Stanford 49-0. This culminated Michigan's National Championship season in which the Wolverines outscored opponents 501-0. Tournament officials, unimpressed with Michigan's feat, took football off the annual list of events in favor of chariot and ostrich racing; *see also Bowl History*, WASH. STATE UNIV. OFFICIAL ATHLETICS, http://www.wsucougars.com /ViewArticle.dbml?DB_OEM_ID=30400&ATCLID=208260435 (last visited December 21, 2014).

[27] *History*, ROSE BOWL STADIUM, http://www.rosebowlstadium.com/about/history (last visited December 21, 2014).

game adopted the name of its new home, the Rose Bowl, and the so-called "bowl game" was cemented.[28]

During the 1930's, other warm-weather locales followed suit and adopted the Rose Bowl model to lure tourists (and their money) seeking refuge from harsh northern winters.[29] Dozens of bowls, in turn, sprouted as communities realized that such events could revitalize local economies devastated by the Great Depression.[30] Three of today's six CFP bowls debuted in that era: the Orange Bowl,[31] Sugar Bowl,[32] and Cotton Bowl.[33] By 1937, this

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[28] *Northwestern Mutual to Sponsor Rose Bowl*, ROSE BOWL STADIUM, http://www.rosebowlstadium.com/news/detail/northwestern-mutual-to-sponsor-rose-bowl. The "Grandaddy of Them All" in the first season under the playoff format, is now referred to as "the Rose Bowl presented by Northwestern Mutual."

[29] *History in the Headlines*, HISTORY, http://www.history.com/news/a-brief-history-of-college-bowl-games (last visited December 21, 2014) [hereinafter *History in the Headlines*].

[30] *Id.*

[31] *The Bowls: A Historical Perspective*, ALLSTATE SUGAR BOWL, http://www.allstatesugarbowl.org /site.php?pageID=19&newsID=706#.VJeMrrhMDJ (last visited December 21, 2014) [hereinafter *The Bowls: A Historical Perspective*]. The Orange Bowl (originally the Palm Festival Game), created by George E. Hussey and Earnie Seiler to boost a market reeling from the Florida land bust, was first played in 1933 when Miami defeated Manhattan College. The game was renamed the Orange Bowl in 1935 and is now called the Capital One Orange Bowl.

[32] *Id.* The Sugar Bowl, though originally devised by Colonel James M. Thomson in 1927, was first played in 1935 when Tulane beat Temple for the game's unique trophy – an antique single-bottle wine cooler. Today, the trophy is the same and the title of the game remains largely unadulterated, minus, of course, the corporate Allstate designation.

[33] *Goodyear Becomes Title Sponsor for Cotton Bowl Classic*, GOODYEAR COTTON BOWL, http://www.goodyearcottonbowl.com/news/news-releases/2014/11/goodyear-becomes-title-sponsor-cotton-bowl-classic/ (last visited December 21, 2014). The first game was played on January 01, 1937, matching TCU and Marquette. The bowl is now called the Goodyear Cotton Bowl Classic and is one of six bowls included in the CFP rotation. During the Alliance and BCS eras, the Cotton Bowl Classic was replaced by the Fiesta Bowl. This shift was caused, in part, by the dissolution of the SWC.

sprawling bowl landscape prompted an Associated Press ("AP") headline to declare: "'Bowl' Grid Games Are Here to Stay."[34]

As the bowl games evolved into a New Year's Day mainstay, so, too, did the ranking of college football's elite.[35] In 1936, sports editor Alan Gould invented the AP poll ("Writers") as the definitive decree for naming a national champion.[36] Gould's formula was straightforward: Poll AP sports writers to rank the top teams in the nation.[37] In 1950, AP competitor United Press responded with its own poll ("Coaches").[38] Rather than survey sports writers, this poll looked to coaches to determine the rankings.[39]

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[34] *History in the Headlines*, *supra* note 29. This was to the consternation of the NCAA, which had unanimously adopted a report condemning bowls as having no place in college football "because they serve no sound education ends, and such promotions merely trade upon intercollegiate football for commercial purposes."

[35] Christopher Walsh, *Money, Control are Why It Took so Long for College Football to have a Playoff*, SATURDAY DOWN SOUTH, http://www.saturdaydownsouth.com/sec-football/money-control-took-long-college-football-playoff/ (last visited December 27, 2014). Prior to the polls, there were many organizations and methods that schools looked to when claiming the throne. Frank Dickinson, an economic professor at the University of Illinois, introduced the first official ranking system in 1926. His formula used mathematical indicators (some still used) to weigh a team's wins against the score and the quality of opponent. Coach Rockne, convinced of the formula's legitimacy, persuaded Dickinson to retroactively apply his formula and crown the 1924 Fighting Irish as the holders of the first "scientific" national championship.

[36] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1124. Gould would later admit that the polls were constructed as a marketing ploy: "Newspapers wanted material to fill space between games. That's all I had in mind, something to keep the pot boiling. Sports then was [sic] living off controversy, opinion, whatever. This was just another exercise in hoopla."

[37] *Id.* The first year of the Writer's Poll was met with controversy when 44 sportswriters voted the 7-1 Minnesota Gophers No. 1. Minnesota's loss came to the 7-1 Northwestern Wildcats, who were voted No. 7. The AP ranked 9-0-1 LSU No. 2, but the Williamson Poll, nonetheless, crowned the Tigers as national champs.

[38] *Id.* at 1124-25 (United Press merged International News Services to become United Press International in 1958); *College Football Poll*, *supra* note 19.

In 1965, the Writers broke protocol and released its final rankings after the bowl season.[40] Bowls, up to this point, were played as mere exhibition games, but now carried the weight of national-title implications.[41] The Coaches, however, held firm and the "mythical national championship" quandary further blurred the state of uncertainty in college football.[42]

The 1970 and 1973 seasons illustrate the incongruity among the pollsters and, together, proved to be the straw that broke the Coaches' back.[43] Following the 1970 regular season, the Coaches prematurely crowned Texas prior to the Longhorns' loss to Notre Dame in the Cotton Bowl.[44] The Writers, however, awarded Nebraska the national championship following the Cornhuskers' Orange Bowl victory over LSU.[45] Similarly, in 1973, the Coaches granted Alabama the title after the Crimson Tide's undefeated regular season.[46] The Writers, true to form, waited to name a champion until the bowl games were complete, and crowned the

CNN/USA Today took over the Coach's Poll in 1991. ESPN/USA Today took the reigns in 1997 and USA Today became the lone service since 2005.

[39] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1125.

[40] *Id.* The post-bowl vote arose from controversy that boiled over from the prior season. In 1964, Alabama and Arkansas were undefeated after the regular season. Nonetheless, the Writers and Coaches voted the Crimson Tide as the national champions even though Arkansas won its bowl game to remain undefeated while Alabama lost its bowl game to finish with one loss. In 1965, there were three undefeated teams (Michigan State, Arkansas, and Nebraska) going into the bowl games. All three lost. The Coaches did not wait for the bowl results and awarded Michigan State the title. The Writers waited and crowned Alabama after the Crimson Tide beat the Cornhuskers in the Orange Bowl.

[41] *Id.*

[42] *College Football Poll*, *supra* note 19. From the inception of the Rose Bowl until 1965, six national championships were awarded to the loser of a bowl game.

[43] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17 at 1125.

[44] *Id.*

[45] *Id.*

[46] *Id.*

undefeated Notre Dame squad after the Irish's Sugar Bowl victory over the Tide.[47]

Aside from occasional missteps, the polls seemed to exist in relative harmony.[48] Controversy, nonetheless, was brewing below the surface and inequity was consistently at play. In 1970, for example, Arizona State and the University of Toledo were both denied national championship consideration despite perfect records.[49] The Sun Devils capped their season with a decisive Peach Bowl win over North Carolina, yet finished No. 6.[50] The Toledo Rockets dominated their season with a victory margin of more than 24 points and a statement win over William & Mary in the Tangerine Bowl, but in the final poll still reached only No. 12.[51] Similarly, in 1973, the pollsters ignored the formidable (and undefeated) Penn State and Miami University (Ohio) teams.[52] The Nittany Lions, which featured a Heisman Trophy winner and an Orange Bowl victory over LSU, ended at No. 5.[53] The Miami Redhawks won in impressive fashion on the road at Purdue, South Carolina, and versus Florida in the Tangerine Bowl, but were relegated to No. 15.[54]

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[47] *Id.*

[48] *Id.* From 1950 to 1990, the Coaches and Writers came to a consensus (as to the national champion) 32 times.

[49] *Id.* at 1293.

[50] *Id*.

[51] *Id.* at 877. The Toledo Rockets went undefeated from 1969 to 1971. The 1969 team curiously dropped out of the rankings (the AP ranked the Rockets in the second to last poll) despite a decisive Tangerine Bowl victory. The 1971 team also won the Tangerine Bowl and ended at No. 12.

[52] *Id.* at 1305.

[53] *Id.* at 1293, 1305. Penn State running back, John Cappelletti, won the 1973 Heisman; WETZEL, ET. AL., *supra* note 15, at 4-5. Coach Joe Paterno's Nittany Lions went undefeated four times without winning a national championship. Coach Paterno, a long-time playoff advocate, once tried to bring the cause to Big Ten Commissioner Jim Delaney. Coach Paterno knew Delaney had the power to effectuate change, but, as expected, Delaney did not budge because the then-University presidents were pro-BCS.

[54] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 489.

The 1970 and 1973 seasons ultimately suggest that the polls were restrained by college football's bowl structure. The pollsters' hands, during those seasons and others, were inevitably tied if No. 1 and No. 2 did not meet in a bowl.[55] Matching the top two teams in a bowl was problematic because of the conference tie-in scheme.[56] Even if the top teams met, other legitimate contenders were regularly left out if pollsters' expectations were not met or the bowls took issue with a team's lack of marketability.[57] Such snags proved the system was trapped by unpredictability, inconsistency, and bias.

B. Forward Progress? Television Advances the Money Grab

In 1974, the Coaches relented and began conducting their final poll at the close of the bowl season.[58] At this juncture, dispelling the national champion myth played second fiddle to the National Collegiate Athletic Association's ("NCAA") desire to replace its "stubborn amateurism" roots with the riches of "creeping commercialism."[59] The advent of live television and NCAA

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[55] *College Football Poll*, *supra* note 19. From 1954 to 1997, the pollsters voted for different champions ten times: 1954 (Ohio State and UCLA); 1957 (Auburn and Ohio State); 1965 (Alabama and Michigan State); 1970 (Nebraska and Texas); 1973 (Notre Dame and Alabama); 1974 (Oklahoma and USC); 1978 (Alabama and USC); 1990 (Colorado and Georgia Tech); 1991 (Miami, Fla. and Washington); and 1997 (Michigan and Nebraska).

[56] *About the Rose Bowl Game*, TOURNAMENT OF ROSES, http://www.tournamentofroses.com/rose-bowl (last visited January 06, 2015). In 1947, the Rose Bowl hosted the first annual conference tie-in game between the Big Ten and Pac-8 (now the Pac-12). In the pre-BCS era, the Rose Bowl featured a No. 1 versus No. 2 match-up two times (1963 and 1969).

[57] KEITH DUNNAVANT, THE FIFTY YEAR SEDUCTION: HOW TELEVISION MANIPULATED COLLEGE FOOTBALL, FROM THE BIRTH OF THE MODERN NCAA TO THE CREATION OF THE BCS 32 (2d. ed. 2004). Television in 1970 or 1973 was not the driving force it is today, but marketability still played a factor.

[58] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1125.

[59] DUNNAVANT, *supra* note 57, at 32. According to Dunnavant, the NCAA's partnership with television transformed college football into a commodity. Television enabled college football to now reach non-alumni and non-student

President Walter Byers' knack for securing lucrative television contracts enabled this transition.[60] Byers' spread-the-wealth approach, however, would eventually create friction that triggered a civil war among college football's elite.[61] In two waves (both originating from behind the closed doors of hotel conference rooms), the NCAA gradually ceded any inkling of control and college football, in turn, surrendered to a system that today promotes profit potential often at the expense of on-the-field merit, and in doing so further widens the chasm between a powerful few and a legion of schools on the outside looking in.[62]

i. Total Rout: CFA Demise and TV Commodity Deregulation

The first and most decisive blow to NCAA control was delivered in 1976 when the major powers of college football convened in a Denver hotel ballroom to hash out the formation of the College Football Association ("CFA").[63] This union of 63 college programs, to the chagrin of Byers, ultimately sought freedom from the NCAA's powerful grasp.[64] In 1981, Byers's fears became reality when the CFA revolted against the NCAA and

audiences and the game separated from its academic mission into a billion dollar industry.

[60] *Id.* at 26-28, 30. National television coverage had, in fact, been around since the 1952 season. As the audiences increased, however, Byers recognized that television threatened gate receipts and the game's balance of power. During his tenure, he turned the NCAA into a police power by creating order within the postseason. As an example, Byers instituted a system that required bowls to return 75 percent of proceeds to participant schools.

[61] *Id.* at 123-24. The NCAA television deal in the late 1970s employed a "super regional" system: Every week, ABC would televise one important game to a great majority of the country and beam a lesser game to several small markets. Under this arrangement, the wealth was shared evenly between powerhouses like Southern Cal and secondary programs like Appalachian State.

[62] *Id.* at 121.

[63] *Id.*

[64] *Id.* at 122-23. The Big Ten and Pac-8 were conspicuously absent from the CFA. The commissioners of these conferences were loyal to Byers, who was said to be "deathly afraid" of the CFA.

negotiated a separate television deal.[65] This skirmish escalated into an all-out legal war that was initially waged in an Oklahoma courtroom before being taken to the highest court of the land.[66] In *Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of the Univ. of Okla.*,[67] the United States Supreme Court sounded the NCAA's death knell by holding that Byers and company violated antitrust law by artificially controlling the number of televised football games.[68] The NCAA's perceived monopoly was over and its power significantly diminished, but college football's fate was still uncertain, and in the coming years the struggle to control the game would play out in dramatic and uncertain fashion.[69]

In 1990, Notre Dame broke rank with the CFA by separately marketing its Fighting Irish brand to television executives.[70] This maneuver ultimately revealed the writing on the wall

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[65] *Id.* at 135-42. This maneuver was considered a direct challenge to the power structure and the NCAA, in turn, issued threats of probation, expulsion, and bowl bans to CFA schools. The major bowls and NBC stayed in the CFA's corner, however, and the NCAA's bluff was ultimately called when the television deal went through in 1981.

[66] Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n., 546 F. Supp. 1276, 1313 (W.D. Okla. 1982).

[67] Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n., 468 U.S. 85 (1984).

[68] DUNNAVANT, *supra* note 57, at 120; *see also infra* note 286-87 (suggesting that the far-reaching effects of this ruling are felt today when a viewer tunes into ESPN and is inundated with coverage Thursday through Saturday in the fall).

[69] SCOTT ROSNER & KENNETH L. SHROPSHIRE, THE BUSINESS OF SPORTS 504 (2004). The duopoly of the CFA and Big Ten/Pac-10 filled the void left by the Court's break-up of the NCAA monopoly. The new powers, however, did not enjoy the commodity's fruits right out the gate. The duopoly's contractual value in 1984, for example, was well below the value of the NCAA's in 1983, despite allocating twice the output of televised games. Some economists theorize that such phenomenon is confirmation of a monopoly.

[70] *Id.* at 504. Notre Dame inked a 5-year deal with NBC for $38 million; *see also* Bill Carter, *Notre Dame Breaks Rank on TV Football Rights*, N.Y. TIMES, http://www.nytimes.com/1990/02/06/business/ notre-dame-breaks-ranks-on-tv-football-rights.html (last visited January 12, 2015). Notre Dame officials attributed several reasons for negotiating its contracts with the networks. The University, for instance, said it considered itself a national versus a regional

for the day's college football power brokers: Adjust to the new business environment or face extinction.[71] For the next several years teams and conferences partook in a high-risk game of musical chairs to secure their own front row seats at the revenue bonanza.[72]

The Big Ten sped up the tempo later in 1990 by making Penn State its eleventh member.[73] A year later the ACC followed by adding then-independent Florida State.[74] The Big East, in turn, landed the University of Miami to secure an important foothold in the Florida market.[75] The SEC then kicked the shuffle into overdrive by inviting Arkansas and South Carolina to become

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institution, based on student enrollment, and wanted to obtain more revenue to increase financial aid for its students. To achieve this, Notre Dame sought national coverage to reach its national audience and propel recruiting. Under the CFA deal, Notre Dame's televised games would be restricted to a regional basis.

[71] ROSNER, ET. AL., *supra* note 69, at 504, 509. Television economics dictated that a conference's or school's negotiating powers would be elevated by size of the market brought to the table. Early on, negotiating power was not needed because the networks overbid contracts in an effort to coax the schools from the CFA.

[72] *Conference Realignment Chart*, *supra* note 16.

[73] *See id.* (providing a chronology of the Big Ten's expansion since the Penn State addition in 1990).

[74] DUNNAVANT, *supra* note 57, at 233-34. The Florida State addition afforded the ACC clout with the networks and bowls because the Seminoles provided both access to millions of Florida homes and a recruiting base rich in talent.

[75] *Id.* at 234-35. Television fueled the Big East's dominance in basketball during the 1980s, but the conference, to stay competitive, decided to add football. The realignments in the early 1990s enabled this transition. The Hurricanes, who captured three national titles in the seven years prior to joining the conference, leveraged the Big East on the gridiron and at the negotiating table; *Conference Realignment Chart*, *supra* note 16; Brandon Gall, *The History of Big East Conference Realignment*, ATHLON SPORTS, http://athlonsports.com/college-football/history-big-east-conference-realignment (last accessed January 16, 2015). In the BCS era, the Hurricanes captured the only Big East's national title in 2001. Three years later, however, the realignment storm struck the Big East when the Hurricanes departed for the ACC. In 2013, the Big East discontinued its sponsorship of football and its six remaining members joined with four other schools to form the AAC.

the eleventh and twelve members in its storied conference.[76] This even-numbered total would prove significant when SEC Commissioner Roy Kramer exploited a little-known NCAA bylaw to hold a conference championship game at the end of its 1992 season.[77] Adding this to the SEC's resume, in time, would change the dynamic of the realignment shuffle and prove to be a bellwether event as conferences realized the economic boon accompanying a title game.[78] The conference championship is not only a linchpin of today's revenue structure, but also an unspoken determinate in

[76] *Conference Realignment Chart*, *supra* note 16. The 1991 expansion was the first in the conference's storied history dating back to 1933. The next expansion occurred in 2012 when the SEC lured Missouri and Texas A&M from the Big 12. This maneuver put the SEC at 14 members and, in turn, temporarily reduced the Big 12 to eight members.

[77] Championship Football, SEC SPORTS, http://www.secsports.com (last accessed January 13, 2015). Under NCAA regulations, a conference with 12 members may play an additional football game to determine its champion, provided the regular season is played in divisions. The SEC is separated by its east and west divisions. The title match-up is determined by selecting each division's top team in terms of overall SEC winning percentage within the eight-game conference schedule.

[78] DUNNAVANT, *supra* note 57, at 236-37. In its first five years, the SEC title game generated nearly $40 million and television right fees tripled. By the late 1990s, the SEC earned more from its title game than it earned from a full season of televised games in the early days following deregulation. CBS Sports Vice President Len DeLuca called the title "one of the smartest ideas in the history of televised sports" and, today, in part, explains SEC domination on the gridiron and ratings; Craig A. Depken II, *Realignment and Profitability in Division I-A College Football*, UTA, http://www.uta.edu/depken/P/confsize.pdf (last visited Feb. 16, 2006). Depken indicates that the NCAA accommodated the alignment trend to safeguard the profit-potential of its members. According to Depken, conferences of twelve teams maximize football profits and, perhaps, suggest why the NCAA has not since reduced the 12-member threshold for a title game; Chris Smith, *The Money on the Line College Football 's Championship Game*, FORBES, http://www. forbes.com/sites/chrissmith/2015/01/12/the-money-on-the-line-in-college-footballs-championship-game/ (last accessed January 15, 2015). The amount of money at stake today is best exemplified by the exorbitant bonuses given to coaches who merely earn a berth (not win) into their conference's champion game. Ohio State coach Urban Meyer, for example, received a $250 thousand bonus when the Buckeyes reached the Big Ten Championship in 2014.

naming a national champion. The Big 12 is the only Power Five conference without a championship game[79] — a structure many believe cost Baylor and TCU an opportunity to be chosen as one of 2014's four semifinalists.

The far-reaching effect of conference realignment is best exemplified by the 1996 season.[80] At the time, the Southwest Conference ("SWC") was reeling from recruiting scandals (most notably Southern Methodist) that had left the conference adrift in perpetual controversy.[81] With the blood of uncertainty in the water, competing conferences circled like sharks and began picking off the SWC's elite teams.[82] Kramer, ever the opportunist, drew first blood by claiming Arkansas.[83] But it was Big Eight Commissioner

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[79] *College Football Data Warehouse*, ALL-TIME CONFERENCE LISTING, http://www.cfbdatawarehouse.com /data/conference_champs/div_champions.php?divid=47 (last accessed January 16, 2015). The Big 12, interestingly, was the first to follow the SEC and hosted its first conference championship game in 1996, though it discontinued the game after the 2010 season. Late to the game were the ACC in 2005 as well as the Pac-12 and Big Ten in 2011. Three conferences from the Group of Five host a title game: Conference USA, starting in 2005; MAC, starting in 1997; and Mountain West, starting in 2013.

[80] *Conference Realignment Chart*, *supra* note 16; Chris Dufresne, College Football's Game of Realignment is Finally Ending, L.A. TIMES, http://www.latimes.com/ sports/la-sp-college-football-realignment-20140817-column.html#page=1 (last accessed January 15, 2015). The first wave of realignments in the early 1990's was a trend that dominated offseason college football headlines until the summer leading into the 2015 season. The recent CFP snubs of the Big 12 might re-ignite another round of musical chairs (or, at the very least, an exemption from the NCAA to allow a conference championship game with ten teams).

[81] DUNNAVANT, *supra* note 57, at 229-30. Southern Methodist's pay-for-play conspiracy led to the so-called "death penalty." This undoubtedly contaminated the well and internal strife certainly festered as the elite programs were forced to keep the SWC and its lower-rung teams afloat. Poor timing, more so than a lack of business acumen or self-preservation, ultimately doomed the SWC.

[82] *Id.*

[83] *Id.* at 230-31. Kramer's move to pursue members from a rival conference was seen as a turning point in college athletics and at the time was widely considered audacious. Such maneuvering from one conference had never before endangered the existence of another conference.

Carl C. James who proved to the most adept predator by grabbing SWC staples Baylor, Texas, Texas A&M, and Texas Tech[84] and thereby expanding the Big Eight to the Big 12. The remaining SWC remnants Houston, Rice, Southern Methodist, and Texas Christian were scattered across lower-rung conferences and, for the most part, pushed into relative obscurity.[85] And just like that, the 81-year-old SWC, its seven college football championships, and annual high-spirited rivalries vanished into the annals of college football history.[86]

The realignment shakeup ultimately empowered the revamped conferences to independently leverage their newfound marketability to the television networks.[87] The first to jump from the CFA ship was the SEC.[88] Anchored by the lure of a heavily

[84] *Id.* at 240; *Conference Realignment Chart*, *supra* note 16. These former SWC members merged with Big Eight Conference members (Colorado, Iowa State, Kansas, Kansas State, Missouri, Nebraska, Oklahoma, and Oklahoma State) to form the Big 12.

[85] *Conference Realignment Chart*, *supra* note 16. Rice, Southern Methodist, and TCU joined the Western Athletic Conference ("WAC"). TCU jumped from the WAC to C-USA, then to the Mountain West Conference ("MWC"), before it returned to its current home with the Big 12 in 2012. In 2005, Rice and Southern Methodist reunited with Houston in C-USA; TCU Athletics, *2014 TCU Football Fact Book*, ISSUU, http://issuu.com/tcu_athletics/docs/2014_fb_fact_book (last accessed January 16, 2015). TCU undoubtedly achieved more gridiron success than the other former SWC members not invited to join the then Big Eight. Since 2005, TCU football has the best record of Texas schools and ranks eighth nationally (as of 2014). Such success certainly swayed the Big 12 to bring the Horned Frogs into the fold. Access to yet another chunk of the Texas market and a $164 million stadium renovation, however, were likely the deciding factors precipitating the invitation.

[86] *A Look Back at the Southwest Conference*, TEXAS ALMANAC, http://www.texasalmanac.com/ topics/sports/look-back-southwest-conference (last accessed January 16, 2015). The SWC also featured five Heisman trophy winners in its storied run. In addition to its former football prowess, the SWC won 47 national championships in other sports and featured three future Olympic track-and-field gold medalists (Randy Matson, Carl Lewis, and Michael Johnson).

[87] ROSNER, ET. AL., *supra* note 69, at 509.

[88] DUNNAVANT, *supra* note 57, at 239-40.

promoted televised conference championship game, the SEC negotiated an $85 million deal with CBS in 1996.[89] Three days later, the ACC inked a $54 million deal with ABC.[90] The day after, the Big East bailed on contract extension negotiations with the CFA and ABC and signed a $56 million deal with CBS.[91] Three weeks later, the Big 12 contracted with ABC for a $57.5 million deal that tore open the final hole in the sinking CFA ship.[92] Crippled by defections,[93] the CFA closed its books in 1997.

The CFA dissolution, at best, granted sovereignty to the prominent conferences and schools to explore a flourishing television market.[94] At worst, it led to the market entrenchment of the traditional powers[95] and the ongoing exclusion of the less prominent conferences. Without the salability networks craved, the less-esteemed conferences were relegated to unfavorable and low-dollar deals with regional cable networks.[96] The have-nots were eventually compelled to play powerhouses in non-conference play as a calculated measure to gain exposure and some degree of rele-

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[89] *Id.* at 239-40, 242. The CBS deal more than doubled the SEC's earnings with the CFA and caused the realignment wave that led to the demise of the SWC. The SEC's attractiveness as a commodity is evidenced by the superior terms it received against its competitors.

[90] *Id.* at 242.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 221-45. The CFA was also in a never-ending fight with the Big Ten and Pac-10. The battles included the typical business posturing and often culminated with expensive lawsuits. In the end, war with the conference heavyweights took its toll and the CFA buckled.

[94] *Id.* at 242.

[95] *Id.*

[96] *Id.* The equity conferences secured cable deals with the Disney ESPN/ESPN2 juggernaut while also compiling millions from regional syndication. The non-equity conferences, such as the WAC, C-USA, and MAC, were left to the scraps of leftover time slots and diminished revenue. Such conferences typically battled to have their best games televised alongside the second- or third-best games from the equity conferences. In retrospect, the ability to compete with a Power Five conference's third-best game would, today, be a feat and welcomed by any Group of Five conference.

vance.[97] This structural change, which was an outgrowth of the NCAA conditions attached to conference championships,[98] would eventually spur controversy during the BCS era and, in the end, eviscerate many college football traditions and rivalries while adding yet another behind-the-scenes formula for determining a true national champion.[99]

ii. Building a Dynasty: The Alliance, Coalition, and Ill-Fated BCS

The second blow came to the NCAA in 1994, in a hotel conference room in Florida, when Kramer shot down an NCAA playoff proposal.[100] After Georgia Athletic Director Vince Dooley made his playoff pitch, his SEC brethren let him know they had something else in mind.[101] At that time, the NCAA had formed

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[97] *Id.* at 243.

[98] *Id.* Upon its split, for example, the SEC was compelled to institute an eight-game conference rotation to trigger allowance for a conference-championship game. Such a schedule ultimately proved taxing and the SEC, in turn, was disinclined to schedule difficult games with intersectional foes. Alabama athletic director Cecil "Hootie" Ingram understood why the SEC took this approach, but also recognized it was not good for the health of the game. "It doesn't make as much sense for us to play people like Penn State and Notre Dame now because we're already playing eight tough conference games, plus hopefully the conference championship game and a bowl game. That's a negative for our program, because we should be playing those kinds of teams." Instead, the equity conferences scheduled games with marginal programs from non-equity conferences. The result was a win-win because the equity schools generally tallied a victory and non-equity schools gained national exposure on top of a large payday. And with the occasional upset, the equity conferences were able to spin the illusion that disparity was not so drastic and, thus, further entrenched their stranglehold on the game's power structure.

[99] *See infra* notes 144-48, 80-85 and accompanying text (denoting the rivalries lost during the BCS and spotlighting the demise of the tradition-rich SWC).

[100] WETZEL,ET. AL., *supra* note 15, at 18-19. The plan, like today's system, called for two semifinal match-ups and a national championship game. The NCAA proposal also set to preserve the bowl system but differed from the current format in that the four teams would be selected following the New Year's Day bowls.

[101] *Id.* at 19. Dooley later recalled Kramer cryptically saying, "I think we'll have another option."

a playoff committee in a last-ditch effort to both resolve the faulty bowl-selection process and position itself for access to the postseason's ever increasing profits.[102] The clamor for such a structure even prompted Nike, Disney, and the QVC home-shopping network to submit their own lucrative proposals.[103] Behind closed doors, however, Kramer had set the wheels in motion for an entirely different postseason system when he colluded with the heads of the other equity conferences (excluding the Big Ten and Pac-10) and the elite bowls (excluding the Rose Bowl).[104] Less than two weeks after Dooley's proposal, Kramer's dealings came to fruition with the unveiling of the Bowl Alliance.[105] A long-time beneficiary of back-room deals, the NCAA was suddenly the powerless outsider.[106]

The prototype and catalyst for the Bowl Alliance was formed three years prior in 1992 when a coalition of leading conferences and top-tier bowls joined together in an effort to inject new life and increased revenue into the postseason.[107] Under this

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[102] DUNNAVANT, *supra* note 57, at 250.
[103] *Id.*
[104] WETZEL, ET. AL., *supra* note 15, at 19-20. Kramer's strategy was to play into the bowls' obvious fear of a playoff and, thereby, safeguard the equity conference's 85 percent take of the postseason revenue. Although a playoff would surely generate millions of additional dollars, the equity conferences were determined to not cede any postseason control to the NCAA. Any appeal to fair play was ultimately a threat to the ruling elite and, therefore, the haves were compelled to squash the minority before an improbable insurrection from the have-nots.
[105] *Id.*
[106] *Id.*
[107] DUNNAVANT, *supra* note 57, at 247-48. The bowls were coming under increased fire when public perception started viewing the structure as a "meaningless, anticlimactic relic." Gasoline was added in November of 1990 when then-undefeated Virginia was chosen by the Sugar Bowl before season's end to face the SEC champion. The Sugar Bowl brass ignored the bid-day rule by prematurely securing the Cavaliers before their final games. At that time, the ACC was without the clout to arrange a contractual tie-in with a bowl. The Cavaliers, nonetheless, had become a hot commodity when rising to the top of the polls after a 7-0 start. This, however, proved to be a cautionary tale when Virginia finished the season 1-4 and lost to Tennessee in the Sugar Bowl. Even

arrangement (collectively known as the "Bowl Coalition"), the Cotton, Fiesta, Orange, and Sugar Bowls contracted with the five major conferences and Notre Dame,[108] predictably excluding the mid-major conferences and lower-tier bowls. The Coalition relentlessly courted the Rose Bowl and its postseason partners, the Big Ten and Pac-10,[109] and not in an appeal to fair play, but rather as a power-grab to maximize profit potential.[110] The Coalition was unable to execute an ongoing agreement,[111] however, and after only three years it dissolved. In 1994, its final year, the Coalition's futility was made evident when an undefeated Penn State was denied a title matchup with undefeated Nebraska.[112] Both teams won their bowl games, but the Cornhuskers were crowned by the major polls despite the Nittany Lions routing Oregon in the Rose Bowl.[113]

Even though the short-lived Bowl Coalition was nearly supplanted by a playoff in its final year, its base structure proved resilient and managed to stay intact over the next two decades and despite the bombardment of continuous controver-

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after the Coalition was instituted, the bowls were reluctant to relinquish their independence. In 1993, for example, the Cotton Bowl bypassed third-ranked Florida State in favor of fifth-ranked Notre Dame due in large part to the Irish's television draw.

[108] *Id.* at 249. This arrangement was momentous "because it was the first time a group of bowls and conferences had resolved to work together to try to make the postseason more relevant."

[109] *Id.*

[110] *Id.*

[111] *Id.* Critics also believe the structure's reliance on the AP and retention of the automatic-qualifier system contributed to the Coalition's shaky credibility.

[112] *Id.* At the time, the Big 12 played a conference championship game, which allowed the Cornhuskers one more game — and one more victory — than the Nittany Lions.

[113] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1389. Nebraska defeated No. 3 Miami and, thereby, regained some redemption after the Cornhusker's last-minute loss to the Hurricanes in the classic 1984 Orange Bowl game. Penn State's 38-20 victory over Oregon was not enough to sway the pollsters and, in turn, Coach Paterno was left with yet another undefeated team not wearing the crown.

sy.[114] This was due, in part, to its architects' ability to stave off the controversy of the particular day by revamping the system as needed.[115]

The first tweak occurred in 1995 in year one of the new Bowl Alliance, the Coalition's immediate successor. In one of their first moves, the powers behind the new Bowl Alliance initiated the rotational national championship game.[116] This plan also eliminated the tie-in scheme to better enable pitting the top two teams for the national crown.[117] On its face, this new structure appeared to be eliminating the "mythical national champion" dilemma.[118] But a closer look reveals that the Alliance was, first and foremost, striving toward an increased bottom-line.[119] This end-goal was realized immediately and unequivocally when overall bowl revenue jumped 30 percent upon the $135 million commitment from the Sugar, Orange, and Fiesta Bowls to land the three coveted rotational spots.[120] Even so, the Alliance left a jackpot on the table by failing to bring the Rose Bowl, Big Ten, and Pac-10 into the fold.[121] This misstep of exclusion, in the end,

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[114] *See generally* DUNNAVANT, *supra* note 57, at 249-75 (discussing the controversies endured by the Coalition and Alliance); WETZEL, ET. AL., *supra* note 15 (detailing the many and varied controversies perpetuated by the BCS).

[115] *See infra* Part II(a)(ii) (denoting Alliance and BCS adjustments).

[116] DUNNAVANT, *supra* note 57, at 251.

[117] *Id.* This hinged on neither a Big Ten nor Pac-10 team being in the top two.

[118] *Id.* Under this structure, the title game would rotate between the three chosen bowls. Conference champions earned automatic bids while the other two spots were reserved for at-large teams.

[119] *Id.* ACC Athletic Director, Gene Corrigan, acknowledged that the Coalition's central purpose was to "maximize revenue" and attain the "best deals."

[120] *Id.* at 252. The bidding process sent the usual suspects into a fever pitch to secure a spot at the Alliance table. The networks and television sponsors, believing the new format would boost sagging ratings, offered exorbitant money that even surprised the commissioners. CBS Sports, for instance, offered an unprecedented $300 million bid over six years. Robert Dale Morgan, executive director of the Peach Bowl, complained that such an offer was "nothing more than a TV network trying to buy college football."

[121] Rich Exner, *TV Audience of 33.4 Million Makes Ohio State, Oregon Second Most-Watched College Football Title Game*, CLEVELAND.COM,

would spur yet another controversy in 1997 when the polls awarded a split national title to Nebraska and Michigan.[122] Still, the Alliance had shown both its financial muscle and marketing preeminence, ultimately forcing the hands of the Big Ten and Pac-10 to abandon their Rose Bowl ties.[123]

The second tweak occurred in 1998 when the Rose Bowl relented and jumped into the bowl rotation, ending a near forty-year rivalry between its one-time exclusive partners, the Big Ten and Pac-10.[124] This new structure, rebranded as the BCS, would prove durable by lasting 16 seasons in the face of unremitting controversy and requests for restructuring.[125] The stated purposes of the BCS were to restore order within the postseason and

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http://www.cleveland.com/datacentral/index.ssf/2015/01/ohio_state_oregon_game _joins_l.html (last accessed January 21, 2015). The list on this website includes Nielsen ratings for the Fiesta, Orange, Sugar, and Rose bowls in addition to the national championship game added in 2007 and this year's playoff. The Rose Bowl holds six of the top 14 spots (including number one) and gives credence to the Granddaddy of Them All designation. During the pre-BCS years, the Rose Bowl television audiences hit 28.4 million in 1995 (ranked 12); 30.4 million in 1996 (ranked 4); and 29.0 million in 1998 (ranked 9).

[122] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 1393, 1397. In its first two seasons, the Alliance was able to crown champions in 1995 (Nebraska) and 1996 (Florida) without an asterisk.

[123] DUNNAVANT, *supra* note 57, at 255. Joining the Alliance had been in discussions by the two conferences since the 1995 Penn State controversy. The rivalry between CBS and ABC surely contributed to the delay. At that time, ABC dominated the ratings war with the Rose Bowl in its lineup. Furthermore, ABC's rights included veto power over any change to the Rose Bowl format. Suffice to say, the ABC executives were reluctant to join in any agreement that might benefit its competition.

[124] *Id.* at 256-57. ABC persuaded the Rose Bowl to join the four-bowl rotation in an effort to stamp out its CBS competition. To achieve their goal, ABC brass committed more than $500 million over seven years and in doing so succeeded in winning the rights to the Rose, Orange, Sugar, and Fiesta. This staggering number, in turn, allowed the games to elevate per-team payouts to more than $12 million per year.

[125] Greg Bishop, *The End of the Much-Debated B.C.S.*, N.Y. TIMES, http://www.nytimes.com/2014/01/08/sports/ ncaafootball/rest-in-peace-bcs-a-maligned-system-that-sometimes-worked.html?_r=0 (last accessed January 27, 2015).

guarantee a national championship game.[126] Critics maintain that these purposes were marketing subterfuge, cover for yet another device the power brokers could exploit for their economic benefit.[127] While proponents argued that the BCS system was driven by tradition, opponents saw it driven by the bottom line, beholden to an age where brands trumped rivalries and Nielsen ratings reigned over merit.[128]

Two structural flaws, designed by profit-centered architects, ultimately tarnished the BCS's legacy. First, the arrangement itself created an institutional bias that marginalized the non-automatic qualifying ("non-AQ") conferences, pushing them further into postseason obscurity.[129] During the BCS's existence, for instance, nine non-AQ conference teams finished the regular season undefeated (Tulane in 1998; Marshall in 1999; Utah in 2004 and 2008; Boise State in 2006 and 2009; Hawaii in 2007; and TCU in 2009 and 2010) yet none were given an opportunity to play in the national championship game.[130] And not only were non-AQ

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[126] *Id.*

[127] *Id.*

[128] *College Football Poll*, *supra* note 19. BCS proponents argue that the structure preserves "tradition" by upholding the game's bowl-game heritage while also attaching significance to the regular season; *but see infra* note 131 and accompanying text (hinting that Nielsen ratings dip when non-BCS schools are featured in a bowl and, thus, selection not based on a meritocracy).

[129] *Id.* Under this structure, the champions of the ACC, AAC (formerly Big East), Big Ten, Big 12, Pac-12, and SEC have automatic berths in a BCS bowl game. This is due to the membership bowl's longstanding tie-in with four of the five equity conferences: Fiesta and the Big 12; Orange and the ACC; Rose and the Big Ten/Pac-12; Sugar and the SEC. The five non-AQ conferences, however, only receive one automatic bid and are often relegated to less exposure (and revenue) in a lower-tier bowl game.

[130] Bill Bender, *Running the Table Likely Not Enough for Group of 5*, SPORTING NEWS, http://www.sportingnews.com/ncaa-football/story/2014-06-10/power-5-vs-group-of-5-college-football-playoff-scheduling-run-the-table (last accessed January 28, 2015). The bowl record in these seasons was 7-2 (including five BCS bowl wins). Utah and TCU were able to parlay such success (or, in the Ute's case, the threat of an antitrust lawsuit) with membership into a Power 5 conference.

conferences excluded from championships opportunities, they were also largely denied access to any BCS games.[131] It took 11 years before two non-AQ conference teams were chosen among the eight BCS teams in the same season.[132] The structure also backfired on the automatic qualifying ("AQ") conferences thanks to the BCS's own convoluted methodology: In 2001, No. 2 Oregon was snubbed in favor of No. 3 Nebraska; In 2003, the AP crowned USC national champions despite the Trojans not playing in the title game; and in 2004, the unbeaten SEC champion, Auburn, was denied a title shot.[133] The BCS structure, despite its supposed 81-percent-success rate, ultimately proved to be imperfect and biased regardless of conference affiliation.[134]

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[131] Darren Everson, *TCU Plays BSU in the BCS? OMG!*, WALL ST. J., http://www.wsj.com/articles/SB10001424052748703558004574583872339892890 (last accessed January 28, 2015). Prior to 2010, only four non-BCS teams have participated in one of the major bowls. According to Nielsen Co., these four games were among the then 10 lowest-rated BCS bowl games ever televised.

[132] *Id.* In 2009, the BCS matched Boise State and TCU in the Fiesta Bowl. This decision was to the dismay of BCS critics, who aimed to validate the merit of the so-called BCS busters. The BCS defended this selection as a rematch of unbeatens in the prior year's Poinsettia Bowl; Joe Barton, *BCS Is College Football's Biggest Problem*, US NEWS, http://www.usnews.com/opinion/articles/2009/12/31/rep-joe-barton-bcs-is-college-footballs-biggest-problem (last accessed January 28, 2015). U.S. Rep. Joe Barton, R-Tex, penned a manifesto for U.S. News & World Report that defended his characterization of the BCS as a "cartel." His ire, which escalated after the TCU and Boise State snubs, prompted him to sponsor a congressional bill that prevented the BCS from coloring its title game as a "national championship game."

[133] WETZEL, ET. AL., *supra* note 15, at 127-136. The formula counterbalanced the polls with computer rating systems to determine a title matchup. The systems, which varied in number through the BCS lifespan, incorporated various factors such as margin of victory and strength of schedule; Bishop, *supra* note 125. Roy Kramer, who has been called the Father of the BCS, inferred that the controversy surrounding the methodology stems from the press' inability to comprehend the BCS "phenomenon."

[134] Bishop, *supra* note 125. Bill Hancock, executive director of the BCS since 2009, maintained that the structure turned the game into a "national obsession."

The second structural flaw can be seen in how the BCS's revenue scheme widened the already deep equity gulf between the AQ and non-AQ conferences. This structure, fueled by exorbitant television contracts with the host bowls, ratcheted up the class warfare.[135] An NCAA audit revealed that BCS totaled $202.5 million in revenue after institutional expenses for the 2012-2013 bowl season, accounting for 67 percent of all bowl revenue.[136] Of the 35 total bowls, the AQ conferences generated $181 million of revenue while the non-AQ conferences generated $27.1 million.[137] Another comparison reveals that the SEC's $37.5 million in revenue was $10 million more than all non-AQ conferences combined,[138] including revenue for the Mountain West ($2.3 million)

Jim Delaney, Big Ten Commissioner, points to the dramatic growth of fan interest in the regular and postseasons under the BCS tenure.

