VOLUME VIII

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LETTER FROM THE EDITOR

Dear Reader,

With much delight, we are pleased to present the Spring 2010 issue of the University of Denver Sports and Entertainment Law Journal. With this issue, we are excited to bring you incisive legal analysis and commentary on a variety of topics within sports and entertainment law. Our authors present diverse perspectives from their positions as law students, professors, and practitioners, and we are enthused to publish five articles, each of which abounds with insightful legal commentary.

The articles range from a commentary and case study on youth basketball programs in America, to an analysis of the intellectual property and contract issues associated with contests, to the historical preservation issues associated with the demolition of Tiger Stadium in Detroit. Further, our fourth article analyzes the dangers of rapid weight loss in the context of the sport of wrestling, and the regulatory efforts of high school and intercollegiate wrestling organizations to educate and keep the participants safe. We are especially proud of our final article, as it was co-authored by two of the Journal members. The article, written by Allison Rosen and Elizabeth Dauer, examines copyright law and the visual arts in the context of the ongoing *Shepard Fairey, et al. v. The Associated Press* case. We would like to thank each of the authors for their hard work and contributions to the Spring 2010 issue of the University of Denver Sports and Entertainment Law Journal.

Scott Neckers

Editor-in-Chief

FULL COURT PRESS: PROBLEMS PLAGUING YOUTH BASKETBALL IN THE UNITED STATES AND AN AGGRESSIVE PLAN TO ATTACK THEM

Paul Pogge[*]

I. Introduction

Amateur sports in America today, especially youth basketball, are rich sources of opportunities for growth, community, and physical activity for aspiring athletes. The Amateur Athletic Union (AAU) has helped stimulate the growth of basketball in the country exponentially, yet has also contributed to the establishment of an environment infested by corporate jostling over young stars and questionable recruiting tactics used by Division I college coaches.[1] As the most influential and recognizable competitive basketball organizations in the country, it is the responsibility of the AAU, National Collegiate Athletic Association (NCAA),[2] National Basketball Association (NBA),[3] and the newly-formed iHoops ("Youth Basketball Initiative")[4] to implement changes to address the negative influences on amateur basketball. The AAU and Youth Basketball Initiative must take affirmative steps to significantly strengthen regulations to minimize the influences of sponsors seeking to use the game to exert control over amateur athletes. Furthermore, it is imperative that the AAU work with the NCAA to eliminate grey area in rules that is currently being exploited by Division I college coaches seeking

[*]Paul Pogge currently holds the position of Assistant Athletic Director at the University of Denver. After graduating from the University of Notre Dame with a degree in finance, he earned his Juris Doctorate from Notre Dame Law School and became a licensed attorney in the state of Colorado. He wishes to thank his parents, Jack and Judy Pogge, for their constant inspiration and support. He would also like to thank his sister, Patty, and his brother, Michael, for their unwavering love and encouragement. In addition, he desires to recognize the profound impact his grandparents Dr. Joseph Twidwell, Virginia Twidwell, Ray Pogge, and Kay Pogge had on his life. Finally, he would like to express his gratitude for the steadfast friendship and wisdom provided by his teachers and peers at Regis Jesuit High School and the University of Notre Dame.

[1] *See, e.g.*, Thayer Evans, *Battle Rages for the Soles of a Young Star*, N.Y. TIMES, Apr. 24, 2006, *available at* http://www.nytimes.com/2006/04/24/sports/24mayo.html?_r=1&oref=slogin.

[2] The NCAA was formed in 1906 at the urging of President Theodore Roosevelt, who was concerned about the injuries and fatalities occurring from collegiate athletes playing football. GARY R. ROBERTS & PAUL C. WEILER, SPORTS AND THE LAW 741 (2004).

[3] The NBA is the most recognizable professional basketball league in America, featuring teams from across the country and holding games from early November until late June. The NBA's website can be viewed at www.nba.com.

[4] The Youth Basketball Initiative, formally named iHoops, was a landmark creation in 2008. Funded by the NCAA and NBA, the organization is "designed to reach and benefit everyone who participates in youth basketball programs . . . . The Initiative will create a platform for teaching youth the value of education and the important lessons of fair play." NBA, *NCAA, NBA Join Forces to Form iHoops, a Youth Initiative*, NBA.COM (June, 9, 2010), http://www.nba.com/2009/news/06/09/ihoopsrelease/index.html. The Youth Basketball Initiative appointed Kevin Weiberg, a former Commissioner of the Big XII conference, as its first CEO in late 2008. Insidehoops.com NewsWire, *NCAA-NBA Youth Basketball Initiative Names Kevin Weiberg CEO*, INSIDEHOOPS.COM, Nov. 24, 2008, http://www.insidehoops.com/youth-initiative-weiberg-112408.shtml.

commitments from AAU participants and other aspiring basketball players.[5] The Youth Basketball Initiative, with support from the NBA, should be utilized to create a system in which basketball development is aided while educational pursuits and personal growth have an increased emphasis.

To effectively analyze the problems within the state of youth basketball across the country today, it is first necessary to discuss the background and structure of the AAU organization that influences the sport in such a strong manner. Part II addresses this issue. Next, Part III provides an analysis of the culture of youth basketball in America, including a case study of basketball in Denver, Colorado for illustrative purposes. A discussion of corporate influences on the amateur levels of the game throughout the country is also provided. Part IV incorporates an overview of current regulations imposed on recruiting by the NCAA. With the status quo established, the facts underlying the problem of devious recruiting tactics used by some Division I basketball coaches can be scrutinized. To illustrate the problem, Part V provides examples of famous recruiting scandals and questionable tactics employed by college coaches. Part VI surveys legal issues and case law influencing efforts to eradicate negative influences from the arena of youth basketball. Combining the discussion of various competing influences in light of the foremost objective of purifying the youth basketball atmosphere in America, Part VII suggests a multi-level approach utilizing NCAA, AAU, Youth Basketball Initiative, and NBA resources to combat the negative influences corrupting the game.

II. The Amateur Athletic Union

In acquiescence to the need for organization of the surging numbers of American athletic participants, the AAU was established in 1888 "to establish standards and uniformity in amateur sport."[6] The organization's stated mission was "to offer amateur athletes and volunteers opportunities to develop to their highest level through a national and local network of sporting events."[7] In its early stages, the AAU represented the country's athletic interests on an international level in several different ways, the most important of which was involvement with the Olympic Games as a developmental system for future participants.[8] This focus was altered years later, however, by the Ted Stevens Olympic and Amateur Sports Act ("Amateur Sports Act") that was passed in the United States in 1978.[9] In the wake of changes made after the Act, the AAU now provides opportunities for amateur athletes in over thirty competitive sports, with girls and boys basketball as the most popular programs.[10] In 2004, for instance, "the AAU boasted over 500,000 members with 50,000 plus volunteers . . . ."[11]

The structure of the AAU is thoroughly outlined in their annually published *AAU Codebook*. The organization is divided into sixty different districts spread across the United

[5] Michelle Kaufman, *College Basketball Recruiting Enters Halls of Middle School*, MIAMI HERALD, Feb. 3, 2009 (on file with author).
[6] Amateur Athletic Union, *About AAU*, http://www.aausports.org/AboutAAU.aspx (last visited Apr. 4, 2010) [hereinafter AAU Homepage].
[7] *Id.*
[8] *Id.*
[9] 36 U.S.C. § 220501 (2006).
[10] AAU Homepage, *supra* note 6.
[11] *Id.*

States and Puerto Rico.[12] A perusal of the governance of these districts and the union as a whole is appropriate to demonstrate the structure of the system through which so many basketball players progress.

The AAU is overseen by a Congress, which the *AAU Codebook* defines as "the legislative body of the AAU."[13] The Congress is comprised of district representatives, various sport committee representatives, national officers of the AAU, past officers, representatives appointed by affiliate members, and up to five "members-at-large" appointed by the president.[14] Collectively, these individuals have the power to amend the Constitution and Bylaws of the organization, elect officers, establish dues and fees, approve budgets, establish district territories, grant charters, approve National Sport Committees, remove officers and/or members of Congress, call meetings, assume original and/or appellate jurisdiction, and impose penalties for violations of the Constitution, Bylaws, policies, rules, or regulations.[15]

The Board of Directors of the AAU is a smaller collection of individuals than the Congress.[16] Beneath the Board of Directors in the general hierarchy of the AAU are the Congressionally-elected officers.[17] Subject to the powers of these governing bodies, each of the sixty districts of the AAU is governed by a distinct Board of Managers comprised of clubs, district officers, Sport Committee Directors, and no more than five at-large members selected by the Governor of the district.[18] Furthermore, each district has an Executive Committee composed of elected officers,[19] the Chair of the district's Finance Committee, and "the Director, or designee, of the District Sport Committee whose District Sport Committee has registered one percent more of the total membership of the district."[20] Additionally, each district includes various committees assigned to fulfill different tasks. Among these multiple groups, each district's Review Committee[21] is charged with the duty to "Investigate and review complaints regarding violations of the AAU Code, and to conduct hearings in accordance with Article III

[12] AMATEUR ATHLETIC UNION, 2009 OFFICIAL AAU CODEBOOK 81 (2009) *available at* http://image.aausports.org/codebook/codebook.pdf (last visited May 9, 2010) [hereinafter AAU CODEBOOK].

[13] AAU CODEBOOK, *supra* note 12, art I.C, at 3.

[14] AAU CODEBOOK, *supra* note 12, art. I.C.2, at 4.

[15] AAU CODEBOOK, *supra* note 12, art. I.C.1, at 3.

[16] Generally, powers of the Board include the abilities to act for the AAU and on behalf of Congress (subject to Congressional approval), establish national policies and procedures for the AAU, approve National Sport Committee operating rules, approve National Championship events, approve the General Counsel, establish check signing authority, and perform various auditing and financial reviews. AAU CODEBOOK, *supra* note 12, art. I.D.1, at 4-5.

[17] These officers include the President, First Vice-President, Second Vice-President, Secretary, and Treasurer. AAU CODEBOOK, *supra* note 12, art. I.E, at 5.

[18] AAU CODEBOOK, *supra* note 12, art. II.E.1.a, at 12. The duties of these Boards of Managers include the election of district officers and various committees within the district, approval of the district budget, election of delegates to the Congress, and calling of meetings. AAU CODEBOOK, *supra* note 12, art. II.E.1.b, at 12.

[19] The officers of each district are the Governor, Lieutenant Governor, Registrar, Secretary, and Treasurer. AAU CODEBOOK, *supra* note 12, art. II.E.3.a, at 14.

[20] AAU CODEBOOK, *supra* note 12, art. II.E.2.b, at 13-14. The duties of each district's Executive Committee include representation of the district and/or Board of Managers, scheduling meetings, approving the Sport Committee's operating rules, filling vacancies in elected offices within the district, reviewing accounts of the District Treasurer, and overseeing budgeting processes. AAU CODEBOOK, *supra* note 12, art. II.E.2.a, at 13.

[21] Each Review Committee consists of five members elected by the Board of Managers for four year terms. The Governor of the district appoints each Review Committee Chair from the elected members. AAU CODEBOOK, *supra* note 12, art. II.E.5.a.3.a, at 17.

and procedures established by National AAU Policy . . . ."[22] The Review Committee may also review decisions that have previously been made to deny membership within the district.[23]

With the multi-tiered, thoroughly outlaid governmental structure adopted by the AAU, it should come as little surprise that judicial processes and remedial measures are similarly explicitly defined. Complaints and investigations proceed through a complex system[24] in which the issue is typically addressed at the district level in its early stages. Rights to appeal are conferred upon parties who disagree with the outcome of initial findings of fact.[25] Within the AAU system, Congress holds the highest degree of power and serves a role comparable to that of the United States Supreme Court in the American judicial system.[26]

Perhaps the most ambiguous yet important clause of the *AAU Codebook* pertains to the authority of the organization's judicial bodies. A wide bestowment of responsibility is conferred, yet there is little formal direction for how investigations should take place or designations of parties particularly responsible for various matters. The *AAU Codebook* simply prescribes that "the appropriate judicial body may exercise its authority as to any member, entity, or affiliate of the AAU which is determined to have violated the AAU Code . . . ."[27] Without further elaboration pertaining to which level of the judicial structure should hold primary accountability for punishing or investigating each infraction, the *AAU Codebook* includes a non-exclusive list of violations that may warrant the exercise of judicial authority. Such infractions include fraud, competing for money, becoming a professional athlete, aiding or abetting an athlete to disqualify themselves, doping, aiding or abetting the use of controlled substances by

[22] AAU CODEBOOK, *supra* note 12, art. II.E.5.a.3.b.1, at 18.
[23] AAU CODEBOOK, *supra* note 12, art. II.E.5.a.3.b.2, at 18.
[24] The first judicial body provided for in the *AAU Codebook* is the National Board of Review, comprised of five members of the AAU including a Chair appointed by the President and an elected member from each of four national zones. AAU CODEBOOK, *supra* note 12, art. III.A.1.c, at 22-23. These five individuals are granted broad jurisdiction such that as a Board they "may review any decision, action, or omission by a member or other entity (other than Congress) which is a part of the Union or any of its activities." AAU CODEBOOK, *supra* note 12, art. III.A.1.b, at 22. The powers of the National Board of Review are rather broad in scope, including the abilities to initiate complaints and investigations, require production of documents and statements, dismiss complaints or appeals, vacate or modify previous decisions, impose penalties, levy expenses, direct audits, create rules, and interpret the organization's constitution and bylaws. AAU CODEBOOK, *supra* note 12, art. III.A.1.a, at 22.
[25] All decisions from the National Board of Review may be appealed to a separate judicial body, the Board of Appeals, which has the power to "vacate, modify, sustain, reverse, or remand . . . ." AAU CODEBOOK, *supra* note 12, art. III.A.2.a, at 23. To earn a favorable ruling from the Board of Appeals, however, the appellant must demonstrate "misapplication or misinterpretation of AAU Code or policies; newly discovered evidence; findings of fact contrary to the evidence presented; or excessive penalties.." *Id*. The Board of Appeals, which is comprised of two committee chairs and three presidential appointees,[25] reviews decisions based on the sufficiency of evidence using an abuse of discretion standard.[25] AAU CODEBOOK, *supra* note 12, art. III.A.2, at 23.
[26] Congress has the power to review any decision of the Board of Appeals. AAU CODEBOOK, *supra* note 12, art. III.A.2.d, at 23. Most complaints do not reach such high levels of the AAU judiciary structure, however. Instead, they are handled in the individual districts by the various District Review Committees. At this level, the District Review Committee has jurisdiction over "complaints against club or individual members of the AAU in regard to a matter at the district level." AAU CODEBOOK, *supra* note 12, art. III.A.3.b, at 24. District Review Committees are charged with investigating alleged violations of district members, reviewing decisions of other district committees, holding hearings, and imposing penalties. AAU CODEBOOK, *supra* note 12, art. III.A.3.a, at 24. The Committee's hearings may be waived by the party entitled to the hearing, but proper notice and formal abidance by standardized AAU procedures must be followed. AAU CODEBOOK, *supra* note 12, art. III.C.1, at 25.
[27] AAU CODEBOOK, *supra* note 12, art. III.B, at 24.

athletes, unfair dealing in connection with competition, violation of AAU rules, aiding or abetting a person to violate the AAU Code, failure to cooperate with AAU judicial bodies, and acts which disturb competition.[28]

This preliminary background of the structure of the AAU provides a framework within which youth basketball in America must be analyzed. The organization in which so many aspiring basketball players participate must be understood to recognize where corruption in the game finds roots. After all, it is this organization that is largely responsible for creating an environment where the game can expose young athletes to both positive and negative influences.

III. The State of Youth Basketball in the United States

The formally structured AAU system was no small contributor to the exponential growth of basketball's popularity across the world and, in particular, the United States. From the game's humble beginnings as James Naismith's creation when it was played with peach baskets as a way to keep young men occupied during the winter months, basketball has exploded into a multi-billion dollar sports industry.[29] Over the course of the game's history, notable figures like Michael Jordan, Wilt Chamberlain, Bill Russell, Magic Johnson, Larry Bird, and Jerry West have enhanced the game by giving fans identifiable heroes at the professional level.[30] The NBA has featured dynasties like the Boston Celtics and the Chicago Bulls and provided an arena in which rivalries like the Celtics and Lakers and the Bulls and Knicks could flourish. College basketball, too, has provided fantastic moments and figures which have spurred interest in the game, from John Wooden's UCLA dynasty to the fan-favorite rivalry between North Carolina and Duke. Thanks in part to the effect that these individuals and teams have had on fan interest in the sport, it is estimated that over 250 million people across the world now participate in organized basketball.[31] With the broadening interest in basketball, corporations have attempted to capitalize on opportunities within the industry as well.[32] In 1994, for example, Columbia Broadcasting System (CBS) agreed to an eight-year, $1.7 billion (or $215 million a year) contract with the NCAA to televise its "March Madness" Division I men's basketball tournament.[33] As interest in the game reached even higher levels, the previous contract was succeeded by an eleven-year, $6.2 billion (or $560 million a year) deal that started during March Madness in 2003.[34]

Across the United States, basketball hoops can be found in almost every school and on nearly every playground. Basketball is a common activity during gym class, at recess, and outside of school. For those young athletes who choose to get involved with the game at a formal level, a variety of options exist. A case study of Denver, Colorado's youth basketball structure is illustrative of the myriad options for aspiring athletes in one particular area alone.

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[28] *Id.* at 24-25.

[29] Basketball History: history-of-basketball.com, http://www.history-of-basketball.com/history.htm (last visited Apr. 15, 2010).

[30] NBA, *The NBA at 50*, NBA.COM http://www.nba.com/history/players/50greatest.html (last visited May 4, 2009).

[31] Factmonster.com, Basketball in America: A History, http://www.factmonster.com/ipka/A0875085.html (last visited May 4, 2009).

[32] ROBERTS & WEILER, *supra* note 2, at 740.

[33] *Id.*

[34] *Id.*

a. *Youth Basketball in Denver, Colorado: A Case Study*

In Denver, middle school athletes within the city who desire to play organized basketball have a wide selection of leagues and organizations from which they can choose. Public leagues are available for recreational yet organized play through a number of YMCAs,[35] recreational centers, and public school systems.[36] It is typical for teams in these leagues to have one practice and one game per week over the course of a two or three month season, with practices and games usually lasting for approximately one hour. All league games for leagues like these are usually held in the same gymnasium, which is typically located in close proximity to the residences of most participants. Similarly, the Catholic middle schools in the Denver area offer organized basketball on a recreational level through the Parochial League of the Denver Archdiocese. Unlike the public leagues, however, the Parochial League requires participants to play for a team representing the Catholic school within the diocese which they attend.

At a higher level, basketball teams specifically affiliated with a high school in Colorado fall under the jurisdiction of the Colorado High School Activities Association ("CHSAA").[37] All of the high schools in the state of Colorado are divided by CHSAA into classes based on competitive factors like the size of enrollment compared to other high schools fielding a team for the same sport. Within each class, high schools are divided into conferences that group schools together based on geographic proximity to minimize the travel required for visiting teams. Due to the overwhelming popularity of the game, most of the larger high schools have to "cut" student-athletes from their teams despite the fact that schools commonly field a freshman, sophomore, junior varsity, and varsity team.

For those youth basketball players choosing to pursue a more competitive route in the greater Denver area, several alternatives are available for both middle school and high school students. Junior Athletics of the Midwest ("JAM"), is one of several leagues for boys and girls in the area that desire to compete in both the fall and spring.[38] It is not uncommon for this league to showcase "feeder" teams for local high schools comprised of seventh and eighth graders who plan to play together in a certain high school's basketball program in the coming years. In a separate division for older athletes, many high schools enter their varsity and junior varsity basketball teams to play against other teams of the same level in the league. By doing so, players are able to gain additional exposure to the game on a much more extended basis than the high school leagues, which commence in November and culminate in March. JAM league games are usually played in local high school gymnasiums and feature a variety of talented athletes, many of which star on high school teams at some point and a number of which later participate at the collegiate level. In addition to JAM, the Gold Crown Foundation[39] provides another competitive

[35]YMCA of Metropolitan Denver, *Youth Sports-Basketball*, http://www.denverymca.org/sports/Sport.aspx?SportID =2 (last visited Apr. 15, 2010) (noting that the Schlessman Family YMCA and the Highline YMCA, for instance, both offer recreational leagues).

[36] The Cherry Creek Public School system offers a league in which teams can be organized by the members and parents and entered each season.

[37]Colorado High School Activities Association, http://www.chsaa.org/sports/basketball/basketball.asp (last visited May 4, 2009).

[38] Junior Athletics of the Midwest, http://www.jamball.com (last visited Apr. 4, 2010).

[39] Gold Crown Foundation was founded by Bill Hanzlik, a former star basketball player for the University of Notre Dame and the NBA's Denver Nuggets, along with his business partner, Ray Baker. It has grown to become one of

league for basketball players from ages nine to eighteen, with the majority of the games played in an expansive field house designed specifically for that purpose.[40]

While talent is certainly evaluated by those scouting the organized high school leagues and other competitive leagues like JAM and Gold Crown, the major focus in scouting and recruiting is now at the most competitive level of youth basketball in the country, the AAU basketball programs.[41] AAU teams emphasize a focus on basketball from a young age and attempt to showcase the best players in the area by traveling to compete in various national tournaments. Colorado's AAU crowns district AAU champions for boys and girls teams comprised of athletes as young as fifth graders. A number of AAU tournaments for middle school and high school athletes are held within the Colorado district alone each year.[42] The best teams travel outside of Colorado to play against teams from other parts of the country at tournaments like the Disney Classic, Easter Classic, and the AAU National Championships.[43]

b. *The Broader AAU and Elite Youth Basketball Scene*

The intensely competitive nature of AAU basketball in Colorado is representative of the status quo across the country. Perhaps the most singularly focused, ultra-competitive youth basketball environment in the country is Prince George's County, Maryland, where aspiring basketball players are funneled into the AAU basketball system before middle school.[44] Prince George's County has produced superstars like Kevin Durant, Michael Beasley, Len Bias, and recent college stars like Ty Lawson of North Carolina, Nolan Smith of Duke, and Sam Young of Pittsburgh.[45] As Chris Palmer notes in *ESPN the Magazine*, AAU basketball played a pivotal role in spurring the growth of the game in places like Prince George's County: "The rise of Prince George's as a basketball power coincides with the explosion of its AAU scene."[46]

With the remarkable growth of AAU basketball nationwide and the corresponding attention paid by young athletes, parents, coaches, scouts, and spectators, it should not be surprising that large corporations and notable figures in the sports world have begun to pump money into AAU team sponsorships. O.J. Mayo, a former AAU standout who went on to star for the University of Southern California and currently plays in the NBA, played for the North Carolina Hill D-I Greyhounds, an AAU team sponsored by Reebok, for most of his AAU career.[47] Despite this Reebok affiliation, Mayo also played briefly for the Tropics, an AAU team funded by Reebok's corporate archrival, Nike.[48] Both shoe companies attempted to build

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the region's most successful youth sports organizations. Gold Crown Foundation,, https://www.goldcrownfoundation.com/ (last visited June 4, 2010).

[40] *Id.*

[41] Chris Palmer, *Rated PG*, ESPN THE MAGAZINE, Dec. 29, 2008, at 53.

[42] Colorado AAU Basketball, http://www.coloradoaaubasketball.com/ (last visited May 4, 2009).

[43] AAU Boys Basketball, Tournament Information, http://aauboysbasketball.org (last visited Apr. 15, 2010) (follow "Events" hyperlink, then "Tournaments" hyperlink, to see current tournaments).

[44] Palmer, *supra* note 41, at 52.

[45] *Id.*

[46] *Id.* at 53.

[47] Evans, *supra* note 1.

[48] *Id.*

goodwill from the AAU sponsorship foundation to compete for Mayo's endorsement after his AAU career finished.

One of the most recognizable legacies of Michael Jordan, perhaps the greatest player in the history of the game, is the strengthened affiliations between athletes and companies.[49] Basketball players, like athletes generally, have become associated with brands they are paid to endorse.[50] Jordan's relationship in the 1980s with Phil Knight and his rapidly expanding Nike brand established a precedent of corporate sponsorship many would follow.[51] As Jordan stated before his first retirement from the Chicago Bulls in 1993, "What Phil and Nike have done . . . is turn me into a dream."[52] This pattern of corporate relationships with superstar players has trickled down to the AAU level.

As was the case when Michael Jordan rose to prominence, fellow basketball superstar LeBron James became the focus of corporations hopeful to sign him to endorsement contracts when he concluded his AAU career and became a professional. Sonny Vaccaro, a former Nike employee who left for rival Adidas after luring Michael Jordan's endorsement of Nike,[53] was the individual in charge of establishing a relationship on behalf of Adidas with LeBron James. Although James eventually signed an endorsement contract with Nike, Vaccaro and James developed a close relationship during the latter's years of involvement with AAU.[54] Vaccaro's influence during LeBron James' ascent to stardom was not atypical; the corporate magnate has become increasingly present and powerful on the youth basketball scene in recent decades.[55]

Consistent with these developments, it is not uncommon for sponsors to spend thousands of dollars on an AAU team.[56] "The Richmond-based Squires Boys Basketball Education Foundation received $18,000 in 2003 from Adidas to sponsor its program . . . ."[57] A similar program, the Boo Williams Summer League, was the recipient of a $115,000 contribution in 2004 from Nike.[58]

Corporations' involvement with youth basketball does not end with AAU team sponsorships, however. Several shoe companies, for instance, attempt to further expose their names and products to young athletes through both team camps and showcase camps for star teams and players from across the country. Through Sonny Vaccaro, Reebok now sponsors the famous ABCD camp each year in which the top high school players from AAU and other competitive teams across the country can showcase their skills for scouts and coaches.[59] In

[49] *See generally* DAVID HALBERSTAM, PLAYING FOR KEEPS: MICHAEL JORDAN AND THE WORLD HE MADE (The Amateurs Limited 2000) (1999).
[50] *See generally* DONALD KATZ, JUST DO IT: THE NIKE SPIRIT IN THE CORPORATE WORLD (Adams Media Corporation 1994).
[51] *Id*.
[52] *Id*. at 8.
[53] Ric Bucher, *The Last Don*, ESPN THE MAGAZINE, Oct. 22, 2002, *available at* http://espn.go.com/magazine/vol5no23vaccaro.html.
[54] *Id*.
[55] *Id*.
[56] Eric Prisbell, *Basketball Recruiting on the Nonprofit Margins*, WASH. POST, Dec. 31, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000194.html.
[57] *Id*.
[58] *Id*.
[59] Reebok ABCD Camp, http://www.reebokabcdcamp.com/home.html (last visited May 1, 2010).

addition, Nike hosts a similar "camp" for top high school basketball players and promotes it using their largely successful Jordan brand.[60] Top college coaches from across the country attend both camps as "instructors," although they are certainly there to evaluate the talent of prospects as well.[61] Hundreds of other individuals, collectively referred to as "talent scouts" within the industry, can also be found in attendance to watch the top players.[62]

The shoe companies are not the only corporations seeking exposure through youth basketball, however. McDonald's sponsors a high school All-American game each year in which professional superstars like Dwight Howard, Kobe Bryant, Carmelo Anthony, Chris Paul, and LeBron James have participated.[63] The game is nationally televised each year on ESPN, which also benefits derivatively from this use of youth basketball.

It is into this dizzying array of competitive AAU teams, vying corporations, and aspiring, easily-influenced young athletes that Division I college coaches insert themselves through the recruiting process. With money passed to AAU teams and coaches through various means, there is ample opportunity for corruption. Furthermore, the rules governing recruitment of prospects yield ample grey area in which recruiters can manipulate the spirit of the regulations without violating the proverbial "letter of the law."

IV. NCAA Rules Governing Recruiting by Division I Men's Basketball Coaches

The NCAA defines recruiting as "any solicitation of a prospective student-athlete or a prospective student-athlete's relatives … by an institutional staff member or by a representative of the institution's athletic interests . . . ."[64] These actions within the definition of recruiting must be "for the purpose of securing the prospective student-athlete's enrollment and ultimate participation in the institution's intercollegiate athletics program."[65] Due in large part to the possibility that the interests of student-athletes may be compromised by coaches seeking to advance the interests of their own programs, the NCAA has adopted specific measures to regulate the area of recruiting. The NCAA regulations, outlined in the *NCAA Division I Manual*, prohibit and standardize a wide range of conduct in the recruiting process.

Importantly, the NCAA stipulates that each recruit "is responsible for his or her involvement in a violation of NCAA regulations during the student's recruitment, and involvement in a major violation . . . may cause the student to become . . . ineligible . . . ."[66] Such a provision clearly minimizes the effectiveness of an ignorance defense. The NCAA also holds the programs themselves accountable for recruiting misconduct.[67] Programs like that of

[60] Five Star Basketball Training Camp, http://www.5starbball.com/ (last visited May 1, 2010).
[61] Joey Johnston et al., *Recruiting in the Shadows*, TAMPA TRIB., Dec. 14, 2008, *available at* http://www2.tbo.com/content/2008/dec/14/140011/na-recruiting-in-the-shadows/.
[62] *Id*.
[63] McDonald's All Americans Alumni, http://www.mcdonaldsallamerican.com/Boys_Alumni.pdf (last visited Apr. 15, 2010).
[64] NAT'L COLLEGIATE ATHLETIC ASS'N, 2008-09 NCAA DIVISION I MANUAL, art. 13.02.12, at 79 [hereinafter DIVISION I MANUAL].
[65] *Id*.
[66] DIVISION I MANUAL, *supra* note 64, art. 13.01.1, at 77.
[67] Associated Press, *Northeastern Penalized for Recruiting Violations*, CBS SPORTS, Apr. 25, 2009, *available at* http://wbztv.com/sports/ncaa.northeastern.university.2.994339.html.

Northeastern University, for example, have faced probation and an imposed reduction in the number of scholarships the program may grant to student-athletes.[68]

For recruiting purposes, the NCAA broadly defines a prospective student-athlete as "a student who has started classes for the ninth grade."[69] In January of 2009, however, the NCAA altered the rule for men's basketball to apply to seventh and eighth grade students as well.[70] Such a policy change was specifically designed to limit interaction between middle school basketball players and college coaches.[71] The NCAA distinguishes a prospective student-athlete from a "recruited" prospective student-athlete by establishing several factors which lead to classification in the latter category. Among these are an institution's participation with an official visit of the recruit; arranging telephone contact or an in-person, off-campus encounter with the prospect or the prospect's parent(s), relatives, or legal guardian(s); and "issuing a National Letter of Intent or the institution's written offer of athletically related financial aid to the prospective student-athlete."[72]

The term "contact," which appears throughout the *NCAA Division I Manual*, is defined as "any face-to-face encounter between a prospective student-athlete or the prospective student-athlete's parents, relatives, or legal guardians and an institutional staff member or athletics representative during which any dialogue occurs in excess of . . . greeting."[73] Even if no conversation takes place, contact within the boundaries of the NCAA rules also consists of any "face-to-face encounter that is prearranged . . . or that takes place on the grounds of the prospective student-athlete's educational institution or at the site of organized competition or practice . . . ."[74] Incorporating this meaning of the term, "contact" is restricted in accordance with various times of the year.

The NCAA divides the calendar year into several periods during which recruiters must conform to different standards of conduct. During "Contact Periods," "it is permissible for authorized athletics department staff members to make in-person, off-campus recruiting contacts and evaluations."[75] "Quiet Periods" are more restrictive, as they are times "when it is permissible to make in-person recruiting contacts only on the institution's campus. No in-person, off-campus recruiting contacts or evaluations may be made . . . ."[76] The most restrictive periods, however, are "Dead Periods," during which time "it is not permissible to make in-person recruiting contacts or evaluations on or off the institution's campus or to permit official or unofficial visits by prospective student-athletes to the institution's campus."[77] Off-campus recruiting contacts are prohibited before the July following completion of a prospect's junior year of high school.[78] As defined by the NCAA, an "Evaluation Period" constitutes an interval

[68] *Id.*
[69] DIVISION I MANUAL, *supra* note 64, art. 13.02.10, at 79.
[70] DIVISION I MANUAL, *supra* note 64, art. 13.12.1.1, at 119.
[71] Charlie Zegers, *NCAA Declares Seventh Graders "Prospects,"* ABOUT.COM, http://collegebasketball.about.com/od/recruiting/a/seventh-grade.htm (last visited May 4, 2009).
[72] DIVISION I MANUAL, *supra* note 64, art. 13.02.12.1, at 79.
[73] DIVISION I MANUAL, *supra* note 64, art. 13.02.3, at 78.
[74] *Id.*
[75] DIVISION I MANUAL, *supra* note 64, art. 13.02.4.1, at 78.
[76] DIVISION I MANUAL, *supra* note 64, art. 13.02.4.3, at 78.
[77] DIVISION I MANUAL, *supra* note 64, art. 13.02.4.4, at 78.
[78] DIVISION I MANUAL, *supra* note 64, art. 13.1.1.1, at 80.

in which "it is permissible for authorized athletics department staff members to be involved in off-campus activities designed to assess the academic qualifications and playing ability of prospective student-athletes. No in-person, off-campus recruiting contacts shall be made . . . ."[79]

Moreover, NCAA men's basketball recruiting regulations rely heavily on the use of "Recruiting-Person Days." As defined, a "Recruiting-Person Day" occurs when a coach is "engaged in an off-campus recruiting activity of a men's basketball prospective student-athlete, including a prospective student-athlete who has signed a National Letter of Intent . . . ."[80] The presence of two coaches from the same institution at an event constitutes the use of two recruiting-person days.[81] Division I men's basketball recruiting rules limit each institution to "130 recruiting-person days during the academic year contact and evaluation periods."[82] With regards to specific prospects, the NCAA restricts each men's basketball program "to seven recruiting opportunities (contacts and evaluations combined) during the academic year per prospective student-athlete . . . ."[83] Over the course of the recruit's senior year of high school, however, "the institution is limited to not more than three in-person, off-campus contacts . . . ."[84] To protect these provisions from abuse, the NCAA prevents staff members from recruiting off-campus until they have been certified as familiar with recruiting regulations.[85] Restrictions may also "be placed on the number of staff members who are permitted to recruit off campus . . . ."[86]

Importantly, NCAA rules prevent coaches' contact with a prospect during the academic year "at any basketball event . . . that is not part of a prospective student-athlete's normal high school . . . season, or any event that is not approved, sanctioned, sponsored or conducted by the applicable state high school or . . . National Federation of State High School Associations . . . ."[87] Broadly, communication "as a result of the prospective student-athlete's participation in basketball . . . is prohibited during the time period in which the prospective student-athlete is participating in a summer certified event . . . [h]owever, printed materials . . . may be sent . . . ."[88] Furthermore, institutional staff members are limited to "one occasion during a particular week within a contact period" on which they may visit a prospect's school, "regardless of the number of prospective student-athletes enrolled in the institution or whether any prospective student-athlete is contacted on that occasion."[89] When a staff member visits a recruit, he or she is not permitted to "expend any funds other than the amount necessary for his or her own personal expenses. . . ."[90]

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[79] DIVISION I MANUAL, *supra* note 64, art. 13.02.4.2, 78. *See generally* DIVISION I MANUAL, *supra* note 64, art. 13.1.8.8, at 92.
[80] DIVISION I MANUAL, *supra* note 64, art. 13.02.7, at 79.
[81] *Id.*
[82] DIVISION I MANUAL, *supra* note 64, art. 13.1.8.8.a, at 92.
[83] DIVISION I MANUAL, *supra* note 64, art. 13.1.8.5, at 92.
[84] *Id.*
[85] DIVISION I MANUAL, *supra* note 64, art. 13.1.2.1.1, 81.
[86] DIVISION I MANUAL, *supra* note 64, art. 13.01.3, at 77.
[87] DIVISION I MANUAL, *supra* note 64, art. 13.1.7.2.2, at 90.
[88] *Id.*
[89] DIVISION I MANUAL, *supra* note 64, art. 13.1.5.1, at 87.
[90] DIVISION I MANUAL, *supra* note 64, art. 13.14.2, at 122.