[135] DUNNAVANT, *supra* note 57, at 256-57. ABC Sports held the televising rights to the BCS for $500 plus million from 1998 until 2006; Larry Stewart, *Fox Lands BCS Deal for $330 Million*, L.A. TIMES, http://articles. latimes.com/2004/nov/23/sports/sp-bcstv23 (last accessed January 29, 2015). When the ABC contract expired, Fox landed a four-year deal (through 2010) of $330 million to televise the BCS bowl games minus the Rose Bowl and 2010 BCS championship game. ABC Sports, however, maintained its ties to Pasadena by agreeing to $270 million for an eight-year extension (the duration of the BCS); Richard Sandomir, *As Bowls Migrate to Cable, Viewership is Just a Number*, N.Y. TIMES, http://www.nytimes.com/2011/01/06/ sports/ncaa football/06sandomir.html (last accessed January 29, 2015). ESPN outbid Fox by upping the ante to a $500-plus million deal for the last four years of the BCS. In that time, Walt Disney (owner of ABC Sports and ESPN) shifted Rose Bowl coverage to ESPN.

[136] Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-2013 Bowls*, AL.COM, http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html (last accessed January 31, 2015).

[137] *Id.* Bowl revenue was calculated from the chart (Bowl Money By Conference, 2012-13) by subtracting Institutional Bowl Expenses from Bowl Payout Received and then totaling based on the AQ versus non-AQ designation.

[138] *Id.* That year, the SEC received a BCS payout of $31.7 million by placing two teams. The SEC also placed in 5 of the top 10 highest-paying non-BCS bowls (including the top four).

and C-USA ($1.6 million).[139] In the BCS's next and final season, the status quo was clearly upheld when the non-AQ conferences received 7.2 percent of BCS total net revenue,[140] an amount around $12.6 million and divided equally between the four non-AQ conferences.[141]

The tilted BCS structure forced conferences into a constant state of flux as schools and bowls jockeyed for greater access to the game's pot of gold.[142] In the BCS era from 1998 to 2013, there were 78 realignments that ultimately led to the dissolution of three conferences (Big West, Western Athletic, and Big East) and the creation of three more (Mountain West, Sun Belt, and American Athletic).[143] The realignment frenzy even took its toll on the surviving BCS conferences, most notably weakening the Big 12 while fortifying the SEC, Big Ten, and Pac-12.[144] Along the

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[139] Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-2013 Bowls*, AL.COM, http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html (last accessed January 31, 2015); *see also* Sammy Eanes, *The College Football Arms Race: Examining Athletic Department Revenues*, THE KEY PLAY, http://www.thekeyplay.com/content/2014/january/20/college-football-arms-race-examining-athletic-department-revenues, (last accessed January 31, 2015). The author, citing The Equity Data Analysis Cutting Tool, highlights bigger-picture disparities by examining athletic departments as a whole. 13 AQ athletic departments had revenues of over $100 million in 2012-13. The non-AQ conferences had none. At the top of the heap was Texas at $166 million. At the bottom was the Sun Belt's Lousianna-Monroe at $9.2 million.

[140] Dennis Dodd, *Sun Belt Finished First (in Non-AQ Revenue) in Last Year of BCS*, CBS SPORTS, http://www. cbssports.com/collegefootball/writer/dennis-dodd/24418974/sun-belt-finishes-first-in-non-aq-revenue-in-last-year-of-bcs (last accessed January 27, 2015).

[141] *Id.*

[142] *Conference Realignment Chart*, *supra* note 16.

[143] *Id.* This was an average of nearly five realignments per BCS season. There were only three seasons that did not experience a shuffle. The most active movement occurred during the 2005 season (16 realignments) and the final 2013 season (17 realignments).

[144] *Id.* In June of 2010, for example, the Big 12 lost Colorado to the Pac-10 and Nebraska to the Big Ten. That same month the Pac-10 also poached Utah from the Mountain West to become the Pac-12. Most significantly, the Pac-12 and

way, tradition-rich rivalries were pushed aside in the shuffle,[145] virtually eliminating intra-state showdowns (Texas vs. Texas A&M, Penn State vs. Pittsburgh), border battles (West Virginia vs Pittsburgh, Kansas vs. Missouri), and powerhouse face-offs (Michigan vs. Notre Dame, Nebraska vs. Oklahoma).[146] The deserted rivalries were also detrimental to other NCAA sports, such as basketball (Kansas vs. Missouri, Georgetown vs. Syracuse, Duke vs. Maryland),[147] baseball (Creighton vs. Wichita State),[148] and hockey (Minnesota vs. North Dakota).[149]

Big Ten put themselves in better position to host conference championship games, while the Big 12 was forced to abandon its two-division format. The following June, the Big 12 suffered another setback when losing Texas A&M and Missouri to the SEC.

[145] Mark Schlabach, *Realignment Killed the BCS Rivalry*, ESPN, http://espn.go.com/college-football/story/_/id/9559944/rivalries-lost-bcs-era-college-football (last accessed February 1, 2015); Brian Palmer, *Sports Rivalries: The Economics of Crosstown Hatred*, SLATE, http://www.slate.com/articles/ business/ rivalries/2013/08/sports_rivalries_the_economics_of_crosstown_hatred.html (last accessed February 1, 2015). Abandoned rivalries also translate into lost revenue for local economies. The Boise State vs. Idaho State match-up, for instance, reportedly brings $1 million to the Moscow, Idaho economy. Restaurant sales in a local Utah economy reportedly jump to a 65 to 75 percent increase in sales on the day of the Utah-BYU game.

[146] *Id.*

[147] Jon Solomon, *Top 6 College Sports Rivalries Lost by Conference Realignment*, AL.COM, http://www.al.com/sports/ index.ssf/2013/02/top_6_college_sports_rivalries.html (last accessed February 1, 2015).

[148] Paul Suellentrop, *Wichita State Losing Its Most Enduring Valley Baseball Rival*, KANSAS.COM, http://www.kansas.com/ sports/college/wichita-state/article1115180.html (last accessed February 1, 2015).

[149] Chip Scoggins, *One of College Hockey's Best Rivalries Losing Out to Power of Dollar*, STAR TRIB., http://www.startribune.com/sports/gophers/143021725.html (last accessed February 1, 2015). Minnesota's departure from the Western Collegiate Hockey Association for the Big Ten's newly formed hockey league meant the end of the Gopher's rivalry with the Fighting Sioux. At the core of this maneuver was the Big Ten Network, which set its sights on expanding the already lucrative brand to the hockey demographic.

The BCS structure endowed the bowls with outrageous amounts of money and power, leading to inflated salaries of bowl directors,[150] bowl kickbacks,[151] and exploitation of bowls' non-profit status.[152] The Fiesta Bowl scandal exemplified the lavish spending of bowls and the cronyism that permeated through the BCS.[153] At the center was Fiesta Bowl Director, John Junker,[154] who a 2011 investigation revealed had thrown himself a $33,000 birthday party and arranged a $95,000 round of golf with Jack Nicklaus.[155] These expenses — as with his $4,856,680 AMEX bill and four country club memberships — were all on the Fiesta Bowl's dime.[156] The most damning revelation, however, focused on Junker's role in a campaign donation kickback scheme where $46,000 in political contributions made by Fiesta Bowl employees were paid back with Fiesta Bowl money, for which Junker was convicted and sentenced to eight months in federal prison.[157] Although the BCS threatened ouster, the Fiesta Bowl

[150] WETZEL, ET. AL., *supra* note 15, at 61. Over 20 executives pocketed more than $300,000 to serve as bowl directors in 2009. On the high-end were the salaries of Sugar Bowl CEO Paul Hoolahan ($645 million), Fiesta Bowl Director John Junker ($674 million), and Outback Bowl President Jim McVay ($693 million).

[151] *Id.* at 53-54. The Fiesta Bowl, for instance, hosts the annual "Fiesta Frolic" to woo athletic directors over a weekend of golf at an exclusive resort in Arizona. The Orange Bowl courts the same crowd on a four-day Caribbean cruise in the near-annual "Summer Splash."

[152] *Id.* at 23-32. In the 2011-12 season, 11 of the 35 bowls were privately owned. The remaining 24 enjoyed non-profit status. And while such designation typically conjures the image of charity, bowls were anything but charitable: In 2012, tax-exempt bowls combined to donate just 1.7 percent of the $186 million in revenue. The lion's share of such revenue went to executive pay, lobbying, and other irregularities (i.e., six figure interest-free loans to bowl executives).

[153] *Id.* at 49-60.

[154] *Id.*

[155] *Id.* at 50.

[156] *Id.* at 49, 55.

[157] Associated Press, *Ex-Fiesta Bowl Chief Headed to Prison*, ESPN, http://espn.go.com/college-football/story/_ /id/10604586/former-fiesta-bowl-

was able to hold its position in the championship-game rotation by paying a $1 million donation to a local charity.[158] Ultimately, this scandal was a critical blow to the structure's already tarnished image and gave credence to John Feinstein's estimation that the BCS "was the worst corporate creation since Enron."[159]

C. Disguised Coverage: The Expansion of College Football's Postseason

Throughout 2012, college football's power circle met in hotel rooms across the country to hash out a playoff format to replace the BCS structure.[160] Leading the cabal was BCS Executive Director Bill Hancock, who just two years earlier opined that a playoff would ruin the regular season.[161] After abysmal TV bowl ratings in the prior two seasons, however, the powers realized a facelift was needed.[162] The BCS Presidential Oversight Committee agreed and, subsequently, approved the proposal in June of 2012. Soon after, the NCAA offered its blessing.[163] Finally, nearly two decades removed from Vince Dooley's pitch, college football had

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chief-john-junker-gets-8-months-illegal-campaign-contribution-scheme (last accessed February 3, 2015).

[158] WETZEL, ET. AL., *supra* note 15, at 59.

[159] Steve Wieberg, *BCS: Boon or Bust?*, USA TODAY, http://usatoday30.usatoday.com/sports/college/football/2005-09-22-bcs_x.htm (last accessed February 03, 2015).

[160] *Chronology*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/chronology (last accessed February 4, 2015) (the BCS four-year term was set to expire after the 2013-14 season).

[161] *Id*.; Bill Hancock, *Yet Again, College Football's BCS Works*, USA TODAY, http://usatoday30.usatoday.com/news/ opinion/forum/2010-12-09-column09_ST2_N.htm (last accessed February 03, 2015).

[162] Jon Soloman, *College Football's Average Bowl Rating Drops to Lowest During BCS Era*, USA TODAY, http://usatoday30. usatoday.com/news/opinion/forum/2010-12-09-column09_ST2_N.htm (last accessed February 03, 2015). The 2011-12 bowl season was the lowest rated in the then 14-year history of the BCS. It also marked the second straight year in decline and marked a 37 percent ratings drop since the BCS-era's peak in the 1998-99 season.

[163] *Id.*

a playoff. [164] The inaugural playoff was slated for the 2014-15 season.[165] But, unlike in Dooley's proposed structure, the NCAA's oversight role would be benched while Hancock and company played coach, quarterback, and cheerleader.[166] The CFP departed from the non-profit model and — with its Delaware incorporation status, board, and various committees — more resembles the workings of a Fortune 500 company.[167] The following sections peel back the layers of the CFP structure (format, methodology, and revenue arrangement) and briefly analyze the developments in its inaugural season.

i. Simplifying the Xs and Os: CFP Format

The CFP format is simple: Four teams play two semifinal bowl games for a shot at the title in the College Football National Championship. [168] The two semifinal games rotate among six bowls: Cotton, Fiesta, Orange, Peach, Rose, and Sugar.[169] The

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[164] *Id.*

[165] Jon Soloman, *College Football's Average Bowl Rating Drops to Lowest During BCS Era*, USA TODAY, http://usatoday30. usatoday.com/news/opinion/forum/2010-12-09-column09_ST2_N.htm (last accessed February 03, 2015).

[166] *See supra* notes 100-01 and accompanying text (noting that Hancock's de facto predecessor, Roy Kramer, shot down Dooley's NCAA proposal in favor of the Coalition).

[167] *Governance*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/governance (last accessed February 10, 2015). CFP Administration, LLC, a limited liability corporation, was formed on March 13, 2013. Its stated purpose: Manage the administrative functions of the College Football Playoff. A Board of Managers, which consists of a university president or chancellor nominated by each member, governs the LLC. A Management Committee of the Football Bowl Subdivision commissioners and the Notre Dame athletics director manages its day-to-day operations. This Committee appoints the Athletics Directors Advisory Group and the Selection Committee.

[168] *About – Overview*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/overview (last accessed February 04, 2015) [hereinafter *CFP Overview*].

[169] *Id.* The Orange, Rose, and Sugar Bowls are contracted outside the CFP arrangement (ACC to Orange Bowl against the highest ranked available team

"New Year's Six," as this rotation has been dubbed, is played in back-to-back triple-headers on New Year's Eve and New Year's Day[170] – with four of the games having no title implications. The championship game, matching the winner of the two semifinal bowls, is then played on the first Monday that is six or more days after the semifinals.[171]

In the inaugural season, the following teams were chosen by the Playoff committee as the top four seeds: (1) Alabama; (2) Oregon; (3) Florida State; (4) Ohio State.[172] In the semifinal games, the Ohio State Buckeyes outscored the Alabama Crimson Tide 42-35 in the Sugar Bowl, while the Oregon Ducks shellacked the Florida State Seminoles 59-20 in the Rose Bowl.[173]

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from the SEC, Big Ten, and Notre Dame; Big Ten and Pac-12 to Rose Bowl; and SEC and Big 12 to Sugar Bowl). If a conference champion qualifies for the playoff, then the bowl chooses a replacement from that conference. When those bowls host the semifinals and their contracted conference champions do not qualify, then the displaced champion(s) will play in the Cotton, Fiesta, or Peach Bowl.

[170] John Ourand and Michael Smith, *ESPN, NFL Lobby for Changes in College Football Playoff Calendar*, SPORTS BUS. DAILY, http://www.sportsbusinessdaily.com/Journal/Issues/2015/01/26/Events-and-Attractions/CFP.aspx (last accessed February 03, 2015). In the 2015-16 season, the CFP semifinals are slated to appear on New Year's Eve. ESPN is pressuring the CFP to move these games to Saturday, January 02, 2016. That night offers little competition and, thus, affords a better chance for stronger ratings and higher advertising rates. The CFP, nonetheless, is holding firm on its commitment to hold triple-header games on consecutive nights over the New Year's holiday.

[171] *Id.* The NFL, which is considering a playoff expansion, is lobbying the CFP to move its title game. The NFL anticipates moving one of its potential new games to the Monday slot, but does not want to engage in a ratings' war with the CFP.

[172] *College Football Playoff Schedule*, FB SCHEDULES, http://www.fbschedules.com/ncaa/college-football-playoff-schedule.php (last accessed February 08, 2015). Rounding out the New Year's Six were Michigan State versus Baylor in the Cotton; Boise State versus Arizona in the Fiesta; Georgia Tech versus Mississippi State in the Orange; and TCU versus Mississippi in the Peach.

[173] *Id.* Outside the playoff, the Spartans came back to edge the Bears (42-41) in the Cotton; the perennial outsiders, the Broncos upset the Wildcats (38-30) in

On Monday night, January 12, 2015, Urban Meyer's Buckeyes routed Heisman trophy winner Marcus Mariota's Ducks 42-20 to capture the first CFP title.[174]

ii. The Game Plan Behind the Scenes: CFP Methodology

The methodology used by the committee to choose its teams (similar to the one used to choose the participants in college basketball's March Madness tournament) is, on the surface, straightforward: A 13-person selection committee ranks the top 25 teams and then determines match-ups for the New Year's Six.[175] The inaugural committee included one current athletic director from each of the Power Five conferences and an assortment of former coaches, players, athletic directors, administrators, and a retired member of the media.[176] The committee members are to

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the Fiesta; the Yellow Jackets handled the Bulldogs (49-34) in the Orange; and the Horned Frogs silenced their critics with a thrashing of the Rebels (42-3) in the Peach.

[174] Stewart Mandel, *Urban Meyer, Nation's Best Coach, is Starting an Ohio State Dynasty*, FOX SPORTS, http://www. foxsports.com/college-football/story/ohio-state-buckeyes-oregon-ducks-national-title-urban-meyer-osu-dynasty-011315 (last accessed February 4, 2015). Urban Meyer has won three national titles (two with Florida and one with Ohio State.

[175] *Selection Committee*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com /selection-committee-faqs (last accessed February 04, 2015) [hereinafter *Selection Committee*].

[176] *Id.* Arkansas (SEC) athletic director Jeff Long serves as the chairman. The other Power Five representatives include Barry Alvarez of Wisconsin (Big Ten); Pat Haden of USC (Pac-12); Oliver Luck of West Virginia (Big 12); and Dan Radakovich of Clemson (ACC). The other eight members are as follows: Lieutenant General Michael Gould (former Air Force Academy superintendent); Tom Jernstedt (former NCAA executive vice president); Archie Manning (former NFL and Ole Miss quarterback); Tom Osborne (former Nebraska coach and athletic director); Condoleeza Rice (former U.S. Secretary of State and Stanford professor); Mike Tranghese (former Big East commissioner); Steve Wieberg (former USA Today reporter); Tyrone Willingham (former Notre Dame, Stanford, and Washington coach); AP, *Texas Tech AD Kirby Hocutt Appointed to Playoff Selection Committee*, FOX SPORTS, http://www.foxsports.com/college-football/story/texas-tech-athetic-director-

serve three-year terms and exclude current conference commissioners, coaches, and media members.[177] The committee (also like the March Madness Selection Committee) employs a recusal policy to endorse transparency and objectivity.[178]

The committee is tasked with submitting weekly rounds of selection ballots in the last seven weeks of the regular season.[179] Unlike its predecessor, the CFP does not use independent polls or computer rankings to make the selections.[180] Instead,

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kirby-hocutt-appointed-to-playoff-selection-committee-020915 (last accessed February 10, 2015). Long was re-elected as the committee's chairman for the 2015-16 season. Texas Tech AD, Kirby Hocutt, fills the Big 12 void left by Luck's departure for a job with the NCAA. Critics suggest that Hocutt's nomination was in response to Baylor AD's Art Briles' criticism that the committee lacked a Texas connection; *Bobby Johnson to Replace Archie Manning on Playoff Selection Committee*, USA TODAY, http://www.usatoday.com/story/sports/ncaaf/2015/03/27/bobby-johnson-replaces-archie-manning-college-football-playoff-selection-committee/70548606/ (last accessed August 04, 2015). Manning, who took a medical leave of absence for the inaugural season, was replaced by Bobby Johnson (former college football player and head coach) in the committee's second season.

[177] *Selection Committee*, *supra* note 175. Terms will be staggered to allow for an eventual rotation of members. Until the ideal rotation has been achieved, however, certain terms will vary.

[178] *Id.* The policy, in part, provides: "If a committee member or an immediate family member, e.g., spouse, sibling or a child: (a) is compensated by a school; (b) provides professional services for a school; or (c) is on the coaching staff or administrative staff at a school or is a football student-athlete at a school, that member will be recused."

[179] *Id.* The Playoff committee will reveal weekly rankings on Tuesday and then its final ranking on the Sunday following the regular season. The last ballot will also determine the match-ups for the semifinals and CFP bowls not obligated by contract; Stewart Mandel, *College Football Playoff to Release Polls… But Why?*, SPORTSILLUSTRATED, http://www.si.com/college-football/2014/04/30/college-football-playoff-top-25-polls (last accessed February 8, 2015). Mandel opines that the selection committee should stay true to its stated purpose and "replace the simplistic horse-race nature of Top 25 polls — where teams only move up if someone above them loses — with a more deliberative evaluation method."

[180] *Selection Committee*, *supra* note 175.

the CFP asks the committee to consider criteria that favors results from the regular season.[181] Chief considerations include a team's strength of schedule, conference championships, team records, and head-to-head results (with no weight on margin of victory).[182] Other gauges look to the tenuous connections between common opponents and opponents' opponents' records, as well as peripheral measures such as key injuries.[183]

iii. To the Chosen Go the Spoils: CFP Revenue Structure

The CFP structure is bankrolled by a $7.3 billion-deal with ESPN.[184] Inked in 2012, the deal guarantees ESPN exclusive broadcasting rights to the CFP for 12 years at a per-season average of $608 million.[185] By comparison, the most recent contract with the BCS was valued at $2 billion over four years for an average of $500 million per year.[186] In an effort to hedge its gamble, ESPN signed deals with 15 national sponsors and 15 local sponsors.[187] The CFP's mega sponsor, Dr. Pepper, for instance,

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[181] *Id.*

[182] *Id.*; *but see* Matt Hayes, *Just Admit It, CFP Committee: It's All About the Eye Tes*t, SPORTING NEWS, http://www.sportingnews.com/ ncaa-football/story/2014-12-02/college-football-playoff-committee-florida-state-tcu-alabama-oregon-baylor-ohio- (last accessed February 09, 2015) (arguing that the committee strayed from metrics in favor of "concepts" such as hot teams, good losses, and the so-called eye test).

[183] *Selection Committee*, *supra* note 175; Mandell, *supra* note 179. The key-injuries factor is seemingly less decisive when considering Ohio State's inclusion after losing two Heisman-caliber quarterbacks to injury. The Buckeye's resilience and continued excellence with third-string quarterback Cardale Jones undoubtedly validated the decision to place less weight on this factor.

[184] ESPN's $7.3 Billion Bet on College Football Playoff Pays Off, CNNMONEY, http://money.cnn.com/ 2015/01/12/media/espn-college-football-playoff-pays-off/ (last accessed February 10, 2015).

[185] *Id.*

[186] *See supra* note 124. BCS contract covered five games while the CFP contract encompasses seven.

[187] *Sponsors*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/sponsors#game-sponsors (last accessed February 12, 2015).

will pay $30-35 million per year as the "presenting sponsorship of the CFP trophy" until 2020.[188]

In the first year of the contract, CFP revenue will reach approximately $500 million after operational expenses.[189] The majority of this money will go to the Power Five conferences: $250 million base share; $24 million split among the conferences that place a semifinal team; $20 million split among the Power Five conferences that place a team or teams in the host bowls (Cotton, Fiesta, and Peach); and $27.5 million for placement in a contract bowl (Orange).[190] The Group of Five conferences will receive a $75 million share to distribute in the aggregate.[191] As for the independents, Notre Dame will receive $2.3 million, while BYU, Army, and Navy will split just under $1 million.[192]

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[188] Michael Smith, *How Dr. Pepper Uses Its Conference Ties to Reach Top Shelf of College Football's Postseason*, BIZ J., http://www.bizjournals.com/dallas/print-edition/2014/12/12/cover-story-how-dr-pepper-used-its-conference-ties.html?page=all (last accessed February 13, 2015). Dr. Pepper's college football roots date back to the inaugural SEC championship game in 1992. In 2015, Dr. Pepper's portfolio includes contracts with all Power Five conferences in addition to the CFP.

[189] *Revenue Distribution*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/revenue-distribution (last accessed February 11, 2015). The CFP notes that the revenues will fluctuate year-to-year depending on the sites of the semifinal and championship games, as well as the gross revenue from all games.

[190] *Id.* These figures do not include revenue from the Rose and Sugar Bowls, which are hosting the semifinals this season. The Big Ten and Pac-12 have an $80 million contract to split evenly in the years the Rose Bowl does not host a semifinal game. The SEC and Big 12 have a similar contract with the Sugar Bowl for the same amount. Another source of revenue includes the NCAA's Academic Progress Rate ("APR") allotment: Each Power Five conference will receive $300,000 for each school's football team that meets APR for participation in a postseason football game. Each independent institution will also receive the $300,000 allotment when its football team meets that standard.

[191] *Id.* This number will be boosted, albeit slightly, by the APR allotment.

[192] *Id.* Notre Dame's share hinges on the Irish meeting the APR standard. The other three independents will share $922,658.

Under this structure, the entity controlling the money is clearly the Power Five.[193] In year one, for instance, the ACC and SEC each took in $83.5 million; the Big Ten and Pac-12 $60 million; and the Big 12 $58 million.[194] The Group of Five conferences, on the other hand, took in an average of $12 million per conference.[195] The remaining $15 million was reportedly split according to computer rankings.[196]

Perhaps the biggest revenue winner in year one is ESPN.[197] The CFP proved to be a rating's jackpot for the network: According to Nielsen, the two semifinals games averaged a 15.0 rating and 28.2 million audience, while the championship had a staggering 18.2 rating with a 33.4 million audience.[198] The inaugural CFP title game represents the largest audience and highest rating in cable television history.[199] And, perhaps most important to ESPN, is the likely increase in future advertising rates.[200] In the

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[193] *Id.*

[194] Kristi Dosh, *College Football Playoff; Conference Payouts*, BUS. OF COLLEGE SPORTS, http://businessofcollegesports.com/ 2014/12/08/college-football-playoff-conference-payouts/ (last accessed February 11, 2015).

[195] *Id.* The Mountain West received an additional $4 million for Boise State's placement in the Fiesta Bowl.

[196] *Id.*

[197] Sheldon Spencer, *College Football Playoffs National Championship One of the Top 20 Most-Viewed Programs in Cable TV History*, WALT DISNEY CO., https://thewaltdisneycompany.com/blog/college-football-playoffs-national-championship-one-top-20-most-viewed-programs-cable-tv-hist-0 (last accessed February 12, 2015); Cork Gaines, *ESPN Won the Lottery With The First-Ever College Football Playoff*, BUS. INSIDER, http://www. businessinsider.com/espn-college-football-playoff-2015-1 (last accessed February 12, 2015).

[198] Cork Gaines, *ESPN Won the Lottery with The First-Ever College Football Playoff*, BUS. INSIDER, http://www. businessinsider.com/espn-college-football-playoff-2015-1 (last accessed February 12, 2015).

[199] *Id.* The CFP's rating success helped propel ESPN as 2014's most-watched cable network in primetime. The success also gave ESPN telecasts every spot in cable's all-time Top 20.

[200] Christopher Heine, *ESPN Scores Highest Cable TV Rating Ever with College Football's First Playoff Championship*, AD WEEK,

first year, advertisers were reportedly charged $1 million per 30-second spot in the championship game, a figure almost certain to rise thanks to the historic ratings of the Ohio State-Oregon championship game. [201]

III. BREAKING DOWN THE COMPETITION: ANTITRUST ANALYSIS

College football and the Sherman Act emerged during an era of rapid economic growth known as the Gilded Age.[202] Later to become formally known as the Sherman Antitrust Act of 1890,[203] this federal legislation was designed to both curb business activities deemed anticompetitive and authorize the government's investigation and pursuit of trusts.[204] Sherman's first meaningful challenge came in *U.S. v. E.C. Knight Company*.[205] In this case, the United States Supreme Court reduced Sherman to a paper tiger by restricting its reach to monopolies through a narrow interpretation of interstate commerce.[206] This ruling, in turn, encouraged wealthy

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http://www.adweek.com/news/television/its-official-espn-scored-cables-highest-ratings-ever-college-football-championship-162333 (last accessed February 12, 2015).

[201] *Id.*

[202] *See* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMP OF MONEY IN AMERICA 1865-1900 (1st ed. 2007). This book recounts how this age created industrial titans and financiers such as John D. Rockefellar, Andrew Carnegie, and J.P. Morgan, who, according to their critics, accumulated unprecedented wealth at the expense of the working class. Their supporters, however, point to their countering acts of philanthropy); *see also* MARK TWAIN AND CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TODAY. Twain and Warner, who are both credited with coining the term, "The Gilded Age," critique the greed and corruption that plagued America after the Civil War. Per the satirists, a thin layer of gold gilded society's ills.

[203] Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§1-7 (Westlaw 2012)).

[204] *Id.*

[205] U.S. v. E.C. Knight Co., 156 U.S. 1, 9 (1895). The monopoly at issue was American Sugar Refining Company, which, as a result of four stock purchases, acquired nearly complete control of the manufacture of refined sugar within the United States.

[206] *Id.* at 16-17. The Court held that the manufacturing of sugar is not interstate commerce because such operations occur entirely in one state. In short, the

capitalists to continue their exploitation of the trust device in numerous other industries.[207]

In 1902 President Theodore Roosevelt sharpened Sherman's teeth when he directed the Justice Department to file suit against Northern Securities Company on the grounds the railroad conglomerate was an illegal restraint of trade.[208] The Supreme Court agreed with his estimation in *Northern Securities Co. v. U.S.*[209] and verified President Roosevelt's reputation as the "trust buster."[210] President Roosevelt's groundwork would eventually spur the breakup of Standard Oil[211] and American Tobacco,[212] while also hastening Congress to close Sherman loopholes.[213]

Court held that Congress has the power to regulate trade but not manufacturing); *but see* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). The Court expanded the federal oversight of the economy by holding that intrastate commercial activities, like manufacturing, may be deemed a part of interstate commerce if such activity has a "close and substantial relationship" to interstate commerce.

[207] *See* BEATTY, *supra* note 202. Some of the largest industries (in addition to sugar) included tobacco, railroads, steel, and meatpacking. Perhaps the most infamous act of exploitation was by the Standard Oil Trust, which was devised by Rockefeller attorney Samuel Dodd in January of 1882. At that time, Standard Oil (and its affiliates) controlled over 90 percent of the oil refining capacity and most of the oil marketing facilities in the United States.

[208] *The Northern Securities Case*, THEODORE ROOSEVELT CENTER, http://www.theodorerooseveltcenter.org/ Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Northern-Securities-Case.aspx (last accessed February 16, 2015). The holding company resulted when railroad competitors James J. Hill and Edward H. Harriman joined forces to create the monopoly with J.P. Morgan and Rockefeller.

[209] N. Sec. v. U.S., 193 U.S. 197 (1904).

[210] Theodore Roosevelt Center, *supra* note 206; *see also* Swift & Co. v. U.S., 196 U.S. 375 (1905). President Roosevelt's "trust busting" extended to the meatpacking industry, which, according to the Court, was within the purview of government regulation since it directly impacted interstate commerce.

[211] Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 52, 62 (1911). The Court identified three consequences (higher prices, reduced output, and reduced quality) in its ruling that Standard Oil "unduly" restrained trade. This case is significant because of the Court's reassertion of the "rule of reason" doctrine.

The following sections initially examine the evolution of antitrust jurisprudence since the trust-busting campaigns; specifically, in the context of Sherman's application to the NCAA. The next section analyzes the relevant market at issue and applies the rule of reason test to determine the CFP's legality. This section also considers less-restrictive alternatives to the CFP's current format. The third and final section considers alternative recourses to antitrust litigation.

A. Momentum Shift: Antitrust Marches into NCAA Territory

The NCAA has been historically shielded from antitrust scrutiny because of its steadfast preservation of the union between amateurism and education.[214] This general immunity, however, eroded as courts began taking notice of the NCAA's yield to commercialism.[215]

The Supreme Court Justices took notice of the NCAA's philosophical shift in *Board of Regents*.[216] This watershed case was

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[212] U.S. v. American Tobacco Co., 221 U.S. 106 (1911). American Tobacco employed the same logic as Standard Oil, which had its fate decided on the same day.

[213] *See, e.g.,* Clayton Act, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§12-27, 29 U.S.C. §§52-53 (Westlaw 2012)).

[214] Richard E. Kaye, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. FED. 2d 43, §1 (2014).

[215] *Id*.; *see generally supra* Part II(b)(i)-(iii) (discussing the NCAA's commercial shift during Byers' tenure and its progression into the billion dollar industry during the BCS era); Richard J. Hunter & Ann M. Mayo, *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L.J. 69, 73-74 (1999). "[T]he more you commercialize what you do," explained Indiana School of Law Professor Gary Roberts, "the more you make judges think that antitrust laws should apply to you"; *Meet Our Staff*, ROBERT H. MCKINNEY SCHOOL OF LAW, http://mckinneylaw.iu. edu/faculty-staff/profile.cfm?Id=313 (last accessed February 19, 2015). At the time of this quote, Professor Roberts taught at Tulane University. He now teaches law at Indiana University.

[216] *Bd. of Regents*, 468 U.S. at 85. Prior to granting certiorari, several lower courts had recognized that the NCAA's commercialism had exposed the non-profit entity to antitrust scrutiny; *see, e.g.,* Hennessey v. Nat'l Collegiate Athlet-

not only significant because it ignited college football's television explosion, but also because it provided guidance to those courts later confronted with antitrust issues in the amateur sport context.[217] Justice John Paul Stevens's majority opinion, specifically, examined whether the NCAA's broadcasting restrictions were per se unlawful under Sherman.[218] Justice Stevens characterized the NCAA's procompetitive justifications (i.e., protecting gate attendance and maintaining a competitive balance) as essential horizontal restraints "if the [college football] product is to be available at all."[219] Such necessities made a per se test improper and, therefore, a truncated rule of reason doctrine was utilized to balance the anticompetitive effects against the procompetitive justifications.[220] Justice Stevens ultimately reasoned that the restraints violated Sherman and, in turn, endorsed the rule of reason as the go-to doctrine in similar cases.[221]

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ic Ass'n., 564 F.2d 1136, 1140, 1149 (5th Cir. 1977) (noting that the NCAA's multimillion dollar budget and the $20,000,000 television contract negotiated for its members demonstrated that the NCAA was a large business venture); Justice vs. Nat'l Collegiate Athletic Ass'n., 577 F.Supp 356, 378 (D. Ariz. 1983) (recognizing that interstate commerce is implicated by the multimillion dollar bids behind the nation-wide television broadcasts).

[217] *See supra* Part II(b)(i)-(iii) (recounting *Board of Regents'* effect on the college football landscape, namely the money-grab accompanying the multiple realignment shakeups).

[218] *Bd. of Regents*, 468 U.S. at 85.

[219] *Id.* at 101.

[220] *Id.* at 109. (quoting Nat'l Soc'y of Prof'l Eng'r v. U.S., 435 U.S. 679, 692 (1978)). Justice Stevens applied a truncated rule of reason analysis (now known as "quick look") because the significant potential for anticompetitive effects negated the required demonstration that the NCAA had market power: "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, where there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"

[221] *Id.* at 114-17, 203; *but see* Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amatuerism Rules*, 15 MARQ. SPORTS. L. REV. 331 (2005) (arguing that subsequent courts have misapplied the *Board of Regents*' logic to bypass the first step in the tradition rule of reason inquiry. That is, courts have deferred to the quick look analysis and presumed

Since *Board of Regents*, the Supreme Court has not had occasion to refine or clarify its application of Sherman to the NCAA.[222] Lower courts, on the other hand, have addressed various antitrust issues affecting collegiate sports.[223] Such litigation ranged from the NCAA's limitations on eligibility[224] to the earnings of coaches.[225] During this time, however, no lawsuit has been filed against the BCS or its two predecessors. And although the BCS endured controversy on an annual basis, the legal challenges it faced did not extend beyond academia,[226] political grandstanding,[227] a political action committee,[228] or congressional hearings.[229]

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that any challenged NCAA's amateurism rules were lawful and, thus, no factual inquiries into the proffered precompetitive justifications necessary).

[222] Nagy, *supra* note 221, at 339.

[223] *Id.* at 349-358.

[224] *See* Banks v. Nat'l Collegiate Athletic Ass'n., 977 N.W.2d 1081, (7th Cir. 1992) (applying the rule of reason to hold that the NCAA's eligibility rules preserved amateurism and, thus, outweighed any anticompetitive effects).

[225] *See* Law v. Nat'l Collegiate Athletic Ass'n., 134 F.3d 1010 (10th Cir. 1998) (utilizing the rule of reason to hold that the NCAA could not restrict the earnings of coaches).

[226] *See, e.g.,* Jasen Corns, *Pigskin Paydirt: The Thriving of College Football within the Bowl Championship Series*, 39 TULSA L. REV. 167 (2005) (arguing that the anticompetitive nature of the BCS exposes the arrangement to antitrust scrutiny); Katherine McClelland, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH. L. REV. 167, 175 (2004) (claiming that the vast inequality between the BCS and non-BCS schools constitute an antitrust violation); Jodi M. Warmbrod, *Antitrust in Amateur Athletic; Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go For An Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333, 379 (2004) (contending that *Sherman* is the improper recourse for achieving reform in college football); Schmit, *supra* note 8, at 246-50 (maintaining that the BCS is rampant with inherent inequality and, thus, within the purview of *Sherman*); Michael A. McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C.L REV. 517, 549 (2011) (recognizing the anticompetive effects of the BCS but noting that that its procompetive virtues would dominate a rule of reason analysis); Nathaniel Grow, *Antitrust & the Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53, 98 (2011) (indicating that BCS is prone to *Sherman* liability because its precompetitive justifications could be achieved through less restrictive means); David L. Ricci, *The Worst Form of Champion-*

Recently, the United States District Court for the Northern District of California issued a landmark decision in *O'Bannon v. Nat'l Collegiate Athletic Ass'n*.[230] The intricacies of this case go beyond this article's scope, but the ruling is noteworthy in its big-business characterization of the NCAA and application of the "less restrictive alternative" prong in its rule of reason inquiry.[231] *O'Bannon*, if it survives appeal, will likely trigger a earthshaking

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ship, Except for All of the Others that Have Been Tried: Analyzing the Potential Anti-Trust Vulnerability of the Bowl Championship Series, 19 VILL. SPORTS & ENT. L.J. 542, 601 (2012) (suggesting that replacing the BCS might create even greater inequality within the ranks of college football); Trevor Jack, *Blue Field of Dreams: A BCS Antitrust Analysis*, 39 J.C. & U.L. 165, 210 (2013) (advocating for alternative recourses to antitrust litigation that remove anticompetitive barriers within the BCS structure).

[227] Wetzel, ET. AL., *supra* note 15, at 196-97, 213. Utah Attorney General Mark Shurtleff, for example, threatened to file an antitrust lawsuit against the BCS in 2011. During the 2008 Presidential Campaign, political opponents Barack Obama and John McCain found compromise on their disdain for the BCS.

[228] *Id.* at 197. Playoff PAC, a non-profit committee, was designed to expose the BCS and apply public pressure for reformation.

[229] *See*, *e.g.*, Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Oversight Hearing Before the H. Comm. on the Judiciary, 108th Cong. (2003) *available at http://commdocs.house.gov/committees/judiciary/hju89198.000/hju89198_0f.htm*; BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Judiciary Comm., 108th Cong., *available at https://www.gpo.gov/fdsys/pkg/CHRG-108shrg93795/pdf/CHRG-108shrg93795.pdf* (2003); Review of Selection Process for College Football Bowl Games: Oversight Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 109th Cong., *available at https://www.gpo.gov/fdsys/pkg/CRPT-109hrpt751/html/CRPT-109hrpt751.htm* (2005); The Bowl Championship Series: Money and Other Issues of Fairness for Publicly Financed Universities: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. *available at https://www.gpo.gov/fdsys/pkg/CRPT-111hrpt706/html/CRPT-111hrpt706.htm* (2009).

[230] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n., 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014) (applying rule of reason test to hold that the NCAA's rules limiting compensation to college athletes unreasonably restrained trade under the Sherman Act).

[231] *Id.* at. 978-79 and 1004-07.

wave through the collegiate athletic landscape and might serve as an impetus for a legitimate antitrust challenge to the CFP.

B. Opponent's Tendencies: The Antitrust Implications of the CFP

The plaintiff in an antitrust suit against the CFP, whether it is the Department of Justice, a Group of Five conference, a university, or a state attorney general, would center its complaint on Section 1 of Sherman.[232] The court would then be tasked with balancing a plaintiff's claim against the rule of reason test.[233] This inquiry generally involves a three-step process.[234] The plaintiff must initially prove that the restraint has an adverse effect on competition in a relevant market.[235] If the plaintiff succeeds, the burden then shifts to the defendant to demonstrate that the restraint has procompetitive benefits.[236] And finally, if the plaintiff demonstrates that the challenged conduct has redeeming competitive qualities, the court will then determine whether the asserted procompetitive benefits could be achieved through less restrictive means.[237]

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[232] 15 U.S.C. at §1. Section 1 prohibits any unreasonable contracts, combinations, and conspiracies in restraint of trade; *see supra* notes 224-25 and accompanying text (applying §1 in the collegiate athletic context); *see also* McCann, *supra* note 226, at 540-41 (dismissing §2 as the less effective route for an actionable claim against the BCS).

[233] *See* Grow, *supra* note 226, at 73 (recognizing that, under *Board of Regents*, commentators generally utilize the rule of reason doctrine to parse out alleged BCS antitrust violations); *see also* Schmit, *supra* note 8, at 240-42 (arguing that the many moving parts within the college football dynamic warrant rule of reason rather than the per se and quick look tests).

[234] *See* Grow, *supra* note 226, at 72 (outlining the three steps for a rule of reason analysis).

[235] *Id.*

[236] *Id.*

[237] *Id.* at 72-3.

i. Finding a Hole: Threshold Issue

Before advancing into the rule of reason inquiry, a plaintiff must first define the relevant market.[238] Clearing this hurdle is essential and could prove fatal if the definition is imprecise.[239] Market definition considers two facets that, when combined, aid the fact-finder in understanding the competitive effects of a challenged restriction on a particular industry.[240]

The first facet includes the products and services that make up the relevant market.[241] In *Board of Regents*, for example, the relevant market was defined as "live college football television."[242] In a CFP lawsuit, the market could be defined as the market for the semifinals and championship game. This would surely be too narrow since there are four other games under the CFP format. The plaintiff could alternatively cast a wide net and define the market as all bowl games. This would undoubtedly be too broad when considering, for example, the vast economic gap between the Rose Bowl and the Famous Idaho Potato Bowl.[243]

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[238] Kaye, *supra* note 214, at §3.

[239] *Id.* The author cites *Rock v. Nat'l College Athletic Ass'n.*, 2013 WL 4479815 (S.D. Ind. 2013) to illustrate the dangers of either an overly-broad or overly-narrow market definition.

[240] Ricci, *supra* note 226, at 567. This article adopts Ricci's analysis of market definition by supplanting the BCS with the CFP; *see also* Kaye, *supra* note 214, at §3. In *Rock*, the plaintiff's successfully plead "the rough contours of a relevant market that [was] plausible on its face and in which anticompetitive effects of the challenged regulations could be felt."

[241] Ricci, *supra* note 226, at 567.

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

[243] Ricci, *supra* note 226, at 568. Ricci argued that an overly broad market definition is problematic "because some bowl games are inherently more valuable than others as measured by broadcast ratings." Ricci then suggests that such a broad definition is an example of the "cellophane fallacy," which theorizes that "sometimes demand for the 'substitutes' increases because the super-competitive price of the preferred product makes otherwise uncompetitive products appealing"; *College Football Poll*, *supra* note 19. The Rose Bowl, for instance, paid out $18 million per team and the Idaho Potato Bowl paid out $325,000 per team.

Therefore, the correct market definition would likely be the market for the "New Year's Six and the Championship Game."[244]

The second facet identifies the interdependent market participants.[245] The many moving parts involved within the CFP dynamic is best understood through the following manufacturing analogy:

> The [CFP] play[s] the role of a vertically joint venture that produces college football games and markets them to end consumers. It has contracts with the "suppliers" [Power Five, Group of Five, and Independents] to supply its six "factories" [New Year's Six and Championship Game] with "raw materials" [individual teams], and then sells its "products" [college football games] as a bundled package to [ESPN].[246]

The NCAA's role in this chain is limited to the regulation of the "suppliers" so as to ensure that the "raw materials" are produced pursuant to certain guidelines and, thus, interchangeable with other raw materials from other suppliers in the trade

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[244] Ricci, *supra* note 226, at 570-71. Ricci defined the relevant market for a BCS lawsuit as "high level college football games." This definition included the BCS games and other rating generators such as the Capital One Bowl. Ricci proposed a compelling argument that analyzed the inverse relationship between the ratings of BCS games and other high-level bowls. In short, the writer surmised that a hypothetical monopolist could institute a profitable non-transitory price increase if the most attractive bowl games were bundled in one package. This, according to Ricci, suggested that the BCS did not, by itself, constitute the entire relevant market. Likewise, the CFP does not make up the entire market. Even so, this article limits its market definition to the "New Year's Six and the Championship Game" to simplify the rule of reason analysis and avoid the pitfalls of a broad definition.

[245] *Id.* at 572.

[246] *Id.* at 572-73.

organization.[247] The second facet ultimately serves to aid the fact-finder's understanding of the layers within the "New Year's Six and Championship Game" market.

ii. Assessing Weakness: Anticompetitive Effects of the CFP

With the relevant market defined, the plaintiff is now tasked with establishing the anticompetitive effects of the "New Year's Six and Championship Game."[248] This demonstration relies on the data from the inaugural CFP season, but also considers figures and trends from past BCS seasons to help forecast how the monopolistic tendencies might alter the college football landscape. In short, the CFP is calculated to avoid dealing with the mid-majors on equivalent terms. That is, the format, methodology, and revenue structures of the CFP combine to exact a group boycott on the Group of Five conferences. Furthermore, the secondary effects that flow from these structures amplifies the anticompetitive effects of the CFP.

1. Restricted Format

The CFP format is anticompetitive in its guarantee of only one spot to the Group of Five in the New Year's Six.[249] The only opportunity for another spot hinges on an unlikely berth into the semifinals.[250] In the inaugural season, the guaranteed spot was granted to Boise State after the Broncos climbed to No. 20 at the close of the regular season.[251] No other Group of Five school broke the top 25 in the final week and only two other mid-major teams, in fact, made brief appearances within the CFP week-

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[247] *Id.* at 570-71 573.
[248] *See* Grow, *supra* note 226, at 72.
[249] *See Overview of the CFP*, *supra* note 168. Under the CFP, the "top-ranked from a non-contract conference" will gain access to the bowls outside the semifinal rotation.
[250] *Id.*
[251] *CFP Rankings*, *supra* note 9. Boise State's progression in the CFP rankings started at No. 23 in Week 14; No. 22 in Week 15; and No. 20 in the Week 16.

ly rankings.[252] There was not, in other words, occasion for a Group of Five school to gain access beyond the guaranteed spot. But what about the atypical season when two Cinderella schools ascend to the top of the rankings? In the BCS era, TCU (then a member of the non-AQ Mountain West) was the lone mid-major school in 16 seasons to manage a final top-four ranking and did so only twice (No. 4 in 2009 and No. 3 in 2010).[253] Such evidence points to the improbability that the CFP format will enable Group of Five access beyond the one-spot guarantee.[254]

Additionally, the fact that the five major conferences are vying for four spots does not bode well for the mid-majors and spells a continuing trend of future exclusion. As previously stated, the two top teams in the Big 12 (one of which, coincidentally, was TCU) were denied access into the semifinals.[255] It stands to reason that the presence of such controversy within the Power Five will, therefore, extinguish the hopes that the Group of Five will be granted anything but the one allotted invite into the New Year's Six. Ultimately, the format is inherently anti-

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[252] *Id.* Following week 10, East Carolina of the AAC was ranked No. 23 in the first CFP poll. The Pirates lost the following week and were ousted from the top 25. In Week 14, 11-0 Marshall was ranked one behind Boise State at No. 24. Marshall's undefeated run was cut short and the Thundering Herd, like the Pirates, were only able to stay in the CFP rankings for one week. Week 14 was the only week with the presence of more than one Group of Five school. Weeks 11-13 did not include a Group of Five school.

[253] *College Football Poll*, *supra* note 19. During those seasons, Boise State was the next highest-rated non-BCS school at No. 6 in 2009 and No. 10 in 2010. Under the CFP, the Broncos would have been guaranteed a spot in the New Year's Six pending TCU's inclusion in the CFP Playoff.

[254] *See* Schmit, *supra* note 8, at 246 (noting that the BCS allowed for automatic qualification standards, which, in theory, enabled mid-majors to earn an automatic bid). The CFP, however, does not have a mechanism to allow the Group of Five an opportunity for future access.

[255] *See supra* notes 11-12 and accompanying text.

competitive and will deprive the Group of Five conferences — already at an economic disadvantage — of significant revenue.[256]

2. Biased Methodology

The CFP methodology is imbedded with the similar imperfections that plagued the BCS and will, like the prejudice suffered by non-AQ conferences, prove anticompetitive to the Group of Five.[257] The CFP eliminated the computer rankings from consideration, for example, yet sustained the weight attached to strength of schedule.[258] This measure has potential for creating a negative trickle-down effect. Power Five schools will now be reluctant to schedule Group of Five opponents because of the threat of a weak-schedule branding.[259] Group of Five schools, in turn, will be all but banished from the CFP as a result of playing the weaker schedules that are inherent in their conference schedul-

[256] Jon Solomon, *UAB Football Isn't Alone in Losing Money for Athletic Departments*, CBS SPORTS, http://www.cbssports.com/collegefootball/writer/jon-solomon/24839675 /uab-football-isnt-alone-in-losing-money-for-athletic-departments (last accessed March 02, 2015) [hereinafter *Group of Five Deficits*].The deficits of the 57 public universities within the Group of Five range from $35.3 million (UNLV) to $1.8 million (Army). 39 of these schools operate at least $15 million in the hole and rely on subsidies (student fees, direct and indirect institutional support, and state money) to stay afloat.

[257] *See supra* Part II(b)(ii) (providing a brief overview of the anticompetitive effects plaguing the BCS).

[258] *See Overview of the CFP*, *supra* note 168.

[259] Dan Wolken, *Uncertain Future for Non-"Power 5" Football Scheduling*, USA TODAY, http://www.usatoday.com /story/sports/ncaaf/2014/05/05/college-football-playoff-power-conference-scheduling-sec-acc-pac-12-big-ten-american-cusa/8698263/ (last accessed February 08, 2015). The SEC, for example, is requiring that beginning in 2016 at least one non-conference game is played against other Power Five conferences; *but see* Pat Forde, *Florida State Could Be Case Study for CFP Committee Moving Forward*, YAHOO SPORTS, http://sports.yahoo.com /news/florida-state-could-be-case-study-for-cfp-committee-moving-forward-210112950.html (last accessed February 08, 2015). Forde argues that Florida State's inclusion this season, despite a weak strength of schedule, might trigger a movement away from the SEC model. That is, Power Five schools might now be prompted to schedule their way to undefeated seasons and, thus, bank on the perfect season being enough for a playoff berth.

ing.[260] Therefore, a vicious cycle will ensue every time a Power Five school recaptures five of the six automatic bids, as well as the four semifinal spots. Furthermore, the Group of Five teams that are able to secure a regular-season showdown with a Power Five school will likely be leveraged into taking unfavorable deals that do not include a home-and-away scheduling package.[261]

Another imperfection lies in the importance the CFP assigns to the conference championship.[262] In the inaugural season, the ranking system came under fire when TCU dropped to No. 6 from No. 3 in the final ranking, despite a 59-3 drubbing of Iowa State in the Horned Frogs' final game.[263] The TCU snub not only highlighted the insignificance of the weekly rankings, but also revealed the considerable influence of a conference title.[264] And if history is any indication, the Big 12's next maneuver will be to increase its membership to meet the NCAA's "magic number" of 12 teams per conference.[265] To do so, the Big 12 will likely target the few marketable powers left in the mid-major conferences. This, in turn, would deplete the Group of Five's competitiveness and reduce the pilfered conferences below the requisite number for

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[260] *See infra* Part III(b)(ii)(4) (denoting the trickle down effect of the strength-of-schedule component).
[261] *See* Wolken, *supra* note 259.
[262] *See Overview of the CFP*, *supra* note 168.
[263] *See supra* notes 11-12 and accompanying text (noting how Ohio State jumped ahead of both Baylor and TCU after the Buckeye's routed Wisconsin 59-0 in the Big Ten Championship).
[264] *See supra* notes 11-12 and accompanying text; Heather Dinich, *Sun Belt Czar: Title Games Needed*, ESPN, http:// espn.go.com/college-football/story/_/id/12275097/sun-belt-commissioner-says-all-fbs-conferences-need-championship-games (last accessed February 08, 2015); Derek Volner, *Sunday's College Football Playoff Selection Show Garners Strong Rating*, ESPN MEDIA ZONE, http://espnmediazone.com/us/press-releases/2014/12/sundays-college-football-playoff-selection-show-garners-strong-rating/ (last accessed February 10, 2014). ESPN will, of course, lobby to keep the weekly ratings structure in tact as long as the ratings bring in the dollars.
[265] *See supra* notes 141-42 and accompanying text (discussing the realignment trend during the BCS era).

hosting a championship.[266] Additionally, Notre Dame would likely be compelled to relinquish its independent status and join a conference for the opportunity to bolster its playoff bid with a conference title.[267] The Irish's theoretical breaking-of-rank would further consolidate the supremacy of the Power Five and widen the rift separating it from the Group of Five.

And, finally, the Playoff committee and the weekly rankings do not offset the biases that plagued the BCS. Not only did the membership of the committee exclude a Group of Five athletic director, for example, but the ranking itself also has inherent partiality that blockades access for the have-nots.[268] By relying on only the judgment of the committee, the rankings run the risk of generating bias through the so-called poll mentality and through the undue influence from lobbying.[269]

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[266] *See supra* note 79 and accompanying text. Presently, three Group of Five conferences (Conference USA, MAC, and Mountain West) host a title game, while two (AAC and Sun Belt) do not.

[267] Brent Sobleski, *Big 12 Would Look 'East not West' If League Decides to Expand*, COLLEGE FOOTBALL TALK, http://collegefootball talk.nbcsports.com/2014/12/19/big-12-would-look-east-not-west-if-league-decides-to-expand/ (last accessed February 10, 2015).

[268] *Selection Committee*, *supra* note 175. The only representation from the Group of Five is from Air Force (Mountain West). Lieutenant General Michael Gould, who commanded under the Air Force branch, is recused if the Falcons are ever in the CFP picture.

[269] George Schroeder, *College Football Playoff's Weekly Ranking is a Bad Idea*, USA TODAY, http://www.usatoday.com/ story/sports/ncaaf/2014/10/27/analysis-college-football-playoff-committee-top-25-ranking-bad-idea/18023119/ (last accessed February 08, 2015). Schroeder contends that the rankings will be a pointless exercise resulting in a "poll mentality" and, thereby, hamstringing the Playoff committee from departing the very hierarchy it created from previous rankings; *see also* Bruce W. Burton and M. Mark Haekin, *Bias in the College Football Selection Process: If the Devil is in the Details, That's Where Salvation May Be Found*, 24 MARQ. SPORTS L. REV. 335, 340-41 (2014) (suggesting that the primary effect created by preseason polls, lobbying, confirmation bias, and jury bias will combine to slant the committee's judgment).

The poll mentality refers to the struggle of voters to reorder rankings after the creation of a personal hierarchy.[270] This hierarchy is initially announced in the preseason poll and then locked in by the "primary effect," which is the phenomenon that information presented first has the most influence.[271] The first CFP ranking, for instance, had 17 of the same 25 teams that were ranked in the AP's preseason poll.[272] The CFP's final ranking had the same top three teams, albeit in different order, as the AP's preseason poll.[273] Furthermore, the CFP and AP had nearly all the same teams in their respective polls from week 10 to week 16.[274] And while this could merely indicate the pollster's consensus when ranking college football's elite, it might also reflect the lack of upward mobility resulting from the poll mentality. In short, the primary effect entrenches the bias out the gate with the preseason polls. This, in turn, induces the poll mentality of the Playoff committee, which, ultimately, is suggestive as to why only three Group of Five schools broke into the CFP rankings.[275]

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[270] George Schroeder, *supra* note 269. The CFP model is similar to the NCAA's basketball selection committee, but, as Schroeder notes, the latter considers a team's full body of work and avoids tainting the evaluation by not producing interim rankings.

[271] *See* Burton and Haekin, *supra* note 269, at 342 (citing DAVID G. MEYERS, SOCIAL PSYCHOLOGY 239 (9th ed. 2008) (arguing that the publication of preseason rankings will create an impression on the minds of the Playoff committee that will leave a psychological impact).

[272] *Compare 2014 NCAA Football Rankings – AP Top 25*, ESPN, http://espn.go.com/college-football/rankings/_/poll/1/ (last accessed March 03, 2015) *with CFP Rankings*, *supra* note 9.

[273] *2014 NCAA Football Rankings – AP Top 25*, ESPN, http://espn.go.com/college-football/rankings/_/poll/1/ (last accessed March 03, 2015). The AP preseason rankings were as follows: (1) Florida State, (2) Alabama, (3) Oregon, and (4) Oklahoma. Ohio State was ranked No. 5. The CFP final rankings were as follows: (1) Alabama, (2) Oregon, (3) Florida State, and (4) Ohio State.

[274] *Id.* The AP and CFP had 24 of the same 25 teams in weeks 10-11 and 14-16; 23 of 25 in week 12; and 22 of 25 in week 13. The slight variations occurred in the bottom of the top 25, while the polls' top-ten rankings consistently mirrored each other in those weeks, though not necessarily in the same order.

[275] *See supra* note 252 and accompanying text.

The CFP ranking system also creates the potential for undue lobbying influence,[276] which was common in the BCS era. Consider, for example, the efforts by then-SEC Commissioner Mike Slive and then-Florida head coach Coach Urban Meyer to openly politick the Gators' way into the 2006 BCS Championship game.[277] A year later, LSU's athletic department and head coach Les Miles spin-doctored the Bengal Tigers' resume and enticed voters into an historic first by propelling LSU from No. 7 to No. 2 in the last week of the season.[278] This trend continued into the CFP era when marketing firms were retained by Baylor to jockey for a semifinal bid and by Marshall to boost its profile.[279] The presence of lobbying not only compromises the integrity of the Playoff committee's purported objectivity, but for mid-major teams like Marshall will prove futile and only add to the Thundering Herd's $15.2 million deficit.[280]

3. Revenue Discrimination

The CFP revenue structure creates economic inequality between the Power Five and Group of Five that is blatantly anticompetitive. Using the last BCS season as a reference point, it is evident the Group of Five greatly benefits from the CFP

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[276] Burton and Haekin, *supra* note 269, at 343-45.

[277] WETZEL, ET. AL., *supra* note 15, at 140-41. The SEC went to bat for the Gators when Slive held a press conference during the halftime of the 2006 SEC Championship game where he opined that if the Gators won, they deserved a BCS title-game bid. If not, Slive said he would be "disappointed." At the time, Slive served as the BCS coordinator, which meant that "the official head of the official postseason system officially admitted that he might not agree with the official result"; *SEC Commissioner Mike Slive Announces Retirement Plans, Discusses Health Condition*, SEC SPORTS, http://www.secsports.com/article/11700734/commissioner-slive-retire (last accessed March 04, 2015). Slive announced his retirement for July 31, 2015.

[278] WETZEL, ET. AL., *supra* note 15, at 137-143. Coach Miles swayed the voters with his "undefeated in regulation" argument and became the first two-loss team to play for the BCS championship.

[279] *See supra* note 14 and accompanying text.

[280] *Group of Five Deficits*, *supra* note 256.

revenue structure.[281] As a whole, the have-nots will receive an estimated 376-percent spike in revenue from the final BCS season.[282] This increase is deceiving, however, when considering that the Group of Five's $79 million take is only 16 percent of the CFP revenue.[283] The Power Five's $349 million take, on the other hand, accounts for 70 percent.[284] The SEC and ACC, in fact, each claimed more than the entire Group-of-Five purse, with shares of $87.5 million and $83.5 million, respectively.[285] Ultimately, the Group of Five's increased revenue does not balance the CFP's enormous tilt toward the Power Five.

4. Secondary Restraints

The anticompetitive effects generated by the CFP format, methodology, and revenue structures fuel the arm's race in college football. The format, for instance, denies equal participation and Power Five conferences, therefore, "know that every year, they will have at least one representative, if not two, in the most prestigious bowl games, playing during the visible times

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[281] *See supra* notes 139 and 140 and accompanying text (denoting the non-AQ's meager take in the final BCS season).

[282] This percentage increase was determined by subtracting the $3.15 million average earned by each of the four non-AQ conferences in the final BCS season by the expected CFP revenue of $15 million earned by each Group of Five conference. The difference ($11.85 million) is then divided by the original number ($3.15 million) and then multiplied by 100.

[283] Dosh, *supra* note 194. The percentage was determined by dividing the $79 million revenue by the total CFP revenue of $500 million.

[284] *Id.* The percentage was determined by dividing the $349 million revenue by the total CFP revenue of $500 million. The remaining 14 percent of the CFP revenue goes primarily to operational expenses while a small sum is allocated to the independents.

[285] *Id.* The ACC and the SEC were able to corner this year's market because the Orange Bowl was not part of the semifinal rotation and, thus, the conference tie-in contract of $54 million was enforced. In years when the Rose and Sugar Bowls are not part of the rotation, the Big Ten, Big 12, Pac-12, and the SEC will receive similar bumps. This season, the Big 12 was at the bottom of the Power Five with $58 million because of its failure to place a semifinal team. The Big Ten and Pac-12 were not far ahead at $60 million.

of the holiday season, guaranteeing conference exposure."[286] This, in turn, affords the Power Five schools the requisite leverage to better lure blue-chip recruits and hire the best coaches.[287] The methodology, too, furthers this end by providing consistent exposure through the weekly ESPN rankings show, which is amplified by the ensuing wire-to-wire coverage and national debates in the media.[288] And, finally, the tilted revenue structure enables Power Five schools to "build a lot more stadiums, create more state-of the-art practice facilities, purchase more top-of-the-line equipment,

[286] *See* Schmit, *supra* note 8, at 243 (quoting Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW J. 97, 120 (2003)).

[287] Bud Elliot, *Blue-Chip Ration: Which College Football Teams have Championship-Grade Recruiting?*, SB NATION, http://www.sbnation.com/college-football-recruiting/2014/2/18/5312840/college-football-recruiting-teams-championships (last accessed March 06, 2015). This article notes that every BCS champion since 2005 (when recruiting rankings could be accurately tracked) has recruited more blue-chips (four and five-star athletes) than lesser-rated athletes in its previous four signing classes. Under this formula, the mid-majors have reason for concern when considering that only three teams in the Group of Five (Boise State, Marshall, and UCF) signed four-star athletes, and only one each. Of the schools in this year's semifinals, Alabama had the top-ranked 2014 recruiting class with 73 percent blue chips; Ohio State was No. 2 with 68 percent; Florida State No. 7 with 56 percent; and Oregon No. 15 with 41 percent); Grow, *supra* note 226, at 576 n. 20. Urban Meyer, for example, was recruited to coach Florida after leading Utah to an undefeated season in 2004. A second example is Rich Rodriguez, who was first lured from Tulane to West Virginia to Michigan, each time receiving a significant increase in pay. A third example is Brian Kelly, who ascended from Central Michigan to Cincinnati before landing the coveted Notre Dame job.

[288] *CFP Rankings*, *supra* note 9. In the inaugural season, the CFP Selection Show was broadcast every Tuesday evening from October 28 to December 2 on ESPN and ESPN2. The final show, Selection Day, was broadcast on Sunday, December 07; *see also* Derek Volner, *Sunday's College Football Playoff Selection Show Garners Strong Rating*, ESPN MEDIA ZONE, http://espnmediazone.com/us/press-releases/2014/12/sundays-college-football-playoff-selection-show-garners-strong-rating/ (last accessed March 06, 2015). The press release detailed the ratings for the Selection Show and the average ratings for the weekly show and also denoted the strongest markets.

and fund more upgrades to existing facilities."[289] This further boosts advantages in recruiting top players and coaches to the Power Five at the expense of the Group of Five. Recent NCAA legislation sharpens the Power Five's edge by granting partial autonomy.[290] Under this historic enactment, the Power Five conferences will now be free to make their own rules without certain NCAA oversights.[291] Headlining this legislation was the option to supplement scholarships with a cost-of-attendance stipend.[292] This will both entrench the already-rich Power Five conferences and inhibit the deficit-strapped Group of Five.[293] And though the mid-majors now have the option to adopt this legislation, the anticompetitive effects highlighted above will undoubtedly impede any efforts to keep up in the so-called arm's race.

iii. Assessing Strength: Procompetitive Benefits of the CFP

The anticompetitive effects outlined above shift the burden to the defendant to argue any procompetitive effects of the "New Year's Six and Championship Game."[294] The defendant is ultimately tasked with demonstrating that the alleged group boy-

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[289] Schmit, *supra* note 8, at 245 n. 192 (citing *H. Comm. on the Judiciary*, *supra* note 229, at 20 (Statement of Dr. Scott Cowen).

[290] *See supra* note 3 and accompanying text (discussing the legislation's far-reaching impact on the Group of Five).

[291] *See supra* note 3 and accompanying text.

[292] Eben Novy-Williams, *NCAA Autonomy Gap Not Seem Widening on $108 Million Vote*, BLOOMBERG, http://www.bloomberg.com/news/articles/2015-01-19/ncaa-autonomy-gap-not-seen-widening-on-108-million-vote (last accessed March 06, 2015). According to conservative estimates, the average scholarship falls $3,000 below cost of attendance. The autonomy will not produce a major gap in the Power Five, which spent an average of $54 million per school for athletics. The gap will occur in the Group of Five, which spent an average $20.6 million per school. Despite limited resources, the AAC and Conference USA will follow the Power Five's lead and offer cost-of-attendance scholarships. The Mountain West and Sun Belt will leave the stipend decision up to each school.

[293] *See Group of Five Deficits*, *supra* note 256.

[294] *See* Grow, *supra* note 226, at 72.

cott is offset by the benefits created by the CFP.[295] This demonstration, like the anticompetitive analysis, considers CFP figures and carryover trends from the BCS, as well as data from other sport's institutions. The procompetitive benefits are that the CFP product, itself, created the relevant market for a playoff to determine college football's national champion. Furthermore, the CFP preserves the regular season and increases revenue to the Group of Five.

1. Creation of the CFP Product

Prior to the CFP, the BCS was established to resolve the mythical national championship debate and bring order to the postseason.[296] BCS advocates claimed an 81-percent success rate during its 16 seasons.[297] In that span, however, the BCS endured annual controversy that blemished these so-called championships.[298] Even AQ teams were frequently usurped, while nine non-AQ teams were denied title bids despite flawless records.[299] The current structure reduces some of the controversy by opening the door for two more teams.[300] Under the format, for example, the 2001 Oregon Ducks, 2003 USC Trojans, and 2004 Auburn Tigers would likely have earned a shot at competing for the national title (and hence raised the success rate to 100%).[301] As for the undefeated non-AQ's teams, the TCU squads from 2009 and 2010 would have likely earned a semifinal bid.[302] Such evidence demonstrates that the CFP is a better and more inclusive alternative than

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[295] *Id.*

[296] *See supra* notes 123-27 and accompanying text (discussing the formation of the BCS as an improvement upon the Coalition and Alliance).

[297] Bishop, *supra* note 125.

[298] *Id.*

[299] *Id.*; Bender, *supra* note 130 and accompanying text.

[300] *CFP Overview*, *supra* note 168.

[301] *College Football Poll*, *supra* note 19. In 2001, the Ducks finished the regular season ranked No. 4 in the BCS Standings; in 2003, the Trojans finished No. 3; in 2004, the Tigers finished No. 3.

[302] *Id.* TCU finished No. 3 in both the 2009 and 2010 final BCS standings. The other seven undefeated teams finished as follows: Tulane No. 10 in 1998; Marshall No. 12 in 1999; Utah No. 6 in both 2004 and 2008; Boise State No. 8 and No. 6 in 2006 and 2009, respectively; and Hawaii No. 10 in 2007.

previous systems for determining a national champion. The defendant would also point to the inaugural season as evidence of its success. Simulated BCS standings, for instance, would have matched No. 1 Alabama versus No. 2 Florida State for the national championship and, thereby, passed over No. 3 Oregon and No. 4 Ohio State.[303] Thanks to the CFP, the Ducks and Buckeyes were given a shot and rose to the occasion by defeating the Seminoles and Crimson Tide in the semifinals.[304]

The CFP also provides an opportunity for its six member bowls to host the semifinal games every three years, rather than four years as under the BCS.[305] The CFP, thus, spreads the wealth by adding two bowls to the structure and shortens the rotation to three years.[306] Furthermore, the Power Five schools periodically give up their conference tie-ins when the bowls host the semifinal games.[307] In the first season, the conferences tied to the Rose and Sugar Bowls each forewent $40 million by virtue of the semifinal rotation.[308] By eliminating the conference tie-in for at least half the structure, the CFP improves upon the confines of the BCS and is, therefore, procompetitive.

2. Preservation of the Regular Season

College football's elite staved off previous pushes for a playoff under the ruse that an expanded postseason would destroy the bowl tradition and water down the regular sea-

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[303] Tony Manfred, *Oregon Shows College Football Playoff is Better than the BCS*, BUS. INSIDER, http://www. businessinsider.com/oregon-college-football-playoff-bcs-2015-1 (last accessed March 06, 2015).
[304] *See supra* notes 172-73 and accompanying text.
[305] *CFP Overview*, *supra* note 168.
[306] *Id.*
[307] *Id.*
[308] *Id.* The Orange is the only other bowl in the rotation contracted outside the arrangement. The Orange is tied to the ACC and to the highest-ranked available team from the SEC, Big Ten, or Notre Dame. The Fiesta, Cotton, and Peach Bowls round out the New Year's Six and will host displaced conference champions and the top-ranked champion from the Group of Five. The highest-ranked available teams will fill any other berths.

son, using the NFL and NCAA college basketball as examples of undesirable results.[309] The power structure eventually capitulated and, today, proclaims that the CFP "preserves the excitement and significance of college football's unique regular season where every game counts."[310] The defendant would likely follow suit and spin the former pretext into a procompetitive benefit.

This determination could be measured by evaluating attendance figures. Home attendance in the inaugural season, however, was down 4 percent from 2013 and the lowest since 2000.[311] But this decline is not attributed solely to the CFP and is in fact likely a byproduct of soaring ticket prices, more lopsided games, loss of rivalries, and the proliferation of wire-to-wire television coverage.[312] It is simply too early to determine whether the CFP will buck the trend and improve gate attendance. The Nielsen ratings, therefore, would prove to be the best measure for this procompetitive demonstration. In Week 15, for example, the 2014 version of the annual Iron Bowl became the highest-rated regular-season college game ever on ESPN.[313] The storied rivalry

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[309] *See* WETZEL, ET. AL., *supra* note 15, at 117-26 (dispelling the myths surrounding bracket creep and dilution of the regular season).

[310] *CFP Overview*, *supra* note 168.

[311] Jon Solomon, *Home Crowds Drop to Lowest in 14 Years*, CBS SPORTS, http://www.cbssports.com/collegefootball /writer/jon-solomon/24891415/college-football-attendance-home-crowds-drop-to-lowest-in-14-years (last accessed March 09, 2015). A breakdown of the numbers show that the 72 percent of the top 25 attendance leaders, all from the Power Five, and Notre Dame, increased or remained the same. 48 percent of the remaining Power Five schools maintained or increased crowd averages. The Group of Five averages, however, dwindled. Crowd averages have been on the decline for six consecutive seasons since peaking in 2008.

[312] Ben Cohen, *At College Football Games, Student Sections Likely to Have Empty Seats*, WALL ST. J. http://www.wsj. com/articles/at-college-football-games-student-sections-likely-to-have-empty-seats-1409188244 (last accessed March 10, 2015). The SEC has attempted to improve attendance by catering to the fan's experience with better cellular reception at Georgia, as well as new stadium video boards and an enhanced sound system at LSU.

[313] *Audience Analysis: Iron Bowl Marks New CFB Viewership Record for ESPN*, SPORTS BUS. DAILY,

between Alabama and Auburn, moreover, contributed to ESPN garnering its most-viewed regular-season Saturday on record.[314] Such evidence, standing alone, strongly indicates that the regular season has been preserved under the CFP. Furthermore, a closer look at the Week 15 figures reveals that the top-six rating winners of the record-breaking Saturday featured match-ups that included a team vying for a semifinal bid.[315] This correlation further bolsters the CFP's preservation argument, but, also, might backfire as the push for expansion gains steam.

3. Increased Revenue

The BCS was frequently criticized for the bias built into its revenue structure.[316] This partiality has since persisted under the CFP; but, as the defendant would argue, is an expected and necessary outcome of the complex negotiations

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http://www.sportsbusinessdaily.com/Daily/Issues/2014/12/05/Media/Final-Ratings.aspx (last accessed March 10, 2015). The game averaged a 7.4 final rating and 13.5 million viewers in primetime. Additionally, the game gained 475,000 unique viewers and an 119,000 average minute audience on the Watch-ESPN app, which were product records for the regular season.

[314] *Id.*

[315] *Compare CFP Rankings*, *supra* note 9, at week 15 *with College Football TV Ratings*, SPORTS MEDIA WATCH, http://www.sportsmediawatch.com/college-football-tv-ratings/ (last accessed March 10, 2015). The top ratings/CFP rankings were as follows: Auburn/Alabama, rating of 7.4 with 13.5 million viewers – Alabama was ranked No. 1 in the CFP; Michigan/Ohio State, rating of 4.9 with 8.2 million viewers – Ohio State was ranked No. 5; Florida/FSU, rating of 3.5 with 6 million viewers – Florida State was ranked No. 4; Mississippi St./Mississippi, rating of 3.1 with 5.2 million – Mississippi St. was ranked No. 10; Baylor/Texas Tech or Michigan St./Penn St., rating of 2.4 with 4 million – Baylor and Michigan St. were ranked no. 6 and 8, respectively; and Oregon/Oregon St., rating of 1.9 with 3.30 million – Oregon was ranked No. 2. Kansas State, ranked No. 9, was the only other top-ten CFP team that played on this day (No. 3 TCU and No. 7 Arizona played on the preceding Thursday and Friday nights, respectively). The Arizona game garnered an abysmal rating of .2 with only 270,000 viewers. This uptick in ratings is, at least, partly attributable to Week 15 being rivalry week.

[316] *See supra* notes 135-40 and accompanying text (discussing the anticompetitive effects of the BCS structure's revenue distribution).

behind the $7.3 billion ESPN deal.[317] Specifically, the negotiations behind the CFP necessitated a give and take between the powerful market participants (i.e., the Power Five and New Year's Six) to leverage for reduced transaction costs.[318] Furthermore, the CFP's packaging of the New Year's Six enabled a more lucrative contract than the bowls could separately negotiate.[319] That is, the consolidation of the ESPN television rights created synergies that increased the value of the CFP package beyond the aggregate value of the bowl's individual broadcast rights.[320] The Group of Five, simply put, does not have the requisite bargaining power to minimize transaction costs, let alone secure a lucrative deal with ESPN. The CFP's design, therefore, is highly procompetitive in spite of any disparate treatment inflicted against the Power Five.[321]

iv. New Approach: Less Restrictive Alternatives

The third and final hurdle of the rule-of-reason inquiry would be invoked if a court or jury found the procompetitive benefits outweigh the anticompetitive effects.[322] Under this phase, the court would consider whether the CFP's benefits could

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[317] *See supra* note 184 and accompanying text.

[318] *See supra* notes 123-24 and accompanying text (recounting the Rose Bowl's historic inflexibility, which exemplifies the type of transaction costs behind the CFP. Without the cooperation of the Big Ten/Pac-12 and the Rose Bowl, for example, the CFP would ultimately be without the necessary components to create the highly profitable market).

[319] *See* Ricci, *supra* note 226, at 581 n. 224 (citing Andrew Hampp, *What ESPN's Winning of Bowl Championship Series Means*, ADAGE, http://adage.com/article/mediaworks/espn-s-winning-bowl-championship-series-means/132714/) (articulating that "packaging TV rights within multiple platforms for games makes 'multiplatform ad buying all the more appealing to advertisers' and leading to even more profits").

[320] *See id.* at 581 n. 225 (arguing that the primary synergy is stability in television ratings and, therefore, a diversified portfolio of bowls is beneficial to the networks).

[321] *See id.* at 580-81 n. 226 (citing Broad. Music Inc. v. Columbia Broad. Sys., 441 U.S. 1, 21-4 (1979)) (arguing that the BCS resembles modern blanket license agreements, which, according to the U.S. Supreme Court, are highly precompetitive).

[322] *See* Grow, *supra* note 226, at 72-73.

lessen the anticompetitive effects with less-burdensome means.[323] Although the obvious solution is expansion of the CFP, structuring an ideal format to preserve its asserted benefits is not so clear. The difficulties lie in the layered challenges imbedded in the degree of expansion.[324]

The first option is a six-team expansion.[325] Under this format, two teams would earn byes and each Power Five conference would receive an automatic spot.[326] The at-large berth would be reserved for schools in the Power Five or Group of Five, or for an Independent.[327] The second option is an eight-team expansion.[328] This structure would allow for three at-large bids.[329] The third and fourth options are either a 12- or 16-team expansion.[330] These two avenues would open up the possibility for the negotiation of automatic berths for the Group of Five, but are

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[323] *Id.*

[324] *See* Cork Gaines, *Urban Meyer Explains Why an 8-Team College-Football Playoff Won't Work, And He Makes A Good Point*, BUS. INSIDER, http://www.businessinsider.com/urban-meyer-college-football-playoff-2015-1 (last accessed March 15, 2015) (contending that an expanded playoff would compromise the health of student athletes); *see also* Josephine R. Potuto, *They Take Classes Don't They?: Structuring a College Football Postseason*, 7 J. BUS. & TECH. L. 331 (2012) (examining the intrusion an expansion would have on an institution's academic performance and the well-being of student-athletes).

[325] Chris Low, *TCU's Gary Patterson Wants Playoff to Expand to Six*, ESPN, http://espn.go.com/blog/big12/post /_/id/96108/tcus-gary-patterson-wants-playoff-to-expand-to-six (last accessed March 15, 2015).

[326] *Id.* Facilitating an expansion would require the elimination of the conference championship game to open up December for the extra games and, thereby, avoid extending the season.

[327] *Id.*

[328] Michael Rosenberg, *College Football Playoff Needs Expansion, Automatic Bids to Improve*, SPORTSILUSTRATED, http://www.si.com/college-football/2014/12/09/college-football-playoff-nfl-playoffs (last accessed March 15, 2015).

[329] *Id.*

[330] *See* WETZEL, ET. AL., *supra* note 15, at 11-17 (exploring the merits of a 16-team playoff by dispelling the myths cited by anti-expansion arguments).

unlikely alternatives at this early stage, if ever.[331] The following section, therefore, evaluates whether the first two options are viable alternatives to preserve the CFP's procompetitive benefits. The next section, in turn, determines whether these formats lessen the anticompetitive effects and, thereby, insulate the CFP from Sherman scrutiny.

1. Six-or Eight-Team Playoff

The first two options are the likely alternatives because they deviate less from the current structure and, moreover, uphold the CFP's procompetitive benefits: Determining a national champion, preserving the regular season, and increasing revenue.

First, each format would fortify the crowning of a true national champion. This benefit strengthens with the expansion of a playoff and, in fact, would bring college football closer to resolution of the mythical national championship.[332] Expanding the playoff would ultimately prevent "false negatives," which, in the first CFP season, were the Baylor and TCU snubs.[333] Even so, an expansion might encourage the inclusion of less-

[331] *See id.* at 12; *see also* Mark Schlabach, *Playoff Expansion is Inevitable*, ESPN, http://espn.go.com/college-football/story/_/id/10969476/not-matter-when-college-football-playoff-expand (last accessed March 16, 2015) (cautioning that such an expansion would mimic that of leagues such as the NBA, NHL, and NFL and incrementally grow from 8 to 12 and then 16); Joe Schad, *Commissioner Craig Thompson Predicts 8-team format*; *Playoff*, ESPN, http://espn.go.com/college-football/story/_/id/8154799/mwc-commissioner-craig-thompson-predicts-college-football-playoffs-expand-eight-teams (last accessed March 18, 2015). Mountain West Commissioner Craig Thompson noted that the CFP's current 12-year cycle was structured to prevent the so-called "bracket creep."

[332] *See generally supra* Part II(a) and notes 130-33 and accompanying text (denoting the seasons with title snubs and split champions and inferring that an expanded format would have dispelled the myth).

[333] Nate Silver, *Expand the College Football Playoff*, FIVETHIRTYEIGHT, http://fivethirtyeight.com/features/expand-the-college-football-playoff/ (last accessed March 16, 2015).

deserving teams.[334] An automatic-bid structure, that is, could generate a "false positive" in a season when one conference has several contenders more worthy than the champion from another conference.[335] Another downside would be the scenario when an at-large team earns a bid based on marketability rather than merit.[336]

Second, each format would reinforce the preservation of the regular season. Under the six-team structure, for example, the end of the regular season would likely increase in intensity and interest as the elite teams vie for the first-round bye.[337] The eight-team structure would produce similar drama as teams, otherwise on the periphery, jockey for a playoff berth.[338] Under such expansion, fans from one conference would now have a heightened interest in games from other conferences.[339] This, in turn, would generate an explosion of television ratings and could turn the record ratings of week 15 into the status quo for the end of future regular seasons.[340]

Third, each format would enrich the revenues of the Power Five, Group of Five, and Independents. Industry experts approximate that the Power Five would increase revenues

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[334] *Id.*
[335] *Id.*
[336] *Id.*; *see also supra* note 11 and accompanying text (discussing the marketability of the Buckeye brand as perhaps a motivating factor behind the exclusions of the Horned Frogs and Bears).
[337] WETZEL, ET. AL., *supra* note 15, at 14. Although the authors do not contemplate the effects of a 6- or 8-team playoff, their evaluation of impact of more expansive formats is comparative. The gist of their arguments is premised on their contention that a playoff would elevate interest at the end of the regular season.
[338] *Id.*
[339] *Id.*
[340] *Id.*; *see also supra* note 315 and accompanying text (discussing the record-ratings of week 15 in the inaugural season and postulating of the likely increase in advertising).

by $250 to $300 million per year under an eight-team format.[341] The uptick in the annual television contract is estimated to double the revenue and reach the $1 billion mark.[342] These inflated figures are supported by this season's ratings' jackpot and may increase again if next season's playoff games garner an even stronger showing.[343]

2. Neutralizing the Anticompetitive Effects

There is no guarantee that a CFP expansion would offset the anticompetitive effects felt by the Group of Five. If a six-team playoff had been used during the BCS era, for example, it is estimated that only six percent of the berths would be filled by mid-majors.[344] Under an eight-team playoff, the percentage improves to just seven percent.[345] Even when enlarged to a 12- or 16-team playoff, the percentages do not reach ten percent.[346] These numbers demonstrate that mere expansion will not improve the Group of Five's access. The proposed CFP structure, therefore, would need to institute measures beyond merely adding games.

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[341] Brian Goff, *College Football Losing Out on $250 Million With Four-Team Playoff Setup*, FORBES, http://www.forbes.com/sites/briangoff/2015/01/12/college-football-losing-out-on-250-million-with-4-team-playoff-setup/ (last accessed March 16, 2015).

[342] *Id.* Estimates do not include the increased revenue generated from sales at the gate and merchandizing; *see also* Schlabach, *supra* note 332.

[343] *See* Goff, *supra* note 341 (noting that the numbers may increase with higher viewership).

[344] *College Football Poll*, *supra* note 19. This percentage utilized the AP polls during the BCS era since the latter's rankings were limited in scope during its first few seasons. The percentage was calculated by dividing six (total number of mid-major teams placing in the top 6) from 96 (total number of berths in 16 seasons).

[345] *Id.* This percentage was calculated by dividing 9 (total mid-majors) from 128 (total berths).

[346] *Id.* These percentages were calculated by dividing 18 (total mid-majors) and 192 (total berths) and 27 (total mid-majors) from 256 (total berths).

Perhaps the biggest obstacle is the inclusion of automatic bids for the Power Five.[347] And because the six-game format would only allow for one at-large bid, the likelihood of a Group of Five berth is slim.[348] During the BCS era, for example, the Power Five schools that did not win their conference championships would fill the limited slots.[349] The 2009 and 2010 TCU Horned Frogs would have been the only mid-major teams to earn a 6-team berth in the BCS era.[350] Access, however, improves slightly when the format expands to eight teams: Utah would have earned a bid in 2004; Louisville in 2006; Utah in 2008; TCU and Cincinnati in 2009; and TCU again in 2010.[351] Such comparisons indicate that the best alternative, at this juncture, is an eight-team playoff.

In the inaugural season, a hypothetical 8-team playoff (with automatic bids) would have matched up as follows: No. 1 Alabama (SEC champ) vs. No. 8 Michigan State (at-large bid); No. 4 Ohio State (Big Ten champ) vs. No. 5 Baylor (Big 12 co-champ); No. 2 Oregon (Pac-12 champ) vs. No. 7 Mississippi State (at-large); and No. 3 Florida State (ACC champ) vs. No. 6 TCU (Big 12 co-champ).[352] No Group of Five team would earn a berth since the highest-rated team was Boise State at No.

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[347] *See supra* notes 318-21 and accompanying text (suggesting that the negotiations behind the CFP structure would grant the Power Five a heightened bargaining position for automatic bids).

[348] *College Football Poll*, supra note 19.

[349] *Id.* In 2004, California was runner-up in the Pac-10, but was ranked higher than Utah. In 2006, Michigan and LSU were runners up in the Big Ten and SEC, respectfully, but were ranked higher than Louisville.

[350] *Id.*

[351] *Id.* In 2009, Cincinnati was part of the Big East (an AQ conference), but today is part of the AAC (Group of Five). In 2011, Boise State was ranked No. 8 in the AP. The Broncos would likely be ousted from consideration since there were four major conference runner-ups (Alabama, Arkansas, Oregon, and USC) competing for the three at-large bids.

[352] Mark Schlabach, *Picture an Eight-Team Playoff*, ESPN, http://espn.go.com/college-football/bowls14/story/_ /id/12003942/picturing-year-college-football-playoff-eight-teams (last accessed March 18, 2015).