Staff members' acceptance of telephone calls, codified as "all electronically transmitted human voice exchange (including videoconferencing and videophones)," [91] is subject to recruiting regulations as well. Beginning in July following the student-athlete's completion of his sophomore year of high school, coaching staff members are permitted to accept *collect* phone calls from the student-athlete, his or her parent(s), and legal guardian(s).[92] Other telephone calls made "at the prospective student-athlete's own expense," however, may be received by institutional coaching staff members "at any time, including before July 1 following the prospective student-athlete's junior year in high school."[93] Telephone contact between institutional coaching staff members and prospects' high school coaches is prohibited in times when the recruit "is participating in a summer certified event" unless "the high school coach or administrator is not in attendance at that event."[94]

It should not be surprising that the NCAA limits recruiters' participation with prospects' teams and tournaments. Specifically, a coach or staff member "involved in the recruiting ofstudent-athletes" is prohibited from participation "in the management, coaching, officiating, supervision, promotion, or player selection of any all-star team or contest" involving players who were members of high school teams during the previous academic year.[95] Coaches are permitted to attend "Elite International Events" like the Olympics, but "attendance at qualifying competition for such events, including tryouts, remains subject to the applicable recruiting calendars."[96]

Coaches' involvement with the camps that are so central to the youth basketball system in the United States is also regulated. Coaches may be involved in the camps at their own institutions, *provided those camps take place on weeks containing days in the months of June, July, or August*.[97] Coaches and basketball staff members are prohibited, however, from being "employed at other institutional camps or clinics or at non-institutional privately owned camps or clinics."[98]

An extremely noteworthy change was made to the NCAA recruiting rules in January of 2009 in response to lavish compensation from college coaches for speeches made by AAU coaches and parents of prospects at camps.[99] The regulations now forbid coaches from employing a person tied to a prospect at a camp or clinic, making payments to nonprofits in which someone associated with a recruit has a financial interest, and using 1-900 numbers for recruiting.[100] Many of the most notable figures in college athletics, including several conference commissioners, championed this new legislation in efforts of purifying the game.[101] In addition,

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[91] DIVISION I MANUAL, *supra* note 64, art. 13.02.14, at 80.
[92] DIVISION I MANUAL, *supra* note 64, art. 13.1.3.6.1, at 86.
[93] DIVISION I MANUAL, *supra* note 64, art. 13.1.3.2.2, at 85.
[94] DIVISION I MANUAL, *supra* note 64, art. 13.1.7.2.2.1, at 90-91.
[95] DIVISION I MANUAL, *supra* note 64, art. 13.13.1, at 122.
[96] DIVISION I MANUAL, *supra* note 64, art. 13.1.8.18, at 94.
[97] DIVISION I MANUAL, *supra* note 64, art. 13.12.2.3.2, at 121.
[98] *Id*.
[99] Charlie Zegers, *Elite Camp*, ABOUT.COM, http://collegebasketball.about.com/od/collegebasketballglossary/g/elite-camp.htm (last visited May 4, 2009).
[100] Dana O'Neil, *Rules Impact Cash Flow to Third Wheels*, http://sports.espn.go.com/ncb/news/story?id=4606269 (last visited Apr. 27, 2010).
[101] *Id*.

the NCAA now also wisely prohibits a school from compensating a coach based on the number of camp participants that coach provides.[102] Despite the changes, the elusive nature of the problem makes it likely that deviant coaches will still be able to funnel money to persons associated with prospects if they so desire.

Prospective student-athletes are subject to intense regulation on visits to school campuses. "Unofficial visits," as determined by the NCAA, occur when a student-athlete's visit to an institution is made at his or her own expense.[103] "The provision of any expenses or entertainment valued at more than $100 by the institution or representatives of its athletic interests shall require the visit to become an official visit . . . ."[104] In Division I men's basketball, unofficial visits are not permitted in the month of July.[105] "Official visits" must not exceed forty-eight hours,[106] during which time the prospect "shall be provided lodging and take meals as regular students normally do."[107] Institutions are barred from publicizing recruits' visits.[108] This stance espoused by the NCAA is extended to a prohibition of introduction of prospects "at a function . . . that is attended by media representatives or open to the general public."[109]

Finally, loans and financial assistance are regulated by the NCAA. The regulations stipulate that "[a]rrangement of educational loans by an institution for a prospective student-athlete shall be permitted, provided the loan is not made prior to the completion of the prospective student-athlete's senior year in high school."[110] Schools are barred from offering or providing, directly or indirectly, financial assistance "to pay (in whole or in part) the costs of the prospective student-athlete's educational or other expenses for any period prior to his or her enrollment or so the prospective student-athlete can obtain a postgraduate education."[111]

This lengthy review of current regulations governing Division I men's basketball recruiting provides a comprehensive view of the restrictions on coaches during their attempts to lure talent to their programs. Recruiting is an essential element of success; as such, many coaches have been willing to compromise ethics in attempts to advance the interests of their programs.[112] It is this willingness to disregard standards of recruiting "the right way" that makes regulation so necessary and, simultaneously, a seemingly-elusive goal.

V. Notable Past Violations and Other Questionable Tactics Used in Basketball Recruiting

The need for thorough regulation in Division I men's basketball recruiting is readily apparent from a survey of violations over the past several decades. Some of the most famous coaches and Division I college basketball programs have been tarnished by recruiting scandals

[102] DIVISION I MANUAL, *supra* note 64, art. 13.12.2.2.1, at 121.
[103] DIVISION I MANUAL, *supra* note 64, art. 13.02.15.2, at 80.
[104] *Id*.
[105] DIVISION I MANUAL, *supra* note 64, art. 13.7.1.1, at 109.
[106] DIVISION I MANUAL, *supra* note 64, art. 13.6.4, at 106.
[107] DIVISION I MANUAL, *supra* note 64, art. 13.6.6, at 106.
[108] DIVISION I MANUAL, *supra* note 64, art. 13.10.5, at 113.
[109] DIVISION I MANUAL, *supra* note 64, art. 13.10.6, at 113-14.
[110] DIVISION I MANUAL, *supra* note 64, art. 13.2.4, at 97.
[111] DIVISION I MANUAL, *supra* note 64, art. 13.15.1, at 123.
[112] Sean Cunningham, *Dirty Teams in NCAA Tournament History*, ESQUIRE, *available at* http://www.esquire.com/the-side/feature/college-basketball-history-2009 (last visited Mar. 18, 2010).

and allegations.[113] Past infractions illustrate the ethical problems underlying the recruiting process and demonstrate how violations have occurred at some of the country's most notable programs even in today's climate of intense scrutiny.

Recruiting issues are not a new phenomenon; rather, alleged improprieties existed over forty years ago at what was perhaps the greatest college basketball program in history.[114] Over the course of a career in which he won ten titles, John Wooden gained the adoration of the basketball world and was dubbed the "Wizard of Westwood" for his basketball acumen.[115] Nevertheless, one of his own standout players, Bill Walton, later cast doubt on his former coach's ethics in recruiting by stating: "[i]f the UCLA teams of the late 1960s and early 1970s were subjected to . . . scrutiny . . . , UCLA would probably have to forfeit about eight national titles and be on probation for the next 100 years."[116] Even if spoken with partial hyperbole, such a remark by a former player about John Wooden's teams casts a shadow of doubt on the recruiting practices that helped build the Bruins' dynasty.

Unlike John Wooden and UCLA, Jerry Tarkanian was subject to intense scrutiny in his years in college basketball.[117] Perhaps angered by Tarkanian's sudden departure from Long Beach State immediately before the program was supposed to go on probation,[118] the NCAA aggressively pursued a case against Tarkanian when he coached at the University of Nevada-Las Vegas (UNLV).[119] Alleging "bought players, illegal transportation of prospects, fraudulent grades and illegal cash handouts," the NCAA attempted to suspend Tarkanian from coaching while he was at UNLV.[120] Although his subsequent legal actions temporarily restored him to his position as UNLV's head basketball coach,[121] Tarkanian's image nevertheless was permanently scarred by the allegations of recruiting improprieties. While his actions at UNLV were certainly suspicious, recruiting problems were not uncharacteristic for Tarkanian. In fact, "a subsequent NCAA investigation showed that the Long Beach basketball program under Tarkanian was guilty of 23 infractions."[122]

Recruiting scandals have had drastic effects for several Division I programs. In 1973, the North Carolina State Wolfpack basketball team finished the season with a record of twenty-seven wins and zero losses behind the efforts of superstar David Thompson.[123] Despite their unblemished season, however, the team was unable to compete for the national championship because they were serving probation for previous recruiting violations. Similarly, Memphis State's program was marred by problems in 1985 after an improbable run to the Final Four of the

[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] Rick Telander, *The Shark Gets a Ruling With Bite*, SPORTS ILLUSTRATED, Oct. 10, 1977, *available at* http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1135754/index.htm.
[118] Tarkanian later attributed his decision to leave Long Beach State to poor attendance at the team's games even after they had been ranked in the top ten during four consecutive seasons. TERRY PLUTO & JERRY TARKANIAN, TARK: COLLEGE BASKETBALL'S WINNINGEST COACH 102 (1988).
[119] Telander, *supra* note 117.
[120] *Id*.
[121] *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).
[122] Telander, *supra* note 117.
[123] Cunningham, *supra* note 112.

NCAA tournament.[124] "Their coach would be jailed for tax evasion, after first being fired for recruiting violations that resulted in the NCAA vacating the Memphis State . . . Final Four run, meaning none of it ever happened . . . ."[125]

Eddie Sutton, who was plagued by a number of problems throughout his coaching career,[126] resigned from his coaching position at the University of Kentucky largely because of recruiting misconduct. The most notable incident during Sutton's tenure at Kentucky occurred when a package sent from Dwayne Casey, one of Sutton's assistant coaches, to the father of prospect Chris Mills, broke open during the mailing process.[127] Unfortunately for Sutton and his staff, the $1,000 contained in the package spilled and a recruiting scandal soon erupted.[128]

Perhaps the most decorated recruiting class in basketball history, Michigan's "Fab Five," was also tarnished by violations.[129] "Chris Webber, Juwan Howard, Jalen Rose, Ray Jackson, Jimmy King & Co. won 56 games and reached the NCAA final in each of their two seasons together. Their talent was breathtaking; their trash-talking, baggy shorts style endearing . . . ."[130] With their on-court success, however, came scrutiny that eventually led to discovery of illicit funds accepted during the recruiting process.[131] As a result of the recruiting scandal, Chris Webber subsequently faced federal perjury charges and the banners commemorating the two Final Four appearances were no longer permitted to be displayed by the University of Michigan.[132]

Not surprisingly, recruiting improprieties have persisted as the game has become more of a spectacle. With growing emphasis on acquiring superstar talent out of high school, college coaches have felt pressure to obtain commitments from prospects that will help their programs win sooner rather than later. Kelvin Sampson, who was plagued by recruiting scandals at the University of Oklahoma, was the subject of further NCAA investigation shortly thereafter when he became the head basketball coach at Indiana University.[133] Sampson had obviously failed to learn to abide by the rules; NCAA investigators alleged his noncompliance with sanctions imposed for impermissible calls made while at Oklahoma.[134] In addition, Sampson was also accused of participation in prohibited phone calls, impermissible recruiting conduct at a two-day camp held on Indiana's campus, and actions contrary to "ethical conduct."[135] Indiana's athletic

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[124] *Id*.
[125] *Id*.
[126] ESPN, *Sutton Takes Leave of Absence; Cited with DUI*, ESPN.COM (Feb. 14, 2006), http://sports.espn.go.com/ncb/news/story?id=2329109.
[127] Dana O'Neil, *Gray Scale: Recruiters Struggle with Perfectly Legal Yet Ethically Questionable*, ESPN.COM (Aug. 6, 2009), http://sports.espn.go.com/ncb/columns/story?id=3710807.
[128] *Id*.
[129] Steve Wieberg, *Fab Five Anniversary Falls Short of Fondness*, USA TODAY, Mar. 8, 2002, *available at* http://www.usatoday.com/sports/college/basketball/men/02tourney/2002-03-27-cover-fab5.htm.
[130] *Id*.
[131] *See Id*. (reporting that Chris Webber was accused of accepting $280,000 while in high school and college, and three other Michigan players also reportedly received a sum of $336,000).
[132] Dan Wetzel, *Revolutionary Fab Five Still Resonates*, Yahoo! Sports, http://rivals.yahoo.com/ncaa/basketball/news?slug=dw-fabfive040509&prov=yhoo&type=lgns (last visited May 4, 2009).
[133] ESPN, *NCAA Lists 5 Major Violations; IU AD 'Profoundly Disappointed,'* ESPN.COM (Feb. 15, 2008), http://sports.espn.go.com/ncb/news/story?id=3243793..
[134] *Id*.
[135] *Id*.

director expressed his personal and professional "profound disappointment" at the allegations,[136] and Sampson's tenure as the Hoosiers' head basketball coach ended abruptly.[137]

Recruiting scandal also rocked the powerhouse men's basketball program of the University of Connecticut (UConn) in early 2009, when Yahoo! Sports reported NCAA rules violations by the Huskies' staff.[138] Although the fallout remains to be seen, allegations of recruiting improprieties involving the recruitment of Nate Miles, a former guard at the school, implicated several notable figures, including Hall of Fame coach Jim Calhoun.[139] The Connecticut staff allegedly "committed major recruiting violations by exceeding NCAA limits on phone calls to Miles and those closest to him . . . ."[140] According to the investigation, 1,565 phone and text communications were made between Miles and members of the Connecticut basketball staff; additionally, "Miles was provided with lodging, transportation, restaurant meals, and representation by Josh Nochimson- a professional sports agent and former UConn student manager- between 2006 and 2008 . . . ."[141] In response to these serious accusations, the University of Connecticut promised cooperation with the NCAA.[142] The program, however, may nevertheless face punishment for noncompliance.[143]

The watchful eyes of NCAA compliance personnel have also recently turned towards institutions like Harvard University, known primarily as a bastion of intellectual development, yet also corralled into the expanding number of potential recruiting derelicts.[144] In March, 2008 Harvard basketball coach Tommy Amaker was described as having "adopted aggressive recruiting tactics that skirt, or in some cases, may even violate National Collegiate Athletic Association rules."[145] Two student-athletes who were granted admission to Harvard admitted that they worked with Kenny Blakeney, who was hired as an assistant basketball coach by Tommy Amaker shortly thereafter.[146] Such conduct is strictly forbidden by NCAA regulations which, as described by an NCAA employee, provide that "should a coach recruit on behalf of a school but not be employed there, he or she is then considered a booster and that recruiting activity is not allowed."[147] Additionally, "accusations include illegal conduct with prospects and their parents, as well as going after students who score below the Ivy League's Academic Index minimum of 171."[148] Specifically, Amaker reportedly contacted the parents of a prospect at a

[136] *Id*.
[137] ESPN, *Indiana, Sampson Reach $750,000 Settlement to Part Ways*, ESPN.COM (Feb. 23, 2008), http://sports.espn.go.com/ncb/news/story?id=3258506..
[138] Adrian Wojnarowski & Dan Wetzel, *Probe: UConn Violated NCAA Rules*, Yahoo! Sports (Mar. 25, 2009), http://rivals.yahoo.com/ncaa/basketball/news?slug=ys-uconnphone032509&prov=yhoo&type=lgns.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] D'Angelou, *Athletic Recruiting Scandal at Harvard?*, ASSOCIATED CONTENT (Mar. 7, 2008), http://www.associatedcontent.com/article/639665/athletic_recruiting_scandal_at_harvard.html.
[145] Pete Thamel, *In a New Era at Harvard, New Questions of Standards*, N.Y. TIMES, Mar. 2, 2008, *available at* http://www.nytimes.com/2008/03/02/sports/ncaabasketball/02harvard.html.
[146] *Id*.
[147] *Id.* (Interpretation of rule by NCAA spokesman Erik Christianson for *The New York Times*).
[148] D'Angelou, *supra* note 144.

grocery store to suggest their son consider playing for him at Harvard.[149] Although their son did not count Harvard among the programs for which he would play, the conversation still violated NCAA rules which limit recruiting contact to "happenstance" during the time of year at which the discussion purportedly took place.[150] Moreover, "even if Harvard did not break any NCAA rules, many in the coaching community said Amaker's staff had behaved unethically."[151]

Unfortunately, such an accusation is not uncommon in Division I men's basketball recruiting. Even programs that have not been formally accused or found guilty of recruiting violations have been characterized as "shady" by coaches like Texas Tech's Pat Knight.[152] "Carefully choreographed elite camps; travel team coaches suddenly ending up on college benches with their super-stud players conveniently going along . . . ; speaking fees for those . . . coaches at colleges . . . recruiting their players . . . . It's all ethically questionable . . . ."[153] Despite the aspersions cast on the conduct of some coaches, however, much of the "shadowy" recruiting of this sort escapes punishment from the NCAA because it does not violate the proverbial "letter of the law."[154] It is in this realm that AAU clubs and other squads playing under the auspices of an "AAU team" provide opportunity for exploitation and manipulation of NCAA regulations.[155] Coaches for these teams have openly solicited donations to help meet the expenses incurred from travel and tournament fees[156] in exchange for access to players on their roster.[157]

Coaches seeking to follow the formalities of NCAA regulations yet avoid upholding their underlying spirit typically realize that "getting the star might mean first taking care of his friend, family members, or those in the inner circle who simply have their hands out."[158] According to Phil Martelli, the head basketball coach at St. Joeseph's University, this can be accomplished rather easily by catering to a prospect's coach or former coach.[159] When a position became available on his coaching staff, Martelli received three different phone calls promising to "deliver" a prospect to his program in exchange for the coaching position.[160] While Martelli claimed such a notion "made his skin crawl," coaches like Baylor's Scott Drew and the Kansas Jayhawks' Bill Self have shown propensities to yield to such temptations.[161] Drew recently hired Dwon Clifton, the former coach of top prospect John Wall's D-One Sports AAU team, as a member of his Baylor basketball staff. [162] Baylor is now among the final schools Wall is

[149] Thamel, *supra* note 145.
[150] *Id*.
[151] *Id*.
[152] O'Neil, *supra* note 127.
[153] *Id*.
[154] *Id*.
[155] Where Most Needed, *AAU Basketball Programs Use Charities to Funnel Payments for Recruits*, http://www.wheremostneeded.org/2007/01/aau_basketball_.html (last visited May 4, 2009).
[156] *Id.* (stating that the Squires an AAU team from Richmond, Virginia organized as a "charity" for tax purposes, amassed approximately $40,000 in expenses in 2005, $11,000 of which came from airplane transportation and $8,000 of which resulted from AAU tournament fees).
[157] *Id*.
[158] Johnston et al, *supra* note 61.
[159] *Id*.
[160] *Id*.
[161] *Id*.
[162] *Id*.

considering attending.[163] In a similar vein, Bill Self's staff at Kansas featured Ronnie Chalmers, the father of standout guard Mario Chalmers, as the Director of Basketball Operations during the team's 2007-2008 championship season.[164] Highly-touted center Gus Gilchrist committed to the University of South Florida Bulls in 2008. "Shortly after Gilchrist entered USF's program . . . the Bulls created a job as a video and conditioning assistant for one of his closest friends."[165] James Harden, the talented shooting guard for the Arizona State Sun Devils, conceded that his recruitment process was affected by the fact that his former high school coach was on the Sun Devils' coaching staff.[166] Similarly, Tyreke Evans, the decorated guard for the Memphis Tigers, shared "bench space with his personal strength and conditioning coach, Lamont Peterson, an administrative assistant to John Calipari . . . ."[167]

The same questionable recruiting associations have created "pipelines" of sorts to several notable programs. The 2007-2008 National Player of the Year, Michael Beasley, revoked his commitment to play for head coach Bobby Lutz at Charlotte when his former DC Assault AAU team coach, Dalonte Hill, left Lutz's staff for a $400,000 salary at Kansas State University.[168] In addition to Beasley, three other former DC Assault players followed Dalonte Hill to Kansas State.[169] Highly-touted prep star Wally Judge, also a member of DC Assault, has signed a letter of intent to play for Kansas State beginning in 2009.[170]

Cliff Findlay, a University of Nevada Las Vegas (UNLV) booster, has been accused of attempting to create another "pipeline" from a "prep" team to the Runnin' Rebels basketball program.[171] Findlay Prep, which bears the booster's name, consists of some of the top prospects in the country and won the inaugural ESPN Rise National High School Invitational Tournament on April 6, 2009.[172] Contrary to what the name might suggest, however, Findlay Prep is not a high school or affiliated with any academic institution whatsoever; rather, the organization represents "the latest step in the evolution of elite . . . basketball: a program that operates completely outside the traditional high school system and makes no pretense about its top priority- to acquire the best talent from all over the world."[173] Perhaps surprisingly, there has been no action taken by the NCAA against Findlay or his team despite the fact that the players are housed in a $425,000 home, amassed 30,000 travel miles in the 2008-2009 season, and attend a private school which costs $16,000 annually per student, all of which was funded by the booster.[174] Findlay emphasizes that the organization was established in conformance with

[163] Shawn Siegel, *John Wall to Baylor: A Done Deal?*, College Hoops Net, July 31, 2008, http://www.college hoopsnet.com/john-wall-baylor-a-done-deal-49251.
[164] Johnston et al, *supra* note 61.
[165] *Id*.
[166] O'Neil, *supra* note 127.
[167] *Id*.
[168] *Id*.
[169] *Id*. (referring to Jamar Samuels, Dominque Sutton, and Ron Anderson, all former DC Assault players who are currently on the Kansas State men's basketball roster).
[170] Rivals, *Wally Judge*, YAHOO SPORTS (Aug. 6, 2009), http://rivals.yahoo.com/basketballrecruiting/basketball/ recruiting/player-Wally-Judge-66239.
[171] Phil Taylor, *March Madness Comes to High School Hoops*, SPORTS ILLUSTRATED Apr. 13, 2009, at 38.
[172] *Id*. at 40 (referring to McDonald's All-American Avery Bradley who recently committed to Texas, as well as D.J. Richardson and Tristan Thompson, who have committed to play at Illinois and Texas, respectively).
[173] *Id*. at 42.
[174] *Id*.

NCAA rules.[175] While such an assertion may be factual in nature, the underlying purposes of Findlay Prep and the booster's close affiliation with UNLV contradict the basic functions of NCAA recruiting guidelines.

Apart from the shadowy associations that suggest impacts on recruits' college commitments, direct payments to prospects' closest kin have plagued the recruiting scene and been decried as "laughable" by University of California coach Mike Montgomery.[176] Larry Orton, for instance, the father of highly recruited star Daniel Orton, was paid $4,800 by former University of Kentucky coach Billy Gillespie simply as compensation for speaking at the school's basketball camps.[177] Orton's stepbrother was compensated $1,950 for similar engagements.[178] Kenny Boynton Sr., father of University of Florida commitment Kenny Boynton, stated that "he rebuffed calls from recruiters and 'street agents' offering to broker deals."[179] Although payments of this nature were not in technical violation of the language of any particular NCAA rule, they clearly contradicted the underlying purpose of the NCAA's efforts to regulate Division I men's basketball recruiting. Jim Boeheim of Syracuse University and Tom Izzo of Michigan State, among others, have both expressed concern about the state of the system and certain colleagues' attempts to circumnavigate NCAA provisions.[180] To the dismay of the coaches who abide by the rules, however, there are a number of others in the mold of Billy Gillespie, "who impishly tweaks the NCAA at every turn . . . ."[181]

Gillespie's conduct in particular has drawn criticism in recent years. Although fired by the University of Kentucky in 2009,[182] his recruiting tactics drew the ire of some because of his savvy ability to funnel money in efforts to sway prospects' college choices.[183] In addition, Gillespie was largely responsible for the NCAA changing the definition of the word "prospect" to include seventh and eighth grade basketball players.[184] Gillespie was able to lure a verbal commitment to Kentucky from Michael Avery, an eighth grader the coach watched at an AAU tournament.[185] Gillespie's actions are more absurd in light of the fact that Avery had not yet selected a *high school* to attend at the time he assured Gillespie he would attend the University of Kentucky.[186] Avery is not alone as a target in the recruiting process at such a young age. Prince George County sensation Jordan Goodman, another product of the DC Assault AAU program, received multiple college scholarship offers before he played in his first high school game.[187] It

[175] *Id*.
[176] O'Neil, *supra* note 127.
[177] Johnston et al, *supra* note 61.
[178] *Id*.
[179] *Id*. (referring to AAU squad Team Breakdown member Kenny Boynton, 2008's eight highest ranked prospect in the country)..
[180] O'Neil, *supra* note 127.
[181] *Id*.
[182] ESPN, *Gillespie, Kentucky Part Ways*, ESPN.COM (Mar. 28, 2009), http://sports.espn.go.com/ncb/news/story?id=4021232.
[183] O'Neil, *supra* note 127.
[184] Kaufman, *supra* note 5.
[185] *Id*.
[186] *Id*.
[187] Palmer, *supra* note 41.

is largely because of situations like these that the NCAA expanded the definition of "prospects" in basketball recruiting.[188]

Other recruiting conduct blatantly violates NCAA rules yet remains concealed. The NCAA has specifically prohibited a school "to pay, or arrange for its boosters or coaches to pay, any portion of a recruit's expenses for any period before he enrolls in college. Donations to a recruit's AAU team violate that prohibition . . . ."[189] Nevertheless, Sonny Vaccaro estimates that ten to fifteen colleges annually arrange for gifts exceeding $20,000 to AAU teams.[190] A large number of AAU programs are established as nonprofit charity organizations under IRS standards so that they can be the recipients of tax-deductible donations.[191] In a report by *The Washington Post*, "two AAU coaches said college recruiters offered them donations without being prompted. One AAU coach said that over the past decade almost two dozen college coaches . . . have offered to arrange for donations, ranging from $20,000 to $50,000 . . . ."[192] An unnamed college coach clarified the purpose implicit in such payments, namely that "a very large donation usually means the team is guaranteed to land all but the most elite players."[193] Despite such speculations and claims, however, the majority of these suspected payments remain concealed. Accordingly, those involved are able to avoid retribution. The NCAA's case against former Baylor basketball coach Dave Bliss is the only *documented* occurrence of a coach attempting to impact recruiting by channeling funds to an AAU program.[194]

The problematic recruiting scene is exacerbated by the tight-lipped mindset of college coaches. "Coaches are guided by a no-snitch mentality as strict as any you'll find anywhere, terrified that the same group that preaches collegiality will shun a rat in an instant (ask Bruce Pearl)."[195] Perhaps because of the lack of a substantial number of explicit disavowals of questionable recruiting tactics by college coaches, the subject is now somewhat polarizing. University of Florida men's basketball coach Billy Donovan has declared that adults have failed young athletes.[196] On the other hand, Sonny Vaccaro has described the system as "brilliant"[197] and "simply doing business. Nothing more."[198] In the words of Vaccaro, the crafty schemes of funneling payments from college programs to parties associated with top prospects are "a unique, newer, and cleaner way of getting money to people who have players who may or may not end up at your school . . . ."[199]

Improper recruiting has extended beyond coaches' and boosters' conduct recently.[200] Fans have recognized the importance of successful recruiting for college programs, leading some

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[188] *Id*.
[189] Prisbell, *supra* note 56.
[190] Where Most Needed, *supra* note 155.
[191] Prisbell, *supra* note 56.
[192] *Id*.
[193] *Id*.
[194] *Id*. (reporting that Dave Bliss was responsible for payments in excess of $110,000 to a Houston AAU team. $87,000 came from boosters, while $28,000 was donated directly by Bliss).
[195] O'Neil, *supra* note 127.
[196] Johnston et al,, *supra* note 61.
[197] Prisbell, *supra* note 56.
[198] Johnston et al,, *supra* note 61.
[199] Prisbell, *supra* note 56.
[200] Justin Pope, *Student Warned Over Facebook Site Wooing Prospect*, News Vine, http://www.newsvine.com/_

to attempt to actively participate in the process.[201] Taylor Moseley, a freshman at North Carolina State University, recently implored prospect John Wall to commit to the school's program.[202] As a result, Michelle Lee, North Carolina State's compliance director, sent Moseley a cease and desist letter that threatened "further" measures if he did not comply.[203]

The problems currently plaguing the basketball recruiting process are controversial and complex. Despite the fact that some questionable recruiting tactics are vehemently defended by those like Vaccaro, it is clear that the climate surrounding youth basketball has been corrupted by jockeying corporate interests and Division I coaches willing to circumvent ethical boundaries for the advancement of their programs. The essence of amateurism in youth basketball has been compromised to a point of near-nonexistence. Moreover, the interests of the participants at the very core of the system have been diminished. No longer is it the development of the student-athlete that is primarily encouraged; rather, those who have the resources and power to control the youth basketball environment have prioritized the advancement of corporate and collegiate programs' interests. As a result, the atmosphere of growth that served as a foundation upon which youth sports in America were established has been jeopardized. It is now the responsibility of those with the means to effectuate change to fix the polluted system so that youth basketball can once again provide opportunities for student-athletes to embrace the lessons of the game free from predatory influences.

VI. Relevant Case Law and Legal Factors

Before any changes to the system can be posited, however, an overview of legal issues in the area is critical to ensure that changes enacted will withstand challenges in American jurisprudence. Among the range of applicable legal principles, equal protection, due process, and antitrust considerations are especially important. Therefore, modifications must be carefully tailored so as to effectuate changes in conformance with precedent in these areas. With the threat of litigation minimized, efforts to improve youth basketball in America will have more credibility and an increased likelihood of providing long-term benefits.

The case of *Colorado Seminary (University of Denver) v. NCAA* established that intercollegiate athletic participation is not a civil right protected under the United States Constitution.[204] Similarly, participation in college sports is not a protected property right.[205] Within this degree of latitude, the NCAA has enacted provisions consistent with their primary purpose, espoused in the NCAA Constitution, to "maintain intercollegiate athletics as an integral part of the educational program and the athlete, as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."[206]

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news/2009/04/10/2666469-student-warned-over-facebook-site-wooing-prospect?category=sports (last visited June 20, 2010).

[201] *Id*.

[202] *Id*.

[203] *Id*.

[204] *See* Colorado Seminary (University of Denver) v. Nat'l Collegiate Athletic Ass'n, 570 F.2d 320 (10th Cir. 1978).

[205] *See* O'Connor v. Board of Educ. School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981).

[206] DIVISION I MANUAL, *supra* note 64, at art. 1.3.1.

Stemming from the incident in which UNLV and the NCAA attempted to suspend Jerry Tarkanian after a host of alleged recruiting improprieties, the coach brought one of the most important legal cases that shaped the scope of the NCAA's powers.[207] The United States Supreme Court eventually held that Tarkanian was *incorrect* in his claims that "the NCAA was a state actor because it misused power that it possessed by virtue of state law" and, through this misuse of power, "the two entities acted jointly to deprive Tarkanian of liberty and property interests, making the NCAA as well as UNLV a state actor . . . ."[208] Justice Stevens analyzed "whether the State was sufficiently involved to treat that decisive conduct as state action,"[209] which "may occur if the State creates the legal framework governing the conduct; if it delegates its authority to the private actor; or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior."[210]

While UNLV, a state university, was "without question . . . a state actor,"[211] the issue in the case was "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action . . . ."[212] The Court held that "neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing . . . recruitment, eligibility, and academic performance . . . ."[213] Furthermore, "UNLV delegated no power to the NCAA to take specific action against" Tarkanian, a university employee.[214] Nor was the NCAA an agent of UNLV,[215] or in possession of "governmental powers to facilitate its investigation . . . ."[216]

Ultimately, the United States Supreme Court reversed the Nevada Supreme Court, holding that "[i]t would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather that that those policies were developed and enforced under color of Nevada law."[217] Thus, Tarkanian was not entitled to the due process protections to which he would have been guaranteed from a state actor as prescribed by the Fourteenth Amendment. Such a holding was contrary to previous lower court holdings[218] that had characterized the NCAA as a state actor in its dealings with all universities.[219] Since *Tarkanian* was decided, "a number of states (including Nebraska, Florida, Illinois, and, not surprisingly, Nevada) passed legislation requiring the NCAA to comply with federal and state due process principles as a matter of statutory law . . . ."[220]

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[207] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 185 (1988).
[208] *Id*. at 192.
[209] *Id*.
[210] *Id*. (citation omitted).
[211] *Id*.
[212] *Id*. at 193.
[213] *Id*. at 195.
[214] *Id*. at 195-96.
[215] *Id*. at 196.
[216] *Id*. at 197.
[217] *Id*. at 199.
[218] *See generally* Howard Univ. v. Nat'l Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975).
[219] ROBERTS & WEILER, *supra* note 2, at 750.
[220] *Id*. at 757.

The classification of the NCAA was previously addressed in relation to eligibility issues as well. In *Arlosoroff v. NCAA*,[221] the Fourth Circuit held that the NCAA was a private actor; thus, there was no validity to a "constitutional challenge against an NCAA rule restricting the eligibility of foreigners brought by a student at Duke University, a private institution."[222] Moreover, the importance of national uniformity of NCAA regulation was recognized by the Ninth Circuit in *National Collegiate Athletic Association v. Miller*.[223] In *Miller*, the Court addressed interstate consistency in NCAA practices, stipulating that such standardization "among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would . . . surely disrupt the NCAA . . . ."[224]

As in *Tarkanian*, protections under the United States Constitution were also unsuccessfully invoked in a 1987 lawsuit brought by Hersey Hawkins and the Bradley University men's basketball team against the NCAA[225] when the team was excluded from participation in "the NCAA basketball tournament because of earlier school violations. The players asserted that imposing such a penalty on them . . . violated the Equal Protection and Due Process Clauses of the Constitution."[226] Hawkins' suit was dismissed, however, because an Illinois District Court found that "the acts of the NCAA did not constitute state action. Consequently, plaintiffs' claims of a due process and equal protection violation cannot be sustained."[227] Furthermore, the Court validated the NCAA's regulatory actions, stating that "restrictions regarding a member institutions' contact and encouragement of high school athletes to attend its institution" are "rationally related to the NCAA's fundamental purpose of promoting *both* educational and athletic values."[228]

NCAA regulation of other issues has also withstood due process and equal protection challenges. In Robert Parish's 1973 lawsuit against the NCAA challenging eligibility requirements, the United States District Court for the Western District of Louisiana held that the NCAA's maintenance of minimum academic standards for athletes does not violate the Equal Protection Clause.[229] In the analogous case of *Mitchell v. Louisiana High School Athletic Association*, the Fifth Circuit restricted due process rights with regards to interscholastic athletic participation generally, holding that "the privilege of participating in interscholastic athletics must be deemed to fall . . . outside the protection of due process."[230]

As demonstrated, courts have held the NCAA to be a private actor and, thus, immune from many due process and equal protection requirements with which state actors must comply. The ability to avoid challenges of this nature confers a greater ability on the NCAA to regulate athletics under their jurisdiction. Moreover, sentiments like those expressed in *Miller* reflect the judiciary's understanding of the need for uniform regulation of collegiate athletics. As such, the

[221] Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984).
[222] ROBERTS & WEILER, *supra* note 2, at 750. *See generally* Graham v. Nat'l Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986).
[223] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993).
[224] *Id*. at 640.
[225] Hawkins v. Nat'l Collegiate Athletic Ass'n, 652 F. Supp. 602 (C.D. Ill. 1987).
[226] ROBERTS & WEILER, *supra* note 2, at 768.
[227] *Hawkins*, 652 F. Supp. at 606.
[228] *Id*. at 615.
[229] Parish v. Nat'l Collegiate Athletic Ass'n, 361 F. Supp. 1220 (W.D. La. 1973).
[230] Mitchell v. La. High School Athletic Ass'n, 430 F.2d 1155, 1158 (5th Cir. 1970).

NCAA enjoys a significant degree of latitude with regards to prospective measures to combat negative influences in college basketball. It is realistic to expect more stringent NCAA recruiting rules to withstand legal challenges in much the same manner that the eligibility requirements at issue in *Parish* were upheld.

Any changes implemented to improve the youth basketball system in America must also be made in conformity with antitrust issues that have been litigated. After all, changes that will not withstand antitrust challenges could be frustrated and nullified by litigation. Although the subject matter of past cases does not exactly parallel the issue of eliminating corruption within youth basketball, several holdings are tangentially analogous.

Of particular importance to the issue of amateur basketball was the case of *Pocono Invitational Sports Camp, Inc. v. NCAA*,[231] decided by the United States District Court for the Eastern District of Pennsylvania in 2004. In *Pocono*, the NCAA was sued on the premise that recruiting restrictions, specifically those influencing recruiting at a basketball camp, were improper restraints on trade or commerce.[232] The Court disagreed with the allegations, however, and granted summary judgment to the NCAA.[233]

NCAA v. Board of Regents of the University of Oklahoma[234] "is the only Supreme Court decision to consider how to apply substantive antitrust law to the sports industry."[235] Although television contracts were the subject matter at the core of the litigation and the case is not specifically on point,[236] Justice Stevens' majority opinion included several statements that should guide regulatory modifications of amateur basketball. Stevens affirmed the NCAA's importance, claiming that it "plays a critical role in the maintenance of a revered tradition of amateurism in college sports."[237] While also recognizing the "ample latitude" needed "to play that role," the Court nevertheless held that "rules that restrict output are hardly consistent with this role."[238] With respect to the television contracts that were the products at issue in the case, the Court stipulated that "by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."[239]

Fourteen years later, the United States Court of Appeals for the Tenth Circuit addressed another antitrust issue involving collegiate athletics in *Law v. National Collegiate Athletic Association*.[240] In *Law*, the Court confirmed the NCAA's need to "ensure . . . competitive equity between member institutions in order to produce a marketable product . . . ."[241] Maintaining competitive balance, the Court implied in a subtle manner, should be more important than other

[231] Pocono Invitational Sports Camp, Inc. v. Nat'l Collegiate Athletic Ass'n, 317 F. Supp. 2d 569 (E.D. Pa. 2004).
[232] *Id*. at 581-84.
[233] *Id*.
[234] Nat'l Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) [hereinafter *Board of Regents*].
[235] ROBERTS & WEILER, *supra* note 2, at 853.
[236] *Board of Regents*, 468 U.S. at 85.
[237] *Id*. at 120.
[238] *Id*.
[239] *Id*.
[240] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).
[241] *Id*. at 1023-24.

factors including the cost-cutting considerations at issue in the case.[242] Moreover, the Tenth Circuit affirmed the need for certain restrictions: "the 'product' made available by the NCAA in this case is college basketball; the horizontal restraints necessary for the product to exist include rules such as those forbidding payments to athletes . . . ."[243]

As can be inferred from the holdings in both *Board of Regents* and *Law*, antitrust challenges to changes implemented to improve the amateur basketball system are unlikely to be successful. Nevertheless, the cases are important to provide a legal framework within which modifications must be made. With these equal protection, due process, and antitrust principles in mind, affirmative measures must now be taken to combat the negative influences corrupting youth basketball in the United States.

VII. Changes that Should be Made to Purify the Polluted Environment of Youth Basketball

The presence of corporate influences and "shady" recruiting conduct continues to cloud the atmosphere of youth basketball in America at an intolerably high level. The need to reform the amateur basketball structure into a positive environment for growth has been amplified by recent developments, including the choice of highly-touted prospect Jeremy Tyler's decision to forgo his senior year of high school to play professional basketball in Europe.[244] Thus, action must be taken immediately to develop a system of youth basketball throughout the country that provides an environment in which basketball skills can be developed while educational pursuits, ethical conduct, and personal growth are encouraged.