20.[353] This begs the question: Should the proposed eight-team structure include an automatic bid for the highest ranked Group-of-Five team? Without such a measure, the CFP's format will be employing just an expanded format of its current dubious version and the anticompetitive effects flowing from its biased methodology, revenue discrimination, and limited Group of Five exposure would, therefore, remain pervasive in college football.[354]

C. Reviewing the Playsheet: Alternatives to Litigation

Litigation might not be the ideal route to institute reform within the CFP. At best, a favorable plaintiff's verdict might result in trebled damages and increased leverage to permit greater access for the Group of Five.[355] At worst, college football would regress back into the traditional bowl system.[356] Although the latter scenario is improbable, a cost-benefit analysis between the two outcomes suggests that an antitrust suit might be best sought as a last resort.[357] Instead, CFP opponents could effectuate change through Congressional hearings.[358] Much like during the BCS era, this avenue might prove influential in reforming the CFP.[359] Further-

[353] *See supra* note 252 and accompanying text (discussing the Group of Five's relative absence in the inaugural CFP rankings).
[354] *See* Ricci, *supra* note 226, at 597 (arguing that a judicially-imposed playoff would be overly intrusive and would run the risk of being overturned on appeal).
[355] *See id.* at 567 n. 162 (noting that NFL antitrust litigation is a tactic to obtain leverage in the collective bargaining process); *see also* 15 U.S.C. §15 (Westlaw 2012). Sherman authorizes damages actions for three times (treble) the amount of injuries sustained as a result of a §1 violation.
[356] *See* 15 U.S.C. §26 (Westlaw 2012) (Sherman authorizes injunctive relief for private parties. A prevailing plaintiff (Justice Department aside) could enjoin the CFP); *see also* Ricci, *supra note* 226, at 597-98 (discussing the possible outcomes of an injunction and denoting that a complete destruction of the structure could "mean a return to the split national titles and disputed championships so common in the era before the BCS").
[357] *See supra* Part III(b)(iii) (examining the strength of the CFP's precompetitive benefits, namely the revenue structure).
[358] *See supra* note 229.
[359] *See supra* note 229 (noting that the various modifications to the BCS structure were often preceded by Congressional hearings).

more, the growing deficits of the athletic departments outside the Power Five, as well as ever-increasing tuition rates, make this a public concern that is worthy of congressional oversight.[360] And finally, CFP opponents could, for good measure, ratchet up the pressure through grassroots campaigns like the Playoff PAC.[361]

IV. THE FINAL WHISTLE: CONCLUSION

A century and a year after that first season in 1869, Boise State debuted in the NCAA and a plane crash wiped out nearly the entire Marshall football team.[362] If the revenue disparity had been in entrenched then, as it is today, it is doubtful the Broncos or Thundering Herd would have become conference powerhouses. It would be more likely Boise State would still be fielding junior college teams, and one wonders whether Marshall could even have survived in the wake of the tragedy.

The ensuing years were a time of great change in college football, with all four 2014 CFP semifinalists at the centers of their own dramas. After suffering through season after season of mediocrity, including a .339 winning percentage for the first half of the 1970s, Florida State turned the corner with the hiring of coach Bobby Bowden in 1976.[363] Ohio State, on the other hand, saw the departure of coach Woody Hayes in 1978, ending nearly three decades of dominance, including three national championships.[364] Four years later, coach Paul "Bear" Bryant left Alabama after 25 years and six national championships.[365] It would take decades for both

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[360] *See Group of Five Deficits*, *supra* note 256.
[361] *See supra* note 228.
[362] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 154-55. Boise State officially joined the Big Sky Conference in 1970 and jumped to Division I-A in 1996; WE ARE MARSHALL (Warner Brothers Pictures 2006).
[363] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 290-95. The Seminoles went 19-37 in the first half of the 1970s).
[364] *Id.*, at 655.
[365] *Id.* at 77.

programs to rebound to their previous status.[366] In Eugene in the mid-1970s, the Oregon football team was losing money and games.[367] The school's aspirations for football were simply to be competitive.[368] That changed twenty years later when Oregon alumnus and Nike founder Phil Knight stepped in with a vision for excellence and the money to fund it.[369]

These six schools illustrate what has changed about college football: Not so long ago, teams could rise from obscurity and, with perseverance and a little luck, make it to the national stage. Likewise, even the mighty were susceptible to changes in fortune, with more schools having an opportunity to lure top players and coaches. In sports there are no guarantees, but today it's easier for Ohio State and Alabama to stay at the top than it was after losing those legendary coaches. Then, the playing field was more level for far more teams. Now, the rich get richer, and if you're not already in a position of power, you probably never will be.

Sherman was designed to protect the marketplace from the monopolistic destruction of competition. The CFP strives against this core Sherman principal by empowering the Power Five at the expense of the Group of Five.[370] That said, the CFP and its predecessors' roles in enriching the college football product should not be understated: The game has progressed into a national obsession and, in turn, has produced more monetary fruits than ever, translat-

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[366] *College Football Poll*, *supra* note 19. Since the formation of the BCS, Ohio State has played in four title games (including the CFP championship) and won two (2002 and 2014). Alabama, on the other hand, was three-for-three in BCS title games (2009, 2011, 2012).

[367] ESPN COLLEGE FOOTBALL ENCYCLOPEDIA, *supra* note 17, at 684-691. In the 1970s, the Ducks' record was 39-75-1 for a winning percentage of .341).

[368] Chuck Carlton, *Phil Night's Dollars, Nike's Marketing Boost Oregon's Appeal and Stature*, DALLAS NEWS, http://www. dallasnews.com/entertainment/cfp/headlines/20150110-phil-knights-dollars-nikes-marketing-boost-oregons-appeal-and-stature.ece (last accessed March 22, 2015).

[369] *Id.*

[370] *See supra* Part III(b)(ii)(3) (discussing the revenue disparity between the Power Five and Group of Five).

ing to more revenue for virtually all football programs, including those in the Group of Five.[371]

With the vast dollars at stake, college football is far removed from its sideshow amateur origins. It is still entertainment, but it is also big, big business — some of it publicly funded — that demands scrutiny.[372] The highest paid employee in 41 of 50 states is the state university's football or basketball coach.[373] Those salaries are derived, in part, by tax dollars, revelatory of the market power of college football and demonstrative of the public policy concerns at stake.[374] Couple this with the fact that only 20 schools in the CFP arrangement have athletic departments with revenue exceeding expenses, and it is easy to appreciate Boise State President Bob Kustra's concern over the arm's race.[375] Every school outside the Power Five should be not only concerned, but also active in trying to change how the CFP unbalances competition. Unfortunately, these are the schools without the funds and power; it would likely take a goodwill effort by the CFP and members of the Power Five to initiate or at least contribute to pushing for necessary change. The history of college football shows this isn't likely to happen, however, for if there is one steadfast tradition, it's that money wins.

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[371] *See supra* Part III(b)(iii)(3) (recognizing the massive uptick in revenue for all parties to the CFP).
[372] *See Group of Five Deficits*, *supra* note 256.
[373] Roger Groves, *Should Michigan Or Any Taxpayer Funded College Pay Football Coaches Over $40 Million?*, FORBES, http://www.forbes.com/sites/rogergroves/2014/12/31/should-michigan-or-any-taxpayer-funded-college-pay-football-coaches-over-40-million/ (last accessed March 22, 2015).
[374] *Id.*
[375] Brian Burnsed, *Growth in Division I Athletic Expenses Outpaces Revenue Increases*, NCAA, http://www.ncaa.org /about/resources/media-center/news/growth-division-i-athletics-expenses-outpaces-revenue-increases (last accessed March 22, 2015); *supra* note 2 and accompanying text.

With the economic stakes higher than ever and current federal jurisprudence ready to break open the floodgates,[376] it's imperative that interested parties, including the Group of Five, act now to prevent what is otherwise likely inevitable: The Power Five consolidates its strength into super conferences that become their own separate NCAA division. If that happens, the likes of Boise State and Marshall will once and for all lose their opportunity to play for a national championship, except in a lesser division. But that may be the least damaging effect: Teams outside the Power Five will no longer be part of "big time college football," no longer part of meaningful TV revenue, no longer part of the top-of-mind competition currently played out on college campuses all across the nation. Some of these schools will likely forfeit their programs. The others will still play college football, but it won't be major college football as it is today. If the CFP and Power Five aren't willing to prevent this, and in fact are likely to pursue it, then it may well be up to Sherman to bring fair competition back to college football.

It shouldn't take the threat of a new anticompetitive empire to create more opportunity and financial equality for more schools. Even if a new super division were never to materialize, the college football landscape is already so unbalanced that it demands an immediate leveling. But it should be noted that if a new super division does come to fruition, any legal recourse might well be too late.

[376] *See supra* notes 230-31 and accompanying text (briefly mentioning the potential for monumental changes as a result of *O'Bannon*).

CAN CONGRESS PLAY BALL?: CONGRESSIONAL POWER TO IMPLEMENT AND ENFORCE PAY-FOR-PLAY AMONG STUDENT-ATHLETES

Charles Barrowman III[1]

ABSTRACT

Recently, the National Labor Relations Board ("NLRB") ruled that grant-in-aid student athletes of National Collegiate Athletic Association ("NCAA" or the "NCAA") universities are permitted to unionize because they are employees of their respective NCAA universities – revolutionizing a troubling but well-settled area of sports and employment law. The issues created from this ruling spread far further than the obvious, begging many questions, in particular: how will a student-athlete be compensated, how will compensation be calculated, how much does the student-athlete deserve, and how will this affect private versus public universities?

Congress is meanwhile seeking to ensure that the NCAA and its member universities can no longer take advantage of athletes who often have no other alternative than to attend a university. Of course, this task will largely be an exercise in public policy. Congress should mainly require universities to compensate student-athletes for the "full cost of attendance" in their scholarships and should share memorabilia royalties with the corresponding player, thus giving each student an additional financial incentive to maximize his potential. In the end, Congress must balance the continued importance of revenue-generating college athletic programs with the well settled principles of employment law and must realize that even though student-athletes derive a benefit from the universities, at current, universities are taking advantage of student-athletes for their own economic advantage. This article calls for Congress to clarify this pressing issue and state that student-

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athletes should derive proper financial benefit from the fruits of their labor.

I. INTRODUCTION[2]

A. The NCAA Landscape Today

The College Sports industry generates $11 billion in annual revenue.[3] This is more than the National Football League's ("NFL") revenue of just under $10 billion per year.[4] Despite this, NCAA universities continue to forbid student-athletes from receiving any of the revenue.[5] By itself, the NCAA earns nearly $1 billion each year in revenue, but still retains its §501(c)(3) non-profit status.[6] Meanwhile, NCAA executives, conference commissioners, athletic directors, and coaches continue to receive *much* of this revenue in the form of salaries.[7] For example, the highest paid

[2] Please note that the NCAA is comprised of 1,281 institutions (both private and public) and regulates athletes in both male and female sports at many different levels. However, in this article, all statistics and information, except as stated otherwise, will pertain to revenue-generating sports; namely, Division I Men's football and/or basketball programs.

[3] Marc Edelman, *The Case for Paying College Athletes: Students Deserve to be Compensated for Their Labor*, U.S. NEWS & WORLD REPORT (Jan. 6, 2014, 8:00 AM), http://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid.

[4] *See, e.g.,* Brian Goff, *The $70 Billion Fantasy Football Market*, FORBES (Aug. 20, 2013, 10:01 AM), http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/.

[5] Edelman, *supra* note 3.

[6] *See* Mark Alesia, *NCAA Approaching $1 Billion Per Year Amid Challenges by Players*, INDY STAR (Mar. 27, 2014, 11:06 PM), http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/; Amanda Pintaro, *Is the NCAA Fulfilling Its Tax-Exempt Status*, ILL. BUS. L. J. (Feb. 21, 2010, 10:14 PM), http://www.law.illinois.edu/bljournal/post/2010/02/21/Is-the-NCAA-Fulfilling-its-Tax-Exempt-Status.aspx.

[7] *See* Edelman, *supra* note 3 (noting that NCAA President, Mark Emmert, receives $1.7 million annually in salary); Rachel Bachman, *Pac-12's Scott is the Highest Paid College Commissioner*, WALL ST J. (May 19, 2013, 6:16 PM) (revealing that Pac-12 Commissioner Larry Scott and Big Ten Commissioner

public employee in 40 of the 50 U.S. states is the state university's head football or basketball coach.[8]

Instead of allowing student-athletes to earn a wage – or even allowing student-athletes to participate in the free market – the NCAA forbids any student-athlete from receiving compensation directly or indirectly tied to his participation in NCAA sanctioned athletics. The one exception to this is that the student may receive financial aid in the amount of a scholarship that does not exceed the cost of attendance.[9] The NCAA has obstinately continued to promote the "principle of amateurism" for more than half a century as an excuse to deny college athletes compensation.[10] However, student-athletes have started to push back. Recently, former student-athletes in both NLRB petitions, as well as two high-profile federal lawsuits, have targeted the NCAA for its restrictive policies.[11]

Jim Delany receive north of $3 million and $2.8 million in compensation each year, respectively).

[8] *See* Edelman, *supra* note 3 (stating that the highest paid public employee in 40 of the 50 U.S. states is the state university's head football or basketball coach); *see also* Decision and Direction of Election, Northwestern Univ. and College Athletes Players Ass'n., Case 13-RC-121359, n.2 (N.L.R.B Region 13, Mar. 16, 2014) [hereinafter Decision and Direction of Election] (in the NCAA, seventeen of the Division I FBS football programs are private institutions, while the rest are public).

[9] *See* NCAA, 2013-14 NCAA Division I Manual art. 15.1 (2013), available at https://www.ncaapublications.com/p-4322-2013-2014-ncaa-division-i-manual.aspx [hereinafter *Div. I Manual*].

[10] *See Div. I Manual* art. 2.9 (2013) (defining the "Principle of Amateurism" by stating that "student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental[,] and social benefits to be derived. Student participation in intercollegiate athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises."). *See also* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 73 (2006).

[11] *See generally* Teddy Greenstein, *Northwestern Football Players Seek to Join Labor Union*, CHICAGO TRIBUNE (January 28, 2014), http://articles.chicagotribune.com/2014-01-28/sports/chi-northwestern-football-players-labor-union-20140128_1_basketball-players-labor-union-national-labor-relations-board; David Porter, *Lawsuit Seeks to End NCAA's 'Unlawful Cartel'*,

B. The College Athletes' Players Association v. Northwestern University Decision and the NCAA Student-Athlete as Employee

Three former college football and basketball athletes founded the College Athletes' Players Association ("CAPA") in January 2014.[12] CAPA, along with technical and financial backing from the United Steelworker's Union ("USW"), filed a petition with the NLRB on January 28, 2014 to form the first union representing college athletes.[13] While the common belief is that CAPA is seeking to unionize student-athletes as employees for the financial benefits that would come with the salaries, CAPA indicated that salaries and "pay-for-play" salaries are not the ultimate goal.[14] Rather, the ultimate goal is to receive coverage for medical expenses, independent concussion experts, improve graduation rates among student-athletes, due process for scholarship review, et cetera.

The NLRB has statutory jurisdiction over private sector employers but does not have jurisdiction over employers in the

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YAHOO SPORTS (March 17, 2014, 6:48 PM), http://sports.yahoo.com/news/lawsuit-seeks-end-ncaas-unlawful-175448180--ncaaf.html; Kurt Streeter, *Former UCLA Star Ed O'Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES (July 22, 2009) http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22.

[12] *CAPA*, COLLEGE ATHLETES PLAYERS ASS'N., http://www.collegeathletespa.com (last visited Aug. 9, 2014) (the founders are former college football players Ramogi Huma and Kain Colter, as well as former college basketball player Luke Bonner).

[13] Seth Borden, *College Athletes to Unionize? More on the Northwestern University Football Players Labor Petition*, LABOR RELATIONS TODAY (Feb. 5, 2014), http://www.laborrelationstoday.com/2014/02/articles/bush-board-reversal/college-athletes-to-unionize-more-on-the-northwestern-university-football-players-nlrb-petition/.

[14] *See* Greenstein, *supra* note 11 (noting that CAPA's "demands include financial coverage for sports-related medical expenses, placing independent concussion experts on the sidelines during games, establishing an educational trust fund to help former players graduate . . . 'due process' before a coach could strip a player of his scholarship for a rules violation, and cost of attendance stipends," as well as allowing compensation for commercial sponsorships).

federal, state, and local governments.[15] This is important because a large majority of NCAA member institutions are public universities, while only a small number are comprised of private universities. It is unsettled currently whether the public institutions would qualify as public or private employers in this setting. Clearly, on the surface, a public institution would be a public employer, but that may not be so in this case, since the NCAA is in the big business of revenue-generating college sports. But assuming, *arguendo*, that public universities are public employers in this setting, the NLRB may have only limited power to reform NCAA member institutions and their policies regarding college athletes. In the instant case, however, CAPA brought an action on behalf of players at Northwestern University, a private university subject to the NLRB's jurisdiction. Thus, CAPA had standing to petition the NLRB, and argues that grant-in-aid student-athletes were employees within the meaning of the Nation Labor Relations Act ("NLRA").[16]

On March 26, 2014, Regional Director Peter Sung Ohr, of the NLRB's 13th Region, ruled that "all grant-in-aid scholarship players for [Northwestern's] football team who have not exhausted their playing eligibility are "employees" under §2(3) of the [NLRA]."[17] This ruling opened up a whole new world of legal issues, including: how will a student-athlete be compensated, how will compensation be calculated, how much does the student-athlete deserve, and how will this affect private versus public universities? This ruling will inevitably be tied up in litigation for months – if not years. But do student-athletes and the NCAA need wait that long for a ruling? This article will discuss whether Congress has the requisite power to legislate and, if so, how legislation

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[15] *Jurisdictional Standards,* NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited Aug. 11, 2014) (note that this is important because the NCAA is comprised largely of public universities. Also note that private sector employers must meet a "minimal level" of interstate commerce before the NLRB will exercise jurisdiction).

[16] Decision and Direction of Election, *supra* note 8, at Part I.

[17] Decision and Direction of Election, *supra* note 8, at Part V.

should be addressed to strike a proper balance between the student-athletes' rights and keeping universities afloat.

II. BACKGROUND

A. The Life of the NCAA Student-Athlete

The student-athlete's time commitment to his sport is the equivalent of a full time job. While the "season" is often a small portion of the year, an athlete spends much, if not all, of the year in preparation for his sport. For example, a typical football player has a rigorous schedule.

For college football, the first week in August customarily starts a month-long training camp, often considered the most demanding part of the season.[18] During training camp, the coaching staff gives the players daily itineraries that detail which football-related activities they are required to attend and participate in including meals, training, medical, and practice schedules. Frequently, this includes mornings starting as early as 6:30AM and concluding as late as 10:30PM. During training camp, the players devote between 50 and 60 hours per week to purely football-related activities. Meanwhile, during the football season, the student-athlete devotes between 40-50 hours per week to football related activities.[19] Following the football season, in spring and summer, the athletes devote 20-25 hours per week on mandatory football-related training activities.[20]

[18] Decision and Direction of Election, *supra* note 8, at Part III.D.
[19] Decision and Direction of Election, *supra* note 8, at Part III.D (noting that the college football season begins in early September and ends at the end of November and the season is extended through early January if the team qualifies for a "bowl" game and also that this time includes travel to and from games).
[20] Decision and Direction of Election, *supra* note 8, at Part III.D

B. The Money Behind It All

1. The Player Impact

Student-athletes and the NCAA are both essential to the other's continuation, as neither could function without the other as they do now. Student-athletes provide the product that sports fans yearn for, while the NCAA provides the infrastructure that student-athletes lack.[21] Each year, the NCAA earns billions of dollars in revenue based on the performance of its student-athletes (for truly, the college sports market without athletes would exist no more than the professional sports leagues), and instead of rewarding these athletes with compensation, they are forbidden from deriving any sort of profit, and are regularly censured for receiving any economic benefit.

i. Ticket Sales and Television Broadcast Contracts

College athletic departments derive a substantial amount of revenue from ticket sales, "booster" donations, and conference distributions.[22] However, the NCAA also earns more in advertising and marketing revenue each year from its annual Men's basketball tournament than do all of the other major professional sports franchises in the United States.[23] Additionally,

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[21] *See* Bobby Rush, *Without Athletes, The Big Money in College Sports Disappears*, U.S. NEWS & WORLD REPORT (Apr. 2, 2013, 10:35 AM), http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/without-athletes-the-big-money-in-college-sports-disappears (noting that without the student-athletes, there would be no football, basketball, or other sports to put on the field and without the NCAA's marketability, the students would not have an outlet to display their talents).

[22] Christopher Lee, *College Athletics by the Numbers: A Deeper Look at Profitability*, SPORTSOLOGIST (Sept. 29, 2010), http://sportsologist.com/college-athletics-by-the-number/ (reporting that 50% of revenues are made up by ticket sales (17%), alumni/booster donations (27%), and NCAA/Conference distributions (14%)).

[23] Cork Gaines, *CHART: The NCAA Tournament Makes More Money on TV Ads than the NFL Playoffs*, BUSINESS INSIDER (Mar. 24, 2014, 4:31 PM),

the "Power Five" NCAA conferences collect $1.1 billion annually from network partners for "regular season" game coverage.[24] And the newly implemented college football playoff will bring in an estimated $470 million annually.[25]

ii. Likeness and Image Revenues

For years, the NCAA has continued to use the likenesses of former and current student-athletes to turn a profit, even long after the student-athlete has left the university. Nowhere is this more evident than the NCAA football and basketball video game franchises.[26] In 2009, former NCAA basketball player, Ed O'Bannon filed an anti-trust class action lawsuit against the NCAA alleging that NCAA basketball and football players are illegally denied a share of the profits under the guise of "amateurism."[27]

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http://www.businessinsider.com/ncaa-tournament-tv-ad-revenue-nfl-playoffs-2014-3 (showing that the NCAA tournament makes more than the NFL playoffs and NBA playoffs as well as making nearly double the amount of revenue as the MLB playoffs and almost ten times as much as the NHL playoffs).

[24] Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014, 2:49 PM), http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/ (stating that the payouts are as follows (rounded): Big Ten - $250 million; Pac-12 - $250 million; ACC - $240 million; SEC - $205 million; Big-12 – $155 million).

[25] *Id*.

[26] *See generally NCAA Football Series*, WIKIPEDIA, http://en.wikipedia.org/wiki/NCAA_Football_series (last visited Aug. 13, 2014) (an American football video game franchise spanning parts of three decades that is licensed between Collegiate Licensing Company and EA Sports; the game allows gamers to control and compete against current NCAA Division I FBS teams); *see also NCAA Basketball Series*, WIKIPEDIA, http://en.wikipedia.org/wiki/NCAA_Basketball_series (last visited Aug. 13, 2014) (an American basketball video game franchise spanning 13 years where gamers can control and compete against current NCAA basketball teams).

[27] Kurt Streeter, *Former UCLA Star Ed O'Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES (July 22, 2009), http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22.

On August 8, 2014, Judge Claudia Wilken ruled that "the NCAA [amateurism/non-compensation] rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."[28] As such, Judge Wilken enjoined all NCAA rules that prohibited student-athletes from receiving compensation for use of their images.[29] Judge Wilken further ordered that universities should be allowed to offer full cost-of-attendance scholarships to student athletes and cover cost-of-living expenses not currently provided via scholarships. Furthermore, the Judge ruled that colleges be permitted to place as much as five thousand dollars into a trust for each athlete per year of eligibility. Currently, *O'Bannon* has been appealed, arguing that the Court failed to consider *NCAA v. Bd. of Regents of the Univ. of Okla.*, which denied the NCAA control of college football television rights, but also stated that "to preserve the character and quality of the 'product,' athletes must not be paid."[30]

2. The NCAA's Subsidy: Providing for the Student

While it is increasingly evident to even the most casual sports fan that the NCAA and its member universities profit off of the backs of its student-athletes, the NCAA does provide a substantial benefit to those student-athletes.[31] The NCAA uses

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[28] O'Bannon v. Nat'l Collegiate Athletic Ass'n., No. C 09-3329 CW, 2014 WL 2899815, at *11 (N.D. Cal. Aug. 8, 2014) (finding that the NCAA "violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men's basketball and FBS football players any more than the current association rules allow.").

[29] *O'Bannon*, 2014 WL 2899815, at *147-48 (stating also that while the NCAA may set a cap on compensation provided by the universities to put in trust until the student-athlete either graduates or is no longer eligible, the cap may not be lower than $5,000 per year).

[30] *See* Ben Strauss, *N.C.A.A. Appeal of Ruling in O'Bannon Case is Heard*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/18/sports/ncaa-appeal-of-ruling-in-obannon-case-is-heard.html.

[31] *See, e.g., Division I Schools Spend More on Athletes than Education*, USA TODAY (July 14, 2013, 1:31 PM), http://www.usatoday.com/story/sports/ncaaf/2013/01/15/division-i-colleges-

substantial portions of its revenue to provide the student with medical, housing, and travel expenses, in addition to creating an outlet for the athlete to publicize his talents to professional sports organizations.[32]

i. Medical Policies and Subsidies

The NCAA's medical policy states that a student-athlete must have an insurance policy that covers athletic-related injuries in order to practice and compete.[33] These insurance policies must cover expenses up to the NCAA's $90,000 deductible under its Catastrophic Injury Policy, at which point the NCAA's policy will kick-in and cover the rest of the bill.[34] However, many student-athletes come from impoverished backgrounds

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spend-more-on-athletes-than-education/1837721/ (showing that NCAA Division I universities spend about six times as much on athletes than is spent on education and the top tier Football Bowl Subdivision spends $92,000 per athlete and only $14,000 per full-time student); Sean Gregory, *College Sports Spending is Insane*, TIME (Dec. 4, 2013), http://keepingscore.blogs.time.com/2014/12/04/college-sports-spending-is-insane/ (recording that The Ohio State University's football program is the top spending school, having spent $380,757 per scholarship football player in 2011). *See generally Athletic & Academic Spending Database for NCAA Division I*, KNIGHT COMMISSION, http://spendingdatabase.knightcommission.org/ (last visited Sept. 5, 2014) (offering a searchable catalogue of athletic and academic spending).

[32] Jay Weiner & Steve Berkowitz, *USA TODAY Analysis Finds $120K Value in Men's Basketball Scholarship*, USA TODAY (Mar. 30, 2011, 2:48 PM), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four_N.htm (breaking down the value of the average men's basketball scholarship). *But see* Lee, *supra* note 22 (reporting that the average university spends 29% of its budget on items such as facilities maintenance and rental, team travel, recruiting, equipment/uniforms/supplies, and game expenses – which is less than it spends just on coaches' salaries).

[33] David Leon Moore, *Insurance by Almost Every School Covers Injuries Like Ware's*, USA TODAY (Apr. 2, 2013, 8:15 PM), http://www.usatoday.com/story/sports/ncaab/2013/04/02/injuries-like-kevin-wares-covered-by-almost-every-division-i-school/2047939/ (also notes that the student-athlete's injury does not need to be catastrophic or completely debilitating, but must merely amount to at least $90,000 in medical bills).

[34] *Id*.

and most continue to live below the poverty level throughout their college career; thus, many cannot afford to personally carry such policies.[35] As such, nearly all Division I schools provide coverage for the student's medical policy, as well as more than seventy-five percent of Division II and Division III schools.[36] Because a $90,000 insurance policy is something that the many student-athletes cannot afford, the NCAA and the universities' policy is of substantial benefit to the student-athlete.

ii. Housing, Travel, and Other Necessities

The NCAA and its member universities also provide student-athletes with housing and travel that the student would otherwise have to pay for himself. The NCAA provides and supports the Student Assistance Fund, which is used to fund student-athletes' trips home, clothing, summer school, tutoring, graduate test fees, health insurance, and other costs that scholarships do not cover.[37] For example, in 2013, the NCAA distributed more than $73.5 million dollars among its conferences for discretionary use by universities "to assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate

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[35] *See generally* Meghan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013, 8:38 AM), http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/ (noting that the poor, non-high profile student athlete often cannot afford the necessary surgeries if injured and the university often will not foot the bill).

[36] Moore, *supra* note 33. *But see* Kristina Peterson, *College Athletes Stuck with the Bill After Injuries*, N.Y. TIMES (July 15, 2009), http://www.nytimes.com/2009/07/16/sports/16athletes.html?pagewanted=all&_r=0 (stating that although the NCAA allows universities to cover student-athletes insurance policy, no clear standards were ever introduced and often student-athletes end up "footing the bill.").

[37] Brian Burnsed, *Meeting the Needs of Student-Athletes: NCAA Provides $53 Million to Players in Need*, NCAA.COM (Aug. 22, 2012, 9:33 AM), http://www.ncaa.com/news/ncaa/article/2012-08-20/meeting-needs-student-athletes.

athletics, enrollment in an academic curriculum[,] or that recognize academic achievement."[38]

iii. Training and Marketing

Because many student-athletes come from impoverished backgrounds, most are unable to market themselves to professional sports franchises without the NCAA.[39] The NCAA has thus become a form of a "farm system" for the NFL and National Basketball Association ("NBA"), due in large part to their draft eligibility rules.[40] The typical NCAA university is the modern-day training ground for those who aspire to play professional sports. Athletic programs on these campuses provide weight rooms, tracks, fields, medical facilities, training rooms, physical therapy, and many other amenities that student-athletes use to stay healthy and enhance their physical abilities.[41] Profits from advertising, ticket sales, memorabilia sales, and other such revenue largely contribute to a university's ability to provide such a venue for an athlete's training and competition.[42] Additionally, the student-athlete benefits from having his or her image plastered all

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[38] NCAA, *NCAA Student Assistance Fund Guidelines*, NCAA.ORG, http://www.ncaa.org/sites/default/files/2013+Student+Assistance+Fund.pdf (last visited Sept. 23, 2014).

[39] *See* Matt Hayes, *Report Concludes 86 Percent of Student Athletes Live in Poverty*, SPORTING NEWS (Jan. 16, 2013, 3:01 AM), http://www.sportingnews.com/ncaa-football/story/2013-01-15/student-athletes-poverty-paid-scholarships-ncpa-texas-duke.

[40] *Farm Team*, WIKIPEDIA, http://en.wikipedia.org/wiki/Farm_team (last visited Aug. 13, 2014).

[41] *See generally* Jeffrey Dorfman, *Pay College Athletes? They're Already Paid Up to $125,000 Per Year*, FORBES (Aug. 29, 2013, 8:00 AM), http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/ (stating that all these additional benefits that the student-athlete receives from the universities should count as "pay" within the economic sense of the term).

[42] *See generally* Michael Smith, *Athletic Budgets Continue to Climb*, SPORTS BUSINESS DAILY (Aug. 22, 2014), http://www.sportsbusinessdaily.com/Journal/Issues/2011/08/22/In-Depth/Budgets.aspx.

over ESPN during every season, as often this contributes to a rise in his "draft stock."[43]

Finally, the majority of student-athletes – even those in revenue-generating sports – do not become professional athletes.[44] There are 138 Division I NCAA football programs and 351 Division I NCAA basketball programs.[45] Each NCAA football program is allotted 85 scholarships, whereas the NFL allows 53 roster spots each year.[46] As such, only the elite athletes go on to compete in the NFL and NBA. Potentially, the most important product that the universities provide for the student is the various degrees offered upon graduation. A study equated the long-term value of a student-athlete's football scholarship at $2 million dollars per student for some of the universities with the most prestigious football programs.[47]

3. The NFL's Three Year Rule: Is the NFL to Blame?

The NFL is widely criticized for implementing the draft eligibility rule, colloquially known as the "Three Year

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[43] *See* Dorfman, *supra* note 41.

[44] *See generally* NCAA, *The Value of College Sports*, NCAA.ORG, http://www.ncaa.org/student-athletes/value-college-sports (last visited Sept. 5, 2014) (noting that the experiences provided by a NCAA scholarship will benefit those students, a majority of whom will "go pro in something other than sports").

[45] *Division I (NCAA)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Division_I_(NCAA) (last visited Sept. 23, 2014).

[46] Note that there are also European and Canadian football leagues as well as European basketball leagues, so the student-athlete's options are not limited solely to the NFL and NBA.

[47] *See* Patrick Rishe, *Value of College Football Scholarship Exceeds $2 Million for College Football's Top 25*, FORBES (Aug. 21, 2011, 11:32 AM), http://www.forbes.com/sites/prishe/2011/08/21/value-of-college-football-scholarship-exceeds-2-million-for-college-footballs-top-25/ (revealing that average the long-term average value of a student-athlete scholarship is $2,045,360).

Rule."[48] This rule prevents any aspiring NFL player from entering the draft until three years after his high school class has graduated.[49] In *Clarett v. NFL*, former star running back for The Ohio State University football team challenged the Three Year Rule on anti-trust grounds.[50] While Clarett was successful in District Court, Judge Sotomayor, writing for an unanimous court, overturned the ruling on appeal in the Second District Court of Appeals.[51]

III. STATEMENT OF THE CASE

A. NCAA Policies Are Restricting Trade and Violating the Sherman Act

The Sherman Anti-Trust Act (the "Sherman Act") prohibits certain business activities that unreasonably conspire to restrain trade.[52] The Sherman Act was primarily implemented by legisla-

[48] *See generally* Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (listing the eligibility requirements for a NFL draftee). Also note that the NBA has a similar rule, but only prevents eligibility for one year following the graduation of the high school class with which the athlete entered high school.

[49] *See id*. at 126 (current Supreme Court Justice Sonya Sotomayor illustrates the history of the NFL's three-year rule by stating "since 1925, when Harold 'Red' Grange provoked controversy by leaving college to join the Chicago Bears, the NFL has required aspiring professional football players to wait a sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft." *Id.* For much of the League's history, therefore, a player, irrespective of whether he actually attended college or not, was barred from entering the draft until he was at least four football seasons removed from high school. The eligibility rules were relaxed in 1990, however, to permit a player to enter the draft three full seasons after that player's high school graduation).

[50] *See id*. (challenging the rule as a restraint of trade in violation of §1 of the Sherman Act (15 U.S.C. §1) and §4 of the Clayton Act (15 U.S.C. §15)).

[51] *Id*. at 143. *See also* Peter Altman, *NOTE: Stay Out for Three Years After High School or Play in Canada -- and for Good Reason an Antitrust Look at Clarett v. National Football League*, 70 BROOKLYN L. REV. 569, 604 (2004) (concluding that the three-year rule is valid practice under anti-trust laws in light of recent treatment of sports labor law issues by federal courts of appeals).

[52] *See* 15 U.S.C. §§1, 2 (Westlaw 2006) ("every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be

tors who understood that lack of competition within a market leads to stagnation. Historically, oil and steel barons were those targeted by the Sherman Act, as they sought to destroy competition and then to exploit those in the market for the actor's services.[53] However, modern society has seen the recession of anti-trust suits against the oil and steel barons of the late 19th and early 20th centuries as organizations such as the NCAA have taken its place.

To establish a violation of §1 of the Sherman Act, "three elements must be shown: (1) a contract, combination, or conspiracy; (2) affecting interstate commerce; and (3) an unreasonable restraint of trade."[54] As discussed later, while the NCAA's policies have been violating the Sherman Act, a Sherman Act violation analysis may not be the best way to address the NCAA's policies. This idea was expressed by Judge Wilken in *O'Bannon*, indicating that while critics of the NCAA's amateurism policies may have valid complaints, anti-trust lawsuits should instead give way to more meaningful reform within college sports.[55] Judge Wilken

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illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

[53] *See* 51 CONG. REC. H4, 100 (daily ed. June 20, 1890) (statement of Rep. Mason) ("trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to one cent a barrel, it would not right the wrong done to people of this country by the trusts which have destroyed legitimate competition and driven honest men from legitimate business enterprise.").

[54] Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F. Supp. 893, 917 (S.D. Ohio 1981) (citing Mowery v. Standard Oil of Ohio, 463 F. Supp. 762, 765 (N.D. Ohio 1976)).

[55] *See O'Bannon*, 2014 WL 2899815, at *151 ("to the extent other criticisms have been leveled against the NCAA and college policies and practices, those are not raised and cannot be remedied based on the anti-trust causes of action in this lawsuit. It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here.").

does not express, however, whether such reforms should come from the NCAA, its universities, its players, or rather – as this article suggests – via Congress.

B. Congress has a Duty to Promote and Regulate Trade Between the Several States

The United States Constitution gives authority to Congress to regulate interstate commerce by means that are "necessary and proper."[56] In July 2014, Congress' Senate Committee on Commerce, Science, and Transportation held a public hearing entitled "Promoting the Well-Being and Academic Success of College Athletes."[57] In the hearing, Committee Chair, Jay Rockefeller stated that "[Congress does] have jurisdiction over sports . . . all sports."[58] The Senator, however, failed to prove this statement. Even though Senator Rockefeller failed to provide authority for his statement, Congress retains jurisdiction over interstate commerce.[59] Additionally, Congress has jurisdiction over higher education, made evident by the fact that Congress created the Department of Education, a realm in which the NCAA and its universities operate.[60]

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[56] U.S. CONST. art. I, §8, cl. 3, 18 ("The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States" and "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[57] Taylor Branch, *NCAA to Congress: Change is Coming*, THE ATLANTIC (July 24, 2014, 4:09 PM), http://www.theatlantic.com/entertainment/archive/2014/07/the-ncaa-tells-congress-its-going-to-reform-itself/374948/.

[58] *Id*. (recalling Democratic Senator Rockefeller's claim of jurisdiction over the NCAA. Branch also notes that the claim of jurisdiction is bi-partisan because Republican Senator Heller agreed that "we do have jurisdiction in this Congress over the NCAA.").

[59] *The NCAA and College Presidents Admit Inability to Reform; The Need for Federal Intervention*, NCPANOW, http://www.ncpanow.org/research/body/The_Need_for_Federal_Intervention.pdf (last visited Sept. 5, 2014).

[60] *See* 20 U.S.C. §3401 et seq. (Westlaw 2006) (creating the Department of Education).

C. The Economic Impact of NCAA Policies Demand Immediate Congressional Intervention

The NCAA, through – and because of – its policies, has recently been called an illegal cartel that artificially depresses the compensation that student-athletes could receive from their respective universities.[61] $11 billion dollars each year is funneled from ticket sales, memorabilia revenue, and television contracts to various people and groups, yet the student-athletes whose physical labors make it possible still fail to receive a dime.[62] Cases of anti-trust violations have been – and will continue to be – tied up in litigation for years to come. Additionally, the NCAA has proven that it is incapable of making changes on its own accord. Because of this, the buck stops at Congress. Congress' legislative authority offers the most flexible, expedient, and convenient avenue for correcting a system that has been flawed for decades at the expense of young student-athletes.

IV. ANALYSIS

A. The Sherman Act Analysis

The NCAA's activities have recently come under anti-trust scrutiny via the Sherman Act. To determine whether a restraint "unreasonably" restrains trade, a court will apply a two-part ap-

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[61] *See* Philip D. Bartz & Nicholas S. Sloey, *The Joy of College Sports: Why the NCAA's Efforts to Preserve Amateurism Are Both Lawful and in the Best Interest of College Athletics*, BRYAN CAVE BULLS, at 2 (Dec. 13, 2011), available at http://www.bryancave.com/files/Publication/d1b731c5-7f86-4347-a032-64b2049dae12/Presentation/PublicationAttachment/1ee1ad19-d6cb-4ce4-8f02-66ae12ce1c6b/The%20Joy%20of%20College%20Sports%20-%20Article_v2.pdf (citing Matt Norlander, Podcast: The Shame of College Sports (Interview of Taylor Branch), CBSSPORTS, (Sept. 16, 2011), available at http://www.cbssports.com/mcc/blogs/entry/26283066/32016194).

[62] *See* discussion *supra* Part I.A.

proach: the *per se* rule and the rule of reason.[63] First, the *per se* rule condemns practices that "are entirely void of redeeming competitive rationales."[64] Second, the rule of reason analysis must decide if the challenged restraint has a substantially adverse effect on competition.[65] Then the court must evaluate whether the pro-competitive virtues justify the anti-competitive impacts.[66]

In *Law v. NCAA*, the Supreme Court ruled that price fixing on NCAA assistant coaches violated §1 of the Sherman Act.[67] However because student-athletes have typically not been considered employees, they have not benefitted from this ruling.[68] Yet, because the NLRB ruled that Northwestern University football players are employees under the NLRA, the floodgates have opened, allowing student-athletes similarly situated to Northwestern football players to challenge the NCAA's no-pay policies under circumstances similar to *Law*.[69] Additionally, Judge Wilken

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[63] *See* Law v. Nat'l Collegiate Athletic Ass'n., 134 F.3d 1010, 1016 (10th Cir. 1998) (describing this two-step process). *But cf.* Edelman, *supra* note 3, at 73 (noting that there is also a "quick-look" test).

[64] *Id*. (quoting SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)). *See also id*. at 1016-17 (citing Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 695 (1978) ("once a practice is identified as illegal per se, a court need not examine the practice's impact on the market or the pro-competitive justifications for the practice advanced by a defendant before finding a violation of antitrust law. Rule of reason analysis, on the other hand, requires an analysis of the restraint's effect on competition."). *See also* Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 73 (2013) ("if a restraint is 'so nefarious' that there is high probability that it lacks any redeeming value, a court will apply the *per se* test" (emphasis added)).

[65] *See SCFC*, 36 F.3d at 965; U.S. v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993).

[66] *See Brown Univ.*, 5 F.3d at 669.

[67] *See generally* Law v. Nat'l Collegiate Athletic Ass'n., 134 F.3d 1010, (10th Cir. 1998).

[68] *See* Edelman, *supra* note 64, at 77 ("unlike assistant coaches, student-athletes have not traditionally been defined as employees, so the collective determination of their pay has not traditionally been construed as wage fixing. Nevertheless, any empirical observation of student-athletes' daily activities shows that student-athletes are closely akin in practice to traditional workers.").

[69] Law v. Nat'l Collegiate Athletic Ass'n., 134 F.3d 1010, (10th Cir. 1998).

determined that restricting players from receiving revenues from their image and likenesses violates the Sherman Act.[70]

B. Can Congress Intervene?: The Power of the Commerce Clause

While Senator Rockefeller claims that Congress has jurisdiction over all sports, no concrete legal precedent exists to back up this claim.[71] Presumably, Congress claims jurisdiction under both the "Interstate Commerce Clause" and "Necessary and Proper Clause" of the United States Constitution.[72] Nonetheless, Congress can exercise jurisdiction over college sports.[73] As discussed previously, in addition to its interstate commerce jurisdiction, Congress can claim jurisdiction over college sports through its creation of the Department of Education. For further proof of Congress' jurisdiction over college sports, note that "Congress has held at least 12 formal hearings regarding college sports in the past decade."[74] Yet, Congress has never passed legislation to regulate the NCAA or its member universities.[75]

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[70] *O'Bannon*, 2014 WL 2899815, at *11(finding that the NCAA "violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men's basketball and FBS football players any more than the current association rules allow.").

[71] *See, e.g.,* Fed. Baseball Club v. Nat'l League, 259 U.S. 200. (1922) (creating the "Major League Baseball Anti-Trust Exemption" by excluding Major League Baseball from the Sherman Act).

[72] U.S. CONST. art. I, §8, cl. 3, 18 ("The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States" and "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[73] As Congress created the Department of Education and NCAA sports are a branch of the institutions governed by this Department, a logical inference indicates that Congress has power over the NCAA universities.

[74] *But see* Todd Jones, *College Athletics: Congressional Hearing to Examine Union Issue*, THE COLUMBUS DISPATCH (May 8, 2014, 5:16 AM), http://buckeyextra.dispatch.com/content/stories/2014/05/08/congressional-hearing-to-examine-union-issue.html.

[75] *But see id*. (stating that the hearings have produced eight written reports on the NCAA).

C. An Overview of "Revenue-Generating" College Sports

1. Football and Basketball Versus the Rest

While the NCAA divides sports into divisions based upon certain factors such as school size and number of athletic programs, it does not differentiate between revenue-generating sports and non-revenue generating sports.[76] Although many Division I schools bring in millions of dollars because of their sports programs, a deeper breakdown proves that the general rule is that only the football and sometimes the basketball programs at NCAA universities tend to be profitable and self-supporting.[77] Despite this, the NCAA has failed to recognize that some college athletic programs are fully commercialized, while some still cling to the principles of amateurism.[78]

To examine this further, one only needs to look to the NFL and NBA draft eligibility requirements. A college football or men's college basketball player must wait until three years or one year, respectively, before they may enter a professional

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[76] *See generally* College Sports Scholarships, *Athletic Divisions of the NCAA*, COLLEGE SPORTS SCHOLARSHIPS, http://www.collegesportsscholarships.com/ncaa-divisions-differences.htm (last visited Aug. 16, 2014) (stating that Division I member schools are required to sponsor a minimum of seven sports for women and seven for men).

[77] *See* Lee, *supra* note 22 (noting that only football and men's basketball were reported as being profitable). *But see* Dave Berri, *Exploitation in College Sports: It's not Just Football and Basketball*, FREAKONOMICS (Apr. 6, 2012, 10:31 AM), http://freakonomics.com/2012/04/06/exploitation-in-college-sports-its-not-just-football-and-basketball/ (stating that a premium college hockey player generates profits in excess of $100,000 per year for the typical institution).

[78] *See* Ben Kercheval, *If the NCAA Allowed It, NFL Shouldn't Hesitate to Help Fund Cost of Scholarship*, BLEACHER REPORT (Apr. 10, 2014), http://bleacherreport.com/articles/2024136-if-ncaa-allowed-it-nfl-shouldnt-hesitate-to-help-fund-cost-of-scholarship (stating that "the NCAA has contributed to the problem by allowing football and men's basketball to become multibillion-dollar enterprises while lumping them together with nonrevenue sports.").

league's draft.[79] Meanwhile, the NFL and NBA use the NCAA as an unofficial training ground and an extended combine.[80] In contrast, the market for college volleyball is not so lucrative ("yet" some might say) resulting in the professional leagues having set age restrictions. However, the NFL and NBA have implemented these same rules to keep the talent pool from being drained out of college football and men's basketball.[81]

2. Title IX Implications

The Pay-for-Play movement has created a stir among those concerned with Title IX implications that may result from compensating student-athletes.[82] Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."[83] A revolutionary tool, Title IX is directly tied to a dramatic increase in the amount of opportunities for women at the collegiate level, including athletics.[84]

However, when understanding the idea of a Pay-for-Play structure, common conceptions about Title IX in college

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[79] *See generally id.* (quoting sportswriter Alicia Jessop that New NBA Commissioner Adam Silver has proposed raising the minimum NBA entry age).

[80] "Combine" refers to the NFL draft combine where scouts assess whether he or she thinks that a player will be successful based upon athletic abilities.

[81] *See* Chad Walters, *NBA and NFL Draft Eligibility Restrictions – Why?*, LEAN BLITZ CONSULTING (February 15, 2013), http://leanblitzconsulting.com/2013/02/nba-and-nfl-draft-eligibility-restrictions-why/.

[82] While it is not the focus of this article to address Title IX, a fully developed argument cannot be created without discussing how Title IX does not apply to the Pay-for-Play ideal.

[83] 20 U.S.C. §1681 et seq. (Westlaw 1986) [hereinafter Title IX]. Title IX is supplemented by its implementing regulation at 34 C.F.R. §106.

[84] *See* Christine I. Hepler, *Symposium: A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442 (2013).

athletics are misunderstood.[85] The market for college athletics lies largely in football and men's basketball.[86] Title IX does not address the issue of compensation, but rather, it means that women will be given the same opportunities.[87] Currently, the policy with regard to collegiate athletics is that women are afforded the same amount of sports (and often more) than the men in which to compete.[88] However, the market value for tickets to a women's sporting event are less than a men's sporting event.[89] As such, the market value for a men's basketball player is higher than a women's basketball player.[90]

Universities and the NCAA often claim that because money would be diverted to compensating the revenue-

[85] *See generally* Karen Blumenthal, *The Truth About Title IX*, THE DAILY BEAST (June 22, 2012), http://www.thedailybeast.com/articles/2012/06/22/the-truth-about-title-ix.html.

[86] *See* Brian Goff, *The Market Value of NCAA Athletes in the Millions*, FORBES (Mar. 31, 2014, 10:27 AM), http://www.forbes.com/sites/briangoff/2014/03/31/the-market-value-of-ncaa-athletes-in-the-millions/.

[87] *See* Jon Solomon, *If Football, Men's Basketball Players Get Paid, What About Women?*, CBSSPORTS.COM (June 5, 2014, 9:52 AM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24581041/if-football-mens-basketball-players-get-paid-what-about-women (quoting prominent attorney Jeffrey Kessler, who states that "Title IX says noting about the issue of compensation. Title IX talks about giving equal opportunities to participate in athletics . . . It's really not different now than the head football coach at Alabama [making] more money in salary than all of the female coaches at Alabama put together. That's not at Title IX violation."). *But see Pay for Play and Title IX*, N.Y. TIMES, March 23, 2014, at SR12 (supporting the idea that male athletes in revenue generating sports could not be awarded additional financial aid scholarships because the total amount of financial aid available to male and female athletes must be "substantially proportionate" to their overall participation rates).

[88] *See generally* Solomon, *supra* note 87.

[89] *See, e.g.,* K.S.C., *Why Professional Women's Sport is Less Popular than Men's*, THE ECONOMIST (July 27, 2014, 11:50 PM), http://www.economist.com/blogs/economist-explains/2014/07/economist-explains-19 (note that while this addresses professional sports, the result is the same in college sports).

[90] *See* Solomon, *supra* note 87.

generating sports' student-athletes, the universities would be forced to cut other programs. However, this will not affect Title IX. Instead, if anything, men's sports will likely see cuts, as Title IX will not allow women's sports to be cut. This is because, even if cuts resulted, men's programs would be the first to go to retain compliance with Title IX. But in the end, it comes down to equal *opportunity*, not equal compensation. The head football coach for the Alabama football program makes more than all of the female coaches at Alabama combined, and yet that is not considered a Title IX violation.[91] In the end, women's sports likely will not see cuts as the revenue needed will increasingly be generated by more lucrative television contracts, cuts in exorbitant head coaching contracts, and increased ticket revenue. However, if a women's sport does become revenue-generating in the future to the point that it is a professional, commercial activity rather than educational, the same argument applies and a female student-athlete should be entitled to compensation.

3. Are All Student-Athletes Employees?

As already discussed, an average student-athlete devotes a substantial amount of his time in college to the athletic field.[92] However, the commercialization of the major, revenue-generating college sports has created a massive market for college football and basketball. As such, the NLRB decided that the grant-in-aid student-athletes on Northwestern University's football team are employees.[93] Under this doctrine, it stands to reason that all

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[91] *See* Solomon, *supra* note 87.

[92] *See* Decision and Direction of Election, *supra* note 8, at Part III.D (discussing how the student-athlete devotes 40-60 hours per week during the season to his particular athletic program). *See generally* Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014; 10:11 AM), http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/ (stating that "the typical Division I football player devotes 43.3 hours to his sport – 3.3 more than the typical American worker.").

[93] Decision and Direction of Election, *supra* note 8, at Part IV.B ("Section 2(3) of the Act provides in relevant part that the "term 'employee' shall include any

student-athletes receiving grant-in-aid scholarships would also be considered employees. However, requiring compensation for all scholarship athletes would be prohibitively expensive and universities would likely be forced to cut programs.[94] Because of the delicate balance that needs to be struck, Congress must legislate to create a new class of employee that will accomplish two things. First, Congress' new class of employee must allow for proper compensation among the revenue-generating student-athletes. Second, Congress must actively remove non-revenue generating sports from consideration as employees.[95] Failure to remove non-revenue generating sports' student-athletes from the compensation structure would be detrimental to both those sports as well as to the revenue-generating student-athletes. Plus, non-revenue generating sports' student-athletes often play more for the scholarship than for a future career in that sport.[96]

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employee . . . " The U.S. Supreme Court has held that in applying this broad definition of "employee" it is necessary to consider the common law definition of "employee") (citing Nat'l Labor Relations Bd. v. Town & Country Elec., 516 U.S. 85, 94 (1995)). Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment.

[94] *See* Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics (noting that Title IX may be the best argument against Pay-for-play in college sports). To not remove non-revenue generating sports' student-athletes from the compensation structure would be detrimental to both those sports as well as to the revenue-generating student athletes. Non-revenue generating sports' student athletes often play more for the scholarship than for a future career in that sport.

[95] Removing non-revenue generating student athletes in sports that do not turn a profit will ensure that universities do not cut these programs in the fear that they will be required to compensate the student-athletes outside of the scholarships that are already provided.

[96] *See* Jeffrey Standen, *The Next Labor Market in College Sports*, 92 OR. L. REV. 1093, 1123 (2014) ("Young players devote themselves to games out of passion . . . or for the chance at a college scholarship with its marginal opportunity at a professional career.").

D. Can Student-Athletes Be Properly Compensated?

1. Student-Athlete Interest Versus University Interest

While one might think that the "front lines" have been drawn in this war between student-athletes and universities, the Drake Group – comprised of university faculty members – has proved that these battle lines are not so rigid.[97]As a result of the Drake Group's efforts, in 2013, Representative Tony Cárdenas introduced a bill entitled the "College Student-Athlete Protection Act" (" CSPA") to the floor of the United States House of Representatives.

Universities tout the idea that they are solely institutions of education, while skirting the idea that they are businesses as well, beholden to much the same marketing and business models as many corporations. However, just like any business, universities regularly compete to be the best educationally by recruiting the best university presidents, provosts, deans, professors, and other faculty through the use of monetary compensation and other remuneration such as healthcare benefits, pensions, and vacation packages.[98] Students attending universities such as Harvard pay much higher tuition costs to presumably receive a much superior product as compared to the typical state or private university.[99]

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[97] The Drake Group is a national association of university faculty members originally organized to defend academic integrity in higher education from the corrosive aspects of commercialized college sports. *See generally The Drake Group*, THE DRAKE GROUP, http://thedrakegroup.org/ (last visited Aug. 14, 2014).

[98] *See, e.g.,* Michael Kan, *Faculty Pay Can't Compete with Ivies League*, THE MICHIGAN DAILY (Jan. 10, 2006), http://www.michigandaily.com/content/faculty-pay-cant-compete-ivies-league.

[99] *Compare* Harvard University, *Cost of Attendance*, HARVARD, https://college.harvard.edu/financial-aid/how-aid-works/cost-attendance (last visited Sept. 5, 2014) (showing that the cost of attendance at Harvard University was about $60,550/year in 2013-2014), *with* COLLEGEdata, *What's the Price Tag for a College Education?*, COLLEGEDATA, http://www.collegedata.com/cs/content/content_payarticle_tmpl.jhtml?articleId=

But when it comes to college sports and student-athletes, the NCAA would have us believe that college sports are not a business, but are rather "motivated primarily by education and by the physical, mental[,] and social benefits to be derived."[100] Time and time again, the NCAA's principle of amateurism serves to "hide the ball" much like a carnival game designed to trick and confuse a participant and bystander alike. While the NCAA's intentions were likely pure when the principle of amateurism was initially implemented more than half-a-century ago, since that time major college sports have become fully commercialized and the NCAA is no longer doing student-athletes any favors by "protecting them from the commercialization of college sports." Instead, the NCAA is partially exploiting student-athletes for its own gain under the guise of protection.

In *O'Bannon*, the NCAA argued that if it were to provide compensation to student-athletes, the competition among universities would upset the balance of competition in college sports.[101] Yet the NCAA could not prove this argument.[102] Instead, it is more likely that the most athletically gifted student-athletes will continue to attend the most elite universities as they always have because student-athletes choose to attend a certain university based on a number of non-monetary factors.[103]

10064 (last visited Sept. 5, 2014) (stating that the average cost of attendance for a "moderate" university in 2013-2014 is $22,826 and $44,750 for state and private universities, respectively).

[100] *Div. I Manual* art. 2.9 (2013).

[101] *O'Bannon*, 2014 WL 2899815, at *126.

[102] *Id*. at 126-30 (quoting testimony based on Katie Baird's article "Dominance in College Football and the Role of Scholarship Restrictions" revealing that "at least, [NCAA regulations] appear to have a very limited effect, and at worst they have served to strengthen the position of the dominant teams.").

[103] Standen, *supra* note 96, at 1097, 1119-21 ("[s]tudent-athletes who in the past would have attended non-elite schools will not choose differently on account of the availability of potentially greater compensation elsewhere. The top programs will continue to attract the finest coaching talent, and will continue to fund college athletics as before"). S*ee also id*. at 1126 (concluding that "the demise of

2. Can Universities Afford it? Does it Matter?

NCAA universities have fully abided by the NCAA's principle of amateurism, keeping student-athletes well below the poverty line while the athletic directors and coaches earn millions of dollars.[104] A report released in 2011, found that if college sports shared revenue the same way as professional sports, the average Division I FBS football player would be worth $121,000 per year and the average basketball player at the same level would be worth $265,000 per year.[105] Universities and the NCAA often counter by stating that, if forced to compensate revenue-generating student-athletes, they will be forced to cut athletic programs.[106] The argument advanced, however, is flawed. The idea that it is acceptable to deny revenue-generating student-athletes compensation so as not to cut non-revenue generating programs is not tenable. If the NCAA's principles of amateurism are true, the NCAA will find a way to make up the difference by, for example, cutting back on gargantuan salaries offered to football and men's basketball coaches or sharing some of the impressive licensing agreement revenue.[107] In all but ten states, the highest paid public employee is the head football or basketball coach.[108] For example,

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the amateur ideal, however undesirable on other grounds, will not likely change the nature of collegiate athletic competition.").

[104] *See* Edelman, *supra* note 64, at 68 (citing Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES (Jan 1, 2012), 32 (Magazine) (noting that "premier college coaches can earn as much or more than a professional coach.")).

[105] Frederic J. Frommer, *Report: Top College Athletes Worth 6 Figures*, USA TODAY (Sept. 12, 2011, 6:32 PM), http://usatoday30.usatoday.com/sports/topstories/2011-09-12-662979720_x.htm.

[106] *See supra* Part IV.C.2 for a discussion on Title IX ramifications and cuts to women's athletic programs.

[107] *See* Lee, *supra* note 22 (reporting that athletic departments spend about 32% of their entire budget on coaches' salaries and benefits – more than any other single expenditure), *and* Ben Cohen & Sara Germano, *Nike Reaches $252 Million Deal to Extend Sponsorship at Ohio State*, WALL ST. J., http://www.wsj.com/articles/nike-reaches-252-million-deal-to-extend-sponsorship-at-ohio-state-1452811305 (last visited Jan. 19, 2016) (noting that The Ohio State University will receive $112 million in Nike products and $103 million in cash from the contract extension).

[108] *See* Edelman, *supra* note 3.

Alabama head football coach Nick Saban received over $7 million in compensation in 2014.[109] However undesirable, it is also possible that football and men's basketball powerhouses may increase ticket and memorabilia prices to help soften the financial blow.

E. How Should Compensation Be Structured?

1. Full Cost of Attendance

Currently, a student-athlete who receives a grant-in-aid athletic scholarship is not entitled to compensation that equals or exceeds the actual cost of attendance.[110] Thus, the "full scholarship" so regularly touted is a misconception.[111] Often, scholarships will provide full tuition and fees and often could provide a housing stipend.[112] However, the practical realities of college students do not align with the compensation structures of the NCAA. Some headway was made in the "Power Five" conferences since the

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[109] NCAA Salaries, *Nick Saban*, USA TODAY, (http://sports.usatoday.com/ncaa/salaries/) (last visited May 26, 2015).

[110] *See* Karen Gullo & Patrick G. Lee, *NCAA Sued Over College Football Player Scholarship Caps*, BLOOMBERG (Mar. 5, 2014, 6:22 PM), http://www.bloomberg.com/news/2014-03-05/ncaa-sued-over-caps-on-college-football-player-scholarships.html (noting that a class-action lawsuit was filed against the NCAA and the Power Five conferences, claiming that they conspired to limit the value of a scholarship to less than the cost of attendance. The named plaintiff, Shawne Alston, had to take out a $5,500 loan to cover the gap in the cost of attendance); *Study: 'Free Ride' Still Costs Athletes*, ESPN (Oct. 26, 2010, 1:08 PM) (showing that "report by Ithaca College researchers and a national athletes' advocacy group shows that the average "full scholarship" Division I athlete winds up having to pay $2,951 annually in school-related expenses not covered by grants-in-aid."). *But see* Weiner, *supra* note 32 (breaking down the value of the average men's basketball scholarship).

[111] *See* Tom Liberman, *Not Enough to Eat for Scholarship Athletes*, TOM LIBERMAN (Apr. 19, 2014), http://www.tomliberman.com/sports/not-enough-to-eat-for-scholarship-atheletes.

[112] *See, e.g., Athletic Scholarships*, SCHOLARSHIPS, https://www.scholarships.com/financial-aid/college-scholarships/scholarships-by-type/athletic-scholarships/ (last visited Sept 6, 2014).

CAPA decision was handed down.[113] In August 2014, the NCAA adopted a Division I model that grants authority to the Power Five so that these conferences can create their own rules in certain areas – including compensation structures – to benefit college athletes.[114] But there is still much to do.

Non-athletes in college often have a part or full-time job, and are allowed to do so even if they have another type of scholarship.[115] However, because a typical student-athlete devotes between 40 and 60 hours per week to their athletic endeavors, they are left with very little time to study or socialize, and a part or full-time job is an unrealistic idea.[116] Student-athletes often must find a way to make up the difference. For some, that comes in trading their sports memorabilia for services.[117] For others, it means taking out loans or asking for help from parents – if they can even afford it. As a significant amount of student-athletes come from economi-

[113] The "Power Five" conferences are the five powerhouse conferences – comprised of 65 universities – in the NCAA Division I structure (the conferences are the: Big Ten, Southeastern ("SEC"), Big 12, Pac-12, and Atlantic Coastal ("ACC") conferences).

[114] Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014, 1:41 PM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24651709/ncaa-adopts-new-division-i-model-giving-power-5-autonomy.

[115] Note that often other restrictions on scholarships exist, such as maintaining a certain grade point average, but these restrictions are usually placed on student-athletes' scholarships as well.

[116] *See generally* discussion *supra* Part II.A.

[117] *See generally* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (explaining how college football and basketball are rife with scandal due to college athletes taking money under the table in apposition to NCAA amateurism policies). *See generally* Rusty Miller, *A Lot Happened in a Year in Ohio State Scandal*, BOSTON.COM (Dec. 21, 2011), http://www.boston.com/news/nation/articles/2011/12/21/a_lot_happened_in_a_year_in_ohio_state_scandal/ (Former Ohio State University star Quarterback, Terrelle Pryor, was caught in a scandal in 2010, where he and a few other fellow student-athletes traded sports memorabilia and autographs in exchange for free tattoo work from a local tattoo parlor. Pryor and the other students were then suspended for some or all of their remaining college athletic careers).

cally disadvantaged homes, parents often cannot help student-athletes pay for such expenses.

Additionally, based on certain financial eligibility thresholds, non-athletes will often qualify for federal or state student "work-study" programs that will allow them to earn money to help pay educational expenses in lieu of taking loans or other financial aid.[118] The NCAA is well within its power to ensure that grant-in-aid scholarships cover the full cost of attendance, including costs of living. However, the NCAA has been reluctant to implement such a policy. Because of this, Congress must take action.

2. Allow NCAA Student-Athletes to Participate in the Free Market

One clear option exists to ensure that student-athletes are allowed compensation without directly costing the university or the NCAA a penny out-of-pocket. This is, of course, under the idea that the NCAA can revise its current policy that forbids student-athletes from receiving monetary benefit from their athletic status. The change would be simple: allow student-athletes to participate in an already thriving market – the market for the athletes' image, likenesses, and memorabilia.[119] Currently, NCAA student-athletes are not allowed to sell, trade, or otherwise receive value for their status as a student-athlete. A student may not use memorabilia awarded to him by his university to receive services, receive any sort of remuneration for signing autographs, make appearances at local establishments or events, or receive any sort of benefits from prospective agents leading up to graduation or

[118] *See generally* Office of the U.S. Department of Education, *Work-Study Jobs*, FAFSA, https://studentaid.ed.gov/types/work-study (last visited Aug. 16, 2014). "Federal Work-Study provides part-time jobs for undergraduate and graduate students with financial need, allowing them to earn money to help pay education expenses. The program encourages community service work and work related to the student's course of study." *Id.*

[119] Memorabilia would likely need to be the student-athletes' own, personal memorabilia – not items belonging to the NCAA or the university.

entry into professional drafts.[120] However, many non-athletes in college often make money on the side due to their affiliation with a particular college or university.[121]

If student-athletes were permitted to make money on their likeness, image, or memorabilia, they could then sign pictures of themselves, autograph balls and other items, and do other things of the sort and receive money. Granted, these athletes likely could not sell jerseys with school logos on them and other things subject to licensing restrictions; however, a student-athlete could have a picture of him in a generic uniform or in other workout gear and that would not violate the licensing agreements. Furthermore, an athlete could receive a contract with major sportswear companies such as Nike, Adidas, Under Armour, or Reebok, and could receive monetary deals with such companies. Moreover, student-athletes could create commercials for these companies and many more such as Bose or Beats in the way that many NFL and NBA players do. All of these things are currently forbidden to student-athletes thus keeping the market untapped.

Additionally, the NCAA's restrictions on student-athlete compensation have slowly been eroding. In 2012, Texas

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[120] Terrelle Pryor and other student-athlete football players from The Ohio State University were rendered ineligible for parts of the football season for trading their own personal memorabilia in exchange for tattoos. *See generally* George Schroeder, *'No Evidence' Manziel Took Money for Autographs, A&M Says*, USA TODAY (Aug. 28, 2013, 6:11 PM), http://espn.go.com/espn/otl/story/_/id/9544137/broker-says-johnny-manziel-took-7500-autographing-helmets (commenting on how Johnny Manziel was suspended for one half of a game for signing autographs, even though there was no evidence that he received any sort of remuneration for the event). *See generally* Charles Robinson & Jason Cole, *Cash and Carry*, YAHOO! SPORTS (Sept. 15, 2009, 2:59 AM), http://sports.yahoo.com/ncaa/football/news?slug=ys-bushprobe (citing an eight-month investigation which uncovered evidence that former Heisman Trophy winner Reggie Bush and his family appear to have accepted improper benefits from prospective agents while still in college).

[121] Local, regional, and national businesses use student representatives as marketing opportunities within the college community and will usually pay the campus representative – who is almost always a current student of the university – hourly wages, salaries, or commissions.

A&M star quarterback Johnny Manziel set up a limited liability company, JMAN2 Enterprises, LLC, and filed for a trademark on his well-known nickname, "Johnny Football."[122] In 2013, Manziel filed a trademark infringement suit against a person selling various "Johnny Football" memorabilia.[123] Because of this lawsuit, the NCAA issued a ruling that a student-athlete can keep financial earnings as a result of a legal action.[124] This effectively created a loophole within current NCAA policies, meaning that almost nothing stops NCAA "boosters" from purposefully infringing on a player's nickname and then paying up when the player brings suit.[125] This just furthers the idea that Congress ought to open student-athletes to the free market, instead of passively condoning loopholes and back channeling to make money on something that the athlete already owns.

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[122] *See* Darren Rovell, *Suit Claims Nickname Infringement*, ESPN (Feb. 23, 2013, 10:09 AM), http://espn.go.com/college-football/story/_/id/8977054/lawsuit-filed-claims-johnny-football-infringement.

[123] *See id*. *See also* J.G. Joakim Soederbaum, *Comment: Leveling the Playing Field – Balancing Student-Athletes' Short-and Long-Term Financial Interests with Educational Institutions' Interests in Avoiding NCAA Sanctions*, 24 MARQ. SPORTS L. REV. 261, 283 (2013) (quoting Rovell, *supra* note 122.)

[124] Clay Travis, *Johnny Manziel Opens Massive Loophole in Paying Players Rule*, OUTKICK THE COVERAGE, FOX SPORTS (Feb. 25, 2013, 5:31 PM), http://www.foxsports.com/college-football/outkick-the-coverage/johnny-manziel-opens-massive-loophole-in-paying-players-rule-022513.

[125] *See id*. ("Manziel can't directly profit off the sale of licensed products featuring his likeness, but he can pocket any proceeds that arise from a trademark lawsuit. Which is basically the same thing. Raising this interesting question, what's to keep a bunch of Texas A&M boosters from intentionally infringing on Manziel's trademark, being sued for doing so, and then settling out of court for hundreds of thousands of dollars in legal payments to Manziel? Nothing."). *But see* Darren Heitner, *Johnny Football to Become Johnny Cash?: Protecting Manziel's Intellectual Property and Ability to Cash-In*, FORBES (Feb. 26, 2013, 2:06 PM) http://www.forbes.com/sites/darrenheitner/2013/02/26/johnny-football-to-become-johnny-cash-protecting-manziels-intellectual-property-and-ability-to-cash-in/ (noting that taking advantage of this loophole regularly could possibly turn into violations of criminal statutes such as wire fraud and racketeering, as well as possibly collusion in filing frivolous lawsuits).

3. Reclassify Student-Athletes to Qualify Under the Federal Work-Study Program

Congress created the Department of Education, which administers the federal work-study program ("FWSP") and can pass legislation as necessary.[126] As such, Congress has the implicit authority to restructure the FWSP.[127] The FWSP "provides funds for part-time employment to help needy students to finance the costs of postsecondary education."[128] It uses a statutory formula to allocate federal funding toward students at universities throughout the United States.[129]

However, if the FWSP were restructured, at least one of two things would happen. First, students who are not student-athletes would likely see their FWSP opportunities cut. Or second, Congress would have to find a way to cover the cost of including student-athletes in the program.[130] Ultimately, restructuring the FWSP while likely part of the solution, is not the whole solution.

F. Why Leave the Job to Congress?

Representative John Kline stated that "classifying student-athletes as employees threatens to fundamentally alter college

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[126] *See* 20 U.S.C. §3401 et seq. (Westlaw 2006) (creating the Department of Education); *see also* 42 U.S.C §4271 et seq. (Westlaw 2006) (implementing the Federal Work Study Program).

[127] *See generally* 42 U.S.C. §4271 et seq. (Westlaw 2006).

[128] U.S. Department of Education, *Federal Work Study Program*, ED.GOV, http://www2.ed.gov/programs/fws/index.html (last visited Sept. 6, 2014) ("Students can receive [FWSP] funds at approximately 3,400 participating postsecondary institutions. Hourly wages must not be less than the federal minimum wage.")

[129] *See id*. (the students must file a Free Application for Federal Student Aid ("FAFSA") which calculates the student's need for such funding).

[130] Covering the cost could come in a myriad of ways including, but not limited to, the following: raising taxes; revoking its non-profit, tax-exempt status; or requiring the NCAA to pay dues to a FWSP program.

sports, as well as reduce education[al] access and opportunity."[131] But one thing has been clear for years: big time college athletics need to be "fundamentally altered." Big time college athletics have been fully commercialized for years even though the NCAA has not evolved with the times.[132]

Moreover, Representative Kline failed to state how compensating student-athletes would alter educational access. As discussed earlier, many different avenues of restructuring compensation schedules are available.[133] It is more likely that Congress is afraid to act for fear of alienating the electorate. A March 2014 poll showed that significant majority of voters oppose the idea of compensating student-athletes beyond their scholarships.[134]

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[131] Jones, *supra* note 74 (quoting Representative Kline; Kline also stated that "The NLRB's decision represents a radical departure from longstanding federal labor policies"). Representative Kline is a Republican Congressman from Minnesota and also Chairman of the House Education and Workforce Committee.

[132] *See* Branch, *supra* note 117 ("Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes.").

[133] *See, e.g.,* Edelman, *supra* note 3 (noting that compensation can be restructured to reduce the exorbitant college coach, Athletic Director, and NCAA employee salaries to offset the costs of compensating student athletes).

[134] *See* Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes, Washington Post-ABC News Poll Finds*, WASHINGTON POST (Mar. 23, 2014), http://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html (quoting ESPN Analyst Jay Bilas: "'It's laughable, but it's not funny [. . .] They pay the scholarship, which is the amount the school pays to itself. They're not out a nickel. The athletics department pays the school. Then they claim that they're poor. Then they pay themselves these outrageous salaries that are market-based, but they say they don't have any money to give to the players, but they have $8 million to give to a football or basketball coach' . . . According to the poll, critics like Bilas are in the minority. Only 19 percent indicated they strongly support paying salaries to college athletes.").

Congress has long had the power to define an "employee," and has statutorily done so in §2(3) of the NLRA.[135] Additionally, the Supreme Court has held that, when determining whether an individual is a statutory employee under the NLRA, one must also consider the common law definition of employee.[136] While the NLRA contained an enabling statute, giving power to the NLRB to define an employee, this does not mean that Congress is without authority to take up the mantle again.

As such, a bill entitled the "Collegiate Student-Athlete Protection Act" ("CSAP"), has been introduced in Congress that aims to alleviate the issues confronting student-athletes in the revenue-generating sector of college sports.[137] If passed, the CSAP would amend the Higher Education Act of 1965 and would require an institution of higher education that has an athletic program that annually receives $10 million dollars or more in income to comply with certain additional requirements concerning student-athletes to be eligible to continue receiving federal student assistance and work-study programs.[138] However, most of the requirements – while both needed and beneficial – do not directly address the issue of student-athlete compensation.[139]

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[135] *See* 29 U.S.C. §152(3) (Westlaw 2006).

[136] Nat'l Labor Relations Bd. v. Town & Country Elec., 516 U.S. 85, 93-94 ("[I]n the context of reviewing lower courts' interpretations of statutory terms, we have said on several occasions that when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute "'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term . . . . In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" (quoting, in part, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992)).

[137] Collegiate Student Athlete Protection Act, H.R. 3545, 113th Cong. (2013) [hereinafter CSAP].

[138] This bill only applies if the income is derived from media rights for television coverage of the institution's athletic program. *Id.*

[139] *See generally* CSAP, *supra* note 137 (CSAP addresses such issues as banning the revocation of an athletic scholarship to a student athlete due to: injury, illness, involuntary dismissal from the team [excluding disciplinary purposes], exhaustion of athletic eligibility, and formal administrative hearings for discipli-

Judge Wilken indicated in *O'Bannon* that criticisms abound in the use of the Sherman Act for further cases against the NCAA's policies.[140] She indicates that the NCAA, its member schools and conferences, or Congress – individually or collectively – could undertake reforms to the NCAA's anti-competitive policies.[141] However, the NCAA's structure makes it incredibly difficult to institute reforms.[142] Furthermore, the universities are hamstrung from compensating the players because of the NCAA's compliance department and the fear of sanctions and possibly the infamous "death penalty."[143]

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nary dismissals from the team. A summary of the proposed benefits can be found at https://beta.congress.gov/bill/113th-congress/house-bill/3545).

[140] *See O'Bannon*, 2014 WL 2899815, at *151 ("To the extent other criticisms have been leveled against the NCAA and college policies and practices, those are not raised and cannot be remedied based on the antitrust causes of action in this lawsuit. It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here.").

[141] *Id*.

[142] *See* Steve Berkowitz, *NCAA's Mark Emmert Gets Grilling from Senate Committee*, USA TODAY (July 10, 2014, 2:59 AM), http://www.usatoday.com/story/sports/college/2014/07/09/senate-commerce-committee-ncaa-mark-emmert/12409685/ ("In response to Emmert having noted earlier in the hearing that he has a limited role in NCAA rules-making that is ultimately done largely by college presidents, [Senator Claire] McCaskill said: 'I can't tell whether you are in charge or whether you are a minion" to the schools and college presidents.'").

[143] *See generally Death Penalty (NCAA)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Death_penalty_(NCAA) (last visited Aug. 21, 2014) (noting that the death penalty has only been instituted three times in revenue-generating college sports, and led to Southern Methodist University's downfall from the pinnacle of college sports in 1986).

V. CONCLUSION

A. Congress has a Duty to Act

The NCAA's revenue-generating sports – football and men's basketball – are ripe for serious reform. However, the NCAA has failed to implement systematic change that has been necessary since the commercialization of big time college sports. As such, Congress must act. While the action proposed in this article would be largely an exercise in public policy, precedent does exist by which Congress could justify its actions. By combining the rulings of cases such as *Law*, *O'Bannon*, and the recent CAPA decision, it is clear that student-athletes of these commercialized college sports are employees and must be compensated accordingly.

B. Three Non-Exclusive Options: (1) Structure Compensation Plans for "Revenue-Generating" Student-Athletes; (2) Force the NCAA to Allow Student-Athletes to Compete in the Free Market; (3) and Restructure the Federal Work-Study Program

Congress has three avenues to institute reform. First, Congress can structure compensation plans to ensure that student-athletes receive the full cost of attendance at their universities. These plans should be aimed at compensating student-athletes while ensuring that the universities are not effectively forced to discontinue major college sports. A quick Internet search shows that suggestions are legion about how this compensation should be structured. However, because the NCAA will not enact this type of policy on its own, Congress must step in and take up the mantle.

Second, Congress can legislate to prohibit any NCAA polices that forbid student-athletes from using their likeness, image, or personal memorabilia to earn money. The idea that a student cannot profit off of his association with a particular university is untenable, considering that "student representatives" are readily seen around college campuses.

Third, the NCAA can restructure the Federal Work Study Program to allow student's athletic endeavors to be counted toward hours worked and compensate them for these activities. Student-athletes should be allowed to use their "optional" workouts and other trainings as countable toward the FWSP. However, if Congress decides to use this option, it must be incredibly delicate. When restructuring the FWSP, Congress should be careful not to reduce the availability of work to non-athletes. Congress may need to create revenue from the NCAA or the universities in the forms of fees to cover this cost. Perhaps the NCAA will be more willing to make changes once Congress gets in its pockets. It's only fair – after all, the NCAA is actively keeping money out of the student-athlete's pockets through its blind belief in the "principles of amateurism."

C. Congress Should Create a Class of Employee that Requires Student-Athletes to Receive the Full Cost of Attendance and also Forbids Restricting Compensation from Third Parties for Image, Likeness, and Memorabilia Sales

While all of the options outlined above would each help to properly compensate student-athletes in revenue-generating sports, Congress should limit legislation to include option one and two, while excluding option three. In other words, Congress should institute legislation that will *require* universities to provide scholarships amounting to the full cost-of-attendance, rather than merely providing tuition and fees. This cost-of-attendance should also be sure to include necessary benefits such as travel stipends, medical coverage, housing allowances, and other things necessary for student-athletes to attend college. This will be their "salary," if you will.

Second, Congress *must* create an avenue for student-athletes to profit off of their image, likeness, and personally owned memorabilia. To continue to allow the NCAA to forbid students from doing so unreasonably restrains trade in violation of the Sherman Act. However, student-athletes should not have to go to

court every time they are suspended for selling autographs or signing a football or basketball. Opening up this "secondary market" will do much to alleviate the tension between the NCAA and student-athletes. Of course, student-athletes may still be prohibited from signing jerseys with NCAA or university logos, but training student-athletes, contractual negotiation, and—if that fails—trademark remedies could then be pursued as a way to flesh that out.

The third option of expanding the Federal Work Study Program should be avoided. The red tape that would be required to implement this program would likely make it prohibitively expensive. Congress would have to appropriate more funds for an already strained federal budget and a distinct possibility exists that opportunities would be taken away from students who currently work for this funding.

Too long have student-athletes been "shielded" from fully commercialized, revenue generating college sports – all under the guise of amateurism. The NLRB got it right in the *CAPA v. NCAA* decision. Many college student athletes are not amateurs; they are employees. It is time Congress treats them as the professional employees that they are.

TRADEMARK LICENSING: FASHION FORWARD PROTECTION AGAINST 3D PRINTING

Naomi E. Abraham[1]

ABSTRACT

In recent years, 3D printing has become more prevalent in United States manufacturing. This emerging technology is used in the biotechnology industry, the food industry, and will soon enter the fashion industry. Even though it is still a rarity reserved primarily for fashion shows, there will be a time when 3D printed cotton and thread are finally perfected and made available for home use. Once this technology is available for home use in a few years, fashion brands will likely feel threatened by infringing articles of clothing.

Lawyers currently estimate that millions of dollars of intellectual property protection will be lost due to 3D printing infringers and 3D printed counterfeit items. The fashion industry is severely threatened by the increased ease of counterfeiting through this technology, especially with its emphasis on logos and brand awareness. Because it is inevitable that 3D printing will have a significant role in the manufacturing process, the fashion industry should take advantage of this innovative idea by entering into trademark license agreements.

This article discusses how trademark protection is best suited for the fashion industry and how trademark licensing is the most

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practical solution to protect fashion brands against infringement due to 3D printing. Trademark licensing offers a reasonable solution to allow 3D printing manufacturers to 3D print authentic branded items for sale and it allows consumers to correctly identify the source of the good.

I. INTRODUCTION

President Obama once noted that, "3D printing…has the potential to revolutionize the way we make almost everything."[2] The popularity of this technology is increasing through a national push to modernize manufacturing in addition to a new wave of startups that make 3D printed materials and objects more accessible to consumers.[3] To date, companies are offering a wide variety of 3D printed items including food, airplane parts, and human organs.[4]

On March 4, 2013, Dita Von Teese wore a fully 3D printed gown[5] made out of a flexible wearable "fabric," which was created from layers of fine powdered nylon.[6] Following Von Teese's debut, 3D printing became attractive to fashion designers because it promised quicker and cheaper manufacturing, customization, and a trend of 3D clothing designs.

With the ease of manufacturing items at home, there are increasing concerns for trademark protection in the fashion industry regarding

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[2] President Barack Obama, 2013 State of the Union (Feb. 12, 2013).
[3] Jeremy Hsu, *3D Printing: What a 3D Printer Is and How It Works*, LIVESCIENCE (May 21, 2013, 12:57 PM), http://www.livescience.com/34551-3d-printing.html.
[4] *See, e.g.*, *30 Things Being 3D Printed Right Now*, THE GUARDIAN (Jan. 29, 2014, 7:40), http://www.theguardian.com/technology/2014/jan/29/3d-printing-limbs-cars-selfie.
[5] Duann, *Revealing Dita Von Teese in a Fully Articulated 3D Printed Gown*, THE SHAPEWAYS BLOG (Mar. 5, 2013), http://www.shapeways.com/blog/archives/1952-Revealing-Dita-Von-Teese-in-a-Fully-Articulated-3D-Printed-Gown.html.
[6] Dan Howarth, *3D-Printed Dress for Dita Von Teese*, DE ZEEN MAGAZINE (Mar. 7, 2013), http://www.dezeen.com/2013/03/07/3d-printed-dress-dita-von-teese-michael-schmidt-francis-bitonti/ ("The laser 'sinters' the nylon into form, a process known as select laser sintering.").

authenticity and quality control. The ability to precisely imitate a design, in particular, creates a huge potential for counterfeits. There is also the danger of producing low-quality items that infringe upon a high-quality brand, such as a fake purse.[7] A fake 3D printed Chanel purse is shown in Figure 1:

Figure 1[8]

Fashion brands have begun to seek various forms of intellectual property protection to deter others from infringing on their products. This article ultimately argues that the fashion industry should turn to trademark protection through the use of licensing agreements to protect their brands against the threat of 3D printing

A trademark is a symbol used to indicate the source of goods, like a brand name or a logo.[9] Trademark licensing is a "contractual agreement that permits the use of a trademark by persons other than the trademark owner."[10] By licensing their trademarks to select 3D printing companies, consumers are less likely to be confused as to the source of a 3D printed item and more likely to avoid deception by counterfeiters attempting to pass off fake merchandise as authentic.

The sector of the fashion industry that this article most applies to is the "accessible brands" sector. "Accessible brands" are fundamentally the companies that would be more open to licensing based on their availability in multiple locations, like its own flagship stores, department stores, and online.

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[7] *3D Printing, Copyright Nightmare or DIY Heaven?*, THE BUSINESS OF FASHION (Oct. 23, 2012), http://www.businessoffashion.com/2012/10/3d-printing-copyright-nightmare-or-diy-heaven.html.
[8] *Id.*
[9] Lanham Act, 15 U.S.C. §1127 (Westlaw 2009).
[10] *Quality Control and the Antitrust Laws in Trademark Licensing*, 72 YALE L.J. 1171 (1963) [hereinafter *Quality Control*].

II. TRADEMAKRS AND THE INTEGRATION OF 3D PRINTING INTO FASHION

The introduction of 3D printing into the clothing manufacturing process, as well as family households, will only amplify the issue of trademark infringement through counterfeit merchandise, online fraud, and bad faith business practices. To understand the recommendation for heightened trademark protection via licensing in the fashion industry, it is necessary to review current trademark protection issues, 3D printing in fashion today, and licensing agreements.

A. What is a Trademark?

A trademark is a "word, name, symbol, device, or other designation . . . that is distinctive of a person's goods or services and that is used in a manner that identifies those goods . . . and distinguishes them from other goods."[11] Examples of famous trademarks include Google, Apple, Gillette, Disney, and McDonald's.[12] The primary purpose of trademark law is to prevent the likelihood of confusion among consumers as to the source of a product while incentivizing trademark owners to invest in the quality of their products in order to maintain their goodwill.[13] A trademark, therefore, functions as an indicator of consistent product quality, whether it is manufactured in-house by the trademark owner or by an authorized licensee.[14]

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[11] 15 U.S.C. § 1127 (Westlaw 2009).
[12] *The World's Most Valuable Brands*, FORBES, http://www.forbes.com/powerful-brands/ (last visited Jan. 31, 2015).
[13] *See* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 190 (1985) (justifying trademark protection to secure the goodwill of a business and to protect consumers to distinguish among competing products).
[14] 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:55 (4th ed. 2014).