Previous attempts to address issues in amateur basketball, while serving as positive foundations from which to build, have failed to implement the widespread changes needed. In 2000, for instance, the NCAA's "newly created Division I Basketball Issues Committee . . . proposed a combination of certification, education, regulation and accommodation to redesign the Division I men's basketball recruiting environment."[245] The certification element of this approach was intended to "require comprehensive financial audits of all summer basketball events, including camps, tournaments and traveling teams. The certification . . . also would identify those individuals . . . who have fiduciary relationships with NCAA coaches. . . ."[246] Additionally, the certification prong suggested by the Committee was designed to monitor particular behavior and organizations, including companies' payments to coaches and teams. While certification played a major role in the posited changes, a decrease in the length of the summer evaluation period and a mentoring program for elite prospects were two recommendations that were also incorporated.[247] Although the summer evaluation period has been shortened since 2000,[248] many of the proposed implementations never came to fruition.

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[242] *Id*. at 1024.
[243] *Id*. at 1018.
[244] Chris Ballard, *Study Abroad: Hoops Major*, SPORTS ILLUSTRATED, May 4, 2009, at 76.
[245] NCAA, *Basketball Issues Group Takes Initial Strides Toward Recruiting Reform*, NCAA NEWS, Dec. 18, 2000, *available at* http://www.ncaa.org/wps/ncaa?ContentID=15355.
[246] *Id*.
[247] *Id*.
[248] *Id*.

Similar concerns were raised by the Student Basketball Council (SBC) in 2001.[249] Unlike the NCAA's Division I Basketball Issues Committee and the Youth Basketball Initiative, however, the SBC lacked power to actually effectuate change.[250] Instead, it was merely "an organization comprised of forty-eight Division I men's basketball players established to voice student concerns about a number of issues currently facing collegiate basketball . . . ."[251] The SBC's composition of athletes intimately familiar with the problems infesting the game, however, lends credibility to their concerns. Among the sentiments echoed by the SBC, negative corporate influences, players and coaches cheating, and recruiting issues were of foremost importance.[252]

The problems facing youth basketball are complex and multi-faceted. As such, proper corrective measures will require a prolonged and thorough collaboration of efforts from the AAU, NCAA, Youth Basketball Initiative, and, to a lesser extent, NBA. The most appropriate approach is a tiered attack on negative influences in which problems at the high school/AAU and collegiate levels are isolated and addressed. Utilization of the Youth Basketball Initiative and support from the NBA are also crucial to the operation's success.

a. *Alterations at the High School/AAU Level*

The AAU should utilize its unique position in the youth basketball industry to serve as the primary catalyst for change in pre-collegiate competitive basketball. The AAU bears the responsibility to implement these measures so the organization's operation increasingly resonates with the professed "amateur" essence at its very nature. The AAU's fulfillment of its responsibilities is essential to providing an environment conducive to academic and personal growth as compliments to basketball development, all of which are objectives harmonious with the nature of the organization.

First, the AAU should implement provisions that limit sponsorship of teams that participate in their tournaments. This limitation should permit corporations and private parties to provide teams with travel expenses incurred en route to competitive basketball tournaments. In addition, the limitation should yield a very small window in which the corporate sponsor could provide necessities that the athletes could otherwise not afford. Basketball shoes and uniforms, for instance, could be supplied. The dollar amount should be limited per team and player, however, to prevent lavish spending by sponsors hoping to influence possible endorsement decisions or college commitments in the future.

The AAU should actively encourage sponsorships of *tournaments* as an alternative to sponsorship of individual teams, however. Sponsors of tournaments should be permitted to provide the reasonable travel expenses incurred by participating teams. The sponsors should be barred, however, from spending in excess or lavishing extravagances on players in much the same manner that they would be limited in sponsorship of individual teams.

[249] John Slosson, *Restoring Joy to Bracketville: Problems Facing College Basketball Stimulate Responses from the NCAA and the Newly Formed Student Basketball Council*, 8 SPORTS LAW. J. 125, 126 (2001).
[250] *Id*.
[251] *Id*.
[252] *Id*. at 127-29.

It would also be appropriate for the AAU to annually cap the amount a sponsor could spend on tournaments and teams participating in AAU events. While this might frustrate some teams and tournaments, which would inevitably have to be dropped as beneficiaries by major companies forced to decrease their expenditures, it would simultaneously diminish the power of the large corporations on the AAU basketball scene. Admittedly, this may lead to an increased number of corporate sponsors necessary to cover expenses. Nevertheless, a series of smaller sponsors carry less weight and have less of an omnipresent essence than several large sponsors, as is the case with major shoe companies like Nike and Adidas right now.

Because of the gravity of the problems currently troubling AAU basketball, enforcement provisions must bear enough force to deter violations. Thus, the AAU should institute harsher punishments for those found guilty of transgressions under the new regulations. Bans from AAU competitions ranging from one year to five years, depending upon the seriousness of the offense, would provide a significant deterrent.

Oversight and enforcement of these changes to the AAU Codebook should become a responsibility of officers of the various AAU districts. Complaints could be brought before a newly-established committee in each district charged with specifically overseeing this area. Complaints deemed valid by the committee should be presented to the district officers, who would then have a duty to take appropriate punitive action. Officers found to have acted negligently in their enforcement duties should be removed from their position. Such a harsh measure would undoubtedly incentivize those in power to ensure the proper administration of the rules.

In addition, the Youth Basketball Initiative could collaborate with the AAU to implement strict limits on interaction between representatives of sponsors and participants in AAU events. This additional oversight provided by the Youth Basketball Initiative would provide an expanded means of confronting the issue of corporate moguls like Sonny Vaccaro inserting a heavy commercial influence in the AAU scene. Ideally, the Youth Basketball Initiative would serve as a complimentary presence to the AAU's regulatory efforts and help to ensure the AAU fulfilled their responsibilities.

Such steps, if taken by the AAU, would create a firm stance against negative influences on youth basketball. While these changes alone would not solve all of the current problems, they have the ability, in conjunction with other actions taken by the NCAA, NBA, and Youth Basketball Initiative, to play an integral role in a significant move towards freeing the game of many corrupting influences. Thus, the AAU's support and participation are extremely important.

b. *Modifications in NCAA Regulations*

The NCAA must serve as a compliment to the AAU in efforts to purify youth basketball. As a highly visible organization, the NCAA has the power to effectuate noticeable change. By controlling the widely publicized actions of Division I coaches and boosters, the NCAA can create a standard of conduct that has the potential to trickle down to lower levels of amateur basketball.

First, the NCAA must tighten regulations to prohibit operations like Findlay Prep. Such an establishment, while concededly in conformance with the rules, exposes a flaw that allows a booster to provide a lavish lifestyle for top recruits. The ability of a booster to use money to

potentially create sentiments of loyalty and indebtedness in the minds of recruits is blatantly wrong and has no place in youth basketball. Because of the possibility to affect recruiting, the NCAA must prohibit those with ties to college programs from becoming such a strong source of financial support for prospects. The Youth Basketball Initiative could facilitate coordination between the NCAA and AAU to further this objective.

Next, the NCAA must strongly enforce the policy of banning all payments from college programs to parents or relatives of top recruits. This provision should be extended to prohibit employment of these individuals as speakers or counselors at college camps in any capacity. An exception should be provided, however, for parents and relatives of top prospects who have already committed to another institution. Should the recruit revoke his prior commitment and instead attend the school that furnished the payments to his family member(s), all compensation should have to be refunded to the school immediately. Furthermore, the NCAA must closely monitor standardized levels of payments to AAU coaches as compensation for work at colleges' summer camps. This oversight must ensure that programs do not attempt to influence recruiting decisions through excessive payments to prospects' coaches.

In addition, the NCAA should prevent prospects' coaches from being hired by a program in which one of their former players participated for a three-year interval after the player's arrival at that school. The same rule should apply to relatives of a prospect. Such a change would certainly create a great deal of controversy, yet its importance is paramount. While there are no specific affirmations that this hiring tactic has actually been utilized by coaches specifically to influence recruiting decisions, its widespread practice indicates the likelihood that this is the underlying motivating factor. A provision of this nature would minimize the risk of college coaches employing such a devious strategy.

As punishment for violations of any of these new provisions, the NCAA should implement monetary penalties. The tarnished images of programs and coaches that would ensue from public punishment would amplify the deterrent effect of these fines. The money derived from these penalties should be channeled to provide additional financial support for the Youth Basketball Initiative.

c. *The Role of the Youth Basketball Initiative*

In addition to providing assistance in limiting interaction between recruits and those with financial means to possibly influence their decisions, the Youth Basketball Initiative must play an integral role in further corrective efforts. Because of its affiliation with both the NCAA and NBA, the Initiative possesses a unique ability to perpetuate improvements. The resources and contacts at its disposal have conferred upon it a special power to influence rule changes and facilitate unified support for the cause.

In 2008, former Georgetown Hoyas and USA Basketball coach John Thompson posited a radical new idea.[253] At the foundation of Thompson's theory was the fact that the foremost desire of many top prospects, perhaps due to corporate influences amalgamating temptations of wealth, is playing professional basketball in the NBA.[254] Contrary to the professional ambitions

[253] Lance Pugmire, *John Thompson Sees Trouble in Basketball Recruiting*, L.A. TIMES, July 22, 2008, *available at* http://articles.latimes.com/2008/jul/22/sports/sp-thompson22.
[254] *See id*.

of some prospects, however, the NBA now requires that players be at least nineteen years old.[255] This requirement has led to a steady influx of "one and done" players[256] in top college programs,[257] a trend that the former coach laments.[258] This has resulted in many players overestimating their worth[259] and undervaluing education.

As an alternative plan, Thompson has proposed a right conferred upon prep prospects to try out for NBA teams at the conclusion of high school.[260] Should the athlete prove to scouts that he is ready for an NBA career, he will be able to pursue it.[261] In the more likely case that scouts determine the prospect needs further physical or athletic development, however, the athlete will not be permitted to enter the NBA.[262] Such a measure would funnel prospects towards college programs and temporarily away from the professional ranks. Moreover, this feedback from those affiliated with the NBA could be reasonably expected to spur aspiring players' motivation to utilize the various opportunities presented by college basketball.

In turn, the NBA should raise the age minimum for players to twenty-one years. This should be a non-negotiable limitation except, however, for those deemed ready to compete immediately after high school. The NCAA should also actively encourage prospects to play multiple seasons in college instead of opting to develop overseas. To provide credibility to the NCAA's efforts in this regard, the NBA could institute an even higher age minimum for those American, NCAA-eligible players who choose to play professionally elsewhere instead. Such measures would play a pivotal role in increasing the presence and, hopefully, the value of education in the student-athlete's life. The Youth Basketball Initiative could provide a means to this positive end by helping orchestrate the "scouting days" on which NBA personnel would determine if a high school product was prepared to compete at the professional level. Additionally, the Initiative could facilitate the complimentary NCAA and NBA rule changes to ensure they effectively encourage aspiring basketball players to attend college.

In addition, the Youth Basketball Initiative could use money obtained from fines of non-complying collegiate programs to support its own Elite Camps. Developmental camps for top prospects in which the best players are provided opportunities to hone their skills against similarly talented individuals are unique and important. The presence of major shoe companies, however, is an unnecessary corporate influence. While it is likely that functions like the ABCD camp will continue, the Youth Basketball Initiative should capitalize on its affiliation with the NBA and NCAA to sponsor elite camps for top prospects free from corporate influence. NBA and NCAA players and coaches[263] could be assembled at the Initiative-sponsored elite camps to provide some of the best instruction possible.

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[255] Glenn Dickey, *NBA's Age-Limit Rule a Disaster for Colleges*, S.F. EXAMINER, January 26, 2009, *available at* http://www.sfexaminer.com/sports/Dickey_NBAs_age-limit_rule_a_disaster_for_colleges.html.

[256] Such a phrase is an informal label for players who attend college for one year before they become old enough to pursue a career in the NBA, at which point they leave school.

[257] Dickey, *supra* note 255.

[258] *See* Pugmire, *supra* note 253.

[259] *Id*.

[260] *Id*.

[261] *Id*.

[262] *Id*.

[263] DIVISION I MANUAL, *supra* note 64, art. 13.12.2.3.2, at 121 (requiring modification to create an exception whereby Div. I coaches would be permitted to work at these camps).

Finally, the Youth Basketball Initiative should take an active role in recruiting oversight. College programs should have to report recruiting actions to the Initiative on a regular basis, including frequent updates of prospects contacted, types of contact used, and times of contact. Although this would decrease privacy and cause additional work for college coaches, it would provide transparency that would make the recruiting process much easier to monitor. This change would also provide the NCAA with another ally in efforts to combat recruiting improprieties.

Such burdens are certainly large for any newly-formed entity, especially one like the Youth Basketball Initiative, which is already saddled with many responsibilities. Nevertheless, the Initiative has the capacity to serve as a catalyst for major positive changes in the game. With the diverse contacts at its disposal and the Initiative's potential to grow, this emerging organization should be able to shoulder these responsibilities and advance a cause that resonates with its own.

d. *The Role of the NBA*

Because the NBA is somewhat separate from youth basketball and college recruiting, its role in these efforts would be significantly less than those of the AAU, NCAA, and Youth Basketball Initiative. Nevertheless, the NBA could still help by providing scouts to evaluate high school prospects who desire to bypass college for a career in the NBA. On a broader scale, the NBA could also use the power of its name and the influence of its superstar players to promote the importance of secondary education. Such a campaign could be effective if designed in a similar manner as the current "NBA Cares" television advertisements. Finally, the NBA could encourage its coaches and players to assist with elite camps sponsored by the Youth Basketball Initiative. Most importantly, however, the NBA's public support of these principles and objectives would provide increased credibility and likelihood of success.

VIII. Conclusion

The current bevy of negative influences, from excessive corporate involvement to devious recruiting tactics of some Division I coaches, is threatening the purity of a game that has the ability to provide many positive opportunities for young men and women in America. The "amateur" nature of youth basketball has been marginalized by those seeking to advance the interests of corporations and college programs. As a result, fundamental lessons central to the sport are being largely overlooked in the chaotic system that now exists.

The AAU, NCAA, Youth Basketball Initiative, and NBA have the resources and ability to effectuate changes in amateur basketball. These entities' collaboration and significant involvement are vital to the success of any corrective efforts. Their level of cooperation with this multi-faceted approach that addresses the issues at various levels of the sport will dictate the extent to which improvements are made. A purge of negative influences from the youth basketball environment will ensure, in turn, that the game remains a source of physical, personal, and educational development for generations to come.

CONTESTS, CONTRACTS, & COPYRIGHT: SOMETIMES A GREAT CONTEST

Pamela S. Evers[*]

I. Introduction

You have seen the advertisements for the photo or essay contests; you may have even entered one or more of them. The contests are designed to entice you with creative themes and the potential for recognition or a prize as the reward for winning the contest. Contest sponsors may be a small business, government entity, a member of the media, or a well-known corporation.[1] Many contests are well-designed opportunities for the entrant and the sponsoring company, but some contests are outright scams designed to collect entrance fees and avoid payment of prizes.[2]

Frequently, contest rules state that all submitted photos or essays become the property of the sponsoring organization or that the entrant grants the sponsor a license in perpetuity. In addition, by submitting an entry to the contest, the entrant may agree to indemnify the sponsoring organization and waive other legal rights. This author wanted to know if these contest rules are legal and contacted the U.S. Copyright Office to find out. Neither the Copyright Office nor a review of the literature concerning contest and gaming law answered the question. Therefore, the purpose of this article is to discuss the applicable law related to contests and determine whether a contest sponsor has the right to claim ownership of an entrant's intellectual property.

Section II of this article reviews the law of contests and gaming. Section III applies contract and copyright law to artistic and literary contests, demonstrating that some contests may violate federal copyright law or state contract law. Section IV provides a few examples of contests that fully comply with contract and copyright law. Section V concludes with some suggestions for best practices.

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[*] Pamela S. Evers, MBA, Emory University; JD, Southern Methodist University; LLM (Environmental Law), Northwestern School of Law Lewis & Clark University; Attorney, State of Texas and the District of Columbia (law practice 1991 to present); Associate Professor, University of North Carolina Wilmington, teaching and researching in the areas of intellectual property, environmental law, and corporate governance.

[1] Examples of contests include: *Can't Stop the Serenity 2009 Art Contest* sponsored by Can't Stop the Serenity.com, *available at* http://community.cantstoptheserenity.com/viewtopic.php?f=30&t=490 (last visited June 21, 2010); *GreatAmericanPhotoContest.com* sponsored by Great American Photo Contest, LLC, *available at* https://www.greatamericanphotocontest.com/ (last visited June 21, 2010; *Celebrate Achievement Contest* sponsored by The J.M. Smucker Company (on file with author); *2010 Summer Photo Contest* sponsored by the InforME (Information Resource of Maine) Network of the State of Maine, *available at* http://www.maine.gov/portal/photo _contest/index.php (last visited June 21, 2010); *Stonyfield and You Photo Contest* sponsored by Stonyfield Farm, Inc. (on file with author); and *Monthly Photo Contest* sponsored by Washingtonian Magazine, Inc., *available at* http://www.washingtonian.com/index.html (last visited June 21, 2010).

[2] The About.com website, http://contests.about.com/, provides useful information about contests, offering tips for winning contests and how to avoid scams.

II. The Law Concerning Contests and Gaming

The journal literature concerning contests primarily address the question of whether a particular contest constitutes gambling or a lottery,[3] the legality of particular games,[4] taxation issues,[5] the intellectual property rights attached to a particular game,[6] or whether a contest constitutes a contract.[7] Statutes and case law related to contests and games focus on establishing whether a particular gaming enterprise is illegal or legal. The language in many of these statutes and judicial opinions could include the apparently innocuous photo or essay contest within the scope of gaming laws originally intended to cover only gambling or betting events.

A person who *gambles* risks *something of value* in a contest of *chance* and agrees or understands that he or she will receive something valuable in the event of a certain outcome.[8] A majority of the states, by statute or case law, declare an activity to be gambling if winning depends predominantly on chance.[9] Determining whether winning depends predominately on chance or skill is generally referred to as the dominant factor test.[10] Under this test, if the entrant must predominantly use skill to win, then the event generally is deemed a contest outside the scope of gambling laws. Some states specifically exclude contests of skill in a statutory definition of gambling.[11] In a number of states, case law establishes that gambling regulations do not apply to games and contests of skill, including those with entrance fees.[12] Several states

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[3] Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197 (2003); Tsan Abrahamson, *The Promotion That Went South: A Look at The Hazards of Product Sweepstakes and Contests*, BUS. L. TODAY July/Aug. 2006, at 25; Natasha Shabani, *Running an Online Contest Without Running Afoul of the Law*, L.A. LAW. July/Aug. 2007, at 21.

[4] Jon Boswell, *Fantasy Sports: A Game of Skill that is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257 (2008).

[5] Bruce I. Kogan, *The Taxation of Prizes and Awards – Tax Policy Winners and Losers*, 63 WASH. L. REV. 257 (1988).

[6] Derek Webb, *The Importance of Intellectual Property Rights as a Regulatory Concern*, 4 CASINO LAW. No. 2, 24 (2008).

[7] John M. Norwood, *Gambling in the Twenty-First Century: Judicial Resolution of Current Issues*, 74 MISS. L.J. 779, 795 (2005); Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526 (2003).

[8] *See, e.g.*, ALA. CODE § 13A-12-20(4) (2009) (Alabama definition of gambling); COLO. REV. STAT. § 18-10-102(2) (2009) (Colorado definition of gambling); N.J. STAT. ANN. § 2C:37-1(b) (2009) (New Jersey definition of gambling). *See generally*, ANTHONY N. CABOT, INTERNET GAMBLING REPORT IV (Trace Publications 2001); INTERNATIONAL CASINO LAW (Anthony N. Cabot et. al. eds., University of Nevada Press 1991).

[9] *See, e.g.*, HAW. REV. STAT. § 712-1220(3), (4) (2009); MONT. CODE ANN. § 23-5-112 (12) (2009). *See also, e.g.*, Opinion of the Justices, 385 A.2d 695, 710-11 (Del. 1978) (McNeilly, J., opinion); State v. Stroupe, 76 S.E.2d 313, 316 (N.C. 1953); Middlemas v. Strutz, 299 N.W. 589, 590 (N.D. 1941). *See generally*, Norwood, *supra* note 7.

[10] Chance is generally defined as "a lack of control over events or the absence of 'controllable causation'-'the opposite of intention.' " Opinion of the Justices, 795 So. 2d 630, 635-36 (Ala. 2001) (quoting BLACK'S LAW DICTIONARY 231 (6th ed. 1990) and explaining the basis for, and legal opinions that apply to, the dominant factor test). For a good chart of states implementing the dominant factor test, *see* Chuck Humphrey, *State Gambling Law Summary*, *available at* http://www.gambling-law-us.com/State-Law-Summary/ (last updated Sept. 30, 2007).

[11] *See, e.g.*, § 18-10-102(2)(b); KAN. STAT. ANN. § 21-4302(a)(1) (2009); WIS. STAT. § 945.01(1)(b) (2009).

[12] *See, e.g.*, Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007); State v. Am. Holiday Ass'n., 727 P.2d 807, 812 (Ariz. 1986). New York case law on this issue is particularly interesting when

do not differentiate at all between games of skill and chance, declaring both types of games illegal.[13] Thus, the use of skill is not necessarily dispositive, particularly in the case of a lottery. A lottery is generally defined as a specialized form of contest or gambling in which something of value is given as a consideration for participation, even if chance is accompanied by some skill to receive the reward.[14] A lottery requires three elements: (1) a prize, (2) chance, and (3) consideration.[15] Consideration, in the gaming context, typically is defined as (a) money or property, any token, object or article exchangeable for money or property, or (b) anything which has commercial or financial advantage to the promoter/sponsor or a disadvantage to any participant.[16] One method of avoiding the consideration element and designation as a lottery is to provide an alternate method of entry (AMOE), but this would not make sense in the case of a contest in which the entrant must submit an artistic or literary work.[17] Does this type of intellectual property constitute the requisite consideration in the gaming context?

Intellectual property is exchangeable for money or property, even if the property is of nominal value. Reasonably, then, intellectual property satisfies definition (a) of consideration in the gaming context. Classifying intellectual property as consideration under definition (b) is dependent upon whether the intellectual property submitted to the contest has commercial or financial advantage to the promoter/sponsor or a disadvantage to any participant. Since the point of a contest or game is to generate publicity and gain market advantage, then a submission of intellectual property must give some, even if nominal, commercial or financial advantage to the promoter/sponsor. This point is exemplified by the science fiction fan club art contest in which the winning design was attached to various promotional (and profitable) items[18] or the dairy

comparing People v. Mohammed, 724 N.Y.S.2d 803 (N.Y.C. Crim. Ct. 2001) (shell game is one of skill, thus it is not gambling) with People v. Denson, 745 N.Y.S.2d 852 (N.Y.C. Crim. Ct. 2002) (three card monte is a game of chance).

[13] *See, e.g.*, FLA. STAT. ANN. § 849.14 (2010); TENN. CODE ANN. § 39-17-501(1) (2010) ("Gambling . . . means risking anything of value for a profit whose return is to any degree contingent on chance . . . .").

[14] *See, e.g.*, WIS. STATS. § 945.01(5)(a) (2009). In the United States, most states follow the American Rule for defining a lottery, declaring a lottery to be a form of gambling even if a degree of skill is involved in obtaining the reward. The key is whether skill or chance is the dominant factor. *See, e.g.*, Ex Parte Ted's Game Enterprises, 893 So. 2d 376, 378 (Ala. 2004); Op. Att'y Gen. Fla. 94-72 (1994). For a discussion comparing the American Rule to the English Rule, *see* Opinion of the Justices at 635-36 (quoting BLACK'S LAW DICTIONARY *supra* note 10, at 231).

[15] *See, e.g.*, FLA. STAT. ANN. § 849.09 (West 2010); WIS. STATS. § 945.01(5)(a) (2009). *See also, e.g.*, Commonwealth v. Lane, 363 A.2d 1271, 1272 (Pa. Super. Ct. 1976); People v. Eagle Food Ctrs., Inc., 202 N.E.2d 473 (Ill. 1964); Lucky Calendar Co. v. Cohen, 117 A.2d 487, 494 (N.J. 1955).

[16] *See, e.g.*, section 21-4302(c) of the Kansas Statutes and section 945.01(5)(b)(1) of the Wisconsin Statutes for the definition that consideration is "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant." *See, e.g.*, section 13A-12-20(11) of the Alabama Laws and section 225.00(6) of the New York Penal Law for the definition that consideration is "money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein."

[17] Shabani, *supra* note 3.

[18] *Can't Stop the Serenity 2009 Art Contest* sponsored by Can't Stop the Serenity.com, a fan club for the science fiction work of Joss Whedon. The reward for winning the contest was "world fame," a plaque and a poster. Contest rules stated that the entrant's artwork would be used by the organization "for T-shirts, posters and promo" and that "no other remuneration will be given to the winner." Ostensibly, profits from promotional activities would be donated to a charitable organization, but the website failed to provide information about a non-profit corporation established to engage in charitable donations. *Can't Stop the Serenity*, *supra* note 1.

company that applied photos of the babies that won a photo contest to products.[19] More importantly, if the participant making the submission of intellectual property has been placed at a disadvantage, such as not able to license or submit the property elsewhere, then the submission qualifies as consideration in the gaming context. More often than not, contest rules declare that entrants cannot submit or license their artistic or literary work elsewhere,[20] the work becomes the property of the sponsor,[21] and that remuneration other than notoriety or a prize will not be given for the property.[22] Consequently, in these games and contests, the submitted intellectual property constitutes consideration within the context of gaming.

III. Contract and Copyright Law Applied to Contests

Hundreds of contests each year require submissions of audio, visual or literary works that, under the U.S. Copyright Act §102(a) (Copyright Act), are protected upon creation in a tangible form from infringement or an unauthorized use. Three aspects of artistic and literary contests are of particular concern. First, these contests may require the author and entrant to waive their copyright or agree to transfer all ownership in the submitted work to the contest promoter or sponsor, and this requirement often is buried within the contest rules.[23] Are these agreements enforceable under the common law of contracts? Second, and far more compelling, the U.S. Copyright Act requires a specific writing to effect transfer of the copyright. Do artistic and literary contests violate federal law? Finally, if transfer to a contest sponsor is effected, does the author of the artistic or literary work have any control over what happens to the work?

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[19] *YoBaby Cover Contest* sponsored by Stonyfield Farm, Inc., 10 Burton Dr., Londonderry, NH 03053. The contest rules estimated the value of the reward for winning the photo contest to be $25,520.00. However, entrants agree under the contest rules that they "…will receive no compensation from Sponsor for the photographs." Contest winners have been shown in YoBaby advertisements and their photos have been placed on product packaging. Stonyfield, *supra* note 1.

[20] *See, e.g.*, *2009 NATIONAL BEEF COOK-OFF®* [herein, *NATIONAL BEEF COOK-OFF®*], *available at* http://www.beefcookoff.org/cookoff/default.aspx (last visited June 21, 2010). The content is sponsored by the Cattlemen's Beef Board, the Federation of State Beef Councils, and the American National CattleWomen, Inc., P.O. Box 3881, Englewood, CO 80155. The contest rules stated: "Judges will disqualify previously published recipes including, without limitation, those that are the legal property of or are included on any restaurant menu, in any cookbook, magazine, from food companies, on food or recipe websites and entries in other recipe contests . . . ."

[21] *See, e.g.*, *Celebrate Achievement Contest*, *supra* note 1. *Celebrate Achievement Contest* [herein, *Celebrate Achievement Contest*] sponsored by The J.M. Smucker Company, One Strawberry Lane, Orrville, OH 44667 (on file with author). The contest rules stated: "All entries become the property of Sponsor and none will be returned."

[22] *See, e.g.*, *Great American Photo Contest*, *supra* note 1. *GreatAmericanPhotoContest.com* [herein *GreatAmerican PhotoContest*] sponsored by Great American Photo Contest, LLC, 24 W. Railroad Ave., #139, Tenafly, NJ 07670. The contest rules stated: "Entrants waive any and all rights to photographs and give Great American the right to publish same in any medium without compensating entrants."

[23] *See, e.g.*, *Celebrate Achievement Contest*, *supra* note 1. The contest rules state: "Submission of a Contest entry grants Sponsor and its agents the right to publish, use, adapt, edit and/or modify the entry in any way, in commerce and in any and all media worldwide now known or hereinafter developed, without time limitation and without further consideration to the entrant. Submission of any entry further constitutes the entrant's (or his/her parent's or guardian's) consent to irrevocably assign and transfer to the Sponsor any and all rights, title and interest in and to the entry, including, without limitation, all intellectual property rights."

a. *Contests and Contract Law*

The Copyright Act does not specifically address whether consideration is required in order for an author to transfer ownership in the protected work to another. However, in absence of a federal statutory directive, the common law of contracts or state contract law would apply to a transfer of ownership. An essential element of any enforceable contract is that there be "some consideration, good cause, or sufficient motive in law," for fulfilling the contract.[24] Without such consideration, the advantage is all on one side and the agreement is a naked promise, or *nuda pacta*.[25] Mutual promises and a mutuality of obligation provide valid consideration of both parties to a contract, but a mere revocable offer or proposal by one party to which the other party does not assent renders the contract incomplete.[26] A common practice is for the promoter or sponsor to declare that they have the right to modify the rules or suspend, terminate, or cancel the contest.[27] A contest that is a mere revocable offer should render the contract incomplete, though an entrant's acceptance of the rules by submitting an artistic or literary work arguably constitutes ratification. If there is mutuality of obligation, then valid consideration exists for an enforceable contract.

All artistic or literary contests require the entrant to provide consideration in the form of intellectual property. In many artistic or literary games or contests, an author or creator who submits their work of intellectual property promises that the promoter or sponsor may publish, display, or perform the work and grants a license – generally irrevocable – in the work.[28] While some contests allow the author and entrant to retain the copyright to the work,[29] others are

[24] C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS AND RIGHTS AND LIABILITIES EX CONTRACTU 17 (Lea & Blanchard 1847).
[25] *Id.* at 19.
[26] *Id.* at 36.
[27] *See, e.g., Spay Day 2010 Online Photo Contest* sponsored by The Humane Society of the United States (HSUS) (on file with author). The contest rules stated: "The HSUS reserves the right at its sole discretion to disqualify any entry or entrant and/or to cancel, terminate, modify, or suspend the . . . Contest," *available at* http://photocontest.humanesociety.org/
contest.html?page=rules&contestId=2 (last visited June 20, 2010). *See also, e.g., NATIONAL BEEF COOK-OFF®*, *supra* note 20, which declared: "Sponsor reserves the right, in its sole discretion, to change these Official Rules, adjust the dates herein or cancel the Contest."
[28] *See, e.g., Great American Photo Contest*, *supra* note 1; *Celebrate Achievement Contest, supra* note 1. The assignment itself could be deemed an essential part of the consideration. In *Ketelbey v. Maggett*, a composer submitted a musical composition to a contest in return for a prize and the promise that the publisher would publish and sell the winning composition, but the court held that the contract failed because there was no promise that the winner would assign the copyright to the publisher. Louis D. Frohlich & Charles Schwartz, THE LAW OF MOTION PICTURES (Baker, Voorhis & Co. 1918) (citing Ketelbey v. Maggett (Eng.), Times, Feb. 8, 1911). However, as will be discussed *infra*, this decision probably would be overturned today.
[29] *See, e.g., Smithsonian Magazine's 8th Annual Photo Contest* [herein, *Smithsonian Photo Contest*] sponsored by the Smithsonian Institution. The Smithsonian photo contest rules stated: "By entering the contest, entrants grant the Smithsonian Institution a royalty-free, world-wide, perpetual, non-exclusive license to display, distribute, reproduce, and create derivative works of the entries, in whole or in part, in any media now existing or subsequently developed, for any educational, promotional, publicity, exhibition, archival, scholarly, and all other standard Smithsonian purposes," *available at* http://www.smithsonianmag.com/photocontest/8th-annual/Photo-Contest-Rules.html (last visited June 21, 2010). More than 17,000 entries were submitted to the *Smithsonian's Sixth Annual Photo Contest*.

particularly severe in the rules language, applying the transfer of copyright ownership to all submissions, whether a winning submission or not, and wholly taking possession of the work.[30]

The promise provided by a contest sponsor or promoter is that the participant in the contest will have a chance to win some sort of reward, in the form of a monetary payment, prize, or notoriety. A contest winner receives a prize or recognition, thus mutuality of obligation exists to support the contract. A promoter or sponsor who fails to provide the prize or recognition theoretically could face a breach of contract claim. Significantly, most contests require all contestants (winning or not) to waive all claims against the sponsor[31] or submit the dispute to arbitration.[32] In general, arbitration agreements are enforceable as any other contractual provision. However, the proposed Arbitration Fairness Act of 2009 could preclude many pre-dispute arbitration agreements, including those related to contests.[33]

For those contestants who do not win, the mere offer of a chance to win may still be enough to satisfy the requirement of consideration and a breach of contract claim. In *Chaplin v. Hicks*, the seminal English "loss of chance" case, the plaintiff was one of 6,000 women who had submitted photos to a beauty contest in which the reward was an interview and chance to receive one of twelve spots in a chorus line.[34] The defendant promoter changed the terms of the contest and the plaintiff could not attend on the only day set aside for interviews. In dismissing the defendant's appeal, the judges agreed that the jury rightfully concluded that taking the chance of competition away from the plaintiff deprived the plaintiff of something which had a monetary value.[35] The value awarded by the jury was based on the salary for employment in the chorus line. In the *Chaplin v. Hicks* decision, Vaughan Williams L.J. opined, "[T]he fact that damages cannot be assessed with certainty does not relieve the wrong-doer [sic] of the necessity of paying

[30] *See, e.g., NATIONAL BEEF COOK-OFF®, supra* note 20. Contest rules stated: "All entries and all legal rights and interests in them, including the rights of copyright, become the exclusive joint property of the Promotion Parties who reserve the right to edit, adapt, copyright, publish, transfer and use any or all of them, without compensation to you or any third party and will not be acknowledged or returned, or any portion thereof." *See also, e.g., Club Med® Photo Contest*, sponsored by All-Travel, 2001 S. Barrington Ave. Ste. 315, Los Angeles, CA 90025. The Club Med contest rules stated: "Submission of any entry further constitutes the entrant's (with his/her her parent's or guardian's consent, if applicable) assignment and transfer to the Sponsor of any and all rights, title, and interest in and to the entry, including, without limitation, all intellectual property rights," *available at* http://www.cmphotocontest.com /site/rules (last visited June 21, 2010).

[31] *See, e.g., 2010 National Wildlife Photo Contest* [herein, *NWPC Contest*], sponsored by the National Wildlife Federation (NWF), 11100 Wildlife Center Drive, Reston, VA 20190. The contest rules stated: "By entering, participants release and hold harmless NWF, its affiliated organizations, and each of their directors, officers, employees, attorneys, agents and representatives (collectively, the "Companies") from any and all liability for any injuries, loss, claim, action, demand or damage of any kind arising from or related to the NWPC, any prize won, any use of the entry materials by NWF, the warranties participants make, any misuse or malfunction of any prize awarded, participation in any NWPC-related activity, or participation in the NWPC," *available at* http://www.nwf.org/photocontest/photocontestrules.aspx (last visited June 21, 2010).

[32] See, *e.g., Club Med® Photo Contest*, *supra* note 30. The Club Med contest rules stated: "Any and all disputes, claims and causes of action arising out of or connected with the Contest, or the prize awarded, shall be resolved individually, without resort to any form of class action, and exclusively by arbitration."

[33] H.R. Res. 1020, 111th Cong. (2009); S. Res. 931, 111th Cong. (2009). The bills, each entitled the Arbitration Fairness Act of 2009, propose to amend the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

[34] Chaplin v. Hicks, (1911) 2 K.B. 786.

[35] *Id.*

damages." [36] A majority of U.S. courts specifically have adopted the loss of chance doctrine in the context of medical malpractice.[37] The doctrine is also a part of U.S. law in breach of contract cases[38] and in the context of gaming.

b. *Contests and Copyright Law – Transferring Copyright*

Section 102(a) of the Copyright Act protection for "original works of authorship, fixed in any tangible medium of expression, now known or later developed." The statute specifically defines works of authorship to include literary works; musical works (including lyrics); dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[39] An owner of a copyright has exclusive rights to the copyrighted work, including the right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending," as well as to perform or display the copyrighted work publicly.[40] A transfer of ownership is defined as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright."[41] Combining this part of the Copyright Act with basic contract law would suggest that a contestant's submission of his or her original work to a contest with rules that require transfer of the copyright to the promoter or sponsor is an effective transaction and creates an enforceable contract. However, there is more to the Copyright Act.

Chapter 2 of the Copyright Act, 17 U.S.C. § 204(a), specifically addresses the requirements for transfer of ownership and declares that, "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed."[42] While § 204(a) seems to expand the statute of frauds, it is not a statement that the courts will not enforce a contract for transfer of copyright ownership, but a declaration that the contract is simply not valid.[43]

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[36] *Id.* at 792. Interestingly, Vaughn Williams L.J. was one of the three appellate judges in one of the famed coronation cases, Krell v. Henry, (1903) 2 K.B. 740.