B. Trademarks in Fashion

Trademark protection is the most valuable intellectual property asset owned by a fashion enterprise.[15] Fashion's dependence on trademark law is reflected by significant trademark developments, including the use of color as a trademark, product packaging and product design, trade dress, dilution by blurring, and secondary liability for counterfeit items.[16] The fact that the value of fashion depends on the allure of a brand and that this allure is protected by intellectual property law provides enough incentive to litigate these trademark infringement cases.[17]

The price of a T-shirt mostly depends on its brand name.[18] Since the 1860s, designers began using marks as a way to authenticate their designs and avoid counterfeits.[19] During "logomania,"

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[15] Charles E. Colman, *An Overview of Intellectual Property Issues Relevant to The Fashion Industry*, 2012 WL 167352, 1 (2002) ("trademark protection tends to eclipse other forms of intellectual property protection in the fashion world.").
[16] *See* Christian Louboutin v. Yves Saint Laurent, 696 F.3d 206 (2d Cir. 2013) (ruling that Christian Louboutin could trademark the color red for the sole of the shoe). *See* Tiffany Inc. v. eBay Inc., 600 F.3d 93, 104 (2d Cir. 2010) (explaining that contributory infringement is when a "manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement). *See* Louis Vuitton Malletier v. Dooney & Bourke, Inc., 500 F.Supp.2d 276, 278–80 (S.D.N.Y. 2007) (ruling that trade dress, "the total image of a product…such as size, shape, color or color combinations," could be a claim for dilution by blurring, when someone "willfully intended to trade on the recognition of the famous mark."). *See also* Wal-Mart Stores Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000) (ruling that clothing design could be distinctive when secondary meaning was shown, thus qualifying as a trademark).
[17] Colman, *supra* note 15,15 at 1.
[18] Christina Passariello, *What Do Armani, Ralph Lauren, and Hugo Boss Have in Common? Bangladesh*, THE WALL ST. J. (Jul. 1, 2013 8:54 AM), http://www.wsj.com/articles/SB10001424127887323998604578567522527553976.
[19] *See* Erin Cunningham, *Counterfeit Culture Moves Beyond Canal Street*, REFINERY 29 (Dec. 3, 2014 6:30 PM), http://www.refinery29.com/2014/12/78905/fit-museum-counterfeit-clothing (discussing how designers signed their names on their labels, trademarked their names, and added thumbprints to their creations to guarantee authenticity).

logos became a status symbol as well as the latest fashion trend, which then lead to a rise in counterfeit merchandise.[20]

Coco Chanel once said, "[f]ashion should slip out of your hands. The very idea of protecting the seasonal arts is childish. One should not bother to protect that which dies the minute it is born."[21] It seems that society agrees with Ms. Chanel, demonstrated by the lack of intellectual property protection for clothing and the current existing counterfeit market responding to consumer demands.[22]

Greater intellectual property protection through new legal and business practices would benefit consumers, businesses, and the fashion industry. With the increased sale of counterfeit merchandise over the Internet, one in six bargain hunters are duped by the perceived quality of an alleged authentic item.[23] Counterfeiters can even replicate the packaging, which increases a consumer's likelihood of confusion as to the item's source and authenticity.[24] In December 2014, the United States Customs and Border Protection Mobile Intellectual Property Enforcement Team uncovered a planeload of counterfeit designer merchandise valued at nearly $3

[20] Chavie Lieber, *Why the $600 Bil Counterfeit Industry is Still Horrible for Fashion*, RACKED (Dec. 1, 2014), http://racked.com/archives/2014/12/01/counterfeit-fashion-goods-products-museum-exhibit.php ("Logos drive a purchase because when people carry items like logoed bags around, it's a status symbol that they have the latest fashion trend.").
[21] *Id.*
[22] *See id.* (quoting Susan Scafidi as the fashion industry's lack of protection in the U.S. is questioned and criticized).
[23] *MarkMonitor Shopping Report: Fall 2014*, MARKMONITOR SHOPPING REPORT (2014), https://www.markmonitor.com/download/report/MarkMonitor_Shopping_Report-2014.pdf.
[24] Laura Gurfein, *'Operation Treasure Hunt' Seizes $2 Million in Counterfeit Goods*, RACKED (Dec. 10, 2014), http://ny.racked.com/archives/2014/12/10/knockoff_goods_seized_queens.php.

million dollars.[25] It is estimated that if the confiscated goods were sold at retail price, their authentic counterparts would have brought in approximately $450,000 to the rightful intellectual property owners.[26] As the prices for designer goods continue to get higher, so does the drive for fakes.[27]

Intellectual property owners "lose approximately 10% of their top-line revenue to counterfeiters each year," which is between $500 billion and $600 billion dollars annually, which is twice the estimated annual profits from the sale of illegal drugs worldwide."[28] Rightful fashion owners are suffering from lost profits. To demonstrate, if all of the seized counterfeit goods in 2013 were actually authentic, their retail value would have risen by 38%, a total of $1.74 billion dollars.[29] While there are some existing incentives to halt counterfeiting, more needs to be done.[30]

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[25] Julianne Escobedo Shepherd, *Feds Seized $450K of Designer Fakes at JFK This Month*, JEZEBEL (Dec. 26, 2014 3:10 PM), http://jezebel.com/feds-seized-450k-of-designer-fakes-at-jfk-this-month-1675324195.

[26] *Counterfeit Designer Merchandise Seized by CBP,* U.S. CUSTOMS AND BORDER PROTECTION (Dec. 23, 2014), http://www.cbp.gov/newsroom/local-media-release/2014-12-23-000000/counterfeit-designer-merchandise-seized-cbp.

[27] *See Outer Limits: The Cost of Luxury Products*, LEDBURY RESEARCH (Nov. 17, 2014), http://www.ledburyresearch.com/ledbury-news/outer-limits-the-cost-of-luxury-products (stating that Carrie Bradshaw's Manolo Blahnik stilettos increased from $500 in 2000 to $1,000 now in 2014). *See also* Shepherd, *supra* note 25 (reiterating that as the price of luxury goods inflates, so does the drive for fake goods).

[28] *See* Roxanne Elings, Lisa D. Keith & George P. Wukoson, *Anti-Counterfeiting in the Fashion and Luxury Sectors: Trends and Strategies, in Anti-Counterfeiting 2013: A Global Guide*, WORLD TRADEMARK REVIEW 33, 34 (2013).

[29] Juliana Escobedo Shepherd, *NYPD Raid Just Made it a Lot Harder to Get a Cheap (Fake) Handbag*, JEZEBEL (Dec. 10, 2014 3:10 PM), http://jezebel.com/nypd-raid-just-made-it-a-lot-harder-to-get-a-cheap-fak-1669275227.

[30] *See* Andrea Felsted, *Fashion Fights Back Against Counterfeiting*, FINANCIAL TIMES (Nov. 28, 2014), http://www.ft.com/cms/s/0/4ca2d6c4-749d-11e4-b30b-00144feabdc0.html#axzz3N72NAk2A (bringing attention to the ethical issues of buying fakes); *see also Man Sentenced to 46 Months for Conspiracy to Traffic Counterfeit Goods*, DON'T BUY FAKES (Nov. 24, 2014), http://dontbuyfakes.com/news/man-sentenced-to-46-months-for-conspiracy-to-traffic-counterfeit-goods (reporting that a man was sentenced to 46 months in

By the 1950s, both the manufacturing and distributing process became easier through licensing agreements,[31] marking the beginning of society's advancements disrupting the fashion world.

C. What is 3D Printing?

3D printing is known as additive manufacturing, which is a method of joining together materials to create 3D objects, joining them layer by layer.[32] The most simple way to explain the process of 3D printing is by comparing it to an ink-jet printer. Instead of copying a two-dimensional picture, a 3D printer operates according to a Computer Aided Design ("CAD") of a three-dimensional object.[33] The 3D printer breaks down the CAD into a series of thin two-dimensional slices and each slice constructs a single layer of the three-dimensional object.[34] Instead of ink, the 3D printer uses powder that is then heated together by a laser.[35] This process then repeats itself layer upon layer until completing the final product, a three-dimensional object.

D. 3D Printing in Fashion

Intellectual property attorney Harley Lewin (attorney for Christian Louboutin in *Louboutin v. YSL*[36]) stated, "the threat of counterfeiting was nothing compared to the threat of this new [3D

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prison and must pay $625,826 in restitution for conspiracy to traffic counterfeit goods).

[31] *See The Big Business of Fashion Counterfeits*, THE DAILY BEAST (Dec. 24, 2014), http://www.thedailybeast.com/articles/2014/12/24/the-big-business-of-fashion-counterfeits.html (explaining that by 1956, many European couturiers had licensed to American manufacturers and department stores, even though they remained leery of unlicensed copiers).

[32] Julian J. Johnson, *Print, Lock, and Load: 3-D Printers, Creation of Guns, and the Potential Threat to Fourth Amendment Rights*, 2013 U. ILL. J.L. TECH. & POL'Y 337, 338 (2013).

[33] Eli Greenbaum, *Three-Dimensional Printing and Open Source Hardware*, 2 NYU J. INTELL. PROP. & ENT. L. 257, 271 (2013).

[34] *Id.*

[35] Jeffrey T. Leslie, *The Internet and Its Discontents: 3-D Printing, the Commerce Clause, and a Possible Solution to an Inevitable Problem*, 17 SMU SCI. & TECH. L. REV. 195, 197 (2014).

[36] Christian Louboutin v. Yves Saint Laurent, 696 F.3d 206 (2d Cir. 2013).

printing] industry."[37] New technology and the Internet combined, in particular, have a history of threatening intellectual property by contributing to the increase in counterfeiting.[38]

"3D printing and fashion just recently met a couple of years ago, but their friendship is off to a promising start."[39] 3D printing is most notably presenting itself on the runway. At the annual Victoria's Secret Fashion Show in 2013, model Lindsay Ellingson strutted 3D printed Angel Wings with Swarovski crystals.[40] That same year, New York City's Fashion Week featured 3D printed pieces by Katya Leonovich, which were very well received.[41] In 2015, MecklerMedia hosted the first 3D printed fashion show held in New York, showcasing top 3D pieces from all over the world.[42] There are even entire fashion weeks dedicated to displaying 3D printed clothing.[43] Recognized accessible brands, like Nike and

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[37] Lauren Sherman, *Proenza Schouler CEO Shirley Cook Hates 'Get the Look for Less' Stories*, FASHIONISTA (Jan. 18, 2013), http://fashionista.com/2013/01/proenza-schouler-ceo-shirley-cook-counterfeiting.

[38] *See* Nicole Giambarrese, *The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry*, 26 TOURO L. REV. 243, 278 (2010) (explaining that better technology and the Internet account for the increased counterfeiting because of high-quality scanners and the ability to find any and all product information needed to counterfeit).

[39] Rachel Hennessey, *3D Printing Hits the Fashion World*, FORBES (Aug. 7, 2013, 7:38 PM), http://www.forbes.com/sites/rachelhennessey/2013/08/07/3-d-printed-clothes-could-be-the-next-big-thing-to-hit-fashion/.

[40] Lauren Indvik, *Victoria's Secret Angel Dons 3D-Printed Wings for Fashion Show*, FASHIONISTA (Nov. 14, 2013), http://fashionista.com/2013/11/victorias-secret-3d-printed-wings.

[41] Scott J. Grunewald, *Katya Leonovich Debut's 3D Printed Clothing Line at New York Fashion Week*, 3D PRINTING INDUSTRY (Sep. 10, 2014), http://3dprintingindustry.com/2014/09/10/katya-leonovich-debuts-3d-printed-clothing-line-new-york-fashion-week/.

[42] *See* Keith Nelson Jr., *Inside One of the First 3D-Printed Fashion Shows in America*, DIGITAL TRENDS (Apr. 7, 2015), http://www.digitaltrends.com/features/inside-new-yorks-3d-print-fashion-show/#/28.

[43] Dhani Mau, *How 3-D Printing Could Change the Fashion Industry for Better and For Worse*, FASHIONISTA (Jul. 19, 2013), http://fashionista.com/2013/07/how-3-d-printing-could-change-the-fashion-industry-for-better-and-for-worse (noting that designers recently staged the first ever 3D printed fashion week in Malaysia).

New Balance, are keeping up with the trend by testing and manufacturing 3D printed materials for shoes to improve performance and to offer customization.[44]

Meanwhile, mini-manufacturers, such as Continuum, are working to enable people to design and 3D print their own apparel.[45] It is clear that designers consider 3D printing an eventuality rather than an experiment.[46] For example, companies like Thingiverse and Shapeways have already established themselves as marketplaces for 3D printed apparel.[47] While not everyone can proudly wear a 3D printed shirt yet, the technology is "SO close."[48]

3D printing promises to integrate itself into the manufacturing process.[49] Even though 3D printed thread seems a long way

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[44] Alexander C. *Kaufman*, *3D Printing Gets Foot in the Door at Footwear Companies like Nike (NKE) and New Balance*, INT'L BUS. TIMES (Jun. 18, 2013, 10:19 AM), http://www.ibtimes.com/3d-printing-gets-foot-door-footwear-companies-nike-nke-new-balance-1311723 (explaining that Nike is testing a lightweight plate for shoes and New Balance is creating individual cuts of shoes for different elite runners as a test to make customized shoes for consumers). S*ee also* Tyler Koslow, *New Balance Announces 3D Printed Midsoles in New Running Shoe Line*, 3D PRINTING INDUSTRY (Nov. 19, 2015), http://3dprintingindustry.com/2015/11/19/new-balance-announces-3d-printed-midsoles-in-new-running-shoe-line/ (announcing that New Balance and 3D Systems are collaborating to release a high performance running shoe that is created with a 3D printed midsole, and this new project is the most functional use of 3D printing by any major footwear company at least in 2015).

[45] *Continuum*, CONTINUUM, http://www.continuumfashion.com/ (last visited Feb. 11, 2015).

[46] Jasmin Malik Chua, *Iris van Herpen Debuts World's First 3D-Printed Flexible Dresses*, ECOUTERRE (Jan. 24, 2013), http://www.ecouterre.com/iris-van-herpen-debuts-3d-printed-dresses-at-paris-couture-fashion-week/.

[47] *Thingiverse*, THINGIVERSE**,** http://www.thingiverse.com/ (last visited Feb. 11, 2015); *See also Shapeways*, SHAPEWAYS, http://www.shapeways.com/ (last visited Feb. 11, 2015).

[48] *See* Mansee, *Shapeways in 2014: A Year in 3D Printing and What's Next for 2015*, THE SHAPEWAYS BLOG (Dec. 29, 2014), http://www.shapeways.com/blog/archives/19390-shapeways-in-2014-a-year-in-3d-printing-and-whats-next-for-2015.html?li=home-yir.

[49] *New 3D Printing Center Aims to Boost US Manufacturing*, LIVESCIENCE (Aug. 16, 2012, 3:05 PM), http://www.livescience.com/22443-3d-printing-

off, comfortable clothes made of alternative 3D printed materials created specifically for fashion are currently underway.[50] Society is embracing the idea of household 3D printers for convenience, customization, social status, and necessity.[51]

i. When Can I Start 3D Printing at Home?

Until there is an efficient, cost-effective method to 3D print cotton or weave cotton thread, 3D printed fashion will remain a style showcased at New York City Fashion Week and not casually worn by consumers.[52] Even though individuals all over the world are currently experimenting with wearable 3D printed materials, finished 3D printed products are not yet a reality and it will still take some time for them to enter the market.[53] However,

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boost-manufacturing.html (reporting that in 2012, President Obama granted $30 million to the National Additive Manufacturing Innovation Institute to "strengthen American manufacturing.").

[50] Mau, *supra* note 43. *See* Jelmer Luimstra, *This Is a 3D Printer That Can Print Clothes*, 3DPRINTING.COM (Apr. 18, 2014), http://3dprinting.com/news/3d-printer-can-print-clothes/ (revealing that Electroloom printed comfortable clothing); *see also* Hennessey, *supra* note 39 (reporting that Materialize invented "TPU - 92A-A," a printing material designed specifically for use in the fashion industry).

[51] Mau, *supra* note 43 (revealing that someone conceptualized a clothing printer that would be a closet hanging on a wall; an old shirt could be put in and a new shirt would print out).

[52] Jelmer Luimstra, *Tomorrow's Reality: Weaving Cotton into 3D Printing Techniques*, 3D PRINTING (Feb. 15, 2014), http://3dprinting.com/products/fashion/tomorrows-reality-weaving-cotton-3d-printing-techniques/.

[53] *See generally* Sarah Anderson, *German Scientists Study Possibility of Textiles Made via 3D Printing, Find Surprising Results*, 3D PRINTING (Oct. 29, 2014), http://3dprint.com/21630/german-3d-printed-textiles/. *See* Tyler Koslow, *Unique Knitting Machine Takes Cue from 3D Printing for Custom Knit Fashion*, 3D PRINTING INDUSTRY (Nov. 5, 2015), http://3dprintingindustry.com/2015/11/05/unique-knitting-machine-takes-cue-from-3d-printing-for-custom-knit-fashion/ (showcasing how 3D printers can knit, thereby transforming the classic conception of knitting to an innovative technique); *see also* Tyler Koslow, *Feel Confident & Comfortable with 3D Printed, Custom-Fitted 'Mesh Lingerie'*, 3D Printing (Nov. 30, 2015), http://3dprintingindustry.com/2015/11/30/62680/ (introducing mesh lingerie).

where there is a will, there is a way, and trademark owners should expect to see cotton infringements one day.[54]

Once an efficient method of 3D printing cotton is available, manufacturers may be eager to use it for either efficiency or customization. Manufacturers are already using it for the "wow" factor, even if it is for individual pieces of a shoe.[55] Overall, customization in apparel appeals to consumers because of its personalization capabilities, better fit, and improved comfort.[56] However, some maintain that 3D printing "remains a hobbyist-driven enterprise with a high barrier [of] entry."[57] For example, considering one 3D printing shoe company called 3dshoes.com, its website clearly states that "dozens of revisions" might be required and the only available materials are foam, plastic, resign, titanium, gold, or platinum.[58] Additionally, 3D printed products could be limited to seven or eight inches and produced at very slow rates, sometimes causing consumers to become frustrated if the 3D printer jams.[59] However, once the technology improves, manufacturers will increase the variety of materials and their methods will be perfected.

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[54] Felicity Kinsella, *Scan It, Print It, Wear It: The Future of Fashion is 3D*, RICHES, http://www.digitalmeetsculture.net/article/scan-it-print-it-wear-it-the-future-of-fashion-is-3d/ (last visited Feb. 12, 2015).

[55] *See* Jelmer Luimstra, *Adidas 3D Prints Lace Locks in a Giant Shoebox*, 3D PRINTING (Feb. 2, 2015), http://3dprinting.com/products/fashion/adidas-3d-prints-lace-locks-giant-shoebox/ (reporting that Adidas is printing lace locks in a new project).

[56] *See* Daniel Blurris, *3D Printed Shoes: A Step in the Right Direction*, WIRED (Feb. 12, 2014, 2:50 PM), http://www.wired.com/2014/09/3d-printed-shoes/.

[57] Peter Hanna, *The Next Napster? Copyright Questions as 3D Printing Comes of Age*, ARS TECHNICA (Apr. 5, 2011, 12:35 AM), http://arstechnica.com/tech-policy/2011/04/the-next-napster-copyright-questions-as-3d-printing-comes-of-age/1/.

[58] *3D Shoes*, 3DSHOES.COM, http://3dshoes.com/order-shoes/ (last visited Feb. 12, 2015).

[59] Charles W. Finocchiaro, *Personal Factory or Catalyst for Piracy? The Hype, Hysteria, and Hard Realities of Consumer 3-D Printing*, 31 CARDOZO ARTS & ENT. L.J. 473, 489 (2013).

Once 3D printing enters the manufacturing process, it is only a matter of time until it enters the home.[60] It seems that a new and inexpensive 3D printer is created by the minute, so there may come a time when it is cheaper and more efficient to print clothing at home.[61] However, there are two setbacks to acquiring a household 3D printer. First, it would be difficult to print an entire outfit rather than just the textile and users might not want to assemble it. Second, users may be disappointed with the quality of the textile or product.[62] The at-home photo printer is the best example of a new technology that consumers were unhappy with because the quality never met the standard of professionally printed photos.[63] Additionally, consumers often found it burdensome to purchase the necessary ink and paper and not significantly less expensive because of the additional required materials.[64] The results of equally expensive but lower quality photos resulted in the declining sales of at-home photo printers[65] and 3D printers could share the same fate.

Furthermore, consumers must wait for 3D printed thread before at-home use can occur. However, as the variety of materials and quality of products continue to increase, and the prices

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[60] *The Future of Open Fabrication*, OPEN FABRICATION, http://www.openfabrication.org/ (last visited Feb. 12, 2015) (explaining that 3D printing manufacturers are trying to bring the resources to the home).

[61] Mau, *supra* note 43.

[62] Mau, *supra* note 43 (noting that printing an entire is difficult, but 3D printing "'textiles' might be easiest").

[63] *See* Joseph C. Storch, *3-D Printing Your Way Down the Garden Path: 3-D Printers, The Copyrightization of Patents, and a Method for Manufacturers to Avoid the Entertainment Industry's Fate*, 3 NYU J. INTELL. PROP. & ENT. L. 249, 307 (2014) (discussing the introduction of at-home photo printers).

[64] *Id.* at 298 (explaining the inconveniences combined with the overall inefficiency).

[65] *Id.*; *see also* John C. Arkin, *Market Share Trend in US by Printer Manufacturer*, PRINT COUNTRY, http://printerinkcartridges.printcountry.com/printcountry-articles/printer-ink-cartridges-information-facts-downloads/market-share-trend-in-us-by-printer-manufacturer (last visited Jan. 13, 2016) (stating that printer shipments for the first half of 2009 showed a 20.2% decline compared to the first half of 2008 while in 2006, the 4.2% decline in U.S. printer shipments was attributed to poor photo printer sales).

continue to decrease, users may begin to resort to 3D printing for their new fashion articles.[66]

E. Trademark Licensing

With the inevitability of accessible 3D printed fashion, it is crucial for fashion brands to find the best way to protect their marks and prevent counterfeiting.[67] Brands will soon be forced to tackle a variety of issues concerning quality control, image reputation, and authenticity.[68] Trademark law is the source of brand protection for these issues and should continue to be so, primarily through trademark licensing.

The basic principle of trademark rights depends on the ability of the trademark owner to exclude others from using a similar mark on a confusingly similar or identical product.[69] This "right to exclude" also comes with the ability of the trademark owner to authorize third parties to use the trademark on related or different products under specific conditions, otherwise known as a trademark license agreement.[70] A trademark license agreement usually includes different terms and conditions, such as exclusiveness, geographical scope, advertising, manufacturing and product quality, and royalties owed to the licensor.[71]

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[66] *See* Ben Depoorter, *Intellectual Property Infringements & 3D Printing: Decentralized Piracy*, 65 HASTINGS L.J. 1483, 1485 (2014) (3D printers "promise to make households largely self-sufficient").
[67] *See* Mau, *supra* note 43 (determining that designers will inevitably use 3D printing because of the benefits of shorter lead times, the ability to produce in smaller quantities with less waste, easier experimentation, and customization).
[68] *See* Mau, *supra* note 43 (explaining that brands must confront these issues because consumers would manipulate the original designs, and quoting Altringer, this "is likely to send big brands, who dedicate huge portions of their budgets to controlling quality and brand image, into a tailspin.").
[69] Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 348 (2007).
[70] *Id.*
[71] *Id.*

Trademark licensing was initially introduced and permitted under the "quality theory" by imposing an affirmative duty on licensors to take reasonable measures to prevent consumer deception.[72] Trademark licensing also fulfills the "guaranty theory" requiring that the trademark owner exercises control over the quality of the licensee's product, thus guaranteeing consistency.[73] By utilizing trademark licensing agreements, licensors ensure that all products bearing the same mark maintain the same quality by setting quality control requirements for licensees.[74] Specifically, §§14 and 45 of the Lanham Act explicitly set forth the conditions for valid trademark licensing.[75] Thus, a trademark owner can either prevent all others from using the trademark or authorize its use to a third party via licensing.

By the 1920s, trademark licenses for clothing manufacturers became legal.[76] Since then, trademark licensing has become a very popular modern business practice due to its numerous incentives, including the maximization of brand image in the market, market production, and the value of the licensor's good will or notoriety.[77] Now, licensing is the most-used distribution practice for clothing. In 2010, retail sales of licensed merchandise based on fashion brands and designers were approximately $16.98 billion dollars.[78]

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[72] Radiance A. Walters, *Partial Forfeiture: The Best Compromise in Trademark Licensing Protocol*, 91 J. PAT. & TRADEMARK OFF. SOC'Y 127, 128 (2009) (explaining that trademark law policy transformed from a "single source theory" that forbade licensing to the "quality theory," which permitted licensing as long as the licensor exercised adequate control over the trademark).

[73] *Quality Control*, *supra* note 10, at 1177 (defining the "guaranty theory" as an assurance of quality).

[74] Calboli, *supra* note 69, at 344–45.

[75] *See* Lanham Act, 15 U.S.C §§ 1064, 1127 (Westlaw 2009).

[76] *See generally* B.B. & R. Knight, Inc., v. W.L. Milner & Co., 283 F. 816 (1922. *See generally* H. Freeman & Son v. F.C. Huyck & Son, 7 F. Supp 971 (1934).

[77] Walters, *supra* note 72, at 130. *See also Quality Control*, *supra* note 10, at 1173. *See also* Calboli, *supra* note 69, at 343.

[78] *See Why Selective Distribution Makes Sense for a Luxury or Premium Business*, CREFOVI (Dec. 9, 2014), http://crefovi.com/articles/fashion-law/selective-distribution-makes-sense-luxury-premium-fashion-business/ [hereinafter CREFOVI]; *See also* Licensing Letter, *Fashion Licensing Down 6%, But Many*

i. When Licensing Leads to Loss of Trademark Rights

"Naked licensing" occurs when a trademark owner does not exercise sufficient control over the licensed mark ultimately leading to trademark abandonment.[79] The most prominent case establishing the standard for what constitutes naked licensing is *Eva's Bridal v. Halanick Enterprises*.[80] Judge Easterbrook affirmed that the plaintiffs abandoned the "Eva's Bridal" mark through naked licensing by not exercising "reasonable control over the nature and quality of the goods, services, or business on which the [mark was] used by the licensee."[81] It is assumed that when a licensor does not exercise sufficient control over the mark, the trademark no longer guarantees consistent product quality, thus resulting in consumer confusion and deception.[82]

ii. The Line for Naked Licensing

In determining whether naked licensing has occurred, courts will ask whether the licensor's control was sufficient under the circumstances to guarantee that the licensee's goods have met the expectations created by the trademark.[83]

Courts have noted that it is extremely difficult to define how much control a licensor should exert to qualify as sufficient control over the mark.[84] The court in *Coca-Cola Co. v.*

Properties Perform Well (Sum is Smaller than the Parts?), HIGHBEAM BUSINESS (May 2, 2011), https://business.highbeam.com/435360/article-1G1-255839422/fashion-licensing-down-6-but-many-properties-perform.

[79] *See* Eva's Bridal v. Halanick Enterprises, 639 F.3d 788 (7th Cir. 2011). *See also* Lanham Act, 15 U.S.C. § 1127 (Westlaw 2009).

[80] *See* Eva's Bridal v. Halanick Enterprises, 639 F.3d 788 (7th Cir. 2011) (amounting to abandonment by not requiring licensees to operate the business in any particular way and not giving the licensor the ability to supervise how the business was conducted or how the mark was used).

[81] *Id.* at 789.

[82] Calboli, *supra* note 69, at 345.

[83] *Eva's Bridal*, 639 F.3d at 790.

[84] *See, e.g.*, Fuel Clothing Co. v. Nike, Inc., 7 F.Supp.3d 594, 606 (2014) (explaining that licensing standards vary depending on the marketplace).

J.G. Butler & Sons found that Coca-Cola exercised exceedingly sufficient standards in controlling their mark when it came to licensing the mark to bottle manufacturers.[85] Coca-Cola selected one bottling company as its sole exclusive customer and licensee in a specific territory for use in local companies.[86] Coca-Cola set the standard and procedure by which the beverage would be bottled, and supervised it through an inspection department.[87] The inspection department sent inspectors to collect samples of the product from the plant, to test the water used in the process of creating the product, and to inspect the sanitary conditions of the plant.[88] Additionally, in *Kentucky Fried Chicken v. Diversified Packaging*, the court noted that retention of a trademark to avoid abandonment requires only minimum quality control and proving otherwise is an extremely heavy burden.[89] The plaintiffs in *Eva's Bridal*, however, lost their mark because they exercised no control whatsoever over the mark.[90]

III. THE BEST INTELLECTUAL PROPERTY PROTECTION AGAINST 3D PRINTING IN FASHION IS TRADEMARK LICENSING

This article: (1) discusses how 3D printing calls for heightened intellectual property protection; (2) compares patent, copyright, and trademark protection in the context of 3D printing; and (3) suggests a trademark licensing agreement is the best source of protection for the fashion industry against the threat of 3D printing. Overall, it is suggested that intellectual property owners seek multiple forms of protection against 3D printing to receive the greatest scope of protection.[91]

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[85] Coca-Cola Co. v. J.G. Butler & Sons, 229 F. 224 (E.D. Ark. 1916).
[86] *Id.* at 227.
[87] *Id.*
[88] *Id.*
[89] Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387 (5th Cir. 1977) (insinuating that distributing supplies under the franchisor's approval may have amounted to adequate control).
[90] *Eva's Bridal*, 639 F.3d at 791.
[91] *See* Skyler R. Peacock, *Why Manufacturing Matters: 3D Printing, Computer-Aided Designs, and the Rise of End-User Patent Infringement*, 55 WM. & MARY L. REV. 1933, 1949 (2014) (arguing that groups succeed in obtaining greater

A. 3D Printing Demands Intellectual Property Protetion

It is predicted that by 2018, 3D printing will result in the loss of at least $100 billion dollars per year in intellectual property.[92] The clothing industry in the United States alone was valued at $225 billion dollars in 2012.[93] With the reduced cost of 3D printers and its increasing material and build capabilities, home manufacturing of 3D printed materials will substantially affect the fashion industry.[94] Consumers will soon be able to manufacture ordinary counterfeit items and it will become a mainstream practice like peer-to-peer file sharing and music copyright.[95] Therefore, instead of allowing counterfeiters to use the technology for infringement, the fashion industry should preemptively take advantage of the technology.[96]

Intellectual property protection faces three problems against 3D printing. First, the anonymity of unauthorized 3D printing in illegally downloading CAD files or purchasing infringing

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security for their intellectual property by seeking multiple forms for one product).

[92] *Gartner: 3D Printing to Result in $100 Billion IP Losses Per Year*, 3DERS, http://www.3ders.org/articles/20131014-gartner-3d-printing-to-result-in-100-billion-ip-losses-per-year.html (last visited Feb. 17, 2015) [hereinafter *Gartner*].

[93] *Size of the Global Apparel Market in 2012 by Region*, STATISTA, http://www.statista.com/statistics/279735/global-apparel-market-size-by-region/ (last visited Feb. 17, 2015).

[94] *Gartner*, *supra* note 92.

[95] *See* Depoorter *supra* note 66, at 1493.

[96] *See* Haritha Dasari, *Assessing Copyright Protection and Infringement Issues Involved with 3D Printing and Scanning*, 41 AIPLA Q.J. 279, 317 (2013) (explaining that granting licenses is an opportunity for intellectual property owners to resolve an economic inefficiency by providing users with this legal and accessible option). *Cf.* Jim Motavalli, *Four Market Disruptors*, SUCCESS (Jan. 14, 2014), http://www.success.com/mobile/article/four-market-disruptors (discussing how the Keurig was seen as a disruptive technology to the coffee market and coffee retail market, but brands soon embraced the technology for its own benefit. In the first two years of its partnership with Keurig, Starbucks sold more than 850 K-Cups, observing that the K-cup category grew nine times faster than the regular coffee market).

products is difficult to detect.[97] Second, the realization that there is a low probability of getting caught for illegal infringement will generate a greater number of infringements.[98] And third, as infringement pervades society, the probability of any individual getting caught reduces even further.[99] As with the digital music industry, users of 3D printing may also adopt a liberal viewpoint on what can be copied without considering the intellectual property rights of others.[100] Given that this liberal viewpoint may become the social norm, any enforcement measures might induce a counterproductive "backlash" on society's view of intellectual property owners.[101]

It is typical of intellectual property owners to be hostile towards new technology because it disrupts current legal practices.[102] There was a time when people worried that the VCR, as a disruptive technology, would lead to uncontrollable copyright infringement. In *Sony Corp. v. Universal City Studios*, the Supreme Court permitted its use because it was capable of substantial non-infringing purposes.[103] Similarly, the 3D printer is also capable of substantial non-infringing purposes. In particular, the *Sony* Court also noted that "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability."[104] If these new creative and innovative works must eventually be made publicly available, it is then

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[97] *See* Depoorter *supra* note 66, at 1496 (explaining that it will be just as difficult to detect as music and movie downloading).
[98] *See* Depoorter *supra* note 66, at 1496.
[99] *See* Depoorter *supra* note 66, at 1496.
[100] *See* Depoorter *supra* note 66, at 1501 (explaining that developing this liberal viewpoint will result in the loss of IP rights).
[101] *See* Depoorter *supra* note 66, at 1501.
[102] *See* Storch, *supra* note 63, at 252 (noting that artists and creators complain "bitterly about a new technology and its harm").
[103] *See generally*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984). *See* Erin Carson, *3D Printing: Overcoming the Legal and Intellectual Property Issues*, ZD NET (Aug. 1, 2014), http://www.zdnet.com/3d-printing-overcoming-the-legal-and-intellectual-property-issues-7000032252/ (explaining that the weight of this case is heavy enough to predict that 3D printing will be accepted because it is capable of substantial non-infringing purposes as well).
[104] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

the duty of intellectual property law to determine how the new invention and owner's rights can live in harmony.

B. How Do I Keep Others from Stealing My Fashion Design? The Answer is Not Found in Copyright or Patent Law

i. No One Likes Copyright Protection, Especially

Copyright law does not protect fashion.[105] When questioned on how to protect intellectual property for clothing, fashion attorneys will agree that a fashion idea can simply not be afforded copyright protection.[106] Fashion law generally cannot depend on copyright protection because of the "useful articles doctrine," the lack of practical remedies, and the negative public opinion based on previous experiences of copyright's reaction to new technology.

First, copyright protection is not available to useful and functional articles under the "useful articles doctrine."[107] Even though many individuals consider fashion to be more ornamental than functional, clothing is considered a useful article.[108] 3D printed clothing will therefore be considered a useful article and not protected under copyright law. Copyright's limited application to certain aspects of fashion design, like a drawing, photo, or individual design element, creates a void that trademark law fills.[109]

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[105] Giambarrese, *supra* note 38, at 244 ("Currently, there are no copyright protections for fashion designs in the United States.").

[106] Colman, *supra* note 15, at 11. *See also* Copyright Act, 17 U.S.C. §102(b) (Westlaw 2014) ("In no case does copyright protection for an original work of authorship extend to any idea.").

[107] Copyright Act, 17 U.S.C. §102(a) (Westlaw 2014).

[108] Colman, *supra* note 15, at 22. *See* Giambarrese, *supra* note 38, at 251 (stating that clothing is considered to be a "useful article.").

[109] Colman, *supra* note 15, at 3–4 (discussing how trademark law suggests trade dress protection as an attempt to fill the void that copyright protection leaves). Chosun Int'l Inc. v. Chrisha Creations, Ltd., 413 F.3d 325, 328 (2005) (if a useful article incorporates a design element that is physically or conceptually

Second, there is no ideal legal recourse under copyright protection in fashion law or current 3D printing situations. In *Jovani Fashion v. Cinderella Divine*, Jovani had copyright protection for its catalogs with photos of dresses it designed and sold.[110] The court granted the defendant's motion to dismiss based on the useful articles doctrine because copyright protection only applied to the pictures and not the physical designs of the dresses.[111] In the case of 3D printing, courts seem unlikely to rule differently from the *Jovani Fashion* case. The fashion article, even if illegally obtained from a CAD file, would still be considered a useful article.

3D printer enterprises, such as Shapeways or Thingiverse, have a safe harbor defense under the Digital Millennium Copyright Act ("DMCA") so long as they post a policy stating they will take down infringing material if the copyright holder requests it.[112] If future copyright cases concerning 3D printing excuse infringements by way of the safe harbor defense, it would be futile for fashion designers to seek copyright protection because of the lack of a real remedy.[113]

Finally, there is a negative perception of excessive copyright measures due to its history in the music industry and its initial reactions to 3D printing. The shutdown of Napster specifically demonstrates how important it is for intellectual property owners to effectively handle infringement situations to avoid

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separable from the underlying product, the element is eligible for copyright protection).

[110] *See generally* Jovani Fashion v. Cinderella Divine, Inc., 808 F.Supp.2d 542 (S.D.N.Y. 2011).

[111] *Id.* at 552.

[112] Carson, *supra* note 103 (explaining that the safe harbor defense allows popular characters to be sold on Shapeways until the copyright holder asks that they be taken down).

[113] *See* Stephen Carlisle, *Copyright Blog Update: Meet the New and Improved "Whack-A-Mole"*, NOVA SOUTHEASTERN UNIV. (Oct. 30, 2014), http://copyright.nova.edu/blog-update-whack-a-mole/ (defining the "whack-a-mole" issue, where infringing material is immediately reposted on the offending website even though the owner sent a take down notice on the same infringing material).

criticism.[114] In the Napster era, the public believed that copyright enforcement was unfairly targeting college students and forcing them to settle claims or face expensive litigation.[115] In two notable cases, copyright infringement claims of hundreds of thousands of dollars were successfully brought against a single mother and a university student for downloading a handful of songs.[116] Even though it is not clear if any money was actually collected, the ultimate consequence was a backlash against the music copyright industry because the public felt that the award was disproportionate and excessive.[117] Excessive copyright measures in 3D printing could repeat a backlash against the fashion industry and encourage more infringement on designs.

The first incident of an infringing 3D printed item involved copyright infringement of the Penrose Triangle.[118] Schwanitz, the designer, offered to sell copies through Shapeways[119] when a few weeks later, a former Shapeways intern reverse-engineered the design and released his schematic on Thingiverse, allowing anyone to download it for free.[120] Schwanitz then initiated a DMCA takedown request, which was the world's first documented complaint over 3D printing. Thingiverse initially complied but later reposted the schematic after Schwanitz withdrew the DMCA request.[121] Schwanitz was forced to withdraw his request due to heavy criticism over the validity of his copyright claim to a design based on something in the public domain and

[114] Carson, *supra* note 103 (discussing that one lesson of the near-disastrous effect of copyright in the music industry was how existing institutions should consider users when confronted with infringement).
[115] Depoorter, *supra* note 66, at 1499.
[116] *See* Sony BMG Music Entm't v. Tenenbaum, No. 07cv11446-NG, 2009 U.S. Dist. LEXIS 115734 (D. Mass. Dec. 7, 2009); *see* Capitol Records, Inc. v. Thomas-Rasset, No. 06-CV-01497 (MJD/LIB), 2009 WL 2030495 (D. Minn. June 18, 2009).
[117] Storch, *supra* note 63, at 273.
[118] Finocchiaro, *supra* note 59, at 478.
[119] Finocchiaro, *supra* note 59, at 478.
[120] Finocchiaro, *supra* note 59, at 478.
[121] Finocchiaro, *supra* note 59, at 478.

eventually gave permission to Thingiverse to post the schematic.[122] A more recent uproar over copyright protection and 3D printing concerns Katy Perry's Left Shark at the 2015 Super Bowl halftime show performance. Shortly after the performance, Left Shark replicas were made available on Shapeways.[123] Perry's attorneys sent cease and desist letters to Shapeways alleging copyright infringement.[124] Generally the public's response to this situation ranges from confusion, at best, to detestation.[125] Unfortunately, copyright is already off to a rough start with 3D printing, as this instance warns that premature regulation could smother creativity and innovation.[126]

Within copyright law, the fashion industry could obtain injunctions requiring Internet Service Providers ("ISPs") to prevent access to websites that offer infringing CAD files (similar to the music and film industries).[127] Copyright owners could also license their material. However, proving copyright infringement in the fashion industry is notoriously difficult, and trademark law is fashion's most-used form of intellectual property protection, so recourse through copyright law is ultimately a weak suggestion.[128]

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[122] Finocchiaro, *supra* note 59, at 478.
[123] *See Left Shark*, SHAPEWAYS, http://www.shapeways.com/product/PHEKBV6E2/left-shark (last visited Feb. 22, 2015).
[124] Stacy Zaretsky, *Katy Perry's Biglaw Firm Sends Out 'Left Shark' Cease and Desist Letter*, ABOVE THE LAW (Feb. 6, 2015, 11:55 AM), http://abovethelaw.com/2015/02/katy-perrys-biglaw-firm-sends-out-left-shark-cease-desist-letter/.
[125] *Id.* (quoting individuals questioning whether Left Shark is copyrightable because it might be a "useful article," describing the letter as "bullying", and stating that "dictators…are much easier to deal with.").
[126] Finocchiaro, *supra* note 59, at 479.
[127] Hilary Atherton, *3D Printing: Predictions for the Fashion Industry*, BIRD & BIRD (May 5, 2014), http://www.twobirds.com/en/news/articles/2014/global/brandwrites/3d-printing-predictions-for-the-fashion-industry.
[128] Colman, *supra* note 15, at 14.

ii. Fashion is Over Patent Protection

Patent protection for fashion is limited to design patents and, less frequently, utility patents.[129] The major issues with the patent process are that it is very costly and often too long for fashion companies because clothing trends change almost monthly.[130] Additionally, even if the patented style is a timeless design, the patent offers protection for no more than twenty years.[131]

In 3D printing, the fashion industry may seek to patent the CAD files.[132] It makes sense to protect the source of infringement rather than expend time and resources to track down infringers.[133] Although, it should be noted that the CAD file may not be eligible for a patent if it is no longer considered a novel invention.[134] Furthermore, it appears to be public opinion that

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[129] Sheppard Mullin, *Patent Your Patent Leather: Patent Protection for the Fashion Industry*, FASHION APPAREL LAW BLOG (Jan. 28, 2008), http://www.fashionapparellawblog.com/2008/01/articles/ipbrand-protection/patent-your-patent-leather-patent-protection-for-the-fashion-industry/.

[130] Giambarrese, *supra* note 38, at 246. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1704-05 (2006) (stating that an approval for a design patent can take up to eighteen months).

[131] *How Long Does Patent, Trademark or Copyright Protection Last*?, STOPFAKES.GOV, http://www.stopfakes.gov/faqs/how-long-does-patent-trademark-or-copyright-protection-last (last visited Feb. 18, 2015) (explaining that a utility patent is usually granted for twenty years).

[132] Bryan J. Vogel, *IP: 3D Printing and Potential Patent Infringement*, INSIDE COUNSEL (Oct. 29, 3013), http://www.insidecounsel.com/2013/10/29/ip-3d-printing-and-potential-patent-infringement (revealing that the U.S. Patent and Trademark Office has received more than 6,800 applications related to 3D printing).

[133] Peacock, *supra* note 91, at 1934 (explaining that monitoring the distribution of CAD files makes more sense than IP owners attempting to prosecute each infringer).

[134] *See generally Patent Requirements*, BITLAW, http://www.bitlaw.com/patent/requirements.html (last visited Feb. 19, 2015).

CAD files should be shared freely, with websites promising and promoting access to CADs.[135]

Another option for the fashion industry is to seek a business method utility patent for a new method of shopping utilizing technology and 3D printing.[136] However, even if patent protection is granted, the short-term protection of twenty years is inadequate protection.

The seemingly futile results of patent protection might be the reason some companies are foregoing any intellectual property protection altogether. For example, Lego bricks does not hold a patent on its ordinary blocks and smaller companies are using 3D printers to create Lego-style pieces.[137] Currently, Lego maintains a Lego Digital Designer CAD program, where users can upload custom designs that Lego manufacturers will create and send to the user.[138] It is possible to imagine Lego extending this program to allow users to 3D print their custom designs at home.[139] The fashion industry could also utilize a similar program, allowing users to 3D print clothing in their own homes. The issue this process presents is that companies utilizing these programs have the option to price discriminate by charging one price in stores, a second price at home, and a third price to subscribe to unlimited printing.[140] Even though this pricing method is legal, it might be prohibitively expensive for consumers. When given the option of 3D printing an expensive patented article of clothing or illegally obtaining a free CAD file with a low probability of getting caught, users may be more likely to choose the latter.

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[135] *See, e.g.,* Ricardo Bilton, *Expanding Beyond 3D Printed Guns, DEFCAD is Officially the Anti-MakerBot*, VENTURE BEAT (Mar. 11, 2013, 1:05 PM), http://venturebeat.com/2013/03/11/defcad-anti-makerbot/ (stating that the website will not take down or remove anything, ever).

[136] *See* Colman, *supra* note 15, at 21 (suggesting a business method for electronic fashion shopping, in light of increasing technology and decreasing available patent protections).

[137] Storch, *supra* note 63, at 285.