[37] The jurisdictions include: Arizona, Connecticut, District of Columbia, Kansas, Illinois, Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[38] RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1981). *See* Robert H. Sturgess, *The "Loss of Chance" Doctrine of Damages for Breach of Contract*, 79 FLA. B.J. 29 (2005). *See also*, Grimes v. State, 178 So. 73 (1937) (opportunity for free chances to play does not nullify the element of consideration).

[39] 17 U.S.C. § 102(a) (2006).

[40] 17 U.S.C. § 106 (2006).

[41] 17 U.S.C. § 101 (2006).

[42] 117 U.S.C. § 204(a) (2006) (this section was based upon long-standing principles of common law and English statutory law concerning the assignment or transfer of copyright). *See* ADDISON, *supra* note 24, at 94 (citing 53 Geo. 3, c. 141; 6 Geo. 4, c. 110); Power v. Walker (1814) 3 Mau. & S. 7; 5 & 6 Vict. C. 45. *See also*, INTERNATIONAL COPYRIGHT ACT, 1838, 1 & 2 Vict. c. 59.

[43] Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994).

According to case law, the writing for a transfer of copyright ownership does not require specific language and may be a simple statement.[44] The key to satisfying the writing requirement of the Copyright Act is that the writing must demonstrate the intent to transfer ownership.[45] In *Effects Assocs., Inc. v. Cohen*, the Ninth Circuit held that the § 204(a) writing requirement serves several purposes, including that it "forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price."[46] Other federal cases have held that a series of faxes, internal memos, or letters referencing a deal or agreement do not satisfy the § 204(a) writing requirement unless these lead to some statement that indicates finality of negotiations. [47] However, if a person submits a work of intellectual property to a contest and signs the contest sponsor's submission form, either by hand for a mailed submission or in digital form for an online submission, then the opportunity for negotiation between the creator and the contest sponsor may be inhibited.

A promoter or sponsor that requires an entrant and author to submit to a standard entry form and contest rules without negotiation creates a contract of adhesion; essentially, a type of browsewrap or clickwrap agreement.[48] While adhesion contracts are generally enforceable, the "take it or leave it" nature of the contract carries a strong implication that the contract was not freely negotiated. Specifically, the contract may lack mutual assent.[49] Indeed, probably few people actually read, much less understand, clickwrap agreements.[50] However, the law concerning adhesion contracts is not well-settled.[51] For example, the Seventh Circuit ruled that shrinkwrap licenses are valid and enforceable unless the terms are unconscionable or violate a rule of positive law. [52] The court held that where only one form is used, the Uniform

[44] Radio Television Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922, 927 (9th Cir. 1999) (no "magic words" required); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990) (one-line statement adequate).

[45] Radio Television Espanola, 183 F.3d at 927.

[46] Effects Assocs., 908 F.2d at 557.

[47] Lyrick Studios, Inc. v. Big Idea Prod., 420 F.3d 388 (5th Cir. 2005) (faxes do not establish a final signed contract and language used demonstrates faxes were part of negotiations); Radio Television Espanola, 183 F.3d at 927 (comments "merely a part of negotiations"); Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994).

[48] Under a clickwrap, browsewrap, or shrinkwrap arrangement, potential licensees are offered the license terms and must expressly, and without any reservation, manifest either assent or rejection before access to the product. These agreements are common in e-commerce and refer to the offers of one party that may be accepted by a second party when clicking on a "submit" or "I agree" icon. *See also* Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999); Specht v. Netscape Communs. Corp., 150 F. Supp. 2d 585, 593-94 (S.D.N.Y. 2001); *aff'd*, 306 F.3d 17 (2d Cir. N.Y. 2002). *See generally* Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123 (2008).

[49] RESTATEMENT (SECOND) OF CONTRACTS, § 19(2) (1981) (conduct of a party may manifest assent if "he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."). *See generally* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.1 (2d ed. 2000).

[50] Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 975-82 (2005). *See also* Nat'l Cyber Alert Sys., *Cyber Security Tip ST05-005, Reviewing End-User License Agreements*, http://www.us-cert.gov/cas/tips/ST05-005.html (last visited June 21, 2010); Mike Masnick, *Proof That (Almost) No One Reads End User License Agreements* (Feb. 23, 2005, 17:46 PST), http://www.techdirt.com/articles/20050223/1745244.shtml.

[51] Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 97-98 (November 2007).

[52] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). *See also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997) (arbitration clause contained in shrinkwrap agreement was binding).

Commercial Code 2-207 (battle of the forms provision) does not apply. The Seventh Circuit did not follow an earlier Third Circuit opinion holding that the Uniform Commercial Code did apply to shrinkwrap licenses where the licensee did not assent to the terms despite use of the product.[53] State courts vary as to which of the two lines of thought they have followed.[54]

Given that a purpose of § 204(a) is to encourage negotiation, an adhesion contract that benefits a contest sponsor far more than the creator of the intellectual property would seem to evidence a lack of mutual assent to the terms of the contract in form of contest rules. Moreover, the contest rules to which an author must agree if they submit an artistic or literary entry may rise to the level of unconscionability since it fails to offer the author and entrant a meaningful choice, especially if the contest sponsor requires an irrevocable and perpetual license or wholly takes ownership of the property.[55] Thus, without further negotiation and a final agreement for transfer of copyright ownership between the creator and the contest sponsor, a key purpose of § 204(a) has been thwarted at best and, worse, probably violates federal law.

c. *Contests and Copyright Law – Controlling Use and Moral Rights*

Contest rules typically declare that the contest sponsor may "reproduce, print, publish, transmit, modify, edit, adapt, distribute, license, sell, perform, dispose of, modify, enhance, display or otherwise use such submission for any and all purposes, in perpetuity, throughout the world."[56] Some contests go far beyond controlling the use of the intellectual property to allow any type of alteration, use of the work anywhere, or use by third parties.[57] One well-known contest avowed in the contest rules that the entrant waived his or her moral rights.[58] For visual works of art, such as a photograph or video submission to a contest, this rule may violate

[53] Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 98, 100, 103-04 (3d Cir. 1991).
[54] Zhang, *supra* note 48.
[55] Unconscionability is an "absence of meaningful choice" for one party combined with contract terms that are unreasonably favorable to the other party. U.C.C. § 2-302 (2008); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). *See also*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003).
[56] *Macy's Keeps America Cooking* contest, sponsored by Macy's Home Store LLC and Macy's Wedding & Gift Registry, 1120 Avenue of the Americas, New York, New York 10036.
[57] *See, e.g., Create Dunkin's Next Donut Contest* [herein, *Dunkin's Donut Contest*] sponsored by Dunkin' Brands, Inc., as Master Servicer and DB Adfund Administrator, LLC, 130 Royall Street, Canton, MA 02021 (on file with author). The Dunkin' Donut contest was particularly inflexible in its control over the intellectual property: "By submitting a [sic] Entry, entrant grants and assigns to Sponsor all title to the Entry, including all its copyright, trademark and other intellectual property rights, and grants and assigns to Sponsor and its designees a worldwide, royalty-free, perpetual, unrestricted, irrevocable and fully sub-licensable right and license to consider, disclose, use, re-use, reproduce, modify, digitize or enhance, adapt, change, edit, publish, translate, create derivative works from, distribute, redistribute and/or display his/her Entry (in whole or in part) including any and all images or likenesses that appear in his/her Entry and/or incorporate all or part of his/her Entry in other works, all in any manner and in any form, format, or media anywhere in the world at any time, as well as in connection with any distribution or syndication arrangement with third parties or third-party sites, in any media format or medium and through any media channels and for any purpose, without further notice or compensation to entrant."
[58] *Dunkin's Donut Contest, supra* note 57: "Entrant waives any and all "moral rights" s/he may have in the Entry." The Dunkin' Donuts contest was highlighted by Promo Magazine. Patricia Odell, *Dunkin' Donuts Returns to Its Roots – Doughnuts – in a $10 Million Campaign*, PROMO MAGAZINE (Mar. 18, 2009), http://promomagazine.com/contests/dunkindonutscampaign/.

Copyright Act § 106A, known as the Visual Artists Rights Act of 1990 (VARA). This section of the Copyright Act refers to the "moral rights" of visual artists and asserts that the rights of attribution or integrity of a work of visual art cannot be transferred and are exclusive to the author, even if the author is not the owner of the work.[59] The VARA recognizes and preserves the protection of moral rights included in the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is signatory.[60] While the rights of attribution and integrity for a visual work may not be transferred, these rights may be waived by the author under § 106A(e)(1) "if the author expressly agrees to such waiver in a written instrument signed by the author."[61] As with the transfer of copyright in general, few contests (if any) would satisfy the requirements of the written instrument without further negotiation between the author and entrant and the contest sponsor.

IV. Examples of Contests

According to a 2001 survey, forty-six percent of the respondents reported that they surfed the Internet specifically to search for special offers, promotions, and contests.[62] Given the boom in contests available online and websites touting or warning about those contests,[63] those in the promotion industry clearly believe that the number has increased since the turn of the millennium. Many of these contests are designed to provide a good consumer experience and avoid legal entanglements by allowing authors and contestants to retain ownership and copyright of their work. These contests include, but are not limited to, the following:

Washingtonian.com Monthly Photo Contest: The sponsor's stated policy – and only statement of rules – is that the photographer retains the copyright, but provides the magazine the limited license "to print the winning photograph in the current issue of the magazine and online as well as in any future issues as long as usage is related to the photo contest."[64] No prize offered except publication, but that is one reason it is such a clearly-delineated contest.

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[59] 17 U.S.C. § 106A (2006).

[60] Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, *as amended* on September 28, 1979. *See generally*, Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997). Several states enacted moral rights laws including, *e.g.*, California Art Pres. Act, CAL. CIV. CODE § 987 (1979) and New York (Artists Authorship Rights Act, N.Y. Arts & Clut. Aff. § 14.03 (1983). However, in 2003, a court held that the New York law was preempted by federal copyright law. Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226, 2005 U.S. Dist. LEXIS 9139 (S.D.N.Y. May 13, 2005), *prior decisions*, 2004 U.S. Dist. LEXIS 17807 (S.D.N.Y. Sept. 8, 2004), 2003 U.S. Dist. LEXIS 13201 (S.D.N.Y. July 13, 2003), 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. June 17, 2001).

[61] 17 U.S.C. § 106A. Specifically, "Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified." 17 U.S.C. § 106A(e)(1).

[62] Randy Scasny, *The New Pastime of Promotion Surfing*, SMALLBUSINESSCOMPUTING.COM, February 13, 2001, http://www.smallbusinesscomputing.com/article.php/588191 (last visited June 20, 2010) (quoting a 2001 commercial survey co-sponsored by StartSampling, Inc. and other companies, and conducted by NFO Worldwide, Inc., now known as Taylor Nelson Sofres, or TNS, for PROMO Magazine).

[63] About.com, Contests, http://contests.about.com/ (last visited June 20, 2010) (providing links to and commentary about contests).

[64] *Monthly Photo Contest* Sponsored by Washingtonian Magazine, Inc., *available at* http://www.washingtonian.com

KODAK Colors of Life Photo Contest: The sponsor provides many rules related to contestant eligibility and subject matter, but a limited license for use of the contestant's intellectual property: "To the extent permitted by law, winners will also be required to grant Kodak and Hachette Fillipacchi Media use of the winning photo, together with their names, likenesses and biographical information, in advertising and publicity about the Contest or future contests without further compensation." Monetary and publication prizes plus photographic credit offered.[65]

Maine.gov Photo Contest: The sponsor is the State of Maine via the statutorily-authorized Internet gateway, InforME (Information Resource of Maine). [66] The rules declare that the photographer retains the copyright to the photograph, but provides a license to the Maine.gov website to display the photos without any fee or other form of compensation. The only reward is photographic credit. Uniquely, this contest states that all photos submitted to the website may be selected for display or use in other Maine state government web pages, but only with permission of the author. Moreover, the rules guarantee non-commercial use only: "Entries will never be used by InforME in any manner for advertising or sale."[67]

PoetrySoup.com Poetry Contest: The contest rules are almost entirely about intellectual property, declaring that, "All Poems submitted to PoetrySoup, by the poet, is [*sic*] published as the poet's original work and under the poet's copyright."[68] The contest website suggests that the poet may wish to register their copyright with the U.S. Copyright Office and offers the requisite link. The only reward is online publication and notoriety.

Warner Bros. Records Contest: In this contest, a contestant artist uploads his or her original song to the Triframe website.[69] While there is no specific recognition of an artist's copyright, the contest rules are straightforward and make no claim to ownership of the artist's intellectual property. The contest sponsors require, if allowed by law, signed releases and an assignment of copyright *after* a contestant has been selected as a contest winner.[70] The prize is a private phone

/index/html (last visited June 20, 2010).

[65] *Kodak Colors of Life Photo Contest* sponsored by Eastman Kodak Company, http://www.kodak.com/US/en/professional/contests/colorsOfLife/rules.jhtml (last visited June 20, 2010).

[66] *2009 Summer Photo Contest* Sponsored by the InforME (Information Resource of Maine) Network of the State of Maine, *available at* http://www.maine.gov/portal/photo_contest/index.php (last visited June 21, 2010).

[67] *Id.*

[68] *PoetrySoup.com Poetry Contest* sponsored by Poetry Soup. Poetry Soup does not publish print books, which is an important point since poetry contests that engage in publishing books or obtaining reading fees may be suspect. *See, e.g.*, the poetry contest sponsored by Creative Communication at http://www.poeticpower.com/howitworks2.html (last visited June 18, 2010). *See generally*, articles published on the About.com website at http://poetry.about.com/od/onlinecontests/Poetry_Contests_Competitions_Prizes.htm (last visited June 19, 2010).

[69] TriFrame is an interactive website designed to allow users to submit artistic works for notoriety and prizes. There is no effort by TriFrame to claim the copyright or ownership of the work submitted by a user except to the extent required for display on the TriFrame website.

[70] Warner Bros. Records Contest, sponsored by TRIFAME, LLC, 20 Island Avenue, Suite 1103, Miami Beach, FL 33139 and Warner Bros Records, Inc., 3300 Warner Blvd., Burbank, CA 91505 (on file with author).

call with an Artists & Recordings representative of Warner Bros. Records and record deal consideration.

V. Conclusion

Many contests available to the public as part of an organization's promotions and marketing strategy probably are illegal under contract and/or copyright law. Intellectual property submitted by an author and the opportunity for a prize or chance of a reward by the sponsor should satisfy the element of consideration in contract formation. This factor, though, may run the risk that a contest could be deemed a lottery in many jurisdictions. Since online contests are accessible by anyone anywhere, artistic and literary contests may be risky business.

The key issue for artistic and literary contests is that the U.S. Copyright Act requires a specific writing to effect transfer of the copyright. Contests that require the author and entrant to waive their copyright or agree to transfer all ownership by submitting a work to the contest promoter or sponsor may not be enforceable contracts under state statutory or common law. Authors may not realize the gravity of the contest rule transferring copyright to the sponsor, especially if the term is buried within the contest rules. While adhesion contracts generally are enforceable, courts could hold that the contract fails because the author has not genuinely assented to the terms of the agreement. Consequently, if an organization insists on claiming ownership, control, or a perpetual license of the submitted work, an opportunity to further negotiate terms of the agreement should be offered to any author whose work will be used by the contest sponsor whether the author won the contest or not.

Finally, visual artists have specific rights–moral rights–under the Copyright Act to attribution and integrity of the work. While an author might waive these rights, an instrument signed by the author is required to effectuate the waiver and most contest entry forms should not satisfy the writing requirement. Why would an organization run the risk of trampling an author's moral rights when the organization probably is trying to obtain a strategic benefit and positive image by offering the contest? More to the point, there simply is no strategic or logical reason to force an author to waive his or her moral rights in an artistic work.

The common element among the well-drafted and designed online contests is the recognition of the author's copyright as well as the sponsor's abstention from claiming a license in perpetuity, full control over the intellectual property, or outright ownership. Not only is such recognition in keeping with the promotional spirit of a contest and the sponsor's goal of goodwill and positive image in the marketplace, recognizing the value of the intellectual property submitted by an author and contestant complies with contract and copyright law.

DEMOLITION BY NEGLECT IN DETROIT AND THE BATTLE TO SAVE HISTORIC TIGER STADIUM: LESSONS FOR BASEBALL PARK PRESERVATIONISTS

Andy Jacoby[*]

I. Introduction

squinting to see him
another generation
sent to right field
-David Giacalone[1]

In the hands of a child, a ticket to a professional baseball game carries magical powers, and it has been this way for generations. To children, local sports stadiums are hallowed ground where heroes perform. These magnificent structures create an aura and are unique to the community. More so than football, basketball, or hockey, baseball has played a greater role in the nation's history and culture than any other sport. While the game's roots stretch back centuries, professional baseball first became nationally popular in the late 19th century. The historic parks and stadiums in which early teams played have all too often been bulldozed to make way for new stadiums. Detroit's Tiger Stadium, aged nearly 100 years, was a rare, precious legacy from baseball's early era. But Tiger Stadium's history should not be reduced simply to one of sport. At its essence, the stadium was the heart of the city for decades. It was Detroit's crossroads, where the city socialized and established its identity. It is not surprising

[*] Andy Jacoby is an attorney for the Texas Water Development Board in Austin, Texas. He grew up in Ann Arbor, Michigan, and occasionally attended games at Tiger Stadium in his youth. He is a 2008 graduate of Tulane Law School. The opinions and team affiliations expressed herein are the author's, not his employer's.

[1] David Giacalone, 4 ROADRUNNER HAIKU JOURNAL (2005), http://www.roadrunnerjournal.net/pages54/haiku54.htm.

that when the stadium became threatened by neglect and a hostile city government, baseball fans and preservationists leaped to its defense. The story of how their effort to save the historic structure failed is a lesson for ballpark preservationists everywhere.

Unlike football and basketball, the distinct characteristics of each baseball stadium play a role in the game itself.[2] When the team plays well, entire communities pour into stadiums or tune in from home, and the pride of the city is bundled up in the performance of the team. These historic stadiums, as much as any local civic building, are often the focal point of a community. Baseball stadiums – ballparks – are not singular in this respect. Historic stadiums of all sports often carry decades of dramatic sports battles, and these stadiums are linked to a city's collective memory.[3] Despite their commanding presence, opportunistic owners and compliant local politicians seek to build new, shinier, more profitable stadiums. All too often the new stadiums are financed by taxpayers, yet benefit team owners disproportionately. Upon construction of the new stadium, old ballparks are often torn down or left to fall apart. This article analyzes the fight to preserve one such stadium, Detroit's Tiger Stadium, in the broader context of how historic preservation law addresses dilapidation. The article also looks at legal issues surrounding public finance of new stadiums, and concludes with lessons learned for preservationists and sports fans.

II. Detroit History, Baseball, and the Evolution of Tiger Stadium

Spring breeze.
This grassy field makes me
want to play catch.
-Masaoka Shiki[4]

In the nineteenth century, Corktown was the Ellis Island of Detroit. The neighborhood, which sits just southwest of downtown Detroit, was founded by Irish immigrants in 1834 and was a landing spot for immigrants in the following decades. In Corktown, a hay market and dog pound sat at the corner of Michigan Avenue and Trumbull Street until the 1890s. The site was converted to a baseball field in 1896 after its purchase by local businessman George Arthur Vanderbeck. But before the new baseball stadium could be built, the site's first historic preservation skirmish was fought.

On the land stood twenty-eight giant historic elm and oak trees, which some citizens fought to preserve against Vanderbeck's wishes. The grove was rumored to be the site of a war

[2] Take, for example, Boston's "Green Monster" and the ivy outfield wall in Chicago's Wrigley Field.
[3] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 759 (1986).
[4] Interview by Debbie Elliott with Cor Van Den Heuvel, *Spring Signals the Return of Baseball* (Nat'l Pub. Radio broadcast on Mar. 31, 2007). Masaoka Shiki (1867-1902) revolutionized the haiku art form in the 19th century. He played baseball and in 1890 penned "Spring Breeze," the first baseball haiku. For this achievement he sits in Japan's Baseball Hall of Fame. Hall of Famers List, The Baseball Hall of Fame and Museum, http://english.baseball-museum.or.jp/baseball_hallo/detail/detail_144.html (last visited June 19, 2010).

council conducted by Chief Pontiac during "Pontiac's War" following the Seven Years' War.[5] The context of the war council was an Indian siege against the British at Fort Detroit in 1763. The British prevailed in 1763, and so did Vanderbeck in 1896. Twenty-three of the trees were cut down to build the ballpark, and the remaining five trees were felled within five years.[6] In the grove's place, a playing field and wooden grandstand, Bennett Park, were built.[7]

The Detroit Tigers played at Bennett Park in the equivalent of today's minor league until 1901, when the team joined the professional American League. The acquisition of ballplayer Ty Cobb led to the Tigers' ascension to three consecutive World Series from 1907-09. The fan enthusiasm generated by the team's success[8] caused the owner to replace small, wooden Bennett Park in 1912 with a new, larger concrete and steel stadium dubbed "Navin Field" on the same site. Though Bennett Park was razed completely that year, the flag pole was left undisturbed, and the reconfiguration of the playing field resulted in the flag pole sitting at the deep end of center field in "fair territory."[9] A flag pole existed at that spot in center field since the nineteenth century and was the lone carryover from Bennett Park.

The catalyst for Detroit's assent into one of the world's foremost cities took place amidst all this. It turns out that the imprint Detroit would leave on the world was, in fact, a tire track. In 1908, not far from Bennett Park, the first of fifteen million Model T automobiles rolled off a Ford assembly line in Detroit. Navin Field[10] opened in 1912, the same day as Fenway Park in Boston, but this news was overshadowed by the sinking of the Titanic that same week.[11] Navin Field included a covered grandstand behind home plate, which extended along the first and third base lines. The structure also contained bleachers in right field and office buildings attached to the grandstands behind the first baseline. Among its quirks, Navin Field contained what may

[5] RICHARD BAK, A PLACE FOR SUMMER: A NARRATIVE HISTORY OF TIGER STADIUM 55 (Wayne St. Univ. Press 1998).

[6] For a while at Bennett Park, trees were located in the outfield in fair territory.

[7] Bennett Park was renovated throughout its fifteen-year life, adding bleachers to the outfields, a groundskeeper's shed, and the players' clubhouse. In 1896 the Bennett Park held 10,000 fans. By 1911, capacity reached 18,000. GEORGE R. MATTHEWS, WHEN THE CUBS WON IT ALL: THE 1908 CHAMPIONSHIP SEASON 188 (2009).

[8] This is not to be confused with any enthusiasm for Cobb himself. A belligerent racist in constant trouble with the law, Cobb was disliked by fans and fellow players alike. *See* Charles Klinetobe & Steve Bullock, *Complicated Shadows: Ty Cobb and the Public Imagination*, 18 NINE: A JOURNAL OF BASEBALL HISTORY AND CULTURE, Nov. 1, 2009, http://z3950.muse.jhu.edu/login?uri=/journals/nine/v018/18.1.klinetobe.pdf Cobb once climbed into the stands and brutally attacked what some sources claim was a physically handicapped fan who had heckled him, which makes Indiana Pacer Ron Artest's notorious 2004 foray into the stands to fight a Detroit Pistons fan look downright cordial by comparison. *See* DAN HOLMES, TY COBB: BIOGRAPHY xxi (2004) (Introduction). During the 1909 World Series, Cobb had to travel around Ohio to evade an outstanding warrant for his arrest there. [James Kossuth, *How Cobb Got Along With Others*, TY COBB: THE HOME PAGE, http://wso.williams.edu/~jkossuth/cobb/race.htm (last visited June 30, 2010). Nevertheless, fans appreciate a winning team, and that is what Cobb gave them. Attendance at Bennett Park nearly tripled from 174,000 throughout 1906 to 490,000 in 1909. BAK, *supra* note 5, at 401 (Appendix A).

[9] BAK, *supra* note 5, at 119.

[10] Capacity: 23,000. BAK, *supra* note 5, at 122.

[11] STANTON, *infra* note 18, at 5.

have been the first batter's backdrop in the history of baseball.[12] A press box and second deck of seating[13] was added in 1923 and 1924 along the first and third base lines.[14]

The 1912 Navin Field to a large extent existed until the summer of 2009. Renovations in 1937-38 led to the construction of the structure that became Tiger Stadium directly over and around most of the Navin Field structures, incorporating the original 1912 Navin Field as a base.[15] The renovations retained Navin Field's lower deck grandstands and extended the double-decker grandstands all the way around the stadium. The renovations also spared some of the auxiliary structures. The stadium was rechristened "Briggs Stadium,"[16] though in 1961 it would once again be renamed: Tiger Stadium.

Like all great ballparks, Tiger Stadium had many idiosyncrasies. There was the famous centerfield flagpole, a relic from the days of Bennett Park.[17] There was the right field upper-deck, which protruded a full ten feet over the playing field, occasionally turning a pop fly into a home run.[18] A blue-collar stadium to its core, the beautiful myriad of steel beams created cheap "obstructed view" seats,[19] and the press box, dugouts and bullpens were austere. According to one architect, "by actual mathematical measurement the average seat at [Tiger Stadium] is closer [to the field] than the average seat at any other ballpark."[20] It was a stadium built before the era of luxury boxes. The outfield upper deck consisted of bleachers where blue-collar autoworkers ("the Bleacher Creatures") could attend games on a budget.[21]

Baseball has been played at the corner of Michigan and Trumbull for 111 years. Many legends have played the field, and great moments in the sport's history were played here. Baseball fans revere the game's history, and to them Tiger Stadium's field is hallowed ground. Babe Ruth hit his 700th career home run here.[22] In fact, more home runs were hit in Tiger

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[12] Ballparksofbaseball.com, *Tiger Stadium*, http://www.ballparksofbaseball.com/past/TigerStadium.htm (last visited June 30, 2010). *But see* Baseball Fever, *Blocked out center field sections*, http://www.baseball-fever.com/showthread.php?89182-Blocked-out-centerfield-sections (last visited June 30, 2010) (debating whether Navin Field was truly the first).

[13] BAK, *supra* note 5, at 131, 138.

[14] *Id.*

[15] *See* Statement of the Old Tiger Stadium Conservancy Regarding the Recent Demolition of Tiger Stadium, TIGER STADIUM CONSERVANCY, http://savetigerstadium.wordpress.com/2009/06/19/statement-of-the-old-tiger-stadium-conservancy-regarding-the-recent-demolition-of-tiger-stadium/ (last visited June 30, 2010).

[16] The structure encompassed 8.5 acres and the stadium's capacity was 52,416. BAK, *supra* note 5, at 213. By the Tigers' 1984 championship season, annual attendance reached 2.7 million. Ballparksofbaseball.com, *198-1989 Attendance*, http://www.ballparksofbaseball.com/1980-89attendance.
htm (last visited June 30, 2010).

[17] Flagpoles in outfield play were common during the nineteenth century, making this preserved relic a direct link to the game as it was played during that time.

[18] TOM STANTON, THE FINAL SEASON: FATHERS, SONS, AND ONE LAST SEASON IN A CLASSIC AMERICAN BALLPARK 47 (2004).

[19] *Id*. at 70.

[20] JOANNA CAGAN & NEIL DEMAUSE, FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT 90 (2008) (quoting architect John Pastier).

[21] *Id.*

[22] Dwight Chapin, *Two tales to tell / The Number's the Same, but the 700 Stories of Ruth and Aaron Have Little in Common*, SAN FRANCISCO GATE, Sept. 20, 2004, *available at* http://articles.sfgate.com/2004-09-20/sports/17445608_1_500th-and-600th-home-babe-ruth-homer.

Stadium than in any other ballpark.[23] It was here that Lou Gehrig ended his record streak of 2130 consecutive games played.[24] It was the home of Ty Cobb, Hank Greenberg, and Al Kaline.[25] The field hosted twelve World Series games and three All-Star games.[26]

Beyond baseball, the site also carries the historical weight of nearly forty years of professional football. The Detroit Lions, Detroit's professional football team, used the stadium from 1937-74, winning three NFL championships in the 1950s.[27] Tiger Stadium is where the traditional Thanksgiving Day NFL game began.[28] It was the home of the great Bobby Lane, and hosted a herd of other early NFL greats.

In the early twentieth century, baseball was America's game. Before radio and television came to dominate our lives, sports were witnessed directly. In Detroit, attendance at a professional baseball game was a special event. The Navin Field trolleys would carry thousands of fans from throughout the city to the stadium. The Michigan and Trumbull intersection was the crossroads of the city. It was the place to see and be seen; fans would dress up for the occasion, and Detroit's social elites would attend. Senators and governors tossed ceremonial first pitches. Tiger Stadium was the famous site of baseball battles and football combat, and it drew the city's most powerful leaders to watch its most capable athletes. But to reduce the site to merely baseball and football lore is to rob it of its entire contribution to Detroit history. In fact, Tiger Stadium stands out among stadiums in how much of the city's cultural and social history was woven into it.

Tiger Stadium has been used for much more than baseball and football. The stadium played host to operas, musicals and dramatic comedies in the 1930s.[29] The ROTC used the field as a training ground during the 1920s.[30] Police officers and firemen held annual field days there.[31] The Shriners marched in the stadium annually.[32] Joe Louis defended his boxing title here in 1939.[33] Jake LaMotta gained his own boxing title here ten years later.[34] Also in the 1930s, the United Auto Workers chose Tiger Stadium as the site for massive labor

[23] There were 11,111 home runs, to be exact. *See* Joel Kurth & David Josar, *Is it the Final Out for Tiger Stadium?*, DET. NEWS, Mar. 16, 2006, *available at* http://detnews.com/article/20060314/METRO/603140 404/Is-it-the-final-out-for-Tiger-Stadium.

[24] Gregg Krupa, *Tiger Stadium Milestones*, DET. NEWS, June 4, 2009.

[25] There are twenty Detroit Tiger players and six Detroit Tiger managers in the Hall of Fame. The Official Site of Detroit Tigers: History: Tigers Hall of Famers, http://detroit.tigers.mlb.com/det/history/hall_of_ famers.jsp (last visited June 15, 2010).

[26] Mel Antonen, *Once a baseball cathedral, Tiger Stadium Now Sits in Disrepair*, USA TODAY, Oct. 19, 2006, *available at* http://www.usatoday.com/sports/baseball/al/tigers/2006-10-18-cover-tiger-stadium_x. htm.

[27] Detroit Lions Team Page, Pro Football Hall of Fame Official Website, http://www.profootballhof.com/ history/team.aspx?FRANCHISE_ID=11 (last visited June 16, 2010).

[28] *Id.*

[29] STRANDED AT THE CORNER (Michigan & Trumbull LLC 2006).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Box Rec, *Boxer: Joe Louis*, http://www.boxrec.com/list_bouts.php?human_id=9027&cat=boxer (last visited June 19, 2010).

[34] LaMotta won the World Middleweight Belt. Box Rec, *Boxer: Jake LaMotta*, http://www.boxrec.com/ list_bouts.php?human_id=009030&cat=boxer (last visited June 19, 2010).

demonstrations.[35] The Tigers were owned at that time by Walter O. Briggs, who made his fortune selling auto parts to car manufacturers. Briggs' power over workers is what brought labor demonstrations to his Tiger Stadium doorstep.[36] In the 1950s, Billy Graham preached to thousands of Detroiters from the infield.[37] Concerts, conventions, and rallies were held throughout the stadium's history. The Tigers' World Series triumph in 1968 made the stadium Detroit's healing ground after the race riots of 1967.[38] Decades later Nelson Mandela addressed the racially-divided city from the field.[39] Given this rich cultural, political and athletic history attached to Tiger Stadium, it is unsurprising that the battle to preserve Tiger Stadium was whole-heartedly fought.

III. Historic Preservation Statutes: What is Fair and What is Foul?

Historic preservationists employ a wide range of tools to prevent the deterioration of historic resources. Much preservationist effort is geared towards influencing politics, and generating support in the local community. But since preservationist battles are often bitter, many disputes end up in court. To understand historic preservation generally, and the attempt to preserve Tiger Stadium in particular, it is first necessary to understand what law applies and where power lies.

Unfortunately for stadium preservationists, for Tiger Stadium Section 106 of the National Historic Preservation Act[40] was not in play. Section 106 requires federal agencies to "take into account" the effect of agency "undertakings" on historic properties.[41] Historic properties include those on, or eligible for, the National Register.[42] Tiger Stadium is on the National Register.[43] However, for Section 106 to be triggered there must be a "[f]ederal or federally assisted undertaking."[44] That is, federal agency action in the form of an "undertaking,"[45] which could include federal financial assistance to a local project.[46] There would be an "undertaking" under Section 106 if there were any federal financial support for Tiger Stadium's demolition. However, the demolition of the stadium was pushed only with city and state funding, not federal support. Thus, the requirements of Section 106 were not met and the Act could not be used in support of preservation.

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[35] RICHARD BAK ET AL., THE CORNER: A CENTURY OF MEMORIES AT MICHIGAN AND TRUMBULL 83 (1999).
[36] *See generally* BAK, *supra* note 5, at 184.
[37] Harry Atkins, *Farewell to Tiger Stadium*, ESPN.COM, Sept. 27, 1999, http://assets.espn.go.com/mlb/s/1999/0927/81754.html.
[38] Bob Logan, *Tiger Stadium: Detroit's Anchor*, CHI. TRIB., June 27, 1985, at C3 (describing Tiger Stadium as a "unifying force for a fragmented city").
[39] *Id.*
[40] 16 U.S.C. § 470(f) (2010); 36 C.F.R. § 800.1 (2010).
[41] 16 U.S.C. § 470(f) (2010).
[42] *Id.*
[43] Nat'l Register of Historic Places: MICHIGAN (MI), Wayne County, http://www.nationalregisterofhistoricplaces.com/mi/Wayne/state6.html (last visited June 19, 2010).
[44] 16 U.S.C. §470(f).
[45] An "undertaking" is a "project, activity or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency . . . ." 36 C.F.R. § 800.16(y) (2010).
[46] *Id*. (noting that federal "undertakings" include activities "carried out with federal financial assistance").

Fortunately, Section 106 is not the only protection for our nation's historic sites.[47] For real property in Michigan, there are three different layers of historic designations: the National Register of Historic Places,[48] the state Register of Historic Sites,[49] and local historic districts.[50] Of the three, only local historic districts actively protect historic structures from alteration or demolition. Both national and state register designations are "purely honorary."[51] The National Register of Historic Places[52] and the Michigan Register of Historic Sites[53] both honor important historic sites. Tiger Stadium was added to the National Register of Historic Places in 1989[54] and to the Michigan Register of Historic Sites in 1975.[55] However, because these designations are merely honorary, they contain no legal handle that could save the structure from alteration or demolition at the hands of the owner. Regardless, assent to either the state or national list is important because it will draw attention if the site becomes endangered. Though not a final legal solution, it is a political step in support of preservation.

To that end, the National Trust for Historic Preservation, a private preservationist group, has devised a way to help prevent a structure's demolition in the absence of legal mechanisms. Each year the National Trust develops a list of the Most Endangered Historic Places in America, an effort geared towards shedding light on the plight of the blight, so to speak. Tiger Stadium made the list in 1991 and 1992.[56] The National Trust's track record is very strong – of the hundreds of structures on the list since 1988, only a few have been demolished.[57] But Tiger Stadium was not so lucky. Nevertheless, in spite of the absence of legal handles created by ascension to the national register, it was beneficial to preservationists that the stadium was listed, because it drew attention to the stadium's jeopardy. Unlike the state and national registers, historic district demolition is much more powerful.

IV. Local Historic Districts in Michigan

In 1970 the Michigan legislature passed the Local Historic Districts Act ("LHDA" or "the Act")[58] to promote historic preservation, safeguard community heritage, support property

[47] This paper does not address zoning ordinances, which represent an additional and quite powerful legal tool for historic preservationists.
[48] 16 U.S.C. § 470a (2010); 36 C.F.R. § 60.1.
[49] 1955 Mich. Pub. Acts 10; MICH. COMP. LAWS § 399.151-52.
[50] Local Historic Districts Act, 1970 Mich. Pub. Acts 169; MICH. COMP. LAWS § 399.201-.215 (2010).
[51] STATE HISTORIC PRES. OFFICE, LOCAL HISTORIC DISTRICTS IN MICHIGAN 33, *available at* http:www.michigan.gov/documents/hal_mhc_shpo_LHD_Manual_105011 _7.pdf (guidance manual for city and county governments) (last visited May 1 2010).
[52] 16 U.S.C. § 470a; 36 C.F.R. § 60.1.
[53] 1955 Mich. Pub. Acts 10; MICH. COMP. LAWS § 399.151-52.
[54] Nat'l Register of Historic Places, *MICHIGAN (MI), Wayne County*, http://www.nationalregisterof historicplaces.com/mi/Wayne/state6.html (last visited June 19, 2010).
[55] Ctr. for Geographic Info., Mich. Historical Ctr., State Historic Pres. Office, http://www.mcgi.state.mi.us/ hso/hsmatchname.asp?hsn=navin&hss=0 (last visited Sept. 13, 2009); State Register of Historic Sites, http://www.ci.detroit.mi.us/legislative/BoardsCommissions/HistoricDesignationBoard/Reports/Statereg.pdf (last visited Sept. 13, 2009).
[56] John Gallagher, *National Group Defends Madison*, DET. FREE PRESS, May 25, 2004, at A1.
[57] *Id*. Two of the few were in Detroit.
[58] Local Historic Districts Act § 399.201-.215.

values, foster civic beauty, improve the economy, and enhance the general welfare.[59] The Act authorizes counties and cities to create historic districts ("Districts") and local commissions ("City Commissions") to oversee those districts.[60] The creation of a local historic district pursuant to the LHDA gives a local city the power to regulate alterations to, and demolition of, resources and structures within that district.[61] While most historic districts encompass entire neighborhoods or towns, the Act also authorizes a local government to create a single resource district that would encompass a single structure, rather than a neighborhood.[62] The Act seeks "to provide for preservation of historic and non-historic resources within historic districts."[63] A "historic resource" is a "publicly or privately owned building, structure, site . . . that is significant in the history, architecture, archaeology, engineering, or culture of this state or a community . . . ."[64]

The Act authorizes local governments to adopt ordinances to "regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources in historic districts . . . ."[65] Management of the district, including approval of work permits, is managed by a City Commission made up of five to nine local residents.[66] The work permit approval power is the crux of the ordinance's power,[67] so the power to appointment City Commissioners is correspondingly important. The Act does not require a particular method of appointment to the City Commission, but rather defers to the local governments to create appointment mechanisms.[68] However, the Act does require that appointments shall be for three-year terms,

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[59] MICH. COMP. LAWS § 399.202, § 2.