[138] *Digital Designer*, LEGO, http://ldd.lego.com/en-us/ (last visited Feb. 22, 2015).

[139] Storch, *supra* note 63, at 286.

[140] Storch, *supra* note 63, at 286.

iii. Trademark Law is Fashion's Classic Form of Protection

Trademark protection is not only important to fashion because of the lack of copyright or patent protection, but because the source of the good is what makes fashion valuable.[141] Fashion brands spend millions of dollars on advertising to build a favorable reputation and exclusivity surrounding their brand name, which consumers are drawn to.[142] Brand names and logos are important to the fashion industry because of their economic value.[143] And because companies invest so much time and resources in their marks and reputation, it is a principle of trademark law to ensure that no third party free rides on their mark through trademark infringement.[144]

At its most fundamental level, trademark protection serves two purposes. First, trademarks offer brands incentive to invest in their mark and sell consistent, high-quality goods. Second, trademarks prevent consumer confusion as to the source of the item.[145] These principles of trademark law make the prevention of counterfeit items a top priority, as counterfeiting is the most serious type of trademark infringement.[146] For fashion, a cause of action for trademark counterfeiting has the benefits of a clear legal standard, damages, seizure of the counterfeit goods, and the potential for severe criminal penalties.[147]

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[141] Colman, *supra* note 15, at 25.
[142] Colman, *supra* note 15, at 25 (explaining that fashion companies spend millions of dollars on runway shows and advertising to create exclusivity, which consumers are drawn to for fantasy or quality).
[143] *Intellectual Property in the Fashion Design Industry,* CENTER FOR FASHION ENTERPRISE, 12 (Mar. 2012), *available at* http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-DesignRights-Download1.pdf (revealing that H&M was worth $16,459 billion and Zara was worth $8,065 billion in 2011).
[144] *See* Colman, *supra* note 15, at 25 (explaining that trademark law attempts to ensure that no third party "free-rides" on the magic of their brand's goodwill).
[145] *See* Colman, *supra* note 15, at 25
[146] *See* Colman, *supra* note 15, at 25, 55.
[147] *See* Colman, *supra* note 15, at 55.

Applied to 3D printing, any 3D printed object with a logo might infringe on the rights of the trademark owner.[148] Even if it is printed without a logo, trademark owners can seek recourse through trade dress infringement.[149] But if 3D printing becomes so accessible that everyone has the latest design at the click of a button, users will print out trademarks as a distinguishing element because no one likes to wear the same thing as everyone else.[150] Therefore, if consumers print the trademarks to distinguish their clothing, trademark owners will have a clear legal recourse.[151] Furthermore, third parties offering infringing 3D printed products would most likely make the CAD files available online.[152] Recently, a United Kingdom court in *Lush v. Amazon* limited the extent to which third parties can use trademarks in keyword advertising and a website's search engine for links that lead consumers to items not originating from the trademark owner.[153] Even though this case did not involve 3D printing, this decision should leave trademark owners hopeful for a similar outcome concerning infringing 3D products available online.[154]

C. Next Season's Line of Trademark Licenses

Licensing is starting to trend in the 3D printed world. In 2014, Hasbro partnered with Shapeways and offered licenses to artists to create fan art based on My Little Pony.[155] This licensing

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[148] Depoorter, *supra* note 66, at 1487.
[149] Depoorter, *supra* note 66, at 1487. *Contra* Raustiala, *supra* note 130, at 1703 (stating that clothing designs will rarely be protected by trade dress because the design elements must be "source designating" rather than merely ornamental).
[150] Atherton, *supra* note 127.
[151] Atherton, *supra* note 127 (explaining that there is a clear legal recourse because printing a trademark is direct trademark infringement).
[152] Atherton, *supra* note 127.
[153] Colin Sawdy, *UK: Lush v. Amazon*, MONDAQ (Mar. 1, 2014), http://www.mondaq.com/x/296274/Trademark/Lush+v+Amazon.
[154] Colman, *supra* note 15, at 54 (suggesting that trademark owners should be hopeful for clear remedies as case law develops because a court could decide that secondary liability applies to search engines and 3D printing).
[155] *Introducing SuperFanArt*, SHAPEWAYS, http://www.shapeways.com/discover/superfanart?li=home-mlp-learn-more - announcing partnership (last visited February 19, 2015); *See generally* Elizabeth A. Harris, *Hasbro to Collaborate with 3-D Printing Company to Sell Artwork*, N.Y. TIMES (July 20, 2014),

partnership between Hasbro and Shapeways should be a model to all future 3D printing partnerships. Specifically, as noted earlier, if 3D printing manufacturers, like Shapeways, create and provide products following existing intellectual property laws and practices, everyone benefits.[156] Through trademark licensing, the licensor gets money from the license, the designer gets money for their creativity (i.e., the artist who designs the 3D printed item), and the 3D printing manufacturer makes money to manufacture the products.[157] It should be noted that the 3D printing manufacturer avoids trademark infringement by 3D printing the item with a license. Most importantly, this existence of a license makes it clear that manufacturers will not 3D print infringing items in absence of a license. The license also speaks to the legitimacy of the intellectual property.

i. The Public Will Respect Trademark Licenses

The most important benefit of licensing is that consumers will know that the licensed products are authentic, thus satisfying the principal purpose of trademark law, which is to prevent consumer confusion as to the source of the goods. The public response to licensing is also expected to be positive, as Hasbro's license is regarded as "brilliant and really open-minded."[158]

There was once a time when the music industry felt threatened by digital music in iTunes. In 2010, the 9th Circuit ruled that songs downloaded from iTunes are licensed and not purchased.[159] The court's reasoning explained that when an indi-

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http://www.nytimes.com/2014/07/21/business/hasbro-selling-my-little-pony-fan-art.html.

[156] *See* Carson, *supra* note 103 (explaining that every party to a licensing deal benefits because of publicity over innovation and revenue).

[157] *See* Carson, *supra* note 103.

[158] Carson, *supra* note 103.

[159] F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958, (9th Cir. Cal. 2010). *See also* Ethan Smith, *iTunes Songs Aren't Purchased, but 'Licensed,' Court Rules*, WALL ST. J. (Sep. 7, 2010, 1:42 PM),

vidual purchases a song, they have purchased a license to play that song in accordance with the terms and conditions on authorized devices.[160] Through this licensing agreement, the profits are split fifty-fifty between the artist and the label.[161] Even though this case focused on copyright protection in music technology, this reasoning can easily be applied to trademark protection in 3D printed fashion. For example, when downloading CAD files to print an article of clothing, the consumer would not be purchasing the item as much as he is granted the license to print the item from a specific device for his sole authorized use (ideally, the terms of the license would not permit the individual to resell the clothing). Consumers do not seem to notice the strings attached in this type of licensing agreement, so the public is unlikely to react negatively.[162]

There has yet to be a court decision specifically addressing trademark infringement in 3D printing. However, there have been a few copyright disputes involving 3D printing. One conflict arose when an engineer, Todd Blatt, created a CAD design for an "alien cube" from the movie Super 8 and uploaded the file to Shapeways.[163] He then received a cease-and-desist letter from Paramount, the producers of Super 8. Within 24 hours of his upload, Paramount had already licensed the right to produce replicas of the alien cube to another party[164] and saw Blatt's upload and potential sales as competition for their licensee.[165] In the end, Blatt took down his design.[166] This conflict proves that a licensee's right to manufacture products under a properly licensed mark will most

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http://blogs.wsj.com/digits/2010/09/07/itunes-songs-arent-purchased-but-licensed-court-rules/.

[160] Genevieve Burgess, *Are Your iTunes Really Yours? Bruce Willis and Eminem are on the Case*, PAJIBA (Sep. 6, 2012), http://www.pajiba.com/think_pieces/are-your-itunes-really-yours.php.

[161] *Id.*

[162] *See id.* (observing that if a consumer isn't even affected by a license's restrictions, it is unlikely to cause an uproar).

[163] Finocchiaro, *supra* note 59, at 479.

[164] Finocchiaro, *supra* note 59, at 479 (noting that it is expected and common practice for third party manufacturers to respect licensing agreements).

[165] Finocchiaro, *supra* note 59, at 479.

[166] Finocchiaro, *supra* note 59, at 479 (noting that Blatt complied because he respected the other licensing agreement).

likely be respected and any other party's attempt to compete will result in expensive litigation in a losing case. A valid license agreement proves the legitimacy of the intellectual property that exists in the product and the associated rights of both the licensor and licensee.

ii. Fashion Licenses

A landmark decision in 1975, *Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing*, recognizes the importance of preventing consumer confusion in trademark licensing clothing brands.[167] In that case, Boston Hockey refused permission to Dallas to use its logo on clothing, but Dallas manufactured the clothing with the Boston Hockey logo regardless.[168] The 5th Circuit decided that Dallas created a likelihood that consumers would identify and associate them with Boston Hockey by duplicating Boston Hockey's trademark and selling the clothing to the public.[169] The court continued to recognize that the logo was a "triggering mechanism for the sale" of the clothing and that this triggering mechanism was enough to establish trademark infringement through association and not confusion as to the source of the goods.[170] This case serves as a reminder to 3D printing manufacturers that courts are not reluctant to establish trademark infringement through the unpermitted use of logos. Therefore, 3D printing manufacturers are encouraged to seek permission to use the mark through license agreements.

Besides naked licensing, designers also worry about exclusivity and adequate quality control when contemplating licensing deals. A cautionary tale is the one of Halston, one of the

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[167] *See* Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., 510 F.2d 1004 (5th Cir. 1975) (demonstrating that a party's interest in exclusively manufacturing a logo is an interest protected by trademark law).
[168] Calboli, *supra* note 69, at 381.
[169] Calboli, *supra* note 69, at 381 (demonstrating that trademark law even protects the association of logos).
[170] Calboli, *supra* note 69, at 381.

first luxury designers to embrace licensing.[171] Once known as the "premier fashion designer of all America," he signed licensing deals with JC Penny.[172] Soon thereafter, his designs were available to women of all income levels in various products like eyeglasses, luggage, and Girl Scout uniforms.[173] However, with so many licenses, he was unable to control all of the deals.[174] The important licensing lesson here is not naked licensing, but how the inability to control the quality and execution of the products can lead to lost exclusivity, which can also ruin a brand's image. Fashion brands, in particular, must be cautious in what they 3D print. Mainly because one of the primary benefits of 3D printing is lower cost, labels should be highly selective in what they wish to 3D print, with which manufacturer, how many items to produce, and how long the goods should be available for. In reality, the possibility of relinquishing all control factors is why luxury fashion labels are starting to avoid licensing agreements, exert greater control over their licensing deals, or buy back their licenses altogether.[175] There is a strong argument that licensing deals are out of fashion because of the lack of control involved. There is, however, an equally strong argument that designers could exercise total control over every part of the process by licensing with just one reputable 3D printing manufacturer.

iii. Avoiding Naked Licensing

A licensor of a trademark must exercise at least some control over the mark to avoid abandonment through naked

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[171] *Fashion Law 101 - Are Licensing Agreements Right for my Brand?*, WIGS AND GOWNS, http://wigsandgowns.co.uk/are-licensing-agreements-right-for-my-brand/ (last visisted Feb. 28, 2015).

[172] *See id.* (stating that he was given this title because after designing First Lady Jacqueline Kennedy's pillbox hat for her husband's inauguration in 1961).

[173] *See id.* (admitting that the availability of items to all women through various products downgraded his brand in the view of the elite New York fashion stores).

[174] *Fashion Law 101 - Are Licensing Agreements Right for My Brand?*, WIGS AND GOWNS, http://wigsandgowns.co.uk/are-licensing-agreements-right-for-my-brand/ (last visisted Feb. 28, 2015).

[175] *See id.* (explaining that Victoria Beckham does not use licensing agreements and controls everything in house, Ralph Lauren reacquired its licenses to exercise greater control over branding, and Burberry bought back its licenses).

licensing. It is therefore recommended that fashion businesses license their brand names by engaging in exclusive licenses and by being consistent with their past licensing practices.

In fashion, it is common for a licensor to have different licenses for different products, such as one licensee for footwear and another licensee for jeans.[176] However, it is best to have one exclusive license when licensing a brand name to a 3D printing manufacturer. One favorable outcome in having one exclusive license is that when the products are debuted in department stores, there will only be one sign indicating the brand and the 3D printing manufacturer rather than many different signs with the brand and the different 3D printing manufacturers that created the goods. This scenario envisions accessible brands, like Ralph Lauren, dedicating a small part of their given floor space of department stores to their new line of 3D printed clothing. Another advantage of granting one exclusive license to one 3D printing manufacturer is that it reduces the likelihood that consumers will be duped into buying infringing and unauthentic items. By fashion brands highly publicizing their new partnerships, consumers will know that they will need to go directly to the store or the fashion company's website to get the authentic items.[177] 3D printing manufacturers that later attempt to sell infringing merchandise will be caught and enjoined from selling the items.

To preempt new issues from arising in 3D printing licenses, trademark owners should abide by the stringent standards set out in *Coca-Cola v. J.G. Butler & Sons*.[178] In *Coca-Cola,* the inspection department examined the product before and after the beverage went through carbonization.[179] In 3D printing cloth-

[176] GUILLERMO C. JIMENEZ & BARBARA KOLSUN, FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, & ATTORNEYS, 120 (2d ed. 2014).
[177] *See, e.g.,* Celia Shatzman, *Get a First Look at the Lilly Pulitzer for Target Collaboration*, FORBES (Jan. 7, 2015), http://www.forbes.com/sites/celiashatzman/2015/01/07/get-a-first-look-at-the-lilly-pulitzer-for-target-collaboration/ (demonstrating that collaborations are highly publicized in anticipation of consumer interest).
[178] Coca-Cola Co. v. J.G. Butler & Sons, 229 F. 224 (E.D. Ark. 1916).
[179] *Id.*

ing, fashion brand owners should examine the CAD file as displayed on the computer, a sample of the 3D printed cloth, and the final product before it is shipped and sold in the marketplace. Just as the plaintiff in *Coca-Cola* monitored the plants, fashion brands should monitor the quality of the 3D printers and thread. The more rigorous fashion brand owners are in monitoring their mark in the 3D printing scene, the more likely a court will not find naked licensing, thus preventing third parties from using the mark due to trademark abandonment.

IV. SET THE TREND OF TRADEMARK LICENSING

Once 3D printing clothing is a common practice, the most reasonable safeguard against counterfeits is trademark licensing. It is important to assess the reality of 3D printing for both manufacturing and home use and the practicality of engaging in license agreements.

The fashion industry is likely to engage in trademark licensing because of its well-established reliance on it. Under current practices, if different manufacturers decided to engage in 3D printing, fashion designers could license their marks through selective distribution, according to qualitative criteria.[180] The criteria and control over licensees in 3D printing must be just as consistent as the control in other types of licenses to avoid a licensing disaster.[181] Following rational licensing policy, the fashion industry could avoid deceiving the public, maintain consistent quality, and foster innovation.[182]

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[180] *See generally* CREFOVI, *supra* note 78 ("Selective distribution is a useful tool at the disposal of the supplier since it can refuse to sell to those dealers that do not comply with the set criteria . . . it allows a supplier to select dealers according to criteria which are mainly qualitative, and to consequently ensure a commercialisation within conditions which befit the prestige of the luxury products.").

[181] Mark Ritson, *The Poisoning of the Calvin Klein Brand*, BRAND STRATEGY INSIDER (Sept. 18, 2008), http://www.brandingstrategyinsider.com/2008/09/the-poisoning-o.html#.Vp6Q_1MrKHp (explaining how Calvin Klein unfortunately licensed in over forty different categories, which confused consumers as to the value of the good, and it was ranked last in status among wealthy American women in 2001).

[182] *See Quality Control*, *supra* note 10, at 1190.

The most critical inquiry for the validity of licensing is whether licensors maintain control over product quality and whether the products conform to any fixed standard.[183] It seems completely possible for fashion brands to license their marks to 3D printing manufacturers and then continue to control the quality of the 3D printed materials through supervision and approval before the goods enter the marketplace.

A. Designing the Trademark License

Trademark owners in fashion must provide a licensing option to 3D printing manufacturers. As previously discussed, a licensing agreement benefits the licensor, the 3D printing manufacturer, and the artist designing the item.[184] The validity of the trademark license is determined by the trademark owner's control over "the nature and quality" of the licensed products.[185]

Licensing agreements provide endless opportunities to form valuable partnerships. For example, one woman raised $8.5 million dollars for her orthotic shoe company, SOLS.[186] As a 3D printing manufacturer, she could bring a lot of goodwill to her business by partnering with a popular shoe brand, like Nike. Even if Nike has no interest in embarking on its own division of orthotic shoes, the company might be willing to license their mark to extend the variety of products they offer, thus effectively enhancing Nike's goodwill and reputation. Additionally, this is an innovative business plan for Nike, comparable to Hasbro's well-received innovative licensing partnership. SOLS also plans to operate through a mobile application that takes six photos of an individual's foot and then extrapolates a series of data and measurements that are used

[183] Calboli, *supra* note 69, at 365.
[184] Carson, *supra* note 103 (explaining that the benefits include increased revenue).
[185] Calboli, *supra* note 69, at 355.
[186] Denise Restauri, *Meet the Woman Who's Using 3D Printing to Make Your Shoes Cool and Comfortable*, FORBES (Oct. 23, 2014, 4:12 PM), http://www.forbes.com/sites/deniserestauri/2014/10/23/meet-the-woman-whos-using-3d-printing-to-make-your-shoes-cool-and-comfortable/.

to create a pair of orthotic shoes.[187] New fashion companies, aware that they are disrupting an industry, could partner with popular brand names to immediately gain a respectable reputation, while the popular brands get the benefit of participating in an innovative process by extending the variety of their products with less wasteful costs and materials.[188]

Every intellectual property license agreement contains paragraphs concerning the scope of the license granted, specifications of the intellectual property, royalties, duration, and termination rights. In fashion, the licensor should engage in agreements that are consistent with past practices.[189] The importance of consistency applies to royalty rates, appropriate channels of distribution, and advertising efforts.[190] The 3D printing manufacturer should be the exclusive licensee for manufacturing the 3D printed clothing[191] and the brand, as a licensor, should limit the specifications of the intellectual property to just the brand name (i.e., its trademark).[192] Specifically, royalties should be consistent with how the licensor has determined royalties in past license agreements, which includes deciding whether the royalties are to be paid up-front in a lump sum or through running royalties. The 3D printing manufacturer should be prohibited from printing anything other than what the fashion designer orders and should also be prohibited from sublicensing. A licensor should have one exclusive licensee because increased channels of distribution (i.e., more than one manufacturer) intensify confusion as to who is behind the brand. The appropriate channels of distribution and advertising efforts are extremely important to maintain the fashion brand's exclusivity

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[187] *Id.*
[188] *Id.*
[189] JIMENEZ, *supra* note 176, at 128.
[190] JIMENEZ, *supra* note 176, at 123 ("Royalty rates in fashion licenses commonly range from 5 to 15 percent of a revenue stream").
[191] *See* RAYMOND T. NIMMER, LICENSING OF INTELLECTUAL PROPERTY AND OTHER INFORMATION ASSETS, 3 (2007) (defining an "exclusive" license as an agreement that gives the licensee exclusive rights to the licensed subject matter).
[192] JIMENEZ, *supra* note 176, at 120 (noting that licensing the brand is the most common approach).

and overall brand image.[193] By the licensor maintaining total control over the advertising, brand image will not become tarnished by advertising to the wrong consumers. Also, by the licensor retaining total control over the distribution, consumers will be less likely to be confused as to which products are authentic, given that fake products will eventually be found online or through other venues that the brand does not use.

V. CONCLUSION

3D printing is making its debut into the manufacturing process and soon into the home, no matter how disruptive intellectual property owners say it is. Even though 3D printed cloth is not yet widely available, fashion brands should prepare for how to protect and control their trademarks. Copyright and patent protection do not seem to offer the best protection concerning the threat of 3D printing and even less so when it involves fashion brands. Although it has its drawbacks, trademark licensing is a prevalent practice for businesses that thrive on brand recognition, and it should continue to be utilized in 3D printing. Trademark law is the most reasonable form of protection because it grants the longest period of protection, it benefits all the parties involved, and the public perception of this measure is likely to be positive because it is not an aggressive tactic. Therefore, trademark licensing is definitely the most fashionable way to tackle the threat of 3D printing.

[193] JIMENEZ, *supra* note 176, at 127 (explaining that in the case of a luxury good, the licensor will want to avoid inappropriate distribution because these sales could "cheapen" brand reputation).

AUNT JEMIMA'S FINAL STAND, BUT ELVIS HAS NOT LEFT THE BUILDING: IN SEARCH OF MOORINGS FOR THE RIGHT OF PUBLICITY AND THE LANDES-POSNER SAFE HARBOR

Andrew F. Emerson, Esq.[*]

ABSTRACT

The right of publicity protects against the appropriation of an individual's name and likeness for purely commercial purposes. The right was first formally recognized under the rubric of the right of publicity in 1953. The cause of action is now characterized by its ill-defined legal parameters both in terms of its scope of coverage and whether, and for what period, the right survives post-mortem. Courts and state legislatures have produced a patchwork of widely divergent approaches to these issues and have struggled to define the lines of demarcation between the right of publicity and the First Amendment right to freely publish that which is expressive, newsworthy, and of legitimate public interest.

The haphazard development of the right has been fueled by the explosion of "celebrityhood" and the rise of a myriad of media outlets where public recognition is frequently a fleeting commodity. Justifications for the recognition of the right of publicity have been several and varied, ranging from economic apologies to the philosophical concept of self-autonomy. This article espouses a unified justification for recognition of the right and reviews the recent landmark decisions defining the parameters of First Amendment protection for nonconsensual, uncompensated use of name and likeness.

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I. INTRODUCTION

The title to this article bespeaks to the explosion of claims, over the past four decades, under the rubric of "the right of publicity."[1] America has become a nation obsessed with celebrities.[2] Through much of the twentieth century, the attainment of celebrity status was limited to the mediums of print, radio, and cinema. Under these conditions, individuals who would attain celebrity status faced a far more difficult climb when contrasted to the present

[1] Hunter v. Pepsico, Inc., No. 14 C 06011, slip op. at 1 (N.D. Ill. Feb. 18, 2015), *aff'd*, No. 15-1424 (7th Cir. Nov. 6, 2015) (order dismissing lawsuit brought by alleged relatives of Anna Short Harrington (Aunt Jemima) seeking recovery in excess of $2 billion for the misappropriation of her likeness by Quaker Oats and others); Presley's Estate v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Presley v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987) (decisions concluding that the right to commercially utilize the name and likeness of Elvis Presley was a transferable and descendible right that survived Presley's death). Matthew Belloni, *Clint Eastwood Sues Furniture Company for Selling 'Eastwood' Chairs*, THE HOLLYWOOD REPORTER (Apr. 7, 2012), http://www.hollywoodreporter.com/thr-esq/clint-eastwood-lawsuit-inmod-furniture-company-309347 (reporting Clint Eastwood's filing of a lawsuit in a California superior court against a furniture company and a website alleging the commercial appropriation of Eastwood's identity and persona in its marketing of furniture); *Arnold Schwarzenegger Files $10 Million Lawsuit,* COURTHOUSE NEWS SERVICE (May 13, 2014) http://www.courthousenews.com/2014/05/13/67850.htm (reporting Arnold Schwarzenegger's filing of a lawsuit in a California superior court against Arnold Nutrition Group and others for misappropriating his name as purported endorser of fitness and nutritional products).

[2] *See, e.g.*, Chrysler Sumner, *Is Celebrity Obsession Just Another Way Americans Detach From Their Lives?*, OPPOSING VIEWS (Mar. 17, 2015), http://www.opposingviews.com/i/columns/america-s-celebrity-obsession-getting-out-control (analyzing the strong trend towards escapism among Americans through preoccupation with the life of celebrities); Keturah Gray, *Celebrity Worship Syndrome Abounds*, ABC NEWS (Sept. 23, 2014), http://abcnews.go.com/ Entertainment/story?id=101029 (discussing the identification by psychologist of "celebrity worship syndrome"); Carlin Flora, *Seeing by Starlight: Celebrity Obsession*, PSYCHOLOGY TODAY (July 1, 2004), https://www.psychologytoday.com/articles/200407/seeing-starlight-celebrity-obsession (reviewing psychological studies on Americans' preoccupation with celebrity).

qualifications for national or international recognition.[3] The previous limitations for entry into the pantheon of celebrityhood have been lifted with the explosion of multimedia that operates in a

[3] *See, e.g.*, RICHARD SCHICKEL, INTIMATE STRANGER: THE CULTURE OF CELEBRITY (1985) (tracing the history of celebrity in western culture and its linkage to the history of communication technology). Graeme Turner, *The Mass Production of Celebrity: 'Celtoids', Realty TV and the 'Demonic Turn',* 9(2) INT'L J. CULTURAL STUDIES, 153 (2006) (analyzing the explosion of celebrity and the shrinking distance between television and reality). Admittedly, some of those who have gained celebrity status did so through infamous accomplishments. *See* JONATHAN EIG, GET CAPONE, 270-73 (2010) (observing the widespread newspaper coverage of Chicago mobster Al Capone). *See also* BILL JAMES, POPULAR CRIME REFLECTIONS ON THE CELEBRATION OF VIOLENCE (2011) (tracing the cultural influence of high profile criminal cases such as Lizzie Borden, the Lindbergh baby kidnapping, and O.J. Simpson).

In a 2012 decision issued by the United States District Court for the Central District of California, the Court in a case involving postmortem use of Albert Einstein's image for commercial purposes, cogently articulated the conflict created by the explosion of media and the rights of privacy and publicity in the following terms:

> "In addition to First Amendment implications, there is another consideration. In the 57 years since Albert Einstein died, the means of communication have increased and so has the proclivity of people to use them frequently. Journalists, academics and politicians frequently issue pronouncements about the impact on society, both in the United States and around the globe, of the dizzying explosion in the tools of communication. New devices and platforms have been developed, including smart phones, personal computers, social networks, email, Twitter, blogs, etc. These technologies have caused a swift and dramatic, but still developing, impact on ordinary life. It has become a truism that their speed, their accessibility, and their popularity appear to have changed social norms regarding privacy and public expression. But it is not yet clear what this should mean for the protection of such rights as the right of privacy, the right of expression and the right of publicity."

Hebrew Univ. of Jerusalem v. Gen. Motors, 903 F. Supp.2d 932, 941 (C.D. Cal. 2012).

myriad of venues on a twenty-four hour cycle.[4] In tandem with the burgeoning number of media outlets, the class of individuals deemed eligible for recognition as nationally celebrated personalities has grown at a frenzied pace. America's anointing of celebrity status is no longer generally limited by the parameters of Hollywood or extraordinary achievement in fields such as politics, sports, literature, or exploration.[5] Rather, celebrities of the twenty-first century run the gamut of occupations and life experiences from the makers of duck calls[6] to those whose sole accomplish-

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[4] *See, e.g.*, FREDERICK LEVY, 15 MINUTES OF FAME: BECOMING A STAR IN THE YOUTUBE REVOLUTION (2008).

[5] *See* Tomas Charmorro-Premuzic, *Kim Kardashian: Why We Love Her and the Psychology of Celebrity Worship*, THE GUARDIAN, http://www.theguardian.com/media-network/media-network-blog/2014/aug/14/kim-kardashian-psychology-celebrity-worship-social-media (last visited Aug. 14, 2015). The journalist sagely notes the divorce of "celebrity" from achievement in the following terms:

> "Celebrities have been around since Alexander the Great, whose face became a public emblem reproduced in coins, tableware, and jewelry, even before his death. The difference is that the contemporary celebrity is not necessarily associated with any form of talent, achievement, or power. In other words, famous people have always been celebrated, but the last decade has seen an unprecedented rise of the empty celebrity cult, that is, our tendency to worship people just because they are famous, without any regard for what they are famous for."

Id. The words of Newton N. Minon, head of the FCC, were more than prophetic when over 50 years ago be observed – "But when television is bad, nothing is worse… I can assure you that you will observe a vast wasteland." Newton N. Minon, Address to the Nat'l Assoc. of Broadcasters: Television and the Public Interest (May 9, 1961).

[6] *See* Ariel Miller*, The Construction of Southern Identity Through Reality TV: A Content Analysis of Here Comes Honey Boo, Duck Dynasty and Buckwild*, 4 ELON J. OF UNDERGRADUATE RESEARCH IN COMMC'NS 1 (No. 2, 2013) (examining the portrayal of southern culture in reality television).

ment is the securing of a role on a reality television where devotees may follow everyday events on an hourly or daily basis.[7]

With the growing ambit of celebrityhood has been the ever expanding recognition that the luminary's name and likeness has potentially great commercial value in the field of product endorsement or even in the mere sale of the celebrity's likeness.[8] The icon's commercial value is not limited to appropriation of his name or likeness, but rather, has expanded to include popularized phrases of the individual, characteristics associated with the personality, and items closely associated with the individual.[9] The

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[7] *See, e.g.*, THE TRUMAN SHOW (Paramount Pictures 1998) (social science themed fictional motion picture concerning an individual who unknowingly is living his entire life in a reality television show). *See also Big Brother*, http://www.cbs.com/shows/big_brother/news/1002621/ (last viewed Mar. 17, 2015) (online advertisement for the CBS reality series "Big Brother" advertising a 24/7 live feed feature).

[8] W. Anson, L. Lodes, & D. Noble, *Valuing a Celebrity's Right of Publicity*, ENTM'T LAW & FINANCE, http://www.lawjournalnewsletters.com/issues/ljn_entertainment/28_2/news/157756-1.html (last visited Feb. 2013) (reviewing the mandatory valuation of rights of publicity for purposes of protecting intellectual property with a focus on 2012 Olympic 100 and 200 meter gold medalist Usain Bolt and National Basketball Association MVP Derrick Rose).

[9] *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098-1011 (9th Cir. 1992) (punitive damage award in excess of $2,000,000,000 based upon radio commercial's misappropriation of a singer's voice through deliberate imitation); White v. Samsung Elec. Am., 971 F.2d 1395 (9th Cir. 1992) (reversing trial court's dismissal of right of publicity claims ultimately resulting in a $400,000 damage award to Vanna White of the television show Wheel of Fortune based upon Samsung's misappropriation of her "likeness" in creating an advertisement utilizing a robot, dressed in a blond wig, gown, and jewelry, posing next to a Wheel of Fortune-like game board); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (damage award to singer Bette Midler based upon television commercial's misappropriation of her voice by deliberate imitation); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831(6th Cir. 1983) (misappropriation of Johnny Carson's introductory phrase "Here's Johnny" in advertisements by a portable toilet company); Motsenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (damages awarded for utilization in advertisement of racing car bearing distinctive characteristics of the car driven by racing star Motsenbacher despite no use of his personal image in the advertisement). The Restatement Third of Unfair Competition adopts this expanded view

commercial value of the media personality's name and likeness continues, and potentially increases, with death.[10]

II. A BRIEF HISTORY OF "THE RIGHT OF PUBLICITY"

A. Recent Expansion of the Right of Publicity

Predictably, the growth of the cult of the celebrity and the expanding recognition of the commercial value of one's name and likeness has resulted in the evolution of a field of law designed to allow the media personality to personally control the commercial value of his name and likeness.[11] Moreover, numerous state legislatures, coupled with groundbreaking judicially-created remedies, have instituted legal mechanisms by which these commercial rights are deemed descendible and capable of intervivos or post-mortem transfer or licensing.[12] Thus, the personality enjoys the benefit of

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of the right of publicity to encompass more than the mere use of the name or likeness of the individual in noting that a wrongful appropriation encompasses nonconsensual use of "the person's name, likeness, *or other indicia of identity*…" RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (emphasis added).

[10]Dorothy Pomerantz, *The Top-Earning Dead Celebrities*, FORBES, http://www.forbes.com/ sites/dorothypomerantz/2011/10/25/the-top-earning-dead-celebrities/ (last visited Mar. 17, 2015) (observing that in the 12 month period, prior to the article, the estate of Michael Jackson had brought in $170 million). The article lists the top fifteen earning deceased celebrity estates including, for example, those of Elvis Presley, Marilyn Monroe, Elizabeth Taylor, and "Peanuts" creator Charles Schulz.

[11]*See generally,* JAMES MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY (2d ed. 2014) [hereinafter MCCARTHY, PUBLICITY] (recognized authoritative work on the evolution and law governing the right of publicity and the right of privacy).

[12] *See, e.g.,* Price v. Hal Roach Studios, 400 F. Supp. 836 (S.D.N.Y. 1975) (one of the earliest decisions recognizing the of the right of publicity involving the comedy team of Stan Laurel and Oliver Hardy). The right of publicity, defined by state law, has subsequently been recognized in numerous states as being a transferable and descendible right either through legislation or by common law creation. *See, e.g.,* CAL CIV. CODE §3344.1(f)(1) & (g) (Westlaw 2000) (recognizing 70-year post-mortem protection for the right of publicity with requirement of registration of the individual's name as a prerequisite to recovery of damages); TEX. PROP. CODE ANN. §26.001 e*t. seq.* (Westlaw 2012) (recognizing a transferable right of publicity with a 50-year post-mortem exclusivity of use

passing on the fruits of celebrityhood to his progeny or other heirs.[13]

With the exponential growth in media outlets for the potential appropriation of the celebrity's name and likeness, there has been a corresponding explosion of litigation involving the assertion of right of publicity claims.[14] Thus, the last year has witnessed a lawsuit in which the purported relatives of Aunt Jemima filed suit against Quaker Oats seeking $2 billion dollars in compensation, plus a share of future revenue from sales of products bearing her likeness.[15]

B. The Birth and Growth of the Right of Publicity

The right to control the appropriation of one's name or likeness can be traced back to as early as Queen Victoria's attempts in the nineteenth century to limit the creation and dissemi-

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prior to the name entering the public domain). Nineteen states have enacted legislation recognizing the right of publicity via statute while 28 states recognize the right via common law. Michael Faber, *Right of Publicity*, http://rightofpublicity.com/statutes (last viewed Mar. 17, 2015) [hereinafter Faber, *Publicity*]. Professor Faber of the University of Indiana McKinney School of Law has created a website dedicated to tracing the origin and tracking legal development and recent decisions concerning the right of publicity.

[13] The recognition of the discernibility of the right of publicity conversely allows the celebrity to prohibit the use of his name, likeness, and image post-mortem. Most recently, Robin Williams, through creation of a trust, bequeathed rights to his name and likeness to a charitable organization. Moreover, Williams qualified the bequeathment with the restriction that no authorized endorsements utilizing Williams can be made until at least August 11, 2039—25 years after his death. Eriq Gardner*, Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (Mar. 30, 2015), http://www.hollywoodreporter.com/thr-esq/robin-williams-restricted-exploitation-his-785292.

[14] *See* Eriq Gardner, *What's in a Name?,* ABA JOURNAL (Nov. 1, 2010), http://www.abajournal.com/ magazine/article/whats_in_a_name (observing the explosive growth of commercial appropriation litigation).

[15] Hunter v. Pepsico, Inc., No. 14 C 06011, (N.D. Ill. Feb. 18, 2015), *aff'd*, No. 15-1424 (7th Cir. Nov. 6, 2015) (case did not survive a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim).

nation of prints of her and the immediate family's portraits.[16] The contours and nature of the legal right of the individual to protect commercial appropriation of her name and likeness initially grew slowly and with ill-defined parameters.[17] Originally, the right to protect against commercial appropriation of one's name and likeness was deemed to be an element of the right of privacy or as otherwise stated, the "right to be left alone." This right of privacy first gained general recognition with a renowned law review article co-authored by Louis Brandeis and Samuel Warren in 1890.[18] However, during the mid-twentieth century, courts commenced to distinguish the "right of privacy" from the right to protect against

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[16] *See* George Smith, *The Extent of the Protection of the Individual's Personality Against Commercial Use: Towards a New Property Right,* 54 S.C. LAW REV. 1, 5 & n.19 (2002) (citing Prince Albert v. Strange, 64 Eng. Rep. 293 (1849)).

[17] *Compare* Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (recognizing the right of professional baseball players to assign the right to utilize their likeness to a chosen baseball card company), *with* Paulsen v. Personality Posters, 59 Misc.2d 444, 448, (N.Y. Sup. Ct. 1968) (tracing the history of New York courts' refusal to extend the statutory right of privacy to redress commercial appropriation of one's likeness); O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1942) (refusing to recognize a cause of action for All-American football player Davey O'Brien based upon Pabst Blue Ribbon's nonconsensual use of his likeness, without consent, on a beer calendar). Much confusion in the development of the law on the right of publicity is attributable to the propensity of some courts to continue to treat the right of publicity as rooted in the right of privacy as opposed to its recognition as an economic right. Jean-Paul Jassy and Kevin Vick, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW 14, 14 & n.8 (2011-2012) (citing McBee v. Delica Co., Ltd., Civ. No. 02-198-P.C., 2004 WL 2634465, at *3 (D. Me. Aug. 19, 2004)) ("the right of publicity flows from the right of privacy"). Recent litigation involving the right of publicity reflects the problematic attempted synthesis of the explosion of the cult of the personality with an all-encompassing media coverage, and the perfecting of video replications of deceased celebrities. *See, e.g.*, Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age*, John M. Olin Program Law and Economics Working Paper No. 120 (2001), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1177&context=law_and_economics [hereinafter *Bogart Gets Scale*] (contending that the ability to produce digitalized reproduction of celebrities should not open uncompensated use in movies and television).

[18] Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter Brandeis & Warren, *Privacy*].

the appropriation of one's name and likeness by commercial interests:

> "[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures."[19]

[19] Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

Thus, this distinct legal cause of action designed to redress commercial appropriation of one's name or likeness was first labeled "the right of publicity" in a decision of the United States Third Circuit Court of Appeals published in 1953.[20] The right of publicity gained further refinement with a 1960 law review article in which William Prosser identified four types of privacy torts and distinguished "the right to be left alone" from the right to protect against the commercial appropriation of one's name and likeness.[21]

Commencing in the 1970's, numerous states, pioneered by California,[22] have in rapid order judicially and legislatively provided legal protection for the right of publicity.[23] Many states have enacted legislation recognizing the right of publicity as a right that survives the individual's death and is both a transferable and descendible right.[24]

III. FIRST AMENDMENT LIMITATIONS ON THE RIGHT OF PUBLICITY

A. The Hazy Line of First Amendment Protection

From the time of its recognition, the right of publicity has enjoyed an uneasy relationship with the freedom of speech and expression guaranteed by the First Amendment.[25] The natural

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[20] *Id*.

[21] William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter Prosser, *Privacy*] (Prosser defined four distinct privacy torts including: (i) intrusion upon seclusion; (ii) public disclosure of embarrassing facts; (iii) false light; and (iv) commercial appropriation of name or likeness). *Accord* Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). Nimmer's article was similarly groundbreaking in its articulation of the right of publicity as a distinct cause of action created for the protection of the commercial value of name and likeness.

[22] *See* Faber*, Publicity, supra* note 12.

[23] *Id.*

[24] *See* Faber*, Publicity*, *supra* note 12 and accompanying footnote text (comprehensively providing the text of statutes and judicial decisions extending the right post-mortem).

[25] *See*, *e.g.,* Zacchini v. Scripps-Howard Broad. Co*.,* 433 U.S. 562, 577 (1977). The *Zacchini* case is the only time the United States Supreme Court has specifi-

tension between the right of publicity and these First Amendment protections has continued on to the present day. One recent decision, defining the parameters of the right of publicity described the First Amendment limitation on the cause of action in the following terms:

> "The Supreme Court in *Procunier v. Martinez* noted that the protection of free speech serves the needs 'of the human spirit — a spirit that demands self-expression,' adding that '[s]uch expression is an integral part of the development of ideas and a sense of identity.'[26] Suppressing such expression, therefore, is tantamount to rejecting "the basic human desire for recognition and [would] affront the individual's worth and dignity."[27] Indeed, First Amendment protections have been held applicable to not only political speech, but to 'entertainment [including, but certainly not limited to] motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works.'[28] Thus, '[t]he breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for

cally addressed the right of publicity and its relationship to the First Amendment. *See infra* notes 81 through 88 and accompanying text.

[26] Procunier v. Martinez, 416 U.S. 396, 427 (1974).

[27] *Id.*

[28] Tacynec v. City of Phila., 687 F.2d 793, 796 (3d Cir. 1982).

> truth.'[29] 'The interest in safeguarding the integrity of these protections therefore weighs heavily in any balancing inquiry.'"[30]

Thus, courts and legislatures have circumscribed the right of publicity by recognizing First Amendment limitations on claims for commercial appropriation. These First Amendment limitations most notably include prohibiting the celebrity from claiming a commercial appropriation when his name or likeness is employed in a newspaper or magazine article,[31] or when incorporated into an expressive work of art, literature, or film constituting something more than a mere naked use of the name or likeness for commercial gain.[32] While universally recognized that the right of publicity

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[29] Dun & Brad-Street, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting).

[30] Hart v. Elec. Arts, Inc., 717 F.3d 141, 149-50 (3d Cir. 2013).

[31] First Amendment's restrictions on the right of publicity, with respect to dissemination of information concerning a celebrity, has resulted in numerous decisions concluding that commercial misappropriation claims were precluded in the circumstance of the news or entertainment media's employment of the individual's name or likeness in a publication qualifying as the reporting of newsworthy events. *See, e.g.*, New Kids on the Block v. News Am. Publ'g Inc., 971 F.2d 302, 309-10 (9th Cir. 1992) (newspaper deemed to have First Amendment protection in commercial appropriation case in which the newspaper used New Kids' name in 900-number telephone survey to determine most popular band member); Lisby v. Cincinnati Monthly Publ'g Corp., 904 F.2d 707 (6th Cir. 1990) (utilization of plaintiff's photograph in a publication with six wedding dolls was not a commercial appropriation); Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977) (newspaper's publication of an Indian boy in a pastoral setting did not constitute an invasion of privacy); The Restatement Third of Unfair Competition describes these First Amendment exemptions from claims of commercial appropriation of one's name or likeness in the following terms: "use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 (1995).

[32] *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (artist's creation and sale of portrait of Tiger Woods not deemed a commercial appropriation because of the transformative nature of the work in its inclusion of other legendary golfers in the background and the implication that Woods would join

is limited by the First Amendment with regard to publications that are newsworthy or an original artistic expression, the legal decisions seeking to apply the constitutional limitation are, to say the least, varied and conflicting.[33]

B. The Supreme Court Decision in *Zacchini v. Scripps-Howard Broadcasting Co.*

Despite the numerous conflicting lower court decisions, the Supreme Court of the United States has on only one occasion addressed the issue of First Amendment limitations on the right of publicity.[34] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the underlying dispute arose out of the performance at an Ohio county fair of a human cannonball act in which Hugo Zacchini was shot some 200 feet into a net.[35] A local television station, without the performer's consent, filmed Zacchini's entire 15 second act and

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this "revered group"); Mine O'Mine, Inc. v. Calmese, No. 2:10-CV-00043-KJD-PAL, 2011 WL 2728390, *8-9 (D.Nev. July 12, 2011) (creation of cartoon character "Shaqtus" constituting half-human, half-cactus depiction of Shaquille O'Neal was sufficiently transformative as to not constitute an appropriation of the likeness of O'Neal); Winter v. D.C. Comics, 69 P.3d 473 (Cal. 2003) (comic book's depiction of renowned musicians Johnny and Edgar Winter was not a commercial appropriation of their person since the characters were transformative characters as half-worm, half-human offspring). *Cf.* Comedy III Prod., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001) (sale of t-shirts with a charcoal drawing of the Three Stooges constituted a commercial appropriation of name and likeness as the drawings were not artistically expressive, but rather, were unadorned depictions of the individuals).