[60] *Id.* at § 399.204. A study commission must first analyze, then formally propose designation of an historic district.

[61] *Id.* at 399.202, § 2.

[62] "A single resource historic district in Michigan is one in which the single resource individually meets the criteria for eligibility established by the U.S. Secretary of the Interior for inclusion in the National Register of Historic Places on its own merit for: (a) association with a significant person, (b) association with a significant event or pattern of history, (c) design and construction, or (d) information potential. In other words, boundary selection is based on the nature of the resource's significance, integrity, and physical setting." STATE HISTORIC PRES. OFFICE, CRITERIA FOR EVALUATING RESOURCES FOR INCLUSION IN LOCAL HISTORIC DISTRICTS 2, *available at* http://www.michigan.gov/documents/hal_mhc_shpo_Criteria EstablishingHistDist_154704_7.pdf (last visited May 1, 2010).

[63] Local Historic Districts Act (Preamble).

[64] MICH. COMP. LAWS § 399.201(a)(l).

[65] MICH. COMP. LAWS § 399.202, § 2. The City Commission does not review "ordinary maintenance" of a structure. MICH. COMP. LAWS § 399.210, § 10.

[66] MICH. COMP. LAWS § 399.204, § 4 (noting also that a "majority of the [Commission] members shall have a clearly demonstrated interest in or knowledge of historic preservation," and that, where available, an architect should be appointed as well. Further, Commissions within larger local government bodies must include two members from a list provided by "duly organized local historic preservation organizations").

[67] The Michigan manual for local governments, which explains how to enact the enabling local ordinance, declares: "Though commissioners may face pressure from individuals—and sometimes government officials— to make a certain decision, commissioners must remember that their role is to protect the community's historic resources." STATE HISTORIC PRES. OFFICE, LOCAL HISTORIC DISTRICTS IN MICHIGAN 33, *available at* http:www.michigan.gov/documents/hal_mhc_shpo_LHD_Manual_105011 _7.pdf (last visited May 1, 2010).

[68] MICH. COMP. LAWS § 399.204, § 4.

and shall be staggered, diffusing the appointer's power.[69] Further, removal of City Commissioners is only permitted if the ordinance expressly authorizes this, and even then removal is only permitted "due to the acts or omissions of the member,"[70] that is, for "just cause."

The local historic district commission evaluates work permit applications for alterations "affecting the exterior appearance of a resource."[71] The exterior includes that which is visible by the public, but in Tiger Stadium's case could possibly also include the enclosed baseball field and grandstands. The stadium wraps around the field completely, and the stadium is not domed. Thus the field and grandstands are visible by the public not from the street but from the air. It may seem a stretch that a City Commission's power to regulate the "exterior appearance" could enable it to regulate the field and grandstands of a stadium beyond sight from the street. But in a different jurisdiction a Louisiana court found that changes to building's enclosed courtyard fell within the power of the historic commission, since the courtyard could technically be considered "exterior."[72] In that case, *City of New Orleans v. Impastato*, the Louisiana Supreme Court flushed an owner's plan to create an open-air bathroom in the historic courtyard of the French Quarter's famous Napoleon House.[73] Michigan lacks case law clarifying the extent of a City Commission's power to govern the "exterior appearance," so the proposition that a City Commission could interrupt the interior alteration of a wrap-around, undomed stadium within an historic district is unsettled.

When there is a request to demolish a structure in an historic district, in order to approve the request the City Commission must establish one of four elements: (1) The structure is a "hazard to safety of the public;" (2) the structure is a "deterrent to a major improvement program [and the applicant has already] obtained all necessary planning and zoning approvals, financing, and environmental clearances;" (3) an "undue financial hardship" due to action "beyond the owner's control"; or, (4) "retaining the [structure] is not in the interest of the majority of the community."[74]

An aggrieved landowner may appeal denial of her work permit or demolition request to the state historic preservation review board.[75] If the review board rules against her, she may appeal directly to her local Michigan circuit court.[76] The citizen need not pursue remedy from the state review board before appealing to the circuit court.[77] Importantly, Michigan's LHDA contains a citizen suit provision for any citizen or historic preservation organization "aggrieved by a decision of the historic district commission."[78] The Detroit ordinance provides standing to enforce historic district requirements to "any property owner or association of property owners

[69] *Id.*
[70] *Id.*
[71] MICH. COMP. LAWS § 399.205, § 5(1).
[72] City of New Orleans v. Impastato, 3 So. 2d 559, 560 (La. 1941).
[73] *Id.*
[74] MICH. COMP. LAWS § 399.205, § 5(6)(a)-(d).
[75] *Id.* AT §§ 399.209(1), .211, .205(2).
[76] *Id.*
[77] MICH. COMP. LAWS § 399.211, § 11.
[78] *Id.*

within the district."[79] Thus, a preservationist group, or neighbor to an historic property owner, could step in to preserve a structure within an historic district where a City Commission was not diligent.

The City Commission is also authorized to determine if a structure is "threatened with demolition by neglect."[80] "Demolition by neglect means neglect in maintaining, repairing, or securing a resource that results in deterioration of an exterior feature of the resource or the loss of structural integrity of the resource."[81] In the event the City Commission makes a determination that a structure is threatened with demolition by neglect, the City Commission can require the owner to repair the structure.[82] If an owner does not make the repairs, the City Commission is authorized to enter the property, make the repairs itself, and then charge the work costs to the owner.[83] This provision is unique within the statute in that it is a positive power by which the City Commission can compel an owner to repair her property; the commission's remaining powers are mostly prohibitive. A watchful City Commission could compel, or even itself repair at the owner's expense, a building with exterior features that are dilapidating.

V. Detroit's Local Historic District Ordinance

In 1976, Detroit passed a local ordinance, the Detroit Historic District Ordinance ("the Detroit Ordinance"), creating the Detroit Historic District Commission ("the Detroit Commission").[84] The Detroit Ordinance incorporates powers authorized by the LHDA. The Detroit Commission is composed of seven members, appointed by the mayor and subject to the approval by the City Council.[85] Two of the seven Detroit Commission members must be selected from a list provided by local historic preservation organizations; and one must come from a list provided by the local chapter of the American Institute of Architects.[86] Although the City Council evaluates the mayor's appointees,[87] the Detroit Commission is often viewed as subject to mayoral influence. Detroit Commission members can only be removed for cause.[88] The City Council is authorized to create historic districts within the city,[89] and can designate a single structure as an "historic district."[90] Detroit's local ordinance retains the full power afforded by the LHDA to prevent any alteration to the "exterior appearance" of an historic structure. The Detroit Commission approves work permits on structures within historic

[79] DETROIT, MICH., CODE § 25-2-10(b).
[80] *Id*. at § 399.205(11).
[81] *Id*. at § 399.201(a)(f).
[82] *Id*. at § 399.205(11)(a).
[83] *Id*. at § 399.205(11)(b).
[84] DETROIT, MICH., ORDINANCES § 161-H (1976); DETROIT, MICH., CODE § 25-2-50 (2010).
[85] DETROIT, MICH., CODE § 25-2-51.
[86] *Id*.
[87] *Id*.
[88] DETROIT, MICH., CODE § 25-2-53.
[89] DETROIT, MICH., CODE § 25-2-4. The Historic Designation Advisory Board generally proposes the creation of an historic district to the Commission. The Commission recommends district creation to the City Council. *Id*. However, any person in the city may request the City Council to designate an historic district.
[90] DETROIT, MICH., CODE § 25-2-4(a)(1), § 25-2-2 ("Historic District").

districts,[91] including owner applications to demolish their structures.[92] The Detroit Commission's oversight extends to both private and publicly-owned buildings.[93]

Regrettably, the robust historic district ordinance defenses and City Commission guardianship of historic structures did not protect Tiger Stadium. Although Tiger Stadium has been recognized by the national and state registers as an historic site, the stadium was not individually identified as a local historic resource,[94] nor was it included within the boundaries of an historic district. The stadium was located adjacent to the Corktown Historic District but not within it, despite being wedded to the neighborhood's history. Accordingly, the strong protections for historic structures available under Michigan historic district law were not available to protect Tiger Stadium.

It is unclear whether local historic district designation for Tiger Stadium would have saved the stadium from its fate, however, it is an avenue that should have been pursued. The battle over Tiger Stadium was ongoing for twenty years and citizens should have petitioned City Council to adopt the stadium as a single structure "Historic District." In 2007, the Detroit City Council voted to demolish the stadium, but that is not to say that during the past twenty years no previous City Council would have passed a bill establishing the stadium as an historic district. Such a designation would have forced an additional preventative measure making demolition more difficult in that it would have required that any demolition plan be evaluated for approval by the Detroit Commission. Although the Detroit Commission is under sway of the mayor's office, commissioners are not easily removed, and with three of the seven coming from local preservation-oriented organizations, it is possible that independent-minded commissioners could have obstructed the stadium's demolition. There is precedence for such independence.[95] If not actively blocking demolition, the Detroit Commission's authority could have persuaded the City Council to be more agreeable to preservation and renovation for alternative use.

The first lesson we can learn from the demise of Detroit's Tiger Stadium is that placing an historic stadium within a state historic district can add an additional obstacle in the event a team owner or city leaders are bent on demolishing the relic.

VI. Roots of Historic Preservation Law

The concept that preservation and remediation of a city's deteriorating historic structures can revive a city in decline is not new to Detroit. As they say, history is instructive. The most successful stadium preservation ever is also the most historic – the Roman Empire's Colosseum. Unsurprisingly, the effort to preserve the Colosseum involved some of the world's earliest historic preservation laws.

[91] *Id*. at 25-2-18.
[92] *Id*. at § 25-2-2, § 25-2-4.
[93] *Id*. at § 25-2-2 ("Historic District").
[94] Historic Dis. Com of Detroit: Nevin Field, Brigg Stadium, Tiger Stadium, http://www.detroitmi.gov/historic/districts/tiger_stadium.pdf (last visited June 19, 2010).
[95] *See infra* at p. 16.

The powerful, centuries-old Roman Empire was so grand that its decline and collapse took centuries. In its assent, the empire generated a wealth of statutes, monuments, buildings, and in 80 A.D., a massive Colosseum. The Colosseum is the famous site of gladiator battles and beast vs. human combat, and it drew the empire's most powerful leaders to watch the empire's most capable athletes. Today, two millennia later, the Colosseum remains a world historical treasure of great importance to the country of Italy, and a centerpiece among ancient monuments in the city of Rome.

Rome's emperors recognized the power that ancient structures carry through the ages.[96] In 458 A.D., centuries after the Colosseum began hosting Rome's version of "sports," the Emperor Majorian wrote one of the world's first historic preservation laws to repair and protect it and other Roman monuments from threats of decay and looting. By that time, the Roman Empire was under pressure from enemies and Roman leaders knew that protecting ancient Roman monuments had a symbolic value.[97] Much like modern historic preservation statutes, Majorian's law banned demolition of ancient structures, but as a practical matter established a governmental review process for exceptions in the public interest.[98] Majorian proclaimed that:

> We, the rulers of the state, with a view to restoring the beauty of our venerable city, desire to put an end to the abuses which have already long excited our indignation. It is well known that in several instances public buildings have been destroyed with the criminal permission of the authorities, on the pretext that the materials were necessary for public works. Splendid ancient buildings have been overthrown, and the great has been everywhere destroyed in order to erect the little. . . . We accordingly command, by universal law, that all buildings which were of old erected for the public use or ornament, be they temples

[96] "'Our care is for the whole Republic, "in which, by the favour of God, we are striving to bring back all things to their former state;" but especially for the City of Rome. We hear that great depredations are being committed on public property there….'(4) Temples and other public buildings, which at the request of many we have repaired, are handed over without a thought to spoliation and ruin." THOMAS HODGKIN, THE LETTERS OF CASSIODORUS, BEING A CONDENSED TRANSLATION OF THE VARIAE EPISTOLAE OF MAGNUS AURELIUS CASSIODORUS SENATOR 213-14 (1886). "'Let nothing lie useless which may redound to the beauty of the City. Let your Illustrious Magnificence therefore cause the blocks of marble which are everywhere lying about in ruins to be wrought up into the walls by the hands of the workmen whom I send herewith." *Id.* at 174.

[97] "You have called our attention to the ruinous state of your walls, and ask leave to use for its repair the stones of the amphitheatre, which have fallen down from age and are now of no ornament to your town, in fact only show disgraceful ruins. You have not only our permission to do this, but our hearty approval. Let the stones, which can be of no use while they lie there, rise again into the fabric of the walls; and your improved defence will be our boast and confidence." *Id.* at 224-25.

[98] To achieve these ends, Majorian proscribed that "if any building must be torn down for necessary considerations, for the public construction of another work or on account of the desperate need of repair, We direct that such claim shall be alleged with the suitable documents before the . . . Senate." JUKKA JOKILEHTO, A HISTORY OF ARCHITECTURAL CONSERVATION 49 (1986).

> or other monuments, shall henceforth be neither destroyed nor touched by anyone whomsoever.[99]

Majorian's edict lamented that "splendid cities and towns . . . fall into ruins through age," and proscribed that "all buildings that have been founded by the ancients as temples and as other monuments and that were constructed for the public use or pleasure shall not be destroyed by any person."[100] Public servants that approved or facilitated the destruction of ancient public structures faced punishment of fines or even having their hands chopped off. It seems that in ancient times, as in modern Detroit, compliant public servants facilitated the destruction of public monuments.

Decades later in 508 A.D., Emperor Theodoric of the Goths, King of Italy, moved to preserve the Colosseum and the empire's other historically important monuments.[101] Emperor Theodoric ruled that dilapidating structures would not be looted for bricks to build new structures. Instead, new bricks would be created and used.[102] At the same time, he appointed a "curator statuarum," "architectus publicorum," and other guardians of important public structures, including the Colosseum.[103] In a beautiful edict that sought to harmonize Rome's past structures with its present constructions, Emperor Theodoric proclaimed:

> - Much do we delight in seeing the greatness of our Kingdom imaged forth in the splendour of our palace.
> - Thus do the ambassadors of foreign nations admire our power, for at first sight one naturally believes that as is the house so is the inhabitant.
> - The Cyclopes invented the art of working in metal, which then passed over from Sicily to Italy.
> - Take then for this Indiction the care of our palace, thus receiving the power of transmitting your fame to a remote posterity which shall admire your workmanship. See that your new work harmonises well with the old. Study Euclid—get his diagrams well into your mind; study Archimedes and Metrobius….
> - When we are thinking of rebuilding a city, or of founding a fort or a general's quarters, we shall rely upon you to express our thoughts on paper [in an architect's design]. The builder of walls, the carver of marbles, the caster of brass, the vaulter of arches, the plasterer, the worker in mosaic, all come to you for orders, and you are expected

[99] ANTHONY M. TUNG, PRESERVING THE WORLD'S GREAT CITIES (2001).
[100] JOKILEHTO, *supra* note 98, at 48.
[101] JOKILEHTO, *supra* note 98, at 6.
[102] BALTHASAR JENICHBN, THE DESTRUCTION OF ANCIENT ROME: A SKETCH OF THE HISTORY OF THE MONUMENTS 78 (1899) ("Thus thoroughgoing repairs were made, not at the expense of other edifices, as in the case of the predecessors of Theoderic, but with brick . . . .")
[103] JOKILEHTO, *supra* note 98, at 6.

> to have a wise answer for each. But, then, if you direct them rightly, while theirs is the work yours is all the glory….
> - As a mark of your high dignity you bear a golden wand, and amidst the numerous throng of servants walk first before the royal footsteps [i.e. last in the procession and immediately before the King], that even by your nearness to our person it may be seen that you are the man to whom we have entrusted the care of our palaces.[104]

Emperor Theodoric's edict was right on the money, except for the part about the Cyclops. Preservation can certainly lead to societal rejuvenation.[105] Centuries later in Detroit, battles won by preservationists have led to neighborhood rejuvenation (*see infra* discussion of Detroit's Orchestra Hall). Where preservationists failed to curtail demolition by neglect, neighborhoods have not been rejuvenated through new development. Though praised for having given "new life to the empire" and for rejuvenating Roman culture, Theodoric could not stop Rome's decline.[106] But his efforts to beautify the city through preservation ensured a legacy that makes Rome one of the world's most magnificent cities. Looking back, it is hard to imagine that one Roman emperor planned to demolish the Colesseum to make way for a road.[107] "Progress" is in the eye of the beholder.

VII. Demolition by Neglect and the Decline of Detroit

After decades of intense growth and wealth fueled by the rise of the automobile industry, Detroit has in many ways been in decline for about fifty years. It is unsurprising, then, that the cry of "demolition by neglect" is typical of Detroit's historic preservationists. When inner-city Detroit was largely abandoned after the race riots of 1967, it left tens of thousands of abandoned buildings, including many magnificent structures built in Detroit's early-century heyday.[108] Auto plant closures exacerbated the exodus and economic collapse. Detroit's population in 1900 was just under 500,000; it peaked in 1950 at about 2,000,000, and in 2000 was back down to

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[104] HODGKIN, *supra* note 96, at 323-24.

[105] "[O]ther municipalities were ordered not to mourn for past glory, but to revive ancient monuments to new splendor, not to let fallen columns and useless fragments make cities look ugly, but to clean them and give them new use in his palaces." JOKILEHTO, *supra* note 98, at 25.

[106] *Id.*

[107] *Id.* at 47.

[108] *See generally* WILLIAM J. V. NEILL, URBAN PLANNING AND CULTURAL IDENTITY 113-14 (Routledege 2004). The wealth that built such structures stemmed in part from Henry Ford's car manufacturing strategy, called "Fordism": well-paid workers would specialize at one task on fast assembly lines. The Henry Ford "five-dollar-a-day" wage was shockingly high, and the dilapidating factories associated with that 1914 promise (Piquette, Highland Park and River Rouge) are now the focus of preservation battles to save them from the wrecking ball. Sam Haymart, *Birthplace of the Model T Named as a National Historic Landmark,* THE MUSTANG NEWS, Feb. 22, 2006, http://themustangnews.com/fomoco_06/st0206_pqnhl.
htm; David Andrews; *River Rouge: Alter of Industry: River Rouge, Henry Ford's Factory of the Future*, COMMON GROUND (National Park Service, Washington, D.C.), Spring 2004, at 20-32.

950,000.[109] The city is now a huge time capsule. Although the city's expansive boundaries could fit all of Manhattan, San Francisco and Boston,[110] not a single new building construction permit was issued in the city in 1988.[111] Unfortunately, although many of the abandoned structures are beautiful and well-built, others are an increasing eyesore as they dilapidate. Detroit is a spotted landscape of the abandoned: lots, homes, office buildings, schools, etc.[112] It is a city where "pre-Depression skyscrapers fell victim to civic indifference and urban scavengers."[113] Many abandoned structures have been torn down, though clearing title is often a legal hindrance.[114] As of 2004, there were 40,000 vacant homes and lots in Detroit, and cloudy land title issues affect roughly half of these.[115]

And that was before the recent economic crisis. In December 2008, the median price of a home sold in Detroit dropped to a mere $7500.[116] Whether Detroit homeowners have the financial resources to address dilapidating homes is doubtful, as the median household income in Detroit has dropped twenty-four percent since 2000.[117] While the cost of upkeep is onerous, so is the cost of neglect. Studies have shown that abandoned properties lead to increased crime, increased fire hazard, reduced home values for nearby homeowners, and reduced tax revenues for the city.[118]

Detroit's local ordinance defines "demolition by neglect" slightly differently than the state enabling law. Under Detroit's ordinance "demolition by neglect" is:

> [N]eglect in the maintenance, repair or security of a site, building or structure, resulting in . . . :

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[109] NEILL, *supra* note 108, at 113-14. For reference, Rome's population experienced similar volatility – from one million in the fourth century, down to ten thousand in the fourteenth, then back up to nearly four million by the twenty-first century. *Id.*

[110] Tim Jones, *Where a Home Can Cost $7,500: Detroit is on the Edge of Bankruptcy, and Still 15 People Want to be Mayor*, CHI. TRIB., Jan. 29, 2009, at C4.

[111] Keith Schneider, *Oh My Gosh, That's So Cool,* MICH. LAND USE INSTITUTE, May 29, 2003, *available at* http://www.mlui.org/growthmanagement/fullarticle.asp?fileid=16491.

[112] Symposium, *Gentrification in Detroit: Renewal or Ruin?*, 4 J. L. SOC'Y 45, 56 (Fall 2002) (description by George Galster, Professor of Urban Affairs, Wayne State University); NEILL, *supra* note 108, at 114. The abandoned, overgrown structures make for amazing portraits. *See* James Griffioen, *School's out Forever*, VICE MAGAZINE, FEB., 2009, http://www.viceland.com/int/v16n2/htdocs/schools-out-forever-625.php?country=; *see also* Forgotten Detroit, http://www.forgottendetroit.com (last visited May 1 2010); Kevin Bauman, *100 Abandoned Houses*, http://www.100abandonedhouses.com (last visited May. 2, 2010).

[113] Geoffrey Gagnon, *City of Blight*, LEGAL AFFAIRS, July/Aug. 2005, at 8-9.

[114] Schneider, *supra* note 111.

[S] *Id*. For comparison, three years after Hurricane Katrina, there were over 71,000 unoccupied residences in New Orleans. Gordon Russell, *Vacant, Ruined Properties Put N.O. at Top of Heap*, NEW ORLEANS TIMES-PICAYUNE, Aug. 21, 2008, *available at* http://www.nola.com/news/index.ssf/2008/08/vacant_ruined_properties_put_n.html. As of August 2008, thirty-one percent of New Orleans residences were vacant or unoccupied; in Detroit (the second highest rate), the pre-economic crisis figure was eighteen percent. *Id*.

[116] Jones, *supra* note 110, at C4.

[117] *Id*.

[118] Mary Elizabeth Evans, *The Prevention, Management, and Re-Use of Jefferson County's Tax Delinquent Property*, at 7-8 (Apr. 5, 2005), http://blog.al.com/bn/2007/08/evans.pdf; *see also* Perepletchikoff v. City of Los Angeles, 345 P.2d 261 (Dist. Ct. App. 1959); York v. Hargadine, 171 N.W. 772, 775 (1919).

I. The deterioration of exterior walls or other vertical supports;
II. The deterioration of roofs or other horizontal members;
III. The deterioration of exterior chimneys;
IV. The deterioration of exterior plaster, mortar, or stucco;
V. The ineffective weatherproofing of exterior walls, roofs and foundations, including broken windows and doors; or

VI. The serious deterioration of any documented exterior architectural feature or significant landscape feature which in the judgment of the commission produces a detrimental effect upon the character of the district.[119]

Demolition by neglect usually comes into play when a structure's owner or custodian wishes to demolish the structure, but cannot obtain commission approval to do so. Instead, the owner allows the structure to deteriorate until it becomes such an eyesore or public safety risk that demolition becomes necessary, or at least more difficult for the Commission to oppose. Under the Detroit ordinance, "If it is determined by the [Commission] that a structure in an historic district is being demolished by neglect, the commission, on its own initiative, and to insure that the structure shall be preserved and protected . . ." may (1) require "correction of defects or necessary repairs," or (2) "cause the necessary corrections or repairs to be made and the cost, if not paid promptly by the property owner, to be reported to the board of assessors for levy as a special assessment against the property."[120]

The Commission's power to repair a dilapidating structure and bill the owner is a powerful tool at the Commission's disposal. There are many reasons to retain such a provision, most importantly, to counter the incentive for a property-owner to deliberately let her property fall apart until it becomes a "hazard to the safety of the public."[121] Where an historic district commission can step in and affirmatively require repair, a landowner may prefer not let a structure fall into disrepair in the first place. In Detroit, the Commission's demolition by neglect power is actively exercised.[122] The Commission has even twice taken the rare measure to repair a structure and bill the owner.[123] However, in both instances the owner sold the property and the new owner agreed to make needed repairs.[124] The mere threat of fine that attaches to the property or remediation by the city is enough to compel most owners to repair their buildings.[125]

An aggressive commission wielding its forced-repair power could wreak havoc in a district. Possible consequences of an overactive commission include driving down property values in the short-term and forcing poor homeowners to make costly repairs, potentially causing poor homeowners to sell and move out of the district. Such an action might also improve

[119] DETROIT, MICH., CODE § 25-2-2(g) ("Demolition by neglect").
[120] DETROIT, MICH., CODE § 25-2-2(a) ("Enforcement").
[121] MICH. COMP. LAWS § 399.205, § 5(6)(a).
[122] Telephone Interview with Susan McBride, Principal Planner, Detroit Historic District Comm'n (Sept. 18, 2009) (describing a list of 123 homes designated under demolition by neglect rules).
[123] *Id*.
[124] *Id*.
[125] *Id*.

neighborhoods by reducing blight and possibly increasing property values in the long-term. Evaluating the trade-offs is not easy.

There is another consequence to not enforcing a demolition by neglect provision. In Detroit's case, deterioration can be such an eyesore and public safety hazard that the city becomes willing to step in and pay for a structure's demolition. This creates another perverse incentive for landowners to allow their building to deteriorate. It is often the wealthiest citizens that can coerce a city to use public funds to demolish their property. A case in point is the Madison-Lenox Hotel, built in 1900.[126] Abandoned and allowed to languish for nearly two decades in downtown Detroit, this historic hotel was demolished using city funds despite being owned by the wealthy Ilitch family. Mike Ilitch also owns the Detroit Tigers, and as caretaker for Tiger Stadium, he has similarly allowed it to dilapidate at the same time he has pushed for its demolition. The Madison-Lenox Hotel was destroyed despite being named to the National Trust's "Most Endangered Historic Places in America" list in 2004.[127] The empty lot now sits without any interested developers. Interestingly, Detroit's Historic District Commission had initially blocked the efforts by Ilitch and Mayor Kwame Kilpatrick to demolish the building,[128] which illustrates the power of the Commission and its ability to stand apart from the person appointing its members. Another example of "successful" demolition by neglect is the Statler-Hilton Hotel. The Statler-Hilton Hotel **(**1914**)** was one of Detroit's nicest hotels until it was also demolished using public funds.[129] This lot now also sits empty with no plan for development.[130]

Demolition by neglect provisions are not unique to Michigan historic preservation law.[131] The constitutionality of ordinances giving a positive duty to repair dilapidation was established in *Maher v. City of New Orleans*.[132] Many cities employ such a code. A Washington D.C. code, repealed, prohibited demolition by neglect and allowed the mayor to order repair or may make the repair himself, while billing the owner for the repair cost.[133] The New Orleans demolition by neglect ordinance also enables the city to repair a structure and bill the owner.[134] Charlottesville, Virginia, and Vicksburg, Mississippi "work with owners to try to sell the properties as a principle strategy" to remedy demolition by neglect.[135] In Islington (London), England, in the context of a housing shortage, and where abandoned properties were becoming "ghastly eyesores" and havens for crime, a 2006 ordinance compels abandoned property owners to repair

[126] Preservation Wayne: Legal, http://www.preservationwayne.org/legal.php (last visited May 1, 2010).
[127] John Gallagher, *National Group Defends Madison*, DET. FREE PRESS, May 25, 2004, at C4.
[128] John Gallagher, *National Group Defends Madison*, DET. FREE PRESS, May 25, 2004.
[129] Preservation Wayne, *supra* note 126; David Josar, *Another Strike for Tiger Stadium?*, DET. NEWS, Mar. 19, 2007, at 1B.
[130] Preservation Wayne, *supra* note 126.
[131] JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 13-15 (National Trust for Historic Pres. 2005) (1997); Demolition by Neglect, SM056 ALI-ABA 527, 531-36 (2007). Other cities employing demolition by neglect codes include Austin, San Francisco, New York City, Seattle and Portland. Demolition by Neglect, *supra* note 119.
[132] 516 F.2d 1051, 1059 (5th Cir. 1975).
[133] WASH. D.C. CODE § 6-1104.02 (repealed).
[134] NEW ORLEANS, LA., CODE Art II, § 84-108.
[135] Sakina B. Thompson, *Saving the District's Historic Properties From Demolition by Neglect*, GEO. L. HISTORIC PRES. PAPERS SERIES (2004), *available at* http://scholarship.law.georgetown.edu/hpps_papers/14/.

and lease residential units.[136] In Islington, "a dedicated officer, working across all six boroughs, has the power to force the landlord into a compulsory purchase or compulsory leasing scheme." Whether because of a lack of funds to repair a dilapidating structure, or by "benign indifference or a deliberate strategy to circumvent historic preservation restrictions against demolition,"[137] demolition by neglect can drag a neighborhood and city down. The greater good may suffer inversely and disproportionately compared to the individual owner.[138]

A review of some of the more prominent cases of demolition by neglect in Detroit highlights the effectiveness of the tactic employed by owners who hope to demolish their historic structures. In addition to the Madison-Lenox and Statler-Hilton hotels, Detroit's Hudson's Department Store (1891) was one of the country's largest department stores. Preservationists pushed plans to renovate the structure into lofts and restaurants.[139] It was allowed to dilapidate for fourteen years in the middle of downtown Detroit.[140] Finally, it was demolished, and is now also the site of a parking lot. Michigan Central Depot (1913) sits dilapidating and vacant. The Depot is fenced off, its future uncertain. It received an "11th hour save" from Detroit's City Council, but such victories are often temporary.[141] Unlike the razed buildings mentioned above, its demolition by neglect is still in progress, and it sits today easily accessed and at the mercy of looters and criminals.

Detroit preservationists have also cheered some notable victories in cases of demolition by neglect. The Penobscot Building (1928) was a dilapidating, rundown office building before a $10 million renovation turned it into high tech office suites. Lit every night in art deco style, it is a jewel of downtown Detroit.[142] The Book-Cadillac Hotel was once the world's tallest hotel.[143] In the years after it was abandoned in 1980 it dilapidated severely. But a few years ago it was saved, renovated, and successfully converted into condos. Orchestra Hall (1919) was saved from the wrecking ball in the eleventh hour by a bassoonist-turned-historic preservation activist. Orchestra Hall had been earmarked for replacement with a McDonald's.[144] Instead, after renovations the structure is now a theatre, orchestra performance space, and restaurant.[145] The Hall is a beautiful cornerstone of a successful neighborhood regeneration.[146]

Tiger Stadium was left to dilapidate in a manner similar to the other magnificent Detroit properties. Over the past few years, a walk through the ballpark revealed peeling paint and trees growing up through the concrete. There were "huge pools of standing water, and the wood over sections of the ballpark [was] rotting."[147] Looters tore the stadium up, and eventually the city

[136] Press Release, Borough of Islington, London, England, Use it or Lose it - Council has Powers to Take Away Eyesore Properties (May 24, 2006), *available at* http://www.islington.gov.uk/Council/CouncilNews/PressOffice/2006/05/2499.asp.
[137] Thompson, *supra* note 135.
[138] Evans, *supra* note 118.
[139] Maureen McDonald, *Preservationists Winners & Losers*, DET. NEWS, Apr. 4, 2001 (on file with author).
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] Gagnon, *supra* note .
[144] CAGAN & DEMAUSE, *supra* note 20, at 98.
[145] McDonald, *supra* note 139.
[146] *Id*.
[147] Josar, *supra* note 129.

auctioned off the stadium's jewels.[148] The city could have invited local children to play in the great baseball cathedral. It would have been a rare bright spot for an inner-city child growing up in a broken city. Instead the stadium was left to fall apart, then demolished. Why was this allowed to happen, and who allowed it?

The Detroit Tigers owned the stadium until 1977, when it was sold to the city for one dollar in exchange for publicly-financed renovations.[149] In the deal, the stadium was leased back to the Tigers for thirty years.[150] The stadium and the property became city-owned; the team is, of course, privately-owned. City-owned property is managed by the Detroit City Council.[151] The struggle among competing parties to influence the fate of Tiger Stadium was a struggle in two phases. The first phase involved ballpark preservationists attempting to block the team's move into a new stadium in the 1990s as the team's lease expiration drew near. It was thought that such a move would seal the fate of the historic stadium.[152] The second phase began after the preservationists lost the fight to keep the Tigers in their historic den. The second phase attempted to prevent the demolition of abandoned Tiger Stadium.

VIII. Demolition by Public Finance of Private Stadiums: The Fight to Prevent New Stadium Construction in Detroit

The battle to save historic Tiger Stadium began when local baseball fans first got wind of the interests of the city and Tigers owner to move the team.[153] The Tiger Stadium Fan Club ("Fan Club") formed in 1987 when Tigers owner Tom Monaghan grumbled about moving the team. Monaghan had bought the Tigers after earning a fortune as founder of Domino's Pizza.[154]

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[148] John Gallagher, *Tiger Stadium Auction a $192,729 Home Run*, DET. FREE PRESS, Oct. 14, 2007, at A1; Press Release, State Historical Marker Apparently Stolen from Tiger Stadium, Mich. Dept. of History, Arts, and Libraries (May 31, 2006), *available at* http://www.mi.gov/som/0,1607,7-192-29938_34758-144396--,00.html.

[149] PATRICK JOSEPH HARRIGAN, THE DETROIT TIGERS: CLUB AND COMMUNITY 1945-1995, at 258 (1997).

[150] *Id*.

[151] John Gallagher, *Time Running Out for Tiger Stadium*, DET. FREE PRESS, Mar. 8, 2007, at E1.

[152] HARRIGAN, *supra* note 149, at 225, 264-76, 311.

[153] This was not the first time an impending departure caused fan outcry. In a scene that would foreshadow events nearly three decades later, in 1972 the Tigers owner announced his intention to build a new stadium, causing uproar among fans. As a result, voters rejected bonds at the polls that would have funded the construction of a new stadium. The county government "actually got as far as issuing $126 million in bonds for the dome before a pair of local activists sued the city and won, arguing successfully that the bond issue had been fraudulently presented – the county had led voters to believe the bonds were backed entirely by stadium revenue, when in fact county taxpayers would be liable for paying any shortfall. The bonds were recalled, and the dome died on the drawing board." CAGAN & DEMAUSE, *supra* note 20, at 85. The Detroit Lions had better luck in 1975, managing to persuade the public to finance a new domed NFL football stadium in the suburbs – the Pontiac Silverdome.

[154] Monaghan is the founder of Ave Maria Law School. Mariah Blake, *How an Eccentric Right-Wing Pizza Billionaire's Attempt to Build Catholic Law School Ended in Disaster*, WASH. MONTHLY, Sept. 8, 2009, *available at* http://www.alternet.org/belief/142499/how_an_eccentric_right-wing_pizza_billionaire%27s_attempt_to_build_catholic_law_school_ended_in_disaster. He is known recently for his attempt to build the next "New Harmony" utopia town of Ave Maria, Florida, a move that is being challenged in court by the ACLU (no sale of contraceptives or pornography is permitted in the town, which is owned entirely by Monaghan) and Defenders of Wildlife (city's encroachment on the habitat of the endangered Florida Panther).

The Fan Club knew that if the team moved, the stadium would be in jeopardy.[155] The team and Mayor Coleman Young allegedly misrepresented an engineering study as portraying the stadium as structurally unsound.[156] Threats to move the team away from downtown Detroit followed.[157] Accompanying him in the push for a new stadium, Monaghan gained supporters in the new Mayor (former Michigan Supreme Court Justice Dennis Archer[158]) and the Governor (John Engler). The city pushed a plan for a city-financed new stadium downtown, arguing that it would create jobs, improve neighborhoods, and be economically profitable in the long-run.[159] It was the early 1990s. The Tiger Stadium Fan Club, a small group of fans-turned-preservationists without any experience, got ready to fight Goliath.

It can be said of modern stadium building that if you are rich, you can build your own stadium; but if you are really rich, you can get the public to build you one. Just ask Paul Allen, co-founder of Microsoft.[160] Allen bankrolled the publicity campaign and funded a public election that authorized the public financing of Qwest Field in Seattle, an NFL stadium.[161] For team owners, getting the public to pay for your team's stadium is a sweet deal.[162] Teams usually get the lion's share of the profit from the investment while only having to chip in a fraction of the capital investment.[163] Taxpayers pay for the stadium and pointlessly take the financial risk.[164] When the economy goes sour, as in recent times, the true winners and losers become

[155] CAGAN & DEMAUSE, *supra* note 20, at 83-102.
[156] *Id.* at 65, 88; Amy Wilson, *Throwing the Big Boys a Curve: Tiger Stadium Fan Club Shows Unexpected Clout*, DET. FREE PRESS, Apr. 3, 1994, at J1.
[157] Wilson, *supra* note 156, at J1.
[158] In 2003, Archer became the first African-American president of the American Bar Association, and in 2004 was appointed legal guardian of civil rights icon Rosa Parks. Interview by Tavis Smiley with Dennis Archer (Nov. 2, 2005), *available at* http://www.pbs.org/kcet/tavissmiley/archive/200511/20051102_archer.html.
[159] STRANDED AT THE CORNER , *supra* note 29; *But see* Lynn Waldsmith, *Do Stadiums Enrich Cities?*, DET. NEWS, July 7, 2002 (noting that, "Taxpayers are persuaded to foot a substantial portion of the bill with promises of increased tax revenues, local economic development, and job creation. Study after study, however, shows that despite their popular appeal, the value of new stadiums to the communities they serve is dubious.").
[160] In 2009, Paul Allen was ranked the nation's seventeenth richest person by Forbes magazine, with a net worth of $11.5 billion. *The 400 Richest Americans*, FORBES, *available at* http://www.forbes.com/lists/2009/54/rich-list-09_Paul-Allen_1217.html. Allen, along with platoon of eighteen lobbyists, coerced the Seattle electorate to approve an arrangement whereby he would pay only $130 million of the $430 million cost of the total new stadium, yet keep the bulk of the revenue. Taxpayers funded the remaining $300 million. *See* Associated Press, *Seattle to Get Expansion MLS Franchise for 2009*, ESPN.COM (Nov. 9, 2007) http://soccernet.espn.go.com/news/story?id=480678&cc=5901.
[161] CAGAN & DEMAUSE, *supra* note 20, at 115, 165.

[162] *See* Brent Bordson, Case Note and Comment, *Public Sports Stadium Funding: Communities Being Held Hostage by Professional Sports Team Owners*, 21 HAMLINE L. REV. 505, 507 (Spring 1998).
[163] KEVIN J. DELANEY & RICK ECKSTEIN, PUBLIC DOLLARS, PRIVATE STADIUMS: THE BATTLE OVER BUILDING SPORTS STADIUMS (Rutgers University Press 2005). On average, the public generally pays approximately eighty percent of the cost for a new MLB baseball facility, and seventy percent of the cost for a new NFL football facility. Martin J. Greenberg, *Sports Facility Financing and Development Trends in the United States*, 15 MARQ. SPORTS L. J. 93, 123 (2004).
[164] Bordson, *supra* note 162, at 507.

clear.[165] It is a counter-intuitive result whereby stadium developers face strong public opposition, yet manage to push their plans through on the backs of local taxpayers. It is often accomplished by well-funded, savvy media campaigns.[166] Such a marketing campaign may be effective, but its underlying premise is highly suspect.[167] Indeed, stadium deals often include "revenue bombs, with financial traps like balloon payments on debt in later years and sweeteners [such as initial property tax rebates] to win public support."[168] In the Detroit suburb of Pontiac, the massive 80,000-seat Pontiac Silverdome was built with public funds in 1975, but the promised economic boon to Pontiac never materialized, and the Silverdome now sits abandoned.[169] Eventually, the $1.5 million annual upkeep costs became a burden for taxpayers, not a boon.[170] In November 2009 a Canadian company snatched up the Silverdome and 127 surrounding acres, which had hosted both the NFL Super Bowl and soccer's World Cup, at auction for a mere $583,000, the rough equivalent of a prime parking space in New York City.[171] In 1975 the Silverdome cost $55.7 million to build (about $220 million in 2009 dollars), but the November 2009 sale earned the city "pennies on the dollar."[172] The Tigers' owner, Mike Ilitch appears poised to perform the same trick with another of his sports teams, NHL's Detroit Red Wings.[173] Although Ilitch "enjoy[s] what is considered the best lease arrangement of any NHL team at Joe Louis [Arena]. Olympia Entertainment [owned by Ilitch] leases the hockey arena, Cobo Arena and an adjacent parking structure for $475,000 a year, while the city tosses in free police protection, landscaping and snow removal."[174] The lease is a great deal for the team

[165] Ken Belson, *As Revenue Plunges, Stadium Boom Deepens Municipal Woes*, N.Y. TIMES, Dec. 25, 2009, *available at* http://www.nytimes.com/2009/12/25/sports/25stadium.html ("From New Jersey to Ohio to Arizona, the stadiums were sold as a key to redevelopment and as the only way to retain sports franchises. But the deals that were used to persuade taxpayers to finance their construction have in many cases backfired, the result of overly optimistic revenue assumptions and the recession.").

[166] Bordson, *supra* note 162, at 507.

[167] Waldsmith, *supra* note 159 (noting that, "Taxpayers are persuaded to foot a substantial portion of the bill with promises of increased tax revenues, local economic development, and job creation. Study after study, however, shows that despite their popular appeal, the value of new stadiums to the communities they serve is dubious."); *see also* Belson, *supra* note 165 (describing stadium deal marketing pitches that promise "transformation" that "spur development," after which "the architects of the deals are long gone by the time the bill comes due." (quoting Mark Rosentraub, author of MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT (BASIC BOOKS 1999)).

[168] Belson, *supra* note 165 (quoting Mark Rosentraub, author of MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT (BASIC BOOKS 1999)).

[169] Editorial, *Stadiums Don't Equal Growth*, DET. NEWS, Jan. 7, 2002 (on file with author) ("The dome does have a firm place in Michigan history. It unforgettably illustrated the folly of sinking substantial public funds into a sports facility in the hope of reviving a struggling city. The Silverdome never came close to reaching the revenue figures its promoters from the city of Pontiac had boosted."); *see also* Allen R. Sanderson, *In Defense of New Sports Stadiums, Ballparks and Arenas*, 10 MARQ. SPORTS. L.J. 173, 173-75 (Spring 2000).

[170] Mike Martindale, *Silverdome Sale Price Disappoints*, DET. NEWS, Nov. 17, 2009.

[171] *Id*.

[172] *Id*.

[173] *See* David Josar, *Future of The Joe Uncertain as Red Wings Consider Move*, DET. NEWS, June 24, 2009, at 3A.

[174] *Id*.

owner, to the detriment of the city.[175] But why rest on a great deal if you can get the taxpayers to build you an even bigger, more profitable arena?

In this public-pays arrangement there is an incentive to abandon older, classic stadiums. In *Public Dollars, Private Stadiums: The Battle Over Building Sports Stadiums*, authors Delaney and Eckstein argue that cities with local economic growth organizations, compliant media, and strong and business-oriented mayors tend to have the best chance at pushing through new stadium development.[176] On the other hand, the authors argue, cities with large urban populations tend to mobilize to oppose new stadiums more so than commuter cities.[177] Applying the Delaney and Eckstein factors to the situation in Detroit in the 1990s, every factor leaned in favor of new stadium development in Detroit. But Delaney and Eckstein have a piece of advice for new stadium critics: push for laws to prevent public financing, and mount legal challenges to city spending on stadiums. Indeed, this is just what the Tiger Stadium Fan Club did.

In 1992, the Fan Club attempted a prophylactic measure designed to prevent the Tigers' move by precluding city funds from being used toward any new stadium construction. The Fan Club collected enough signatures to get the measure on the ballot, and with grassroots promotion managed to get the bill passed by a two-to-one margin.[178] In the meantime, the group also managed to get the Stadium placed on the National Register of Historic Places to help make it politically harder to tear the stadium down.

Mike Ilitch, the founder of Detroit's other pizza empire, Little Caesar's Pizza, bought the Tigers from Tom Monaghan shortly after Monaghan's 1992 defeat at the ballot. Before founding Little Caesar's Pizza, Ilitch was a baseball player in the Detroit Tigers' farm system.[179] As he built his wealth, he has created a huge entertainment empire, owning the Tigers, the Detroit Red Wings of the National Hockey League, Olympia Arenas, Inc.,[180] the Fox Theatre, the Detroit Rockers professional soccer team, and a series of local theatres, restaurants and comedy clubs.[181] From the beginning, the powerful Ilitch opposed any use of Tiger Stadium, and insiders say that he does not want any nearby ballpark as potential competition for the Tigers, who now play in their new ballpark close to the site of Tiger Stadium.[182] Ilitch was more politically astute than Monaghan[183] and maneuvered to persuade Michigan's Governor Engler to help him build a new downtown stadium. While the Detroit local ordinance prevented city funds from being applied towards a new stadium, there was no similar provision preventing state funds from being used. However, even though Engler supported Ilitch's new stadium plan, the Michigan Legislature, not the governor, holds the power of the state purse. To get around this, Engler redirected funds received by his executive branch without seeking appropriation by the

[175] *See also* Belson, *supra* note 165 (describing the "lopsided" and "sweetheart leases" afforded to professional teams in Cincinnati).
[176] *See generally* DELANEY & ECKSTEIN, *supra* note 163 (Rutgers University Press 2005).
[177] *Id*.
[178] CAGAN & DEMAUSE, *supra* note 20, at 94.
[179] Bill McGraw, *Ilitch's Anguish*, DET. FREE PRESS, May 2, 1994, at 1A.
[180] The management company for Detroit's Joe Louis Arena and Cobo Arena.
[181] McGraw, *supra* note 179.
[182] Jack Lessenberry, *Detroit's missing the pitch for Tiger Stadium*, TOLEDO BLADE, Mar. 31, 2006.
[183] *See* CAGAN & DEMAUSE, *supra* note 20, at 95 (noting that "two separate city-development directors would lobby hard for a new stadium then leave public office only to turn up on Ilitch's payroll.").

Michigan legislature. In 1995, the Tiger Stadium Fan Club brought suit to prevent the state government's use of these funds to construct a new stadium.[184] The case was premised on the Michigan Constitution's separation of powers doctrine,[185] and addressed the delegation of funds to new stadium construction where those funds were collected by Governor John Engler from local Indian tribes.

Governor Engler and the tribes had negotiated a consent agreement pursuant to the federal Indian Gaming Regulatory Act.[186] The consent agreement resulted in the tribes maintaining their monopoly on casino gaming in the state, while in return the state would receive semi-annual payments from the tribes.[187] Under the agreement, the tribal payments would go to a special state fund called the Michigan Strategic Fund ("MSF"). The MSF is a public corporation managed by the state's executive branch under Governor Engler.[188] A portion of these payments to the states would be redirected to the local government units near the casinos. The Michigan legislature approved the consent agreement.[189] The governor then sought to transfer these MSF funds to the city to help finance the new baseball stadium. The governor relied on a state statute to create the Center for Community Redevelopment, which would "make grants to municipalities" for "public infrastructure including land acquisition and site development for . . . public improvements which are related to a specific identifiable project."[190]

While the Michigan legislature approved the consent agreement which brought in funds from the tribes,[191] the Tiger Stadium Fan Club attempted to block the funds from being appropriated by the governor without further approval from the Michigan legislature. The funds received from the tribes, the Fan Club argued, were "state funds," and thus could only be appropriated by the legislature.[192] The Michigan Constitution's Appropriation's Clause provides that the legislature alone may appropriate state funds,[193] while the Separation of Powers Clause precludes one branch from usurping another branch's powers.[194]

Unfortunately for the Fan Club, the Michigan Court of Appeals found the Governor's actions laudable.[195] The court ruled that the tribal funds constituted "public funds not subject to appropriation."[196] These public funds did not constitute "state funds" under the Michigan

[184] Tiger Stadium Fan Club v. Governor, 553 N.W.2d 7 (Mich. App. 1996).
[185] "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution." MICH. CONST. art. III, § 2.
[186] 25 U.S.C. §§ 2701-2721 (2010).
[187] *Tiger Stadium Fan Club*, 553 N.W.2d at 9.
[188] Engler was for the MSF before he was against it. He originally opposed the fund, calling it "corporate welfare." CAGAN & DEMAUSE, *supra* note 20, at 95.
[189] *Tiger Stadium Fan Club*, 553 N.W.2d at 9.
[190] MICH. COMP. LAWS § 125.2007(q).
[191] *Tiger Stadium Fan Club*, 553 N.W.2d at 9.
[192] *Id*. at 10.
[193] "[N]o money shall be paid out of the state treasury except in pursuance of appropriations made by law." MICH. CONST. art. IX, § 17.
[194] MICH. CONST. art. III, § 2.
[195] *Tiger Stadium Fan Club*, 553 N.W.2d at 12.
[196] *Id*.

Constitution because they were "akin to . . . a grant . . . for a specific purpose."[197] However similar to a "grant" these funds were, they were not technically grants but rather payment of a lawsuit settlement.[198] The court stated that "state funds" were distinct from the funds at issue in *Tiger Stadium Fan Club*, because the revenues at issue were not the result of taxes, fees, gifts or grants to the state, or rents or royalties collected.[199] They were not received as "payment of debts or as penalties,"[200] and they did not stem from the extraction of natural resources.[201] Finally, they did not result "from the sale, relinquishment, waste, or damage of state assets."[202] Instead, "[t]he payments here are gratuitous payments specifically designated for the MSF, not for the state. The MSF is expressly authorized by statute to accept gifts, grants, loans, and other aids."[203] Because the funds did not fall within the ambit of the Appropriations Clause, the court likewise found that the Separation of Powers Clause was not violated.

The *Tiger Stadium Fan Club* ruling came down in 1996 at the same time that a well-funded marketing campaign by Ilitch, along with public officials actively promoting the bill, caused a law to be passed that effectively retracted the 1992 ban on public fund use and created a new public stadium development entity.[204] With state funds and city funds now in play, the city maneuvered to build a new stadium without further legal impediment.[205] The resulting stadium, Comerica Park, was built at a cost of $260 million: $40 million from the city, $40 million from the county, $55 million from the state of Michigan, $66 million from a bank for naming rights, and about $60 million from the Tigers.[206] The Tigers moved into their new den in 1999.

IX. The Fight to Prevent Tiger Stadium's Demolition

With the new stadium built and the team moved, the second phase of the fight to preserve Tiger Stadium was just getting started. The city owned Tiger Stadium and the City Council has authority over city-owned land. The City Council called upon the Detroit Economic Growth Corporation ("DEGC") to evaluate proposals on what to do with the newly-vacant Tiger Stadium. The DEGC is a public/private partnership made up of local businessmen appointed by

[197] *Id*.
[198] *Id*. at 11-12.
[199] *Id*. at 13.
[200] *Id*.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *See* 1948 Mich. Pub. Acts 31 (1996), MICH. COMP. LAWS §§ 123.951-965 (1996).
[205] Ironically, although the move cost the taxpayers dearly, had the city simply renovated the stadium, federal funds could have been directed to the project. Some local governments, including Detroit, are eligible for grants from the National Park Service for historic preservation of nationally registered sites. Beyond grants, there are state and federal tax credits available for historic preservation. *See, e.g.* MICH. COMP. LAWS § 206.266 (2010).
[206] WILLIAM J. V. NEILL, *supra* note 108. The total cost to build the stadium is a matter of debate. Sources disagree on the exact contribution by the Tigers, but all agree that the Tigers' ante was much less than half of the total. *See, e.g.*, Martin J. Greenberg, *Sports Facility Financing and Development Trends in the United States*, 15 MARQ. SPORTS L. J. 93, 123 (2004) (indicating a higher ante by the Tigers).

the mayor.[207] While DEGC's recommendations are given heavy consideration, the City Council retains ultimate decision-making authority on all city-owned property. In short, the DEGC was the reviewing entity, and the City Council was the ultimate decision-maker on the fate of Tiger Stadium. A clear conflict of interest was immediately present: DEGC had already been pushing for complete demolition of the stadium while soliciting commercial retailers.[208] Unsurprisingly, other developers hoping to preserve or renovate the stadium, in whole or in part, found the DEGC hostile to their ideas.[209]

In the interim, while the city was deciding what to do with the site, the City Council could have maintained the structure itself or contracted this out to a security service. Instead the city chose to enter into an agreement with the Tigers whereby the departed team would "maintain" and "provide security" for the old park.[210] As a result, the city retained ownership, and the team would act as the stadium's custodian. Such a delegation of custodian authority begs the question: If the Tigers' owner wished that Tiger Stadium be torn down, what incentive did he have to maintain and protect the stadium? The city paid the Tigers up to $400,000 annually to maintain the stadium,[211] though this consisted essentially of a single security guard.[212] A local preservationist organization offered to maintain the stadium at no cost to the city, but the city preferred to send millions of dollars to one of its most powerful citizens in order to ensure that the stadium's caretaker was the person most interested in its demise. The conflict of interest led to the obvious result: The stadium was encouraged to dilapidate and was not maintained or protected. It was demolition by neglect. Looters stole much of the stadium, and there were problems with standing water, rotting wood, rusting beams, and trees growing in the stadium's cracks.[213]

At about this time a new face emerged in the battle to save Tiger Stadium. Ernie Harwell, who recently passed away on May 4, 2010, first started announcing baseball games in 1948. He gave the play-by-play for the first ever coast-to-coast live telecast of a professional baseball game, which was, incidentally, the famous 1951 pennant playoff match in which Bobby Thompson hit the "shot heard 'round the world."[214] He was so highly valued for his play-by-

[207] The DEGC "serves as the lead implementing agency for business retention, attraction and economic development initiatives in the city of Detroit." Detroit Economic Growth Corp., http://www.degc.org/about.aspx (last visited Sept. 13, 2009). The president of the DEGC is also the mayor's chief development officer. John Gallagher, *Proposal to Demolish Tiger Stadium Hits Bump*, DET. FREE PRESS, July 12, 2007, at 1A.

[208] David Josar, *Tiger Stadium Plan Hits a Snag*, DET. NEWS., July 13, 2007, *available at* http://detnews.com/article/20070713/METRO/707130375/Tiger-Stadium-plan-hits-a-snag.

[209] Curt Guyette, *A Hole in the Heart: Corktown's Lost Field of Dreams*, METRO TIMES, Aug. 6, 2003; Gallagher, *supra* note 207.

[210] Tyler Kepner, *A Former Baseball Cathedral Now Lies Neglected and Decrepit*, N.Y. TIMES, July 10, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0DE6D9153DF933A25754C0A9639C8B63&sec=&spon=&pagewanted=all.

[211] Neil deMause, *Tiger, Tiger Turning Blight*, FIELD OF SCHEMES BLOG, Mar. 14, 2006, http://www.fieldofschemes.com/news/archives/2006/03/2761_tiger_tiger_tur.html.

[212] Jack Lessenberry, *Detroit's Missing the Pitch for Tiger Stadium*, TOLEDO BLADE, Mar. 31, 2006, *available at* http://news.google.com/newspapers?nid=1350&dat=20060331&id=DckwAAAAIBAJ&sjid=aQQEAAAAIBAJ&pg=6886,4452273.

[213] Josar, *supra* note 129.

[214] Mike Brudenell, *Ernie Harwell's Big Ten List*, DET. FREE PRESS, Sept. 13, 2002, *available at* http://www.baseball-almanac.com/legendary/ernie_harwell_top_tens.shtml.

play broadcasting that he became the only broadcaster ever traded for a player.[215] He was the voice of the Tigers from 1960-2002, and a statue of him stands in front of the Tigers' new home, Comerica Park.[216] Despite his statutory presence at the new park and the fact that Harwell welcomed the Tigers' move across town, Harwell vigorously opposed Tiger Stadium's demolition. He hoped to convert it into a museum, to which he was prepared to donate much of his historic baseball memorabilia. His ambitious efforts could not stop the momentum against the stadium. By the time he became active, Tiger Stadium was in its final throes. Proposed development schemes had flooded in, running the gambit of uses, including turning the stadium into condos, an amusement park, a fitness center, a music/sports museum, a kids and amateur sports tournament field, a greeting card company headquarters, a boxing gym, a minor-league baseball field, a gospel music hall, a football field, a Wal-Mart, a bullfighting ring, a rugby stadium, and a jail and police headquarters.[217] But developers who pitched deals to the city report that the city strung them along or simply wouldn't return calls and letters.[218] The City Council vote to demolish the stadium seemed a foregone conclusion.

That the City Council would vote to demolish is unsurprising from an historical standpoint. Historic stadiums, cherished by fans, are often torn down upon construction of new stadiums. In addition to demolishing old stadiums, unbeknownst to some fans many old stadiums have been reconstructed, in whole or in part, south of the border for Mexican baseball teams.[219] For instance, a California Angels grandstand was installed for the Hermosillo Orange Pickers; the Texas Rangers old scoreboard sent to the Ciudad Obregon Yaquis; the Seattle Kingdome's scoreboard now belongs to the Cordoba Coffee Growers; the Kansas City Chiefs' scoreboard went to the Mexicali Eagles; and the Oakland Athletics' Jumbotron went to the Tabasco Olmecas.[220] But for most stadiums, the wrecking ball is the destiny.

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[215] Pat Zacharias, *Ernie Harwell and Tiger Stadium: Two Old Friends*, DET. NEWS, Aug. 22, 1998, *available at* http://apps.detnews.com/apps/history/index.php?id=108.

[216] Harwell was also an ex-Marine and former spokesman for Blue Cross/Blue Shield. His contract "lasted until he is 95, but he has the option to extend – for another 10 years." Jack Lessenberry, *Ernie Harwell Leading Late-Inning Rally to Save Tiger Stadium*, TOLEDO BLADE, Aug. 3, 2007. Ernie Harwell did just about everything in his life. In addition to an illustrious baseball career, he wrote country music for Homer & Jethro's "Thinking Man's Hillbillies" and in 1975 performed a voice-over for the film "One Flew Over the Cuckoo's Nest."

[217] John Gallagher, *Harwell's Plan to Save Tiger Stadium Growing*, DET. FREE PRESS, Aug. 21, 2007, *available at* http://preservedetroit.blogspot.com/2007/08/harwells-plan-to-save-tiger-stadium.html; Tyler Kepner, *A Former Baseball Cathedral Now Lies Neglected and Decrepit*, N.Y. TIMES, July 10, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0DE6D9153DF933A25754C0A9639C8B63&sec=&spon=&pagewanted=all; David Josar, *Stadium Proposals Fell Short*, DET. NEWS, July 19, 2007, *available at* http://detnews.com/article/20070719/METRO/707190382/Tiger-Stadium-proposals-fell-short; John Gallagher, *Tiger Stadium is Eyed as Cop Site*, DET. FREE PRESS, July 16, 2005; CAGAN & DEMAUSE, *supra* note 20, at 102.

[218] Curt Guyette, *A Hole in the Heart: Corktown's Lost Field of Dreams*, METRO TIMES, Aug. 6, 2003; *See also*, John Gallagher, *Proposal to Demolish Tiger Stadium Hits Bump*, DET. FREE PRESS, July 12, 2007.

[219] Joel Millman, *Ballparks Never Die, When Mexico Puts Them Back Together – El Mecano Was in Houston and Called Colt Stadium; Today, It Lives in Tampico*, WALL ST. J., Sept. 5, 2000, at A1 ("In an age of instant nostalgia, when old stadiums are demolished so millions of dollars can be spent putting up 'retro' ballparks, Mexico still treasures Major League castoffs. Today, 30 years after El Mecano ceased to be in the U.S., a thriving trade in stadium parts continues to serve fans south of the border.").

[220] *Id*.

In July 2007 the Detroit City Council debated whether to approve Mayor Kilpatrick's[221] demolition plan. Ernie Harwell's presence and support for the stadium brought clout. Harwell received a warm welcome from council members, and he asked that the Council give the preservationists more time. In the end, even Harwell could not move the Council, which voted in favor of demolition, 5-4, with Motown-legend-turned-councilwoman Martha Reeves[222] casting the deciding vote.[223] However, at the same meeting, the city balked, voting not to transfer the stadium's land title to the DEGC, which was given the green light to demolish the building to make way for retail and residential buildings.[224] The land title vote briefly delayed the inevitable. As part of the concessions, the city and the DEGC agreed in a Memorandum of Understanding to allow a local preservationist group, the Old Tiger Stadium Conservancy ("Conservancy"),[225] to get first dibs at putting up the money for a project that would include retail and residential, but that would also preserve the remnants of the Navin Field structure that Tiger Stadium was built on top of.[226] As part of the arrangement, Harwell agreed to support a new, reduced plan to save as much of the stadium as possible. He agreed to join the Corktown-based Conservancy as a board member. These last-minute maneuvers sought to preserve 3,000 seats, both dugouts, a locker room, and the playing field itself, but only if the group could arrange for $10 million in financing.[227] The Conservancy set about raising money.

In October 2007, Tiger Stadium's most valuable treasures were auctioned off. Seats, tables, signs, washtubs, lockers, World Series banners, and even urinals were sold, raising money for demolition.[228] The stadium was methodically hollowed out. The Old Tiger Stadium Conservancy submitted its development plan to save the five percent of the stadium that constituted the old Navin Field ground and structures, mostly dating from 1912. The Conservancy's final plan would save the original 1912 grandstand, the 1923 upper deck, the

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[221] Mayor Kilpatrick is perhaps better known for the spectacular conclusion to his political career, which came after sending nearly 14,000 text messages in four months to a woman other than his wife, presumably not about the fate of Tiger Stadium. The scandal was a nail in the coffin for Detroit's youngest ever mayor. Jim Schaefer & M.L. Elrick, *Kilpatrick, Chief of Staff Lied Under Oath, Text Messages Show*, DET. FREE PRESS, Jan. 24, 2008, at A1, *available at* http://www.freep.com/article/20080124/NEWS05/801240414/
Kilpatrick--chief-of-staff-lied-under-oath--text-messages-show.

[222] Martha Reeves became famous leading Martha and the Vandellas during Motown's heyday. Their hits include "Dancing in the Street" (1964), "Nowhere to Run" (1965), and "(Love is Like a) Heat Wave" (1963).

[223] Editorial, *Struck Out*, METRO TIMES, Aug. 1, 2007. Council President Ken Cockrel Jr. said that it was "one of the most difficult decisions of his career." *Id*.

[224] *Id*. Although their actions supported demolition for Tiger Stadium, the DEGC has supported preservation in other instances. George W. Jackson, Jr., *Preservation is Part of the Picture*, MODEL D, Aug. 11, 2009, http://www.modeldmedia.com/features/jackson20309.aspx.

[225] Harwell had originally supported a different stadium preservation group, but out of necessity joined the Old Tiger Stadium Conservancy when it became clear that the Conservancy's scaled-back plan was the only option that had a chance with the City Council. *Harwell Scales back Tiger Stadium Plan, Field of Schemes* (Sept. 16, 2007) (http://www.fieldofschemes.com/news/archives/2007/09/3229_harwell_scales.
html.

[226] David Josar, *Tiger Stadium Preservation Plan Gets Boost*, DET. NEWS, Sept. 11, 2007, *available at* http://www.detnews.com/apps/pbcs.dll/article?AID=/20070910/UPDATE/709100436/1129/SPORTS0104.

[227] *Id.*

[228] *Id*.

dugouts, clubhouses, broadcast booth, and, of course, the historic playing field itself.[229] Thus, the 1930s Tiger Stadium shell would be demolished, leaving the earlier structures that Tiger Stadium had been build upon. The Conservancy's development plan to save the original Navin Field components was approved by the city. In late 2008, the city demolished most of Tiger Stadium, leaving the Navin Field structures for the most part undisturbed. The Conservancy began to raise donations from fans to make escrow payments, and meanwhile prepared to receive millions in federal and state tax credits.[230]

The group found investors and arranged for tax credits, but had already struggled to meet escrow and plan deadlines. Behind the scenes, the DEGC was ignoring investors interested in investing in the stadium's rehabilitation.[231] Finally, in an unpublicized meeting on June 1, 2009 the Economic Development Corp., an extension of the DEGC, voted to allow the immediate demolition of the remaining Navin Field structures.[232] The Conservancy was caught by surprise[233] and scrambled to get a Temporary Restraining Order on June 5 to halt the demolition.[234] Despite the restraining order, demolition "resumed and later intensified until a supporter jumped the fence and gave the [temporary restraining] order to the demolition operator."[235] "The demolition seemed to be intended to cause the most damage . . . in the shortest time."[236] Then on June 8, 2009, a judge ruled that final demolition could proceed.[237] The dream to preserve Navin Field was over and the remaining stadium was demolished.

As of September 2009, a visitor to the corner of Michigan Ave. and Trumbull St. would find a pile of rubble surrounding a lone elevator shaft reaching skyward. The city has no alternative plans for the property, and will lose the $18 million secured thus far in federal earmarks, grants and tax credits.[238] The funds secured by the Conservancy to support the project will be returned to donors.

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[229] *Breaking: Updated Statement on Funding Needs & Resources*, OLD TIGER STADIUM CONSERVANCY BLOG, Sept. 25, 2008, http://savetigerstadium.wordpress.com/2008/09/25/breaking-updated-statement-on-funding-needs-resources.

[230] The final amount the city required was about $15 million, $4 million of which would come from a federal earmark, and $6 million from various tax credits, including brownfields and historic preservation tax credits. *Breaking: Updated Statement on Funding Needs & Resources*, OLD TIGER STADIUM CONSERVANCY BLOG, Sept. 25, 2008, http://savetigerstadium.wordpress.com/2008/09/25/breaking-updated-statement-on-funding-needs-resources.

[231] Nancy Kaffer, *Conservancy Gets Restraining Order to Stop Tiger Stadium Demolition*, CRAIN'S DET. BUS., June 5, 2009.

[232] Mary Kramer, *Who are the Winners in Tiger Stadium Tear-Down?*, CRAIN'S DET. BUS., June 5, 2009.

[233] *Id*.

[234] Nancy Kaffer, *Conservancy Gets Restraining Order to Stop Tiger Stadium Demolition*, CRAIN'S DET. BUS., June 5, 2009, *available at* http://www.crainsdetroit.com/article/20090605/FREE/906059989#.

[235] *Statement of the Old Tiger Stadium Conservancy Regarding the Recent Demolition of Tiger Stadium*, OLD TIGER STADIUM CONSERVANCY BLOG, (June 19, 2009), http://savetigerstadium.wordpress.com/2009/06/19/statement-of-the-old-tiger-stadium-conservancy-regarding-the-recent-demolition-of-tiger-stadium.

[236] *Id.*

[237] Margaret Foster, *Tiger Stadium Demolition Resumes*, PRESERVATION MAGAZINE, June 9, 2009.

[238] *Id.*

X. Lessons Learned for Ballpark Preservationists

season's end
every pennant on the stadium roof
pointing south
-Ed Markowski [239]

More so than any other sport, baseball is a game that each generation passes along to the next. It seems odd that revered stadiums would be so readily destroyed. But the reasons they have less to do with the will of the community, and more to do with the relationship between team owners and municipal governments. While each community is unique, ballpark preservationists would be wise to study the losing battle in Detroit, and take away three important lessons.

Lesson One: Use political clout and public favor when it is available to push for a local ordinance to prevent public funds from being used towards a new stadium. This preventative maintenance includes pushing for city and state laws to this effect. Studies indicate that the new stadium momentum generated by wealthy owners and complying politicians can form a juggernaut to constructing a new stadium.[240] Studies also show that publicly-financed stadiums are a bad deal.[241] Ordinances should be pushed through locally-elected bodies early, when the timing is most favorable, rather than waiting until the new stadium promoters establish well-marketed momentum for their project. Baseball park preservationists should reach beyond their sports fan ranks to public interest organizations mindful of the public till. Sweet deals for team owners means wasted taxpayer funds, which ought to galvanize entire communities, but only if the message is conveyed beyond the sports fan community.

Lesson Two: Make sure your ballpark is on the state and national registers. Although this will not prevent their ultimate demise, it can make demolition politically more difficult. At the very least it can help bring attention when a ballpark is threatened. Further, there are federal funds (and often, accompanying state funds) available for historic preservation of listed sites. For this reason, registration has the added benefit of dangling money in front of owners to preserve registered stadiums, and making it financially less appealing to build new stadiums.

Lesson Three: Make sure your site is protected by a local historic district. Local protection is a formidable tool available for preservationists. A watchful local commission can prevent unfavorable renovations or demolition. A commission could stand up to political pressure, and can occasionally force an owner to prevent demolition by neglect. Maneuvering a stadium into an historic district should be done as a preventative measure. The most politically advantageous

[239] Ed Markowski, F/K/A (David Giacalone ed.), http://blogs.law.harvard.edu/ethicalesq/baseball-haiku-page (last visited June 19, 2010).
[240] *See generally* DELANEY & ECKSTEIN, *supra* note 163 (Rutgers University Press 2005).
[241] Waldsmith, *supra* note 159 (citing studies).

moment could be in the afterglow of a team championship. If successful in getting listed, stadium preservationists should monitor the commission, particularly in the appointment of commissioners.

Protecting America's heritage should include preservation of the nation's ageing baseball cathedrals. As inventor of the game, and keeper of its traditions, the country would be wise to learn the lessons of the Roman Empire. The empire promulgated some of the first historic preservation laws, and as a result of their continuous protection through the centuries, Rome retains some of the world's most spectacular historical treasures. In a sense, preservation laws create a legally recognized public interest in a privately owned building. Comparatively, a community's collective attachment to a sports stadium visited by millions is much greater than the community's interest in the façade of a private home. Yet stadiums are often unprotected by historic preservation law. But by prudently taking the steps outlined in this article at opportunistic moments, preservationists and sports fans can help ensure that their local stadiums have the best chance to continue to grace their community.

YOU ARE WHAT YOU EAT, WHICH IS HOPEFULLY SOMETHING:

MINIMUM WEIGHT REGULATIONS FOR HIGH SCHOOL AND INTERCOLLEGIATE WRESTLERS

Timothy Fiorta[*]

I. Introduction

> *Weight has always been a problem in certain sports. Jockeys can literally grow out of their jobs. Gymnasts have become anorexic, eating nothing but green salads. The cyclist Gregory LeMond, who won the Tour de France three times, said an inability in later years to lose five pounds hurt him severely in climbing mountains. Swimmers and figure skaters have been slaves to the scale.*
>
> *As in boxing and the martial arts, wrestling competition is conducted in weight classes. Wrestlers forever seem to be trying to lose weight to compete in lighter classes, and they can do it easily within reason. But when they try to lose too much too soon, the results can be fatal.* [1]

Amateur wrestling at the high school and collegiate levels does not garner a great deal of popular attention.[2] While just about any sports fan can rattle off at least a few names from the Mitchell Report[3] on steroids in baseball, very few people would be able to pick Cael Sanderson out of a police lineup, winner of four national wrestling titles at Iowa State—compiling a career record of 159–0 while in college—and gold medal champion at 190 pounds in the 2004 Athens Olympics.[4] While a tragedy in intercollegiate wrestling briefly thrust the sport into the national

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[*] Tim Fiorta is currently an Associate at Jones Day in Cleveland. Tim is a proud graduate of the University of Notre Dame (B.A. 2006, J.D. 2009). He would like to thank Professor Ed Edmonds and the Sports and Entertainment Law Journal staff for their assistance on this article, as well as his family for its positive and unwavering support.

[1] Frank Litsky, *Wrestling; Collegiate Wrestling Deaths Raise Fears About Training*, N.Y. TIMES, Dec. 19, 1997, *available at* http://query.nytimes.com/gst/fullpage.html?sec=health&res= 9505eeda1e3ff93aa25751c 1a961958260.

[2] In 2004, the NCAA wrestling national championship meet boasted a television ratings *all-time record* of 0.6 (a little over 500,000 households nationally). NCAA, *Wrestling Championship Sets TV Ratings Record*, Mar. 29, 2004, http://www.ncaa.org/wps/ncaa?ContentID=21035. In contrast, the first weekend of the NCAA basketball tournament in 2008, comprising the rounds before the Sweet Sixteen, earned a rating of 4.8 (about 7.5 million viewers), a nine percent *dip* from the previous year. Chris Purcell, *CBS' March Madness Ratings Down*, TVWEEK, Mar. 30, 2008, *available at* http://www.tvweek.com/news/2008/03/ cbs_march_madness_ratings_down.php. The 2007–08 BCS football bowl season saw the national title game between Ohio State and LSU receive a 17.4 rating, and even the lowly New Orleans Bowl between Florida International University and Memphis eked out a rating of 1.63. BCSFootball.org, *TV Ratings*, http://www.bcsfootball.org/news/story?id=4819384 (last visited Mar. 15, 2009).

[3] George J. Mitchell, Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball, Dec. 13, 2007, *available at* http://files.mlb.com/mitchrpt.pdf.

[4] Wikipedia, *Cael Sanderson*, http://en.wikipedia.org/wiki/Cael_Sanderson (last visited Mar. 15, 2009); *see also* CaelSanderson.com, http://www.caelsanderson.com (last visited Mar. 15, 2009).

spotlight in 1997,[5] wrestling has since retreated back into relative obscurity in recent years.[6] This paper, then, seeks to bring scholarship on wrestling up to date.

Part II provides background on the culture of weight loss in wrestling, outlining prevalent weight management techniques and discussing the potential health impact of weight-cutting on young athletes. Part III traces the regulatory actions taken by the National Collegiate Athletic Association (NCAA) and state high school athletic associations since 1989, culminating in the National Federation of State High School Associations' (NFHS) implementation of weight management programs within its rules. Part IV, then, analyzes the effectiveness of these weight management programs, ultimately calling for a more systematic study of compliance with these regulations at the high school level, as well as increased efforts to educate coaches, parents, athletic trainers, and athletes about proper nutritional health.

II. Background: Weight-Cutting Culture

In every sport, athletes seek a competitive edge. High school football players chug protein shakes before bed in order to add bulk. High school baseball players unload hundreds of dollars on the latest glove or bat to hit the market every spring. To gain an edge in wrestling, participants cut weight. A lot of weight.[7]

In theory, wrestlers believe cutting weight will provide an advantage for two reasons: "First, it's better to be the heaviest wrestler in a class than the lightest. Second, since so many wrestlers cut pounds to make weight, [those wrestlers who do not cut weight are] essentially wrestling people with the muscle mass of a heavier opponent."[8] Put another way, the wrestler with a natural weight of 145 pounds has no desire to compete against opponents who weighed over 180 pounds just months before the season and cut down to 145 for competition; this athlete naturally feels a strong motivation to move down a few weight classes and play the part of the larger-framed bully at 125 pounds.[9] Add in the social pressures of wanting to help one's team

[5] *See infra* notes 26–38 and accompanying text.