[33] *See infra* notes 53 through 69 with authority therein cited and accompanying text (reviewing various judicial tests seeking to draw lines of demarcation between the First Amendment right of expression and the right of publicity). One commentator in describing the ill-defined lines of demarcation drawn in cases implicating right of publicity claims and defenses based on the First Amendment right of freedom of speech and expression has aptly summarized that "[t]he form of speech protected under the First Amendment in right of publicity cases is a mystery awaiting a solution." Shubba Ghosh*, On Bobbling Heads, Paparazzi and Justice Hugo Black*, 45 SANTA CLARA L. REV. 617, 635 (2005).

[34] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[35] *See id.* at 563.

broadcasted it on the nightly newscast.[36] Zacchini accordingly brought an action for violation of his right of publicity with the Ohio Supreme Court concluding that the claim was barred by the television station's First Amendment right to broadcast the act, without compensation to Zacchini, as a newsworthy event of public interest.[37] In a 5-4 decision, the United States Supreme Court reversed the Ohio Supreme Court's decision, concluding that the First Amendment's protection did not bar Zacchini's claim for misappropriation of the act.[38] Justice Byron White's majority opinion readily acknowledged the First Amendment's protection for the dissemination of newsworthy events, but concluded that this constitutional shield was trumped by Zacchini's right to enjoy the fruits of his vocational labor and the valuable economic inducement to expend the time and labor necessary for the creation of such entertainment.[39]

C. Recent Pronouncements on the Right of Publicity and Its First Amendment Restrictions

The parameters of the First Amendment's protection for works that purport to be artistic or expressive in nature have been thoroughly examined in the last four years through a series of lawsuits brought by former college and professional football and basketball players utilized in EA Sports video games. The EA Sports video games are characterized by the realism with which they portray hundreds of identifiable former players in the video creations of sporting events.[40]

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[36] *Id*. at 563-564.
[37] *See generally* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).
[38] *Id.* at 576-79.
[39] *Id*. at 576-579. The critical texts of Judge White's opinion with respect to the economic interests of Zacchini are hereafter quoted at length. *See* i*nfra* notes 42-43.
[40] *Hart*, 717 F.3d 141 at 146 (3rd Cir. 2013); Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1271 (9th Cir. 2013)/ *See generally*, O'Bannon v. Nat. Collegiate Athletic Assoc., 7 F.Supp.3d 955 (N.D. Cal.); *see also* Davis v. Elec. Inc., 775 F.3d 1172 (9th Cir. 2015) (affirming the district court's denial of a Motion to Strike based upon alleged First Amendment protection). The cases implicating First Amend-

As a prerequisite to analyzing the substance of the *EA Sports* decisions, a review will be initially undertaken of the basic justifications for recognition of a cause of action for the right of publicity and the recognized judicial tests for determining whether or not an expressive or artistic work is subject to First Amendment protection from a claim of commercial appropriation.

IV. UNDERLYING JUSTIFICATIONS FOR RECOGNITION OF A RIGHT OF PUBLICITY

A. Incentives for Individual Accomplishment and Preventing Unjust Enrichment

Historically, the right of publicity primarily finds its justification in economic theories. There are related but divisive strands to the economic rationale underlying the right of publicity.[41] A repeated apology for the right of publicity is its ability to incentivize an individual to engage in the labor and employ the ingenuity necessary to create a lucrative public image.[42] A second economic

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ment limitations on right of publicity claims arise in connection with numerous models of expression. *See, e.g.,* S. Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994) (First Amendment protection extended to publisher and movie studio); New Kids on the Block v. News Am. Publ'g Inc., 971 F.2d 302, 309-10 (9th Cir. 1992) (recognizing First Amendment protection for newspaper survey concerning the band); Montana v. San Jose Mercury News, 40 Cal. Rptr. 2d 639, 640 (Cal. Ct. App. 1995) (First Amendment protection afforded for newspaper's dissemination of a Joe Montana poster).

[41] Law professor Michael Madow, in a 1993 article, offered a spirited and well-reasoned response in opposition to each of the prominent justifications for recognition of the right of publicity. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 205-28 (1993) [hereinafter *Private Ownership*].

[42] *See, e.g.*, *Zacchini*, 433 U.S. at 576-77 (1977). Justice White, writing for the majority in *Zacchini,* justified the extension of protection to Zacchini's act in the following terms:

> "Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to

justification for the right of publicity is preclusion of unjust enrichment by those who would commercially capitalize upon the individual's labor associated with attaining celebrity status.[43] The

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> the public. This same consideration underlies the patent and copyright laws long enforced by this Court."

Id. at 576. Professor Madow rejects the "incentive" justification on grounds that the economic rewards that come to the celebrity in terms of salary, royalties, and similar remuneration constitute sufficient motivation to create a public image and no evidence is offered to suggest that the right of publicity engenders greater incentive. *Private Ownership*, *supra* note 41, at 208-16. Parenthetically, Madow observes that in our media driven culture, the attainment of celebrity status is not necessarily the result of hard work and creative effort, but can instead be bestowed by virtue of infamous criminal acts or scandal. An example is Donna Rice, implicated in the Gary Hart sex scandal, and subsequently signed to a contract to endorse No Excuses Jeans. *See id.* at 179-82.

[43] Justice White, in his *Zacchini* majority opinion, additionally urged the unjust enrichment justification:

> "Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance;' if the public can see the act free on television, it will be less willing to pay to see it at the fair. The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. 'The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'"

Zacchini, 433 U.S. 562 at 576-77 (1977) (citing Kalven, *Privacy in Tort Award Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 325, 331 (1966)). Professor's Madow urges that the unjust enrichment theory is deficient as virtually all celebrities do not create their persona from whole cloth, but rather, incorporate or build upon the works of performers that preceded them. Thus, no unjust enrichment is occurring since all celebrities, to a greater or lesser extent, are merely constructing a creation utilizing that which preceded them. *Private Ownership, supra* note 41, at 184-96. Madow additionally cogently attacks the premise that celebrity is somehow inevitably the product of the labor and talent of the celebrity. *Id.* Madow's point seems well taken given the prolific rise of celebrityhood without noteworthy accomplishment. *See id.* and accompanying text. *See also* Steven Semeraro, *Property's End: Why Competi-*

unjust enrichment apology bears close relationship to the moral defense of philosopher John Locke that one is entitled to enjoy the fruits of her labor.[44]

Judge Richard Posner and University of Chicago Professor William Landes also offer an alternative economic justification that legal recognition of the commercial value of one's name and likeness, as a property right, insures that the optimal value will be received in the market place from the licensing of the right to commercially utilize one's name and image.[45] Posner and Landes' explanation of the underpinnings of the right of publicity is deemed a preferred apology by this author and their theory is explored at further length in Part VII of this article.[46]

B. The Personal Autonomy Justification

In addition to the Locke "fruit of one's labor's" philosophical justification[47] one author has urged that the right of publicity find its raison d'etre in the Kantian notion of personal autonomy and the right to control the use of one's own person.[48] Indeed, the "personal autonomy" justification was elegantly articulated in an early twentieth century opinion from the Georgia Supreme Court in *Pavesich v. New England Life Insurance Company*.[49] In recog-

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tion Policy Should Limit the Right of Publicity, 43 CONN. L. REV. 753, 776 (2011) [hereinafter *Property's End*].

[44] JOHN LOCKE, TWO TREATISES OF GOVERNMENT, §§ 25-33, 44 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690).

[45] *See* Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) [hereinafter Posner, *Privacy*]; Richard Posner & William Landes, *The Economic Structure of Intellectual Property Law*, 222-26 (Harvard Univ. Press 2003) [hereinafter Posner, *Intellectual Property*].

[46] *See* Posner, *Intellectual Property*, *supra* note 45; *infra* notes 100-12 and accompanying text.

[47] *See* Michael Schoenberger*, Unnecessary Roughness: Reconciling Hart and Keller with Standard Befitting the Right of Publicity*, 45 CONN. L. REV. 1875, 1884-85 (2013).

[48] *See id.* (citing Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity,* 49 DUKE L.J. 383 (1999)).

[49] *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

nizing a cause of action for commercial appropriation of one's likeness, the *Pavesich* court stated the following:

> "The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy."[50]

As with a Lockean "fruits of labor" justification, a central flaw with the "personal autonomy" justification for the right of publicity is that individuals do not unilaterally develop their celebrity or public persona in a vacuum. For example, it is highly doubtful that political persona Joe the Plumber worked tirelessly towards the goal of defining and preserving his personhood as a precursor to being projected on a national stage.[51] Moreover, recognition of

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[50] *Id.* It is noteworthy that while the *Pavesich* court appeals, on one hand, to a natural law of personal autonomy as justification of a right to prevent misappropriation for commercial purposes, the court subsequently adopts the rational of an earlier decision observing that one has a "property" right in his likeness comparable to the property right held by the author of a literary composition. *Id.* at 77-79 (citing Robertson v. Rochester Folding Box Co., 64 N.E.2d 442 (N.Y. 1901)).

[51] Joe the Plumber is Samuel J. Wurzelbacher who acquired the nickname and media attraction in the course of a spontaneous discussion with Barack Obama, held in Wurzelbacher's front yard, during Obama's 2008 campaign tour of the neighborhood. Michael James, *In Working Class Ohio, Obama Meets Amorous Dogs, Skeptical Plumber*, ABC NEWS (Oct. 13, 2008),

such a broad right to personal autonomy naturally conflicts with the right of other individuals to utilize the celebrity's name and likeness in pursuing their recognized right of free expression so prominent in decisions espousing the First Amendment.[52]

V. JUDICIAL TESTS FOR EXPRESSIVE CREATIONS MERITING FIRST AMENDMENT PROTECTION

A. The Predominant Use Test

In the wake of *Zacchini* and the Supreme Court's decision to refrain from articulating a generalized test for First Amendment restrictions on the right or publicity, three distinct judicially-created tests have been employed in misappropriation cases wherein First Amendment protection for creative expression is claimed.

In 2003 the Missouri Supreme Court, sitting en banc, articulated what is commonly known as the "Predominant Use Test" in *Doe v. TCI Cablevision.*[53] In *TCI Cablevision*, professional hockey player Anthony "Tony" Twist brought a commercial appropriation claim based upon publication of the Spawn comic book series which included a character named Anthony "Tony Twist" Twistelli.[54] The Missouri Supreme Court announced that in order to ascertain whether First Amendment protection should preclude

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http://blogs.abcnews.com/politicalpunch/2008/10/in-working-clas.html. Subsequently, Wurzelbacher appeared in a series of commercials concerning conversion of analog television to digital and was hired to make a series of videos explaining the DTV conversion. *See Joe the Plumber Now Pitchman for Analog-to-Digital Coupons*, BOSTON HERALD (Nov. 25, 2008), http://www.bostonherald.com/news/ us_politics/view/; Eric Taub, *The Digital TV Transition: More Confusion*, N. Y. TIMES (Dec. 27, 2008, 7:04 PM), http://bits.blogs.nytimes.com/2008/12/22/the-digital-tv-transition-confusion-reigns/?_r=0. *See also, The Joe the Plumber Book is Coming Soon*, L. A. TIMES (Nov. 18, 2008), http://latimesblogs.latimes.com/jacketcopy/2008/11/the-joe-the-plu.html.

[52] *See, e.g., supra* notes 25-32 and accompanying text. *See also,* Stacey L. Gogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1182-83 (2006).

[53] Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

[54] *Id.* at 365.

the claim, it would utilize a test inquiring as to whether the product was predominately exploitative of the person's name and likeness, or alternatively, whether the work was primarily expressive:

> "If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the pre-dominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight."[55]

The court in *TCI Cablevision* concluded that the Twistelli character, while having a metaphorical reference, was nevertheless primarily used by the comic book creators to exploit the commercial value of the plaintiff's person and was not within the ambit of the First Amendment's protection of expressive work.[56]

The Predominant Use Test has, however, been roundly criticized. Specifically it is deemed subjective in nature, essentially requiring the presiding judge, or judges, to act as an art critic in divining whether a literary or other purported artistic work is primarily intended to commercially exploit the celebrity's name or likeness, or alternatively, if the creator primarily intended to create

[55] *Id.* at 374 (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity – Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)).
[56] *Id.*

something artistic in nature with the celebrity's identity constituting a mere raw material.[57]

B. The Rogers Test

A second test for determining whether First Amendment protection precludes a commercial appropriation cause of action originated in a trademark case. In *Rogers v. Grimaldi*,[58] the Ninth Circuit Court of Appeals was confronted with a setting in which a right of publicity claim was brought against the producers and distributors of a Fellini film entitled *Ginger and Fred.* Movie star Ginger Rogers brought an action claiming that her right of publicity was violated by utilization of the film's title given her universally acclaimed film collaborations with Fred Astaire.[59] Notably, the film was not about Ginger Rogers and Fred Astaire, but rather, followed the lives of two fictional Italian cabaret performers.[60] In crafting what is now known commonly as the "Rogers' Test," the court observed that the law of Oregon would not "permit the right of publicity to bar the use of a celebrity's name title in a movie title unless the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services."[61] The court then concluded the title was not an attempt to exploit the names of Ginger Rogers and Fred Astaire.[62] Shortly thereafter, the issue had been raised as to whether the Rogers Test was only applicable to analysis of First Amendment protection in the setting wherein the celebrity's name is employed in the title of the work.[63]

C. The Transformative Use Test

Finally, the California Supreme Court articulated the "Transformative Use Test" in the case of *Comedy III Productions*

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[57] *See, e.g.,* Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 (3d Cir. 2013).
[58] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).
[59] *Id.* at 996-97.
[60] *Id.*
[61] *Id*. at 1004-05.
[62] *Rogers*, at 1003-1005.
[63] *See Hart*, 717 F.3d at 154-55.

v. Gary Saderup.[64] The court in *Saderup* considered a right of publicity claim within the context of the creation and sale of charcoal drawings and lithographs of the Three Stooges.[65] The drawings were a literal depiction of the comedy characters and the court concluded that the likeness of the Three Stooges was not "one of the 'raw materials' from which [t]he original work [was] synthesized", but instead, "the very sum and substance of the work:"[66]

> "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist. . . . [However], when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity."[67]

The Transformative Use Test has not been restricted to applications of California law,[68] but also was subsequently employed

[64] Comedy III Prod., Inc. v. Gary Saderup Inc., 21 P.3d 797, 808-10 (Cal. 2001).
[65] *Id*. at 800
[66] *Id*. at 809.
[67] *Saderup,* 21 P.3d at 808.
[68] *See e.g., Keller*, 724 F.3d at 1273-1279 (9th Cir. 2013); Hilton v. Hallmark Cards, 580 F.3d 874, 890 (9th Cir. 2009); *Winter*, 69 P.3d at 473 (Cal. 2003) (holding a comic book's depiction of renowned musicians Johnny and Edgar Winter was not a commercial appropriation of their persons since the characters were transformative characters as half-worm, half-human offspring).

by courts applying other states' law, including the Third Circuit in its decision in *Hart v. Electronic Arts, Inc.*[69]

VI. THE EA SPORTS LAWSUITS

The recent Electronic Arts and similar decisions represent the growing adoption of the Transformative Use Test as the preferred test for determining whether First Amendment protection of expression precludes a right of publicity claim.[70] The EA Sports NCAA video football games created a vehicle ripe for claims of commercial misappropriation of name and likeness. Since 1993 Electronic Arts has, among their numerous videos games, offered for sale a yearly selection of NCAA football games.[71] The Third Circuit in *Hart* provided a succinct and accurate depiction of the EA Sports NCAA video football format and experience:

> "A typical play session allows users the choice of two teams. 'Once a user chooses two college teams to compete against each other, the video game assigns a stadium for the match-up and populates it with players, coaches, referees, mascots, cheer-leaders and fans.'In addition to this 'basic single-game format,' EA has introduced a number of additional game modes that allow for "multi-game" play.

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[69] *See Hart*, 717 F.3d at 158-66 (applying New Jersey law); Mine O'Mine, Inc. v. Calmese*,* Case No. 2:10-CV-00043, 2011 WL 2728390, at *8-9 (D. Nev. July 12, 2011) (applying Nevada law).

[70] *See* cases cited *supra* notes 68-69.

[71] Electronic Arts offers videos games in numerous areas of sports, including but not limited to PGA golf, rugby, soccer, cricket, baseball, basketball, NASCAR stock car racing, hockey, and extreme sports. EA SPORTS, http://www.easports.com/ (last visited Mar. 20, 2015). The EA Sports video games are characterized by their remarkable true to life recreations of sports venues and real life participants. *See id.*

> In no small part, the NCAA Football franchise's success owes to its focus on realism and detail — from realistic sounds, to game mechanics, to team mascots. This focus on realism also ensures that the 'over 100 virtual teams' in the game are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information. Thus, for example, in NCAA Football 2006, Rutgers' quarterback, player number 13, is 6'2" tall, weighs 197 pounds and resembles Hart. Moreover, while users can change the digital avatar's appearance and most of the vital statistics (height, weight, throwing distance, etc.) certain details remain immutable: the player's home state, home town, team, and class year."[72]

In the *Hart* litigation, former Rutgers University star quarterback Ryan Hart, brought suit against Electronic Arts for the unauthorized use of his likeness in an EA Sports NCAA Football video game.[73] It was undisputed that Hart was utilized as an identifiable figure in the video game as were hundreds of former collegiate football players.[74] Virtually identical issues were presented in the action brought by former Arizona State and Nebraska quarterback Sam Keller.[75] In each case, the EA Sports video game afforded the game participant the ability to alter the individual avatar's appear-

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[72] *Hart*, 717 F.3d at 146.
[73] *Id.*
[74] *See id.* at 146. The Hart litigation was a class action lawsuit encompassing plaintiffs "similarly situated" collegiate athletes.
[75] *See Keller*, 724 F.3d at 1271-72 (9th Cir. 2013) (affirming that the First Amendment did not preclude Keller's right-of-publicity claim against Electronic Arts).

ance.[76] However, the courts, in both *Hart* and *Keller,* acknowledged that video games are subject to First Amendment protection as expressive works:

> "Video games are entitled to the full protections of the First Amendment, because '[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas — and even social messages — through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world).'"[77]

Nevertheless, the Third Circuit Court of Appeals in *Hart* and the Ninth Circuit Court of Appeals in *Keller* respectively concluded that the ability to alter the appearance of the avatar in the EA

[76] *Hart*, 717 F.3d at 166. The fact that the video game player could alter the avatar presented a unique question as to whether or not the video game was thereby afforded First Amendment protection as "expressive speech." Previously, in a noted California court of appeals decision, the court had ruled that a video game incorporating avatars resembling members of the rock bank *No Doubt* was not subject to First Amendment protection from a right of publicity claim. The court in *No Doubt* emphasized the fact that the avatars were not subject to alteration by the video game player. No Doubt v. Activision Publ'g., Inc., 122 Cal. Rptr. 3d 397, 409-10 (Cal. Ct. App. 2011). In contrast to the *No Doubt* decision is Kirby v. Sega of Am., Inc., 50 Cal. Rptr.3d 607 (Cal. Ct. App. 2006). The *Sega* decision represents the other end of the spectrum in terms of affording First Amendment protection. The avatar utilized in the music video bore strikingly similar physical characteristics and musical catch phrases ("ooh la la") to the lead singer of the group Deee-Lite. Despite the undeniable appropriation of singer Kierin Kirby's attributes, the court concluded that First Amendment protection protected the work as transformative expression based upon other fanciful differences and the work's futuristic setting. *Id.* at 408-09.

[77] *Keller*, 724 F.3d at 1270-71; *Hart*, 717 F.3d at 148.; Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).

Sports NCAA football game did not render the works sufficiently "transformative" to merit First Amendment protection:

> "The ability to make minor alterations — which substantially maintain the avatar's resemblance to Appellant (e.g., modifying only the basic biographical information, playing statistics, or uniform accessories) — is likewise insufficient, for '[a]n artist depicting a celebrity must contribute something more than a 'merely trivial' variation.'[78] Indeed, the ability to modify the avatar counts for little where the appeal of the game lies in users' ability to play 'as, or alongside' their preferred players or team.[79] Thus, even avatars with superficial modifications to their appearance can count as a suitable proxy or market 'substitute' for the original."[80]

Equally important, in both *Hart* and *Keller*, the analysis of whether the video games were sufficiently "transformative" in nature to merit First Amendment protection was not based upon consideration of the video games in its totality, but rather, focused primarily upon transformative analysis of the individual avatar.[81]

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[78] *Winter*, 69 P.3d at 478-79.
[79] *See No Doubt*, 122 Cal. Rpt. 3d at 411.
[80] *Hart*, 717 F.3d at 168. *See also Saderup*, 21 P.3d at 808; *Winter*, 96 P.3d at 479; *Keller*, 724 F.3d at 1276-77.
[81] *See Hart*, 717 F.3d at 169; *Keller*, 724 F.3d at 1277-78. Both the *Hart* and *Keller* litigation were collectively settled by EA Sports. Specifically, the class action settlement with former NCAA athletes in the *Keller* and *Hart* litigation, and additionally in a class action lawsuit brought by former UCLA basketball star Ed O'Bannon, were estimated to yield up to $40 million dollars in settlement payments by EA Sports with approximations of 100,000 former and

VII. CONCLUSION

A. The Haphazard and Disunified Judicial Development of the Right of Publicity

The explosion of right of publicity litigation in recent decades bears scrutiny as to whether the continued expansion of the legal right is societally beneficial. The present problems of defining the scope of the right and the absence of any consensus concerning the existence or length of a post-mortem right of publicity, are largely attributable to the cause of action's sloppy and ill-defined judicial birth and subsequent evolution. A logical and orderly development of the cause of action was initially impaired by judicial decisions mistakenly analyzing a publicity claim as a mere variation or subset of the general right of privacy.[82] Decades of judicial confusion ensued prior to the commercial appropriation tort being formally recognized in terms of a property right quite distinguishable from the right of privacy espoused by Brandeis and

current collegiate players to receive respectively $4000. Tom Farrey, *Players, Game Makers Settle for $40M*, ESPN OUTSIDE THE LINES (May 31, 2014), http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

[82] *See, e.g.*, Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) (concluding that the right of publicity is personal to the individual performer and therefore is not a postmortem right); *Pavesich*, 50 S.E. at 74 (identifying the right to prevent commercial appropriation as rooted in the right of privacy); Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902) (action for young girl's nonconsensual appropriation of photograph for appearance on a flour company's box analyzed in terms of a right of privacy). Notably, subsequent to the *Roberson* decision, New York enacted a statutory right to privacy which was by its terms intended to encompass unauthorized use of name, portrait or picture for advertising purposes. N.Y. CIV. RIGHTS LAW §§ 50-51 (2001 & Supp. 2005). Noted authority Thomas McCarthy in his exhaustive work on the right of publicity, traces its origins in the right of privacy and its subsequent evolution into a separate property right. MCCARTHY, PUBLICITY, *supra* note 11, at §5.8[B], 5-66. *See also* Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case For Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT L.J. 223, 224 (1994) (observing the "forty years of erratic judicial development…" of the right of publicity).

Warren.[83] During the years preceding and subsequent to the landmark decision in *Haelan*,[84] courts struggled to articulate a unified explanation for the right of publicity as it was espoused as a property right, justified in quasi-moral terms as a Lockean right to enjoy the fruits of one's labors.[85] A review of the decisions reflects a confounding trail of inexplicably conflicting decisions on very similar fact patterns.[86]

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[83] *See* Brandeis & Warren, *Privacy*, *supra* note 18 and accompanying text. One commentator has cogently summarized the inadequacy of the right of privacy as a basis from which to develop the right of publicity:

> "By failing to identify how publication of private facts or photographs violated an individual's interests, Warren and Brandeis's article left courts without a normative lodestar against which to measure other alleged invasions, including identity appropriation. Without such guidance, courts were unable to resist. The gravitational pull of formalism as they viewed identity appropriation through the privacy lens."

Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 240 (2005) [hereinafter *Autonomous Self-Definition*].

[84] *See, e.g.*, *Haelan Labs*, 202 F.2d at 866.

[85] *See, e.g.*, *Matthews*, 15 F.3d at 437-38 (asserting that the right of publicity provides inducement for pursuing noteworthy accomplishments and additionally provides a mechanism for the unwarranted dilution of the celebrity's publicity rights through "excessive exploitation of the name and likeness…"); *White*, 971 F. 2d at 1399 (justifying the right of publicity in terms of the celebrity's exclusive right to her publicity value regardless of how the value was obtained); Uhlander v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (espousing the justification of the celebrity's right to the fruits of his labors); Onassis v. Christian Dior-N.Y. Inc., 472 N.Y.S.2d 254, 261 (Sup. Ct. 1984) (prevention of unjust enrichment); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 76 (N.J. Super. Ct. Law. Div. 1967) (prevention of unjust enrichment).

[86] *Compare White*, 971 F.2d at 1395 (reversal of trial court dismissal ultimately resulting in a $400,000 damage award to Vanna White, famed "letter turner" on Wheel of Fortune, based upon Samsung's misappropriation of her "likeness" in creating an advertisement utilizing a robot dressed in a blond wig, gown and jewelry posing next to a Wheel of Fortune-like game board), *with* Kirby v. Sega of Am., Inc., 50 Cal. Rptr.3d 607 (Cal. Ct. App. 2006). Specifically, the court in *Kirby*, in finding First Amendment protection, emphasized that the depiction of the singer differed from the real life character to the extent of being set in Japanese-style animation and being cast in a 25th century space age

Most notably, the Supreme Court's decision in *Zacchini* exemplifies the continuing struggle that courts have manifested in articulating the basis and parameters of the right of publicity.[87] In fairness to the Court in *Zacchini,*[88] it was only presented with the narrow issue of defining whether the First Amendment proscribed Zacchini's cause of action for the commercial appropriation of the entirety of his fifteen second human cannonball act.[89] The Court

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environment. *Id.* at 610, 618. These variations from the actual singer were deemed to render the character "expressive" in nature as opposed to constituting a bald reproduction of the singer. *Id.* at 618. *Compare* C.B.C. v. Major League, 505 F.3d 818, 823 (8th Cir. 2007) (makers of fantasy baseball game were protected from a commercial appropriation claim in employing players' names and statistics, based upon the First Amendment), *with Uhlaender*, 316 F.Supp. at 1282-83 (finding a violation of the right of publicity by the makers of a baseball board game based upon its employment of major league player's statistics and names and rejecting defense that the information was freely available in the public domain).

[87] Justice White, in the *Zacchini* majority opinion, offers underlying economic justifications for the right of publicity in terms of providing inducement for extraordinary achievement and to preclude unjust enrichment by those who would commercial appropriate. *Zacchini*, 433 U.S. at 576-77. *See supra* notes 42-43.

[88] *Zacchini*, 433 U.S. at 565-66.

[89] In this respect, the Supreme Court's actions in *Zacchini*, in drawing a narrow opinion on the facts presented, is quite laudable in terms of not seeking to impose a global directive for courts to apply in the myriad factual scenarios they would subsequently be confronted within future right of publicity cases. While providing clear directives that the First Amendment right of newsworthiness did not subsume the right of publicity claim, the Court left for state and federal courts, sitting in diversity cases, to refine the parameters of the First Amendment and the right of publicity in fifty distinct laboratories of federalism. *But see* Douglas G. Baird, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co*., 30 STAN. L. REV. 1186 (1978) [hereinafter *Human Cannonballs*]. Baird critiques the *Zacchini* decision in failing to further clarify the First Amendment's restrictions on the right of publicity claim generally:

> "Concentrating on the facts before it at the expense of the underlying broader issues, the majority left lower courts with little guidance in resolving the tension between incentive and access. The cloudy boundary between rights of performance

was therefore not charged with the responsibility of carefully defining the parameters of the right of publicity and providing an all-encompassing line of demarcation between the First Amendment and the right of publicity.[90] Nevertheless, the Supreme Court's analysis and decision in *Zacchini* case demonstrates the ad hoc nature of a myriad of decisions in this field. In the end, all that can really be gleaned from *Zacchini*, in terms of the right of publicity, is: (i) the First Amendment does not permit the media, under the rubric of newsworthiness, to film the entirety of a carefully honed and constructed human cannonball act;[91] (ii) individuals are entitled to the fruits of their labor;[92] (iii) the right of publicity acts as an inducement, analogous to patents and copyrights, to invest the time and effort in the creation of one's act;[93] and (iv) a right of publicity is compatible with the First Amendment with definition of that compatibility left for later decisions.[94]

B. The Triumph of Legal Realism in the Development of the Right of Publicity

The *Zacchini* Court, in its careful decision limited to the facts of the case, manifests a very telling aspect of numerous deci-

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> and the first amendment may ultimately harm both press and performer by achieving unprincipled results."

Id. at 1204. In fairness, Baird thereafter critiques Justice Powell's dissent in *Zacchini* as imposing too restrictive a test for First Amendment restrictions on lower courts resolving right of publicity cases the multitude of factors present in determining newsworthiness. *See id.* at 1204-06.

[90] *See Zacchini*, 426 U.S. at 565-66.

[91] *See id.* at 578-79.

[92] *See id.* at 576-77.

[93] *Zacchini*, 426 U.S. at 576.

[94] *See id.* at 577-79. The factual nature of *Zacchini*, with the television station's appropriation of the performer's entire act, was uniquely extreme when compared to the multitude of right of publicity cases. More often, the celebrity's entire act is not appropriated, but rather, selected aspects of the celebrity are appropriated such as a famed phrase (*i.e.* "Here's Johnny") or other portions of the overall persona. *See, e.g., supra* note 9. In short, the facts of the *Zacchini* case did not lend themselves well to a comprehensive test that would be applicable to the myriad scenarios in which commercial appropriations disputes arise.

sions in their application of the right of publicity. In particular, the failure of the courts to reach any expanded consensus on the parameters of the right of this commercial appropriation tort is largely explainable in terms of legal realism and judicial restraint. Oth-Otherwise stated, decisions in the realm of the right of publicity may, to a greater or lesser extent, be the product of a visceral sense of fairness.[95] What could be equitable in concluding that Zacchini's life's work of perfecting a human cannonball act could be freely distributed for public consumption and he thereby be deprived of the value of the act?[96] In a similar vein, it simply seems innately unfair that EA Sports should derive millions upon millions of dollars in profits from sales of video games, while collegiate players such as Hart and Keller, so integral to the video game's success, receive nothing.[97] Unfortunately, the courts have frequent-

[95] Legal realism is the school of thought, presaged by the works of Oliver Wendell Holmes, asserting that judicial decisions are not the result of pure legal reasoning, but rather, are largely a product of the judge's beliefs and psychological prejudices. It is not ironic that the term "right of publicity" was first utilized by the famed advocate of judicial realism, Jerome Frank. *Haelan Labs*, 202 F.2d at 868.

[96] *See* Rochelle Cooper Dreyfuss*, We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity?*, 20 COLUM.-VLA J.L. & ARTS 123, 127-28 (1996) ("In fact, the decisions [regarding the right of publicity] do not tend to include justifications for placing what is, after all, called a public image, within the plenary control of private individuals. Rather, the courts tend to assume that, if someone hones an image, that person generally has the right to capture the benefit of all its uses."). *Autonomous Self-Definition, supra* note 83 at 229 & n.70. McKenna makes the point that courts frequently claim that the right of publicity is steeped in economic value, but offers no reasoned argument as to why economic value should be allocated to the celebrity. *Id.*

[97] *See Hart*, 717 F.3d at 171 (Ambro, J., dissenting) ("[W]ere this case viewed strictly on the public's perception of fairness, I have no doubt Hart's position would prevail."). Decisions concerning right of publicity claims within the context of video games evidence the judicial realism that permeates the decisions. While uncompensated college football stars such as Keller and Hart are successful, notorious criminals, or their successors, are deemed unworthy of compensation when the criminal's image or names are employed in video games. *See* Dillinger, LLC, v. Elec. Arts, Inc., 795 F.Supp.2d 829, (S.D. Ind. June 15, 2011) (right of publicity claim implicating use of name of notorious gangster John Dillinger in EA Sports series of videogames based on The Godfa-

ly chosen not to undertake the in-depth reasoning necessary to determine whether society generally is benefitted from the creation of an individual's monopoly over commercial use of his name and likeness or why. Instead, the judiciary has generally elected merely to resort to conclusory phrases such as "unjust enrichment" or the "fruit of one's labor" to justify their decision on the right of publicity.[98]

This fundamental fairness, case-by-case model for resolution of right of publicity disputes is inadequate given the rise of the celebrity with no corresponding noteworthy accomplishments.[99]

C. The Landes-Posner Model as a Proposed Unifying Justification for the Right of Publicity

Even with this evolution in the nature of "celebrityhood," a preferable approach for resolution of the right of publicity cases is to be found in the Poser-Landes economic model.[100] Judge Posner and Professor Landes deem publicity an intangible with a market

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ther dismissed on grounds that use of Dillinger's name in the video games was comparable to a literary work subject to First Amendment protection); Noriega v. Activision/Blizzard, Inc., 41 F.Supp.3d 885 (Sup. Ct. L. A. Cnty. 2014) (presently incarcerated and former Panamanian dictator, Manuel Noriega's right of publicity claim for use of his name and likeness in the popular video game "Call of Duty: Black Ops II" stricken with the court finding the use was "transformative").

[98] *See* cases cited *supr*a note 85. *See also Human Cannonballs*, *supra* note 89, at 1204. *See generally* Felix S. Cohen*, Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935); Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 443 (1930). *See also Autonomous Self-Definition, supra* note 83, at 244 & n.93 (articles by exponents of legal realism concerning the propensity of courts to utilize mired, formalistic language in lieu of in-depth legal reasoning in their decision).

[99] *See No Talent, No Problem: 25 Stars Who Are Famous for Doing Nothing at All*, RADAR ONLINE, http://radaronline.com/photos/no-talent-no-problem-25-stars-who-are-famous-for-doing-nothing-at-all/photo/1020977 (last viewed June 10, 2015) (chronicling 25 individuals and groups who have attained fame through appearance on reality television shows or other similar mediums without displaying any particular accomplishment apart from their existence).

[100] *See supra* note 45 and authority therein cited.

value that, in the absence of recognition of a property right, would be inefficiently allocated and needlessly devalued:

> "There is a perfectly good economic reason for assigning the property right in a photograph used for advertising purposes to the photographed individual: this assignment assures that the advertiser to whom the photograph is most valuable will purchase it. Making the photograph the communal property of advertisers would not achieve this goal."[101]

The rationale of furthering economic efficiency as the basis for a right of publicity is sometimes referenced as the tragedy of the commons.[102] Otherwise stated, privatizing a commons for grazing insures that the value of the pasture is not diluted by opening it to all sheepherders.[103] If all sheep were freely allowed to graze the commons, the pasture would be inefficiently used as overgrazing would occur without any animals receiving sufficient sustenance from the pasturelands.[104] Similarly, privatizing publicity rights insures that the value of the celebrity's name and likeness will not be economically diluted by tarnishing or overexposure which could occur if unfettered public access to the name and likeness were available.[105]

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[101] Posner, *Privacy*, *supra* note 45.
[102] *See Property's End*, *supra* note 43, at 771 & n.89 (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968)). Hardin was the originator of the phrase "Tragedy of the Commons" in suggesting the pursuit of self-interest, even rationally, can work to the detriment of the whole by depicting resources in an inefficient manner.
[103] *Id.*
[104] *See* Posner, *Intellectual Property*, *supra* note 45, at 223.
[105] The British term "face wearout" is utilized as a shorthand for the phenomena of the value of a celebrity's name and likeness being diluted through overexposure. *See Private Ownership*, *supra* note 41, at 222.

The economic efficiency apology is most appealing in providing an in-depth explanation for societal recognition of the right of publicity without mere resort to reliance on rhetorical phrases such as the "fruits of one's labor" or "unjust enrichment".[106] Moreover, the Posner-Landes model provides an effective apology for recognizing a right of publicity claim even when the individual has done nothing noteworthy or is by chance thrust into fame. In essence, the market itself arbitrates the value of the individual's publicity rights without reference to how celebrityhood was attained. The laws of supply and demand will determine the value of the individual's right of publicity regardless of whether attained by accomplishment or fortuitous circumstances.

The Posner-Landes approach additionally offers an underlying justification for recognizing a post-mortem right of publicity and considerations in determining its length.[107] Moreover, the Posner-Landes economic approach provides guidelines for regulating free use of the right of publicity in areas such as newsworthiness and parody.[108]

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[106] *See*, *e.g.*, *supra* note 85 and cases therein cited. For example, Landes and Posner offer a thorough, economic-based explanation on why recognition of the right of publicity only negligibly encourages investment for the individual to become a celebrity. *See* Posner, *Intellectual Property*, *supra* note 45, at 223. *See also id.* at 224-26 (providing an in-depth analysis that economic efficiency is justified through recognition of a right of publicity).

[107] *See generally* William Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 59-62 (2005) [hereinafter Posner, *Economics Approach*]. *See also* Posner, *Intellectual Property*, *supra* note 45, at 228-31. While these articles generally discuss the justification for postmortem copyright, they would appear to be equally applicable to a postmortem right of publicity.

[108] *See generally*, Posner, *Economics Approach*, *supra* note 107, at 62-66 (setting forth the economic justification for fair use in the copyright realm). *See also* Posner, *Intellectual Property*, *supra* note 45, at 88-90. Posner's article provides economic justification for fair use and emphasizes the fact that intellectual property law does not protect ideas, but rather the expression of those ideas. *See also* Posner, *Economics Approach*, *supra* note 106, at 62-67. Thus, there is nothing inconsistent with the Posner-Landes economic approach to the right of publicity and the attempts in the EA Sports decision to define grounds for

This economic model, premised upon maximizing the value of the celebrity's name and likeness, has been attacked on several grounds, including the extent to which publicity rights should be treated as property.[109] Several commentators contend that unlike the grazing commons, the individual's identity is not a commodity that can be exhausted through overuse since the celebrity's name and likeness is infinitely reproducible unlike the grass in the commons.[110] Secondly, the maximization of economic value theory is attacked on grounds that the free proliferation of publicity rights actually can result in an actual increase in the value of the celebrity's likeness as in the case of Elvis Presley.[111] However, the flaws in these protestations are evident upon further examination. First, the fact that there can be infinite replications of the celebrity's likeness does not lead to the inevitable conclusion that the value of the image is not diluted by infinite usage. The example is well taken that the Disney Company, for good reason, does not overexpose its multitude of cartoon characters, but rather practices careful husbandry by avoiding overexposure of characters, such as Mickey Mouse, to preclude dilution of their value.[112] Moreover, if the

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deeming a work to be sufficiently expressive to merit First Amendment protection. *Id.*

[109] William Prosser early on observed that debates over whether the right of publicity constitute a property right are meaningless and unnecessary as it is sufficient to conclude that compensation for the use of name and likeness is a right that should be recognized. Prosser, *Privacy*, *supra* note 21, at 406.

[110] *See Private Ownership*, *supra* note 41 at 220-25; *Autonomous Self-Definition*, *supra* note 83, at 268-69.

[111] *Autonomous Self-Definition*, *supra* note 83, at 270-71 & n.203. It is ironic that McKenna selects Elvis Presley as the example of the increase in the value of a likeness through continued exposure. While it is true that there have been multiple parodies and impersonations of Elvis Presley, the image of Presley and the use of his name and likeness for commercial purposes has been carefully guarded by his heirs in multiple legal proceedings. *See, e.g.*, Presley's Estate v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Presley v. Crowell, 733 S.W.2d 89 (Tenn. App. 1987).

[112] Posner, *Intellectual Property*, *supra* note 45, at 224-25. Landes and Posner further observe that if Humphrey Bogart's name and likeness were free for anyone to use that the value of the character would likely be degraded by tarnishing, boredom, and confusion. *Id.* at 224. *Cf. Bogart Gets Scale*, *supra* note 17, at 10-11 (concluding that the right of publicity claims for deceased celebri-

right of publicity is a commodity that is in unmitigated supply, the question must be raised as to why companies will pay extraordinary prices for use of this right with respect to some celebrities as opposed to simply moving on to use of a celebrity with a lower price tag for licensing rights.

D. The E.A. Sports Decision as a Commendable Approach to the Right of Publicity and Public Access

The Electronic Arts litigation highlights the problems created in the application of the right of publicity in an America that has been revolutionized by a dizzying media explosion and corresponding technological advancement. A century ago, a marketable right of publicity in collegiate football players would not have been a pressing legal issue with the exception of those rare players, such as Red Grange, who gained national recognition through the medium of the newspaper.[113] In the Golden Era of Sports that was the 1920's, there would have been no issue as to the utilization of avatars of hundreds of collegiate football players in a nationally marketable video game because the technology did not exist to create such a product. One hundred years later, the unmitigated growth in technology and the media has led to the proliferation of right of publicity cases at an unmitigated rate.[114]

Given the cloud of uncertainty that surrounds the application and defining parameters of the right of publicity, it is recommended

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ties, such as Bogart, should be applicable to attempts to digitalize the deceased celebrity for purposes of utilizing the deceased's persona in films or commercials).

[113] *See* MARK INABINETT, GRANTLAND RICE AND HIS HEROES, THE SPORTSWRITER AS MYTHMAKER IN THE 1920'S (1994) (observing how sports legends, of the 1920's, such as Red Grange, Babe Ruth and Jack Dempsey were transformed into national icons through the descriptions of their exploits by famed sportswriter Grantland Rice).

[114] The earliest located case in which professional athletes successfully prosecuted claims for commercial appropriation for their use in a board game occurred in 1967 when a challenge was made by professional golfers Arnold Palmer, Gary Player, Doug Sanders to the use of their names, uniform numbers and statistical information in a board game). Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458 (N.J. 1967).

that the formulation of the Transformative Use test represents a laudable attempt to create a functional standard for judicial determinations as to First Amendment limitations on the right.[115] Moreover, it is urged that the movement of some states towards recognition of a descendible right of publicity that lasts for one hundred years, or conceivably in perpetuity, is not a welcomed development.[116] Paralleling copyright law[117] in allowing the right to survive the celebrity's death by seventy years seems sufficient time to fulfill the articulated purpose of incentivizing the individual to pursue socially valuable accomplishments and prevent unjust enrichment. Given its checkered development, the only assuredness as to the future of the right of publicity will be ever-increasing litigation and subjective determinations of the claims.

[115] *Hart*, 717 F.3d. at 158-163 (tracing the history of the Transformative Use Test and analyzing why it is a preferred test for determination of whether the First Amendment precludes a right of publicity claim).

[116] *See* IND. CODE § 36-1-8 (Westlaw 2012) (recognizing statutorily that a right of publicity survives for 100 years after the death of the individual); TEN. CODE ANN. §25-1105(a) (Westlaw 2012) (creating potentially a right of publicity in perpetuity). *See generally* Posner, *Economics Approach*, *supra* note 107, at 59-60 (offering a formula for determining the optimal length of copyright and suggesting that an extension of 70 years after the creator's death versus 51 years would yield only trivial economic benefit).

[117] 17 U.S.C. §302 (Westlaw 2012).