[6] There is a distinct drop-off in literature following the 1997 deaths and regulatory response from the NCAA. *See infra* Part II. While this paper only skims the surface of weight issues in wrestling, hopefully others will fill in the gaps left by the present analysis.

[7] *See, e.g.*, Casey Olson, *Wrestling with Weight*, FED. WAY MIRROR, Feb. 17, 2004, *available at* http://www.pnwlocalnews.com/south_king/fwm/sports/19916599.html; *see also* Cara Caulfield, *Standley Lake Wrestlers Struggle to Make Weight*, Feb. 17, 2009, http://denver.yourhub.com/Westminster/ Stories/Education/High-School/Story~581256.aspx ("I was trying to get from 130 [pounds] to 112 . . . . At 119 I got nose bleeds from not having enough iron.").

[8] Easha Anand, *Cutting Weight to Make the Cut*, SILVER CHIPS ONLINE, Feb. 20, 2004, http://silverchips.mbhs.edu/story/2954.

[9] This belief is mistaken, however. *See* Robert A. Opplinger et al., *ACSM Position Stand On Weight Loss In Wrestlers*, 28 MED. SCI. SPORTS EXERC. (1996) ("Wrestlers practice these weight loss techniques believing their chances of competitive success will increase. Ironically, 'weight cutting' may impair performance and endanger the wrestler's health. . . . The combination of food restriction and fluid deprivation creates a synergistic, adverse physiologic effect on the body leaving the wrestler ill-prepared to compete. . . . In short, weight cutting appears to adversely influence the wrestler's energy reserves and fluid and electrolyte balances.").

succeed,[10] and a powerful argument for weight-cutting can be made from a competitor's perspective.

In terms of how weight-cutting is actually done, the details of the process are not for the faint of heart. Wrestlers do not go on what most people consider to be "diets," avoiding sweets and snacks and perhaps opting to take the stairs instead of riding the elevator at the office. Rather, while in the middle of intense physical training, wrestlers essentially stop eating.[11] Additionally, massive dehydration is employed in order to reduce water weight. As a high school wrestler in Ohio, I personally witnessed a teammate who—in an effort to maintain his weight at 119 pounds, down from nearly 140 pounds prior to the season—consistently wore three-to-four layers of sweaters to school and carried around a small plastic cup throughout the day in order to constantly spit saliva rather than swallow.

While this stunning lack of nutrition would hardly sustain a completely sedentary individual, wrestlers exercise vigorously throughout this entire process, running, weightlifting, and cycling in addition to grueling practices that last for several hours every day, all while wearing several layers of sweats to maximize perspiration.[12] For many years and arguably still today, losing twenty pounds in a week was seen not only as acceptable behavior, but as desirable self-sacrifice, signifying true dedication to team success.[13] Trips to emergency rooms for dehydration were not uncommon, and such events were generally dismissed as a sign of an individual's weakness rather than an indication that something was awry in the training program.[14] In a practical sense, dropping fifteen to twenty percent of one's total body weight is no small matter, particularly when that drop is from 120 to 103 pounds, but such practices were

[10] *See* Leonard F. Marquart & Jeffery Sobal, *Weight Loss Beliefs, Practices, and Support Systems For High School Wrestlers*, 15 J. ADOLESCENT HEALTH 410 (1994) (discussing the influence of coach and teammate pressure as a motivating factor to cut weight for many high school wrestlers).

[11] *See, e.g.*, Anand, *supra* note 8 (describing a high school wrestler whose lone meal for a day was "a cup of plain lettuce").

[12] In addition, increasingly popular bodybuilding supplements such as creatine exacerbate the health risks of rapid weight loss by placing even further strain on the body. *See* Litsky, *supra* note 1 ("Wrestlers use [creatine] to recover more quickly from workouts and help develop muscle bulk, but the abuse of creatine without sufficient water intake can cause the body to dangerously overheat."). Because creatine causes the body to retain water, this poses obvious risks when used by individuals who are avoiding hydration at any cost. *See id.*

[13] Rob Prebish, a high school wrestling coach and author of *The Solitary Wrestler*, admitted to cutting nearly twenty pounds every week to make his weight class when he competed in high school and college. *See* Jason Bryant, *Q&A With Rob Prebish: Author of "The Solitary Wrestler,"* INTERMAT, http://209.183.221.249/articles/bryant21.aspx (last visited Mar. 15, 2009).

[14] *See, e.g.*, David Fleming, *Wrestling's Dirty Secret: The NCAA Should Be Called On the Mat After Three Collegians Died Trying to Shed Pounds*, SPORTS ILLUSTRATED, Dec. 29, 1997, *available at* http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1011763/index.htm ("Once, after cutting sixteen pounds in two days . . . —through starvation and dehydration—I was hospitalized in Rochester, N.Y., with a clogged salivary gland that had swollen to the size of a grapefruit. To prevent that from happening again, my coach said upon my return to campus that he was putting me on the Jesus Christ diet. 'Forty days and forty nights in desert conditions without food or drink,' I remember him saying. 'That ought to get you down to weight.'"); *see also* Bryant, *supra* note 13 ("I almost died in 1991 cutting weight for a college match. It was one of the scariest things I have ever dealt with. Imagine lying in the emergency room with an IV in your arm, listening to the doctor basically chew you out for destroying your body. I almost died!" (quoting Rob Prebish)).

considered to be routine for many years.[15] As late as 2004, the following account was written in a high school student newspaper, detailing the day-to-day life of a wrestler on the school's team:

> In the next forty-five minutes, Coleman will sweat off five pounds. He will climb sixty flights of stairs on nothing but a tablespoon of peanut butter and a mouthful of water, gargled during yesterday's practice to convince his throat he's getting rehydrated, then spit out to prevent water weight. At 3:30 p.m., the naturally 150-pound athlete will be 135 pounds. Coleman will make weight for his meet; he always has.[16]

The ubiquity of rapid and intensive weight loss in wrestling has led some to conclude that it is "inherent" in the sport.[17] In other words, when someone joins a wrestling team, it is just assumed that he will drop however many pounds necessary to fill a weight class for the squad.[18] There is simply no shock value for a 130-pound high school student—whose body is still very much in the process of growing and maturing—to starve himself into the 103-pound weight class. To the contrary, the willingness to put oneself through torture in order to make a lower weight is viewed as a measure of one's toughness and dedication to the team; cutting weight has become, in a sense, "a macho badge of honor."[19]

The above description of the pervasiveness of weight-cutting in wrestling is not meant to suggest that no one ever objected to the practice until the very recent past.[20] Indeed, there were those who tried to warn of the intense danger of the practice. In a 1996 study assessing the body

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[15] Because wrestlers are in a constant battle to stay eligible for a certain weight class, small hiccups in routine can be devastating in attempts to cut weight before competition. In January of 2009, wrestling coaches in Altoona, Pennsylvania complained that snow days were throwing off training regimens at schools that cancel practices when school is not in session. *See* Todd Irwin, *Winter Weather Creates Havoc With Weight Cutting*, ALTOONA MIRROR, Jan. 13, 2009, *available at* http://www.altoonamirror.com/page/content.detail/id/515047.html?nav=816&showlayout=0 ("Whenever the schedule gets moved around and you're not sure when you're going to wrestle because of the weather, it makes it tough to hold your weight and make sure your weight is where it needs to be . . . ."). This further illustrates the point that weight-cutting is a constant battle, and it is still an issue very much on the minds of coaches and participants even today; when reducing one's weight so severely, one missed day of intensive training can disrupt the entire process.

[16] Anand, *supra* note 8.

[17] *See* Alexander J. Pal, Hungry For Victory: Why High School Wrestling Coaches Should Not Be Held Liable for Injuries Resulting from Weight Loss 10–13 (2008) (unpublished comment), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=alex_pal (arguing that weight-cutting is an inherent part of wrestling, and thus the risks associated with weight-cutting are assumed by participants in the sport).

[18] *See* Marquart & Sobal, *supra* note 10.

[19] Fleming, *supra* note 14; *see also* ROB PREBISH, THE SOLITARY WRESTLER (2004), *available at* http://www.jbeonlinebooks.org/wrestling/sample.htm ("Until nine years ago [in 1997], the rubber suit was simply a much needed part of the wrestler's wardrobe. Extra workout sessions in searing heat were the norm. Starving before weigh-ins was simply a test of intestinal fortitude. If you did not cut a lot of weight for wrestling, you were not tough enough.").

[20] In fact, wrestling's "dirty little secret" has been fairly well known for many years. *See* Robert A. Oppliger, Suzanne A. Nelson Steen, & James R. Scott, *Weight Loss Practices of College Wrestlers*, 13 INT'L J. SPORT NUTRITION EXERC. METABOLISM 29, 29 (2003) ("In 1967, a banner headline on the front page of the Des Moines, Iowa Register news proclaimed 'Health Peril in Wrestling.' The 'health peril' referred to the practice of losing weight for competition, 'cutting weight.'") (internal citation omitted).

composition of high school wrestlers,[21] Dale Wagner recommended that minimum weight classes be put in place to cap the amount of weight competitors could lose over the course of a season, thus increasing overall physical well-being and decreasing the risk of serious injury.[22] The American College of Sports Medicine (ACSM) also published a position paper in 1996, detailing the prevalent methods and scope of wrestling weight loss[23] and describing the wide-ranging dangers that could result from such behavior.[24]

Unfortunately, these words of warning were not heeded,[25] and the issue of weight loss did not catch the public's eye until three collegiate wrestlers died within a span of just a few weeks in 1997.[26] Jeff Reese, a wrestler at the University of Michigan, was attempting to rapidly lose seventeen pounds prior to competition.[27] He worked out for two hours in a rubber suit in a room with the temperature cranked up to ninety-two degrees.[28] His official cause of death was listed as rhabdomyolysis, "a cellular breakdown of skeletal muscle under conditions of excessive exercise, which, combined with dehydration, resulted in kidney failure and heart malfunction."[29] Joe LaRosa, a wrestler at the University of Wisconsin-La Crosse, also died after a stationary bike workout performed in a steam room while wearing a rubber suit.[30] His body temperature reached 108 degrees.[31] Billy Saylor of Campbell University suffered a similar fate under nearly identical circumstances.[32] Despite whatever causes of death were listed on the certificates produced by the coroner, these three young men all died from the self-induced torture of attempting to cut weight for wrestling. And all of this occurred within thirty-three days.[33]

While these were the first deaths ever recorded since wrestling became an NCAA sport in 1928,[34] the proximity of the events made the prevalence of the weight-cutting problem very clear to even casual observers of the situation, and the public outcry was swift and fierce. Major

[21] *See* Dale R. Wagner, *Body Composition Assessment and Minimal Weight Recommendations For High School Wrestlers*, 31 J. ATHLETIC TRAINING 262 (1996).
[22] *See id.* at 264–65.
[23] *See* Opplinger et al., *supra* note 9.
[24] *See id.* Beyond damage to "energy reserves and fluid and electrolyte balances," the ACSM noted the potential—albeit non-conclusively—that "'weight-cutting' practices may also alter hormonal status, diminish protein nutritional status, impede normal growth and development, affect psychological state, impair academic performance, and have severe consequences such as pulmonary emboli, pancreatitis, and reduce immune function." *Id.* (internal citations omitted).
[25] Wrestlers' unawareness of the seriousness of the issue stems in part from the tendency of young men in the prime of their athletic careers to feel a certain sense of invincibility. *See* Mike Viscardi, *Weight Issues In Wrestling*, VANDERBILT HEALTH PSYCHOLOGY, http://www.vanderbilt.edu/AnS/psychology/health_ psychology/Weight-Wrestling.htm (last visited Mar. 15, 2009) ("'They [wrestlers] think they are indestructible . . . .' Wrestlers believe that it is mind over body; they can accomplish anything and nothing bad will ever happen to them." (quoting legendary wrestling competitor and coach Dan Gable)).
[26] *See* John Marcus, *Death of Wrestlers Leads to New Training Rules*, TIMES HIGHER EDUC. (Apr. 3, 1998), http://www.timeshighereducation.co.uk/story.asp?storyCode=106630&sectioncode=26.
[27] *See* Viscardi, *supra* note 25.
[28] *See id.*
[29] *See id.*
[30] *See id.*
[31] *See id.*
[32] *See id.*
[33] *See* Fleming, *supra* note 17.
[34] *See* Marcus, *supra* note 26.

national media outlets, ranging from *Sports Illustrated*[35] to the *New York Times*,[36] published articles detailing the gruesome events and chastising the weight-cutting practices that had been taking place under the media radar in wrestling rooms for years. Scientific studies were funded to investigate the weight loss behavior of wrestlers,[37] and coaches were closely scrutinized for improper influence on competitors regarding their weight. Attention for wrestling had never been so intense—save, perhaps, in ancient Athens or Rome—but this was certainly not the type of attention wrestling officials wanted, particularly in light of the recent decline in participation stemming from college program cuts occurring steadily since the enactment of Title IX in 1972.[38]

III. Regulatory Response

To its credit, following the tragedies of 1997, the NCAA acted quickly and decisively in regulating weight loss in collegiate wrestling. Taking its cue from a policy paper published by the ACSM,[39] the NCAA imposed a number of regulations designed to curb unsafe weight-cutting

[35] *See* Fleming, *supra* note 14.

[36] *See* Litsky, *supra* note 1.

[37] *See* Kathleen S. Dale & Daniel M. Landers, *Weight Control in Wrestling: Eating Disorders or Disordered Eating?*, 31 MED. SCI. SPORTS EXERC. 1382 (1999); Randle R. Wroble & Donald P. Moxley, *Acute Weight Gain and Its Relationship to Success in High School Wrestlers*, 30 MED. SCI. SPORTS EXERC. 949 (1998). This is not to suggest that such studies were not conducted in past years, but the tragic events of 1997 certainly led to a spike in capital invested in the issue.

[38] *See* John Irving, Opinion, *Wrestling With Title IX*, N.Y. TIMES, Jan. 28, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C00E2DB1339F93BA15752C0A9659C8B63 ("In 1982, there were 363 N.C.A.A. wrestling teams with 7,914 wrestlers competing; in 2001, there were only 229 teams with fewer than 6,000 wrestlers. Yet, in that same period, the number of N.C.A.A. institutions has increased from 787 to 1,049.").

[39] *See* Opplinger et al., *supra* note 9. The recommendations of the ACSM were as follows:

1. Educate Coaches and wrestlers about the adverse consequences of prolonged fasting and dehydration on physical performance and physical health.
2. Discourage the use of rubber suits, steam rooms, hot boxes, saunas, laxatives, and diuretics for "making weight."
3. Adopt new state or national governing body legislation that schedules weigh-ins immediately prior to competition.
4. Schedule daily weigh-ins before and after practice to monitor weight loss and dehydration. Weight lost during practice must be regained through adequate food and fluid intake.
5. Assess the body composition of each wrestler prior to the season using valid methods for this population. Males 16 yr and younger with a body fat below 7% or those over 16 yr with a body fat below 5% need medical clearance before being allowed to compete. Female wrestlers need a minimal body fat of 12%–14%.
6. Emphasize the need for daily caloric intake obtained from a balanced diet high in carbohydrates (>55% of calories), low in fat (<30% of calories) with adequate protein (15%–20% of calories, 1.0–1.5 $g \cdot kg^{-1}$ body weight) determined on the basis of RDA guidelines and physical activity levels. The minimal caloric intake for wrestlers of high school and college age should range from 1700 to 2500 $kcal \cdot d^{-1}$, and rigorous training may increase the requirement up to an additional 1000 calories per day. Wrestlers should be discouraged by coaches, parents, school officials, and physicians from consuming less than their minimal daily needs. Combined with exercise, this minimal caloric intake will allow for gradual

practices by its athletes. These measures included (1) banning the use of saunas[40] and rubber (and other impermeable) suits,[41] (2) increasing weight allowances,[42] and (3) moving weigh-in times closer to matches.[43]

While the banning of rubber suits and saunas as weight loss tools are the most obvious safety measures taken by the NCAA in terms of their impact, the policy with the greatest effect on athletes' weight management decisions has arguably been shifting weigh-in times closer to matches.[44] Traditionally, wrestlers were weighed in at tournaments upwards of twenty hours before competition was to begin (often the night before, for ease of administration).[45] This allowed athletes an opportunity to gorge on food immediately prior to the competition in an effort to regain much-needed strength before a match.[46] Faced with the prospect of having to wrestle only two hours after weighing in, however, a wrestler is less likely to emaciate himself for fear of being weakened and slow on the mat.[47]

Another important element of weight management regulation has been the establishment of a minimum weight class for all student-athletes, to be determined at the beginning of each season.[48] This allows for some gradual weight loss over the course of the season but imposes firm limits on how much weight can be lost each week until the minimum allowable weight is reached. While the determination of minimum weight is somewhat technical, high school coach Rob Prebish has stated the process rather straightforwardly:

> The NCAA has specific guidelines for athletes to follow in order to determine [minimum weight]. The first step . . . is to determine the wrestler's body fat percentage while in a fully hydrated state. This means all athletes must have a urine specific gravity test to ensure that they meet the maximum specific gravity for a hydrated wrestler of 1.020. . . . If the wrestler's urine tests above

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> weight loss. After the minimal weight has been attained, caloric intake should be increased sufficiently to support the normal developmental needs of the young wrestler.

Id. (internal citations omitted).

[40] *See* Marcus, *supra* note 26.

[41] *See id.*

[42] *See* Olson, *supra* note 7 ("A seven-pound weight allowance has been added to each class, an increase from the previous one pound allowance. This means that a wrestler in a 118-pound class can actually weight up to 125 pounds.").

[43] *See* Marcus, *supra* note 26; Olson, *supra* note 7.

[44] *See* Olson, *supra* note 7 (arguing that the weigh-in rule change would have the greatest impact on weight management decisions of wrestlers).

[45] *See id.*

[46] *See* Marcus, *supra* note 26. In reality, the perception that the human body can recover this quickly is mistaken. *See* Opplinger et al., *supra* note 9 ("Wrestlers hope to replenish body fluids, electrolytes, and glycogen in the brief period (30 min–20 h) between the weigh-in and competition. However, reestablishing fluid homeostasis may take 24–48 h; replenishing muscle and glycogen may take as long as 72 h, and replacing lean tissue may take even longer.") (internal citations omitted).

[47] *See* Olson, *supra* note 7 ("'With less recovery time after weight-in, a person who is using his head knows if he has to cut too much weight, he's not going to perform on the mat.' This change should severely reduce the frantic, last minute attempts to drop weight using the dehydration measures." (quoting Marty Benson, playing rules liaison to the NCAA Wrestling Rules Committee)).

[48] *See* Olson, *supra* note 7.

> 1.020 specific gravity, no tests to determine percent body fat may continue because the wrestler is considered dehydrated. . . . If the wrestler's urine specific gravity meets the hydration standard, the trainer will proceed with the program. The wrestler will step on a scale and have the weight recorded to the nearest tenth of a pound.
>
> The second step to determine the wrestler's [minimum weight] is to measure body density, or body fat. . . . Once this has been completed, the number of weeks of weight loss will be determined, as well as the amount of weight that can be lost per week. The amount of weight loss can only reflect 1.5% of total weight per week. An equation will be used to determine the athlete's [final] Minimum Wrestling Weight (MWW).[49]

The most intriguing part of the establishment of a minimum weight is the hydration requirement at the time of weigh-in. This ensures that wrestlers do not simply push their drastic weight reduction strategies further back into the preseason in order to show up emaciated at the season's initial weigh-in, thus making the program entirely ineffective. Instead, if a wrestler attempts to establish minimum weight in a dehydrated state, he simply cannot weigh-in that day.[50] While the measure used to determine whether an athlete is properly hydrated has been criticized by some as casting an overly broad net,[51] the overall value of ensuring hydration at the season's initial weigh-in can hardly be denied.

High schools have followed the same basic regulatory structure, although the path taken to get there was a bit more winding than in the case of the NCAA. In reality, the NCAA actually borrowed its regulations from a few states that had already established weight management programs prior to 1997. Wisconsin was the first state to implement such a program in 1989, requiring body fat measurements for wrestlers and imposing maximum weekly weight loss amounts at 1.5% of total body weight.[52] Michigan followed in 1995 with a broad regime that "offered nutritional education to coaches, [and established] a skin fold test for body fat that would not allow any wrestler with less than 7% body fat to compete unless authorized by a physician . . . ."[53] Indeed, the programs in these states—and particularly the program in Wisconsin—provided the impetus for many of the scientific studies warning of the dangers of extreme weight-cutting measures published prior to the 1997 tragedies.[54] In the area of wrestling

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[49] *See* PREBISH, *supra* note 19.

[50] *See id.*; *see also* Olson, *supra* note 7.

[51] *See* PREBISH, *supra* note 19 ("I know my athletes are hydrated; I make sure they have water bottles with them during practice and that they have ample opportunity to get water if they need it. We work hard during practice and my athletes sweat, but they do replace most of their fluids. No one complains of being tired, or any signs of dehydration. . . . I cannot emphasize normally hydrated wrestlers I have whose [urine specific gravity tests above permissible levels]!").

[52] *See id.* This weekly limitation serves to ensure that any weight loss that occurs throughout the season is at the natural pace one would expect from rigorous exercise coupled with healthy nutrition.

[53] *Id.* The comparable limitation for female wrestlers is generally set at twelve percent. *See, e.g.*, NWCA Optimal Performance Calculator, http://www.nwcaonline.com/nwcaonline/wrestling.aspx (last visited Apr. 5, 2010).

[54] *See* Dale R. Wagner, *Body Composition Assessment and Minimal Weight Recommendations For High School Wrestlers*, 31 J. ATHLETIC TRAINING 262 (1996).

weight management, it can truly be said that the states acted as laboratories of sound public policy.

While a few states led the way on wrestling weight management programs, however, state high school athletic associations on the whole lagged behind the NCAA. With vast financial resources and a relatively limited number of college competitors, implementation is logistically simpler for NCAA officials. States, however, face a number of difficulties in trying to make such programs work, ranging from the budgetary to the political to a problem of sheer numbers: It is estimated that there are more than forty high school wrestlers for every one that will compete collegiately.[55] Therefore, even though Wisconsin and Michigan stepped to the forefront of weight management regulation to protect their wrestlers, many states failed to act for a number of years after the NCAA regulations took effect.[56]

Finally, in 1996, the National Federation of State High School Associations (NFHS) added weight management programs to its rules, which have since been implemented by all states. The general requirements outlined by the NFHS are basically in line with the regime imposed by the NCAA.[57] As of the 2006 wrestling season, "all states would be required to implement a weight management program that included a specific gravity not to exceed 1.025; a body fat assessment no lower than seven percent males/twelve percent females and a monitored weekly weight loss plan not to exceed 1.5% a week."[58] While some states differ on the particulars of implementation[59]—and states are always free to impose more restrictive guidelines

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[55] *See* John Irving, Opinion, *Wrestling With Title IX*, N.Y. TIMES, Jan. 28, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C00E2DB1339F93BA15752C0A9659C8B63.

[56] *See* PREBISH, *supra* note 19. Some states employed alternative measures, such as the "fifty percent system" for weight certification, but such alternatives proved more problematic than the regulations imposed by Wisconsin, Michigan, and the NCAA. *See id.*

[57] *See* Alan C. Utter, *Weight Management: The Basics*, http://www.nwcaonline.com/sports%20science%20articles/weight%20management%20basics.cfm ("A successful weight management program should consist of the following three essential components: 1) Establishment of a healthy minimal wrestling body weight through body composition and hydration assessment. 2) Development of a sound, gradual and safe weight-loss plan that includes nutritional information if weight loss is desired. 3) Development of a nutritional educational program that is directed to the coach, individual wrestler and, parents.") (last visited June 5, 2010).

[58] *See* PREBISH, *supra* note 19.

[59] For example, some states differ on the appeal process available for wrestlers who are initially denied certification at a particular weight class. *See, e.g.*, Ohio High School Athletic Ass'n Weight Mgmt. Monitoring Program, 2009-10, http://www.ohsaa.org/sports/wr/boys/WgtManagement/wtmanage.htm (allowing wrestlers to compete at the lowest allowable weight class determined at their initial assessment during the appeal process) (last visited June 5, 2010); IHSA Sports Medicine, *Wrestling Weight Control Program*, http://www.ihsa.org/initiatives/sportsMedicine/weight.htm (specifying that, during the appeal, "the wrestler may not wrestle in interscholastic competition until the appeal results are posted . . . .") (last visited June 7, 2010). Needless to say, whether or not one has to forego competition while appealing weight certification may have a major impact on whether or not a wrestler chooses to question his or her initial certified weight. Additionally, states differ on whether a growth allowance is allowed over the course of the season. *Compare* HAW. WRESTLING WEIGHT MONITORING PROGRAM: RULES AND REFERENCE GUIDE 3 (2009), *available at* http://www.sportshigh.com/files/content/sports/wrestling/hhsaa_state_wrestling_wmp_0910.pdf (providing for a two-pound allowance at a specific point during the season) (last visited June 24, 2010), *and* Ohio High School Athletic Ass'n Weight Mgmt. Monitoring Program, 2009-10, http://www.ohsaa.org/sports/wr/boys/WgtManagement/wtmanage.htm (same), *with* IHSA Sports Medicine; Wrestling Weight Control Program, *available at* http://www.ihsa.org/initiatives/

than those minimally required by the NFHS[60]—basic uniformity reigns in today's regulatory landscape.[61]

In addition to promulgating rules, the NCAA and states have been fairly effective at disseminating educational information to coaches, parents, and student-athletes. Such efforts (1) help shed light on what is required under the weight management programs,[62] which is helpful to coaches attempting to adjust to changing times,[63] and (2) provide nutritional health information, pointing out the risks involved in rapid weight-cutting.[64] This educational information is vital for improving overall health in young wrestlers. While coaches tend to be experts in all things wrestling, they are not necessarily schooled in proper sports nutrition.[65] Indeed, since many grew up competing in an era of weight-cutting abuses,[66] coaches are particularly likely to be dangerously misinformed. Additionally, educating wrestlers on the reasons such regulations are being imposed will hopefully motivate them to internalize and willingly adopt healthier eating habits and not simply comply with minimum requirements involuntarily.

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sportsMedicine/weight.htm (last visited June 24, 2010) (lacking any mention of a growth allowance).

[60] *See, e.g.*, 2006–07 NFHS Wrestling Rules Interpretations, http://www.arkwrestling.com/2006-07%20Interps.pdf (noting that, in addition to the weekly weight loss limits, "Each state association's rules may require that in order to compete in a weight class at the state championships, that he/she must compete at a weight class for at least 50-percent of his/her matches . . . [because] under NFHS wrestling rules, state associations have the authority to make playing rules more restrictive in any sport.") (last visited Apr. 5, 2010). Thus, the NFHS guidelines set only floors for what is to be required of amateur wrestlers, and states are free to impose stricter requirements. While more stringent regulation may take various forms in different states, Virginia stands out by requiring written records of daily weigh-ins before each practice, as well as daily monitoring by coaches of weight fluctuation of greater than three percent of total body fat in any team member, which can lead to recalculation of the weight loss schedule for that individual. Virginia High School League Wrestling Weight Control Program, http://www.fcps.edu/supt/activities/atp/WCP/
vhslwcpabout.htm (last updated Nov. 13, 2009).

[61] While this is largely because of the mandatory NFHS guidelines dominating regulatory structure, states have also tended towards uniformity by choice. For example, at least thirty-five states have adopted the National Wrestling Coaches Association's [NWCA] Optimal Performance Calculator [OPC] to set proper weight loss plans and nutritional guidelines for wrestlers. *See* Mike Moyer, *NWCA Optimal Performance Calculator*, NAT'L WRESTLING COACHES ASS'N, *available at* http://www.nwcaonline.com/nwcaonline/
backgroundopc.pdf (last visited June 9, 2010).

[62] *See* Va. High School League, *supra* note 61.

[63] *See* Dave Kraska, *Wrestling With Weight*, http://unbound.intrasun.tcnj.edu/archives/0203/health/
wrestlers.htm (last visited June 24, 2010).

[64] *See* Tennessee Wrestling Minimum Weight Program: Parental and Doctor Permission Form, *available at* http://www.docstoc.com/docs/673081/Tennessee-Wrestling-Minimum-Weight-Program (last visited June 24, 2010).

[65] *See* Karen Sossin et al., *Nutrition Beliefs, Attitudes, and Resource Use of High School Wrestling Coaches*, 7 INT'L J. OF SPORT NUTRITION 219, 221 (1997) ("Although coaches considered themselves to be very knowledgeable about wrestling, only forty-five percent rated themselves as knowledgeable about weight loss, thirty-six percent about sport nutrition, and seventeen percent about vitamin supplements.").

[66] *See* Bryant, *supra* note 13 (discussing the climate of dangerous weight loss that existed when current coach Rob Prebish was a competitor in high school and collegiate wrestling).

IV. Analysis

Most people would probably agree that placing restrictions on weight loss for high school and collegiate wrestlers is, at least intuitively, a good idea. Indeed, it is difficult to construct a defensible position advocating the continued destruction of immature bodies through a kind of athletic bulimia.[67] However well-intentioned minimum weight programs are, though, such programs would be of little value if the harmful weight-cutting behavior persisted after implementation of the regulations. Accordingly, this section looks at the available scientific research that analyzes the effectiveness of wrestling minimum weight programs. While the data is scarce and the results somewhat mixed,[68] the general consensus seems to be that weight loss behavior among amateur wrestlers is becoming safer and less extreme.[69]

After considering the effectiveness of weight management programs, this section examines potential avenues for further research and scholarship. These other areas include the potential for litigation against noncompliant coaches, considered particularly in light of the recent *Stinson* case in Kentucky,[70] as well as the possibility of extending weight management programs to other sports with high rates of eating disorders and unhealthy nutritional behavior, such as gymnastics and cross country.[71]

A. The Impact of Weight Management Programs on Athlete Behavior

A little over a decade after the three tragic deaths of collegiate wrestlers in 1997, comprehensive weight management programs have become ingrained in the sport's rulebooks nationwide. The NCAA, as well as every state high school athletic association, has adopted minimum weight programs designed to promote healthy weight management behavior on the part of student-athletes.[72] While evaluation of such programs will continue to evolve as more data becomes [note: I know it's technically wrong, but that usage has become generally acceptable, and it reads better] available in the future, some have attempted at least a preliminary investigation of the effectiveness of weight loss restrictions thus far.

In 2004, for example, the *Journal of Athletic Training* published a study investigating the impact of the NCAA's weight management program and discussing Wisconsin's comparable high school program. [73] Observing seventy-eight male collegiate wrestlers who were members of elite programs over the course of one season,[74] as the study's conclusions were "cautiously

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[67] *See* Jack Ransone & Brian Hughes, *Body-Weight Fluctuations in Collegiate Wrestlers: Implications of the National Collegiate Athletic Association Weight-Certification Program*, 39 J. ATHLETIC TRAINING 162, 163 (2004) *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC419511/pdf/attr_39_02_0162.pdf (last visited June 5, 2010); Bret Maurras, *Bulimic Behavior Among Wrestlers*, VANDERBILT HEALTH PSYCHOLOGY DEP'T, http://www.vanderbilt.edu/ans/psychology/health_psychology/wrestle.htm (last visited June 5, 2010).

[68] *See infra* notes 73-84 and accompanying text.

[69] *See infra* note 75 and accompanying text.

[70] *See infra* notes 91-108 and accompanying text.

[71] *See infra* notes 85-90 and accompanying text.

[72] *See* Moyer, *supra* note 61 (noting that *all* collegiate governing bodies have explicitly adopted the OPC for administering their respective programs).

[73] *See* Ransone & Hughes, *supra* note 67.

[74] *See id.* at 162.

optimistic" about the value of minimum weight programs.[75] The authors of the study were careful to (1) caution that "[r]eview of high school and collegiate policies regarding weight loss needs to continue,"[76] (2) called for enhanced efforts at improving nutritional education,[77] and (3) ultimately issued a sobering perspective of the sport of wrestling in general:

> [A]s long as wrestlers are allowed to compete in differing weight categories, the popular practice of competing at the lowest possible weight will probably continue. In that situation, the best course of action for the certified athletic trainer is to become acutely aware of the unique nutritional concerns of these athletes in order to make this practice as safe as possible.[78]

Despite the authors' ongoing concerns with weight management behavior in wrestling, they noted that "[t]he NCAA weight-certification program appears to have influenced the volume of body-weight gains and losses by wrestlers . . . ."[79] Of course, influencing the volume of weight gains and losses is the primary motivation for implementing such programs; that the programs have had such influence is no small statement. Thus, at least in the case of the NCAA, weight management programs seem to have influenced wrestler behavior regarding weight, which is at the very least a positive step towards healthier student-athletes, and—at best—evidence that the programs are doing exactly what they were intended to do.

While the information provided above is certainly beneficial, it is by no means comprehensive. The sample sizes are relatively small,[80] such that they may not be sufficiently representative of the general population of competitors in the sport.[81] Thus, while the *Journal of*

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[75] *Id.* at 163-64 ("The wrestlers in our investigation lost significant amounts of weight before and gained significant amounts of weight after competition. . . . Although these changes in body weight may be statistically significant, they are within the range that has been observed as a result of normal water turnover."). This conclusion, while stating that weight loss generally fell within the normal range, is not exactly a ringing endorsement for the NCAA weight management program's impact on wrestler behavior.

[76] *Id.*

[77] *Id.* ("Most coaches (eighty-two percent) considered themselves to be very knowledgeable about wrestling but less informed about sport nutrition, weight loss, and ergogenic supplements. The best preventative measure may be the education of wrestlers, parents, and coaches about the consequences of rapid and extreme weight loss and the significant role nutrition and fluid replacement play in successful training and competition.").

[78] *Id.*

[79] *Id.* Interestingly enough, more recent scholarship seems to take a similar view of the NCAA program's effectiveness. *See, e.g.*, Aimee E. Gibbs, Joel Pickerman & Jon K. Sekiya, *Weight Management in Amateur Wrestling, Abstract*, 1 SPORTS HEALTH 227 (May 2009) *available at* http://sph.sagepub.com/content/1/3/227.abstract (suggesting in the abstract that some improvements in weight management behavior have been realized, but that further reform is still needed) (last visited June 24, 2010). [note: I just found this abstract online and could not view the full study. Feel free to remove reference altogether. I keep going back and forth on citing an abstract without viewing the study itself.]

[80] *See id.* at 162 (noting that the study included seventy-eight wrestlers, all of them at elite collegiate programs).

[81] *See id.* Because the wrestlers chosen were all members of teams that had recently finished in the top five nationally in NCAA Division I competition, this study fails to consider the weight management behavior at smaller, less prestigious programs, which may have more difficulty recruiting elite participants at every weight class (and thus might feel greater pressure to have wrestlers alter their weights more drastically in order to field a competitive squad).

Athletic Training study allows for some extrapolation from changed nutritional behavior in the sample group to changed behavior in wrestlers in general, things are not so simple in reality. Maintaining and enforcing a minimum weight restriction is costly; staff must be hired and trained to administer weigh-ins,[82] proper equipment for testing hydration and body fat must be purchased,[83] and even the scales used to weigh competitors must be certified as accurate.[84] Accordingly, enforcement of such policies is likely less rigid in poorer, rural areas of the country than enforcement in big-budget metropolitan centers, and the process is likely much less organized and precise in high schools than in colleges.

Having rigorous policies on the books, however laudable, is not beneficial to the health of young wrestlers if no one actually gives the program teeth through strict enforcement. Unfortunately, no systematic study has yet been attempted to examine compliance rates on a state-by-state (or even more geographically specific) basis. Thus, we really do not know to what extent minimum weight policies are being followed in different areas of the country. While it is good to know that current policies generally seem to promote healthier weight management behavior in wrestlers, it would be helpful to find out how dutifully such policies are followed; only then could we have a full picture of the current situation of weight loss in wrestlers. Such a systematic study is seriously needed in order to fill gaps in the data currently available.

B. Possible Expansion of Weight Management Programs and Optimum Performance Calculations

As noted in the opening quote of this article, wrestling is not the only sport that suffers from rampant malnutrition and disordered eating habits. Gymnastics is fraught with anorexia and bulimia,[85] and cross-country runners also tend to take extreme measures to maintain a small, light frame.[86] Other sports, such as football, suffer from the opposite problem: obesity that leads to problems with dehydration and exacerbates heat related illness.[87]

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[82] *See* Ohio High School Athletic Ass'n Weight Mgmt. Monitoring Program, *supra* note 60.
[83] *See id.*
[84] *See id.*
[85] *See* Ana Cintado, *Eating Disorders and Gymnastics*, VAND. HEALTH PSYCHOL., http://www.vanderbilt.edu/ans/psychology/health_psychology/gymnasts.htm (noting that "women's gymnastics seems 'designed for this disease'" and estimating that over half of all participants likely suffer from eating disorders (internal citation omitted)); *see also* Murray G. Hughes, *Eating Disorders and Gymnastics*, GIRLS GYMNASTICS FOR PARENTS, http://www.all-eating-disorders.com/eating_disorder/gymnastics_and_ eating_disorders.htm (discussing bulimia and anorexia) (last visited June 5, 2010).
[86] *See* Nanci Hellmich, *Athletes' Hunger to Win Fuels Eating Disorders*, USA TODAY, Feb. 5, 2006, *available at* http://www.usatoday.com/news/health/2006-02-05-women-health-cover_x.htm (noting the motivation to become lighter and faster); Eli Saslow, *In Prep Cross-Country, Girls Often Face an Uphill Battle: Physiological Changes Can Hinder Female Runners*, WASH. POST, Sept. 16, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/15/AR2006091501153_ pf.html ("College and high school coaches estimate that about 80 percent of female runners will level off [in skill], at least temporarily, because of physiological changes. The average girl gains about 10 or 20 pounds during high school, doctors said, and much of the added weight consists of natural fat. Nutritionists suggest women must maintain at least 17 percent body fat to menstruate; top male athletes, meanwhile, often thrive on less than 10 percent."); Paul Scott, *When Being Varsity-Fit Masks an Eating Disorder*, NY TIMES, Sept. 14, 2006, *available at* http://www.nytimes.com/2006/09/14/fashion/14Fitness.html (detailing the death of a 20-year old cross country

Hopefully, these sports—and all sports—can learn from wrestling and its weight management programs. While other sports may not have weight classes—which provide uniquely strong incentives to cut as much weight as possible in wrestling—athletes in those other sports still have powerful reasons to push the boundaries of good health in order to gain a competitive edge. Recognizing the need for healthier weight management behavior in other sports, and at the behest of several state high school athletic associations,[88] the NWCA has modified its Optimum Performance Calculator (OPC) to "accommodate the unique needs of all sports."[89] While the OPC for other sports would not involve certifying for weight classes, body fat could be tested at the beginning of a season to ensure hydration and a healthy body composition, and minimum weights could still be set for the duration of the competitive year. In addition to facilitating the expansion of weight management programs to other interscholastic sports, the NWCA has also partnered with several state high school athletic associations and state departments of education to combat childhood obesity in youths with education campaigns targeted at younger students.[90] These are both extremely positive developments, hopefully trending towards a culture of healthier student-athletes in all sports, as well as a healthier population on the whole.

C. Potential Future Litigation Against Wrestling Coaches

This article's discussion of weight management programs in high school and collegiate wrestling can only be properly considered against the background of the dangerous weight-cutting culture that has permeated the sport in recent history. Accordingly, this sub-part briefly considers the potential for litigation against wrestling coaches who continue to condone or promote hazardous methods of cutting weight. In other words, if NCAA and NFHS regulations do not sufficiently ensure wrestlers' nutritional well-being, what—if any—recourse is available for those who suffer catastrophic injury as a result of unhealthy weight-cutting practices?

In August of 2008, fifteen-year-old Max Gilpin, a Kentucky high school football player, collapsed and died in the waning moments of an hour-long practice session that was conducted in ninety-four degree heat.[91] His body temperature reached at least 107 degrees, and the apparent cause of death was complications from heat stroke.[92] In response, the state charged Jason Stinson, head football coach of Max's team, with reckless homicide in connection with Max's death.[93] The charge involved "'fail[ure] to perceive a substantial and unjustifiable risk

runner who collapsed and died from cardiac arrest as a result of intense training and starving herself down to seventy pounds).

[87] *See* Moyer, *supra* note 62.

[88] *See id.*

[89] *See id.*

[90] *See id.*

[91] *See* Dan Slater, *After Player's Death, High School Football Coach Charged With Homicide*, WALL ST. J., Jan. 23, 2009, *available at* http://blogs.wsj.com/law/2009/01/23/after-players-death-high-school-football-coach-charged-with-homicide/.

[92] *See id.*; *see also* Associated Press, *Kentucky Coach Charged in Player's Death*, ESPN.COM, Jan, 22, 2009, http://sports.espn.go.com/highschool/rise/football/news/story?id=3852811.

[93] Kentucky uses the term "reckless homicide." Other states refer to this crime as "negligent homicide" or "gross negligence." *See* Slater, *supra* note 92.

that the result will occur.'"[94] While wrongful death lawsuits are frequent in cases of athletes dying on the field of play, [95] the application of criminal charges against Stinson was unprecedented.[96]

Even though Stinson was ultimately acquitted,[97] the former coach may still face civil liability[98] and his case provides strong warning to coaches, schools, and parents across the country.[99] Indeed, "coaches nationwide will be watching and seeing what happens and how it may affect them and how they do their jobs."[100] Particularly relevant to wrestling coaches is the role that dehydration played in the incident; apparently, player requests for water during the workout were denied by the coaching staff. As one criminal law professor explained:

> If it's true that there was water denied, that strikes me as problematic. . . . What we're talking about is coaches entrusted with the care of children. This kid was fifteen. And fifteen year-olds aren't always the most cautious people. They want to please their coach and their parents and show off to their teammates. So a reasonable person should know about the limitations of a high school athlete, and should know that a kid might not necessarily ask for water if he's being told not to.[101]

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[94] *See id.*

[95] A simple Internet search will generate hundreds of relevant results. *See, e.g.*, Chad Day, *Update: Tentative Settlement Reached In Aaron O'Neal Suit*, MISSOURIAN, http://www.columbiamissourian.com/stories/2009/03/10/tentative-settlement-reached-aaron-oneal-wrongful-death-suit/ (discussing the wrongful death suit of a former University of Missouri football player) (last visited Apr. 5, 2010); Iliana Limón, *UCF Seeks Summary Judgment In Wrongful Death Suit, Claiming Ereck Plancher Signed Injury Waivers*, ORLANDOSENTINEL.COM,http://www.orlandosentinel.com/sports/college/knights/orl-sportsplancher 25042509apr25,0,975227.story (discussing a similar lawsuit filed against the University of Central Florida) (last visited Apr. 5, 2010).

[96] *See* Lindsay English, *Fallout From Stinson Indictment Could Impact Coaches Across the Nation*, WAVE 3 TV, Jan. 22, 2009, *available at* http://www.wave3.com/global/story.asp?s=9720037%20 ("'It seems to me to be a unique situation and having covered sports and covered football for 20 plus years now, I cannot remember an instance where it got to this level with a reckless homicide charge,' says Pat Forde, senior writer for ESPN.com.").

[97] *See* Jim Halley & Andy Gardiner, *Jury Acquits High School Coach On All Charges In Death of Player*, USA TODAY, Sept. 17, 2009, *available at* http://www.usatoday.com/sports/preps/football/2009-09-17-stinson-trial_N.htm.

[98] A civil trial against Stinson for wrongful death was set for February 15, 2010. *See* Andrew Wolfson, *Stinson's Acquittal Poses Problems for Civil Lawsuit*, LOUISVILLE COURIER-JOURNAL, Sept. 19, 2009, *available at* http://www.courier-journal.com/article/20090919/SPORTS05/909200329/. Despite Stinson's acquittal in his criminal trial, as well as the substantial likelihood that potential jurors would be aware of that result because of the high publicity generated by the case, the plaintiff's attorney in the wrongful death suit remained optimistic about his chances to obtain a favorable judgment for damages against Stinson. *See id.* ("Just because [someone is] found not guilty doesn't mean they are innocent."). The civil trial of Stinson for wrongful death has yet to occur, however, because of delays caused by pretrial appeals. *See* Jason Riley, *Appeal Will Likely Delay Trial of Stinson and Assistant Caches a Year or More*, COURIER-JOURNAL.COM, May 7, 2010, *available at* http://www.rr.com/news/topicdl/article/dlt/0f8s5gV526efV/06oBh2KeBE8Hu/Appeal_will_likely_delay_trial]

[99] *See* English, *supra* note 96.

[100] *Id.* (quoting Pat Forde).

[101] Slater, *supra* note 92 (quoting Andrea Davis, former defense attorney and current criminal law professor at the University of Kentucky); *see also* CNN, *High School Football Coach Charged in Player's Death*, CNN.COM, Jan. 26, 2009 *available at* http://www.cnn.com/2009/CRIME/01/26/football.coach.indicted/ index.html ("'If he [Stinson]

As was mentioned previously, one of the primary means of extreme weight loss in wrestling is dehydration.[102] Additionally, wrestling is a sport of intense loyalty,[103] in which participants are unlikely to question a coach's judgment on something like the timing of a water break. Thus, a coach who attempts to sidestep the minimum weight regulations and continues to endorse heavy weight cutting by his team may very well find himself in the same boat as Stinson should a wrestler die or suffer a major injury.

This brief discussion is not intended to be a penetrating legal analysis of the merits of the state's failed case against Mr. Stinson; rather, it simply seeks to point out that this matter could cause major waves in the wrestling coaching community, particularly in areas of the country that are less rigidly compliant with minimum weight program requirements. Additionally, the possibility for criminal liability presents a stark contrast to the position taken by at least one author who, under the dubious assumption that dehydration is an inherent risk in the sport, has suggested that wrestling coaches should be protected against even civil liability in cases of injury caused by extreme weight loss because athletes assume the risk by choosing to compete.[104] In short, the future of coaches' liability in cases of wrestling injuries related to dehydration and weight loss is very much up in the air, and the precedent set by the *Stinson* case may have an important impact on how prosecutors treat such injuries going forward.

V. Conclusion

For many years, wrestlers at the high school and collegiate levels have engaged in dangerous weight-cutting practices in an attempt to garner a competitive edge in their sport. Unfortunately, three young men had to die in the late 1990s before the sport's supervising bodies took any significant regulatory action, but the NCAA and NFHS have since implemented comprehensive weight management policies designed to encourage healthier habits on the part of student-athletes and to put a stop to reckless nutritional and exercise habits. Early returns analyzing these programs have been mixed, but the policies implemented seem to be doing at least some good towards erasing harmful training and nutritional practices among amateur wrestlers. A systematic study on compliance with these programs—particularly at the high school level, where monitoring difficulties abound—would do a great deal to help assess the efficacy of the NCAA and NFHS regulations, as well as to bring to light areas in which changes

denied him access to water, that's really, really serious,' said CNN senior legal analyst Jeffrey Toobin. 'I can see the case moving forward.'").

[102] *See supra* notes 11–33 and accompanying text.

[103] *See supra* note 19 and accompanying text.

[104] *See* Pal, *supra* note 17 (arguing that weight-cutting is an inherent part of wrestling and thus that the associated risks are assumed by participants). The intricacies of coach liability for athlete injury or death during participation are largely beyond the scope of this article; noting the existence of this criminal matter is simply meant to direct attention to a contemporary legal matter that may have far-reaching implications for wrestling coaches who routinely assist their wrestlers in seriously dehydrating themselves in order to cut weight. The perspective of Pal and others that coaches should not even be civilly liable for wrestling tragedies was noted to illustrate the wide divergence in scholarly opinion on the matter. For a good synopsis of some of the major issues in this area of the law, *see* Timothy B. Fitzgerald, *The Inherent Risk Doctrine, Amateur Coaching Negligence, and the Goal of Loss Avoidance*, 99 NW. U. L. REV. 889 (2005).

in the regulatory structure might improve a program's overall efficacy. Such a systematic study is desperately needed in this area. In the meantime, however, continuing efforts must be made to educate coaches, parents, athletic trainers, and student-athletes about proper nutritional health and the risks of extreme weight-cutting. Unfortunately, no matter what efforts are made to curb abusive weight loss practices by wrestlers, there will always be those who push their bodies beyond their natural limits in an effort to succeed, and the courts may be called upon to fill gaps where student-athletes have managed to fall through the cracks and injure themselves through destructive weight loss practices.

COPYRIGHT LAW AND THE VISUAL ARTS: *FAIREY V. AP*

Elizabeth Dauer[*] *and Allison Rosen*[**]

I. Introduction

Shepard Fairey is a prominent figure in the world of visual modern art known for his creation of controversial works of political and social commentary.[1] To support Barack Obama's presidential campaign in 2008, Fairey created the "Obama Hope" and "Obama Progress" posters,[2] which became widely recognizable throughout the historic campaign.[3] While the posters generated a great deal of positive favor for Barack Obama's presidential candidacy, the effect of the posters on the artist who created them did not generate such a favorable result.[4] Upon discovering that The Associated Press ("AP") owned the rights to the reference photograph used in the posters, the AP claimed that Fairey's posters infringed its copyright.[5] Fairey maintains that the incorporation of the photograph into the posters constitutes a fair use and that the posters were not created in violation of any valid copyright held by the AP.[6]

This essay examines the status of the recent copyright infringement litigation in *Shepard Fairey, et al. v. The Associated Press*, and analyzes the issues in the context of the fair use factors enumerated in the Copyright Act of 1976 ("Copyright Act" or "Act").[7] Part II sets the stage by reviewing copyright law and its application to the visual arts. Part III then details the lawsuit's factual and procedural background. Finally, Part IV applies the four fair use factors to the case.

[*] J.D. Candidate 2011, University of Denver Sturm College of Law. I would like to thank my co-author and the entire editorial board of the Sports and Entertainment Law Journal for their invaluable assistance in seeing this project to fruition. Additionally, I would like to dedicate this article to my parents, Bruce and Doreen Dauer, for their unwavering support and encouragement of all my endeavors.

[**] J.D. Candidate 2011, University of Denver Sturm College of Law. I would like to extend thanks to my co-author, Beth Dauer, as well as the entire editorial board of the Sports and Entertainment Law Journal for their constant support, dedication, and input throughout this process. I would also like to thank my friends and family for their ongoing love and encouragement.

[1] Randy Kennedy, *Artist Sues the AP Over Obama Image*, N.Y. TIMES ART & DESIGN, Feb. 9, 2009, *available at* http://www.nytimes.com/2009/02/10/arts/design/10fair.html?scp=5&sq=randy%20kennedy%20shepard%20fairey&st=cse.

[2] Complaint for Declaratory Judgment and Injunctive Relief at 4, Shepard Fairey & Obey Giant Art, Inc. v. The Associated Press, (S.D.N.Y 2009) (No. 09-01123).

[3] *See* Kennedy, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Copyright Act of 1976, 17 U.S.C. § 106 (2006).

II. Copyright Law and the Visual Arts

Modern copyright law is one of the primary channels through which intellectual property rights are protected. While originally intended to protect literary materials,[8] copyright law has since been expanded to cover a wide variety of original works, including "pictorial, graphic, and sculptural works."[9] It is derived from a provision of the U. S. Constitution granting Congress the authority "to promote the Progress of Science and useful Arts" by conferring upon artists "the exclusive Right to their respective Writings."[10] Enacted in 1976, the Copyright Act[11] grants holders of copyrights exclusive rights[12] to "original works of authorship fixed in any tangible medium of expression."[13] The Act attempts to balance owners' exclusive rights against the rights of others to copy and use such materials.[14]

A cause of action for infringement arises when an individual or entity misappropriates a copyright owner's protected material.[15] To succeed in an infringement action, the claimant must show both ownership of the copyright and copying by the defendant.[16] Congress has deemed certain enumerated purposes to be automatically non-infringing.[17] In addition to these *per se* exceptions, alleged infringers may also defend their use under the fair use doctrine. When raised in an infringement action, the Copyright Act mandates application of four statutory fair use factors.[18] While not exclusive, these factors are intended to guide courts' discretion within the framework of each individual case.[19] As an "equitable rule of reason,"[20] the fair use doctrine encourages flexible judicial inquiries conducted on a case-by-case basis, and thus is unencumbered by bright-line rules.[21]

The application of copyright law to the visual arts has proven to be especially challenging for courts and individuals alike.[22] Although the Copyright Act expressly includes "pictorial" works within its scope,[23] courts have long struggled to analogize literary works to artistic

[8] Willajeane F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After* Rogers v. Koons, 59 BROOK. L. REV. 373, 411 (1993).
[9] 17 U.S.C. § 102(a)(5).
[10] U.S. CONST. art. I § 8, cl. 8.
[11] 17 U.S.C. §§ 101-805.
[12] 17 U.S.C. § 106.
[13] 17 U.S.C. § 102.
[14] *See* Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 245 (2d Cir. 1983) (courts must "strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected by infringement").
[15] *Id*. at § 501.
[16] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).
[17] 17 U.S.C. § 107 (identifying various purposes as *per se* non-infringing uses, including "criticism, comment, news reporting, teaching, . . . scholarship, or research").
[18] *Id.*
[19] *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 577-78 (1994).
[20] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (explaining that the fair use doctrine is based on the concept of "reasonableness").
[21] *E.g.*, *Campbell*, 510 U.S. at 577; Blanch v. Koons, 396 F.Supp.2d 476, 479-80 (S.D.N.Y. 2005) (stating that assessment of the fair use factors is an "open-ended and context-sensitive inquiry").
[22] McLean, *supra* note 8, at 383.
[23] 17 U.S.C. § 102(a)(5).

images.[24] Since only the original, stylistic aspects of a work are protectable,[25] courts are uniquely positioned to determine the particular boundaries which define the various elements of original expression. In doing so, courts aim to "strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected by infringement."[26]

Some look to style to inform this inquiry, defined as "a quality that gives distinctive excellence to something (as artistic expression) and that consists (especially) in the appropriateness and the choiceness of the elements (as subject, medium, form) combined and the individualization imparted by the method of combining."[27] Nonetheless, it is inherently difficult to isolate the independent elements of an image which are attributable to one particular artist as opposed to those elements which merely depict factual subject matter. Thus, this process requires judges, many of whom lack artistic expertise, to make value judgments by attempting to parse the various elements of a work in order to determine which deserve protection and which should stay in the public domain. As may be expected, judges have not always articulated consistent principles, and thus, jurisdictions have frequently come to widely differing conclusions when confronted with such disputes.[28] For example, some courts isolate the artistic (and thus, protectable) elements of a work before engaging in a fair use analysis, while other courts consider the work as a whole.[29] Complicating this task is the dearth of case law to clarify these issues because many of these conflicts are settled outside of court.

The clash between art and law also emerges from the postmodern art movement and, in particular, the trend towards artistic appropriation, an artistic technique whereby artists reference and expand upon elements from others' works in order to create new images and foster new understandings.[30] Proponents of this movement maintain that "absolute novelty is an impossibility," such that "*all* works are necessarily derivative."[31] The use of preexisting images for inspiration creates a logical tension between the First Amendment value of free speech with the need to safeguard individual ownership rights.

III. Factual and Procedural Background

In manifestation of his support for Barack Obama's 2008 presidential campaign, Plaintiff Shepard Fairey created several campaign posters depicting the presidential candidate's likeness

[24] Judith B. Prowda, *Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts*, 19 COLUM. J.L. & ARTS 269 (1995).
[25] 17 U.S.C. § 102(b). *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 217 (1954).
[26] Warner Bros. v. Am. Broad Cos., 720 F.2d 231, 245 (2d Cir. 1983).
[27] Webster's Third International Dictionary 2271 (1986).
[28] *See* H.R. Rep. No. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."). *But see* Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (describing fair use as "the most troublesome [issue] in the whole of copyright.").
[29] *See* Steinberg v. Columbia Pictures Indus., Inc., 663 F.Supp. 706 (1987).
[30] McLean, *supra* not 8, at 385 (describing appropriation as the "artistic technique in which artists copy/borrow/quote elements from another's work").
[31] *Id.* (emphasis in original).

and containing various inspirational phrases.[32] These posters, which were in Fairey's signature, modern style, consisted of a "pensive Barack Obama looking upward, as if to the future, splashed in a Warholesque red, white, and blue and underlined with the caption HOPE [or PROGRESS]."[33] Initially, Fairey claimed that the reference image was one taken at a 2006 National Press Club panel on the crisis in Darfur, captured by photographer Mannie Garcia while on assignment for the Associated Press.[34] Thereafter, Garcia asserted ownership rights to the reference photograph, alleging that he was neither an employee of the AP nor did he assign the rights to the photograph to the AP.[35]

Fairey's posters became ubiquitous as the iconic symbol of Obama's historic presidential campaign.[36] Notably, the works have continued to receive acclaim in the aftermath of President Obama's election, as evidenced by the commission of the National Portrait Gallery of the Smithsonian Institution for a permanent display of Fairey's Obama-inspired works.[37] In response to the immense popularity of the posters, members of the public began to inquire as to the source of the reference photograph used by Shepard Fairey.[38] As soon as the Mannie Garcia photograph was identified, the AP contacted Fairey and related entities, requesting both compensation and attribution for the use of the Garcia image, to which Fairey readily declined.[39]

Settlement discussions ceased when Fairey filed a preemptive action against the AP in the United States District Court for the Southern District of New York, seeking a declaratory judgment stating that there was no copyright infringement and that any appropriation of the image constituted fair use.[40] In response, the AP promptly filed a Counterclaim against Fairey and related entities, asserting that Fairey's works do not qualify for the fair use affirmative defense, but rather amount to a violation of copyright and a threat to the integrity of the journalism profession.[41] Fairey's Answer to the Counterclaim asserted that the AP claims are barred by the equitable doctrine of unclean hands, meaning that the AP cannot in good faith continue this litigation when the AP itself frequently makes commercial use of the copyrighted materials of other artists.[42]

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[32] *See* Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants at 2, Shepard Fairey v. Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

[33] Hillel Itale, *AP wants credit for Fairey's Obama image*, THE BOSTON GLOBE, Feb. 5, 2009, *available at* http://www.boston.com/ae/media/articles/2009/02/05/ap_wants_credit_for_faireys_obama_image/.

[34] Complaint for Declaratory Judgment and Injunctive Relief at 3, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press, (S.D.N.Y 2009) (No. 09-01123).

[35] Randy Kennedy, *Rights to Obama Photo: Three Way Battle*, N.Y. TIMES, July 14, 2009, *available at* http://www.nytimes.com/2009/07/15/arts/design/15artsATHREEWAYBAT_BRF.html?scp=3&sq=shepard%20fairey%20mannie%20garcia&st=cse. The merits of Garcia's argument appear to be weak, however, an in-depth discussion of such is beyond the scope of this Comment.

[36] Kennedy, *supra* note 1.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Complaint for Declaratory Judgment and Injunctive Relief at 1, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press, (S.D.N.Y 2009) (No. 09-01123).

[41] *See* Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants at 2, Shepard Fairey v. Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

[42] *Id.* at 21.

Recent developments have exposed evidence that Fairey misidentified the source of the image in his original Complaint.[43] In fact, Fairey used an entirely different photograph taken by Mannie Garcia, which consisted solely of a headshot of Obama with the United States flag in the background, rather than the initially cited photograph that also included actor George Clooney.[44] In an unsuccessful attempt to conceal the true reference photograph, Fairey allegedly attempted to delete the electronic files used to create his works and delivered falsified documents to his counsel for production.[45] As a result, Fairey's original legal counsel withdrew from the case citing professional ethical obligations.[46] Further, the AP amended its Answer to assert additional claims against Fairey, including spoliation of evidence and fraud. Although Fairey subsequently retained new counsel, both Fairey and his former counsel maintain that while the indiscretion was regrettable, the posters still constitute fair use.[47]

Notably, Fairey is also currently embroiled in other legal disputes in relation to his art.[48] Fairey has been arrested on twelve other occasions and, shortly after filing suit, he was arrested on an outstanding warrant arising out of the unauthorized tagging of buildings.[49] The AP's reluctance to enter into settlement agreements may be due in part to the added clarity that is likely to result from adjudication of this controversy, as well as the AP's view that Fairey is a particularly unsympathetic opponent. In the court of public opinion, support for Fairey may have diminished in light of his checkered past and his recent admission that he lied to his own attorneys.[50] While the merits of the case still allow for a plausible fair use argument, the untruths Fairey perpetuated could potentially persuade a jury that the use was neither fair nor equitable.[51]

IV. Application of the Fair Use Factors to the Present Controversy

A. Purpose and Character of the Use

The first factor in a fair use analysis considers the nature of the alleged infringement.[52] First, courts must determine whether the use was for commercial or non-commercial purposes.[53] Where used primarily to reap commercial gain, the Supreme Court has deemed the use

[43] Liz Robbins, *Artist Admits Using Other Photo for Hope Poster*, N.Y. TIMES, Oct. 17, 2009, *available at* http://www.nytimes.com/2009/10/18/arts/design/18fairey.html?scp=3&sq=robbins%20fairey&st=cse.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Anthony Falzone, *Fair Use Project Withdrawn From Fairey Case; Hope Remains*, THE CENTER FOR INTERNET AND SOCIETY (Nov. 13, 2009), http://cyberlaw.stanford.edu/node/6353.
[48] Jay Lindsey, *Shepard Fairey Arrested in Boston*, Huffington Post, Feb. 7, 2009, *available at* http://www.huffingtonpost.com/2009/02/07/shepard-fairey-arrested=i_n_164872.html.
[49] *Id.*
[50] Hillel Italie & Joe Mandak, *Artist admits he used key AP photo for 'HOPE' poster*, USA TODAY, Oct. 17, 2009, *available at* http://www.usatoday.com/news/nation/2009-10-17-obama-hope-poster-lawsuit_N.htm.
[51] *Id.*
[52] 17 U.S.C. § 107(1). *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
[53] *E.g.*, *Harper & Row*, 471 U.S. at 562 (explaining that the question is "not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price").

presumptively unfair.[54] By contrast, courts are more likely to approve use for non-profit purposes. Courts also inquire into whether the use was transformative, such that the resulting work "adds something new [to the original], with a further purpose or different character, altering the first with new expression, meaning, or message."[55] For instance, if the secondary work serves an entirely different function than that of the original, this weighs in favor of a finding of fair use.[56] Where this factor is satisfied due to a high degree of transformation, courts tend to accord less importance to the remaining fair use factors.[57] The recognition of this factor reflects the social utility inherent in the promotion of the arts.

Some courts have emphasized the propriety, or lack thereof, of the alleged infringer's conduct when assessing this factor. The Second Circuit, in which the present controversy resides, gave substantial weight to the defendant's bad faith conduct in an infringement case rejecting the fair use defense.[58] The Court stated that "[k]nowing exploitation of a copyrighted work for personal gain militates against a finding of fair use."[59] By contrast, the U.S. District Court for the Southern District of New York recently held that "[e]ach case of alleged infringement involving different works must be decided on its own merits," and emphasized that the defendant's prior copyright infringements had no bearing on the controversy.[60] Thus, it is uncertain whether such bad faith conduct will be given weight in this dispute, particularly given the inconsistencies that have arisen within the jurisdiction.

In the present case, Fairey stresses his non-commercial objectives, claiming that he did not receive any profits from his reference to the original photograph. Specifically, Fairey argues that, despite initial sales of approximately 350 posters at a price of forty-five dollars each, any incoming revenue was merely used to print additional posters, which were then freely distributed to consumers.[61] The AP, however, produced evidence that Fairey has already reaped substantial profits from sales of the posters and other merchandise, noting that by September 2008 alone, proceeds had exceeded $400,000.[62]

The court will likely give substantial weight to these personal and monetary advantages. There is little doubt that Fairey has garnered quite a bit of recognition through distribution of his art, the resulting media attention, and this lawsuit itself. Regardless of any direct financial gains, Fairey's career has clearly been furthered by the creation of these posters. As such, it is likely

[54] *Sony Corp.*, 464 U.S. at 449, 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright").
[55] Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).
[56] *See* Perfect 10, Inc. v. Amazon.Com, Inc., 503 F.3d 1146, 1165 (9th Cir. 2007); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) ("The use must be productive and must employ the quoted material in a different manner or for a different purpose from the original.").
[57] *Campbell*, 510 U.S. at 577.
[58] Rogers v. Koons, 960 F.2d 301, 309 (1992) (considering "whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer").
[59] *Id.*
[60] Blanch v. Koons, 396 F.Supp.2d 476, 482-83 (2005).
[61] *See* Complaint for Declaratory Judgment and Injunctive Relief at 5-6, Shepard Fairey & Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).
[62] *See* Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants at 11, Shepard Fairey v. Obey Giant Art, Inc. v. The Associated Press, 2009 WL 319564 (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123).

that Fairey and related entities have reaped significant commercial gains and will continue to do so.

Recent disclosures of Fairey's attempts to conceal the true source of the photograph used, attempts to destroy relevant evidence, and falsification of court documents all evince Fairey's bad-faith conduct relating to the present proceedings. Since courts frame the inquiry as whether the defendant intended to exploit someone else's artistic value for personal gain,[63] rather than focusing on the fact of impropriety for its own sake, Fairey must prove that he genuinely intended to transform the Obama photograph into an original work of art. Fairey's lies as to the source of the image constitute *prima facie* evidence of bad faith, in that his efforts at concealment reveal that Fairey himself believed that he had exploited the artistic value of the Garcia photograph. Moreover, Fairey's actions have not only imposed economic and reputational harm on the AP and Garcia, but have also interfered with the proper administration of justice, disrupting the integrity and efficiency of the civil court system. Regardless of the law to be applied, these facts are unlikely to be viewed favorably in any court's evaluation. While this Court's earlier decision refused to consider alleged infringers' prior conduct,[64] the opinion did not specifically address the relevance of bad faith conduct occurring within the context of the case itself.[65] Since the fair use doctrine is grounded in principles of equity, it is likely that a reviewing court would accord great weight to such egregious conduct when balancing the competing interests at stake.

Fairey also claims that any use of the Garcia photograph was highly transformative. He argues that "the literal depiction contained in the photograph was transformed into an abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message."[66] Fairey argues that he aimed at conveying a powerful message entirely independent from the underlying factual content. Fairey's argument is supported by the recent Second Circuit decision in which it held that an artist's use of a photograph in creating a collage painting was transformative because the photo was "fodder for the collage's commentary on the mass media and not merely a repacking of an existing photo."[67] Although Fairey did not create a collage, his alterations to the photograph and his placement of the photograph in an entirely new medium served to transform the narrative meaning intended by Garcia into an iconic portrait to promote Obama's presidential campaign. On the other hand, the AP challenges these contentions by arguing that the decision to use this particular photograph reveals the absence of any transformative purpose, as Fairey failed to make any substantial alterations to the original photograph.[68]

[63] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
[64] *Blanch*, 396 F.Supp.2d at 482-83.
[65] *Id*.
[66] Complaint at 1.
[67] Blanch v. Koons, 467 F.3d 244, 260 (2006).
[68] Answer at 13.

B. Nature of the Copyrighted Work

The second factor considers "any aspect of the nature of the copyrighted work that has rational bearing on whether its secondary use should be considered fair."[69] The Copyright Act provides owners with the right of first publication.[70] Thus, unpublished works receive greater judicial protection than those that are published.[71] A distinction is drawn between factual and creative works, such that creative works are entitled to greater protection from infringement.[72] The Supreme Court has described the elements of originality in a photograph as including "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."[73] By contrast, individuals are entitled to copy a substantially greater portion of factual works, as such copying advances the public benefits inherent in the free flow of information.[74] This also entails a determination as to whether the work "represented a substantial investment of time and labor made in anticipation of financial return."[75]

Fairey argues that the original photograph captured by Garcia only documented factual events,[76] and he emphasizes the widely disparate purposes of the two works.[77] Whereas the Garcia photograph served the factual purpose of informing the public of a newsworthy event, Fairey's posters were more creative. Due to the public interest in access to facts, particularly for news purposes, this factor must weigh in favor of fair use. He also points out that the photograph was published long before he appropriated the imagery, such that both the AP and Garcia had adequate opportunity to promote and display the original. The AP disagrees, contending that the Garcia photograph is in fact a creative work derived from Garcia's artistic skill and training, which permitted him to capture a unique moment in time through his deliberate choice of lens, lighting, composition, and angle.[78] The particular angle and tilt of Obama's head, the thoughtful expression, and the powerful symbolism of the United States flag in the background are original elements captured by Garcia. Further, these are the creative elements that led Fairey to choose this particular photograph in the first place, as demonstrated by the mere fact that Fairey selected the image long after its publication.[79]

[69] 17 U.S.C. § 107(2). *See also* New Era Publ'ns Int'l APS v. Henry Holt & Co., 695 F.Supp. 1493, 1500 (S.D.N.Y. 1988).
[70] 17 U.S.C. § 106.
[71] *See* Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1078 (2d Cir. 1992).
[72] *See Harper & Row*, 471 U.S. at 562.
[73] *Burrow-Giles*, 111 U.S. at 60.
[74] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
[75] MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981). *See also Rogers*, 960 F.2d at 310 (holding that copying was not a fair use where original photographer invested substantial creative effort in the work).
[76] Complaint at 11.
[77] *Id*. at 5 ("While the evident purpose of the Garcia Photograph is to document the events that took place at the National Press Club . . . the evident purpose of [Fairey's works] is to inspire, convince, and convey the power of Obama's ideals, as well as his potential as a leader, through graphic metaphor.").
[78] Answer at 12-13.
[79] *Id*.

The court is likely to give significant weight to the AP's claims that Garcia's original photograph was creative, not factual. The Supreme Court has long recognized copyright protection for photographic works.[80] Inasmuch as copyrights may only issue for works possessing a sufficient degree of originality,[81] an existing copyright necessarily presumes such creativity. Moreover, there is little question that Garcia invested his time and energy into the creation of the original work and that he did so with an expectation of receiving financial benefits. On the other hand, Garcia's photograph had previously been published by the AP, a fact weighing in favor of a fair use finding.

C. Amount and Substantiality of Use

The third factor looks at the quantitative and qualitative degrees of copying and asks whether the taking was reasonable under the circumstances.[82] Courts look to both the portion of the copyrighted work used and the relative importance of the portion used in relation to the work as a whole.[83] Although relevant to a fair use determination, copying of an entire work does not automatically preclude a finding of fair use.[84] Rather, the central issue is "substantial similarity."[85]

One interpretation of qualitative evaluation is reflected in the "idea/expression dichotomy," under which only the underlying expression, not the idea, may be protected by copyright.[86] The Second Circuit has ruled that photographers cannot monopolize poses, but noted that the concept is increasingly blurry when dealing with the visual arts because the "conceptual distinction between idea and expression becomes almost impossible."[87] Since the visual elements in a photograph are difficult to parse, courts must choose between either protecting the whole image or none at all, thereby undermining the requisite balancing under the fair use doctrine. Moreover, the Second Circuit stressed that "[t]o criticize the work, the postmodern artist may need to use the entire image in order to engage effectively in . . . the cultural values it espouses."[88]

Fairey's primary argument is that he only used a portion of the original photograph, and any portion used was reasonable in light of his purpose.[89] By contrast, the AP claims that Fairey

[80] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (establishing copyright protection for original photographs). *See Rogers*, 960 F.2d at 307 (acknowledging that photographers' works are "artistic creation[s]" because of the "unique expression of the subject matter captured in the photograph").
[81] 17 U.S.C. § 102.
[82] 17 U.S.C. § 107(3).
[83] *Rogers*, 960 F.2d at 310 (1992).
[84] *Sony Corp.*, 464 U.S. at 450.
[85] Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 245 (2d Cir. 1983). *See also* Comptone Co. v. Rayex Corp., 251 F.2d 487, 488 (2d Cir. 1958) ("[t]he copying need not be of every detail so long as the copy is substantially similar to the copyrighted work").
[86] *Rogers*, 960 F.2d at 310.
[87] *Id.* at 310-12 (explaining that "the complete photograph must be seen in order to experience its import").
[88] *Id.*
[89] *See* Complaint at 11.

misappropriated the entire work, while retaining "the heart and essence of the photo."[90] Thus, any degree of copying precludes a finding of fair use.[91]

Evaluation of this factor requires the Court to find the proper balance between the rights of the original copyright owner, the rights of the artist, and the resulting costs and benefits to society. While Fairey undoubtedly misappropriated the primary substantive content of the Garcia photograph, the determination as to which aspects of that photograph are protected and which are not is far from clear. Ultimately, this amounts to a policy judgment regarding whether Fairey appropriated more of the work than necessary to convey his message. The concern is that the boundaries of fair use would be diminished if artists can use others' works without crediting the copyright owner at all.

D. Effect of the Use on the Market

The Supreme Court has ruled that this factor[92] is "the single most important element of fair use."[93] Where the holder of the copyright can show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists,"[94] courts reject the fair use defense. No showing of actual harm is required.[95] Analysis focuses on three main inquiries: whether the infringing use decreases potential sales for the original work, whether the use interferes with the marketability of the original, and whether it fulfills the demand for the original.[96]

Fairey claims that he has not harmed the market for the original or any derivatives, but rather has actually enhanced the value of the original "beyond measure,"[97] noting that his works have substantially increased public demand for the original photograph. He points out that his works became so iconic that consumers sought to incorporate the original Garcia work into their collections.[98] The AP argues that Fairey's infringing use not only substantially impaired the market for the Garcia photograph, but widespread, continuing use will effectively undermine the AP's licensing program.[99]

V. Conclusion

In the milieu of the visual arts, many artist-creators often want to protect their creative expressions.[100] One court has explained that an artist should have the right "to protect his choice

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[90] Answer at 12-13.
[91] *Id*.
[92] 17 U.S.C. § 107(4).
[93] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).
[94] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (emphasis in original).
[95] *Id*.
[96] *E.g.*, Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155-56 (9th Cir. 1986). *See also Sony Corp*., 464 U.S. at 451 (stating that harmful use may be shown by proof that "if [the use] should become widespread, it would adversely affect the potential market for the copyrighted work").
[97] Complaint at 11.
[98] *Id*. at 2.
[99] Answer at 39.
[100] Judith B. Prowda, *Application of Copyright and Trademark Law in the Protection of Style in the Visual Arts*, 19 COLUM. J.L. & ARTS 269, 273 (1995).

of perspective and lay-out in a drawing, especially in conjunction with the overall concept and individual details."[101] It is relevant that "mass reproduction of a visual artist's work may diminish its value."[102] The present case involves two parties, both seeking to safeguard their creations at the expense of the other. There is no readily available conclusion as to which party possesses a greater entitlement or serves a weightier public interest, as both of these inquiries involve value judgments that cannot be answered by resort to doctrinal principles. Furthermore, both of these entities make substantial contributions to society, albeit in different ways.

Bad faith on Fairey's part may well shift chances of success in the AP's favor; however, due to the broad discretion given trial judges in applying the four fair use factors, it is difficult to predict the outcome of this controversy, as the ultimate conclusion will depend on a careful balancing between the competing interests at stake with the underlying purposes of modern copyright law. Moreover, the volatility of the litigation renders it likely that even more allegations and evidence may emerge, which may further reinforce the need for structured guidelines to guide both courts and parties.

[101] Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y. 1987).
[102] *Id*.